

**IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU**
(Criminal Appellate Jurisdiction)

Criminal Appeal
Case No. 23/279 COA/CRMA

BETWEEN: VICTOR NAKATO
Appellant

AND: PUBLIC PROSECUTOR
Respondent

Date of Hearing: 8 August 2023

Before: *Hon. Chief Justice V Lunabek
Hon Justice JW von Doussa
Hon Justice R Asher
Hon Justice D Aru
Hon Justice VM Trief
Hon Justice EP Goldsbrough*

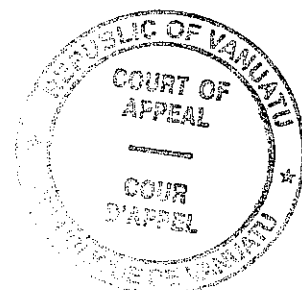
Counsel: *Appellant in person
S Blessing for the Respondent*

Date of Order: 18 August 2023

JUDGMENT OF THE COURT

Introduction

1. On 25 November 2022 Mr Nakato was sentenced to an end sentence of 6 years imprisonment on one count of acts of indecency and two counts of unlawful sexual intercourse. As the appeal period has lapsed, Mr Nakato applies for leave to appeal out of time his sentence.
2. Following his sentence, he was taken into custody. As a result, he alleges he was unable to instruct Counsel to prepare and file his appeal within time and the 14 days appeal period lapsed. His notice and grounds of appeal were subsequently filed on 3 April 2023 roughly 4 months later. He appeared in person by video link from Luganville, Santo to pursue his application for leave.



Background

3. At the time of the offending, the victim, who was Mr Nakato's step daughter was under 13 years of age. In 2019 at different times and dates he committed acts of indecency on the victim by touching her breasts. This led to him having unlawful sexual intercourse with the victim on several occasions.
4. In 2020, Mr Nakato on numerous occasions had unlawful sexual intercourse with the victim whenever her mother was out of the house. The unlawful sexual intercourse with the victim was repeated again on numerous occasions in 2021.
5. He pleaded guilty to those charges and was sentenced accordingly.

Discussions

6. Section 201 of the Criminal Procedure Code [CAP 136] provides for the procedure on appeal and subsection (6) states:-

"(6). The appeal court shall have power to extend any time herein provided for the taking of any necessary step in appeal, as it may consider fit."

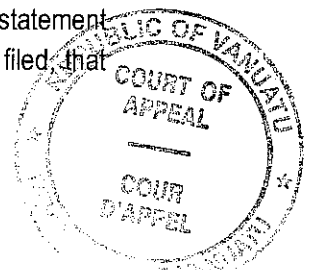
7. This Court in **Gamma v Public Prosecutor** [2007] VUCA 19 said the following in relation to the discretion to extend time:

*"7. Although the Criminal Procedure Code does not detail how a discretion to extend time is to be exercised, judicial authority throughout comparable jurisdictions is consistent. It is encapsulated in what was said by the New Zealand Court of Appeal in the **Queen v. Knight** [1998] NZLR 583 at 589:*

"The Applicant must demonstrate some special feature or features particular to the case that led to the conclusion that in all the circumstances justice requires that leave be given. Amongst the considerations which will also be relevant in that overall assessment are the strength of the proposed appeal and the practical utility of the remedy sought, the length of the delay and the reasons for delay, the extent of the impact on others similarly affected and on the administration of justice, that is floodgates considerations, and the absence of prejudice to the Crown".

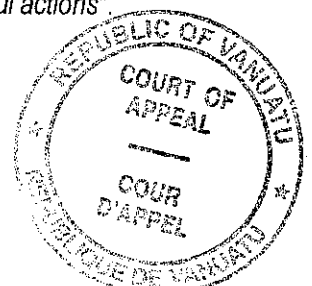
8. *There is similar authority in Australia and the United Kingdom.*
9. *The fundamental test is what in all the circumstances justice requires.*
(emphasis added)

8. Mr Nakato raises a number of complaints in his grounds of appeal. The first relates to complaints against his former Counsel. That Counsel, he says, failed to attach the victim's statement requesting cancellation of the case to his sentencing submissions when they were filed, that



relevant case authorities were not referred to in those submissions , that no reference to his personal background was discussed in the submissions and the fact that he offended due to his wife's conduct , that no elaboration was made on the mitigating factors referred to in the submissions and finally because of those failures, Counsel was wrong to submit a starting point of 9 years imprisonment for the charge of unlawful sexual intercourse and 2 years imprisonment for the charge of acts of indecency.

9. Next, he complains that the Same Day Report contained factual errors that the victim was his daughter and the probation officer failed to provide a fair and honest Same Day Report, that the victim and her mother were not interviewed, that witnesses to his custom reconciliation were not interviewed and not enough time was allowed to produce a medical certificate to show that he had hepatitis B.
10. As a result of these alleged errors, Mr Nakato asserts that the primary judge made factual errors in his judgment noting that there were no mitigating factors and that the victim was his daughter when in fact she was his step daughter. Secondly that the primary judge ignored the fact that he offended because of his wife's unnecessary spending of their money in Vila and extramarital affairs while he was the only person supporting his children as mentioned in the Same Day Report.
11. Mr Blessing in summary, submitted that the application for leave should be dismissed as there is no merit in the appeal. He submitted that the victim's letter of cancellation will not make a difference as Mr Nakato pleaded guilty. It was further submitted that the end sentence was available to the primary judge regarding Mr Nakato's culpability.
12. The allegations against Counsel are serious. We have not seen any sworn statement filed by Mr Nakato's previous Counsel therefore we cannot consider disputes about facts which were previously agreed without a waiver of privilege. [**Iaru v Public Prosecutor** [2022] VUCA 9].
13. As for the preparation of the Same Day Report, it was incumbent upon Mr Nakato to inform and provide the Probation Officer with all available information pertaining to his personal circumstances to enable the preparation of the report. His lack of doing so cannot be justification for a complaint against how the Same Day Report was prepared.
14. On the whole, Mr Nakato maintains that his offending was justified by his wife's extra marital affairs. This in our view shows a real lack of remorse on Mr Nakato's part and cannot be justification for a reduction in the end sentence.
15. Unlawful sexual intercourse with a child under 13 years is the lead offending in this case and the is punishable by a maximum sentence of life imprisonment. The primary judge noted that the charges of unlawful sexual intercourse and acts of indecency were representative charges of Mr Nakato's offending over the years 2019, 2020 and 2021. He took into account aggravating factors of the offending and noted that there were no mitigating factors "*warranting his unlawful actions*".



16. He then arrived at a starting point of 10 years imprisonment. For the guilty plea, the sentence start point was reduced by the full one third discount. At paragraphs 17 and 18 the primary judge said: -

"17. For his other mitigating factors such as custom reconciliation, his physical condition and children and clean past record, I deduct a further 8 months.

18. His end sentence is therefore 6 years imprisonment."

17. We are satisfied the primary judge considered all mitigating factors in favour of Mr Nakato before arriving at the end sentence. In our view the appeal lacks merit.

Result

18. The Application for leave to appeal out of time is therefore refused and is hereby dismissed.

Dated at Port Vila, this 18th day of August 2023

BY THE COURT

Hon. Chief Justice Vincent Lunabe

