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

Criminal Appeal Case No. 04 of 2011

CHARLIE EDGEL
-V-
PUBLIC PROSECUTOR

Coram:	***Hon. Chief Justice Vincent Lunabek*** ***Hon. Justice Bruce Robertson*** ***Hon. Justice Oliver Saksak*** ***Hon. Justice John von Doussa*** ***Hon. Justice Daniel Fatiaki*** ***Hon. Justice Robert Spear***
Counsel:	*Mr. A. Bal for the Appellant* *Mr. S. Blessing for the Respondent*
Date of Hearing:	*23rd November 2011*
Date of Decision:	*25th November 2011*

JUDGMENT

1. On 28th April 2011 the appellant entered guilty pleas to representative counts of Unlawful Sexual Intercourse and Sexual Intercourse with a Child Under Care and Protection. The offences were committed on the appellant's step daughter between the years 2003 and 2008. On 1 June 2011 the appellant was sentenced in the Supreme Court (**Weir. J**) to concurrent sentences of 7 years and 10 months imprisonment.

2. On 29 June 2011 (two weeks after the appeal period had expired) a Notice of Appeal was filed together with an application for leave to appeal out of time and a sworn statement in support. The appellant claims that he needed more time to consider whether or not to appeal

his case in addition to his deteriorating health as a result of his incarceration.

3. Although the application is orally opposed by State counsel on the basis that the grounds advanced in support of the application do not constitute special circumstances peculiar to the appellant and which the interests of justice requires to be heard, we remain unconvinced that any serious prejudice or injustice would be occasioned by granting the application. Accordingly we reserved our final decision on the application for leave pending a consideration of the merits of the appeal. (*see*: **Simon v. PP** [2008] VUCA 9; **Sur v. PP** [2008] VUCA 8 and **Gamma v. PP** [2007] VUCA 19).

4. The Notice of Appeal asserts that the appellant's sentence is *"manifestly excessive"* and arises from the errors made by Weir. J in his assessment of the weight to be assigned to the various aggravating and mitigating factors identified in the case. In particular, **ground (iii)** complains that *"the presiding judge erred in making no deduction for the custom reconciliation performed to the victim and her family and their community"*

5. In sentencing the appellant Weir J closely followed the recent judgment of this Court in **PP v. Kal Andy** [2011] VUCA 14 where the Court in allowing the State's appeal and sentencing the appellant to 3 years imprisonment for an offence of Unlawful Sexual Intercourse, endorsed a *"three step"* sentencing process as follows:

> *"First Step: The Starting Point;*
>
> *Second Step: Assessment of Factors Personal to the Offender;*

Third Step: Deduction for Guilty Plea."

6. In the **Kal Andy** case (op-cit) in recognition of the three mitigating factors of *"good character, remorse and compensation"* the Court gave a *"significant deduction of approximately 15%."* on top of an allowance for a guilty plea.

7. Although there are 5 grounds advanced in the appeal against sentence counsel at the hearing of the appeal accepted that the appellant had no complaint with either the judges' approach to the appellant's guilty plea or the level of discount allowed for it. We therefore leave that factor to one side and turn to consider the appellant's principal complaint which was directed at **paragraph 21** of the sentencing remarks where the judge dealt with the mitigating factors personal to the appellant.

8. **Paragraph 21** reads as follows:

"21 FACTORS RELEVANT TO THE OFFENDER

There are no aggravating factors relevant to you. There are several relevant mitigating factors. Firstly, you have no previous convictions. Secondly you have participated in a custom reconciliation ceremony and paid monetary compensation to the victim. Thirdly you are described by your chief as being a well known member in the community and you participate well in community activities.

