DIDIER MARIE EDMOND FARSY –V- REGINAM

High Court of Solomon Islands
(Palmer CJ)

Criminal Appeal Case No. 63 of 2004

Hearing: **17th March 2004**
Judgment: **24th June 2004**

K. Averre for the Applicant
C. Ryan for the Respondent

Palmer CJ: This is an appeal by Didier Marie Edmond Farsy (hereinafter referred to as "**the Appellant**") against his conviction by the Principal Magistrates Court, for two counts of indecent practices contrary to section 162(a) of the Penal Code, one count of indecent practice contrary to section 162(b) and one count of buggery contrary to section 160(a) of the same Act. He was sentenced as follows:

Count 1: 6 months imprisonment
Count 2: 2 years imprisonment
Count 3: 5 years imprisonment
Count 4: 1 year imprisonment

Counts 1 and 4 appear to have been made concurrent and counts 2 and 3 consecutive to each other resulting in a total sentence of 7 years being imposed.

Count 1 relates to the events which occurred on the evening of 13th September 2003 at Maluu Lodge ("**the Lodge**"), North Malaita when the Appellant procured Victim 1 ("**V1**") to masturbate him. Count 2 relates to the events which occurred later that same evening when the Appellant committed fallatio on him. Count 3 relates to the act of buggery committed on the second victim ("**V2**") on the following day, 14th September 2003 also at the same Lodge in the room of the Appellant. After buggering V2, the Appellant turned him over and masturbed him. Count 4 relates to that subsequent act.

Appeal Grounds

A total of 12 grounds have been filed in support of the Appeal; grounds 2 to 7 against conviction and grounds 8 to 13 against sentence.

Ground 2: Failure to properly consider the case and weight of the evidence before delivering judgment and thereby rendering the decision or conviction unsafe.

Two matters arise from Ground 2.

(i) That the learned Magistrate did not retire to consider the matter following defence submission; and

(ii) That the learned Magistrate appeared to be reading from a pre-typed sheet raising presumption that the Magistrate had decided to convict before close of Prosecution case and closing speeches.

This appeal ground basically questions or queries the manner or approach in which the decision of the Magistrates' Court had been delivered and alleging that it is irregular thereby raising a presumption that the decision was unsafe.

Paragraph (i): The decision whether or not to retire before giving decision is a matter solely within the discretion of the presiding Magistrate or the Court. The presiding Magistrate is the person in charge of his Court; he hears the evidence, sees and observes the witnesses and is in the best position to make conclusions or decisions about the weight to be attached to each evidence and reliability of witnesses. Rarely would an appellate court interfere with his findings of fact. At the conclusion of the case he makes the decision after taking everything into account. It is not unusual for Magistrates to give decision on the case ex tempore or straight after close of proceedings/submissions from Counsels. The mere fact he has decided to give judgment ex tempore does not imply he has failed to consider the evidence properly. On its face, this submission has little substance.

Section 150(1) of the Criminal Procedure Code ("**CPC**") sets out the mode of delivering judgment; that is how courts are expected to deliver judgment. I quote:

> *"The judgement in every trial in any criminal court in the exercise of its original jurisdiction shall be pronounced, or the substance of such judgment shall be explained, in open court either immediately after the termination of the trial or at some subsequent time of which notice shall be given to the parties and their advocates, if any:*
>
> *Provided that the whole judgment shall be read out by the presiding Judge or Magistrate if he is requested so to do either by the prosecution or the defence."*

The above provision recognizes and caters for situations where the judgment may be pronounced or its substance explained immediately after trial or at some subsequent time. So it is not unusual, wrong or illegal if judgement should be delivered **immediately after termination of the trial**. The law recognizes that this can be done and insofar as the learned Magistrate had opted to do that, he was entitled to do so.

Paragraph (ii): The second issue raised relates to the submission that the learned Magistrate when giving his decision appeared to be reading from a pre-typed sheet giving the impression that he had formed an opinion when case was yet to be concluded.

Again there is nothing unusual or unlawful about Magistrates or Judges reading from a pre-typed sheet and adding to, amending, deleting etc. any thing from that pre-typed sheet as trial progresses and reading from it at conclusion of trial. Some Judges and Magistrates actually do that as the trial progresses, typing up or writing up parts of the Judgment as they consider appropriate.

I have had opportunity to read through the pre-typed sheet of the presiding Magistrate with his amendments, additions etc. I find nothing wrong or suspicious about them; they are consistent with the notes of judgment of a Magistrate who had typed up part of his judgment as he considers appropriate and to make handwritten notes of his additions or changes as the trial progresses. I find nothing to be read or drawn from the existence of that pre-typed sheet which would support any suggestion that the learned Magistrate had pre-judged the case to the detriment of this Appellant, or that he had failed to properly consider the evidence.

The case of **Regina –v- Kwatefena**[1] ("**Kwatefena's Case**") relied on by the Appellant is distinguishable on its facts. Kwatefena's Case relates to the blatant omissions of the presiding Magistrate in his record keeping and the manner in which he had conducted trial which had the cumulative effect of rendering the verdict unsafe and unsatisfactory. In this case there are no blatant omissions or errors, only "assumptions" or suspicions that the verdict was unsafe because the learned Magistrate gave his decision straight after close of proceedings and because he appeared to be reading from a pre-typed sheet. That is not sufficient for purposes of overturning findings of fact made by the presiding Magistrate or to support the suggestion that the learned Magistrate failed to properly consider the evidence. This ground must be dismissed.

Ground 3: Conviction was unsafe and unsatisfactory and against the weight of the evidence. The Magistrate indicated in his judgment that he believed each complainant implicitly. This went against the strength of the evidence.

The principles of law governing how findings based on the weight of the evidence may be set aside are set out in **Gerea and Others –v- DPP**[2], that an appellate Court can review decisions based on findings of questions of fact or the credibility of witnesses made by a trial Judge if it is convinced that the trial Judge was wrong, applying the principles in **Powell and Wife –v- Streatham Manor Nursing Home**[3]:

> "*Two principles are beyond controversy. First it is clear that, in an appeal of this character, that is from the decision of a trial Judge based on his opinion of the trustworthiness of witnesses whom he has seen, the Court of Appeal "must, in order to reverse, **not merely entertain doubts whether the decision below is right, but be convinced that it is wrong**".* (Emphasis added)

In **Kenneth Charles Ferris –v- Regina**[4] the Court followed what was stated in Gerea and Others v. DPP (ibid), that a review court should only reverse if it is convinced that the trial judge was wrong. It however went on to say that when reviewing, it should also consider the manner in which the lower court evaluated the evidence.

> "*When reviewing a case, the Court will consider not only whether there is evidence capable of supporting the decision but also the manner in which the lower Court evaluated the evidence*".

In **Gouwadi –v- Reginam**[5], the proposition of law in Gerea and Others v. DPP (ibid) was restated as:

> "*An appellate court would only interfere in a case that depended on the Magistrate's assessment of witnesses and evidence where it was satisfied there was **a real likelihood he reached the wrong conclusion***". (Emphasis added)

Paragraph 3(i): The Appellant alleges that the findings of the learned Magistrate in respect of counts 1 and 2 were against the weight of evidence in that the three witnesses relied on by Prosecution gave conflicting evidence. Further that the

---

[1] (1983) SILR 106
[2] [1984] SILR 161
[3] [1935] A.C. 243 per Lord Wright at p.265 followed
[4] 1988/1989 SILR 128
[5] [1990] SILR 168

victim on whom the allegation of oral sex had been committed slept in the same bedroom of the Appellant on a separate bed the whole night after the commission of the alleged offence on him.

Evidence of Complainant ("V1"). This witness says he was at the Lodge when the appellant arrived. He says that when he went to have his bath the Appellant took a photo of him in the nude. The Appellant was wearing only a towel at that time. He says in the evening after they had had dinner, the Appellant went and touched him on his chest and kissed him on his cheeks. After that he asked him to touch his penis, which he did. He says it was erect, he masturbated the Appellant. The Appellant then masturbated himself and shot his sperm before stopping. Later, when he went to the Appellant's bedroom to sleep the Appellant pulled his trousers down and committed oral sex on him. He says he shot his sperm into the Appellants mouth. After that he slept on another bed whilst the Appellant slept on separate bed.

Evidence of Prosecution Witness no. 1 ("LW"):

This witness was a child witness of about 12 years. He says he was also at the Lodge with the Appellant and V1. He was an eye witness of the circumstances surrounding the commission of the offence in count 1. He saw the Appellant taking hold of V1's hand, putting it under his towel then taking off his towel and telling V1 to masturbate him.

Evidence of Mike Wanefilia ("MW"):

He was present at the Lodge also at the time of the commission of the alleged offences. He confirmed that V1 helped the Appellant to take water for his bath and then stayed upstairs throughout that time. He also confirmed that when they came to the dining table the Appellant was wearing a towel and was trying to touch and move his hand on V1's body. He confirmed that LW and V1 had told him that the Appellant had showed them his penis and masturbated them.

