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

Criminal Appeal
Case No. 22/2155 CoA/CRMA

BETWEEN: Timothy Kavila
Appellant

AND: Public Prosecutor
Respondent

Date of Hearing:	***7th November 2022***
Before:	***Hon. Chief Justice V Lunabek*** ***Hon. Justice R Young*** ***Hon. Justice R White*** ***Hon. Justice D Aru*** ***Hon. Justice S Harrop*** ***Hon. Justice E Goldsbrough***
Date of Decision:	***18 November 2022***
Appearances:	***P Malites for the Appellant*** ***B N Tamau for the Respondent***

JUDGMENT OF THE COURT

1. This is an application for leave to appeal against sentence and, if successful, an appeal against sentence imposed by the Supreme Court following convictions entered in 2017.

2. The applicant, Timothy Kavila, was sentenced on 4 October 2017 following his guilty pleas entered on 31 August 2017 to charges for which he was about to stand trial. Those charges are having sexual intercourse with a 20 year old female without her consent on five occasions between 13 and 16 February 2017, committing an act of indecency on and without the consent of the same woman, making a threat to kill her and intentionally assaulting her. The victim is a relative of the applicant's wife.

Background facts

3. The applicant accepted and agreed the brief of facts which outlined how the offences were committed. On a pretence, he and his wife took the victim to their house and suggested the indecent behaviour which the victim resisted until being threatened with

violence. Both fearful and intimidated, she succumbed to her assailants and reluctantly participated in the perverted sexual conduct of both the applicant and his wife. He told his victim to undress and sucked her breasts and vagina and inserted his finger into her vagina whilst his wife took on the role of sucking the victim's breasts and vagina. She was then made to suck his penis and his wife's vagina. He then penetrated her with his penis. The intercourse took place first in the early evening of 13 February 2017 and was repeated later that night and then again in the early hours of 14 February.

4. Sexual intercourse took place again during the daytime of 14 February. When the victim tried to leave the following day, she was assaulted by the applicant. He locked her into the house. That night again he raped her. The following day, 16 February and no longer with his wife present, he raped her again and the next day, returned her home. Because the victim's sister was unhappy with what had taken place, the victim was taken back to the Teouma residence where the offending had taken place.

5. Both this applicant and his wife admitted the offending when interviewed by the police but his initial plea to the charges was not guilty. His plea only changed on the day of his trial.

Leave to appeal

6. The application to appeal out of time, by almost five years, was filed on 11 August 2022. He instructed counsel within the office of the Public Solicitor to handle his appeal during July 2022 but there is no explanation offered as to why he chose not to take any action sooner. In his sworn statement in support of his application for leave he says simply that he was sentenced on 4 October 2017 to sixteen years imprisonment, that at the time he was told he had 14 days to appeal and that he instructed the Public Solicitor to file an appeal on 15 July 2022. The appeal against sentence, it is said, would focus on a starting point that was manifestly excessive.

7. The delay in filing an appeal is extraordinary as is the notion that no reason for the delay needs to be offered. Such a reason is required. That is clear from the observations made in Gamma v Public Prosecutor [2007] VUCA 19 citing with approval factors identified in Queen v. Knight [1998] NZLR 583 which are the strength of the proposed appeal and the practical utility of the remedy sought, the length of the delay and the reasons for delay, the extent of the impact on others similarly affected and on the administration of justice, that is floodgates considerations, and the absence of prejudice to the Crown.

8. Plainly, the very length of the delay in this case cried out for an explanation. That is even more given that the applicant had been sentenced in 2018 for further offending. We would have expected the explanations to be provided in sworn statements from the applicant and the counsel who acted for him previously.

9. In the absence of any reason being offered for the delay, and the extraordinary length of delay here, additional reliance is unnecessarily placed on the remaining factors. It is important to appreciate that this alone may tip the balance in favour of a refusal to grant leave.

10. All the above requirements assist the Court in determining what is in the interests of justice. That is the real test on an application for leave.

11. The strength, if any, of this appeal against sentence is submitted to be a sentence starting point which is unjustifiably high resulting in a manifestly excessive end sentence. The starting point set is twenty years imprisonment for each of the sexual intercourse without consent offences. The end sentence is one of sixteen years imprisonment, with shorter, concurrent, sentences of imprisonment imposed for the remaining offences.

12. In addition, it is submitted, that the sentencing court should have dealt with how pre- trial and sentence custody was to be considered. Here the sentencing judge left the Correctional Services Department to calculate the actual term to be served after deduction of pretrial and presentence custody.

13. In submissions to the sentencing court, counsel for the appellant submitted an optimistic starting point of six years. The respondent submitted a starting point of ten years imprisonment. The trial judge did not accept either of those submissions. He indicated that ten years might have been appropriate for one offence of rape, but not five. In that, we agree with him.

