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

APPEAL CRIMINAL CASE No. 1 of 1996

BETWEEN: Jessy Noel

Appellant

AND: Public Prosecutor

Respondent

Mr Jon Baxter Wright for the Appellant
Mr John Timakata for the Respondent
Date of hearing: 25 October 1996
Date of Judgement: 1 ~~October~~ November 1996

JUDGEMENT OF THE COURT

The Appellant Jessy Noel pleaded guilty to two charges, one of Attempted Rape for which he was sentenced to three years imprisonment; and one of indecent assault for which he was sentenced to six months imprisonment ; the terms to be concurrent.

In addition the Appellant was ordered to pay to the complainant, a 15 year old school girl, the sum of 100, 000 vatu. This payment had to be made within seven days of sentencing. If payment was not so made, the Chief Justice ordered that in addition to the concurrent sentence of three years the Appellant would be further committed to prison *"... for one day for every 500 vatu outstanding..."*. Consequently if the compensation of 100, 000 vatu was not paid the Appellant would serve an additional six and half months approximately. The Penal Code Act 1981 (CAP 135) Section 52 (1) enables the Court to impose such a term of imprisonment where there is default in the payment of a fine imposed. However by section 14 of the Penal Code Amendment Act 1989 the assessment of the term of imprisonment in default of the payment of a fine has been altered to provide a rate of one day imprisonment for every 50 vatu. On that basis the term of imprisonment in default of the payment of the fine of 100, 000 vatu would be in excess of five years. This means that the Appellant has received a sentence of more than eight years imprisonment if unable to pay the 100, 000 vatu compensation.

In addition the Appellant was also ordered to pay 10, 000 vatu prosecution costs.

It is against this sentence that the Appellant submits that the Chief Justice failed or alternatively failed adequately to take into account:

1- The substantial custom ceremony;
2- The recorded attitude of the complainant and her family;
3- The provisions of section 119 of the Criminal Procedure Code Act (CAP 136)

so that a manifestly excessive sentence was imposed that was wrong both in principle and in law.

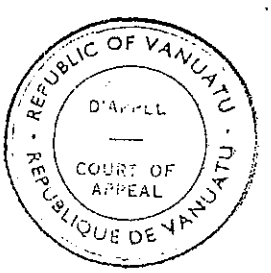
This Appellant at the time of the offence was the driver of a public bus; the complainant was forcibly dragged from the bus in an isolated area some time after 11pm on the evening of the 29 December 1995; the complainant successfully resisted the Appellant's prolonged attempts at intercourse; and the Appellant was affected by drink. It is against that background that we are required to consider whether the sentence imposed on the Appellant was appropriate and adequate or whether as now suggested it was manifestly excessive.

We consider first the relevance of customary law in the sentencing process. Article 95 (3) of the Constitution provides that:

> *"Customary law shall continue to have effect as part of the law of the Republic of Vanuatu".*

It is the custom in Vanuatu for village chiefs to preside over Custom Courts. In this case Chief Kalmasei Warsal of Hog Harbour, who is also Chairman of the East Santo Area Council of Chiefs, on the 3rd January 1996 made the following determination against the Appellant in respect of the incident, the subject of this appeal. His decision was as follows:

"	*(a)*	*Rape*	*VT*	*50, 000*
	(b)	*The girl was still a student when the incident happened*	*VT*	*10, 000*
	(c)	*Compensation for damage to the girls clothing*	*VT*	*5, 000*
	(d)	*Custom payment to ensure that the relationship between the people of Hog Harbour and Ambae remains good for ever more*	*VT*	*15, 000*
		Amount paid in full *Total*	*VT*	*80, 000*



The custom fines imposed above were complied with on the afternoon of the same day, 3rd January 1996, at the house of Pastor Amas Waki and were witnessed by him and his brother Joseph, the father of the complainant Aslinda Vira, and the family of Jessy Noel.

Signed: Chief Kalmasei Warsal
Hog Harbour."

Those custom fines have been paid. Based on the formula set out in Section 14 of the Penal Code Amendment Act 1989 that is equivalent to approximately four and a half years imprisonment.

It is true that the Chief Justice in sentencing referred to the Appellant having *"... performed a custom ceremony towards the girl and her family"*. He does not however refer to the quantitative effect of the custom penalty imposed and already paid. Calculated on the formula he stated at sentencing the Custom Court fine would have equated to just over five months. However when calculated by the correct formula the custom Court fine equates to more than four years imprisonment.

