

IN THE SUPREME COURT
OF THE REPUBLIC OF VANUATU

Criminal Case No. 02 of 2013

(Criminal Jurisdiction)

PUBLIC PROSECUTOR

V

ABRAHAM AMOKORI

KALMATA KALNATA

Coram: Justice Mary Sey

Counsel: Simcha Blessing for the Public Prosecutor

Eric Molbaleh and Roger Tevi for the Accused Persons

Date of Decision: 20 February 2013

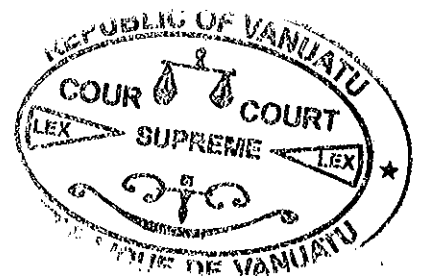
SENTENCE

1. The first accused Abraham Amokori is before this Court for



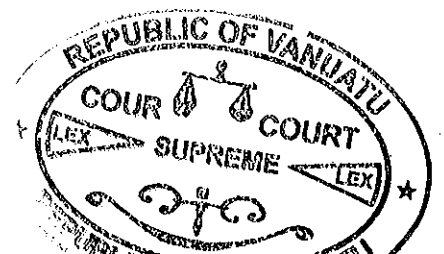
sentencing having pleaded guilty on the 18th day of February 2013 to the following charges laid under the Penal Code [CAP 135]:

- Count 1: Threats to kill contrary to Section 115
 - Count 2: Kidnapping contrary to Section 105(b)
 - Count 3: Assault contrary to Section 107(b)
 - Count 4: Sexual Intercourse without consent contrary to Section 90(a) & 91
 - Count 5: Sexual Intercourse without consent contrary to Section 90(a) & 91
 - Count 6: Sexual Intercourse without consent contrary to Section 90(a) & 91
 - Count 7: Assault contrary to Section 107(b)
 - Count 8: Sexual Intercourse without consent contrary to Section 90(a) & 91
 - Count 9: Sexual Intercourse without consent contrary to Section 90(a) & 91
 - Count 10: Sexual Intercourse without consent contrary to Section 90(a) & 91
2. After the plea was taken, Mr. Blessing entered a nolle prosequi pursuant to Section 29 of the CPC in respect of the assault charges



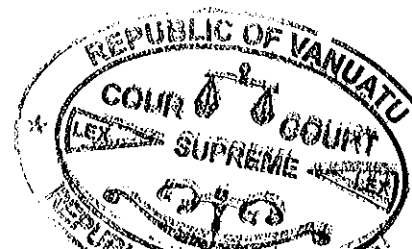
preferred against the first accused in count 3 and count 7 as afore stated. No conviction has been entered against Abraham Amokori in respect of these two counts and he is accordingly hereby discharged in respect of count 3 and count 7.

3. The second accused Kalmata Kalnata pleaded guilty to a single count of Act of Indecency without consent contrary to Section 98 (a) of the Penal Code [CAP 135].
4. The offence of Sexual Intercourse without consent is one of the most serious charges here in Vanuatu and it carries a maximum penalty of life imprisonment. The offence of threats to kill carries a maximum penalty of 15 years imprisonment whilst the offence of Kidnapping carries a maximum penalty of 10 years imprisonment.
5. The factual basis upon which the accused persons were charged were summarised in the prosecution's sentencing submissions. The victim Winnie Hapi is from Lap Station Wiel Village North West Malekula. She attended Lonvat Secondary School and was 16 years old at the date of the alleged offending. The first accused is from Leviamp village North West Malekula. He was a public transport driver and was 23 years of age at the relevant time. The second accused is also from Leviamp village and is the victim's cousin. He was 30 years old and unemployed at the time of the alleged offending.
6. At about 10.30 pm on the 31st December 2012 the victim and a couple of her relatives went to Leviamp village for the New Year's celebrations. They arrived at the Apostolic Live Ministry compound



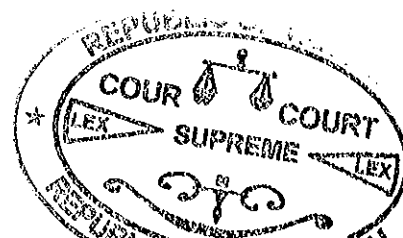
sometime after 11.00 pm. The religious activities at the church compound closed sometime after 11.30 pm and the people were informed that the rest of the activities to go until the New Year will be at the beach at the bank of the Leviamp River. The victim and her relatives immediately made way towards the river. The victim took the lead and the rest followed her in a straight line along a narrow footpath next to the fence of the church compound. En route, they encountered the first defendant and an acquaintance of his. There was no other pathway so they walked directly towards the first defendant and his friend who were standing in the middle of the footpath.

