

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

**Criminal Appeal
Case No. 23/1022 COA/CRMA**

BETWEEN: HARRISON LAWI
Appellant

AND: PUBLIC PROSECUTOR
Respondent

Date of Hearing: 14 August 2023

Coram: Hon Chief Justice V. Lunabek
Hon Justice JW von Doussa
Hon Justice R Asher
Hon Justice OA Saksak
Hon Justice VM Trief
Hon Justice EP Goldsbrough

Counsel: E Molbaleh for the Appellant
T Karae for the Respondent

Date of Judgment: 18 August 2023

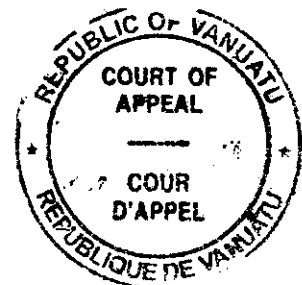
JUDGMENT OF THE COURT

Introduction

1. The Appellant, Mr. Harrison Lawi ("*Mr. Lawi*") was sentenced by the Supreme Court for 3 years imprisonment on one charge of unlawful sexual intercourse with a child under the age of 15 years on the 9th June 2023.
2. This appeal was made against the decision of the Judge in the court below for not suspending wholly or partly the sentence of 3 years imprisonment.

Facts

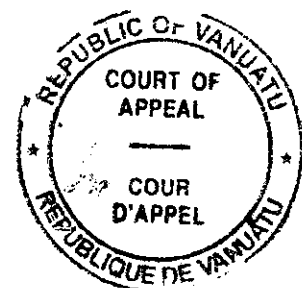
3. The complainant was a student. In November 2022, she came to Vila and stayed with relatives who were running a kava nakamal opposite the University of the South Pacific. She worked in the nakamal canteen whilst one of her close cousins sold kava.



4. The appellant who was a bus driver came to know the complainant through her cousin who gave him her phone number. The appellant began calling the complainant and texting her telling her he liked her.
5. On the night of the incident, the appellant picked up the complainant and her cousin in the bus he was driving and they went for a ride. They ended up at a guest house at Erakor half road.
6. The appellant took the complainant inside the guest house whilst her cousin remained in the bus. The appellant told the complainant's cousin to sleep in the bus.
7. The complainant upon entering the guest house was shown to a room where she entered and sat down on the bed. The appellant joined her then caressed her mouth and breasts, then, undressed her and penetrated her vagina with his penis. During sexual intercourse, the complainant did not fight back and did not call for help. She remained calm and covered her face with her hands. After the sex, they remained at the guest house till early morning before returning home.
8. The complainant was later questioned by her relatives. She admitted to having sexual intercourse with the appellant. A formal complaint was lodged with the police against the appellant.
9. The appellant was later arrested and formally interviewed and questioned on 18 January 2023. He exercised his right to say nothing and remained silent.

The Sentence

10. The primary Judge identified a number of aggravating factors, which resulted in a sentence start point of 6 years imprisonment.
11. The Judge then considered the following mitigating factors:
 - (ii) The appellant pleaded guilty to the charge at the first-time opportunity and reduced the sentence start point by one third;
 - (iii) He was a first-time offender and has a 5-year-old son from a previous relationship. He earned his living as a bus driver to support his son and his parents. For the personal factors including the fact that he has no previous convictions, the sentence start point was further reduced by 12 months.
12. The appellant was therefore sentenced to 3 years and 2 months imprisonment. The Judge deducted a further 2 months to reflect the time the appellant had already spent in custody prior to his sentence.
13. The appellant's end sentence was three years imprisonment.



Suspension Consideration

14. In the Supreme Court, the Judge considered the appellant's submission that the end sentence must be suspended. He noted that the appellant's counsel's strongest argument in support of suspension was that there was a strong and unwavering bond of love and friendship between the complainant and the appellant which led to them having consensual sex. Further that the complainant's intention was to be the future wife of the appellant as confirmed through text messages on the appellant's mobile and little notes of paper passed to the appellant.
15. The Judge in the court below turned his mind to the circumstances of the offending, the nature of the crime and the character of the offender as set out in Section 57 of Penal Code [Cap 135]. The Judge noted that the nature of the crime in the case was that a 28-year-old took advantage of the immaturity of the complainant to indulge her in sexual intercourse as highlighted by this court in its guideline judgment in Public Prosecutor v. Gideon [2002] VUCA 7 "*Men who take advantage sexually of young people forfeit the right to remain in the community.*"
16. The Judge held that the sentence of 3 years imprisonment would not be suspended. A custodial sentence is warranted to hold the appellant accountable for his action and to deter him and the public at large from such offending.

