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

Criminal Appeal
Case No 19/1543CoA/CRMA

BETWEEN: **Public Prosecutor**

Appellant

AND: **Etienne John Samuel**

Respondent

CORAM: ***Chief Justice V Lunabek***
Justice J Hansen
Justice O Saksak
Justice G Andrée Wiltens
Justice V Molisa Trief

COUNSEL: *Philip Toaliu — Counsel for Public Prosecutor*
Pauline K. Malites — Counsel for Respondent

DATE OF HEARING: *6th November 2019*

DATE OF DECISION: *15th November 2019*

JUDGMENT OF THE COURT

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[1] The appellant pleaded guilty to one count of intentional homicide. He was sentenced to an effective sentence of 18 years' imprisonment on 10th June 2019. The sentence was effective from 19 October 2018 when he was remanded into custody.

[2] The public prosecutor appeals that sentence on the ground it was manifestly inadequate. It was said that the starting point of 27 years adopted by the Judge was wrong, as was the final sentence of 18 years.

[3] At the commencement of the appeal, Mr Toaliu advised the Court that he abandoned the ground of appeal relating to the starting point. For reasons that follow, that was perhaps unfortunate, as a number of matters he raised on the appeal this Court considers should have been taken into account in fixing a starting point.

Background facts

[4] The deceased was a 16 year old schoolgirl. She had obviously had contact with the respondent as a relative through her father. On 10th October 2018 she arranged to meet him at crossroads at Sorovanga at an unusually early hour of the morning. From there they were observed travelling by bus and foot to a road leading to the Teuma Gardens area. They walked up that road to the gardens. They then left the road and entered an area of bushland that was secreted and relatively remote. It was the clear intention of the respondent to have sexual intercourse with this schoolgirl, and he admitted he persisted in his demands for sex. Ultimately she pushed him away and told him she would report him to the police. As a consequence, he picked up a rock and hit her on the head. Ultimately, he struck her five times with large rocks, until she died. He left the area around 7.30 a.m., leaving her lying on the ground. The body was discovered around 1.30 p.m. that day.

[5] The appellant was seen leaving the area alone by those who saw him arrive with the victim. He advised his employer he was unwell and returned to Sorovanga. There he washed his clothes, which had been stained with the deceased's blood. At the time, he was on parole, and he sought approval from his Probation Officer to travel to Malekula. That was refused, but the next day he obtained an advance of VT10, 000 from his employer, and booked a flight to Malekula under the assumed name Richard Alick. On 19th October 2018 he was arrested on Malekula by the police, and transported back to Port Vila. He made a complete confession. His self-justifying reasons were that he killed the girl as he did not want to be recalled to prison from his current parole which would have happened if she reported him to the police.

[6] Of particular significance in relation to this respondent are his two previous convictions for sexual intercourse without consent. In Criminal Case 6 of 2008 the sentencing notes record that in February 2003 he persuaded a young girl of 15 years to follow him into the bush. When they reached a secluded bushed area he asked her to lie down but she refused. He pushed her down, fell upon her, and when she started to cry he removed his t-shirt and gagged her. He removed his clothes and raped her. What the sentencing notes fail to mention is the agreed statement of facts, contained in the Prosecution's sentencing submissions, which record the offending continued until November 2003, although he only faced only the one charge. For unknown reasons he was not sentenced until June 2009. For that he was sentenced to an effective sentence of three years, four months, with an allowance of nine months being given for his time in custody.

[7] Shortly after that sentence had expired, on 15th June 2012, the respondent raped a five year old girl. He tricked the child away from her home, forced her to lie on a concrete surface, removed her underwear and attempted to penetrate her with his penis, with only partial success. She was then dragged along the cement surface, and the respondent inserted two fingers into her vagina, forcing them in and out up to six times. He took her to the road and she was noticed in a distressed state and taken to hospital. The findings indicated that the child had suffered from vaginal bleeding, a torn hymen, torn perineum and vaginal wall. He pleaded guilty to sexual intercourse without consent and was sentenced to eight years' imprisonment and was still on parole when the offending the subject of this appeal occurred.

