

BETWEEN: Public Prosecutor

AND: Nase lau
Defendant

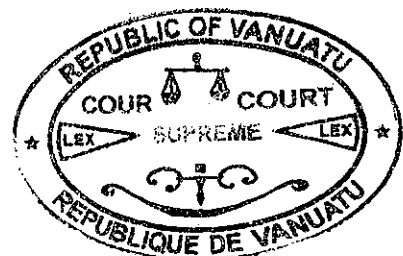
Before: Justice G.A. Andrée Wiltens
Hearing: 13 July 2018
Counsel: Ms L. Lunabek for the Public Prosecutor
Ms K. Karu for the Defendant

Sentence

A. Introduction

1. Mr lau faced a total of 8 charges:

- 3 counts of sexual intercourse without consent, laid contrary to section 90(b) of the Penal Code Act [Cap 135] - the maximum sentence for this offence is life imprisonment;
- 4 counts of domestic violence, laid contrary has pleaded guilty to unlawful sexual intercourse, contrary to section 97(2) of the Penal Code [Cap 135]. The maximum sentence for this offence is a term of 5 years imprisonment; and
- 1 count of interfering with a witness, laid contrary to section 82(c) of the Penal Code Act [Cap 135]; the maximum sentence for this offence is a term of 5 years imprisonment.

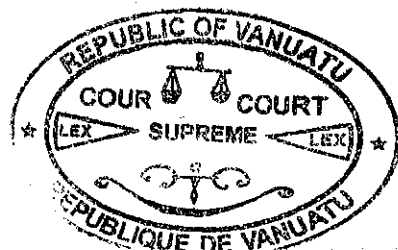


2. Mr lau pleaded guilty to 3 of the domestic violence charges. He defended all the other charges, but was convicted of all but the final domestic violence charge.

B. The Facts

(i) Relating to sexual intercourse without consent

3. Mr lau was married to the complainant Naome Malesu in June 2003. They eventually split in 2016, after 13 years of marriage.
4. Ms Malesu recalled an incident on a date in 2007 she cannot any longer be sure of when she and her husband were at Tapa Bay. On that particular occasion she was sleeping when her husband came to her, and started to touch her in such a way that she understood indicated that he wanted to have sex. He tried to touch her breasts and her private parts. She told me that she refused - she did not want to have sex.
5. Ms Malesu related that the next thing to occur was her husband hitting her and instructing her to get some blue-handled scissors, which he then used to cut off her clothing. She told me she was afraid; but she had sexual intercourse with her husband while crying. Their baby was on the bed at the time.
6. The second incident occurred in 2012, again on a date Ms Malesu cannot be sure of. She was asleep on the bed at Tapa Bay, when her husband tried to hit her with a hammer. They had been arguing earlier in the day; but at night time her husband went to her wanting to have sexual intercourse. Ms Malesu refused, and he wanted to hit her with a hammer which he obtained from under their bed.
7. Mr lau did not actually hit Ms Malesu with the hammer – he just threatened her with it. Ms Malesu continued to lie on the bed, and he removed her clothes and had sex with her.
8. A third event event occurred on 14 July 2017. That night after dinner they went to bed, telling each other stories. Ms Malesu fell asleep. Then she felt her husband touching her and she knew he wanted sex. Ms Malesu tried to keep his hands away, telling him she was already asleep. He accused of her lying, just pretending. Then he hit her on the forehead and demanded they go outside. Ms Malesu was afraid; she knew that if she refused he would hit her. When they were outside he picked up a stone and tried to hit her with it.
9. Ms Malesu was sitting on the pavement; her husband was standing over her holding the stone in one hand. Ms Malesu was afraid. He said he could kill her right there. He was angry that every time he wanted to have sex he had to force her to agree. Ms Malesu was crying and she apologised. Later when they went home, her husband wanted sex and Ms Malesu allowed him to as she was still afraid.