Assessment of evidence:

I find consistency in the evidence of LW, MW and V1, that the Appellant was wearing a towel at the time of commission of the offence. They were all agreed that initially MW was with them but left later to work on a motorbike. Both LW and MW confirmed that only LW and V1 were with the Appellant upstairs at that time.

Direct evidence supporting the allegation in count 1 came from V1 and LW. V1 says that the Appellant held his hand and told him to masturbate him, which he did. LW saw this and confirmed that the Appellant held his hand and told him to masturbate him. MW gave evidence of what the boys told him; that the Appellant masturbated them. In cross-examination he says:

> *"Both told me white man showed penis and white man masturbated them. I was so surprised I couldn't have anything to say. I went up ½ hour later."*

MW confirmed that V1 and LW told him that the Appellant touched V1's body but also says he personally witnessed the Appellant touching V1's body as well.

Both V1 and LW's evidence about photos of them being taken in the nude is consistent throughout. There has been no dispute that such photos exist; for instance "Exhibit H" was a photo of LW in the nude. There is undisputed evidence

that the video camera of the Appellant contains digital images of boys in the nude. The evidence on the whole both relating to the matters which occurred prior to, during and after the commission of the offence has been consistent and corroborated throughout.

On the question therefore whether there is evidence capable of supporting the decision to convict under count 1, the answer must be yes.

This brings me to the second part of that question as to the manner in which the lower court evaluated the evidence.

At the outset his Worship cautioned himself regarding any assessments he was going to make on child witnesses and complainants including the need to look for corroboration of their evidence. His overall assessment was that the witnesses struck him as being remarkably honest.

On the evidence of LW, the learned Magistrate noted that despite alleging that all his evidence was a lie, the Defence did not challenge any of his detailed evidence. The learned Magistrate was entitled to draw an adverse inference from that observation. His Worship also found that LW's evidence was corroborated by a full frontal nude photograph of the witness taken by the Appellant in the bathroom where part of the incident was alleged to have taken place. This has never been challenged. The learned Magistrate also noted that LW confirmed V1's evidence as to the actual commission of the offence, that is, seeing V1 with the Appellant and taking hold of V1's hand and putting it under the Appellant's towel and asking him to masturbate him. I find nothing wrong with his assessment of LW's evidence.

As to V1's evidence, the learned Magistrate described him as a convincing and honest witness such that he was prepared to accept his evidence on its own. He did point out however that it had been corroborated by LW's evidence and other witnesses. Such assessment/evaluation cannot be faulted – it is within the discretion/capacity of the presiding Magistrate to rule on who he believes or whose evidence he accepts. My role is to determine if such evaluation is proper or justifiable in the circumstances; that is, based on reasonable grounds. In the circumstances of this case, the answer is yes. I find nothing wrong with the evaluation of the learned Magistrate's findings on this matter and must dismiss this ground.

Count 2: Oral Sex:

Under count 2, on the question whether there is evidence capable of supporting the decision or conviction, the answer is yes, although it was based primarily on the sole evidence of V1.

On the question of manner of evaluation of that evidence, his Worship accepted V1's evidence as convincing and honest; a judgement which he was entitled to make having seen, heard and observed the witness in court. This court does not have that benefit. His Worship also was careful to point out that although no one else saw the offence the circumstantial evidence was overwhelming. He pointed out that there was no alternative evidence or evidence adduced in rebuttle such to raise a reasonable doubt in his mind that no such offence occurred. His Worship accepted outright the evidence of V1 that the Appellant performed oral sex on him and ejaculated into his mouth.

It was sought to be suggested that the fact that V1 did not abscond or attempt to run away from the Appellant after the alleged commission of the offence was so unlikely or illogical, to be true and therefore the Court should not believe the evidence of V1. This submission raises a presumption about what or how a victim in such situation would have responded; that he would have absconded. Perhaps in other situations he would have run away from the Appellant, but not in this case. Was this unusual or so unlikely to be true? I do not think so. The circumstances in which the offences had been committed should be borne in mind; that the Appellant endeared himself to the victim as a friendly man and winning his trust before committing the offences on him. The victim was a simple and unsuspecting youth from a rural area who could have been overborne so easily by the shameless advances and actions of this Appellant. In the circumstances I do not think it is unusual or unreal that V1 did not run away immediately. This type of offence corrupts the mind and innocence of its victim and can cause more of an embarrassment or disgrace when committed on an unsuspecting person. The fact that the victim was a young person is relevant. I do not think much can be read into or out of the fact that V1 slept in the same room but in a separate bed rather than running away. Even if he did, it was already too late, the offences had been committed on him.

I find nothing wrong about the learned Magistrate's evaluation and decision. He saw, heard and formed view on the demeanour of the witnesses and their veracity. He was in best position to make such evaluation and conclusion. I do not think I can do any better. I am satisfied he had basis for his findings and conclusion. Do I entertain doubts in my mind whether the decision was right? The answer must be no. Am I convinced that the decision is wrong? The answer must again be no. Am I satisfied that there was a real likelihood the presiding Magistrate reached the wrong conclusion? The answer must also be no.

Paragraph 3(ii)(a):

Counts 3 and 4 relate to the offences committed on the second victim ("**V2**"). In his submissions, learned Counsel Mr. Averre submits that the learned Magistrate committed an error of law when he accepted circumstantial evidence as corroborating the evidence of the complainant. Mr Averre submits that the circumstantial evidence rather was conflicting; none of the witnesses gave the same evidence as the other.

Under subparagraph (a) the Appellant says that Wilson Jeffrey's ("**Wilson**") evidence, that he spoke with V2 immediately following the incident and was with witness David Kona/Kala ("**David**") when V2 gave fresh complaint, was contradicted by David when he said in his evidence that he was not with Wilson. Appellant say Wilson's evidence of fresh complaint should not have been relied on because it conflicted with David's evidence. The records of proceedings however, seems to show otherwise.

In his evidence, Wilson says he was on the ground floor when he saw the Appellant and V2 going upstairs. They stayed upstairs for about ½ an hour before coming down again. He saw them when they came down; V2 came first with the Appellant behind him. He was in a shop under the Lodge when he asked V2 about what had happened upstairs (meaning the Lodge).

David's evidence in contrast was that he was also **in the shop under the Lodge** when the Appellant and V2 went upstairs. He also saw them going upstairs and

that they were away for sometime, about 15 – 20 minutes. He also saw V2 when he came down.

Although Wilson and David were never asked directly whether they were together in the same shop or in different shops **they both were in a shop when V2 came down.** From that shop they both saw the same things. Wilson spoke to V2 about what had happened upstairs. David did not speak with V2 but says he saw a group of boys trying to question V2 about what had happened upstairs. He says that Wilson was with the boys. This raises the question whether they were in the same shop together? The evidence adduced seems to indicate that they were in the same shop but perhaps not necessarily standing together. As to any suggestions of conflict to be drawn from this, I must say it is trivial in nature and insignificant. To the contrary, the evidence on the whole has been consistent throughout. For instance, no issue has been raised regarding the evidence of matters occurring prior to the incident. Wilson's evidence of seeing the Appellant with V2 in the morning and using a spray on his leg is consistent with V2's evidence about the existence of a spray that had been used on him before he was buggered by the Appellant and his evidence that the Appellant had invited him to his room to treat his sores with a spray. Wilson's evidence about a $10.00 note given to V2 is also consistent with what V2 had said. His evidence too of seeing them going upstairs and being away for about half an hour is also consistent with what David and V2 says. Also David confirmed seeing V2 buying a roll of Sol-Tobacco at the shop and seeing him take a photo of V2 outside the shop; consistent with what V2.

I am satisfied sub-paragraph 3(ii)(a) must be dismissed.

Paragraph 3(ii)(b): Appellant submits here that the evidence of Veronica Kelly ("**Veronica**") should not be given weight as –

(i) It was highly suspicious; and

(ii) Contradicted by the evidence of David, V2 and MW.

What was Veronica's evidence? Her evidence related to events occurring immediately after the alleged buggery. She also saw V2 coming down the Lodge with the Appellant; consistent with the evidence of other witnesses. She noticed something different or unusual about his manner of walk and demonstrated this to the court. It was like walking with legs apart. She told the court it was unusual. She also noticed something in his hand but could not see what it was. She also observed that his trousers was wet and asked him about it.

Was her evidence highly suspicious and if so in what way? In order to properly deal with any allegations of suspicion, it is important to appreciate the context in which her evidence was given. It was primarily in relation to matters after the event. On their own, they would have been meaningless, but when construed in the light of what had transpired, especially in the light of V2's evidence, any reasonable Magistrate would be able to see the crucial links that her evidence provides. For instance, her observations that V2's trousers was wet and that she had asked him about it were consistent with what V2 had said in his evidence; that is walking past Veronica's restaurant and being asked about what the Appellant had done to him. Veronica's observation that the Appellant was about 15 feet away is consistent with what V2 says, that he was not far behind him. I find considerable consistency in their evidence throughout.

