

Public Prosecutor

v

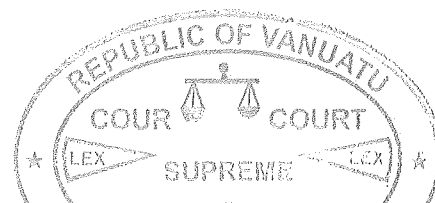
Tom Nako

Before: Chief Justice Vincent Lunabek

**Counsel: Mr. Philip Toaliu for Public Prosecutor
Mrs. Kylie B. Karu for the Defendant**

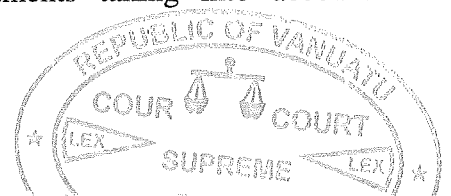
SENTENCE

1. This is the sentence of the above Defendant Tom Nako. Mr. Nako, you are charged initially with the following offences:
 - 1) Act of indecency with a young person, contrary to section 98A of Penal Code (Count 1);
 - 2) Sexual intercourse without consent, contrary to sections 90 and 91 of Penal Code;
 - 3) Theft, contrary to section 122 (a) of Penal Code.
2. On 14 May 2019, you entered a not guilty plea in relation to the offence of Acts of indecency in count 1. The prosecution entered a Nolli prosequi in accordance with section 29 of the Criminal Procedure Code Act; you then entered guilty pleas in respect to sexual intercourse without consent and theft respectively. You are today sentenced for the offences of sexual intercourse without consent and theft (counts 2 and 3) contained in the information (as amended)
3. The maximum penalties for sexual intercourse without consent are life imprisonment and 12 years imprisonment for the offence of theft. They are serious offences as reflected by the respective maximum penalties imposed by law.
4. The brief facts are that: the complainant (R.A) was 22 years old when the offence occurred and she is originated from Paama Island. Tom Nako, you are from Middle Bush, Tanna
5. On May 25, 2015 you met the complainant at Number 2 area, Port-Vila and you told her to follow you and that you will pray for her as she was sick.
6. You lured the complainant to a secluded area behind Freshwater 6 area after lying to her that you are a prayer warrior and that you could pray for the complainant for healing.



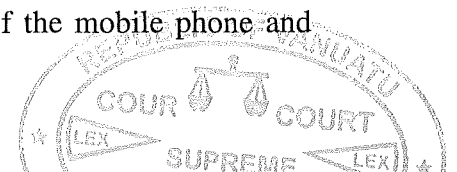
7. After you had lured the complainant to a secluded area, you promised that you would pray for her and assured her healing. You then told her to give you all her money and her mobile phone. She stated in her statement that she believed what you were saying so she gave you her mobile phone and her money – 1,200vt.
8. You then asked her whether she was born in to this world with clothes or naked and whether she will have clothes or not when she departs earth (death). She replied “naked”.
9. You then told her that you would pray and while you pray, she should remove her clothes. She refused but you told her that if she wanted God to heal her, she must comply with what you ask of her otherwise she would die as her life hangs by a thread.
10. As you prayed, she removed her underwear. She kept her shirt and skirt. You then told her to lie on a rock and you got on top of her and had sexual intercourse with her by inserting your penis into her vagina. She did not want to have sex with you but she was afraid she would die as you said her life was hanging by a thread.
11. After you ejaculated, you told her to take the lead and walk towards the road. She walked a few meters and when she turned around, you had disappeared with her phone and money.
12. When she got home that day, she told her brother who also gave a statement about what happened.
13. Because of this fear, she removed her underwear and let you have sex with her.
14. You admitted to having sex with the complainant and lying to her. You also agreed that you stole her mobile phone and her money – 1,200vatu.
15. The prosecution in their submissions refer to the approach of sentencing in Public Prosecutor –v- Andy [2011] VUCA 14 which the Court of Appeal in RL –v- Public Prosecutor (2018) VUCA26 v (22) re-emphasised it again when the court stated:

“Justice Chetwynd approached sentencing in the manner laid down by this Court in PP v Andy [2011] VUCCA 14. We endorse that approach and say again that step one should be an assessment of the criminal culpability involved; step two should then make adjustments taking into account



aggravating and mitigation factors personal to the defendant and finally step three should look at any available discounts for the timing of plea(s) if any.”

