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

CRIMINAL APPEAL CASE No.05 OF 2012

BETWEEN: **PUBLIC PROSECUTOR**
Appellant

AND: **BILA YACINTH**
Respondent

Coram: *Hon. Chief Justice Vincent Lunabek*
Hon. Justice Bruce Robertson
Hon. Justice Daniel Fatiaki
Hon. Justice John Mansfield
Hon. Justice Robert Spear
Hon. Justice Dudley Aru

Counsel: *Mr Parkinson Wirrick for the Appellant*
Ms Jane Tari for the Respondent

Date of hearing: *15th October 2012*
Date of judgment: *25th October 2012*

JUDGMENT

1. On 27th August 2012 the respondent was sentenced to an effective term of 4 years imprisonment. He had been charged with (and entered an early guilty plea to) one charge of sexual intercourse without consent contrary to section 91 of the Penal Code Act [CAP.135]. On 3 September the Public Prosecutor appealed on the basis of the manifest inadequacy of the sentence.

2. In the Supreme Court and before us there was no dispute as to the relevant facts. The sentencing Judge said:
"You are a 38 year old mature man. Your victim is 22 years old and is your step-daughter. At the times of offendings she was living under your care and protection at the family home at Panes Village, South Pentecost. The victim is suffering from a mental disability which affects her speech and which has

caused her right leg to be paralyzed. The medical report dated 6th July 2012 confirms this.

The offendings started in August 2011 and continued until January 2012. On three separate occasions during this given period of 7 months you had sexual intercourse with her without consent. As a result, the victim became pregnant. In July this year, she gave birth to a baby boy at Pangi Health Centre. The pregnancy brought these offendings to light. A complaint was made and the Police arrested you and upon investigations, you cooperated well and admitted the offendings."

3. The respondent has no argument as to the law applicable to this case. The Public Prosecutor's right to appeal and the approach to it were discussed in **PP v. Gideon** [2002] VUCA 7. The general approach to sentencing (which is aimed at creating consistency in approach) was discussed in **PP v. Andy** [2011] VUCA 14. Guidelines for sentencing generally in the area of sexual offending is considered in **PP v. Scott** [2002] VUCA 29.

4. The sentencing Judge took the view that the starting point for the offending disclosed should be 8 years, and applied an uplift of 2 years.

5. At that point he deducted 1/3 for an early guilty plea which meant a term of 6 years and 8 months was in contemplation. He went on to say:
"And the Court will allow a further reduction because the victim did not report the offendings in August 2011 when it happened on the first occasion. She waited until she became pregnant and gave birth. She made a statement only on 6th July 2012. She could have done so in August, 2011 and prevented further offendings but she did not. That omission and/or failure by the victim must be taken as a mitigating factor, and added with the other factors such as being a first-time offender and good cooperation with the Police, a further reduction of 2 years and 8 months is hereby made. The sentence is effectively reduced to exactly 4 years imprisonment which commenced on 12th July 2012 when you were first taken into custody."

6. A number of issues were advanced before us but the overall situation can be simply stated. This was a charge which arose out of a care relationship in which the respondent was in a position of trust and responsibility towards the victim. In accordance with the relevant decisions of this Court the starting point of 8 years was thoroughly appropriate.

7. We are satisfied that there were additional aggravating factors which required an uplift to be applied. These included:
   (a) The facts that there were three separate offences over a period of 7 months;
   (b) The victim became pregnant as a result;
   (c) The offending was committed within the family home where the victim ought to have been safe and secure;
   (d) The respondent took advantage of the victim's mental and physical disabilities.

8. 10 years was not an inappropriate figure after aggravation had been allowed for. We have considered the double counting argument but we consider that had a higher figure been reached by the trial Judge we would not have interfered with that.

9. The approach to sentencing discussed in **Andy** requires that any mitigation factors should be allowed for prior to any allowance for a guilty plea.

10. We leave aside the question of the late complaint by the victim but we note that the Judge had regard to the fact the respondent was cooperative and was a first time offender.

11. We make no specific comment as to the effect of no previous convictions which may only be neutral. But we recognise that the Judge was impressed by the level of cooperation and from the material available in the file it is clear he is a man who is truly remorseful. On that basis we are satisfied that 1 year can be deducted.

12. It is then appropriate to consider the plea of guilty. It was at the earliest opportunity and there was nothing done by the respondent to prolong the uncertainty for this unfortunate young woman or to worsen the situation for her. Like the trial judge we are satisfied that a third is an appropriate deduction.

13. That brings us to a sentence of 6 years imprisonment.

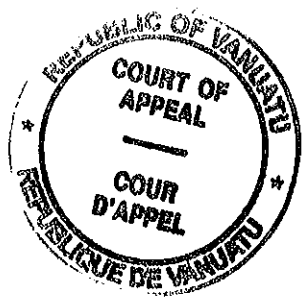
14. The deduction which the Judge then allowed in respect of the non complaint at an early stage of their relationship was the centre of the argument in the appeal.

15. If it had been a matter of mitigation, like any other it should be taken into the assessment prior to recognition of the plea of guilty. Leaving that aside, we find that the approach adopted by the sentencing judge was in one specific respect in error and unsustainable.

16. There was a time in early history when complainants in rape cases were required to raise an immediate "hue and cry". All the available experience now indicates that reactions of victims will vary. Initially some are unable to make complaint in respect of the offending because of their particular circumstances. In some countries specific legislative provisions mandate that delay is to be ignored.

17. In our view, the position of this victim in this case meant it was almost inevitable that she would not immediately initiate a complaint. She was fragile and vulnerable. The offending was by a person who should have been caring for her. She should have been safe in a home which needed to support her.

18. There was no mitigation in the fact that it was only when the pregnancy developed that she eventually disclosed what had occurred. Her ongoing reticence and inability to talk about the matter are further demonstrated in the manner in which she was unable or unwilling to talk over the situation with the probation officer involved in this case.



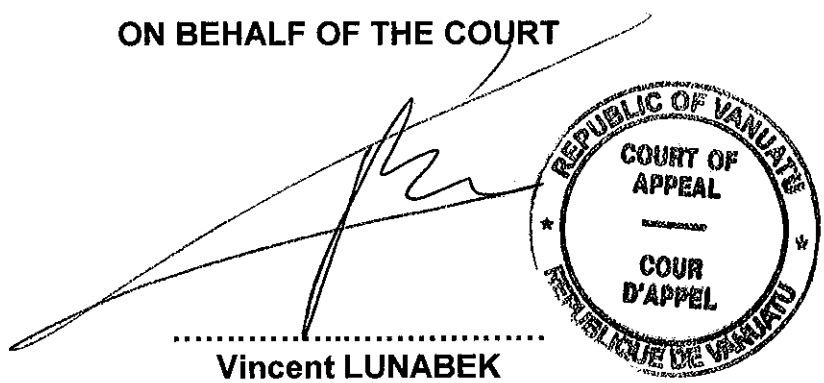
19. There is nothing which mitigates the respondent's culpability in the victim's initial omission to disclose as described by the sentencing Judge. It is a matter with no relevance to the exercise to be undertaken.

20. We are satisfied that the appeal must succeed because there was in the evaluation of culpability undertaken by the sentencing Judge a substantial error of approach.

21. The appeal is allowed. The sentence of 4 years is quashed and in its place Mr Bila Yacinth is sentenced to 6 years imprisonment effective from the 12th July 2012 when you were first taken into custody.

DATED at Port-Vila this 25th day of October 2012

ON BEHALF OF THE COURT



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Vincent LUNABEK
Chief Justice