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

Criminal
Case No.18/600 SC/CRML

# PUBLIC PROSECUTOR
# v
# JUSTIN MALTURNEIM

***Coram:*** ***Chief Justice Vincent Lunabek***

***Counsel:*** *Mr S. Blessing for the State*
*Mr E. Molbaleh for the Defendant*

***Date of Sentence:*** *09 August 2018*

## SENTENCE

1. Mr. Justin Malturneim, this is your sentence. You are initially charged with one count of Acts of Indecency With a Young Person and Unlawful Sexual Intercourse, contrary to Sections 98A and 97(1) of the Penal Code Act [CAP. 135] (respectively).

2. On 6 August 2018, you entered guilty plea on the offence of Unlawful Sexual Intercourse charged in Count 2. The prosecution applies and the Court grants a nolle prosequi pursuant to Section 29 of the Criminal Procedure Code Act [CAP. 136] in relation to the offence of acts of indecency in Count 1. You are discharged of the offence of Acts of Indecency accordingly.

3. You are only sentenced for the offence of Unlawful Sexual Intercourse in Count 2 of the Information (amended) dated 6 August 2018.

4. The facts of this case are provided by the Prosecution. You do not dispute those facts. You agree and accept these facts before you enter guilty pleas. You had sexual intercourse with the complainant on five (5) different occasions in the month of August 2017. The first incident occurred during the daytime when you invited the complainant into your store. You then indecently touched her breast and you gave her VT500. The same day at night time, you went into the complainant's room when no one was there. You then removed her clothes and you also removed your own clothes you then inserted and penetrated her vagina with your penis. The next day, you gave her VT1,000 but you did not

say a word. On the second incident, you had sexual intercourse with her during the night time. At that time, you entered her bedroom and removed her clothes and you also removed your clothes. You then inserted and penetrated her vagina with your penis and had sex with her. The next day you gave VT1,000 to her. On the third occasion, you came into her room. You removed all her clothes. You then inserted and penetrated her vagina with your penis and had sexual intercourse with her. The next day you gave her VT1,000 and told her that she must not tell anyone about the sex. You also told the complainant that if you die then she will be the one who will be living in your house. The fourth time, you came into her room and had sex with her. You removed her clothes and your own. You inserted and penetrated her vagina with your penis and had sex with her. Again the next day, you gave her VT1,000. The last time you have sexual intercourse with the complainant was in August 2017. She recalled that it was during the night time again. You came into her bedroom and removed her clothes. You also then inserted and penetrated her vagina with your penis and had sex with her. The next day, you gave her VT1,000. In her statement to the police, she said she did not tell anyone because you told her that if she kept quiet then when you die she will live in your house. You were arrested, cautioned and interviewed by the police at Lakatoro. You shifted blame to the complainant stating that it was her also who initiated these sexual activities but not you.

5. The penalty for the offence of unlawful sexual intercourse under Section 97(1) has been amended by increasing it from 14 years to "*life*" by the Penal Code (Amendment) Act No. 15 of 2016. The complainant girl is a child of 12 years of age at the time of offending and as such she was a girl under the age of 15.

6. The nature of the offence is very serious which is reflected by the intention of Parliament to impose a maximum penalty for life. The court's duty is to show this intention through this sentence and according to the circumstances of each case.

7. I peruse the pre-sentence report (same day) provided by the Probation Officer (Samson Avock). I hear submissions from your lawyer and the prosecution. You lawyer submitted that the appropriate sentence for this type of offending will be between 5 – 6 years imprisonment and an end sentence of 2 – 3 years (after appropriate deductions for mitigating factors) and to be suspended based on the facts of PP v Tino Meltek [2016] 120; Criminal Case 2425 of 2016 (2 September 2016). The mitigating factors leading to the suspension of the sentence of defendant Meltek are not the same as the case of the present defendant. Further the offence occurred in 2006 some 10 years before defendant Meltek was prosecuted and sentenced. The prosecution submitted that the appropriate sentence would be between 11 – 12 years imprisonment

based on the facts of PP v Sigi [2016] VUSC 80. The facts of PP v Slpi are distinguished from the present case

8. I have also read and considered the relevant guideline judgment and case authorities supplied by the prosecution. In PP v Gideon [2002] VUCA the Court stated:

*"... there is overwhelming need for the Court on behalf of the community to condemn in the strongest terms any who abuse young people in a community. Children must be protected. Any suggestion that a 12 year old has encouraged or initiated sexual intimacy is rejected. If a twelve year old is acting foolishing then they need protection from adults. It is totally wrong for adults to take advantage of their immaturity.*

9. In PP v Bae [2003] VUCA the Court of Appeal stated:

*"The principle is simple. Parents who use their children for their own sexual gratification will go to prison. It is almost impossible to imagine circumstances in which that will not be the necessary response ....".*

10. This principle applies also to grandparents who sexually abuse their grandchildren.

11. This is to mark the seriousness of your offending, the disapproval of your action, a deterrence for you and others, and to protect the children as they are young and vulnerable.

12. In this case, not only your offending is serious but also that the circumstances of the offending was aggravated by the following factors.

(a) You are her grand father. She trust you. You breach that trust;
(b) The offending is repeated and committed mostly by night;
(c) There is a disparity of 58 years between your age of 71 and that of the complainant girl of 12 years. It is substantial;
(d) The offending occurred in the confinement of the home – the gilr complainant was supposed to feel safe and protected;
(e) The sexual intercourse acts were unprotected, putting the girl at the great risks of illness and teenage pregnancy;
(f) The mental and physical impacts on her life as a school child and growing child with adverse effect on her;
(g) You gave her money after the sexual intercourse;

13. Eight to ten years imprisonment would be appropriate starting point sentence. I take it that 9 years will be the appropriate sentence here.

14. In mitigation you are a first time offender. You do not have previous conviction. I give an allowance of 6 months. A sentence of 8 years and 6 months remains. I

give you an additional allowance of 25% for your guilty plea (but not a one third as you are not entitled to it). 6 years and 3 months remains. That is your end sentence.

15. I consider but I decline to suspend your sentence of 6 years and 3 months imprisonment. I take it that while you serve your term of imprisonment, the correctional officers will manage your health condition and situations.

16. The prosecution applies for costs in the amount of VT10,000 under Section 98 of the Criminal Procedure Code (CPC) [CAP. 136]. The rational for the application is premised on the adjournments caused by the defendant when the prosecution was ready with its witnesses for trial in July 2018 and the defence counsel was also available and attended the court but the trial was adjourned on the application of the defendant. And again, the prosecution was ready in August with its witnesses but the defendant entered guilty pleas.

17. In the circumstances of this case, I decline the prosecution's application. The adjournment was made by a court order not by a making of the defendant. An imprisonment sentence is imposed. It is not appropriate to order costs aside an imprisonment sentence. That is not what Section 98 of the CPC [CAP. 136] intended.

18. You shall serve a term of 6 years and 3 months with immediate effect.

19. You have 14 days to appeal against this sentence if you are unsatisfied with it. The 14 days starts today.

**DATED at Lakatoro, Malekula, this 9th day of August, 2018.**

**BY THE COURT**

REPUBLIC OF VANUATU COUR COURT LEX SUPREME LEX REPUBLIQUE DE VANUATU

**Vincent LUNABEK**
**Chief Justice.**