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

Criminal Appeal Case No. 23/804 COA/CRMA

BETWEEN: FABIANO VINABIT
Appellant

AND: PUBLIC PROSECUTOR
Respondent

Date of Hearing:	***6 November 2023***
Before:	***Hon Acting Chief Justice, Oliver A Saksak*** ***Hon Justice Dudley Aru*** ***Hon Justice Mark O'Regan*** ***Hon Justice Richard White*** ***Hon Justice Edwin Goldsbrough*** ***Hon Justice William Hastings***
Counsel:	***MB Markward for the Appellant*** ***M Tasso for the Respondent***
Date of Judgment:	***17 November 2023***

JUDGMENT OF THE COURT

Introduction

1. The appellant, Fabiano Vinabit, pleaded guilty in the Supreme Court to two counts of domestic violence contrary to s 4(1) of the Family Protection Act 2008 and one count of sexual intercourse without consent contrary to ss 90(b)(iii) and 91 of the Penal Code [Cap 135]. The maximum penalty for sexual intercourse without consent is life imprisonment and the maximum penalty for domestic violence is five years' imprisonment or a fine of VT100,000 or both.

2. The appellant was sentenced to imprisonment for seven years and one month for sexual intercourse without consent and for one year and six months on each of the two domestic violence counts (*Public Prosecutor v Vinabit* [2023] VUSC 55). These sentences were to be served concurrently and were backdated to commence from 25 April 2022, to take into account the fact that the appellant had already spent 12 months and 24 days in custody prior to sentencing.

3. The victim of the offending was the appellant's de facto partner, with whom he has a daughter, who was three years old at the time of sentencing.

4. The appellant appeals to this Court against sentence.

Facts

5. The background facts are set out in some detail in the judgment of the Supreme Court. For present purposes it is sufficient to recount that, after a dispute about collecting their daughter from school, the appellant became angry and told the victim not to return home. Because the appellant was so angry, the victim stayed away from the home but eventually received a call which led her to believe that he was no longer angry with her. She went home to find the appellant and his nephew drinking kava. She went to bed but the appellant asked her for sex, which she refused. This made him angry, and he picked up a moneybox tin that was heavy with coins and threw it at her head. This was the basis for the first count of domestic violence.

6. The appellant then picked up a broken mirror and used it to cut the victim several times on her buttocks. This was the basis for the second count of domestic violence.

7. The appellant then dragged the victim outside, pulled her into an empty house that was only partially completed and put a mat on the floor and made her lie down on it. He then undressed her and sexually assaulted her. This involved penetration of her anus with his penis, sucking her breast, making her suck his penis, penetrating her vagina with his penis and ejaculating on her. This occurred despite the victim's injuries to her buttocks. She did not resist because she feared that he would harm her more if she did. Although the sexual assault had many components, the appellant faced a single charge of sexual intercourse without consent.

8. The following morning the victim told the appellant she needed to seek medical assistance. He told her that if she was asked about how the injuries occurred, she was to lie. Instead of going for medical assistance, the victim went to the Vanuatu Women's Centre and then made a police complaint.

Supreme Court sentence

9. The sentencing Judge adopted a starting point for all three charges of nine years and six months' imprisonment. In doing so, the Judge commented that there were no mitigating factors but a number of aggravating factors, namely:

   (a) breach of trust;

   (b) the use of a broken mirror and a heavy moneybox as weapons;

   (c) the long, vicious attack on the victim including to effect the rape;

   (d) the injuries and pain the victim had to endure during and after the assault and the rape;

   (e) the fact the offending occurred at home where the victim should have been able to feel safe and secure;

   (f) the offending occurred at night time;

   (g) the appellant told the victim to lie about the cause of her injuries; and

(h) the effect on the victim including the lack of protection used exposing her to the risk of a sexually transmitted disease and other infection from the anal penetration followed by vaginal penetration.

10. The sentencing Judge then made a 15 per cent allowance for the appellant's guilty plea. The background to this was that the appellant pleaded guilty at the first opportunity to the domestic violence charges, but his guilty plea to the charge of sexual intercourse without consent came much later, at a time when the prosecutor agreed not to proceed with three other counts against the appellant. The 15 per cent discount applied to the global starting point.

11. The Judge allowed a further global discount of 12 months to reflect a number of factors. These included the following:

(a) the appellant had no previous convictions;

(b) the appellant was employed in a skilled position at the Reserve Bank of Vanuatu;

(c) the appellant had performed a customary reconciliation ceremony with the victim, involving mats, root crops valued at VT25,000, a slaughtered bull valued at VT60,000 plus cash of VT300,000. This had been accepted by the victim, though the victim had since moved on with her life and did not wish to have anything more to do with the appellant; and

(d) the appellant was remorseful.

12. After taking these mitigating factors into account, the sentencing Judge imposed the sentence specified in paragraph 2 above.

Grounds of appeal

13. The appeal is advanced on two grounds:

(a) that the starting point of nine years six months' imprisonment was too high; and

(b) that the Judge made insufficient allowances for mitigating factors personal to the appellant.

