IN THE SOLOMON ISLANDS COURT OF APPEAL

NATURE OF JURISDICTION:	Appeal from Judgment of the High Court of Solomon Islands (Pallaras J)
COURT FILE NUMBER:	Criminal Appeal Case No. 02 of 2014 (On Appeal from High Court Criminal Case No. 318 of 2011)
DATE OF HEARING:	28 September 2015
DATE OF JUDGMENT:	09 October 2015
THE COURT:	Goldsbrough P Ward JA Lunabek JA
PARTIES:	Patterson Tango Limana - V – REGINAM
ADVOCATES: Appellant: Respondent:	 MR LAWRY WITH HIM B IFUTO'O MR TALASASA JN.
KEY WORDS:	
EX TEMPORE/RESERVED:	RESERVED
ALLOWED/DISMISSED	ALLOWED
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JUDGMENT OF THE COURT

1. The appellant pleaded guilty to six counts of Defilement of a child between 13 and 15, contrary to section 143(1) of the Penal Code. On 2 December 2013 he was sentenced to a total of 11 years imprisonment and he now appeals against that sentence on the single ground that the sentence was manifestly excessive.

2. All the offences were committed over a period of roughly one month during the second half of June and the first half of July 2010 in Gizo. They were all against the same child who, at the time, was one month short of her fifteenth birthday. Shortly after the offences she discovered that she was pregnant. She gave birth to a son and it is not disputed that the appellant is the father of the baby.

3. The appellant is 25 years old and the victim's brother in law, married to her older sister. The facts suggest it was he who made the first approach but there is no challenge that the young girl was a willing participant in the sexual acts and, on at least one occasion, (the second) she appears to have actively sought out the appellant to have sexual intercourse. The first two offences took place on consecutive days as did the fourth and fifth and they were all within the period of about one month.

4. It is agreed that fear of her parents' reaction prevented the girl telling them during the time they were taking place. When she did tell her mother on 19 October 2010, her parents informed the police and her pregnancy was discovered on medical examination the next day.

5. The learned judge delivered a detailed sentencing judgment. Having taken the matters of mitigation and aggravation into consideration, he continued:

> "30....after having assessed the factors of mitigation and aggravation of the offences identified in the case, I judge that an appropriate sentence for each of Counts 1, 2 and 3 is a term of imprisonment for three and a half years. I regard the commission of Counts 4, 5 and 6 as aggravated by

the earlier offences and impose a sentence of 4 years imprisonment for each of those counts.

31. To properly reflect the principle of totality, I make the following orders.

32. I order that the sentences impose for Count1, 2 and 3 be served concurrently with each other resulting in a total sentences for these three counts of three and a half years imprisonment.

33. I order that the sentences for Counts 4 and 5 be served concurrently with each other resulting in a total sentence for these two counts of 4 years.

34. The sentences imposed for Counts 4 and 5 are to be served cumulatively upon the sentences imposed for Counts 1, 2 and 3 resulting in a total sentence for Counts 1 – 5 inclusive of seven and a half years imprisonment.

35. The sentence for Count 6 is to be served cumulatively upon the sentences imposed for Counts 1-5 resulting in a total sentence for all six counts of eleven and a half years.

36. I order that the total sentence be reduced by six months to reflect the late plea of guilty"

6. The appellant appeals that sentence. Counsel submits it is manifestly excessive on the basis that:

    1. The judge has failed to recognise the difference between the penalty for defilement pursuant to section 143(1)(a) as opposed to section 142 where the victim is under the age of 13 years for which the legislature has prescribed a sentence of life imprisonment;
    2. The judge has wrongly made sentences consecutive as opposed to concurrent;
    3. In fixing a sentence for individual offences the judge has taken a starting point that is too high in the circumstances.
    4. The judge has failed of make an adequate adjustment to take account of the totality principle.

7. The appellant was charged and convicted of offences contrary to section 143(1)(a) which provides that anyone who has sexual intercourse with a girl

of or above the age of thirteen years and under the age of fifteen years shall be liable to imprisonment for five years. Section 142, to which the appellant refers in the first ground of appeal, provides that, where the victim is under the age of thirteen years, the offender is liable to imprisonment for life.

8. It can be seen that the sentence ordered by the judge in each individual case is within the limit of the penalty stated in section 143 but the total sentence that the appellant has been ordered to serve is more than twice the maximum possible for a single offence under that section and more in keeping with the level of punishment appropriate for offences under section 142.

9. Having correctly assessed various aggravating and mitigating factors, the judge concluded:

> "27. Defence counsel also submitted that any sentences should be ordered to be served concurrently. The reason for this was said to be because the offences were committed against the same Complainant. Again with respect to counsel, this totally misses the point. These crimes were individual, separate crimes committed over a period of weeks. They did not all occur at the same time or as part of the one criminal transaction. The prisoner spread these offences over a period of a month and had serval opportunities to reflect and desist. He chose not to. In my judgment, these offences are properly punishable by consecutive sentences, subject of course to principles of totality.
> 28. It is said that a society is judged by the way in which it treats its weaker members. Amongst the weakest members of any society are its young children. The Legislature has sought to create a child protection regime in which offences against children are regarded as serious offences and are punished appropriately"

10. It is apparent from the statements by the judge in sentencing that he regarded the maximum sentence in section 143 as inadequate and we regret to say that it appears he sculptured the sentences largely to avoid the restrictions imposed by the legislature. Despite his acknowledgment of the

totality principle, he appears to have failed to apply it to the total he had ordered.

