

**PUBLIC PROSECUTOR**

**vs.**

**VOY KALO**

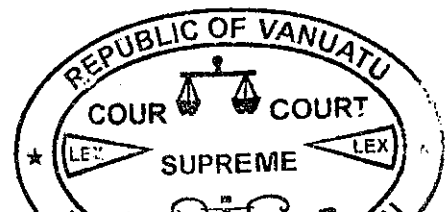
**Coram:** Chief Justice Lunabek  
**Counsel:** Mr. D. Boe for the Public Prosecutor  
Mr. E. Molbaleh for the Defendant  
**Date of Sentence:** 22<sup>nd</sup> June 2018

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**SENTENCE**

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1. Voy Kalo this is your sentence.
2. You were found guilty and convicted for one charge of Sexual Intercourse without consent, contrary to sections 90 (b) (ii) and 91 of Penal Code [CAP 135] after trial on 7 June 2018.
3. The brief facts of the offending in this case. The offence occurred on Saturday 28 October 2017. You agreed you had sexual intercourse with the complainant on 28 October 2017 in a bush area at Wailapa South Santo.
4. The complainant was diagnosed as mild retardation. She has a slow thinking. She is known to be epileptic since her childhood. But she understood the questions she was asked. She understood what you did to her on 28 October 2017.
5. The only issue in the case is of consent. On Saturday 28 October 2017, the complainant wanted to go to the garden but she said she was afraid to go alone. She told Henry Wells to accompany her. On their way to the garden, they arrived at the coconut plantation of Moise, Charlot's father. You run behind them, took a coconut bean (fruit) and threatened to throw it at Henry Wells if he did not return to his house and leave the complainant alone with you. Wells was afraid of your action and run away to Charlot's house nearby. You held the complainant's hand and asked her to have sexual intercourse with you. She refused to have sex with you. You forced her, you held her hands and pulled her in a bush area at Elsie's garden underneath the burao



tree. You removed her trousers (panties). She did not want. You pushed her on the ground and slept on top of her and had sexual intercourse with her.

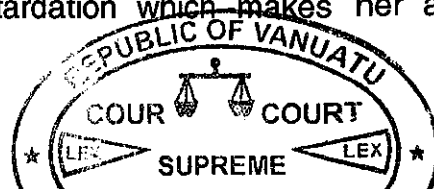
6. Immediately after the sex, the complainant told Elsie in the garden of what you did to her. She told Elsie, you hold her hands, pulled her in the bush area forced her for sex, you removed her trousers underneath the burao tree and had sex with her. She did not consent for sex with you on Saturday 28 October 2017. The other prosecution witnesses observed what you did to the complainant before the sexual intercourse took place. They also saw you after the sex. You were sweating. You told them to have sex with the complainant also. They refused and told you why you had sex with a disabled woman, you should find a normal woman to have sex with her instead.
7. In your sentencing, I note and consider the report provided by the Probation Office.
8. I read and consider the submissions and case authorities given by the prosecution. I also read and consider the submissions and case authorities provided by your defence counsel.
9. The prosecution refers to the judgment of the Court of Appeal in **Public Prosecutor v Scott [2002] VUCA 20** where the Court of Appeal set out the guideline in such cases referring with approval to the Supreme judgment in **Public Prosecutor v Ali August [2000] VUSC 73**.
10. The prosecution refers the Court to the sentencing principles where the Courts say:

*“... one of the main purposes of punishment ... is to protect the public from the commission of such crimes by making it clear to the offender and to other persons with similar impulses that, if they yield to them, they will meet with severe punishment.” (New Zealand Criminal Court of Appeal decision of R v Radich [1954] NZLR86 at 87).*

11. The prosecution also refers the Court to the case of **Morris Ben v Public Prosecutor [1993] VUCA 3** where the Court of Appeal considered the principle and the purposes of sentencing and in particular the principle of proportionality applying the High Court of Australia judgment **In Veen v The Queen (No.2) [1988] HCA 14; (1988) 164 CLR 465** to the effect that:

*“.....the principle requires that a sentence should neither exceed nor be less than the gravity of the crime having regard to the objective circumstances.”*

12. The prosecution submits that the appropriate starting point sentence in this case is one of 10 years imprisonment taking the situation of the complainant woman as a person who is more than weak and vulnerable because she was known as a person with special need in her community. She is a slow thinking person and described as a mild mental retardation which makes her a



disabled person. The prosecution submits finally that an end sentence of 9 years would be justified after proper account of mitigating factors are considered.

13. The defence counsel refers the Court to the cases of Public Prosecutor –v- Ali August [2000] VUSC 73 and Public Prosecutor –v- Andy [2011] VUCA and submits that the starting point sentence of 5 years should be appropriate and an end sentence between 3 and half years to 4 years imprisonment.

