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

CRIMNAL APPEAL CASE No.03 OF 2009

BETWEEN: **PUBLIC PROSECUTOR**
Appellant

AND: **WILLIAM KOATA**
Respondent

Coram: *Chief Justice Vincent Lunabek*
Justice J. Bruce Robertson
Justice John von Doussa
Justice Oliver Saksak
Justice Nevin Dawson

Counsel: *Mr Bernard Standish for the Appellant*
Mr Chris Bennett and Mr C. Tavoa for the Respondent

Date of Hearing: *13th July 2009*
Date of Judgment: *16th July 2009*

JUDGMENT

1. This is a State appeal against the sentence imposed by Butler J on the respondent on 20th May 2009.

2. The respondent was charged with committing sexual intercourse without consent under Section 91 of the Penal Code Act [CAP.135] ("the Act").

3. After the matter was dealt with at trial the primary judge returned a verdict of guilty on 22nd April 2009.

4. On 20th May 2009 the primary judge sentenced the respondent to 4 years imprisonment but suspended it for a period of 3 years on condition he did not commit and was convicted of any other offence.

5. The Public Prosecutor appeal against the whole of the sentence on grounds that the sentence was contrary to law and further that it was manifestly inadequate.

6. The facts can be summarised as follows. On 2nd February 2006 the complainant (victim) was walking home after she had finished work at 7 o'clock pm. She was picked up some 30 minutes later by the respondent in his bus who told her he would take her home. The victim got into the bus and sat on the back seat. The respondent however drove past her house after which the victim asked him where he was taking her to. The respondent told her they would go for a short ride. They went as far as Pango village and returned and dropped off another passenger at Esqual area (towards Tagabe). The victim requested if she could get off there and walk home but the respondent refused and assured her he would drop her off at her home. On the way there the respondent did not stop but went all the way to the Bladiniere Estates (towards Mele). The respondent then left the main road and followed an unsealed road. The respondent was speeding. The victim asked him where he was going and was told they were just going to turn around and return to the main road. However at a secluded area, away from the main road and houses the respondent left his seat, locked the door and got into the back seat with the victim. He then started to hold the victim and demanded that she remove her trousers and her underwear. The victim resisted by trying to push the respondent away but the respondent appeared too strong for her. Eventually the respondent forcibly removed the victim's trousers and her panties and then removed his own, and penetrated her. The victim struggled but the respondent held her head and banged it against the seat. She sustained injuries to her head and hand. The respondent then left her. He offered her some money but she refused them. The victim walked back to her home at Ohlen Area with her trousers in her hand and told people about her ordeal. She was crying at the time.

7. In his sentencing the respondent on 20th May 2009 the primary Judge considered the pre-sentence report which emphasised the respondent had

lost three of his children in a fire which burned down their house in 2007. He noted the difficulties faced by the respondent's wife (who is expecting another child) without assistance from the respondent, his remorse, his beating by the relatives of the victim resulting in his hospitalisation for seven days due to injuries and the customary ceremony he had performed which involved the giving of a pig and cash of VT30,000 to the victim.

8. The primary judge after considering all of these factors adopted a starting point of 6 years imprisonment but reduced it to 4 years allowing for those mitigating factors.

9. The primary judge then went on to consider suspension of the sentence and said at page 3 of the sentencing Order.

"Those factors in my mind reduce the sentence of imprisonment to one of 4 years. I need to consider whether the sentence should be suspended. The Vanuatu Court of Appeal has said that a suspended sentence for rape will only be imposed in very rare circumstances. In this case it is impossible for me to ignore the death of your three children, the injuries which you have suffered yourself and which are detailed in the medical report which I have, the fact that your wife is expecting another child and needs your help and the fact that you have not re-offend since February 2006.

Accordingly, the 4 years sentence of imprisonment will be suspended for a period of 3 years. That 4 years term of course will be reduced by any period of time which you have spent in custody in relation to this charge."

