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

Criminal
Case No. 18/2710 SC/CRML

PUBLIC PROSECUTOR
v
ENOCK LORIN

Date of Sentence: *12 October 2018*
Before: *Justice D. V. Fatiaki*
Attendance: *Mr. K. Massing for the State*
Mr. J. Garae for the Defendant

SENTENCE

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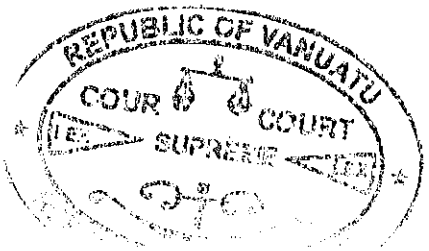
1. On 8 October 2018 the defendant was arraigned on an Information that charged him with two (2) counts of Unlawful Sexual Intercourse contrary to Section 97(1) with the same complainant on two separate days in January and March 2018 respectively during which time she was under the age of 13 years by a couple of months and by a few days.

2. The defendant pleaded not guilty to Count 1 and guilty to Count 2. He admitted the prosecution's brief of facts on Count 2 which told of how the defendant met the complainant at her uncle's house. From there, he held her hand and led her to an old unoccupied house nearby. There the defendant lay the complainant on a bed, removed her clothing as well as his and had sexual intercourse with her until he ejaculated on her naked abdomen. The next morning the complainant without any prompting, told her uncle about what the defendant had done to her the previous night and he advised her to report the matter to the police as she was just a young girl ("*... yu wan smol gel nomo*").

3. A medical report on the complainant dated 1 March 2018 (**ie.** 5 weeks after the alleged first incident and the day before the admitted second incident) noted: "*... positive physical evidence of sexual intercourse in the past*" (whatever that means). Unfortunately, no actual findings or physical "*evidence*" is recorded or identified in the report, nor what parts (if any) of the complainant's body or genitalia was examined. No mention is made of the state of the complainant's hymen or what lacerations or injuries (if any) were found on it or around the vaginal area. No mention is made of the relative size, tightness, or openness of the complainant's vagina **eg.** whether it admits 1 or 2 fingers with ease.



4. These important omissions are magnified given that the complainant claimed that she was a virgin and had apparently told the examining doctor that her assailant (the defendant) on his first attempt to have sexual intercourse with her "*... had difficulty penetrating due to her small vagina*" and furthermore, the examining doctor had opined in his report, that the complainant's "*... medical examination* (was) *consistent with forced sexual abuse*" (whatever that means).

5. Likewise, the second medical report requested by the police and dated 20th June 2018 (**ie.** 3 months after the second incident) is equally unhelpful in that it merely records the complainant's genital examination had "*no laceration*" and "*normal findings*" (whatever that means in the case of a 13 year old child who had allegedly just had her second sexual experience). Yet, such a finding of normality according to the examiner: "*... doesn't rule out sexual and physical assault*".

6. Under caution the defendant admitted in his police statement about the second occasion, being seduced by the complainant and succumbing to the temptation and having sexual intercourse with her ("*... kam from mi mekem se imekem tinktink blong mi kranke ikasem mi makem se mi kat sex wetem*"). However the defendant whilst admitting sexual intercourse with the complainant denies any knowledge of her age ("*... mi no aware nomo se age blong hem ismall be taem mi fuckem hem no gat eni blood kam out mo hemi relax nomo*").

7. Although the court was initially hesitant to accept the defendant's guilty plea, defence counsel was firm that his instructions were clear in that the defendant admitting having sexual intercourse with the complainant and that was what he was pleading guilty to on Count 2.

8. The court also considered the provision of subsection 97(3) which clearly states:

   "*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*".

   Plainly, even if the defendant was seduced by the complainant and therefore, presumably, sexual intercourse was consensual, that is "*no defence*" to the charge. Likewise the defendant's claimed unawareness or belief regarding the complainant's age is no defence to affirmative proof that the complainant is "*... under the age of 13 years*". In the court's view the offences under Section 97 closely mirrors an offence of strict liability [***see:*** Section 6(5) read with Sections 11(2) and (3) of the Penal Code].

9. After much discussion with both counsels, the court was satisfied and convicted the defendant on his guilty plea to the offence of Unlawful Sexual Intercourse with a child under 13 years of age contrary to Section 97(1) of the Penal Code.

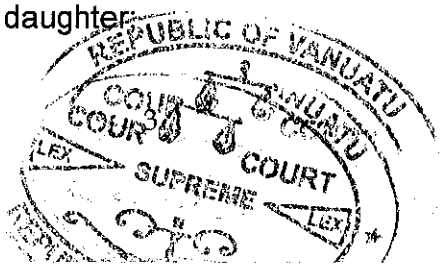
According to her birth certificate the complainant at the time, was 2 days shy of her 13th birthday.

10. The defendant was further remanded in custody and a pre-sentence report was ordered together with sentencing submissions. The trial on Count 1 was adjourned to allow prosecuting counsel to consider the defendant's offer to plead instead, to an offence of Attempted Unlawful Sexual Intercourse.

