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

Criminal Appeal Case No. 24/2461 COA/CRMA

BETWEEN: PUBLIC PROSECUTOR
Appellant

AND: MICHELLE DANIEL
Respondent

Date of Hearing:	***5 November 2024***
Coram:	***Hon. Chief Justice V. Lunabek*** ***Hon. Justice M. O'Regan*** ***Hon. Justice R. White*** ***Hon. Justice O. A. Saksak*** ***Hon. Justice D. Aru*** ***Hon. Justice E. P. Goldsbrough*** ***Hon. Justice M. A. MacKenzie***
Counsel:	***S. Blessing for the Appellant*** ***J. Tari for the Respondent***
Date of Decision:	***15 November 2024***

JUDGMENT OF THE COURT

Introduction

1. Following a trial, the respondent was acquitted of one charge of attempted sexual intercourse without consent but convicted on two counts of committing an act of indecency without consent, contrary to s.98(a) of the Penal Code: *Public Prosecutor v Daniel* [2024] VUSC 115.

2. The Judge then imposed concurrent sentences of imprisonment for 1 year 8 months and 2 weeks but suspended those sentences for a period of 18 months on conditions that the respondent not re-offend during that period and that he complete 60 hours of community work: *Public Prosecutor v Daniel* [2024] VUSC 194.

3. The Judge reached the sentence by commencing with a global starting point of 2 years and deducting 2 months on account of the respondent's personal factors and a further 1 ½ months on account of the time which he had already spent in custody.

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4. The Public Prosecutor now appeals against the sentence. There is a single ground of appeal, namely, that the Judge erred in suspending the sentence, thereby leading to a miscarriage of justice.

Circumstances of the Offending

5. On 23 December 2022, the respondent (then aged 31 years) attended a Christmas party at his employer's home. Other employees were also in attendance. In addition, the employer's daughter and granddaughter (the complainant) aged 16 years who were visiting from Australia were present. At one stage while the respondent and the complainant were briefly in the swimming pool together and alone, the respondent put his hand under the complainant's right buttock and, through her clothing, squeezed it. Immediately afterwards, he moved his hand further down and touched her vagina, again through her clothing.

6. Each of these actions was an indecent act for the purposes of Section 98(a), although they occurred so closely together that they might have been regarded as constituting the one incident.

7. The respondent and the complainant had not previously met and, as the Judge found, the respondent could not have had any reasonable belief that the complainant was consenting to his indecent conduct.

8. Almost immediately, the complainant reported the incidents to her mother who accosted the respondent. He was required to leave the property immediately and his employment terminated the same day.

9. The respondent was charged with attempted sexual intercourse without consent in contravention of ss.28 and 91 of the Penal Code and, in the alternative, with the two acts of indecency without consent. The prosecution led evidence from the complainant, her mother and others. The respondent gave evidence denying the allegations. As indicated, he was acquitted on the charge of attempted sexual intercourse without consent but convicted on the two counts of indecent acts.

The Sentence

10. At the time of sentencing, the respondent continued to maintain his innocence. Consistent with that stance, he has not made any expression of regret or contrition.

11. The complainant supplied a Victim Impact Statement for use in relation to the sentencing. The Judge made no reference to the Victim Impact Statement, but there is no reason to suppose that, having accepted the complainant's evidence at the trial, Her Ladyship did not also accept that statement in relation to the sentencing. It indicated the affront to the complainant caused by the appellant's conduct and that she has continuing effects from the incidents, including anxiety and a lack of trust when around men. The complainant has received regular counselling in Queensland, Australia, where she resides.

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12. In relation to the respondent's personal circumstances, the Judge accepted that he was 32 years old at the time of sentencing; that he had no prior convictions; that he and his partner have an 18 month old child; and that he makes his living from his market garden.

13. In relation to the suspension of the sentence, the Judge accepted that the sexual nature of the offending counted against a favourable exercise of the discretion. However, the Judge considered that the respondent's offences, while serious, were at the lower end of the scale for sexual offending, comprising, in substance, a one-off momentary touch of the complainant's vagina over her clothing. The Judge also considered that the respondent's family responsibilities, his prior clean record and his prospects for rehabilitation favoured suspension. As already noted, that is what the Judge ordered.

