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

CRIMINAL APPEAL CASE No.03 OF 2001

BETWEEN: **PUBLIC PROSECUTOR**
Appellant

AND: **KEVEN GIDEON**
Respondent

Coram: **Chief Justice Vincent Lunabek**
Justice Bruce Robertson
Justice John von Doussa
Justice Daniel Fatiaki
Justice Roger Coventry

Counsels: **Ms Miranda Forsyth for the Appellant**
Mr. Hillary Toa for the Respondent

Hearing date: **24 April 2002**
Judgment date: **26 April 2002**

JUDGMENT

This is an appeal pursuant to Section 200 of the Criminal Procedure Code [CAP.136] sub-section 4 of which provides:

> ***"The Public Prosecutor may appeal to the Court of Appeal on a point of law against any judgment of the Supreme Court exercising original jurisdiction."***

This Court in Andrew Tom Naio & Noel Nathaniel v. The Public Prosecutor, Criminal Appeal Case No.7 of 1997 said:

"The power of an Appellate Court in an appeal such as this is well settled. The position had been clearly stated in **Skinner v. The King** (1913) 16 CLR 336 at 340 where the High Court of Australia said:

'... a Court of Criminal Appeal is not prone to interfere with the Judge's exercise of his discretion in apportioning the sentence [and will not interfere unless it is seen that the sentence] is manifestly excessive or manifestly inadequate. If the sentence is not merely arguably insufficient or excessive, but obviously so because, for instance, the Judge has acted on a wrong principle, or has clearly overlooked or undervalued or overestimated, or misunderstood some salient features of the evidence, the Court of Criminal Appeal will review the sentence; but short of such reasons, I think it will not'.

We respectfully adopt those principles as we are clearly of the view that those principles are apt to the circumstances of Vanuatu and should be applied in this jurisdiction".

We apply them again in this case.

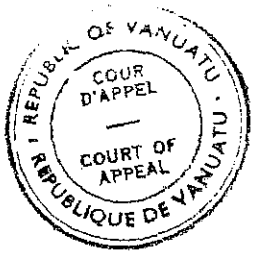
Keven Gideon entered a plea of guilty to one charge of Unlawful Sexual Intercourse contrary to Section 97(1) of the Penal Code. The charge was in these terms:

"Keven Gideon, yu blong Malo mo yu stap live lon Vila, samtaem long manis March 2001, long four different occasions hemia long Anamburu area Vila, yu bin haven sexual intercourse wetem girl ia mo long taem ia hemi under age long 13 years yet."

A purist might argue that a count should never include more than one allegation of criminality but that can lead to an unhelpful proliferation of charges. Where there is no dispute, no harm is done. If there is a challenge than the matters must be separately identified. No person should be sentenced for matters not admitted or properly proved but care must be taken to ensure that all relevantly established issues are before the Court.

The prosecution summary of facts was as follows:

1. At the time the offence was committed (March 2001), the complainant was 12 years old (date of birth 4 June 1988).
2. The accused is the complainant's mother's sister's boyfriend.
3. The accused lives in a house in Namburu.
4. One Saturday in March, the complainant was left alone in the house in Namburu. The accused came home in the middle of the day, came into the room where the complainant was, pushed her onto a bed, lifted up her skirt and had sexual intercourse with her.
5. The accused then threatened complainant not to tell anyone.
6. After the accused left the complainant noticed blood on her underpants but thought it was just her monthly period.
7. The complainant's bleeding continued.
8. The accused had sex with complainant another three times.
9. On each occasion on which the accused had sex with her, the complainant was bleeding, but the accused continued regardless.
10. The complainant at first did not tell anyone what was happening because she was frightened of what her mother's sister and her uncle would do to her. Eventually she told her relatives who took her to the police.
11. The complainant was taken to the hospital because she was losing too much blood. However, even this did not stop her bleeding, and at the date the police complaint was made (7 August 2001) she was still bleeding.
12. The complainant continues to feel weak and her eyes go dark. After the incidents she doesn't go to school. She stated in her police statement "mi feelim very sick after long trabol we Keven ibin mekem long me".
13. The police interviewed the accused and he admitted that he had had sex with the complainant on one occasion and on two occasions had "pusum penis blong mi iko long cunt blong hem be istap pass outsaed nomo".



We are told that some of the allegations are not accepted or admitted. Those issues should have been sorted out prior to sentencing. The prosecution must obviously prove all the essential ingredients of a charge. Additional factors whether they be mitigation or aggravation must be established by the party which is asserting the particular circumstances. Any issue which is in contention which either side wants to rely on must be established by proper evidence.

In light of the advice that some issues are in contention we deal with the case on the basis that there was no assault in paragraph 4, no threat in paragraph 5 and in paragraph 8, there was only one other full act of intercourse, the other two occasions being intimate connection without penetration.

In sentencing, the Judge made specific reference to the provisions of Section 97(3) of the Penal Code Act which provides that consent or belief that the person was over the age of 13 years is no defence.

The Judge referred to the fact that there had been a customary settlement of Vatu 30,000 to the complainant's relatives, also to the Chief a pig and a fine mat. The sentencing Judge referred to his own decision in Public Prosecutor v. Peter Wayane & Others, Criminal Case No.8 of 2000 where he had said:

"I will refer to one of my earlier sentence in the case CR 08 of 2000 PP v. Peter Wayane & Others on customary settlement, this what I refer to: 'a defendant commits an offence must pay the price for the penalty prescribed by such offence and any customary settlement cannot exchange such punishment but can only be used to ease the ill feeling between the parties and their relatives and ... benefit sentence."

