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

Criminal Appeal
Case No. 24/763 COA/CRMA

BETWEEN: **MICHEL DO**
Appellant

AND: **PUBLIC PROSECUTOR**
Respondent

Date of Hearing:	***10 May 2024***
Coram:	***Hon. Chief Justice V. Lunabek*** ***Hon. Justice J.W. von Doussa*** ***Hon. Justice R. Asher*** ***Hon. Justice O.A. Saksak*** ***Hon. Justice D. Aru*** ***Hon. Justice E.P. Goldsbrough*** ***Hon. Justice W.K. Hastings***
Counsel:	***M.B. Markward for the Appellant*** ***T. Karae for the Respondent***
Date of Decision:	***17 May 2024***

JUDGMENT OF THE COURT

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1. The Appellant pleaded guilty to one charge of committing an act of indecency without consent contrary to s. 98(a) of the *Penal Code* [Cap 135], and one charge of intentional assault where no physical damage is caused contrary to s 107(a) of the Penal Code. He was found guilty after trial on one charge of unlawful sexual intercourse with a child under the age of 15 years but of or over the age of 13 years contrary to s 97(2) of the Penal Code, and one charge of threatening to kill contrary to s 115 of the *Penal Code*.

2. The Appellant appeals his conviction on the charge of sexual intercourse with a child, and his sentences on all four charges. During the appeal hearing, Mrs Markward took no issue with the sentences imposed on the indecency and intentional assault charges, leaving only the sentences on the sexual intercourse and threat to kill charges for us to consider.

3. If the appeal against conviction were dismissed, and the appeal against the sentences imposed on the unlawful sexual intercourse and threat to kill charges were allowed, counsel agreed this Court should resentence the Appellant rather than return the matter to the primary judge.

REPUBLIC OF VANUATU COURT OF APPEAL COUR D'APPEL

Background

4. In 2016 the complainant was 14 years old and a student. The complainant lived with her mother who introduced her to the Appellant. The Appellant was 56 years old. The complainant at that time thought he was her biological father. He sometimes bought things for her and brought them to her house.

5. The unlawful sexual intercourse and indecency charges relate to an incident in 2016. After the complainant sent the Appellant a text asking who her father was, the Appellant said he would pick her up and explain it at a church. The Appellant drove the complainant to the church and explained what he was going to do to upgrade it. He then talked about what boys and girls do in a relationship, and rubbed her breast, first through her shirt, then under her shirt. He then sucked her breast. The Appellant took off his jeans and told her to suck his penis, which she did. He then told her to lie down and remove her pants. He knelt down by her legs and pushed his fingers into her vagina. He unzipped his fly and lay on top of her. She felt the weight of his stomach. He then said "*OK, it has gone inside*" and began to move up and down while lying on top of her. She felt pain in her vagina. She said she was shocked and confused about what was happening. The Appellant was interrupted when someone came to the door of the church. Both the Appellant and the complainant got dressed. The next day the complainant saw blood in her underwear. She was sure the blood was not menstrual blood.

6. The remaining charges relate to an incident that took place on 17 February 2022. The complainant went to the Appellant's house at his request to type and print a letter for the church. Her big sister, and another man from church, were there. The Appellant asked where she would spend the weekend. When she explained she would not go to her mother's house because her stepfather was doing the same thing to her as the defendant, the Appellant grabbed her neck and pushed her up against the wall. He said he would call his friends who would kill her by witchcraft. He then removed his hands from her neck and pulled a knife from a bucket of tools. He pointed the knife at her and her sister, telling them he would cut them with it. They moved backwards. The complainant said she was frightened and thought he would kill her. When she said she would do the church papers, he left with the other man. The complainant went to the police.

7. The complainant gave statements to the police on 18 February 2022, 5 July 2022 and 9 July 2022.

The appeal against conviction

8. Where, as here, the Court is asked to quash a conviction because the verdict is unsafe, we must consider whether, upon the whole of the evidence, it was open to the primary judge to be satisfied beyond reasonable doubt that the accused was guilty. In doing so, the Court will consider whether or not the primary judge has expressed sufficient reasons on key points (*Sesil v Public Prosecutor* [2018] VUCA 24). When assessing credibility findings made by the primary judge, the Court will pay full attention to the fact that she has had the benefit of having seen and heard the witness. (*M v The Queen* (1994) 181 CLR 487).

