

PUBLIC PROSECUTOR -v- AMSEN PAKOA SONGI

Coram: *Chief Justice Vincent Lunabek*

Counsel: *Mr Gregory Takau for the Public Prosecutor
Mr Andrew Bal for the Defendant*

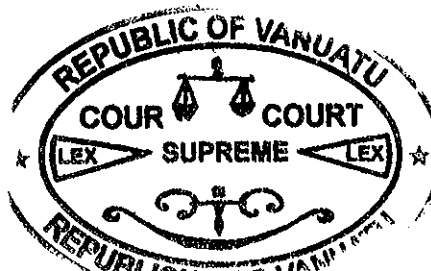
SENTENCE

This is the sentence of the Defendant, Amsen Pakoa Songi. On 18 February 2010, the Defendant was found guilty and convicted of four (4) counts of Indecent Assault, contrary to section 98(1) of the Penal Code Act [CAP.135] respectively in 2003 and 2006.

The convictions were secured on alternative verdicts under s.109 of the Criminal Procedure Code [CAP.136]. The complainant girl was born on 6 June 1994. She was 9 years of age in 2003 and 12 years of age in 2006. She is now 17 years of age. The Defendant is the Apu (grandfather) of the complainant girl. He was 50 years old in 2003 and 53 years of age in 2006. At the time of his sentence, he is 57 years old.

Below are the brief facts upon which the Defendant, Amsen Pakoa was found guilty and convicted on 18 February 2010:

The complainant is a student attending Hiwello Primary School in Tongoa. Sometimes in 2003 the Defendant, on two occasions, indecently assaulted the complainant. On the first occasion the Defendant held the complainant tightly under a nabanga tree. He then removed the complainant's clothes and caused her to sleep on the ground before he sucked her vagina. At that time, the Defendant also



penetrated her vagina with his finger. On the second occasion, the Defendant took the complainant back to the same place where the first incident occurred and touched her private part and also pushed his finger into her vagina.

Sometime in 2006, on two occasions, the Defendant indecently assaulted the complainant. On the first occasion the Defendant drank some kava and slept inside the house where the complainant was residing. During the night the Defendant approached the complainant and touched her breast, kissed her mouth and touched her private part. On the second occasion the Defendant sucked her vagina and also kissed her mouth.

Section 98(1) of the Penal Code Act [CAP.135] provides as follows:

“98.(1)No person shall commit any act of indecency with any other person under the age of 13 years.

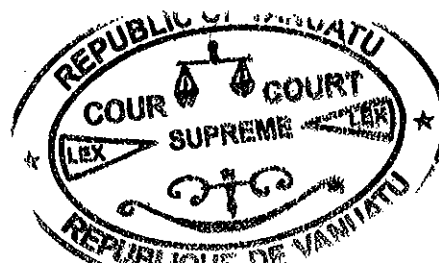
Penalty: Imprisonment for 10 years.”

The offence of indecent assault, contrary to section 98(1) of the Penal Code Act carries a maximum penalty of 10 years. It is a serious offence.

The Courts have dealt with offences of sexual nature and sexual offences involving children in particular and condemned these offences in the strongest terms.

In **PP v. Scott** [2002] VUCA 29, Criminal Appeal Case No.02 of 2002 (24 October 2002), the Court of Appeal confirming the Judgment of **PP v. Ali August** [2002] VUSC 73; Criminal Case No.014 of 2000 (28 November 2000) stated as follows:

“The offence of rape is always a most serious crime. Other than in wholly exceptional circumstance, rape calls for an immediate custodial sentence. This was certainly so in the present case. A custodial sentence is necessary for a variety of reasons. First of all to mark the gravity of the offence. Secondly to emphasize public disapproval. Thirdly to serve as a warning to others. Fourthly to punish the offender, and last



but by no means least, to protect women. The length of the sentence will depend on the circumstances. That is a trite observation, but these in cases of rape vary widely from case to case.

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, or by a man who has broken into or otherwise gained access to a place where the victim is living, or by a person who is in a position of responsibility towards the victim, or by a person who abducts the victim and holds her captive the starting point should be eight years.

