

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

Criminal Case No. 21 / 2012

PUBLIC PROSECUTOR

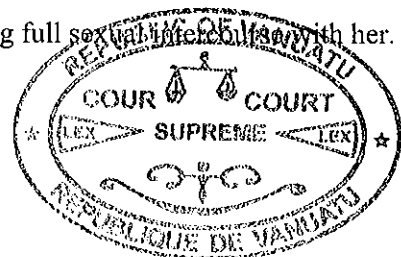
V

OBED MAHIT

Hearing: 11 May 2012
Before: Justice Robert Spear
Appearances: Tabisa Harrison for the State
Eric Molbaleh for the accused

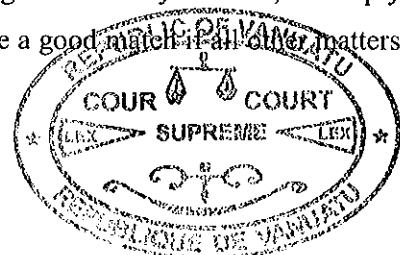
SENTENCE

1. Obed Mahit, you are for sentence having pleaded guilty to a charge of having unlawful sexual intercourse with a girl under 12 years of age. You faced a lead charge of sexual intercourse without consent but, following the entry of your plea of guilty to the unlawful sexual intercourse charge, the prosecution elected not to pursue the lead charge and a *nolle prosequi* was entered to that charge.
2. You are for sentence only on the basis of having unlawful sexual intercourse although that is a serious offence in itself. It carries a maximum penalty of 14 years imprisonment. In certain circumstances, it can come as close to the offence of having sexual intercourse without consent as that charge itself. That is because the Court recognises that the younger the child, the less likely that child will be to understand the nature of and implications involved in sexual acts. Accordingly, it becomes increasingly difficult to consider that a true consent could have been given. Be that as it may, you are to be sentenced within a 14 years maximum period rather than the greater penalty for sexual intercourse without consent.
3. In June 2011, this 11 year old girl was staying with her grandfather on Epi. You went into her bedroom and forced yourself upon her having full sexual intercourse with her.



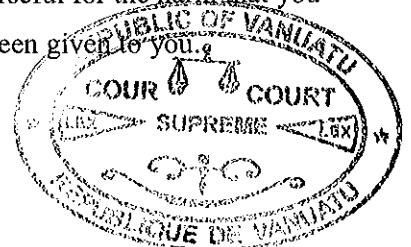
The summary of facts explains that she tried to scream for help but you covered her mouth with your hand. Furthermore, you threatened to kill her if she tried to scream again. You dispute that you threatened to kill her. The question then raised for me is whether I consider that this dispute is of such sentencing moment that it should be resolved by a disputed facts hearing. I do not consider it necessary to do so. The summary of facts, even without the mention of threat to kill, explains that this would have been a terrifying ordeal for that young girl to undergo.

4. As it happened, the young girl did not immediately complain about what you had done until she heard that you had been bragging about having sexual intercourse with her. Her Gandfather then found out about it and that led to her disclosure to her grandfather with this prosecution resulting.
5. When you were interviewed by the Police on 10 February 2012, you admitted that you had sexual intercourse with the complainant on the day in question. You also said that you had had sexual intercourse with her on other occasions when she had refused your approaches. I can only sentence you on the basis of this charge and what is outlined in the charge and that is for committing unlawful sexual intercourse on one occasion in June 2011 and I will sentence you on that basis.
6. Be that as it may, it is still serious offending given that you as a 21 year old man forced yourself on an 11 year old girl.
7. I have been assisted by a pre-sentence report from the Probation Service and from submissions from both prosecution and the defence counsel.
8. There is one matter that is raised through the pre-sentence report and that is your assertion that the complainant was your custom wife. That is not explained further by any of the material in front of me but I have been assisted by both Mrs Harrison and Mr Molbaleh in that respect. This reference to "custom wife" can be explained in this way. In some Melanesian societies, at an early age, a young boy and a young girl may be identified by elders as being a couple who could marry with the full support of their community. That does not mean that marriage necessarily follows, it simply means that the community accepts that this would be a good match in all other matters

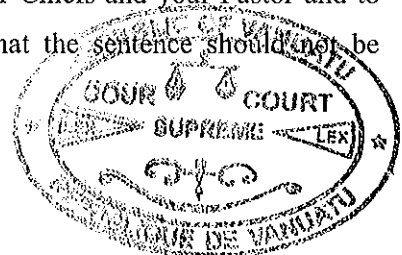


work out. It does not bind one to the other. Counsel confirm that this is an accurate explanation of the term, "custom wife".

