IN THE COURT OF APPEAL OF
THE REPUBLIC OF VANUATU Criminal Appeal Case N.11 of 2015
(Criminal Appellate Jurisdiction)

BETWEEN: FRAZER ARU WENU
Appellant

AND: PUBLIC PROSECUTOR
Respondent

Coram: *Hon. Chief Justice Vincent Lunabek*
Hon. Justice von Doussa
Hon. Justice Raynor Asher
Hon. Justice Daniel Fatiaki
Hon. Justice Raynor Asher
Hon. Justice Stephen Harrop
Hon. Justice Dudley Aru

Counsel: *Mr Jacob Kausiama for the Appellant*
Mrs Matariki Timakata for the Respondent

Date of Hearing: *10th November 2015*

Date of Decision: *20th November 2015*

JUDGMENT

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1. On 8th January 2012, the Appellant touched the breast of a young girl of 16 years of age at Quatamele village, Ambae Island without her consent. He was charged with act of Indecency without consent, contrary to section 98 of the Penal Code Act ("the Act"). On the 20th October 2015, the Learned sentencing judge sentenced him as follows:

- a starting point sentence of 3 years imprisonment;
- the sentence was further increased by 6 months to take into consideration the aggravating factors;
- the sentence was reduced to one of 18 months imprisonment after balancing with the mitigating factors;

- The Appellant to serves 9 months imprisonment of the 18 months partly suspended imprisonment sentence.

2. The Appellant now appeals against the sentence.

The Sentence

3. The maximum penalty which might have been imposed for act of indecency was 7 years imprisonment.

The Grounds of appeal

4. There are two grounds of appeal.

5. The first is that the sentence is manifestly excessive; and the second, is that the learned sentencing judge failed to properly consider whether or not to fully suspend the sentence.

The Offence

6. The offence was committed on 8th January 2012. On the pretence of needing a knife the Appellant asked the complainant girl to get one for him from the kitchen. He followed her into the kitchen and when she was searching for knife, the Appellant touched her breast from behind. The Appellant was living with the complainants' family at the time of the offence. The Appellant was the uncle to the complainant's father. The young girl concerned is disabled although exact details of her disability are not known. The touching of the breast was through her clothing.

The antecedents

7. The Appellant is a first time offender. He is 58 years old. He has no previous convictions. He was a man of good character. He has taken part in a custom reconciliation ceremony.

The sentence is manifestly excessive

8. The first ground of appeal is that the sentence imposed was manifestly excessive.

9. In arriving at his sentence, the Learned sentencing Judge stated:

> "There are any number of cases in this jurisdiction and others where the *Court says something along the lines that it has a duty to provide the community or some particular section of the community, with protection. The alarming statistics available show that women in Vanuatu are routinely abused either violently, sexually or both. The statistics show that:-*
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> "The rates of physical and sexual non-partner violence against women are very high with almost 1 in 2 women (48%) having experienced either or both since the age of 15. More than 1 in 4 (28%) have experienced physical violence; 1 in 3 (33%) have experienced sexual violence; and about 20% have experienced both
>
> Overall, the prevalence of non-partner physical and sexual violence is higher in rural than urban areas. However, there are substantial variations in prevalence rates between locations. Port Vila (16%) and Sanma (12%) have the lowest prevalence for non-partner physical violence; Penama (22%) and Shefa (24%) have prevalence below the national rate of 28%; whereas Tafea (45%), Luganville (39%), Torba (37%) and Malampa (36%) have prevalence considerably higher than the national rate.
>
> There is a similar pattern in the rates of sexual violence by people other than husbands or intimate partners. The rural prevalence (36%) is much higher than the urban rate (23%), but this masks substantial variation between locations. Port Vila again has one of the lowest rates (14%) along with Shefa (10%); Luganville and Tafea have prevalence of 34%, which is close to the national rate of 33%; but Torba (44%), Sanma (44%), Penama (41%), and Malampa (37%) have prevalence considerably higher than the national rate."

