

PUBLIC PROSECUTOR
-V-
KALWAS MALAPA

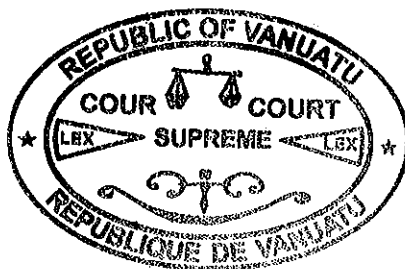
Coram: Justice D. Fatiaki
Counsel: Mr. T. Karae for the State
Mr. T. J. Botleng for the Defence
Date of Sentence: 24 June 2011

SENTENCE

1. On 12th April 2011 the defendant pleaded guilty to and was convicted of the following offences:
 - (a) Two (2) counts of **Sexual Intercourse Without Consent** contrary to **Section 91** of the **Penal Code Act [CAP. 135]**;
 - (b) Two (2) counts of **Unlawful Sexual Intercourse** contrary to **Section 97(1)** of the **Penal Code Act [CAP. 135]**; and
 - (c) Two (2) counts of **Sexual Intercourse with a Girl under Care and Protection** contrary to **Section 96(1)(b)** of the **Penal Code Act [CAP. 135]**.
2. As this form of charging offences is frequently adopted in cases of this nature, it is necessary to say something about the desirability of charging a multiplicity of counts or offences in the one charge sheet or information.
3. In this regard **Section 72** of the **Criminal Procedure Code** is relevant in dealing with the joinder of counts in a charge or information. Subsection (1) provides:

"More than 1 offence may be put together in the same charge or information if the offences charged are founded on the same facts or form, or are a part of a series of offences of the same or similar character."

(my underlining)



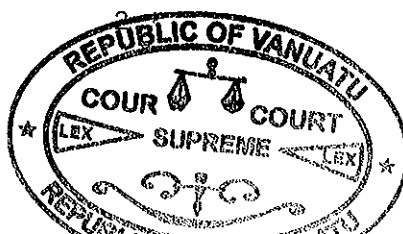
4. The first observation that can be made is that joinder of several offences in the one charge or information is NOT mandatory. Secondly, joinder is limited to (1) offences arising from or "*founded on the same facts*" or (2) as more oftenly charged, constitutes "*a series of offences of the same or similar character*".
5. In the present case, given the multiplicity of counts, it does not appear as if any real thought has been given to the joinder of the various offences in the one information. Plainly the offences are not "*founded on the same facts*" as the elements or ingredients are different according to the offence charged. Furthermore no thought has been given to whether or not some of the joined offences should have been charged as alternatives. Consideration should also be given in this regard to **Section 109** of the **Criminal Procedure Code** which permits the conviction of "*a lessor offence*" although not charged in the information, as well as, to the provisions of **Section 97** which permits the withdrawal with the consent of the Court, of undisposed of charges against an accused person facing a multiplicity of charges where the accused has been convicted of 1 or more of the charges.
6. Counsel also need to bear in mind that the Court always has power under **Section 72(3)** to order severance of counts or separate trials of offences joined in the one information if "*the Court is of the opinion that (an accused) may be embarrassed in his defence*" by such joinder.
7. The sentencing Rule recognized in **Section 52** of the **Penal Code** should also be borne in mind when drafting charges and informations. That Rule states:

"If a person is convicted on more than one charge of an offence tried jointly, the respective sentences of imprisonment imposed for such offences are deemed to be concurrent sentences, unless the Court otherwise orders."

(my underlining)

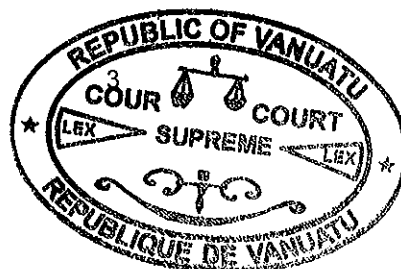
8. I accept that a charge or information should, as a rule, seek to reflect the totality of an accused's criminal behaviour, but, costs and efficiency or ease of proof are equally important considerations that should not be ignored.
9. Recently, in **PP v. Manuel Malsungai** Criminal Case NO. 27 of 2011 where the defendant was charged with an offence of sexual intercourse without consent and a second count of sexual intercourse with a child under care and protection, based on the same facts, Spear J. in discharging the defendant on the second count to which the defendant had pleaded guilty, said:

"The question is now raised as to why there is a need for Count 2? It is, to an effective and significant degree, a duplication of the Count 1. It is clear that the fact that the complainant was under your care and protection is an aggravating feature to the sexual violation without consent charge. I have raised that with counsel and they agree that is appropriate that this is addressed by your discharge

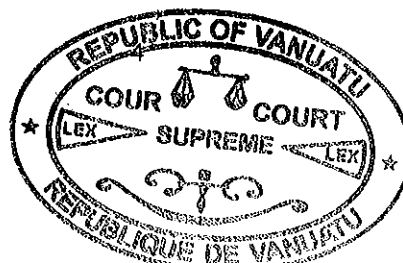


on Count 2. You are discharged accordingly on count 2 leaving you facing only one count of sexual intercourse without consent or, as it is often known, rape."