(ii) Relating to domestic violence

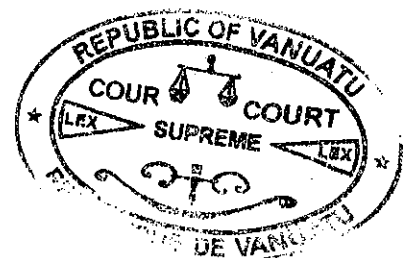
10. In December 2016 Ms Malesu ran away from home. She then received a phone call from Mr lau to the effect that if she did not return home he would kill dead both their daughters, Selina and Anna. Over the phone she heard re-inforce that threat by instructing Selina to get a knife from the kitchen. Me Malesu agreed to return home – and when she did Mr lau assaulted her with a sharp iron bar and a small black-handled knife.
11. In August 2017, after sharing a bottle of wine, Mr lau persuaded Ms Malesu to go with him to the Anchor Inn. There Ms Malesu had a chance meeting with a male from her home island of Nguna – they shook hands and said hi to each other. Mr lau wanted to know who the other person was, and when Ms Malesu told him, he responded by first assaulting the amle and then assaulting Ms Malesu, causing her to fall to the ground and split open her head. She became unconscious. Mr lau tried to get Ms Malesu to accept that it was the male who had struck her, and when that did not succeed, he struck her to the jaw. His nephews had to intervene. Ms Malesu declined to go home with Mr lau, and in retaliation he burnt some of her clothes.
12. Mr lau later apologised and persuaded Ms Malesu to return home. On arrival he instructed her, while holding an iron bar, to remove all her clothes. He told her to take a match, which she did – but she then seized an opportunity to grab a towel and run. He chased after her, still holding the iron bar. Fortunately a police officer who lived nearby stopped Mr lau.

(iii) Relating to interfering with a witness

13. This charge related to while Mr lau was remanded in custody. There had been some contact over the period prior to trial – mostly talking over the telephone. The first time he called was in December 2017, to speak to their daughters. Then, between December 2017 and May 2018, he would ring every Friday that he could manage. During those calls Mr lau told Ms Malesu what to say when she went to Court – he instructed her to tell the Court that her statements to the police were not true.

C. Submissions

14. Ms Lunabek referred the Court to the well-known and oft quoted precedent authorities dealing with the principles and purposes of sentencing as follows:
 - *PP v Kalosil* [2015] VUSC 149; and
 - *R v Engert* (1995) 84 Crim R 67.
15. The prosecution pointed to other authorities as to the appropriate level of sentencing for sexual intercourse without consent:
 - *PP v Scott* [2002] VUSC 29,



- *PP v August* [2000] VUSC 73, and
- *PP v Tabi* [2015] VUSC 65.

16. The prosecution pointed to other authorities as to the appropriate level of sentencing for domestic violence:

- *PP v Pita* [2017] VUSC 177, and
- *PP v Malliwan* [2015] VUSC 29.

17. Ms Karu further referred the Court to:

- *PP v Vuti* [2017] VUSC 75, and
- *PP v Teol* [2016] VUSC 161.

D. Starting Point

18. The prosecution pointed to the following aggravating factors:

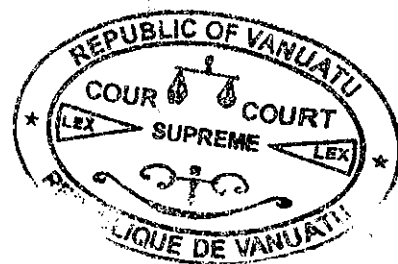
- The breach of trust
- The offending occurring at home in a domestic context, and
- The lengthy period over which the offending occurred.

19. The prosecution submitted that the appropriate starting point in terms of *PP v Andy* [2011] VUCA 14 was 5 years imprisonment, with an uplift for the domestic violence charges of between 2 – 3 years imprisonment. Ms Karu accepted the start point for the sexual intercourse without consent charges of 5 years imprisonment. She submitted that an appropriate uplift for the aggravating factors was one further year of imprisonment. However, she sought discounts of one year of imprisonment for both the personal mitigating factors and the lack of previous convictions. She then submitted that a further year of imprisonment was warranted in respect of the domestic violence charges after taking the guilty pleas into account.