14. We do not agree, however, that the five offences of rape justified a 20-year starting point. This Court in Public Prosecutor v Scott [2002] VUCA 29 approved what had been said by the Chief Justice in Public Prosecutor v. Ali August of Criminal Case No. 14 of 2000. "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. The offence of rape should in any event be treated as aggravated by any of the following factors:

a) Violence is used over and above the force necessary to commit rape;
b) A weapon is used to frighten or wound the victim;
c) The rape is repeated;
d) The rape has been carefully planned;
e) The defendant has previous convictions for rape or other serious offences of a violent or sexual kind;
f) The victim is subject to further sexual indignities or perversions;
g) The victim is either very old or young;
h) The effect upon the victim, whether physical or mental, is of special seriousness."

Where any one or more of these aggravating features are present, the sentence should be substantially higher than the figure suggested as the starting point.

15. The five offences were aggravated by the presence of several of the factors referred to above. In our view the totality of the offending would be adequately reflected in a starting point of 16 years imprisonment. That is a starting point 20% lower than that adopted by the sentencing judge.

16. We do not agree with the submission that the discount given for the late guilty plea is inadequate or that the additional reduction for personal mitigating factors of twelve months is wrong. It may have been preferable to deal with both the guilty plea reduction and personal mitigating factors together as one percentage reduction (see Moses v R (2020) 29 CRNZ 381). This avoids various issues as to the order in which the various discounts are applied and can make a substantial difference to a longer sentence.

17. The guilty plea came just before trial. Until that time all the witnesses expected to attend court and give evidence of what they know. That will not have been a pleasant situation to be in. It could have been avoided, as could the court time allocated to trial which proved unnecessary. A discount of 15% is not unreasonable. It should not have been more. One year taken from a sixteen-year sentence amounts to a 6.5% reduction.

18. Given a starting point of sixteen years and applying a combined reduction of 21.5% for the late guilty plea and other mitigating factors as identified correctly by the sentencing judge the Court arrives at an end sentence of 12.5 years. As a percentage reduction that is roughly 20% down on the actual sentence imposed.

Pre-trial and pre-sentence custody

19. The Penal Code at section 51 makes provision for a sentence of imprisonment to run from the date on which it is imposed -see section 51(2), but further provides that section

51 (2) is subject to subsections (3), (4) and (5) which follow it. Here, only subsection (4) has any relevance when it provides that if the offender has been in custody pending trial or appeal, the duration of such custody is to be wholly deducted from the computation of a sentence of imprisonment.

20. The question arises as to how that period of custody should be taken into account. In this case the sentencing judge left the computation to the Correctional Services Department. In decisions of this Court when resentencing offenders orders have been made backdating the sentence to a date when the offender had been taken into custody for the offence or offences in question. (See Tari v Public Prosecutor [2019] VUCA 80 as an example) In Obed v Public Prosecutor [2019] VUCA 42 This Court said: -

> *"We observe once again that the deduction for pre-trial time spent in custody is best reflected in a backdated prison sentence rather than a specific deduction. Backdating sentence commencement avoids parole eligibility issues."*

21. We agree with that statement repeated above and commend the practice. We consider that an order made under section 51 (4) dealing with the period of custody pending trial or appeal by backdating or deeming the sentence to have commenced at an earlier time can displace the requirement under section 51 (2). To effect such an order the sentencing judge should ascertain the date on which the offender was first taken into custody for the offence or offences and include that date in the deeming provision.

22. We do not consider that the decision on the actual term to be served after deduction of time spent should be left to the Correctional Services Department. That order is part of the sentence and should be determined by the sentencing court. In that way, as part of the sentence, it may be the subject of appeal, not otherwise available. It shows that presentence custody has been considered, and it is less prone to error than deduction. Deduction is not simply a matter of taking away the length of presentence custody, but also calculating what that time would represent if it were part of the sentence, given that some offenders benefit from release after serving 50% of the sentence.

Discussion

23. This is an exceptional case and were it not for the two factors identified that plainly make the sentence unjust, without good reason for the late application to appeal it would have been refused. There is good reason why an appeal should be filed within time. This case should not be regarded as detracting from that and from the requirement to provide reasons for any delay. With such a long delay as here and with no reason put forward for that long delay, the applicant puts himself at a disadvantage.

24. However, because of the disparity between the imposed sentence and the sentence set out above at paragraph 18 and because pre-sentence custody was not properly dealt with by the sentencing court, exceptionally, leave to appeal is granted. We have already set out how we would dispose of the appeal against sentence above and do not propose to repeat them.

Disposition

25. Leave to appeal is granted. The appeal against sentence is allowed. The sentences of sixteen years imprisonment for each of the five offences of having sexual intercourse without consent are set aside. In their place, sentences of twelve years and six months imprisonment are imposed. All those sentences are ordered to run concurrently and are deemed to have commenced on 12 July 2017, being the date we are told the offender went into custody for these offences. No order is made in respect of the sentence imposed for the remaining offences save that they too are deemed to have commenced on 12 July 2017 and remain concurrent to the sentences imposed today.

DATED at Port Vila this 18th day of November, 2022

BY THE COURT

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Hon. Vincent Lunabek
Chief Justice