

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

Criminal Case No. 2427 of 2016

**PUBLIC PROSECUTOR**

**-v-**

**TOMA RALE**

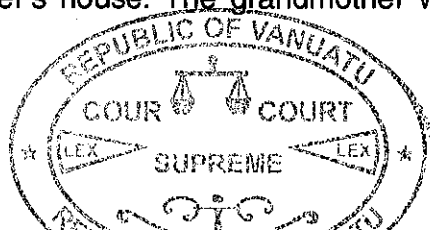
**Coram:** V. Lunabek CJ

**Counsel:** Mr Simcha Bless for Public Prosecutor  
Mr Henzler Vira for the Defendant

**Date of Delivery:** 16<sup>th</sup> October 2017

**SENTENCE**

1. Toma Rale, this is your sentence on two (2) counts of sexual intercourse without consent, contrary to s.90 and 91 of Penal Code Act.
2. You were tried, found guilty and convicted on those offences on 13 September 2017. You are sentenced today.
3. The brief facts of your offending is this – you forced the complainant to have sexual intercourse with you on two separate occasions in the month of May 2014 in the village of Peterbu, north Malekula, you and the complainant live in.
4. The first incident of forced sexual intercourse occurred on 29 May 2014. It was during the day time. You and the complainant are straight cousins. Your grandfather and the grandfather of the complainant are biological brothers. On May 29, 2014, the parents of the complainant went to the gardens which were far away from the house. The complainant was staying at home with her little sister (of 4 years old) and brother (of 2 years old). They were staying in the big house (Copper House). You came into the complainant's house, you sent away her little sister and brother to her grandmother's house. The grandmother was not there.



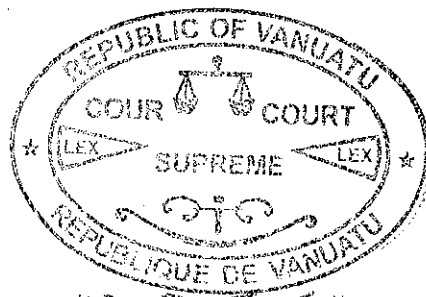
You asked her for sex. She refused. You forced her. You proposed to give her money in return for sex with her. She refused. You forced to remove her clothes. She refused. You forced her again and you removed her clothes. You made her laid on the mattress inside the big house and you have sex with her without her consent.

5. The second time, you forced to have sexual intercourse with her was in the month of May 2014 after the first incident. She did not recall the date. It was in the kitchen. She peeled the bananas. She prepared the food. You entered into the kitchen with a bush knife and forced her for sex. She refused. You forced her again for sex. She refused. You told her to remove just her culottes (panties). She was afraid of you as you had the big knife. She removed her panty. You made her lay on the pandanus mat in the kitchen. You had sexual intercourse with her without her consent.
6. In June 2014, she got pregnant. She made her complaints to the police on 11 August 2014. She gave birth to a baby boy as a result of the forced sexual intercourse you had with her.
7. Sections 90 and 91 of the Penal Code Act are the relevant provisions of the law [Cap 135]. They provide as follow:

**“Sexual Intercourse without consent defined**

90. Any person who has sexual intercourse with another person –

- a) Without that person’s consent; or
- b) With that person’s consent if the consent is obtained (when relevant) –
  - i. by force; or
  - ii. by means of threats of intimidation of any kind; or
  - iii. by fear of bodily harm; or
  - iv. ....
  - v. ....
  - vi. ....
  - vii. ....



commits the offence of sexual intercourse without consent.

**“91. Punishment of sexual intercourse without consent**

No person shall commit sexual intercourse without consent.

Penalty: Imprisonment for life”

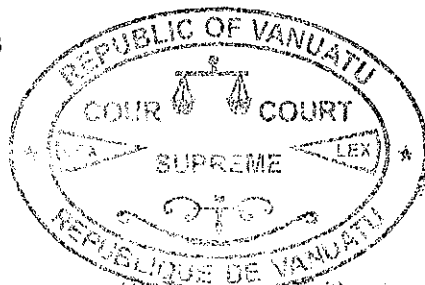
8. The prosecution assisted the Court with the following case authorities –

- a) **Public Prosecutor –v- Ali August [2000] VUSC 73.** The applicable principles in relation to the offence of sexual intercourse without consent (previously known as rape) were set out in this case 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 handwritten signature in black ink, consisting of a stylized, cursive letter 'A' followed by a flourish.

