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

Criminal Case No. 3680 of 2016

PUBLIC PROSECUTOR
v.
ERICK MOLFETH

Date of SENTENCE: *9th day of December, 2016 at 3:00PM*
Before: *Justice Daniel Fatiaki*
In Attendance: *Counsel – Ken Massing for the State*
Counsel – Jane Tari for the Defendant

SENTENCE

1. The defendant Erick Molfeth was originally charged with two separate offences arising out of the one incident – Unlawful Sexual Intercourse (Count 1) and Act of Indecency With a Young Person (Count 2). After frank discussions with prosecuting counsel an amended Information charging a single offence of Attempted Unlawful Sexual Intercourse contrary to Sections 28 and 97 of the Penal Code was filed. On being arraigned on the amended Information the defendant pleaded guilty and was convicted after he admitted the brief facts outlined by the prosecutor.

2. In summary the defendant and the complainant's father were co-employees who lived and worked at Loro Plantation in East Santo. On the night of 29 July 2016 the 7 year old complainant accompanied her father who was fixing solar lights in houses with the help of the defendant. Whilst the complainant's father was moving between houses the defendant invited the complainant to accompany him to the front office where the defendant got the complainant to hold his exposed penis and when it became erect he removed the complainant's clothes made her lie on the floor of the office and he lay on top of her and after trying unsuccessfully to penetrate her and he ejaculated on her body. The complainant's father arrived at the front office and using his mobile torch light he saw his daughter sitting on the floor half-naked and shaking and the defendant quickly pulling and holding onto his unfastened trousers to prevent it falling down.

3. The complainant was medically examined a week later and her medical report indicated that her gentalia was normal and "*hymen intact but look red and tender*". Her birth certificate records that the complainant was born on 28 February 2009 and therefore would have been just over 7 years of age at the time of the offence.

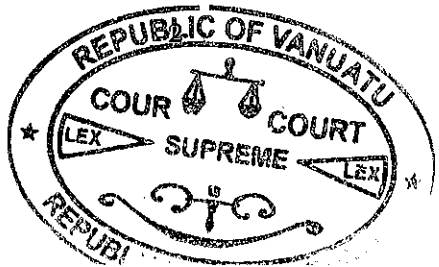
4. On 20 October 2016 the defendant was interviewed under caution and admitted the offence as well as knowing the age of the complainant (**see:** Q & A: 17 and 24). He also accepted that it was not appropriate for a man to have sex with such a young child (**see:** Q & A: 18) and when asked why he committed the offence he replied: "*rabis tingting nomo*" (**see:** Q & A: 28).

5. Upon his conviction a same day pre-sentence report was ordered along with sentencing submissions. I am grateful for the assistance provided to the Court in the report and in counsels' written submissions.

6. The defendant is originally from Lautha village on Merelava island in the Banks Group and is the second of 5 siblings. He was educated to level 6. He initially came to Santo seeking medical treatment for his defacto partner but after they separated he remained in Santo and now lives with his father at Balon village in East Santo. He has skills in gardening and copra cutting and sometimes does casual paid labour to earn some money.

7. The defendant told the probation officer who prepared the pre-sentence report that "*... he cannot tolerate not having sex when he is sexually emotional*" and "*he is very remorseful for the victim*". Although he was fined and paid VT3,000 to the complainant's father immediately after the incident, he is still willing "*... to perform reconciliation to the victim if he is released ...*". The defendant is assessed as "*(a) high risk in this type of offending due to his marital status as single. He may benefit from a sentence of imprisonment to rehabilitate himself*".

8. The complainant's father confirms receiving the customary "*fine*" of VT3,000+ in his deposition as well as returning a sum of VT500 to the defendant for having beaten him up on the same night of the incident. This latter incident is further confirmed by an open statement of the defendant included in the depositions bundle wherein he states:



"Mr. Johndy (Papa blong Girl) hemi bin finem mitufala mo sem taem hemi killim nogud mi. mi swim gud long blood blong mi, 2 teeth blong mi imove move naoia, hemi weepim mi wetem hand blong burao mo ibrokbrok long mi. ...

