IN THE COURT OF APPEAL
OF THE REPUBLIC OF VANUATU

Criminal Appeal
Case No. 18/2275 CoA/CRML

BETWEEN: MICHAEL LUEN

Appellant

AND: PUBLIC PROSECUTOR

Respondent

Before: Justice J.W.Hansen

Justice D. Fatiaki

Justice G.A. Andree Wiltens

Justice S. Felix

Hearing Date: 11th February 2019

Counsels: Ms Pauline Kalwatman from the PSO for the Appellant

Ms Katrina Mackenzi and Ms Michelline Tasso for the Respondent

Date of Decision: 22 February 2019

JUDGMENT

A. Introduction

1. Leave to appeal out of time has been granted and Ms Kalwatman, on behalf of Mr Michael Luen, appeals against the sentence delivered on the 27th of July 2018 on two charges of Incest.

2. This Court orders that the names and all particulars leading to the identification of the victims in this matter be suppressed and that they be referred to by pseudonyms only.

3. The appeal was advanced on the basis that the sentencing judge was wrong in his assessment of the culpability and seriousness of the offending, and, therefore, fixing the starting point at 8 years imprisonment was too high.

B. Background

4. Mr Luen had sexual intercourse with his 2 adopted daughters aged 21 and 25. The offending occurred once with each complainant.

5. The facts and the circumstances of the offending are not disputed. The Appellant is only submitting for the Court to compare this case with other cases of similar circumstances and to treat this case as not the 'worst of its category' to attract a starting point of eight years imprisonment , two years less than the maximum penalty prescribed by the legislation at that time.

6. The first incident occurred in January 2017. While his wife was away, the Appellant had sexual intercourse with the victim S aged 21, sexually inexperienced and in a confused state of mind. The victim was threatened not to tell anyone and later became pregnant as a result of that sexual interaction.

7. The second incident with the victim N, aged 25, occurred around November 2016 to February 2017 while the adoptive mother was still away. Also sexually inexperienced and in the middle of the night, victim N was also in a confused state of mind when her adoptive father approached her while she was asleep and asked for sex. He then had sexual intercourse with her and told her not to tell anyone about it.

C. Judge's Decision

8. The sentencing judge adopted a concurrent starting sentence of 8 years imprisonment, in his assessment of the offending, including the aggravating factors such as some degree of planning, the breach of trust, the sex was unprotected and exposed the victims to the risks of sexually transmitted diseases and pregnancy, and also the fact that one victim did become pregnant with her father's child.

9. The judge considered the mitigating factors and deducted 1 year imprisonment for an unblemished past record, 3 months imprisonment for time already spent in custody and 3 years imprisonment for the early guilty pleas. He then passed an end sentence of 4 years.

D. Discussion

10. The maximum penalty prescribed by law was 10 years imprisonment when these offences were committed. That provision has now been amended and increased to 15 years (Penal Code Amended Act number 15 of 2016);

11. The sentencing of the defendant for the two offences was not considered on the basis that there were two victims, and that the incidents occurred 9 to 10 months apart with different consequences and that the second incident was a repetition of the first. However the sentencing judge did consider all relevant aggravating factors when he fixed a total concurrent start sentence of 8 years imprisonment for the two offences together.

12. There is no dispute that offences of this nature are considered serious by Parliament and as also reflected in previous decision and sentences imposed by this Court such as in *Public Prosecutor v Scott [2002] VUCA 29; CA 02-02 (24 October 2002)* and *Public Prosecutor v Ulas [2018] VUCA 54; Criminal Appeal Case 1822 of 2018 (16 November 2018)*

13. In *PP v Scott*, this Court commented that...."*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.*"

14. In this present case, even If the victims were consenting adults, the level of intimidation involved placed the victims in situations where they had no other option but to obey or give in to their adoptive father's demands, which depicts a serious breach of trust by the Defendant.

15. The case of *The Queen v Kilic (2016) HCA 48 7 Dec 2016*, cited by Ms Mackenzie on behalf of the State, the High Court of Australia suggested that the Court should avoid the use of the expression **'the worst category'** of an offence to determine an appropriate sentence but only consider whether the offence is or is not so grave so as to warrant the maximum prescribed penalty; We accept this view as a correct approach in determining a person's culpability in relation to his or her offending.

16. The gravity of the offending and the culpability of the offender must therefore be determined based on the facts and circumstances of each case. In the case of *Public Prosecutor v Ulas [2018] VUCA 54; Criminal Appeal Case 1822 of 2018 (16 November 2018)*, this Court stated that a start sentence must adequately reflect the seriousness of the crime and should increase if it is repeated.

E. Decision

17. We reject the Appellant's submission that this case should not be assessed as not a worst category offence of this type and that the start sentence should be reduced.

18. Taking into consideration the maximum penalty prescribed by law and the relevant aggravating factors, we confirm that the concurrent start sentence of 8 years imprisonment is not excessive.

19. Although very generous, we propose not to make any alterations to the discounts given for the mitigating factors which included a year deduction for an unblemished past record. In offences of sexual nature, a person's previous good character has very little relevance in mitigating a sentence.

20. In any event, regardless of what the start sentence might be, this Court is required to take a step back at the end of the sentencing exercise and say whether the end sentence is or is not manifestly excessive.

21. In this case, we consider that the end sentence of four years imprisonment for two separate offences of incest with serious aggravating features is not manifestly excessive;

22. The appeal is therefore dismissed

Dated at Port Vila this 22nd of February 2019

BY THE COURT

Justice J.W. Hansen

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