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

Criminal Appeal
Case No. 17/3321 CoA/CRMA

BETWEEN: JACK NAMPO
Appellant

AND: PUBLIC PROSECUTOR
Respondent

Coram:	***Hon. Chief Justice Vincent Lunabek*** ***Hon. Justice Bruce Robertson*** ***Hon. Justice John Mansfield*** ***Hon. Justice Daniel Fatiaki*** ***Hon. Justice Oliver Saksak***
Counsel:	*Ms P. Kalwatman for the Appellant* *Mr J. Naigulevu for the Respondent*
Date of Hearing:	*9th July 2018*
Date of Decision:	*20th July 2018*

JUDGMENT

1. At the commencement of the hearing of the appeal counsel for the respondent sought leave to supplement the appeal record by including the prosecutor's sentencing submissions provided to the trial judge and which the appellant's counsel had overlooked in preparing the appeal book. The application was not opposed and we have taken the liberty of referring to the submissions in determining this appeal.

2. The appellant was originally charged with 3 counts of Sexual Intercourse Without Consent and 3 related counts of Threats to Kill involving the 2 elder daughters and the appellant's wife. The intercourse offences occurred over a 12 month period and the victims were the appellant's 3 daughters aged 5, 14 and 17 years, respectively. The sexual intercourse in each instance was by "*digital penetration*".

3. After the defendant pleaded not guilty, a trial commenced on all counts and the 2 elder daughters gave unshaken evidence that the appellant, had digitally penetrated them once on different occasions. After a luncheon adjournment when the trial resumed, the appellant was re-arraigned at his counsel's request and entered guilty pleas on the 3 counts of Sexual Intercourse Without Consent. The prosecution then entered nolle prosequis on the 3 Threats to kill counts which were not proceeded with.

4. In sentencing the appellant to 15 years imprisonment the trial judge said:

"4. *As has been said in various cases over the years the starting point for an offence of rape committed by an adult with no aggravating or mitigating circumstances should be 5 years. That is where we start in this case.*

5. *The offence involving a 5 year child must attract a substantial uplift and ever more so when the child is a son or daughter. In addition this was 1 of a series of rapes. A son or daughter would be entitled to feel that he or she will be safe in their own home and would be protected by a parent. When a parent sexually abuses one of their own children in their home this is such a fundamental breach of trust that the sentence should reflect the catastrophic harm, physical and psychological, that such abuse will cause. I do not see that a sentence any less than 15 years should be imposed.*

6. *For the rape of a 14 year child the sentence should be only slightly less because although less harmful than abuse involving a very young child, the breach of trust and harm caused is still very serious. The sentence should be 12 years imprisonment.*

7. *When the rape involves a young adult there is still considerable harm and so for the offence involving the 17 year old daughter the defendant will be sentenced to 10 years imprisonment.*

8. *In mitigation it can only be said the defendant has taken part in a ceremony involving payment of a fine and so has shown some remorse. He also has a clear record up to now. This is of only minor relevance in mitigation. Taking these matters into account the sentences can be reduced by 6 months.*

9. *As the guilty pleas were entered only after two of the victims had given evidence there can be no credit given to guilty pleas. That leaves sentences of 14 ½ years, 11 ½ and 9 ½ years.*

10. *The offences were committed over a period of some 12 months and involved 3 separate instances of rape. In those circumstances they cannot be said to have occurred within one course of conduct. The sentences should be consecutive. That would lead to a total sentence of 35 ½ years being imposed.*

11. *When faced with such a sentence the Court must stand back and look at appropriate totality of sentence to be imposed. 35 ½ years would offend against the principle of totality and in all the circumstances the sentence to be imposed should be 15 years."*

5. In the present case the trial judge adopted what might be described as the traditional method of sentencing for each offence and then adding up the individual sentences to arrive at an aggregate and finally, standing back and assessing the aggregate against the "*totality principle*" and adjusting the total to reflect the overall criminality of the offending. However, no downward adjustments were made to the individual sentences.

6. The appellant appealed the sentence on 3 grounds:

   (1) That the learned sentencing judge erred by failing to provide any discount for the guilty pleas;

   (2) That the sentence of 15 years imprisonment was manifestly excessive;

(3) That the learned sentencing judge erred by failing to impose a separate sentence for each of the three charges.

