

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

Criminal Case No 18/907 SC/CRM

PUBLIC PROSECUTOR

V

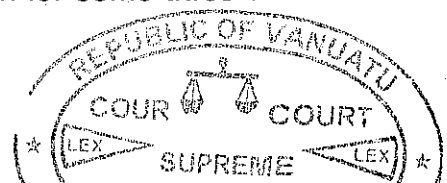
JOHN LEONA
CLENCY QWITA
ALEX TABEVA

Before: Chetwynd J
Hearing: 19th and 20th June 2018 at Loltong Pentecost
Counsel: Mr Boe for the Prosecution
Mr Vira for the Defendant

SENTENCE

1. The defendants John Leona, Clency Qwita and Alex Tabeva have all been convicted of one count of sexual intercourse without consent. Two of the defendants, John Leona and Alex Tabeva, have in addition been found guilty of offences of carrying out an act of indecency against the victim of the rape. The maximum penalty for an offence of rape is life imprisonment. There is no doubt that rape is considered to be one of the most serious crimes and offenders must be sentenced accordingly. There are any number of decisions, from the Court of Appeal and from this Court, which hold that view to be true.

2. The circumstance of the rape were set out in my previous decision dated 20th June. In brief, these three men whilst under the influence of alcohol took it in turns to rape their young victim. She had just turned 17. The defendants neither asked for the young girl's consent nor did they care whether they had her consent or not. A degree of force was used including some gagging of the mouth to prevent the victim crying out. The rape of the victim in the presence of the other defendants. This type of offending is commonly called gang rape and must be particularly distressing for a victim. For this victim it was and she was physically in pain for some three weeks.



She was emotionally upset for a similar period and is she still feels humiliated when she walks around the village. One of the factors which intensified her feelings of shame and humiliation is that all three defendants are related to her. Apart from the morality of rape in itself a sexual relationship between such close relatives offends against custom as well.

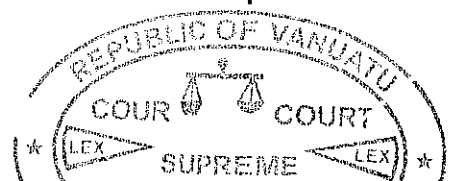
3. I have received submissions by the prosecution and defence and I have received very helpful pre sentence reports from the Probation Service. I have taken all of this information into account in coming to a decision about sentence. This is particularly so because one of the defendants was 16 at the time of the offending. I have heard that all three defendants took part in a reconciliation ceremony.

4. Dealing with John Leona first as he is the eldest, he is 26 years old. He admits he was under the influence of alcohol. He still denies pulling the victim into his house by the hands. He has no previous convictions. He is not particularly remorseful. He does not seem to think rape is an offence.

5. Next there is Clency Qwita, he is said to be 19. He too accepts he was under the influence of alcohol. He seems to blame the other two defendants for getting him involved. In addition he too seems to think that there was no offence involved in raping a young girl. His reported attitude is not indicative of a remorseful person.

6. We then come to Alex Tabeva. He is the 16 year old. He told the probation officer he was under the influence of alcohol but he knew what he was doing was wrong. He says it was not the first time he had sex with the victim. The victim denies that there has been any sexual relationship between her and Clency Qwita. He said that he had not intended to have sex with the victim that night but when he saw the other two defendants having sex he thought he would too. He accepts that he acted in a "rabis fasin" towards the victim.

7. Even if I tended to accept that there was a sexual history between the victim and any of the defendants, and I wish to make it very clear I do not believe that was the case, if a woman says no that means no. It does not matter how many times there has been sexual intercourse between them in the past, a woman's fundamental right is to say no and if she says no and a man persists in having sex then that is rape. A



woman's right to say no is not negated by any previous relationship between her and the man even if that relationship is one created by marriage. No means no.

