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

Criminal Appeal Case No. 20 of 2008

KOILO
V
PUBLIC PROSECUTOR

Coram: **Hon. Chief Justice V. Lunabek**
Hon. Justice J. Von. Doussa
Hon. Justice R. Young
Hon. Justice O. Saksak

Counsel: **Mr. J. Kausiama for the Appellant**
Mr. L. Tevi for Respondent
Mr. A. I Kalsakau, Attorney General

Date of Hearing: 13th July, 2010

Date of Decision: 16th July 2010

JUDGMENT

1. **Introduction**

The Appellant's abduction and multiple offences of sexual intercourse without the consent of the victim resulted in a sentence of 9 years and 5 months imprisonment in the Supreme Court. The Appellant says the sentence was manifestly excessive in that the starting point was too high and that there was inadequate allowance for his pre-trial custody and for a customary reconciliation

ceremony. Further the Appellant says, the two assaults he has been subject to in prison entitle him to a further reduction of his sentence.

2. **Background Facts**

The victim, her boyfriend and another female friend were walking in Fresh Wota Park on the evening of the 15th of April 2008. A group of young men attacked the victim's group. The young man was assaulted and ran off. The two young girls (the victim was 18 years of age at that time) were separated.

3. The victim was then dragged into the bushes by the Appellant. She was threatening with a knife if she cried out for help. Over the next few hours she was sexually abused without her consent on four separate occasions by the Appellant. The Appellant continued to threaten her including a threat to kill her and her family if she spoke of the sexual intercourse without her consent.

4. Eventually at about 10.00 am the next day she escaped and immediately complained of the sexual intercourse without her consent. The Appellant was convicted after a trial, his defence of consent was rejected.

5. The Judge at sentencing identified the serious threat of violence, including the use of the knife, the abduction and the fact that the Appellant had a previous conviction for sexual intercourse without consent as aggravating features. He considered the facts justified a starting sentence of eight years of imprisonment and gave a further uplift of two years to reflect the Appellant's past criminal conduct.

6. The Judge considered there were no mitigating features. In doing so he rejected a custom ceremony as irrelevant given neither the complainant nor the Appellant participated.

7. When the Appellant first appeared before this Court with respect to his appeal against conviction and sentence in April 2009 he had what appeared to be serious injuries. We dismissed his appeal against conviction and adjourned the

sentence appeal requesting enquiry be made into the circumstances that gave rise to his injuries.

8. This is now the fifth session of the Court of Appeal in which this appeal has been listed. As a result of the previous hearings including Mr. Koilo giving evidence before us, it has been established:-

   a) That Mr. Koilo escaped from custody on the 23rd of February 2009, and gave himself up to the police on the 18th of March 2009. He was sentenced to 12 months imprisonment for his escape from custody concurrent with his sentence of 9 years and 5 months imprisonment;

   b) Shortly after his return to custody the Appellant was removed from prison without authority, taken to police premises where he was seriously assaulted by members of the Vanuatu Mobile Force. He suffered serious injuries including broken bones in both legs and one arm;

   c) In July 2009 the Appellant filed a Constitutional Application seeking damages for violation to his constitutional rights arising from the assault;

   d) In August 2009 the Appellant was unlawfully taken to the Port Vila Police Station and assaulted by Police Officers. As a result the Constitutional Application was amended to include this violation of Mr. Koilo's Constitutional rights;

   e) In April 2010 this Court was advised that Mr. Koilo's Constitutional Application had been settled with the State paying Mr. Koilo a sum of money.

9. A medical report established that Mr. Koilo has mostly recovered from his injuries. However given that many of the broken bones he suffered in the assaults were near joints the risk of early ongoing osteoarthritis is high. It is also clear from the report that Mr. Koilo suffered considerable pain for an extended

period from his injuries. Before considering what if any relevance these events have to Mr. Koilo's sentence appeal we consider the other grounds of the appeal.

10. **Starting Sentence Appropriate?**

The start sentence for the abduction and sexual intercourse without consent of eight years imprisonment was well within the range available to the Judge. The aggravating features of the sexual intercourse without consent and abduction included:-

- The initial violence by multiple attackers aimed at the victim's boyfriend to facilitated the criminal offending;
- The abduction of the young victim from a public area of Port Vila during the night;
- The threats of violence including the use of the knife by the Appellant to re-enforce the threats and to subdue the victim;
- The multiple sexual intercourse without consent;
- The further threat to kill including threats to avoid detection.

11. A higher starting point than 8 years for this offending could easily have been justified. Certainly the 8 years starting point was well within the range available to the Judge.

12. The Appellant has a bad list of previous convictions. His first sentence of imprisonment was in 1994 and since then he has been regularly imprisoned. His offending spans violence and property offences. Most seriously he was sentenced to 5 years imprisonment in 2002 for sexual intercourse without consent. This past offending especially for sexual intercourse without consent justified a substantial uplift of 2 years from the starting sentence.

13. Subject to the consideration which follows we are satisfied therefore the 10 years imprisonment was appropriate for the offending.

14. **Custom Ceremony.**

The Appellant's counsel said in support of the appeal that the Appellant asked the Chief of his village to undertake a customary reconciliation ceremony with the Chief from the victim's village. The ceremony ultimately involved the Chiefs of the Appellant's village and the victim's village, and the Chief of the Fresh Wota Park area were the offending occurred. The ceremony concerned not just the appellant's offending but also the offending of the other men that night. The ceremony ended with a satisfactory reconciliation of the parties. The Appellant was in prison and could not attend. The victim chose not to attend.

