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PUBLIC PROSECUTOR

-v-

**ANDREW KUAU
THERESE SASIA**

Coram: *Chief Justice, Vincent Lunabek*

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

Date of hearing: *23-34 February 2010*

Date of judgment: *26 February 2010*

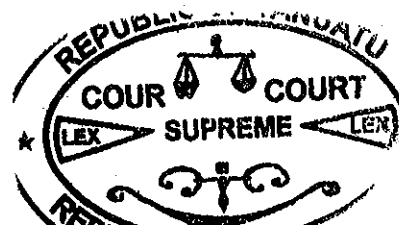
SENTENCE

This is the sentence of the Defendants Andrew Kuau and Therese Sasia on counts 3 and 4 of the information dated 22 February 2010. The above-named Defendants are husband and wife.

Defendant Andrew Kuau was charged with one count of rape, contrary to sections 90(a) and 91 of the Penal Code Act and one count of sexual intercourse with child under care or protection, contrary to section 96(1)(b) of the Penal Code Act [CAP.135]. He pleaded not guilty to rape, contrary ss. 90(a) and 91 of the Penal Code Act and he pleaded guilty to the offence of sexual intercourse with child under care or protection, contrary to section 96(1)(b) of the Penal Code Act.

Defendant Therese Sasia was charged with one count of aiding her husband to rape the complainant girl, contrary to sections 30, 90(a) and 91 of the Penal Code Act and one count of aiding her husband to have sexual intercourse with the complainant girl who was a child under their care or protection, contrary to sections 30 and 96(1)(b) of the Penal Code Act [CAP.135]. She pleaded not guilty to the offence of Aiding Rape, contrary to sections 30, 90(a) and 91 of the Penal Code Act and she pleaded guilty to the offence of Aiding Sexual Intercourse With Child under care or protection, contrary to sections 30 and 96(1)(b) of the Penal Code Act.

Offences of Rape, contrary to ss. 90(a) and 91 of the Penal Code Act and Aiding Rape, contrary to ss. 30; 90(a) and 91 of the Penal Code Act charged against the two above-named Defendants in counts 1 and 2 are withdrawn by the prosecution.



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The brief facts are as set out in the prosecution brief of facts. They are summarized as follows:

The accused Andrew Kuau is the uncle of the complainant while the co-accused Therese Sasia is the Aunty of the complainant. Both Defendants are husband and wife.

The complainant, the co-accused and the accused were living in the same house belonging to the couple but the complainant has her own separate room while the couple have their own separate couple room.

At one night in 2005, while the complainant was sleeping, the accused Andrew Kuau went to her room, called her and informed her that her aunty (the co-accused "Therese Sasia") wanted to see her in their sleeping room.

The complainant went to their room and the co-accused asked her to get undressed but the complainant refused. However, both the co-accused and the accused forced her to remove her clothes but she still refused and the co-accused went and removed the clothes of the complainant.

The co-accused then instructed the complainant to lie down on their mattress which she did and at the same time, the accused lied on top of her and penetrated her vagina. The complainant was shouting, the co-accused covered her mouth with her hands.

The complainant was struggling to come out from the accused but could not because the accused continued strongly to penetrate her while the co-accused continued strongly to cover her mouth. Once the accused came out from the complainant, she felt so much pain on her vagina. The complainant then got dressed up again and wanted to go back to her room but the couple commanded her to sleep with them in their bed which she did.

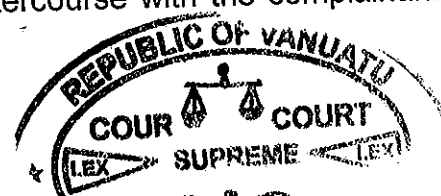
The next day, the complainant so much pain on her vagina which as a result, also affected the health of her entire body. The complainant cannot walk properly and while urinating, she felt so much pain on her vagina.

The couple warned the complainant not to tell anyone about the incident which she did because she was so much afraid that they will kill her if she discloses the matter.

Just three (3) days after the incident, the complainant saw her menstruation for the first time in her life.

The accused and the co-accused were then arrested in 2008 for interview and caution statement after the complainant put the report to the police. During the interview, the couple admitted all the allegations put against them by the complainant.

The complainant was 16 years in 2005 at the time of the offending. She did not lodge a criminal complainant because she was too scared of her uncle and aunty. Defendant Andrew continued to have sexual intercourse with the complainant in



2007 on two different occasions in the gardens. She got pregnant and she gave birth to a baby girl before she put her complaint to the police in May 2008.

On 26 May 2008, the complainant lodged a complaint at the police station of Isangel, Tanna against her uncle and aunty (above named Defendants).

The prosecution submitted that they rely on the case of **PP v. Willie Atis** [2004] VUCA 4, Criminal Appeal Case No.2 of 2004 (9 June 2004).

Both Defendants are first time offenders. The prosecution says the Defendants' guilty pleas will be taken into account by a reduction of their sentence of 1/3.

The prosecution submitted that a head sentence of 2 years imprisonment is the appropriate sentence.

In mitigation, the defence submitted that they take note of the cases submitted by the prosecution. Both Defendants are first time offenders. Both pleaded guilty and both perform custom reconciliation ceremony to the complainant and the chiefs.