*a more than ordinary danger and a sentence of fifteen years or more may be appropriate".*

- b) **Public Prosecutor –v- Gideon [2002] VUSC 75.** The Court of Appeal also provided sentencing guidelines in relation to sexual offences in that case as follows:

*"...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..."*

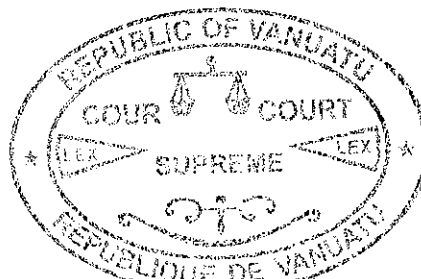
*It will only be in most extreme of cases that suspension could ever be contemplated in a case of sexual abuse. There is nothing in this case which brings it into that category. Men must learn that they cannot obtain sexual gratification at the expense of the weak and the vulnerable. What occurred is a tragedy for all involved. Men who take advantage sexually of young people forfeit the right to remain in the community..."*

- c) **Public Prosecutor –v- Scott [2002] VUCA 29; CA 02-02 (24 October 2002),** the Court adopting the principles espoused in **Ali and Gideon**, stated:

*"...It will only be in the most exceptional 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 the vulnerable.... men who take advantage sexually of women forfeit the right to remain in the community."*

The court also reiterated the principals set out in **Ali August** where the court stated:

*"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.

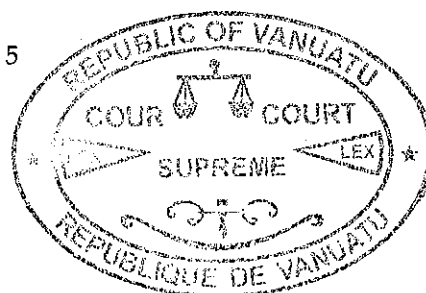
For rape committed by an adult without an aggravating or mitigating feature, a figure of five years should be taken as the starting point in a contested case. Where a rape is committed by two or more men acting together, or by a man who has broken into or otherwise gained access to a place where the 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.

Where the defendant's behavior 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 appropriate.

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



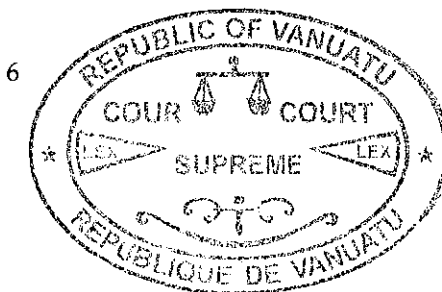
*Where any one or more of these aggravating features are present, the sentence should be substantially higher than the figure suggested as the starting point.*

*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.*

*The fact that the victim may be considered to have herself in danger by acting imprudently (as for instance by accepting a lift in a car from a stranger) is not a mitigating factor, and the victim's previous sexual experience is equally irrelevant. But if the victim has behaved in a manner which was calculated to lead the defendant to believe that she would consent to have sexual intercourse, then there should be some mitigation of the sentence. Previous good character is of only minor relevance."*

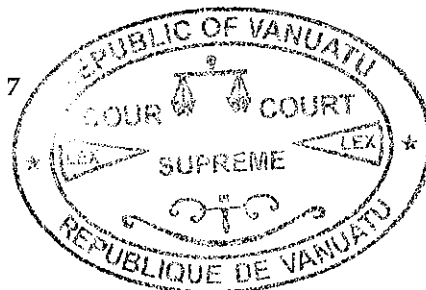
*That reasoning is again apparent in the further Judgment of the Chief Justice in **Public Prosecutor v. Mark Katipa and Peter Roy delivered on 17<sup>th</sup> September 2002** where the same principles were repeated but the Judge noted that the proper starting point in that case was 8 years imprisonment with adjustments for aggravating and mitigating factors as the two (2) accused pleaded not guilty. There can be no room for any deviations from these fundamental and essential principles. The rights of women must be recognised maintained and upheld."*