15. We consider some small reduction in sentence is justified for this ceremony. We acknowledge, as the Judge observed, that the ceremony did not involve either the Appellant or the victim. However serious crimes such as these can easily give rise to strong feelings of grievance on behalf of the victim, her family and her village. This can, if left unresolved, itself cause unwise attempts at retribution. Custom ceremony therefore can help to avoid further violence between the family of the victim and the perpetrator. Such a successful ceremony therefore should be reflected in a modest sentence reduction as an incentive to resolve such potential conflict by custom. We consider it appropriate to deduct three months from the Appellant's sentence to reflect the ceremony.

16. **Time Spent in Custody**

The sentencing Judge reduced the Appellant's sentence of 10 years imprisonment by 7 months to reflect the time the Appellant had spent in custody before trial. Section 51 (4) of the Penal Code Act [CAP 135] provides:-

"If the offender has been in custody pending trial or appeal the duration of such custody is to be wholly deducted from the computation of a sentence of imprisonment."

17. In Whitford v- Public Prosecutor (07/2007) this Court identified the potential problem in making a proper allowance for pre-trial custody. We said:-

> *Under the new regime in the Correctional Service Act (No. 10 of 2006) Section 51, every person is eligible for parole after they have served half of their sentence. Where a person has been in custody and the Judge takes that into account as required in the effective sentence imposed, it means that in respect of the period in custody prior to sentence the potential for parole is not available. If a person has been in custody for days or a few weeks then no serious injustice may arise. But in this case Mr. Withford had been in custody for more than 26 and a half months.*

and further

> *Under the present arrangement, where there has been substantial period in custody it is necessary for a Judge in assessing what the effective sentence should be to allow for the fact there is this potential for injustice to arise. The right to gain parole is not automatic. The Judge will have to make an assessment having regard to a person's background, behavior in prison, remorse, and the like in deciding whether an allowance is necessary because of this anomaly and what allowance should made for it.*

18. We consider some modest allowance in terms of the *Whitford* principle should have been given to Mr. Koilo. The seven months in pre-trial custody was a

significant period. The allowance should only be modest because Mr. Koilo's past criminal record and the seriousness of his offending is likely to mean he has limited parole eligibility. We consider that rather than a deduction of seven months for pre-trial custody a ten month allowance would have been appropriate and fair.

19. **Use of Extra Curial Punishment**

The fundamental principle relevant to this issue is that it is for the Judiciary and not for Police to punish those who commit crime. The Police have no power to punish those whom they consider have broken the law. In a democracy such as Vanuatu that function is the Courts. The police who assaulted Mr. Koilo were themselves law breakers.

20. The question is therefore whether this unlawful punishment and the attendant pain and injuries suffered by Mr. Koilo should properly result in a reduction of an otherwise proper sentence.

21. The Attorney General appeared before us advised that the State and the Appellant had reached a confidential settlement of Mr. Koilo's Constitutional Application.

22. The Attorney Gereral also provided a copy of a memorandum of agreement between Corrections and the Police. This memorandum was designed to stop the illegal removal of prisoners from the custody of Corrections by the Police. Finally the Attorney General advised that there were ongoing investigations into police actions with respect to Mr. Koilo.

23. It is appropriate to consider each assault separately. As to the first assault this followed the Appellant's return to custody after his escape. The Police action in assaulting the Appellant was "punishment" for that escape. Mr. Koilo pleaded guilty to this escape from custody in the Magistrates Court. His Counsel before us

accepted that he had emphasized the fact Mr. Koilo had been assaulted and asked the Magistrate to take this assault into account in mitigation of sentence. Counsel for the Appellant accepted that ordinarily the Appellant could have expected a cumulative sentence (cumulative on the 9 years 5months sentence) of a few months imprisonment for such an escape in the Magistrate's Court.

24. Mr. Koilo's concurrent sentence of 12 months imprisonment was therefore an acknowledgment by the Magistrate of the harm done to the Appellant in the assault after his escape.

25. Further the Appellant has settled his constitutional claim with the State. We consider the settlement sum very modest. However given this settlement together with the advantage Mr. Koilo received with respect to the escape sentencing, we see no need to further acknowledge the extra curial punishment of Mr. Koilo with respect to the first assault by any reduction in his sentence.

26. We take a different view with respect of the second assault. This assault was not precipitated by any escape by Mr. Koilo. The assault on him was a flagrant breach of his rights while he was in the state's lawful custody. The assaults occurred after this Court had made it clear that it had a continuing interest in Mr. Koilo's welfare. It was a seriously lawless act. The injuries Mr. Koilo has suffered will mean his imprisonment will be more difficult for him to serve. His prognosis is of an increased risk of an early onset of arthritis. Mr. Koilo has also suffered considerable pain as a result of the assault.

27. Taking into account of the very modest settlement of his constitutional claim we consider that a further reduction in sentence of 6 months imprisonment is justified for the second assault.

28. The appeal is therefore allowed and the sentence of 9 years 5 months imprisonment is quashed. A sentence of 8 years and 5 months imprisonment is imposed instead.

29. Finally during the course of the various hearings before this Court we expressed our concern about the safety of Mr. Koilo and other prisoners given the unlawful acts of removing Mr. Koilo from prison and taking him to the police station to be assaulted.

30. We are pleased to note the memorandum which reflects an understanding between the Head of Corrections and the Chief of Police that Corrections will not allow the Police to remove prisoners as they choose from prisons unless the police have lawful authority to do so. We are also pleased to note that Attorney General advised us that there were continuing ongoing investigations into the two assaults on Mr. Koilo. We express our disappointment however that those investigations have not yet resulted in the arrest of those responsible.

Dated at Port Vila, this 16th day of July, 2010

BY THE COURT

Hon. Chief Justice V. Lunabek

REPUBLIC OF VANUATU COURT OF APPEAL COUR D'APPEL

Hon. Justice R. Young

Hon. Justice John v. Doussa

Hon. Justice O. Saksak