IN THE SUPREME COURT OF FIJI
[CRIMINAL APPELLATE JURISDICTION]

CRIMINAL PETITION: CAV0039 OF 2023
[Court of Appeal No: AAU0028/2017]

BETWEEN : **VISHAL KRISHNA**

Petitioner

AND : **THE STATE**

Respondent

Coram : The Hon. Mr Justice Salesi Temo, Acting President of the Supreme Court
The Hon. Mr Justice Brian Keith, Judge of the Supreme Court
The Hon. Mr Justice Terence Arnold, Judge of the Supreme Court

Counsel: Petitioner in Person
Mr J Nasa

Date of Hearing: 9th October, 2024

Date of Judgment: 30th October, 2024

JUDGMENT

Temo, AP

[1] I had read Mr Justice T. Arnold's draft judgment and I agree entirely with his reasons and conclusions.

<u>Keith, J</u>

[2] I agree with the judgment of Arnold J.

<u>Arnold, J</u>

Introduction

[3] The Petitioner, Vishal Krishna, was charged with two counts of rape, one of indecent assault and one of sexual assault, committed over a 13 month period. The charges related to the same complainant, a 14 year old relative. The assessors were unanimous in their opinion that the petitioner was guilty on all counts, and the trial Judge agreed. The petitioner was sentenced to a total of 15 years imprisonment, with a non-parole period of 14 years.

[4] The petitioner applied for leave to appeal against both conviction and sentence. A single Judge of the Court of Appeal considered that none of the grounds advanced had any reasonable prospect of success and refused leave to appeal against both conviction and sentence.[1]

[5] The petitioner renewed his application before the Full Court. The argument against conviction in that Court proceeded on the basis of one ground − that there were material inconsistencies as between the complainant's statements and her evidence which the trial Judge had not adequately addressed in his summing up. The argument in relation to sentence covered two grounds, namely that the trial Judge took into account irrelevant matters when fixing the starting point and failed to take account of factors which would have resulted in a reduced sentence. The Full Court rejected all grounds and affirmed the petitioner's convictions and sentence.[2]

[6] The petitioner now seeks leave to appeal to this Court against both conviction and sentence:

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[1] *Krishna v State* [2021] FJCA 51.
[2] *Krishna v State* [2023] FJCA 71.

(a) The ground of his appeal against conviction is that the trial Judge erred when he failed to "test the truthfulness of the [complainant's] prior statement to police", which was materially inconsistent with the evidence she gave in Court, affecting her credibility.

(b) The grounds of appeal against sentence are that the sentence was, in all the circumstances, excessive, that no non-parole period should have been imposed and that, in any event, the non-parole period imposed was too close to the head sentence.

Jurisdiction

[7] This Court may only grant leave to appeal in a criminal matter where any one of three criteria is met. The proposed appeal must involve: (i) a question of general legal importance; (ii) a substantial question of principle affecting the administration of criminal justice; or (iii) the risk of a substantial and grave injustice otherwise occurring. For the reasons set out below, I would deny leave on the conviction appeal but grant leave on the sentence appeal.

Discussion

[8] I deal first the grounds relevant to conviction and then the grounds relevant to sentence.

(i) Conviction

[9] The petitioner argues that there were material inconsistencies or omissions as between the statement that the complainant gave police when she was interviewed and her evidence at trial and contends that the trial Judge failed to give adequate directions in relation to those inconsistencies/omissions.

[10] This ground was fully argued before, and addressed by, the Court of Appeal. By way of background, the complainant was 15 when she was interviewed in July 2013 and 18 when she gave her evidence in August 2016. Four alleged inconsistencies/omissions were identified in her evidence, as well as one in that of the petitioner's former wife, who was a prosecution witness. Two of the inconsistencies related simply to dates. The petitioner's counsel put the inconsistences/omissions to the relevant witnesses in cross-

examination and they gave their explanations. Counsel also referred to the inconsistencies in her closing address.

[11] Inconsistencies between a witness's statement to police and their sworn evidence in court may be such as to undermine the witness's credibility or reliability but this depends on the circumstances. The courts recognise that, with the passage of time, there may well be inconsistencies or discrepancies between what a witness says in an interview and what they say in court, or that they may develop gaps in memory. Given limits in people's powers of observation and the characteristics of human memory, the existence of some inconsistencies, discrepancies or omissions is relatively common and does not mean that a witness's evidence must be discarded as unreliable in its entirety.

