

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

Criminal Case No. 3298 of 2016

PUBLIC PROSECUTOR

-v-

BERRICK SUPE

**Mr Massing for Prosecution
Mr Jnr Garae for the Defendant**

Hearing 11th October 2016

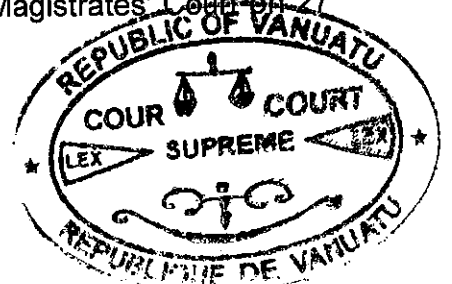
SENTENCE

1. The Defendant appeared before me on October 4th and entered a guilty plea to a charge of sexual intercourse without consent. The case was adjourned to today so that a pre-sentence report could be obtained. In their usual efficient fashion, Probation Services have provided a timely report and both counsel for the Public Prosecutor and the Defendant lodged helpful written submissions.

2. The facts of the case are that on 24th August this year the Defendant and the Complainant ("Ms DOS") were walking from Maloa village to the west coast of Santo. Ms DOS was intending to visit other community workers who were her friends. The Defendant was acting as a guide for Ms DOS. Even though she is an expatriate the two are not strangers. She has been living in the area for several years and the Defendant referred to her as Tawi or sister in-law because at the time she was living with his mother and father in-law. They set off in the early morning whilst it was still dark. They had been walking a while when the Defendant said he wanted to stop and have a cigarette. Whilst stopped he asked for a massage. Ms DOS declined and the defendant then asked for sex. Ms DOS refused and the Defendant attacked her and tried to push her to the ground. She struggled and the Defendant began punching her and holding her around the neck. He eventually subdued her and proceeded to rape her. After he had ejaculated inside her he said he wanted to rest and lay down beside her. He fell asleep and Ms DOS was able to escape and get back to the village.

3. When she arrived back in the village several people saw her in a distressed condition covered in blood and with torn clothing. She was crying and shaking. She was taken to Luganville and reported the incident to the police. She was medically examined as well.

4. The Defendant was arrested and when interviewed under caution he admitted the offence. He was held in custody and appeared before the Magistrates' Court on 27th



September where he was committed for trial to the Supreme Court. When he first appeared before this Court on 4th October he entered his plea of guilty.

5. The Defendant is a 31 year old farmer from the West Coast of Santo. He has a *de facto* partner and together they have one child. He is in good health despite apparently suffering a severe leg injury when he was a young man. He has no previous convictions. He does not dispute the prosecution summary of facts.

6. In sentencing the Defendant the approach to be adopted by the Court is that set out in *Andy*¹. The three stage process requires the Court to determine the starting point in the sentence. Next the Court will look at factors which are personal to the Defendant. That will allow the Court to arrive at the final sentence. After that any time off for any early plea of guilty will be taken into account. When dealing with cases of rape and in order to arrive at the starting point the comments of the Court of Appeal in the case of *Scott*² should be borne in mind. Their Lordships cited with approval the comments of the Chief Justice in the case of *August*³ :-

"The offence of rape is always a 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 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 any aggravating or mitigating features, 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.

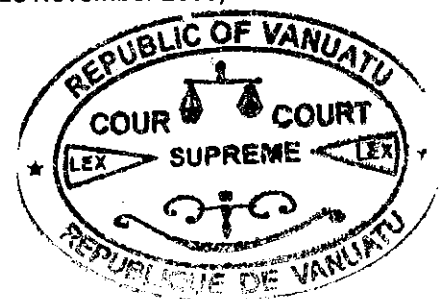
At the top of the scale comes the defendant who has committed the offence of rape upon a number of different women or girls. He represents a more than ordinary danger and a sentence of fifteen years or more may be appropriate

