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

Criminal Appeal Case No. 03 of 2003.

BETWEEN: PUBLIC PROSECUTOR
Appellant

AND: GRATIEN BAE
Respondent

Coram: **Hon. Chief Justice Vincent Lunabek**
Hon. Justice Bruce Robertson
Hon. Justice John W. von Doussa
Hon. Justice Daniel Fatiaki
Hon. Justice Patrick Treston

Counsel: Mr. Macintosh for the appellant
Mr. Toa for the respondent

Hearing Date: 28th October 2003.
Judgment Date: 31st October 2003.

JUDGMENT

When this matter was called on Tuesday 28 October the Court was surprised to find that the respondent was not present and dismayed when it learned that Mr. Bae perhaps did not even know that there had ever been an appeal against the sentence imposed upon him. That is a totally intolerable situation.

Whenever there is an appeal filed by a prosecutor under the provisions of s. 200 (4) of the Criminal Procedure Code [Cap. 136] it is essential that every effort be made by ALL concerned parties to ensure that the person whose sentence is being appealed against is personally served at the earliest possible opportunity with the proceedings. Counsel who appeared at the original sentence have no warrant or right to proceed to defend an appeal without reference to the client. This was a man who thought that the State had completed its action against him. He was the person in jeopardy of losing his liberty. He had to know what was happening so he could exercise his rights. Fortunately a message was quickly sent to Mr. Bae and he came to the Court house.

On 8th August 2003 Mr. Bae pleaded guilty to one charge of incest contrary to Section 95 (1) of the Penal Code [CAP. 135]. He was sentenced to two years imprisonment but the sentence was suspended for 2 years under the provisions of the Suspension of Sentences Act [CAP. 67] which empowers a Court to suspend the execution of a sentence where the Court considers such a course is appropriate having regard to the circumstances and in particular the nature of the crime and the character of the offender.

The prosecution appeals against the order for suspension. Mr. Macintosh specifically advised the Court that the prosecution was not challenging the length of the sentence. We record and acknowledge that concession. It was a proper exercise of discretion by the Public Prosecutor, although very merciful.

The offence alleged against Mr. Bae occurred in 2000 and involved his natural daughter who was born on the 8th June 1984.

On 10th March 2003 the daughter made a statement to the police alleging sexual intercourse with her father. We note that it was not until the 24th June 2003 that the respondent was interviewed concerning these allegations. In our judgment that delay of three months is unacceptable. Where matters of this sort come to the attention of the police they should receive much more prompt and urgent consideration.

When Mr. Bae was interviewed he said that he first commenced indecent acts towards his daughter when she was 12 years old. He said that the activity had included fondling his daughter's vagina and eventually it developed into full sexual intercourse. He said that the statement made by the complainant, which detailed a consistent course of action over a number of years of escalating seriousness, was true.

The principles applicable to an appeal by the prosecution are certain and well known and do not require restatement.

Similarly the principles applying to sentences under Section 95 of the Penal Code have been repeated time and again by this Court. They were summarized in *Solisi Abednigo v. Public Prosecutor Court of Appeal Case No. 3 of 1990* and repeated more recently in *Peter Talivo v. Public Prosecutor Court of Appeal Case No. 2 of 1996.*

The principles are simple. Parents who use their children for their own sexual gratification will go to prison. It is almost impossible to imagine circumstances in

which that will not be the necessary response. This Court would anticipate that it will only be in the most truly exceptional circumstances, which are clearly and unequivocally demonstrated to exist, that this will not apply. We had considered that there were sufficiently clear statements of the principles from this Court that there could have been no doubt about the situation but there have been drawn to our attention an alarming number of cases at first instance where that correct approach has not been followed.

The prosecuting authorities have a duty to innocent children who have been abused in this intolerable way to ensure that sentences which do not follow that approach, are subject to prosecution appeal for correction in this Court.

The sentencing judge articulated the reasons for his approach by reference to two factors. The first that the respondent was a first offender and that the incident was not repetitive indicating that it was not the habitual character of Mr. Bae.

We are of the view that this assessment was not available to the judge. It is essential that the Court sentence only on the basis of actual offending which is admitted or proved. This sentencing was for one act of sexual intercourse with his daughter who was not more than 16 years. However it is quite unrealistic to treat that as a one off incident by a person who had otherwise been totally blameless in his conduct. On the contrary he admitted a course of conduct which had gone on for years in which he had used his daughter as a means of obtaining sexual gratification. He is not sentenced additionally because of those factors but he cannot come before the Court and ask to be treated as someone who has had a once only fall from grace. This was a man who was admitting one charge of intercourse but it was not out of the blue and was in fact the culmination of behaviour which needed to be condemned in the strongest terms and which occurred over a lengthy period.

The second factor which was advanced to justify the extraordinarily light sentence was that Mr. Bae was the father of six children, the youngest of whom was at kindergarten and the second youngest just ten years old. The Judge said they all lived with Mr. Bae as their mother had deserted them. There was no evidence to justify the use of the word "*desertion*". The uncontraverted evidence before the Court was that because, of the activities of the respondent towards his daughter, his wife had found it intolerable to live with him. We were advised that the Court below was informed that the mother of the children had indicated her willingness and ability to care for them. That appears to have been overlooked or ignored by the sentencing judge. Her ability to provide care has been confirmed to us.

One of the tragedies of offending of this sort is that the parental involvement with children is disrupted while a term of imprisonment is served. That is a consequence of the wrongdoing of the person who has committed the crime. It is an inevitable result which the Court cannot give weight to except in the most exceptional circumstance. They did not exist here.

There was no basis to deviate from normal sentencing approaches. A sentence of 3 to 5 years imprisonment would have withstood appeal . This appeal is allowed. Because of the concession the term of 2 years is not altered but the order for suspension is cancelled. Mr. Bae will go to prison immediately to commence the sentence of imprisonment.

Dated at Luganville, this 31st day of October 2003.

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Hon. V. Lunabek CJ.

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Hon. J. B. Robertson J.

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Hon. J. von Doussa J.

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Hon. D. Fatiaki J.

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Hon. P. Treston J.

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