

(Criminal Jurisdiction)

PUBLIC PROSECUTOR

VS.

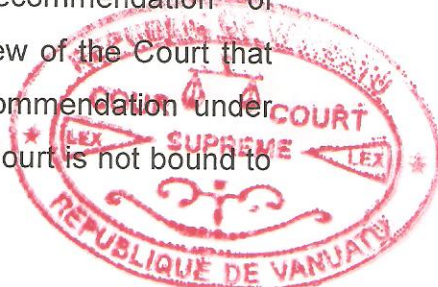
KARL ANDY

Mr Justice Oliver A. Saksak
Mrs Anita Vinabit – Clerk

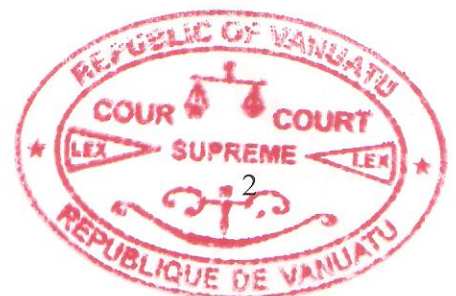
Ms Kayleen Tavoia – Public Prosecutor
Mr Saling Stephens – For the Defendant

SENTENCE

1. Karl Andy you pleaded guilty on 21st October 2010 to one charge of unlawful sexual intercourse contrary to section 97(1) of the Penal Code Act Cap 134. The maximum penalty for this offence is 14 years imprisonment. This makes the offence of unlawful sexual intercourse a serious one.
2. In imposing sentence, I have considered the submissions made by the Public Prosecutor and Mr Stephens. I have seen your Pre-Sentence Report and take note of Mr Stephens' submission about parts of the Report that should not be accepted. However, those facts about your offending as stated by the Probation Officer are necessary to enable the Court to say whether or not they are consistent with facts told by the victim and the offender to the police at interviews. Also, they are essential to enable the Court to say whether they are consistent with the facts as presented by the prosecutor to the Court. It is also relevant in that it assists the Court to say whether the facts presented by the offender are consistent. As regards the recommendation of imprisonment by the Probation Officer, it is the view of the Court that the Probation Officer is entitled to make the recommendation under Section 58 E (2) of the Penal Coded Act. But the Court is not bound to adopt and apply the type of option recommended.



- 3.1. Your victim was a 10 year old school girl who went to your house at the invitation of your own daughter. Section 97(1) of the Act protects such girls as this victim. However, you disregarded her age and after committing acts of indecency on her, you had sexual intercourse with her. The medical report dated 25th April 2010 confirms that the victim's labia majora was "blood stained", her vestibule was "bruised" and her hymen had "tears and bleeding". The medical report concluded (a) there was "sexual assault", "digital vaginal penetration" and (b) "child sexual abuse".
- 3.2. Your version of the facts to the Probation Officer at page 3 of the Pre-Sentence Report indicates that you removed the victim's clothes, touched her vagina with your finger even pushing a finger into her anus and vagina before you started licking her vagina which you did for sometime. You stated that you were naked but did not have sexual intercourse with the victim. Even if what you said at the end here is true, your admission of pushing a finger into the anus and vagina is consistent with the medical examiner's conclusion that there was "digital vaginal penetration."
- 4.1. "Sexual Intercourse" is defined in Section 89 of the Act as follows:
"For the purpose of this part, sexual intercourse means any of the following activities, between any male upon a female, any male upon male, any female upon a female or any female upon a male:-
- (a) *The penetration to any extent, of the vagina or anus of a person by any part of the body of another person, except if that penetration is carried out for a proper medical purpose or is otherwise authorized by law; or*



