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

Criminal Appeal Case No. 24/2398 COA/CRMA

BETWEEN: PUBLIC PROSECUTOR
Appellant

AND: STEWARD TULILI
Respondent

Date of Hearing:	***4 November 2024***
Coram:	***Hon. Chief Justice V. Lunabek*** ***Hon. Justice M. O'Regan*** ***Hon. Justice R. White*** ***Hon. Justice O. A. Saksak*** ***Hon. Justice D. Aru*** ***Hon. Justice E. P. Goldsbrough*** ***Hon. Justice M. A. MacKenzie***
Counsel:	***M. Tasso for the Appellant*** ***P. K. Malites and K. S. Amose for the Respondent***
Date of Decision:	***15 November 2024***

JUDGMENT OF THE COURT

Introduction

1. This appeal requires the Court to address again the issue of when it is appropriate for a sentence imposed for the offence of sexual intercourse without consent (rape), contrary to s.91 of the Penal Code, to be suspended. The issue arises in this case in relation to a 19 year old offender.

2. The line of authority in this Court concerning the suspension of sentences in cases of serious sexual offending commences with *Public Prosecutor v Gideon* [2002] VUCA 7. *Gideon* confirmed a sentence imposed on a 25 year old offender for the offence created by s.97(1) of the Penal Code, *viz.*, sexual intercourse with a child under the age of 13 years. This Court said:

> It will only be in [the] most extreme of cases that suspension could ever be contemplated in a case of sexual abuse. ... Men must learn that they cannot obtain sexual gratification at the expense of the weak and 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.

3. Also in 2002, in *Public Prosecutor v Scott* [2002] VUCA 29, this Court set aside the suspension of a sentence imposed for the offence of rape (sexual intercourse without consent) in contravention of s.91 of the Penal Code. The Court said:-

> Men must learn that they cannot obtain sexual gratification at the expense of the weak and vulnerable. What occurred is a tragedy for all involved but men who take advantage sexually of women forfeit the right to remain in the community
>
> .....
>
> The time has long come when all men must know and understand that women have the right to control what they do with their bodies and what sexual activity they involve themselves in. If they cannot or will not recognise that fundamental position then they cannot remain within the community.

4. Later in *Scott*, the Court endorsed the statement of the Chief Justice in *Public Prosecutor v Ali August* (Criminal Case No. 14 of 2000):

> The offence of rape is always a most serious crime. Other than in wholly exceptional circumstances, rape calls for an *immediate* custodial sentence. This was certainly so in the present case. A custodial sentence is necessary for a variety of reasons. First of all to mark the gravity of the offence. Secondly to emphasise public disapproval. Thirdly to serve as a warning to others. Fourthly, to punish the offender, and last but by no means least, to protect women ...(emphasis added)

5. As we will indicate shortly, these sentencing principles have been repeated and endorsed by this Court on numerous occasions. They reflect the seriousness with which the law views sexual offences and the affront they cause to the human dignity and personal integrity of victims, who are usually female. It is a means by which the Court seeks to fulfil a fundamental purpose of the criminal law, namely, the protection of the community.

6. The seriousness with which the law views contraventions of ss.91 and 97(1) is also seen in their maximum penalties viz., imprisonment for life. They are two of the few offences against the person for which that maximum penalty is fixed.

7. The principles stated in *Gideon* and *Scott* are not the only important sentencing principles. In the case of young offenders, reform and rehabilitation are important considerations, and in some circumstances, can outweigh factors which would otherwise apply in the sentencing of more mature offenders. This was recognised in *Heromanley v Public Prosecutor* [2010] VUCA 25 in which this Court said at [17] that "in the sentencing of young offenders ... the dual purposes of punishment and deterrence *may* need to give way to reform and rehabilitation" (emphasis added). The Court also referred to the legislative purpose in relation to the sentencing of youth offenders evident in (ss.37, 54 and 58H of the Penal Code).

8. However, as will be seen, the *Gideon* and *Scott* principles concerning suspension remain applicable even when the offenders are young.

9. The present appeal is one of four in this session of the Court of Appeal in which the application of the principles in *Gideon* and *Scott* in the sentencing of young offenders is in question.