9. In the pre-sentence report, you informed the Probation Officer that the complainant was your custom wife as if you had some rights with her. That was characterised by the Probation Officer as being an attempt by you to justify or minimise the offending. The Probation Officer rejects that as having any proper basis; and so do I. It raises a real concern about you. It raises a concern that you still do not understand what harm you have done this young girl and that you do not understand how serious this offending is. The reality, which the Courts see time and time again, is that young girls who are sexually abused often have difficulty forming relationships as they get older and they often have quite disturbed lives. It is often said that they are robbed off their childhood simply because someone like you wanted sex and you had no regard for the young girl. Clearly, here, you decided that this young girl was fair game even to the point where you felt able to brag about it.
10. Chief Paul is reported by the Probation Officer to say that he has known you from childhood and that, while you are a physically well-built "boy", you have the mentality of a child and you do not take things seriously. That, of course, simply means that you are immature. But, even an immature young man such as yourself would have known, without question, that it was wrong to take advantage of an 11 year old girl. I am in no doubt at all that you knew what you are doing was wrong.
11. There has been a significant custom reconciliation ceremony undertaken here and that is important because hopefully it will have resolved differences between the families concerned and within the small communities on Epi within which the complainant and you reside. However, while you are entitled to some credit for that, the concern - the continuing concern - is that this cannot be accepted as an indication that you are remorseful for the harm that you have done this young girl. It has been more a question of your family coming together to make peace with the complainant's family. You are entitled to some credit for it but not to the same extent as if you had actively participated in the custom reconciliation ceremony, that you fully accepted that what you had done was wrong and that you were remorseful for the harm that you had done that young girl. Greater credit could then have been given to you.



12. Both Mrs Harrison and Mr Molbaleh, in their submissions, reached an end sentence of 3 years imprisonment which recognises all the aggravating features to this offending as well as all the personal mitigating circumstances including the guilty plea. Their able submissions recognise that this is serious offending and that the Courts must be consistent in their approach to those who sexually abuse young girls. I endorse their submissions. It must understand that this type of offending is not worth the risk.
13. It must also be understood that those who sexually abuse young girls will be imprisoned absent extraordinary features to the case.
14. When I came to consider what the appropriate sentence should be in this case, I recognise the age difference involved - you are 21 and the complainant is 11 - so a 10 year age difference. The age of the complainant is essentially captured by the maximum penalty provided which points the court to the range available.
15. You pleaded guilty at the earliest possible opportunity and, of course, you co-operated completely and fully with the Police with an early admission. Your family has undertaken a custom reconciliation ceremony. You have no previous convictions and appear otherwise of good character.
16. I adopt a starting point of 6 years imprisonment which is in line with the authorities presented to me by counsel and which takes into account all the aggravating circumstances of this offending. I allow you 9 months credit for your youth and the fact that you are otherwise of good character with no previous convictions. I allow you a further 9 months for the fact that your family has undertaken a custom reconciliation ceremony which no doubt will help the family relationships on I then allow you a full one third credit for your early guilty plea which, coincidentally, brings me to an end sentence of 3 years imprisonment.
17. The issue then is whether I suspend that sentence of imprisonment. You have been in custody now since 10 February 2012, a period of 3 months which is effectively a 6 months sentence. Mr Molbaleh argues forcefully for a suspended sentence to enable you to go back to your community to work with your Chiefs and your Pastor and to put this matter behind you. Mrs Harrison argues that the sentence should not be



suspended and, indeed, refers to authority from the Court of Appeal which indicates that it would only be in an exceptional case that the sexual abuse of a young girl results in a suspended sentence of imprisonment.

18. I might have been more inclined towards a partially suspended sentence if I felt that you were completely remorseful for the harm you had done to did this young girl but I have not been brought to that point. I can find no exceptional reasons why I should suspend the sentence.
19. You are accordingly sentenced to 3 years' imprisonment which will be deemed to have started on 10 February 2012.
20. You have 14 days to appeal this sentence if you do not accept it.

BY THE COURT

