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

Criminal Appeal Case No. 04 of 2010

BETWEEN: **FRANK METO**
Appellant

AND: **PUBLIC PROSECUTOR**
Respondent

Coram: *Hon. Justice J. Mansfield*
Hon. Justice O. Saksak
Hon. Justice E. Goldsbrough
Hon. Justice N.R. Dawson

Counsel for the Appellant: *E. Molbaleh*
Counsel for the Respondent: *G. Takau*

Date of hearing: *1st December 2010*
Date of decision: *3rd December 2010*

JUDGMENT

1. This is an appeal against conviction and sentence. The Appellant was convicted by the Supreme Court, after trial, of three offences involving unlawful sexual intercourse with a girl. Those offences are described as unlawful sexual intercourse with a child under care or protection, contrary to section 96 of the Penal Code Act [Cap 135] (the Act), unlawful sexual intercourse with a child between 13 and 15 years contrary to section 97(2) of the Act and unlawful sexual intercourse with a girl without consent, contrary to section 91 of the Act.

2. The victim of these offences is variously described as the Appellant's daughter or step daughter. We shall call her 'the daughter' or 'the victim'. It is clear regardless of the actual family relationship that the girl was living in the Appellant's household and under his care and control.

3. The offences are said to have occurred during a period beginning in 2002 and ending in December 2009. At the outset of the appeal the Appellant made it clear that he does not maintain any challenge to the conviction for the offence under section 96 of the Act. During submissions counsel for the Prosecution conceded that there was no material admissible before the trial court sufficient to maintain a conviction under section 97(2), as there was little evidence of offences being

committed when the victim was between the ages of 13 and 15 years. At the start of the period she was less than that age and by December 2009 she was beyond that age limit.

4. The remaining conviction the subject of appeal is unlawful sexual intercourse without consent. The information in that respect alleges that the Appellant sometime between 2002 and 23 December 2009 on various occasions had sexual intercourse with the daughter without her consent. This is said to be contrary to section 91 of the Act.

5. The grounds of appeal are that the trial judge erred in convicting the Appellant on uncorroborated evidence and that the trial judge neglected the defence of consent as a correct and lawful defence.

6. During the trial the Appellant was not represented. The trial took place between 6 and 8 April 2010 and judgment was delivered on 9 April 2010. At the trial the court heard evidence from the victim, Anne Marie Jimmy, her mother, Wendy Frank and the younger sister of the complainant, Elsie. There was in addition evidence from a medical practitioner as to injuries found on the complainant. The Appellant chose not to give evidence but called two witnesses on his own behalf.

7. The substance of the complaint about the behaviour of the Appellant towards the complainant was of unlawful sexual intercourse committed at various times and places on the complainant. Whilst she gave evidence of where this conduct took place, she could not give evidence of dates and times in all instances.

8. The period ended on 23 December 2009 when the conduct complained of on that particular day, that of unlawful sexual intercourse, was admitted by the Appellant. The issue, then, on that occasion is consent, hence the withdrawal of the appeal against conviction for the offence under section 96 of the Act because the daughter's alleged consent would not be a defence to that charge in any event.

9. When the trial judge considered the evidence he noted several parts of the evidence that amounted to corroboration of the story from the victim. That corroboration was of the two being together in a particular place, the mother seeing the Appellant on top of her daughter on their bed and of the observations of the younger daughter. That evidence is helpfully summarised in the published judgment of the trial judge.

10. From those observations made by the trial judge, it is apparent that he had in his mind the need to exercise caution in convicting on uncorroborated evidence of a young child. In the course of the evidence the trial judge heard and thereafter made findings accepting that evidence, that amounted to corroboration of the evidence of the unlawful sexual intercourse.

11. We therefore reject the ground of appeal that the trial judge convicted the Appellant on uncorroborated evidence without warning himself of the need to exercise caution in respect of evidence of a child or young person. There was

evidence capable of corroborating the evidence of the young victim and the learned trial judge accepted that evidence in the course of his judgment. He went further to comment on the reasons why he determined that the evidence could be relied upon to support a conviction. The learned trial judge also took into account the medical evidence of injury which itself is capable of providing corroborative evidence.

12. As to the issue of consent, we note the evidence in that regard and the finding of the trial judge in that regard. The evidence on that was of threats and of fear on the part of the complainant such that in her view she was forced to have sexual intercourse with the Appellant. Evidence from the younger sister also contained evidence of force being used to make the victim comply with the Appellant's wishes. There is, further, evidence of physical assaults committed by the Appellant when he was criticised for his conduct or did not get his own way. That evidence itself is capable of supporting a finding of lack of consent through fear.