10. Although the sentencing Judge in the present case did not refer expressly to these principles, we are satisfied that the Judge did not overlook them, in particular those in *Scott* which were directly applicable. Instead, the Judge considered that the Respondent's youth, his clean record, his ready acknowledgement of his wrongdoing and otherwise good character, his willingness to perform a custom reconciliation ceremony, the important sentencing aims of reform and rehabilitation applicable in the case of youth offenders, and the risk of adverse effects which may arise from imprisonment, justified the suspension of his sentence.

Factual Circumstances

11. The respondent was born in November 2003 and so was 19 years and 8 months old at the time of his rape of the complainant (aged 16 years) on 15 July 2023. He is an uncle of the complainant. The respondent was 20 years and 9 months old at the time of sentencing on 25 July 2024.

12. The offence occurred at about 4:00 am, in the hours of darkness. Earlier that night, the complainant, together with some family members, had left their home village of Unmet on Malekula Island to go to a nearby village, being attracted by the sound of music. They returned to Unmet at about 4:00 am.

13. The respondent noticed their return and called out to the complainant to follow him. She refused, whereupon the respondent walked to her at the Unmet roundabout and grabbed her hand. The complainant tried to call out to her companions, but the respondent prevented her from doing so by blocking her mouth. He pulled her into some nearby bushes and tried to force her to remove her clothes. She refused and the respondent removed her shirt, trousers and panty himself. The complainant was crying but the respondent made her lie down. When he tried to kiss her, she turned away from him. He then held her head to the ground and kissed her, forced her legs apart and effected penile penetration of her vagina. The complainant cried out and struggled. The respondent then ceased intercourse. This allowed the complainant to stand up. She grabbed her clothes and ran onto the main road. The respondent chased her but did not continue the pursuit. On the way back to her home the complainant redressed.

14. On any view, this was a brazen and brutal case of sexual intercourse without consent.

15. It was however to the respondent's credit that, when interviewed by the Police on 26 July 2023, he admitted his conduct.

The Sentence

16. The Judge took as the starting point a sentence of 5 years. In doing so, the Judge noted several circumstances of aggravation; that the rape had occurred at night and just off a public road; the use of force; the young age of the complainant; the absence of use of protection with the consequent of exposure of the complainant to sexually transmitted infection and pregnancy; the pain and fear caused to the complainant; and the breach of trust involved, given the respondent's familial relationship with the complainant.

17. The Judge reduced the starting point by 30% (18 months) on account of the respondent's early plea of guilty.

18. For the respondent's personal factors (his good record, his remorse, the support of his family and his Chief and, in particular, his immaturity), the Judge made a further reduction of 25% (15 months). A further reduction was made on account of the time which the respondent had already spent in custody. This resulted in the sentence of imprisonment of 2 years 1 month and 10 days.

19. In relation to suspension, the Judge said:-

> This was serious offending. On the other hand, I take into account that at the time of the offending, Mr Tulili was 19 years old. He had no prior convictions. He voluntarily admitted the offending to the Police when interviewed. He pleaded guilty at the first reasonable opportunity and is willing to perform a custom reconciliation ceremony to the complainant.
>
> In the sentencing of young offenders, the dual purposes of punishment and deterrence may need to give way to reform and rehabilitation in the interests of society that young offenders be rehabilitated and grow up to become responsible law-abiding members of society: *Heromanley v Public Prosecutor* [2010] VUCA 25 at [17].
>
> I consider that the imposition of an immediate sentence of imprisonment on Mr Tulili with the inevitable consequence of exposing him to long term hardened criminals would be counter-productive and inappropriate.
>
> I therefore exercise my discretion under s. 57 of the *Penal Code* to suspend the sentence for 2 years. Mr Tulili is warned that if he is convicted of any offence during that 2-year period that he will be taken into custody and serve his sentence of imprisonment, as well as the penalty imposed for the further offending.
>
> In addition, Mr Tulili is to complete 100 hours of community work.

Statutory Provisions

20. The power of a Court to suspend a sentence of imprisonment is contained in s.57 of the Penal Code. If the sentencing court considers that in view of the circumstances, and the nature of the crime and the character of the offender that it is not appropriate to make the offender suffer immediate imprisonment, it may order the suspension of the sentence of imprisonment. By s.58, if the Court has decided that the case is so serious as to warrant imprisonment and that it is not appropriate to suspend the whole sentence, it should consider whether there are grounds for suspending the sentence in part.

