

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

Civil Appeal
Case No. 20/2348 SC/CIVLA

BETWEEN: Public Prosecutor
Appellant

AND: Simon John
Respondent

Date of Hearing: 9 November 2020

Before: Chief Justice V. Lunabek
Justice J. Mansfield
Justice R. Young
Justice D. Aru
Justice G.A. Andrée Wiltens
Justice V. M. Trief

Counsel: Mr S. Blessing for the Appellant
Mr J. Garae for the Respondent

Date of Decision: 20 November 2020

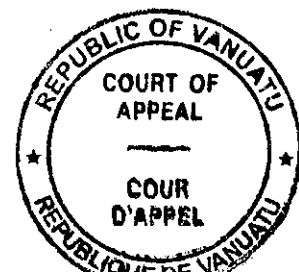
JUDGMENT

A. Introduction

1. This was an appeal against sentence.
2. Mr John pleaded guilty to a representative charge of unlawful sexual intercourse with a 7-year old girl. He was sentenced to 3 years imprisonment, suspended for 2 years.
3. The prosecution brought the appeal on the basis that the sentence was appropriate but for the suspension. It was submitted that the 3 year end term ought not to have been suspended.

B. Background

4. Mr John was one of three defendants involved in this case. The defendants and the young complainant are all from Tongban village in North Ambrym. They are related and all attended the same school, Topol Primary School. As well, the complainant and Mr John slept in the same house.

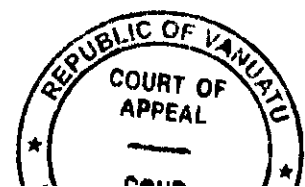


5. The other defendants' circumstances are substantially different to those of Mr John, and the prosecution did not challenge the more lenient sentences imposed on them.
6. The actual circumstances of Mr John's offending are relevant. His date of birth is 14 August 2001. Accordingly, at the time of the offending Mr John was 17 years old initially, later 18 years old – the offending occurred throughout 2019 and continued to March 2020.
7. The offending occurred mainly at the house where both Mr John and the complainant slept, but also at other places described as "in bushes" and "at the riverside".
8. In Mr John's case, the offending involved, on multiple occasions, kissing, both anal and vaginal penile intercourse, sucking of the complainant's vagina and the insertion of Mr John's finger into the complainant's vagina.

C. The Sentence

9. The primary judge identified a number of aggravating factors, which resulted in a sentence start point of 6 years being adopted. The aggravating factors included the physical effects of the offending on the complainant (she found urinating painful and had an anal laceration with some blood accompanying her faeces), the age differential between the complainant and Mr John, the breach of trust involved due to their relationship, the fact that there was planning involved, and the repeat nature of the offending over a period greater than 12 months.
10. The primary judge noted the defendants' allegation that the complainant had been flirtatious, and a willing, uncomplaining participant. He correctly dismissed such suggestions as being capable of mitigation.
11. Mr John had pleaded guilty at the earliest available opportunity, which the primary judge dealt with by reducing the sentence start point by one third.
12. The primary judge next took into account Mr John's youth at the time of the offending, his lack of previous convictions and his continuing desire to complete his education and become a carpenter. The primary judge accepted Mr John's stated remorse, which he considered evidenced by his reaction during the pre-sentence report interview when Mr John was tearful and apologetic for his conduct. For these additional factors, the primary judge allowed a further reduction from the sentence start point of 12 months.
13. The end sentence arrived at was 3 years imprisonment.
14. The primary judge then recorded:

"I have regard [to] his youthful age, his ambition and [his] wishes to continue his education to reach that ambition and to have a good job, [be] a good father and family [member] to usefully contribute to the



development of Vanuatu. I consider that his end sentence should be suspended for a period of 2 years, under section 57 of the Penal Code Act."

