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

Criminal Appeal Case No. 17/644 CoA/CRMA

BETWEEN: ALEX VUTI
Appellant

AND: PUBLIC PROSECUTOR
Respondent

Coram: ***Hon. Chief Justice Vincent Lunabek***
Hon. Justice Ronald Young
Hon. Justice Oliver Saksak
Hon. Justice Dudley Aru
Hon. Justice Paul Geoghegan
Hon. Justice Mary Sey

Counsel: *Mr Brian Livo (PSO) for the Appellant*
Mr Tristan Karae (PPO) for the Respondent

Date of Hearing: *Tuesday 28th March 2017 at 2:00 pm*
Date of Judgment: *Friday 7th April 2017 at 4. pm*

JUDGMENT

1. On November 4th 2016 Mr Vuti was sentenced in the Supreme Court on two counts of sexual intercourse without consent and one count of intentional assault after conviction at trial. The maximum sentences for those offences are life imprisonment and five years' imprisonment respectively.

2. Mr Vuti was sentenced to 11 years imprisonment in respect of the rape charges and one year imprisonment on the assault. The sentences were to run concurrently.

3. Mr Vuti now appeals that sentence on the basis that it is manifestly excessive. The appeal may be broken down to three issues contended by the Appellant namely:-

   a) The aggravating features of the offending did not justify a starting point of 8 years.

   b) The personal aggravating feature of a previous conviction for rape in 2010 did not justify an uplift of three years.

   c) There were personal mitigating features which should have been taken into account by the sentencing Judge but were not.

4. Mr Vuti had also appealed against his conviction however that appeal was withdrawn.

5. The facts upon which Mr Vuti was sentenced were stated briefly by the sentencing Judge at paragraph 2 of his judgment. The Appellant and the victim had been in a relationship and the Judge referred to the fact that upon Mr Vuti seeing the victim with another man, he assaulted both of them and *"dragged the victim to a house at the end of the airport"*. He then said:-

   "For good measure on the way there you beat the victim again. You made threats against her and you forced her to have sexual intercourse. She did not want to have sex with you but because of the violence she did not resist. The physical and sexual abuse continued for some days until the victim decided to go to the police".

6. In arriving at the sentence of 11 years the sentencing Judge referred to the well-known decisions in PP v. Scott[1] and PP v. August[2]. He acknowledged that those authorities refer to a starting point in rape cases of five years where there are no aggravating or mitigating features. He then referred to three aggravating features which justified an increase in the starting point from five years to eight years. Those features were as follows:-

   a) There was violence used over and above the force necessary to commit rape.

   b) The rape was repeated.

   c) The victim was *"kept captive for some days"*.

7. The Judge then referred to the fact that Mr Vuti was previously convicted of an offence of sexual intercourse without consent in 2010 in respect of which he was sentenced to three years imprisonment. In respect of that issue, the sentencing Judge stated at paragraph 6 that:-

   "As indicated above, you were recently convicted of a similar offence. Because this reoffending was so close to your supposed release from prison the sentence should be further increased to 11 years. I do not propose to differentiate between the two counts of rape. The sentence on each count is 11 years."

[1] [2002] VUCA 29
[2] [2000] VUSC 73

8. The sentencing Judge found that there were no personal mitigating features which would justify any decrease in the sentence. At paragraphs 7 and 8 of his sentencing judgment he stated:-

> *"7. There are absolutely no other redeeming features about your character or the events. There can be no discount for any custom settlement because, according to you, you have a broken leg which has prevented you from organizing one. Nor can you pray in aid a previous good character. You are not entitled to any discount for a timely plea because you were found guilty after trial. You have shown no remorse for what you have done, quite the reverse your attitude seems to be as you had spent money on the victim, you could do what you want to her. You will serve 11 years. On each count of rape, the sentences to be served concurrently.*
>
> *8. I have concerns that you are a serial offender and should receive a longer sentence but I have only evidence of two convictions (the one in 2010 and the one this year) and 11 years is the maximum sentence I can impose".*

9. The Court of Appeal in Boesaleana v. PP[3] referred to the approach to be taken in respect of sentencing. At paragraph 6 the Court stated:-

> *"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."*

[3] [2011] VUCA 33

10. With reference to the first rape on September 14th 2015, Mr Livo submitted that the Judge was wrong to find that there was violence used over and above the force necessary to commit rape as the rape occurred *"many hours"* after the assault had finished. Mr Livo submitted that there was no actual violence or force used at the time of the rape or immediately before it. We reject that submission. The violence perpetrated against the victim was serious violence which would have had an undeniable effect upon her. The Judge was entitled to take that violence into account. Any suggestion that violence cannot be regarded as relevant unless it occurs at the time of the rape or immediately before it must be rejected.

11. Mr Livo also took issue with the Judge's finding that the victim was kept captive for some days. He submitted that the evidence at trial was that the victim chose to stay at home the day after she was raped and not go to work. He submitted that while she may have felt unable to leave the house, she was not held captive.

12. We reject this submission. It is clear from the evidence that the assaults perpetrated upon the victim caused her to feel unable to leave the home and the Judge was again entitled to take the view that he did on the facts as he found them. We note that in his verdict judgment he accepted the evidence of the victim that she did not want to leave the house because of her injuries and that she was also frightened by Mr Vuti's threats of further violence and his threats to kill her and her family if she ran away or did not obey him.

