

BETWEEN: Public Prosecutor
Appellant

AND: Bong James
Respondent

Coram: *Hon. Chief Justice Vincent Lunabek*
Hon. Justice Bruce Robertson
Hon. Justice Dudley Aru
Hon. Justice Gus Andrée Wiltens

Counsel: *Mr. D. Boe for the Appellant*
Mr. J. Garae for the Respondent

Date of Hearing: *11 July 2018*

Date of Judgment: *20 July 2018*

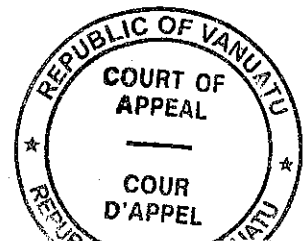
JUDGMENT

Introduction

1. This is an appeal against sentence only. Bong James was sentenced by the Court below on 23 November 2017 to serve a concurrent sentence of 2 years imprisonment which was suspended for 2 years. In addition he was ordered to perform community work for 100 hours within a period of 12 months.
2. The respondent was charged with 5 counts of acts of indecency contrary to s 98 (a) and (b) (i) of the Penal Code [CAP 135]. The maximum penalty for these offences is 7 years imprisonment. Initially he pleaded not guilty to all 5 counts. The matter then proceeded to trial. After the two young complainants completed their evidence, the respondent sought leave to be re arraigned. Leave was granted. He then entered guilty pleas to counts 1, 2, 3 and 4 and maintained his not guilty plea to count 5. The prosecution then entered a *nolle prosequi* in relation to count 5 resulting in the respondent being acquitted on that count alone.

Grounds of Appeal

3. The appeal is pursued essentially on four main grounds, namely that the primary Judge:-
 - a) was wrong in suspending the sentence when the circumstances warranted an immediate custodial sentence;



- b) imposed a sentence that was manifestly inadequate;
- c) imposed a sentence that did not properly reflect the multiple offending against multiple victims or the harm done to each complainant; and
- d) placed too much weight on the mitigating factors personal to the respondent.

Facts

4. The facts before the primary Judge at the time of sentencing were that in March and April 2017 in relation Victim A the respondent (i) touched her breast (ii) touched her vagina (iii) held her hand and forced her to touch his penis.
5. On 18 July 2017 the respondent exposed his penis to Victim B. All the incidents occurred within their home. Victim A, his biological daughter, was 17 years of age and Victim B his niece, was 15 years of age.

Approach

6. Although the appeal was argued first on a consideration of suspension. The proper starting point in a case such as this is the substantive term of imprisonment. Only when that is determined can suspension be considered.

First – Adequacy

7. Dealing first with the question of adequacy of the sentence, the primary Judge said:-

“Taking the aggravating features and the facts in totality your sentence will be one of imprisonment and the starting point shall be 3 years imprisonment.”

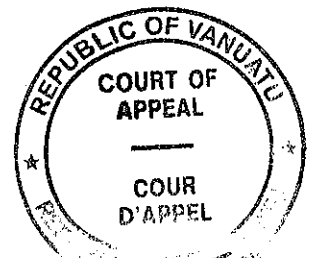
8. He then allowed a deduction of 6 months for the late guilty plea and said:-

“The balance of your sentence is 2 years and 6 months imprisonment.

(b) You performed custom reconciliation to Sheila and her mother by paying fine at VT 20.000, a pig and local food (Taro, Kumala and banana). This shows remorse on your part.

(c) You are a first time offender with clean past record for (b) and (d) together a deduction of 6 months is made leaving the balance of your sentence at 2 years imprisonment. I therefore convict you and sentence you to 2 years imprisonment on each of the 4 counts to be served concurrently.”

9. In reaching a 3 year starting point, the primary Judge took account of aggravating features but did not state what the factors were. The prosecution submissions highlighted the following as aggravating factors:-



- Degree of planning;
- Serious breach of trust;
- Use of force to commit the offence;
- Offending committed inside the home;
- Offending involved two victims and;
- Age disparity.

10. There was a serious breach of trust , the offences occurred within the family home and there is an age disparity all of which support a higher starting point than the 3 years adopted by the primary Judge.

