

PUBLIC PROSECUTOR - v - NOCKLAM JIMMY

Coram: V. LunabeK CJ

Counsel: Mr Tristan Karae for the Public Prosecutor
Mr Andrew Bal for the Defendant

SENTENCE

Nocklam Jimmy, you appear today for sentencing on one count of sexual intercourse without consent, contrary to section 91 of the Penal Code Act [CAP.135] ("the Act"). You entered a not guilty plea on 5 February 2013. A two-day trial was scheduled initially at Isangel, Tanna commencing 25 February 2013.

The trial dates were then rescheduled on 21-22 March 2013 but the trial venue was changed to Prot-Vila Supreme Court. On 21 March 2013, you changed your initial "not guilty" plea into a guilty plea.

The offence of sexual intercourse without consent carries a maximum penalty of imprisonment for life. This is a very serious offence and Parliament who makes laws, makes law against this offence and set very high penalty for it to mark its seriousness.

The factual circumstance leading up to your offending are provided by the prosecution. I set out the facts as provided by the prosecution except that I will omit to refer to the name of the complainant girl for obvious reasons. I refer to the complainant girl as [CG] in this sentencing. [CG] is of 16 years old and she was attending Tafea College. On the 3rd of November 2012, she made a complaint against you, Nocklam Jimmy for the offence of sexual intercourse without consent.

(CG) and you are related. You called (CG) as your "small mother".

You are 25 years and you are married.

The incident occurred on the 3rd of November 2012 at Middle Bush area on Tanna. On



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the day of the incident (CG)'s mother went to the hospital with your wife for treatment because you had assaulted your wife earlier that day.

(CG) was at home and she went to the river for a swim, in an area called Lamnipe. On her way she met you, Nocklam Jimmy. She saw you were holding onto a knife at that time.

You invited the complaint for a chat about your wife. You asked about your wife and in response she replied that your wife was taken to hospital for treatment.

As you were chatting with her, you quickly grabbed and held (CG) tightly with one hand and blocks her mouth with your other hand. (CG) resisted by saying that you are families or related to each other. But you refused to accept this and used a knife to slap her body. You went on to smack the girl on her cheek with your hands.

You dragged the girl into the bush and instructed her not to cry. You ordered the girl that, if she continues to cry you would use the knife to slice her.

You then took (CG) to an area where the boys usually bathe; there you instructed the girl to remove her clothes but she refused. You then held the girl and ripped her clothes and pushed her down to the ground and removed her panties. You quickly undressed yourself and lay on top of the girl.

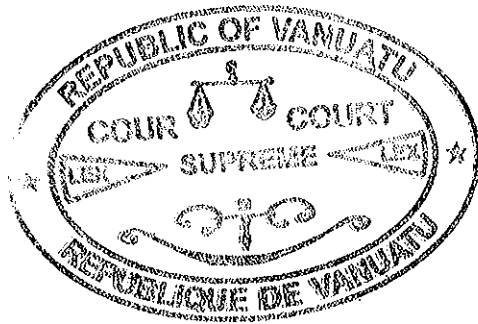
You slept on top of the girl and inserted your penis into her vagina. At first instance you failed to penetrate the vagina but you succeeded at the second time. During penetration, (CG) experienced pain and was bleeding from her vagina and was crying but you continued to penetrate her until you ejaculated inside her.

After sexual intercourse you ran into the bushes leaving (CG) behind. The girl then got up, dressed and went to the river. (CG) went to wash off the dirt and because she was bleeding, as she got to the river side she was shocked to see her elder brother and she-broke down and cried and told her brother of what you had done to her.

At home, she told her family and other relatives about what had happened.

(CG) was then taken to the police station to report the matter. She was also taken to the hospital for medical examinations.

The medical examinations show that there are-



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- Perforation on the left -side of the ~~hymen~~
- Vaginal bleeding

Those are the facts. There is no dispute about the facts of your offending. Your lawyer accepted them on your behalf before you changed your initial plea to a "guilty plea". Yourself accepted them before you entered your guilty plea.

I am sure you now know that you come before the Court because you have broken the law. The law that you have broken is the criminal law. Section 91 of that law prohibits a person to have sexual intercourse with a person without that person's consent.

Section 91 provides:

"No person shall commit sexual intercourse without consent."