7. When the victim reached where the first accused was standing he grabbed hold of the victim and when she tried to run away the first defendant chased after her and grabbed her. She cried and shouted for help but her friends had already taken flight as soon as they saw the defendant chasing her. When the first accused saw that the victim was crying and calling out to her relatives for help, the first accused threatened them not to come back and or tell anyone back in the village. He said: "Yufala i go yufala i harem? Yufala i go mo yufala i no talemaot long anyman from spos yufala i talemaot, bae anytime we bae mi lukim face blong wan long yufala long Leviamp back again bae mi mas kilim hem" (Translation: Go away didn't you hear me? Go away and don't tell anyone because if you tell anyone, anytime I see anyone of you at Leviamp I will kill you).
8. The victim continued to cry and call for help but everyone had already gone to the beach at the bank of the river. The first accused

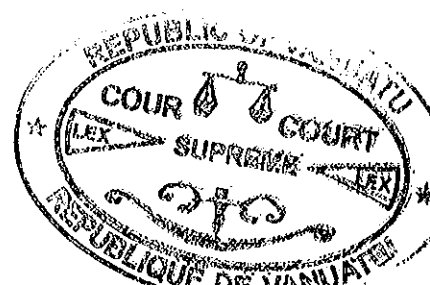


grabbed the victim and pulled her towards the beach towards Wiel village. After they arrived at a secluded area close to the beach he grabbed the victim with one hand and squeezed her breast and vagina with the other hand. The victim resisted and struggled to remove herself from the accused as she had never endured such experience and never had sexual intercourse with another person before. Despite the victim's pleas and resistance, the first accused pushed her to the ground, spread her legs and then he penetrated her vagina. He had difficulty penetrating her vagina so he removed his penis, spat on her vagina to ease penetration and applied oral sex on her. He went on top of the victim again, inserted his penis into her vagina and had sexual intercourse with her.

9. The victim felt severe pain on her vagina when the defendant achieved full penetration, felt pain on her breasts and her hips, chest and legs as the defendant applied force that was in excess of what was necessary to achieve intercourse. When the defendant withdrew himself from the victim, the victim felt blood running down her legs. The first defendant pulled her up, carried her and bathed her with sea water.
10. After sever minutes he dragged the victim's body further ashore, hit her head against a rock and had sexual intercourse with her again. He then told the victim who was already powerless, "today bae mi mas finishim sperm blong mi inside long you" Translation: "today I must finish my sperm inside you".

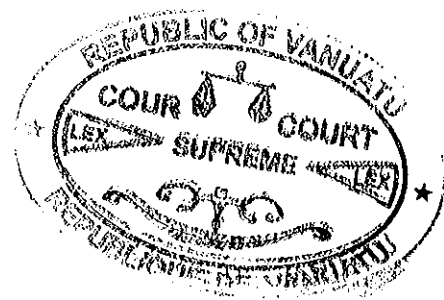


11. After he ejaculated, the first accused removed himself from the victim, pulled her through some rocks and placed her body at a sandy location in the middle of the rocks. He then spread the victim's legs, inserted his penis into her vagina and had sexual intercourse with her for the fourth time. The victim was in severe pain and at that stage she was helpless.
12. After the fourth sexual intercourse with the victim, the first accused pulled the victim's body up a rock and had sexual intercourse with the victim on top of the rock. After ejaculation, he dragged the victim's body to the sandy location in the middle of the rocks where had previously had sex with her.
13. The sixth sexual intercourse occurred when the first defendant sat astride the victim and inserted his penis into her mouth.
14. He then left the victim at the beach and took off. The victim remained helpless on the beach for about 20 minutes and in as much as the whole of her body was aching severely, she was nevertheless determined to get help so she pulled herself up, covered herself with her damaged lava lava and underpants and dragged herself through the bush to find help.
15. She arrived at Leviamp village some 20 minutes later and went directly to her uncle's house Mr. Rabi Tanbel. When she arrived at the house she saw someone with a torch approaching and she recognized the person to be her cousin, the second accused. She was overwhelmed with relief as she had finally found someone who would be able to help her. The victim cried and hugged him whereby



