

PUBLIC PROSECUTOR V. A. R.

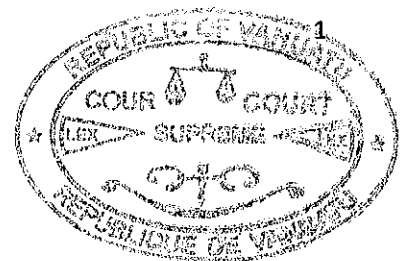
Sentence: *Wednesday 11 March 2015 at 9.00 am at Luganville, Santo*

Before: *Justice SM Harrop*

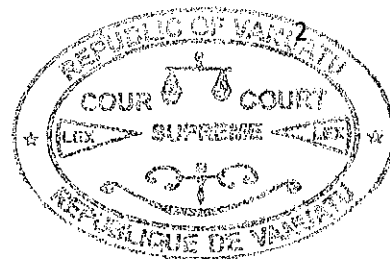
Present: *Mr. Ken Massing for the Public Prosecutor
Ms Jane Tari for the Defendant*

SENTENCE

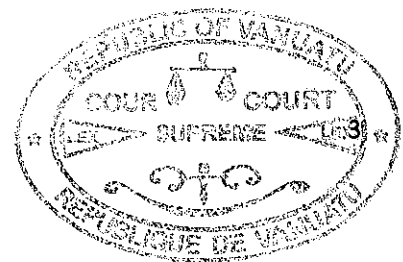
1. Mr. R you are 37 and for sentence on one count of incest under Section 95 of the Penal Code. In December 2014 on 3 occasions you had full sexual intercourse with your 13-year old daughter Samantha. The charge is serious and the 10-year maximum penalty alone indicates that, except in exceptional circumstances, an unsuspended prison sentence is properly imposed; both counsel accept this is so in this case.
2. On the first occasion, at around midnight, you entered your daughter's room, woke her up, took her to your room and told her not to talk, you removed her clothes, laid her on the bed then you removed your clothes and had full sexual intercourse with her. You instructed her not to tell anyone about the incident and you threatened to slice her if she told anyone about it. She suffered pain during the act of intercourse.
3. The second occasion was later in December during the daytime when your wife and her mother were in town at the market. You instructed your two other daughters to perform kitchen duties and then instructed Samantha to tidy up their beds inside the house. While she was inside the house, you followed and closed the door. Again you threatened to slice her with the knife if she refused your demands and again sexual intercourse occurred.



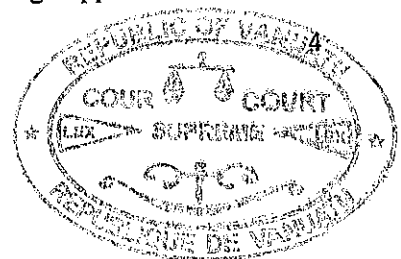
4. The third occasion was at night time. You asked that she come and see you. Then you instruct her to wait while you checked if somebody was coming. Again you proceeded to have sex with her which again caused her pain.
5. She later told someone about what had happened and you were arrested. I understand you have been in custody since 2 January and of course I will take that into account in sentencing.
6. The pre-sentence report says that you and your wife have four children, three daughters and one new baby boy. There are some positive comments about your work skills and aside from this terrible set of incidents your wife says that you are a good father, you help her at home and your offending is a shock to her. She does not know why you did such a disgraceful act.
7. I mention at this stage that although this kind of offending obviously has a primary victim, your daughter Samantha, there are other victims, most particularly your wife and your other children. The inevitable prison sentence which I must impose today will remove you, your contributions to the running of the household and bringing up the children and your income-earning potential from them for several years.
8. There is reference in the report to your having apparently being tempted by the way your daughter was dressing herself. You say that your relationship with your wife is okay and so it is nothing to do with problems in your own relationship. You also say that you were not the first man that your daughter has had sex with. The probation officer describes you as minimising the offending on this account.
9. Worryingly you are recorded as not having any remorse towards Samantha nor any remorse at all for what you did. You have performed a customary reconciliation to your wife and daughter and other members of the family. In relation to Samantha, Vt3.000 has been offered and accepted by her with your apology. While I must and will take that into account, obviously that is very small sum and in no way can it come close to righting these three wrongs.



