

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

Criminal Appeal
Case No. 18/1822 CoA/CRMA

BETWEEN: Public Prosecutor
Appellant

AND: Timothy Ulas
Respondent

Coram: *Hon. Chief Justice Vincent Lunabek*
Hon. Justice John Von Doussa
Hon. Justice Ronald Young
Hon. Justice Daniel Fatiaki
Hon. Justice Dudley Aru
Hon. Justice Gus Andrée Wiltens

Counsel: *Mrs. K. Mackenzie for the Appellant*
Mr. G. Takau for the Respondent

Date of Hearing: *8th November 2018*

Date of Judgment: *16th November 2018*

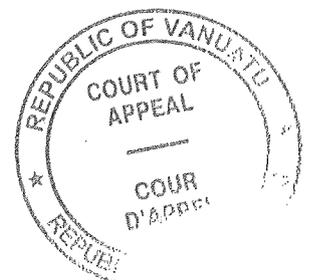
JUDGMENT

A. Introduction

1. On 20 August 2018 the respondent was sentenced to 3 years and 4 months imprisonment on three charges of incest. The prosecution appeals the sentence. Two matters are raised for determination on this appeal: was the correct starting point applied? and was too much weight placed on personal mitigating factors?

B. The facts

2. The offending occurred over a period of three years. The first incident occurred in 2015. The complainant was then only 15 years old. The respondent was alone in the house when the complainant returned home from school for lunch. She had a shower



and only had a towel around her when the respondent pulled her into her brother's room and had sexual intercourse with her to the point of ejaculation.

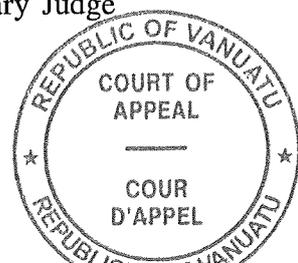
3. In 2016, the respondent punished the complainant for not agreeing to his sexual demands by forcing her to do household chores. She continued to refuse his continued demands. The second incident occurred when the respondent went to the complainant's room when she was already asleep. He woke her and told her to remove her clothes. He then again had sexual intercourse with her.
4. The final incident occurred in 2017. The respondent returned home after a night of drinking, knocked on the complainant's room and when she opened the door he went inside and had full sexual intercourse with her. At the same instant the complainant's mother entered the room and saw what was happening. The complainant cried and told her mother that the respondent had forced himself on her.
5. We note that the maximum sentence for the first two offences was 10 years imprisonment. There was then a change in the legislation so that the third offence was subject to a maximum penalty of 15 years imprisonment.

C. Judge's decision

6. The primary Judge in arriving at the sentence start point identified a number of aggravating factors namely: degree of planning, breach of trust, age disparity and unprotected sex. The primary Judge adopted a concurrent starting point of 7 years imprisonment for all three charges.
7. Deductions were then allowed for mitigating factors, namely: 2 years reduction for co-operation with the Police, remorse and contrition and taking part in a custom reconciliation. The full 1/3 discount was allowed for early guilty plea. The end sentence imposed was 3 years and 4 months imprisonment on all 3 charges concurrently.

D. Submissions on Appeal

8. The appellant submits that there are three incidents of incest and the overall seriousness needs to be considered. It was submitted that the first incident was the most serious as there was an element of force involved. The appropriate start point for each charge as submitted should have been 8 years imprisonment. It was further submitted that the deductions allowed for mitigation were discounted to more than 50% of the start sentence, and that was excessive and resulted in a manifestly inadequate sentence.
9. The respondent on the other hand submitted that 7 years was the correct starting point concurrent on all 3 charges. It was also submitted that the primary Judge



allowed proper discounts for the guilty plea, time spent in custody and custom reconciliation; and arrived at a correct end sentence.

E. Decision

10. We reject the respondent's submissions. Discounts for mitigation should not as a general rule be more than 50% of the start sentence otherwise it is self-defeating as punishment for the crime.
11. The maximum penalty for the first two charges was 10 years imprisonment. The maximum penalty for the third incident was 15 years imprisonment. We are satisfied that a start sentence of seven years imprisonment did not adequately reflect the seriousness of the repetitive offending, or for the third charge with the the increase in penalty . Given this is a prosecution appeal we think the lowest appropriate start sentence for all three charges is 10 years imprisonment.
12. Although the discounts for mitigation and guilty plea were very generous we do not propose to alter them. The start sentence of 10 years imprisonment will be reduced by 2 years for personal mitigation to 8 years imprisonment and further reduced by one third for the guilty plea resulting in a final sentence of 5 years and 4 months imprisonment.

F. Conclusion

13. We allow the appeal. We substitute a sentence of 5 years 4 months imprisonment on each of the three charges, the sentences to be served concurrently. The sentence is backdated to 13 March 2018. When the respondent was first remanded in custody.

DATED at Port Vila this 16th day of November, 2018

BY THE COURT


.....
Hon. Vincent Lunabek
Chief Justice

