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

Criminal Appeal
Case No. 23/289 COA/CRMA

IN THE MATTER OF: **AN APPEAL FROM THE SUPREME COURT OF THE REPUBLIC OF VANUATU**

BETWEEN: **PUBLIC PROSECUTOR**
Appellant

AND: **KIPREL MARAE**
Respondent

Date of hearing:	***15th May 2023***
Coram:	***Hon Chief Justice Lunabek*** ***Hon Justice J Mansfield*** ***Hon Justice R Young*** ***Hon Justice V M Trief*** ***Hon Justice E Goldsbrough***
Counsel:	***K Massing for the Appellant*** ***W Kapalu for the Respondent***
Date of Decision:	***19th May 2023***

DECISION OF THE COURT

---

1. Kiprel Marae was sentenced, after a trial, on 24th February 2023 for incest. That sentence was imprisonment for six years, suspended for three years, and an order for community work. It is against that sentence, in particular the suspension, that the Public Prosecutor has brought an appeal.

2. An information for the offence of incest, contrary to section 95 (1) of the Penal Code, was filed in November 2021 alleging that Kiprel Marae, sometime in June and July 2021 on Tanna Island, committed the offence of incest when he had sexual intercourse with his biological daughter knowing at the time that she was his daughter.

3. The matter was contested, and a trial took place over two days in February 2023, with the decision being announced on 24th February 2023. Kiprel Marae was found guilty of the offence and sentenced the same day. The trial judge found that he was guilty of non-consensual incest attracting a maximum penalty of twenty years imprisonment.

4. The facts, as found by the trial judge, show that Kiprel Marae entered the room where his daughter was sleeping with her child, began touching her, then placed himself on top of her, and had sexual intercourse with her. He told her not to tell anyone, threatening that he would kill her if she did. She told him he should not be behaving towards her as he was doing because he was her father.

5. At a family meeting later in the same week, the daughter told the family what had happened, and the Chief reported the matter to the police.

6. In his sentencing decision, delivered orally on 24th February 2023 and then issued in writing in March 2023, the Respondent was sentenced to a period of imprisonment of six years, suspended under section 57 of the Penal Code for a period of three years on good behaviour and 100 hours of community work.

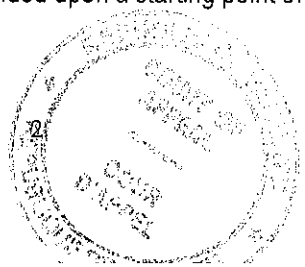
7. The appeal against the sentence is brought on a single ground that the judge erred in law in suspending the sentence of six years imprisonment. There is no complaint brought by either party as to the length of the sentence of imprisonment or, indeed, the conviction recorded, or facts found therein.

8. The power to suspend a sentence of imprisonment is found in section 57 of the Penal Code. That section provides: -

> *57 (1) The execution of any sentence imposed for an offence against any Act, Regulation, Rule or Order may, by decision of the court having jurisdiction in the matter, be suspended subject to the following conditions:*
>
> *(a) if the court which has convicted a person of an offence considers that:*
>
> *(i) in view of the circumstances; and*
> *(ii) in particular the nature of the crime; and*
> *(iii) the character of the offender,*
>
> *it is not appropriate to make him or her suffer an immediate imprisonment, it may in its discretion order the suspension of the execution of imprisonment sentence it has imposed upon him or her, on the condition that the person sentenced commits no further offence against any Act, Regulation, Rule or Order within a period fixed by the court, which must not exceed 3 years;*

9. Whilst the Appellant acknowledges that the sentencing judge referred, in paragraph 12 of his decision, to having considered the circumstances of the offending, the nature of the offence committed and his character and concluding that suspension of the sentence if imprisonment was warranted, it is said that there was an error in that consideration.

10. In his sentencing remarks, the judge decided upon a starting point of seven years imprisonment. He said:-



"This is to mark the gravity of the offending, the public disapproval of your actions, to deter likeminded persons, to protect women and girls and the vulnerable, and to punish you adequately."

