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

Criminal Case No. 65 / 2011

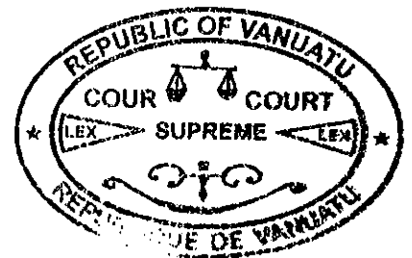
PUBLIC PROSECUTOR

V

DANIEL EPSI

Hearing:	***27 October 2011***
Before:	***Justice Robert Spear***
Appearances:	***Gregory Takau for the State***
	Lent Tevi for the Accused

SENTENCE

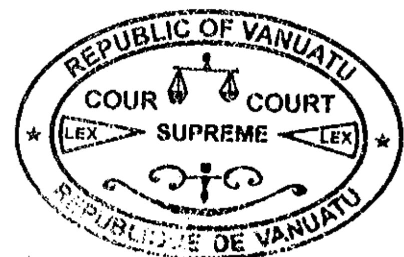


1. Daniel Epsi, you are for sentence on 2 counts of having unlawful sexual intercourse with a young girl from your village on Erromango. You pleaded guilty to an amended indictment containing 2 representative counts on 12 September 2011 during the course of your trial and after the complainant had given evidence.

2. Count 1 is a charge that you had sexual intercourse on occasions with this 12 year old girl in 2009. Count 2 is a charge that you again had sexual intercourse with her on occasions the following year when she was 13 or 14 years of age. These amended charges were based on your acknowledgements made during the course of cross examination of the complainant by your counsel.

3. In the ruling given by this Court on 12 September 2011, the history to the charging of your offending was recorded. However, for convenience, I summarise that history in this way. You initially faced trial on an indictment that charged you with 1 count of unlawful sexual intercourse under section 97 (1) of the Penal Code and a further count of unlawful sexual intercourse under section 97 (2) with the two charges to reflect the differing age of the young girl at that time.

4. On the morning of the trial, the indictment was amended by consent to include three separate counts. Counts 1 and 2 were directed towards specific occasions when the complainant was said to have been 11 years of age and count 3 related to a specific occasion when the complainant was 14 years of age. As detailed more exactly in the course of that decision, it became clear during the cross-examination of the complainant that your objection to the charges was principally to do with the dates on which the offending was alleged to have taken place as well as the surrounding circumstances and that you did not dispute that you had sexual intercourse with her when she was of a young age.



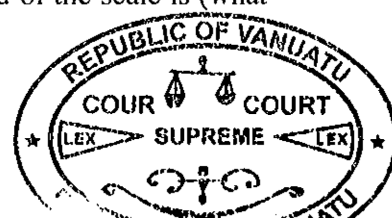
5. Your counsel and prosecution counsel conferred and, by consent, the indictment was further amended so that it contained just two charges. As I have mentioned, count 1 is a representative charge that during the course of 2009 you had sexual intercourse on occasions with this young girl when she was 12 years of age and count 2 is a further representative charge that you had sexual intercourse with her again on occasions the following year when she was 13 or 14 years of age.

6. The complainant gave evidence about her recollection of the circumstances within which the sexual offending took place. He account is significantly different to what you are prepared to accept as having occurred. In particular, you claim that the sexual intercourse was consensual and that there was no force applied by you to obtain access to this young girl. Indeed, you assert that she came on to you.

7. The prosecution has chosen to charge you with unlawful sexual intercourse rather than rape. Accordingly, the issue of consent does not arise. Equally, however, I accept that evidence given by the complainant that you used force and threats of force to obtain your way with her cannot be treated in the same way as if the prosecution was for the rape of this young girl. Indeed, I do not take account of the complainant's evidence that this was effectively non-consensual sexual intercourse.

8. All that notwithstanding, having sexual intercourse with a young and vulnerable girl is still serious offending. It is necessary for the courts to respond to such serious offending fully recognising the evil that this particular crime is designed to address.

