

PUBLIC PROSECUTOR

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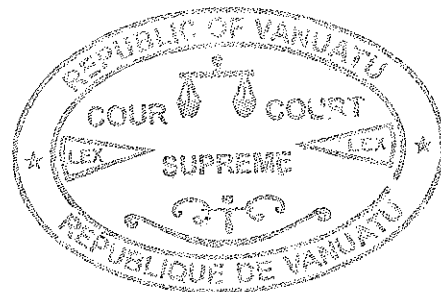
DANIEL HARRY

Coram: V. LunabeK - CJ

Counsel: Losana Matariki for Public Prosecutor
Francis Tasso for the Defendant

SENTENCE

1. Daniel Harry you appear today for sentence on one count of sexual intercourse without consent and one count of acts of indecency with a young person, both respectively against ss.90 & 91 and 98A of Penal Code Act [Cap. 135].
2. On 16 May 2017, you entered a guilty plea on count 2 (of acts of indecency, contrary to s. 98A) and not guilty pleas on counts 1 and 3 (of sexual intercourse without consent and alternatively, unlawful sexual intercourse). A trial was required on counts 1 and 3 of the information dated and filed 15 May 2017.
3. The matter was adjourned for a pre-trial conference on 30 May 2017. On that date, you asked your lawyer that you wished to be re arraigned. When you were re-arraigned, you changed your initial not guilty pleas on count 1 into a guilty plea.
4. As a consequence, count 3 of unlawful sexual intercourse being an alternative charge, was withdrawn by the Prosecution.
5. You are now sentenced on counts 1 and 2 of the information charge dated 15 May 2017.



6. The offence of Sexual intercourse without consent is defined in s.90 of Penal Code. It provides:

“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-*
 - (i) by force; or*
 - (ii) by means of threats of intimidation of any kind; or*
 - (iii) by fear of bodily harm; or*
 - (iv) by means of false representation as to the nature of the act; or*
 - (v) in the case of a married person, by impersonating that person’s husband or wife*
 - (vi) by the effects of the alcohol or drugs; or*
 - (vii) because of the physical or mental capacity of that person,*

Commits the offence of sexual intercourse without consent. The offence is complete upon penetration.”

7. Section 91 states that:

“No person shall commit sexual intercourse without consent;

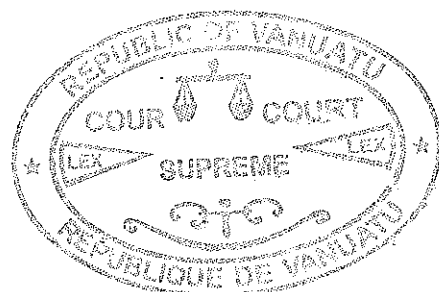
Penalty: Imprisonment for life.”

8. Section 98A of Penal Code says:

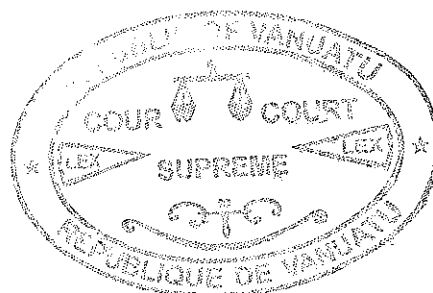
“ A person must not commit an act of indecency upon, or in the presence of another person under the age of 15.

Penalty: Imprisonment for 10 years.”

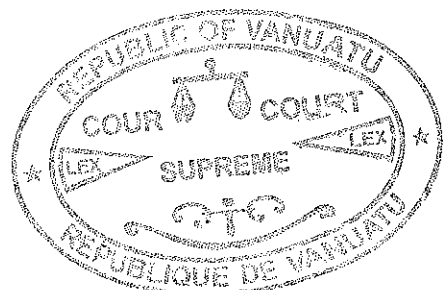
9. The high level of punishment set by law of imprisonment for life and 10 years imprisonment, indicate the intention of the legislature that those offences are serious offences. The courts must reflect that intention when sentencing those committing such offences.



