

BETWEEN: JOHN SIMO
Appellant

AND: PUBLIC PROSECUTOR
Respondent

Date of Hearing: 7 August 2023

Before: Hon. Justice JW von Doussa
Hon. Justice R Asher
Hon. Justice OA Saksak
Hon. Justice D Aru
Hon. Justice VM Trief
Hon. Justice EP Goldsbrough

In Attendance: R Willie for the Appellant
M Taiki for the Respondent

Date of Decision: 18 August 2023

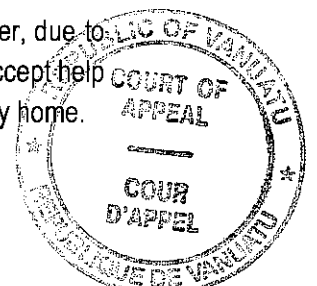
JUDGMENT OF THE COURT

A. Introduction

1. This was an appeal against sentence.
2. Mr Simo pleaded guilty to three charges of sexual intercourse without consent. One of the three charges involved the use of force, threats and fear of bodily harm to obtain the complainant's consent. The maximum penalty prescribed is life imprisonment (sections 90 and 91 of the *Penal Code* [CAP. 135]). Mr Simo was sentenced to 7 years and 7 months imprisonment.

B. Facts

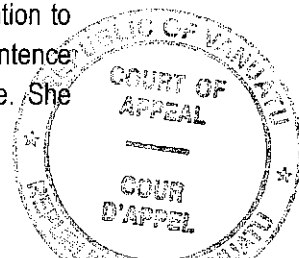
3. Mr Simo and the complainant commenced their *de facto* relationship in 2015 and have two children together. He is 44 years old and she is 37 years old.
4. Both Mr Simo and the complainant consumed alcoholic drinks. She faced a lot of physical violence and to some extent sexual violence by Mr Simo.
5. They lived with the complainant's family at Solway area, on Santo Island. However, due to Mr Simo's violence and abusive treatment to the complainant and her refusal to accept help from her family members, they sent Mr Simo and the complainant out of their family home.



6. In June 2022, Mr Simo, the complainant and their children moved to live with Mr Simo's family at Malo Island.
7. On Malo Island, Mr Simo would have sexual intercourse with the complainant every day, even when she had returned home tired from work she would be forced to have sexual intercourse. She would refuse to have sex but Mr Simo would threaten to kill or harm her, or would threaten to cut her with a knife, in order to make her have sex with him.
8. On 9 February 2023, the complainant lodged a complaint against Mr Simo for sexually abusing her.
9. In 2017, after the birth of their first child, the couple were living at Pepsi area on Santo Island. They had been drinking in the evening and then the complainant went to sleep. When she woke up the next morning, she felt pain in her vagina, saw a Tusker beer bottle near the side of the bed and asked Mr Simo what he had done to her. He responded that he had only pushed the bottle a little into her and then took it out.
10. In December 2020, at Solway area, the complainant had drunk alcohol, eaten then went to bed. She was asleep when she suddenly felt a pain in her body. She woke up to see Mr Simo trying to pull a hand watch out of her vagina. She asked Mr Simo what he was doing. She turned on the light and saw blood running down her legs.

C. The Appeal

11. The grounds of the appeal were that the sentence was manifestly excessive, and that the sentencing judge erred in failing to properly consider Mr Simo's personal mitigating factors. Mr Willie also put before the Court, by way of memorandum, documents stated to relate to a custom reconciliation ceremony by Mr Simo to the complainant and a statement by the complainant. He accepted that none of these documents had been placed before the sentencing judge. Three of the documents were dated after the date of sentence.
12. Ms Taiki submitted for the respondent that Mr Simo's prior conviction for cultivation of cannabis was irrelevant to any consideration of the sentence starting point. She submitted that even without consideration of that prior conviction, the sentence starting point was appropriate and within range, and that the sentence was made on the information before the Court. She pointed out that the pre-sentence report was contradictory as to whether or not a custom reconciliation ceremony had been performed with the complainant. Further, that the same chief who was recorded in the pre-sentence report as being unaware of the recent offending and any reconciliation between Mr Simo and the complainant signed the letter attached to Mr Willie's memorandum attesting to a ceremony performed prior to Mr Simo's guilty pleas therefore she doubted the veracity of the letter.
13. Ms Taiki also submitted that even if this Court accepted that there had been a custom reconciliation ceremony, the sentencing judge did take into account Mr Simo's intention to perform one. Accordingly, Mr Simo's personal factors were considered and the end sentence was within range and appropriate given the facts and circumstances of this case. She



submitted that there were no exceptional circumstances, in whole or in part, to justify suspension of sentence.

