IN THE COURT OF APPEAL OF

THE REPUBLIC OF VANUATU

APPEAL CASE NO. 3/1990

SOLAISE ABEDNIGO -v- THE PUBLIC PROSECUTOR

JUDGMENT

This appellant is a seventy four years old man convicted of incest and indecent assault on his twelve years old granddaughter, who was living with him at the time in Maewo. He was sentenced to eight years imprisonment on each count concurrent and appeals against that sentence on the general grounds that the sentence was manifestly excessive because the Court gave too much weight to aggravating circustances whilst attaching too little weight to matters of mitigation.

There were a number of aggravating factors which the learned Chief Justice clearly and properly took into account. One matter, however does require further consideration in relation to the charge of incest.

The facts, as opened by the prosecution, referred to three acts of sexual intercourse. The complainant had given such an account and the appellant, when seen by the police, had made two statements the first of which was a denial and the second of which admitted three occasions. At the trial, Counsel for the appellant stated that the appellant had, in fact, only once had sexual intercourse and sought to explain his apparant admission of the other two.

In his judgement, the learned Chief Justice stated: "Accused was interviewed by the police and said that, it was true he played with her breasts and private parts and that she held his penis but, he did not have sex with her. In a further statement he admitted having sex with her three times. In court he wished to clarify the situation by saying that the three times referred to once touching her breasts, once touched her vagina and once having sex with her.

The two statements made by the accused were not challenged. I accepted them as containing the truth of what the accused did to the young girl."

It is clear that he based the sentence on three incidents of sexual intercourse and, in that, we feel he erred.

When an accused person pleads guilty but qualifies the plea, the Court may either accept his qualification and sentence on that basis or hear evidence to ascertain the truth. Once the accused denies the charge as stated, he is entitled to have the matter tried on the evidence and the Court is not entitled simply to decide whether or not to accept the equivocation. It is easy to appreciate the reluctance of the learned Chief Justice to take a course that would require such a young complainant to give evidence but that did not allow him to decide the point without evidence unless he accepted the accused man's version.

Here the Court had not heard any evidence which leaves us asking on what the Court based its assessment of the truth. The Chief Justice's comment that the statements made by the accused are not challenged is difficult to understand in view of the qualification raised by defence counsel and the conclusion they contained the truth has to be squared with a contradiction between them on the very point the accused was disputing.

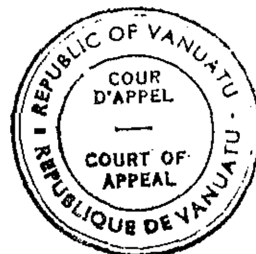
We see no merit in the other matters raised. The learned Chief Justice considered them all and there is nothing to support counsel's complaint.

However, the sentence was passed on a man who the Court found had not only committed a very serious offence but had repeated it twice more. Such a repetition, had it occurred, would have been a serious aggravation. Having committed such an offence, many may have regretted it but to repeat the offence shows a very different attitude and a lack of contrition or remorse. We feel those extra offences must have added substantially to the sentence and we reduce the sentence passed to one of five years imprisonment.

It would appear the sentence for indecent assault was based on the more serious charge and we feel justice demands that is reduced accordingly.

Appeal allowed. Sentence reduced to 5 years imprisonment on each count concurrent.

Dated at Port Vila, this 18th day of October, 1990.



Mr Justice G. Ward
Court of Appeal Judge

Mr Justice E. Goldsbrough
Court of Appeal Judge