The *Gideon* and *Scott* principles

21. At the commencement of these reasons, we set out the principle stated in *Gideon*. The sentence in that case had been imposed on a 25 year old male who had contravened s.97(1) of the Penal Code by engaging in sexual intercourse and other sexual activity with a 12 year old member of his domestic family. At the time the maximum penalty for a contravention of s.97(1) was imprisonment for 14 years. It is now imprisonment for life.

22. As in the present case, the offender in *Gideon* had been remorseful, had a clean record, was in steady employment and was "well spoken of". Unlike the present case he had actually engaged in customary reconciliation. Despite these mitigating circumstances, the Court said:-

> "Whatever may be said about this man personally having learned his lesson, 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. Children must be protected."(Emphasis added)

23. It is evident that the Court regarded the seriousness of the offence of unlawful sexual intercourse with a child, the need for protection of children, denunciation of the offender's conduct, and general deterrence as particular matters precluding an exercise of the discretion to suspend.

24. In *Scott*, which concerned the rape of an adult female, the Court referred to deterrence and condemnation as important considerations.

25. *Gideon* and *Scott* have been followed in numerous subsequent decisions concerning serious sexual offending.

26. Decisions of this Court which have applied and endorsed the *Gideon* and/or *Scott* principles include *Public Prosecutor v Koata* [2009] VUCA 36, *Public Prosecutor v Morkro* [1417] VUCA 16, *Public Prosecutor v Iotil* [2020] VUCA 216, *Tabeva v Public Prosecutor* [2018] VUCA 55, *Public Prosecutor v John* [2020] VUCA 49, *Shing v Public Prosecutor* 2021 VUCA 21, *Public Prosecutor v Marae* [2023] VUCA 23 and *Lawi v Public Prosecutor* [2023] VUCA 41. This is far from being a complete list.

27. In both *Public Prosecutor v John* and *Public Prosecutor v Shing*, this Court said at [23] and [24] respectively:

> *We strongly reiterate as remaining relevant in 2020 the comments in PP v Scott and PP v Gideon recorded in paragraphs 17 and 18 above in relation to the inappropriateness of suspending sentences where serious sexual allegations have been proved or admitted.*

28. *Public Prosecutor v John* is particularly pertinent presently as it was a prosecution appeal against the suspension of a sentence imposed on an offender aged 17 and 18 during the period of 12 months in which he had engaged in unlawful sexual intercourse with a girl aged 7 and 8 years. This Court did not regard the matters upon which the sentencing Judge had relied in suspending the sentence (the offender's age, his ambition, his wish to continue his education so as to obtain a good job and become a good father and family member and thereby to contribute usefully to the development of Vanuatu) as justifying suspension.

29. *Tabeva v Public Prosecutor* [2018] VUCA 55 is also pertinent presently. It concerned (relevantly) an appeal against the sentencing judge's refusal to suspend the sentence imposed on an offender aged less than 16 years for the offence of sexual intercourse without consent (rape) in contravention of s.91 of the Penal Code. The Court said at [47] that the seriousness of the crime

meant that, despite his youth, some period of imprisonment without suspension was appropriate. Having regard to s.54 of the Penal Code, the Court ordered that 15 months of the sentence of two and half years of imprisonment, be suspended for a period of 3 years.

30. Finally on this topic, we note that in *Lawi v Public Prosecutor* [2023] VUCA 41, in which an adult offender in a boyfriend-girlfriend relationship with the complainant, was convicted of unlawful sexual intercourse with a child under the age of 15 years but over the 13 years (Penal Code s.97(2)), this Court held that only a partial suspension of the three years sentence of imprisonment was appropriate. That has been so even when the Court has considered the application of those principles in relation to young offenders.

31. In short, the authorities to which we have referred indicate the consistency and frequency with which this Court has applied the *Gideon* and *Scott* sentencing guidelines in the cases to which they are applicable.

The relevance of Youth

32. Counsel for the respondent emphasised the sentencing principle concerning youth in *Heromanley* to which we referred at the commencement of these reasons. *Heromanley* did not concern sexual abuse but it does reflect the special consideration given by sentencing courts over a long time to the youth of young offenders. That special consideration arises for a number of reasons; the recognition that the young are more prone to ill-considered or rash actions; the recognition that the young do not always appreciate the nature, seriousness and consequences of the criminality in their conduct; the potential for the young to be redeemed and rehabilitated; and the prospect that incarceration may be more likely to impair rather than improve the offenders' prospects of a successful rehabilitation.

