

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

Criminal CaseNo.27 of 2015

PUBLIC PROSECUTOR

-v-

SIMEON MARKMOI

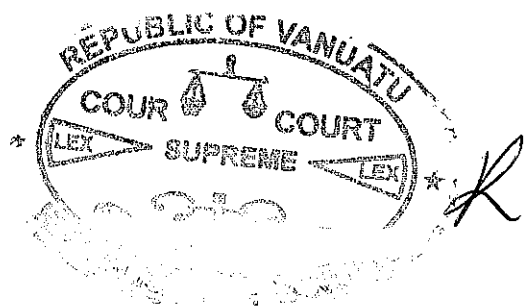
Coram: V. Lunabek, CJ

*Counsel: Mr Ken Massing for the Public Prosecutor
Ms Jane Tari for Defendant*

Date of Judgment: 10 July 2015

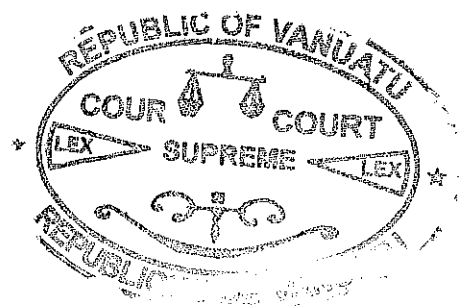
SENTENCE

1. Simeon Markmoi you appear for sentence
2. You are a 15 year old boy from Port Orly village. You attended school at Port Orly but due to financial constraints you were unable to complete your studies. You reside permanently in Luganville, Santo. You are currently attached with a mechanic outlet in Luganville earning an amount of VT8,000 per month.
3. On 30 June 2015, you pleaded guilty to one count of unlawful sexual Intercourse, contrary to section 97(2) Penal Code Act.
4. The brief facts of your offending are provided by the prosecution. You accept these facts. They are these.
5. A complaint was made against you for the offence of Unlawful Sexual Intercourse.
6. The complainant is over 14 years old but under 15 at the time of the alleged incident. You are 17 years old.



7. The offence occurred on the 5th of April 2015 on the eastern part of the island of Santo in the village of Port Orly. It occurred particularly on sector one on Port Orly village during the night time.
8. On the day of the incident, there was a feast that was held on sector one where the feast continued all day until night. At night time, there was a dance that was held. On that night you and the complainant were participants among the dancers. .

9. While the dance was going on, you asked Hypolite Damrock for him to ask the complainant for them to meet. The complainant refuses where Hypolite left. Just shortly, he came back and asked her to follow him to meet with you Hypolite left where you then grasped her in the hand and pulled the complainant to an empty house belonging to Chrislyne. When you and her reached the door of the house, you opened the door and pushed the complainant inside the house. You then closed the door when both of you were inside the house.
10. Inside the house, you holds her neck and push her head against the bamboo wall. You then bend her over and undressed her and yourself. You then inserted and penetrated her vagina with your penis and had full sexual intercourse with her. You then ejaculated inside her.
11. During the sexual activity the complainant got scar on her back because you pushed her back so strong against the bamboo wall. She also tried to screams out for help but you held firmly her neck. Besides the people cannot heard her calling because of the music was so loud.
12. After sex, you both get dressed and the complainant returns to her home. When she reached home, her parents asked her where she went that night. She then reveals what you had done to her.
13. The complainant's father also came over that night and asked you if he did what she told her. You then admitted that you had sex with her and said that you will apologise.



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14. The complainant was medically examine where the report reveals that there are bruises mark on her right flanks and she had previous sexual intercourse.
15. You were arrested by the police later. You were cautioned and interviewed by the police where you admitted the offence as alleged.
16. Unlawful sexual intercourse is prohibited and sanctions by the law. The Penal code Act is the relevant law. Section 97 (1) (2) provides:

"Unlawful Sexual Intercourse

97. (1) *No person shall have sexual intercourse with any child under the age of 13 years.*

Penalty: Imprisonment for 14 years

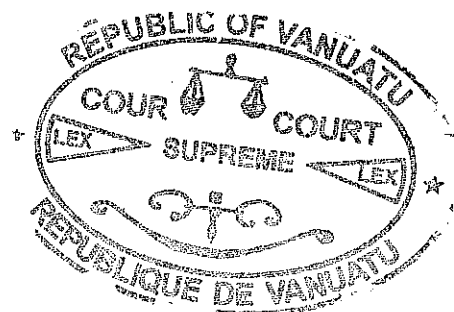
(2) *No person shall have sexual intercourse with any child under the age of 15 years but of over the age of 13 years.*

Penalty: Imprisonment for 5 years."

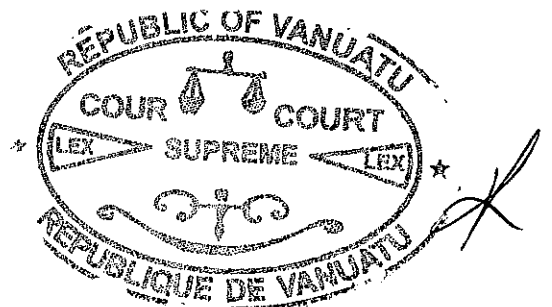
17. Unlawful sexual intercourse is a serious offence. The maximum penalty is an imprisonment for 5 years.
18. The guideline judgment is the case of Public Prosecutor –v- Gideon [2002] VUCA 7. This is a case in which a 12 year old girl was the victim of the sexual abuses. In Gideon, the court of appeal stated:

"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.

... 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."



