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

CRIMINAL APPEAL CASE No. 16/4026 CoA/CRMA

BETWEEN: **PUBLIC PROSECUTOR**
Appellants

AND: **DAVID PATTINSON**
Respondent

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

Counsel: *Mr J Naigulevu for the Appellant*
Ms J Tavoa for the Respondent

Date of Hearing: *28 March 2017*

Date of Judgment: *7 April 2017*

JUDGMENT

1. Following a trial the respondent, David Pattinson, was convicted of one charge of indecency with a young person contrary to section 98A of the Penal Code [Cap 135]. He was sentenced to two years imprisonment suspended for 12 months. He was also ordered to perform a custom reconciliation ceremony with the complainant and his family. The public prosecutor appeals against that sentence on three grounds. It is said too much weight was given to personal mitigating factors; secondly the judge did not treat the respondent's offending as seriously as the facts warranted and thirdly, the judge suspended the sentence and the circumstances of the case required an immediate custodial sentence.

2. In the judgement as to verdict the judge accepted evidence from the complainant AA that there had been at least two incidents or occasions of indecency. One occurred on the respondent's yacht. It is described in full at paragraph 9 of the judgment and again at paragraph 44 where the judge says;

> *"AA told the Court that at the time the accused touched his penis they were sitting on a bed in front of the yacht. AA said that when DP had finished, he pulled up his trousers and then went to the kitchen. Further that when DP*

came back he lay down on the bed which was under the deck and he put his mouth on AA's tummy. I accept this piece of evidence from AA and I believe him".

3. The second incident noted by the judge occurred at a later date in the Hibiscus Motel in Port Vila. The respondent admitted in evidence that both he and AA were naked in a motel room. The respondent explained he was a naturist. He denied grabbing or touching AA's penis or any other activity with a sexual connotation.

4. In the judgment on verdict the judge refers to the other allegations of touching in the hotel room but does not make any specific finding about the incident. The judge says, "*...the evidence relating to an act of indecency by the accused "in the presence of" AA is overwhelming."* The judge then goes on to discuss the respondent's admitted nakedness in the presence of AA and it is clear from those discussions the judge was of the view that that itself constituted an act of indecency.

5. The judge repeats a finding that, "*AA is telling the truth in relation to this charge preferred against the accused*" and at paragraph 50 of the judgment on verdict says :-

> *"I find the offending by the accused was that of committing an indecent act "upon" or "in the presence" of AA who is a child under the age of 15. As I stated earlier in this judgment, no physical contact is required for an act to have been committed "in the presence of" a child. The accused himself admitted that he was naked in AA's presence. This, plainly was an act which was committed in the presence of a child and it is sufficient for resolution of the present case to say this was capable of constituting an act of indecency with a young person"*

6. When sentencing the judge referred to the respondent's predilection for naturism and acknowledged his admission of being naked in AA's presence. However, when dealing with the defence submissions that this was an offence at the lower end of the scale the judge said there was a need for a prison sentence "*to mark the seriousness of the offending*".

7. The judge had premised the sentencing decision by saying :-

> *"The facts upon which you were found guilty and convicted are contained in the judgment on verdict delivered on 4 November"*

Unfortunately the judge does not then go on to say specifically what those facts are. It is implicit in the comments that the touching on the yacht was taken into account in sentencing because the judge dealt with that specific incident in the judgement on verdict and expressly commented that AA's evidence about what happened on the yacht was accepted. It is also plain the judge did not accept defence submissions that this was merely an old man parading naked in front of a young boy. Apart from the yacht incident the judge also accepted the truthfulness of AA's evidence generally but whilst it is obvious the judge took the touching of

AA's penis on the yacht into account it is not so obvious the judge took the touching of AA's penis and the physical contact at the motel into account when deciding how serious the offending was.

8. The judge adopted a "starting point" of 2 years and further indicated that factors aggravating the offence (including age difference) would merit an uplift of 1 year. After taking into account all the facts of the offending, aggravating or mitigating, the judge reached an actual starting point of 3 years imprisonment. This was entirely in line with the submissions of the prosecutor. The judge clearly felt the offending was as serious as submitted by the prosecution. It is perhaps unfortunate the specific facts relied on in sentencing were not set out but the judge did accept the prosecution submission the offence was serious enough to warrant a sentence of three years.

