IN THE SUPREME COURT OF THE REPUBLIC OF VANUATU

Criminal Case No. 741 of 2015
(previously number 111 of 2014)

(Criminal Jurisdiction)

PUBLIC PROSECUTOR

V.

JANSEN FRAZER WELEGTABIT

Hearing: ***Wednesday 23rd March 2016 at 2:20 pm at Luganville***

Before: ***Justice SM Harrop***

In attendance: ***Mr Ken Massing for the Public Prosecutor***
Mr Junior Garae (PSO) for the Defendant (Ms Tari having been excused for reasons of ill health)

SENTENCE

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1. Mr Welegtabit you appear for sentence today at the age of 47 on two counts under sections 90 and 91 of the Penal Code of sexual intercourse without consent against your eldest daughter Franita, respectively on the 27th of April 2013 and in June 2013. There is also one count of committing an act of indecency without consent in relation to her on the 21st of December 2012 under section 98 (a) of the Penal Code. She was born in October 1987 so she was aged 25 at the relevant times and you were I think 43 or 44.
2. The maximum penalty for sexual intercourse without consent is life imprisonment and that for indecency is seven years' imprisonment. The

former tells you how seriously the Parliament of Vanuatu regards rape offending. I found you guilty of these three charges in my verdicts judgment delivered on the 10th of March 2016 following the trial at Gaua in December over five or six days and which was concluded here in Luganville on the 2nd of March.

3. I know that you denied any of this offending has occurred and you gave evidence on oath denying. That is your right but of course I must sentence you in accordance with my verdicts judgment.

4. The trial before me was a retrial; you were tried and found guilty of the same charges by the Chief Justice on the 22nd of September 2015 and on the 20th of October 2015 he sentenced you to seven years and eight months imprisonment. You successfully appealed to the Court of Appeal against conviction and that led to the retrial. You also appealed against the sentence imposed by the Chief Justice but that appeal was not considered by the Court of Appeal in light of its decision to overturn the convictions.

5. Although the Chief Justice sentenced you on essentially the same facts as I heard and accepted, my task is to form my own view as the appropriate sentence. However I have of course read the Chief Justice's decision and the submissions that counsel made to him.

6. Turning to the facts of the offences, in each case I accepted the essential evidence that your daughter Franita gave about each of the incidents in chronological order, which is also one of increasing gravity. The incidents were as follows:

7. On 21 December 2012 in the early hours of the morning you entered Franita's bedroom while she was still asleep, she was sleeping rather later later than usual because she had been to an evening Church service for Christmas Carols the night before. You touched her breasts which woke her up, you then touched her vagina and you showed her a pornographic image or movie on your phone and you gave her Vt 1,000.

8. She ran off, but put the money back in your bag. She met her mother, your wife Lily, but did not complain to her nor did she shout out during the incident because she was fearful of you. I note there are no especially aggravating features of this offence beyond the obvious one that you are her father and this was a gross breach of trust. I do not consider the showing of the pornographic image(s) or the offering of money materially increases the gravity of the offending which is complete on the carrying out of the touching. I also note the incident was relatively brief, which is not to say it was not shocking and distressing for your daughter.

9. The second incident was on 27 April 2013, that evening Franita left the family home in Naveto village where her two young daughters were sleeping and went to see and to have sex with her boyfriend Branly who lived nearby. She did not tell anyone she was going and other members of the household were woken by the crying of the younger daughter and were annoyed to find that Franita was missing.

10. Your son Lenny went to look for her and found her at about 10 pm. He slapped her and began pulling her back home. Near the Mormon church she saw you standing there, you took her hand and sent Lenny home to tell Lily that Franita had been found. So that left you alone with her. You pulled her over to a nearby burao tree, slapped her and told her to lie

down, take off her underwear and open her legs. She did not agree to this. So you forced her to do so and then raped her. When you went back to the house you told her not to say anything and that if she did you would kill her. As a result she did not tell anyone. She took your threats seriously.