13. Consent is defined in section 90 of the Act to include, inter alia, consent obtained by force, threats of intimidation, or fear of bodily harm. The evidence on which the learned trial judge made his findings puts the issue of consent beyond reasonable doubt. His finding appears, to this Court, to be a clear and absolute finding on the evidence that the complainant did not consent to the sexual intercourse. Once the trial judge accepted, as he did, that the evidence of the daughter, her mother, and her younger sister was all reliable and that he was prepared to accept it, then he was entitled to conclude that he was satisfied beyond reasonable doubt that the daughter had not consented to the offending conduct of the Appellant. The trial judge noted that the evidence called by the Appellant was not relevant to the issue of consent. There was no other evidence.

14. The trial judge was obviously aware that the victim was not able to identify precise dates for the offending conduct, but that she was clearly able to identify the location and circumstances when that conduct took place. We reject the contention that, because of the age of the victim and uncertainty as to precise dates, it was unsafe to convict the Appellant. We are far from persuaded about that. The trial judge had the benefit of seeing each of the witnesses give evidence, and so to assess their reliability. He was aware that each element of the offences needed to be established beyond reasonable doubt. In our view, there is no reason to conclude that his findings were unsafe.

15. We reject, therefore, the notion that the learned trial judge did not consider consent or, more correctly, the lack to consent to be a necessary ingredient of the offence under section 91. It is apparent from the judgment that not only did the learned trial judge consider the question of whether the complainant consented or not to the act but also that the clear findings of the trial judge were a lack of consent. It is, of course, clear that in relation to other offences not the subject presently on appeal that consent is not an issue – see section 97(3) of the Act.

16. In submissions on this appeal we note that the Respondent refers to the information alleging three charges and that during oral submissions the Respondent referred to

the possibility of alternative convictions based on certain findings during the trial. If, for example, it had not been possible to maintain a conviction for the more serious offence of sexual intercourse without consent, then the second position of the Respondent was to rely upon sexual intercourse with a child under care or control, where consent under section 96 of the Act is not an issue. We regard that as a proper view to take and appreciate that the Respondent in those circumstances may not press for a conviction to be recorded as against all offences alleged where the criminal conduct is singular and may be the same conduct within each particular allegation.

17. Turning to the question of the appeal against sentence, the total period of imprisonment imposed before deduction for time already served is ten years. The maximum sentence is life imprisonment. Based on a starting point of five years, the learned sentencing judge, who also had carriage of the trial, increased the starting sentence to reflect various factors present in this course of criminal conduct. Counsel for the Appellant did not contend that the starting point was not an appropriate starting point. The aggravating factors are set out in the published sentencing remarks. The Appellant has one previous conviction for an offence not related to this offending. The factors taken into account to increase the sentence from a five year starting point are set out as being the large age gap between the offender and the victim, the repetitive nature of the offending, the threats made to induce consent and the breach of trust as between the father figure and daughter who would be unable to feel safe, secure and protected at home, and the young age of the daughter.

18. This Court takes the view that all of those factors are relevant and should properly be taken into account, and that in determining that the appropriate penalty should be increased from five to ten years for those reasons, no error in sentencing has occurred. We reject the argument that the sentence is manifestly excessive in the circumstances.

19. The starting point is recognised in previous decisions of this court to which the trial court and this court have been referred. Those authorities, in particular ***PP v Scott*** *[2002] VUCA 29* (confirming the dicta from ***PP v Ali***) and ***PP v Gideon*** *[2002] VUCA 7* are all indicative of a sentence within the range imposed in this case. It is not therefore possible for this Court on this appeal to conclude that the sentence imposed by the Supreme Court was manifestly excessive

20. All sentences are expressed to run concurrently and therefore the quashing of the conviction for the offence under section 97(2) of the Act makes no difference to the total effective period of imprisonment. This Court may have taken a different view on sentencing were the terms of imprisonment imposed to have been consecutive terms, as this may have amounted to more than one punishment for what was effectively one repeated offence, although as that is not the case here the point remains moot.

21. In any event, the appeal against conviction for the offence under section 97(2) of the Act, that is to say unlawful sexual intercourse with a child under the age of fifteen years but of or over the age of 13 years is allowed and that conviction quashed, as is the corresponding sentence of four years imprisonment for that offence. The conviction for unlawful sexual intercourse without consent under section 91 is upheld and the appeal dismissed. In relation to the sentence of ten years imprisonment in respect of that offence the appeal is similarly dismissed and the sentence confirmed.

DATED at Port Vila, this 3rd day of December 2010

BY THE COURT

.....
Justice J. Mansfield

.....
Justice O. Saksak

.....
Justice E. Goldsbrough

REPUBLIC OF VANUATU COURT OF APPEAL COUR D'APPEL

.....
Justice N. R. Dawson