

PUBLIC PROSECUTOR -v- ERIC MATOA

Coram: Chief Justice Vincent Lunabek

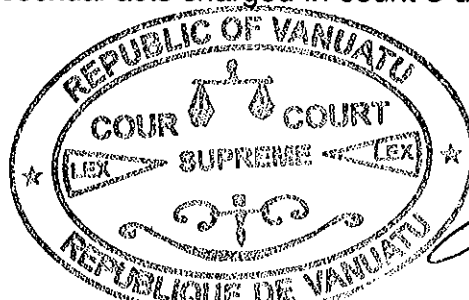
Counsel: Mrs Losana Matariki for the Public Prosecutor
Mr Tom Loughman for the Defendant

SENTENCE

Mr Matao, you are charged originally with 3 separate counts. One count of sexual intercourse without consent, contrary to section 91 of the Penal Code Act [CAP.135] ("the Act") and one count of Aggravated sexual intercourse with a child, contrary to section 97A(1) of the Act and one count of homosexual acts, contrary to section 99 of the Act.

On 22nd March 2011, the prosecution withdrew the charge of sexual intercourse without consent, under s.91 of the Act laid against you. You entered guilty pleas on offences of aggravated sexual intercourse with a child, contrary to section 97A(1) and homosexual acts, contrary to section 99 of the Penal Code Act and you were then convicted on each of both counts 2 and 3. The submissions for sentencing and your sentencing were adjourned to 24 March 2011.

On 24 March 2011, before I considered the appropriate sentence to impose upon you for the 2 offences, I had informed you that s.99 of the Penal Code Act under which your were charged in count 3 of the Information dated 14 February 2011, had already been repealed by Parliament by s.15 of the Penal Code (Amendment) Act No.25 of 2006. The Court has been misled by the prosecution to enter a conviction on the charge of homosexual acts, contrary to section 99. To remedy the situation, I made an order dismissing the alleged charge of homosexual acts charged in count 3 under



the repealed s.99 of the Penal Code (Amendment) Act as there is no longer statutory basis for such an offence. You were discharged and your conviction on count 2 was null and void ab initio.

On 24th March 2011, the Court also informed the prosecution counsel that upon perusing the brief facts provided by the prosecution, there were no particulars of facts alleged indicating any of the matters of "circumstances of aggravation" described from (a) to (f) in the meaning of "circumstances of aggravation" under section 97A(2) of the Penal Code (Amendments) Act No.17 of 2003 and No.25 of 2006.

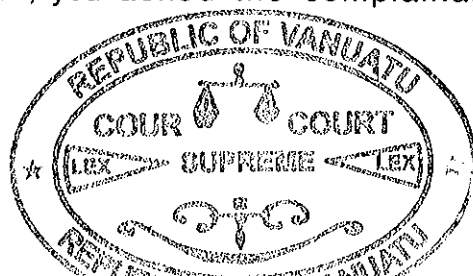
Counsel for the prosecution confirmed that there were no such particulars described in s.97A(2) from (a) to (f) with the meaning of "circumstances of aggravation". The prosecution counsel, then, applied to amend the charge of aggravated sexual intercourse with a child with a lesser charge of unlawful sexual intercourse, contrary to section to section 97(1) of the Penal Code Act.

On 24th March 2011, you were discharged of aggravated sexual intercourse with a child, contrary to section 97A(1) of the Penal Code (Amendment) Act and your guilty plea on that charge was dismissed and your conviction was null and void ab ignition. You were then re-arraigned and entered a guilty plea on the amended charge of unlawful sexual intercourse with a child under the age of 13 years, contrary to section 97(1) of the Penal Code Act [CAP.135].

The only offence in the information you are sentenced on is the offence of unlawful sexual intercourse with a child, under the age of 13 years, contrary to section 97(1) of the Penal Code Act in count 2(as amended).

The facts of the case are set out by the prosecution brief of facts. They are accepted by you and your lawyer. They are set out as follows:

The complainant is a 10 year old boy from Taloa village, Nguna Island. He is the first born of his family and is regarded as his father's successor in their home. You are also from Taloa village, Nguna Island. The alleged offences happened back in 2008 when you were living with the Complainant's family. You were staying in a separate room in the complainant's house, and on one occasion, you asked the complainant to



A handwritten signature in black ink, consisting of several loops and a long horizontal stroke, is written over the page number.

remove his pants but he refused. You then grabbed both his hands and pushed them back and you removed his pants and had anal sex with him (the complainant).