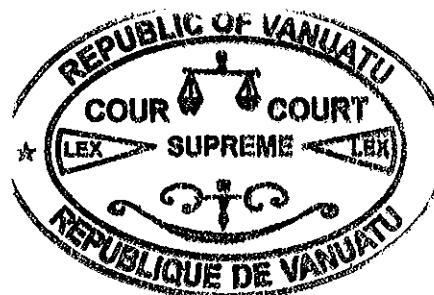
At the top of the scale comes the defendant who has committed the offence of rape upon a number of different women or girls. He represents a more than ordinary danger and a sentence of fifteen years or more may be appropriate.

Where the defendant's behaviour has manifested perverted or psychopathic tendencies or gross personality disorder, and where he is likely, if at large, to remain a danger to woman for an indefinite time, a life sentence will not be appropriate.

The offence of rape should in any event be treated as aggravated by any of the following factors:

- (1) Violence is used over and above the force necessary to commit rape;*
- (2) A weapon is used to frighten or wound the victim;*
- (3) The rape is repeated;*
- (4) The rape has been carefully planned;*
- (5) The defendant has previous convictions for rape or other serious offences of a violent or sexual kind;*
- (6) The victim is subject to further sexual indignities or perversions;*
- (7) The victim is either very old or young;*
- (8) The effect upon the victim, whether physical or mental, is of special seriousness.*

Where any one or more of these aggravating features are present, the sentence should be substantially higher than the figure suggested as the starting point.



If the defendant pleads guilty, the sentence should be reduced by 1/3 depending on the circumstances, including the likelihood of a finding of not guilty had the matter been contested.

The fact that the victim may be considered to have herself in danger by acting imprudently (as for instance by accepting a lift in a car from a stranger) is not a mitigating factor, and the victim's previous sexual experience is equally irrelevant. But if the victim has behaved in a manner which was calculated to lead the defendant to believe that she would consent to have sexual intercourse, then there should be some mitigation of the sentence. Previous good character is of only minor relevance."

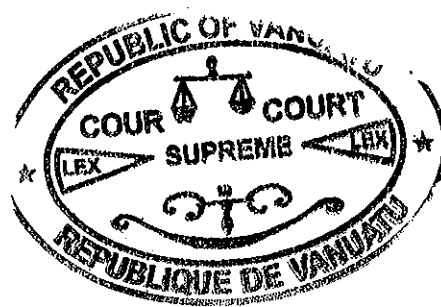
In the case of **Public Prosecutor v. Gideon** [2002] 7 Criminal Appeal Case No.03 of 2001 (26 April 2002), the Court of Appeal stated:

"Men must learn that they cannot obtain sexual gratification at the expense of the weak and the vulnerable. What occurred is a tragedy for all involved. Men who take advantage sexually of young people forfeit their right to remain in the community."

The prosecuting counsel refers the Court to the judgment of the Court of Appeal in the case of **PP v. Boita** [2002] VUCA 38; Criminal Appeal Case No.09 of 2002 (1 November 2002). This case involved a school teacher indecently assaulting a number of girls students at the school. They are aged between 8-11.

The Court of Appeal held that the appropriate starting point for this particular offending would be in the age of 7 or 8 years. The Court of Appeal quashed the judgment of the Supreme Court of 1 year and 10 months and substituted a term of 4 and ½ years imprisonment.

The defence counsel refers also to the Boita case and in addition he refers to the case of **PP v. Solaise Obednigo**, Criminal Case NO.3 of 1990, in which the Court of



Appeal sentenced the Defendant for 5 years for incest and indecent assault of his 12 years old granddaughter.

The trend of the courts' judgments consistently show that the appropriate sentence must be a custodial one. This is also the case in this case.