9. Mrs Markward submitted there were two inconsistencies in the complainant's account to which the primary judge gave insufficient weight when assessing the complainant's credibility. She submitted as a result, the conviction on the unlawful sexual intercourse charge was unsafe and should be quashed.

10. The first was an inconsistency in the complainant's evidence about where the Appellant picked her up from to take her to the church. In her statement of 5 July 2022, the complainant said the Appellant picked her up from Eratap. In her evidence-in-chief, she said she was picked up from Anambrou Park. In cross-examination, the complainant said she was not picked up at Anambrou. Mrs Markward submitted this showed the complainant was making things up and that her evidence was unreliable.

11. Mr Karae submitted that this inconsistency was minor and does not affect the safety of the conviction.

12. We agree with Mr Karae. The primary judge considered the inconsistency. She said it "is explained by the passage of time since 2016 and in any event, it is immaterial where she was picked up from." It is a minor point, it was open to the primary judge to give it the weight she gave it, and in our view it does not affect the safety of the conviction.

13. The second inconsistency identified by Mrs Markward is an inconsistency in the complainant's evidence about whether or not there was penetration. No mention of penetration is made in the statement of 18 February 2022. In the statements of 5 July 2022 and 9 July 2022, the complainant says penetration occurred. When she was asked about this inconsistency in re-examination, the complainant said she told the police in her first statement that there was penetration but they did not write it down.

14. Mrs Markward took us to the following passage in the Judge's notes recording the cross-examination:

> D - lo oral ex, u se get penetration? Yes.
> Be lo s/t 18/2/22 u no get penetration? Yes.

Translated, the judge recorded the question as, "*in your oral evidence, you said you were penetrated?*" The answer was "*yes.*" The judge recorded the next question as "*in the statement of 18 February 2022 you were not penetrated?*" The answer was also "*Yes.*"

15. Mrs Markward submitted that the answers to these questions are inconsistent. She submitted that the complainant agreed that she was both penetrated and not penetrated. She submitted the primary judge did not properly consider the inconsistency in the complainant's answers during cross-examination when she found the complainant to be a credible witness.

16. Mr Karae submitted the primary judge took into account the three police statements, two of which record that the complainant said she was penetrated, as well as evidence from the complainant

that the Appellant said "*it had gone inside*", that she felt pain in her vagina, and that there was blood in her underwear the next day. Mr Karae submitted that on this evidence, it was open to the judge to find that the inconsistency between the first police statement and the rest of the complainant's evidence did not damage the complainant's credibility.

17. We consider the passage on which Mrs Markward relied in the judge's notes does not support her submission. As we read the notes, the complainant agreed that she said she was penetrated in her examination in chief, and she agreed that there was no reference to penetration in her first statement. This is not an inconsistency. The complainant simply agreed that the statement contained no reference to penetration and explained in re-examination why that was. The rest of the evidence was consistent with penetration. The judge properly considered the whole of the evidence when assessing the complainant's credibility, including what she heard the Appellant say, the pain she felt in her vagina, and the blood in her underwear the next day.

18. The primary judge had the benefit of seeing and hearing the witness. She provided sufficient reasons to find that the complainant was a credible witness. On the whole of the evidence it was open to the primary judge to find the complainant to be a credible witness and to be satisfied beyond reasonable doubt that the accused was guilty.

19. For these reasons, the appeal against conviction is dismissed.

20. We now turn to the appeal against sentence.

The appeal against sentence

21. There was no challenge to the sentences imposed on the indecency and assault charges. As those sentences will not affect the outcome, they will not be reviewed.

22. We deal first with the sentence on the charge of unlawful sexual intercourse with a child under the age of 15 years but over the age of 13 years. Thinking the maximum penalty for this offending was 15 years' imprisonment, the primary judge adopted a starting point of 10 years' imprisonment taking into account the breach of trust, the 42 year age differential, the risk of sexually transmitted infection and pregnancy, the fact the Appellant told the complainant not to tell anyone, and the physical and emotional effects on the complainant, as aggravating factors related to the offending.