[8] In relation to this offending it is clear from what is said above that, although he pleaded guilty to intentional homicide, it occurred from his sexual demands and gratification. There were serious sexual overtones to the offending.

[9] The Judge considered the aggravating features of age disparity; high level of violence; planning; his motivation being to avoid report to the police; and his history of sexual offending. He took a starting point of 27 years' imprisonment.

[10] The respondent put forward as a mitigating factor that he had been assaulted by police and correctional officers whilst in custody. This was rightly rejected by the Judge. The Judge, apart from the early guilty plea, found no mitigating circumstances. He allowed a full one-third discount, leaving an end sentence of 18 years' imprisonment. That was to be effective from 19th October 2018, when he was remanded in custody.

Appellant's submissions

[11] Mr Toaliu submitted that the end sentence of 18 years was manifestly inadequate. He submitted that it was wrong to give a full one-third discount for the guilty plea, even though it was an early one, in the circumstances of this case. He said that was because there was an extremely strong prosecution case and there was a lack of remorse.

[12] In this case there was the respondent's admission to the police. There were witnesses who saw the respondent with the victim immediately prior to the offence, and then without her almost immediately after. There was also overwhelming DNA evidence.

[13] Mr Toaliu also submitted that the respondent sought to minimise and justify his actions which showed his remorse was in no way genuine. In this regard he referred to the pre-sentence report where the respondent appears to be justifying the assault by inferring his anger from the refusal of sex was reasonable and should be taken into account. Mr Toaliu submitted such self-justification showed a lack of insight into offending behaviour and it was wrong of the Judge not to take account of these matters.

[14] He returned to the theme of the guilty plea by referring to *Public Prosecutor v Niala* [2004] VUCA 25, where this Court stated:

> Having said that we agree that the sentences must be reduced in the light of the very early pleas of guilty by the respondents to the amended charges. In recognition of an allowance for pleas of guilty we also take into account that the pleas inevitably saved the trouble and expense of a defended hearing. In all the circumstances the credit due to the respondents must be tempered by the fact that they had no real defence even to the amended charge in view of the eyewitnesses and the admissions which they made to the authorities.

[15] In that case the Court made only a 22 per cent allowance for the early guilty plea, because of the strength of the prosecution case.

[16] He further submitted that the decision in *Public Prosecutor v Andy* [2011] VUCA 14 Criminal Appeal Case 09 of 2010, 8 April 2011 relied on by the respondent only set down guidelines and the comments there relating to guilty pleas should not be taken as a hide-bound rule of law. To do so he submitted was a misinterpretation of *Andy.*

[17] He referred the Court to a later decision of *Boesaleana v Public Prosecutor* [2011] VUCA 33, where this Court stated at 7:

> As is clear from the submission filed in this Court on both appeals and in the Supreme Court at first instance, there appears to be a (particular fascination) at the Bar with the decision of this Court in [*Andy*]. There is no doubt that the Court in that case intended to provide some useful guidelines with regard to the difficult and demanding task of sentencing. But it should be remembered that in any case the sentencing of a prisoner is not an exact mathematical science but a nuanced art. It is essential that every Judge, whatever methodology they employ, looks to see whether the overall sentence is commensurate with the established culpability of the particular accused person.

[18] Finally, he submitted that an appropriate end sentence for Mr Samuel, in all of the circumstances set out above, was a finite sentence of 23–25 years' imprisonment.

Respondent's submissions

[19] The respondent did not accept the submission that the strength of the prosecution case could operate to reduce what they saw as the one-third rule set out in *Andy* (supra), where that Court said:

> 18. ... The greatest discount allowed under this head will be a discount of one third where the guilty plea has been entered at the first reasonable opportunity. A later guilty plea will result in a smaller discount. No discount is available under this head if the charges have been defended through a trial.