- (b) *The penetration to any extent, of the vagina or anus of a person by an object, being penetration carried out by another person, except if..... for proper medical purpose or is otherwise authorized by law; or*
- (c) *The introduction of any part of the penis of a person into the mouth of another person; or*
- (d) *The licking, sucking or kissing, to any extent, of the vulva, vagina, penis or anus of a person; or*
- (e) *The continuation of sexual intercourse as defined in paragraph (a), (b), (c) or (d); or*
- (f) *The causing, or permitting, or a person to perform any of the activities defined in paragraph (a), (b), (c) or (d) upon the body of another person.”*

4.2. Under paragraphs (b) and (d) of the above definition, you technically committed acts of sexual intercourse with your victim when you (a) pushed your finger into her vagina and anus and (b) you licked her vagina. Having done those activities, you committed the offence of sexual intercourse. It is obvious the victim did not consent to you doing those things to her. And the Act protects her. Section 97(1) states –

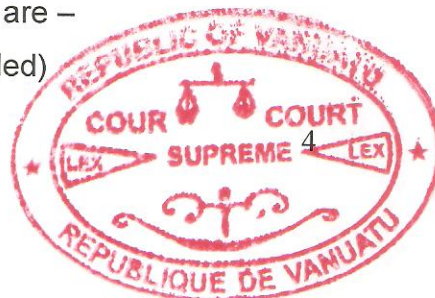
“No person shall have sexual intercourse with a child under the age of 13 years.

Penalty: Imprisonment for 14 years.”

5.1. The prosecution urged the Court to follow the sentencing guidelines in the cases of PP v. Kevin Gideon, PP v. Scott and Tula and PP v. Ali August and to impose a custodial sentence due to the following aggravating features –



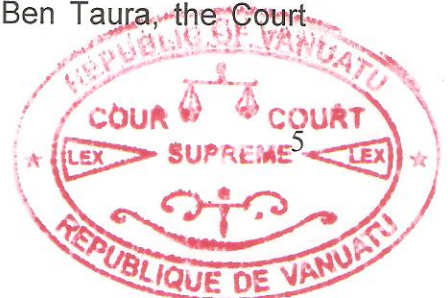
- (a) The great disparity between the ages of the offender being 30 years old and the victim 10 years old.
 - (b) There was a breach of trust had in you as a father by your daughter who took the victim with her to your house being her mate or friend.
 - (c) You are a student nurse, a profession of great-responsibility with whom such patients could have plenty of trust and confidence.
 - (d) The offences were carried out whilst you were under influences of alcohol, cigarettes or tobacco and cannabis.
 - (e) The offending involved more than one activity as defined under Section 89 A (b) and (d) of the Act.
 - (f) You took away the victim's virginity and self-esteem.
- 5.2. The prosecution urged the Court to increase the starting point from 5 years to 7 years imprisonment for your offending taking account of the aggravating features.
6. Your legal counsel however urged the Court to distinguish the three cases cited by the public Prosecutor and submitted that the Court applied the sentencing approach taken by the learned Chief Justice in the Case of PP v. Randy Kenneth Cr. Case 51 of 2002 where sentence was deferred on conditions. Further, counsel submitted that in all the three cases referred the offences related to rape and unlawful sexual intercourse which were of a more serious nature, whereas in your case your actions amounted merely to indecent acts which were offendings on a lesser degree. This submission is not correct. Section 89 A of the Act which defines what "Sexual Intercourse" means does not-differentiate between which actions are serious and which are less serious. It places all acts from (a) to (f) inclusive on the same plane or degree of seriousness.
7. Mr Stephens urged the Court to take into account your mitigating circumstances when considering sentences. These are –
- (a) Your guilty plea (after the charge was amended)



- (b) Your respect and compliance with all bail conditions.
- (c) You're paying compensation of VT100.000 to the victim and her family.
- (d) Your performance of reconciliation and exchange of 3 mats and paying of traveling expenses at VT15.000.
- (e) Your being a first-time offender; and
- (f) Your remorse and contrition.

