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

Criminal Appeal Case No. 15 of 2008

BETWEEN: PUBLIC PROSECUTOR
Appellant

AND: PHILIP HINGE
Respondent

Coram:	***Hon. Chief Justice Vincent Lunabek*** ***Hon. Justice John William von Doussa*** ***Hon. Justice Ronald Young***
Counsels:	*Mr. Bernard Standish for the Public Prosecutor* *Mr. Hillary Toa for the Defendant*
Date of Hearing:	*2 December 2008*
Date of Decision:	*4 December 2008*

JUDGMENT

Introduction

In July 2006 the victim was walking on the road with her aunt and a brother and sister. The Respondent, who was apparently drunk, dragged the aunt to the side of the road and then dragged the victim into a secluded area. He asked her to consent to sexual intercourse. She refused. By that time the victim's parents had begun searching for her. After she refused to have intercourse the Respondent forcibly removed her clothing. He threatened to assault her if she did not cooperate. He then raped her. Immediately afterwards she complained of the rape.

There was some delay in the Respondent coming to trial. The trial began on 19 August 2008. After the complainant gave evidence and was cross-examined the Respondent pleaded guilty. The Judge sentenced the Respondent to 3 years

imprisonment on the rape charge of which 18 months was suspended. He was also sentenced to supervision: s58F, s.58G of the Penal Code (Amendment) Act. The Respondent was convicted and discharged on the kidnapping charge. The Public Prosecutor says the sentence was manifestly inadequate.

The Appellant's case

The Public Prosecutor submits the judge fell into error by:-

(a) failing to follow guideline judgments on rape;
(b) failing to appreciate the seriousness of the offending;
(c) giving insufficient weight to the aggravating features and too much weight to the mitigating features

And in the end he imposed a manifestly inadequate sentence for the offending.

Discussion

This Court said in *PP v. Scott and Tula [2004] VUCA29*

> *"for a rape committed by an adult without an aggravating or mitigating feature a figure of 5 years should be taken as the starting point in a contested case. Where a rape is committed is committed by two or more men acting together, or by a man who has broken into or otherwise gained access to a place where the victim is living, or by a person who is in a position of responsibility towards the victim, or by a person who abduct the victim and he held her captive the starting point should be 8 years".*

(see also Public Prosecutor v. Gideon [2002] VUCA7)

This was clearly a case where the victim was kidnapped. The Appellant accepted this when he pleaded guilty to the count of kidnapping. In our view therefore the appropriate starting point to reflect the rape together with the kidnapping and threats of violence was at least 8 years imprisonment. We stress the importance of Supreme Court Judges adhering to this guideline judgment.

The judge was wrong to reject the Public Prosecutor's submission that this was a rape accompanied by kidnapping. The Judge's starting point of 6 ½ years imprisonment did not reflect the seriousness of the offending.

As to mitigating factors the Appellant claimed a previous sexual history with the complainant which he said made him believe, at least initially, that the victim would consent to sexual intercourse. There was no evidence to support this assertion. The victim gave evidence and was cross-examined at trial. She denied any previous sexual relationship with the Appellant. The Respondent's violence to the aunt and the victim conflicts with this assertion. In any event well before the rape it would have been clear to the Appellant the victim did not want to go with him nor did she want to have sexual intercourse with him.

It is appropriate to take into account three mitigating features. The Appellant's guilty plea came only after a lengthy delay to trial and after the complainant gave evidence at trial. Many judges would give no allowance for such a late plea. Given this is a prosecution appeal we consider a modest deduction can be made. Secondly the Appellant is also entitled to have taken into account his previous good record. However, given the seriousness of this offending this can only result in a modest reduction in the starting sentence. Thirdly there was a custom reconciliation ceremony in this case. One pig was paid by the respondent's family to the victim's family. We take this into account in mitigation: s.38, 39 of the Penal Code Act.

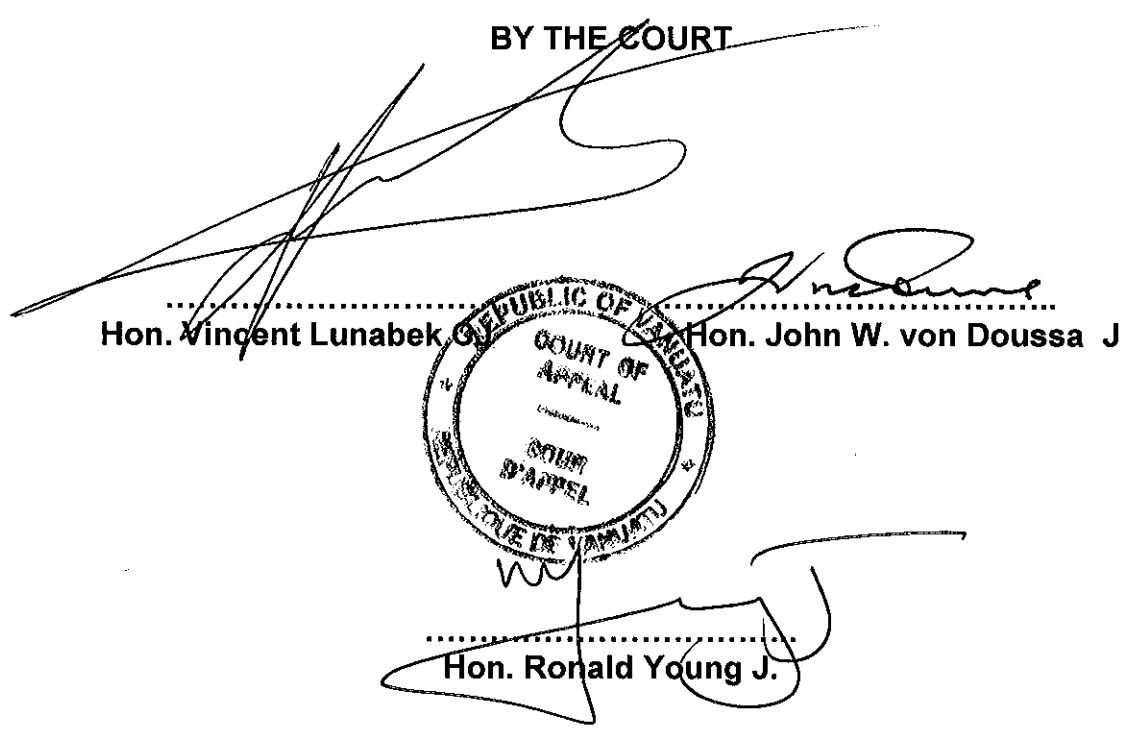
We do not consider the judge's reduction of more than 50% from his starting point for mitigating factors was at all justified. As we have said the only mitigating features were of modest effect.

From the starting sentence of 8 years imprisonment we deduct 2 years to reflect the mitigation. This is a generous allowance to reflect the fact this is a prosecution appeal. This reduces the sentence to one of 6 years imprisonment in our view the least that could be imposed in the circumstances. Clearly there is no question of suspending any part of the sentence given it is more than 3 years: s.58 of the Penal Code Act.

The appeal is allowed. The sentence of 3 years imprisonment quashed and a sentence of 6 years imprisonment imposed for the rape and a concurrent sentence of 2 years imprisonment imposed for the kidnapping. The sentence of supervision is also quashed.

DATED at Port Vila, this 4th day of December, 2008.

BY THE COURT



Hon. Vincent Lunabek C.J. **Hon. John W. von Doussa J**

Hon. Ronald Young J.