11. I have received and read the pre-sentence report and counsels' sentencing submissions which I found most helpful.

12. From the defendant's pre-sentence report I extract the following personal details and mitigating factors:

- The defendant originates from Mere Lava Island in the Torba Province;
- The defendant is now resident at Lembaoatu Village on Gaua Island. He is now 22 years of age living in a "*defacto*" relationship with one child;
- He attended school up to year 3 only and maintains a living by doing subsistence gardening;
- He maintains good relations with his family, chiefs and the community at Lemboatu Village and is considered a helpful member who assisted a lot with church activities;
- He is a first offender and cooperated fully with police investigations;
- Although the defendant maintains he was unaware that what he did was an offence he has never denied the act and pleaded guilty at the earliest opportunity to Count 2. As for Count 1 the defendant has offered a guilty plea to a different inchoate offence;
- The defendant has been in custody since 4 September 2018 when he was first apprehended and escorted to Santo police station;
- On 7 September 2018 the defendant tested positive to **Hepatitis "B"** whilst a remandee at the Luganville Correctional Centre;
- The defendant told the probation officer he now realises his mistake and regrets his actions. He professes to have learnt his lesson while being on remand;
- The defendant's chief has attempted to organise a custom reconciliation ceremony between the defendant and the complainant's family but the complainant's father has rejected all attempts and insists the defendant must stop seeing his daughter.



- Unfortunately owing to lack of time and difficulty with communication, the complainant could not be contacted and no victim impact report could be prepared.

13. Be that as it may, defence counsel submits that any custodial sentence may be wholly suspended as the court consider appropriate.

14. However prosecuting counsel in his sentencing submissions, highlights the aggravating factors in the case including, the age difference of 8 years between the defendant and the complainant; the unprotected nature of the sexual intercourse; and the psychological impact on the victim, and counsel submits that "*an end sentence of between 4 – 5 years imprisonment is appropriate in this case*".

15. In this case the defendant was the older more sexually mature person and the complainant was a vulnerable immature child aged less than 13 years. Even if the complainant was acting foolishly as claimed, the defendant was the adult and should have exercised more self-control and not taken advantage of the complainant.

16. Having said that, I accept that the defendant succumbed in a moment of carnal weakness and no force or threats were used on the complainant either before, during, or after intercourse as so often happens in cases of this type. Although technically an offence, the defendant's offending is not the worst possible case of its type and is not as serious as other cases that have come before the Court.

17. In determining the starting point in this case I have borne in mind the increased maximum penalty that Parliament has enacted for an offence of Unlawful Sexual Intercourse namely, life imprisonment ***see:*** Section 5 of the Penal Code (Amendment) Act No. 15 of 2016. I have also considered the leading Court of Appeal cases of Public Prosecutor v Gideon [2002] VUCA 7 and Public Prosecutor v Kal Andy [2011] VUCA 14 and the Supreme Court cases of Public Prosecutor v Daniel Epsi [2011] VUSC 287; Public Prosecutor v Roy [2011] VUSC 99; Public Prosecutor v Mahit [2012] VUSC 112; and Public Prosecutor v Sigi [2016] VUSC 80.

18. I am satisfied that a starting point of 36 months imprisonment is appropriate in this case. I deduct 9 months for mitigating factors including the defendant's past unblemished record and co-operation with the police enquiries leaving a mid-stage sentence of (36 – 9) = 27 months imprisonment. I deduct a further 9 months in recognition of the defendant's early guilty plea leaving an end sentence of (27 – 9) = 18 months imprisonment.

19. I turn next to consider whether this is an exceptional case where a suspended sentence of imprisonment would be appropriate. In view of the circumstances

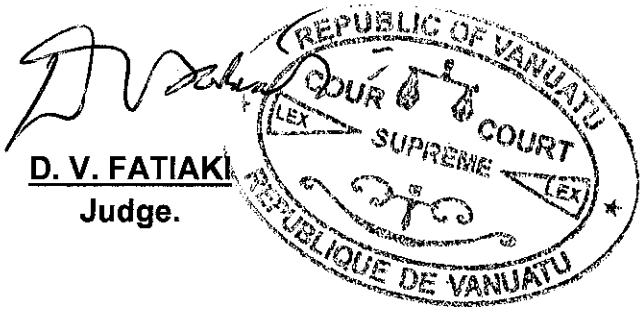
where the complainant was 2 days shy of her 13th birthday and the spontaneous nature of the crime where the defendant succumbed to the complainant's seductive behaviour and no violence or threats were used and finally, having regard to the hitherto unblemished character of the defendant and the almost 2 months that he has already spent on remand (which is the equivalent of a 4 months prison sentence) coupled with the fact that the defendant contracted Hepatitis "B" whilst in remand and acknowledging realisation and regret expressed by him to the probation officer, I consider that the defendant's end sentence should be wholly suspended for a period of 2 years.

20. What this sentence means is that the defendant will not be returned to prison today. However for the next 2 years he will have a sentence of 18 months imprisonment hanging over him and liable to be activated at any time should he re-offend and be convicted of any other offence within the next 2 years. If the defendant stays out of trouble however for the next 2 years then this sentence of 18 months imprisonment will be deemed to have expired and he will not have to serve it. Whether this sentence is activated or expires in the next 2 years is entirely in the defendant's hands, but, if he does commit another offence then he cannot expect the same leniency and mercy that this court has extended to him on this occasion.

21. The defendant is advised that he has a right to appeal this sentence within 14 days if he does not agree with it.

DATED at Luganville, Santo, this 12th day of October, 2018.

BY THE COURT



D. V. FATIAKI
Judge.