16. The Prosecution submitted in some details on the factors to be considered in relation assessing your criminal culpability in the offending: the maximum penalty; the nature of offence; the factors of aggravation. The Prosecution submitted that the starting point sentence should be of 5 years imprisonment on the basis of Public Prosecutor -v- Scott [2002] VUCCA 29 and an uplift of 2 years as in Public Prosecutor -v- Nalau [2014] VUSC 206. A starting point sentence of 7 years should be appropriate and after appropriate deductions made for mitigating factors, the Court should impose an end sentence between 4-5 years imprisonment without suspension.
17. Your lawyer in his submissions refers the court also to the approach of sentencing in PP -v- Andy [2011] VUCA.14. In relation to the starting point sentence, she refers to the case of Public Prosecutor -v- Scott [2002] VUCA 29 and submitted that 6 years imprisonment will be an appropriate starting point sentence in the circumstance of this case. She submitted that the Court should consider mitigation factors, including your personal circumstances, the delay and your early guilty pleas. Your lawyer submitted the Court to impose an end sentence of 2 years and 6 months imprisonment.
18. In this case, the following aggravating factors exist:
 - You took advantage of a vulnerable woman who was sick and needed help. She trusted you to be a man of prayer to heal her from her sickness.
 - You lured her to a secluded area away from public eyes where the offence took place;
 - The nature and degree of the deception that you told the complainant. You told her that you were someone who prayers for the sick.
 - You fled with her mobile phone and her money of VT 1,200.
 - The sexual intercourse was unprotected and the complainant was vulnerable to sexually transmitted infections and pregnancy.
 - There was a degree of planning. This is reflected by the distance where you met the complainant and took her to the place of the offence at freshwater 6 (from Nambatu to Freshwater 6). I assess your criminal culpability bearing in mind the maximum penalty for the offence of sexual intercourse without consent which is life imprisonment; the serious nature of your offending coupled with the above aggravating factors. I fix 7 years imprisonment is the starting head sentence. I assess 6 months imprisonment for the theft of the mobile phone and



money cash of VT 1,200 to be served consecutively. Your head sentence is further increased to 7 years and 6 months imprisonment.

19. You are not a first time offender. You have previous convictions on similar type of offence according to the Correctional Services Department records. Your head sentence is further increased by 6 months to reflect that factor. Your total head sentence is 8 years imprisonment as your starting point sentence.
20. In mitigation, I consider the following personal circumstances – you are married with 3 children below the age of 10. You separated with your wife and the children remain with you and your family- you attended only pre-school. You cannot read and write but you have skills in agriculture and farming. Your desire is to work hard for your children to have good education in the future. You are remorseful. I give you an allowance reduction of 12 months for these mitigating factors. I give you a further credit allowance of 6 months to reflect the delay to prosecute your case from 2015 to August 2019 when you are sentenced today. Your sentence is reduced to 76 months i.e. 6 years and 4 months. You are entitled to one third (1/3) reduction for your earlier guilty pleas. Your sentence is therefore reduced to 51 months i.e. 4 years and 5 months imprisonment.
21. I consider whether it is appropriate to suspend your imprisonment sentence of 4 years and 5 months. I decline to suspend this sentence as it will be contrary to the purpose and deterring effect of sentencing in such cases on you as an offender and on others who may behave like you did in this case.
22. You are orders to serve the sentence of 4 years and 5 months imprisonment with effect from 22 January 2019 which is the date you were arrested and remanded to custody to take into account of the time you have already sent in custody before you are sentenced today.
23. You have 14 days to appeal this sentence if you are unsatisfied with it.

Dated at Port Vila this, 2nd day August 2019

BY THE COURT


.....
Chief Justice Vincent Lunabek