In the present case, the starting point is 5 years imprisonment. This term of imprisonment will be increased taking into account of the following aggravating factors:

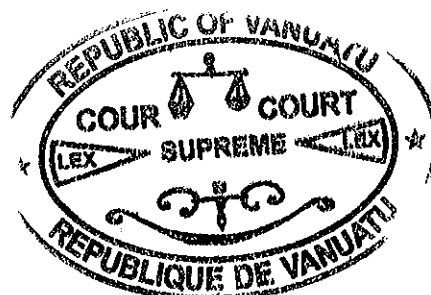
1. The age of the complainant;
2. The breach of trust because of the domestic relationship which existed between the Defendant and the complainant;
3. The fact that the offence occurred within what should have been the security of a home where the complainant should have been safe;
4. The fact the complainant was specifically told not to tell anyone;
5. The age of the Defendant.

The terms of 5 years is increased by 2 years to reflect the aggravating factors which is totaling an imprisonment term of 7 years.

In mitigation, your counsel told the Court that the defence concedes with facts tendered by the prosecuting counsel which is contained in the prosecution submissions and those facts are those found by the Court leading to your convictions on the alternative verdicts on 18 February 2010.

You are a first time offender and as such you have no records of previous convictions. You cooperated with the police.

I read the report filed by the probation officer dated 1 March 2010. The report showed that you are now 57 years old. You come from Bongabonga village on the Island of Tongoa.



You are single and you are never married. You used to be in a relationship with a girl from another village in Tongoa. However, the relationship ended after the immediate family members of that girl were not happy about the said relationship. You vowed not to be married the rest of your life. The report shows that you are in good terms with the members of your village and community of Bongabonga.

You described yourself as the Chief Representative of your village with the chiefly name of Taripoamata. Your nephew, Jason Pakoasongi confirmed you are a highly respected Chief of the Bongabonga village in Tongoa. You understand the custom of your village.

You attended school until class 6 in 1960's.

The report shows that you moved to live on the Island of Efate around the year 2006 and you had been living in Epule village, at the Northern part of Efate island until you were arrested and remanded in custody awaiting the trial of your case.

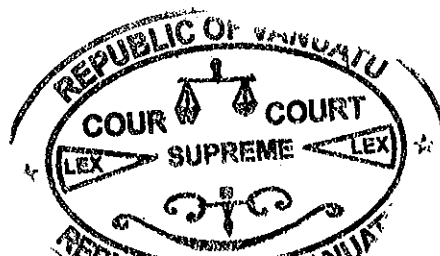
You are a Deacon at the Epule Presbyterian Church. You do gardening. You sell the produce of your garden at the Port-Vila Market. You are of good health.

The description of the offending in the Report are wrong in law and as such any recommendation made at the end of the report must be made on the basis of such a misapprehension of the offending and so must be disregarded.

I take all what your counsel told the Court into consideration when I consider your sentence. I take also what is relevant in the report in your credit. I note that you express no remorse for your offending.

In balancing the aggravating factors and the mitigating ones, and after cross-referencing them, the aggravating factors outweigh the mitigating factors.

Mr Amsen Pakoa Songi, you are sentenced to 5 years imprisonment on each of the 4 counts of indecent assault, contrary to section 98(1) of the Penal Code Act



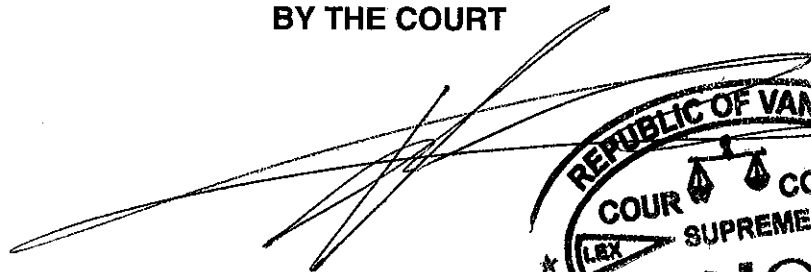
[CAP.135]. You have already spent 6 months and 9 days since your remand on 2 September 2009. This will be deducted to your total term of 5 years imprisonment.

You are ordered to serve 4 years 5 months and 21 days imprisonment CONCCURRENTLY and this is with immediate effect.

You have 14 days to appeal this sentence if you are dissatisfied with it.

DATED at Port-Vila this 11th day of March 2010

BY THE COURT



Vincent LUNABEK
Chief Justice

