

PUBLIC PROSECUTOR
V.
MELSEBEN LIVAE

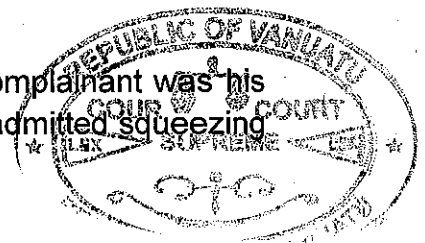
Coram: Justice D. V. Fatiaki

Counsel: Mr. K. Massing for the State
Ms. J. Tari for the defendant

Date of Sentence: 12 September 2014

SENTENCE

1. The defendant was originally charged with three (3) counts, one count of Act of Indecency Without Consent and two (2) counts of Incest. He pleaded guilty to the Act of Indecency and not guilty to the Incest counts. The prosecution filed a nolle prosequi in respect of the Incest counts and the trial proceeded on the Act of Indecency Without Consent count only.
2. The brief facts of the case relates to an incident that occurred on 26 December 2013 at Tevitwot Village on Vanualava Island. The defendant and his 18 year old daughter had gone to a relative Aton at Qeso Village to arrange for a boat to take them to Motalava Island for New Year's celebration.
3. On their return journey from Qeso Village, the defendant and his daughter stopped to rest at a relative Kalaban's house. While they were resting the defendant told his daughter to rest her head on his leg so he could look for lice in her hair. The daughter did as she was told and the defendant proceeded to squeeze her breasts and indecently touched her vagina until his daughter pushed his hand away.
4. The defendant and his daughter slept at Kalaban's and returned home early the next morning. The defendant instructed his daughter not to tell anyone, not even her mother, about what he had done to her.
5. Under caution the defendant confirmed to police that the complainant was his eldest (first born) child from an earlier relationship. He also admitted squeezing



his daughter's breasts and indecently touching her vagina. He frankly admitted that what he did to his daughter: "*i nogud*".

6. The defendant also explained that after the incident he received a visit from his chiefs on 29 December 2013 and he was fined VT20,000 cash plus a pig worth VT10,000 and a head of kava root worth VT5,000. He paid half the fine and the other items during a custom ceremony he performed on 30 December 2013 to the Chiefs and witnessed by his mother and wife Patricia.
7. The custom ceremony is the subject matter of two (2) letters written in February 2014 by the defendant's wife and traditional chief. In essence both letter writers expressed shock and dismay at the police involvement in a matter that had been traditionally dealt with and resolved according to custom. By way of illustration I refer to the following passages:

(from the defendant's wife)

"I am urging your office to consider this ceremony as an important part of our culture and custom ... I must admit we were shocked to see police at our door"

"I am strongly urging your high office to release my husband according to this ceremony after appearing before the Court".

(from Chief Wycliffe Tagar)

"The police officers who went and took Melseben's statement thought they know the law better, but its hard for them to link their culture/custom with the laws of Vanuatu, this creates disorder between people of the village and community ..."

and later:

"Police officers should know the matter had been dealt with by the chiefs, but by their taking of statements men concern now create disorder, division, hatred in the community".

8. If I may say so these sentiments are clearly at odds with those expressed by Chief Daniel Tavoia and Chief Reveag Dominique of Vatop Village in Vanualava who both agree with the case being taken to Court.
9. Of greater concern however to this Court is the absence, in both letters, of any mention whatsoever of the complainant being involved in the custom ceremony either as a victim, participant, or witness. Indeed I am left with the distinctly uncomfortable impression that the complainant was very much a secondary concern or consideration in the custom ceremony (if at all). No-one seems to have sought the complainant's agreement or forgiveness of the defendant yet she was the victim of the defendant's criminal behaviour and indecent



advances. It was not the chiefs, not the defendant's wife Patricia who was assaulted yet they figured prominently in the reconciliation ceremony.

10. I accept that this Court has power in criminal cases:

"(to) promote reconciliation and encourage and facilitate the settlement in an amicable way according to custom or otherwise, of any proceedings for an offence of a personal or private nature punishable by imprisonment for less than 7 years ... on terms of payment of compensation or other terms approved by (the) court, and may thereupon order the proceedings to be stayed or terminated"

[see: Section 118 of the Criminal Procedure Code (CPC) and Section 38 of the Penal Code (PC)].