Discussion

33. The *Gideon* and *Scott* principles apply to all cases of serious sexual abuse, irrespective of the age of the victim. But they must have particular application in those cases in which the victim is also youthful.

34. There is no reason to suppose that the particular considerations concerning the sentencing of young offenders have been overlooked in this Court's previous consideration of the *Gideon* and *Scott* principles, in the cases in which they were applicable. That is particularly so in the case of *John, Tabeva* and *Lawi* to which we have already referred.

35. The Court's attention was also drawn to the United Nation Convention on the Rights of the Child, in particular, to Article 37 which provides that the arrest, detention or imprisonment of a child should be in conformity with the law, and should be used only as a means of last resort and for the shortest appropriate period of time. Vanuatu is a signatory to the Convention by reason of the Convention on the Rights of the Child (Ratification) Act 2006 and its terms are binding in Vanuatu.

36. The Obligations in Article 37 are to be regarded seriously. Sections 37, 54 and 58H of the Penal Code reflect those obligations.

37. However, the Convention on the Rights of the Child is not concerned only with the treatment of young offenders. It is also concerned with the protection of children from sexual abuse. Article 34 provides:-

> "State Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, State Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent .....the inducement or coercion of the child to engage in any unlawful sexual activity:-....."

38. The *Gideon* and *Scott* principles are important means by which effect is given to that obligation in Vanuatu.

39. It is difficult to regard the present respondent's offending or his personal circumstances as rare or exceptional. In the experience of this Court, it is regrettably not unusual for young men to contravene s.91 of the Penal Code by engaging in unlawful sexual intercourse. The fact that in this session of the Court of Appeal there are four appeals involving contraventions of ss.91 or 97 of the Penal Code is, by itself, evidence of that circumstance.

40. Nor can it be said that the circumstances of contrition, remorse, good prospect of rehabilitation, willingness to engage in customary reconciliation and the potential for imprisonment to have adverse effects on the offender, whether individually or in combination, make this case exceptional. These are circumstances which commonly exist in cases of the present kind.

41. It is the sentencing principle stated in *Scott* which, like the present, was a case or rape, which is directly engaged in the present case.

42. In the application of that principle, it cannot be said that this is one of the exceptional cases contemplated by *Scott* in which suspension may be appropriate. In reaching the contrary conclusion the Judge erred.

43. For these reasons, we are satisfied that the Judge erred in suspending the respondent's sentence of imprisonment.

Disposition of the appeal

44. It remains to consider the appropriate order for the disposition of the appeal. Over 3 months have now lapsed since the respondent was sentenced. We were told that the respondent has not commenced performance of the 100 hours community work which the Judge ordered as a condition of the suspension. That is only because there has not been a Correctional Services Officer on Malekula to supervise the community work.

45. When the Court allows a Prosecution appeal against sentence, it interferes only to the minimum extent essential in the interest of Justice. That is particularly so when offenders will suffer the

disappointment of imprisonment which they had previously thought they had avoided: *Public Prosecutor v Andy* [2011] VUCA 14 [38].

46. There are also some occasions in prosecution appeals when the Court thinks it sufficient, having identified the error, to allow the sentence to stand. It does so because of the additional hardship and disappointment it recognises that a young offender, who has thought he or she has avoided custody, will suffer if now ordered to serve time in custody.

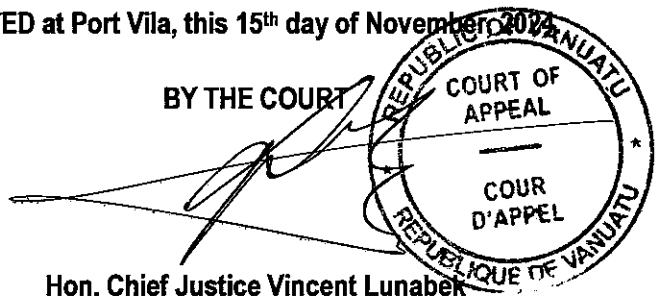
47. In the particular circumstances of this case and having regard to these considerations, we consider that an appropriate result is for the Court to allow the Judge's sentence, including the suspension, to stand. It will be sufficient for the error in the sentence to have been identified by this Court.

48. It follows that the result of this appeal should not be regarded as a precedent justifying suspension in cases of like offending.

49. Accordingly, the formal order of the Court is that the appeal is dismissed.

DATED at Port Vila, this 15th day of November 2024

BY THE COURT



Hon. Chief Justice Vincent Lunabek