23. Mr Karae responsibly filed an amended submission on 10 May 2024 in which he clarified that the maximum penalty for the offence of unlawful sexual intercourse with a child under the age of 15 years but of or over the age of 13 years was 5 years at the time of the offending, not 15 years as was assumed by counsel and the primary judge.

24. The maximum penalty was increased from 5 years to 15 years in the Penal Code Amendment Act 2016 which commenced on 24 February 2017. As this offending took place in 2016, the maximum penalty for this offence was 5 years' imprisonment. The accused must be sentenced on the basis of the law as it was at the time of the offending.

25. Mrs Markward submitted the appropriate starting point on the charge of unlawful sexual intercourse ought to have been 3 years' imprisonment. She relied on *PP v Charley* [2011] VUSC 56 and *PP v Kleopas*, [2023] VUSC 195, in which starting points of 4 years and 7 years respectively were adopted on charges carrying a maximum penalty of 15 years. *Charley* involved offending by a 16 year old Appellant against several victims aged between 6 and 12 years over a period of 12 months. *Kleopas* involved offending over a period of 2 years by a 62 year old Appellant against a 14 year old victim that resulted in pregnancy and a miscarriage. She submitted the offending in *Charley* and *Kleopas* was more serious than the offending in this case.

26. We consider the primary judge correctly identified the aggravating features of this offending. Taking into account those aggravating features and the correct maximum penalty, we consider a starting point of 3 years and 6 months' imprisonment to be appropriate. Adopting the primary judge's deduction of 15 percent for the defendant's personal mitigating factors which include his willingness to engage in a custom reconciliation ceremony, absence of any prior convictions and remorse, the end point on this charge is a sentence of 3 years' imprisonment.

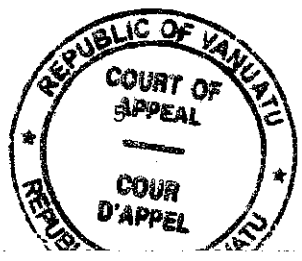
27. Turning to the charge of threatening to kill which carries a maximum penalty of 15 years' imprisonment, the primary judge identified the breach of trust, repeated threats of violence, the use of a knife when making the threats and the physical and psychological effects on the complainant as aggravating factors and adopted a starting point of 7 years' imprisonment.

28. Mr Karae submitted the primary judge correctly identified the aggravating factors and submitted that the starting point of 7 years' imprisonment was appropriate.

29. Mrs Markward relied on *PP v Manuake* [2023] VUSC 227 in which a starting point of 3 years and 6 months was adopted on a charge of threatening to kill that did not involve a weapon. At the appeal hearing, she submitted a starting point of 6 years' imprisonment on this charge was appropriate to take into account the more serious aggravating factors.

30. We accept both counsel's submissions that this case is more serious than *Manuake*, but we do not accept either counsel's submission on the starting point. We agree that this offending involved a considerable number of aggravating factors that make it more serious than the offending in *Manuake*. In addition to the breach of trust and the psychological effects this offending would have had on the complainant, there were repeated threats accompanied with violence. The Appellant placed his hands on the complainant's neck, pushed her to the wall, and then pointed a knife at the complainant and her sister when making threats. We consider however that the primary judge's starting point of 7 years' imprisonment was manifestly excessive. Taking these aggravating factors into account, we consider a starting point of 5 years' imprisonment to be appropriate. Applying the primary judge's discount of 15 percent for personal mitigating factors, the end point reached for this offence is 4 years and 3 months' imprisonment.

31. We do not consider the sentence should be suspended for the reasons given by the primary judge.



Result

32. The appeal against conviction is dismissed.

33. The appeal against sentence is allowed.

34. The Appellant is resentenced as follows:

On the charge of threatening to kill: 4 years and 3 months' imprisonment;

On the charge of unlawful sexual intercourse with a child under the age of 15 years but over the age of 13 years: 3 years' imprisonment;

On the charge of committing an act of indecency without consent: 2 years and 2 months' imprisonment (no change);

On the charge of intentional assault where no physical damage is caused: 6 months and 2 weeks' imprisonment (no change).

35. The sentences are to be served concurrently.

DATED at Port Vila, this 17th day of May, 2024.

BY THE COURT

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Hon. Chief Justice Vincent LUNABEK

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