IN THE COURT OF APPEAL
OF THE REPUBLIC OF VANUATU

Criminal
Appeal Case No.3607 of 2017

BETWEEN: RL
Appellant

AND: Public Prosecutor
Respondent

Date of Hearing of Appeal: Wednesday, 17 April 2018

Before: Justice J. von Doussa
Justice R. Asher
Justice D. Aru
Justice O. Saksak
Justice G.A. Andrée Wiltens

Counsel Appearing: Mr N. Morrison for Appellant
Mr S. Blessing for the Public Prosecutor

Date of Judgment: 27 April 2018

JUDGMENT

A. Introduction

1. This was an appeal against end concurrent sentences of six years imprisonment for:

- one charge of attempted rape in 2005 with a maximum sentence of life imprisonment, and

- one representative charge of indecent assault on a young person under the age of 13 years, which occurred numerous times in the years of 2005, 2006 and 2007 – the maximum sentence for this offence is 15 years imprisonment.

2. The sentences were submitted to be manifestly excessive. This Court has jurisdiction to consider the appeal, as explained in *Andrew Tom Naio and Noel Nathaniel v. PP* Criminal Appeal Case No.7 of 1997 which approved of the English practice, now more than a century old, of considering appeals against sentence if they are either "manifestly excessive" or "manifestly inadequate", but otherwise not interfering with a sentencing Judge's discretion.

3. In particular Mr Morrison submitted that the start point adopted for the offending was too high, that various authorities referred to by counsel were not obviously taken into account by the learned Judge in the sentencing exercise, and that the unusual feature of a 12-year delay between the offending and sentencing was not given sufficient weight as a mitigating factor.

B. The facts

4. The appellant pleaded guilty to the two charges at the earliest opportunity. Other charges had been laid, but they fell by the wayside. There was an agreed summary of facts which detailed the offending. Counsel agreed before us that the relevant ages of the appellant and the victim be ascertained from their dates of birth - the appellant was born in 1982, the victim in 1996.

5. The attempted rape charge involved the appellant going to the complainant's house and asking for her. She was his niece. She went, as asked, to see the appellant. He lifted her up onto his lap, pushed his hands under her skirt and moved her underpants to one side and inserted his finger into her vagina – this caused her some pain. He then carried the complainant to the garage, removed her skirt and undergarments, placed her on the floor, removed his trousers and got on top of her. He spread her legs and attempted to push his penis into her vagina – he could not achieve penetration, but he rubbed his penis against her vagina until he ejaculated. Thereafter he prayed with her, seeking forgiveness, and left shortly afterwards. At some point thereafter, the complainant woke her parents up at night time to complain of extreme stomach pain. She was examined at hospital, but nothing was detected.

6. The indecent assault charge involved misconduct through a 3-year charge period of 1 January 2005 to 31 December 2007. The specific features of the offending are that the appellant would go to the complainant's house and lure her into accompanying him to a room or an area in her house where he would commit acts of indecency either with her or in her presence. He would remove her skirt and under garments, remove his trousers and expose himself to her, he would rub his penis on her vagina to the point of ejaculating. Again, he would subsequently invite her to pray with him seeking forgiveness, prior to leaving. This was said to have occurred a number of times over the charge period.

C. The sentence

7. Justice Chetwynd approached sentencing in the manner laid down by this Court in *R v Andy* [2011] VUCA 14. We endorse that approach and say again that step one should be an assessment of the criminal culpability involved; step two should then make adjustments taking into account aggravating and mitigating factors personal to the defendant; and finally step three should look at any available discounts for the timing of plea(s) if any.

8. Justice Chetwynd adopted a start point of 10 years imprisonment for the offending. He did so by finding the following aggravating factors:

- Extreme physical pain caused to the complainant – such that she was taken to hospital;

- The differential in age between the complainant and the appellant – some 14 years;

- The very young age of the complainant at the relevant times – ranging from 9 to 11 years of age at the time of the offending;

- Mental anguish caused to the complainant, which has had long-lasting consequences;

- Breach of trust – the appellant is the complainant's uncle;

- The fact the offending occurred in the complainant's home, where she is entitled to feel safe and secure; and

- The appellant did not use protection, thereby potentially exposing the complainant to sexually transmitted disease.

9. Justice Chetwynd could have added the length of time of three years during which the indecent assaults took place.

10. Justice Chetwynd gave credit to the appellant, by way of mitigation, the following:

- The appellant's otherwise good character, although of limited relevance, which reduced the sentence by 6 months imprisonment;

- The appellant's remorse (albeit late in the Judge's view) and his intent to engage in custom reconciliation – which allowed a further reduction by 6 months; and

- The gap of 10 years since the last offending – this was taken into account in determining that he could allow the full one-third discount for early guilty pleas, despite commenting that "real guilt was not accepted until many years after the offences were committed". The Judge also noted that the aspect of delay could not be given much weight as the complainant had been told to not divulge the offending.

