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

Criminal Appeal
Case No. 20/54 CoA/CRMA

BETWEEN: Tom Nako
Appellant

AND: Public Prosecutor
Respondent

Date of Hearing:	***Monday 10th February 2020***
Coram:	***Hon. Justice J Hansen*** ***Hon. Justice R White*** ***Hon. Justice D Aru*** ***Hon. Justice O Saksak*** ***Hon. Justice G Andree Wiltens*** ***Hon. Justice V M Trief***
Counsel:	*K Karu — Counsel for Appellant* *P Toaliu — Counsel for Public Prosecutor*
Date of Decision:	***Thursday 20th February 2020***

JUDGMENT OF THE COURT

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[1] The appellant appeals against a sentence of four years and five months' imprisonment imposed on him for offences of sexual intercourse without consent and theft, on the grounds the sentence is manifestly excessive.

Background

[2] The victim is a naïve 22 year old woman. She originated from Paama Island, but resided in Port Vila. She had been unwell. The complainant met her in Port Vila on 25 May 2015 and said he was a "prayer warrior" and would pray for her, as she was sick. With foresight and planning, he lured her to a secluded area behind Freshwater, and said he would pray for a cure for her. The appellant told the complainant to hand over her money and her mobile phone, which she did. He then asked her whether she was born

into this world with clothes, or naked, and she replied, "Naked." The appellant then told the complainant he would pray for her, and while he prayed she should remove her clothes. She refused, but the appellant insisted that if she wanted God to heal her she must comply with what the appellant asked, otherwise she would die, as her life hung by a thread.

[3] As a consequence, as the appellant prayed the complainant removed her underwear, but she kept on her shirt and skirt. The appellant told her to lie on a rock, then got on top of her and had sexual intercourse with her through to ejaculation. The complainant said in her police statement that she did not wish to have sex, but she was afraid she would die, as the appellant said her life hung by a thread.

[4] After ejaculation, the appellant told her to take the lead and walk towards the road. She walked a few metres, turned around, and found the appellant had disappeared with her phone and money. When she got home she told her brother, reported the matter to the police and gave a statement about what had happened. The appellant admitted having sex, lying, and stealing the mobile phone and her money. He pleaded guilty at an early stage.

The sentence

[5] The Chief Justice referred to the leading authority of *RL v PP* [2018] VUCA 26 in stating the approach to sentencing for the lead sexual offence. The appellant's counsel had contended for a starting point of six years' imprisonment and submitted, taking into account mitigation, including personal circumstances, the delay in the matter coming to Court and the early guilty plea, a final sentence should be one of two years and six months' imprisonment.

[6] The Chief Justice noted a number of aggravating features which were clearly present. We concur in those. The appellant took advantage of a vulnerable woman who was sick and afraid. With a level of planning, she was lured to a secluded area. There was considerable deception in the appellant telling the complainant that he was a "prayer warrior" who could assist her and cure her illness. The sexual intercourse was unprotected, and the complainant was vulnerable to sexually transmitted diseases and pregnancy. There was the theft of the money and phone.

[7] The Chief Justice took a starting point of seven years, in line with the submission made by the prosecutor in relying on *PP v Scott* [2002] VUCA 29 and *PP v Naulu* [2014] VUSC 206. The Chief Justice considered the aggravating features warranted an uplift of six months. He also recorded that the appellant was not a first offender, and that he had previous convictions for similar offending which warranted a further uplift of six months, giving a head sentence of eight years' imprisonment as a starting point.

[8] In mitigation, the Chief Justice considered the appellant's personal circumstances: that he was married with three children below the age of 10; that because of separation he was responsible for the children; that he was illiterate but had skills in agriculture and farming; and he was remorseful. All of these factors warranted a further reduction of 12 months. He gave further credit of six months, to reflect the delay in prosecuting the case. He then allowed a one-third reduction, to reach a final sentence of four years and five months' imprisonment. Although nothing turns on it, the mathematics do not quite work out.

The appeal

[9] The one ground advanced that the sentence was manifestly excessive was that the learned Chief Justice was incorrect in finding that the appellant was not a first offender. This was agreed to by the prosecutor. The learned Chief Justice had relied on a confusing passage in the pre-sentence report which referred to this appellant facing trial for similar offending. However, for sentencing purposes, he was a first offender.

Submissions

[10] The submissions on behalf of the appellant were to the effect that there should be a six-month reduction in sentence, as that was the uplift imposed by the learned Chief Justice because of the prior convictions. On the other hand, the prosecution submitted that the overall sentence imposed of four years and five months was well within range.

Discussion

[11] It is clear that this man had no previous convictions. However, that does not automatically lead to a reduction in sentence. What this Court must do is look at the overall sentence imposed, and determine whether it is manifestly excessive for the appellant's offending.

[12] By reference to the authorities above, we do not think the end result can in any way be said to be manifestly excessive. Given the level of planning, duplicity, and the taking advantage of a vulnerable person, the aggravating features could well have warranted a greater uplift than six months. As well, the limited mitigation features could be said to have not warranted a reduction of as much as 12 months. This was serious sexual offending, and an end sentence of four years and five months is certainly within range and could, in fact, be considered lenient. Furthermore, while there was a delay in bringing this man before the Courts, the reasons are not apparent, and to give a six-month allowance for that could be considered generous.

[13] There is one other matter it is necessary to deal with. The learned Chief Justice clearly took into account the matter of the theft, but does not appear to have imposed a separate sentence for that. To tidy that matter up, on the theft the appellant is convicted and discharged without further penalty. But in relation to the sentence for the offence of sexual intercourse without consent, the appeal is dismissed.

Dated at Port Vila this 20th day of February 2020.

BY THE COURT

Hon. Justice John Hansen

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