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

Criminal Case No. 38/ 2015

PUBLIC PROSECUTOR

V

EILON MASS

Hearing:	***Monday 28 September 2015 at 2pm***
Before:	***Justice SM Harrop***
Appearances:	***Betina Ngwele for the Public Prosecutor*** ***Eilon Mass, C/- Correctional Services, Port Vila***

SENTENCE

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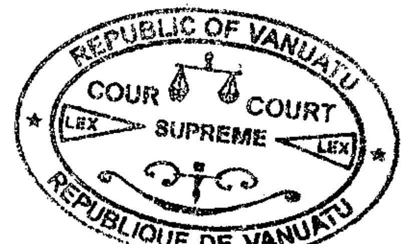
1. Mr Mass you are 40 years of age and here for sentence on one count of having sexual intercourse without consent on 24 July 2014, Pikinini Day, in Port Vila. I shall refer to the victim as "LH" or as "the victim" in this judgment to protect her identity.

2. It's important to record at the outset that you have always denied and continued to deny that there was ever any sexual contact between you and LH but I found you guilty in a verdict delivered on 4th September after a lengthy trial. You have made clear your disagreement with my verdict and have I understand lodged an appeal against conviction which of course you have a right to do. But you must understand that my sentencing must proceed today on the basis of my judgment being correct. You will have your opportunity to argue that it is incorrect before the Court of Appeal, which I expect will hear your appeal in the session beginning on 9 November.

3. I should also say something about representation. Following the verdict my understanding is that you discontinued instructions to Mr Yawha who had been your counsel at trial and in part I understand that that is because you were not satisfied with the way he represented you at the trial. You wish to



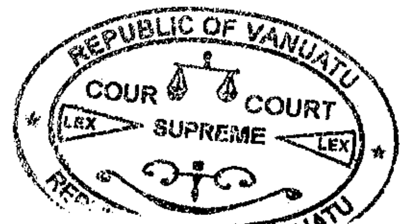
include in your grounds of appeal some grounds relating to that. You are fully entitled to dispense with his services and to challenge on appeal his representation at trial. However, having dispensed with his services you have nevertheless had an opportunity if you wished to be represented at the sentencing hearing by a public solicitor but you have chosen to represent yourself. You are an intelligent and an articulate person and I have received detailed written submissions from you which I have read. I would urge you, although it is not my job to advise you, to ensure that you are represented by a lawyer in connection with the appeal. I have already mentioned that, and why it is prudent, in a Minute issued on 21 September.

4. Turning now to the sentencing itself the maximum penalty for sexual intercourse without consent also known as rape is life imprisonment. This indicates how seriously the Parliament of Vanuatu regards this offence because life imprisonment is the most serious sentence that is able to be imposed in Vanuatu.

5. Based on the evidence I heard and accepted the key facts on which I am going to sentence you are as follows. On 15th of July 2014 at the place you living in No. 3 you asked LH who was at that time only 16 if she would have sex with you. She said no because your girlfriend Beverly was her best friend. So you knew at that point that any sex with her would not be consensual, you would have to rape her to achieve that.

6. You then planned, clearly with some forethought, a way of getting her alone to achieve that. You phoned her and told her falsely that Beverly really wanted to see her and that you would sent a bus to collect her. She agreed to come and was duly brought by bus but when she arrived at your place, you were there alone. Beverly was not there.

7. You led her inside, shut the door, told her to take off her clothes and to get on to the bed. She made it clear she did not want to do that and repeated that she was Beverly's best friend. You had a small knife and you walked over to her, pushed her up against the wall and told her that she did not remove her



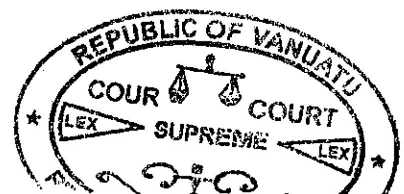
clothes you would slit her throat. She refused and you cut her clothes off, threw her onto the bed, she struggled but again you told her you would slit her throat if that continued. You then raped her despite her efforts to get you off her. After you had finished, you told her that if she told anyone what you had done you would kill her and her family. You then locked the door and left. Her clothes were unwearable so she used a curtain to cover her body. Fortunately her cries were heard by two young men who rescued her and put her on a bus for home.

8. There are obvious aggravating features in this case over and above those present in any rape, which is an inherently violent offence. First, the holding of a weapon, a lethal weapon to achieve your purpose. A small knife is clearly capable of inflicting injury or death and was wielded with intent by you. Next there were your several threats. These were effectively reinforced by the wielding of the knife. Also, the knife was used to cut her clothes off, as if to reinforce your willingness to use it if necessary. There was a certain degrading feature of the undressing being done in that way

9. The next factor is the premeditation and planning which involved a trick or ruse to get the victim to your place on false pretences. Then there is the age difference. You are more than twice her age. You are 40, 39 at that time, and she was 16, so there was a degree of domination involved. I did not hear any evidence as to whether a condom was used or not but I can only infer from the nature of the incident that one was not; that exposed her to a risk of pregnancy.

