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

Criminal
Appeal Case No. 18/2089
SC/CRML

PUBLIC PROSECUTOR v BOB TEVI

Date of Hearing: ***12th February 2019***

Date of Judgment: ***22nd February 2019***

Coram: ***Hon. Justice John Hansen***
Hon. Justice Daniel Fatiaki
Hon. Justice Gus Andrée Wiltens
Hon. Justice Stephen Felix

Counsels: ***Mrs Bertha Pakoasongi for Appellant***
Mr Henzler Vira for Respondent

JUDGMENT

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1. On 19th June 2018 the respondent was charged with two (2) counts of Sexual Intercourse Without Consent, a count of Act of Indecency and a final fourth count of Abduction.

2. The brief facts of the case are outlined in the trial judge's sentencing remarks as follows:

   "Briefly what happened was that in 2014 the victim was, whilst out shopping, accosted by the defendant and pulled into his house. There she was forced to the ground, her clothes were removed and she was raped by the defendant. Afterwards she was told that if she spoke about what had happened to anyone the defendant would beat her.

   In a second incident in 2015 the defendant asked the victim to purchase some matches for him from the store. She did so and when she attempted to hand over the matches the defendant took hold of her, pulled her behind the church, removed her panties and had sexual intercourse with her."

   Notable by its absence in the sentencing remarks, is any mention of the close familial relationship that existed between the victim and the respondent who "*...is her uncle"* or the age differential of almost 10 years that existed between the victim

and the respondent at the time of the rapes. The victim was aged 14 years at the time of the first offence.

3. The respondent was convicted after a trial on the charges of Sexual Intercourse Without Consent. Of the remaining two charges the trial judge said: *"..... they are subsumed into the more serious charge of rape. They were part of the rapes."* No convictions were formally entered on the subsumed charges. The Abduction was the pulling of the victim into the respondent's house during the first incident and the indecency was the respondent forcibly kissing the complainant on the mouth prior to the first rape.

4. In his sentencing remarks however, on 11 July 2018, the trial judge records that convictions were entered in respect of all charges but no separate penalties would be imposed in respect of the Act of Indecency and Abduction convictions. The trial judge treated the 2 offences of Sexual Intercourse Without Consent as one transaction comprised of two identical offences committed against the same victim with a 9 months gap between offendings.

5. After noting that the victim became pregnant after the second incident the trial judge, without differentiating between the two (2) rape offences, settled on a common starting point of eight (8) years imprisonment which in his words: *"reflects the culpability of the defendant and the nature of the offending."* The trial judge then reduced the starting point by 9 months for the defendant's previous good character and his performance of a custom reconciliation ceremony leaving an end sentence of *"7 years and 3 months imprisonment on each count of rape"* less any time already spent in custody. Both sentences were ordered to be served concurrently from 9 July 2018.

6. By Memorandum dated 3 August 2018 the Public Prosecutor appealed the sentence on the dual grounds that the trial judge (1) did not properly take into account all of the offences; and (2) imposed a manifestly lenient starting point having regard to all the circumstances of the case. Both grounds of appeal were dealt with together in the appellant's submissions. We propose to do the same in our judgment.

7. It is settled law that on a prosecution sentence appeal it must be clearly established that the sentence being appealed, is not merely arguably insufficient or excessive, but manifestly so because, the trial judge has acted on a wrong principle, or has clearly overlooked, undervalued or overestimated, or misunderstood some salient feature of the evidence.

8. In the present appeal prosecuting counsel submits that the sentence was clearly wrong in not properly accounting for the aggravating features of the respondent's offending. In this regard the trial judge identified two (2) aggravating features, namely: ...."*the rape was repeated..."* and *"...the victim becoming pregnant..."* However no separate uplift was imposed for either aggravating feature as there should have been, nor does the sentence clearly show that other aggravating

features in the case had been accounted for in arriving at the starting point of 8 years imprisonment.

9. In particular, there is no mention of the age disparity of almost 10 years between the victim and the respondent during both incidents; the fact that intercourse was unprotected thus exposing the victim to the risk of contracting a sexually transmitted disease and pregnancy; the fact that the respondent had threatened to assault the victim if she reported the matter to anyone after the first incident; the fact that there was an element of pre-meditation and planning by the respondent in relation to the second incident; and the obvious and real power imbalance between the young vulnerable victim and the respondent who *"is her uncle"*.

10. We accept that a starting point of eight (8) years imprisonment may be consistent with the judgment of this Court in Public Prosecutor v Scott [2002] VUCA 29 where the sole aggravating factor in a single incident of rape is that the victim was abducted before non-consensual sexual intercourse took place, but where there are other aggravating factors, as enumerated above, then the starting point should be higher.

11. Although two aggravating factors are referred to in the trial judge's sentencing remarks neither factor resulted in any uplift being added to the starting point. In that omission we are satisfied, that the trial judge overlooked significant aggravating factors in the offending and erred in adopting a manifestly lenient starting point.

12. In Vuti v Public Prosecutor [2017] VUCA 14 where a concurrent end sentence of 11 years imprisonment for two rapes involving the same victim was left undisturbed on appeal, this Court in rejecting a submission that a starting point of 8 years was too high in that case relevantly said:

".... (the) submissions took no account however of the fact that there was a second rape which occurred within a month of the first. It would be completely unacceptable for the Court to impose a sentence which effectively ignored that rape. ....the circumstances of this particular case would suggest that a starting point in excess of five years could easily be justified, however leaving that issue to one side and taking the two rapes together it could not be said that a starting point of 12 years would have been excessive.

With reference to that point, we consider that the sentencing judge also failed to take proper account of the fact that there were two rapes....as we have said, the first rape alone justified a starting point of 8 years. The sentencing judge should then have assessed what should be added for the second rape thereby reaching a starting point which adequately reflected both offences."

13. In the circumstances, we allow the appeal and quash the trial judge's sentence(s). Adopting the approach of the trial judge, the respondent is resentenced as follows: We adopt a starting point of 12 years imprisonment for each of the offences of Sexual Intercourse Without Consent which we reduce by one (1) year for personal mitigating factors giving an end sentence of 11 years imprisonment.

14. In recognition that this is a prosecution appeal and that the respondent's sentence is being increased, we reduce the end sentence by a further one (1) year giving a final end sentence of 10 years imprisonment on each offence of Sexual Intercourse Without Consent, to be served concurrently, and commencing from 9 July 2018.

DATED at Port Vila this 22nd day of February, 2019.

BY THE COURT

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Hon. Justice J Hansen
Judge

REPUBLIC OF VANUATU
COURT OF APPEAL
COUR D'APPEL
REPUBLIQUE DE VANUATU