## The Law

### **SEXUAL INTERCOURSE DEFINED**

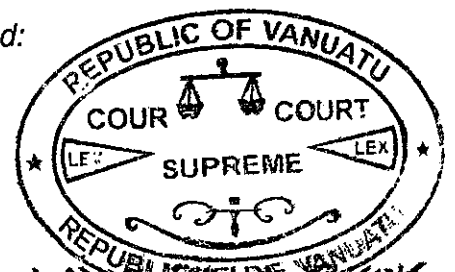
**89A.** For the purposes of this part **sexual intercourse** means any of the following activities, between any male upon a female, any male upon a male, any female upon a female or any female upon a male:

- (a) the penetration, to any extent, of the vagina or anus of a person by any part of the body of another person, except if that penetration is carried out for a proper medical purpose or is otherwise authorized by law; or
- (b) the penetration, to any extent, of the vagina or anus of a person by an object, being penetration carried out by another person, except if that penetration is carried out for a proper medical purpose or is otherwise authorized by law; or
- (c) the introduction of any part of the penis of a person into the mouth of another person; or
- (d) the licking, sucking or kissing, to any extent, of the vulva, vagina, penis or anus of a person; or
- (e) the continuation of sexual intercourse as defined in paragraph (a), (b), (c) or (d); or
- (f) the causing, or permitting, of a person to perform any of the activities defined in paragraph (a), (b), (c) or (d) upon the body of another person.

### **SEXUAL INTERCOURSE WITHOUT CONSENT**

**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:



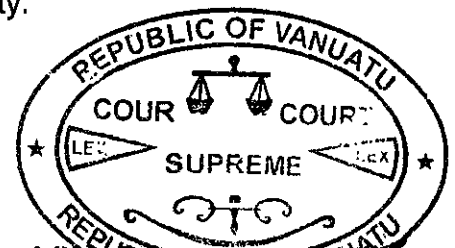
- (i) *by force; or*
- (ii) *by means of threats of intimidation of any kind; or*
- (iii) *by fear of bodily harm; or*
- (iv) *by means of false representations as to the nature of the act; or*
- (v) *in the case of a married person, by impersonating that person's husband or wife; or*
- (vi) *by the 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.*

**PUNISHMENT OF SEXUAL INTERCOURSE WITHOUT CONSENT**

**91.** *No person shall commit sexual intercourse without consent.*

*Penalty: Imprisonment for life.*

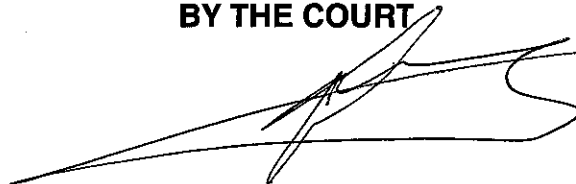
- 14. The nature and the circumstances of the offending are serious and they require an immediate custodial sentence.
- 15. In this case not only the offence is committed but the commission of such an offence is aggravated by the following factors:
  - (i) The victim is vulnerable by virtue of her mental health;
  - (ii) The force is used over and above the to commit this offence;
  - (iii) The threats were used in course before sexual intercourse;
  - (iv) The effect upon such a victim of mental health is of special seriousness.
- 16. I accept the prosecution submissions that a starting point sentence of 10 years imprisonment is appropriate.
- 17. In mitigation, Voy Kalo – you are 24 years of age. You are a first time offender. You do not have previous conviction record. You have good relationship with your family and your community in the village of Parisa in South Santo. You are the eldest of the family. You have skills in gardening and building local houses. The chief of your village appreciates your contribution to the community and the work in the community.



18. I give you an allowance reduction of 12 months to take into account your mitigating factors. Your sentence is now reduced to 9 years imprisonment.
19. You have spent some time in custody before you are sentenced today. You were ordered to serve your imprisonment sentence on 8 June 2018 after the verdict was given. This time will be deducted or calculated in your favour.
20. Your lawyer says you spent time in custody before your trial from 7 November 2017 and released on bail on 14 December 2017. This means a period of 1 month and 22 days in custody before sentence. The total time you have spent in custody since 7 November 2017 to 21 June 2018 will be taken into account in your sentence.
21. You are ordered to serve a term of 9 years imprisonment which is deemed to be effective from 17 April 2018 to take account of the time you have already spent.
22. You are sentenced to 9 years imprisonment effective from 17 April 2018.
23. You have 14 days to appeal this sentence if you are unsatisfied with it.

**DATED at Luganville this 22<sup>nd</sup> day of June, 2018**

**BY THE COURT**



.....  
**Vincent Lunabek**  
**Chief Justice**