15. In addition, the primary judge imposed a supervision order under section 58G of the Penal Code Act for 2 years.

D. The Appeal

16. Mr Blessing submitted that the primary judge had erred in law and fact in the exercise of the discretion to suspend the entire sentence, which resulted in a manifestly inadequate sentence being imposed. Further, the end sentence was contrary to guideline principles and previous authority.

17. Mr Blessing relied on *PP v Scott* [2002] VUCA 29, where this Court commented:

"...it will only be in the most exceptional of cases that suspension could ever be contemplated in a case of sexual abuse."

18. Mr Blessing also relied on the authority of *PP v Gideon* [2002] 7 where this Court said:

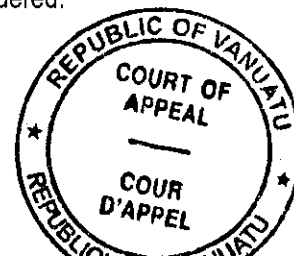
"...there is an overwhelming need for the Court on behalf of the community to condemn in the strongest of terms any who abuse young people in our community."

19. In response, Mr Garae stressed the aspect of Mr John's comparative youth, his lack of previous convictions and his rehabilitation prospects. He pointed to the fact that Mr John had already spent time in custody. Quite fairly he conceded the offending was very serious and that it warranted a sentence of imprisonment.

E. Discussion

20. This Court considers there were further aggravating factors that were not taken into account in arriving at the sentence start point. In particular, this Court points to the fact of the complainant's extreme youth and vulnerability, that no protection was used during the offending which exposed the complainant to the transmission of sexual disease, the fact that a large amount of the offending occurred in the house where the complainant slept and where she was accordingly entitled to feel safe, and the additional indignities over and above the ingredients of the offence charged that Mr John subjected the complainant to.

21. However, the manner in which the appeal was conducted enables this Court to only consider the aspect of suspension of the sentence. Had the case been presented on a different basis the assessment of the sentence start point and the end sentence would have been significantly increased over those arrived at by the primary judge, which this Court considers out of step with a number of previous binding decisions by this Court which were not considered.



22. The prosecution accepted as appropriate the primary judge's assessment that the sentence start point be set at six years imprisonment. It was further accepted that the deductions for Mr John's plea and his personal factors were appropriate, despite being generous. This Court cannot go behind those concessions by the prosecution. However, we agree that the primary judge erred in the exercise of his discretion. The sentence should not have been suspended. The factors cited by the primary judge are not such as could properly be described as "exceptional".
23. We strongly re-iterate as remaining relevant in 2020 the comments in *PP v Scott* and *PP v Gideon* recorded in paragraphs 17 and 18 above in relation to the inappropriateness of suspending sentences where serious sexual allegations have been proved or admitted.
24. As well we also re-affirm the following statement from *PP v Gideon* in relation to the contention that a complainant's alleged conduct prior to or during offending can be mitigatory:

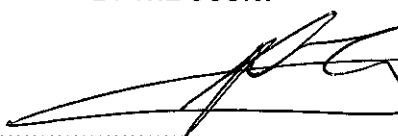
"Children must be protected. Any suggestion that a 12 year-old has encouraged or initiated sexual intimacy is rejected. If a twelve year-old is acting foolishly then they need protection from adults. It is totally wrong for adults to take advantage of their immaturity."

F. Result

25. The appeal against sentence is allowed. The order to suspend the sentence for 2 years is quashed.
26. Mr John is to serve his sentence of 3 years imprisonment.
27. Mr John was remanded in custody in respect of this case from 22 June 2020 to 8 July 2020, a period of 15 days. Accordingly, to take that factor into account and to preserve his parole rights, Mr John's sentence will run as from 4 November 2020.
28. This Court does not consider the sentence start point of 6 years imprisonment to appropriately reflect Mr John's criminal culpability. The end sentence of 3 years imprisonment is also overly lenient in our view. Accordingly, this case should not be referred to as an authority as to the appropriate level of sentencing for serious offending of this nature and extent.

Dated at Port Vila this 20th day of November 2020

BY THE COURT


Chief Justice V. Lunabek

