

**BETWEEN:** Public Prosecutor  
*Appellant*

**AND:** William Ure and Kalmet Kalo  
*Respondents*

**Coram:** *Hon. Vincent Lunabek, Chief Justice*  
*Hon. Justice John von Doussa*  
*Hon. Justice Ronald Young*  
*Hon. Justice Oliver Saksak*  
*Hon. Justice Daniel Fatiaki*  
*Hon. Justice Dudley Aru*  
*Hon. Justice Paul Geoghegan*

**Counsel:** *Mr Simcha Blessing, Mr Lenry Young and Mr Philip Toaliu for Public Prosecutor*  
*Mr Junior Garae for Respondents*

**Date of Hearing:** *Friday 14<sup>th</sup> July 2017*

**Date of Judgment:** *Friday 21<sup>st</sup> July 2017*

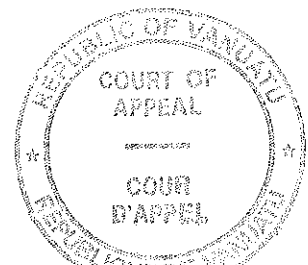
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## JUDGMENT

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### **Introduction**

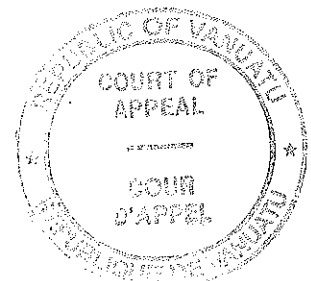
1. This is an appeal from the Public Prosecutor against imprisonment sentences of 8 months imposed by the Supreme Court against the two respondents for unlawful sexual intercourse with a child under 15 years at Luganville, Santo, on 15<sup>th</sup> March 2017.
2. The notice of appeal is lodged pursuant to subsection 4 of section 200 of the Criminal Procedure Code Act [CAP 136]. In *Naio v. Public Prosecutor*



[1998] VUCAI this Court has settled its powers when dealing with such an appeal.

### **Background**

3. A complaint was made on 10<sup>th</sup> March 2017 at the police station in Luganville, Santo, against the two respondents for unlawful sexual intercourse with a child under 15, contrary to s. 97(2) of Penal Code.
4. A criminal information charge containing a representative charge of unlawful sexual intercourse was laid against each of the Respondents on 10<sup>th</sup> March 2017.
5. On 13 March 2017 each of the respondents pleaded guilty and was convicted on one count each of unlawful sexual intercourse with a child under 15, contrary to S. 97(2) of the Penal Code. The maximum sentence for the offence is 5 years imprisonment.
6. On 15 March 2017, each respondent was sentenced to 3 years imprisonment as a starting point after taking into account the difference in ages between the complainant who was between 13 years and 14 years and the respondents who were in their early 20's and the admitted repetition of offending.
7. The sentencing Judge discounted each sentence by six months to take account of the limited remorse they expressed and for their lack of previous convictions. That left a sentence of 2 years imprisonment.
8. The Judge then stated:  
*"They have had the maturity to admit their offending and plead guilty so they are both entitled to a full 1/3 reduction in their sentences.*



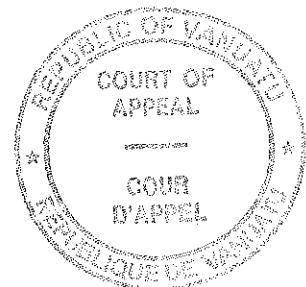
*They have effectively spent 4 months on remand and so their sentences can be further reduced by 8 months. Both defendants will go to prison for a period of 8 months from today.”*

### **Grounds of Appeal**

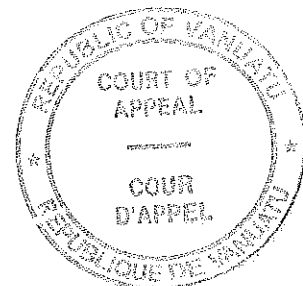
9. The following grounds of appeal are contained in an Amended Memorandum of Appeal filed 4 July 2017:-
  1. The primary Judge placed undue weight on mitigating factors personal to the respondents resulting in the imposition of sentences that were manifestly inadequate.
  2. The primary Judge made an arithmetical error which contributed to the imposition of end sentences that were manifestly inadequate.
  3. And/or alternatively the primary Judge relied on principles not known to law.

### **Consideration**

10. We now consider the grounds of appeal in turn.
11. **Ground 1:** Placing undue weight on mitigating factors resulting in inadequacy of sentence.
12. The Public Prosecutor recognized and accepted that the 3 year starting point for each of the respondents is not in dispute as it is within the acceptable range of sentences for this kind of offending.



13. The Public Prosecutor, however, submitted that the primary Judge placed undue weight on mitigating factors personal to the respondents when he discounted each sentence by six months to take some account of the limited regrets they expressed and for their lack of previous convictions. The Public Prosecutor submitted that a reduction of 3 months for their limited regrets and remorse should be appropriate.
14. In this case, the respondents were first time offenders; they cooperated with the police; they expressed limited regrets and remorse. We are of the view that a 6 month deduction is not out of line given comparable cases and the Court should not interfere with this exercise of discretion by the primary Judge.
15. This first ground of appeal must fail.
16. **Ground 2:** Arithmetical error or error in calculation.
17. The Public Prosecutor submitted that the primary Judge made an error in his calculation of the end sentence which should be more than 8 months imprisonment.
18. Each respondent was charged with one count of unlawful sexual intercourse with child under 15. The Judge adopted a starting point of 3 years. He deducted 6 months for mitigating factors. The remaining sentencing figure therefore should be 2 years and 6 months instead of the 2 years the judge calculated. This was an arithmetical error.
19. From 2 years and 6 months a “full 1/3<sup>rd</sup> reduction” is made. That leaves a sentence of 1 year and 8 months imprisonment.



20. Each respondent had spent 4 months in custody before they were sentenced on 15 March 2017. Accordingly eight months should have been be deducted from the balance sentence of 1 year and 8 months leaving 12 months imprisonment.
21. The final remaining sentencing figure would have been 12 months imprisonment. Therefore, there was an arithmetical error in the calculation of the sentences. However, we consider that 8 months imprisonment as an end sentence was within the acceptable range for this type of offending. We, therefore, dismiss the second ground of appeal.
22. We must emphasize that the arithmetical error in calculation of the sentencing figure is not an appealable question of law requiring the Public Prosecutor to lodge an appeal pursuant to s. 200(4) of the Criminal Procedure Code Act [CAP 136]. The simple approach to follow is for the Public Prosecutor, once the arithmetical error is identified, to notify and inform the sentencing Judge so that the error can be rectified.
23. We do not see the need to consider the third ground of the appeal.
24. In this case, we dismiss the appeal.

**DATE at Port Vila, this 21<sup>st</sup> day of July 2017.**

**BY THE COURT**



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**Vincent LUNABEK**  
**Chief Justice**

