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

Criminal Appeal Case No. 03 of 2011

BETWEEN: REUBEN WOTU
Appellant

AND: PUBLIC PROSECUTOR
Respondent

Coram: ***Hon. Chief Justice Vincent Lunabek***
Hon. Justice Bruce Robertson
Hon. Justice John von Doussa
Hon. Justice Oliver A. Saksak
Hon. Justice Daniel Fatiaki
Hon. Justice Robert Spear

Counsel: *Mr. E. Molbaleh for the Appellant*
Mr. S. Blessing for the Respondent

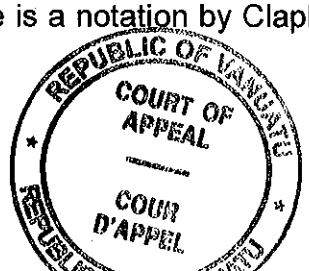
Date of Hearing: *22 November 2011*

Date of Decision: *25 November 2011*

JUDGMENT

1. This is an appeal against a sentence of **7 years imprisonment** imposed on the appellant in the Supreme Court (**Clapham J.**) on **23 September 2009** upon his conviction for an offence of Incest. The appellant had pleaded guilty to the offence which charged him with having sexual intercourse with his biological daughter over a period of 5 years between 2004 and 2009. In these circumstances **Section 200 (2)** of the **Criminal Procedure Code** limits or confines any appeal to "*the legality of the sentence only*".

2. The formal Notice of Appeal was lodged on **29 June 2011** together with an application for leave to appeal out of time supported by a sworn statement of the appellant. However a perusal of the original Supreme Court file uncovered a handwritten letter by the appellant in bislama on the subject matter "***RE: APPEAL AGENSEM CASE AND SENTENCE***". Although the letter is undated, there is a notation by Clapham J. dated 2 October 2009,



requesting an English translation. The translation indicates that the appellant lodged his appeal because of his "*health problems*" and the difficulties facing his family after his incarceration.

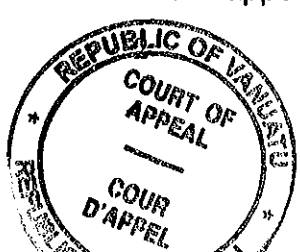
3. In light of the provisions of **Section 202** of the **Criminal Procedure Code** [CAP. 136] and State Counsel's concession on learning of the existence of the appellant's letter, we are satisfied that the appeal in this instance was lodged within time and therefore there is no need for us to further consider the application for leave to appeal out of time.

4. Appellant's counsel in his written submissions refers to the fact that the appellant was unrepresented at the sentencing stage and presumably was unable to place "*all possible mitigating factors*" before the Court. What those additional factors were remains unclear but, in any event, we are satisfied that the appellant was neither handicapped nor prejudiced by not having the assistance of counsel at the sentencing stage.

5. Clapham J. had before him a detailed and comprehensive pre-sentence report on the appellant as well as a helpful written sentencing submission from the prosecutor which included a copy of the decision in **PP v. Gratien Bae [2003] VUCA 14**. The appellant was also given and took the opportunity to orally address the Court at length, by way of mitigation prior to the sentence being imposed.

6. Included in the appeal book is a **Medical Report** on the appellant dated **21 October 2011** which confirms from hospital records that the appellant is "*diabetic and hypertensive*" and is on medications for both conditions. Nothing is disclosed as to when or for how long the appellant has had these conditions which were not drawn to the attention of Clapham J.

7. We accept that a defendant's pre-existing medical condition may be a relevant mitigating factor where a sentence of imprisonment or incarceration would seriously aggravate it. But in the present circumstances we do not consider the appellant's medical conditions are



exceptional, nor in our view is the recommended dietary and exercise regimes beyond the capacity of the correctional authorities to cope with or accommodate.

8. We turn to consider the substantive appeal which asserts that the appellant's sentence is "*manifestly excessive*". The grounds of appeal further allege errors on the part of Clapham J. "*in placing too much weight on the aggravating factors*" and "*... insufficient weight on the mitigating factors*"; and "*in making no deduction for the custom reconciliation which was refused by the victim and her mother*".

9. In the absence of an agreed statement of facts the appellant was sentenced on the basis of English translations of his police caution interview answers and eye-witness accounts which, by inference, observed the appellant having sexual intercourse with his daughter on several occasions in their family home during the months of March and April 2009.

10. A perusal of the Appellant's caution interview record discloses that he was asked and answered a total of **97** questions. Many of the answers are incriminatory whereas others are plainly exculpatory such as his consistent denial of any sexual activities with his daughter at Erromango. There are few factual findings referred to in the sentencing remarks of Clapham J.

