

**IN THE SUPREME COURT OF FIJI**  
**[APPELLATE JURISDICTION]**

**CRIMINAL PETITION NO. CAV 0009 of 2023**

[Court of Appeal No. AAU 120/2018]

**BETWEEN** : **PETERO MASALA**

***Petitioner***

**AND** : **THE STATE**

***Respondent***

**Coram** : The Hon. Mr Justice Salesi Temo, President of the Supreme Court  
The Hon. Mr Justice Terence Arnold, Judge of the Supreme Court  
The Hon. Madam Justice Lowell Goddard, Judge of the Supreme Court

**Counsel** : Petitioner in Person  
: Kumar R for the Respondent

**Date of Hearing** : 3<sup>rd</sup> April, 2025

**Date of Judgment** : 29<sup>th</sup> April, 2025

**JUDGMENT**

**Temo, P**

[1] I agree with Her Ladyship Justice Goddard's judgment and conclusions.

**Arnold, J**

[2] I have read the judgment of Goddard J in draft and agree with her conclusion for the reasons she gives.

**Goddard, J**

[3] The petitioner was charged with three counts of sexual offending: - sexual assault by indecent touching; rape; and indecent assault. All charges concerned a teenage girl who was his wife's niece and therefore a vulnerable person in a relationship of trust with the petitioner.

[4] The rape of the victim and the sexual assault both occurred while the victim was aged 15 years and the petitioner aged 42 years. The petitioner pleaded not guilty to those charges; but pleaded guilty to the third charge of indecent assault which had occurred a year later when the girl was 16.

[5] The petitioner was tried before a judge and three assessors in the High Court at Lautoka. The assessors gave unanimous opinions that the petitioner was guilty of sexual assault but not guilty of rape. The trial judge accepted the assessors' opinion of guilt on the charge of sexual assault but did not accept their opinion of not guilty of rape and found the petitioner guilty of rape also.

[6] The petitioner was duly convicted on all three counts and on 2 November 2018 sentenced to an aggregated term of 14 years and 11 months imprisonment with a non-parole period of 12 years.

[7] He initially appealed against both his conviction and sentence.

[8] A single judge of appeal refused him leave to appeal against conviction but granted leave to appeal to the full Court of Appeal against sentence.

[9] The petitioner pursued both his appeal against conviction and against sentence before the full Court of Appeal on 7 July 2023 and on 27 July 2023 both appeals were dismissed.

[10] Although his petition to this Court was originally for leave to appeal both conviction and sentence, the petitioner abandoned his conviction appeal before the hearing and sought leave to appeal against sentence only.

### **Background facts**

[11] The evidence for the State came from the victim and from a friend of hers to whom she had made a recent complaint and from an Aunty.

[12] The facts, as established in evidence by these three prosecution witnesses, were extensively traversed by the trial judge in his summing-up and in his judgment, and summarised in the Court of Appeal judgment as follows:

*“The victim in 2012 was 15 years of age a Form 3 student. On one of the days during the second term of school she was at the house of her uncle the accused, her aunty had gone to work. The victim did not go to school because she was having stomach ache. The accused offered to massage the victim’s stomach, the victim was alone with the accused.*

*She was wearing a shorts and a top, in the sitting room the accused started to massage the stomach of the victim, as he continued he started to massage the victim’s vagina and was playing around by touching it. Thereafter the accused removed the victim’s shorts and underwear and went on top of her and penetrated her vagina with his penis. When the accused penetrated her for the second time the victim pushed the accused away because it was painful for her, her legs were shaking she felt weak and emotionally broken.*

*The victim did not consent to what the accused had done to her. After two days the victim told her friend Faustina about what the accused had done to her. Faustina wanted to tell her mother but the victim stopped her since she felt nobody would believe her and that she was scared.*

*The matter was reported to the police after the victim couldn't continue to live with it any longer, she informed her distant relative Laisiana Tukana. Between 29 July, 2013 and 3 August, 2013 the victim went to Suva, she stayed at the house of an aunt. The accused also resided there.*

*One night when she was sleeping, she felt a light being shown on her face she opened her eyes and saw the accused shining a torch at her face and at the same time touching the victim's neck, breasts and private part on top of her clothes. The victim was scared and did not know what to do. The accused touched her for about an hour she did not consent to the touching by the accused. The victim later told her relatives, and the matter was reported to police. The accused was arrested and charged."*

### **The sentencing decision**

[13] In passing sentence on the petitioner, the trial Judge remarked as follows"

*The maximum penalty for the offence of rape is life imprisonment which means this offence falls under one of the most serious category of offences. The Supreme Court of Fiji in the decision of Anand Abhay Raj (supra) has confirmed that the tariff for the rape of a juvenile is now a sentence between 10 years to 16 years imprisonment.*

*It is the duty of the court to protect children from sexual exploitation of any kind that is the reason why the law has imposed life imprisonment for the offence of rape as the maximum penalty.*

*There has been an increase in sexual offences involving offenders who are known to the victim and matured adults. It is sickening to note the manner in which the accused had breached the trust of this victim.*

*Section 17 of the Sentencing and Penalties Act states:*

*"If an offender is convicted of more than one offence founded on the same facts, or which form a series of offences of the same or a similar character, the court may impose an aggregate sentence of imprisonment in respect of those offences that does not exceed the total effective period of imprisonment that could be imposed if the court had imposed a separate term of imprisonment for each of them."*