11. We respectfully agree with those expressed reasons.

12. Having determined a starting point, the sentencing judge turned to mitigating factors. He found that the Respondent displayed no remorse and had not reconciled with the family or accepted responsibility for his actions. He confirmed there could be no reduction for a guilty plea following the contested trial. Still, he allowed a deduction for the previous good character of one year, remarking that this was his first offending and conviction.

13. Given the findings made following the trial, which remain unchallenged, that the Respondent had committed similar offences against his daughter on two earlier occasions, whilst not leading to a criminal conviction but informal sanction within the village, those remarks appear to be at odds with the facts as found by the trial judge. The Chief who reported the matter to the police did so, having regard to the previous behaviour and sanctions imposed, which had not resulted in the Respondent stopping the sexual abuse of his daughter.

14. Taken together with the remarks concerning the seriousness of the offending, it is difficult to accept that, had the three factors set out in section 57 (i), (ii), and (iii) been properly considered, a finding that suspension was appropriate could be made.

15. In *Public Prosecutor v Gideon* [2002] VUCA 7 dealing with a prosecution appeal against a sentence for the offence of unlawful sexual intercourse, this Court said: -

"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."

16. We do not see this case as an extreme case warranting suspension of the sentence imposed. No exceptional circumstances exist in this case, as referred to in *PP v Bae* [2003] VUCA 14. In *Bae,* dealing with a charge of incest, this Court said: -

"The principles are simple. Parents who use their children for their own sexual gratification will go to prison. It is almost impossible to imagine circumstances in which that will not be the necessary response. This Court would anticipate that it will only be in the most truly exceptional circumstances, which are clearly and unequivocally demonstrated to exist, that this will not apply. We had considered that there were sufficiently clear statements of the principles from this Court that there could have been no doubt about the situation but there have been drawn to our attention an alarming number of cases at first instance where that correct approach has not been followed."

17. *Bae* itself was a prosecution appeal against suspension of the sentence of imprisonment. Again, in *Bae*, the offending had occurred over some time. The decision in Bae was to remove the suspension.

18. As this Court pointed out in *PP v Gideon* applying the principles set out in *Skinner v The King* (1913) 16 CLR 336, interference in the exercise of a sentencing discretion will occur if the Judge has acted on a wrong principle or has clearly overlooked or undervalued or overestimated, or misunderstood some salient features of the evidence, the Court of Appeal will review the sentence; but short of such reasons, it will not.

19. There has been an error as described above in the assessment of the factors which must be considered when deciding to suspend a sentence of imprisonment, and for that reason, this Court will allow the appeal.

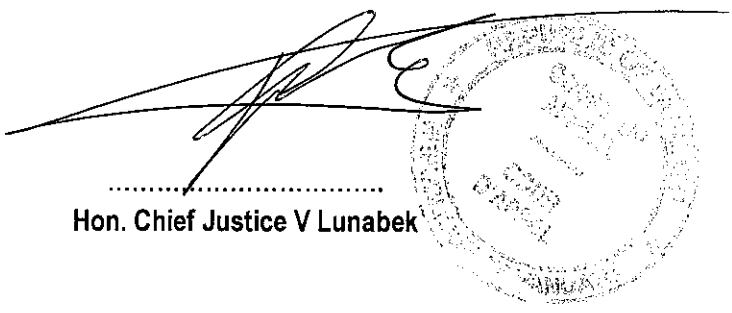
20. In short, the circumstances in which the offence occurred and the nature of the crime provide no basis for the exercise of the discretion in section 57. They point strongly to not exercising the discretion. The judges' findings about the Respondent do not identify any personal characteristics which might involve the exercise of the discretion. To the contrary, his past behaviour and his lack of remorse, the absence of reconciliation and the fact that he did not accept responsibility for his actions also point in the opposite direction.

21. The order suspending the sentence of six years imprisonment is set aside. In addition, the order for community work is set aside. The term of six years imprisonment will remain save that a deduction of sixty days will be made to reflect the period of pre-trial custody. We do not need to allow any days reflecting the number of hours already performed under the community work order, as it is only eight.

22. The sentence of five years and ten months is to commence on the day that the Respondent is arrested and taken into the custody of the Correctional Services Department.

DATED at Port Vila, this 19th day of May 2023

BY THE COURT



.....

Hon. Chief Justice V Lunabek