As to the wet patch on his trousers, V2 says that when he washed himself after the incident, he was holding onto his trousers. I accept there is no direct evidence as to how the trousers got wet; whether it got wet when he was washing himself or whether it got wet when he wore it without drying himself with any towel. There is also no direct evidence regarding whether he dried himself with any towel or not or simply put on his trousers after washing himself. Veronica's observations however are consistent with the very real possibility, not a fanciful possibility, that the trousers at some stage had gotten wet. To that extent the learned Magistrate would have been entitled to view her observations as supporting or corroborating the events which occurred that day.

Although MW and David did not say anything about observing any wet patch at the seat of his trousers, it is not clear whether they were ever asked about that fact or not. The fact they said nothing, does not imply Veronica's evidence is to be viewed with suspicion and considered unreliable. They also may simply have failed to notice it. It is generally said that women tend to pay more attention to details whereas men generally are more concerned about the general state of things.

The decision whether to accept Veronica's observations as being consistent with or corroborating the evidence of V2 must be left with the presiding Magistrate himself. He saw, heard and observed the witnesses and was in better position to assess the weight to be placed on all the evidence heard, in particular the weight to be attached to Veronica's evidence about the wet trousers.

Veronica's evidence has also not been confined to the observation of that wet trousers alone. She had also observed that V2 was not walking normally, which she demonstrated to the court. The learned Magistrate described it as "*walking keeping legs apart*". When assessed in the light of events which preceded that observation, the learned Magistrate was entitled to accept her evidence as supporting the complaints of V2, bearing in mind the medical evidence of redness around the anus; consistent with the claims of V2 of having been buggered by the Appellant. I find no substance to the allegations raised under this paragraph.

3(ii)(c):

The Appellant submits under this ground that V2's evidence should not have been accepted without exception as there were a number of factors raised which throw doubt on the credibility of his evidence.

(i) Use of aeroguard as an inappropriate lubricant. Medical witness Nurse Korina Liusulia had said in her evidence that aeroguard was an inappropriate lubricant. The first point to note is that it is not clear if that was the spray that was used. There was evidence that a "spray" was used on V2's sores but it is not clear if that aeoroguard spray was the same spray used on his sores. V2 was never asked if that spray was the same spray used on his anus. If so, then it would seem to be an inappropriate spray as well for sores! But the mere fact the spray was inappropriate as a lubricant does not necessarily mean it was not used on him in this instance. The complainant clearly described a spray being used. That is direct evidence. Whilst the inappropriateness of aeroguard as a spray has now been raised in issue in this appeal the type or description of that spray was never put to V2 to identify. At the end of the day, the question whether that evidence is accepted or not is a matter for the learned Magistrate to weigh and determine. He was the best person to assess the submission put forward that because aeroguard was an inappropriate lubricant that V2's evidence should not be accepted after hearing the evidence. In choosing to believe the evidence of the complainant, that

is a matter best reserved for him and I have no intention of interfering with his findings on that matter as it entails an assessment not only of the evidence on that specific point but also on all other related evidence.

(ii) Whether the anal penetration hurt or not. The question whether the act of anal penetration was painful or not was a matter which the learned Magistrate was entitled to consider in the totality of the evidence heard or considered and to determine whether such act did occur or not. Again to suggest without more that the absence of pain casts doubt on the veracity of his evidence is presumptuous. It presumes that an act of anal penetration must always be painful or that the victim should experience some form of pain or discomfort. The fact it did not cause pain or discomfort is a matter for the learned Magistrate to determine and I find nothing wrong about his conclusions.

The evidence adduced however, contrary to what was suggested indicated that the complainant actually said it was quite painful! The relevant part of his evidence of V2 read as follows:

> *"I didn't see him take off his trousers he sprayed around my anus. It was feeling cold he penetrated anus.* ***It was quite painful.*** *I am sure he did this. I went to the doctor for checking."*

The evidence of the medical officer confirms his version. I quote:

> *"Rectum had opening having said* ***he had pain.*** *Its stretched around the anus."*

To suggest therefore that there was no pain would be contrary to the evidence before the court!

(iii) The third issue raised again seeks to suggest that in the circumstances of a frightened complainant he could not have sustained a state of arousal. Again that suggestion can only be described as presumptuous and speculative. If it is to be considered and weighed, the best person to do that is the presiding Magistrate, not this appellate court. It should be borne in mind that there was no evidence whatsoever to suggest that the complainant was not aroused; it was never put to him in cross-examination either. To the contrary, the learned Magistrate had before him the evidence of a complainant that he had opportunity to observe and to make a ruling as to whether or not he accepted his evidence. I find no substance to this ground.

3(ii)(d):

This alleges that the learned Magistrate did not apply the warning regarding the evidence of young witnesses to the circumstances of the case and was too ready to accept in its entirety the evidence of the complainants?

This ground must be dismissed as having no basis. The requirement that warnings be given in respect of evidence of children or young witnesses was obligatory where there was a jury. A Judge was required to tell a jury that the evidence of a child or young person must be scrutinized with particular care, meaning that where possible, corroboration must be sought. The law in England regarding the unsworn evidence of a child of tender years prior to 1988 was that corroboration was required by statute; see section 38(i) of the Children and Young Persons Act 1933. Where the evidence is sworn, although corroboration is not

required as a matter of law, a jury should be warned of the danger of acting on uncorroborated evidence. This means they may act on such evidence if nonetheless they are convinced that the witness is telling the truth – see **R v. Campbell**[6], **R v. Sawyer**[7].

The situation in Solomon Islands is different where the magistrate or judge presiding is judge both of fact and law. The requirements of a warning to that extent can be relaxed as a judge or magistrate in most instances would be legally qualified in any event and cognizant of the requirements of law on corroboration. As a rule of thumb however, magistrates and judges do make a point of saying in their judgments that they do bear such warnings in mind. That clearly was the intent which the learned Magistrate had in mind when he issued that warning in his judgment at para. 2 of page 1:

> "*In this case there are child witnesses and complainants. I have to caution myself to be doubly careful when assessing the evidence. Firstly this is a sex case and secondly there are witnesses that may not understand the seriousness of the situation or understand the obligation to tell the truth or may make untrue allegations for a myriad of reasons. In each case where there was such a witness I have looked for and found corroboration of their stories.*"

The evidence of V2 was not sworn in the usual way it seems. The records of evidence showed he was sworn by promise. I do not know exactly what that meant, whether he swore by promise on the Bible to speak the truth or whether it was a mere declaration by promise without an oath. I note there is no finding by the learned Magistrate that upon enquiry he was satisfied that the child did not understand the nature of an oath[8]. In perusing the record of evidence it seems that V2 was an intelligent child/youth and ought to have been sworn under the usual oath. The procedure adopted by the learned Magistrate however in getting V2 to swear by a promise in my respectful view is not wrong or unlawful. I see nothing wrong with that if the intent was to impress upon the youth the essence of speaking the truth in court and to be subjected to cross-examination in the usual way. It is clear in my respectful view, the learned Magistrate was satisfied the child/youth was "*possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth*". He was subjected to cross-examination in the usual way. The alternative approach would have been to require him to give unsworn evidence but to be subjected to cross-examination in the usual way. I find no miscarriage of justice in the procedure adopted by the learned Magistrate.

This was not an easy case for the learned Magistrate as he was dealing with juvenile witnesses and the need for corroboration. I have carefully considered his judgment, I am satisfied he was fully aware throughout of the need to find corroboration and to scrutinize evidence of witnesses carefully. I am satisfied on the offence of buggery he applied the warning throughout. I quote:

> "*There was corroboration of this by evidence that the defendant took the boy to his room locked the door undressed him all of which evidence was unchallenged by the defence. The boy had a wet patch on his trousers after*

---

[6] (1956) 40 Cr. App. R;
[7] (1956) 43 Cr. App. R. 187
[8] s.38 (1) of the Children and Young Persons Act 1933 by application under Schedule 3 to the Constitution.

and was walking awkwardly, medical evidence showed that his anus was red...

The unchallenged fact that the defendant paid the boy $10 and told him to be quiet is also very persuasive as are answers given by the defendant to the police."[9]

In so far as V1 was concerned, it appears the learned Magistrate was satisfied he understood the nature of the oath because he was sworn ad subjected to cross-examination in the usual way. On the question whether the learned Magistrate applied the same warning to the circumstances of that case I am also satisfied he did. For instance, at conclusion of his judgment, at para. 13 of page 3, he says:

> *"(V1's) evidence was convincing and again I would say he was so honest I would accept it on its own but it is corroborated by (LW) and other witnesses. Although no one else saw the act of oral sex by the defendant on (V1) the circumstantial evidence is overwhelming and the defence haven't said what they say happened. This is not evidence against the defendant but it does mean there is no alternative evidence as to what happened nor is there any evidence in rebuttle, there is more than enough evidence for me to be sure the defendant invited (V1) to masturbate him and he had oral sex with (V1)."*

At his concluding remarks he again addresses the issue of corroboration:

> *"Some of the corroborating witness evidence contradicts it was given with the usual forgetfulness of witness and perhaps some reticence of witness to implicate himself in an act of indecency but in my view does not take away from the corroboration as to location time opportunity indication pure and of the acts of the defendant and did not throw any doubt in my mind that (V1's) version was 100% correct."*

I am satisfied this ground should also be dismissed.

