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

Criminal Appeal Case No. 24/2889 COA/CRMA

BETWEEN: PUBLIC PROSECUTOR
Appellant

AND: ALEXY BANI
Respondent

Date of Hearing:	***6 November 2024***
Coram:	***Hon. Chief Justice V. Lunabek***
	Hon. Justice M. O'Regan
	Hon. Justice R. White
To check	***Hon. Justice O. A. Saksak***
	Hon. Justice D. Aru
	Hon. Justice E. P. Goldsbrough
	Hon. Justice M. A. MacKenzie
Counsel:	***M. Tasso for the Public Prosecutor***
	P. K. Malites for the Respondent
Date of Decision:	***15 November 2024***

JUDGMENT OF THE COURT

Introduction

1. The respondent pleaded guilty to the offence of unlawful sexual intercourse with a child under 15 years of age, but over 13 years of age, for which s.97(2) of the Penal Code provides. He was sentenced on 5 September 2024.

2. After a number of deductions from a starting point of a term of imprisonment for 3 years and 6 months, the respondent was sentenced to imprisonment for 9 months. The Judge suspended that sentence for 2 years on condition that the respondent not offend again and ordered that he perform 120 hours of community work.

3. The sole ground in the filed notice of appeal by the Public Prosecutor is that the Judge erred in suspending the sentence.

4. However, during the hearing of the appeal, it emerged that the sentencing Judge had been mis-informed about a number of important matters. This means that the appeal must be allowed so that the respondent can be re-sentenced on the correct factual basis.

The circumstances of the offending

5. We will put to one side for the moment the date on which the respondent committed his offence.

6. The offending occurred on the island of Ambae. The prosecution case was that the complainant and her younger sister had found a phone when making their way home from a birthday party. They handed the phone to a group of boys, one of whom was the respondent. The other boys then left but the respondent remained with the complainant and her sister. He told them to follow him but they refused. The respondent then told the youngest sister to go away. When she refused, he shouted at her, frightening her into leaving. The respondent then commenced kissing the complainant and had penile-vaginal sexual intercourse with her. The younger sister had run home to tell her parents what was happening. Initially, they could not find the complainant. Later, the incident was reported to the Police.

7. When interviewed by the Police shortly afterwards, the respondent admitted his conduct.

8. It was common ground that the respondent had been born on 7 May 2005 and the complainant on 5 January 2010.

The date of the offending

9. Both the complaint filed in the Magistrate's Court and the information filed in the Supreme Court alleged that the offence had occurred on 16 June 2023. This was also the assertion in the prosecution's summary of facts, and it formed the basis for the Judge's sentence.

10. The Court raised the accuracy of that date with the parties during the hearing of the appeal. Following the hearing, counsel agreed that the offending had occurred on 16 June 2024, that is, one year later than the Judge had been told.

The ages of the respondent and the complainant

11. The Judge imposed sentence on the respondent on the basis that he was 17 years old at the time of his offending and that the complainant had been 13 years and 5 months old. In fact, the respondent was within 3 weeks of his 19th birthday and the complainant was 14 and half years old.

12. The Judge had been led into error by the mistake in the date on which the offending had occurred. Moreover, in the submissions of defence counsel, it was said that the respondent had been 17 years old at the time of his offending. However, we accept that the prosecution summary of facts, the prosecution submissions and the Pre-sentence Report had indicated correctly that the respondent was then aged 19 years.

The time in custody

13. The Judge sentenced the respondent on the basis that he had been remanded in custody from 30 April 2024, this being the date stated in the Pre-sentence Report prepared by the Probation Office in the Department of Correctional Services.

14. As the respondent was sentenced on 5 September 2024, the Judge allowed, in accordance with the usual sentencing practice, a deduction for time in custody of 8 1/2 months.

15. Counsel now agree that the Pre-sentence Report was inaccurate in this respect and that the respondent had been in custody only since 2 July 2024.

The Judge's sentence

16. The Judge took as a starting point a sentence of 3 years and 6 months having noted the aggravating factors, including a 6 years age differential between the respondent and the complainant (it was in fact 4 and half years), the respondent's premeditation, and his exposure of the complainant to the risk of sexually transmitted infection and pregnancy. The Judge also noted that there were no mitigating aspects.

