

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

Criminal Case No. 20 / 2012

PUBLIC PROSECUTOR

V

JOEL JIMMY

Hearing: ***19 July 2012***

Before: ***Justice Robert Spear***

Appearances: ***Loasana Matariki for the State***
 Christina Thyna for the Accused

SENTENCE
19 July 2012

1. Joel Jimmy you are for sentence today following your conviction on one count of having sexual intercourse without consent. That is an offence that carries a maximum penalty of life imprisonment. It is a most serious offence in any form and, in this particular case, it was a serious case of its type.
2. You pleaded guilty to this charge on the day set for the trial.
3. There is no dispute with the facts as set out both in a summary of facts and also in the Prosecutor's written submissions.
4. I have also received written submissions from your counsel to which I will return in due course.
5. I simply note now that Ms Thyna withdraws her objection to the stated fact that you held the bush knife at some stage. She accepts that, in your statement to the Police, you admitted that you held the knife.
6. This offense occurred at night. A fifteen year old girl, residing in a rural community, decided for various reasons to catch a bus and travel to Rentapau to stay with a friend. She walked to a shelter by the main road with her male cousin and waited for a bus to come along.
7. Three men, yourself and two others, saw this young girl and, without question, you quickly decided that you would isolate her from her cousin and you would rape her. One of your associates physically assaulted the cousin and engaged him in fight while you and the other man accosted the young girl. Initially, the other man with you had a bush knife which was brandished at the young girl and left her terrified as to what fate might be fall here. You made it very clear to her, right from the outset, that you wanted to have sex with her.
8. At some stage, you took the bush knife, cut down some banana leaves and lay them on the ground to provide a bed on which to lay the complainant. At this stage, she was pleading with your associates to let her go. Her cousin had managed to extricate himself from the fight and he ran off to seek help. That left the complainant with yourself and the other two men. The man who had been fighting with the cousin then pushed the complainant on to the banana leaves that you had placed on the ground, he removed her lower clothing and he raped her –

that is, he had sexual intercourse with her without her consent and without a reasonable belief that she was consenting. When he was finished, you took your turn and you raped her. It appears that the only reason why the third man did not take his turn was because help summonsed by the cousin was heard to be arriving. The three of you then run off.

9. The young girl was found in a terrible stage. She was severally traumatised by what had happened; and understandably so.
10. You, of course, are the only person who is to be sentenced for what happened that night. Initially, yourself and two others were charged with various offenses:
 - a. **Count 1** was a charge of kidnapping that was levelled again the three of you;
 - b. **Count 2** was a charge of Kidnapping for the purposes of committing sexual intercourse without consent and that was levelled solely at the other two men;
 - c. **Count 3** was a charge of sexual intercourse without consent and that was directed both to you and one of the other men.
11. The three of you pleaded not guilty to all these charges when you were first arraigned in this Court on 3 April 2012. At that time, the strength of the case against each of the three of you was considered as part of a determination of a bail application. It quickly became apparent that you were the only one who had made a formal admission of the offending. Furthermore, that the prosecution intended to rely on your statement to the Police as to who else was there with you that night and dock identification by the complainant. There was no suggestion that the complainant had ever met any of the three of you beforehand.
12. Accordingly, the case against the other two men was intended to be the dock identification of them by a young girl at night of men she had never met before and your police statement as to who was with you that night. That is all addressed in a judgment given by me on 25 April 2012 on the bail application. I invited the Prosecutor to review the case against the other two men having particular regard to what admissible evidence implicated them in the sexual violation of the complainant. It is clear law that what you said in your police statement is not admissible evidence against the other two men. Additionally, the courts are required to be particularly careful when dealing with a case critically dependent on identification evidence.

13. The outcome of that review by the Prosecutor was the indication given subsequently that the Public Prosecutor would present no evidence against the other two men charged with you. A *nolle prosequi* was then entered in each of those two men and they were discharged.
14. The case was recalled before me on 8 May 2012 being the date that had been set for this trial. Ms Thyna took time to discuss the matter further with you and, I was informed, particularly in respect of your confession to the Police. A discussion then took place between your counsel and the Prosecutor with the result that the charge of kidnapping was dropped and you then pleaded guilty to Count 3 being the charge that you committed the offence of sexual intercourse without consent.
15. You might well feel hard done by as the other two men with you, particularly the third man who has said to have both assaulted the cousin and then been the first to rape the young girl has escaped scot free; and that is indeed most unfortunate. However the Prosecution can only present a case based on admissible evidence and I accept the assessment that was clearly made by the Prosecutor that the case against the other two men could never succeed. The lack of sufficient admissible evidence meant that the court could never be brought to the point of being sure of guilt in either respect.
16. I tell you now that just because the other two men with you managed to get off scot free will not assist you and it will most certainly not result in a reduction of the sentence to be imposed on you.
17. Rather than dwell upon the unfortunate state of the case against the other men, the Court must confront the serious offending established as having been committed by you.
18. This was without question a planned and predatory exercise by three men intent on raping a young girl perceived as being vulnerable to your intentions. The three of you were fully grown men and you, indeed, were 25 years of age at that time. There was clearly a degree of planning involved (as the summary of facts identifies) with one of the three been assigned the task of isolating the cousin from the complainant. The cousin was there for both company and as security for the complainant.
19. So what we have is a planned attack upon a young and vulnerable 15 year old girl who was in no position at all to fight off her assailants. The motivation was single minded and that

was to rape her which, indeed, occurred. Not only was the victim terrified of being sexually violated, she understandably feared that she would be killed with the bush knife after you had finished with her. The bush knife was brandished around at the time.