9. The crime of having unlawful sexual intercourse is designed to protect the young and the vulnerable particularly from the old and the mature. The law recognises that a girl aged 12 and 13, even 14, years of age should not be put into the position of having to make the decision about whether or not to consent to sexual intercourse. There is also a large range in respect of the seriousness of this type of offending. At the lower end of the scale is (what



is often described as) adolescence sexual experimentation. At the upper level is the situation where an adult takes advantage of the youth and the vulnerability of the young girl or boy. Your case clearly falls into the second category of serious offending of this type.

10. At the time of the offending captured by count 1, you were about 46 years of age and the complainant was 12 years of age. At the time of the offending captured by count 2, you were about 47 years of age and she was 13 years of age.

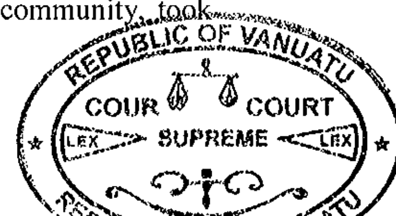
11. I also accept that there is some further aggravation to the seriousness of this offending because you are distantly related to her and that you also occupy, and certainly you did at that time occupy, a leading position reflecting your seniority in the village community and on the island of Erromango. I say that as a matter of aggravation because it simply made it a lot harder for that young girl to come forward with this complaint. She knew that she was challenging the face of authority in her world. Indeed, the offending would not have come to light but for the support she received from other adults who were not prepared to be as submissive to your position as this young girl clearly was.

12. Count 1, by reason that the complainant was only 12 years of age, carries with it a maximum term of imprisonment of 14 years. Count 2, reflecting her age as being either 13 or 14 years of age carries with it a maximum sentence of 5 years imprisonment.

13. This is, however, offending that must be addressed by a condign sentence. A sentence of imprisonment must be imposed for such serious offending as this.

14. I am required first to adopt a starting point having regard to the circumstances surrounding the offending.

15. If I was sentencing you just on count 1, a charge where a 46 year old man, in a position of authority and seniority in this small village community, took

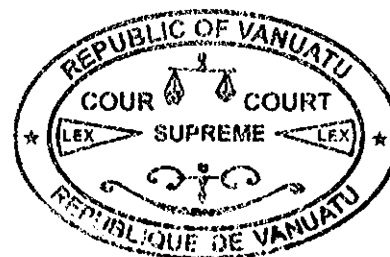


advantage of a 12 year old girl, a starting point of 6 years imprisonment would be appropriate. There is, of course, the further offending and that requires some uplift to reflect the totality of the offending and I consider that a further 1 year is appropriate leaving an overall starting point of 7 years before I have regard to matters relating to you as a person.

16. I should point out that this starting point is in line with the submissions of prosecution counsel and, as well, somewhat reluctantly conceded to be in line with authority by Mr Tevi particularly having regard to the decisions of the Court of Appeal in ***PP v Gideon*** [2002] VUCA 7 and ***PP v Kal Andy*** [2011] VUCA 14; Criminal Appeal 09 Of 2010 (8 April 2011).

17. Mr Tevi questions: *why should a sentence of 6 to 7 years could be contemplated for unlawful sexual intercourse when the Court of Appeal has stated that a starting point of 5 years imprisonment is appropriate in the general course for a defended case of rape?*. It may be time to review that starting point for rape but that is for the Court of Appeal. However, serious cases of unlawful sexual intercourse must surely rank quite close to (what might be called) unexceptional cases of rape. However, the recent decision of ***PP v Kal Andy*** sets out without question where the Courts should be focussed when it comes to the starting point. In line with that authority, and having regard to the totality of this offending, I fix that starting point at 7 years' imprisonment.

18. Taking a starting point of 7 years might be considered by some to be unduly harsh but such an approach is warranted to reflect society's condemnation of those who sexually abuse the young and vulnerable members of our community. The sentence imposed must also reflect the seriousness of the offending, hold you fully accountable for what you have done and send out the strong message, the consistent message, that the Courts will act decisively with adults who sexually abuse the young and the vulnerable. There must be a clear deterrent message embedded in the sentence and that is why the starting point here must be as high as 7 years imprisonment.



