

(Criminal Jurisdiction)

**PUBLIC PROSECUTOR**

**VS.**

**BENNETH MALON  
JACOB KALO**

**Mr Justice Oliver A. Saksak  
Mrs Anita Vinabit – Clerk**

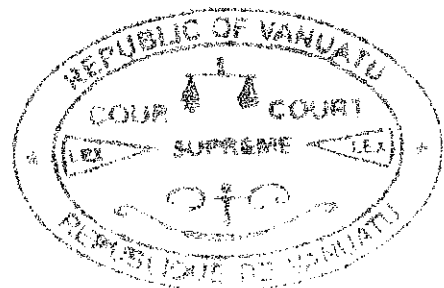
**Mr Lent Tevi for Public Prosecutor  
Mr Jacob Kausiama for Defendants**

**9<sup>th</sup> May 2006**

### **CONVICTION AND SENTENCE**

Benneth Malon (BM) and Jacob Kalo (KL) are charged jointly with one count of rape contrary to section 91 of the Penal Code Act [CAP. 135] (the Act). The offence of rape carries a maximum of life imprisonment.

They both plead guilty to the charge. BM is 15 years old and JK is 13 years old. The incident happened about 12 O'clock midnight on 5<sup>th</sup> April 2006. The two defendants followed the victim who was sent by her uncle to collect her cousin brother at the house belonging to a Mr Joe. On the way the defendants blocked her, grabbed her, pulled her to the side of the pathway, removed her clothes and forcefully had sex with her one after the other. BM had sex with the victim first and he called for JK to have his turn. When JK had finished having intercourse, then BM had his second go and when he had finished JK had his second go. There was full penetration and ejaculation. Medical examination revealed blood on the vaginal opening due to a freshly torn hymen. There was a small laceration on the cervix. An



investigation into the vaginal swab showed the presence of spermatozoa. The victim was a 16 year old girl.

A conviction is recorded against both accused due to their guilty pleas.

In considering sentence, the Court is urged by the Prosecutor to follow the sentencing guidelines and principles laid down in Public Prosecutor v. Ali August as upheld by the Court of Appeal in Public Prosecutor v. Maslea Scott and Jeremiah Tula.

I accept that the aggravating features of this offence were that:-

- (a) The victim was a young girl of 16 years and a virgin.
- (b) Some degree of physical force was used on her.
- (c) The offence was repeated by the two defendants.
- (d) It happened in the dark at midnight in the bushes.

I am also aware that the defendants are minors.

Mr Kausiama submits the following mitigating factors:-

- (a) Both pleaded guilty at the first opportunity.
- (b) They both have expressed remorse and contrition.
- (c) Both are first-time offenders.
- (d) Both are minors.

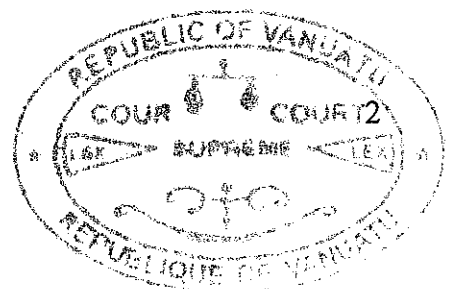
I accept these and consider them accordingly in assessing sentence.

I also consider sections 17 and 38 of the Act. Section 17(1) states –

*“No child under the age of 10 years shall be capable of committing any criminal offence. A child of 10 years of age or over but under 14 years of age shall be presumed to be incapable of committing a criminal offence unless it is proved by evidence that he was able to distinguish between right and wrong and that he did so with respect to the offence with which he is charged.”*

Section 38 states –

*(1) No person under 16 years of age shall be sentenced to imprisonment unless no other method of punishment is*



*appropriate. Where any person is sentenced to imprisonment, the Court shall give its reason for so sentencing.*

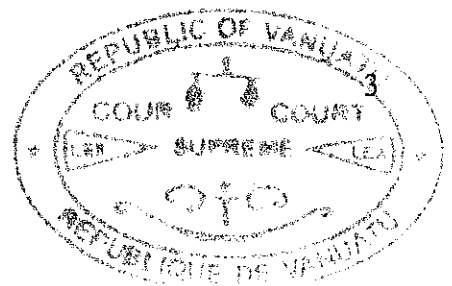
*(2) An offender under the age of 16 years shall serve a sentence of imprisonment in a special institution or, if no such establishment exists, shall be separated from offenders of 16 years of age and over."*

It is common knowledge that in Vanuatu there is no special institution in existence to cater for imprisonment of young offenders. Therefore section 38(2) of the Act is completely ruled out.

JK is 13 years of age and it appears he has protection against imprisonment under section 17(1) of the Act. However that protection applies only on the premise that at the time of the commission of the offence the defendant could not distinguish between right and wrong. No evidence was led to that effect but that was not called for. In his submission Mr Kausiama submits in mitigation that both defendants have expressed remorse and apologized for their actions. From that it is clear that JK could tell that what he did was wrong because if he did not, there could be no room for an apology. I conclude therefore that JK cannot escape responsibility under section 17(1) of the Act.

Both defendants are minors and have started offending with a very serious criminal offence carrying a maximum term of life imprisonment. Due to the aggravating features adding to the already seriousness of the offence, the Court accepts Mr Tevi's submission that the Court should consider imposing a sentence that not only would be appropriate to the circumstances of the offenders, but also to have some deterrence effect for others so as to maintain some consistency with the principles as laid down in the Ali August and Maslea Scott cases.

Both defendants are no longer attending at school. As young offenders it cannot be presumed that they are habitual offenders and that they would continue doing this sort of thing. They each have a long future ahead of them and Mr Kausiama has urged the Court to show leniency to enable them to rehabilitate. I have had an opportunity of asking them about their recollection and experience in jail whilst under remand in custody. Both have said they did not enjoy



being there and both answered that they would not wish to go back there.

Having said all that, it is my view that a term of imprisonment for the two defendants is ruled out. However there are other options left to deal with them so as to achieve and ensure a deterrence effect for others.

Weighing all those factors, I consider that the appropriate punishment the Court can impose are as follows:-

- (1) For Benneth Malon – Imprisonment for a term of 3 years but suspended for a period of 3 years from the date of sentence. This suspension is made pursuant to the provisions of the Suspension of Sentences Act CAP. 67.  
Further as a gesture of remorse, he is ordered to pay compensation to the victim in the sum of VT5,000 plus a gift of one (1) mat.
  
- (2) For Jacob Kalo – He is convicted but discharged under the provision of section 43 of the Act.  
Further, he is ordered to pay a compensation of VT5,000 plus a gift of one (1) mat to the victim of the offence as a gesture of remorse and reconciliation.

Those are the sentences and orders of the Court.

**DATED at Luganville this 9<sup>th</sup> day of May 2006.**

**BY THE COURT**



**OLIVER A. SAKSAK**  
Judge

