IN THE SUPREME COURT
REPUBLIC OF VANUATU
(Criminal Jurisdiction)

Criminal Case No. 2862 of 2016

PUBLIC PROSECUTOR

-v-

ENOCK IATIKNU

Before Justice David Chetwynd
Hearing 7th February 2017
Mr Young for the Public Prosecutor
Mr Livo for the Defendant

SENTENCE

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1. On 15th December last year the defendant Enock Iatiknu entered guilty pleas to charges of indecency and abduction. A pre-sentence report has been provided by the Senior Probation Officer and both the prosecutor and defence counsel have filed written submissions. The pre-sentence report was premised on the defendant having been convicted of rape rather than an act of indecency but it was still of use as it contained much pertinent information about him.

2. Because the report mentioned rape there was some uncertainty to begin with as to whether the defendant accepted the summary of facts as being accurate. In order to clarify the defendant's position I allowed Mr Livo some time to talk to the defendant and take instructions. After hearing from Mr Livo I was satisfied that the defendant did accept the summary of facts provided by the prosecution and his comments to the probation officer were to indicate he did not accept any suggestion he had raped the complainant. I did say that he was fortunate in that regard because he could have been charged with attempted rape pursuant to section 28 of the Penal Code. He was not so charged and he is being sentenced for an offence involving an act of indecency.

3. In arriving at the appropriate sentence I bear in mind the guidelines set out in the case of *Andy*[1]. I will not repeat what the Court of Appeal said in *Andy* because the procedures described by the court have been oft repeated and are, or should be by now, well known.

4. As mentioned previously, the defendant was also charged with abduction contrary to section 92 of the Penal Code. When I first read the papers in this case I was concerned about that charge. The reason for that concern is the way the section

[1] *Public Prosecutor v Andy* [2011] VUCA 14; Criminal Appeal 09 of 2010 (8 April 2011)

is worded following the amendment to it by the Penal Code (Amendment) Act 2006. As a result of the amendment section 92 now reads as follows:

> ***92 ABDUCTION***
>
> *A person must not intend to cause another person to have sexual intercourse, either with him or her with any other person, take that person away or detain that person against that person's will.*
>
> *Penalty: Imprisonment for 10 years.*

The section does not make sense without having to add additional words to it. I have researched PacLii to see if there has been any previous mention by the courts about the obvious grammatical error in the amendment. I cannot find any case law which refers to the wording of the section.

5. The original section 92 read, *"No person shall, with intent to marry, have sexual intercourse with a female of any age, or to cause her to be married by or to have sexual intercourse with any other person, take her away or detain her against her will."* That wording was presumably causing difficulty because it too had a grammatical error which meant that the *mens rea* or *"intention"* required by the section seemed to be linked to an intention of marriage. [2] The 2006 amendment seems to be an attempt to remove that linkage and instead make it an offence to take a person away or detain them in order to cause them to have sexual intercourse. However, in order to reach that conclusion and to make sense of the section it has to be either read as saying, "*A person must not <u>with the intention</u> to cause another person to have sexual intercourse, either with him or her with any other person, take that person away or detain that person against that person's will*" or alternatively *"A person must not intend to cause another person to have sexual intercourse, either with him or her with any other person, <u>by taking</u> that person away or detain<u>ing</u> that person against that person's will".* If the section is read in either of those ways then I am satisfied, in all the circumstances of this case, that the plea of guilty by the defendant to the charge of abduction was a proper one to accept.

6. The established facts are that the defendant encountered the complainant whilst walking past her home in the village. She was brushing up some leaves. The defendant grabbed hold of the complainant's hand and took her into the bush. There he took off her clothes and made her lie down. He removed his own clothes and lay on top of her. As he did so the complainant's daughter arrived on the scene and shouted at him whereupon he ran off. The daughter had gone looking for her mother because of the latter's mental illness. The complainant is aged over 60 and is described in a psychiatric report as being schizophrenic and vulnerable.

7. The abduction was not an unduly violent one. The defendant did not use excessive force, he did not need to. In her confused and vulnerable state the complainant was fairly compliant. However, because of her mental incapacity she

[2] *Public Prosecutor v Poia* [1993] VUSC 20

could not properly consent to what was happening. She could not consent to the abduction and she could not give consent to the indecent act which occurred in the bush.

8. In all the circumstances I deem the offence of committing an indecent act to be far worse than the abduction and the sentences will reflect that. The offence under section 98 of the Penal Code carries a maximum sentence of 7 years. There are varying degrees of indecency. These could range from a mere touching outside of clothing to flesh to flesh contact and simulated sexual acts. However, if the act consists of, *"the penetration to any extent of the vagina or anus"* of a person or even, *"the licking, sucking or kissing to any extent"* of a person's genitalia or anus then the act is no longer an act of indecency it becomes sexual intercourse. In this case it is accepted the complainant was lying naked on the ground and the defendant was lying on top of her. It is not entirely clear if the defendant had removed all his clothes or had simply removed some so that his penis was exposed. By any measure what occurred was a serious act of indecency.

9. In my view the starting point for the offence involving an act of indecency of this sort is two years. The offence is aggravated by the defendant's callous disregard of the complainant's mental state. This is especially so because he does not deny that he knew of her vulnerability. It was a deliberate act on his part to take advantage of mentally impaired and vulnerable old lady. The proper sentence is one of 3 years.

10. With regard to the abduction the sentence will be two years imprisonment.

11. The defendant is 26 and has not been in trouble with the police before. He did show some remorse but it seemed to be remorse at being caught not for what he did. When the matter came before the court in September 2016 he pleaded not guilty and the case was set down for trial. It was only when the case was called on for trial that the defendant changed his plea. He therefore cannot be given full credit for a guilty plea at the earliest opportunity. I also take into account the fact that the offences were committed in November 2014. No reason has been put forward for the delay and I was not told why the case was only committed for trial in August 2016. In all the circumstances detailed above I will deduct 12 months from the sentence meaning the defendant will serve 2 years for the offence of indecency and 1 year and three months for the offence of abduction. The sentences will be served concurrently.

12. I am next required to consider the possibility of suspending all or part of the sentence. Even though sexual intercourse did not take place this was a case of sexual abuse. The case of *Gideon* [3] is good authority for saying that men who sexually abuse the weak and vulnerable cannot expect their sentences to be suspended unless there are exceptional circumstances. There are no exceptional circumstances in this case and the defendant will serve his sentence immediately.

[3] *Public Prosecutor v Gideon* [2002] VUCA 7; Criminal Appeal Case 03 of 2001 (26 April 2002)

13. There is one final matter to be mentioned before I leave this case. I am perturbed by the comments of the defendant's de facto partner suggesting the defendant has done something similar on two other occasions. This is not evidence he has done so but I can see no reason why she should lie. If what she says is true then there is likely to be some underlying psychology which causes the defendant to behave this way. It is not something which I have taken into account when sentencing but I believe I have an obligation to the defendant and to the community to ensure the possibility is investigated. I will write to the Senior Psychiatry Registrar at Central Hospital to see if his mind team can assist.

14. The defendant has 14 days in which to appeal against this sentence.

Dated at Port Vila this 7th day of February 2017

BY THE COURT

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D. CHETWYND
Judge

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