E. Personal Factors

20. In terms of step 2 of *PP v Andy* Ms Karu made the following points:

- Mr lau is 42 years of age, with a family
- Mr lau has no previous convictions
- Mr lau is said to remorseful



- Mr lau performed a custom reconciliation with Ms Malesu.

F. Pleas

21. Mr lau pleaded guilty to the 3 charges of domestic violence, but not at the first available opportunity. He pleaded to one count on the first morning of trial; the second was later in the morning of the same day; and the third was on the second day of trial. He took the remaining charges to trial – as he was perfectly entitled to do. However, that disentitles him to the maximum of one-third of the end sentence, which discount is set out in *PP v Andy*. The few pleas, the lateness of them, and the fact of convictions on the balance of the charges for sentencing, results in only a limited discount being available.

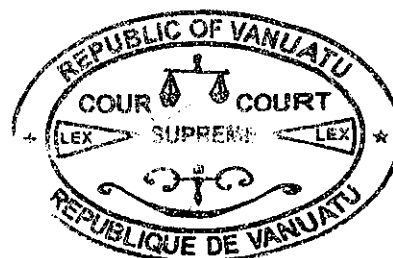
G. Sentence

22. The main purposes and sentencing principles in this type of offending are to:

- hold the offender accountable for his conduct and the harm done
- promote a sense of responsibility for the harm done
- provide for reparation
- denounce the conduct
- deter the offender and the public at large from this type of behaviour
- protect the community
- assist in rehabilitation and re-integration
- take into account the gravity of the offending
- take into account the seriousness of the offending in comparison with other offending, and
- consider consistency of sentencing and parity of sentences.

23. The Courts have made plain that for a defended charge of rape which results in a conviction, the usual starting point should be around 5 years imprisonment – see *PP v Scott*. Aggravating factors need to be added to that – in this case the use of violence and threats, including weapons, plus the fact that the offending occurred 3 times over a long period in a domestic setting and with a breach of trust involved. Those factors require an uplift of a further 2 years imprisonment.

24. The domestic violence charges are a different type of offence, and while not ignoring totality of sentence, they warrant a further uplift. Taking all 3 charges into account, on a global and concurrent basis those charges warrant an uplift of a further year of imprisonment.



25. Mr lau also has to be sentenced for interfering with a witness – trying to persuade Ms Malesu to not testify against him. This is again a different type of offending, and as this strikes at the heart of the justice system, this warrants a further uplift of his starting point, by 6 months imprisonment.

26. I am prepared to discount the start point due to the following factors:

- Lack of previous convictions – 10 months,
- Time spent in custody – 4 months, and
- Custom reconciliation – although modest, I accept that by undertaking this Mr lau acknowledged to some extent his wrong-doing – 4 months.

27. I do not accept what the PSR report-writer has recorded in relation to “deep regret”. Were there any such feelings, they would have been manifested in not requiring his former wife to have to testify.

28. The end sentence is therefore set at 7 years imprisonment. I cannot impose that on all the charges, due to the maximum sentences available. Accordingly, I impose that sentence on the 3 charges of sexual intercourse and impose 12 month sentences on all the other charges; all sentences are to be served concurrently.

H. Suspension

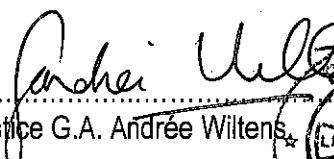
29. Section 57(1) of the Penal Code requires the Court to consider whether the end sentence should be imposed immediately or suspended. The Court has jurisdiction to suspend the sentence if immediate incarceration is not appropriate:

- In view of the circumstances,
- In particular, the nature of the crime, and
- The character of the offender.

30. This offending is simply too serious for suspension to be considered: *PP v Gideon* [2002] VUCA 7.

31. Mr lau has 14 days to appeal this sentence if he disagrees with it.

**Dated at Port Vila this 13th day of July 2018
BY THE COURT**


Justice G.A. Andrée Wiltens