9. As to the sentencing approach, the prosecution refers to the Guidelines sentencing approach in **Public Prosecutor -v- Andy [2011] VUCA 14; Criminal Appeal 09 of 2010 (8 April 2011)**.
10. The prosecution also refers the Court to comparative case authorities when the sentencing range for the offence of sexual intercourse without consent for sexual intercourse committed by males and/ or females upon victims to whom they are related and where the age disparity is not significant, and where pleas of guilty are entered. The following table shows these cases:



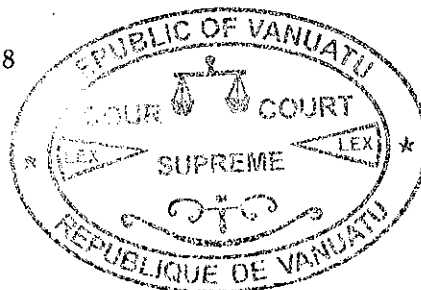
Case name & Citation	Charge(s )	Plea	Aggravating factor(s)	Mitigating factor(s)	Computation of sentence	End Sentence
Public Prosecutor - v- Jonathan [2008] VUSC 29; Criminal Case 5 of 2008 (2 April 2008)	Single count of SIWC	PG	Breach of trust - The accused was the complainant's mother's brother (biological uncle)	Cooperation with investigation and admission of allegations at first instance  PG at the first reasonable opportunity  Remorse  Custom Reconciliation  First time offender	Court imposed a starting point of 5 years imprisonment for the offence of SIWC  Staring sentence was reduced by 1/3 to reflect the accused's early guilty plea  Head sentence was further reduced to take into account the custom reconciliation and remorse  Sentence reduced to 3 years imprisonment	3 years imp for the offence of SIWC  No suspensi on of sentence
Public Prosecutor - v- Ikoiko [2010] VUSC 32; Criminal Case 10 of 2010 (24 May 2010)	Single count of SIWC	PG	Breach of trust - The accused is the biological cousin of the complainant's father. The accused was 73 years of age and the complainant was mid-aged at the relevant time  Threats of violence  High degree of cruelty. The complainant who was 2 months pregnant endured severe pain but the accused continued notwithstanding	Cooperation with investigation and admission of allegations at first instance  PG at the first reasonable opportunity  Remorse  Custom Reconciliation  First time offender	Court imposed a starting point of 5 years imprisonment for the offence of SIWC  Sentence further uplifted to 7 years to reflect aggravating factors  Court reduced the head sentence to 4 years and 6 months to take into account the PG entered at the first reasonable opportunity and mitigating factors	4 years and 6 months imp for the offence of SIWC  No suspensi on of sentence

11. The table below shows comparative case authorities when the sentencing range for the offence of sexual intercourse without consent for sexual intercourse committed by males and/ or females upon victims to whom they are related and



where the age disparity is not significant, and where pleas of not guilty are entered:

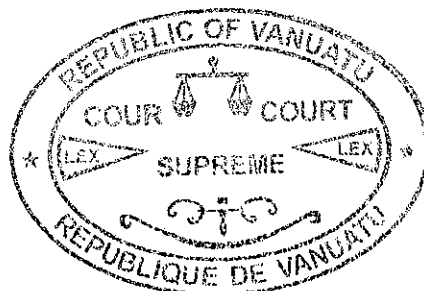
Case name & Citation	Charge(s)	Plea	Aggravating factor(s)	Mitigating factor(s)	Computation of sentence	End Sentence
Public Prosecutor - v- Nuarau [2010] VUSC 54; Criminal Case 130 of 2009 (14 April 2010)	Single count of SIWC	PNG	Breach of trust - The accused is the brother of the complainant's husband	First time offender but showed no insight into his offending	Court imposed a starting point of 10 years imprisonment for the offence of SIWC  No further reductions	10 years imp for the offence of SIWC  No suspension of sentence
Public Prosecutor - v- Less [2012] VUSC 258; Criminal Case 128-12 (21 December 2012)	Single count of SIWC	PNG	Breach of trust - The complainant was the girlfriend of the accused's brother. The complainant was 17 years of age. The age of the accused is not reflected in both the judgment on verdict and judgment on sentence but there would have not been a big difference in their ages  Premeditation	First time offender	Court imposed a starting point of 6 years imprisonment for the offence of SIWC  Sentence further uplifted to 7 years to reflect aggravating factors  Court reduced the head sentence to 4 years to take into account the single mitigating factor that the accused had an unblemished record	4 years imp for the offence of SIWC  No suspension of sentence
Public Prosecutor - v- Kombe - Sentence [2015] VUSC 53; Criminal Case 100 of 2014 (21 May 2015)	Single count of SIWC	PNG	Breach of trust - The accused was the cousin brother or the victim. Age- gap between them was not considerable  Time of day  Degree of physical force  Traumatic effect on the victim	First time offender  Expressed willingness to perform custom reconciliation	Court imposed a starting point of 6 years imprisonment for the offence of SIWC  Sentence further uplifted to 8 years to reflect aggravating factors  Court reduced the head sentence to 5 years to take into account mitigating factors	5 years imp for the offence of SIWC  No suspension of sentence



