



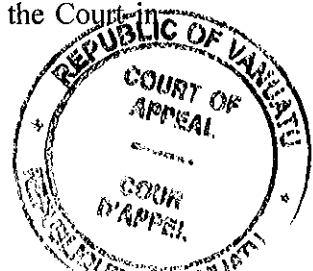
[3] On 28 October 2011 Mr Boesaleana was sentenced to an effective term of 5 years imprisonment (which was to be cumulative on the 21 year sentence) after he had pleaded guilty to 3 further counts of rape contrary to section 91 and 1 count of attempted rape contrary to section 28 and 91 of the same Act.

[4] There are, before this Court, appeals against the total effective sentence of 26 years imprisonment in respect of all this offending.

[5] It is regrettable that all the charges were not dealt with together and Mr Boesaleana sentenced at the same time for all offending. They all involve within the family sexual abuse which took place over a substantial number of years and involved two of the appellant's daughters.

[6] There can be substantial debate as to the approaches which can be applied in sentencing. But it is essential that the Court does not become lost in formulae or arithmetic calculations but rather looks in a general and realistic way at the entire offending, assessing all relevant aggravating and mitigating factors, and then reaches a sentence which in its totality properly reflects the culpability which has been established.

[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 Public Prosecutor v. Karl Andy [2011] VUCA 14 Criminal Appeal Case 09 of 2010, 8 April 2011. There is no doubt that the Court in

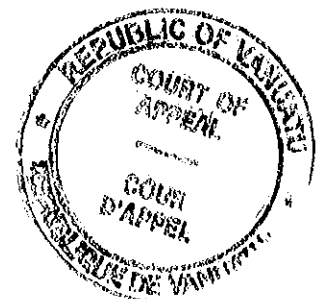


that case intended to provide some useful guidelines with regard to the difficult and demanding task of sentencing. But it should be remembered that in any case the sentencing of a prisoner is not an exact mathematical science but a nuanced art. It is essential that every Judge, whatever methodology they employ, looks to see whether the overall sentence is commensurate with the established culpability of the particular accused person.

[8] It is now clear that from 2007 the Appellant had been abusing an adopted daughter and one of his own natural children. The adopted daughter was only 13 when this offending commenced and natural daughter was only 8. The offending included various offences of sexual activity all of which can be condemned in the strongest terms. The serious effect on those two children, which is the inevitable consequence of this type of offending, is of real concern.

[9] When a Court is having to sentence a convicted person who faces many counts and more than one victim, it is often beneficial to decide what is the most serious offending and to impose a lead sentence on that which properly takes account of all aggravating factors and then to impose concurrent sentences in respect of other offending as that is appropriate.

[10] That would be the best way to deal with matters like this. Across the entire spectrum, it is clear that the most serious offences are those of rape. The starting point for rape is 5 years but what are the aggravating factors here?



[11] First it is to be noted that all involved a father and his children and thus a most despicable breach of trust.

[12] Secondly, that in respect of one daughter the offending begin when she was 8 and continued until she was 12. In respect of the other daughter it started when she was 13 and continued until she was 16.

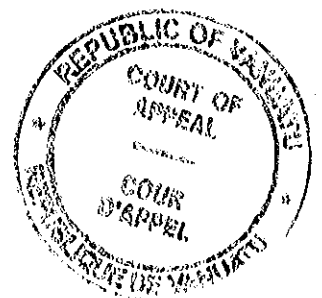
[13] Thirdly, most of the offending occurred in a family home (or near to it) where any child ought to be, and feel, safe and secure.

[14] Fourthly, the offending included threats of violence against both victims and the victims were specifically told that they must not report what was happening to anyone.

[15] Fifthly, the offending not only happened over a substantial period of years but was planned to take advantage of times when other people were absent from the home or everyone was asleep. This even included requiring a daughter to return home during school time so that he could use her for his sexual satisfaction.

[16] Sixthly, particularly with the younger girl because of her youth, physical damage was caused especially in the earlier stages of the offending.

[17] Seventhly the offending encompassed a variety of sexual activity and this took place in the presence of the other girl.



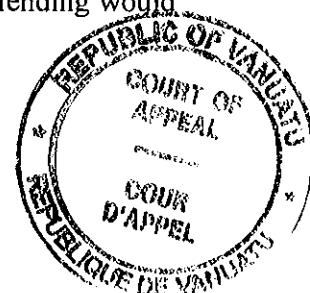
[18] When these factors are all assessed, starting from the 5 year starting point, we are satisfied that on all the rape counts, the appropriate end point at this stage could not be less than 18 years.

