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

CRIMINAL CASE NO. 16/2259 SC CRML

PUBLIC PROSECUTOR

V

JEFFERY TAGARO

Coram: **Justice Mary Sey**
Counsel: Mr. Tristan Karae for Public Prosecutor
Ms. Kylie Bakeomemea for the Defendant

Date of Decision: 20 September 2016

SENTENCE

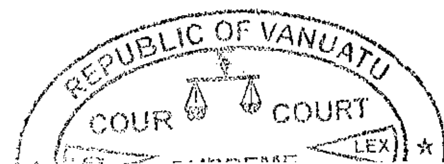
1. The defendant, **Jeffery Tagaro**, appears for sentence today having been convicted upon his own guilty plea on 9 August 2016 to one count of **Unlawful Sexual Intercourse** contrary to **section 97(1) of the Penal Code [Cap.135]** and three counts of **Unlawful Sexual Intercourse** contrary to **section 97(2) of the Penal Code [Cap.135].**

   These two sections provide as follows:

   > *"97(1) No person shall have sexual intercourse with any child under the age of 13 years.*
   >
   > *Penalty: Imprisonment for 14 years.*
   >
   > *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."*

2. The complainant is a 13 year old girl and she resides with her parents at Tebakor area in the same block of apartments where the defendant also lives with his children. The defendant is 65 years old. 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.

3. The offending occurred over a period of time on different dates in 2015. The defendant would call the complainant during the day or at night time to go to his



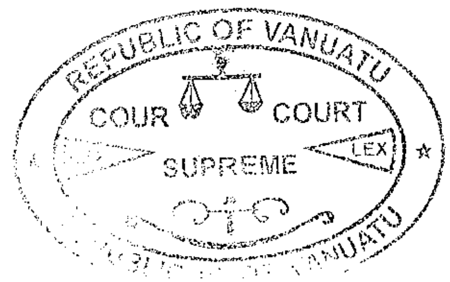
house where he would remove the complainant's clothes and perform sexual acts on her. These sexual acts consisted of the defendant licking the complainant's vagina, rubbing his penis on it and inserting the tip of his penis into her vagina. After the sexual ordeal the defendant would give the complainant VT500, VT100 or VT1000.

4. The first incident occurred sometime in March 2015 just after cyclone Pam. Schools were closed and the complainant stayed home most of the time with her parents. She does not recall the exact date but it was on this occasion that the defendant called out to the complainant to come over and wash his clothes. After the complainant had finished washing the defendant's clothes, he called her into the house and he locked the door and began removing the complainant's skirt, panties and top. The complainant saw the defendant's penis was fully erect. He then laid down and told the complainant to lie on top of him. The complainant did as she was told and the defendant then inserted the tip of his penis into the complainant's vagina and told the complainant to move up and down. The complainant did not know how to and so the defendant held the complainant's hips and assisted her to move up and down on his penis. The complainant felt that the defendant had pushed only half of his penis into her vagina. After the defendant had finished he told the complainant to return home. The complainant did not report this to her parents as she was afraid her parents would smack her.

5. In April 2015, the complainant does not recall the exact dates but she remembers that on many occasions the defendant would called her into his house where he would remove her clothes and perform oral sex on her by licking her vagina. The defendant would then lie on top of the complainant and rub his penis on her vagina and suck her breast and he would also insert the tip of his penis into her vagina.

6. In June and July 2015, the complainant recalls the defendant doing the same thing to her. Every time she returned from school or during the night the defendant would call the complainant into the house and would firstly perform oral sex on the complainant and he would then lie on top of the complainant and rub his penis on the complainant's vagina. Sometimes the defendant would lie down and have the complainant lie on top of him and rub his penis on her vagina and sometimes he would insert the tip of his penis into her vagina.

7. Between the months of August and December 2015, the complainant does not recall what dates exactly but she recalls that the defendant would call her to the house and in the house the defendant would remove her clothes and he would then perform oral sex on the complainant by licking her vagina and sucking her breasts. The defendant would then lie on top of the complainant and rub his penis on the complainant's vagina and he would then insert the tip of his penis into the complainant's vagina.



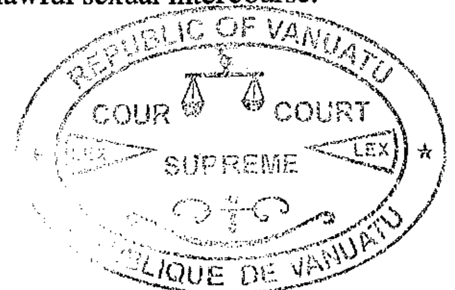
8. The defendant's offending first came to light on the 13th of January 2016 when the complainant's elder brother witnessed a little girl (Ms. Y) lying on top of the defendant in the defendant's bedroom. He called out to the defendant and after a confrontation with the defendant he returned to their house where he approached the complainant and asked her if the defendant had been doing the same thing to her to which the complainant confessed.

