

PUBLIC PROSECUTOR -v- SAM NAUANIKAM

Coram: Chief Justice, Vincent Lunabek

Counsel: Mr Leon Malantugun for Public Prosecutor
Mr Henzler Vira for the Defendant

Date of hearing: 23-24 February 2010

Date of judgment: 26 February 2010

SENTENCE

This is the sentence of the Accused, Sam Nauanikam. The accused Sam Nauanikam is charged with one Count of Attempted Sexual Intercourse without Consent, Contrary to sections 28(1) (2); 90(a) and 91 of the Penal Code (Amendment) Act [CAP.135] and one Count of Attempted Incest, contrary to sections 28(1) (2) and 95 of the Penal Code Act [CAP 135]. The charges are contained in the amended information dated 17 February 2010.

The accused Sam Nauanikam pleaded guilty to the two counts as charged against him in the information of 17th February 2010.

The particulars of the offences are set out below:-

Sometimes between 1st January 2009 and 31st January 2009 at Loukeru village, West Tanna, the Accused Sam Nauanikam, attempted to have Sexual Intercourse with the complainant girl without her consent.

Sometimes between 1st January 2009 and 31st January 2009 at Loukeru Village, West Tanna, the Accused attempted to have Sexual Intercourse with the girl complainant who is a child of the Accused and the Accused knows the girl complainant to be his child (daughter).

The brief facts can be elucidated from the prosecution brief of facts. They are set out as follows:

The complainant was around 14 years old at the time of the offence and she was the natural daughter of the accused. And they are from Loukeru Village in West Tanna.

Sometimes in 2008 at Loun Village, the complainant, the accused and the complainant's mother who was the accused wife went to the garden. At that time,



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while the mother went to look for some food crops for them to take home, the accused went and held the breast of the complainant.

The second occasion happened in 2008 at home in the late night when every body slept. At that time, the accused came to the complainant, woke her up, undressed her, removed his penis and the complainant was scared of him but the accused kept on assaulting the complainant. The accused kept on attempting to penetrate the vagina of the complainant but without success and the complainant said "*I stap klisklisem nomo*". The accused threatened the complainant not to tell anybody about what he did to her otherwise he will kill her; so she did not disclose the incident because she was afraid of the accused.

The third occasion happened in 2008 at home in the night when every body was sleeping. The accused came to the complainant, woke her up and held her breasts and her vagina.

The fourth occasion happened in 2008 at home in the night when everyone was sleeping. The accused woke up the complainant, undressed her, took out his penis and kept on attempting to penetrate the vagina of the complainant but without success and as the complainant stated: "*mo i pusum kock blong hem mo stap klisklisem kan blong mi*". The complainant felt the sperm of the accused that was ejaculated on the complainant's legs. The accused threatened the complainant not to disclose the matter otherwise he will kill her.

Through the actions of the accused, the mother knew that the accused was having affairs with the complainant and when she asked the accused, he denied and threatened to kill her. The mother was scared of the accused because when she asked him something, he threatened to kill her. Few days later, the mother send the accused's junior brother to ask the accused about the matter to which he admitted that yes he had sex with the complainant.

After two weeks of the incident, the accused's son was sicked and upon praying on the son, the mother informed the accused that he committed some wrongs to which the accused admitted that he had sex with the complainant and stopped having sex with the complainant in 2008.

The complainant went and resides at Loun Village and when she came back to Loukeru Village, the accused again attempted to have sex with the complainant in the month of January 2009.

In January 2009, the accused kept on attempting to penetrate the vagina of the complainant 5 times at different times but without success and as the complainant said: "*taem hemi stap fuckem mi I stap klisklisem kan blong mi nomo*".

The fifth and the last occasion happened at that same time (January 2009) but in particular during the function of the New Year festive.

And when the son was sick again, the mother prayed on him and again informed the accused that he involved in some wrongdoings to which the accused again admitted that yes he was having sex with the complainant.



At that time, the complainant reported the incident to her mother and the mother sends her to go and reside at Loun Village. And from there, the complainant reported the matter to the police.

The police then arrested the accused for interview and caution statement to which he admitted all the allegations made against him by the complainant.

Section 28 deals with an attempt to commit a criminal offence. It provides:

"28. (1) *An attempt to commit a criminal offence is committed if any act is done or omitted with intent to commit that crime and such act or omission is a step towards the commission of that crime which is immediately connected with it, or would have been had the facts been as the offender supposed them to be.*

(2) *An attempt shall be committed notwithstanding that complete commission of the offence was impossible by reason of a circumstance unknown to the offender.*

(3) ...

(4) *The Commission of an attempted offence shall constitute an offence punishable in the same manner as the offence concerned."*

In this case you attempted to commit the offence of Sexual Intercourse Without Consent, contrary to Sections 28, 90 and 91 of the Penal Code Act [CAP.135] and you also attempted to commit the offence of Incest, contrary to Sections 28 and 95 of the Penal Code Act [CAP.135].

Offences of sexual intercourse without consent and incest are very serious offences. Attempts to commit such offences are also very serious offences and are punishable as the offences concerned. The seriousness of those offences can be seen and felt through how Parliament defines those offences and the maximum penalties it imposes for the said offences.

Section 89A and 90 of the Penal Code (Amendments) Act Nos.17of 2003 and 25 of 2006 define what is sexual intercourse and what is sexual intercourse without consent. They provide as follows:

"89A. SEXUAL INTERCOURSE

For the purpose of this Act, sexual intercourse means any of the following activities, between any male upon a female, any male upon a 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 by another person, except if that penetration is carried out for a 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 or 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 the person who caused or permitted the activity."

