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

Criminal Appeal Case No.3299 of 2018

BETWEEN: ROBERT PAKORO
Appellant

AND: PUBLIC PROSECUTOR
Respondent

Coram: *Hon. Vincent Lunabek, Chief Justice*
Hon. Justice John von Doussa
Hon. Justice Ronald Young
Hon. Justice Oliver Saksak
Hon. Justice Daniel Fatiaki
Hon. Justice Dudley Aru
Hon. Justice Gus Andrée Wiltens
Hon. Justice Stephen Felix

Counsel: *Linda Bakokoto for the appellant*
Betina Ngwele for the respondent

Date of hearing: *29th April 2019*
Date of Judgment: *10th May 2019*

JUDGMENT

Background

1. The complainant whose name is suppressed, alleged her father had sexually abused her whilst she was between the ages of 10 and 12 years. Mr Pakoro the appellant was charged with 15 counts of sexual offending all of which he denied. He was tried and found guilty of 8 of the charges: 3 charges of sexual intercourse without consent (Counts 1, 2, and 5), 3 charges of incest (Counts 7, 8 and 10), and 2 charges of acts of indecency with a young person (Counts 13 and 14).

2. On 28th November 2017 the primary judge sentenced the appellant to a starting sentence of 18 years imprisonment as concurrent sentences for the 3 charges of sexual intercourse without consent, (Counts 1, 2 and 5) 8 years imprisonment for the three charges of incest (Counts 7, 8, and 10) as concurrent sentences, and a further 8 years imprisonment as concurrent sentence for the two charges of acts of indecency with a young person (counts 13 and 14).

3. Mr Pakoro was sentenced to an end sentence of 18 years imprisonment. The primary Judge did not give the appellant any deductions and the Judge did not suspend the sentence.

The Appeal

4. Mr Pakoro appealed against the sentence of 18 years imprisonment initially on 4 grounds: namely that the primary Judge had erred in imposing a starting point of 18 years imprisonment; that the Judge failed to recognise the difference between digital and penile penetration when assessing the culpability of the appellant; that the Judge failed to make any deductions for the appellant's unusual not guilty plea due to his belief that having confessed his sins to the Church Pastor, he was forgiven; and that the end sentence of 18 years was manifestly excessive.

5. The appellant filed an amended memorandum of appeal giving notice to the Court that he abandoned grounds 2 and 3 of his initial Notice of Appeal f and that he would pursue only grounds 1 and 4 but which was combined into one ground; " *that the sentencing Judge erred when he imposed a starting point of 18 years imprisonment which resulted in a manifestly excessive sentence.*"

The Facts

6. The offending on which the appellant was sentenced occurred between 2010 and 2012; when the complainant was between 11 and 13 years of age.

7. Count 1 involved digital penetration of the complainant's vagina in 2010. In the alternative there was a charge of incest (Count 7). Count 2 also involved digital penetration, but in 2011. In the alternative there was a charge of incest (Count 8). Counts 5 involved digital penetration in 2012. Count 10 involved the appellant putting his penis into the complainant's mouth in 2012. This was an incest count. Count 13 involved the appellant touching the complainant's vagina and having her touch the appellant's penis. Count 14 involved the appellant touching the complainant's vagina in 2011. This count was an alternative count to count 2.

Submissions

8. At the hearing of the appeal Counsel for the prosecution conceded that the starting sentence of 18 years imprisonment was too high. Ms Ngwele submitted the appeal should be allowed and the appellant resentenced. In the circumstances we adopt that approach.

9. Ms Ngwele submitted that based on the cases of Public Prosecutor.v. Tevi [2019] VUCA 16, Vuti.v. Public Prosecutor [2017] VUCA 14 and Vahirua.v. Public Prosecutor [2019] VUCA 17, the appropriate starting sentence should be 14 years imprisonment.

10. The aggravating features the prosecution submitted the Court should take into account were that, the incidents took place in the family home, the age difference, breach of trust, degree of planning and lack of remorse. Ms Ngwele submitted there were no factors relevant to warrant any deductions, and that the end sentence taking into account the totality principle in Public Prosecutor.v. Kavila [2017] VUSC 160, should be 14 years imprisonment.

11. Ms Bakokoto submitted the cases of Public Prosecutor.v. Moise [2016] VUSC 5, Public Prosecutor.v. Amos Telukluk [2017] VUSC 162, Nampo.v.Public Prosecutor [2018] VUCA 43, Public Prosecutor.v. Scott [2002] VUCA 29 and Public Prosecutor.v. Ali August [2000] VUSC 14 for comparative analysis.

12. Ms Bakokoto further submitted the cases of Tevi, Vuti and Vahirua should be distinguished from this case in that they involved penile penetration. In this case the offending involved digital penetrations which was less serious than penile penetration. Counsel said that there should be 100% uplift from the usual starting sentence of 5 years imprisonment for sexual offendings for the aggravating features identified. This would result in a start sentence 10 years imprisonment.

Discussion

13. The sentencing judge convicted the appellant of the charges in counts 1, 2 and 5 (sexual intercourse without consent), counts 7, 8 and 10 (Incest) and counts 13 and 14 (Act of indecency with a young child). The charges in Counts 7, 8 and 14 were alternatives to counts 1 and 2. Therefore the appellant should be discharged on Counts 7, 8, and 14.

14. We consider the aggravating features in this case were as follows; the length of offending of approximately 3 years; breach of trust; the offending involved sexual assaults on the appellant's young daughter ; the victim was between 10 years and 13 years of age during the offending, the offending was repeated and involved a variety of sexual perversions and indignities, threats of violence were made to the victim to prevent her telling anyone else about the offending; on one occasion the child victim was forced to watch pornography

15. These aggravating features illustrate this was serious offending against a young child. We consider the appropriate start point, taking account of all the offending is a start sentence of 12 years imprisonment. This case has some similarities with Vahirua.v. Public Prosecutor where the sexual offending also involved a young child over a 15 month period. Some of the sexual offending in Vahirua were more intrusive than this case. The Court there adopted a start point of 16 years imprisonment.

16. The appellant did not challenge the conclusion of the sentencing judge that there were no mitigating factors which justified any reduction in the start sentence, or any basis to suspend the sentence.

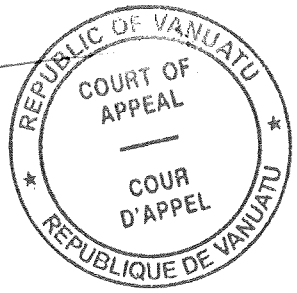
The Result

17. We therefore allow the appeal against sentence, quash the sentences imposed and make the following orders:
    1. The appellant is discharged on - Counts 7, 8 and 14.
    2. On Counts 1, 2, 3, and 5 the appellant is sentenced to 12 years imprisonment.

3. On Counts 10 and 13 the appellant is sentenced to 8 years imprisonment.
4. All sentences are concurrent.
5. The sentence is backdated to the date when he was first taken into custody before trial.

Dated at Port Vila this 10th day of May 2019

BY THE COURT



VINCENT LUNABEK

Chief Justice