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

Criminal Appeal
Case No. 23/1198 COA/CRMA

BETWEEN: PARMOD ACHARY
Appellant

AND: PUBLIC PROSECUTOR
Respondent

Date of Hearing:	***8 and 15 August 2023***
Coram:	***Hon. Chief Justice V Lunabek*** ***Hon. Justice JW von Doussa*** ***Hon. Justice R Asher*** ***Hon. Justice OA Saksak*** ***Hon. Justice D Aru*** ***Hon. Justice EP Goldsbrough***
Counsel:	***CX Soto and MJ Hurley for the Appellant/Respondent*** ***K Massing for the Respondent/Appellant***
Date of Judgment:	***18 August 2023***

JUDGMENT OF THE COURT

Introduction

1. This decision considers appeals arising from a decision of the Supreme Court on 16 June 2023[1] in its criminal jurisdiction entering verdicts of guilty on five charges of indecency without consent and five breaches of s 9 of the Leadership Code Act. This decision also determines the appeal from a later sentencing decision of 2 August 2023 when Mr Achary was sentenced to one and a half years' imprisonment and ordered to pay VT200,000 to each complainant. The prison sentence was suspended for two years. Mr Achary appeals the conviction decision and verdict. The Public Prosecutor appeals the sentence.

2. At the time of the alleged offending Mr Achary was General Manager of the Vanuatu National Provident Fund (VNPF). The complainants were female staff members of the VNPF. Their allegations in general terms were of Mr Achary engaging in non-penetrative outside clothing indecent assaults, having also engaged in crude insulting sexual language on occasions with most of them. The trial took four days.

[1] *Public Prosecutor v Achary* 16 June 2023 22/1308 SC/CRML

THE CONVICTION APPEAL

The charges

3. There were a total of ten charges against Mr Achary. Five of those were for indecent assault, including one for indecent assault with force, and five under the Leadership Code Act.

4. The charge of act of indecency without consent under ss. 98(a) of the Penal Code [CAP. 135] has 3 legal ingredients which must be proved for a conviction to be entered. They are that on the occasion alleged:

    i. Mr Achary committed an act of indecency upon, or in the presence of the complainant; and

    ii. The act was without the complainant's consent; and

    iii. Mr Achary knew there was no consent or did not believe on reasonable grounds that the complainant consented.

5. The charge of act of indecency by force without consent under para. 98(b)(i) of the *Penal Code* has the same 3 legal ingredients with the added factor of "*force*" in relation to "*the act*".

6. Paragraph 13(1)(a), in Part 2, of the Leadership Code Act provides that a leader must comply with and observe the law, and if not is guilty of a breach. Mr Achary was a leader.

7. The submissions for Mr Achary in support of the appeal were careful and exhaustive extending to 27 pages. They amount to general criticisms of the judge's approach and application of key legal principles, as well as errors of fact. We do not need to exhaustively consider every point made.

The grounds of appeal

8. Ms Soto who, with Mr Hurley, presented submissions on behalf of Mr Achary and in support of the appeal against conviction put forward six general grounds of appeal. These were as follows:

Ground One

(a) The judge erred in not analysing and/or considering whether the alleged indecent acts were intentional and/or reckless;

Ground Two

(b) The judge did not direct herself that a preference for the prosecution is not enough to convict beyond reasonable doubt in a criminal trial;

Ground Three

(c) The judge did not provide cogent reasons as to why the appellant's evidence was not accepted and/or given proper weight;

Ground Four

(d) The judge erred in accepting the uncorroborated evidence of the complainant;

Ground Five

(e) The judge erred in assessing the reliability of the complainant's evidence in circumstances where no contemporaneous notes or records were made;

Ground Six

(f) The judge erred in convicting the appellant where the circumstances showed a vagueness of particularisation of the date of the offending, and reversed the onus of proof back onto the appellant.

