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

Criminal Appeal
Case No. 21/4062 COA/CRMA

BETWEEN: JOHNA IARU
Appellant

AND: PUBLIC PROSECUTOR
Respondent

Coram:	***Hon. Chief Justice Vincent Lunabek*** ***Hon. Justice John Hansen*** ***Hon. Justice Oliver A Saksak*** ***Hon. Justice Dudley Aru*** ***Hon. Justice Richard White*** ***Hon. Justice Viran Molisa Trief*** ***Hon. Justice Edwin Goldsbrough***
Counsel:	***Mr Frederick Loughman for the appellant*** ***Mr Lenry Young for the respondent***
Date of Hearing:	***8th February 2022***
Date of Judgment:	***18th February 2022***

JUDGMENT

Introduction

1. The appellant Johna Iaru was sentenced in the Supreme Court on 5th October 2021 to a start sentence of 5 years and 6 months but reduced to 3 years and 4 months after allowing deductions for mitigating factors.

2. The appeal is against the severity of that sentence. The appellant contended the start sentence was too high and submitted it should be lowered.

Background

3. The Prosecution initially charged the appellant with eight (8) counts as follows:

   - Act of indecency with a young person, counts 1, 2, 3 and 4, contrary to section 98A of the Penal Code Act [CAP 135] (the Act);

- Sexual Intercourse without consent, sections 90(a) and 91 of the Act, Count 5;
- Unlawful sexual intercourse, section 97 (2) of the Act, Count 6; and
- Act of Indecency without consent, section 98 (a) of the Act, Count 7 and 8.

4. Those charges were contained in the Information dated 27th December 2021. Count one alleged that the appellant had sucked the breast of his 10 year old step daughter in July 2014, Count 2 that he had touched the vagina of the child at and about the same time, Counts 3 and 4 that he had engaged in the same conduct with the same child in 2014 and 2015, and Count 7 that he had touched the vagina of another step daughter, aged 14 years. The offences occurred in circumstances involving gross breaches of trust.

5. The charges in Counts 6, 7 and 8 were alternative charges.

6. The appellant appeared for plea at Isangel, Tanna on 4th October 2021 with Counsel Mr Rantes. He pleaded guilty to the charges in Counts 1, 2, 3, 4 and 7 and entered not guilty pleas to the charges Counts 5, 6, and 8.

7. Following the not-guilty pleas, the Prosecution entered nolle prosequi in respect of the three charges in Counts 5, 6 and 8 and the appellant was acquitted.

8. The Prosecution amended the summary of facts in paragraphs 10 and 14 to reflect the pleas. Mr Rantes informed the Judge that the facts in the amended summary were agreed.

9. The Judge then convicted the appellant on his own pleas and on the balance of the facts as amended and accepted a start sentence of 5 years and 6 months imprisonment on a global basis.

10. The Court reduced the start sentence to 3 years and 4 months after making appropriate allowances for the mitigating factors.

The Appeal

11. The appellant appeals against that sentence. He sought orders that-

a) The appeal be allowed;

b) The appeal against sentence for indecent assault be allowed;

c) The sentence for indecent assault be reduced in light of the time he has already spent in custody.

12. The appeal was advanced on the following grounds that the Supreme Court had acted-

a) Improperly by relying on unsubstantiated evidence;

b) Contrary to the Judge's findings, the appellant had instructed the first complainant not to make any noise, that he had threatened to beat her if she did, and that he had stopped her from reporting his conduct to anyone;

c) Contrary to the Judge's findings, the appellant denied that he had touched the second complainant's vagina, that he had kissed her on the mouth, that the second complainant had escaped and ran off, and that the appellant persuaded her not to by shouting at her;

d) Contrary to the Judge's understanding, he had attempted a custom reconciliation but the complainants' family had refused. He had paid VT 24,000 to the complainants' family;

e) He was not the cause of the delay in the prosecution not having been commenced.

f) On the basis of **John Tangiat v Public Prosecutor** [2014] VUCA 1, the sentence was manifestly excessive and should be reduced.

Discussion

13. Mr Loughman submitted first that the Supreme Court had erred when it said the offence of act of indecency with a young person was continuous and repetitive in 2014 and into 2015 but without any particularisation. As such it was prejudicial and aggravated the appellant's position in sentencing. Counsel relied on **PP v Leiwawa** Criminal Case No. 2 of 2009.

14. Secondly Counsel submitted the Court should only sentence the appellant on the basis of actual offending proven and relied on **PP v Gratien Bae** VUCA 3 of 2003.

