IN THE COURT OF APPEAL OF
THE REPUBLIC OF VANUATU **Criminal Appeal Case No. 17/779**
(Appellate Jurisdiction)

BETWEEN: BILL GIGINA
Appellant

AND: PUBLIC PROSECUTOR
Respondent

Coram: ***Hon. Chief Justice Vincent Lunabek***
Hon. Justice Ronald Young
Hon. Justice Oliver Saksak
Hon. Justice John Mansfield
Hon. Justice Mary Sey
Hon. Justice Paul Geoghegan

Counsel: ***Jane Tari for the Appellant***
Simcha Blessing for the Respondent

Date of Hearing: ***5TH April 2017***
Date of Judgment: ***7th April 2017***

JUDGMENT

1. The appellant and victim were boyfriend and girlfriend. On 15 July 2016 the appellant entered the house that the victim was staying at and indecently assaulted her.

2. He pleaded guilty to two charges and was sentenced in the Supreme Court to 10 months imprisonment.

3. The appellant appeals against that sentence submitting it was manifestly excessive and that the sentencing Judge imposed a sentence which was out of line with similar cases.

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4. In submissions before us the appellant initially focused on a challenge to the Judge's refusal to suspend the sentence of imprisonment.

5. The appellant had pleaded guilty to the indecent assault charges, one that he had touched the victim's breasts and the other that he had touched her vagina.

6. The Judge apparently pronounced sentence on 15 March and published his reasons for the sentence on 21 March. In his reasons the Judge first dealt with the facts. The Judge described two incidents of sexual assault. The first in the house when the appellant grabbed the victim's breasts and vagina. The second when he took the victim outside and again the Judge said *"he grabbed her roughly by the breasts and vagina and demanded sex."* The Judge described the appellant as *" aggressively"* assaulting the victim.

7. He considered a starting sentence of 3 years imprisonment was justified. He deducted 18 months for remorse and a further one third for his guilty plea. Together with time spent in custody he considered a final sentence of 10 months imprisonment was appropriate. No order for suspension was made.

8. When we began hearing submissions from counsel it became apparent that there were effectively three different versions of the *"facts"* in this case; one presented to the Court at sentencing described as a " Prosecution Brief of Facts"; another the description in the Judge's sentencing remarks; and a third contained in the respondent's submissions in this appeal.

9. After discussion with both counsel it was accepted that the appellant had pleaded guilty on the basis of the prosecution's prepared "Brief of Facts".

10. The respondent therefore correctly accepted that the *"facts"* contained in its submissions before this Court could not be the facts on which the

appellant could be sentenced. Further the respondent accepted, correctly in our view, that the Judge had not sentenced the respondent on the Brief of Facts as he was required to in this case.

11. The Judge at sentencing had described two separate incidents of sexual assault both involving touching outside of clothing, the victims breasts and vagina, whereas the Brief of Facts described only one such touching of breast and vagina. There were other important differences between the Brief of Facts and the Judge's sentencing note relating to the extent of violence used by the respondent.

12. We are satisfied the Judge was wrong to sentence the appellant on anything other than the Brief of Facts presented by the prosecution at sentencing. Those were the facts the prosecution said the appellant should be sentenced on and those were the facts to which the appellant pleaded guilty and made submissions in mitigation. If different aggravating facts were to be alleged by the prosecution they needed to be fully put before the Judge and the appellant. The appellant was then free to dispute those facts and if disputed, the prosecution would by evidence need to prove them. This process did not happen here.

13. In those circumstance the Judge sentenced the appellant on an incorrect factual basis. These *"facts"* alleged further offending and additional violence and therefore would have been of real significance in the final sentence.

14. The sentence of the Judge in the Supreme Court is therefore quashed. The appropriate course is now for this court to resentence the appellant as counsel for the appellant accepted.

15. The facts before the Court are that in the early morning of 15 July 2016 the appellant began banging on the door of a house where the victim lived. He was let inside. The victim was inside.

16. When she wanted to go to the toilet he stopped her. Two of the victim's friends were present. The appellant told them to go to bed. He then asked the victim for sex and for oral sex. She refused. He then touched her vagina and breasts. The victim's friends told the appellant to stop. He then dragged the victim outside the house but left when the victim cried out and her friends again told him to stop.

17. The following morning the appellant returned to the village and performed a public reconciliation to the victim and her family which included 3 pigs, 2 red mats and VT 6000. He publically renounced his conduct. He co-operated with the police by going to the police station voluntarily to be charged and pleaded guilty at the first reasonable opportunity. He is a first offender who until his imprisonment, had a part- time job.