11. In general, concurrent sentences may properly be imposed where a number of similar offences are being sentenced together or where the sentencing is of different offences forming part of the same overall transaction. In such a case, the sentence for the principal offence will usually set the overall level. As can be seen from the passage set out above, the judge considered the manner in which the offences were repeated separately over a period of some weeks justified their being treated a separate cases for which consecutive sentences were appropriate. The two approaches are described by Thomas in his "Principles of Sentencing" as the 'one transaction rule' and the 'totality principle'. The division between them is frequently difficult to define and we accept that the present case is borderline. However, once started, the appellant's offending, by its frequent, albeit irregular, repetition satisfies as that the offences formed part of a continuing course of conduct. On the other hand, it clearly would not accurately reflect the seriousness of the appellant's conduct to suggest each repetition did not make the whole matter increasingly serious and add substantially to the appellant's culpability.

12. This Court has recently referred to the inadequacy of most sentences passed in cases of defilement both under section 142 and 143. The judge correctly recognised the need for the court to apply adequate penalties more consistently than is the case at present.

13. However, the level of sentence considered appropriate for any particular offence is determined by Parliament and, in the case of offences under section 143, has been set at five years imprisonment. Whilst the statutory provision fixes the upper limit of sentence permissible and appropriate for a single occurrence, it may properly by exceeded where the offence is repeated. In consequence it may properly result in a total sentence for the whole course of offending which exceeds the maximum sentence under the Act. However, the extent to which that excess can be properly imposed must be proportionate and reasonable measured against the maximum prescribed in the section.

14. We are satisfied that the manner in which the judge imposed this sentence resulted in one which was seriously out of line with the reasonable and properly appropriate level of punishment under section 143. Despite his acknowledgement of the totality principle, we consider that, had he stood back as it were and viewed the overall sentence against the offences themselves, he would or certainly should have found that the total of eleven and a half years was far too high in the circumstances of the case before him.

15. It is not necessary to go through the matters he took into account as aggravating and mitigating the final penalty. We accept that they were relevant and were properly taken into account. However, as we have stated, they produced a sentence far too high and the manner in which the judge applied the sentences to the various counts had little relation to their relative seriousness.

16. We consider that the sentence of three and a half years ordered for the first offence is, in the circumstances of this case, correct. Had the offences ceased then or possibly after the second offence the next day, that would have been an appropriate total sentence. However, the subsequent repetition seriously increased the overall culpability of the appellant and justified an increased sentence even if that exceeded the maximum penalty in section 143. Considering the circumstances of this case an appropriate additional penalty for the further offences would in, our view, be three years imprisonment.

17. The result is a total sentence of six and a half years. The court must finally consider whether to order any reduction for his plea of guilty. The judge ordered that the total sentence of eleven and a half years be reduced by six months "to reflect the late plea of guilty".

18. That was the correct approach. The principal reason for such a reduction is to acknowledge that a plea reflects the offender's remorse and, in cases of sexual assaults, such remorse also means that he does not wish to make the victim suffer further by reliving the experience in the witness box.

19. In the present case, the judge acknowledged that and continued:

"20. It is submitted that the prisoner has demonstrated his remorse by his payment of SID$300 to the mother of the complainant. I note however that since the birth of his child he has offered no support of any kind to the complainant to assist in the raising of the child. He is also said to have shown his contrition in the letter handed to the Court by counsel. It is to his credit that the prisoner has gone some way in an attempt to reconcile the various families and people affected by his offending. Hopefully that demonstrates a recognition that he has caused pain and hurt to others by his selfishness. If so, that is to have credit.

21. However, whatever mitigation that conduct might offer, it has to be balanced by the sentiments expressed in the letter written by the prisoner and tendered on his behalf and also in the submissions put to me by his counsel. In his letter that prisoner says:

I am sorry for what I have done to (the complainant) because she is my sister in law. I coveted her but she should have reported that to her sister, my wife, so that I would be frightened not to ask her.

22. His expressed attitude that somehow the complainant was to blame because she did not report him to his wife is astonishing ..... It reflects an absolute failure to recognise his own culpability, his own responsibility and the harm that his selfishness has caused.

20. The judge was right to consider the letter in that way. In effect, it totally negatives any suggestion that his plea showed real contrition or any recognition of the real effect of his conduct on a young girl. Whilst it is rare that a court does not give some "discount" on sentence following a plea, it is always a matter for the Judges' discretion. Exceptionally, we do not, in the face of that indication of his continuing attitude, consider that any reduction should be given for the plea.

Order

The sentence by the judge is quashed and replaced by the following:

1. The sentence for counts one and two is three and a half years imprisonment on each count.
2. The sentence for counts three, four, five and six is three years imprisonment on each count.

3. The sentence for counts one and two are to be served concurrently with each other ;
4. The sentence for counts three, four, five and six are to be served concurrently with each other, but consecutively to the sentence on counts one and two giving a total sentence of six and a half years.

THE COURT OF APPEAL OF SOLOMON ISLANDS

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Goldsbrough JA
President of the Court of Appeal

THE COURT OF APPEAL OF SOLOMON ISLANDS

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Gordon Ward JA
Member of the Court of Appeal

THE COURT OF APPEAL OF SOLOMON ISLANDS

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Vincent Lunabek JA
Member of the Court of Appeal