

IN THE SUPREME COURT
REPUBLIC OF VANUATU
(Criminal Jurisdiction)

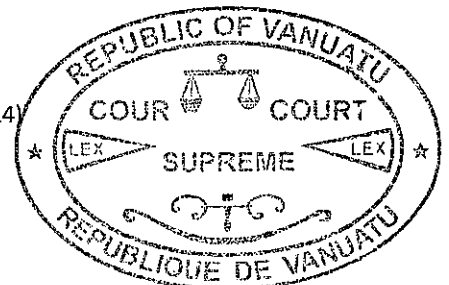
Criminal Case No. 68 of 2015

PUBLIC PROSECUTOR
-v-
FRAZER ARU WENU

Sentence

1. Frazer Aru Wenu, you have pleaded guilty to one offence of an act of indecency without consent contrary to section 98 of the Penal Code [Cap 152]. You pleaded not guilty to a second identical charge and the Public Prosecutor has entered a *Nolle Prosequi* to that charge. In accordance with section 29 of the Criminal Procedure Code [Cap 136] you are discharged in respect of that allegation.
2. The agreed facts are that on 8th January 2012 on the pretence of needing a knife you asked the complainant to get one for you from the kitchen. You followed her into the kitchen and when she was reaching for the knife you groped her breast from behind. I have deliberately used the word grope with all the distasteful connotations it carries because what you did was unpleasant. You were living with the complainant's family at the time of the offence. It is said you the uncle to the complainant's father. The young girl concerned is disabled although exact details of her disability are not known. The groping was through her clothing. Those are the basic agreed facts.
3. Whilst you have pleaded guilty you still seem to be trying to blame the young girl for your behaviour. You seem to have told the Probation Officer that the Complainant is to blame. It is hard to understand the somewhat twisted logic that a young 16 year old girl who is mentally disabled can be blamed for your actions. Be that as it may, I am going to sentence you on the agreed facts.
4. Defence Counsel helpfully referred me to the case of *Livae*¹. The facts of that case are quite similar. The case involved a father and his daughter and an indecent assault through clothing. In *Livae* there was an admission to the police and a plea of guilty. Fatiaki J arrived at a starting point of 2 years. I would adopt the same starting point except for one thing and it is this. There are any number of cases in this jurisdiction and others where the Court says something along the lines that it has a duty to provide the community or some particular section of the community, with protection.

¹ *Public Prosecutor v Livae* [2014] VUSC 126; Criminal Case 53 of 2014 (12 September 2014)



The alarming statistics available ² show that women in Vanuatu are routinely abused either violently, sexually or both. The statistics show that:-

"The rates of physical and sexual non-partner violence against women are very high with almost 1 in 2 women (48%) having experienced either or both since the age of 15. More than 1 in 4 (28%) have experienced physical violence; 1 in 3 (33%) have experienced sexual violence; and about 20% have experienced both

Overall, the prevalence of non-partner physical and sexual violence is higher in rural than urban areas. However, there are substantial variations in prevalence rates between locations. Port Vila (16%) and Sanma (12%) have the lowest prevalence for non-partner physical violence; Penama (22%) and Shefa (24%) have prevalence below the national rate of 28%; whereas Tafea (45%), Luganville (39%), Torba (37%) and Malampa (36%) have prevalence considerably higher than the national rate.

There is a similar pattern in the rates of sexual violence by people other than husbands or intimate partners. The rural prevalence (36%) is much higher than the urban rate (23%), but this masks substantial variation between locations. Port Vila again has one of the lowest rates (14%) along with Shefa (10%); Luganville and Tafea have prevalence of 34%, which is close to the national rate of 33%; but Torba (44%), Sanma (44%), Penama (41%), and Malampa (37%) have prevalence considerably higher than the national rate."

The Courts then have a duty to protect the community and women in particular from sexual (and physical) abuse. That can only be done by passing deterrent sentences. That the Courts have such a duty and can adopt such a stance has been accepted by the Court of Appeal. In The case of *Namatak v Public Prosecutor* ³ the Court said:

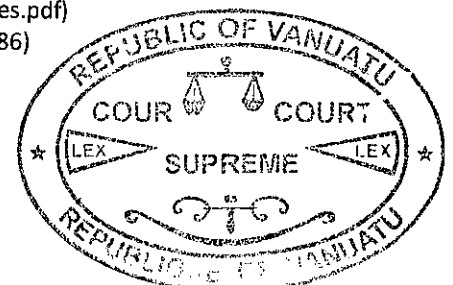
"We are very conscious of the Chief Justice's position. Where any type of crime is serious and prevalent, it is his duty to discourage the offenders. He can only do this by deterrent sentences.