11. Again there is nothing especially aggravating about the rape itself other than what is inherent in that very serious crime but of course there is again the obvious and very serious aggravating feature of the gross breach of trust. There can be no more serious breach of trust between a father and a daughter. In addition there was the aggravating feature of the threat accompanying the incident and it was clearly a serious one, to kill her, and she clearly took it very seriously.

12. The third incident was in June 2013 and is the most serious. Having left home after the April rape, Franita was staying with her uncle and aunt at Tolo village. One day in June she working in their garden with them, you phoned her and ask her to come to meet you and her mother at your garden. She immediately walked there. When she arrived she saw no one but you came up behind her, blocked her mouth with your hand and told her to go over to a small bush. Her mother was not there and it is clear to me that the reason you mentioned her mother in the phone call was a devious means of getting her to come to the garden. She would never have come to see you alone in view of what you had done previously. You demanded that she lie down and do what she was told, she refused and did not move. You had a bush knife and you used it to cut a nearby banana tree which was clearly done to reinforce the threat that you would cut her if she did not cooperate. You also told her that she should hurry up or you would cut her neck. She still resisted but you

raped her again. And as with the earlier occasion you ejaculated outside her body onto her leg. I should add that nevertheless carries with it a risk of both pregnancy and a sexually-transmitted disease.

13. This rape has a number of aggravating features beyond those risk:, the gross breach of trust, the luring of her to the garden which indicates planning and premeditation, the making of threats and the use of a lethal weapon to reinforce them. Again however I note there was no additional violence actually inflicted on her beyond that which is inherent in the rape itself.

14. In determining the appropriate sentence the first thing I need to do is assess a starting point. That is the sentence that would be appropriate having regard to the maximum penalty, the circumstances of the offending including all of its aggravating features and taking into account the guidance from the Court of Appeal and the way that similar cases have been dealt with in the Supreme Court. Once I have settled the starting point I will then need to consider mitigating factors which may reduce that, your personal circumstances and other factors. I need also to take into account the time you have spent in custody prior to sentencing and the comments in the pre-sentence report and in your counsel's submissions.

15. Here we have three separate offences. My approach is to isolate the lead offence, determine the starting point for that and then to increase it having regard to the other offences. A totality or overview must be taken of the three offences so that an excessively high sentence is not reached.

16. Before I refer to submissions about the starting point I make some general comments about rape. It is a serious violent offence carrying a penalty equalled only by pre-meditated intentional homicide. Perhaps because sex between consenting adults is a desirable and accepted part of our society, rape which is the same physical act without consent with implicit threats and violence associated may not be treated as seriously as it should be. Today, we just happen to be having a national day against domestic violence, involving major marches in Port Vila and here in Luganville. The Court endorses that campaign and reinforces the point that domestic (or any) violence can never be part of a civilised society such as Vanuatu in which the human rights of women are to be respected. No man should ever treat any woman in the way you did, particularly not a family member for whom you are responsible. Your duty was to look after rather than to sexually abuse your daughter, let alone three times.

17. In terms of the starting point Mr Boe in his written submissions submitted that taking into account all of the aggravating features it should be 11 years imprisonment. I note that was despite the submission that was made by him to the Chief Justice last year that it should be eight years and despite there having been no cross-appeal to the Court of Appeal by the Public Prosecutor against the Chief Justice's decision that it should be nine years.

18. I reject Mr Boe's submission that there are material factual differences between the first and second trials. I do not see any.

19. Ms Tari has adopted her original submission to the Chief Justice that the starting point should be eight years but ultimately it is the end sentence

which matters; she submits that the Chief Justice's end sentence of seven years and eight months is appropriate. I note that is by way of contrast with her submission to the Chief Justice that it should be five to six years from a suggested starting point of eight to ten years.

