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

Criminal Appeal Case No.2969 of 2018

BETWEEN: EDMON OBED
Appellant

AND: PUBLIC PROSECUTOR
Respondent

Coram: ***Hon. Justice Vincent Lunabek***
Hon. Justice John von Doussa
Hon. Justice Ronald Young
Hon. Justice Oliver Saksak
Hon. Justice Daniel Fatiaki
Hon. Justice Dudley Aru
Hon. Justice Gus Andrée Wiltens
Hon. Justice Stephen Felix

Counsel: ***Jane Tari Aru for the Appellant***
Marie Taiki for the Respondent

Date of hearing: ***29 April 2019***
Date of Judgment: ***10th May 2019***

JUDGMENT

Background

1. A mother and her adopted daughter, whose names are suppressed, complained that their husband and father, Edmond Obed, the appellant had raped them on 7 occasions over a period of 18 months from May 2015. The appellant was charged with 6 counts of sexual intercourse without consent against his adopted daughter and with one similar count against his wife. He pleaded guilty to all the charges only after both witnesses had given their evidence and was sentenced to a starting sentence of 18 years imprisonment which was reduced to 15 years and 9 months for mitigating factors. The appellant says the primary judge was wrong in adopting a starting point of 18 years and the final sentence of 15 years and 9 months was manifestly excessive.

Leave to appeal

2. The appellant sought leave to appeal out of time. The appeal was filed some 10 months and 14 days late. The application was not opposed and leave was granted.

Grounds of Appeal

3. The appellant argued 3 grounds of appeal; that the sentencing Judge erred when he adopted a starting point of 18 years imprisonment, that he erred in failing to give any discount for the late guilty pleas, and that the end sentence of 15 years 9 months imprisonment was manifestly excessive. Grounds 1 and 3 were argued together.

Facts

4. The appellant is a 42 year old father. From 1st to 31st May 2015 he had sexual intercourse with his adopted daughter in their house. He made her sit on his penis and he had sexual intercourse with her without her consent (Count 1). During the same period in the kitchen or cooking house he had digitally penetrated her vagina with his finger, made her suck his penis and then had penile penetration with her against her consent (Count 2). Still in 2015 in a Chinese Store in the area he had penile intercourse with the daughter against her will (Count 3). In 2016 in the living house he made her perform oral sex on him while he performed cunnilingus on her (Count 4). On another occasion in 2016 he made her lie down on the bed and he had penile intercourse with her without her consent (Count 5). On another occasion in 2016 he penetrated his wife without her consent (Count 6). Finally on the last occasion in 2016 he digitally penetrated the daughter's vagina with his finger without consent (Count 7).

5. In sentencing, the judge adopted a starting point of 18 years imprisonment. He identified the aggravating features as: the sexual assault of an adopted child; breach of trust; offending in the house; age difference; unprotected sex; the sexual acts had particular degradation and humiliation. As to mitigation the judge deducted 9 months for past good conduct; 12 months for participation in a custom reconciliation ceremony and 3 months for a custodial period (which equates with 6 months time served). The Judge refused any reduction for the guilty pleas.

Issues

6. The appellant submitted the starting point of 18 years imprisonment was excessive and that the Judge was wrong to give no discount for the appellant's guilty pleas.

7. The appellant accepted that the Judge had correctly identified the aggravating features but said they did not justify the 18 years start sentence. The appellant submitted that a start sentence of 15 years was more appropriate.

8. In particular the appellant submitted that a number of aggravating features identified by this Court in Public Prosecutor v. Scott [2002] VUCA 29 were absent including; no violence beyond the rape itself; no weapon used; no previous convictions for sexual violence and no young victims.

9. In Boesaleana v. Public Prosecutor [2011] VUCA 33 this Court considered 18 years was an appropriate start sentence for 23 counts of sexual abuse of his two young children over many years. The appellant submitted the facts of this case were much worse than the current offending.

10. The appellant submitted also that the facts in Vahirua v. Public Prosecutor [2019] VUCA 17 were more serious than the current offending. That case involved aggravated sexual assaults of a 7 year old child over 15 months. The Court of Appeal upheld a starting sentence of 16 years imprisonment.

11. As to the second ground of appeal the appellant pleaded guilty during the course of the trial after the two complainants had given evidence. The appellant accepts that his late guilty pleas did not relieve the victims from the trauma and stress of giving evidence. However he says his late guilty pleas did save court time because the judge was not required to deliver a judgment and it showed remorse. The appellant said a discount of up to 25% was justified.

The Sentencing

Discussion

12. We accept the appellant's submissions that counts 4 and 5 were one incident and counts 6 and 7 were also one incident. Given the sentencing judge heard the complainant's evidence we have no reason to conclude he did not understand how the counts were linked.

13. There are aspects of the Boesaleana case which justified a higher starting sentence than the facts of this case. In Boesaleana the appellant was convicted of the significant sexual abuse of his two young children over many years. The appellant's current offending is very serious but we accept less serious than Boesaleana. This conclusion also acknowledges the appellant's third ground of Appeal relating to aggravating features. We are satisfied the starting sentence of 18 years was excessive.

14. We consider an appropriate start sentence for this offending was 16 years imprisonment, in view of the very serious intrusive nature of the sexual assaults, that the offending involved a second complainant, his wife, in depraved circumstances the breach of trust, and the likely destruction of the family unit.

15. There was no challenge to the mitigating deductions of the sentencing Judge except his refusal to deduct any period for the appellant's guilty pleas.

16. We agree with the sentencing Judge that no deduction for the appellant's guilty plea in the particular circumstances was appropriate. The appellant waited until both complainants had given evidence before his change of plea. He therefore did not save either complainants the humiliation or embarrassment of giving evidence about intimate details of their sexual abuse. Further his very late plea in our view showed no remorse at all. Any remorse he may later have felt was generously reflected in the discount he received for the reconciliation ceremony. Finally he saved the court little time by his late plea.

The Result

17. We therefore allow the appeal. We deduct from the start sentence of 16 years imprisonment the deductions identified by the sentencing Judge. We observe once again that the deduction for pre-trial time spent in custody is best reflected in a backdated prison sentence rather than a specific deduction. Backdating sentence commencement avoids parole eligibility issues.

18. We therefore make the following orders:

    (a) The sentence of 15 years and 9 months imprisonment is quashed.

    (b) On Counts 1 – 7 inclusive, the appellant is sentenced to 14 years and 3 months imprisonment concurrent, to commence from the date on which he was first taken into custody before trial.

DATED at Port Vila this 10th day of May, 2019.

BY THE COURT

Vincent LUNABEK
Chief Justice

REPUBLIC OF VANUATU COURT OF APPEAL COUR D'APPEL REPUBLIQUE DE VANUATU