"90. SEXUAL INTERCOURSE WITHOUT CONSENT

Any person who has sexual intercourse with another person:

- (a) without the at person's consent; or
- (b) with that person's consent if the consent is obtained:
 - (i) by force; or
 - (ii) by means of threats of intimidation of any kind; or
 - (iii) by fear of bodily harm; or
 - (iv) by means of false representation as to the nature of the act; or
 - (v) in the case of a married person, by impersonating that person's husband or wife;
 - (vi) by the effects of alcohol or drugs; or
 - (vii) because of the physical or mental incapacity of that person; commits the offence of sexual intercourse without consent."

Section 91 of the Penal Code Act [CAP.135] prohibits the offence of Sexual Intercourse without Consent and imposes a maximum penalty of life imprisonment.

Section 95 of the Penal Code Act defines Incest and provides the sanction. It provides:

"INCEST

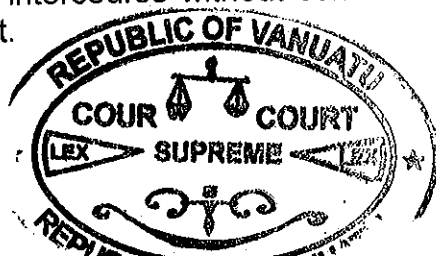
95.(1) Incest is sexual intercourse between:

- (a) parent and child (including adopted child);
- (b) brother and sister, whether of the whole blood or of the half blood, and whether the relationship is traced through lawful wedlock or not, or
- (c) grandparent and grand child,

Where the person charged knows the relationship between the parties.

- (2) No person of or over the age of 16 years shall commit incest.
Penalty: Imprisonment for 10 years."

The prosecution submitted that they rely on the cases of **PP v. Bae** [2003] VUCA Criminal Case No.03 of 2003 for the offence of attempt incest and the case of **PP v. Scott and Tula** for the offence of sexual intercourse without consent contrary to ss. 28, 90(a) and 91 of the Penal Code Act.



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The prosecution submitted the appropriate sentence for the offence of attempted rape is 3 years imprisonment and 2 years imprisonment for the offence of attempted incest, contrary to sections 28; 95 of the Penal Code Act.

The prosecution submitted also that the sentence be served concurrently and 1/3 of the total sentence be reduced in favour of the Defendant because he is a first time offender and he pleads guilty at the first opportunity given to him.

In mitigation, the defence counsel submitted as follows:

The Defendant pleaded guilty to both counts of offences charged against him.

The defence noted the reference by the prosecution of the cases of **PP v. Bae** and **PP v. Scott and Tula**. The defence submitted that the Defendant in this case was charged and pleaded guilty to attempted offences.

The defence says the Defendant is 55 years of age. He is a gardener. He has 6 children. The eldest of his children is of 6 years of age and the youngest is one month old. Three of his children are at school.

He got incomes from the produces of his gardens when he sold them at the market. The Defendant's wife has a young baby. The Defendant's family look upon the Defendant for their day to day livelihood.

The Defendant had performed a custom ceremony to the victim with 1 pig, 1 head kava, 4 yards of calico and 4 mats. The Defendant shook hands with the girl victim. He said sorry to her and apologized to her. He said he will not do it again. The ceremony was organized by the chief of the village in about January 2009.

The defence submits that any imprisonment sentence be suspended and order of the Community service be imposed.

I consider the particular circumstances of the offending, the character and personal history of the Defendant supplied in the Probation's Same Day Report dated 24 February 2010.

In the present case, the following aggravating factors are present:

1. Breach of trust.
2. The offences were repeated on many occasions since 2008 until January 2009.
3. The incidents occurred in most occasions during the night.
4. The age difference between the Defendant (55 years) and the girl complainant (14 years).

I consider a head sentence of 3 years in respect of the offence of attempt sexual intercourse without consent and increase it to 3 years to reflect the aggravating factors which is totaling 6 years imprisonment.

I consider a head sentence of 2 years in respect to the attempt incest and increase it to 2 years to reflect the aggravations which is totaling 4 years imprisonment.



Both sentences to operate concurrently which is a term of 6 years imprisonment.

I consider the mitigating factors, the Defendant's guilty plea, the fact that the Defendant is a first time offender, the custom ceremony. I balance the aggravating factors and the mitigating ones and after cross referencing them, I decide to sentence the Defendant to 3 years imprisonment on both counts of attempted sexual intercourse without consent, contrary to sections 28; 90(a) and 91 of the Penal Code Act and attempted incest, contrary to sections 28 and 95 of the Penal Code Act [CAP.135].

Defendant Sam Nauanikam is convicted of the 2 counts charged against him and ordered to serve 3 years imprisonment with immediate effect.

In addition, to the above sentence, I note that subsection 3 of section 95 of the Penal Code Act provides as follows:

"(3) Upon conviction of any male of an offence or attempted offence under subsection (2) against any female under the age of 18 years, the court may divest the offender of all authority over such female and if the offender is the guardian of such female, remove him from such guardianship and in such case appoint another guardian in his place."

Upon hearing counsel, the Chief of the Defendant and the communities of Lowinio and upon making the court's intention understood by the Chief, the complainant girl, her mother and other members of her family present in Court at Isangel, Tanna, on Thursday 25 February 2010 and in application of section 95(3) of the Penal Code Act, the Court divest the Defendant Sam Nauanikam of all authority over the girl complainant (Esther Sam) and remove Sam Nauanikam from his guardianship of Esther Sam and appoint Chief George Napikau, Chief of Lowinio to be the new guardian of Esther Sam.

14 days to appeal the sentence if you are dissatisfied with it.

DATED at Isangel, Tanna this 26th day of February 2010

BY THE COURT

Vincent LUNABEK
Chief Justice