[20] Further reference was made to the decision of *Taviti v Public Prosecutor* [2016] VUCA 41, where it was stated:

> *14. We need to emphasise that it has always been the law in Vanuatu well before the Andy case, that a reduction of sentence discount of one third is allowed as a matter of sentencing principle when a person pleads guilty at the first opportunity given to him or her by the Courts (see: Public Prosecutor v. Scott [2002] VUCA 29 and other cases). We accept the submissions of the Appellant that the guideline case on Sentencing in PP –v- Andy (2011) VUCA 14 emphasised this point when the Court stated:*
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> > *"The third step of the sentencing process is the deduction for a guilty plea:*
> >
> > *The trial judge will then consider what discount from the second stage end sentence should be applied for a guilty plea. The greatest discount under this head will be a discount of one third where the guilty plea has been entered at the first available opportunity. A late guilty plea will result in a smaller discount. No discount is available under this head if the charges have been defended through a trial."*
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> ...
>
> *16. A guilty plea discount is important as a criminal sentencing principle and it justifies a reduction in an otherwise appropriate sentence for three reasons:*
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> > *First, it relieves victims and witnesses of the trauma, stress, and inconvenience that is caused by a delay in resolving the case and by the trial itself, particularly the need to give evidence. Secondly, it avoids the need for a trial, with the attendant advantages of a reduction in Court delays and costs savings. Thirdly, it generally indicates a degree of remorse. At the very least, it represents an acceptance of responsibility for the offending. (The Queen –v- Hessell [2009] NZCA 450).*

[21] It was also submitted for the respondent that assessing the strength or otherwise of a prosecution case where there has not been a trial to test it is very difficult. The respondent again relied on *Hessell.*

Decision

[22] Sentencing is the exercise of a discretion. *Andy* is clearly a guideline decision. With respect to *Taviti*, the submission made, said to be based on that decision, was that the one third deduction is a rule of law. We do not accept that. All *Taviti* is saying is that it is well established in Vanuatu that applying

general sentencing principles the usual reduction for the earliest possible guilty plea will be one third. It goes no further. We do not accept there is a law in Vanuatu to the effect that a one-third allowance must be made when a person pleads guilty to the first opportunity. Usually it will but only after weighing all competing sentencing principles. In assessing a final sentence, the correct approach is that set out in *Boesaleana*, above. We are quite satisfied it is perfectly proper to take into account other matters, as well as those supporting a reduction that are set out in paragraph 16 of *Taviti*, above. These include, but not exclusively, the matters relied on by Mr Toaliu of the strength of the case and the lack of genuine remorse.

[23] In this case, the evidence was such that guilt was inevitable. There was a confession, there was strong surrounding evidence of him arriving and leaving, and there was the DNA evidence. The prosecution case was overwhelming.

[24] Despite the respondent's submission relating to the comments in the pre-sentence report, we also read it that the respondent sought to minimise his culpability by justifying his anger because the victim had refused to have sex with him and threatened to report him to the police.

[25] In standing back and looking at the end sentence in terms of *Boesaleana*, as any sentencing and appellate Court must do, it is necessary to take into account the overall culpability here. The respondent had been convicted of raping a 15 year old in 2009. (He was treated leniently.) He was convicted of raping a five year old in 2012. This offending occurred soon after he was released from prison but remained on parole. There was a level of relationship with the victim, and the only inference that can be drawn from the evidence is that he groomed her in a way that led her to meet him in the early hours of the morning for some sort of assignation. The modus operandi in this case was very similar to the two previous rapes, i.e. taking the victim to a secluded area with the intention of having sex with them. In this case it escalated because the victim refused his sexual advances, so, in a fit of anger and fear of being recalled to prison, he brutally killed her and then sought to cover up his crime. He lied and fled.

[26] We accept the matters of the previous conviction are more properly taken into account in reaching a starting point, but in light of *Boesaleana* our task must be to look at the overall culpability and reach what is an appropriate end sentence.