19. When I sentence you I consider the submissions of the prosecuting counsel and the submissions of your counsel made on your behalf. I also consider the pre-sentence report filed by the probation office to assist me in your sentencing.
20. The prosecution relies on the case of *Public Prosecutor –v- Cisci Usamdi [2015] VUSC 67*; where the defendant is a young boy of 17 years of age sentenced for unlawful sexual intercourse under s.97 (1) of Penal Code Act, there was repetition of offending and force was used.
21. The prosecuting counsel highlights the aggravating factors, including, the force you used to have sexual intercourse with the complainant. The prosecuting counsel submitted that a starting point of 4 years imprisonment should be appropriate in this case and that after appropriate deductions to reflect the mitigating features, the end sentence should be 2 years imprisonment and it should be suspended with additional sentence of community work.
23. The pre-sentence report reveals that you are born sometime in the year 2000 (date and time unknown). If so, I take it that you are 15 years of age. You are quite an obedient boy. You listen to your parents. You help out at home doing the house chores. It is reported you are young but a responsible boy. It is also reported that although you had not been able to complete your education at Port Orly, you did not stop there, you found yourself engaged in a job with the Mechanics where you reside. You are paid an amount of VT8,000 per month. You are described generally as of good character. On the night of the offending, the victim's father and brother assaulted you but you did not retaliate which shows that you are not a violent boy. It is reported immediately when the offending was discovered, you took up the responsibility to apologize by way of a fine, however, this was rejected.
24. In her submissions, your lawyer emphasises that on the night of 5 April 201, the date of offending, you were under 15 years of age and the complainant girl was 14 years. She refers the court to the guideline judgment of the court of appeal in *PP –v- Gideon [2002] VUCA 7* and *Tausi –v- Public Prosecutor [1990] VUCA 4*; where the court stated:

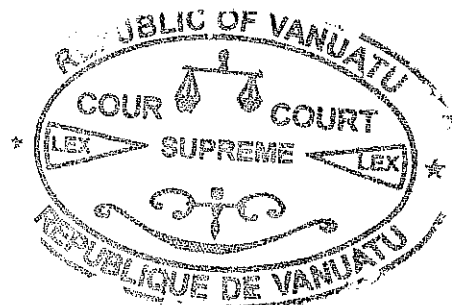


“That fact must always be a matter for the Courts to bear in mind when passing sentence but the fact remains that the principal purpose of section 97 is to protect young girls – if necessary from themselves. Although some young girls may develop their sexuality earlier than others, the law recognises the fact that they do not necessarily develop discretion to match it. Thus the law expects older men not to take advantage of such a girl even if she encourages them.”

25. Your lawyer refers and relies on the case of *Public Prosecutor –v- Daniel [2014] VUSC 108*, where the Defendant (a young boy under 16 years of age) pleaded guilty to one count of unlawful sexual intercourse, contrary to s.97(1) of Penal Code Act, and in considering the sentence of the defendant Daniel Her Ladyship Justice MM Sey made a summary of cases involving teenage sexual offences in following cases: (PP v Nasip [2010] VUSC 6; PP v Malikum [2010] VUSC111; PP v Seule [2011] 286) and sentenced Defendant Daniel to 50 hours of community work and 12 months supervision.
26. Your lawyer submits that most of the cases referred to above involved teenagers who found themselves having pre-mature sex either consensually or non consensually with strangers who but are teenagers as well. In those cases, the courts impose suspended custodial sentences and for more serious offending additional orders for community work and or supervision are also made.
27. Your lawyer says that in your case, you and Defendant Simeon Markmoi know each other but you both have no prior relationship before the offending.
28. Your lawyer refers and reminds the Court of the provisions of section 54 of the Penal Code which states:

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

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



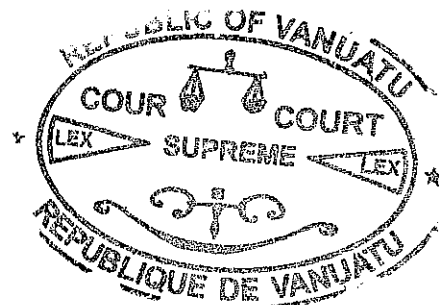
29. Your lawyer submits that the Court sentences you with a community work ranging between 50-100 hours or a short suspended imprisonment sentence between 6-12 months taking into consideration of your young age and the effect of s.54 of Penal Code Act.
30. In this case, not only you break the law when you have sex with a 14 year old girl but the commission of this offence is aggravated by the force or violence you used when you have sex with her.

31. On the other hand, to mitigate your offending, I note that:

- You are a young 15 year old boy;
- You are a first time offender;
- You plead guilty at the first opportunity given to you by the court and I accept that it is a sign of your remorse. Your guilty plea saved the court's time and the victim from re-living the trauma. You are entitled to receive one third reduction of any custodial sentence if one such a sentence is imposed on you in this case.
- You cooperated well with the police during their investigation;
- You intended to compensate the victim by making amends through a fine however it was rejected by the victim girl and her family;
- You were assaulted on the night of the incident by the father of the victim girl;
- Although you were young, you found for yourself and your family a source of income for sustenance.

32. The circumstances of the commission of the offence in this case, justify a custodial sentence. However, I bear in mind and consider the provisions of s.54 of Penal Code Act referred to earlier and the provisions of 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:

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



33. In the present case, I decline to impose a custodial sentence in the light of the above forgoing provisions the rational of which is to protect a child like you from his or her young age, inexperience and immaturity. I consider that the appropriate sentence for you will be one of alternative to custodial sentence.
34. You are sentenced to 80 hours of community work and 12 months supervision on the general standards and if any special conditions then they will be within the NewFala Road Program in existence with the Probation Office.
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35. You have 14 days to appeal this sentence if you are unsatisfied with it.

DATED at Luganville, Santo this 10th day of July 2015

BY THE COURT


Vincent LUNABEK
Chief Justice

