IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU
(Criminal Jurisdiction)

Criminal Case No.795 of 2015

PUBLIC PROSECUTOR
V.
KERRY TOLISH

Coram: ***Justice D. V. Fatiaki***

Counsel: *Mr. S. Blessings for the State*
Mr. J. Kausiama for the Defendant

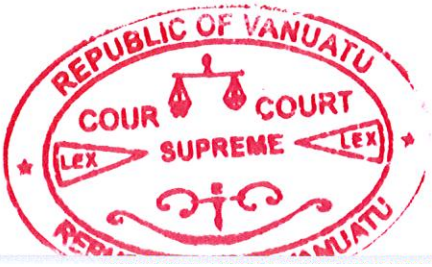
Date of Sentence: *11 December 2015*

SENTENCE

1. The defendant was convicted on his guilty plea ("*I tru*") to a single offence of Sexual Intercourse Without Consent contrary to Section 89A, 90 and 91 of the Penal Code. The particulars of the offence allege that between 2007 and 2008 at Malekula the defendant had sexual intercourse on different occasions with the male victim [name withheld] without his consent and after giving the victim money to suck the defendant's penis. At the time the defendant was the head master of the junior secondary school that the victim attended as a student. The victim was between 12 and 13 years of age at the time of the offending.

2. The offending first came to light in July 2008 when a report was lodged by two students who saw the defendant and the victim in compromising circumstances. The defendant was suspended from teaching duties and remained unemployed until he was reappointed after serving a lengthy suspension period.

3. The defendant was originally charged on 14 September 2015 with 2 counts of Unlawful Sexual Intercourse contrary to Sections 97(1) and 97(2) of the Penal Code which prohibits sexual intercourse with a child under 13 years of age or with a child aged between 13 and 15 years respectively. By order dated 15 October 2015 the defendant was committed for trial in the Supreme Court in Luganville on 2 counts of Unlawful Sexual Intercourse and was remanded into



custody. The defendant's remand was extended on 2 further occasions by the Magistrate's Court in Luganville on 27 October 2015 and 6 November 2015.

4. On 4 December 2015 the Public Prosecutor filed an Information charging the defendant with a single offence of Sexual Intercourse Without Consent which is the most serious of sexual offences in the Penal Code carrying a maximum sentence of life imprisonment. The charge is plainly based on the extended definition of "*sexual intercourse*" contained in Section 89(c) involving the introduction of the defendant's penis into the victim's mouth and despite the giving and acceptance of money by the victim on each occasion, the charge avers that the act was done without his consent and counsel stresses the money was given as an inducement for an otherwise non-consensual act. There is no suggestion however that physical force or threats were used in the commission of the offence.

5. The inordinate delay of over 7 years in charging the defendant after he had frankly admitted in his police caution interview on 13 June 2008 that the complaint lodged against him "*hemi tru evriwan*", represents a serious failure on the part of the authorities concerned, made worse, by the absence of any satisfactory explanation and, in my view, constitutes a further punishment on the defendant who was suspended from duties pending the outcome of his police case. The prosecutor's proffered excuse that it was because the complainant could not be located is neither reasonable or acceptable.

6. A further and perhaps unforeseen consequence of the lengthy delay is that the original charge in Count 2 of Unlawful Sexual Intercourse contrary to Section 97(2) which carries a maximum penalty of 10 years imprisonment and which was originally charged against the defendant in the Magistrate's Court and on which he was later committed for trial should not have been proceeded with as it was already time-barred.

7. This is clear from the provisions of Section 15(b) of the Penal Code which expressly prohibits the commencement of a prosecution for an offence "*punishable by imprisonment for up to 10 years*", where 5 years have elapsed after the commission of the offence. In the present case the offence under Section 97(2) was allegedly committed between 2007 and 2008 and the charges were laid in September 2015 (*ie*. after 7 or 8 years had elapsed "*... after the commission of the offence*").

