

BETWEEN: Stanley Korthy
Kerepe Joseph
Roger Enock
Appellants

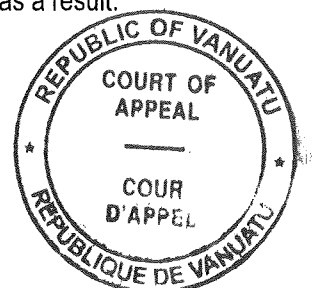
AND: Public Prosecutor
Respondent

Date of hearing: 11 February 2019
Before: Justice J.W. Hansen
Justice D. Fatiaki
Justice G.A. Andrée Wiltens
Justice S. Felix
In Attendance: Ms L. Bakokoto for the Appellants
Ms B. Ngwele with Mr S. Blessing for the Respondent
Date of decision: 22 February 2019

JUDGMENT

A. Introduction

1. This is an appeal against sentence following guilty pleas to one count of rape against each appellant. For his involvement in this multi-handed rape case, Korthy was sentenced to an end sentence of 10 years imprisonment; Joseph to an end sentence of 7 years 6 months imprisonment; and Enoch to an end sentence of 9 years imprisonment. Each appellant submitted that the primary sentencing Judge had erroneously assessed their respective culpabilities and sentenced each of them to manifestly excessive end sentences as a result.



B. Background

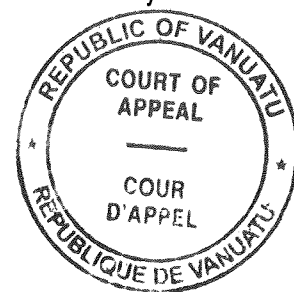
2. At around midnight, a young woman of 20 years was enticed away from wedding celebrations on Malekula Island by Korthy on the pretext that a young boy from Ambrym wanted to speak with her. Korthy then led her to a nearby secluded beach where he raped her.
3. Three other men including Joseph followed them, and when Mr Korthy had departed from the beach area, they each took turns at raping the still naked young woman while the other two kept guard. Joseph was the third of the group to rape her.
4. After those 3 men had left the scene, the young woman's boyfriend, Enoch, appeared and threatened to not return the woman's clothes unless he too was permitted to have sexual intercourse with her. Once Enoch had finished, he instructed the young woman to accompany him to his house; and on the way there he felled her, removed her clothes, and forcibly again had sexual intercourse with her. He then parted company with her. He was charged and convicted of only one of those events of rape.
5. The young woman was subsequently medically examined and found to have internal injuries resulting from her ordeal.

C. The Decision

6. The primary Judge based his sentencing decision on the Agreed Facts which had been prepared for the purpose of sentencing and signed by both prosecuting and defence counsel. It was accepted by Ms Ngwele that the primary Judge, as submitted by the appellants, had erred in his assessment of the individual culpability of each of the appellants by relying on aggravating facts not contained in the Agreed Facts.
7. The errors are of such number and magnitude that we see no real alternative but to set to one side the sentences imposed, proceed to consider the appropriate sentences from scratch by looking at each appellants' individual criminal culpability and available mitigation, and to then compare those sentences with what was imposed by the primary Judge in order to determine these appeals.

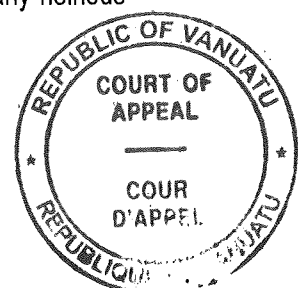
D. Appropriate Sentences

8. We take into account that all 3 appellants pleaded guilty at an early stage in the proceedings. In the ordinary course of events, that can lead to a reduction of sentence by up to one-third. However, in the case of 2 of these appellants, the remorse that could be inferred from a guilty plea has been undermined to such degree that the deductions available for their pleas are assessed at 20%. In the cases of Korthy and Enoch that follows from the Agreed Facts, in which is recorded that both appellants had asserted that the young woman had consented to sexual intercourse with them. In his Pre-Sentence Report, Enoch was described as "minimising or shifting the blame" for the offending onto the victim. Korthy was similarly



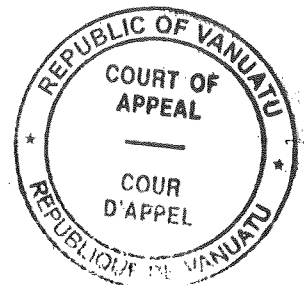
described in his Pre-Sentence Report, but further, his report records him as advising that the victim willingly went with him for the purpose of having sex on the beach. Accordingly, we consider that neither appellant is truly remorseful and therefore not entitled to the maximum available discount for prompt guilty pleas. However, we do accept their pleas obviated the need for the victim to have to give evidence against them in Court and having to re-live the truly traumatic events of that evening – hence we are prepared to allow a 20% reduction for the pleas by Korthy and Enoch.