the second accused asked the victim, "eh sister blong mi, wanem i wrong long you"? (Translation: "Hey, my sister, what's wrong/what happened to you?") The victim responded: "Please brother blong mi, you helpem me blong sevem life blong me, Abraham i rapem mi" (Translation: "Please my brother, help me to save my life, Abraham raped me"). The second accused said: "Oh! Sorry sister blong me, OK you stop cry bae mi helpem you" (Translation: "Oh! I am sorry my sister, OK don't cry, I'll help you").

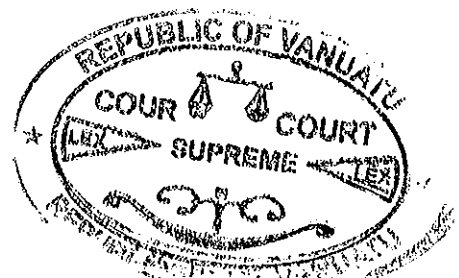
16. The second accused grabbed the victim and told her that he will take her to her parents. On their way he asked the victim whether she wanted to drink alcohol. The victim responded in the negative. This aroused suspicion in the mind of the victim because even though the second accused saw that she was already feeble and was in great pain yet he offered her alcohol. She then asked him whether he was taking her to Lap to which the second accused responded that Lap was too far. The victim then told him to take her back to her uncle's house at Leviamp. The second accused agreed but told the victim that they will take a short cut.
17. However, on the way, the second accused grabbed the victim, removed his penis from his trousers and forced her to hold his penis but the victim cried and refused to hold his penis. He then grabbed the victim's hand and pulled it towards his penis. The victim cried louder and called out for help whereupon he released the victim's hand and she made haste to her uncle's house. The victim's uncle and aunt heard the victim crying and opened the door of the house to enquire. She entered the house and that was the last thing she



could remember until she regained consciousness on the forenoon of 1st January 2013.

18. The victim was taken to Norsup hospital on the same night and she was examined by a medical practitioner who later prepared a full medical report on the 2nd of January 2013. According to the report, the victim sustained swelling on her clitoris and vaginal wall with some bleeding. The doctor also noted bruises on her cervix.
19. Both accused persons were arrested on the 8th of January 2013 and they were cautioned and interviewed on the same day and they admitted the allegations.
20. There is no dispute about the facts in this case and the defence concedes to the facts as outlined in the prosecution's sentencing submissions as being those that rendered the accused persons guilty.
21. The applicable principles to be borne in mind when dealing with the offence of rape at the sentencing stage were set out by the Chief Justice in **Public Prosecutor v Ali August** [2000] VUSC 73 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



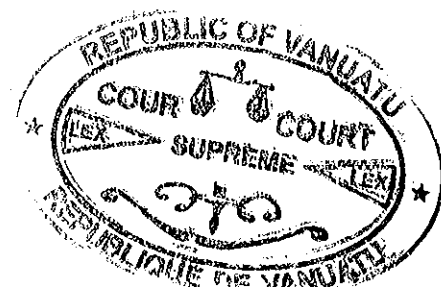
least, to protect women. The length of the sentence will depend on the circumstances. That is a trite observation, but these in cases of rape vary widely from case to case.

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”.

22. The Court of Appeal then went on to state that the offence of rape should in any event be treated as aggravated by any of the following factors:

- “(1) Violence is used over and above the force necessary to commit rape;*
- (2) A weapon is used to frighten or wound the victim;*
- (3) The rape is repeated;*
- (4) The rape has been carefully planned;*
- (5) The defendant has previous convictions for rape or other serious offences of a violent or sexual kind;*



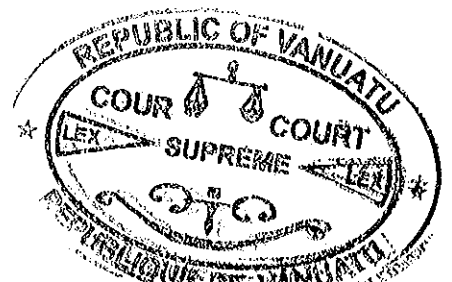
- (6) *The victim is subjected to further sexual indignities or perversions;*
- (7) *The victim is either very old or young;*
- (8) *The effect upon the victim, whether physical or mental, is of special seriousness.*

Where any one or more of these aggravating features are present, the sentence should be substantially higher than the figure suggested as the starting point."