These factors are very significant and are required to be recognised on sentencing in order to comply with the provisions of Section 119 of the Criminal Procedure Code Act (CAP 136) which states as follows:

> *"Upon the conviction of any person for a criminal offence, the Court shall in assessing the quantum of penalty to be imposed, take account of any compensation or reparation made or due by the offender under custom and if such has not yet been determined may if he is satisfied that undue delay is unlikely to be thereby occasioned, postpone sentence for such purpose".*

While reference was made by the Chief Justice at sentencing to a custom ceremony his reference to *"... one day for every 500 vatu outstanding ..."* clearly indicates that he had not addressed the effective more than four years equivalent for the Custom Court penalty and its impact on the additional compensation of 100, 000 vatu that he imposed. We have already calculated that equivalent in terms of days in default at more than five years which together with the Custom Court penalty is in excess of nine years. That is before we consider the sentence of three years imposed.

We must be careful however to ensure that in approaching the impact of a Custom Court decision we do not create a precedent which could be interpreted as 'buying" ones freedom. This more especially when the offence is a serious one as in this instance. This very issue now arises in this appeal. We are told by Mr Baxter-Wright that the Appellant's family, no doubt at considerable financial hardship to themselves, have paid to him the 100, 000 vatu in order to settle that portion of the sentence. Does this mean that the penalty for a serious charge of Attempted Rape can be assessed in monetary terms so that those with financial means, or access to it, can avoid imprisonment?

Such an approach can neither be countenanced or justified. There must be a carefully balanced recognition of custom in order to ensure continued control and effectiveness of the Council of Chiefs and so maintain the influence of the individual Chiefs themselves. At the same time the laws of Vanuatu must be upheld to ensure appropriate penalties are imposed on any offenders who breach those laws, and so warn the public in general of the level of punishment that will follow from like transgressions.

It is our view that the learned Chief Justice when imposing the 100, 000 vatu penalty failed to adequately take into account the monetary penalty imposed by the Custom Court and its equivalent effect as required by Section 119 of the Criminal Procedure Code Act (CAP 136). otherwise he could not have imposed the additional monetary penalty of 100, 000 vatu with its resultant potential for five years approximately for non payment, pursuant to the provisions of Section 14 of the Penal Code Amendment Act 1989.

We have been told that five years is a recognised minimum sentence for Rape in this jurisdiction. On that basis three to three and a half years would seem to be the proper starting point to consider what is an appropriate sentence for Attempted Rape.

However, in addition to the penalty imposed by the Custom Court, we believe it is necessary to also take into account "*victim impact*" considerations. While no formal report of the complainant was before the Court, there was a statement by her dated the 2nd February 1996 confirming her satisfaction with the outcome of the custom Court and her wish that no further action be taken against the Appellant. The Chief Justice made no reference to that statement.

By way of further confirmation of attitude, the complainant and her father wrote to the Public Solicitor advising that they wished the police proceedings cancelled; and since then they have written a further letter to this Court as follows:

> *"We were very sorry to see Jessy Noel go to Court. We have already resolved this incident in accordance with our custom. He has suffered enough. We would like him to come out of prison"*

Complimentary to those sentiments expressed by the complainant is the undoubted difficulty of promoting reconciliation between the two families intimately involved and the associated extended families who are ultimately involved while the Appellant remains confined in prison. Of much more importance however is that the Appellant is a married man and his wife is expecting his child, circumstances resulting in considerable hardship for her.

For the above reasons we allow the appeal in part in order to apply the legal principles necessary to achieve an appropriate sentence; to recognise the penalty already imposed by the custom Court; to take

into account the impact on and the request by the complainant and her family; to allow for the guilty plea; and to show appreciation for the Appellant's personal family circumstances.

The original sentence is therefore varied in part as follows:

1- The penalty of 100, 000 vatu is cancelled;

2- The term of imprisonment for the offence of Attempted Rape is reduced from imprisonment for three years to two years concurrent with the sentence of six months imprisonment for indecent assault.

Justice ROBERTSON
Judge of Appeal

Justice MUHAMMAD
Judge of Appeal

Justice DILLON
Judge of Appeal

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