

PUBLIC PROSECUTOR

V.

CECIL ARU

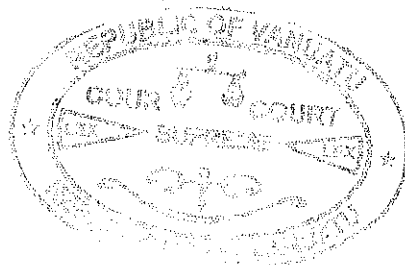
Coram: *Mr. Justice Daniel Fatiaki*

Counsel: *Mr. L. Malantugun for the State
Mr. G. Takau the for defendant*

Date of decision: *30 September 2014*

SENTENCE

1. The defendant Cecil Aru was convicted on 27th August of an offence of Unlawful Sexual Intercourse contrary to Section 97(2) of the Penal Code. The offence occurred on 18th April 2014 and the complainant who was born on Christmas eve in the year 2000 was over 13 years of age at the time of the offence.
2. The offence under Section 97(2) carries a maximum penalty of 5 years imprisonment. Furthermore, it is no defence that the victim consented to the act or the offender believed that she was older than she actually was, at the time of the offence. I cannot over-emphasize these two important features of this offence.
3. The brief facts of the case are that the defendant and the complainant were on friendly talking terms for some time before the incident. On the day of the incident which was a Friday, the complainant had gone to spend the weekend at her aunts' house at No. 3 area. While at the aunts' home, the complainant received a mobile call from the defendant inviting her to meet him at the airport. When she went to the airport, the defendant invited her to accompany him to Santo. Again she agreed, so the defendant paid for her air ticket.
4. On arriving at Santo, they checked into a room at Canal View Guest House where they spent the night. They had full consensual sexual intercourse. The complainant who was still a virgin and menstruating, experienced pain during intercourse and was fearful of becoming pregnant. After intercourse, the defendant immediately regretted his actions and apologized to the complainant. He then took the complainant to a relative's house in Santo and left her there. The next day the



defendant and complainant returned to Port Vila. A police report was lodged against the defendant.

5. The complainant was medically examined on 22 April 2014 (4 days after the incident). Everything was "normal" except for her hymen which was not intact, looked redish, and was tender to touch suggesting recent vaginal penetration.
6. From the defendants' pre-sentence report I gratefully extract the following personal details:
 - The defendant is single, 25 years of age from Lolovenue Village, North Ambae;
 - He is third in a family of six and attended primary school at his home village before completing his secondary schooling at St Patricks' College. He also attended the University of the South Pacific;
 - He was working as a bank officer at the National Bank of Vanuatu (NBV) but resigned when he was charged;
 - He is a devoted member of the Anglican Church and maintains a healthy relationship with his family and with his wider community;
 - The defendant is a first offender, expressed his remorse and has offered to perform a custom reconciliation ceremony to the complainant and her family;
7. Defence counsel whilst accepting that a custodial sentence may be necessary, nevertheless, submits that the sentence should be suspended. Counsel highlights the mitigating factors, including, the defendants' guilty plea; the absence of any force; the consensual nature of the intercourse and the early regret and remorse expressed by the defendant who is also a first offender.
8. The aggravating factors in the case highlighted in the prosecution's submissions includes, the young age of the complainant; the age difference of 12 years between the defendant and the victim; and the fact that there was an element of planning in the commission of the offence.
9. I note that the defendant maintains to the probation officer that the complainant had "*willingly submitted to him*". But as already mentioned, consent is "*no defence*" to the charge of Unlawful Sexual Intercourse which is quite different and distinct from Sexual Intercourse Without Consent. In the former offence it is the very act of intercourse that is "*unlawful*" whereas in the latter offence it is the absence of consent that is crucial. In other words sexual intercourse with a girl under 15 years of age is strictly forbidden under any and all circumstances.
10. As was said by Spear J in Public Prosecutor v Epsi [2011] VU SC 287:



"The crime of having unlawful sexual intercourse is designed to protect the young and the vulnerable particularly from the old and the mature. The law recognizes that a girl aged 12, and 13, even 14 years of age should not be put into the position of having to make the decision about whether or not to consent to sexual intercourse. There is also a large range in respect of the seriousness of this type of offending. At the lower end of the scale is (what is often described as) adolescence sexual experimentation.. At the upper level is the situation where an adult takes advantage of the youth and the vulnerability of the young girl or boy."

11. The offence is also intended to protect young adolescent girls even from themselves whether it be from natural curiosity or active sexual desire. The growing incidence of young single mothers stemming from unlawful sexual activity must be curbed in the interests of the proper emotional and physical development of young girls. In short, children should not be put at risk of having children.
12. The Court of Appeal in the leading case of Public Prosecutor v. Kevin Gideon [2002] VUCA 7 whilst recognising that "*that the circumstances which can arise with an offence under section 97 can vary substantially*", nevertheless, in that case, where a 25 years old first offender had sexual intercourse with a 12 year old girl causing her to bleed excessively, the Court said, in words that could equally apply in the present case:

" we are of the view that the minimum sentence, which the judge could properly have considered for this (def) even allowing for the fact that this was a 25 year old with no previous convictions, who was in employment and otherwise well spoken of, was four years imprisonment. Whatever may be said about this man personally having learned his lesson, there is an overwhelming need for the Court on behalf of the community to condemn in the strongest terms any who abuse young people in the community. Children must be protected. Any suggestion that (a young girl) has encouraged or initiated sexual intimacy is rejected. It is a (young girl) from adults. It is totally wrong for adult to take advantage of their immaturity.