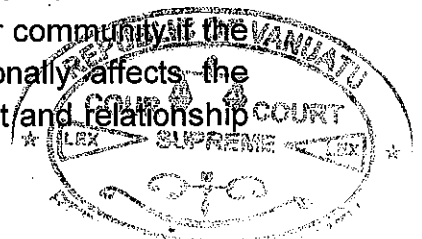
11. Likewise Section 119 of the CPC expressly and relevantly provides:

"Upon the conviction of any person for a criminal offence, the Court, shall, in assessing the quantum of penalty to be imposed, take account of any compensation or reparation made or due by the offender under custom ..." (see also: Section 39 of the PC).

12. In light of the foregoing it is a serious misconception to think that the Courts are unconcerned with traditional customary compensation, fines, or with "*klinim fes*". On the contrary, Courts are duty-bound to consider the use of custom to resolve problems and punish misbehaviour within remote rural island communities, but equally, Courts having a duty to protect the weak and the vulnerable in every community including the young and the voiceless. Courts also have a duty to declare, uphold, and enforce the law which is enacted by Parliament and is binding on all persons alike and applies in every island of Vanuatu not just in the urban centres.

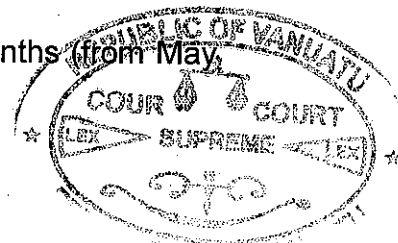
13. The letter writers seem to suggest that there is some "*conflict*" between custom and the law and that custom should prevail over the law. I do not agree with such a superficial assessment nor do I accept that raping or indecently assaulting one's child was or is traditionally acceptable behaviour. It is certainly unchristian and immoral.

14. Every crime or offence has two aspects to it – a public order community element and an individual victim aspect. Both are affected by criminal behaviour and both must be corrected and atoned for. Take the present offence for example. Indecent assault of one's daughter impacts on the offenders marital and family relationships and indirectly affects the wider community if the activity is unchecked. The offence also directly and personally affects the victimised daughter not only in undermining her sense of trust and relationship

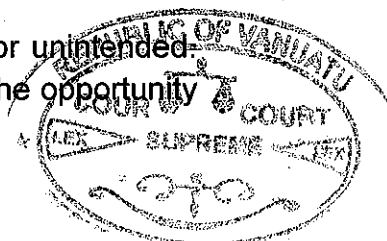


with her father, but also, her self-esteem, personal security and her attitude to intimacy as well as future marriage prospects.

15. The advantage and strength of the traditional custom reconciliation ceremony is that it addresses the public order community aspect of a crime to restore balance and order in the community, BUT, a major weakness is that, often, it sacrifices and ignores the concerns of the actual victim who is the person most directly affected by the crime and has suffered the most from it. In this regard the Court complements rather than detracts from custom by providing some closure or relief to the individual victim of crime.
16. It is unfortunate that no victim impact statement was prepared in this case as there should have been, but the pre-sentence report indicates that since the incident, the defendant's daughter is engaged and has moved to her fiancé's village on Gaua Island. She has at least found some happiness in her life and her future prospects looks promising.
17. From the pre-sentence report I also extract the following personal circumstances of the defendant:
 - He is 42 years of age and originates from Totoglag village on Motalava island;
 - He had only 3 years of schooling at Telhei School;
 - He is married to Patricia and together they have 4 children;
 - The defendant works well with his chief and within the community;
 - The defendant is the sole bread-winner of his family. He is considered to be hard working and a good provider for his family's needs;
 - His wife is an unconfirmed cancer sufferer who occasionally experiences stomach pain;
 - He was born Anglican but later converted to the "Glorious Church" in which he was a pastor until his resignation when the present incident occurred;
 - He is remorseful for his actions and regrets that it ever occurred. He realises his mistake and promises never to re-offend. He is willing to face the consequences of his actions and the hurt and shame he caused to his daughter and his family;
 - He is a first offender and he performed a custom ceremony of reconciliation to the chiefs and his family 3 days after the incident;
 - He was remanded in custody in Luganville prison for 4 months (from May – August 2014) before he was released on bail;