10. This is appalling offending and yet other example of criminal sexual conduct which occurs far too often in Vanuatu. It is a problem in all cultures and is certainly not limited to Vanuatu, but it does seem to be a particular problem in the culture here. Despite Parliament creating this offence and allocating the maximum penalty of 10 years and despite the Courts delivering strong sentences and strong words, some men who otherwise have good qualities seem to think this is acceptable behaviour.
11. Once again the Court needs to state very clearly it is not only morally very wrong but it is a serious criminal offence. The Court of Appeal back in 2003 in *Public Prosecutor v. Bae* [2003] VUCA 14 said: *"The principles are simple. Parents who use their children for their own sexual gratification will go to prison. It is almost impossible to imagine circumstances in which that would not be the necessary response. This Court would anticipate that it will only be in the most truly exceptional circumstances which are clearly and unequivocally demonstrated to exist that this would not apply"*.
12. A father who has sex with his own daughter at the age of 13 breaches at the most fundamental level the special relationship of trust between a father and a daughter. Instead of caring for your daughter and acting in her best interests at all times, you abused her in the most serious way possible, for your own sexual gratification. It is disturbing, to say the least, that you do not appear to regret this or even to understand what effects this has had, and will continue to have for years, on your daughter and indeed on all of your family.
13. The effects of this kind of offending are well known to be long-lasting and serious. Samantha's ability to form healthy relationships with men in the future is likely to be compromised. Victims of this kind of offending are often depressed, lack self-worth and on some level are inclined to blame themselves for what has happened. In truth of course it is entirely the offender's fault.

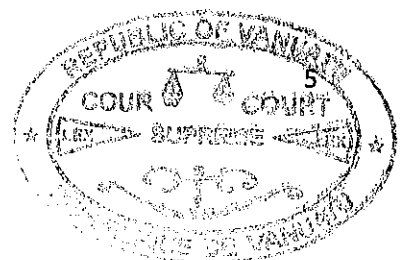


14. I note with particular regret that Samantha says that as a result of this offending she is no longer attending school. That alone is a very serious adverse consequence for any young person.
15. The idea that the way she dressed and your belief that she had had sex before make any difference is abhorrent. Incest is incest regardless of circumstances.
16. Contrary to Mr. Massing's submission, I note that breach of trust is not an aggravating feature of the offending because that is inherent in the offence itself; that is already taken into account in the maximum penalty. It is not a special feature of this or any other incest case.
17. But her age and the fact there were three occasions, which each clearly involved some planning and premeditation are clearly aggravating factors. Your threats make it obvious that you knew very well that what you were doing was wrong and that you would be in big trouble if she did talk about it. So you tried to stop her doing that.
18. Although one instance of incest cannot be excused in any way, the fact that there were three within one month means you had, but did not take, the opportunity to reflect on what you had done the first time, to realize it was wrong and not to do it again. So the second and third occasions are particularly aggravating.
19. In determining the appropriate sentence I first must assess a starting point which reflects the seriousness of the offending but has nothing to do with you personally, then I need to deduct from that the appropriate discounts recognising mitigating factors relating to you.
20. Mr. Massing has helpfully referred me to a number of cases not only the Court of Appeal Case in *Public Prosecutor v Bae* which I have mentioned but also *Public Prosecutor v. Songi* [2012] VUSC 208, *Public Prosecutor v. Peter* [2013] VUSC 108 and *Public Prosecutor v. Niala* [2010] VUSC 199. These cases demonstrate that, serious although your case is, there are worse examples. Aggravating features in those cases included offending over a lengthy period, offending against more than one daughter and the victim becoming pregnant and giving birth. At least none of those things applies here but as I



have said the fact there three occasions, the fact there were threats and pain caused certainly do aggravate the current offending.

21. Mr Massing accepts that your case is less serious than several of the others and suggests that a starting point of around 6 to 7 years imprisonment is appropriate before any discounting is considered. In *Songi* which was clearly more serious, the starting point was 8 years, in *Peter* which was also more serious again the court adopted a starting point of the maximum of 10 years before reducing it on account of mitigating factors. In *Niala* which again I would say was slightly more serious, there was a 7 year starting point.
22. So I accept that the starting point has to be somewhat less than 7 years, as indeed Mr Massing effectively does. Ms Tari says that about 3 to 5 years would be appropriate although she does not refer to particular authorities to justify that submission.
23. I also record that Ms Tari has emphasised quite properly a number of mitigating factors which I will come to shortly. Having regard to the maximum penalty of 10 years and to the other case authorities with which I am required to be consistent where facts are similar, I accept Mr Massing's assessment of the appropriate starting point. I have come to the view that 6 ½ years is the least restrictive starting point I can properly adopt. That is 78 months imprisonment.
24. Turning out to the mitigating factors, Ms Tari highlights that you are a first-time offender with an unblemished record, you are the sole breadwinner for the family, you are a hardworking man at the plantation, you have diving and gardening skills, you have spent about 9 weeks in custody since you were arrested, you took part in and paid compensation during the customary reconciliation ceremony, you pleaded guilty at the first opportunity and cooperated with the Police during the investigation.
25. I accept all of those points and give them due weight. The primary mitigating factor is the guilty plea for which you are entitled to a 1/3 discount. That is about 25 months bringing the sentence down to 53 months, or 4 years and 5 months. Some people might think that the 1/3 discount is too much but I think it is important in this kind of case that



