

PUBLIC PROSECUTOR -v- JOHNA NASIP

Coram: Chief Justice Vincent Lunabek

Counsel: Mr Leon Malantugun for the Public Prosecutor
Mr Henzler Vira for the Defendant

Date of sentence: 26 February 2010

SENTENCE

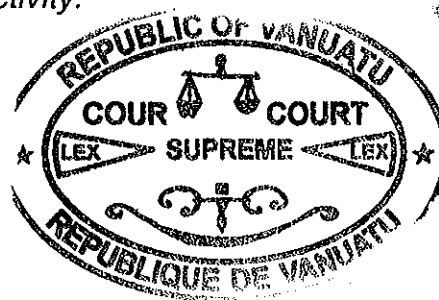
This is the sentence of Defendant, Johna Nasip. On 25 February 2010 you were convicted of 2 counts of Sexual Intercourse without consent, contrary to sections 90(1) and 91 of the Penal Code Act [CAP.135].

Sexual intercourse is defined under section 89A. It provides:

"89A. SEXUAL INTERCOURSE

For the purpose of this Act, sexual intercourse means any of the following activities, between any male upon a female, any male upon a male, any female upon a female or any female upon a male:

- (a) *the penetration, to any extent, of the vagina or anus of a person by any part of the body of another person, except if that penetration is carried out for a proper medical purpose or is otherwise authorized by law; or*
- (b) *the penetration, to any extent, of the vagina or anus of a person by an object, being penetration carried by another person, except if that penetration is carried out for a proper medical purpose or is otherwise authorized by law; or*
- (c) *the introduction of any part of the penis of a person into the mouth of another person; or*
- (d) *the licking, sucking or kissing, to any extent of the vulva, vagina, penis or anus or a person; or*
- (e) *the continuation of sexual intercourse as defined in paragraph (a), (b), (c) or (d); or*
- (f) *the causing, or permitting or a person to perform any of the activities defined in paragraph (a), (b), (c) or (d) upon the body of the person who caused or permitted the activity."*



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Sexual intercourse without consent is defined under section 90(1) of the Penal Code Act [CAP.135].

"90. SEXUAL INTERCOURSE WITHOUT CONSENT

Any person who has sexual intercourse with another person:

- (a) without the at person's consent; or*
 - (b) with that person's consent if the consent is obtained:*
 - (i) by force; or*
 - (ii) by means of threats of intimidation of any kind; or*
 - (iii) by fear of bodily harm; or*
 - (iv) by means of false representation as to the nature of the act; or*
 - (v) in the case of a married person, by impersonating that person's husband or wife;*
 - (vi) by the effects of alcohol or drugs; or*
 - (vii) because of the physical or mental incapacity of that person;*
- commits the offence of sexual intercourse without consent."*

Section 91 prohibits the offence of sexual intercourse without consent and sanctions it with a life imprisonment sentence.

The facts upon which you are found guilty and convicted are contained in your Judgment Verdict of same date of 26 February 2010. There is no need to revisit them. The complainant did not consent to have sexual intercourse with you. You forced her to have sexual intercourse with you on January 2009 and July 2009. She gave details of you holding her T-shirt near a nakamal you pulled her on the other side of the place where the nakamal was. She was crying and called out for her father and mother. You told her not to call out as people drunk kava in the nakamal. She stopped shouting as she explained it is contrary to Tanna custom to shout when people drunk kava at the nakamal as there is a custom fine as a sanction. You forced her to lay on the ground. You removed her skirt and panties. You attempted to spread her legs. She tried to hold them close for 3 times. You were too strong. You had sexual intercourse with her on the 2 occasions in January 2009 and July 2009.

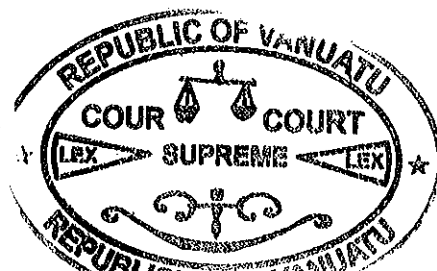
Sexual intercourse without consent, contrary to sections 90 and 91 of the Penal Code Act, is a very serious offence.

The principle guideline judgment is Public Prosecutor v. Scott [2002] VUCA 29; Criminal Appeal Case No.02 of 2002 (24 October 2002).

The appropriate sentence is a custodial sentence.

The following aggravations are present in this case:

- Loss of virginity
- 1 of the offences occurred in the night at the early morning of 24 July 2009 at 3.00PM o'clock.
- The sexual intercourse occurred by means of threats or of intimidation of any kind.



In mitigation, the defence submitted that the Defendant is a first time offender. He was born on 13 July 1993. Therefore, he was 15 years when he offended on January 2009. He was 16 years of age when he offended on 24 July 2009.

The Defendant and his family had performed a custom ceremony to the complainant, her family and chief at Esmatanis Nakamal on Sunday 25 April 2009. The custom ceremony was performed through the exchange of 1 pig, 7 mat, yards of calico and 2 heads of kava.

The defence counsel referred the Court to the provisions of Section 54 of the Criminal Procedure Code ("CPC") [CAP.136] Act which says:

- "54.(1) A person under 16 years of age is not to be sentenced to imprisonment unless no other method of punishment is appropriate.
(2) If a person under the age of 16 years of age is sentenced to imprisonment the Court must give its reasons for doing so."

Upon considering and balancing between the aggravation and the mitigating factors upon noting that this Defendant committed one offence of sexual intercourse without consent while he was under the age of 16 years of age in January 2009 and committed another offence of the same nature just after his 16 years of age on 24 July 2009 and after cross-referencing with the aggravating and mitigating factors, I sentence the Defendant Johna Nasip as follows:

1. In count 1:
2 years probation and 300 hours community work; and
2. In count 2:
2 years imprisonment suspended for 2 years;
AND IN ADDITION, 2 years probation; and 300 hours community work;
3. The Defendant Johna Nasip shall serve his probation terms and community services sentences CONCURRENTLY. This means, Jonha Nasip shall serve 2 suspended year of imprisonment; and 2 years probation; and 3 hours community services.

14 days to appeal.

DATED at Isangel, Tanna this 26th day of February 2010

BY THE COURT

Vincent LUNABEK
Chief Justice