18. I have also received and carefully considered the helpful sentencing submissions filed by both counsels which I found of assistance;
19. Prosecuting counsel relies on the leading Court of Appeal cases in this area of PP v. Bae [2003] VUCA 14 and PP v. Gideon [2002] VUCA 7 which lays down the simple sentencing principle that: "*Parents who use their children for their sexual gratification will go to prison except in truly exceptional circumstances ...*". Counsel also highlights the aggravating features in the case, including, the age difference; the breach of trust; the warning of the victim not to tell anyone; and counsel seeks an immediate prison sentence with a starting figure of between 3 – 4 years.
20. However defence counsel in her submissions correctly distinguishes the sentencing precedents advanced by the prosecution as "*... far more serious than the present case in respect to their own circumstances and outcome or penalty*", and counsel relies on the more recent case of PP v. Mahit [2012] VUSC 231 where a suspended prison sentence, community work order, and a compensation order were imposed. In mitigation, counsel highlights the defendant's early guilty plea; his full cooperation with police enquiries and his admissions in his caution interview; and his hitherto unblemished record.
21. The offence of Act of Indecency Without Consent contrary to Section 98 of the Penal Code carries a maximum sentence of 7 years imprisonment. It is undoubtedly a serious offence but it is also an offence that can be committed with varying degrees of seriousness from extended and repeated full digital penetration of a victim's vagina to momentary touching of a victim's private parts over her clothes.
22. I agree with defence counsel's categorisation of the defendant's offending in this case as a "*one-off action*" which "*falls at the lower scale of offending ... the offence was not repeated or aggravated further than one incident or continued over a long period*" and counsel urges a suspended term of imprisonment would still serve "*the principles of deterrence and denunciation for the individual, the community and the nation as a whole*".
23. Consistent with the sentencing principle laid down by the Court of Appeal, a custodial sentence is inevitable in a case such as the present where a father indecently assaults his daughter without her consent.
24. Melseben Livae there can be no possible excuse or justification for your disgraceful behaviour. It constituted a flagrant breach of trust where you took advantage of your superior parental status and abused your daughter's trusting nature.
25. Although your behaviour was momentary, it was not accidental or unintended. You knew very well what you were doing and you even created the opportunity



for it to happen under the pretext of looking for lice in your daughter's hair. To your credit however, you did not persist or repeat your behaviour nor did you seek to elevate it to a more serious level of offending.

26. Taking all circumstances of your offending into account I adopt a starting figure of 2 years imprisonment which is increased to 30 months imprisonment for aggravating factors. From the 30 months I deduct a figure of 12 months on account of mitigating factors including the custom ceremony you performed and, a further 6 months for your early guilty plea making a final effective sentence of 12 months imprisonment.
27. I turn next to consider whether this court should adopt an exceptional course by suspending the sentence and, in that regard, I have considered the provisions of Section 57 of the Penal Code.
28. I am satisfied from the following factors that it is not appropriate to make you suffer an immediate imprisonment, namely:
- The "one-off" momentary nature of the offence;
 - The non-penetrative nature of the assault on the complainant;
 - The fact that the defendant is a first offender;
 - The absence of any possibility of repetition;
 - The genuine and public remorse demonstrated by the defendant soon after the incident; and
 - the fact that the defendant has already spent 4 months in remand which equates to an effective sentence of 8 months imprisonment;
29. Accordingly the defendant's sentence of 12 months imprisonment is suspended for a term of 3 years from today's date. What this sentence means is that the defendant will not have to go to prison today, but, if he re-offends and is convicted of another offence during the next 3 years, he will be sent to prison to serve this sentence of 12 months imprisonment in addition to any other sentence he may receive for his re-offending.
30. Whether you re-offend and are required to serve this sentence is entirely up to you and how you choose to lead your life from now onwards into the future. If you turn away from crime and lead a useful incident-free life caring for your children and sick wife for the next 3 years then you will not have to serve this sentence. However, if you choose to re-offend then you can expect no further mercy from this court and you will go to prison immediately for 12 months.
31. In addition, I order and direct the defendant to pay by way of compensation, the outstanding VT10,000 traditional fine to the complainant personally within 28 days and the probation officer is directed to ensure that this payment is made.



32. Melseben Livae, you must consider yourself very fortunate that you are not going to prison today. Do not waste this opportunity to rehabilitate and reform yourself and to become again, a caring husband to your wife and a loving and protective father to your children.
33. You have 14 days to file an appeal if you do not agree with this sentence.

DATED at Sola, Banks, this 12th day of September 2014.

BY THE COURT



D. V. FATIAKI
Judge.