23. In **Public Prosecutor v Scott** [2002] VUCA 29 the Court of Appeal emphatically 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"

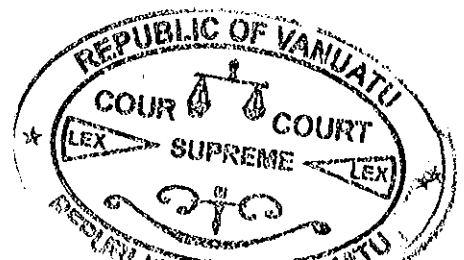
24. After both accused persons had pleaded guilty, I had ordered a pre-sentence report to be prepared by the probation officer and this order was complied with. I am grateful to the probation service for its assistance in that regard. I have also found the sentencing submissions of state prosecutor Simcha Blessing and defence counsel Eric Molbaleh and Roger Tevi very useful.
25. It is now necessary for me to pass sentence on both accused persons. In doing so, it is proper to bear in mind the chief objectives



of criminal punishment, namely retribution, the prevention of crime, the deterrence of criminals, and the reformation of the offender. It is also necessary to impose a sentence which has a dispassionate regard for the nature of the offence, the interests of the offender and the interests of the society. Suffice it to say, however, that rape involves a severe degree of emotional and psychological trauma, in effect obliterating the personality of the victim.

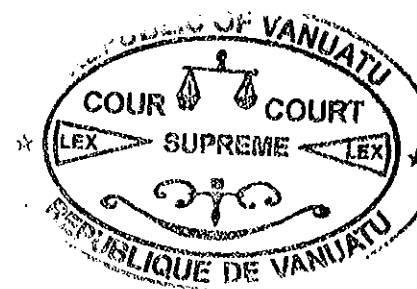
26. It is for this reason that rape is regarded by Parliament, by the Courts and by society as a very grave offence which necessitates the imposition of a very severe sentence which would not only punish the offender but also act as deterrence to other would be offenders.
27. The rape in this present case was clearly a rape accompanied by kidnapping. The offence of kidnapping is prohibited under section 105 (a) of the Penal Code [Cap 135]. The provision provides that 'no person shall by force compel, or by fraudulent means induce, any person to go from any place to another place'. A person convicted for kidnapping faces a penalty of up to 10 years imprisonment.
28. In **PP v Hinge** [2008] VUCA 30, the Court of Appeal remarked thus:

"This was clearly a case where the victim was kidnapped. The Appellant accepted this when he pleaded guilty to the count of kidnapping. In our view therefore the appropriate starting point to reflect the rape together with the kidnapping and threats of violence was at least 8 years imprisonment. We stress the importance of Supreme Court Judges adhering to



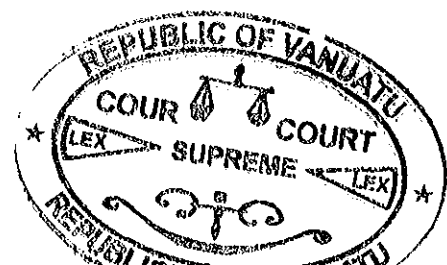
this guideline judgment."

29. I must state that I am mindful of this guideline judgment and will adhere to it. I am equally mindful of the decision in **Public Prosecutor v Andy** [2011] VUCA 14 in which the Court of Appeal set out the appropriate sentencing steps.
30. In a case such as this present one, the factors to be taken into account in fixing the starting point will include how the offending arose; what happened during the course of the offending and the effects on the victim.
31. It needs to be mentioned that the indictment does not specify the particulars of the offence as to whether it was penile penetration or digital penetration of the vagina or mouth or anus. Nonetheless, the facts before the Court reveal that the sexual intercourse varied from penile penetration into the vagina or anus of the victim, penile penetration into the mouth, digital penetration of the vagina and in some instances the penetration resulted in injuries to the victim.
32. In **Public Prosecutor v Tasere** [2011] VUSC CRC 122 of 2011, the defendant was convicted after trial on an indictment containing one count of kidnapping, one count of committing an act of indecency with a young person, sexual intercourse without consent by way of digital penetration and sexual intercourse without consent by way of penal penetration. The sentencing Judge made a further uplift of 2 years from the 8 years starting point requirement reaching an offending end point of 10 years imprisonment. After taking into