11. As it is important in a sentence appeal to ascertain the factual basis on which sentence was imposed in the lower Court, we adopt (with slight amendments) the brief facts in the prosecution's sentence submission before Clapham J which provides an accurate summary of the gist of the appellant's incriminatory answers. They are set out as follows:

> *"The defendant is the biological father of the victim.*
>
> *In 2006, the defendant and the victim lived at Pango Village with their family members. The victim was in class 6 (Grade 6) at Pango School. While in Pango, when the mother is not*

around or, in the bush or, when people are not at home, ... he took her into the bush lay a white bed sheet and he penetrated the victim's vagina for the first time. She felt pain, but he continued to have sexual intercourse with her. ....

After that he continued to have sexual intercourse with her. He used to take the victim with him in the night, at around 10pm and return with her at about 6am and they had sexual intercourse in Pango bush. .....

These sexual offending on the daughter continued in 2007 to 2008, where he continued to take her to Pango bushes and return early in the morning of the next day. At times he would have sexual intercourse with her when people are not around at home.

In 2008, the family moved to Erakor half road area, and the defendant continued to have sexual intercourse with her in the early hours of the morning.

In 2009, he continued to have sexual intercourse with her, however on 16 April 2009, was the last time they had sexual intercourse when they were seen by neighbours.

On 25 April 2009, the victim reported the defendant to the police.

On 5 May 2009, the defendant was cautioned and interviewed. During the interview he admitted the allegations."

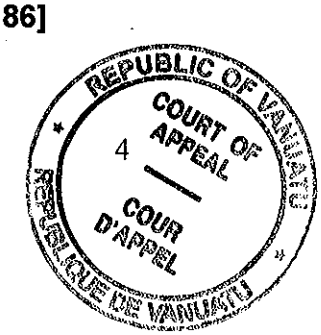
12. We also consider the appellant's admissions supports the following additional facts and inferences:

(a) Sexual intercourse with his daughter commenced in 2006 at Pango and ended at Erakor half road area in April 2009 when the matter was reported to the police; **[Ans: 58, 59 and 60]**

(b) The appellant continued to have sexual intercourse with his daughter even when he knew she was pregnant; **[Ans: 66 and 67]**

(c) The appellant admits having sexual intercourse with his daughter on so many occasions that he couldn't count them. **[Ans: 74]**

(d) The appellant accepts that his daughter was 17 years of age in April 2009. **[Ans: 86]**



13. In sentencing the appellant Clapham J. correctly noted that the offence of Incest carries a maximum sentence of 10 years imprisonment. It is also clear that his honour adopted the maximum penalty as the appropriate starting point in the sentencing of the appellant and from this he discounted 3 years, principally, in recognition of the appellant's plea of guilty and his record of public service.

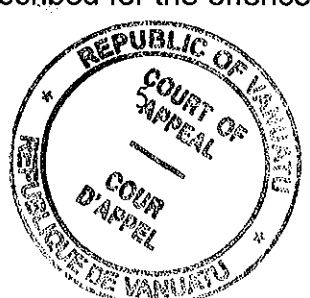
14. By way of aggravating factors his honour noted:

- the appellant's prior convictions in 1996 for Unlawful Sexual Intercourse and Rape for which the appellant received an effective sentence of 8 yeas imprisonment;
- the period of time over which the offending occurred;
- the consequences upon the victim;
- what his honour describes as the appellant's complete lack of insight into his obligations as a parent; and
- his lack of remorse.

15. Clapham J. also referred to the judgment in **PP v. Gratien Bae [2003] VUCA 14** where this Court in setting aside an order suspending a sentence of 2 years imprisonment imposed on the defendant in that case for an offence of **Incest** said:

> *"The principles are simple. Parents who use their children for their own sexual gratification will go to prison. It is almost impossible to imagine circumstances in which that will not be the necessary response."*

16. Although there are several grounds of appeal enumerated in the Memorandum of Appeal, at the hearing of the appeal, appellant's counsel accepted that the primary issue or ground upon which the entire appeal turned was: Whether or not Clapham J. erred in adopting as the starting point in the sentencing of the appellant, the maximum sentence of 10 years imprisonment prescribed for the offence of Incest.



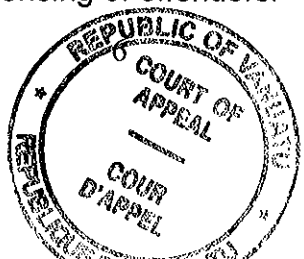
17. Appellant's counsel submits that the fact that the appellant had kept out of trouble and not re-offended for a period of 13 years after his last conviction in 1996, indicates that the appellant "*could not possibly ... be seen as a person who is not safe for the community and ... must be sentenced to a term of imprisonment ... calculated starting from the maximum term*". We would merely point out that for a good part of those 13 years the appellant would have been in custody serving his sentence, and therefore, it is the time that the appellant was at large that counts. On the appellant's own admission **[Ans: 23 & 24]** this would have been sometime in 2002. Nevertheless, counsel suggests a starting figure of 7 ½ years as more appropriate.

