

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

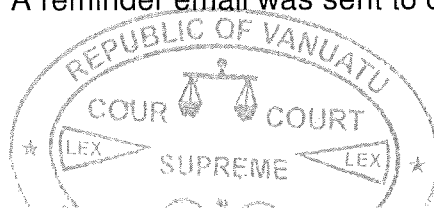
Criminal
Case No. 18/2827 SC/CRML

**PUBLIC PROSECUTOR
v.
BEN TOARA**

Coram: Justice D. V. Fatiaki
Counsel: Ms. B. Ngwele for the State
Ms L. Bakokoto for the Defendant
Date of Sentence: 28 February 2019

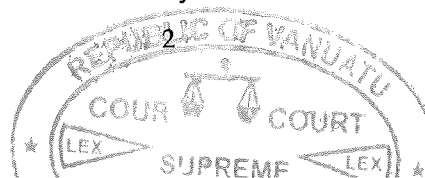
SENTENCE

1. On 12 December 2018 the defendant was arraigned and pleaded guilty ("Yes *hemi tru*") to an offence of Sexual Intercourse Without Consent. After admitting the prosecution's brief facts the defendant was convicted on his plea. Thereafter the case was adjourned for sentencing on 31 January 2019 and a pre-sentence report was ordered to be filed with submissions from counsels by 21 January 2019. The report and submissions were filed on 29 January 2019.
2. On 30 January 2019 the day before sentence was to be passed, the defendant's former solicitors filed a Notice of Ceasing to Act on being advised by the defendant's new solicitors Kapapa Lawyers & Consultancies that they had received instructions to act for the defendant who intended "... *to be re-arraign on his plea*".
3. On 31 January 2019 the court acknowledged new counsel's letter and sought the filing of a sworn statement from the defendant explaining his reason(s) for wanting to change his plea. Counsel was also directed to file a Memorandum briefly outlining the court's power to set aside the conviction already entered on the defendant's guilty plea. A reminder email was sent to defence counsel on 19



February 2019 but still there has been no response to the court's directions up till delivery of this sentence.

4. The brief facts of the case which was admitted by the defendant tells of how the complainant who was suffering from chronic stomach pains, was taken to the defendant to help cure her using traditional custom medicine. On the first day of treatment 29 September 2018, the defendant wrapped the complainant's body with custom leaf as she lay naked on a bed in his house.
5. The next day 30 September 2018, in the morning the defendant rubbed the complainant's naked body with custom leaf medicine and gave her custom medicine to drink causing her to vomit. Later that day the complainant at the defendant's bidding returned to his house with a bottle of oil. She again stripped naked and lay on the defendant's bed facing up. This time, as the defendant was rubbing her naked body with custom medicine and oil, the complainant heard him say that he would rub his penis with custom leaf and oil and that she should not be afraid as that was how the medicine works. After oiling himself the defendant parted the complainant's legs, pushed his penis into her vagina and had full penile intercourse with her as she lay helpless on his bed.
6. When he had finished, the defendant told the complainant that what had happened between them was a "*private matter*" and he had had sexual intercourse with her to prevent her from getting pregnant and to protect her from being impregnated by other men. He also told the complainant not to tell her parents about what he had done to her. The complainant returned home distressed and immediately reported the matter to her mother.
7. A report was laid with the police and the defendant was arrested and made a caution statement in which he frankly admitted having penile intercourse with the complainant. The defendant also apologised for the wrong he had done to the complainant. ("*Mi sorry ating mi rong blong mekem olsem be hemia las wan bai mi nomo mekem custom medicine*").
8. Ben Toara what you did to your niece is disgraceful. You groomed her over two treatment sessions and you succeeded in lulling her into a false sense of security so that she willingly stripped naked on your bed and allowed you to rub her naked



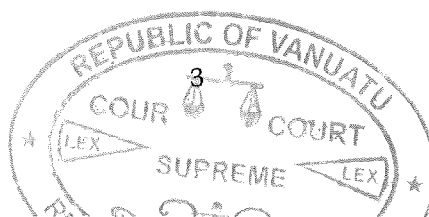
body including her vagina with your bare hands while using custom leaf medicine and oil. The offence occurred in the afternoon of the second day of treatment after you had earlier treated the complainant in the morning with custom medicine. Why was it necessary to treat her again in the afternoon? The offence was clearly planned in that you personally went and found the complainant after her treatment in the morning and you told her to bring some oil with her when she came in the afternoon for more treatment. The complainant trusted you and naively did as she was told.

9. Your offending is aggravated by the following features:

- You knowingly “groomed” the complainant over 2 treatment sessions;
- You are the complainant's uncle by marriage and someone that she completely trusted. You selfishly abused that trust to satisfy your lust;
- You had unprotected intercourse and exposed the complainant to the risk of contracting a STD and an unwanted pregnancy;
- You are 30+ years older than the complainant and you have a wife and 3 dependent children.

10. In Public Prosecutor v Scott [2002] VUCA 29 the Court of Appeal endorsed a starting point of five years in a contested rape case without aggravating or mitigating features. However, where the offender is in a position of responsibility towards the victim the Court said: “*the starting point should be eight years*”.


11. I have also considered the sentencing in the case of Public Prosecutor v Hosea [2012] VUSC 266. That was a case involving a so-called custom healer who had sexual intercourse with 2 victims who had sought his assistance with their personal problems with a boyfriend in one instance and infertility in the other. I accept Hosea's case is more serious and an end sentence of 6 years and 9 months imprisonment was imposed. Also in the not dissimilar case of Public Prosecutor v Raul Pakoa [2005] VUSC 59, Bulu J imposed a consecutive term of 8 years 2 months for 2 incidents of forced sexual intercourse by the defendant under the pretext of treating his mother-in-law and sister-in-law with traditional medicine. This case too is more serious and I note a sentence of 4 years and 1 month was imposed in respect of each offence.



12. In the present case having regard to the aggravating features earlier identified, I adopt a starting point of 8 years (96 months) imprisonment. For the defendant's guilty plea I give him the full one third discount giving a sentence of $(96 - 32) = 64$ months before taking into account mitigating circumstances.
13. The defendant's mitigating factors includes his hitherto unblemished past; his cooperation and assistance with police investigations; and the time the defendant was remanded in custody. For these personal mitigating factors I deduct a further 12 months giving an end sentence of: $(64 - 12) = 52$ months imprisonment **ie** 4 years and 4 months with effect from 12 December 2018.
14. Finally Ben Toara you are informed of your right to appeal this sentence within 14 days if you do not agree with it.

DATED at Port Vila, this 28th day of February, 2019.

BY THE COURT


D. V. FATIAKI
Judge.