there is full credit given for a guilty plea. That is for several reasons. First, it avoids the court putting on a trial on which any person charged is entitled to insist. Second, and much more significantly, it avoids Samantha having to come to Court to explain what happened in public and to be cross-examined and challenged. There is another aspect which I think is important: a number of sex offenders plead not guilty and even when they are found guilty they refuse to accept they have done anything wrong. The victim often feels that although the Court has found the offender to have acted wrongly, he - and perhaps his supporters too - still does not accept he has done anything wrong. So the fact you have been prepared to front up, to plead guilty in public is a tangible recognition that Samantha's complaint was correct and fully justified. It is a public acknowledgement of responsibility by you; I note that you immediately accepted your responsibility when you were spoken to by the Police. And of course you pleaded guilty as soon as you had that opportunity.

26. There are other mitigating factors I have already mentioned, notably the custom reconciliation ceremony. While the payment may have been modest it is very important in ni-Vanuatu culture that this occurs and that it is given due weight by the Court. Obviously the harm cannot be undone but there has been in that sense also a public acknowledgment and an effort to put things right. I must say though that your lack of remorse and understanding and your reference to your daughter's "provocation" causes me to reduce the weight accorded. In short, I am doubtful your apology was genuine.
27. I take into account that you are were previously of good character. You have been a good father in all respects until December 2014. Your wife says that it was a shock and finds it very hard to understand why you did this, and especially that having done it once that you did it twice more.
28. On account of those matters I will reduce the sentence by further 10% which is about 5 months and brings it down to 48 months or a 4 year prison sentence.
29. It is then necessary under Section 51(4) of the Penal Code to take into account the fact that you have spent about 2 months in custody, otherwise you would effectively to serve



that again. So I deduct that amount of the sentence from the end sentence. The result is that you are sentenced to imprisonment for 3 years and 10 months from today.

30. There can be no suggestion of suspension of a term of imprisonment in a case like this, as Ms Tari accepts.

31. You have 14 days to appeal against that sentence if you do not agree with it.

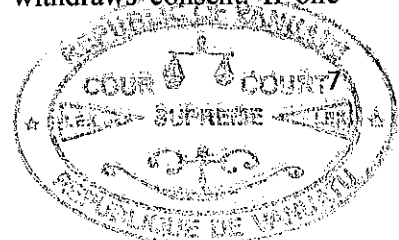
32. There two other matters I want to mention. The first is the suppression of your name. Looked at in isolation of course your name should be published and you should be publicly held accountable for what occurred. However in my view there is a greater public interest in Samantha not being identified; that would inevitably happen through publication of your name because her surname is the same as yours.

33. Accordingly, to protect her and certainly not to protect you, I am going to suppress your name in all reports of this case. Mr Massing does not oppose this. I emphasise that is not in any way to minimize the seriousness of the offending.

34. The second point is a general one, which has nothing to do with you personally. I am going to ask that a copy of this judgment be given to the relevant Ministries with a request that they and, if they think fit, Parliament consider the appropriateness of the maximum penalty for this offence which is 10 years imprisonment, or I should say only 10 years.

35. I am unable to understand why the penalty for sexual intercourse without consent against section 91 of the Penal Code, for what might be called an "ordinary" rape, is imprisonment for life but that for rape of a 13 year old child, who is in the offender's care and in a relationship of trust with him, is at most 10 years imprisonment.

36. A rape case may involve two young people, close in age, who have previously had consensual sexual intercourse but then have a further encounter where the woman decides at the last minute that she does not want to have sex and withdraws consent. If one



compares that kind of case, to which life imprisonment attaches, with your case of raping (three times) your 13-year old daughter, I cannot understand how the former case can be seen by Parliament as the more serious.

37. It is also difficult to understand why the maximum penalty for sexual intercourse with a child under the offender's care and protection, under section 96, is only 10 years imprisonment.

BY THE COURT

Stephen Harrop

JUSTICE STEPHEN HARROP

