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

Criminal Appeal
Case No. 24/2830 CoA/CRMA

BETWEEN: TOUGEN HERKINS
Appellant

AND: PUBLIC PROSECUTOR
Respondent

Date of hearing:	***5 November 2024***
Coram:	***Hon. Chief Justice Lunabek*** ***Hon Justice M O'Regan*** ***Hon. Justice R White*** ***Hon Justice O Saksak*** ***Hon Justice VM Trief*** ***Hon Justice E P Goldsbrough*** ***Hon Justice M MacKenzie***
Counsel:	***Leo, C for the Appellant*** ***Tete, J for the Respondent***
Date of Decision:	***15 November 2024***

JUDGMENT OF THE COURT

Introduction

1. This is an appeal against sentence, beginning with an application for leave to appeal out of time. As there is no opposition, that application is granted.

2. The Appellant was convicted on his own plea of two offences of having unlawful sexual intercourse with a child under the age of 13 years in contravention of s 97(1) of the Penal Code. Both offences were committed in 2014. The victim in each case was the same child. At the time of the offences, the Appellant was a fifteen-year-old boy.

3. In 2014, the victim was nine years old and living with her grandmother in Port Vila. The appellant was a relative of hers. On the first occasion, the appellant forced his way into the toilet occupied by the complainant. He tried to force her to take off her pants, but she refused. The appellant then took them off himself and took off his own pants. The victim declined to touch the appellants' exposed penis, but he then took her hand and masturbated. The appellant pushed one of his fingers into the victim's vagina. Even though told to stop because he was causing the victim pain, the appellant persisted and tried pushing the victims' face towards his penis. The appellant concluded this episode by telling the victim not to tell anyone about what he had done.

4. The second offence occurred a few months later when the appellant took the victim into her uncles' room. He put her on the bed and told her to remove her underwear. When she refused, the appellant removed his own pants and laid down on top of her. He then started licking and kissing her chest, and followed that with penile – vaginal intercourse, despite the victims' pleas for him to stop.

The Grounds of Appeal

5. The first ground of appeal is that the starting point fixed by the sentencing Judge was too high, even taking into account the guidelines laid down by this Court in *Public Prosecutor v Scott* [2002] VUCA 29. As the appeal must be against the end sentence and not the starting point, we have treated this as a complaint that the sentence was manifestly excessive.

6. The second ground is that the Judge had not applied the maximum penalty applicable to contraventions of s. 91(1) at the time of the offending but had instead applied the maximum in force at the time of sentencing. This ground was added by consent during the appeal hearing.

7. On any view, the appellants' offending was serious. In accordance with the sentencing appeal principles stated in *Public Prosecutor v Gideon* [2002] VUCA 2, it would normally attract a sentence of immediate imprisonment. However, counsel for the Public Prosecutor conceded that errors had occurred in the sentencing, conceded that the appeal should be allowed, and conceded that the sentence imposed on a re-sentencing should be suspended.

Error in the stated maximum penalty

8. The maximum penalty provided for in s.97(1) of the Penal Code for the offence of having unlawful sexual intercourse with a child under 13 years of age has been changed over time. In 2014, when these offences took place, fourteen years imprisonment was prescribed in the Penal Code. That was amended in the Penal Code (Amendment) Act No 15 of 2016, which came into force on 24 February 2017. It is now life imprisonment. The Constitution provides, in Article 5 (2) (g), that no-one is to be punished with a greater penalty than that which existed at the time of the commission of their offence.

9. At the sentencing hearing, counsel for the prosecution told the judge that the maximum penalty for a contravention of s.97(1) of the Penal Code was life imprisonment. That indication was wrong, as the maximum penalty applicable to offences committed in 2014, when these offences were committed, was fourteen years. Given the importance of the maximum penalty in fixing an appropriate sentence this error infected the whole the sentencing process, and that, by itself, warrants this Court re-sentencing.

The Judge's Approach to Sentence

10. The sentencing Judge set a starting point of eight years concurrent for the two offences. In doing so, he noted aggravating matters including the age disparity of six years, the breach of trust

involved, the repetition in the offending, the fact that the offending had occurred in the victim's home, the degree of planning in the offending and the enduring psychological effects on the victim. The judge considered that the appellant had taken advantage of the victim's vulnerability for his own sexual gratification.

11. From the starting point of eight years, he deducted twelve months because the appellant was a first-time offender and had favourable character references, a further six months for the delay in the matter being prosecuted and a discount of 33% for the early guilty pleas entered by the Appellant.

12. We note that there was a mathematical error when calculating the end sentence of four years which was imposed. Given the figures used by the sentencing judge, the end sentence should have been three years and ten months.

13. Counsel for the Appellant on this appeal submitted that he had no issue with the scale or extent of the three discounts from the starting point, simply that they were each deducted from a starting point that was too high. He submitted that an appropriate starting point would be five years imprisonment.

14. Counsel for the respondent to this appeal conceded that the starting point was too high and that an appropriate starting point should be less than eight years.