[12] Rather, it is necessary to consider whether the inconsistencies/omissions are material, that is, whether they are such to undermine the witness's credibility or reliability on key issues. Relevant to that consideration is whether the witness is able to offer an acceptable explanation for the inconsistency/omission. In cases involving assessors, the trial Judge was required to draw the inconsistencies/omissions to the assessors' attention and point out their relevance to assessing the witness's credibility or reliability.[3]

[13] These matters were addressed by the Court of Appeal, who concluded that the inconsistencies/omissions identified at trial related to peripheral matters and that the trial Judge's directions were sufficient. Having considered the relevant statements and evidence, the Judge's directions to the assessors and the terms of his judgment agreeing with their opinion,[4] I see no basis to disagree with the Court of Appeal's reasoning or conclusion on this issue. Accordingly, I would not grant the petitioner leave to appeal against his conviction.

(ii) *Sentence*

[14] In relation to sentence, the petitioner argues that he should have received a substantial discount because he was a first offender. However, as the Court of Appeal pointed out he was convicted of four offences committed over a 13 month period, so he was not

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[3] See, for example, *Singh v R* (1963) 9 FLR 105, esp at 107-108, *Nand v R* (1964) 10 FLR 37, esp at 44-45 and *Prasad v R* (1984) 30 FLR 13, at 23-24.

[4] The trial Judge considered that the complainant had satisfactorily explained her inconsistencies/omissions.

truly a first offender but rather a repeat offender whose serial offending was dealt with at a single trial.

[15] The petitioner's more substantial point related to his non-parole period. His first contention – that a non-parole period should not have been imposed as there is no Parole Board in Fiji – does not recognise that a non-parole period serves the purpose of preventing an offender from being released earlier than is appropriate through the practice of remitting one third of a sentence for good behaviour.[5] Without a non-parole period, the petitioner could be released after serving two-thirds of his 15 year sentence, ie 10 years. Imposing a longer non-parole period serves the functions of denunciation, punishment and deterrence, which are legitimate purposes of sentencing.[6]

[16] His second contention − that his non-parole period (14 years) was too close to his head sentence (15 years) – has substance. This Court recently discussed the issue of fixing non-parole periods in *Ratu v State*.[7] I will not repeat that discussion here.

[17] The important point is that the Court has made it clear that a non-parole period should not be too close to the head sentence. If a non-parole period is too close to the head sentence, it undermines the offender's incentives for rehabilitation. But the Court has also pointed out that there cannot be too great a gap between the non-parole period and the head sentence as that may undermine the deterrent effect of the sentence.

[18] The offences in the present case were serious. In my view the head sentence of 15 years was within range, albeit at the upper end, and was fully merited. It responded to what was repeated offending against a vulnerable schoolgirl who was entitled, as a close relative, to rely on the petitioner's support.

[19] However, the non-parole period is too close to the head sentence and should be lower. In my view, it should be 12 years. This is longer than the 10 year period that would apply if the one-third remission took effect, and so serves the purposes of denunciation, punishment and deterrence, but also provides a reasonable incentive for rehabilitative efforts by the petitioner.

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5 See *Ratu v State* [2024] FJSC 10, at para [33].

6 Section 4(1) of the Sentencing and Penalties Act 2009.

7 *Ratu v State*, above n 5, at paras [34]-[35].

[20] Accordingly, I consider that there has been an error of principle in respect of the petitioner's sentence. I would therefore grant him leave to appeal against sentence. I would affirm the head sentence of 15 years imprisonment but quash the non-parole period of 14 years and substitute a non-parole period of 12 years.

Orders:

1. *The application for leave to appeal against conviction is dismissed.*

2. *The application for leave to appeal against sentence is granted.*

3. *The Petitioner's head sentence of 15 years imprisonment is affirmed.*

4. *The Petitioner's non-parole period of 14 years imprisonment is quashed, and a non-parole period of 12 years imprisonment is substituted.*

The Hon Mr Justice Salesi Temo
ACTING PRESIDENT OF THE SUPREME COURT

The Hon Mr Justice Brian Keith
JUDGE OF THE SUPREME COURT

The Hon Mr Justice Terence Arnold
JUDGE OF THE SUPREME COURT