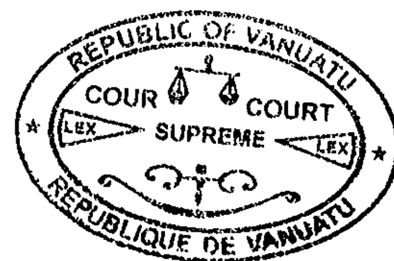
19. You are now 48 years of age. You are a married man with 6 children whom you are supporting in your village on Erromango. The fact that you will be going to prison today, and indeed have been in prison for almost the last 6 months, will mean that your family will suffer terribly but no one is to blame for that but you. No one else has visited on them the deprivations that that they will suffer because you have been taken out of circulation and from the workforce. They are the result of your criminal actions.

20. I now have regard to your personal circumstances. There are no aggravating matters that apply to this consideration.

21. At 48 years of age, you come before the Court without previous convictions. You are someone who has had his leadership qualities respected by your community and you have held positions of responsibility. Clearly, you were then and probably still remain a senior member of your village community and indeed in respect of the island community of Erromango. Those who have the privilege of holding a chiefly title must understand that there is also responsibility that comes with it. That is primarily to set an example by way of conduct. You have failed miserably in that respect.

22. The issue of remorse is somewhat problematic. I am in no doubt at all that you are truly remorseful for what you have done and that you are sincere in your stated wish for a reconciliation ceremony to take place. That offer has been rejected by the complainant's family and that of course is their right. No one can force them to undertake and participate in a custom reconciliation ceremony. I accept, however, that your wish to participate in such such a ceremony reflects your acceptance that you have done harm to this young girl and your wish for there to be peace between the families.

23. Be that as it may, I remain concerned that you still endeavour to place some of the blame on the complainant which raises a question as to whether there are unhealthy and anti-social attitudes entrenched within you.



24. The fact that you appear to be of good character in all other respects is not in question and that is to be taken into account. You are entitled to be allowed to call it into account the good work that you have done in your community as a leader of that community.

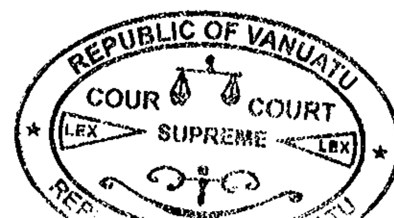
25. In respect of matters of remorse, good character and such like, I am prepared to allow a 15% reduction against the sentence that would otherwise be imposed on you. Rounding that up to 13 months brings me down to 71 months or just under 6 years.

26. I then need to take account of the guilty plea that was entered. This was clearly not at the first reasonable opportunity and, indeed, only after the complainant had given evidence.

27. I accept that you never disputed that you had sexual intercourse with this young girl and that your defence was more towards the particular days that it was said that you did have sexual intercourse with her and the circumstances surrounding those occasions. Those circumstances, as stated by the complainant, really amounted to a case of rape in each respect. Of course, no charge of rape is being pursued. I said at the time that the charges were amended, during the course of the trial, that there are always difficulties with cases of this nature and in particular for an accused to understand fully the nuisances of criminal charging. I said then that I considered further credit of 15% was appropriate notwithstanding that the pleas of guilty emerged during the course of the trial. That reflected what I accepted was your difficulty appreciating the best response required of you at that time given your acceptance that sexual offending did take place.

28. I hold to that 15% reduction and that reduces the sentence by a further 11 months if rounded up slightly.

29. That brings me down to a sentence of 5 years' imprisonment after having regard to all matters of aggravation and mitigation both in relation to the offending and to you as a person.



30. In my view, standing back and looking at the sentence, that sentence seems appropriate to mark the seriousness of the case and all those other factors that I have taken account of.

31. On count 1, you are sentenced to 5 years' imprisonment less the 6 months that you have spent in custody. In that respect, I notice that it is 5 months 3 weeks and 3 days but I round that up in your favour to 6 months. That reduces the sentence on count 1 to 4 ½ years' imprisonment.

32. On count 2, the sentence is 3 years' imprisonment.

33. You have 14 days to appeal this sentence if you do not accept it.

BY THE COURT