Prosecution submissions on appeal

14. Counsel for the Public Prosecutor accepted, appropriately, that the Judge had the power under s.57 of the Penal Code, upon consideration of the respondent's character, the circumstances and the nature of the offending, to order suspension. He also accepted, again appropriately, that the respondent's conduct was at the lower end of the scale of Section 98(a) offences.

15. Nevertheless, counsel submitted that the respondent's character militated against suspension. This was because even now the respondent does not acknowledge his wrongdoing and has not expressed any remorse. As part of this submission, counsel noted that the respondent had exercised his right to silence when interviewed by the Police and had pleaded not guilty to the charges, thereby compelling the complainant to give evidence and to relive her distressing experience.

16. Next, counsel submitted that the nature of the respondent's offending militated against suspension. He referred to *Public Prosecutor v Gideon* [2002] VUCA 7 in which the Court stated:

> It will only be in [the] most extreme of cases that suspension could ever be contemplated in a case of sexual abuse. ... Men must learn that they cannot obtain sexual gratification at the expense of the weak and vulnerable. What occurred is a tragedy for all involved. Men who take advantage sexually of young people forfeit the right to remain in the community.

17. In contending that the principle stated in *Gideon* should have been applied in the present case, counsel emphasised that the respondent was being sentenced for two offences so that there had been, as he contended, a continuation by the respondent in criminal conduct; the disparity in ages between the 31 year old respondent and the 16 year old complainant (which he submitted had created "a stark power imbalance"); the element of breach of trust (by reason of the respondent as a trusted employee being invited to the grandfather's home for the Christmas party); the effects which the offending have had on the complainant; and the respondent's intoxication.

18. Finally, counsel submitted:

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> *"The gravity of the offence compounded by the respondent's blatant lack of accountability, called for a far more severe punishment. The sentence conveys a troubling message to young girls in our community that men who exploit them for sexual gratification and feel justified in their actions may evade appropriate punishment. A suspended sentence in this case was unwarranted".*

Discussion

19. The sentencing principle stated in *Gideon* on which the Public Prosecutor relies is undoubtedly important, as our judgment in *Public Prosecutor v Tulili* delivered in this session indicates. Subject to what we say below, the principle was applicable in this case. The statement in *Gideon* that it will only be in the most extreme of cases of sexual abuse that suspension will be appropriate indicates that the circumstances in which suspension may be ordered must be exceptional.

20. However, as this Court noted in *Achary v Public Prosecutor* [2023] VUCA 44 at [80], the principle stated in *Gideon* must be understood in the context of the facts of the case in which it was stated, namely, a number of sexual acts including full intercourse with a child under the age of 13 years. The Court went on to say that the *Gideon* principle had less force in relation to minor non-penetrative non-skin to skin offending with adult victims.

21. *Achary* is a recognition that the 'sexual abuse' to which the *Gideon* principle is applicable may vary greatly in its character and seriousness. In the case of the offences of rape (Penal Code s.91) and unlawful sexual intercourse (Penal Code s. 97(1) and (2)), suspension is appropriate only in those cases which are truly exceptional. The very seriousness of the offending requires such an approach. In cases of less serious forms of sexual abuse, sentencing Courts may not be so constrained in finding exceptional circumstances. That is to say, the *Gideon* principle is still to be applied but that should occur with reference to the nature of the sexual abuse then before the Court.

22. Acts of indecency within s.98(a) are generally a less serious form of sexual abuse than rape and unlawful sexual intercourse. Further, the conduct which may constitute indecent acts for the purposes of s.98(a) can vary greatly both in form and in seriousness.

