

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

CRIMINAL CASE NO: 128 OF 2012

PUBLIC PROSECUTOR

V

ISMAEL PETER LESS

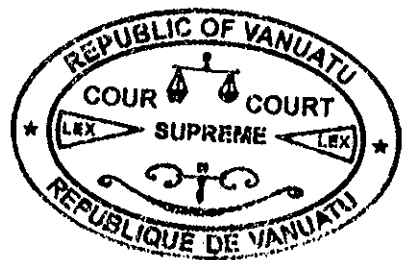
Coram: Justice Mary Sey

Counsel: Mrs Tabitha Harrison for the Public Prosecutor
Mr Andrew Bal for the Defendant

Date of Decision: 21 December 2012

SENTENCE

1. On the 13th day of December 2012, the defendant was found guilty and convicted after trial for the offence of **Sexual Intercourse Without Consent**. The punishment prescribed for the offence under Section 91 of the Penal Code Act [CAP.135] is imprisonment for life.
2. The defendant has now been brought before the Court for sentencing. There is no dispute about the facts in this case and the defence



concedes to the facts as outlined in the prosecution's sentencing submission as being those that rendered the defendant guilty of the offence of Sexual Intercourse Without Consent.

3. I have considered the pre-sentence report submitted to the Court by the probation officer and I note that the defendant is a first time offender and that he is in a defacto relationship with Betty Bong with whom he has twin sons.
4. The report also states that the defendant is remorseful and regrets his wrongful action and he blames himself for his inability to control his sexual desire for the victim. The defendant also stated that he felt sorry for the broken trust he has created towards his younger brother and that he also felt sorry for the victim. The report also alluded to the fact that the defendant's family is in the process of performing two kastom ceremonies in that one would be for the victim and the other kastom ceremony would be between the defendant and his younger brother.
5. The prosecution has submitted that there were aggravating features present in this case in that the defendant had premeditated the offence and that he took advantage of the victim's drunken state. There is also the element of breach of trust since the victim is the defendant's brother's girlfriend.
6. On that fateful night, the victim had requested the defendant to take her home to her boyfriend Norman but instead the defendant dragged her to the bush and raped her. It is the prosecution's further submission that the defendant's offending is serious and it warrants a custodial sentence which should not be suspended.
7. The defence filed submissions on mitigation and sentence in which defence counsel urged the Court to take the following mitigating factors into consideration:
 - a. The defendant is a fist time offender
 - b. The defendant has no previous criminal record
 - c. The defendant cooperated well with the Police
 - d. The defendant is remorseful for his actions
 - e. The defendant has a wife and two children

- f. The defendant's wife and children depended on the defendant for financial assistance and other assistance provided by the defendant.
8. When dealing with the offence of rape, there are applicable principles to be borne in mind at the sentencing stage. In the case of **Public Prosecutor v Ali August [2000] VUSC 73**, the Chief Justice set out the said principles as follows:

"The offence of rape is always a most serious crime. Other than in wholly exceptional circumstance, rape calls for an immediate custodial sentence. This was certainly so in the present case. A custodial sentence is necessary 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 but by no means least, to protect women. The length of the sentence will depend on the circumstances. That is a trite observation, but these in cases of rape vary widely from case to case.

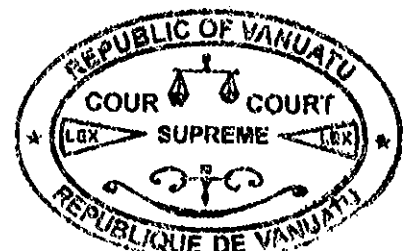
For rape committed by an adult without an aggravating or mitigating feature, a figure of five years should be taken as the starting point in a contested case. Where a rape is committed by two or more men acting together, or by a man who has broken into or otherwise gained access to a place where the victim is living, or by a person who is in a position of responsibility towards the victim, or by a person who abducts the victim and holds her captive the starting point should be eight years.

At the top of the scale comes the defendant who has committed the offence of rape upon a number of different women or girls. He represents a more than ordinary danger and a sentence of fifteen years or more may be appropriate".

9. The Court of Appeal reiterated these same principles in **Public Prosecutor v Scott [2002] VUCA 29** when it stated that:

"there can be no room for any deviations from these fundamental and essential principles. The rights of women must be recognised maintained and upheld"

The Court then went on to emphasise the view which was expressed by Justice Coventry, in **Public Prosecutor v Ivon Feriam Criminal Case**



No. 32 of 2001, that there can be no issue of suspension in sexual abuse cases.

10. In arriving at the appropriate sentence to be imposed in this case, I have taken into account all the mitigating circumstances of the accused which said factors usually influence discretionary sentences. However, I must also not lose sight of two other applicable factors namely, the gravity of the crime of which the accused has been convicted and the interests of society. It is beyond disputation that society would require of this Court that it marks its severe disapproval of this type of criminal behaviour by a heavy sentence of incarceration which must also serve as a deterrent not only to the defendant to abstain from similar behaviours in the future, but to others who may have like-minded schemes in contemplation.
11. In **Public Prosecutor v Andy [2011] VUCA 14, Criminal Appeal 09 of 2010 (8 April 2011)**, the Court of Appeal set out the appropriate sentencing steps. I must state that I am mindful of these steps and I shall endeavor to apply them to this present case.
12. The appropriate starting sentence for an offence of Sexual Intercourse without consent in a contested case, where there are no aggravating features, is 5 years imprisonment. In your case, **Ismael Peter Less**, I would consider a starting point of 6 years imprisonment to which I would add an extra year for aggravating factors making a sentence of 7 years imprisonment from which I shall deduct 3 years in recognition that this is your first offence.
13. In the result, **Ismael Peter Less**, you are hereby sentenced to four (4) years imprisonment.
14. You have 14 days to appeal this sentence if you do not agree with it.
15. It is hereby ordered that the said sentence be backdated to the 28th day of September, 2012 which is the date on which the defendant was remanded in custody.

DATED at Port Vila, this 21st day of December, 2012.

BY THE COURT


M.M.SEY

Judge