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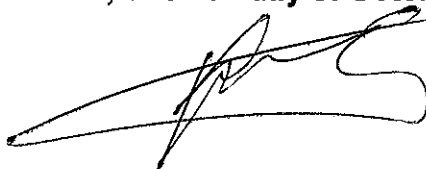


12. The prosecution submitted that on the bases of the foregoing features, the maximum penalty of life imprisonment, the Guideline Judgments and the sentencing ranges found in comparative authorities, relevantly where pleas of not guilty are entered as set out in paragraph 11 above, the appropriate head sentence in the present case is 8 years imprisonment for each charge to reflect the seriousness of the offence and the capability of the actual offending.
13. Your lawyer submitted to the following effect. He relies on the cases of **PP –v- Andy [2011] VUCA 14** and **PP –v- Paul [2014] VUSC 35**. In both cases, the Court states the starting point of sexual intercourse without consent to be 6 years imprisonment. Your lawyer agrees to the above aggravating factors submitted by the prosecution to increase the starting point in both offences to 8 years imprisonment and to be concurrent.
14. In this case, the nature and circumstances, of your offending are aggravated by the following factors:-
- Victim was 17 years old at the time of offending and you were also 17 years old. The disparity is in terms of months difference and it is, thus, not significant.
  - Breach of trust (biological relationship, straight cousins).
  - Force used through the sight of the knife as weapon to intimidate the complainant for sex.
  - Exposure of the complainant to sexually transmitted diseases.
  - Repetition of offending in a space of 1 month.
  - Exposure of the complainant to the risk of unwanted pregnancy.
  - The impact of the offending on the young victim with a baby boy born out of the forced sexual intercourse.
15. You are sentenced to eight years imprisonment as a starting point in both offences (counts 1 and 2) concurrently. Your total sentence is 8 years imprisonment on both offences to run concurrently.



16. In mitigation, you are a first time offender and you were 17 years of age at the time of offending. That is you were a very young man at the time. You are now 21 years of age.
17. I give you an allowance of 24 months to reflect your youth and immaturity as a young man of 17 years when you committed the offences.
18. You said you have performed customary compensation to the victim and her family when you paid a custom fine of VT100, 000 with a pig and kava. The victim and her family accepted the customary compensation as customary reconciliation. I accept that you did so. I give you an additional allowance of 6 months.
19. You committed the offences on the month of May 2014. You were tried in August and September 2017 and you are sentenced in October 2017. There are some 3 years delays. I give you a further discount of 6 months for that.
20. Your end sentence is 5 years imprisonment.
21. The circumstances of your offending, do not justify a suspension. I note you committed the offences when you were 17 years of age. They are very serious offences. The sentence of imprisonment cannot be suspended.
22. You are ordered to serve the term of 5 years imprisonment which is deemed to start on 13 September 2017.
23. You are entitled to appeal this sentence if you are unsatisfied with it. The 14 days starts on the date of your sentence.

**DATED AT PORT VILA, this 16<sup>th</sup> day of October 2017**



**Vincent Lunabek  
Chief Justice**

