

IN THE SUPREME COURT
OF THE REPUBLIC OF VANUATU

(Criminal Jurisdiction)

Criminal Case No. 36 of 2003

PUBLIC PROSECUTOR

-v-

JOHNLYN ARNHABAT

Coram: Justice Treston

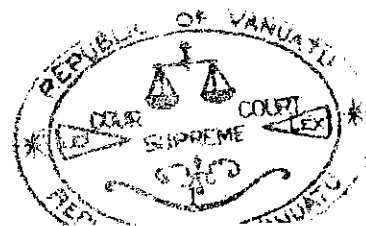
Mrs. Tavoia for Public Prosecutor

Mr. Toa for the Accused

SENTENCE

Mr. Arnhabat you are here today for sentence on one charge of indecent assault.

That charge of indecent assault is under section 98 (2) of the Penal Code [CAP. 135] which provides that the maximum potential sentence is 7 years imprisonment. The nature of the indecent assault was you fondling one of the nipples of the complainant and putting your finger into her vagina in the course of a massage you were performing on her in order to facilitate her being able to conceive a child. Your actions, I have found, went well beyond what she consented to and she immediately told you to stop when you did go too far. You are a first offender with no previous conviction of any kind.



The Public Prosecutor submits to me that throughout the trial you showed no remorse and that necessitated a lengthy hearing of the matter. It is submitted to me by the Public Prosecutor that the Court should take into account that the community does not want this sort of offence to happen and the Court should impose a sentence of imprisonment to prevent such a crime.

On your behalf I am invited to take into account, as I must, that there have been steps taken by you and your family to facilitate a customary settlement under section 119 of the Criminal Procedure Code [CAP. 136] which provides that upon a conviction of any person such as you 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 it is satisfied undue delay is unlikely to be thereby occasioned, postpone sentence for such purposes. I am satisfied and fortified by the fact that it has been agreed that the sum of VT60, 000 is be paid to the victim by way of custom settlement. I approach sentencing on the basis that that is agreed and that that amount will be paid. I am not going to delay sentencing any further but I certainly take the compensation under custom into account.

On your behalf I am told that you are 61 years of age and have 4 children. Their details and circumstances were set out fully in the submissions. I know that more than one of them relies on you for support and maintenance. I am told that your wife does not work and that, although you do not charge for the massage work that you perform, you receive recompense sometimes in money some

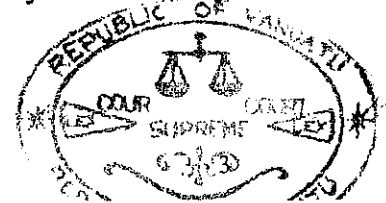


times by way of kind for that and for other jobs that you do. You are the sole income earner and support for your wife and children. Some of your children particular Steven at age of 26 really need to start looking after themselves in my view but I accept that you assist. The penalty available to this Court is fully set out and has been referred to me in submissions. I am invited to accept that you are not a threat to society and are a well-respected elder of your church. You have performed massage for 44 years without incident or complaint and examples of your positive work had been attested to by various witnesses at the trial. I am asked to accept that there are no aggravating features to the offence and at the end of the day it is submitted that I should impose a sentence of imprisonment but suspend that sentence.

It is said that you express shame, regret and sorrow and I have considered the cases and other sentences in similar matters which have been placed before me for consideration. I also take into account the fact that there are positive references put forward on your behalf.

There are nevertheless, in my view, aggravating features to this offending. Those features include of course, first, the actual use of force albeit minimal. I indicated in my judgment that even a caress can amount to an indecent assault and here there was some force required to insert your finger into the vagina of the victim.

Next there was clearly skin to skin contact which is an aggravating feature in an indecent assault. Next is the fact that you actually



penetrated the complainant's vagina with your finger, which is in my view a serious aspect.

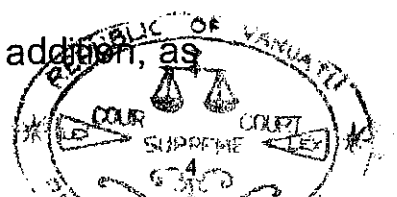
Next that there was an abuse of trust between you and the victim. She trusted you as a person who has been described as a professional to do what was necessary to have her conceive a child and you clearly went far too far on my finding.

Next there was the particular vulnerability of the victim in these circumstances. I say that because she was vulnerable because of her desperate wish to conceive a child and was prepared to do almost everything you required her to do to achieve that end.

There was the fact also, as she said in evidence which I accepted that you specifically told her not to tell her husband of what had occurred.

Of course I balance those aggravating features against the mitigating ones which have been able placed before me. A mitigating feature is your age of 62 years, two, the fact of your previous good character with no previous conviction of any kind, three there is no evidence of permanent injury to the victim, four, there are references of good remarks which had been placed before me as to your character.

Having said all that and balancing the aggravating and mitigating facts I am nevertheless forced to the conclusion that the nature of this offending means that it is a serious case. The victim was required to go through the stress of a long trial and, in addition, as



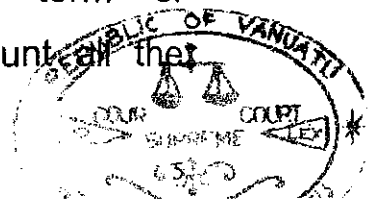
a matter of general comment, your conduct must be denounced and you need to be deterred from offending again in this way. I have a need to protect other members of the public from your future actions. I have already referred to s.119 of the Criminal Procedure Code and your family's efforts to promote a customary settlement. I repeat that I expect the figure that has been arrived at and agreed upon to be paid as soon as possible. I rely on you and your family to attend to that. Your own submissions referred to the case of *Public Prosecutor v Gideon* appeal case no. 03 of 2001 where the Court said this:

"Section 119 is relevant to an assessment of the "quantum of sentence" and not the nature of the sentence. It can influence the length of a sentence of imprisonment or the amount of a fine, but not its fundamental nature. In other words the Section cannot alter what is otherwise an appropriate immediate custodial sentence into a non-custodial one as occurred in this case".

It is not a bargaining chip, as the Court of Appeal said, and the Court went on to say this:

"It will only be in a (sic) most extreme of cases, that suspension could ever be contemplated in a case of sexual abuse"


I cannot find that this was an exceptional case it is my view that imprisonment is inevitable and the appropriate term of imprisonment is 2 years. However, taking into account all the



mitigating facts that I have referred to, and particularly the question of section 119, I am sentencing you today to a term of imprisonment of fifteen months. That is a sentence, which you can appeal within 14 days. I thank counsel for their assistance and I note that the time you have already spent in custody will be deducted from the sentence of 15 months.

Dated AT PORT VILA, this 17th day of October 2003

BY THE COURT


P. I. TRESTON
Judge

