

Registry

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

Criminal Case No. 65 of 2014

PUBLIC PROSECUTOR

V

TOM DANIEL

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

Counsel: *Mr. Damien D. Boe for the Public Prosecutor*
Mr. Andrew Bal for the Defendant

Date: 28th August 2014

SENTENCE

1. The defendant **Tom Daniel** was arraigned before this Court on the 5th day of August, 2014 and he pleaded guilty to one count of unlawful sexual intercourse without consent contrary to section 97(1) of the Penal Code Act [CAP 135].
2. The defendant now appears for sentence. The summary of facts are:

The complainant was under the tree near her house cutting leaves when the defendant walked straight to the location where she was. The defendant told the complainant to lie down and he forcefully removed the complainant's clothes. Then the defendant ordered her to kneel down on her knees and face downwards. The defendant took off his trousers and positioned himself on top of the victim and pushed his penis inside the victim's vagina and her anus and then he penetrated her vagina.



The complainant cried and struggled whilst the defendant ordered her not to cry or make any noise and told her that if she continued to cry she will no longer call him "brother in law." Throughout the whole incident the complainant was in fear and she could not escape from the defendant.

3. 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.
4. Section 97 (1) of the Penal Code Act [Cap.135] provides that no person shall have sexual intercourse with any child under the age of 13 years.

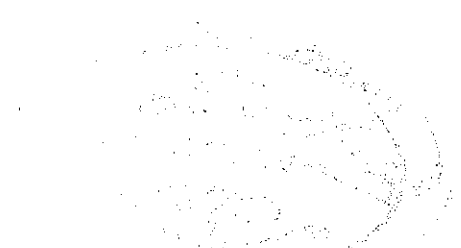
Penalty: Imprisonment for 14 years.

Subsection (3) states that 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.

5. 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".

6. The pre-sentence report shows that the defendant is a first time offender with no previous convictions. He is a student currently in grade 3. He is the youngest



child to Mr. Kaitou Harry and Mrs. Rose Harry and he has two brothers and two sisters. The report also states that the defendant had performed a kastom reconciliation ceremony to the victim and her family by presenting a pig, a kava stump and a mat.

7. It is noteworthy that Chief Yamul Solomon who is the defendant's Chief is also the victim's father. Both he and his wife, Mrs. Naswiau Solomon, have accepted the kastom reconciliation ceremony as a sign of "Klinim Fes" and peace and forgiveness. I am grateful to the correctional services for its assistance in preparing the report.
8. The aggravating factor in this case is that the sexual intercourse occurred by means of threats and force and the complainant who was 12 years old was in fear and could not escape from the defendant
9. 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.
10. 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."



11. Also of equal significance is **Article 37(b) of the Convention on the Rights of the Child (CRC)** which was ratified by Vanuatu as part of the Laws of Vanuatu. It provides that:

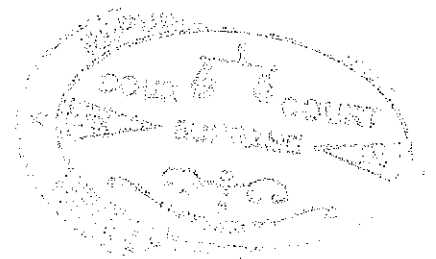
"No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of the last resort and for the shortest appropriate period of time."

12. Furthermore, I have taken into consideration comparative case authorities where the defendants were young offenders facing similar charges like the defendant before this Court. The following cases are of relevance:

- 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.
- 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 on him plus 150 hours community work.
- 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 defendant who was 16 years old 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.
13. Defence counsel has also referred me to the case of **Public Prosecutor v Seule [2011] VUSC 286** in which the defendant was 15 years of age and the complainant was 13 years old. The defendant was charged with two counts, namely, sexual intercourse without consent and unlawful sexual intercourse. The charge of sexual intercourse without consent was withdrawn and the defendant pleaded guilty to the charge of unlawful sexual intercourse without consent at the earliest opportunity. The Court sentenced the defendant to 200 hours community work and he was placed under supervision with special conditions for one year.
 14. **Tom Daniel**, in light of the aforementioned case authorities and the provisions of **section 54 of the Penal Code Act** and **Article 37(b) of the CRC**, it is my considered view that your case can be considered as an exceptional case because of your very young age and inexperience as well as immaturity at the time of the offending. For these reasons, I will not impose a custodial sentence on you.
 15. Be that as it may, however, your offending would need to be addressed at this early stage before it spirals out of control and ultimately lands you in prison. It is



clear that your age does not in any imaginable manner complement the aggravating factors of your offending. At your age, you should be reading books and be more concerned with educational matters rather than harboring sexual thoughts and engaging in sexual activities.

16. In the circumstances, I hereby sentence you to 50 hours community work to be served within 12 months of the date that it commences.

In addition, I impose a sentence of supervision for a period of 12 months pursuant to section 58(F) of the Penal Code Act.

I am satisfied that a sentence of supervision by a probation officer would reduce the likelihood of your further offending through your rehabilitation and reintegration back into the community.

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

DATED at Port Vila, this 28th day of August 2014.

BY THE COURT


M.M. SEY

Judge