10. In the present context the offence of **Sexual Intercourse Without Consent** which carries a maximum penalty of life imprisonment must be considered the most serious of the offences charged. The other two offences of **Unlawful Sexual Intercourse with a Child** and **Sexual Intercourse with a Child under Care and Protection** are not as serious, albeit, that they introduce aggravating factors to the charge of **Sexual Intercourse Without Consent** namely, the age of the victim of the sexual assault and the familial relationship between the defendant and the victim.
11. Such matters of aggravation although distinct ingredients of the two lesser charges are ultimately and relevantly reflected in the sentence that is imposed for the most serious offence. They should not be elevated into separate stand alone charges, and, if charged in the same information, as occurred in this case, ought properly to be charged and identified as alternatives to the more serious charge of **Sexual Intercourse Without Consent**.
12. So much for the charges in this case which I shall treat for sentencing purposes as constituting a series of offences of similar character coming within the Section 52 sentencing Rule.
13. Returning to facts in the present case, the offences relate to two (2) separate incidents of sexual intercourse that occurred between the defendant and the complainant in September 2009 and July 2010. The defendant was the step-father of the complainant at the time. He had commenced a relationship with the complainant's mother sometime in 2005 after the complainant and her mother moved in with the defendant and settled at Malapoa Estate in Port Vila.
14. The first incident of sexual intercourse occurred at the family home at Malapoa Estate approximately 2 weeks after the complainant's mother died. At the time the complainant was a virgin and barely 12 years of age (Date of birth: 2 August 1997). The defendant had unusually insisted for the complainant to sleep with him in his bedroom and when she agreed, he demanded to have sexual intercourse with her. At first she refused but eventually she succumbed to the defendant's persistence and intercourse took place with the complainant seated astride on top of the defendant. After intercourse had taken place the defendant, using various threats, warnings, guilt manipulation and fear, succeeded in getting the complainant to maintain her silence about the defendant's actions.
15. The second incident occurred on 31 July 2010 and followed an innocent request by the complainant for a new pair of sandals. The defendant saw this as an opportunity to demand sexual favours and, when rejected again, the defendant kept insisting and intercourse took place with the complainant again sitting astride on top of him.



16. The matter eventually came to light in December 2010 when the defendant again demanded sex for a third time and this time, when the complainant refused, the defendant assaulted her. The complainant fled and was spotted by a relative crying outside the family home and with the help of her relative a report was lodged at the Police Station.
17. The complainant was examined by a doctor in January 2011 and although the complainant does not appear to have sustained any serious injuries, he recorded that the complainant's "*hymen was not intact and was torn*".
18. The defendant was later interviewed under caution and he denied all the allegations against him whilst accusing the complainant of telling lies because he had been cross at her for being late in cooking his meals.
19. **Kalwas Malapa** on those facts and your pleas of guilty this Court will now proceed to sentence you. What you did to your step-daughter was not only disgraceful, it was also cruel. You were her step-father who had taken-in and sheltered the complaint and her estranged mother with whom you had a defacto relationship.
20. When her mother died and the complainant was left orphaned, helpless and vulnerable, instead of caring for and shielding her from the sad and untimely loss of her mother, you took advantage of her vulnerability and abused the trust that she had in you to satisfy your selfish lust.
21. **Kalwas Malapa** you are a mature experienced man of **58 years** of age with grown children of your own. You were in regular paid employment and were able to start a relationship with the complainant's mother despite your relatively advanced years. You have now thrown away all of that and, in the process, you took away the complainant's virginity and childhood innocence.
22. Not satisfied with the first incident you opportunistically preyed on the complainant a second time, when she naively asked you to purchase for her a new pair of sandals.
23. Although you have pleaded guilty to the charges laid against you which saves the complainant from having to relive her ordeal in a trial, you told the probation officer preparing your pre-sentence report that you are "*unwilling to undertake any programme to address*" your offending and you continue to blame the complainant for your offending. So negative was your attitude during the pre-sentence report that the probation officer considered that there was a risk of you re-offending and, furthermore, no alternative non-custodial community-based sentences could be recommended for you. That is all very unfortunate given your advancing years.
24. **Kalwas Malapa** as a starting point for your offending I consider a sentence of 6 years imprisonment is appropriate. To that I add 2 more years to reflect the aggravating factors in the case including the repeated nature of the offending, the breach of trust and the significant difference in your ages, making a sentence of 8



years imprisonment. From that 8 years I deduct 32 months for your guilty pleas and past good record, and a further 5 months for the time you have already spent remanded in custody to await your trial and sentence, making a final figure of **(96 – 37) = 59 months** ie. 4 years and 11 months imprisonment.

25. That is the sentence I impose on for the offences of Sexual Intercourse Without Consent (**Counts 1 and 4**). For each of the offences of Unlawful Sexual Intercourse (**Counts 2 and 5**) which carries a maximum penalty of 14 years imprisonment, I impose a sentence of 3 years imprisonment **and** for each of the offences of Sexual Intercourse with a Child under Care and Protection contrary to **Section 96(1) of the Penal Code (Counts 3 and 6)**, I impose a sentence of 2 years imprisonment. All sentences are ordered to be served concurrently thus making a total operative sentence of **4 years and 11 months** imprisonment with effect from today.
26. You have 14 days in which to appeal this sentence to the Court of Appeal if you do not agree with it.

DATED at Port Vila, this 24th day of June, 2011.

BY ORDER OF THE COURT


D. V. FATIAKI
Judge.

