

**PUBLIC PROSECUTOR – V- DUDLEY URBAN, ALBAN  
ABEL, JOHN MASTIN,  
JOHNATHAN TAPAS,  
JOSEPH HOWARD,  
STEVAN BRIGHTLY,  
BETHEL JAMES, KILBAT  
JOHNNY WILLIAM**

**Coram:** *Mr. Justice Oliver A. Saksak*

**Counsels:** *Sgt Rexton Langon, State Prosecutor as agent for Mr Wirrick for the Public  
Prosecutor.  
Miss Jane Tari for the Defendants*

**Date of Sentence:** *11<sup>th</sup> March 2013*

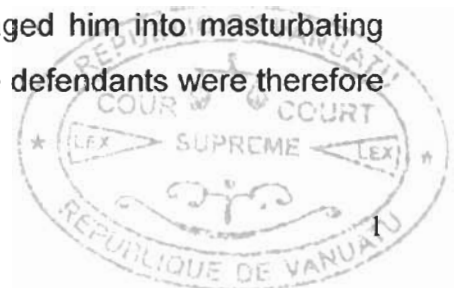
## **SENTENCE**

1. These eight defendants were charged jointly as follows:-
  - (a) With Act of Indecency contrary to section 98(b)(vii) of the Penal Code Act Cap 135 (the Act); and
  - (b) With Obscene Publication contrary to section 147 of the Act – Only against Alban Abel.
2. Section 98(b)(vii) states –

*“A person must not commit an act of indecency on, or in the presence of another person:*

*(b)with that person’s consent if the consent is obtained:*

*(vii) because of the physical or mental incapacity of that person.”*
3. Literally it was not the 8 defendants who committed the act of indecency but rather their victim who is of mental incapacity and the defendants took advantage of that physical condition and encouraged him into masturbating himself in their presence and other on-lookers. The defendants were therefore



accomplices and co-offenders. And section 30 of the Act provides for Complicity as follows:-

*“Any person who aids, Counsels or procures the commission of a criminal offence shall be guilty as an accomplice and may be charged and convicted as a principal offender.”*(My underlining for emphasis).

4. Section 31 of the Act provides for co-offenders thus –

*“A co-offender shall mean a person who, in agreement with another, takes part him in the commission of a criminal offence.”*

5. And section 32 of the Act provides for punishments of accomplices and co-offenders thus –

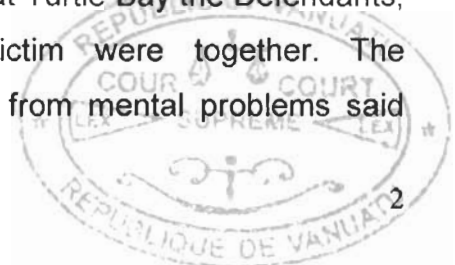
*“Subject to any express provision of law, in accomplice and a co-offender shall be punishable in like manner as a principal or sole offender.”*

6. The Public Prosecutor exercised her discretion to charge the defendants as principal offenders under section 98(b) to which all eight defendants have pleaded guilty. But for future cases it will be necessary to charge offenders of this offence and nature with both sections 30 or 31 in conjunction with the principal offence in section 98 of the Act.

7. On 10<sup>th</sup> December 2012, all the defendants pleaded guilty as charged. An offence under section 98(b)(vii) carries a maximum of 7 years imprisonment and an offence under section 147 of the Act carries a maximum of 2 years imprisonment.

8. The facts are as presented by the Prosecutor and contained in their submissions as follows:-

(a) Sometime during the day of 2<sup>nd</sup> November 2012 on the banks of a river near the Independence Day celebration area at Turtle Bay the Defendants, some prosecution witnesses and the Victim were together. The Defendants, knowing that the Victim suffers from mental problems said



words to him and pressured him into masturbating himself. The Victim masturbated himself while all Defendants were present and urging and pressuring the Victim to continue knowing that he suffered from mental problems. The Victim continued on to the point of ejaculation.

