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

Criminal Appeal
Case No. 20/317 CoA/CRMA

BETWEEN: PUBLIC PROSECUTOR
Appellant

AND: TOM IOTIL
Respondent

Coram:	***Hon. Justice John von Doussa*** ***Hon. Justice Raynor Asher*** ***Hon. Justice Oliver A Saksak*** ***Hon. Justice Dudley Aru*** ***Hon. Justice Gus Andreé Wiltens***
Counsel:	***Ms Laura Lunabek for Appellant*** ***Mr Harrison Rantes for Respondent***
Date of Hearing:	***5th May 2020***
Date of Judgment:	***15th May 2020***

JUDGMENT

Introduction

1. This is a State appeal pursuant to section 200 (4) of the Criminal Procedure Code Act CAP. 136.

2. The Public Prosecutor appeals against the sentence imposed by the sentencing judge in the Supreme Court on 20th December 2019 whereby the respondent was sentenced to 3 years and 6 months imprisonment suspended for 12 months with 100 hours of community service.

3. The appeal having been filed out of time, the appellant also sought leave to appeal out of time.

Facts

4. The respondent was charged with sexual intercourse without consent contrary to sections 90 and 91 of the Penal Code Act CAP.135.

5. The offending occurred in 2009 when the complainant was 25 years old and the respondent was 50 years old.

6. The complainant had been working in a garden to earn some money to travel to New Caledonia. The respondent approached her and asked her for sex but she refused. The respondent returned to his house and returned with a VT 5.000 note. He was wearing a piece of cloth (Calico) around his waist. He sat down in front of the complainant and exposed his genitals and told her to have sex with him. She was afraid but the respondent pulled her clothes off and had sex with her. He then gave her the VT 5.000 note and told her not to tell anyone what happened. He continued to say that to the complainant until 2017. The complainant reported the matter to the police in 2018. The respondent is a relative of the complainant and she has always regarded him as a grandfather. They are part of an extended family.

The Sentence

7. The sentencing judge considered the seriousness of the offence and the aggravating features of the offence and imposed a starting sentence of 5 years imprisonment.

8. In mitigating the sentence the judge considered the factors contained in the pre-sentence report of the respondent, including his clean past and remorse, and reduced his starting sentence of 5 years imprisonment by 12 months. A further 6 months was deducted for his guilty plea leaving his end sentence to be 3 years and 6 months.

9. The sentencing judge then suspended the sentence for a period of 12 months and imposed an additional sentence of community work for 100 hours, taking account of the circumstances and the character of the respondent.

Submissions

10. Ms Lunabek for the State submitted in relation to the suspension of sentence that for a serious offence of rape, it was wrong to have suspended the sentence. The appellant relied on the case authorities of **Public Prosecutor v August** [2000] VUSC 73 and **Public Prosecutor v Scott** [2002] VUCA 29. Counsel submitted suspension was not an option put to the judge by either the prosecutor or the defence counsel in the Court below.

11. In relation to the second ground of appeal Ms Lunabek submitted the sentencing judge was wrong to have adopted the starting sentence of 5 years imprisonment. Counsel submitted the correct starting sentence should have been 7 years imprisonment by uplifting the 5 years imprisonment by 2 years for aggravating features.

12. In relation to the third ground of appeal Ms Lunabek submitted the sentencing judge had placed too much weight on the personal factors of the respondent by deducting a further 12 months which represents a 20% reduction, which counsel argued was excessive.

13. Mr Rantes for the respondent had no objection to the application for leave to appeal out of time being granted. Further counsel conceded there should not have been any suspension of sentence.

14. In relation to the second and third ground, Mr Rantes submitted the starting sentence of 5 years was in accord with **PP v Scott** but for the aggravating features the prosecution should have asked for 7 years imprisonment as the starting sentence. Mr Rantes submitted 6 years was the appropriate starting sentence and then submitted that the following deductions should be made-

    a) 5 months for good behaviour for the last 10 years after the incident, and for being a resourceful person in the community;

    b) 5 months for personal factors in his pre-sentence report (instead of 12 months as made);

    c) 6 months for guilty plea; and

    d) 2 months to reflect the 100 hours community service already completed.

15. Mr Rantes further sought a discount for the delay inherent in this case. The offending occurred in 2009, but Mr Iotil was only sentenced in late 2019. We reject that argument, on the basis that the Respondent was responsible for the majority of that delay by virtue of his threats which prevented the complainant coming forward to the police until 2018.

Discussion

16. First on the question of leave to appeal out of time, we grant leave on the basis there was no objection by the respondent to the application.

17. Secondly on the question of suspension of sentence in the first ground of appeal, it was conceded by counsel for the respondent that no suspension should have been made. Despite that concession, we reinforce what this Court said in **Public Prosecutor v Gideon** and **PP v Scott** in 2002, that it will only be in most extreme and exceptional cases that suspension could ever be contemplated in sexual abuse cases. In this case there were no extreme or exceptional circumstances of the respondent to warrant the suspension of his sentence and it was therefore not open to the sentencing judge to order the suspension of the sentence.

18. In relation to the proper starting sentence the prosecution had asked for 5 years starting point but with an uplift of 2 years for the aggravating features. It is apparent the sentencing judge did not take that submission into consideration and therefore imposed a starting sentence of 5 years and then made deductions for mitigating factors.

19. From the facts of the case there were aggravating features such as breach of trust, the age disparity between the victim and offender, the degree of planning involved, the

unprotected sex, the fear and threats made to the victim from 2009 to 2017 and the mental impact on the victim that made her report to the police in 2018 although the offence was committed in 2009, some 9 years earlier. We note that the guilty plea was only entered after completion of the complainant's evidence.

20. In our view those factors warranted an uplift of 2 years as submitted by the prosecutor, bringing the starting sentence to 7 years imprisonment. The 7 years falls at the lower end of the scale for a serious offending, but with its own set of circumstances is appropriate.

The Result

21. We allow the appeal. We quash the sentence in the Supreme Court and resentence the respondent to a starting sentence of 7 years imprisonment.

22. We make the following deductions –

    a) For personal factors- 6 months;

    b) For guilty plea- 10 months, (equivalent of 12%);

    c) For completion of 100 hours community work and 1/3 of the suspended sentence- 6 months; and

    d) For being a prosecution appeal and delay- 12 months.

23. The end sentence is 4 years and 2 months imprisonment without suspension commencing on 20th December 2019. This is to ensure the respondent does not lose his parole privilege.

DATED at Port Vila this 15th day May 2020

BY THE COURT

John von Doussa
Judge

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