[19] When the most serious offending is dealt with in that way, it is then not appropriate to impose additional cumulative sentences in respect of matters which have already been encompassed as aggravating factors. The inter family aspect which is incest has been captured. The various attempts to commit offences become part of that overall situation. The three counts of act of indecency which were having intercourse with one daughter while using the other as a guard or lookout, equally are subsumed within the assessment which has occurred.

[20] Having undertaken that exercise the Court is then required to consider the mitigating factors which exist.

[21] This 36 year old man is the father of 7 children from a long standing relationship who has not previously appeared before the Court. He seems to want to blame others for his own offending and to an extent one cannot help but wonder if his contrition is just that he is feeling sorry for himself that his wicked behavior has been brought to light.

[22] It was only when his wife became suspicious about his activities with his adopted daughter that the younger natural child indicated to the family that this had been happening to her as well. Without this, there is no sign that the offending would have ceased.

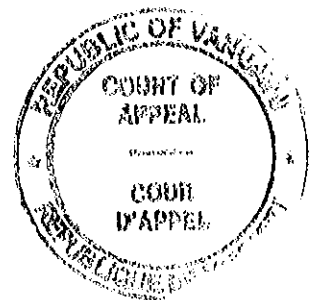


[23] We do however give him credit for the fact that once the matter came to light he was thoroughly cooperative and pleaded guilty, thereby avoided his daughters' further trauma, indignity and embarrassment by having to be part of a defended Court proceeding. We are accordingly satisfied that the effective sentence on the most serious charges should be 12 years imprisonment.

[24] By undertaking this exercise we have ensured that all the relevant factors which require attention in sentencing are considered but only once. Further, it ensures that overall there is a sentence which in its totality is commensurate with the admitted culpability.

[25] The effective sentence of 26 years imprisonment for the offending, involved a substantial amount of double counting and cannot be sustained because it was manifestly excessive even in the appalling circumstances of this case.

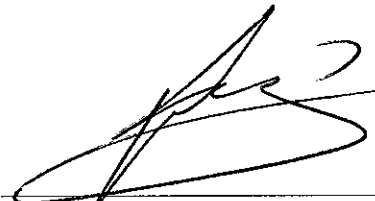
[26] Accordingly the appeal is allowed. The sentences imposed in the Supreme Court are all quashed. On the 11 counts of rape contrary to section 91 Mr Boesaleana is sentenced to 12 years imprisonment. On each of the counts of incest he is sentenced to 8 years imprisonment. On each of the counts of attempted rape he is sentenced to 5 years imprisonment. On each of the counts of act of indecency with young persons he is sentenced to 3 years imprisonment.

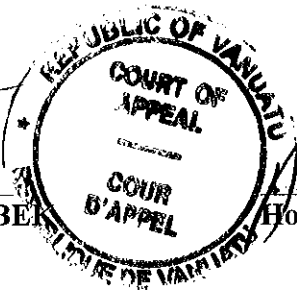


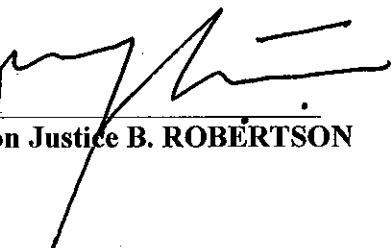
[27] The sentences imposed on all 24 counts shall be served concurrently so that 12 years imprisonment is the effective sentence which he must serve subject to the right to parole.

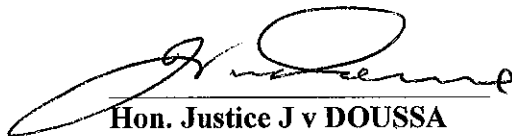
DATED at Port Vila, this 25<sup>th</sup> day of November 2011

BY THE COURT

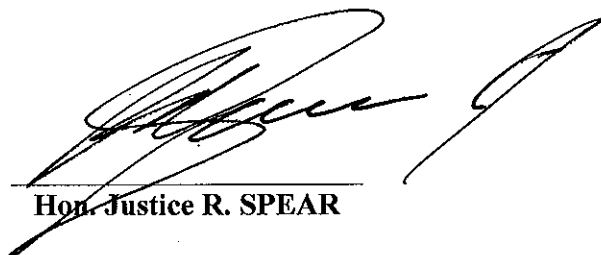
  
Hon. Chief Justice V. LUNABE

  
REPUBLIC OF VANUATU  
COURT OF APPEAL  
COUR D'APPEL  
REPUBLIC DE VANUATU

  
Hon Justice B. ROBERTSON

  
Hon. Justice J v DOUSSA

  
Hon. Justice D. FATIAKI

  
Hon. Justice R. SPEAR