

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

**Criminal Appeal  
Case No.16/3681 CoA/CRMA**

**BETWEEN: PUBLIC PROSECUTOR**  
*Appellant*

**AND: GEOFFREY MORKRO**  
*Respondent*

**Coram:** *Hon. Chief Justice Vincent Lunabek*  
*Hon. Justice John Mansfield*  
*Hon. Justice Ronald Young*  
*Hon. Justice Dudley Aru*  
*Hon. Justice Paul Geoghegan*  
*Hon. Justice David Chetwynd*  
*Hon. Justice Mary Sey*

**Counsel:** *Ms Bettina Ngwele for the Public Prosecutor – Appellant*  
*Mr Henzler Vira for the Respondent*

**Date of Hearing:** *30<sup>th</sup> March 2017 at 2pm o'clock*

**Date of Judgment:** *07<sup>th</sup> April 2017 at 4 pm o'clock*

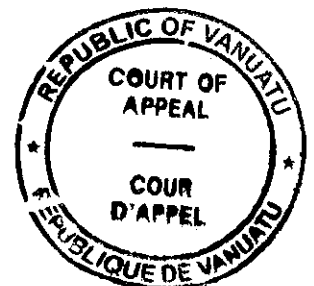
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**JUDGMENT**

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1. This is a Public Prosecutor's appeal pursuant to section 200 of the Criminal Procedure Code Act [Cap 136] which subsection 4 provides:

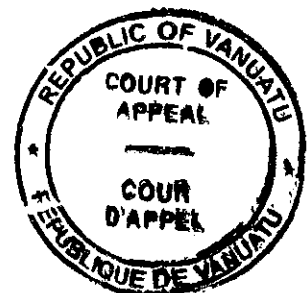
*"The Public Prosecutor may appeal to the Court of Appeal on a point of law against any judgment of the Supreme Court exercising original jurisdiction."*



2. The power of the Court of Appeal in an appeal such as this is well settled as stated by this court in *Andrew Tom Naio & Noel Nathaniel –v- The Public Prosecutor*, Criminal Case No.7 of 1997.

## BACKGROUND

3. A complaint was made in 2012 to the police at Lakatoro police station, Malekula, against the Respondent for sexual intercourse without consent, contrary to section 91 of Penal Code. The police investigated the complaint and completed their investigations by 10 December 2012. A charge was not laid against the Respondent until 26 February 2016.
4. Mr Geoffrey Morkro was then charged, tried and convicted on one count of sexual intercourse without consent, contrary to section 91 of the Penal Code by the Supreme Court on 21 October 2016 at Lakatoro, Malekula.
5. On 22<sup>nd</sup> October 2016, he was then sentenced to 7 years imprisonment as a starting point by the sentencing judge based on the following aggravating features of the offending:
  - a) There was a degree of violence used
  - b) The respondent was in possession of rifle 22 at the time of offending
  - c) There was a degree of planning
  - d) There was an age difference of 9 years
  - e) The respondent was married with 3 children
  - f) The victim was a child and a student
  - g) The distance at which the offending took place was such that the victim was at great risk of being hurt if she called out or refused to give in to the respondent's demand
  - h) There was a complete ignorance of the complainant's plea for him to stop
  - i) There is close family relationship between the respondent and victim and a breach of trust



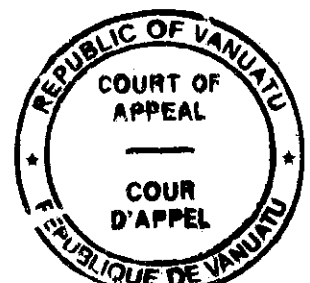
- j) The victim was exposed to risk of pregnancy and contracting sexually transmitted diseases due to unprotected sex
6. His sentence of 7 years was reduced by 2 years to reflect the mitigating factors leaving an end sentence of 5 years imprisonment. The sentencing judge treated the case of the Respondent as an exceptional one to order that the sentence of 5 years imprisonment was to be suspended for a period of 2 years under section 57 of the Act. The Judge explained that the reason for the suspension was due to the delay in laying the appropriate charge against the Respondent for a period of 4 years. Mr Morkro was effectively sentenced to 5 years imprisonment suspended for a period of 2 years. In addition, he was ordered to perform 200 hours community work.

### **GROUND OF APPEAL**

7. The Public Prosecutor now advances this appeal against the sentence of the Respondent by the Supreme Court dated 22<sup>nd</sup> October 2016 on the following grounds:
- a) The learned judge erred in law when he suspended the sentence of 5 years imprisonment which sentence was manifestly inadequate having regard to all the circumstances of the case.
- b) The learned judge erred in law when he treated the delay in laying of charges as an exceptional circumstance.