3 (ii) (e):

This ground relates to the medical evidence adduced. In his judgment the learned Magistrate accepted the evidence that there was red around the anus but ignored the evidence on dilation of the anus. Defence case is that in choosing to ignore the medical evidence on dilation, the learned Magistrate should also have ignored the evidence on redness, in that there could have been any number of explanations why the anus was red.

The medical evidence came from a health officer who had undergone medical training at the Central Hospital in Honiara and in Fiji. This officer carried out an examination on the complainant and noted redness around the anus. This officer also noted dilation of the anus and gave opinion that such dilation usually takes up to 24 hours. The examination occurred in the evening of the same day at about 10 – 11 pm.

I find nothing wrong or conflicting about the observations of the medical officer and the decision taken by the learned Magistrate on the side of caution to ignore the evidence about dilation. The reason being that that witness had made it quite clear in her evidence that that case was the first of its kind she had dealt with; she

[9] See paras. 5 – 6 page 2 of Judgement

was more familiar with dilations occurring in women. I am satisfied the learned Magistrate did the right thing in ignoring that piece of evidence. Her evidence on redness and that his anus appeared stretched were relevant evidence which the learned Magistrate was entitled to take into account. I find nothing conflicting about such finding.

Whilst it has been suggested that the redness could have been due to any number of explanations, in the absence of supporting evidence that is mere speculation. No evidence has been adduced to support such submission. It is one thing to make suggestions; it is another to adduce evidence in support which is capable of raising a reasonable doubt in the mind of the Court. Nothing of that sort had been done in this case. In the absence of such evidence, it is mere speculation.

I must also point out that the evidence of V2 had never been discredited to the point whereby it was unreasonable or improper for the presiding Magistrate to also conclude that the redness may have been caused by anything other than the act of buggery alleged. I find nothing wrong about his finding that the redness was directly linked to the offence of buggery and was one of the factors consistent with V2's evidence. As the person who heard the evidence, he was the best person to make finding on that matter.

3(ii)(f):

This ground raises the allegation that because rumours were everywhere in Malu'u in connection with the Appellant that the presiding Magistrate failed to warn himself adequately or to take this fact into account when considering the weight of the evidence.

It is trite law that what is said outside of Court, whether rumours or not, are not evidence and therefore inadmissible. Where there is trial by jury, it is a requirement that the presiding Judge directs them to ignore anything they may have heard outside of Court or read in the papers etc. Where however, the Magistrate sits as judge of fact and law, it would simply be stating the obvious for the presiding Magistrate to warn himself from taking such rumours into account when considering the weight of the evidence. The presiding Magistrate in this case was a qualified lawyer of many years experience and understands only too well that what is said out of Court is not evidence in the case. I know of no rule of law which says he ought to warn himself expressly in the judgment. It is sufficient if in his judgment it is seen he has taken that warning into account.
I really do not see how the rumours spreading around Maluu have any relevance or bearing to the case before him because it is not those rumours that he is required to consider but the evidence before him and his evaluation of them. He may have heard rumours, if so he is obliged to put them aside and concentrate on the evidence before him. In fact he should not have taken them into account in anyway. On that I am more than satisfied he had discharged his duty. On the other hand, he may not have heard rumours; if so, all the better for him as it means he only has the evidence before him to deal with.

I am satisfied this ground should also be dismissed.

Paragraph 4. **Judgment on conviction and sentence demonstrates bias against the Appellant?**

A number of allegations have been raised which I will attempt to deal with in the order raised. First, the allegation that the wording of rulings were in a language so

florid it demonstrated a lack of impartiality. The first point to note about this allegation is that the judgement and sentence are divorced in time and separate. They deal with two entirely separate subjects; one, on whether the evidence on trial established the Appellant's guilt beyond reasonable doubt; the other as to what level of punishment is appropriate and proportionate to the Appellant's offending.

I have had opportunity to carefully scrutinize the judgment of the presiding Magistrate. I am unable to find any evidence of biasedness, impartiality or emotive language used which would render the judgment unsafe. I also fail to find any evidence that the presiding Magistrate was overborne by the nature of the allegations or that he became affronted and allowed this to affect his reasoning in the delivery of his judgment. This allegation must be dismissed.

I fail to find anything in the judgment which demonstrated that the learned Magistrate used or considered the attempted suicide during the course of the case as a sign of guilt. To the contrary, he goes to great lengths to ensure that there was sufficient evidence to sustain a conviction.

It has also been alleged that the meeting by the Magistrate with the Appellant, in the presence of counsels for the Crown and the Appellant on the night of 23rd October 2003 at Auki Police Station was inappropriate, wrong and demonstrated prejudice in the mind of the Magistrate against the Appellant; the Appellant was the concern of relevant authorities.

To appreciate the reasons for that visit it is important to appreciate what happened earlier that day. In the morning, during trial, the Appellant had been hitting his head against the wall and floor. After the lunch break when Court reconvened the Appellant failed to turn up in Court. The Court was told that the Appellant was seen collapsed on his bed. The presiding Magistrate ordered that his room be broken into at about 1:40 pm. He accompanied Police Officers and saw the Appellant collapsed on his bed; his wrists slashed. The learned Magistrate noted that they were superficial. The Appellant told them he had taken aspirin. He was rushed to the hospital and checked. It was determined that the medication taken was not life threatening and he was placed on observation at 10 minutes intervals. Following his discharge from hospital he was returned to the cells. The visit by the learned Magistrate was made when he returned the cells. The court records show that the visit was carried out after the matter had been discussed between counsels and the Magistrate on the law concerning mental health issues.

Section 11 of the Penal Code raises a presumption that every person is of sound mind until the contrary is proved. Learned Counsels concede that events which occurred that day had been all stressful for everyone. In view of what had transpired the learned Magistrate would have had concerns about whether the Appellant was of sound mind and in fit state to continue with his trial. It would have been proper therefore that a visit was made.

The Mental Treatment Act [cap.103] does provide powers inter alia for reception orders to be made in respect of persons suspected to be of unsound mind (see Part V of the Act). Section 21 provides power for the Magistrate to visit a person suspected of being of unsound mind at the place where he may be kept or require such person by order to be brought before him. This power may be exercised where the Magistrate is satisfied by information on oath or affirmation that a person suspected of being of unsound mind is at large or is dangerous to himself or others, etc.

Although there has been no suggestion that section 21 of the Mental Treatment Act may have been relied on, it would have provided some basis in law for the visit.

To suggest that the visit was inappropriate needs to be balanced against such provision for visiting rights under the Mental Treatment Act. For a start, the visit was not unlawful. Whether it was appropriate is a matter of degree. Given the circumstances of that day, I fail to see anything inappropriate about the visit. That the learned Magistrate would entertain serious concerns about the well being of the Appellant cannot be denied. He had earlier observed the Appellant beating his head against the wall and the floor of the Court house and in a distressed condition with his wrists slashed and collapsed on his bed, after a suicide attempt. Any Magistrate or Judge would be gravely concerned about the well being of an accused in such situation.

There were suggestions that Prosecuting Counsel had on several occasions counseled the learned Magistrate not to allow the meeting to continue further but that he had insisted on continuing. In his submissions to this Court, Mr Ryan explained that his opposition was based on a fear that should the conversation continue for more than a short time that the Appellant might make an admission and cause the trial to abort. Nothing of that sort happened and the learned Prosecutor also concluded that the visit was entirely appropriate. I find nothing to convince me otherwise and this ground must also be dismissed.

Paragraph 5.

Alleges that the learned Magistrate misdirected himself as to the application of the rule in **Brown –v- Dunn**[10]. During cross-examination of a young witness, LW, Defence Counsel had sought to challenge veracity of his evidence by putting to that witness that he was lying. This elicited a warning from the learned Magistrate that a failure to cross-examine on relevant matters in evidence could be viewed adversely against the Appellant on matters not challenged.

The rule in **Brown –v- Dunn** was succinctly stated by Wells J in **Reid –v- Kerr**[11] as follows:-

> "*Speaking generally, it is essential to the fair conduct of a trial that a party should put to each of his opponent's witnesses in turn so much of his own case as concerns that particular witness..... As a corollary to this, it must also be borne in mind that where it is intended to suggest that a witness is not speaking the truth in a particular matter, his attention should be drawn to what is going to be suggested about it, so he may have an opportunity of explanation*".