7. A pre-sentence report and sentencing submissions were provided to the trial judge before sentence was passed.

8. The pre-sentence report showed that the appellant had performed a customary reconciliation ceremony to his family members and village chief where he presented a pig valued at VT50,000 and a kava stump worth VT6,000. This mitigating factor is mentioned in the judge's sentence and, together with the appellant's past clean record, received a discount of 6 months in the context of a sentence of 15 years imprisonment (**ie**. 3%). For similar mitigating factors, the Court of Appeal in Public Prosecutor v Andy [2011] VUCA 14 gave "*... a significant deduction of approximately 15%*".

9. After discounting 6 months for the appellant's guilty plea and past clean record, the trial judge arrived at end sentences of 14½, 11½ and 9½ years for the 3 offences of Sexual Intercourse Without Consent. The trial judge then proceeded to consider the aggregate of the sentences and imposed a final sentence of 15 years imprisonment which, effectively, removes the earlier discount of 6 months.

10. In Edgel v Public Prosecutor [2011] VUCA 37 in reducing the sentence of 7 years and 10 months imprisonment in that case by 10 months (**ie.** 10%) the Court of Appeal said:

"*Given the social and cultural significance of performing a customary reconciliation ceremony amongst the indigenous people of this country, especially where the same has been accepted by the injured party, we are satisfied that the appellant deserves, if not a separate, then a greater discount for that important statutory mitigating factor*".

11. In similar vein, after referring to the provisions of Section 119 of the Criminal Procedure Code (which is replicated in Sections 38 and 39 of the Penal Code sentencing provisions) the Court of Appeal said in Public Prosecutor v Gideon [2002] VUCA 7:

"***The requirements of the Section are plain in that a Court is required in passing sentence in any criminal case, to take account of any customary settlement that has occurred in the case*** *and, in the absence of the same, to postpone sentence in order to facilitate the effecting of customary settlement. ...*"

(our highlighting)

And later the Court continued:

"It is not the function of this Court to comment on the wisdom, or desirability of requiring a sentencing court to take account of customary settlement in every conviction of a criminal offence, however heinous or trivial it may be. However, that is the law"."

12. A perusal of counsel's sentencing submissions discloses that both counsel were of the view that despite the lateness of his guilty plea, the appellant should receive some deduction for it. Defence counsel sought a "*22%*" reduction and prosecuting counsel submitted that "*... some deduction should be made*".

13. The reason given for refusing any credit for the appellant's guilty pleas was: "... (they) *were entered only after two of the victims had given evidence ...*". No recognition has been given to the fact that in respect of the youngest of the victims namely, the 5 year old, the appellant's plea was entered before she gave any evidence.

14. We accept that in respect of the two elder teenage victims, the appellant's guilty pleas were not given at the earliest opportunity so as to avoid them having to give evidence and being cross-examined in court, but, that is not the only reason for giving a discount for a guilty plea.

15. As was said by this Court in Taviti v Public Prosecutor [2016] VUCA 41:

> *"14. **We need to emphasise that it has always been the law in Vanuatu well before the Andy case, that a reduction of sentence discount of one third is allowed as a matter of sentencing principle when a person pleads guilty at the first opportunity given to him or her by the Courts** (see: Public Prosecutor v. Scott [2002] VUCA 29 and other cases). We accept the submissions of the Appellant that the guideline case on Sentencing in PP –v- Andy (2011) VUCA 14 emphasised this point when the Court stated:*
>
> ***"The third step of the sentencing process is the deduction for a guilty plea:***
>
> *The trial judge will then consider what discount from the second stage end sentence should be applied for a guilty plea. **The greatest discount under this head will be a discount of one third where the guilty plea has been entered at the first available opportunity. A late guilty plea will result in a smaller discount**. No discount is available under this head if the charges have been defended through a trial."*
>
> *15. We also accept the Appellant's submissions that the proper method for encouraging offenders to provide the names of other offenders is to give an extra discount for assisting authorities, over and above the standard discount for a guilty plea.*
>
> *16. **A guilty plea discount is important as a criminal sentencing principle and it justifies a reduction in an otherwise appropriate sentence for three reasons**:*
>
> ***First**, it relieves victims and witnesses of the trauma, stress, and inconvenience that is caused by a delay in resolving the case and by the trial itself, particularly the need to give evidence. **Secondly**, it avoids the need for a trial, with the attendant advantages of a reduction in Court delays and costs savings. **Thirdly**, it generally indicates a degree of remorse. At the very least, it represents an acceptance of responsibility for the offending. (The Queen –v- Hessell [2009] NZCA 450)."*
>
> (our highlighting)

16. We are satisfied that all 3 "*reasons*" to a lesser or greater degree were present in this case when the guilty pleas were entered.

