IN THE SUPREME COURT OF THE REPUBLIC OF VANUATU
(Criminal Appellate Jurisdiction)

Criminal Appeal Case No.9 of 2002

BETWEEN: PUBLIC PROSECUTOR
Appellant

AND: DICK BOITA
Respondent

Coram: ***The Honourable Justice Bruce Robertson***
The Honourable Justice John von Doussa
The Honourable Justice Daniel Fatiaki
The Honourable Justice Roger Coventry
The Honourable Justice Oliver Saksak

Counsel: ***Mr. Eric Sciba for the Public Prosecutor***
Mr. Hilary Toa for the Respondent

Hearing and Judgment Date: *31st October 2002*
Reasons for Judgment Date: *1st November 2002*

REASONS FOR JUDGMENT

This is an appeal by the Public Prosecutor against the sentence imposed in the Supreme Court sitting at Isangel, Tanna on 15th July 2002.

The respondent was initially charged with twelve counts of indecent assault contrary to Section 98 (1) of the Penal Code Act [CAP. 135], (the Act). Six of these counts were withdrawn. To the remaining counts 1, 2, 8, 9, 10 and 11 the respondent pleaded guilty. He was sentenced by the judge at first instance to one year and ten months imprisonment. This was effectively a sentence of 2 years imprisonment bearing in mind time previously spent in custody.

The grounds of appeal are that this sentence is inadequate on the following grounds:-

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1. The sentence did not adequately reflect the seriousness of six counts of indecent assault to which the respondent clearly pleaded guilty;

2. The Judge had given insufficient weight to the aggravating factors in the case which placed this case in a more serious category of offending;

3. The Judge had given insufficient weight to the principles of both personal and general deterrence in sentencing the respondent.

These offences were committed by the respondent, a school teacher at Quarauken Primary School on Tanna. The complainants are girl students at the school. The offences were committed over a period from March 2001 to May 2002. The complainants are all students at Etap and Quarauken Primary Schools.

MD is 8 years old. MT is also 8 years old. They are both from Imana Village, South West Tanna to which the respondent also belongs.

In March 2001 the respondent indecently assaulted KL a girl of 11 years. The respondent is the girl's uncle. The incident took place in the classroom after which the girl went home and told her parents about it.

One day in January 2002 the girls were cooking lunch when the respondent approached them and asked them to follow him into the bushes. In the bushes he asked the girls to lie down then he first indecently assaulted MT. When he had finished with MT the respondent also indecently assaulted MD in the same manner as he had done to MT. The respondent then warned the girls not to tell anyone about what he had done to them.

On two occasions in April 2002 the respondent committed the offence of indecent assault on one EM a girl of 9 years. She is a student at Etap Primary Scool. The first incident took place on 24th April and the second on 27th April. The respondent is the 'brother' of the girl. The

first incident took place in the complainant's house. The second incident took place in the garden.

In May 2002 the respondent committed the offence of indecent assault on MB a girl of 10 years who attends Quarauken Primary School. The incident happened in a classroom.

On 15th July 2002 the respondent pleaded guilty to the six counts.

The Public Prosecutor appeals pursuant to Section 200 (4) of the Criminal Procedure Code Act [CAP. 136]. The prosecution submits that the sentence of one year and 10 months is manifestly inadequate in several respects:-

(a) That the respondent was a teacher at the time of the commission of the offences and as such occupied a position of trust over the complainants. It is contended that the respondent had abused that trust which his community had placed in and expected of him.

(b) The maximum sentence for an offence under Section 98 (1) of the Act is 10 years imprisonment.

(c) The 1 year and 10 months sentence is well below the appropriate sentencing range.

(d) The Court's order that the sentences be served concurrently was also flawed.

It was submitted by the prosecution that the starting point in a case of this nature should have been 5 years. We have been referred to the *Public Prosecutor v. Solaise Abednigo Court of Appeal Case No. 3 of 1990* where a 74 year old man was sentenced to 12 years imprisonment for incest and indecent assault on his 12 year old grand daughter. The Court of Appeal reduced that sentence to 5 years. In *Public Prosecutor v. Daniel Kamisak Criminal Case No. 4 of 1996* the Supreme Court sentenced a man on 4 counts of indecent assault on three young girls of 6 years, 4 years and 8 years respectively committed in almost the same manner as the respondent in this case. The defendant was sentenced to 5 years.

We have also considered other Supreme Court authorities. These cases show the wide disparity in the sentencing range which the Courts below have imposed on offenders committing the same offence as the respondent was charged with. There is a need for consistency.

On the facts presented before the Supreme Court, most of which the respondent accepts, this case differs significantly from and is much more serious than all those other cases which have been referred to us.

The aggravating factors in this case are:-

(a) The victims of the offences were all young girls with ages of from 8 to 11 years;
(b) The victims were all students;
(c) The respondent was a teacher in the school of some placing him in a position of trust;
(d) One of the victims was distantly related to the respondent;
(e) On two occasions the offences were committed in the classroom and during school hours;
(f) The offences were repeated over an extended period of time;
(g) The degree of indecent assaults on the young girls was serious and substantial including digital and oral violations.
(h) The admitted factual circumstances were in some cases, so serious and intrusive that they would have supported charges of at least attempted rape and not just indecent assault.

The issue is what should be the starting point and the appropriate penalty for this offence given its particular circumstances.

It is accepted that there were no injuries to the girls. There was no actual physical violence involved beyond the commission of the offences themselves and although some said that threats were made, the respondent now disputes that.

The mitigating factors were that the respondent had been remorseful. He had performed a customary ceremony to the parents and relatives of the girls. He made admissions to the police and most importantly, in pleading guilty at the first available opportunity he has spared the

girls the humiliation of having to recount their ordeals in the witness box.

It appears that much credit was given to the respondent for his guilty plea and we endorse that. But having regard to the aggravating factors enumerated above, we agree with the prosecution that the starting point of three years was manifestly inadequate.

The appropriate starting point for this particular offending would properly in our view be in the range of 7 or 8 years. Allowing for mitigating factors and in particular the guilty plea of the respondent, the appropriate penalty in our view should be reduced to four and a half years imprisonment. That includes recognition of the fact that this was a Public Prosecutor's appeal in which circumstances the Court of Appeal will always err on the side of leniency.

Accordingly we quash the sentence imposed in the Supreme Court and substitute a term of four and half (4 ½) years imprisonment effective from the time he was first taken into custody.

Dated at Port Vila, this 1st day of November 2002.

BY THE COURT

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Hon. Justice Bruce Robertson

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Hon. Justice John v. Doussa

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Hon. Justice Daniel Fatiaki

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Hon. Justice Roger Coventry

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Hon. Justice Oliver Saksak