*I am satisfied that the three offences for which the accused stands convicted are offences founded on the same facts and are of similar character. Therefore taking into account section 17 of the Sentencing and Penalties Act I prefer to impose an aggregate sentence of imprisonment for the three offences.*

*After assessing the objective seriousness of the offences committed, I take 12 years imprisonment as the starting point of the aggregate sentence. I add 5 years for the aggravating factors, bringing an interim total of 17 years imprisonment. Since the personal circumstances and family background of the accused has little mitigatory value I find his good character has substantive mitigating value. I therefore reduce the sentence by 2 years.*

*I note from court file that the accused was remanded for 2 weeks. In exercise of my discretion I deduct 1 month in accordance with section 24 of the Sentencing and Penalties Act as a period of imprisonment already served. The final sentence is 14 years 11 months imprisonment.*

*Under the aggregate sentence regime of section 17 of the Sentencing and Penalties Act the head sentence of imprisonment for one count of sexual assault, one count of rape and one count of indecent assault is 14 years 11 months.”*

*Having considered section 4 (1) of the Sentencing and Penalties Act and the serious nature of the offences committed on a victim who was 15 years of age compels me to state that the purpose of this sentence is to punish offenders to an extent and in a manner which was just in all the circumstances of the case and to deter offenders and other persons from committing offences of the same or similar nature.*

*Under section 18 (1) of the Sentencing and Penalties Act, I impose 12 years as a non-parole period to be served before the accused is eligible for parole. I consider this non-parole period to be appropriate in the rehabilitation of the accused which is just in the circumstances of this case.*

*I am satisfied that the term of 14 years 11 months imprisonment does not exceed the total effective period of imprisonment that could be imposed if the court had imposed a separate term of imprisonment for each offence.*

*In summary I pass an aggregate sentence of 14 years 11 months imprisonment with a non-parole period of 12 years to be served before the accused is eligible for parole. Due to the closeness of the relationship between the accused and the victim a permanent non molestation and non-contact orders are issued to protect the victim under the Domestic Violence Act.”*

## **The Appeal to the Court of Appeal**

[14] In dismissing the petitioner's appeal against sentence, the Court of Appeal remarked as follows:

*“The appellant submits that when the sentence was passed in this case, the aggravating factors may have been double counted in choosing the 12 years as the starting point of the sentence passed by the court. It is important to note that the trial judge is NOT using a sentencing tariff to choose the starting point. He is relying on the power in section 17 of the Sentencing and Penalties Act which states:*

*‘If an offender is convicted of more than one offence founded on the same facts, or which form a series of offences of the same or similar character, the court may impose an **aggregate sentence** of imprisonment in respect of those offences that does not exceed the total effective imprisonment that could be imposed if the court had imposed a separate term of imprisonment for each of them.’*

*As was noted by the trial judge when he announced the sentence that the aggregate sentence regime of section 17 of Sentencing & Penalties Act, the head sentence of imprisonment for one count of sexual assault, one count of rape and one count of indecent assault is 14 years 11 months.*

*Is this sentence wrong? It is not when you take a step back and look at the totality of offence committed in this case. In my view the sentence is proper.”*

## **Grounds of petition for special leave to appeal against sentence only**

[15] The petitioner premised the grounds of his sentence appeal to this Court as based on error of principle by an alleged double counting, contending the sentencing Judge had already considered the aggravating factors in his selection of the starting point but had counted them again in fixing the end sentence.

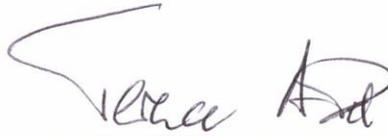
- [16] The petitioner's argument rested primarily on whether the applicable tariff had been correctly identified and applied in his case; on whether the total sentence imposed was fair in comparison with sentences passed in other cases of familial sexual offending, particularly in relation to the aggravating factors; and on whether extraneous or irrelevant matters had been taken into account by the sentencing Judge.
- [17] Counsel for the State acknowledge there may have been an element of double counting of the aggravating feature of breach of trust in computing the sentence; and some basis for taking issue with a reduction of only two years for the mitigating factors. However, the Court is satisfied that the adoption of the aggregate starting point of 12 years was well within the applicable range that there was no discernible error in the sentencing outcome.
- [18] During the course of the hearing the petitioner sought to abandon his appeal against sentence altogether. He was carefully questioned by the Court about this change of stance but maintained that it was his wish not to continue with the appeal.
- [19] Notwithstanding, the Court proceeded to give due consideration to the merits of his sentence appeal, in the interests of justice.
- [20] In the outcome, we are satisfied that the overall sentence imposed cannot be impugned, as it was well within the established range of 10 to 16 years imprisonment for this type of offending, and there is no reason to adjust the end point.
- [21] However, the Court also gave consideration to the non-parole period set by the trial Judge and we have concluded it should be adjusted downwards. Grave though the offending was, a non-parole period of 12 years does not provide a sufficient incentive for rehabilitation and reintegration back into society and into the family. We consider that the petitioner is capable of a positive reintegration when the time comes and it is therefore important to maximise his potential in that regard.

[22] We accordingly, grant the petitioner leave to appeal his sentence pursuant to section 98(4) if the Constitution of Fiji and section 7(2) of the Supreme Court Act, and his appeal is allowed to the limited extent that the non-parole period of 12 years is reduced to a non-parole period of 10 years.



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



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**The Hon Mr Justice Terence Arnold**  
JUDGE OF THE SUPREME COURT



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**The Hon Madam Justice Lowell Goddard**  
JUDGE OF THE SUPREME COURT