10. All rape victims suffer significant adverse mental consequences. They are not necessarily to be seen as aggravating features of the offending because their seriousness can be seen as already reflected in the maximum penalty. Here Ms Ngwele submits the consequences for LH, as summarised in her short memorandum dated 24 September, should be seen as an aggravating factor.

11. I was aware in preparing for the sentencing that I did not have any comment from the probation officer or from the prosecutor about how the victim felt about this offending. I therefore decided to request such information from Ms



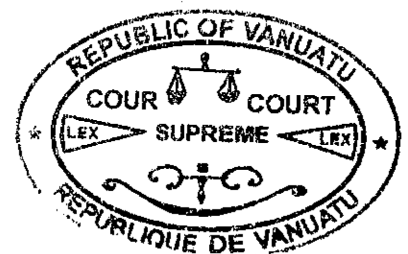
Ngwele. You have spent some time in your submissions criticising this step and the content of the memorandum itself.

12. There is nothing unfair in a judge requesting further information relevant to sentencing provided as a matter of natural justice the defendant is given an opportunity to consider and comment on the information, as you have been. I do not propose in this judgment to go through the criticisms which you have made of the contents of the memorandum. That is because I am not going to place significant weight on it. That is not to say that I do not believe what LH says; quite the contrary. Rather it is because the comments that she makes are really very typical of what one reads in the comments of rape victims. I am not satisfied that the effects on her were sufficiently unusual to warrant my treating them as aggravating for sentencing purposes.

13. The sentence I am going to impose is therefore not going to be any different from that I would have imposed without having the memorandum. What I do know as an experienced judge, without referring to this particular victim, is that the long term consequences for rape victims are often very significant and often not fully appreciated at the time. Typically there are difficulties with self-esteem and in forming and maintaining relationships with sexual partners. These consequences can last a lifetime. To what extent LH will be affected in the long run remains to be seen. But you should understand that what you did has put her mental health at significant risk.

14. It is important not to treat rape as a short-term incident of violence from which the victim will readily recover. It is a gross intrusion of a woman's bodily integrity which has significant mental health consequences more than physical consequences.

15. Because rape is regrettably very common in Vanuatu there are many sentencing decisions, including several guideline decisions, to assist me in determining the starting point for the sentence; it is an important consideration in sentencing to try to be reasonably consistent between similar cases.

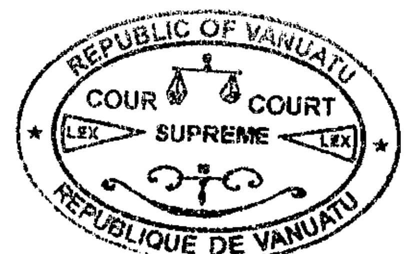


16. The process that I am required to follow is first to determine an appropriate starting point. This involves consideration of the offence itself with all its aggravating features, but not of you as the offender. I will then consider you at the offender and assess whether the starting point should be increased or decreased on account of your personal factors. In the case there will be a decrease because you had no previous convictions as at date of this offence and this was not an offence committed while on bail for another offence.

17. There is no doubt that an immediate custodial sentence is required for this offence; there can be no question of suspension. In one of the leading cases, *Public Prosecutor v. August Ali* [2000] VUSC 73, which is often quoted in rape sentencing judgments, the learned Chief Justice said: "*The offence of rape is always a serious crime and other than in wholly exceptional circumstance, rape calls for an immediate custodial sentence..... 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 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 a rape committed by an adult without any aggravating or mitigating features 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 woman or girls. He represents a more than ordinary danger and a sentence of fifteen years or more may be appropriate.

[I pause here to note that your rape of LH is not in any of these especially serious categories.]



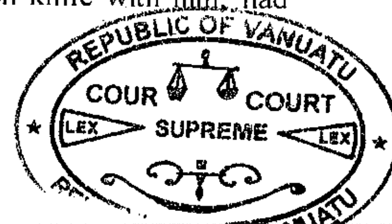
The Chief Justice went on to say: *"The offence of rape should in any event be treated as aggravated by any of the following factors:*

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 is been carefully planned;*
5) *The defendant has previous for rape or other serious offences of a violent or sexual kind;*
6) *The victim is subject to further sexual indignities or perversions;*
7) *The victim is either very old or young; and*
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".