### **CONSIDERATION**

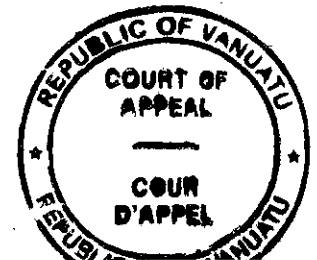
8. Before we considered the grounds of appeal, we noted that the Appellant's counsel applied for evidence by a sworn statement to be given to the Court. We discussed the opportunity with both counsel and we refused to accept the statement as it would not be fair to the Respondent and his counsel to do so.
9. We now consider the two (2) grounds of appeal in turn.



10. **Ground 1:** The suspension of sentence of 5 years imprisonment for sexual intercourse without consent is wrong in law and is inadequate having regard to all the circumstances of the case.
11. The Appellant's counsel submits as follows:
12. First, the learned judge failed to follow existing precedent when he suspended the sentence of the Respondent. Ms Ngwele refers to guideline principles in sexual intercourse without consent judgment cases and serious sexual abuses against children in *Public Prosecutor –v- Gideon [2002] VUCA 7*, *Public Prosecutor –v- Scott [2002] VUCA 29*, *Public Prosecutor –v- Ali [2000] VUSC 73* when the courts stated:

*“It will be in the most extreme of cases that suspension could ever be contemplated in a case of sexual abuse...” (PP v. Gideon)*

*“The offence of rape is always a most serious crime. Other than in wholly exceptional circumstances, rape calls for an immediate custodial sentence” (PP v. Ali [2000] VUSC 73).*
13. Second, there is nothing in this case which brings it to the category of exceptional circumstance. Suspension is not appropriate given the nature and seriousness of the offending as reflected in the aggravating features considered by the learned judge (which were referred to earlier in this judgment at page 2).
14. Third, the aggravating factors outlined in this case outweigh the need to suspend on the basis of delay in laying of charges against the respondent. The learned judge put too much weight on the delay factor that led to the suspension of the sentence.
15. Fourth, the suspension of sentence in this case will convey a contradictory message to the victim, the community at large and other potential offenders of



this sort to the existing strict guideline principles adopted by the courts in sexual abuse cases.

16. Fifth, the end sentence to be imposed should be one of a custodial sentence.
17. In response, the Respondent counsel submits to the following effect:-
18. First, that the question of suspension of sentence involves the exercise of judicial discretion. Each sentencing case must be considered on its own unique facts and circumstances.
19. Second, in this case, no error of principle or approach has been identified by the Appellant. The case was properly identified to be "exceptional" by the sentencing judge.
20. Third, the sentence was within the acceptable range of sentences for this offence.
21. Section 57 of the Penal Code relevantly deals with the suspension of sentences of imprisonment. Subsection (1) (a) says:

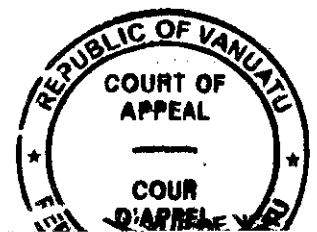
**"PROVISION FOR SUSPENSION OF SENTENCES OF IMPRISONMENT**

*(1) The execution of any sentence imposed for an offence against any Act, Regulation, Rule or Order may, by decision of the court having jurisdiction in the matter, be suspended subject to the following conditions:*

*(a) If the court which has convicted a person of an offence considers that:*

- (i) In view of the circumstances; and*
- (ii) In particular the nature of the crime; and*
- (iii) The character of the offender,*

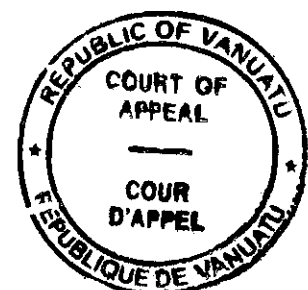
*It is not appropriate to make him or her suffer an immediate imprisonment; it may in its discretion order the suspension of the execution of*



*imprisonment sentence it has imposed upon him or her, on the condition that the person sentenced commits no further offence against any Act, Regulation, Rules or Order within a period fixed by the court, which must not exceed 3 years;*

...”