D. Discussion

14. The sentencing judge adopted a sentence start point of 12 years imprisonment. He did so having noted the aggravating features of the offending including a degree of planning involved, gross breach of trust, the offending occurred at home where the complainant should be safe, force was used over and above the commission of the offence, repeated offending, the effect on the complainant whether physical or mental, and that threats were used including to cut the complainant with a knife.
15. We agree with Ms Taiki's submission that Mr Simo's prior conviction for cannabis cultivation was irrelevant to this offending and to the assessment of the sentence starting point. However, we are satisfied that the sentencing judge noted that Mr Simo had that prior conviction but did not take it into account in imposing the sentence starting point of 12 years imprisonment.
16. In the circumstances of this case, from June 2022 on Malo Island, Mr Simo on a daily basis forced the complainant by physical force and by way of threats including to cut her with a knife to have sex with him. It is accepted that Mr Simo and the complainant's relationship was characterised by physical violence and to some extent sexual violence by Mr Simo. This is exemplified by the offending in 2017 involving the use of a Tusker bottle and in 2020 involving a hand watch pushed into the complainant's vagina without her consent. However, from June 2022 onwards, the violence had escalated to the point of rape every day resulting in the complainant seeking help from the Police.
17. In *Public Prosecutor v Scott* [2002] VUCA 29, this Court endorsed and repeated what the Chief Justice had said in *Public Prosecutor v Ali August*; Criminal Case No. 14 of 2022 as follows:

"The offence of rape is always a most serious crime. Other than in wholly exceptional circumstance, rape calls for an immediate custodial sentence. This was certainly so in the present case. A custodial sentence is necessary for a variety of reasons. First of all to mark the gravity of the offence. Secondly to emphasize public disapproval. Thirdly to serve as a warning to others. Fourthly to punish the offender, and last but by no means least, to protect women. The length of the sentence will depend on the circumstances. That is a trite observation, but these in cases of rape vary widely from case to case.

For rape committed by an adult without an aggravating or mitigating feature, a figure of five years should be taken as the starting point in a contested case. Where a rape is committed by two or more men acting together, or by a man who has broken into or otherwise gained access to a place where the victim is living, or by a person who is in a position of responsibility towards the victim, or by a person who abducts the victim and holds her captive the starting point should be eight years.



At the top of the scale comes the defendant who has committed the offence of rape upon a number of different women or girls. He represents a more than ordinary danger and a sentence of fifteen years or more may be appropriate.

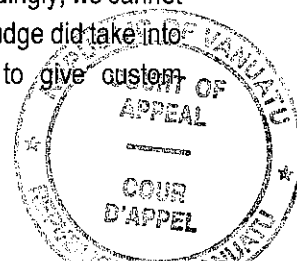
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The offence of rape should in any event be treated as aggravated by any of the following factors:

- (1) *Violence is used over and above the force necessary to commit rape;*
- (2) *A weapon is used to frighten or wound the victim;*
- (3) *The rape is repeated;*
- (4) *The rape has been carefully planned;*
- (5) *The defendant has previous convictions for rape or other serious offences of a violent or sexual kind;*
- (6) *The victim is subject to further sexual indignities or perversions;*
- (7) *The victim is either very old or young;*
- (8) *The effect upon the victim, whether physical or mental, is of special seriousness;*
- (9) *Where any one or more of these aggravating features are present, the sentence should be substantially higher than the figure suggested as the starting point.*

..."

18. Given the aggravating factors of the offending and in light of our comments in *Scott*, no error has been demonstrated in the sentencing judge's adoption of a sentence starting point of 12 years imprisonment. That starting point was appropriate in the circumstances of the offending.
19. It is accepted that the matters that Mr Willie put forward by way of memorandum were not before the sentencing judge at the time of his consideration and delivery of sentence.
20. To avoid doubt, fresh evidence cannot be adduced by way of a memorandum by counsel. The party wishing to do so must seek the Court's leave by way of an application supported by a sworn statement. As set out in *Adams v Public Prosecutor* [2008] VUCA 20, the cumulative conditions which must be fulfilled by a party seeking to have fresh evidence received by an appellate court include that the evidence could not have been procured by the exercise of reasonable diligence for use at the trial [or in preparation for sentencing], that the evidence is relevant and otherwise admissible, and that the evidence is apparently credible (capable of belief).
21. Turning to the documents attached to Mr Willie's memorandum, the complainant's statement, the chief's statement and Mr Simo's statement did not raise any material not already set out in the pre-sentence report and which was considered by the Judge. In addition, they were all dated after the date of sentence. The remaining document was titled "Report for reconciliation" in relation to a custom reconciliation ceremony by Mr Simo to the complainant. Ms Taiki correctly pointed out that the chief who signed that report informed the pre-sentence report writer that he was not aware of Mr Simo's recent offending nor had he assisted the couple with counselling and presumably reconciliation in recent times. Accordingly, we cannot be satisfied that the report, on its face, is capable of belief. The sentencing judge did take into account as a personal mitigating factor that Mr Simo had intention to give custom



compensation therefore we consider that all applicable personal factors were taken into account. The reduction given for Mr Simo's personal mitigating factors was extremely generous.

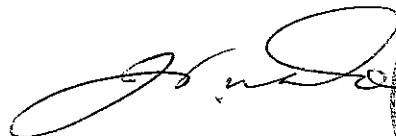
22. In the circumstances, no error has been demonstrated on the part of the sentencing judge to fail to consider personal mitigating factors nor has the end sentence been shown to be manifestly excessive.

E. Result

23. The appeal against sentence is dismissed.

DATED at Port Vila this 18th day of August 2023

BY THE COURT



Hon. Justice John William von Doussa