Second – Seriousness

11. Concerning the issue of seriousness of the offending the primary Judge said:-

“it appears you are trying to shift blame and responsibility for your actions on Sheila for her misbehaviour. You explain that you were ‘teaching’ her by touching the different parts of her body. But clearly your explanation affords you no excuse. You as a father to Victim A and uncle to Victim B acted very inappropriately and you went too far. Unfortunately the actions did not go beyond touching of private parts and exposure. Nevertheless your actions are clearly prohibited by law in that they were done to the girls without their consents.

In my view your offendings by comparison to the sentences imposed in the cases referred to by Mr Garae fall within the lower end of the scale for this category of offending. The offending attract a custodial sentence.”

12. The offending was repeated on Victim A. With Victim B, the offending was of similar nature, indecent exposure. Overall the offending spanned 5 months.

Third–Personal factors

13. Taking into account personal factors of the respondent, the primary Judge said:-

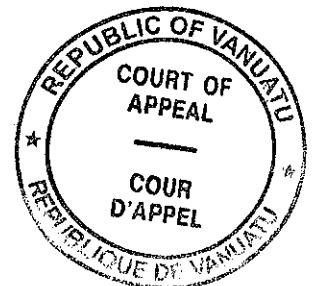
“You performed custom reconciliation to Victim A and her mother by paying fine at VT 20.000, a pig and local food (Taro, Kumala and banana). This shows remorse on your part.

(c) You are a first time offender with clean past record for (b) and (d) together a deduction of 6 months is made leaving the balance of your sentence at 2 years imprisonment.”

14. Custom reconciliation was only done with Victim A and her mother but not Victim B. Therefore any discount under this head should reflect that.

Fourth - Suspension

15. Finally, on the issue of suspension, the primary Judge said that:-



"I consider that this is a case where your term of imprisonment should be suspended. Accordingly I Order that your end sentence of 2 years imprisonment be suspended for 2 years under section 57 of the Penal Code Act. This means that within 2 years from the date of this sentence you must not commit these offences again or any other criminal offences (s) for which you are charged and convicted. If you do, you will go to prison to serve out your 2 years imprisonment terms."

16. Section 57 of the Penal Code sets out the criteria to be taken into account if suspension is being considered: the circumstances of the case, the nature of the crime and the character of the offender. In **Public Prosecutor v Gideon** [2002] VUCA 7 this Court in plain terms stated that:-

"It will only be in a most extreme of cases that suspension could ever be contemplated in a case of sexual abuse. There is nothing in this case which brings it into that category. Men must learn that they cannot obtain sexual gratification at the expense of the weak and the 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."

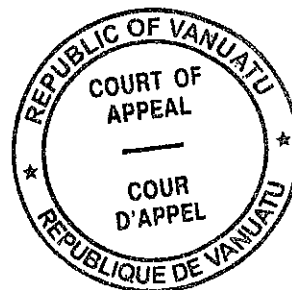
17. There is no evidence that this case falls within the "most extreme of cases" to justify a suspension.
18. We are mindful that this is a prosecution appeal. The minimum starting point must be 5 years imprisonment on a totality basis. The sentence can be reduced by making the following deductions: 3 months for previous clean record; 6 months for the custom reconciliation; 3 months for the time spent in custody (83 days); 6 months for the time already served and completion of 100hours community work; 2 months for the very late guilty plea and 4 months for the time that has lapsed since non-custodial sentence was imposed.
19. The appeal is allowed and the suspended sentence is quashed.
20. The respondent is sentenced to an end sentence of 2 years and 8 months imprisonment. A warrant of arrest will be issued for the respondent to begin serving the sentence in custody.

DATED at Port Vila this 20 day of July, 2018.

BY THE COURT



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Hon Vincent Lunabek
Chief Justice.



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

Criminal Appeal
Case No. 17/3531 CoA/CRMA

TO: The Director of Correctional Services Department

LOCATION: Republic of Vanuatu

**WARRANT OF COMMITMENT UPON A CONVICTION
WHERE THE PUNISHMENT IS IMPRISONMENT
(Section 189)**

WHEREAS **Bong James** of Santo East area Luganville Santo Sanma was convicted of various offences of:

1. Act of Indecency (x 4 Counts)

AND WHEREAS on 20th July 2018, the said **BONG JAMES** was sentenced to be imprisoned for **2 years and 8 months**;

NOW THEREFORE YOU ARE HEREBY COMMANDED to keep the said **BONG JAMES** in custody for the period of **2 years and 8 months imprisonment.**

DATED at Port Vila this 20th day of July, 2018.

BY THE COURT

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Vincent Lunabek
Chief Justice