13. As to Mr Livo's submission that the aggravating features of the offending did not justify a starting point of eight years, we do not agree.

14. In submitting that a starting point of eight years was too high, Mr Livo appears to have overlooked or ignored the fact that there were two rapes. Mr Livo submitted that a starting point in respect of the first rape should have been seven years. His submissions took no account however of the fact that there was a second rape which occurred within a month of the first. It would be completely unacceptable for the Court to impose a sentence which effectively ignored that rape. Accordingly, if the second rape was regarded as a rape without any aggravating or mitigating features an appropriate starting point would be one of 5 years. The circumstances of this particular case would suggest that a starting point in excess of five years could easily be justified, however leaving that issue to one side and taking the two rapes together it could not be said that a starting point of 12 years would have been excessive.

15. With reference to that point, we consider that the sentencing Judge also failed to take proper account of the fact that there were two rapes. That is clear from the fact that he fixed a starting point of 8 years to which he then added an uplift of 3 years for the prior conviction. As we have said, the first rape alone justified a starting point of 8 years. The sentencing judge should then have assessed what should be added for the second rape thereby reaching a starting point which adequately reflected both offences.

16. As to the imposition of an uplift of three years to take account of a previous conviction for rape in 2010 we agree that that degree of uplift was excessive. The uplift of three years equals the sentence of three years imposed in respect of the previous conviction.

While it is entirely appropriate to take account of previous convictions a sentencing Judge must be careful not to effectively re-sentence an offender in respect of an earlier conviction. We consider that the imposition of an uplift equal to the original sentence imposed was excessive. We consider that the appropriate uplift should have been no more than one year.

17. It will be clear however from our reference to 12 years as an appropriate starting point in respect of both rapes, that the addition of an uplift of one year would bring about a prospective sentence of 13 years before allowance for personal mitigating features and before any consideration of the final sentence overall.

18. As to the submission that the sentencing Judge was wrong to find that there were no mitigating features, Mr Livo referred to a number of matters which he submits should have been taken into account by the sentencing Judge :-

    a) Mr Vuti expressed *"deep regrets"* regarding the assault, a matter referred to in the pre-sentence report. While that is correct the report writer refers to the fact that the appellant stated he felt deep regret only with reference to the charges of assault and threatening to kill. With reference to the most serious charges it is clear that he had no remorse and the pre-sentence report also refers to the report writer's assessment that the appellant was justifying himself in his offending. Further, given his denial of the rapes, Mr Vuti could hardly claim to be remorseful. In the circumstances, the Judge was entitled to draw the conclusion that the appellant had shown no remorse and therefore not provide any allowance for it.

b) Mr Vuti reconciled with the man he assaulted. That reconciliation was in respect of another victim and is irrelevant.

c) Mr Vuti was willing to perform custom reconciliation with the victim if given the chance. While that may be so, a reconciliation did not take place. Furthermore, we would not be surprised if the victim refused to take part in any ceremony given the nature of the offending in this case.

d) Mr Vuti is a marine biologist and had *"prospects of rehabilitation"*. Given the fact that this was the appellant's second and third convictions for rape within seven years we consider that there must be significant doubts regarding the prospect of rehabilitation. The fact that Mr Vuti may have expertise as a marine biologist is of little significance when taking into account the seriousness of the offending.

e) Mr Vuti was required to use crutches to walk long distances and therefore imprisonment will be harsher for him than for most persons. This is not a factor which justifies any reduction in sentence.

19. We agree with the sentencing judge that there were no personal mitigating factors which could be taken into account.

20. Accordingly, despite the view we have expressed regarding the uplift applied by the sentencing judge we regard the sentence as one which, in its totality, properly reflects the culpability of the appellant.

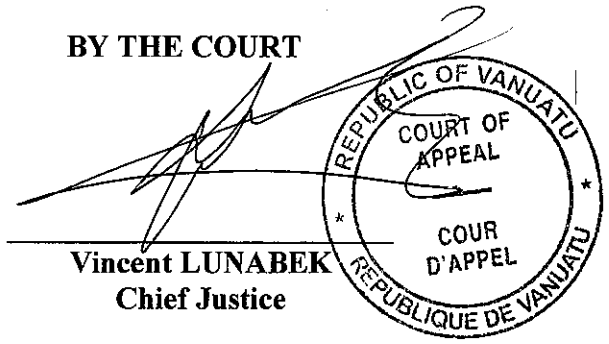
21. Before disposing of this matter we make an observation which we hope will assist counsel in the future. In the course of his submissions Mr Livo referred us to many

other cases involving rape sentencing. The submissions referred to the final sentences imposed in each case. Such a practice is common in appeals such as this. While this is intended to give the court some comparative cases that end is not achieved when counsel refer only to the final sentence. To be of any assistance any reference should be to the starting point adopted by the sentencing Judge, as that starting point will focus on the offending and the aggravating and mitigating features of the offending. That provides a potentially useful comparison. A final sentence, which necessarily involves the application of aggravating and mitigating features which are personal to the offender, does not.

22. For the reasons referred to the appeal is dismissed accordingly.

DATED at Port Vila this 7th day of April, 2017

BY THE COURT



Vincent LUNABEK
Chief Justice