IN THE SUPREME COURT
REPUBLIC OF VANUATU
(Criminal Jurisdiction)

Criminal Case No. 3979 of 2016

PUBLIC PROSECUTOR

-v-

DENNY MALAU

Before Justice David Chetwynd
Hearing 15th March 2017 (Written reasons published 21st March 2017)
Mr Massing for the Public Prosecutor
Mr Garae for the Defendant

Sentence

1. The defendant Denny Malau was charged with 5 counts on an information filed the 10th March 2017. He pleaded guilty to one charge alleging an act of indecency with a child under 13 (contrary to section 98A of the Penal Code [Cap 135]) sometime in 2015; guilty to a second charge alleging unlawful sexual intercourse contrary to section 97(1) of the Penal Code with the same child on 13th September 2016 and guilty to a second charge of unlawful sexual intercourse on 15th September 2016. He pleaded not guilty to two charges of sexual intercourse with a child under his care and protection. The prosecutor entered *nolle prosequis* in respect of those charges. The maximum penalty in respect of an offence under section 98A is 10 years imprisonment. The maximum sentence for offences under section 97(1) is life imprisonment. The sentence for such an offence was increased from 14 years by the Penal Code (Amendment) Act No. 15 of 2016 which Act commenced when it was gazetted on 24th February 2017. I asked for counsels' assistance in answering the question of whether the defendant should be sentenced under the old regime or the new one. I am grateful to them for their submissions on that question.

2. The short answer to the question is that the defendant is only liable for a maximum sentence of 14 years. The most important reason is that according to Article 5(2)(g) of the Constitution;

> *"No person shall be punished with a greater penalty than that which exists at the time of the commission of the offence"*

It might be argued, taking a narrow view of the provision, that although the term of imprisonment has increased the penalty remains one of imprisonment and so it is not a greater penalty. This would be on the basis the provision was meant to catch a change in the nature of the penalty such as from a fine to imprisonment. However that interpretation would strain logic as well as language and it seems to me to be

plain a maximum term of imprisonment for life is a greater penalty than a term of imprisonment for 14 years.

3. Secondly, even if it could be said the defendant was now liable for a maximum sentence of life imprisonment would that affect the length of the sentence that should be imposed. It might be natural to assume that as Parliament has increased the length of the sentence the courts should impose lengthier sentences accordingly. However, that ignores the importance of sentencing guidelines found in many cases and in particular decisions from the Court of Appeal. Unless the sentences legislated are mandatory sentences the maximum sentences decided on in Parliament do not dictate the length of sentences imposed by the courts. The length of sentences imposed is a matter for the courts and not Parliament. In the case of *Wenu* [1] the Court of Appeal said:

> *"...departure from the guidelines for sentencing based on prevalence is more appropriately made by the Court of Appeal as a matter of principle and sentencing policy guidelines"*

Later the Court said this approach was based on:

> *"... the need for consistency in sentencing as an important part of the administration of justice."*

4. In all the circumstances I shall base the sentencing of the defendant in this case on the existing guidelines. I will deal with the sentence for unlawful sexual intercourse and treat the offence of indecent assault as aggravating the offence rather than sentencing consecutively.

5. A person who has sexual intercourse with a person under the age of 13 is guilty of an offence because legally a person under the age of 13 is deemed unable to consent to the act. It is worth remembering that this type of offence was historically known as statutory rape. For these reason sentencing for this type of offence follows closely to the guidelines for rape or sexual intercourse without consent as it is more properly called.

6. The facts in this case are that sometime in 2015 the victim and the defendant were living in Luganville. The victim's mother was the defendant's *de facto* partner. When the mother was not at home the defendant would touch the victim's breasts and vagina. Later the defendant escalated his abuse of the victim by inserting his finger into her vagina. He also penetrated her with his penis and masturbated. This happened on two occasions.

7. For the offences of unlawful sexual intercourse, as set out in Count 3 of the information, aggravated by the long term and repeated abuse over 18 months and further aggravated by the disparity in age, the other indignities inflicted on the victim

[1] *Wenu v Public Prosecutor* [2015] VUCA 51; Criminal Appeal Case 11 of 2015 (20 November 2015)

and the undoubted breach of trust; the defendant should be sentenced to 8 years imprisonment.

8 There is not a lot that is good that can be said about the defendant. He has no previous convictions and has shown some remorse. There has also been limited custom reconciliation. When considered against the background of abuse for reasons of revenge against his partner and the expressed concerns he still behaves improperly towards the victim his sentence can only be reduced by 1 year. He is however entitled to a full 1/3rd reduction for his early guilty plea. The final sentence is 4 years and 8 months. The same sentence will be imposed in respect of Count 2 and that sentence will be served concurrently. For count 1 the defendant will serve a total sentence of 3 years. That sentence will also be served concurrently

9 There can be no question of the defendant having any part of the sentence suspended. He fits squarely in the *Gideon*[2] guidelines. He will go to prison immediately and will serve 4 years and 8 months imprisonment which will be deemed to have commenced on 12th October 2016 when he was taken into custody.

10 I will remind the defendant of what I said in court, namely if he is unhappy with the sentence handed down then he has the right to appeal. The time for appeal will start to run when his counsel receives a copy of these written reasons.

11 Finally, can I thank counsel and especially the Probation Service for preparing timely and helpful submissions and reports? Their assistance was greatly appreciated.

Dated at Luganville this 15th day of March 2017.

BY THE COURT

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D. CHETWYND
Judge

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[2] *Public Prosecutor v Gideon* [2002] VUCA 7