Again in December 2009, at Chief Manamena's house, you grabbed the Complainant and took him to the chief's kitchen and removed his pants and had anal sex again with him (the complainant). The last time it happened was on the 30th of January 2011 at night when the Complainant went to his aunt's (Janet Dick) house. After having his food, the complainant went inside to sleep when you arrived and told him to remove his pants again to which he refused. You then removed the Complainant's pants, and had anal sex with him again. As soon as you finished having anal sex with the Complainant, the aunt walked in and saw that the Complainant was naked and so were you. Your pants were down to your knees. The aunt suspected that you two were up to something since there was no noise or talking from the room so she decided to go and have a look and thus walked in with a shining flash light on both of you and saw that you were lying on top of the complainant who was looking up. When she removed the blanket and she saw you were fully naked with your pants on your knees. She questioned the complainant about the incident to which the complainant admitting to that being the third time which you had done this to him.

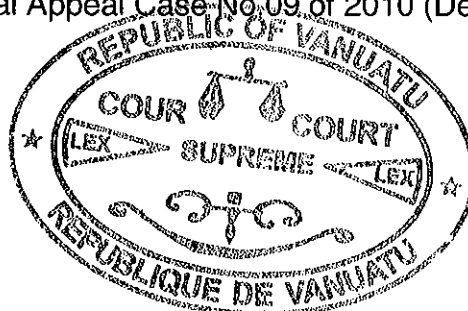
You were then arrested at Etas Area on the 1st of February 2011 around 17.00 hours as a result of the aforementioned offences. You were interviewed from 09.40 hours to 11.00 hours on the 2nd of February 2011 and admitted to all the offences committed. Your statement was read to you and you agreed to its contents and signed.

You pleaded guilty to an offence of sexual intercourse with a child under the age of 13 years. Section 97 deals with unlawful sexual intercourse. S.97(1) states:

"No person shall have sexual intercourse with a child under the age of 13 years.

Penalty: imprisonment for 14 years."

Your sentencing and its rationale are based on the guideline provided by the decision of the Court of Appeal in **PP v. Kal Andy**, Criminal Appeal Case No.09 of 2010 (Decision



dated 8 April 2011).

This is a very serious offence as reflected in the maximum penalty imposed by law.

It is no defence to a charge under this section that the child consented or that the person charged believed that the child was of or over the age in question (s.97(3)).

The seriousness of your offending is aggravated by the following factors which exist in the circumstance of your offending:

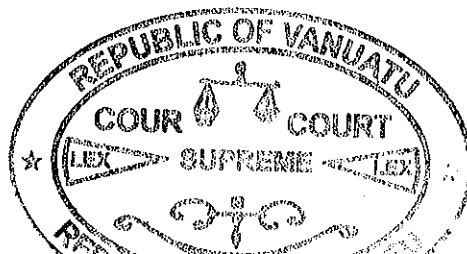
- The child is of 10 years of age at the time of your offending.
- You committed this offence on the child (first, at the child's parents' house in 2008 when you lived with them; second, in December 2009 at Chief Manamena's kitchen; the last occasion on 30 January 2011 at night at the child's aunt's house.
- There was a degree of trust between you and the child when you lived with him and his parents and also when you later on lived at his aunt's house as the pre-sentence report indicates, you were sent off by your father's family from their home. The complainant's house or the house of his aunt are the places the complainant should be safe and protected.

I consider a starting point of six (6) years imprisonment.

In mitigation, you are born on 19 October 1992 which means that you are now 19 years of age. You started committing the offending in 2008 when you were 16 years of age. Again in 2009 when you were 17 and in 2011 when you are 19 years of age. You are a first time offender and you do not have previous convictions. You cooperate with the police. You are a youth offender and you are remorseful for what you did.

However, the report indicates that you are willing to perform a custom ceremony but no Chief of your community nor a member of your community could assist you. I make a discount of 20% bearing in mind of your youth.

In this case I am satisfied that you entered a guilty plea at the first reasonable opportunity given to you by the Court. You had been facing the more serious charge



A handwritten signature in black ink, consisting of a large, stylized loop followed by a few trailing strokes.

under section 91 of the Penal Code Act which was withdrawn by the prosecution. You entered a guilt plea on another serious charge of aggravated sexual intercourse with a child, contrary to section 97A(1) of the Penal Code Act which was then amended to unlawful sexual intercourse with a child under the age of 13 years, contrary to section 97(1) of the Penal Code Act on which you are now sentenced. Given your early entering of guilty plea, I give you a maximum of one third.

Conclusion

From the six years starting point, I deduct the mitigating factors relating to you personally which is a discount of 20%. Your guilty plea provides a discount of approximately one third, giving an end discount just over 45%. You have already spent some time in remand custody waiting for your trial a total of more than 3 months. I give such an allowance. In the end, a discount of 50% is justified.

I therefore sentence you to 3 years imprisonment. You shall serve your sentence forthwith.

You have 14 days to appeal this sentence if you are not happy with it.

DATED at Port-Vila this 4th day of May 2011

BY THE COURT

**Vincent LUNABEK
Chief Justice**