17. The Judge then allowed a deduction of 33⅓% (14 months) on account of the respondent's early plea of guilty. She noted that the respondent had steady employment as a boat driver and timber cutter, that he had no prior convictions, that he was remorseful, and that he was willing to pay compensation to the complainant. Having regard to those matters and also the respondent's young age and immaturity, the Judge allowed a reduction of 25% from the starting point (10 ½ months).

18. The further reduction allowed by the Judge of 8½ months for time spent in custody meant that the end sentence was 9 months.

Re-Sentence

19. As already indicated, the mistaken basis on which the respondent was sentenced means that he must be re-sentenced.

20. The maximum penalty for a contravention of s.97(2) is imprisonment for 15 years. This is an indication of the seriousness with which the law views the offence and the need for the protection of the young.

21. In the re-sentencing some matters are important. First, this Court is not bound to adopt the same approach as the sentencing Judge. Secondly, as it is a prosecution appeal, this Court should adopt the usual practice of interfering only to the minimum extent necessary which is essential

in the administration of justice. That is particularly so when the Court is considering whether an offender should spend time in custody which he/she has thought they have avoided: *Public Prosecutor v Andy* [2011] VUCA 14 at [38] and the judgments in *Public Prosecutor v Tulili* and *Public Prosecutor v Lop* delivered earlier in this session..

22. The respondent's age, being just on 19 years at the time of the offence, makes his offending more culpable than would have been the case had he been, as the sentencing Judge supposed, just less than 18 years old. He can be taken to have been more mature.

23. On the other hand, there is a significant mitigating factor to which the sentencing Judge did not advert. The sentencing materials indicated that the respondent and the complainant were in a boyfriend-girlfriend relationship at the time of the offending. This was evident in the submissions made by defence counsel. Likewise, the Pre-sentence Report recorded the respondent telling the Probation Officer that he had an "*affair*" with the complainant and had been unaware that it was unlawful to have sexual intercourse with someone aged under 15 years. The Probation Officer recorded that she had not been able to contact the complainant to confirm the relationship.

24. The Public Prosecutor had not disputed, and still does not dispute, the existence of the boyfriend-girlfriend relationship. In these circumstances, it is appropriate to proceed on the basis for which defence counsel submitted.

25. The pre-existing relationship between the respondent and the complainant is relevant to the fixing of the starting point as it reduces the moral culpability of the respondent – see *Lawi v Public Prosecutor* [2023] VUCA 41. We also take into account that this was non-violent sexual intercourse and there is no indication that the complainant had suffered injury or trauma. Indeed, there was no evidence before the primary Judge and none before us as to whether the sexual intercourse was consensual or not. We not that absence of consent is not an element of the offence under s.97(2). Nevertheless, the view of the law which underpins s.97(2) to which we referred earlier remains important.

26. Another relevant matter is that, contrary to the submission of defence counsel at first instance and a statement in the Pre-sentence Report, the respondent was not a first time offender. The material provided by counsel after the appeal hearing indicates that the respondent had, on 31 May 2023, been sentenced to imprisonment for three months (suspended) for the offence of possession of cannabis (s.2 of the Dangerous Drugs Act). Even though this was an offence of a different nature, he cannot be sentenced for his present offence on the basis that he had a clean record.

27. Having regard to all these circumstances, we consider it appropriate to proceed with the same starting point as did the Judge, namely, 3 years and 6 months.

28. From that starting point, we deduct 33⅓% (14 months) on account of the respondent's early acknowledgment of his offence and his early plea of guilty.

29. On account of the appellant's personal circumstances, we allow a deduction of 8 months (in round terms 19%).

30. The respondent is then entitled to a reduction for the period between 2 July 2024 and 5 September 2024 which he spent in custody. This was 7 weeks and 2 days. In accordance with the usual sentencing practice, that means he is entitled to a further reduction of 14 weeks and 4 days.