(b) While this was happening some prosecution witnesses were watching. One prosecution witness, Steven Ellie could not bear to watch and left the scene after a short time.

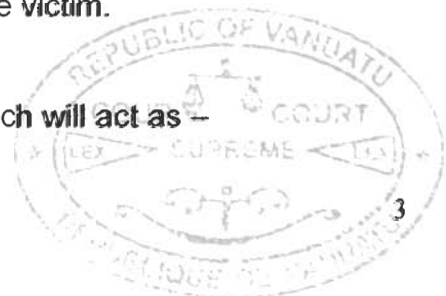
(c) The Defendant Alban Abel was at the time recording what the Victim was doing on his mobile phone. The Defendant Alban Abel saved the recording on his mobile phone and showed the recording to various people in the Turtle Bay area including the other Defendants and prosecution witnesses. The mobile phone was seized by the Police but the recording had been deleted. Reports about what had happened spread within the Community which eventually led to the complaint and arrest of the Defendants. The Defendants provided statements to the Police under caution in which they admitted the offendings.

9. Those facts are generally agreed by the defendants. Having so admitted, technically and by virtue of sections 30 and 31 of the Act read in conjunction with section 98(b) of the Act, it is deemed that it was the defendants themselves who had acted indecently in the presence of each other and others present and watching. It is a technical offending and a serious one.

10. The facts show the following aggravating features that add to the seriousness of the defendants' offendings –

- (a) The defendants acted together as accomplices and co-offenders.
- (b) The victim is very well known to the defendants thus creating some degree of trust between them, which was breached.
- (c) The defendants took advantage of the mental incapacity of their victim.
- (d) The public humiliation and loss of dignity of the **victim**.

11. These aggravating features warrant penalties which **will act as –**



- (a) A deterrence to all the defendants and to others who may be minded to do the same.
- (b) The public disapproval and condemnation of such unlawful actions of the defendants.
- (c) Appropriate and adequate punishments.

12. For those reasons the only appropriate penalties the Court will impose will be custodial sentences as follows –

- (a) For Act of Indecency as accomplices and co-offenders, the Court sentences Dudley Urban, Alban Abel, John Mastin, Jonathan Tapas, Joseph Howard, Steven Brightly, Bethel James, and Kilbat Johnny William to imprisonment for 3 years each as the starting point, without any uplifts.
- (b) For Obscene Publication, the Court sentences Alban Abel to 6 months imprisonment.

13. In mitigation, the Court has considered the Pre-Sentence Reports of each defendant in light of the mitigating factors submitted by defence counsel. The relevant mitigating factors are –

- (a) Early guilty pleas.
- (b) Performance of reconciliation showing remorse.
- (c) Cooperation with Police.
- (d) Previous clean record and being first time offenders.

14. For those mitigating factors, it is appropriate that the sentences for all eight defendants in relation to the offence of Act of Indecency be suspended. Accordingly, I order that the 3 years imposed on each defendant be suspended for a period of 3 years on condition that none of the defendants shall commit the same offence or any other offence for which they are charged and convicted. If they do, the sentence of 3 years ~~will~~ automatically be activated.



15. For Alban Abel however, he went further to commit the offence of Obscene Publication which is an offence against public interest. It was his second offending on the same day. His culpability is substantially greater than the rest of the defendants. He is the eldest of the defendants who should have discouraged the younger defendants from doing what they did. But he did not. Therefore he deserves to go to prison for this offence. A higher sentence of 16 months would have been imposed had it not been for his mitigating factors which warrant that only 6 months would be appropriate. This Sentence begins today 11<sup>th</sup> March 2013.

16. Those are the sentences of the Court for each of the defendants. All the defendants have right of appeal against sentence within 14 days from the date hereof.

**DATED at Luganville this 11<sup>th</sup> day of March 2013.**

**BY THE COURT**

  
**OLIVER A. SAKSAK**

**Judge**