18. We are grateful to State Counsel for the details of the appellant's prior convictions which involved the prolonged sexual abuse of the appellant's step-daughter who lived with him as a member of his family. The circumstances of the appellant's prior offending bears a striking and disturbing similarity to his offending against his biological daughter in the present case under appeal which commenced within 5 years of his release from prison.

19. State Counsel in opposing the appeal submits "*that the aggravating features of the offending objectively places this case at the highest end of the scale of cases of incestuous abuse in this jurisdiction*" and therefore "*the 10 years starting point adopted by his Honour ... was commensurate to the objective gravity of the offending*".

20. In the nature of prescribed penalties we accept that, the maximum sentence is provided for the worst category of offending. Nevertheless it is a sentence that must have been intended by Parliament as capable of being imposed and not as some asbstract hypothetical target that can never be attained.

21. Recently in **PP v. Kal Andy** [2011] VUCA 14 this Court said, of the "*starting point*" in the sentencing of offenders:



"*The starting point can be defined as the sentence of imprisonment that reflects the seriousness of the offence and the culpability of the actual offending; that is, the specific actions of the offender and their effect in the context of the specific charge and its maximum sentence. In this first step, there is no consideration of circumstances which are personal to the offender. The calculation has regard only to the seriousness of the offending.*"

The Court also identified the following relevant factors in assessing culpability:

"*(a) The age of the victim. The evidence in the depositions is that the appellant's daughter was born in 1992 and therefore would have been 14 years of age when sexual intercourse began with the appellant;*

(b) The harm suffered by the victim. The victim experienced severe pain whenever the appellant had intercourse with her. The appellant also ejaculated inside the victim exposing her to the risk of pregnancy and infection from their unprotected sex. By the appellant's own admission he had sexual intercourse with his daughter even when he knew she was 5 months pregnant which resulted in her miscarriage;

(c) Breach of trust. The appellant was the biological father of the victim and had a responsibility and a duty to care for and protect her. Instead, he selfishly used her for his own sexual gratification even within the family home without the slightest care or concern for his daughter's welfare and under the pretext that he loved her;

(d) The age of the offender. The appellant was an experienced and mature man in his late forties who knowingly and intentionally abused his daughter over a period of 4 years;

(e) The degree of violation. In the present case the violation of the daughter began with digital penetration and oral stimulation and continued with partial penile penetration until full penetration and ejaculation was eventually achieved ;

(f) Premeditation. In this regard the frequency and the duration of the appellant's sexual activity reflects a high degree of premeditation and planning on his part and

was sustained by the fear and shame instilled in his daughter;

(g) *The scale of offending. On the appellant's own admission sexual intercourse with his daughter extended from 2006 until April 2009 and was so numerous as to be uncountable ("mi gat sex wetem hem fulap time we mi no save countem hemi fullap tumas").*"

(our underlinings)

22. We are also assisted by the observations of the NZ Court of Appeal in **August v. The Queen** [2011] NZCA 91 where in a case of Intentionally Causing Grievous Bodily Harm, the Court said, in upholding the adoption of the maximum penalty as the starting point for the sentencing of the appellant:

> "(the maximum penalty) *... is not preserved for particular fact patterns and that equally serious cases can arise through different factual combinations. Moreover as this court said in Xie* ([2007] 2 NZLR 240) *cases falling within the most serious category are not confined to cases at the limits of human imagination. We should also add that the fact that counsel were unable to locate any cases where the maximum penalty was used as the starting point for intentionally causing grievous bodily harm is not decisive. Obviously Parliament contemplated that there would be such cases*".

23. To the same effect are the observations of the High Court of Australia in **Veen v. The Queen (No 2)** (1988) 164 CLR 465 when it said (at p 472):

> *".....the maximum penalty prescribed for an offence is intended for cases falling within the worst cases for which that penalty is prescribed. Ibbs v. The Qween (1987) 61 ALJR 525 at 527; 74 ALR at 5. That does not mean that a lesser penalty must be imposed if it is possible to envisage a worse case; ingenuity can always conjure up a case of greater heinousness. A sentence which imposes the maximum penalty offends the principle only if the case is recognizably outside the worst category."*

24. Turning to the present case where the victim had been continuously sexually violated by her biological father from the age of 14 until she

turned 17 and given the appellant's prior convictions for the sexual violation of his step-daughter, we are satisfied that this was indeed one of the most serious cases of its kind deserving of condign punishment and for which the maximum penalty was an entirely appropriate starting point.

25. For the foregoing reasons the appeal is dismissed.

DATED at Port Vila, at 25th day of November, 2011.

BY THE COURT

.....
Chief Justice Vincent Lunabek

.....
Justice Bruce Robertson

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Justice John Von Doussa

REPUBLIC OF VANUATU COURT OF APPEAL COUR D'APPEL

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Justice Oliver A. Saksak

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Justice Daniel V. Fatiaki

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Justice Robert Spear