23. In our view, the Judge was correct to characterise the respondent's conduct in this case as being at the lower end of the scale for acts of indecency prescribed by Section 98(a). That is so even though the complainant was a child, because the conduct appears to have been only momentary and did not involve any skin to skin contact. That is not to say that the conduct was not serious: it is only to locate it appropriately in the wide range of conduct which may constitute an offence of 'sexual abuse'. That is important as it meant that *Gideon* did not have to be applied with the same rigour.

24. It is the case that the respondent was being sentenced for two offences but, as noted earlier, they were so proximate in time and circumstance that they probably could have been charged as the one offence. This is not a case in which the respondent had, after an opportunity for reflection after committing the first offence, chosen to continue his criminal conduct.

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25. This does not seem to have been a case in which the respondent had sought to take advantage of a power imbalance arising by reason of the age disparity. To the contrary, the offending appears to have been opportunistic, and it was immediately and successfully resisted by the complainant.

26. We agree that there was an element of breach of trust involved. We also agree that the fact that the complainant was a child and that the conduct has caused ongoing distress and anxiety are important considerations. But there is no indication that these factors were overlooked by the sentencing Judge.

27. The respondent's intoxication to which counsel referred may help to explain why the respondent, who had otherwise been of good character, chose to engage in his opportunistic conduct.

28. Lastly in relation to the matters relied upon by the Public Prosecutor, and contrary to counsel's submission, we do not regard the respondent's failure to admit his guilt when interviewed by the police or his pleas of not guilty as reflecting adversely on his character so as to disentitle him to suspension. In adopting those courses of action, the respondent was exercising fundamental rights available to him and it would be wrong for him to suffer detriment on account of doing so. In any event, the respondent was to an extent vindicated in pleading not guilty because he was acquitted of the more serious charge of attempted sexual intercourse without consent laid by the Public Prosecutor. We have said "to an extent" because it had been open to the respondent to have pleaded not guilty to the charge of attempted sexual intercourse without consent but guilty to the alternative charges.

29. As to the respondent's failure to acknowledge his offending subsequent to the Court's verdict on which the Public Prosecutor relied, there was an obvious difficulty for him doing so when he had, only a few weeks previously, denied that conduct on his oath.

30. As counsel for the respondent noted in her helpful submissions, the Public Prosecutor is appealing against a discretionary decision, and the circumstances in which this Court will interfere with such decisions are confined. The appellant must show that the exercise of the discretion miscarried, for example, by the Judge taking into account irrelevant matters, or failing to take into account relevant matters, or by the Judge making some error of law of principle. It is not sufficient for the appellant simply to invite this Court to exercise the discretion afresh – see: *Public Prosecutor v Gideon* [2002] VUCA 7 and *Pipite v Public Prosecutor* [2018] VUCA 53 at [82].

31. We note again the matters on which the Judge relied: the offending being at the lower end of the scale of seriousness; the respondent's clean record, his good prospects for successful rehabilitation and his undertaking of his family responsibilities. We also recognise that the Judge had had the opportunity to observe the respondent when he gave evidence in the trial. Finally, we note that as a result of his offending, the respondent's employment by the grandfather was terminated immediately. He has suffered that deterrent as a result of his offending.

32. For the reasons given above, we are not satisfied that the Public Prosecutor has demonstrated an error entitling appellate intervention in the Judge's exercise of discretion to suspend.

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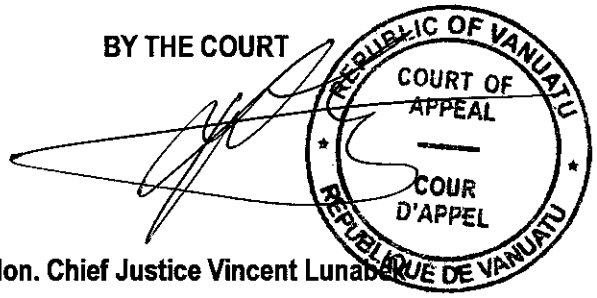
Conclusion

33. Accordingly, the order of the Court is that the appeal is dismissed.

DATED at Port Vila, this 15th day of November, 2024.

BY THE COURT



Hon. Chief Justice Vincent Lunabek