In so doing, he needs the support of the Court of Appeal which should be slow to intervene unless there is cause."

This has been echoed in cases such as *Public Prosecutor v Adams* [2008] VUCA 28; Criminal Appeal Case 11, 12, 13 & 14 of 2008 (4 December 2008); *Public Prosecutor v*

² The Vanuatu National Survey on Women's Lives and Family Relationships 2011 (which can be downloaded at <http://www.pacificwomen.org/wp-content/uploads/womens-centre-survey-womens-lives.pdf>)

³ *Namatak v Public Prosecutor* No 1 [1986] VUCA 4; [1980-1994] Van LR 274 (4 March 1986)



Wah [1989] VUSC 6; Criminal Case 005 of 1989 (10 July 1989); and more recently in *Apia v Public Prosecutor* [2015] VUCA 30; Criminal Appeal 02 of 2015 (23 July 2015).

5. I therefore intend to take a stand and raise the starting point for this kind of offence. In my view therefore the starting point in this case is 3 years.

6. I bear in mind that had the offence happened a year earlier the maximum sentence would have been 10 years and not 7. Otherwise I agree with most of what Fatiaki J says in *Livae* about degrees of seriousness but of course because of the definition of sexual intercourse set out in section 89A of the Penal Code an act of indecency cannot go beyond the point of simply touching a victim inappropriately. Penetration without consent **“to any extent”** whether such penetration is penile or digital, is rape or sexual intercourse without consent. What the Defendant was involved in was touching the Complainant through her clothing.

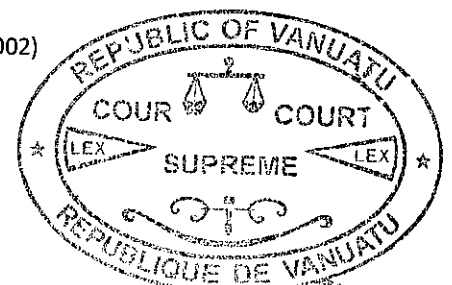
7. Because of the Complainant’s age and the familial relationship between you and her, the sentence should be increased to 3 years and 6 months. You must be given credit for your timely guilty plea. You will receive the maximum discount of 33 percent and the sentence will be reduced by 13 months to 29 months. There should be further credit for the fact you have no previous convictions and were a man of good character. You have also taken part in a custom reconciliation ceremony. The final sentence is reduced to one of 18 months.

8. I am asked to consider suspending your sentence. There is ample authority, the foremost being the case of *Gideon*⁴, to say that the sentence should not be suspended. I will repeat again what the Court said in *Gideon*.

“It will only be in the most extreme of cases that suspension could ever be contemplated in a case of sexual abuse.....Men must learn that they cannot obtain sexual gratification at the expense of the weak and 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”

9. Bearing in mind what was said, I find there are circumstances here where I can consider suspending the sentence, at least in part. The offence was committed in January 2012, some 3 years and 9 months ago. I do not know why there has been this delay and I am not concerned with apportioning blame for any delay. What I can say is there is no suggestion you have caused the delay. You have been living in the community for nearly 4 years and I have not been informed of any problems between

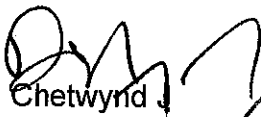
⁴ *Public Prosecutor v Gideon* [2002] VUCA 7; Criminal Appeal Case 03 of 2001 (26th April 2002)



you and the Complainants family and so there is scope for saying the sentence can be suspended. Against that is the very robust guidance in *Gideon* and I am of the view there must be some censure or punishment as well. In all the circumstances I order that half or 9 months of your sentence should be suspended for 3 years. This means that you will go to prison now for 9 months. You will be released on a date the Correctional Services authorities will determine after giving you the appropriate time off for good behaviour. If you commit no further offences during the three years following your release you will not be required to service the balance of 9 months. If you commit further offences during that three year period you will immediately be sent back to prison to serve the remainder of your sentence.

10. If you are dissatisfied with the sentence I have handed down you have the right to appeal and that appeal must be lodged within 14 days. I would suggest that you seek guidance and advice from your counsel before making any decision.

Dated 20th October 2015 at Saratamata, Ambae.


Chetwynd