8. In previous cases the Court of Appeal have expressed the view that any offence of sexual intercourse without consent must be met with a sentence of at least 5 years imprisonment. If there are aggravating factors then the sentence should be increased accordingly. In my view the fact that there were three defendants who took it in turns to rape the victim must be an aggravating factor. This view was also expressed in the case of *Scott*¹:-

"For rape committed by an adult without an aggravating or mitigating feature, a figure of five years should be taken as the starting point in a contested case. Where a rape is committed by two or more men acting together....the starting point should be eight years".

In this case the starting point must be 8 years.

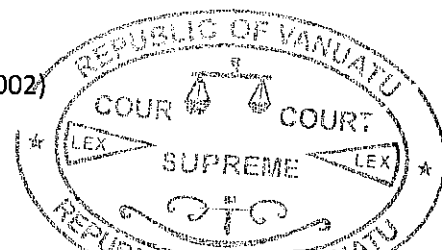
9. Looking at the defendants individually, John Leona has no previous convictions and has been involved in a reconciliation ceremony. He is entitled to a reduction of six months. His final sentence is 7 ½ years. He will also be sentenced to 3 years imprisonment for committing an act of indecency upon the victim. These sentences to be served concurrently.

10. As for Clency Qwita, he too has no previous convictions and took part in the reconciliation ceremony. His sentence will be reduced by six months as well. In addition he is a relatively young man and it is generally accepted a sentence in such circumstances should be further reduced. I will reduce his sentence a further 2 years to take account of his age. His final sentence is 5 ½ years.

11. Turning now to the youngest, Alex Tabeva, I am very mindful of section 54 of the Penal Code. It says that a person under 16 years is not to be sent to prison unless there is no other appropriate method of punishment. It is not entirely clear whether Mr Tabeva was 15 or 16 at the time of the offending. There have been cases where a 16 year old has been convicted of rape but avoided being sent immediately to prison. However the cases I am aware of involved only the juvenile offender. Here Mr Tabeva has been convicted of rape and an act of indecency in concert with others.

12. The courts must obviously treat such offending as extremely serious (see *Scott* cited above). In this case I think it would send the wrong message if Mr Tabeva was not sent to prison. The message would be you can participate in serious

¹ *Public Prosecutor v Scott* [2002] VUCA 29; CA 02-02 (24 October 2002)



offending along with adults but whilst they will be sent to prison you will not. However, I must bear in mind the very young age of Mr Tabeva. He has no previous convictions and has taken part in a reconciliation process so would be liable to a sentence of 7 ½ years. However due to his young age his sentence will be heavily discounted and he will serve 2 1/2 years imprisonment. He will be sentenced to 6 months imprisonment for the offence of committing an act of indecency. The sentences to be served concurrently. He will be serving his sentence in the company of his relatives who can support him during his incarceration. He will also be able to take part with them in the rehabilitation modules of sexual offending, victim awareness and family violence. From what they told the probation officer all three defendants would benefit from such rehabilitation.

13. None of the defendants are entitled to any reduction in their sentences for a guilty plea. They were all convicted following a trial.

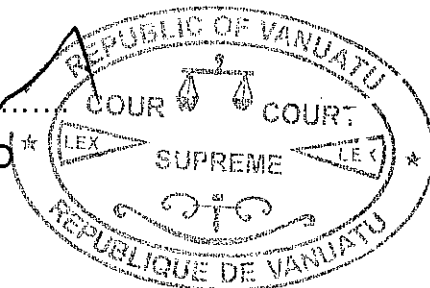
14. From my comments it is probably obvious but I will make it clear that I do not think any of these sentences can be suspended. The case of *Gideon*² is ample precedent for not suspending a sentence in these circumstances :-

"It will only be in a most extreme of cases that suspension could ever be contemplated in a case of sexual abuse."

15. The defendants should know that if they are unhappy with these sentences (or their conviction) they can appeal and they have 14 days in which to lodge any appeal. I would advise them to consult with their legal counsel before doing so.

Dated at Luganville this 3rd July 2018


D. CHETWYND
Judge



² *Public Prosecutor v Gideon* [2002] VUCA 7; Criminal Appeal Case 03 of 2001 (26 April 2002)