17. In Public Prosecutor v Hinge [2008] VUCA 30 the Court of Appeal in recognizing the 3 mitigating factors in that case including the appellant's previous good record; his belated guilty plea after the complainant had given evidence and his performance of a customary reconciliation ceremony involving the payment of 1 pig to the complainant's family, gave a "*generous allowance*" of 2 years for all 3 factors from a starting sentence of 8 years imprisonment **ie.** 25%.

18. Both counsel accepted that sexual intercourse by "*digital penetration*" was different from and less serious than "*penile penetration*" and that such a distinction should be recognized for sentencing purposes.

19. Counsel referred to and cited earlier sentencing decisions of the Supreme Court where the distinction was highlighted, namely, in Public Prosecutor v Enock Tao [2012] VUSC 219 and Public Prosecutor v Harkenson Moise [2016] VUSC 5 where the sentencing judges adopted a starting point of 4 years imprisonment for offences of digital penetration.

20. More recently in Public Prosecutor v Amos Telukluk [2017] VUSC 162 the Chief Justice after a full trial, adopted a starting point of 7 years imprisonment for a repeated digital penetration of the victim that occurred on 2 consecutive days and where the Court agreed with defence counsel's submission that: "*... the nature of the offences being digital penetration as opposed to penile penetration, there was no exposure of the penis*".

21. In the present case however, the trial judge adopted "*a different view*" on the basis that:

> "*the Section* (**89A**) *does not differentiate between penile or digital penetration. I accept that penile rape may have more aggravating features than digital rape because of the risk of pregnancy or sexually transmitted deceases* (sic) *with the former, but I can see no reason why digital rape should be treated less seriously*".

22. We accept that the expanded statutory definition of "*sexual intercourse*" draws no distinction between penile or digital penetration for the purposes of the commission of the offence of Sexual Intercourse Without Consent or indeed any offence which requires the commission of an act of "*sexual intercourse*", but that does not mean that it is illegal, wrong, or improper for a court to recognize or make that distinction when considering the appropriate sentence for such an offence.

23. Indeed, the definition of "*sexual intercourse*" appears to differentiate between "*an object*"; "*the mouth*"; "*the penis*"; and other "*parts of the body*" as well as, between "*penetration*" and non-penetrative acts such as "*licking, sucking or kissing*".

24. The distinction is also recognized in Public Prosecutor v Andy (op. cit).

25. It has been clear law in the Republic that penile intercourse as opposed to other forms of penetration of the vagina is "*more serious*" and "*more physically intrusive*". The Court of Appeal in Andy's case also recognized that in assessing culpability, the absence of aggravating factors may lead to a lower starting point. In the present case the trial judge himself, recognized that "*penile rape may have more aggravating features than digital rape*" but, in his view, that was "*no reason*" to treat digital rape "*less seriously*. We are not able to agree.

26. The trial judge also considered that the three individual sentences "*should be consecutive*" as they had not "*... occurred within one course of conduct*". Identity of the victims is but one inconclusive feature of a "*course of conduct*". In addition there is the identity of the perpetrator, of the manner of offending, of the type of offence(s) committed as well as the duration of the offending and the context and

existence of any prior or familial relationship between the victims and the perpetrator.

27. In Kalfau v Public Prosecutor [1990] VUCA 9 the Court of Appeal said with regard to the use of concurrent sentences:

"The general rule in sentencing is that sentences for separate offences should normally be consecutive but this may be modified in two main ways. In the first case, a series of offences that form part of the same overall transaction and cause harm to the same person may be appropriately dealt with by a concurrent sentence.

The second basis for modification is where, having passed a proper sentence for each of a number of offences, the aggregate effect of making them consecutive will produce an inappropriate total. ...

Even where the total does not offend against that principle, the court may in an appropriate case reduce it if, in the circumstances of a particular accused, the effect would be crushing.

It should finally be pointed out that the reduction of the total is best achieved by making some or all the penalties concurrent rather than to reduce the sentence for any individual offence below the proper level."