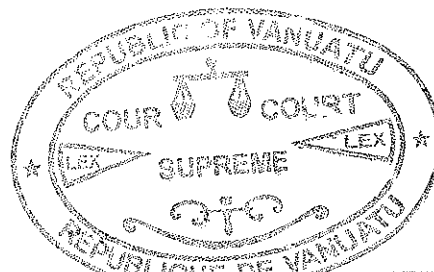
10. A person who commits such offences is liable for such maximum penalties of imprisonment for life and 10 years imprisonment.
11. The facts of this case are provided by the prosecution and you accepted these facts before you entered your guilty pleas on them on 16 May 2017 and 30 May 2017. You did not dispute them. You are now sentenced on the basis of these facts.
12. These facts are those-
13. On the 12th of April 2014 a complaint was laid against you Daniel Harry with the Police for allegations of sexually assaulting a 7 year old girl.
14. The complainant at the time of the offence was 7 years old, a student at Pikinini Club Teouma valley.
15. At the time of the offence you were around 31 or 32 years old.
16. The complainant's biological mother is the older sister of your wife.
17. The complainant lived with you and your wife (victim's smol Mummy) at Teouma
18. The incident happened at a house at No. 2 (Nikita Taiwia's home) after the complainant and her family returned from having a meal at a Chinese's place on Friday 12th April 2014.
19. When they reached the house at No. 2, the owner of the house Nikita Taiwia left for work while you stayed home at No.2 with the complainant and her older sister, a 12 year old girl and also a sister of your wife.
20. It was also at this same time that you decided that you wanted to have a bath you told the complainant to follow you to the bathroom and hold the door for you while you bathed.



21. The complainant followed you to the bathroom and was told by you to go inside the bathroom and closed the door.
22. The complainant held onto the door with her back to you while you took off all your clothes.
23. After taking off of all your clothes, you lifted up the complainant's skirt and made her lie down inside the bathroom.
24. You also told the complainant that she was not to tell anyone about what you were doing to her.
25. You then knelt down and rubbed your penis around the complainant's vagina and then pushed your penis into the victim complainant's vagina.
26. The complainant felt pain and started protesting, but you held her tight and continued to push your penis into her vagina.
27. After sometime the complainant felt liquid (which she referred to in her statement as pispis) from your penis pour into her vagina.
28. What she saw was white pispis like substance that came out of your penis after pushing your penis into her vagina for quite some time.
29. After that you got off of the complainant, you pulled up your trousers and left the bathroom.
30. The complainant, as soon as she left the bathroom told her older sister (of 12 years old) who was with her in the house, about what you did to her in the bathroom.
31. The complainant also stated in her statement that that was not the first time for you to assault her sexually.



32. That on one occasion in Teouma at your house, while your wife was not in the house, you had sexual intercourse with the complainant through anal penetration.
33. On another occasion you pushed your penis into the complainant's mouth.
34. That the sexual assault had been going on for quite a while.
35. You were arrested and brought into the police station for questioning and in your interview with the police you admitted to allegations made against you. That you had had sexual intercourse with the complainant several times.
36. In this case, not only the circumstances of your offending were serious, the following aggravating factors also are present:-
- (a) There was a serious breach of trust between you and the complainant. You marry the complainant's small mammy (antie). The complainant lives with you and your wife. She was entitled to treat your home as her home where she will be saved. You have breached that trust.
- (b) The age differential between you and the complainant girl is an aggravating factor. You were 31 years at the time of offending while the victim girl was 7 years old. The 24 years difference is a substantial aggravation as you are an adult and responsible person while the victim girl is a vulnerable child. She needs protection.
- (c) You had sexually assaulted this victim girl on several occasions.
- (d) There is an impact of the offending on the victim girl. The victim girl was referred to Patricia Gavotto, a Clinical Psychologist practicing in Port-Vila, Vanuatu. The Psychologist assessed the impact of the offending on the victim girl at the request of the girl's legal guardian called for professional help to assist the girl to deal with the non-visible damages and unusual behaviours observed, after she has been a victim of multiple acts of sexual abuse perpetrated by trusted family members and male care provider(s).



d-1 She provided a report dated 10 October 2016. The severe sexual abuses (including full penetration) were kept secret, at the request of the aggressors(s), and were only disclosed to the guardian, after the victim displayed unusual behaviours which were severe enough to worry her legal guardian. Those abuses include the last recent abuses by you, Harry Daniel, a trusted male family member, in the victim girl's new home setting. The unusual behaviours, which are a major source of concern to the legal guardian, as she frequently is daily and the intensity stronger since the offending of 14 April 2014.

- The report assessment concluded-

The girl is suffering from severe anxiety, acute posttraumatic stress, impaired relations to self, environment and others. This may have long life consequences, such as inability to develop positive relation with a partner and become a stable and capable mother, if her condition is not treated.

d-2 A further report by the psychologist dated 30/11/2016 reveals the following:-

- The victim's mental damages, apart from what was found and recorded in her report dated 10/10/2016, summarily recorded above, two further details must be noted:
- The assessment of her teacher and a high academic performance, demonstrate that her intellectual abilities were not impaired before the recent abuse. Since then, a drop in school results and a massive disengagement in school work has been observed by her teacher and her legal guardian. This is consistent with a negative reinforcement of the damages done, following the recent re-abuse.
- Her impaired relations to self, environment and others. Her permanent insecurity, emotional instability, extreme difficulty to regulate and cope with her negative emotions, lead to frequent uncontrolled and disruptive angry episodes, massive inhibition (retention and suppression of negative emotions and dissociative states.