9. Korthy was the young woman's "custom man", and, as a result of that custom relationship, there was a breach of trust involved in Korthy's offending. We note further that Mr Korthy used deceit and a certain degree of planning to trick the young woman into leaving the wedding celebrations and go with him to the beach. There was no young man – Korthy's admitted intention was to get the young woman to a secluded place so that he could rape her. The sex that eventuated was unprotected, so that the young woman was exposed to pregnancy and sexually transmitted diseases. These factors are aggravating features of his rape, and combine to set, in our view, the criminal culpability of Korthy's criminal conduct at the starting sentence point of 10 years imprisonment.
10. The mitigation available for Korthy comprises the fact that he had no previous convictions and his early guilty plea. This Court has many times stated that previous good character is of limited value where sexual offending is involved. We have earlier commented on the value of Korthy's plea, given his lack of true remorse. The appropriate end sentence for Mr Korthy is accordingly one of 8 years imprisonment.
11. The primary Judge sentenced Korthy to 10 years imprisonment. Partly that was on the basis that Korthy was involved in the gang rape aspect of the offending, which is not made out on the Agreed Facts; and also because other aggravating factors were mistakenly applied to his sentence. There is no link between Korthy's offending and that of the others involved – his culpability must be considered on its own.
12. Korthy's appeal is therefore allowed.
13. Joseph is to be sentenced on the basis that he and 2 others followed Korthy and the young woman to the beach, with the intent of raping her. Once Korthy had left the scene, they approached the still naked young woman on the beach and participated in serially raping the young woman. Joseph assisted the other 2 men by standing guard and observing them while they raped the young woman in turn. He then took his turn, while the other 2 kept guard for him. The sexual intercourse by all 3 was unprotected, so that the young woman was again exposed to pregnancy and sexually transmitted diseases from each of them.
14. We note the primary Judge adopted a starting point of 12 years imprisonment for Joseph's participation in the gang rape. We accept that is within range for this level of culpability, but we would not have interfered with a significantly higher starting point for this particularly heinous



type of offending, especially taking into account the physical and psychological effects of such offending on a young woman.


15. The starting point we adopt for Enoch's criminal culpability is therefore set at 12 years imprisonment. We repeat our comments regarding previous good character – we make no deduction from the start point for that. The primary Judge allowed a 30% deduction for Enoch's plea. Whether we allow that amount of deduction for the plea, or the more usual 33.3%, is moot as the end sentence that we arrive at is greater than that which was imposed by the primary Judge.
16. This not being a prosecution appeal, we have no reason to interfere with the actual sentence imposed of 7 years 6 months imprisonment.
17. Accordingly, Joseph's appeal is dismissed.
18. Lastly, we turn to Enoch's offending. He was the young woman's boyfriend, and as a result, there was a clear breach of trust involved in his offending. He entered the scene after Joseph and the 2 other men had departed. He too came upon the still naked young woman. She was physically and emotionally not in any position to resist. He took advantage of that.
19. Subsequently, while leading her to his home, he knocked the young woman to the ground, removed all her clothes and again raped her, before leaving and going his own way. The two episodes of sexual intercourse were unprotected, so that the young woman was exposed to pregnancy and sexually transmitted diseases by him as well.
20. We see Enoch's criminal culpability as meriting a sentence start point of 12 years imprisonment. We say that taking all the aggravating factors into account; but not, as the primary Judge did, ascribing to him participation in the gang rape aspect of the offending. We consider the second rape as being properly considered as part of Enoch's overall offending even though there was no charge in relation to that – it was part of the factual matrix and is part of Enoch's overall criminal culpability.
21. We repeat our comments regarding previous good conduct (no allowance) and the appropriate reduction for Enoch's early guilty plea (20% deduction). The additional factor that must be considered here is Enoch's comparative youth, he being only 18 years old at the time of his offending. There is much authority for the proposition that young men, especially, suffer from immaturity and poor reasoning. Further, the possibility of rehabilitation is greater in the case of youths. For that reason, we allow a discount of 20 months for Enoch's young age at the time of his offending.
22. Taking all those matters into account, we set Enoch's end sentence at 8 years imprisonment.
23. Accordingly, his appeal is also allowed.



E. Decision

24. The appeal against sentence by Korthy is allowed. His sentence is reduced from 10 years imprisonment to 8 years imprisonment.
25. The appeal against sentence by Joseph is dismissed. His sentence remains at 7 years 6 months imprisonment.
26. The appeal against sentence by Enoch is allowed. His sentence is reduced from 9 years imprisonment to 8 years imprisonment.

Dated at Port Vila this 22nd day of February 2019
BY THE COURT


Justice J. W. Hansen