Approach to the appeal

9. This Court considered the approach to a criminal appeal in *Morrison v Public Prosecutor*.[2] It was observed that there is no statutory provision in Vanuatu setting out the circumstances in which a general appeal against conviction should be allowed. The general approach to be taken in considering a jury verdict was considered in the Australian High Court decision of *Pell v R.* The Appeal Court must decide whether it thinks that upon the whole of the evidence it was open to the decision maker to be satisfied beyond reasonable doubt that the accused was guilty. The decision maker must as distinct from might, have entertained a doubt about the appellant's guilt.

10. There is an instructive statement in *Pakoa v Public Prosecutor*:[3]

> We cannot accept that, in deciding if a verdict is unsafe or unsatisfactory, in asking ourselves if we have a lurking doubt, we can or should hear a virtual repeat of the type of arguments usually presented in Counsel's closing speech. The appeal court is not to be regarded simply as an opportunity to have a second bite at the same cherry.... Thus, before it will intervene in such a case, this Court must have some ground for considering the verdict unsafe or unsatisfactory that goes beyond the simple question of whether we feel we might have come to a different conclusion if we had been the trial judge on the appearance of the written record.

11. Thus it is important to approach this appeal appreciating that this is not just a matter of this Court substituting its own opinion for that of the Supreme Court judge. This Court must analyse the evidence, but in the end rather than apply its own opinion it must ask the question whether it was

[2] [2020] VUCA 29.
[3] [2019] VUCA 51.
[2020] HCA 12

open to the Supreme Court judge to reach the decision that she did. Before we allow the appeal we must have reached the position that any reasonable decision maker should have entertained a doubt about Mr Achary's guilt, or found there to be some fundamental unfairness in the way the trial was conducted.

12. We now turn to the individual charges. These charges all arose from actions said to have taken place at the office of the VNPF. All the complainants were female staff at the VNPF, occupying various positions in various departments. It is not in contention that Mr Achary was general manager and the chief executive of VNPF at the relevant times.

Preliminary comment

13. The judge at the outset of her judgment directed herself on a number of the points which it is submitted for Mr Achary she did not observe in her actual judgment. She set out that the prosecution had the onus of proof and was required to establish the allegations beyond reasonable doubt before a finding of guilt could be made. She stated that each charge should be considered as a distinct exercise and that Mr Achary was not required to establish anything in relation to each of those exercises. Any admissible relevant evidence could be considered and that given that this was a case of alleged sexual offending, she reminded herself she should be aware of the danger of convicting the defendant on the uncorroborated evidence of a complainant.

14. We accept immediately that the mere recitation of these matters is not in itself an answer to criticisms of a judgment. It is necessary for this Court to consider the evidence that was adduced, and in broad terms the appellant's criticisms of that evidence and the judge's consideration of it. However we say at the outset that we have seen no sign in the reasons for judgment that the trial judge overlooked any of these fundamental precepts.

The first charge – Josian Viralilliu

15. In the verdict the judge dealt with the charges complainant by complainant, and we will follow the same pattern.

16. The first charge is that Mr Achary committed an act of indecency upon Ms Viralilliu by touching her buttock without her consent. At the relevant time she was acting board secretary.

17. She gave evidence that through 2021 she experienced abusive language from Mr Achary, including him calling her "fucken ass", "big hole", "stupid idiot" and other similar phrases. He would say "go fuck the board members". He would also say to her, "bae mi fuckem yu ia" ("I will fuck you")" or words to the effect of "go and the Chairman of the Board will fuck you".

18. The incident that led to the charge relating to Ms Viralilliu arose when she was in the VNPF office, standing at a printer machine, trying to fix the paper jam. Mr Achary approached from behind and placed his penis from inside his clothing against her clothed bottom as she was bending down. She was shocked by that action and scolded him. He said "Oh yu late – I go insaed finis" ("you're too late – it's already inside").