15. Thirdly Mr Loughman relied on **Tangiat v PP** VUCA 1 of 2014 and submitted that his offence of act of indecency without consent was not a repeated offending and should be considered at the lower end of the scale.

16. Mr Loughman was not counsel for the appellant during pleas and sentence on 4th and 5th October 2021. As such he perhaps was not well versed with the charges that were laid against the appellant. First we note from his written submissions that Counsel made reference to only two (2) charges being an act of indecency with a young person contrary to section 98 (A) Count 1 and an act of indecency without consent contrary to section 98 (a), Count 2. That was plainly wrong.

17. The actual Information dated 27th September 2021 had 8 counts, 4 of them being for acts of indecency with a young person, section 98A, 2 for acts of indecency without consent, section

98 (a) and 2 others for sexual intercourse without consent and unlawful sexual intercourse. The appellant was sentenced for five counts of an act of indecency without consent, being those to which he had pleaded guilty. And there were in fact two victims who were sisters.

18. The appellant's complaint that the charges in relation to acts of indecency with a young person in 2014 into 2015 were not particularised was also plainly wrong. They were particularised and what is more they were alleged as representative charges in Counts 3 and 4. The appellant had pleaded guilty to those charges on that basis.

19. In the appellant's case the sentencing Judge had recorded on 4th October 2021 that only paragraphs 10 and 14 and the last sentence of the summary of facts which related to an alleged offending in 2017 when the complainant was 14 years of age were deleted. The balance of the facts were accepted and admitted by his then counsel. The Judge sentenced on the basis of those agreed facts, which included the facts now disputed by the appellant. That is a major difficulty for the appellant. The appellant cannot resile from the facts he admitted before the Judge simply because he has had a change of counsel. There was no suggestion that previous counsel had misunderstood his instructions when agreeing those facts.

20. Mr Rantes and Mr Vira were counsel for the defendant then. Mr Loughman has not attempted to file any sworn statements from previous counsel following a waiver of privilege. Counsel cannot raise on appeal disputes about facts which were previously agreed without a waiver of privilege so that the Court can examine whether there was any mistake or misunderstanding by counsel.

21. As noted from the Information, the charges in Counts 3 and 4 were representative charges in relation to offences committed by the appellant on the young victim from 2014 into 2015. Whilst it is true the actual dates and times are not stated, once admitted by the appellant as representative charges on the plea date without challenge to the facts, it was proper for the sentencing Judge to state that the offences had occurred regularly, thus aggravating the offences.

22. The cases of **Leiwawa** and **Bae** were of no assistance to the appellant. And the case of **Tangiat** is distinguished and not of any assistance to the appellant.

23. In this case Counsel appeared not to understand that in order to succeed on an appeal against sentence, it is necessary to show error by the sentencing judge. Doing so is difficult when the judge has acted on the basis of agreed facts. Counsel needs to do more than merely assert from the bar table that the facts were different. We also note that counsel's submissions were only partly directed to the grounds in the notice of appeal.

24. The sentencing Judge correctly sentenced the appellant on his own guilty pleas and on the accepted facts after the necessary changes were made. No errors have been demonstrated to us by the appellant. Considering that there were 5 charges of repeated offending involving two victims over a period of time and the Judge sentencing the appellant on a global basis, it is our

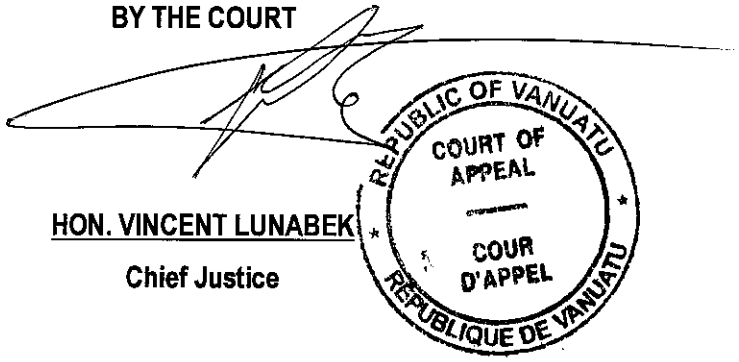
view the start sentence of 5 years and 6 months imprisonment, reduced to 3 years and 4 months was a merciful sentence. It cannot be lowered.

The Result

25. The appellant's appeal fails on all grounds and is accordingly dismissed.

DATED at Port Vila this 18th February 2022

BY THE COURT



HON. VINCENT LUNABEK

Chief Justice