The Report (Same Day) reveals the following:

Mr Andrew Kuau and Mrs Therese Sasia, you a married couple and you have four children. Your youngest child attends secondary school. Mr Andrew Kuau, you attended an English primary school back in the years seventies and you have limited skills in reading and writing. You are a subsistence farmer from which you do gardening and you sell at the local market to meet your family's daily income. You are a senior person in decision making within your family members and you are a member of Catholic Church. You are also a resourceful person in your community.

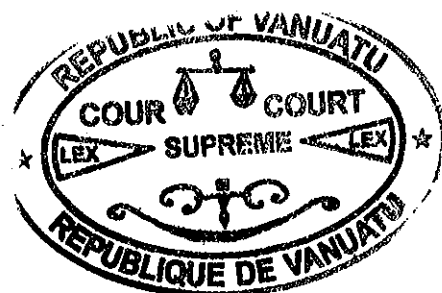
You had performed a kastom ceremony by exchanging three bundles of kava, two pigs and a rooster to the victim, your wife Therese and the chiefs.

You intend to perform a kastom reconciliation ceremony to the victim's parents after they returned from Vila.

The report says you are remorseful for your actions.

Mrs Therese Sasia, you attended school up to year six and had little skills in writing and reading French language. Like your husband you do gardening and you sell your produce at the local market for your daily income. You had performed a kastom reconciliation together with your husband and the victim by exchanging two pigs, a rooster and three bundles of kava in the presence of the community chief and some members of the community at lavori Nakamal. You are a first time offender and you were showing remorse on your actions.

Sexual intercourse with child under care or protection is a serious offence. Section 96 of the Penal Code (Amendment) Act No.17 of 2003 deals with the offence in this way:



"96. SEXUAL INTERCOURSE WITH CHILD UNDER CARE OR PROTECTION

(1) A person must not have or attempt to have sexual intercourse with any child, not being the person's spouse, who is under the age of 18 years and who-

- (a) being the person's step child,, foster child or ward, is at the time of the intercourse or attempted intercourse living with the person as a member of the person's family;
- (b) not being the person's step child, foster child, or ward, and not being a person living with the person as the person's wife, is at the time of the intercourse or attempted intercourse living with the person as a member of his family and is under the person's care or protection.

Penalty: Imprisonment of 10 years.

(2) It is no defence to a charge under this section that the child consented."

Section 30 of the Penal Code Act says that:-

"30. Any person who aids, counsels or procures the commission of a criminal offence shall be guilty as an accomplice and may be charged and convicted as a principal offender."

I consider the particular circumstance of the offending, the character and personal history of each of the Defendant provided by the same day report dated 25 February 2010.

The Report reveals also that the complainant girl was customarily was adopted to Andrew Kuau and Therese family. The customary adoption is a sort of Tanna custom arrangements to swap or replace female and in this present case, the complainant's mother and father swapped the complainant to replace her mother who came from the Defendant Andrew's family.

The time will come when the courts will say something on the customary societal rational of such a practice of swapping of female child and in particular in the light of the fundamental rights contained under Article 5 of the Constitution and the Convention on rights of the children (C.R.C.) to which Vanuatu had ratified.

The two Defendants, as adopted parents of the complainant girl failed their responsibility to care, protect, educate and love the complainant as their own child.

In the present case, the following constitute the aggravating factors:

1. Breach of trust;
2. Offence occurred at night;
3. The complainant lost her virginity;
4. The offence was repeated by the Defendant Andrew Kuau;
5. The complainant got pregnant as a result of such sexual activities by her uncle Andrew Kuau.

The appropriate sentence in this case is a custodial sentence.



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I sentence Defendant Andrew Kuau to 3 years for sexual intercourse with child under care or protection, contrary to section 96(1) of the Penal Code Act [CAP.135].

I increase the sentence of Andrew Kuau by 3 years to reflect the aggravating factors which is totaling 6 years.

I sentence the Defendant Therese Sasia to 3 years imprisonment for Aiding Sexual Intercourse with child under care or protection, contrary to sections 30 and 96(1)(b) of the Penal Code Act.

There is no aggravation for the Defendant Therese Sasia.

On balancing the aggravating factors with the mitigating factors and in cross-referencing them, I reduce the sentence of the Defendant Andrew Kuau to 4 years and I reduce the sentence of the Defendant Therese Sasia to 2 years.

I consider whether I should suspend the sentences of the two above named Defendants.

The circumstances of offending by Defendant Andrew Kuau do not justify a suspension.

I order the Defendant Andrew Kuau to serve 4 years imprisonment with immediate effect.

I consider the offending by the Defendant Therese Sasia. The circumstances of her offending justify a suspension of her sentence of 2 years imprisonment.

I order the sentence of Defendant Therese Sasia of 2 years imprisonment to be suspended for a period of 2 years.

In addition, I order Defendant Therese Sasia to perform 300 hours of Community Work.

14 days for each Defendant to appeal their sentences if they are dissatisfied with them.

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

BY THE COURT

Vincent LUNABEK
Chief Justice