19. The judge said that she demonstrated that the incident arose as she was bending down to fix the paper jam. Mr Achary came from behind and put his front pelvis right onto her bottom (indicating her buttocks). She said to him "wanem yu mekem?" ("what are you doing?"). He responded, "mi putum go inside finis") ("I have inserted it already"). He was referring to his penis.

20. There was a detailed submission made to us for Mr Achary in relation to this account. The background point was made that a mere touching, albeit an accidental touch, would not amount to indecent assault, and there was a reasonable doubt that the incident amounted to no more than that. It was submitted that the appellant's evidence was not properly taken into account by the judge. Similar submissions were made in relation to her consideration of all the indent assault charges.

21. Much was said of the available space beside or behind the photocopier, which it was submitted would have made an accidental touching very easy. It was pointed out there was no eyewitness to the incident. It was said that the complainant had misled the Court when she had said that she was not employed currently in answer to a question in cross-examination, whereas it turned out that she did indeed have a training position in which she was working.

22. Ms Viralilliu's evidence was considered in considerable detail by the trial judge. Ms Viralilliu agreed in cross-examination that there was not much space between the wall and her bending down. However she was very clear and very adamant that Mr Achary had, through his clothes, placed his penis against her bottom. Ms Viralilliu accepted that she did not make an immediate complaint and that she could have used the VNPF disciplinary process.

23. The judge dealt with Ms Viralilliu's evidence about her not currently working. She appeared to accept the explanation that she only had a trainee position. Ms Viralilliu explained that she told her husband, who was the closest person to her, about the incident. The judge found Ms Viralilliu a truthful and accurate witness, clear in her evidence and firm under cross-examination. Quite clearly the judge considered in detail the cross-examination and the submission she had received from Mr Achary's lawyer at the trial.

24. We can see why the judge found Ms Viralilliu a credible witness. It has long been understood that an absence of immediate complaint means little in cases of sexual assault, particularly when there is ongoing relationship between the perpetrator and victim such as family or employment. We can see no sign of error in the judge's consideration of the evidence or approach in terms of the burden and onus of proof. Indeed we find the judge's analysis detailed and convincing.

The second charge – Nathalie Merick

25. This charge was under s 98(1)(b)(i) alleging force. When Mrs Merrick arrived at work one morning in 2021, Mr Achary passed her in the Customer Service Area at the door to the Compliance department. He said "good morning" and she replied "good morning boss". Then he walked towards her, held her hand and pushed it to touch his private part. She demonstrated in Court how she curled her hand into a fist, saying "eh boss!" and was trying to pull her hand back but he kept coming nearer and pushed her hand until she felt his penis, "mi actually feelim" ("I actually felt it") (through clothing). She did not like him making her feel his penis ("mi no laekem").

26. When Mr Achary did this, the door was still open. She turned around, came back inside and told Serah Stephens what had happened. Mr Achary too came inside the Compliance office and said good morning to the staff.

27. A main swear word that Mr Achary liked to call her was "big hole". There was one time when she felt extremely offended at the public parking area at the Centrepoint Mama Handicraft market. She was standing there with two male officers. Mr Achary came out of his truck, saw her and said "big hole, how much did you collect?" as they had just collected contributions from the mothers at the Handicraft market. After he swore at her in that public area, she sat in the truck and cried as there were many people in that public area who heard Mr Achary. She did not report it to the Police because she feared for her job security, and she did not report the incident promptly.

Sarah Stephens

28. There was corroboration of Ms Merick's evidence. In 2021 Serah Stephens and Nathalie Merick worked together in the Employment Relations Department. The passageway was through the door close to her (Mrs Stephens') desk. Ms Stephens was facing her computer so she did not see what Mr Achary did to Ms Merick. However, Ms Merick came in and said that Mr Achary had forced her hand onto his private part for her to touch it. She sat down and then Mr Achary said to her "big hole, sut blo mi" (a very derogatory term in Bislama for women's genitals and a crude reference to sexual intercourse).

