

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

Criminal Case No.07 of 2004

PUBLIC PROSECUTOR

-v-

KALMER TOM

Coram: Justice Treston

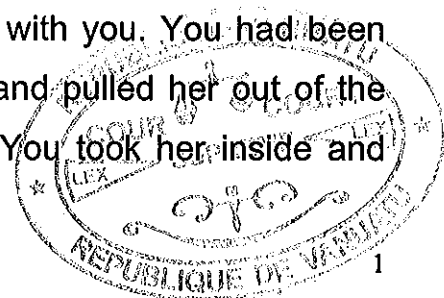
Mr. Stephen for Public Prosecutor
Mr. Bartels for Defendant

Date of sentencing: 17th May 2004

SENTENCE

Mr. Kalmer Tom, you appear for sentence today on 1 count of rape. Rape is regarded seriously by the law when it provides that the maximum potential sentence is life imprisonment. This incident occurred as alleged on 12 August 2000, so it happened sometime ago.

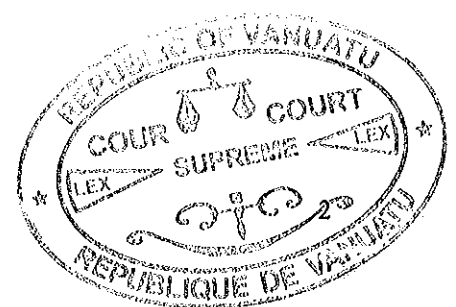
I have had the benefit of hearing a full summary of facts, which has been amended to take into account a disputed facts hearing. As it happened and for the reasons I have given, that disputed facts hearing was largely resolved in your favour. Nevertheless, the facts themselves were serious enough. You had gone to see the victim earlier in the morning on the day in question. You had tried to force her into a taxi but she refused, you persisted and tried to force her into the taxi again and then told her false words which led her to go with you. You had been drinking, you took her eventually to your hut and pulled her out of the taxi and pushed her to the side of the road. You took her inside and



detained her by locking the door. You asked her to remove her clothing, she declined her, you forcible did so. She was clearly distressed and crying and you forced yourself upon her and raped her.

The Prosecutor points out to me various aggravating factors, which I will consider shortly. They include you position as her Uncle and therefore there is a breach of trust aspect. Reference is made to your careful planning and deception and your detaining the victim.

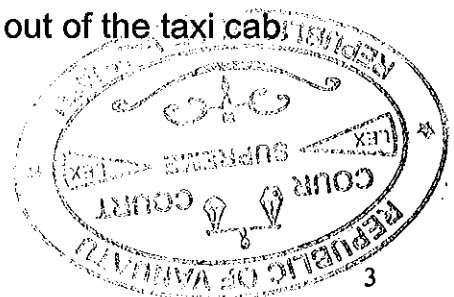
On your behalf, I am reminded that you are now 28 or 29 years of age, that you now have a new relationship with a woman with whom you have one child and another one expected. You had been drinking and regard this matter as a great error of judgment and despite the fact you are candid it is with some concern that I note that you regarded this incident as something of a payback or revenge to the victim for alleged wrongs done by her to you concerning your former wife. You had considered that this victim had something to do with your wife leaving you and you were going to get your own back albeit with a mind befuddled somewhat by liquor. To your credit, I am reminded that you have undergone counseling for anger management and for good relationships with women. There is a letter from your pastor who says that you have been somewhat disciplined by your church and that you are the caretaker of their property. You accept that you have drawn down the curtain on this episode from your point of view but you have failed somewhat to appreciate that it is more difficult for the victim to draw the curtain down on her experience and I do not detect from you or in submissions made on your behalf any remorse or concern for the victim at all. With the greatest respect you seemed to approach the matter somewhat from your point of view only.



Counsel has referred me to some of the decisions that are relevant to sentencing levels in matters of this kind and I will refer to those shortly.

When I consider the question of sentencing, I have regard to the accountability that you must have for harm not only to the victim for whom this was a distressing incident but also to the community at large. I must consider the question of reparation but there has been nothing put before me that would indicate that you have done anything by way of custom settlement under section 119 of the Criminal Procedure Code. In fact as I have heard you haven't done anything for the victim at all, as I understand. I must denounce your conduct and deter you and others from similar offending in the future. I have a responsibility also to protect the public from this sort of serious offending which goes to the very basis of the vulnerability of women. I of course impose the sentence which has the least restrictive outcome which is possible upon you but I must take into account there is an inevitably an effect on the victim.

On the aggravating side of things clearly there was a breach of trust aspect with you as the uncle of the victim and although there was no gross disparity between your ages there was some difference, she was only 19 at the time you were 26 and no doubt a more sophisticated person. Despite what your lawyer says on your behalf, I am of the view that this was indeed carefully planned. That was demonstrated by the persistence of your behaviour in taking her to your place and also by the disturbing aspects of almost retribution and revenge which you have talked about through your lawyer. Once there at your hut she was detained by you when you locked the door on her and there were elements of force when you forced her into and out of the taxi cab.

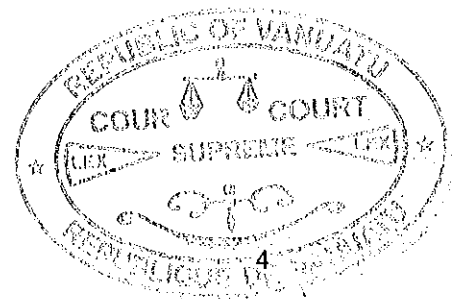


By way of mitigation of course there is your plea of guilty and your previous good character.

The Prosecutor referred to appropriate precedent cases which have been used in this Republic for sentencing levels for rape. Effectively the leading case was the Public Prosecutor v August Criminal Case 14 of 2000 which was a decision of the Chief Justice subsequently confirmed on appeal in the case of Public Prosecutor v Scot & Tula CAC No. 2 of 2002. In the August case the Court said this: -

"The offence of rape is always a serious crime. Other than in wholly exceptional circumstances, rape calls for an immediate custodial sentence. This was certainly so in the present case. A custodial sentence is necessarily for a variety of reasons. First of all to mark the gravity of the offence. Secondly to emphasize public disapproval. Thirdly, to serve as a warning to others. Fourthly, to punish the offender and last by no means least, to protect women. For rape committed by an adult without any aggravating or mitigating factors a figure of 5 years should be taken as a starting point in a contested case".

This is not a contested case but counsel agree that the appropriate starting point is 5 years imprisonment. It is my view that that starting point is aggravated by these factors. One, the breach of trust, two, the careful planning three, the detention, four, the elements of retribution and revenge and it is my view that that would elevate sentence from 5 years to 6 years imprisonment. However, in the August case the Court said this: -



" If the defendant pleads guilty the sentence should be reduced by one-third depending on the circumstances, including the likelihood of a finding of not guilty had the matter been contested"

If I reduced the sentence in accordance with that, the appropriate term for you would be 4 years imprisonment. I certainly don't make the sentence any worst because you have contested certain facts in the summary. That is your right, of course, and as I say it was resolved in your favour largely in any event. There has been references to your good character but that is of minor relevance the decisions say. By pleading guilty of course you have avoided the complainant, the victim, the necessity of giving evidence of very personal matters in front of strangers. I take into account the other factors put forward in your favour and there is no necessity to reduce your term because of the time already served on remand. As I have already indicated I consider the appropriate sentence for you is 4 years imprisonment and you are sentenced accordingly. You have the right to appeal against that sentence should you not be satisfied with it within 14 days.

Dated AT PORT VILA, this 17th day of May 2004

BY THE COURT



P. I. TRESTON

Judge