The Judge noted two decisions of the Supreme Court to which he had been referred about appropriate sentencing levels and reached the conclusion that the proper sentence was 18 months imprisonment which he said reflected

his plea of guilty. On the basis of the customary settlement he suspended that sentence for a period of 24 months.

It is that 18 months sentence suspended for 24 months which is now appealed. It is submitted that it is manifestly inadequate in that-

(a) the term was very much at the low end of the scale; and

(b) there should not have been suspension in an offence of this seriousness.

In our judgment the critical factors in this charge are-

(a) the age of the complainant;

(b) the breach of trust because of the domestic relationship which existed between the respondent and the complainant;

(c) the fact that the offending occurred on more than one occasion;

(d) the fact that the offence occurred within what should have been the security of a home where the complainant should have been safe;

(e) that she was specifically told not to tell anyone;

(f) that the complainant suffered physical damage;

(g) the age of the respondent.

The circumstances which can arise with an offence under Section 97 can vary substantially. In our judgment the facts which are outlined above place this as a serious matter. Initially there had been consideration to a charge of rape. Although that was not pursued what occurred was not a single lapse but involved this young girl being used by a mature man to satisfy his own lust over a period.

Considering the appropriate sentencing range in respect of rape and acknowledging that this was not alleged to be rape, it was serious offending within the Section charged. We are of the view that having regard to the factors

that we have outlined above a sentencing Judge had to begin with a starting point of not less than six years.

As is always the case, having reached that conclusion, it is necessary to consider what reduction should be allowed for mitigating factors. The first and most obvious in this case was the plea of guilty. That always will attract a substantial reduction particularly when it occurs at the first available opportunity. This relieves a victim (and particularly a young victim such as this) from having to relive the trauma of the wrong done to her by having to recite and recall all details before a group of strangers in a Court. It is also an indication of remorse and contrition.

The other factor that should be considered is the issue of the custom payments which were made.

Section 119 of the Criminal Procedure Code provides:

> ***"Upon the conviction of any person for a criminal offence, the court shall, in assessing the quantum of the penalty to be imposed, take account of any compensation or reparation made or due by the offender under custom and if such has not yet been determined, may, if he is satisfied that undue delay is unlikely to be thereby occasioned, postpone sentence for such purpose."***

The requirements of the Section are plain in that a Court is required in passing sentence in any criminal case, to take account of any customary settlement that has occurred in the case and, in the absence of the same, to postpone sentence in order to facilitate the effecting of customary settlement.

It is plain that customary settlement may occur at any one of three stages:

(1) before charge;

(2) after charge and before conviction; and

(3) after conviction.

In the case under appeal we were informed that customary settlement occurred at stage (2) and the trial Judge took this into account in imposing sentence on the respondent.

Customary settlement in this case was initiated by a letter from the village Chief to the respondent demanding the payment of a fine of VT30,000, a pig and mats by a specified date, failing which criminal charges would be laid against him. The demands of the letter were duly met but that did not prevent the criminal charge being laid against the respondent who might well entertain some sense of grievance.

We were not informed whether the complainant supported the settlement demands or received anything as a result of it. We are concerned however at the suggestion in the letter that performance of customary settlement could somehow influence the laying of criminal charges in this case. We desire to dispel any notion that customary settlement can have such an effect in an offence as serious as occurred in this case where the public interest dictates that criminal charges must be laid.

It is not the function of this Court to comment on the wisdom, or desirability of requiring a sentencing court to take account of customary settlement in every conviction of a criminal offence, however heinous or trivial it may be. However, that is the law.

We observe that Section 119 has no application at the charging stage and cannot be the basis for reducing an otherwise appropriate charge to a lesser

charge. It must not be used as ***a 'bargaining chip'*** in determining what is or is not an appropriate charge.

Section 119 is relevant to an assessment of the ***'quantum of the sentence'*** and **not** the nature of the sentence. It can influence the length of a sentence of imprisonment or the amount of a fine, but **not** its fundamental nature. In other words the Section cannot alter what is otherwise an appropriate immediate custodial sentence into a non-custodial one as occurred in this case.

Taking all these matters into account we are of the view that the minimum sentence, which the Judge could properly have considered for this respondent even allowing for the fact that this was a 25 year-old with no previous convictions, who was in employment and otherwise well spoken of, was four years imprisonment. Whatever may be said about this man personally having learned his lesson, there is an overwhelming need for the Court on behalf of the community to condemn in the strongest terms any who abuse young people in our community. Children must be protected. Any suggestion that a 12 year-old has encouraged or initiated sexual intimacy is rejected. If a twelve year-old is acting foolishly then they need protection from adults. It is totally wrong for adults to take advantage of their immaturity.

The sentencing Judge expressed himself as being of the view that there should be suspension of the sentence that he imposed because of the custom settlement which had occurred. In the light of what we have said above about custom settlement it will be clear that in and of itself is not a justification for suspension of sentence.

It will only be in a most extreme of cases that suspension could ever be contemplated in a case of sexual abuse. There is nothing in this case which brings it into that category. Men must learn that they cannot obtain sexual gratification at the expense of the weak and the vulnerable. What occurred is a