31. The end result, with some rounding, is a sentence of 16 months and two weeks.

Suspension

32. In other appeals in this session (particularly *Public Prosecutor v Tulili* and *Public Prosecutor v Lop*), we have confirmed the need for sentencing judges to apply, in the cases in which they are applicable, the guiding sentencing principles stated in *Public Prosecutor v Gideon* [2002] VUCA 7 and *Public Prosecutor v Scott* [2002] VUCA 29. They are to the effect that suspension of a sentence imposed for a serious sexual offence will be appropriate only in exceptional cases. It is not necessary presently to repeat what we have said in *Tulili* and *Lop* about the observance of those guideline sentencing principles.

33. If the respondent was now being sentenced for the first time, we would not, in accordance with the sentencing principles stated in *Gideon*, have suspended his sentence. However, the respondent is not being sentenced for the first time and it is appropriate for the Court to have regard to circumstances which have occurred in relation to his sentencing. In particular, this Court should have regard to the fact that the respondent was released from custody on 5 September 2024 as a result of the sentencing decision of the primary Judge. Although that sentence proceeded on a mistaken basis, the respondent must then have thought that he had been spared further time in custody. The respondent has, we were told, complied to date with the terms of his suspension, and recently commenced the performance of the community work ordered by the Judge.

34. In *Tulili* and *Lop*, we referred to the extra harshness involved in the imposition of a sentence on an offender (particularly a young offender such as the present respondent) who has thought with reasonable justification that he has been spared time in custody. That is particularly so in the case of the present respondent who had been in custody but was then released.

35. We note that in *Lawi v Public Prosecutor* [2023] VUCA 41, this Court considered it appropriate, in the exercise of the power in s.58 of the Penal Code, to order that the offender serve in custody the first 18 months of a sentence of 30 months imprisonment, with the balance of the sentence suspended for a period of 2 years. That is to say, the Court ordered that 60% of the end sentence of 30 months be served in prison and the remaining 40% be suspended. *Lawi* is pertinent presently because it was a case of unlawful sexual intercourse in contravention of Section 97(2) of the Penal Code by an offender who was in a boyfriend-girlfriend relationship with the complainant.

36. Having regard in particular to the unusual circumstances in which the Court is now sentencing the respondent, the pre-existing relationship between him and the complainant, the time which the respondent served in custody before being sentenced and the particular considerations which guide this Court when re-sentencing on a prosecution appeal, we are satisfied that this is an exceptional case in which it is appropriate to order the suspension of the whole of the sentence which the Court is now imposing.

Conclusion

37. For the reasons given above, we make the following orders:

(a) The sentence imposed by the sentencing judge is set aside;

(b) The respondent is re-sentenced to imprisonment for a period of 16 months and 2 weeks;

(c) The sentence is to be taken to have commenced on 5 September 2024;

(d) The sentence is suspended for a period of 2 years;

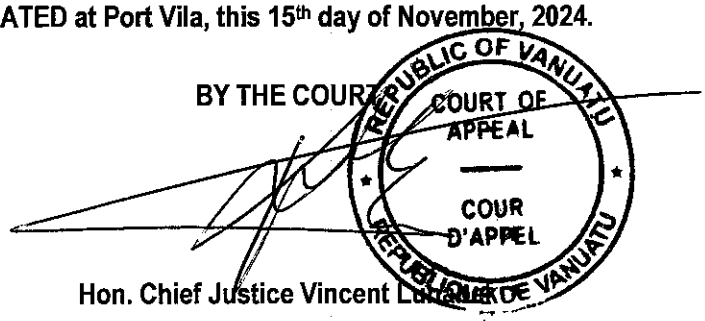
(e) If the respondent is convicted of any offence during the 2 year period, he will be taken into custody and have to serve this sentence as well as any penalty imposed for the further offending;

(f) The respondent is to perform 120 hours of community work but is to be given credit for the community work he has already performed pursuant to the sentence imposed on 5 September 2024; and

(g) Both the sentence and the period of suspension are to be taken to have commenced on 5 September 2024.

DATED at Port Vila, this 15th day of November, 2024.

BY THE COURT



Hon. Chief Justice Vincent Lunabek