

PUBLIC PROSECUTOR

V

BYRON MOLI TUKU

Coram: Justice Mary Sey
Counsel: Ms. Marie Taiki for Public Prosecutor
Mr. Roger Tevi for the Defendant

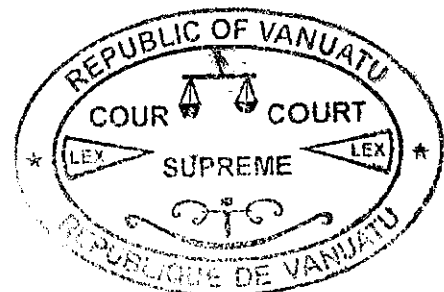
Date of Decision: 20 September 2016

SENTENCE

1. **Byron Moli Tuku**, you pleaded guilty on 9 August 2016 to the following offences:
one count of **Sexual intercourse without consent** contrary to **section 90 & 91 of the Penal Code [Cap 135]** (Count 1), three counts of **Unlawful Sexual Intercourse** contrary to **section 97(1) of the Penal Code [Cap 135]**(Count 2, Count 4, Count 6), one count of **Acts of Indecency with a Young Person** contrary to **section 97(A) of the Penal Code [Cap 135]**(Count 3) and one count of **Acts of Indecency without consent** contrary to **section 98 of the Penal Code [Cap 135]**(Count 5).
2. You were convicted accordingly and you appear today for sentence. No dispute is taken with the summary of the facts presented by the prosecutor as follows:
 - i. Glenden Ilaisa (the Complainant) lodged a report to the police on 24 May 2016 on behalf of his adopted daughter K.I. (the victim) against his step-son Byron Moli Tuku (the Defendant);
 - ii. The Defendant is 18 years old (Date of Birth 22 August 1997) and the victim is 15 years old (Date of Birth 6 November 2001);
 - iii. The offences occurred on different occasions during the period of 2013, 2014 and 2016 at Estella Marie, Port Vila, Vanuatu.

The alleged incidents

2013



- iv. Sometimes in January 2013, the victim was 11 years old at the home in Stella Marie when the defendant pulled her hand and took her into their parent's bedroom. He put her on top of the bed and removed her panty and despite the victim's refusal the defendant removed his trousers and rubbed his penis against her vagina.
- v. Sometimes in January 2013, when the victim was asleep in her room the defendant entered her bedroom and forced her to have sexual intercourse with him, she felt sore at that time.
- vi. After those incidents the defendant began having sexual intercourse with the victim almost every day until December 2013 when she was 12 years old at that time;

2014

- vii. Sometimes in January 2014 the defendant began showing pornographic, the defendant continued to have sexual intercourse with the victim until May 2014;
- viii. The incidents stopped around November 2014 when the defendant left and went to Ambae and it resumed when he returned to Port Vila.

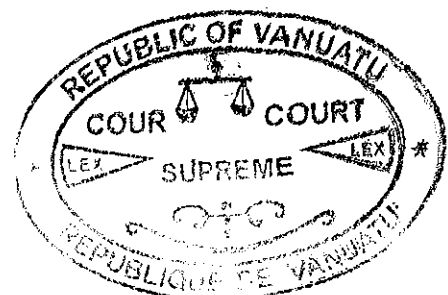
2016

- ix. Sometimes in January 2016, the victim was outside the yard feeding the chickens when the defendant approached her and forced her to lay down her back, he then took a photo of her vagina with his mobile phone, afterwards he forced the victim to suck his penis;
- x. January 2016 was the last time the defendant had sexual intercourse with the Victim who was 15 years old at the time
- xi. Sometimes in April 2016 the incidents came to light when the victim and the defendant's mother found pornographic material on the victim's tablet and she questioned her about it.
- xii. The defendant was arrested and cautioned and he admitted to the allegations levied against him.

3. For the offence of **Sexual Intercourse Without Consent Sections 90 and 91 of the Penal Code [Cap 135]** provide as follows :

“90. Any person who has sexual intercourse with another person:

- (a) without that person's consent; or



- (b) with that person's consent if the consent is obtained:
- (i) by force; or
 - (ii) by means of threats of intimidation of any kind; or
 - (iii) by fear of bodily harm; or
 - (iv) by means of false representations as to the nature of the act; or
 - (v) in the case of a married person, by impersonating that person's husband or wife; or
 - (vi) by the effects of alcohol or drugs; or
 - (vii) because of the physical or mental incapacity of that person.

commits the offence of sexual intercourse without consent.

91. No person shall commit sexual intercourse without consent.

Penalty: Imprisonment for life."

4. As regards the offence of **Unlawful Sexual Intercourse** (Count 2, Count 4, Count 6)

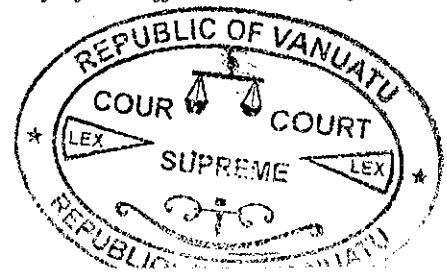
Section 97(1) of the Penal Code [Cap 135] provides:

"97. (1) No person shall have sexual intercourse with any child under the age of 13 years.

Penalty: Imprisonment for 14 years.

5. The prosecutor has drawn my attention to sentencing guidelines pronounced by the Courts in judgments relating to this type of offending, namely, the case of *Public Prosecutor v Scott* [2002] VUCA 29 and *Public Prosecutor v Ali August* [2000] VUSC 72. Invariably, the guidelines in these cases are endorsed and applied by the Courts in other cases:

"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."