20. The lead offence here, the most serious of the three, is clearly the garden rape. Applying the approach of the Court of Appeal in the *PP v. Scott* [2002] VUCA 29, which endorsed what the Chief Justice had said in the Supreme Court in PP v. Ali August in 2000, in my view the starting point for this rape on its own must be at least eight years. That is largely because of the gross breach of trust. But when the other aggravating features are factored in that could well be seen as lenient and I think nine years could well be justified. I do not propose to repeat in this judgment the often-cited observations of the Chief Justice which were adopted in the *Scott* case, but my application of those principles to the present case leads me to the conclusion that the least restrictive starting point that I can adopt for the garden rape is eight years.

21. As to the second rape and the additional indecency offence, when these are added in, I consider on a totality view the least restrictive sentence I could add is one of two years. Therefore I have decided the least restrictive starting point is one of ten years imprisonment; again it could be said that adding only two years for a rape between a father and daughter together with a separate indecent assault is lenient.

22. I acknowledge that with the considerable number of rape sentencing decisions in the Supreme Court, it is possible to find several which involve a lower starting point than I have selected, even where there have been multiple sexual offences. My view is that while consistency is

important I must apply the Court of Appeal guidelines as set out in *Scott* while of course not doing so in an unthinking or robotic way.

23. I should pause at this stage to say that there is no information before the Court about the effects on your daughter of this offending. But from long experience as a sentencing Judge having read many victim impact statements in New Zealand written by rape victims, especially family members, I know that the consequences for her will have been mentally very serious. They will be with her for the rest of her life. Sometimes victims who demonstrate apparent toughness and resilience at around the time of the offending find later that their lives are traumatically affected in a way they had not understood would be possible at the time of the incident. There are often for example difficulties in forming healthy sexual relationships.

24. There are therefore very serious mental consequences for all rape victims but where there is the breach of trust between a father and daughter, some of the effects of which I observed when your daughter was giving evidence, the consequences are even more serious. There is a danger too that because of your family having suffered as a result of your time in custody and the time in custody to come that they may blame her rather than you for what happened. They must not do that, she has done nothing wrong and it is taken considerable courage on her part to bring you to justice. Ironically you should, as a parent, be proud of the character she has shown in this regard.

25. Returning to the starting point I note that the ten- year period is within the range of starting point submitted by Ms Tari to the Chief Justice, albeit at the top of that range. I do not accept the Public Prosecutor's

submission that an 11-year starting point is appropriate having regard to other sentencing decisions in the Supreme Court and the Court of Appeal guidelines. I note too that this was a new submission from the Public Prosecutor after having earlier taken a much more lenient view, namely that eight years was appropriate on the same facts.

26. Mr Boe has also asked for this Court to apply a new sentencing tariff, a higher one, that will have effect throughout the Republic of Vanuatu, but that is a request properly made of the Court of Appeal supported by good deal of relevant information about sentencing levels in the Supreme Court, the levels of reoffending and so on. As a Supreme Court Judge I cannot take a different approach from the Court of Appeal guideline judgment. Only the Court of Appeal can adjust that.

27. Having said all of that I proceed from the starting point of ten years imprisonment covering all three offences and this is clearly a case where concurrent sentences should be imposed.

28. In terms of mitigation Ms Tari submits there should be reduction for your cooperation with the Police for your being a first-time offender, a hard working member of the community and a leader in the Mormon church. Obviously, by contrast with many sentencing cases there can be no deduction for guilty plea, remorse, apology or insight because you deny the offences occurred. I might add that I give no deduction for your leadership in the Mormon church because that only indicates that you should have known better. Behaving in such an unChristian way towards your daughter was all the more unacceptable.

29. The probation report is necessarily brief and does not add a great deal to what Ms Tari has said because you continue to deny any offending.

30. I note that the Chief Justice gave a deduction of 12 months for the delay between the offending and the trial and three months for being a first offender so he reduced the sentence from a starting point of nine years to by some 15 months.