18. So what the Chief Justice was saying is that a starting point of five years should be adopted, but if there are one or more aggravating features then that should be substantially increased. Ms Ngwele said in her written submissions that there should be a starting point of six years imprisonment. But on reflection, because of what the victim had said about the effects on her, she considered that seven years would be more appropriate. I have already said that I am not going to increase the starting point on account of what the victim said. I repeat that that is not because I do not accept what she said but because there do not appear to be aggravating effects of "special seriousness" to use the Chief Justice's words.

19. In order to assess consistency with other cases I have considered a couple of more recent judgments of the Chief Justice. These are not ones referred to by the Prosecutor. The first is *PP v. Bulesap* [2015] VUSC 90, a judgment given on 10 July 2015. There, a six-year starting point was adopted by the Chief Justice. He noted the defendant had had a bush knife with him, had



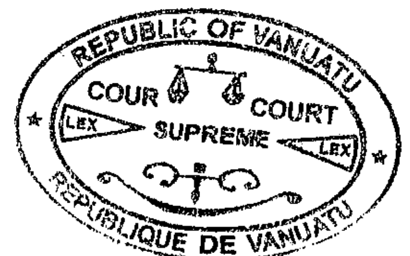
grasped the victim by the neck and hands and had dragged her into bush were he forcefully removed her clothes. He was 20 and the victim was 33. The offence appears to have been opportunistic rather than premediated so it might be seen as somewhat less serious case than the present one.

20. In *PP v. Richard* [2014] VUSC 37 the Chief Justice's adopted a seven-year starting point. There the defendant had been under the influence of alcohol. There was an age disparity of only three years, there was planning, deception, force and threats when sex was refused. There was also evidence as to the mental consequences for the victim. This case might be seen as approximately on the same level as the present one, but if anything it might be seen as less serious given the difference in age disparity between the two cases.

21. I should have mentioned when referring to representation earlier that Mr Yawha was not initially granted leave by me to withdraw as counsel. You may not appreciate the distinction, indeed some lawyers do not, but it is one thing to cease to act for a client and another thing to be released as counsel by the Court. Counsel has a special position as officer of the Court and it was on that basis that I required Mr Yawha to come last Friday, when the sentencing hearing was initially listed and from which it was adjourned, so that he could assist me with essentially legal submissions about the sentence.

22. He filed some helpful brief submissions, and supplemented them orally; the essence was that the starting point should at most be five years. For the reasons I have outlined and particularly the Chief Justice's observations in the *Ali August* case, I cannot accept that it an appropriate starting point because of the several aggravating features.

23. Having weighed the matter up carefully and considered those two other cases of the Chief Justice, I adopt a starting point of six and a half years imprisonment, or 78 months taking into account all of the aggravating features. I could have justified a seven years starting point but it is my duty to adopt the least restrictive starting point I reasonably can.

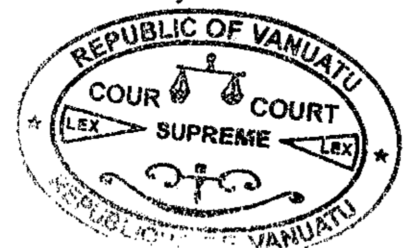


24. The second half of the sentence assessment process is the identification and weighing of mitigating factors relating to you as the offender. Here there are reasons why I can properly reduce the sentence because of the information put in front of me both by you and by the probation officer in the helpful report I should record that initially there was no probation report and you were recorded as being unwilling to be interviewed, but it seems that resulted from a misunderstanding and I am pleased to say that a helpful report has now been prepared. This is to your advantage because it confirms a number of the things which Mr Yawha spoke about on Friday and which you have repeated in your written submission today.

25. Without going through everything which is said, you are a well-educated expatriate Israeli. You had 12 years of education focusing on science and natural healing. You have other wide-ranging skills in hydro-electric construction, solar systems, plumbing, computer hardware, business management and development and real estate. Indeed it was that combination of those skills that brought you to Vanuatu to set up your business Raw for Beauty, focusing on the consumption of raw and natural products.

26. You also have been instrumental in the creation and development of the organisation called Vanuatu People's Investment and Equity Fund (VPIEF) whose purpose is to help ni-Vanuatu in business development. You have made voluntary contributions to that organisation both in establishing it and since it was up and running, so that is a contribution to the community which stands in your credit. When you offend in the way you did, although it is most directly an offence against the victim, it is also an offence against community standards. You are entitled to have weighed in the scales the contributions you have made in the Vanuatu communities in the ways that you have.

27. You have complied well with the requirements of the Corrections since you have been in custody. It is relevant to record that you have been in custody for a total of 45 days now, there were 21 days after you were arrested before you were granted bail and then 24 days since the verdict when you were



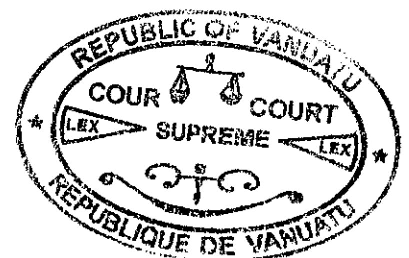
declined bail. You of course have not been involved in a custom reconciliation ceremony. That is not a criticism, you are simply being consistent because you say there is nothing to apologize for.