After long fight ia, papa blong girl hemi askem fine long mi. hemi askem 3.200 vatu. Papa blong mi I fine sem taem nomo.

Papa blong girl ia Mr Johndy hemi fine 500 vatu long mi mo mifala iforgivim mifala. Meanim se case ia hemi finis. Emia nomo statement blong mi, mi mekem long free will blong mi mo hem istret every wan mi no save kiaman."

9. Also included in the deposition bundle is another open statement from Jif Victor Ron in support of the above last paragraph where he states:

"This report ia, mi submittim blong talem aot nomo se, long custom law, mo law blong Vanuatu, man hemi mas punish wan taem nomo:

Punishment ia, hemi save mekem long custom or Vanuatu law.

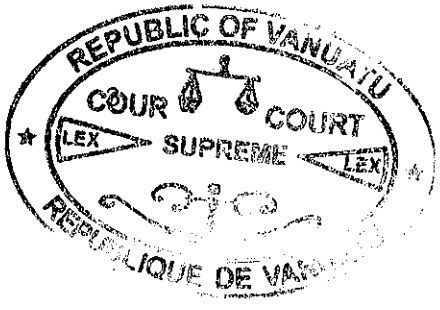
Wetem case ia, mi understand se, papa blong girl I askem blong oli solvem long custom fasin nomo.

Folem request blong papa, nao ia folem law case hemi closed folem custom ceremony we ibin tekem ples long stret date we incident ia hemi happen.

Mi olsem Jif, mi askem family blong girl mo family blong boy blong kam together blong mekem small custom ceremony bakeken blong cleanim face blong ol narafala family mo Jif blong Merelava mo Jif blong Mota bae istap blong witnessem.

Emia nomo thank yu big wan long understanding blong every wan."

10. I mean no disrespect when I say that this latter statement is misconceived. The Court does not make the law it merely interprets and enforces it. The Court like every citizen of Vanuatu must obey the law and is bound by it. In this case the law which is contained in the Penal Code states in Section 97 that "*no person shall have sexual intercourse with any child under the age of 13 years*" even if the child consent to it [*see:* subsection (3)]. Additionally Section 28(4) states: "*The commission of an attempted offence shall constitute an offence punishable in the same manner as the offence concerned*". The offence of Unlawful Sexual Intercourse With a Child under 13 years carries a maximum penalty of 14 years imprisonment.



11. More relevantly, the Penal Code recognizing the relevance and value of "*custom*" in the lives of man-Vanuatu states in Section 39: "*When sentencing an offender, the Court must, in assessing the penalty to be imposed, take account of any compensation or reparation made or due by the offender under custom ...*".

12. From the foregoing three things are clear. Firstly, the law and presumably "*custom*" strictly prohibits sexual intercourse with children under 13 years of age. Secondly, in passing the law the Parliament of Vanuatu was fully aware of and took into account practices and penalties that might be imposed in "*custom*", and thirdly, Parliament did not prohibit the Court from imposing a penalty on an offender who had already been punished under "*custom*" as it could have done if that was its intention.

13. I accept at once that the Constitution or Mama Loa states in Article 95(3):

"*Customary law shall continue to have effect as part of the law of the Republic of Vanuatu*".

But in the absence of legislation implementing Article 51, the Court must continue to be guided by the provisions of the written Penal Code.

14. In my view, here is no inevitable conflict or dichotomy between Customary law and the Penal Code nor are they mutually exclusive in their operation and application such that both cannot co-exist. Customary law and the Penal Code both seek to punish offenders in vindicating the victims of crime and in the broader interest of restoring and maintaining peace, order and harmony in society which is the essence of the customary reconciliation ceremony of "*Klinim fes*".

15. I also accept as a normative rule or principle of justice that no man should be punished twice for the same offence. The Penal Code itself does not expressly prohibit it and Article 5(2)(h) of the Constitution only prohibits a convicted or acquitted person being "*... tried again for the same offence or any other offence of which he could have been convicted at his trial*". There is no mention of a punishment or penalty in the sub-article but the implication is irresistible, that there can be no punishment or penalty without a conviction. Having said that the special pleas of "*autrefois acquit*" and

"*autrefois convict*" are limited to trials before a court of competent jurisdiction which a customary ceremony most certainly is not.