The Courts then have a duty to protect the community and women in particular from sexual (and physical) abuse. That can only be done by passing deterrent sentences. That the Courts have such a duty and can adopt such a stance has been accepted by the Court of Appeal. In The case of Namatak v Public Prosecutor the Court said:

"We are very conscious of the Chief Justice's position. Where any type of crime is serious and prevalent, it is his duty to discourage the offenders. He can only do this by deterrent sentences.
In so doing, he needs the support of the Court of Appeal which should be slow to intervene unless there is cause."

This has been echoed in cases such as Public Prosecutor v Adams [2008] VUCA 28; Criminal Appeal Case 11, 12, 13 & 14 of 2008 (4 December 2008); Public Prosecutor v Wah [1989] VUSC 6; Criminal Case 005 of 1989 (10 July 1989); and more recently in Apia v Public Prosecutor [2015] VUCA 30; Criminal Appeal 02 of 2015 (23 July 2015).

I therefore intend to take a stand and raise the starting point for this kind of offence. In my view therefore the starting point in this case is 3 years."

10. It is submitted on behalf of the Appellant that the starting point of 3 years is too excessive. It is submitted also that the sentencing judge was in error to use a higher starting point when the Appellant had only touched the breast of the victim. It is argued that this was offending that clearly, fell at the lower end of the offending.

11. The case of *Tangiat –v- Public Prosecutor [2014] 15; CRAC 01 of 2014 (4 April 2014)* was referred to in support of the Appellant's submissions.

12. In response, it is submitted on behalf of the Respondent (Public Prosecutor) that the Learned sentencing judge did not fall into error in adopting the starting point of 3 years and arriving at the end sentence of 18 months partially suspended. The rational for the Respondent's submissions is that the sentencing judge's adoption of the 3 years head sentence was based on his Lordship's substantiated observations of the prevalence in cases of sexual abuse of women and young children in this jurisdiction. He

was justified in placing greater importance on the principle of deterrence in light of his observations and the available information before him.

13. We are of the view that the Respondent's submissions on the first ground of appeal cannot be sustained for two reasons.

14. The first reason is that, as we have noted earlier, the sentencing judge intended to take a stand and raise the starting point for this kind of offence to 3 years by using the statistical material information from the Vanuatu National Survey on Women's lives and Family Relationships 2011 to show the prevalence of this kind of offending in Vanuatu. However, we are of the view that departure from guidelines based on prevalence must be supported by some evidence or at least a submission to that effect from the party seeking to persuade the court of its existence.

15. In this case, we were informed during the hearing of this appeal that counsel for the Appellant and that of the Respondent each did not make submissions on the statistic material information used by the sentencing Judge.

16. We are of the view that it was not appropriate for the sentencing Judge not to give an opportunity to both the Appellant and Respondent counsels to make submissions on the statistical material relied upon in the Supreme Court.

17. In any event, if the statistical material was intended to be used, Vanuatu National Women bodies could also have been invited to make submissions.

18. We are clearly of the view that this type of departure from the guidelines for sentencing based on prevalence is more appropriately made by the Court of Appeal as a matter of principle and sentencing policy guidelines.

19. We finally observe that this type of departure from guidelines sentencing is more often than not initiated by the Public Prosecutor through a sentence appeal as has been done on previous occasions in the courts in this jurisdiction.

20. The second reason is the need for consistency in sentencing as an important part of the administration of justice. In the present case, the touching of breast through the clothing is the offending under section 98(a) of the Act.

