

IN THE SUPREME COURT
OF THE REPUBLIC OF VANUATU

(Criminal Jurisdiction)

Criminal Case No.53 of 2005

PUBLIC PROSECUTOR

-v-

TIOBAN ROBERT
NOEL ROBERT

Coram: Justice Treston

Mr. Kalmet for Public Prosecutor

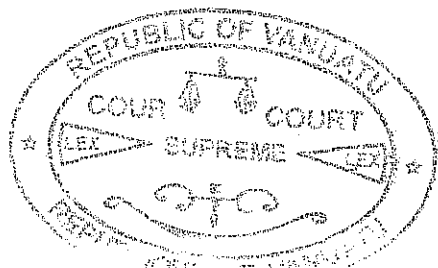
Mr. Bartels for Accused

Date of Plea: 06 September 2005

Date of Sentence: 16 September 2005

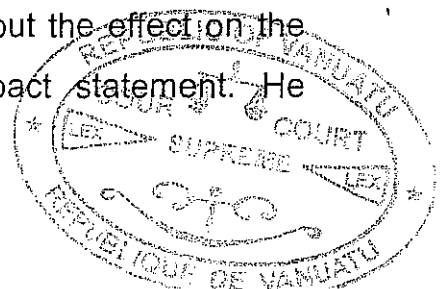
SENTENCE

Each of you Mr. Robert Tioban aged 17 years and Mr. Noel Robert aged 20 years have pleaded guilty to one count of rape. The victim was aged 16 years and had been in a friendship kind of relationship with you Mr. Robert Tioban previously. The maximum penalty provided by the law of this Republic is life imprisonment for each of you, so of course it is a very serious charge that each of you face.



The offences happened on 11 July of this year, when sometime after 2.30pm, the victim was returning home from school. She came across the pair of you and some other boys. There was an exchange of words and eventually you went with her to a closed-down meat packaging factory. Robert Tioban you had with you a bush-knife and you asked her to follow you, she refused so you told her to follow you otherwise you would kill her. You then took her to another place close-by and told her you were going to have sex with her but she refused. You removed her shorts and panties, pushed her on to carton boxes on the floor, lay on top of her and had intercourse with her. During the intercourse you placed the knife at your side. Mr. Noel Robert, you then also approached her. She did not agree to having sex with you but despite that you did so. Another member of the group came and also asked her for sex but that was declined. He had the good sense to accept that refusal. The victim immediately reported the matter to the police and lodged a complaint. A medical check-up showed she had some lacerations to parts of her vagina. Both of you admitted when you were interviewed by the police that the incident had occurred without her consent. Mr. Tioban, you denied in the interview that you threatened her.

The prosecutor in helpful submissions reminded me of the principles concerning sentencing for rape which were largely set out by the Chief Justice in the Public Prosecutor v Ali August Criminal Case No. 14 of 2000. Those principles and the matters set out in August case was subsequently confirmed by the Court of Appeal in another case. The prosecutor submitted that the aggravating features included the use of violence on the victim during the acts of rape. He submitted that the rape was repeated and carefully planned and the victim was relatively young at 16 years of age. The prosecutor points out the effect on the victim that have been set out in a victim impact statement. He



contended that the starting point should be 8 years imprisonment in accordance with what the Chief Justice set out, but that should increase, the prosecutor said, because of the aggravating features but allowances should be made for pleas of guilty and customary settlement. In addition there should be a reduction, the prosecutor submitted, for time spent in custody.

On your behalf the public solicitor submitted to me Mr. Tioban that you are relatively young at 17 years of age, and you reside with your parents. Your mother is here as well as your uncle and you are unemployed. You are a person with no previous conviction, you developed bad thoughts towards the victim when you saw her but now say you are sorry for what you did. Some issue was taken with whether or not this was a carefully planned incident but in general terms it was accepted that there was a threat of violence, the presence of a weapon, and the victim was pushed to the ground and forced to have intercourse. It was submitted that you are relatively close in age to the victim and that because of your relative youth you may be more susceptible to rehabilitation than an older offender.

Mr. Noel Robert, the public solicitor on your behalf submitted that at 20 years of age, you are also a first offender. You reside with your uncle at Freshwota and your mother is here in Court to support you as well. You agree that you followed on your co-offender in raping the victim but now say that you are sorry and have undertaken a custom settlement and the detail of that is set out in a letter from the paramount chief at Tongoa dated 22 July 2005. The victim accepted what was offered and the items totalled VT32, 000. You still of course face sentence by this Court despite that ceremony and of course I take into account the compensation by custom but as the Court of Appeal said in Public Prosecutor v Gideon Criminal Appeal Case No. 3 of 2001:



"A defendant commits an offence and must pay the price or the penalty and any custom settlement cannot exchange such punishment but can only ease the ill feeling between the parties and their relatives"

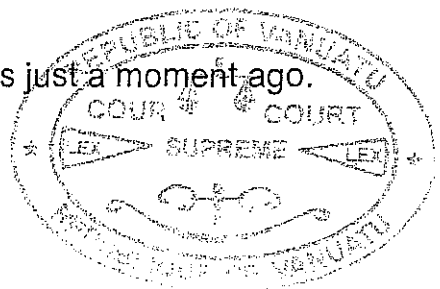
As to section 119 of the Criminal Procedure Code CAP 136, the Court of Appeal said that a custom settlement can influence the length of sentence of imprisonment but not its fundamental nature. The Court said, in other words, that the section cannot change what is otherwise an appropriate immediate custodial sentence into a non-custodial one.