29. Another incident Ms Stephens witnessed was Mr Achary calling another employee Bianca in the Member Services section, "big hole" and making a vulgar action of his left hand fingers in a circle and the right hand inserted in and out of that circle.

30. Ms Stephens also demonstrated the way that Mr Achary approached Isabel Lawi from the back, held onto her shoulders, leaned forward over her and his face close to Isabel's face and talking to her. Ms Stephens felt bad seeing how he was holding the young girl Isabel like that. She did not report to her supervisor or team leader because she had previously reported to a Manager and he was terminated. So she kept it to herself until it got too much. She then went to the Police. She knew that when the report reached Mr Achary that she had gone to the Police, that he would terminate her employment, but she took the risk.

31. Like other witnesses Ms Stephens was cross-examined about the fact that not all matters were mentioned in her initial Police statement. She explained that she did not put them in because she felt it was for Nathalie Merick to say.

The third charge – Lorina Pamela Tugu

32. Ms Tugu gave evidence that sometime in early 2020, she was walking along the corridor on the ground floor to go inside the Member Services Department when she felt someone touch her bottom from behind. She was shocked and turned around saying, "hey!" She was most surprised to see that it was Mr Achary. She felt it was not right and looked at him, he just laughed.

33. She did not say anything but walked to her workstation and he left. She did not feel good. Her colleague, Leah Takaro, saw her facial expression and asked her what was wrong. She told her, "no, mi no feelim gud, mi no glad from mi wokbaot I kam ia, boss blo mi I tajem mi lo arse blo mi, mi no feelim gud" ("I don't feel good. I am not happy because as I was walking here, the boss touched my bottom. I don't feel good.") She did not tell anyone because Mr Achary was her boss and she feared the consequences. She was frightened to lose her job because she is the sole breadwinner in the family and her children would suffer.

34. In cross-examination Ms Tugu confirmed that she knows Mr Viraliliu. She denied that Ms Viraliliu asked her to make a statement to the Police. Like Ms Viraliliu, she was cross-examined on why she had not made a complaint earlier.

Leah Takaro

35. Ms Tugu's evidence was corroborated by a fellow employee at the VNPF, Leah Takaro. She stated that in early 2020, Lorina came in, she had a bad expression on her face and told her (Mrs Takaro) that Mr Achary touched her bottom. Lorina was her supervisor at the time. She told Lorina to go report it to their supervisor Erick but that she (Mrs Takaro) would not report it because she did not trust anyone at the VNPF. At that time there were two groups at the VNPF and she was scared to report the incident as the information would get to Mr Achary who would discipline her and terminate her employment. She did not know who was in which group so she did not know who she could report to. She was the only person working to support her family.

36. Mrs Takaro also gave evidence without objection about how every morning Mr Achary would come by to say "good morning" and would hug Elizabeth Garoleo when he passed by her desk. This was in 2021 after she moved to the Finance Department. As a mother, she felt that what she saw was not right. She did not report it out of fear for her job security. If the information reached Mr Achary he could terminate her employment.

37. Mrs Takaro was cross-examined on the basis that Josian Viraliliu was her cousin and had put her up to making a statement to the Police. She denied it was possible that she saw Mr Achary tapping Elizabeth's shoulder.

38. Again the judge went through all Ms Takaro's evidence in great detail. She accepted her as a truthful and accurate witness. She found that Ms Tugu's and Ms Takaro's accounts were consistent.

The fourth charge – Melissa Iopa

39. Ms Iopa gave evidence that in 2020 Mr Achary entered the Investment Department where she worked, approached her from behind and began massaging her shoulders but then his hands went lower down on to her chest. She began to feel uneasy as there was only one other female staff there but the others were all male. She felt ashamed, laughed and starting leaning forward and shrugging her shoulders. She felt it was an invasion of her private parts as he was touching her towards her breasts. She leaned forward and then he walked away.