21. Although, the sentencing Judge noted that the facts of the present case are similar to those in the case of *Public Prosecutor –v- Livae [2014] VUSC 118; Criminal Case No.53 of 2014 (12 September 2014)*, the nature of the offending in that case was more serious than in the present case as in that case the offences were touching the breast and also touching the vagina over the clothes. The only case on the point is the judgment of this court in T*angiat –v- Public Prosecutor [2014] VUCA 15*. The Appellant in that case, was charged with indecent assault, contrary to section 98(a) of the Act. There, the appellant had touched the victim's breast on the outside of the clothing. This court considered that touching of the breast outside the victim's clothes falls on the lower end of this particular offending. A range between 9-12 months imprisonment was considered as the appropriate starting point.

We are of the view that the sentencing Judge should have applied the case of *Tangiat –v- Public Prosecutor* as the facts in both cases were similar in nature. In any event, the sentencing Judge is bound to apply the Court of Appeal decision in *Tangiat*. This is so as consistency in sentencing as an important part of the administration of justice.

We are of the view that the starting point sentence of 3 years imprisonment imposed for the offence of touching the breast through the clothing is manifestly excessive.

Error to consider whether or not to fully suspend the sentence

The second ground of appeal is that the Learned sentencing Judge failed to properly consider whether or not to fully suspend the sentence.

It is submitted for the Appellant that the Learned sentencing judge erred in failing to consider the following relevant factors listed in section 57 (1) (a) of the Act before refusing to fully suspend the 18 months imprisonment imposed on the Appellant:

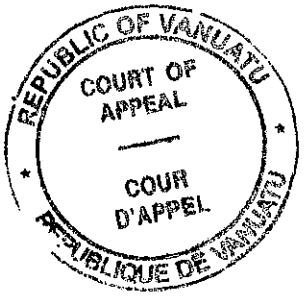
(i) the circumstances (of offending);
(ii) the nature of the crime; and
(iii) the character of the offender.

We agree with the submissions of the Appellant on the second ground also and we reject the prosecution submissions made to the contrary effect. The view we express here follows from the view we held on the first ground of appeal.

In the present case, we consider that 9 to 12 months imprisonment was the appropriate starting point. The appellant was entitled to a 1/3 reduction for his guilty plea. He was entitled to further 2 months reduction for custom reconciliation and a past clear record.

The appellant was entitled to 1 month for delay since his offending in 2012. That reduces his sentences to 3-5 months imprisonment. He was entitled to automatic parole release after serving half of his sentence.

Having served time in jail, the appellant has been deprived of the real possibility that he might otherwise have received a non-custodial sentence for the act of indecency. The appellant has spent 1 month in custody. In lieu of the sentence imposed in the Supreme Court we substitute a sentence of 4 months imprisonment to be wholly suspended for a period of 2 years. . The appellant should be released from custody forthwith.

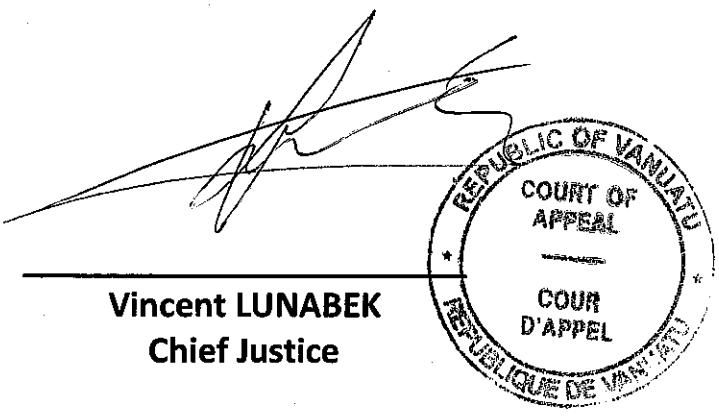


SENTENCE ORDER

1. The appeal against the sentence is allowed.
2. In lieu of the sentence imposed in the Supreme Court a sentence of 4 months imprisonment to be wholly suspended for a period of 2 years is substituted.
3. The Appellant is released forthwith from the custody.

DATED at Port-Vila this 20th day of November, 2015

BY THE COURT



Vincent LUNABEK
Chief Justice