Re-sentencing

15. In the re-sentencing we adopt a starting point of six years. We do so having regard to the appellants' youth at the time of the offending and the aggravating factors, particularly the age disparity and breach of trust. We apply similar reductions to the sentence as the sentencing judge applied, as there was no submission that they were inappropriate. We indicate that it is usually preferable to express those reductions in percentages rather than months. In that way, they may be applied with certainty to the chosen starting point.

16. Based on a starting point of six years, a deduction of 20% for personal mitigating factors means a sentence of fifty-seven months imprisonment. The further reduction of 33% from the starting point for the early guilty plea produces an end sentence of 34 months imprisonment.

17. Counsel for the Appellant submitted that there should be a further reduction from the starting point to reflect the age of the Appellant at the time of the offences. He submits that a reduction of six months would be appropriate. Counsel for the respondent took a different view of how the Appellant's age should have been taken into account. She submitted that the Appellant should have been sentenced as a fifteen-year-old and not been made the subject of a custodial sentence. Counsel referred to s.54 of the Penal Code, which provides that a person under 16 years of age is not to be sentenced to imprisonment unless no other method of punishment is appropriate and that if a person under the age of 16 years of age is sentenced to imprisonment, the Court must give its reasons for doing so.

18. We do not accept the prosecution submission. This was very serious offending for which a custodial sentence is appropriate despite the appellant's youth. We have taken the appellant's youth at the time of the offending into account in the fixing of the starting point of six years.

19. Counsel for the Respondent further submitted that it had been wrong for the sentencing judge to have treated a lack of consent on the part of the victim as an aggravating factor. It is not clear that the Judge did make the error which counsel attributes to him, but it is not necessary for this Court to express a concluded view about that.

20. The Court notes that often in the case of offences involving sexual intercourse with children the offence charged is that of unlawful sexual intercourse i.e. underage sex. When the circumstances indicate that the sex was not only underage but also non-consensual, it is open to the prosecution to charge sexual intercourse without consent under section 91 of the Penal Code. If the prosecution does so, it will of course have to prove the absence of consent. Although offences against s.91 and s.97 (1) now both carry the same maximum sentence, an offence under s.91 requires the prosecution to show a lack of consent in addition to the act of intercourse.

21. Here, the agreed amended summary of facts suggested a lack of consent but the appellant was not charged with rape. We agree that the Appellant should not be sentenced for an offence not charged and thus agree that the principle set out in *R v De Simoni* [1981] HCA 31 is applicable. The Court is nevertheless entitled to consider, from the victim's perspective, the effects the offence. By way of example only, an act of consensual sexual intercourse, albeit illegal, between two young people within the context of an ongoing relationship is less likely to produce significant impacts on the victim than unwanted and unsolicited intercourse with a person in a position of trust towards the victim.

22. In re-sentencing the appellant now, it is appropriate to take into account the time he has spent in custody since 12 March 2024 by reason of the Judges' sentence. That is eight months, which, in accordance with sentencing practice in Vanuatu entitles the appellant to a deduction of 16 months. That reduces the sentence to imprisonment for eighteen months.

Suspension of the Sentence

23. We turn to consider whether there are exceptional circumstances that would allow this Court to depart from an immediate custodial sentence in accordance with the guiding sentencing principle in *Public Prosecutor v Gideon* [2002] VUCA 7.

24. We conclude that there are exceptional circumstances which, in combination, do warrant suspension of the sentence in this case. Those circumstances are the age of the offender at the time of the offences and, particularly, the 10-year delay in bringing this matter to court. We were told this was attributable to the elapse of time before the victim reported the offending. In noting this, we do not criticize the victim for the delay in reporting. There can be good reasons for a delayed complaint.

25. Section 57 of the Penal Code sets out what a court must consider in relation to the suspension of a sentence of imprisonment. The Court must consider the circumstances, particularly the nature of the crime and the character of the offender, in determining whether suspension is appropriate.

26. The delay in the prosecution being brought is particularly significant in this case. During the 10-year period, the appellant has successfully rehabilitated himself. He now holds a responsible position as the principal of a school, has been responsible for the development of the school in significant ways, has introduced several worthwhile innovations and is greatly admired in his school community. The Chairman of the School Board says that the school is proud to have the appellant as its principal. The appellant is still relatively young at 25 years and has an otherwise clear record.

27. In addition, the appellant has already spent several months in custody having commenced the sentence of imprisonment imposed by the Judge on 12 March 2024. As already noted by the time of this decision, he will have served eight months imprisonment. He has experienced the hardship of imprisonment.

28. These circumstances, in combination, are not commonly encountered in the sentencing for s.97(1) offences. We are satisfied that they do make this case exceptional so that the sentencing principle against suspension stated in *Gideon* need not be applied.

29. Accordingly, the appeal is allowed. The sentence imposed by the Judge is set aside. The Appellant is now sentenced for two offences of unlawful sexual intercourse with a girl under the age of 13 years to imprisonment for a term of eighteen months. That sentence of imprisonment is suspended for two years from today. The appellant is to be released forthwith from custody.

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

BY THE COURT

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

Hon. Chief Justice Vincent Lunabek