13. In the present case, **Cecil Aru** although your offending is not as serious as the identified "*upper level*", there is not the slightest doubt in my mind that you took advantage of the complainant's relative immaturity and her obvious infatuation with you. Not satisfied with calling her to the airport, you then invited and paid for her air ticket to Santo with little or no concern at all as to whether or not her family would be worried or even knew and approved of her trip. In short, you intentionally set in motion the train of events and provided the financial means that enabled the offence to be committed.
14. Having said that I adopt a starting sentence of 24 months imprisonment which is raised to 30 months for aggravating factors. From that total figure I deduct 10



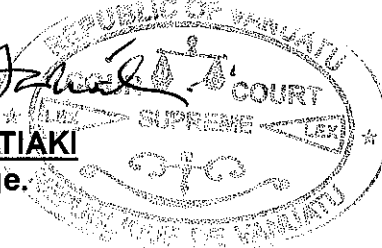
months in recognition of your guilty plea and a further 8 months for mitigating factors leaving an end sentence of 12 months imprisonment which is suspended for 2 years.

15. **Cecil Aru** what this suspended sentence means is that you will not go to prison today, but, if you commit another offence in the next 2 years, you will be required to serve this sentence of 12 months imprisonment before any other sentence you may receive for your reoffending. Needless to say whether that happens is entirely in your hands.
16. You are an educated and eligible young man with good future prospects. I therefore urge you to find someone closer to your age group to establish a steady relationship with in future. It would be a real shame if you failed to heed this advice and ruined your life.
17. In addition, given your expressed willingness to undertake a custom reconciliation ceremony, you are ordered to perform a custom reconciliation ceremony to the complainant and her family within 28 days with the assistance of Chief Rolong Uvi and under the supervision of a probation officer who shall provide a written report to the Court 7 days after the said custom ceremony.
18. Finally, you are sentenced to 12 months Supervision with 2 special conditions under **Section 58 (K)** of the **Penal Code** as follows:
 - (1) That you undertake and complete the Niufala Rod Programme under the supervision of a probation officer; and
 - (2) That you keep away from and do not contact or accept calls from the complainant, either directly, or indirectly for the next 2 years;
19. You have 14 days to appeal against this sentence if you do not agree with it.

DATED at Port Vila this 30th day of September, 2014.

BY THE COURT


D. V. FATIAKI
Judge.



The seal of the Supreme Court of Vanuatu is circular, featuring a central emblem with a scale of justice and a book. The text 'REPUBLIC OF VANUATU' is at the top, 'SUPREME COURT' is in the center, and 'VANUATU' is at the bottom. There are decorative stars on either side of the central text.

**IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU**

ORDER FOR SENTENCE OF SUPERVISION
(Section 58F Penal Code Amendment Act 2006)

Name: CECIL ARU

DOB: 27 October 1987

Residential location: Port Vila, Efate.

At a sitting of the Supreme Court at Port Vila, this 30th day of September, 2014, you were sentenced to 12 months supervision following conviction for:

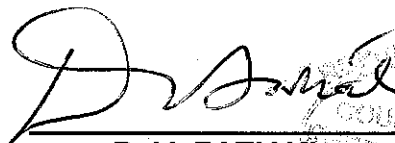
<u>Criminal Case number:</u> CR Case 44 of 2014	<u>Offence(s):</u> - Unlawful Sexual Intercourse contrary to Section 97 (2) of the Penal Code Act [CAP. 135]
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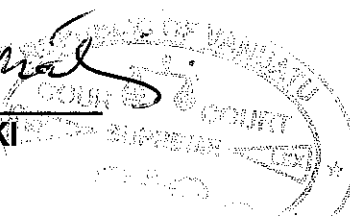
In addition to the standard conditions of Supervision (to be given to the offender) the Court has imposed the following Special Conditions:

<u>Special Condition:</u> <ul style="list-style-type: none">• That you undertake and complete the Niufala Rod Programme under the supervision of a probation officer; <u>and</u>• That you keep away from and do not contact or accept calls from the complainant, either directly or indirectly for the next 2 years.
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DATED at Port Vila, this 30th day of September, 2014.

BY THE COURT


D. V. FATIAKI
Judge.



Standard Conditions Of Supervision

1. You must report in person to a probation officer as soon as practicable and not less than 72 hours after the sentence is imposed.
2. You must report to a probation officer as and when required to do so by a probation officer and must notify the probation officer of your residential location.
3. You must not move to a new residential location without the prior written consent of a probation officer.
4. You must take part in a rehabilitative and re-integrative needs assessment and/or programme if and when directed to do so by a probation officer.

Other rules of the sentence of Supervision will be explained to you when you meet your Probation Officer