The Appeal and submissions

17. The appellant appealed against the non-suspension (either wholly or partly) of 3 years imprisonment by the Supreme Court on 9th June 2023 on the following four grounds:
 - (i) *Firstly, the Judge erred in fact and law by not accepting that the appellant has an 8-year-old daughter. He has been providing for her everyday needs and paid for her school fees. This case is exceptional on that basis.*
 - (ii) *Secondly, the Judge erred in fact and law by not considering and accepting the victim is not and has not suffered from the sexual encounter; and the victim did not report the matter to the police.*
 - (iii) *Thirdly, the Judge erred in fact and law by not accepting that the appellant and the victim were very much in love that is inseparable and that they wanted to be future husband and wife with children; and their love and relationship makes this case an exceptional one warranting for a suspension of the 3 years imprisonment.*
 - (iv) *Fourthly, the Judge erred in fact and law by not considering and accepting that when the victim reached legal age which is soon, their sexual relationship will no longer be an issue and, so, the sentence of three years should be suspended.*
18. During the hearing of this appeal, Mr. Molbaleh informed the court that the Appellant has a daughter of 8 years old but not a son of 5 years as mentioned in the sentence of 9 June 2023.



19. The court also noted that this was a case of non-violent sexual intercourse involving a child under 15 years of age. As such, it is arguable that the sentence start point of 6 years imprisonment was far beyond the reasonable sentence start point in terms of moral culpability of this type of offending based on its facts.
20. Mr. Molbaleh informed the court that the appeal was only made on the non-suspension (either wholly or partly) of the end sentence of 3 years imprisonment.
21. The court then pointed to Mr. Molbaleh that if the appeal is advanced on the initial four grounds as they appeared in the notice and grounds of appeal, the appeal will not achieve anything. In the course of the discussions with Mr. Molbaleh, the court indicated to Mr. Molbaleh that the appeal was made against the sentence of the Supreme Court issued on 9 June 2023 and that nothing prevented the appellant from adding a new ground of appeal challenging the sentence start point of 6 years imprisonment as too excessive. It was, therefore, open to the appellant to challenge the sentence start point of 6 years imprisonment based on the facts of this case.
22. During the submissions on this appeal, Mr Molbaleh added a further ground of the appeal and challenged the sentence start point of 6 years imprisonment as too excessive based on the fact that it was a non-violent sex involving a child under 15 years of age.
23. Mr. Molbaleh urged the Court to suspend the sentence based on the initial grounds advanced in this appeal.
24. Mr Karae on behalf of the Respondent, noted the possible and additional ground of appeal that the sentence start point of 6 years imprisonment was excessive.
25. He referred this court to his submissions in the Supreme Court when he submitted that an appropriate sentence start point will be between 5 – 8 years imprisonment in this type of offending. However, the primary judge disregarded his submissions of 5 years start point and adopted the sentence start point of 6 years imprisonment instead.
26. Mr Karae conceded that, in this case, the moral culpability of the offending is less serious and 5 years imprisonment would be an appropriate sentence start point.
27. On the question of suspension of the end sentence of 3 years and 2 months imprisonment, Mr Karae submitted that the factors advanced by the appellant for the suspension of the end sentence of imprisonment were mitigating factors which were taken into account based on the three steps applied in the sentencing approach in the case of Public Prosecutor v Andy [2011] VUCA 14; Criminal Appeal Case 09 of 2020 (8 April 2011) and Philips v Public Prosecutor [2020] VUCA 40; Criminal Appeal Case 955 of 2020 (17 July 2020).
28. Mr. Karae submitted that this case was not an exceptional circumstance case for sexual abuse. As such, a suspension of the end sentence of imprisonment will not be warranted. An immediate



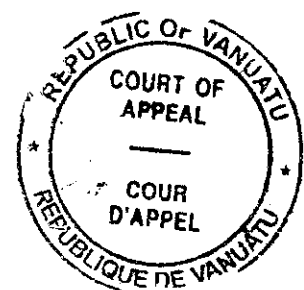
custodial sentence should be imposed in line and consistently with the guideline judgments principles on these types of cases as repeatedly stated by this court in PP v Gideon [2001] VUCA 1; PP v Scott [2001] VUCA 29 and others.