In **Allied Pastoral Holdings Pty Ltd –v- Commissioner of Taxation**[12] Hunt J, shed further light on the application of the rule as follows:-

> "*There are many reasons why it should be made clear, prior to final addresses and by way of cross-examination or otherwise, not only that the evidence of the witness is to be challenged but <u>also how</u> it is to be challenged. Firstly, it gives the witness the opportunity to deny the challenge on oath, to show his mettle under attack (so to speak), although this may often be of little*

[10] (1894) 6 The Reports 67 (HL)
[11] (1974) S.A. S.R. 367 at 374-375
[12] [1983] 1 N.S.W. L.R. 15

value. Secondly, and far more significantly, it gives the party calling the witness the opportunity to call corroborative evidence which in the absence of such a challenge is unlikely to have been called. Thirdly, it gives the witness the opportunity both to explain or to qualify his own evidence in the light of the contradiction of which warning has been given and also, if he can, to explain or to qualify the other evidence upon which the challenge is to be based."

The rule in Brown –v- Dunn is directed to challenges to the version of events on facts or attacks on an opponent witness's credit. That, if the cross-examining party, **intends to adduce evidence which contradicts** evidence given by the witness, he should put his version to the witness, so that the witness may have the opportunity of explaining the contradiction. If a party fails to do this, he is generally taken to have accepted the witness's evidence (see also **Criminal Evidence** by Richard May[13]).

Mr Averre submits that whilst he had not cross-examined on each and every detail of LW's evidence, the overall effect was to elicit in respect of counts 1 and 2, conflicting accounts of the events of the 13th September 2003. The Defence case was put on the basis that the evidence of the offences was not accepted and that it was sought to be put to the witness that he was not telling the truth but merely saying what he had been told to say.

Was the warning by the learned Magistrate regarding the rule in Brown v. Dunn improper or inappropriate? In my respectful view the answer is no. The learned Magistrate was not obliged to warn Defence Counsel about it but in doing so, it was more helpful to the Defence case than prejudicial; a *fortiori* when it became clear that the Appellant was not giving or calling any evidence.

It is a general rule in the conduct of cross-examination that where the credibility of a witness is sought to be discredited as part of the defence case, defence counsel must be satisfied that the allegations have reasonable basis; that is, the allegations put to the witness are not merely consistent with instructions but are supported by reasonable grounds.

In **R v. Callaghan**[14] it was held that it is not a proper practice for counsel for the defence to make a major attack on the honesty of the police in the taking of a voluntary statement and then fail to call the defendant to substantiate the allegations by giving specific evidence to support that attack – see also, **R v. Fenlon, Neal and Neal**[15].

In his judgment the learned Magistrate expressly referred to those discrepancies and pointed out that he was entitled to take an adverse view in the absence of such cross-examination. I quote:

"As for count 1 the evidence on its own of (LW) which despite me warning the defence that if they did not put to this witness all matters in his evidence that they disputed I would be left with the only conclusion that was possible namely that the defence were not in dispute with the unchallenged evidence and that I may accordingly take it as fact. The defence other than saying he may be lying on everything did not challenge any of his detailed evidence. As for the general allegation that all his evidence was a lie the defence were told

[13] Criminal Evidence by Richard May third edition page 442 at paragraph18-65
[14] (1979) 69 Cr. App. R. 88.
[15] (1980) 71 Cr. App. R. 307, 312-313

by me. This was too general the answer and specific allegations had to be put." (see paragraph 10 of judgment)

I find nothing wrong whatsoever with the learned Magistrate's approach or findings; more so when no evidence had been adduced by the Appellant in the court below. His Worship referred to this at paragraph 13 of his judgement:

> "*Although no one saw the act of oral sex by the defendant on (V1) the circumstantial evidence is overwhelming and the defence haven't said what they say happened. This is not evidence against the defendant but it does mean there is no alternative evidence as to what happened nor is there any evidence in rebuttle ....*"

When it is sought to be put to a witness that he is lying, it infers there is a true or correct version which Defence has. In such situation Defence is obliged to call evidence to that effect. If Defence does not intend to call evidence in support of such assertions, then it would have been more appropriate to suggest that the witness version is perhaps a cock and bull story, incapable of belief, but not to go so far as to allege that the witness is lying because the defence is not going to call evidence in support of that allegation or to put forward the alternative version.

His Worship was entirely correct in warning defence Counsel about the requirements of the rule in Brown v. Dunn in that when the allegations of lying were raised against LW they were too general and did not relate to challenges to detailed evidence.

In **R v. Robinson**[16], - see **Carter's Criminal Law of Queensland**[17]: "*it was held that whilst in a strict sense questions are not evidence, questions asked and unasked, form part of the conduct by counsel of his client's case. Counsel is concerned with, and his instructions are as to, primary facts and it is his strict obligation that, if he "puts" occurrences to witnesses, he put them in accordance with instructions. Accordingly instructions may be inferred from questions and if there is a discrepancy in a significant particular between questions based on instruction as inferred and the evidence, then it is permissible for a trial judge to ask the jury to have regard to the discrepancy in evaluating the evidence.*"

I am not satisfied the learned Magistrate misdirected himself regarding the application of the rule in Brown –v- Dunn.

Paragraph 6: This ground alleges that the learned Magistrate was affronted by the conduct of the Appellant and used such terms as "arrogant" to describe the Appellant in an abusive way, evidencing bias against him.

The presiding Magistrate was entitled to use such words and terms of expression which best described the Appellant's conduct and behaviour. Another Judge or Magistrate may have used other words or terms of expression. There is no hard and fast rule. I fail to find anything abusive, insensitive or biased in the use of the word "arrogant" by the learned Magistrate. I find nothing to suggest that the term was used in a deliberate, demeaning or abusive way or that the learned Magistrate was affronted by the conduct of the Appellant; appalled, yes. The word "arrogant" basically means extremely haughty and presumptuous and when used in the light of the circumstances of this case can only in my respectful view, correctly and

---

[16] [1977] Qd R 387

[17] sixth edition at page 508

accurately describe the manner and way in which those offences had been committed; but if not, then perhaps the words "brash" and "brazen" would have been more appropriate.

I have had opportunity to read through the judgment of the presiding Magistrate and fail to find anything "abusive" insulting or prejudicial about the language used or anything that would support the submission that the presiding Magistrate was biased against the Appellant.

Paragraph 7: Ground 7 alleges that the conviction is unsafe and not in accordance with the evidence; that no reasonable tribunal could reach the conclusions the learned Magistrate reached.

I have carefully considered the evidence adduced in the court below and the evaluation of that evidence by the learned Magistrate. I am satisfied there was sufficient evidence to support the decision of the learned Magistrate and that his evaluation of that evidence cannot be faulted. I do not need to reiterate my findings and assessments of the evaluation of those evidence by the learned Magistrate. This ground raises no new issue. I do not entertain any doubts in my mind about the rightness of that decision. The conviction is not unsafe; I am satisfied it is a decision which any reasonable tribunal could reach.

The appeal against conviction must be dismissed.

Appeal against sentence

Paragraph 8. Counsel for the Appellant submits that the learned Magistrate erred in law in sentencing in that he failed to enter into any comparative sentencing exercise. Mr. Averre submits sentencing should have been on parity with defilement cases. Mr. Ryan on the other hand says comparative sentencing means no more than imposing a sentence that remains within the bounds of previous cases in comparable cases – see **Kaboa v. Reginam**[18]. Learned Counsel submits that the learned Magistrate was not addressed as to previous sentences for buggery of young boys or acts of gross indecency committed on young boys by strangers. He submits there are no comparable cases. The attempts by Counsel for the Appellant to draw an analogy between defilement cases and those involving buggery is incorrect; they are not analogous.

Offences of buggery in this jurisdiction are few and therefore comparative sentencing cannot be done properly. It is incorrect and misleading to suggest that any sentencing should be at parity with defilement cases. Defilement seeks to protect the spirit of innocence of children from being subjected or exposed to sexual activity below a certain age limit. It not only seeks to protect them from the paedophile or sexual maniac but also from themselves. Beyond that age limit however, consensual sexual activity is not sanctioned by the criminal law.

Buggery on the other hand pertains to what the law describes as an unnatural offence, a perversion. In other western jurisdictions the criminal element has been removed between consenting adults, not in Solomon Islands. The age of the parties and whether there is consent make no difference to the criminality of the offence; they may be taken into account however, for mitigation purposes.

---

[18] (1980/81) SILR 43

The two therefore are not analogous, they are different. To gauge any proper comparative sentencing one has to look outside of our own jurisdiction for guidance and see how other countries have dealt with such offences.

In the circumstances I am not satisfied it has been made out that an error had been committed by the learned Magistrate in not taking into account a parity sentencing with regards to defilement cases. I will say more on the issue of whether the sentence imposed was appropriate or not.