40. She stated that when Mr Achary was massaging her towards her breasts, she felt scared and ashamed, but she did not know how to tell him to stop. She thinks there were three other staff present in the room. After he touched her, Mr Achary just laughed, smiled and walked away. She did not tell anyone about the incident because the others present saw what happened and told her that if she did not like what Mr Achary did, she should tell him to stop. But at that time she had just joined the VNPF and Mr Achary was her boss so she did not know how to tell him that she did not like his actions.

41. In 2021 she resigned from VNPF because the situation did not improve. The verbal language Mr Achary used with her, work pressure, and swearing at her with words like "big hole", "mother fucker", "fucken arse" and "fucken idiot" continued to happen.

42. She did not feel safe to report so she just resigned. She was cross-examined on the basis that she did not initially complain and did not mention the incident in her resignation letter. It was put to her that Mr Achary never massaged her but that on occasion, he would put a hand on her shoulder and lean over her. She answered, "there is a big difference between a massage and just a tap. And you would feel the difference between your personal space being invaded and just a tap". She agreed she told the Court that Mr Achary was going towards her breast, saying, "yes, he was massaging towards my breasts and I felt uncomfortable". Again the witness was cross-examined on various issues, but the judge found her a truthful witness and accepted her evidence. It is conceded that Ms Iopa did not take notes or made any reference to "breast" or "breasts" in her typed statement.

43. In consideration of this incident the judge said:

> [289] I considered that Ms Iopa's evidence was credible and reliable. I considered that the inherent likelihood of her account alleging that her breasts were fondled in the presence of others, which made her feel ashamed and uncomfortable, was that she would not have made such an allegation unless it actually happened.
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> [290] Ms Iopa established that in 2020, Mr Achary massaged her shoulders then down towards her breasts (through clothing). She felt it was an invasion of her personal space and she felt uncomfortable and ashamed. She did not consent to him doing so. He could not be under any illusion that she consented to his act which was indecent and done in the presence of others. Charge 4 has been established beyond reasonable doubt.

44. The use of "fondled" is emphasised by the appellant and it was submitted correctly that the evidence of Ms Iopa never went that far; she did not allege that her breasts were touched. This is a valid criticism of the judgment.

45. However, in the next paragraph the judge showed that she was clearly aware that Ms Iopa's breasts were not touched, and she refers to the movements being down towards her breasts through clothing rather than on them. The judge in a number of other places also accurately recounts Ms Iopa's evidence. We are satisfied that the reference to "fondled" was a careless use of language, and does not indicate any misunderstanding or fundamental error.

The fifth charge – Cynthia Ala

46. In 2019 Ms Ala, a VNPF employee, went to pick up some papers that she had printed from the printer just beside Mr Achary's door. While she was there Mr Achary came out through his office door and with a push of his hand touched her buttock. She did not expect that, especially from the General Manager. She was shocked and said in Bislama "kass!". She looked towards him and said, "stop it!". He walked past and just laughed.

47. Apart from that, she experienced a lot of abusive and insulting words from Mr Achary to the staff and he swore at her too. Common swear words he would use were "fucken arse", "fuck you". He would call staff "useless!" and to both her and other staff he would say insulting words such as "sting pussy" (a derogatory term about women's genitals). She was cross-examined on the basis that she had not complained promptly or used the VNPF's disciplinary procedures. She agreed that she did not mention the incident in her letter of resignation. She denied that Mr Achary was upset with her performance in her job.

Meresimani Markward

48. Ms Ala's evidence was corroborated by another witness, Meresimani Bakeo Markward, a lawyer who worked at the VNPF at the relevant time. She recorded an incident when Mrs Ala was printing board papers. While she was still bending over the printer to collect the papers, she (Mrs Markward) saw Mr Achary walk past Mrs Ala and touch her bottom. Ms Ala said "kass!". Mr Achary just walked on. Mrs Markward did not say anything but turned round to go back to her room.

