

BETWEEN: **JOHN TANGIAT**
 Appellant

AND: **PUBLIC PROSECUTOR**
 Respondent

Coram: *Hon. Justice John von Doussa*
 Hon. Justice Oliver Saksak
 Hon. Justice Ronald Young
 Hon. Justice Daniel Fatiaki
 Hon. Justice Stephen Harrop
 Hon. Justice Mary Sey
 Hon. Justice Dudley Aru

Counsel: *Mr Andrew Bal for the Appellant*
 Mr Leon Malantugun for the Respondent

Date of Hearing: 26th March 2014

Date of Judgment: 4th April 2014

JUDGMENT

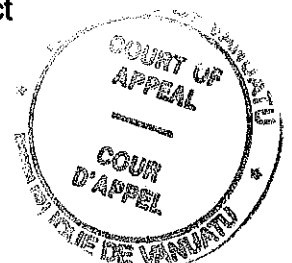
1. On 26th March 2014 the Court heard Counsel in relation to their submissions in respect to this appeal. After consideration of these submissions the Court delivered its oral decision that—

- (a) The appeal be allowed.
- (b) The conviction on the charge of incest be set aside.
- (c) The appeal against sentence for indecent assault be allowed.
- (d) The sentence of the appellant for indecent assault be reduced to a sentence of imprisonment for the time already served.

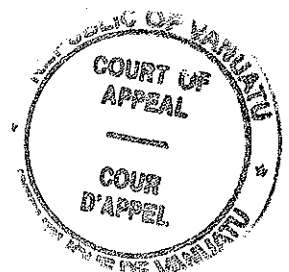
The Court then ordered the release of the appellant from the Correctional Centre and indicated that reasons for its decision would be published later which it now provides.

2. The background facts are as follows:

- (a) The appellant was initially charged on three counts as follows:-
 - (i) Indecent Assault – section 98(a) of the Penal Code Act [Cap 135] (the Act)
 - (ii) Abusive or Threatening Language – section 121 of the Act, and
 - (iii) Sexual Intercourse without Consent – section 91 of the Act



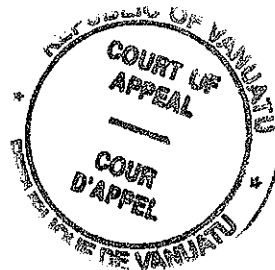
- (b) The appellant pleaded guilty to the Indecent Assault charge but pleaded not guilty to the Abusive Language or Threatening charge and to the Sexual Intercourse without Consent charge.
 - (c) He was tried in relation to the not guilty pleas.
 - (d) The trial judge found insufficient evidence against the appellant and returned a verdict of not guilty in relation to the two charges
 - (e) Following an application by the Prosecution the trial judge then purported to exercise his discretion pursuant to section 113 of the Criminal Procedure Code Act [Cap 136] to enter an alternative verdict and found the appellant guilty of incest under section 95(a) of the Act. The victim was the adult daughter of the defendant's then partner.
 - (f) The trial judge then imposed custodial sentences of 3 years for the indecent assault and 4 years for the incest.
 - (g) Allowing deductions for mitigating factors the trial judge arrived at end sentences of 12 months imprisonment for the indecent assault and 36 months for the incest. These were however ordered to be served concurrently. The total period of imprisonment was therefore 36 months.
3. The appellant appealed against his conviction for incest and against his sentence for indecent assault.
4. The appellant's grounds of appeal were that-
- (a) The complainant and the appellant were not living in a relationship of "parent and child" as required by section 95 of the Act;
 - (b) Section 113 has been completely repealed; and
 - (c) The sentences of 12 months for indecent assault and 3 years for incest were manifestly excessive.
5. At the outset of the hearing the Prosecution informed the Court that they conceded that the appellant's conviction for the lesser charge of incest was contrary to law. We agree that given the defendant (appellant) and the complainant had not been living in a relationship of parent and child, the appellant could not be convicted of an offence of incest. Ground (a) is therefore not in issue and the appeal is allowed on that ground.



6. While Section 113 of the Criminal Procedure Code Act has been completely repealed, there may be a common law right to amend a charge and convict a defendant of a lesser charge in appropriate circumstances.
7. The only remaining ground was the 12 months sentence imposed by the trial judge for the indecent assault. In this case the appellant touched the victim's breast on the outside of her clothing. The facts therefore fall at the lower end of the scale for this offence.
8. We consider that 9 to 12 months imprisonment was the appropriate starting point. The appellant was entitled to a 1/3 reduction for his guilty plea. He was entitled to further reduction of 2 months for custom reconciliation and a past clean record. That reduces his sentence to 4- 6 months imprisonment. He was entitled to automatic parole release after serving half of his sentence.
9. Having served time in jail, the appellant has been deprived of the real possibility that he might otherwise have received a non-custodial sentence for the indecent assault. The appellant has spent a little over 3 months in custody and that is sufficient punishment. It was on this basis that the Court ordered the appellant's release from custody.

DATED at Port-Vila this 4th day of April 2014

BY THE COURT



John vON DOUSSA
Judge