Discussion

29. We considered the submissions of the Appellant and the Respondent on the additional ground of appeal challenging the appeal against the sentence start point of 6 years imprisonment as too excessive. We noted the concession of Mr Karae on behalf of the Respondent that 6 years starting point was too excessive and that, in this case, the culpability of the appellant for the offending is less serious and will be considered in the low range taking into account of the fact that this was a case of non-violent sexual intercourse.
30. We considered and accepted that the primary judge erred in not taking into account the specific facts of this case when he assessed the sentence start point of 6 years imprisonment. In the circumstances, the sentence start point of 6 years imprisonment was manifestly excessive.
31. We considered that the appropriate sentence start point was 5 years imprisonment.
32. We agreed with the primary judge that 12 months imprisonment will be reduced to the sentence start point of 5 years to reflect the appellant's personal circumstances, the fact that he has a clean record before he was convicted and sentenced in this case and the fact that he is the bread-winner for his family and looks after his old father and daughter.
33. We agreed with the primary judge to reduce the sentence start point further of one third (or 33%) to reflect his guilty plea given at the first opportunity provided to him by the authorities.
34. We considered that the end sentence should be of 32 months. We noted the appellant has spent sometimes in pre-custodial period. We agreed with the primary judge to deduct 2 months to reflect the time he had already spent in pre-sentence custody.
35. The balance of his end sentence is 30 months (i.e., 2 years and 6 months) which is eligible for suspension under Section 58 of Penal Code. S. 58 provides:

"58. Power of court to suspend sentence in part

- (1) *If a court has decided that the case is so serious as to warrant imprisonment, and that it is not appropriate to suspend the whole sentence, it should consider whether there are grounds for suspending the sentence in part;*
- (2) *A court may suspend a sentence in part if the sentence is for three years or less".*



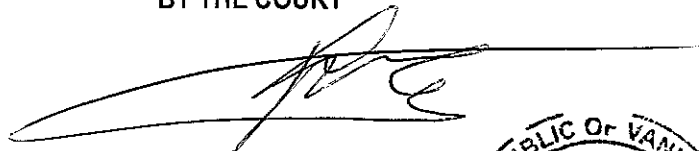
36. We considered that unlawful sexual intercourse with a child under the age of 15 years under Section 97(2) of Penal Code is a serious offence. However, in the case under appeal, the moral culpability is less based on its own facts as it was a non-violent sexual intercourse and the victim girl did not suffer any injury or trauma and there was no reported adverse impact of the offending on the victim. We noted that the appellant believed what the complainant told him which was that she was over 15 years old at the time of offending. This was supported by the text messages in the appellant's mobile phone and the notes sent to the appellant by the complainant which were attached to the appellant's sworn statements filed in support of his appeal on 28 July 2023.
37. We considered it appropriate to partly suspend the end sentence of 30 months imprisonment in the following respect: That, the appellant shall serve the first part of his sentence, i.e., 1 year and 6 months in custody with immediate effect and that, the remaining part shall be suspended for a period of 2 years.

Disposition

38. The court therefore allowed the appeal. We set aside the sentence of the Supreme Court of 9 June 2023. We re-sentence the appellant in the following way:
- (i) The appellant's end sentence is 30 months imprisonment;
 - (ii) The appellant shall serve the first part of his sentence of 30 months imprisonment, i.e., 1 year and 6 months in custody with immediate effect;
 - (iii) The remaining second part of his end sentence of 30 months imprisonment, shall be suspended for a period of 2 years.
 - (iv) The appellant understood the consequences and implications of a breach of a wholly or partly suspended sentence of imprisonment explained to him by the court.

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

BY THE COURT


Hon. Chief Justice Vincent Lunabek