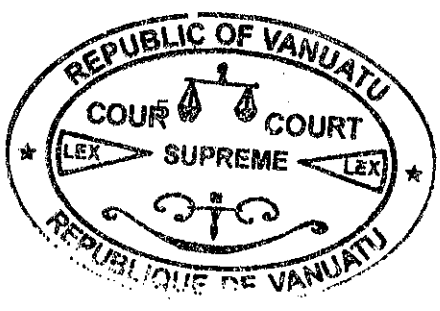
16. Returning to the defendant's sentence. Prosecuting counsel relying on well-known dicta in PP v. Gideon [2002] VUCA 7 and on the cases of: PP v. Matavusi [2000] VUSC 42 and PP v. Capten [2007] VUSC 19 where suspended prison sentences were imposed, submits as appropriate, a starting point of 3 – 4 years imprisonment to reflect the aggravating factors in the case including the age differential and the physical and mental impact on the child victim. From that deductions should be made for (unidentified) mitigating factors giving an end sentence of 2 – 3 years which: "*... should not be suspended considering its seriousness particularly the young age of the victim*".

17. Defence counsel for her part refers to even more relevant dicta in PP v. Andy [2011] VUCA 14 and highlights that the offending in this case is a "*one-off*" incident, unplanned and consisted of a brief attempt with minimal injuries caused to the victim. Reference was also made to PP v. Kalsale [2007] VUCA 11 where the Court of Appeal in quashing a suspension order in that case upheld a sentence of 2 years and 4 months imprisonment for a serious anal violation of a young 7 year old boy which required hospital treatment and counsel submits the case "*falls at a lower scale of offending*".

18. Defence counsel submits that "*an end sentence between 18 – 24 months imprisonment is appropriate without suspension*".

19. I have carefully considered all that has been urged on the defendant's behalf but regrettably do not agree with defence counsel's categorization of his offending. The defendant's case, in my view, is at the higher level of attempts to commit the offence and only fell short of being completed because he was disturbed by the victim's father.

20. This is not a case of a fleeting encounter between strangers or a case of an indecent assault which did not involve "*skin to skin*" contact. It is a much more serious case where a mature man who was known and trusted by a young child lured her away at night from the relative safety of her father to an unlit room where the girl was undressed and the offence perpetrated.



21. The Court's have said time and again that men who taken advantage of young girls must expect to lose their liberty. Children must be protected from men who take advantage of them to satisfy their unnatural and uncontrollable lust. It needs hardly to be said that there are less loathsome non-criminal ways of satisfying or controlling a carnal urge than attempting to have sexual intercourse with an innocent child.

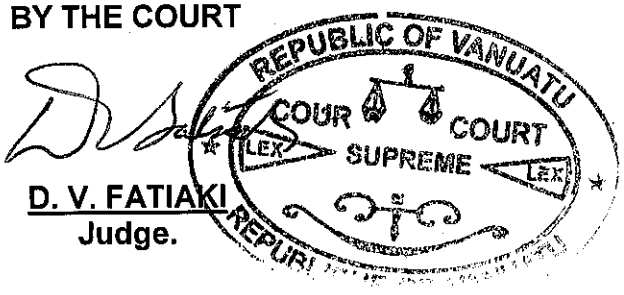
22. The maximum penalty for the offence is 14 years imprisonment. For this offence I adopt a starting point of 6 years imprisonment. As for mitigation, for your early guilty plea I discount the sentence by 2 years and deduct a further 1 year for other mitigating factors including the custom fine already paid and the summary beating you received at the hands of the victim's father. This gives an end sentence of (6 – 3) = 3 years imprisonment.

23. I do not consider this an exceptional case for which suspension of any part of the sentence would be appropriate however the sentence is ordered to commence from 13 October 2016 to account for the period the defendant has already spent in remand.

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

DATED at Luganville, Santo, this 9th day of December, 2016.

BY THE COURT



D. V. FATIAKI
Judge.