28. I take all of that into account. Of course in many sentencings the defendant has pleaded guilty and that attracts a substantial discount. Of course you denied the offence and gave evidence on oath denying that there had been any sexual contact at all. So obviously there is no question of any discount for guilty plea or remorse.

29. The major mitigating factor is that at the age of 40 you have no previous convictions, or at least at the date of this offence you did not. You have since been convicted and await sentence by Justice Saksak on counts of inciting unlawful assembly and theft which relates to an incident at Valet Bay in Santo on 21 September 2014. That was some two months after the rape so I put those convictions to one side, both because they happened afterwards but also because they are of a very different character from the present offence.

30. Taking a global view I have decided to discount your sentence by 15%, or 12 months, because of your previous good record and your positive contributions to Vanuatu since you have been here. My conclusion then, leaving aside one further aspect, is that the appropriate end sentence is one of 66 months imprisonment or 5 ½ years.

31. Before I conclude the sentencing I want to record that I have read your detailed written submissions. To a large extent, even though you are at pains to say you not arguing the appeal at the moment, in effect you are doing so. You challenge the prosecution case in a number of ways, you say for example that they should have called another witness who was listed, you say the victim impact statement should not be considered because it is new evidence, when in fact it is simply standard procedure for a sentencing Judge to seek information on the effects on a victim. It would be quite wrong for a judge to do that in the course of a trial where the question is: has there been a



rape or not? Had I asked Ms Harry, as you suggest I should have, how the rape had affected her, that would have been presumptuous and unfair to you.

32. So you need to understand there is a difference between the trial which is for the purpose of determining whether the charge is proved beyond reasonable doubt and the sentencing which is for determining the appropriate sentence in light of the guilty verdict and other information. This is why I did not permit you to get the rest of your files from the prison. Many of your submissions attempt to address matters which are not relevant, or a least do not weigh with me at sentencing.

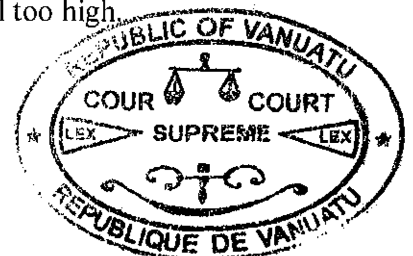
33. So I come to the final part of the sentencing. It is necessary for me under section 51 (4) of the Penal Code to take into account the time that you have been in custody prior to sentencing. It says that period must be wholly deducted but I think it needs to be doubled in order to be fair to you. The reason is that if you had been sentenced to imprisonment for 90 days you would have served 45 days and then become eligible for parole. Your good compliance while in custody suggests that you would get parole at the earliest opportunity.

34. So in effect here, you have already served the equivalent of a three-month prison sentence. I will therefore reduce the sentence that I mentioned earlier, 66 months or 5 ½ years, by three months.

35. The end sentence I impose is therefore **five years and three months imprisonment,** to be treated as starting today.

36. You have already lodged an appeal against conviction and if that succeeds this sentence will automatically be quashed. If however, you wish to appeal against the sentence itself you have a right to do so within the next 14 days and you need to do it separately from the appeal against conviction.

37. Such an appeal would allow you before the Court of Appeal to contend that if the conviction is not overturned the sentence was still too high.



38. Mr Mass a copy of this judgment when typed up will provided to you so you can consider it. I repeat that I urge you to obtain free legal advice from the Public Solicitor's office about appeals. While you are entitled to represent yourself, equally you are entitled to a lawyer and if you wish one will be provided free of charge. Of course if you choose to engage a lawyer privately you will have to pay.

39. If you engage a lawyer you will not be hampered in terms of preparing your appeal(s) because the lawyer can help you with research and facilities. I note your concerns, which are again raised in your most recent bail application, about the facilities available to your while you are in custody. I think Justice Chetwynd has already said to you in his detailed bail judgment, and I may have said to you last week as well, that the Supreme Court is not here to tell Corrections how to do their job.

40. Once a sentence of imprisonment is imposed then you are in custody and under the control of Corrections. They, under the Corrections Act, make decisions about your access to assistance with lodging and preparing appeals. Nevertheless I hope that what a Supreme Court judge says may have some influence.

41. Corrections should in my view do everything they reasonably can to facilitate your preparation of your proposed appeal(s). Imprisonment restricts most of your liberties but cannot deprive you or anyone of a fair opportunity to exercise your constitutional and statutory rights of appeal.

BY THE COURT