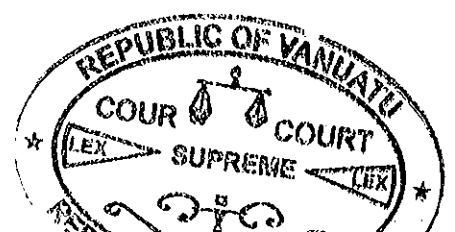
account custom reconciliation and the defendant's faint statement of remorse, the sentencing Judge deducted 2 years from the lead sentence of 10 years leaving an effective sentence of 8 years imprisonment.

33. Now, judging from the plethora of cases cited to this Court, it is clear to me that the appropriate starting point for a contested rape case accompanied by kidnapping and threats of violence should be 8 years imprisonment. If the defendant pleads guilty, the sentence should be reduced by 1/3 depending on the circumstances, including the likelihood of a finding of not guilty had the matter been contested.
34. Abraham Amokori, although you have pleaded guilty, I take note of the fact that your guilty verdict was not recorded at the earliest opportunity. It could have been entered at the first reasonable opportunity when you were called for plea at the Court in Luganville on 5th February 2013.
35. I accept that your family made three attempts at kastom reconciliation and that they paid a fine of 10, 000 Vatu to each of the three chiefs of the area where those offences occurred to put back respect and peace in the community. In ***Edgel v Public Prosecutor*** Criminal Appeal case No. 04 of 2011, the Court of Appeal said:



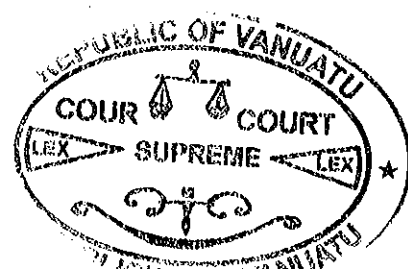
"given the social and cultural significance of performing a customary reconciliation ceremony amongst the indigenous people of this country, especially where the same has been accepted by the injured party, we are satisfied that the appellant deserves, if not a separate, then, a greater discount for that important statutory mitigating factor."

36. However, I note that all three attempts at reconciliation with the victim's family were rejected and the offer of VT50, 000 and a male pig were not accepted
37. I also note that there is some remorse expressed by you and I have taken all your mitigating circumstances into account. I note that you are a first time offender and that you operate a business of public transport serving the people of Malakula Island. It is also noteworthy that you have even offered to marry the victim as a way of repairing the damage because you realize that what you did to her was wrong.
38. However, what you did to the victim was despicable and utterly appalling. You not only forcefully robbed her of her virginity but you repeatedly raped her and you also subjected her to further sexual indignities and perversions. The psychological effect on the victim is of great significance and it will forever leave an indelible and painful memory in her mind. In fact, at paragraphs 6, 7, 8 and 9 (which are to be found at page 15 of her complaint statement) she recounted the event of that ill-fated night of 31 December 2012 in this way:

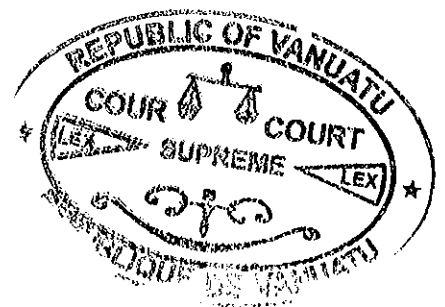


"Last night blong year 2012 we hemi long Monday 31st December hemi wan night we mi no save forgetem mo mi no wantem rememberem tu ol incidents we i happen long mi long night ia from ol incidents ia oli fraetenem mi... night blong Monday 31st December 2012, Abraham hemi spoilem mi blong destroyem virginityblong mi olsem wan student. Mi wantem blong Court blong Republic blong Vanuatu i waipem out ol images blong incidents we i happen long mi long night blong Monday 31st December 2012 inside long mind or memory blong me blong punishim tufala man ia Abraham Amokori mo Kalmata Kalnata... Mi askem tu long Court blong i no mas allowem tufala blong mekem same samting we tufala i mekem long mi long any nara girl or student from fasin blong tufala ia olio i inhuman fasin... Court of Law mo papa God long Heaven bae i helpem mi long case blong mi" (Translation: "The last night of the year 2012 which is Monday the 31st of December 2012 is a night I will never forget and I don't want to remember the incidents that happened to me that night because they frighten me... the night of Monday 31st December 2012, Abraham spoiled me because he destroyed my virginity while I was just a student. I want the Court of the Republic of Vanuatu to wipe out the images of the incidents that happened to me on the night of 31st December 2012 inside my mind or memory and punish Abraham Amokori and Kalmata Kalnata... and I also ask the Court to stop these two people to do the same thing they did to me to another girl or student because their actions are inhumane... Court of Law and God in Heaven will help me with my case..."

39. Needless to say that the victim did nothing to deserve this and for that you need to be punished severely. The sentences to be imposed on you should distinctly reflect society's condemnation of your offending against a young and vulnerable member of the community and they must act as a deterrent to other would be and like-minded offenders.



40. **Abraham Amokori**, while taking the charge of Sexual Intercourse without consent as the lead charge, I would only give you a reduction of 1 year against the offending end point of 8 years imprisonment earlier mentioned. In the circumstances, your sentence will be imposed in this way:
- (a) **Count 1:** Threats to kill - 5 (five) years imprisonment;
 - (b) **Count 2:** Kidnapping - 5 (five) years imprisonment;
 - (c) **Count 4:** Sexual Intercourse without consent - 7 (seven) years imprisonment;
 - (d) **Count 5:** Sexual Intercourse without consent -7 (seven) years imprisonment;
 - (e) **Count 6:** Sexual Intercourse without consent - 7 (seven) years imprisonment;
 - (f) **Count 8:** Sexual Intercourse without consent - 7 (seven) years imprisonment;
 - (g) **Count 9:** Sexual Intercourse without consent - 7 (seven) years imprisonment;
 - (h) **Count 10:** Sexual Intercourse without consent - 7 (seven) years imprisonment;
41. All your sentences are to run concurrently and should therefore be served concurrently and they shall be deemed to have commenced on 8 January 2013 when you were first taken into custody.



42. You have 14 days to appeal this sentence if you do not accept it.
43. **Kalmata Kalnata**, you have pleaded guilty to the charge of Indecency without consent contrary to Section 98(a) of the Penal Code [CAP 135]. The penalty for committing an act of indecency on, or in the presence of, another person without that person's consent is imprisonment for 7 years.
44. Although you have pleaded guilty, I take note of the fact that your guilty verdict was not recorded at the earliest opportunity when you were called for plea at the Court in Luganville on 5th February 2013.
45. Be that as it may, in arriving at what I consider to be a condign sentence in your case, I have considered all the mitigating factors advanced on your behalf and I have, in particular, also considered the fact that you are a first offender and a relatively young man and that you are remorseful. Furthermore, I have taken into consideration that your family made a payment of VT10, 000 to a paramount chief in your area as a result of his demands after he had learnt about this offence.
46. I have also considered the various case authorities, including **Public Prosecutor v Buroro** Criminal Case No. 82 of 2011 that have been referred to in defence counsel's sentencing submissions. I note that the defendant in that case was charged with the offence of Act of Indecency without consent. He pleaded not guilty to that offence. He was found guilty. He was sentenced to a starting point of 3 years imprisonment. His Lordship then reduced it to 2 years imprisonment and suspended the sentence for three years.



47. **Kalmata Kalnata**, it is my considered view that the appropriate starting point of your sentence would be one of 3 years imprisonment. After taking into account all the relevant mitigating factors, I would reduce this term by 2 years leaving a term of 12 months imprisonment suspended for a period of 24 months.
48. Your sentence shall be deemed to have commenced on 8 January 2013 when you were first taken into custody.
49. You have 14 days to appeal this sentence if you do not accept it.

DATED at Lakatoro, Malekula this 20th day of February, 2013.

BY THE COURT


M.M. SEY

Judge

