

PUBLIC PROSECUTOR

V

BATISTAN RAY

Coram: *Mrs. Justice M.M.Sey*

Counsel: *Mr. Ken Massing for Public Prosecutor*
Mr. Junior Garae for the Defendant

Date: *22nd August 2014*

SENTENCE

1. The defendant **Batistan Ray** was arraigned before this Court on the 18th day of August, 2014 and he pleaded guilty to one count of Sexual Intercourse Without Consent contrary to section 90 and 91 of the Penal Code Act [CAP 135] and one count of Unlawful Sexual Intercourse Without Consent contrary to section 97(2).
2. The defendant now appears for sentence. The summary of facts are that on the night of the 29th of April, 2014, the complainant, who was 13 years and 4 months old, was on her way to the classroom at Saletui School compound to study when the defendant called out to her to meet him.
3. When she reached the defendant, he pulled her right hand and dragged her towards a banyan tree where he removed all the complainant's clothes and pushed her to the ground. He then removed all his clothes and he laid on top of



the complainant and he penetrated her vagina with his penis. After he had ejaculated he got dressed and went back to study.

4. There is no dispute about the facts in this case and the defence concedes to the facts as outlined in the prosecution's sentencing submissions as being those that rendered the defendant guilty.

The Law:

5. SEXUAL INTERCOURSE WITHOUT CONSENT

"90. Any person who has sexual intercourse with another person:

- (a) without that person's consent;

commits the offence of sexual intercourse without consent.

91. No person shall commit sexual intercourse without consent.

Penalty: Imprisonment for life.

6. UNLAWFUL SEXUAL INTERCOURSE

"97 (2) No person shall have sexual intercourse with any child under the age of 15 years but of or over the age of 13 years.

Penalty: Imprisonment for 5 years.

- (3) It is no defence to a charge under this section that the child consented or that the person charged believed that the child was of or over the age in question."

7. In 2002, the Court of Appeal provided sentencing guidelines in relation to sexual offences in the case of **Public Prosecutor v Gideon** [2002] VUCA 7 as follows:



"...there is an overwhelming need for the Court on behalf of the community to condemn in the strongest terms any who abuse young people in our community. Children must be protected. Any suggestion that a 12 year-old has encouraged or initiated sexual intimacy is rejected. If a twelve year-old is acting foolishly then they need protection from adults. It is totally wrong for adults to take advantage of their immaturity.

It will only be in most extreme of cases that suspension could ever be contemplated in a case of sexual abuse. There is nothing in this case which brings it into that category. 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 the right to remain in the community."

8. Also, sentencing guidelines are to be found in **Public Prosecutor v Scott** [2002] VUCA 29 where the Court of Appeal made the following observation:

"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".

9. In this present case, the defence submits that the defendant cannot be classified as an adult since he was 15 years old at the time of the offending. Defence counsel further submits that the current case can be considered as an exceptional case because of the very young age of the defendant and his inexperience and immaturity at the time of the offending.



10. The pre-sentence report shows that the defendant is a first time offender with no previous convictions. He is still a student and his father is struggling very hard so as to ensure that the defendant has a better education than any of his siblings. The report also states that attempts were made to perform a custom ceremony but the victim and her family were reluctant to accept any reconciliation. I am grateful to the correctional services for its assistance in preparing the report.

11. The following aggravating factors are present in this case:

- Loss of virginity;
- The offence occurred in the night;
- The sexual intercourse occurred by means of forcefully dragging the complainant into the bush to have sex with her.

12. In mitigation, defence counsel informed the Court that the defendant admitted his offending to the police during his interview and he pleaded guilty at the first opportunity given to him. Furthermore, that the defendant is remorseful and regrets his actions towards the victim.

13. **Batistan Ray**, even though you are now 16 years old, I am mindful that you offended when you were 15 years of age. In arriving at my sentence, I have looked at the provisions of section 54 of the Penal Code Act [CAP 135] which states that:

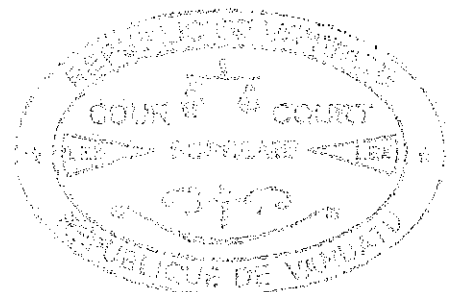
"54 (1) A person under 16 years of age is not to be sentenced to imprisonment unless no other method of punishment is appropriate.

(2) if a person under the age of 16 years is sentenced to imprisonment, the Court must give its reasons for doing so."