22. When suspending a sentence of imprisonment, a sentencing judge must take into account the following three (3) characteristics:
- (i) The circumstances of the case; and
  - (ii) The particular nature of the crime; and
  - (iii) The character of the offender.
23. We are of the view that, in this case, the aggravating circumstances and the serious nature of the offending do not justify the suspension of the 5 years imprisonment sentence. Further there is nothing before the sentencing judge either in the Pre-sentence report or otherwise within the character of the offender (Respondent) that would justify a suspension of the sentence. An immediate custodial sentence should be imposed in line and consistently with the guideline judgments principles on these types of cases as repeatedly stated by this Court. See *PP –v- Gideon [2001] VUCA 15; PP –v- Scott [2001] VUCA 29* and others.
24. In this case, the end sentence of 5 years imprisonment is not in dispute. What is in dispute is its suspension. We agree with the Appellant that the sentencing judge erred in suspending the 5 years imprisonment sentence in all circumstances of this case.
25. We allow the appeal on the first ground.
26. **Ground 2:** The learned judge erred in law when he treated the delay in the laying of charges as an exceptional circumstance.



27. The Appellant submits that the delay in the laying of charges should not be treated as an exceptional circumstance that warrants a suspension rather it should be considered as a mitigating factor that would allow for reduction of sentence. In this case, the Appellant says the learned judge should allow a deduction in sentence to reflect the delay of 4 years to reflect consistency in sentencing approaches taken in previous cases by the courts when dealing with prosecutorial delays. Ms Ngwele refers to some of those cases in her submissions.

27. The Respondent refers the Court to the principle stated by this Court in *McEwen -v- PP [2011] VUCA 32*, when the Court said:

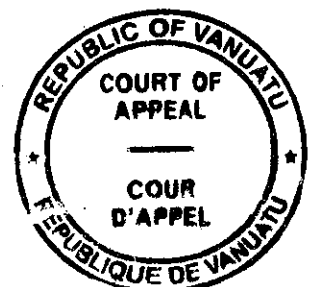
*"...the integrity of the judicial system and public confidence in the administration of justice demand that when serious allegations are made they should be heard speedily."*

28. The Respondent contends that in the present case, a complaint was made to the police in 2012. Investigations were completed by 10 December 2012. A charge was not laid until 26 February 2016. There was no explanation of such a delay. Had the respondent been charged in 2012 or early 2013, it is highly likely he would have been tried and sentenced, and would already have served his sentence.

29. We take note of the principle outlined in *McEwen v. PP* above.

30. The question is whether the delay in laying of charges by prosecution constitute an exceptional circumstance in this case.

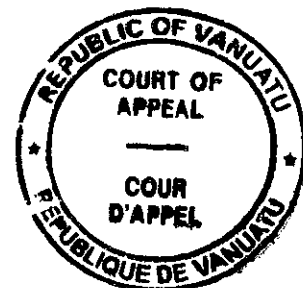
31. We are of the view that the delay of 4 years would not be an exceptional circumstance so that suspension could be contemplated in a case of sexual intercourse without consent and sexual abuse against women and children and in particular in this case considering the serious nature of the offending.



32. We are of the view that giving a substantial reduction allowance remedies the delay and leaves the case back to its proper sentencing considerations in line and consistently with the guideline judgments principles on these types of cases.
33. We therefore agree with the Appellant that in the circumstances of this case, the delay of 4 years does not amount to an exceptional circumstance which justifies the suspension of 5 years imprisonment sentence. In our view the sentencing judge erred in treating the delay of 4 years as an exceptional circumstance and to justify the suspension of 5 years imprisonment sentence where it should not be the case.
34. We also allow the appeal on the second ground.

#### **APPEAL DISPOSITION AND ORDERS**

35. The Appellant submits that an allowance of 6 months is appropriate to be deducted from the Respondent's end sentence of 5 years imprisonment to reflect the 4 years delay.
36. We are of the view that, as this is a prosecution appeal and time has passed since the sentence of the Supreme Court on 22<sup>nd</sup> October 2016, that a reduction of 12 months rather than 6 months for the delay is justified.
37. We allow a further reduction of 3 months to reflect the fact that the Respondent has already performed the 200 hours of community work ordered against him by the sentencing judge (as we have been informed by the Respondent's counsel).
38. This represents a total of 15 months reduction to the 5 years imprisonment sentence leaving a balance of 3 years and 9 months imprisonment sentence.





39. The Respondent will be sentenced to 3 years and 9 months imprisonment with immediate effect.

**ORDERS**

40. The appeal is allowed.

41. The Respondent's sentence of 5 years imprisonment suspended for a period of 2 years and 200 hours of community work imposed by the Supreme Court on 22 October 2016 is set aside.

42. The Respondent, Geoffrey Morkro is resented by this Court to 3 years and 9 months imprisonment with immediate effect. A warrant is issued for his immediate arrest.

**DATED at Port-Vila this 7<sup>th</sup> day of April, 2017**

**BY THE COURT**



**Hon. Vincent Lunabek**  
**Chief Justice**