31. I propose to adopt that 12-month reduction and to give a somewhat greater credit for the absence of previous convictions and your previous community contributions. I accept, with respect, that the Chief Justice was correct to reduce the sentence by 12 months on account of the delay in the matter being charged and determined. I accept it has been a real penalty for you to have had this hanging over you since the complaint was made in May 2014 and for there to have been no charges at all laid until some 12 to 18 months after the incidents. It was not your fault that a re-trial was necessary.

32. I think for reasons of consistency I ought to adopt the Chief Justice's level of deduction on that account but in any event I respectfully agree with his treatment of that issue. So that brings the sentence down by 12 months or 10% of the 120 months starting point to 108 months or nine years.

33. I will deduct a further eight months for your previous good character over many years prior to December 2012 and the various community contributions that you have made. I note that there would have been a more substantial reduction for previous good character and community contributions had there not been three offences committed over a period

of a number of months. This was not a one-off lapse of character but a repeated series of offences against your daughter which rather throws into perspective your previous good character.

34. The result is that, apart from one factor I will shortly address, the sentence I would impose on you is one of 100 months imprisonment or eight years and four months.

35. That factor is the time you have spent in custody. From the time of your arrest until now in various bites you have spent almost exactly six months in custody. Mr Boe submits that I should ignore the first 5 ½ months of that because it occurred before the first trial and only take into account the 13 days that you have been in custody since I delivered the verdicts on the 10th of March. He submits that is the effect of section 51(4) of the Penal Code. I am unable to accept that submission. The whole period you were in custody was in connection with these charges. The re-trial does not change anything in that regard and I note the Public Prosecutor agreed in submissions to the Court of Appeal that credit did need to be given for the 5 ½ months you had spent in custody and that the Chief Justice had been misinformed that you had only been in custody for less than a month. I cannot understand how the Public Prosecutor can say last November to the Court of Appeal that that period should be taken into account but that he now says it should not be considered.

36. Section 51 (4) of the Penal Code says: *"If the offender has been in custody pending trial or appeal, the duration of such custody is to be wholly deducted from the computation of a sentence of imprisonment."*

37. Mr Boe seems to have read that as meaning that such deduction is only required if the offender has been in custody for the *whole* of the period pending trial or appeal. I consider that involves a misreading of the provision. It surely means that for whatever portion of the period prior to trial the offender has been custody, he is entitled to have that period taken into account.

38. It would be nonsense if a person was in custody for 12 months before the verdict and could have that taken into account but a person who was in custody for 12 months, apart from one day on bail, could not. The obvious purpose of this provision is to ensure that as between those who are given the same sentences that they end up serving the same period in custody, whether that is all after the sentence is imposed or partly before and partly after it.

39. The reality here is that you have, solely as a result of these charges spent six months in custody. Because of the effect of the half parole provisions I consider it fair to you that I reduce your sentence by 12 months.

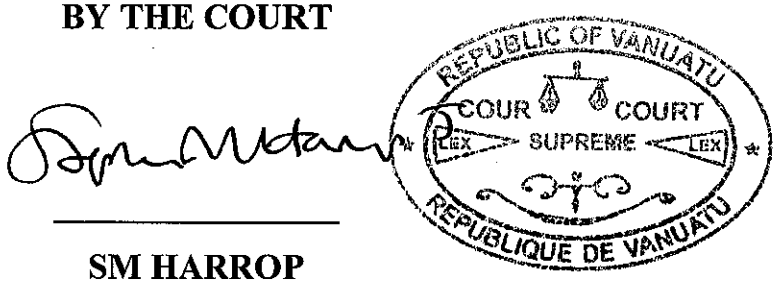
40. Accordingly I reduce the sentence from eight years and four months to seven years and four months, but I make it clear that that sentence starts from now.

41. I impose that sentence concurrently on the two rape charges, counts one and three. On the indecency charge, count five, you are sentenced to two years' imprisonment concurrent with the other two sentences. So the overall sentence remains seven years and four months.

42. You have 14 days to appeal against one or all of these sentences if you wish to do so.

DATED at Luganville this 23rd day of March 2016

BY THE COURT



SM HARROP

JUDGE