10. It is submitted on behalf of the State that this sentence was manifestly inadequate and wrong in law on the following grounds-

(i) There was failure by the primary judge to follow precedent.

(ii) There was error in imposing a sentence which did not reflect the seriousness of the offence.

(iii) There was error in placing insufficient weight on the aggravating features present in the Commission of the offence.

(iv) There was error in placing too much weight on the mitigating factors of the respondent.

(v) There was error in placing insufficient weight on the principles of denunciation and personal and general deterrence.

(vi) There was error in imposing a wholly suspended sentence and failing to identify the reasons for so ordering.

(vii) The sentence imposed was contrary to law.

(viii) In all the circumstances, the sentence imposed was manifestly inadequate.

11. The respondent conceded he was responsible for some delays in the case, however he argued the Public Prosecutor had also made some concession about the delays which had been taken into account by the Court. Counsel for the respondent defended the sentence of the imprisonment of 4 years wholly suspended for 3 years and submitted there was no legal impediment to such sentence being imposed.

12. There is no dispute about the established principles as laid down in the cases as cited in particular, **Public Prosecutor v. Keven Gideon, Public Prosecutor v. Scott and Tula** and **Naio & Nathaniel v. Public Prosecutor**.

Without re-stating those principles which are clear and definite, we simply reconfirm them but it means that a starting point of between 5 and 8 years was called for and that suspension would not generally be available.

13. The real issue appears to be: was the respondent entitled to special consideration due to the loss of his three children and the adverse effect on his wife in her present circumstances. Balanced against that tragedy is the issue of what message would be conveyed to the victim, the community at large and other potential offenders of this sort by a totally suspended sentence.

14. As we have said over and over again, women are entitled to determine and control their sexual activities and men who refuse to acknowledge and accept that reality will go to jail.

15. From the verdict the primary judge recorded the victim's evidence which show violence and force used against her by the respondent in the course of the offending. The verdict records clear evidence of the immediate complaints made by the victim to another witness of a damaged trousers, bodily pain and violence all of which was believed by the primary judge. The two of them are cousins and lived in the same house and there was a breach of trust by the respondent who usually transported the victim to and from work.

16. In the sentence of 20th May 2009 none of these are referred to by the primary judge as aggravating features to weigh as a balancing exercise against the mitigating factors of the respondent.

17. We note also that the cases of Gideon and Scott and Tula were referred to the primary judge for consideration by the State Prosecutor Mr Molbaleh in his submission on sentence. However the written sentence of the Court below does not make any specific references to those cases to demonstrate why considerations of the prevailing principles were not reflected in the assessment of sentence.

18. We are persuaded that the appeal must succeed on grounds that precedents were not followed and that too much weight was placed on the mitigating and personal circumstances of the respondent.

19. We are persuaded that a wholly suspended sentence in this case was not justified. We reiterate the principle established in the cases that suspension for rape in cases such as this will be absolutely exceptional and that is not the case of the respondent.

20. We are of the view that delays, tragedy and the reconciliation ceremony were sufficiently reflected in the 2 years reduction made by the primary judge when he reduced the sentence from 6 years down to 4 years. While we accept that a starting point of 8 years would unlikely to have been interfered with if he appealed, we accept a starting point of 6 years imprisonments was just within range. An accused person is not punished

for pleading not guilty but in light of the evidence and the surrounding circumstances it is difficult to understand why he did not plead guilty, and get the appropriate discount.

21. In the circumstances of the case, we allow the appeal. We quash the suspension and confirm the term of 4 years imprisonment which is now without suspension. We are unmindful of the terrible tragedy which has beset this family but it cannot wipe out the substantial wrong the respondent committed.

DATED at Port-Vila this 16th day of July 2009

BY THE COURT

.....
Vincent LUNABEK CJ

.....
J. Bruce ROBERTSON J

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John von DOUSSA J

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Oliver SAKSAK J

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Nevin DAWSON J