20. There can be no question but that you are as guilty of these offending as anyone and certainly this is not a case where you took up a secondary role to others.
21. I note again that, at one stage, you took hold of the bush knife from the second man and used it cut down banana leaves clearly pointing to the intention held by you at the time to rape her.
22. The effect of this offending on young girl has been substantial. It is in line with the experience of the courts in respect of the effect of offending of this nature on young girls. Not only did the complainant suffered the pain that accompanied the ordeal, she has since felt herself isolated from her home community. There has been a distinct change in her approach to life from an outgoing and personable young girl to someone who is sad and unable to face public life.
23. As I have mention, these are the consequences that the courts see time in time again with young girls who are raped.
24. I have the assistance of not only a report (called a victim consent form) attached to the pre-sentence report but also a victim impact report that has been prepared by probation. It confirms that harm suffered by this complainant. In short, you have done your very best to ruin this young girl's life. She had never experienced sexual intercourse before that night. The experience of the courts, from many other similar cases, is that she will likely have difficulty socialising with her age peers, she will have difficulty forming relationships and maintaining relationships, she will indeed have difficulty dealing with life from now on. You have done your best to deal her a life sentence.
25. Sadly, it does not appear as if she has had the benefit of counselling to help her come to terms with what has happened. Certainly, in New Zealand, she would have access to counselling to assist her to manage the difficulties that have been created within her. This could be an excellent role for her church. She will have a significant period of time ahead of her where she will battle to come to terms with the fact that she was raped. She will never get over it and, sadly, she has already felt that she has been ostracised to some extend by different

factions in her community. If that, indeed, is happening then it is an almost prehistoric response to a young girl who has been violated in such a terrible way through absolutely no fault of her own. The Court can only deplore the fact that anyone would blame this young girl for what happened.

26. I have a pre-sentence report on you. It explains that you are now 26 years of age, that you are from the Island of Tanna, and that you reside with your wife and two children in the Teouma area. Your wife and children have been dependant on you and they will now find it tough going as they are going to be separated from you for a number of years. The only person responsible for that is you.
27. The probation report indicated that your chief considers that you have been a good contributing member to your community here at Teouma. It is always difficult to understand why a person with a family and with responsibilities would offend in such a terrible way.
28. The Probation officer explains that there has not been a custom reconciliation ceremony although two attempts were made by you or on your behalf but they were rejected by the victim and her family. You say that you want to apologise to her, to seek her forgiveness and that you are sorry that that has happened.
29. I must tell you that I have some concerns as to the sincerity of your expressions of remorse. I have gained the impression that your offer to undertake a custom reconciliation ceremony is more to do with the fact that you feel sorry for yourself and that you wish to reduce the sentence rather than an indication of the empathy that could be shown to the complainant for her plight.
30. The complainant has informed the Probation officer that she will not accept a custom ceremony and that she wants the law to deal with the matter - that is her right. She states the offending has ended her young life and that it has tarnished her reputation both in school and in the young community in which she lives.
31. Mrs Matariki submitted that the offending, with all these aggravating features, requires the Court to adopt an end-offending point of 8 years before any consideration can be given to matter of mitigation.

32. Ms Thyna, in her submissions, argued that there are no aggravating features to this offending beyond the rape itself. However, in cause of this hearing, Ms Thyna qualified that submission that there was no aggravation features beyond the actual offending in the form of previous convictions or such like. Ms Thyna argues that the Court should adopt a starting point of 5 years imprisonment before making any allowance for mitigation circumstances.
33. I accept the submissions of the Prosecutor. The starting point must be a sentence of five years imprisonment and that must then be lifted by 3 years to an offending end point of 8 years to recognise the further aggravating circumstances. First, this was a gang rape committed essentially by three men acting together notwithstanding that only two of the men raped the young girl. It was predatory conduct as you were able to identify the young girl as easy prey because she was in an isolated country area. It is clear that you devised a plan that would enable you to isolate the young girl from her male cousin so that you could rape her. The plan required the use of violence and that indeed was applied by way of the attack on her cousin and also the force used to put her on the ground and remove her lower clothing. There was the use of weapon being the bush knife that was brandished in front of her and put her in fear of her life. All that is in addition to the actual act of raping her. There is the young age of the girl and the fact that you were all grown men.
34. All those circumstances aggravate the seriousness of this offending from what might be called an unexceptional rape to a rape of a serious nature of its type.
35. Having set the end-offending point at 8 years, it is now necessary to give consideration to what circumstance might mitigate the sentence. In that respect, you appear otherwise to be a man who of good character and, to the extent that I have already addressed, it appears that you are remorseful for what you have done. As mentioned, I question whether that remorse extends to empathy with the victim. However, to recognise what remorse you have shown and the fact that you have otherwise been well behaved, I allow 12 months against the sentence that would otherwise have been imposed on you.
36. You pleaded guilty to this offending but you did so really at the last minute notwithstanding that you have made a full admission to the police at an early stage. Your early plea of not guilty meant that the complainant had to be taken out of school and brought down to Port Vila

from Santo for the trial. It meant that she had this case hanging over her for a number of months when that did not need to be so if you had recognised that you had no defence to run.

37. As it was a late plea of guilty, and you cannot expect to receive a reduction of 1/3rd as would have been the case if you have pleaded guilty right from the outset. I considered that a 20% reduction is sufficient to reflect the fact that the complainant did not have to suffer the ordeal of giving evidence.
38. That brings me to an end sentence of 5 years and 9 months imprisonment and that, in my view, is an appropriate sentence for offending as serious as this.
39. You are accordingly sentenced to imprisonment for a term of 5 years and 9 months which will be calculated to commence from the 27 November 2011 when you were first taken into custody.
40. You have 14 days to appeal this sentence if you do not accept it.

BY THE COURT

A handwritten signature in black ink, appearing to read 'Alfred J.', written in a cursive style.