Where the defendant's behaviour has manifested perverted or psychopathic tendencies or gross personality disorder, and where he is likely, if at large, to remain a danger to woman for an indefinite time, a life sentence will not be

¹ *Public Prosecutor v Andy* [2011] VUCA 14; Criminal Appeal 09 of 2010 (8 April 2011)

² *Public Prosecutor v Scott* [2002] VUCA 29; CA 02-02 (24 October 2002)

³ *Public Prosecutor v August* [2000] VUSC 73; Criminal Case No 014 of 2000 (28 November 2000)



appropriate. [Note: I have not been able to ascertain whether there is a typing error in the published judgment at this point but it would seem logical, given the preceding paragraph, that His Lordship in fact said a life sentence would not be *inappropriate.*]

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 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 effect upon the victim, whether physical or mental, is of special seriousness.*

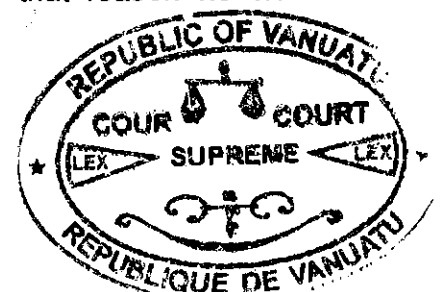
Where any one or more of these aggravating features are present, the sentence should be substantially higher than the figure suggested as the starting point.

If the defendant pleads guilty, the sentence should be reduced by 1/3 depending on the circumstances, including the likelihood of a finding of not guilty had the matter been contested."

7. In the circumstances the starting point in this case should be 6 years given the nature of the attack and the culpability of the Defendant.

8. There are aggravating factors present. The violence used was over and above that necessary to commit rape. Ms DOS was beaten into submission and the medical report shows extensive bruising and lacerations. The Defendant was a person Ms DOS was entitled to place great trust in. He abused that trust and his position of responsibility. From what Ms DOS says in her statement it is apparent that the Defendant's behavior deeply affected her. She had made the conscious choice to be celibate and had in fact been celibate for a number of years. That her celibacy should be brought to an end in such a violent and degrading manner can but have had a detrimental effect on her mental equilibrium. Taking into account all the circumstances, the sentence should be increased to 9 years.

8. What is of real concern is that the Defendant says that Ms DOS's behavior was a major contributing factor to his committing rape. A victim of crime can never be blamed for the crime committed against them particularly when the offence is rape. Ms DOS did not encourage, provoke or contribute to the commission of the offence. What the Defendant says is that Ms DOS never wears panties and for that reason he was



compelled to want to have sex with her. This "you made me do it" attitude by the Defendant is as perverted and corrupt as it is misogynistic and has no place in any decent society. Even if Ms DOS's behavior could be said to be in some way culturally insensitive it would still never excuse the Defendant's abhorrent response.

9. The Defendant's apparent inability to control himself was put forward as a mitigating factor. I hope I have made it plain it is not. I had considered whether his repugnant reasoning could be an aggravating factor in this case. On balance it probably is not. However the Defendant cannot be given any reduction in his sentence because he has shown no real remorse or understanding of his offending. In my view his advancing such a viewpoint deprives him of any right to be considered of good character even though this is his first conviction. Good character does not solely consist of a clean criminal record. It must involve some moral component, some consideration of a defendant's acceptance of his culpability.

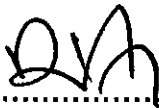
10. The final sentence is therefore 9 years. However, the Defendant is entitled to 1/3 remission because he has saved the Complainant the indignity and embarrassment of having to appear court by entering his guilty plea at the earliest opportunity. He will serve 6 years imprisonment.

11. I have considered whether the sentence can be suspended. There are no circumstances that would allow the Court to take the wholly exceptional step of suspending the sentence.

12. The sentence of 6 years imprisonment will be deemed to commence when he was first taken into custody on 20th August 2016.

Dated at Luganville this 11th day of October 2016.

BY THE COURT



D. CHETWYND
Judge