All of those factors would, in my view have greater impact if you demonstrated remorse, whereas in fact that is not the case. You still continue to attempt to shift the blame onto

the victim, despite the fact that she was only 9 when these violations began. Finally I note that you have diabetes and high blood pressure and that you were recently admitted to Vila Central hospital for 3 weeks. In my view those mitigating factors, such as they are, warrant a deduction of 10%." (our underlinings)

9. For completeness, we extract from the pre-sentence report details of the items provided by the appellant for the custom reconciliation ceremony:

- *"Five pigs (presented to the victim's family)*
- *A tusked boar, 5000VT cash, and six mats of high traditional value (presented to the appellant's wife)*
- *50, 000VT cash (presented to the victim)*
- *Kava and food (presented to the community)*

Victim stated that she accepted the kastom reconciliation and the items presented"

It is accepted that the total value of the items is 230,000VT

10. Counsel for the appellant submits that the trial judge erred in his consideration and assessment of the importance and significance of the custom reconciliation ceremony which *"is a sign of remorse"* and therefore in not giving a greater discount for that particular mitigating factor.

11. Weir J. noted there was a custom reconciliation ceremony but its force and effect appears to have been subsumed into the more general notion of remorse whereas it is a stand alone statutory mandatory factor.

12. On that aspect we can do no better than to adopt the eloquent exposition of State counsel in his written submissions where he writes on the meaning of customary reconciliation and settlement as follows:

> "30. *The underlying principles behind customary reconciliation are, inter alia, expression of remorse, admission and acceptance of guilt, confession, apology, atonement, and essentially the revitalization or inception of a new beginning on the parts of the wrong doer(s) and the person(s) who has being wronged. The equivalent of the Bislama version "Klinim fes". On top these considerations rests the value of the process which custom considers of the uppermost value."*

13. In **PP v. Kevin Gideon** [2002] VUCA 7 this Court said of the mitigating effect of the guilty plea in that case which also involved an offence of Unlawful Sexual Intercourse (at p 4):

> *".....it is necessary to consider what reduction should be allowed for mitigating factors. The first and most obvious in this case was the plea of guilty. That always will attract a substantial reduction particularly when it occurs at the first available opportunity. This relieves a victim (and particularly a young victim such as this) from having to relive the trauma of the wrong done to her by having to recite and recall all details before a group of strangers in a Court. It is also an indication of remorse and contrition. The other factor that should be considered is the issue of the custom payments which were made.* (our underlining)

14. As for the custom payments that were made in the **Gideon** case, the Court said after referring to the then applicable provisions of **section 119** of the **Criminal Procedure Code (cap 136)** which are substantially reproduced in **sections 38** and **39** of the **Penal Code** (cap 135).

> *"The requirements of the section are plain in that a Court is required in passing sentence in any criminal case, to take account of any customary settlement that has occurred in the case, and, in the absence of the same, to postpone sentence in order to facilitate the effecting of customary settlements."*

And later:

> *"It is not the function of this Court to comment on the wisdom, or desireability of requiring a sentencing Court to take account of customary settlement in every conviction of a criminal offence, however heinous or trivial it may be. However, that is the law".*

15. Given the social and cultural significance of performing a customary reconciliation ceremony amongst the indigenous people of this country, especially where the same has been accepted by the injured party, we are satisfied that the appellant deserves, if not a separate, then, a greater discount for that important statutory mitigating factor.

16. Having said that, this was a serious case of sexual abuse of a child by a parent where the aggravating factors clearly outweighed the mitigating factors urged on the appellant's behalf.

17. In the context of the maximum term of imprisonment prescribed for an offence of Unlawful Sexual Intercourse of a Child, Weir J's starting point of 10 years cannot be faulted and is upheld. The discount for the appellant's guilty plea is not challenged and therefore remains.

18. We are satisfied however that greater recognition should have been given to the custom reconciliation ceremony and for that reason alone we grant leave to appeal.

19. The appeal is allowed on that narrow ground and the sentence is reduced to one of seven years imprisonment with effect from 1 June 2011.

DATED at Port Vila this 25th day of November, 2011.

BY THE COURT

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Chief Justice Vincent Lunabek

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Justice Bruce Robertson

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

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Justice John von Doussa

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Justice Oliver Saksak

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Justice Daniel Fakiaki

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Justice Robert Spear