49. Again, Mrs Markward was cross-examined extensively on the geography of the area where the incident occurred, with the cross-examination being designed to show that the touching could have been accidental. She was firm that it was not. The judge accepted both Ms Ala and Mrs Markward as truthful and accurate witnesses and explained why.

Our analysis of the decision on guilt

50. The view of this Court is that the Supreme Court judge clearly understood the issues of burden and onus, and the danger of uncorroborated evidence in sexual charges. She considered the evidence of the complainants exhaustively. She recognised the considerable amount of corroborative evidence that was available, and examined it. We can see exactly why she found the evidence persuasive. We have considered the submission that she insufficiently analysed the evidence, and find that to the contrary her analysis was complete and convincing. She put her reasons forward cogently and clearly.

51. It was submitted for Mr Achary that she did not focus sufficiently on whether the acts in question were intentional. To the contrary, although she did not explicitly focus on intention, her whole consideration was dominated by the consideration of Mr Achary's claim, put to all the complainants and articulated by him, that the incidents did not happen, or were just accidental contacts of an every-day type. The whole thrust of her findings was that these were deliberate assaults. She considered and explicitly rejected Mr Achary's evidence. She did not find it credible.

52. Therefore while there was no specific discussion by her of intention, that is not unusual in a consideration of indecent assault. A key to outside clothing indecent assaults as was recognised by the judge, was whether the action was deliberate or accidental. If the action is found to have been deliberate, intention does not need to considered as a separate issue, as it is implicit that if the action was a deliberate indecent touching it will have been intentional.

53. There were no charges laid in relation to the obscene and insulting language that Mr Achary was said to use to most of the complainants and others. However that evidence was relevant in that it showed a mind-set that he had to female staff which was sexual and abusive. To this extent it was corroborative of an indecent approach to staff, and a willingness to cross acceptable boundaries of contact, verbal in the instance of the insults, physical in the instance of the indecent assaults.

54. We cannot accept therefore the criticisms that have been made of the judge's analysis. Apart from the odd misuse of language, understandable in such a long judgment, her consideration seems to us to have been careful and correct.

55. We are unable to accept the submission that the charges were insufficiently particularised. The charges set out the dates, the complainants and the nature of the assaults. They are the necessary basic particulars. Counsel for Mr Achary did not seek further particulars before the trial, and the issue is only raised on appeal. There is no evidence of prejudice to Mr Achary. The date periods are broad, but that is not uncommon in the laying of sex charges that took place some time ago. Complainants have difficulty recalling exact time frames.

Propensity evidence

56. One of the curious things about this prosecution is that the five charges were heard together, and can be seen as similar fact or propensity evidence. There was also evidence given without objection of other possible indecent assaults on female staff that were not the subject of charges. However, the judge was careful not to adopt any similar fact or propensity reasoning in her decision.

57. This appears to have resulted from an exchange about propensity evidence at the outset of the trial. A notice of the adducing of propensity evidence had been given prior to trial by the Public Prosecutor to Mr Achary's lawyers. Clearly there were some other witnesses who were not complainants but who were said to have been involved in similar indecent assaults. Nevertheless after an exchange with counsel, the judge recorded "we will not call most of the witnesses. No longer any issue recalling of witnesses other than to prove charges versus the defendant". It seems that this was a record of an agreement by the Public Prosecutor not to rely on propensity or similar fact evidence.

58. We raised this issue with counsel during the hearing of the appeal, and we have not got an entirely understandable account of that initial exchange. However, given that the judge clearly felt as a consequence of some agreement or concession she should not consider propensity evidence, we in this appeal will also not consider any propensity reasoning. In the appeal there was no criticism by either side of the way in which the judge dealt with this issue.