14. Furthermore, I have taken into consideration comparative case authorities where the defendants were young offenders facing similar charges like the defendant in this present case. The following cases are of significance:

- In **Public Prosecutor v Vuti** [2012] VUSC 154, the defendant who was 16 years old had sex with a 12 year old victim as she walked home from school on the Northern part of Ambae. The defendant pleaded guilty to the offence. The starting point of the sentence was 5 years imprisonment and the end sentence that was imposed by the Court was 1 year imprisonment suspended for 2 years, plus 150 hours community work with 12 months supervision.
- In **Public Prosecutor v Nicholson** [2011] VUSC 14, the defendant was 20 years of age and was charged with sexual intercourse contrary to section 97(2) of the Penal Code. The defendant had sex with a 14 year old victim on many occasions and they were in a boyfriend and girlfriend relationship. The defendant pleaded guilty to the offence and he was sentenced to 2 years imprisonment suspended for 2 years plus 200 hours community work.
- See also the case of **Public Prosecutor v Philip Tarising**, Criminal Case No. 73 of 2014 where the defendant was 16 years old and the complainant was 14. The defendant pleaded guilty and the Court imposed a 2 year suspended sentence plus 150 hours community work on him.
- In **Public Prosecutor v Nasip** (2010) VUSC 6, the defendant was convicted of 2 counts of sexual intercourse without consent. The defendant was 15 years when he first offended in January 2009 and he was 16 years of age when he offended for the second time on 24 July 2009. The Court sentenced him to 2 years probation and 300 hours



community work in respect of count 1 and for count 2, the sentence was 2 years imprisonment suspended for 2 years and, in addition, 2 years probation and 3 years community services.

- Also noteworthy is the case of **Public Prosecutor v Malikum (2010) VUSC 111** where the 16 old defendant sexually abused a child of 3 years of age by inserting a piece of wood into her vagina. The defendant entered guilty pleas in relation to the offence of unlawful sexual intercourse in count 1 and sexual intercourse without consent in count 2 and he was convicted accordingly. He was sentenced to 12 months probation and 50 hours community work for count 1 and 24 months probation and 100 hours community work for count 2.
15. **Batistan Ray**, in light of the aforementioned case authorities and the provisions of section 54 of the Penal Code Act, I will not impose a custodial prison sentence on you.
16. Be that as it may, however, I order that you perform 150 hours community work coupled with supervision. In addition, you are to undertake "Niufala Rod Program" and also take part in rehabilitative programs as directed by a Probation Officer. Moreover, you are to undertake a custom reconciliation ceremony to the victim and her family.
17. You have 14 days to appeal this sentence if you do not accept it.

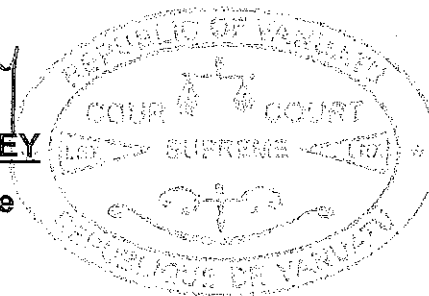
DATED at Luganville, Santo this 22nd day of August 2014.

BY THE COURT


M.M. SEY

Judge

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SUPREME COURT OF THE REPUBLIC OF VANUATU

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ORDER FOR SENTENCE OF COMMUNITY WORK
(Section 58 A Penal Code Amendment Act 2006)
(Section 58 B Penal Code Amendment Act 2006)
(Section 58 N Penal Code Amendment Act 2006)
(Delete not applicable)

Name: BATISTAN RAY

DOB: 16 years old

Residential location: Ipayato Village, South Santo

At a sitting of the Supreme Court at Luganville, Santo this 22nd day of August 2014 you were sentenced to 150 hours of Community Work

Case Number	Offences
109/2014	1. Sexual Intercourse Without Consent, c/s- 90 & 91 PCA CAP 135. 2. Unlawful Sexual Intercourse Without Consent, c/- 97(2) PCA CAP 135.

The Penal Code Amendment Act 2006 requires you to;

1. Report to a Probation Officer as soon as practicable and no later than 72 hours, after sentence is passed.
2. Report to a Probation Officer as directed at any other time during the sentence for the purpose of monitoring the sentence.
3. Notify a Probation Officer, within 72 hours, if you move to a new residential location.



4. Work as directed by the Probation Officer until the total number of community work hours is finished.
5. Perform Community Work every Sunday from 7.30am to 4.30pm.

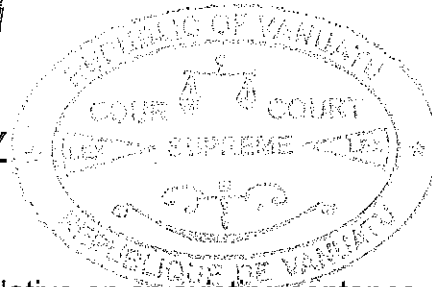
Other rules of Community Work sentence will be explained to you when you meet your Probation Officer.

DATED at Luganville this 22nd day of August 2014.

BY THE COURT



M.M.SEY
Judge



NOTE FOR COURT: If the sentence is cumulative on an existing sentence of Community Work please state case number: _____