Paragraph 9: Under this paragraph the Appellant submits that in making the sentences to run concurrently and consecutively, the learned Magistrate misguided himself in law by making counts 1 and 2 to run consecutively, counts 3 and 4 also to run consecutively but making count 2 to run concurrently with counts 1 and 4. Appellant submits this is contrary to established law. Counts 2 and 4 were committed on different days and if the Magistrate were to make 2 and 4 concurrent, all sentences should be concurrent.

The sentences imposed by the learned Magistrate were:

Count 1: six months imprisonment.
Count 2: 2 years imprisonment.
Count 3: 5 years imprisonment.
Count 4: 1 year imprisonment.

Count 1 related to the act of masturbation which the Appellant procured from V1 on 13th September 2003. Count 2 related to the act of fallatio committed by the Appellant also on the same victim V1 later that night. Counts 3 and 4 pertain to the act of buggery and masturbation committed by the Appellant on V2 on the very next day, 14th September 2003. The notes on sentencing of the learned Magistrate read as follows:

> "*12. On the offence of buggery he will serve five years.*
>
> *13. On count four he will serve one year consecutive although the offences happened at the same time this offence was not part of the buggery and is aggravated by doing it to a frightened child and further detaining him and abusing him after the first act.*
>
> *14. On count one I sentence to six months consecutive. I think that given the circumstance the offence was hardly with consent. Indeed the defendant had to take the victims hand when he was frightened and put it on his penis.*
>
> 15. *On count two oral sex has the risk of aids and I sentence to 2 years consecutive to buggery but concurrent to the other sentences so that he will serve a total of 7 years.*"

It is not very clear on the records how the various sentences have been made concurrent and consecutive to each other, but I think what was intended was as follows: Counts 3, 4 and 1 were all intended to be consecutive sentences producing a total of 6½ years. However when he came to sentence on Count 2 he also decided that this was to be consecutive to Count 3 producing a total of 7 years. His Worship then decided that this was to be concurrent to counts 1 and 4. The net result was a sentence of 7 years in total.

As a general rule, sentences for offences which arise out of the same transaction should be ordered to run concurrently. The Court of Appeal in **R v. Wheatley**[19] however has recognized that a court may depart from the principle requiring concurrent sentences for offences which form part of one transaction if there are **exceptional circumstances**. See also **R v. Dillon**[20] per comments of Farquharson J. that "..., *while recognizing there may be a general rule in ordinary circumstances where the offences arising out of the same incident should not be the subject of consecutive sentences, held that it is not a universal rule and when the circumstances demand it, consecutive sentences should be imposed.*"

Although counts 1 and 2 relate to the same victim, they were separate offences occurring at different times in the evening. Count 1 occurred at an earlier time; count 2 much later at night. The learned Magistrate could have made those two offences consecutive to each other yet decided not to. I find nothing wrong with that. In view of their closeness and that they related to the same victim, he was entitled to make them concurrent to each other. It would not have been wrong in any event for him to make them consecutive, had he decided to take that option.

Counts 3 and 4 on the other hand relate to the offences committed on the second victim on 14 September 2003. Although they were separate acts of gross indecency, they occurred immediately one after the other and can be described as arising from the same incident or forming part of the same transaction. I also find nothing wrong about his decision to make them concurrent to each other.

Counts 2 and 3 on the other hand pertain to two separate and distinct offences committed on two separate victims. The learned Magistrate was perfectly entitled to pass consecutive sentences. I fail to find anything wrong or unlawful about that.

Paragraph 10. The Appellant submits under this ground, that the learned Magistrate took into account irrelevant matters and failed to take into account relevant matters in sentencing. Those matters which were irrelevant included the following:

(i) The Appellant relied on the possibility of the transmission of the HIV virus to the victim when no evidence as to the Appellants HIV status had come before the court;
(ii) References to plane tickets when no evidence had come before the court in relation to plane or other travel tickets;
(iii) References to a suicide attempt which was outside the scope of the trial and offences;
(iv) Concluding that the Appellant was a paedophile and a risk to the community in circumstances where there was no evidence of this, nor previous convictions or any other suggestion of such; and
(v) Telling the Appellant that he needed to grow up.

When considering what sentence to impose or would be appropriate, the courts have developed four guiding principles. These were referred to by Lawton LJ in **R v. Sargeant**[21] as the **classical principles of sentencing**:

> *"Those classical principles are summed up in four words:* ***retribution, deterrence, prevention and rehabilitation****. Any judge who comes to*

[19] (1983) 5 Cr. App. R. (S.) 417, CSP A5.2(j)
[20] (1983) 5 Cr. App. R.(S) 439, CSP A5.2(j)
[21] (1975) 60 Cr App R 74 at pages 77-78

sentence ought always to have those four classical principles in mind and to apply them to the facts of the case to see which of them has the greatest importance in the case with which he is dealing." [Emphasis added]

See also comments of Sir Mari Kapi JA in the Court of Appeal of Solomon Islands in **Johnson v. Tariani**[22]:

"Where the law simply provides a maximum sentence, the Courts are given a very wide discretion to determine the appropriate penalty in each case. The courts have developed principles of sentence which guide the exercise in this discretion. The Courts have developed theories of sentence which may be described as ***deterrence, separation, rehabilitation and retribution****. I have described these theories in the Papua New Guinea case of Acting Public Prosecutor v. Uname and Others [1980] PNGLR 510 at 537 – 538. At p. 538 I said:-*

> *The agonizing task for the sentencing judge is to evaluate which of these theories of sentencing should be achieved if he chooses one theory of sentencing he is likely to frustrate the other theories. In some cases, a judge will need to give balanced consideration to all theories of sentencing. In others, a judge will want to emphasise or achieve one theory of sentencing more than the other in certain classes of offences.*
>
> *Even if a judge applies the proper sentencing principles, how is he to arrive at the appropriate term of imprisonment? There is no mathematical or scientific method of arriving at the appropriate term. It is therefore important to bear in mind that a sentencing tribunal should aim to achieve consistency in the approach or principles of sentence, rather than to achieve consistency in the actual term of imprisonment (or the use of any other sentencing option). See Bibi (1980) 71 Cr App R 360. However, sentencing in a particular class of offences over a number of years will lead to a range of sentences which may be a guide in determining appropriate terms of imprisonment [or other sentencing options]."*

It is clear the learned Magistrate had in mind the elements of **retribution, deterrence and prevention or separation,** when imposing sentence in this case. It was also clear the learned Magistrate formed the view that he was not dealing with an inexperienced person in such activities. This was not the case of a person who had been lulled into perverted sex by others. The evidence was crystal clear. Here was a complete stranger recently arrived in the country and only after a day or so on arrival at Maluu North Malaita, purposely instigated all the sexual offences. He endears himself to them and after having obtained their trust, lures them to his room and starts toying with their bodies, taking photographs of them while in the nude, buggering one and masturbating him; with the other procuring him to masturbate him and later committing fallatio on him. Surely the learned Magistrate was entitled to conclude that this type of activity can only be committed by a person that falls in line with the description of a "sex tourist". The evidence seems to bear this out. I cannot say therefore that such description of the Appellant in the perverted circumstances of this case was not apt. I quote: *"This man came to the Solomon's as a sex tourist. He came for the sole perverted purpose of having sex with young innocent boys ...."* There was certainly evidence before the learned Magistrate which entitled him to make such conclusion. In the

---

[22] [1988/1989] SILR 7 at pages 12 - 13

circumstances, the learned Magistrate was entitled to view this Appellant in such negative light.

The facts in each case are different; it is a matter in the discretion of a presiding judge to determine what sentence would be appropriate. In **Lahey v. Edwards**[23], Burbury CJ stated that sentencing "*is a matter for the exercise of a discretionary judgment within wide limits in the particular circumstances of each case and it is not for this court to define or restrict that discretion by attempting to prescribe anything in the nature of a standard punishment to be imposed unless exceptional circumstances are found.... It is for the sentencing tribunal to weigh all the varying factors relating to the circumstances of the particular offence and the individual who commits it and to exercise a judicial discretion....the choice of the appropriate punishment is not a matter of rule ... it is a matter of a wide judicial discretion.*" That was exactly what the learned Magistrate sought to do in this case. His Worship weighed all the varying factors relating to the peculiar circumstances of the offences and the Appellant (the merits of the case), before exercising his discretion (applying the established principles) as to the appropriate sentence to be imposed.

See also **Gifford v. R**[24] where Dwyer CJ said:

> "*In imposing sentences there are various considerations necessarily present in the mind of the trial judge one of which must certainly be the imposition of a sentence which will punish the offender and also act as a deterrent to others from engaging in similar criminal activities; and in order to achieve such and other purposes I think it is proper for the judge to consider all the circumstances of the case and amongst them the probability that the criminal conduct of the accused consisted of more than one single thoughtless act for which possibly an excuse might be put forward.*"

The presiding Magistrate as I pointed out earlier clearly not only applied the classical/established principle of retribution/punishment but also deterrence:

> "*In the Solomon's there are laws against Buggery and there are laws that protect our children from perverts like this defendant. I want it to be known to everyone who comes here that if they touch our children they can expect no mercy from our courts none at all. I intend to send a message out with this case to all sex tourists, stay away. Leave our children alone. This offence deserves a* ***deterrent sentence*** *as a warning to others.*" [Emphasis added].