59. We must, however, comment that whatever the concession that was made at the start of the Supreme Court hearing, similar factual or propensity reasoning could have been entirely appropriate given the evidence. It could be seen as an extraordinary coincidence that five staff members should all allege similar outside of clothing sexual contacts from Mr Achary at the work place. It could be said that the evidence as a whole showed a propensity on Mr Achary's part to use abusive and insulting sexual language towards his female staff, and carry out low level indecent assaults. This was undoubtedly a proper case for the prosecution to have relied on similar fact/propensity reasoning.

60. However while recording our surprise at the lack of similar fact/propensity reasoning, we put such reasoning entirely to one side as did the trial judge for the purposes of determining this appeal.

Conclusion on conviction appeal

61. For the reasons we have given we find the approach of the judge to have been correct, and her reasoning entirely persuasive. We will dismiss the conviction appeal.

THE SENTENCE APPEAL BY PUBLIC PROSECUTOR

The sentencing decision

62. In her sentencing decision of 2 August 2023 the judge noted the maximum sentences of 7 years imprisonment for indecent assault and 10 years imprisonment and VT5 million fine for the breaches of the Leadership Code Act. She noted that there were no mitigating facts relating to the offending, but it was aggravated by a serious breach of trust (manager to employee), a disparity of power with the complainants most of whom subsequently feared for their jobs, that the offending took place at the complainants' workplace and the effect it had on them.

63. She took into account the circumstances of the offending, including touching of buttocks and forced touching through clothing of the penis, as well as the breach of trust and disparity of power between Mr Achary and the complainants. She fixed a global starting point of two years and six months imprisonment.

64. In relation to his personal circumstances, she noted that Mr Achary was 71 years old, was married and has 2 adult children. He has the strong support of his wife and family and of his chief in Vanuatu. His family relies on him as their main source of income and support. His chief reported Mr Achary's strong support to the Seaside Tongoa community. Mr Achary has also been adopted by and bestowed with a chiefly title by a chief of Tanna. The Court and counsel were provided with written references in support of Mr Achary from prominent members of the community, both male and female.

65. Mr Achary has occupied many senior and important employment positions in Vanuatu and Fiji. The Director General of Finance and Economic Management and Chair of the VNPF Board spoke in the pre-sentence report of Mr Achary's passion and very big heart in serving the VNPF. The

VNPF's development since 2017 had thrived under Mr Achary's leadership. The VNPF Financial Year 2022 report noted that members' funds have experienced growth for the past 7 years, coinciding with Mr Achary's tenure as General Manager of the VNPF since September 2017.

66. Mr Achary resigned from the VNPF with immediate effect soon after the Verdict, citing the intense pressure and criticism from the media including social media and other sources. He has no previous convictions, (although the judge noted that in cases of a sexual nature, that is of little mitigatory value).

67. Also, Mr Achary had serious health problems including diabetes, hypertension, coronary heart disease, stroke, psoriasis, prostatic hypertrophy and mild to moderate depression. His kidneys and prostrate were being monitored. He was on a series of daily medications. Mr Achary had issues with his vision and must be careful around stairs and slopes. His healthcare requirements were such that constant monitoring with a practitioner who knows his history and background was required.

68. He had not performed a custom reconciliation ceremony. However he had been willing to do so. Two of the complainants informed the pre-sentence report writer that they were not willing to accept any such ceremony given the effect of the offending on them, and the attitude of the others is unknown.

69. In the end the judge deducted twelve months from the sentence for personal mitigating factors on the Leadership Code charges she fined VT1 million to be paid in 3 months, the whole of which was to be paid as compensation to the 5 victims by payments of VT200,000 each. She then suspended the sentence of one and a half years imprisonment for two years.

Approach to the appeal

70. We must consider whether in all the circumstances the sentence was manifestly inadequate.

The starting point related to the offending

71. We consider the starting point first from the point of view of the facts of the offending.

72. As with all indecent assaults this was serious offending which caused great distress to the victims, particularly given that Mr Achary was the manager, and had power over their employment positions. Nevertheless it was not skin to skin, and it was outside of clothing with no direct or indirect touching of the genitals. Thus in terms of the gravity of the assaults, highly distressing as they were to the victims, they were at the lower level when compared to a skin to skin touching of genitals.