When sentencing both of you, I must underline your accountability for the harm done not only to the victim herself but also to the community at large. I must emphasis your own individual offender responsibility. I must denounce your unlawful behaviour for such a serious crime and I must deter you and others from this sort of offending. I have sadly had occasion to say on more than one occasion recently that rape appears in this Republic to be on increase. I must protect the community and this victim.

The Chief Justice said quite clearly in the Ali August case that

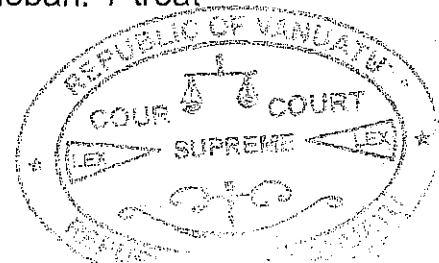
"The offence of rape is always a serious crime. Other than in wholly exceptional circumstances rape calls for an immediate custodial sentence. A custodial sentence is necessary for a number of reasons, first of all to mark the gravity of the offence. Second to emphasis public disapproval. Thirdly to serve as a warning to others. Fourthly to punish the offender, and last by no means least to protect women."

I have already touched on some of those matters just a moment ago.



I deal with the starting point for each of you. Although you are younger than some other offenders because each of you committed a very adult crime and I am satisfied in the circumstances that you two accused were acting together because although it was you, Mr. Tioban who had the weapon, you Mr. Robert took advantage of what had gone on earlier when you had your way with the victim. The starting point for each of you should be 8 years imprisonment under the principles of August case, but the 8 years starting point should be increased to 9 years because of the aggravating features which I now identify. A weapon was used to frighten and coerce the victim so it was the threatened use of that when you Mr. Tioban threatened to kill the victim. The rape was repeated not individually by each of you but each of you carried out the rape so it was a multiple offence to that extent. There was the vulnerability of the victim who was after all a 16 year old school girl coming home from her studies. Although there are elements of planning I do not consider that it was a carefully planned rape to the extent that you deliberately waylaid her for that purpose. Although there may be elements of that it was opportunistic to an extent and in addition of course there was the effect on and injuries to the victim which are aggravating features. Her statement indicates that she feels affected and cannot walk around freely anymore. She tends to feel ashamed when she is with friends and family and she had difficulty in sleeping at about the time the incident occurred. I immediately ought to deduct as that case said, one-third for your pleas of guilty

I have just said that there will be a reduction for your pleas of guilty which has saved the victim the trauma and ordeal of having to give evidence in Court before strangers and to an extent I have taken into account your relatively young age particularly you Mr. Tioban. I treat



your pleas of guilty as some indication of remorse and contrition and each of you is of previous good character with no earlier conviction.


In addition I now take into account, as far as you are concerned Mr. Noel Robert, the relatively significant custom settlement which has taken place. That does not apply, of course, to Mr. Tioban and despite your younger age, it is my view that the sentence for you must reflect you as being more culpable than your co-offender because it was you who wielded the weapon, kept it near to you and made a threat with it, so to that extent I differentiate between the pair of you although each of you in Court is responsible effectively as parties to the action of the other. I also take into account the fact that you have been in custody for approximately one month each.

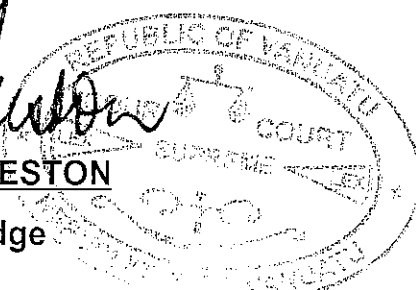
Carrying out those various calculation and allowances which I have talked about I deal with you in this way, Mr. Robert Tioban you are sentenced to imprisonment for 5 years and 5 months, Mr. Noel Robert you are sentenced to imprisonment for 4 years and 11 months.

Each of you has 14 days to appeal that sentence if you are unsatisfied with it.

Dated AT PORT VILA, this 16th day of September 2005

BY THE COURT


P. I. TRESTON
Judge

The seal of the Republic of Vanuatu Supreme Court is circular. It features a central emblem with a palm tree and a sun. The words "REPUBLIC OF VANUATU" are written in a circle around the top, and "SUPREME COURT" is written around the bottom. There are also some smaller, less legible words and symbols within the seal.