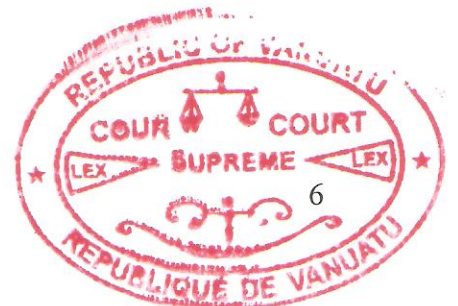
Further, Mr Stephens urged the Court to take into account your high academic qualifications and performance and your good character references indicating that you have potential of being an influential leader in the future and to impose a deferred sentence in line with Randy's Case.

8. It is my view that Randy's Case is distinguished from yours in several respects. First, the offender there was 14 years old at the time of committing the offences. Second, he was charged with 2 counts of indecent assault under Section 98(2) of the Act. Third, the offender was still in year 9 at College and his victim was one year older than him. Fourth, the offender pleaded not-guilty to both counts and his case proceeded to trial. As a result, the Court found the charge not proved against him in respect of count 1. Fifth, there is no record that the offender had performed any reconciliation thus showing remorse. Sixth, the offender still being a student was not yet contributing to the wellbeing of the people of Vanuatu. Seventh, the Act was not yet amended to bring the offender's actions falling within the definition of "Sexual Intercourse".
9. Talking all these together in comparison to your case, your personal profile, your education background and high level of performances throughout until your most recent achievement on 16th November 2010 (some three weeks ago), your positive references and recommendations by your superiors namely Dr Andrew Bullock, Dr Griffith Harrison, Dr Edward Tambisari, Mrs Leipakoa Matariki and Mr Ben Taura, the Court would pose one question:



Does your case fall within the “most extreme of cases” to warrant another sentence other than a custodial one?

10. The phrase “most extreme cases” is not defined in the Gideon Case. The Court of Appeal delivered that judgment on 26th April 2002. Randy’s Case was decided on 3rd December 2002. There is nothing in the judgment in Randy’s Case to indicate that it was a case considered to fall within the “most extreme of cases”. Nevertheless, it was within the discretion of the learned Chief Justice to impose a deferral sentence with strict conditions.
11. It is my view that your high qualifications and contributions towards the health of the people of Vanuatu, (unlike Randy who was still a student) and the positive reports, and recommendations made by your superiors place your case within the ambit of “most extreme case”.
12. It took you years to get you to where you are today and you did not get here by your own efforts. It was a collective efforts of your parents and close relatives and families, your trainers and your superiors. It would be a great amount of resources, valuable skills and knowledge thrown away in one day and which would take years to replace by training another person as good and capable as you are. It is a pity that you did not realize this at the time of committing this offence. You threw all that away for the sake of alcohol, cannabis and your desire for sexual gratification. You should be extremely sorry and ashamed of yourself. I hope you will always remember from today on that you have been assessed as “a potential and influential leader” in the future.
13. I note that you have made a spiritual commitment by being baptized and that you have taken a vow not to consume alcohol. I hope that you will remain true and faithful to that commitment.



14. For the foregoing reasons, the Court will not go to the extent of sentencing you today. Having had due regard to your history and character academically, the Court will deal with your case under Section 56(1) of the Act. Your sentence is deferred for a period of 3 years from today on the following conditions:-

- (a) You must not re-offend or commit any other criminal offences for which you would be charged.
- (b) You must pay further compensation to the victim in the sum of VT100.000 as the VT100.000 you have paid is insufficient. The sum of VT100.000 must be paid into Court in four months time in 4 equal installments. The money cannot be released to the victim until she has attained the aged of 16 years.
- (c) You must not consume kava, alcohol, cigarettes, cannabis or any other prohibited substances.
- (d) Your superiors must monitor your behavior and report to the Court as and when appropriate. In the event that you breach any these conditions, you will be called up and sentenced for this offence accordingly. You must observe and comply with these conditions for a period of 3 years from today. Your superiors will do and submit a final report on your behavior on 13th December 2013.

DATED at Luganville this 13th day of December 2010.

BY THE COURT


OLIVER A. SAKSAK

Judge