9. On 13th January 2016, the defendant was arrested by police officer Ms. Laicha and taken to the police station where he was searched and detained. On or about 14th January 2016 she cautioned and interviewed the defendant and he confessed to the allegation made against him.

10. The applicable principles to be borne in mind when dealing with the offence of rape at the sentencing stage were set out by the Chief Justice in *Public Prosecutor v Ali August* [2000] VUSC 73 as follows:

> *"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.*
>
> *For rape committed by an adult without an aggravating or mitigating feature, a figure of five years should be taken as the starting point in a contested case. Where a rape is committed by two or more men acting together, or by a man who has broken into or otherwise gained access to a place where the victim is living, or by a person who is in a position of responsibility towards the victim, or by a person who abducts the victim and holds her captive the starting point should be eight years.*
>
> *At the top of the scale comes the defendant who has committed the offence of rape upon a number of different women or girls. He represents a more than ordinary danger and a sentence of fifteen years or more may be appropriate."*

11. In 2002, the Court of Appeal provided sentencing guidelines in the case of *Public Prosecutor v Gideon* [2002] VUCA 7 in relation to sexual abuse offences. This was a case where the prosecution had appealed against the inadequacy of the sentence imposed for offences of unlawful sexual intercourse. The Court held:



"...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.

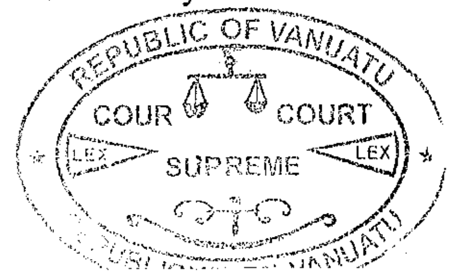
Men must learn that they cannot obtain sexual gratification at the expense of the weak and the vulnerable. What occurred is a tragedy for all involved. Men who take advantage sexually of young people forfeit the right to remain in the community."

12. Another case in point is that of *Public Prosecutor v Daniel Epsi* [2011] VUSC 287, The defendant was charged with unlawful sexual intercourse under section 97(1) and unlawful sexual intercourse under section 97(2) of the Penal Code Act [Cap,135]. The defendant was 46 years of age and in a position of authority and seniority in a small village community. He took advantage of a 12 year old girl by having sexual intercourse with her when she was 12 years old and again when she was 13 and 14 years old. In sentencing the defendant the Court said:

    "Taking a starting point of 7 years might be considered by some to be unduly harsh but such an approach is warranted to reflect society's condemnation of those who sexually abuse the young and vulnerable members of our community. The sentence imposed must also reflect the seriousness of the offending, hold you fully accountable for what you have done and send out the strong message, the consistent message, that the courts will act decisively with adults who sexually abuse the young and the vulnerable. There must be a clear deterrent message embedded in the sentence and that is why the starting point here must be as high as 7 years imprisonment."

    For the offence of unlawful sexual intercourse contrary to section 97(1), the defendant was sentenced to 4 years and 6 months imprisonment and for unlawful sexual intercourse contrary to section 97(2) the defendant was sentenced to 3 years imprisonment.

13. My attention has also been drawn to the case of *Public Prosecutor v Eli Roy* [2011] VUSC 99. The defendant was 27 and the complainant was 12 years old.



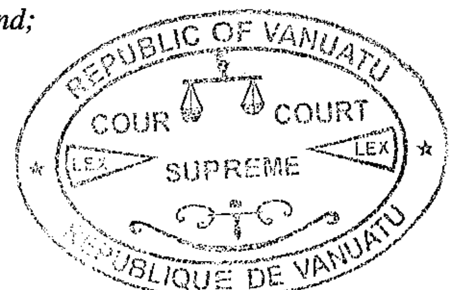
The defendant was entrusted with the role of taking care of the complainant and her mother at a time when the complainant's father was in prison. The defendant repeatedly had sexual intercourse with the complainant over a period of three months after which a complaint was filed to the police.

I find Justice Fatiaki's sentencing remarks apt and relevant to Mr.Tagaro's case. He said:

> *"The seriousness of the offence is further highlighted by the fact that the consent of the victim is not a defence to the charge nor is an accused's belief as to the age of the victim a relevant consideration. The reason for this law is clear. It is intended to protect and prevent young girls from the possible consequences of engaging in sexual activity for which they are physically, emotionally, and psychologically ill-prepared to handle. To put it bluntly, 13 year old girls are far too immature to be exposed to the risk of becoming mothers at such a tender age even if they consent to the sexual activity.*
>
> *In most cases, of which the present case is a prime example, young vulnerable girls fall victim to the predatory behavior and charms of older mature men who are either known to or related to them. These men usually abuse their victims to fulfill their sexual desires with little or no thought for the girl's welfare. It is purely fortuitous that the victim did not fall pregnant in this case."*