Section 90 of the Act defines sexual intercourse without consent:

"90 – SEXUAL INTERCOURSE WITHOUT CONSENT

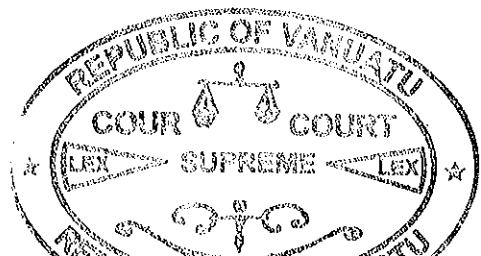
Any person who has sexual intercourse with another person:

- (a) *without that 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 representations as to the nature of the act; or*
 - (v) *in the case of a married person, by impersonating that person's husband or wife; or*
 - (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."

The prosecution refers to the following guideline judgments to the Court:

PP v. Scott and Tula [2002] VUCA 29; **PP v. Gideon** [VUCA]; **PP v. Hinge** [2008] VUCA 30; **PP v. Andy** [2011] VUCA 14 and others. I apply the rational of these cases on the facts of your case.



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From the above cases, the Courts say and repeat every time that sexual intercourse without consent is always a most serious crime. Other than in wholly exceptional circumstances, a person who commits this offence must go to custody. The custodial sentence is necessary for the following reasons:

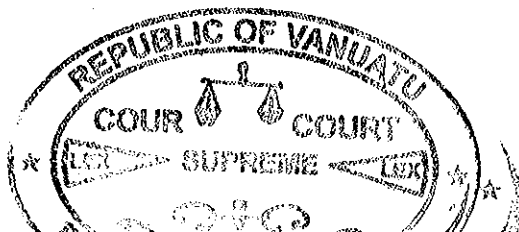
- It reflects the seriousness and gravity of your offending.
- The public disapproves this type of offending.
- The Court sends warning to others who will intend to commit same offence to go to custody.
- Here, the sentence of custody is to punish you for your serious offending.
- The custodial sentence is to protect girls, children and other vulnerable people in the society.
- The starting point for a custodial sentence is between 5-8 years imprisonment.

The nature of your offending is very serious and the seriousness is aggravated by the following factors:

- Age difference between you and the complainant: 25 and 16. You are a mature person, the girl is a child.
- You used force, you assaulted her twice.
- You used your bush knife to threaten her to have sex with her.
- She suffered pains to her stomach and her private parts (she was bleeding - She lost her virginity.)
- (CG is related to you. There is a breach of trust.
- Impact of the offending on the girl – she was afraid of being alone or walking alone in the day or night. The medical examination reveals she is infected with sexually transmitted disease.

Your offending is very serious and coupled with the aggravating factors, your sentencing terms of imprisonment must be towards the top of the assessment on starting point. The Court condemns in the strongest terms your offending as not tolerable and not acceptable in the society for a person to commit such serious offence on a child girl who is directly related to that person. This is your situation here.

You have used the girl to gratify your sexual needs. You have taken advantage sexually of this child. You deserve to go straight to custody. The appropriate sentence for you is 7 years imprisonment as a starting point.



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I peruse and consider what your lawyer told the Court in his submissions on your behalf. I take into account of the pre-sentence reports provided to assist the Court.

In mitigation, you are a first time offender; you have no previous convictions; you pleaded guilty but not at the first opportunity given to you by the Court. You will benefit for some allowance for your guilty plea but you will not benefit to the full $\frac{1}{3}$ allowance. You have already spent some time in custody since 20 December 2012 and this will be deducted in the total term of imprisonment imposed on you. You comply well with Correctional Centre Rules as provided in the report.

On the balance between aggravating and mitigating factors, I sentence you to 5 years imprisonment. The time you have already spent in pre-custody shall be considered from imprisonment term of 5 years.

ORDERS

1. You are convicted and ordered to serve a term of 5 years imprisonment on one count of sexual intercourse without consent, contrary to section 91 of the Penal Code Act. This is deemed to take effect from 20 December 2012.
2. You are deemed to start your sentence on 20 December 2012 [covering time you already spent in pre-custody period].
3. You have 14 days to appeal your sentence if you are not happy with it.

DATED at Port-Vila this 12th day of April 2013

BY THE COURT


Vincent LUNABEK
Chief Justice