28. The Court of Appeal in ordering a concurrent sentence in Apia v Public Prosecutor [2015] VUCA 30 said (at para. 31):

"*The facts pertaining to the charge of obtaining money by deception were closely related to those of the forgery counts. They were all part and parcel of Mr Apia's criminal operation. We consider the appropriate course was to set an overall starting point encompassing all of the offending and to impose concurrent sentences on all 6 charges*".

29. In Boesaleana v Public Prosecutor [2011] VUCA 33 the Court of Appeal, in imposing concurrent sentences in an information that charged numerous counts of rape, incest and indecency with a young person where the 2 victims were the offender's natural and adopted daughters said (at paras. 5, 6, 7 and 9):

"[5] It is regrettable that all the charges were not dealt with together and Mr Boesaleana sentenced at the same time for all offending. ***They all involve within the family sexual abuse which took place over a substantial number of years and involved two of the appellant's daughters.***

[6] 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.

[7] ... it should be remembered that in any case ***the sentencing of a prisoner is not an exact mathematical science but a nuanced art. It is essential that every Judge, whatever methodology they employ, looks to see whether the overall sentence is commensurate with the established culpability of the particular accused person.***

[8] ...

[9] ***When a Court is having to sentence a convicted person who faces many counts and more than one victim, it is often beneficial to decide what is the most serious offending and to impose a lead sentence on that which properly takes account of all aggravating factors and then to impose concurrent sentences in respect of other offending as that is appropriate.***

[10] That would be the best way to deal with matters like this."

(our highlighting)

30. While no two cases are identical and judges may differ in their view of the law, it is a fundamental principle of justice that like cases are treated in a consistent and like manner. There should be transparency in process and consistency in the treatment of all who have offended against the criminal law. Although uniformity is an impossible ideal, consistency in the sentences imposed by judges of the Supreme Court is a desirable feature of criminal justice.

31. Both counsel in their sentencing submissions referred to several guideline judgments of the Court of Appeal including: Public Prosecutor v Scott and Tula [2002] VUCA 29; Public Prosecutor v Gideon [2002] VUCA 7 and Public Prosecutor v Andy [2011] VUCA 14.

32. In Scott's case the Court of Appeal in adopting guidelines for the sentencing of offences of sexual intercourse without consent said inter alia:

"For rape committed by an adult without an aggravating or mitigating feature, a figure of five years should be taken as the starting point in a contested case. Where a rape is committed by two or more men acting together, or by a man who has broken into or otherwise gained access to a place where the victim is living, or by a person who is in a position of responsibility towards the victim, or by a person who abducts the victim and holds her captive the starting point should be eight years."

(our underlining)

33. In Andy's case the Court of Appeal relevantly said with regard to the correct approach to sentencing (at para. 12):

"*... consistency of sentencing with other sentences being imposed in Vanuatu and parity between offenders will also be applied*".

And later, in dealing with the fixing of the "*starting point*" the Court iterated (at para. 16):

"*If there are relevant judgments relating to the type of offending, these will be considered in the sentencing process to ensure consistency of sentencing*".

The Court of Appeal there fixed a starting point of six to seven years imprisonment in that case which involved a single incident of digital penetration of a 10 year old victim.

34. Counsel also referred in their sentencing submissions to comparable digital penetration cases in the Supreme Court including: Public Prosecutor v Jeffrey [2010] VUSC 41 where a starting point of 5 years imprisonment was adopted; Public Prosecutor v Enock Tao [2012] VUSC 219 and Public Prosecutor v Moise [2016] VUSC 5 where a starting point of 4 years was adopted commensurate

with the prosecutor's proposed starting point in his submission before the trial judge, and finally in Public Prosecutor v Amos Telukluk (op. cit) where the Chief Justice adopted a starting point of 7 years imprisonment in a contested case.

35. The appeal is allowed, the sentence is set aside and the appellant is re-sentenced as follows:

For each count of Sexual Intercourse Without Consent we adopt a starting point of 8 years imprisonment and we order the sentences to be served concurrently making an effective starting sentence of 8 years imprisonment. For the appellant's past clean record; belated guilty pleas; and customary reconciliation ceremony, we reduce the starting sentence by 2 years giving an end sentence of 6 years imprisonment with effect from 25 May 2017.

DATED at Port Vila, this 20th day of July, 2018.

BY THE COURT

REPUBLIC OF VANUATU COURT OF APPEAL COUR D'APPEL REPUBLIQUE DE VANUATU

Hon. Vincent LUNABEK
Chief Justice.