14. Counsel for the appellant, Mrs Markward, argued that the combined effect of these factors was that the overall sentence was manifestly excessive.

Was the starting point too high?

15. Mrs Markward argued that the starting point adopted by the sentencing Judge was out of line with the authorities on sentencing for sexual intercourse without consent. She referred in particular to *Public Prosecutor v Mahit* [2015] VUSC 176 and *Public Prosecutor v Rocoty* [2009] VUSC 91. In *Mahit*, the Supreme Court adopted a starting point of six years with an uplift for two

and a half years to reflect aggravating factors such as the repeated nature of the offending over the course of 10 years, the abuse of trust and the traumatic experience suffered by the victim. In *Rocoty*, the Supreme Court adopted a starting point of 10 years in a case that involved not only a rape but also the repeated penetration of the victim with foreign objects and digital penetration.

16. Mrs Markward noted that this Court had observed in *Public Prosecutor v Scott* [2002] VUCA 29 that for a rape committed by an adult without any aggravating or mitigating features, a starting point of five years' imprisonment was appropriate. However, the Court also noted that if the offender was in a position of responsibility towards the victim or abducted the victim and held her captive, the starting point should be eight years.

17. Mrs Markward accepted that there were a number of aggravating factors in the present case, including the violence used to commit the rape, the use of weapons (the broken mirror and the moneybox), breach of trust and the effect of the offending on the victim.

18. However, her argument was that a starting point in the region of six or seven years ought to have been adopted.

19. For the Public Prosecutor, Ms Tasso argued the starting point was correct, given the fact that it was not only for the rape but also the domestic violence counts, the fact that the rape involved both violence and a number of indignities on the victim and the use of weapons. She argued that sentences have increased since the time of *Public Prosecutor v Scott*, decided in 2002, and that starting points of greater than five years could now be expected in relation to a rape committed by an adult without aggravating or mitigating features. She referred to the decision of this Court in *Vuti v Public Prosecutor* [2017] VUCA 14, in which this Court in dealing with an offender charged with two rapes considered that a starting point of 12 years would not have been excessive and that the starting point for the first rape alone could have been eight years' imprisonment.

20. While a starting point of nine years and six months' imprisonment can be regarded as at the top end of the available range, we are not persuaded that it was excessive in the circumstances of this case. This was not just a case of sexual intercourse without consent. The two counts of domestic violence involved serious violence and domestic violence is, itself, a serious offence with a maximum penalty of five years' imprisonment. We are satisfied that the starting point adopted by the Judge when taking the overall offending in the round was within the available range.

Should there have been a greater recognition of mitigating factors?

21. There were two aspects to this ground of appeal.

22. The first was an argument advanced on behalf of the appellant that the discount given for his guilty pleas should have been greater than 15 per cent. As noted earlier, this is complicated by the fact that his guilty pleas to the domestic violence counts were prompt, while his plea to the more serious charge of sexual intercourse without consent came late in the day.

23. The discount for other mitigating factors was 12 months, which equates to about 18 per cent discount from the starting point discounted by the 15 per cent allowed for the guilty plea.

24. Mrs Markward argued the discount for the guilty plea should have been higher. She cited *Nampo v Public Prosecutor* [2018] VUCA 43 in which this Court allowed a discount of 22 per cent for a guilty plea that was entered part way through the trial. We do not see that case as creating any rule about the level of discount. The maximum discount of 33 per cent assumes a plea at the first opportunity, so a plea that comes later will necessarily attract a lower discount. One of the particular benefits of an early guilty plea is that it allows a victim to get on with her life in the knowledge that she will not be called upon to testify. In the present case, pleading guilty to the domestic violence counts but not the sexual intercourse without consent count did not achieve this benefit, because the victim still had the prospect of testifying about the latter count hanging over her until the plea on that count was entered. We are not persuaded that a discount of greater than 15 per cent was called for, given the lateness of the plea on the sexual intercourse without consent count.

25. Mrs Markward argued that the Judge did not give enough weight to the mitigating factors identified in the sentencing judgment (as set out above). In addition, she argued that the Judge did not take into account the fact that the appellant was president of the UNEX Youth Association, that he assisted his chief and his community and that he assisted his wider family financially from time to time with their personal needs. She noted that he was an educated man who held a responsible position at the Reserve Bank of Vanuatu and had no previous convictions. Mrs Markward also argued that the customary reconciliation ceremony should have been given greater recognition than afforded to it by the sentencing Judge.

26. Again, while we consider that greater recognition for these factors would not have been untoward, we are not persuaded that the sentencing Judge erred in the weight afforded to personal mitigating factors.

27. Standing back and looking at all factors in the round, we consider that the overall sentence of seven years one month was not manifestly excessive. We therefore dismiss the appeal.

DATED at Port Vila this 17th day of November 2023

BY THE COURT

Hon. Acting Chief Justice Oliver A Saksak