[27] Due to the strength of the prosecution case and his lack of genuine remorse we consider that the full one-third allowance for the guilty plea is too high. An allowance similar to *Niala* would be appropriate.

That would lead to a deduction of six years. No issue has been taken by the respondent with the Judge's finding that the guilty plea was the only mitigating factor. That would leave an end sentence of 21 years.

[28] In this case there is added culpability as he offended while on parole.

[29] In submissions on sentencing the appellant referred to a number of cases of intentional homicide such as *Tabi v Public Prosecutor* [2010] VUCA 40, where there was an end sentence of 27 years; *Public Prosecutor v Jimmy* [2018] VUSC 23, where there was an end sentence of 26 years; and submitted that the present case, given the age of the victim, and particularly the antecedent convictions for rape with a similar modus operandi and against young, vulnerable women, made it more serious. We concur in that submission. A sentence of 18 years' imprisonment does not, in our view, properly reflect the culpability of this offender. This offending, and his previous offending, shows him to be a serial sexual predator targeting young, or extremely young, females as his victims. The sentence must consider the overall protection of society from such depravity. All of these factors, as well as offending while on parole, would well justify a higher starting point.

[30] Overall we are satisfied that an end sentence of 25 years would have been the appropriate sentence in this case. Applying the general principle that applies to all appeals by the Public Prosecutor, we reduce that to 23 years.

[31] In the course of submissions in this case, and what occurred in a case dealt with on the same day, (*Bob Robert v PP Criminal; Appeal 19/993*), the question of the parole provisions relating to life and finite sentences assume some prominence. The legislation dealing with parole currently allows someone sentenced to a life sentence to apply for parole after eight years. For a finite sentence, parole can be applied for after half the term. Yet life is the ultimate sentence of imprisonment. The anomaly created by this can be highlighted by this case. On the sentence we have imposed, the respondent can apply for parole after 11 years, six months. But if he had been sentenced to life imprisonment, the most serious term of imprisonment that can be imposed, he would be eligible to apply for parole after eight years. This Court has commented on this previously, and we urge the legislature to consider giving urgent attention to this matter and advance suitable amending provisions.

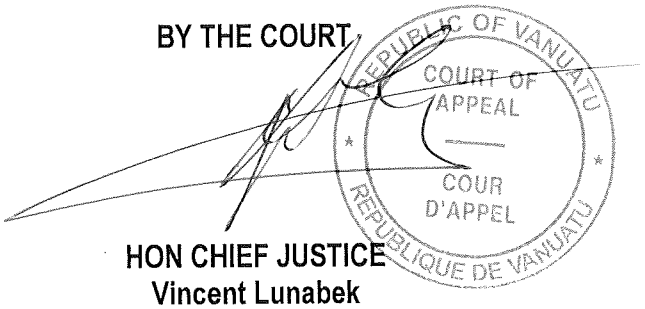
[32] Any questions of parole for Mr Samuel are a matter for the parole board. But it may be of assistance to them if we point out that this man is a violent sexual predator who has shown that whenever he is free in the community he poses an extreme danger to young, and very young, females. This is

highlighted by the nature of the first offence which he accepted was a continuing offence over 9 months even though this is omitted from the sentencing notes (See [6] above. There is nothing to suggest in this, and the earlier cases, that he has any true insight into his offending, and in our view he is highly likely to reoffend if released into the community.

[33] The appeal is allowed. The sentence of 18 years' imprisonment is quashed. The respondent is sentenced to 23 years' imprisonment on the charge of intentional homicide. This is to run from 19th October 2018 when the respondent was remanded in custody. We note that on 23rd November 2018 the parole board recalled the respondent to prison for the 2012 rape. This sentence is concurrent with that sentence as from that date.

DATED at Port Vila this 15th day of November 2019

BY THE COURT



HON CHIEF JUSTICE
Vincent Lunabek