18. In John Tangiat v Public Prosecutor [2014] VUCA 15 this Court said a starting sentence of 9 to 12 months imprisonment was appropriate for an indecent assault involving touching the victim's breasts. The facts in this case are more serious justifying a higher starting sentence.

19. We consider the appropriate starting sentence based on the facts is 15 months imprisonment. The appellant was aggressive on the night of the offending. He was told his attention was not welcomed but he persisted until he indecently assaulted the victim on her breasts and vagina over her clothing.

20. We agree in this case there is significant mitigation. The appellant immediately accepted his offending, expressed remorse and sought culturally appropriate reconciliation. He is also a first offender and so his good character can be taken into account. Those factors could justify a reduction of the start sentence to 11 months imprisonment. From that sentence one third should be deducted for his early guilty plea leaving a sentence of 7 months imprisonment. This is a very significant reduction (just over 50%) from the starting sentence. It is only justified by the evidence of special remorse as we have identified.

21. We are satisfied this sentence should be suspended. For reasons we will mention later in this decision this is an unusual course in sentencing for sexual offending. In this case the facts are at the lower, although not the lowest, end of such offending. But it is the appellants conduct since his offending which convinces us to suspend the sentence. We again mention his immediate response and his actions to do his best to apologise to the victim and to make what amends he could.

22. Therefore in substitution for the sentence in the Supreme Court we impose on each charge, to be concurrent, 7 months imprisonment suspended for 12 months. We note the appellant has spent approximately six weeks in custody.

23. There are several aspects that arose during the course of this appeal which we wish to comment on.

24. In this case the Judge apparently pronounced sentence but did not then give his reasons. They were given in writing some six days after the sentence was imposed.

25. We consider a Judge should give full reasons for his sentence at the time of sentencing. The defendant should be told in open Court why he has been sentenced in the particular way. Such an approach should avoid the problem that occurred with sentencing in this case. The Judge had made an error on the facts. If he had given his reasons in Court counsel for the appellant would have then been able to tell the Judge the appellant believed the Judge had made a mistake. This cannot occur when reasons are given after sentence is pronounced.

26. In her submissions counsel for the Appellant referred to a number of Supreme Court sentencing decisions involving various sexual assaults. Of the sixteen Supreme Court decisions referred to all but two resulted in suspended prison sentences. All involve sexual assaults of young persons 18 years and younger, several under 10 years of age.

27. In Public Prosecutor v Gideon 2002 VUCA 7 this Court made it clear that suspending prison sentences for those convicted of sexual crimes would be rare. This was repeated by us in Public Prosecutor v Bae 2003 VUCA 14. We emphasis again these observations.

28. The Supreme Court cases referred to by the Appellant are cases involving the sexual assault of young children some involving serious intrusive sexual assaults. Other than in extraordinary circumstances sentences for this type of serious offending should not be suspended. We emphasise that it would be only in the most extraordinary situation for imprisonment to be suspended in such cases.

29. A sentencing Judge will therefore need to identify the extraordinary circumstances in the Judge's sentencing remarks should the Judge consider suspension is warranted.

30. In many of the cases referred to, the Supreme Court Judges have starting sentences of three, four or more years imprisonment. This is understandable where the offending is against a young person and the sexual assault is more than minor. However deductions of well over 50% and sometimes up to 70-80% of the start sentence have been given.

31. Such large deductions undermine the sentencing process. They make the starting sentence virtually meaningless. And they mean that the dominant feature of any sentencing, the facts of the crime, lose their importance.

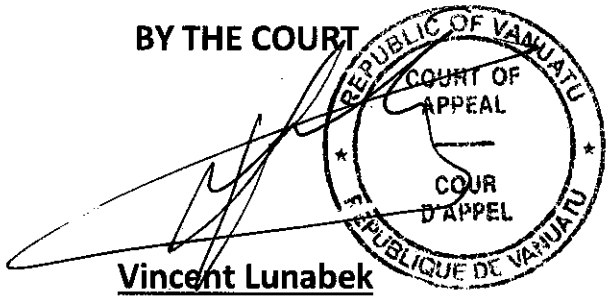
32. Overall it will be rare for mitigation deductions including guilty pleas to total 50% and even rarer for them to exceed 50%.

Result

33. The sentence of 10 months imprisonment is quashed. Instead, 7 months imprisonment is imposed concurrently on each charge suspended for 12 months. The appellant should be immediately released from custody.

DATED at Port Vila this 7th day of April 2017

BY THE COURT



Vincent Lunabek

(Chief Justice)