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8. Be that as it may and avoiding any possible statutory limitation period, the prosecution have chosen to ignore the victim's age and the obvious indecency in the defendant's actions (*viz*: Sections 97, 97A, 98) and, instead, charged the defendant with the most serious sexual offence in the Penal Code. Likewise the prosecutor has ignored the accepted monetary inducement for the offence which would be more accurately reflected in a charge of Engaging in Acts of Child Prostitution under Section 101B of the Penal Code.

9. Even accepting the technical correctness of the charge, the circumstances of the offence could have been more appropriately dealt with in my view, by a lesser charge. This raises the question of whether the defendant should be prejudiced or unfairly denied that possibility not because of anything he did but purely because of police ineptitude and dilatoriness in charging the defendant? I think not.

10. Turning to the actual circumstances of the case the defendant's offending is aggravated by the following features:

    (a) The clear abuse of trust and authority that exists between a teacher and his pupil;

    (b) The repetitive nature of the offending extending over 2 years;

    (c) The difference in ages between the defendant a sexually mature father of 35 years and his young immature male victim;

    Bearing those factors in mind and noting the difference between the maximum sentences for offences under Section 97(1) and 97(2) namely 9 years imprisonment, I fix a sentence of 3 years imprisonment as the appropriate starting sentence.

11. By way of mitigating factors I gratefully extract the following from the defendant's pre-sentence report:

    (a) The defendant is a first offender who pleaded guilty at the first opportunity;

(b) He maintains a good relationship with his chief and community and participates well in community activities. He does voluntary work for his church and is seen as a valuable advisor to his chief and in setting out and organizing functions and fundraising for the school and church;

(c) The defendant performed a traditional ceremony of reconciliation to the victim and his family by paying VT25,000 and handing over a *Nagaria* leaf as a sign of peace at the request of the victim's family;

(d) The defendant is recorded as having expressed insight into his offending, showed remorse and informed the probation officer "*... that he is deeply and truly sorry for what he had done and that he shall live with this guilt for the rest of his life and also stated that he will not re-offend again in the future*";

(e) The defendant was suspended from teaching for a lengthy period before being reappointed as a teacher; and

(f) The defendant has been remanded in custody since 15 October 2015 until the present day.

12. For the above mitigating factors I reduce the defendant's starting sentence of 3 years by 18 months and by a further 8 months for the inordinate and unreasonable delay in charging the defendant including the 2 months already spent in custody making an end sentence of (18 – 8) = 10 months imprisonment.

13. Furthermore in exercise of the court's discretion in view of the unusual circumstances of the case and the character of the offender including the fact that the defendant is a confirmed hypertensive, this Court orders the defendant's end sentence be suspended for 2 years.

14. The defendant is warned that although he will not be returned to prison today, this suspended sentence means that if he is convicted of any other offence within the next 2 years then he will be returned to prison to serve this 10 months imprisonment in addition to any other sentence he may receive for his re-offending.

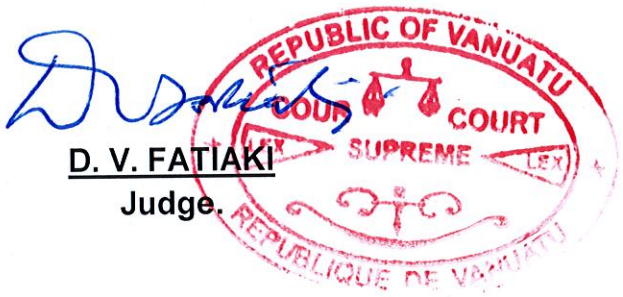
15. However if the defendant stays out of trouble for 2 years as is the expectation of this court, then he will not have to serve this sentence of 10 months imprisonment. Whether that happens or not is entirely in the defendant's hands.

16. In addition you are sentenced to 150 hours community work and directed to report to a probation officer within 72 hours to finalize the details of this community work order. To facilitate in the implementation of the community work order the court recommends that the defendant's chief be given an over-seeing role consistent with his offer to assist in the rehabilitation of the defendant.

17. If the defendant does not agree with this sentence he may appeal to the Court of Appeal within 14 days.

DATED at Luganville, Santo, this 11th day of December, 2015.

BY THE COURT



D. V. FATIAKI
Judge.