73. However there is one other aggravating factor in addition to their position of employees. There was not one but five indecent assaults on five different victims. This had to be taken into account, and we have no doubt that the judge did so.

74. We do not accept the Public Prosecutor's submission that a starting point of 5 to 6 years imprisonment would have been correct. That would have been approaching the maximum. Given the 7 year maximum term for indecent assault, two years and 6 months seems to us to have been an appropriate starting point in all the circumstances, particularly given the judge's decision to impose a fine of VT one million on the breach of the Leadership Act charges. It was a significant starting point. It could have been less if there was only one charge.

Mitigating and aggravating factors

75. There were significant mitigating factors set out above. They included Mr Achary's age, his families' reliance on him, the strong support for the seaside Tongoa community, and the written references from prominent male and female members of the community. Mr Achary's excellent performance at VNPF was important.

76. Mr Achary has made a significant positive contribution to his community, and he is entitled to a considerable credit for that. Mr Achary resigned from the VNPF with immediate effect soon after the verdict. He has no previous convictions. He has faced the collapse of his income and reputation.

77. He has the serious health problems outlined in the judgment. He requires constant medical monitoring. He has not performed a customary reconciliation ceremony but is willing to do so.

78. The judge was right to accept that an appropriate sentence for the breaches of the Leadership Code Act would have been a fine. It was determined in the end that a fine of VT1,000,000 was to be paid in three months' time, the whole to be to the five complainants in the sum of VT200,000 each.

79. Given the significant personal mitigating factors, we consider the judge's deduction of 12 months for personal mitigating factors, reducing the sentence to one year and 6 months together with the payment of the VT one million, to have been appropriate. There were no aggravating factors.

Suspension of sentence

80. The critical decision made by the judge was to suspend the sentences. The Prosecution submitted that this was contrary to the statement in *R v Gideon*[4] that "*It will only be in a most extreme of cases that suspension could ever be contemplated in a case of sexual abuse*". That statement must be seen in the context of the facts of *R v Gideon* which were of a number of sexual act including full intercourse with a child under 13. It has less force in relation to minor non-penetrative non skin to skin offending with adult victims.

81. The judge recognised this. She acknowledged that the offending was serious, the important role that Mr Achary occupied, and the fact that his offending was directed at employees of the statutory body that he headed. These were factors counting against suspension of sentence.

[4] [2002] VUCA

82. However, she also noted the particular factors about the offending that had been set out above. She considered that Mr Achary had good prospects of rehabilitation and had suffered a most significant fall from grace. She placed weight on his putting the interests of VNPF and its members first and making the difficult decision to resign. For these reasons she suspended the sentence, warning Mr Achary that he must remain offence free for the next two years or he will serve his full sentence.

83. This was a merciful sentence, but we consider it to have been appropriate in all the circumstances. In addition to the matters we have set out as to his contributions to the community and family and fall from grace, Mr Achary does have multiple medical conditions which would make a period in prison a much greater hardship for him than would normally be the case. Such a sentence would be disproportionate and harsh, given the nature of the offending and the personal mitigating factors.

84. We do not underestimate the very significant effect that his breach of trust had on the complainants. They deserve every sympathy. However, this sentencing and the particular features personal to Mr Achary that we have set out, make this an exceptional case warranting the leniency shown by the judge. The sentence was not manifestly inadequate.

Result

85. The appellant's appeal against conviction is dismissed.

86. The public prosecutor's appeal against sentence is dismissed.

DATED at Port Vila, this 18th day of August 2023

BY THE COURT

Hon. Chief Justice Vincent Lunabek

REPUBLIC OF VANUATU COURT OF APPEAL COUR D'APPEL REPUBLIQUE DE VANUATU