6. In the case of *Public Prosecutor v Seule* [2011] VUSC 286, the defendant was 15 years of age and was charged with one count of unlawful sexual intercourse with a 13 year old girl. In sentencing the defendant, Justice Spear stated in paragraph 4 of the judgment that:

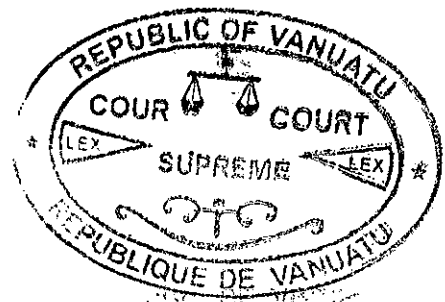
"This offence is one designed to protect the young and the vulnerable. It is designed to protect if necessary young girls from themselves, in this case you were the older of the two... by 2 years and you should have exercised restraint. You should not have taken advantage of her vulnerable state. So that is the criminality of your offending and that is the basis upon which you are to be sentenced."

In *Public Prosecutor v Matoa* [2011] VUSC 40 the defendant was charged with unlawful sexual intercourse under section 97(1) of the Penal Code Act. The complainant was 10 years old and the defendant was 19 years of age at the time of the offending which began in 2008 when the defendant was 16 years of age and continued until 2011. The defendant was a first time offender and he cooperated with police investigations and he was remorseful. In sentencing him, the Court considered a starting point of 6 years imprisonment and after taking into consideration the defendant's mitigating factors and time spent on remand the Court imposed an end sentence of 3 years imprisonment.

7. **Byron Moli Tuku**, you need to understand that sexual intercourse with another person without that person's consent is a very serious offence as reflected by the maximum penalty of life imprisonment that the law imposes for this offence. It is no defence to a charge under this section that the child consented or that the person charged believed that the child was of or over the age in question (s.97 (3)). A sentence of imprisonment must be imposed for such serious offending as this. However, in sentencing you, I need to take your age into account since you were aged 15 to 16 at the time of the offending of Count 2, Count 4 and Count 6.

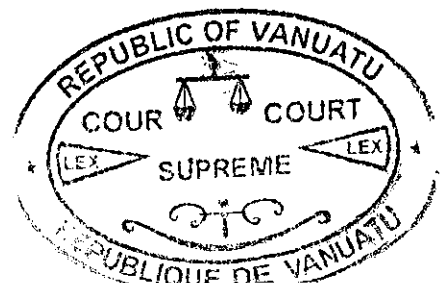
8. Therefore, I consider the following starting points appropriate in the circumstances:

- Count 1: Sexual Intercourse Without Consent -4 years imprisonment;
- Count 2, Count 4, Count 6 :Unlawful Sexual Intercourse – 3 years imprisonment;
- Count 3: Acts of Indecency with a Young Person - 12 months imprisonment;
- Count 5: Acts of Indecency without Consent- 6 months imprisonment.



Nonetheless, I must say that I do not intend to impose cumulative sentences in this case as I am mindful of the Court of Appeal's remarks in *Boesaleana v Public Prosecutor* [2011] VUCA 33 that, when a Court has to sentence a convicted person who faces many counts, it is often beneficial to decide what is the most serious offending and to impose a sentence on that which properly takes account of all aggravating factors and then impose concurrent sentences in respect of other offending as appropriate. The Court of Appeal went further to state that when the most serious offending is dealt with in that way, it is then not appropriate to impose additional cumulative sentences in respect of matters which have already been encompassed as aggravating matters.

9. As I consider the culpability of your offending, a number of aggravating factors stand out. You began offending at the age of 15 years and this continued until you were 18 years old; there is an age difference of 4 years between you and the complainant and you were in a position of trust over her as her elder brother. Needless to say that you breached that trust and your actions have seriously affected the complainant who now feels ashamed as can be gleaned from the Victim Impact Statement. She no longer feels safe at home. Your offending was to a large extent influenced by the pornographic materials you were watching over the period from 2013 – 2014 and 2016 which are the years that covered your offending.
10. In mitigation, the defence submits that you are a 19 year old teenager and a person of good character; that you are the only son to Mrs. Shirley Wilbur and Mr. Stewart Moli and that currently you are undertaking Preliminary Courses at the University of the South Pacific (USP Courses) at Tebakor in Port Vila. Further, that you want to achieve a better education and a bright future as are planning to become a teacher once you complete your studies. The defence also submits that you are a first-time offender and that you have entered a guilty plea at the earliest given opportunity and that this demonstrates how remorseful you are about your actions. It is further submitted by your counsel that you are a victim of a relationship whereby your parents got separated and you are growing up with your mother and a stepfather and that you find yourself in a situation where you lack a stable home and outside influences contributed to your offending.
11. I note from the PSR report that you have not performed any reconciliation ceremony to the victim yet but that you are willing to perform one should the victim accept. I also note from the report that attempts at reconciliation with the victim's family failed as the victim's relatives want the matter to be dealt with by the Courts and they will not accept any reconciliation from you until the Court process is completed.
12. In sentencing you I adopt a starting point of 48 months. You will be given full credit for your early guilty plea and your sentence will be reduced by one third which is 16 months. That will



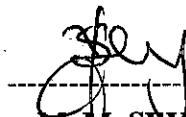
reduce your sentence to 32 months from which I also deduct a further 8 months for mitigating factors. On balance, your end sentence is 24 months imprisonment.

I note that you have spent 79 days in custody and this period is to be taken into consideration in computation of time.

13. I have been greatly assisted by the prosecution and defence submissions and also by the pre-sentence report.
14. You have 14 days to appeal against this sentence if you do not agree with it.

DATED at Port Vila, this 20th day of September, 2016.

BY THE COURT


M. M. SEY
Judge