D. Was the correct start point adopted?

11. Mr Morrison took no issue with the aggravating factors identified in relation to the offending, but submitted that the starting point was too high. He relied on several previously decided cases to make this submission, in particular:

- *PP v Andy* [2011] VUCA 11
- *PP v Ali August* [2000] VUSC 73,
- *PP v Maslea Scott* [2000] VUCA 20, and
- *PP v Song Sam* [2004] VUSC 78

12. Mr Blessing sought to uphold the start point. He also submitted several authorities to support his position, namely:

- *PP v Vulu* [2004] VUSC 51
- *PP v Tarilingi* [2005] VUSC 140
- *PP v Benjamin* [2005] VUSC 110
- *PP v Gideon* [2007] VUCA 7, and
- *PP v Scott* [2002] VUCA 29.

13. All these cases are relevant and on point; but in the final analysis every case must be dealt with on its own facts.

14. We note that Justice Chetwynd took the attempted rape charge as the lead offence. It was an attempted rape towards the top of the scale given how close the appellant was to full penetration, and the other factors referred to. In our view, the indecent assault charge is particularly serious – it could easily be taken as the lead offence. It involved on numerous occasions, over a 3-year period, skin on skin contact, to the extent of rubbing the appellant's erect penis against a young child's vagina to the

point of ejaculation. It is difficult to imagine any more serious indecencies. As ample authorities have made plain, offending of this kind warrants a condign sentence to mark the seriousness of the offending, to hold the perpetrator accountable for such conduct, to deter such conduct, and to protect innocent members of the community. It is trite law that in such circumstances personal mitigating factors can only have a limited impact on the sentence that must be imposed.

15. Having carefully considered the written and oral submissions, and looked at the authorities relied on by counsel, we are firmly of the view that the start point of 10 years imprisonment is well within range when the culpability for these two serious charges is assessed.

E. The Issue of delay and other mitigating factors

16. Mr Morrison further submitted that the delay of some 12 years between the offending and sentencing was prejudicial to the appellant and had not been properly considered in the sentencing exercise. In that 12-year time since the offending the appellant had not re-offended in any way, and had built a life for himself within the community. His testimonials demonstrated that he was an asset to his community and a person of good standing. In the circumstances Mr Morrison submitted that greater consideration of section 57 of the Criminal Procedure Code was warranted relating as to whether suspension of the sentence was appropriate in this instance. He relied on the case of *PP v Heru* [2015] VUSC 88 as authority for that proposition. He also drew the Court's attention to *PP v Gideon* [2002] VUCA 7 in relation to the considerations to be taken into account when analysing whether or not a sentence should be suspended.

17. Mr Morrison stressed that an important consideration in this sentencing exercise was the lack of any need to deter the appellant from similar offending - he had already demonstrated over the last 12 years that there was no such need. Similarly, there was no need to protect the community from the appellant for the same reason. Additionally, Mr Morrison emphasised that the Courts have made plain in previous cases that the inevitable consequence of this type of offending is immediate incarceration. Given the delay in this case, that is now not possible. As a result Mr Morrison questioned the utility of a custodial sentence, and asked the Court to consider the appellant's prospects of re-offending. He submitted that in the circumstances of the case, and taking the appellant's personal characteristics into account, the end sentence be suspended either wholly or in part.

18. Mr Blessing took issue with this submission and relied on the authority of *PP v Morkro* [2017] VUCA 16 to support his contention that delay itself ought not to be the basis for suspension of sentence.

19. The actual delay is not 12 years, but 10. It was occasioned due to the complainant not reporting the offending – and we note that Judge Chetwynd considered the delay was due to the complainant being told to not divulge the matter. None of the delay can be attributed to the police or the state, unlike in *PP v Heru* where several years of delay was so occasioned. We take into account that frequently there will be a delay in the reporting of sexual misconduct where young children are involved. There are real issues of embarrassment, fear, and incomprehension of what has actually occurred to them which possibly explains that.

20. We consider the authority of *PP v Morkro* should be applied. The better way to deal with delay prior to sentencing is not by way of suspension of sentence, but by allowing a suitable reduction. It should not be overlooked that what we are dealing with here is offending of the most serious kind. To suspend the sentence in these circumstances would be to send the wrong message to the community.

21. The overall deduction of 40% for the factors in mitigation was not generous, but was within the range.

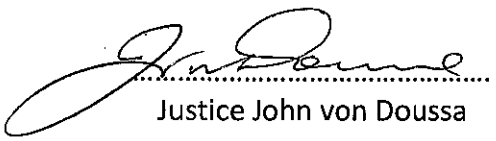
F. Conclusion

20. As we have outlined, this was extremely serious sexual offending. Proper weight must be given to not only the attempted rape, but also three years of most serious indecent assaults. Accepting that there were significant mitigating factors, the end sentence is within the range. The sentence was not manifestly excessive.

G. Result

21. The appeal against sentence is dismissed.

Dated at Port Vila this 27th day of April 2018
BY THE COURT



Justice John von Doussa