9. The judge then considered mitigating factors and mentioned the respondents advanced age (he was 75 years old), his poor health and the five months already spent in custody. The judge also referred to his support, including financial support, of a family of 9. The judge concluded that these factors warranted a reduction of the sentence by one year resulting in an end sentence of 2 years, exactly the same sentence proposed by the prosecutor. The Judge accepted the respondent's previous good character and mentioned a belief the respondent, "*was still in denial*" and was trying to justify his offending, "*on the basis you are a nudist and that it was the complainant who had come to your yacht uninvited*". The respondent was counselled to come to terms with his offending and to realise nudity in the presence of young persons was not an acceptable concept in Vanuatu culture. The judge conclude by saying that in the circumstances particular to the case a sentence of 2 years suspended for a period of 12 months would be imposed.

10. It is difficult to reconcile the position taken on appeal by the prosecutor and that taken in sentencing submissions. In submissions to this court the prosecutor suggested the judge should have started at 4 years and uplifted by a year to 5 years as a starting sentence. With respect to the learned Public Prosecutor this would have elevated the offence from serious to really serious. The judge, without specifically referring to touching, obviously felt the offending was serious, certainly more so than offending consisting of just parading naked in front of AA, and sentenced accordingly. The difference between the judge and the prosecution at sentencing was the decision to suspend.

11. Whether a judge should suspend a sentence in accordance with section 57 of the Penal Code is an exercise of judicial discretion. The judge is required to take into account all the circumstances of the case, the nature of the crime and the character of the offender. This court has given guidance about suspending sentences where there is sexual abuse. In *Gideon* [1] this court said:-

> *"... there is an overwhelming need for the Court on behalf of the community to condemn in the strongest terms any who abuse young people in our community."*

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[1] *Public Prosecutor v Gideon* [2002] VUCA 7; Criminal Appeal Case 03 of 2001 (26 April 2002)

Later in the same case we said:-

> *"It will only be in a most extreme of cases that suspension could ever be contemplated in a case of sexual abuse. There is nothing in this case which brings it into that category. Men must learn that they cannot obtain sexual gratification at the expense of the weak and the vulnerable. What occurred is a tragedy for all involved. Men who take advantage sexually of young people forfeit the right to remain in the community."*

~~Whilst Gideon involved unlawful sexual intercourse those views apply when there~~ is sexual abuse no matter what legal label that abuse is given.

12. This case involved the respondent touching AA's penis. The judge accepted AA was telling the truth when he gave his evidence and that evidence clearly shows two occasions when this happened. AA's evidence also shows that the respondent encouraged AA to touch his penis and that AA describes how he (the respondent), *"took my hand and put it on his penis and I was afraid and I was shaking."* The respondent's behaviour puts this offence into the serious bracket and suspension of the sentence is not appropriate.

13. The appeal is allowed and a warrant will now issue for the arrest of the respondent David Pattinson and for his detention for a period of two years effective form the date of his arrest.

14. Before leaving this appeal we should mention section 72 of the Criminal Procedure Code. It says:-

> *72. Joinder of counts in a charge or information*
>
> *(1) More than 1 offence may be put together in the same charge or information if the offences charged are founded on the same facts or form, or are a part of a series of offences of the same or similar character.*
>
> *(2) Where more than 1 offence is put in a charge or information, a description of each offence so charged shall be set out in a separate paragraph of the charge or information called a count.*
>
> *(3) Where, before trial or at any stage of a trial, the court is of opinion that a person accused may be embarrassed in his defence by reason of being charged with more than 1 offence in the same charge or information, or that for any other reason it is desirable to direct that the person should be tried separately for any 1 or more offences put in a charge or information, the court may order a separate trial of any count or counts of such charge or information.*

We suspect that had the prosecution taken note of the requirements of section 72 the judge's task in this case, both at trial and at sentencing, would have been far easier. Instead of there being two counts the Information read :-

"Particulars Blong Wrong

David Pattinson, you're 73 years of age. Sometime between the month of April and July 2014 on two different occasions you committed the act of indecency in the presence of AA, at the time he was 14 years."

The prosecution should have described the two different offences in separate paragraphs or counts. This would have made it clear that there were two incidents both of which involved physical contact between the respondent and AA. The judge accepted the totality of AA's evidence and found, *"The charge of act of indecency with a young person ...proved by the prosecution beyond reasonable doubt"* but may have been wrong footed as to the second incident and the seriousness of the offending overall.

DATED at Port Vila this 7th day of April 2017

BY THE COURT

Hon. Vincent LUNABEK
Chief Justice.