I find nothing wrong about the principle of deterrence being applied here.

It is also clear the learned Magistrate took into account the fact whether the criminal conduct of the Appellant consisted of more than one single thoughtless act for which some excuse might be put forward. In this instance he found none. To the contrary his Worship found they were deliberate acts, motivated by perverted lust and taking advantage of the naivety and innocent trust of the boys to a stranger who appeared very friendly. In Solomon Islands culture acts of friendliness by strangers are esteemed highly, more so in the rural areas. His Worship rightly described him as *a man without scruples.* He also commented on the absence of remorse demonstrated by the Appellant, his attitude throughout the

---

[23] [1977] Tas SR 266 (Note 13)
[24] (1947) 49 WALR 97 at 98

trial, and the absence as well of even a simple apology. I find nothing wrong about such observations.

His Worship also took into account in his sentencing the principle of **prevention or separation**. He noted, correctly, that the Appellant had expressly admitted his interest in young boys and had taken photographs of the victims in the nude. He had also a vast array of photographs of young boys it seems stored in digital form in his camera. The learned Magistrate formed the view, rightly so, that this man is a menace to young boys and that he needed to impose a sentence which would protect them from him. Again I fail to find anything wrong about the application of that principle in the facts of this case. Here was a complete stranger, recently arrived in the country, endears himself to innocent unsuspecting young boys, lures them to his room at the motel he was staying and commits gross indecent acts on them. All his actions were orchestrated and driven by his perverted lust.

The learned Magistrate did also touch on the fourth principle of sentencing, **rehabilitation**, but formed an adverse view of the defendant. I fail to find anything unusual, wrong or even unlawful about his approach as it is generally accepted that offences of this nature warrant a deterrent punishment – see **R v. Howie and Hill,**[25] where it was observed that a deterrent punishment was appropriate where sodomy had been committed by a prisoner on a fellow prisoner. The facts of this case are even more serious, where a complete stranger commits sodomy on a young person.

The court in determining the appropriate sentence is also entitled to take into consideration matters of judicial notice. Although there was no direct evidence of any airline tickets held by the Appellant, the learned Magistrate was perfectly entitled to take judicial notice of the fact that the Appellant was a foreign national and had recently entered the country. For that to happen he must have had valid airline tickets which permitted an entry and a departure, otherwise he would not have been allowed to enter in the first place. He was entitled to form an adverse view based on the evidence before him that he came for boys because he liked them and had photographs taken of them in the nude.

On the question whether he had tickets to rove the Pacific to pursue his perverted lust I accept no evidence has been adduced as far as the record of proceedings were concerned and to that extent was an inappropriate comment to make though it would have made one wonder if the Appellant was prepared to do what he did in Solomon Islands and get away with it, where else and who else may have fallen victims to his perverted activities.

Further, the court may use its general knowledge of the prevalence of a particular offence and have regard to sentences imposed in similar cases. Sometimes the court may make observations on the consequences of the conduct of the offender, even if it was not directly related to the commission of the offence. I accept the learned Magistrate did mention the risk of aids. I quote: *"This man did not know whether he had aids but he had unprotected sex with a boy who knew nothing about the risks. In short for his pleasure he was prepared to put the boy's life at risk it is as simple as that."* I accept there was no evidence that this man had aids and therefore it would not be right to say that the boy's life was put at risk. However if the intention was to point out the danger or potential risk if he had had aids, then I find nothing wrong about his comments. The way and manner in which the offences were committed were so brash and highhanded. It is common knowledge

[25] [1978] Qd R 386

that aids is a deadly disease and one of the common ways it is transmitted is through such homosexual activities. I accept it would not be right to penalize the Appellant for something without any evidence to back it up. But even if credit were given for this fact, I am not satisfied it would have made much difference on the overall sentence imposed. The learned Magistrate rightly pointed out the effect such acts may have had on the boys; being mentally scarred for sometimes, the loss of innocency and their ability to trust white men in particular.

On the issue of references to an attempted suicide – see paragraph 6 of his Sentence, the learned Magistrate states as follows:

> "*When he realized the game was up and his victims did have the courage to attend court he indulged in play-acting pretending to attempt suicide. Creating scenes in the court room banging his head on the floor all to try to get sympathy when all he was doing was acting. Stopped eating is just acting again. Grown up and address your problems.*"

Whilst it is correct to say that the reference to a suicide attempt was outside the scope of the trial and the offences, they were made in the context of the learned Magistrate's observations as to the conduct and behaviour of the Appellant during the trial. At the preceding paragraph he describes the Appellant as a man *totally without scruples*, in getting the victims to give evidence and then accusing them in cross-examination of lying adding to their humiliation; yet he never gave evidence or called evidence as to what he was the truth. When read in that light, any appellate court would hesitate to interfere with the learned Magistrate's assessments. He saw the Appellant and observed his demeanour and behaviour in court. He is the better judge of the Appellant's behaviour and conduct. But even if the attempted suicide was not play-acting, I am not satisfied it was consistent with any suggestions of biasedness against the Appellant.

As to the conclusions made or suggested, that the Appellant was a paedophile, these were primarily based on his own admissions and the evidence before the court. For instance, the Appellant had admitted in his statement that he liked boys, that they were beautiful and that he liked taking pictures of them in the nude. He had also admitted that he had gone to Malaita because he had heard that of "boys houses"; this was what had drawn him to go there. There is evidence that the camera of the Appellant when checked by the Police contained a large numbers of images of naked boys, including recent shots of the victims in this case. The Appellant had also admitted to Police posting pictures in a website he had access to.

As to the question whether he is a risk or menace to the community, that cannot be overstated enough. Young boys need to be protected from the likes of this Appellant. I do not need to repeat what I have already in this judgment.

As to telling the Appellant to grow up and address his problems, again I fail to find anything inappropriate about this. There are standards of behaviour and morality in life which are reflected in our laws. The offences for which this Appellant has been charged include such laws. They reflect on what is acceptable, unacceptable, normal or abnormal behaviour. In so far as the circumstances of the offences for which this Appellant has been charged with are concerned, and having regard to the victims and the manner in which the offences had been committed, it was only appropriate the Appellant was sharply reprimanded during sentencing in the hope that he will realize that his behaviour is unacceptable, abnormal and wrong.

In the circumstances I am not satisfied the matters raised were all irrelevant considerations; but even where that is so, I am not satisfied it is sufficient to warrant the intervention of this court. On the question whether that reflected biasedness against the Appellant, again I am not satisfied that has been established.

Paragraph 11. The Appellant argues he had been sentenced on the basis that upon release he would do exactly the same thing again; that this was not an accepted basis for sentencing, to penalize a person on the basis of speculation.

It is not disputed that the learned Magistrate formed an adverse view about the prospects of rehabilitation or reform of this Appellant – see paragraph 10 of his Sentencing Notes: "... *I have no doubt when released he will try again.*" and at paragraph 17 "...*I am convinced he will re-offend again.*" I have pointed out in this judgment that the learned Magistrate was entitled to form an adverse view of the Appellant based on the evidence that was before him. I find nothing wrong or speculative about such view, even if it might be thought judgmental. It is important not to overlook the context in which they had been used. The learned Magistrate had expressed those views while sentencing and in the context of the sentencing principle of **prevention or separation.** I do not need to repeat what I have said on that. Suffice to say I find no basis for concluding that the Appellant had been sentenced other than on this sentencing principle and which he was entitled to do. It was a view he formed from the evidence and his observations of the demeanour, mannerisms and behaviour of the Appellant throughout the trial.

Paragrahs 12 and 13: These two paragraphs I think can be dealt with together as they relate to more or less the same thing. Is the sentence imposed of 7 years manifestly excessive or unjust taking into account the circumstances of the case and the totality principle?

In England, under the Sexual Offences Act 1967 (section 3), the following penalties for buggery apply:

Buggery of a boy under sixteen:	Life imprisonment
Buggery of a male over sixteen without consent:	Ten years
Buggery of a male over sixteen with consent:	Two years
Buggery of a male over sixteen but under twenty-one, by a man over twenty-one, with consent:	Five years

In England the tide had turned through the recommendations contained in the Report of the Departmental Committee on Homosexual Offences and Prostitution which was presented to Parliament in 1957 and had become known as the "Wolfenden Report" regarding the perception of such offences. One of the recommendations implemented in the Sexual Offences Act 1967 was that a homosexual act in private between consenting adults should not be made an offence. One of the important changes also made was the recognition of the need to protect the young even from themselves. This was reflected in the sentencing regime imposed and putting an age limit of 21 years on such homosexual acts. For buggery of a boy under the age of 16 years, life imprisonment was retained reflecting the seriousness with which British Courts should have regarding buggery of boys under the age of 16 – the younger the boy the more serious the offence. Note the victim buggered in this case was described as a juvenile. Although the age of the boy was never really ascertained, the presiding Magistrate was of the view that he was a juvenile. That could be anything from being a child (below 14

years) to being a young person (below 18 years). Whilst English law reduces the seriousness to be attached to such an offence for a male victim over 16 without consent to 10 years, the seriousness with which such courts view such offences against young people remains an important factor to bear in mind for purposes of sentencing by the courts in Solomon Islands as well.