14. The prosecutor submits that in considering the culpability of Mr. Tagaro's offending a number of aggravating factors stand out. For instance, there is the age disparity between the complainant (12-13 years old) and the defendant (65 years old); the offence was intended and repeated over a period of months; the defendant paid money to the complainant to keep her silent and he took advantage of a young immature girl to fulfill his lustful desires. Moreover, the defendant has a previous conviction for a similar offence. In this regard, I must say that I am mindful of the Court's pronouncement in PP v *Ali August* that:

> *"The offence of rape should in any event be treated as aggravated by any of the following factors:*
>
> *(1) Violence is used over and above the force necessary to commit rape;*
> *(2) A weapon is used to frighten or wound the victim;*
> *(3) The rape is repeated;*
> *(4) The rape has been carefully planned;*
> *(5) The defendant has previous convictions for rape or other serious offences of a violent or sexual kind;*



(6) *The victim is subject to further sexual indignities or perversions;*
(7) *The victim is either very old or young;*
(8) *The effects upon the victim, whether physical or mental, is of special seriousness."*

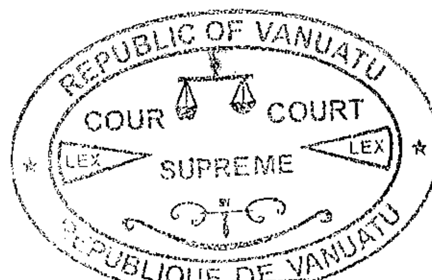
15. In sentencing the defendant, I am required first to adopt a starting point having regard to the circumstances surrounding the offending. I consider a starting point of 6 years imprisonment to be appropriate for the single offence of **unlawful sexual intercourse** contrary to **section 97(1)** and for the three offences of **unlawful sexual intercourse** contrary to **section 97(2)** I adopt 3 years imprisonment as the starting point.

16. In considering aggravating and mitigating factors personal to the defendant, the defence has invited the Court to consider the principle applied by the Court of Appeal in the case of *Boesaleana v Public Prosecutor* [2011] VUCA 33. The defence submits that this very defendant was in the month of April this year 2016 convicted and sentenced to 4 years imprisonment which he is now serving for a similar offence like this offending. The defence submits that the Court of Appeal remarked in the Boesaleana case that when a Court has to sentence a convicted person who faces many counts and more than one victim, it is often beneficial to decide what is the most serious offending and to impose a sentence on that which properly takes account of all aggravating factors then impose concurrent sentences in respect of other offending as appropriate. The Appeal Court went further to state that when the most serious offending is dealt with in that way, it is then not appropriate to impose additional cumulative sentences in respect of matters which have already been encompassed as aggravating matters.

17. Let me state straightaway that I am not unmindful of this principle and I will therefore not impose cumulative sentences in this case.

18. In mitigation, defence counsel submits that the defendant has pleaded guilty to the offence at the earliest opportunity and that he cooperated with police and made admissions to the offence in the terms of the charge ultimately preferred against him and that in doing so the defendant has shown remorse. Therefore a 1/3 reduction should be made to the end sentence. To buttress their submission, the defence referred the Court to the case of *PP v Gideon* [2002] VUCA 7 where the Court of Appeal said:

> *"As is always the case, having reached that conclusion, it is necessary to consider what reduction should be allowed for mitigating factors. The first and most obvious in this case was the plea of guilty. That always will attract a substantial reduction particularly when it occurs at the*



first available opportunity. This relieves a victim (and particularly a young victim such as this) from having to relive the trauma of the wrong done to her by having to recite and recall all details before a group of strangers in a Court. It is also an indication of remorse and contrition."

19. I have gathered from the pre-sentence report that a custom ceremony was organised and performed on behalf of the defendant by Chief Timothy Vira who presented a mat and a rooster to the complainant's families. I note that the families have accepted the reconciliation although they still demand for a bigger compensation sum of VT 200,000.

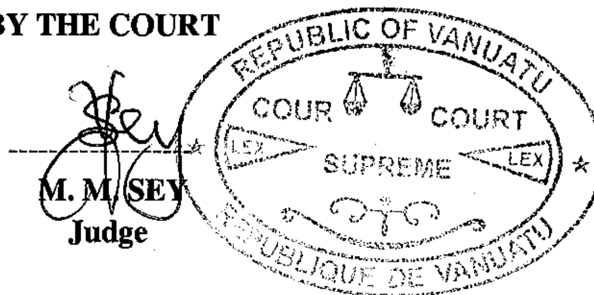
20. **Jeffery Tagaro**, for your early guilty plea you will be given full credit for that and your sentence will be reduced by one third (1/3) which means for the offence of **unlawful sexual intercourse** contrary to **section 97(1)** your end sentence is 4 years and for the three offences of **unlawful sexual intercourse** contrary to **section 97(2)** the end sentence is 2 years. Both sentences are to run concurrently which means you should serve a total of 4 years imprisonment for your offending.

21. You have 14 days to appeal against this sentence if you do not agree with it.

22. I must say I have been greatly assisted by the prosecution and defence submissions and also by the pre-sentence report.

DATED at Port Vila, this 20th day of September, 2016.

BY THE COURT



M. M. SEY
Judge