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

Criminal Appeal
Case No. 24/2480 COA/CRMA

BETWEEN: PUBLIC PROSECUTOR
Appellant

AND: JEFF LOP
Respondent

Date of Hearing:	***4 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 V. M. Trief*** ***Hon. Justice E. P. Goldsbrough***
Counsel:	***M. Tasso for the Public Prosecutor*** ***E. Molbaleh for the Respondent***
Date of Decision:	***15 November 2024***

JUDGMENT OF THE COURT

Introduction

1. This is the second prosecution appeal in this session against the suspension of a sentence imposed for a serious sexual offence.

2. The respondent had pleaded guilty to the offence of unlawful sexual intercourse with a girl under the age of 15 years but over the age of 13 years, in contravention of s.97(2) of the Penal Code, committed on 3 November 2023. At that time, the respondent was aged 17 years and 7 months and the victim 13 years. They were not known to each other.

Circumstances of the offending

3. The victim, who was on her way home from school, had alighted from a bus on the main road and was making her way to her house at Erakor Half Road. The respondent alighted from another bus and walked behind the victim. He called out to her and initiated a short conversation with her as they walked together. The respondent then grabbed the victim and forced her into his own home which was nearby. There he undressed her and had penile-vaginal intercourse with her.

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4. The victim did not tell her father immediately what had occurred but did a few days later. When interviewed by police on about 11 November 2023, the respondent admitted his offending. He also pleaded guilty to the charge at the first opportunity.

The Sentence

5. The primary Judge reduced her starting point of 5 years for an appropriate sentence by 20 months (33 and 1/3%) on account of the respondent's early plea of guilty and by a further 12 months (20%) on account of his personal circumstances. These included his youth, his clean record, his remorse, his participation in a custom reconciliation ceremony, the view that the respondent had "*learned [his] lesson*" and his good prospects of rehabilitation. The Judge then made a further reduction of 2 months on account of the time which the respondent had served in custody before being granted bail.

6. As to suspension, the Judge referred to the statement by this Court in *Public Prosecutor v Gideon* [2002] VUCA 7 that it would only be "*in the most extreme of cases that suspension could ever be contemplated in a case of sexual abuse*". The Judge also referred to the statement by this Court in *Heromanley v Public Prosecutor* [2010] VUCA 25 at 17 that the "... *dual purposes of punishment and deterrence may need to give way to reform and rehabilitation in the interest of society that young offenders be rehabilitated and grow up to become responsible law-abiding members of the community*". In relation to the respondent's youth, the Judge had earlier referred to the neurological differences between young people and adults. The Judge then referred again to the matters which had warranted the reduction of 12 months from the sentence starting point on account of the respondent's personal circumstances.

7. The Judge concluded:

> "*I consider that the imposition of an immediate sentence of imprisonment on you with the consequence of exposing you to long term hardened criminals would be counter-productive and inappropriate.*
>
> *I therefore exercise my discretion under section 57 of the Penal Code to suspend the sentence for 2 years. You are warned that if you are convicted of any offence during that 2 year period that you will be taken in custody and will serve this sentence of imprisonment, as well as the penalty imposed for the further offending.*
>
> *This is an exceptional case given your youth and good prospects of rehabilitation. In such circumstances, an immediate custodial sentence is not required. This was the approach taken by the Court recently in Public Prosecutor v Tulili. Both counsel were aware of Tulili. Mr Molbaleh relied on Tulili to submit that the sentence should be fully suspended. Ms Lunabek submitted that the sentence should not be fully suspended. As she noted, Tulili is a Supreme Court decision and reminded the Court about the principle enunciated in Public Prosecutor v Gideon regarding suspension , as outlined above. I took Ms Lunabek's submission into account, but youth and prospects of rehabilitation have led me to take a merciful approach here.*
>
> *In addition, you are sentenced to 100 hours community work.*"

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8. The respondent was aged 18 years and 4 months at the time of sentence.

The Appeal

9. The sole ground of appeal is against the suspension of the entire sentence.

10. On the hearing of the appeal, counsel for the Public Prosecutor contended that the Judge had been wrong to order the suspension of the entire sentence. Counsel relied on the judgment of this Court in *Public Prosecutor v Gideon* [2002] VUCA 7 in which the Court said:

> "*Whatever may be said about this man personally having learned his lesson, there is an overwhelming need for the Court on behalf of the community to condemn in the strongest terms any who abuse young people in our community. Children must be protected. ... it will only be in [the] most extreme of cases that suspension could ever be contemplated in a case of sexual abuse. There is nothing in this case which brings it into that category. 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*".

11. Counsel submitted that the judgment of this Court in *Heromanley* and in particular the statement at [17] that "*in the sentencing of young offenders ... the dual purposes of punishment and deterrence may need to give way to reform and rehabilitation*" did not justify any different approach. In support, counsel referred to the judgments of this Court in *Tabeva v Public Prosecutor* [2018] VUCA 55 and *Lawi v Public Prosecutor* [2023] VUCA 41 in both of which cases this Court had ordered partial suspension of a sentence imposed for serious sexual offending.

12. In seeking to support the suspension, counsel for the respondent emphasised first the absence of a number of circumstances. These included the absence of excessive force and verbal abuse, the fact that no weapon had been used, the fact that the offending had been opportunistic rather than planned and that there was no suggestion of the victim suffering injury.

13. In relation to the respondent's personal circumstances, counsel emphasized the respondent's youth, his willing participation in a custom reconciliation ceremony, his clean record, his compliance with his bail bond over a period of about 8 months, the good potential for a successful rehabilitation and the potential for detrimental effects on his rehabilitation if he is incarcerated. Relying on *Heromanley*, counsel submitted that this was a case in which punishment and deterrence should give way to reform and rehabilitation.

Discussion

14. In the judgment in *Public Prosecutor v Tulili* delivered in this same session, this Court reviewed in some detail the operation of the *Gideon* principle in cases of the present kind. There is no need presently to repeat what the Court then said. Despite the maximum penalty for a contravention of s.97(2) being 15 years compared with the maximum penalty of imprisonment for life for a contravention of Section 91, and despite the present respondent being slightly younger than Mr Tulili at the time of his offending, we consider, for the reasons stated in *Tulili*, that the present case cannot reasonably be described as exceptional. In deciding to the contrary, the sentencing Judge erred.

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15. Ordinarily, that conclusion would lead to an order that the appeal be allowed and the sentence set aside. However, as in the case of *Tulili*, we are conscious that the interference with the sentence by this Court should be to the minimum extent necessary to achieve the interests of justice. We are also conscious of the disappointment which the respondent is likely to experience if, despite the expectation he had following the sentencing on 31 July 2024, he is now required to serve time in custody. We also note that the respondent has commenced the performance of the 100 hours of community service which the sentencing Judge ordered as a condition of the suspension. We were told that he has already completed 60 hours.

16. In the light of these circumstances, we have decided that it is sufficient to identify the error made by the Judge and then to take the merciful approach of not setting aside the sentence. That makes it unnecessary to consider the submission of counsel for the Public Prosecutor to the effect that a sentence with partial suspension should be ordered.

17. Again, for the reasons stated in *Tulili*, the result of this appeal should not be taken as a precedent in favour of the suspension of a sentence imposed for offences like the present.

18. The formal order of the Court is that the appeal is dismissed.

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

BY THE COURT

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Hon. Chief Justice Vincent Lunabek