- The victim has not shown so far delay in her physical development. This may develop when she will become pubescent.
 - The recent sexual abuse has reinforced negatively the mental damages that may have lifelong consequences, as the level of distress has increased.
37. The pre-sentence report states that you live together with the victim girl and her family. You have sexual feelings for the victim and it leads you to commit the offence.
 38. You must be responsible and accountable for your own acts. The offences committed here are very serious offences.
 39. The prosecution referred to following guideline judgments. *PP –v- Ali August [2000]* and *PP –v- Scott and Tula [2002] 29*; *PP –v- Gideon [2000]*. Your lawyer also referred the Court to these guideline judgments in his submissions to assist the Court in considering your sentencing.
 40. In these cases, the court held and continued to hold that the appropriate punishment for such sexual offences must be custodial, save for very exceptional circumstances. Children are vulnerable and need protection by adults. The present case is not an exception. The question then is for how long you will be in custody.
 41. In this case, the appropriate starting point is between 10 -12 years. I have noted that you have previous convictions for unlawful sexual intercourse with child under s.97(1) of Penal Code Act.
 42. I noted also that the offences of sexual abuses you were sentenced in 2015 and the sexual offences complained of in the present case, were subject to complaints made by the victim older sister (of 12 years) and the victim girl of 7 years in this case. These complaints were made together at the same time on 12 April 2014 after the incident at the house at No. 2 area. For this time factual reason, I do not treat your previous convictions as an aggravating factor for



the purpose of your sentencing in the present case. If I do, I would have set the starting point to 12 years imprisonment.

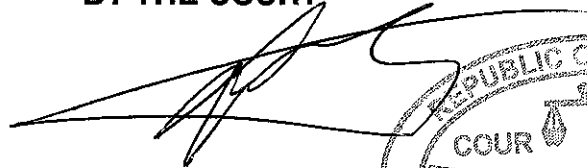
43. In the present case I consider and take 10 years as a starting point which is inclusive of the aggravating factors mentioned above but I exclude the previous convictions on sexual abuses which led to your sentence in 2015 for the factual reasons I mentioned earlier.
44. In mitigation, I take into account of what your lawyer said in his submissions to assist the Court (when relevant). In this case you pleaded guilty not at the earliest opportunity given to you by the court (apart from your plea in count 2). Your sentence will be reduced by 20% as you are not entitled to the full one third (1/3) reduction.
45. You cooperated with the police and you are remorseful of what you have done to the victim girl. I will give a further reduction of 4 months.
46. Your sentence is now reduced to 92 months which is equivalent to 7 years and 6 months. You have the intention to perform custom compensation ceremony to the victim girl and her family but you cannot as you are held in custody. I have no doubt about you being genuine of doing this. You may have done some custom reparation if you were not held in custody as you did in 2015. I give you a reduction of 3 months.
47. I noted that you committed this offence in 2014 and you are sentenced today 17 July 2017, some 3 years later. I give you a further 3 months reduction for the delay.
48. 7 years imprisonment is your end sentence for the offence in count 1 and 3 years imprisonment for the offence in count 2. You have to serve the two sentences concurrently. This means that you have to serve a total term of 7 years imprisonment at once.
49. The next question I ask myself is whether the circumstances of your offending justify a suspension of your sentence of 7 years. I answer it in the negative (no).



50. Your lawyer submitted that you shall serve your term of imprisonment of 7 years in this case concurrently or together and at once with your previous sentence of 3 years and 4 months you are currently serving.
51. I refuse and reject that submission as a nonsense. The sentence of 3 years and 4 months was subsequent to the complaints of the elder sister (of 12 years old) of the victim girl in this case, while this current sentence is in respect to the complaints of the younger sister of 7 years old at the time of offending. They were two separate complaints made at the same time to the police.
52. You are ordered to serve the term of 7 years imprisonment immediately at the end of your current sentence term of 3 years and 4 months.
53. You have a right to appeal this sentence if you are unsatisfied with it. You have 14 days to do that and it starts today.

DATED at Port Vila, this 17th day of July 2017

BY THE COURT



**Vincent LUNABEK
Chief Justice**