In **R.v. Willis**[26] Lawton L.J. held that the sentencing bracket for such offences which have neither aggravating nor mitigating factors is from three to five years and the place in the bracket will depend on age, intelligence and education (see also **R v. White**[27], **R. V. Alden and Wright**[28]). He said that few offences have neither aggravating nor mitigating factors; many have both. In such situations the judge has to weigh what aggravates against what mitigates. His Lordship then sets out a list of aggravating factors and mitigating factors as follows:

(i) Physical injury to the boy.
(ii) Emotional and psychological damage.
(iii) Moral corruption.
(iv) Abuse of authority and trust.

For the main mitigating factors, these include:

(i) Mental imbalance.
(ii) Personality disorders.
(iii) Emotional stress.

In the **Attorney General's Reference (No. 17 of 1990) (R. V. Jones (Stephen))**[29], the Court of Appeal issued guidelines for sentencing offenders convicted of sexual attacks on young children. These were:

(a) the overall gravity of the offence;
(b) the necessity of punishment;
(c) the necessity to protect the public from a particular kind of offender;
(d) the public concern at sexual offences against young children; and
(e) the effect of a deterrent sentence.

Some English decisions on sentences for buggery: In **R. v. Simpson**[30] a man of 60 years pleaded guilty to three counts of buggery of one boy, two counts of indecent assault on one of his brothers and one count of indecent assault on his other brother. The appellant had committed buggery with the oldest boy on numerous occasions over a period of six years, beginning when the boy was 8 years old and indecent assaults on the other boys when they were about nine years old. He was sentenced to 9 years but reduced on appeal to 7 years. That case involved a series of buggery offences over a period of years and that the offender had previous convictions.

R. v. Thornton[31] involved a man of previous good character who had pleaded guilty to buggery. The victim was aged 13. He had offered him money and had committed a single act of buggery. He was sentenced to 30 months but on appeal reduced to 2 years.

---

[26] (1974) 60 Cr. App. R. 146
[27] 12 Cr. App. R. (S.) 30, CA
[28] [2001] 2 Cr. App. R. (S.) 89, CA
[29] 92 Cr. App. R. 288
[30] (1981) 3 Cr. App. R. (S) 345
[31] (1983) 5 Cr. App. R. (S.) 395

The case of **R. v. Sheridan**[32] involved an act of indecency committed on a boy of 13 and one count of attempted buggery. The Court sentenced him to 5 years for the attempted buggery and six months for the indecent assault concurrent. On appeal the Court of Appeal said:

> *"It is perfectly true this Court has on occasions indicated that, according to the circumstances, it may be appropriate to pass sentences as low as 30 months, two years or three years. When one comes to consider this case, there are startling differences at once apparent. Here, this lad was put into the witness box. He was made to go through the ordeal of reliving this disgraceful incident. He had to tell his story to the jury. Not a word of remorse and not a word of contrition came from this man. It was a bad case on the facts and subsequently any possible mitigation there may have been was completely destroyed by the manner in which this man failed to show any degree of remorse or express anything by way of contrition."*

The Court of Appeal found nothing wrong with the sentence and upheld the sentence of five years for attempted buggery and six months for indecent assault.

The facts in R. v. Sheridan are the closest to this case. In this case the Appellant had also entered a not guilty plea and caused the victims to go through the ordeal of reliving the disgraceful incidents. The words expressed in that case were very similar to what the learned Magistrate said in this case. I quote:

> *"The defendant obtained the trust of a young boy offering to treat his sores. He takes him to his room, locks the door, buggers him then showing no mercy just his own perverted lust turns him over and masturbates him.*
>
> *He shows no sorrow for his act but forces him to give evidence in this trial hoping probably that he would be too nervous to turn up. He did this to both victims, he accused them in cross-examination of lying thus adding to their humiliation.*
>
> *.....He has not apologized to the boys who will probably be mentally damaged for sometimes as a result of this ...."*

If anything, this was a more serious case in that it entailed a stranger endearing or entrusting himself to the young boy, winning his trust by pretending to have a concern for his sores, taking him to his room then buggers him. In **R. V. Sheridan**, the appellant received a sentence of five years for attempted buggery. In this instance, not only did the Appellant achieve complete penetration but according to the unchallenged evidence of V2 after completing his perverted act, turned him over and masturbated him. The Appellant deserved a sentence of no less than five years in the circumstances.

In **Josefa Biu v. The State**[33], an appeal matter before the High Court of Fiji, the case involved one count of attempted rape and one count of buggery of a 11 year old girl. The offences were committed by a close relative of hers, an uncle. The defendant pleaded guilty before the Magistrates Court and was sentenced to a total of 9 years; 4 years for count 1 and 5 years for count 2.

---

[32] (1986) 8 Cr. App. R. (S.) 10

[33] [2000] FJHC 121; HAA0085j.00s (14th November, 2000)

On the count of buggery the learned Judge Nazhat Shameem of the High Court of Fiji made the following comments:

> *"On count 2, I consider the sentence of five years imprisonment appropriate, although the Appellant might have received considerably more if he had been sentenced in the High Court. In* ***Stephen Peter Jones*** *(1991) 92 Cr. App. R. 288, the English Court of Appeal considered the appropriate sentences for sexual offending against children. In that case, the court held that the appropriate sentence for* ***buggery*** *with children was six years imprisonment. In* ***Maleli Qiladrau*** *Crim. App. No. 48/2000 Pathik J considered a sentence of 4½ years imprisonment to be appropriate for unnatural offence with a boy.*
>
> *In the circumstances, I consider the five year term on count 2 entirely appropriate. Furthermore, looking at the totality of the sentence (a total of nine years imprisonment) I also consider that a consecutive sentence reflects the gravity of the offending, the abhorrence that the public holds for the offences, and the public interest in passing a deterrent sentence in offences against children."*

In Solomon Islands, there is very little case law to assist the courts in sentences for buggery. I have made references to some cases in the English Courts and a case from Fiji to give some indications as to the standards set in other countries. Solomon Islands view such offences with no less severity especially when committed against children. Each case will have to be dealt with on its merits. The starting point for such offences in this jurisdiction nevertheless against children is five years imprisonment. Where aggravating features are present longer sentences must be imposed. For purposes of assisting the courts reach an appropriate sentence, the guidelines set out in **Attorney General's Reference (No. 17 of 1990) (R. V. Jones (Stephen))** and **R.v. Willis** may be used.

The circumstances surrounding the commission of the offences in this case in my respectful view were very serious and that a custodial sentence was imperative. The need to protect the public from the likes of such person must be uppermost in the mind of the court. One wonders how many more young boys could have fallen victim to his perverted activities had he not been caught and prosecuted.

Young children are the future of any nation and such practices which corrupts their minds, morals and innocency must be viewed with extreme abhorrence. The courts job in such situations is to protect our unsuspecting young persons from such unscrupulous characters. A deterrent sentence in the circumstances was entirely appropriate.

I find nothing wrong with the sentence imposed by the learned Magistrate having regard to the totality of the sentence imposed. The sentence of five years for buggery in the circumstances of this case however does not correctly reflect the level of seriousness in this case. An appropriate sentence to reflect the seriousness of the offence would have been 6-7 years. Taking into account the mitigating factors of this Appellant, that he is a foreigner and the associated hardships which will be experienced in serving out his sentence in a foreign country, a sentence of 6 years is more appropriate. I reject any suggestions that the sentence of 5 years imposed by the learned Magistrate was excessive or unjust in any way. For count three, which entailed the commission of fallatio on V1, although I find nothing wrong with the sentence of two years, in the circumstances of this case that should be reduced to one year and made consecutive so that the total sentence of 7 years imprisonment remains the same.

Decision

All the grounds of appeal having been dismissed the appeal must therefore be dismissed.

ORDERS OF THE COURT:

1. **Uphold conviction of the Appellant against counts 1, 2, 3 and 4.**
2. **Uphold sentence of 6 months imprisonment for count 1.**
3. **Quash sentence of 2 years for count 2 and substitute sentence of 1 year.**
4. **Quash sentence of 5 years for count 3 and substitute sentence of 6 years.**
5. **Uphold sentence of 1 year for count 4.**
6. **Sentences in counts 2 and 3 of 1 year and 6 years to be made consecutive to each other.**
7. **Sentences in counts 1, and 4 made concurrent to counts 2 and 3.**

THE COURT