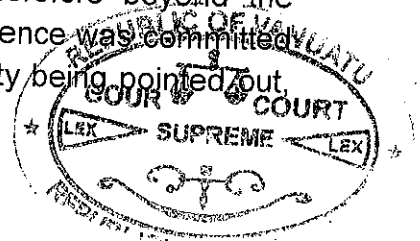


PUBLIC PROSECUTOR
v
JOHN ALBIE

Coram: Justice D. V. Fatiaki
Counsel: K. Massing for the State
H. Rantes for the Defendant
Date of Delivery: 24 August 2018

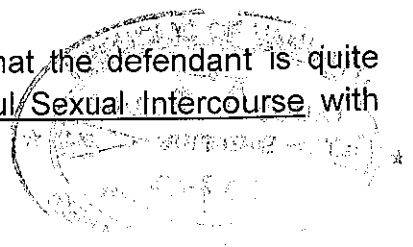
SENTENCE

1. The defendant was originally charged and committed for trial in the Supreme Court on a charge of Sexual Intercourse Without Consent and 2 charges of Threats to Kill. All 3 offences are alleged to have taken place on "23 April 2018".
2. On 21 August 2018 an amended information was filed in the Supreme Court charging the defendant with 3 counts: **Count 1:** Sexual Intercourse Without Consent; **Count 2:** Threats to Kill and **Count 3:** (which the prosecutor accepts is an alternative to count 1): Unlawful Sexual Intercourse With a Child "*weh long taem ia hemi kat 15 yia nomo*". Inexplicably, in the amended information the offences are alleged to have occurred "... sometimes between December 2017 and April 2018" (**ie** over a period of 4 months). No reason is given for the change in the date of commission of the offences which are all solitary instances. The change however to an uncertain date over a period of 4 months is unfortunate in that the offence of Unlawful Sexual Intercourse, contrary to section 97(2) as charged in count 3, requires as an essential element that the complainant child be "... under the age of 15 years but of or over the age of 13 years" at the time of the commission of the offence.
3. Given the complainants' recorded date of birth as: "1 January 2003", she would have turned 15 years on 1 January 2018 and was therefore beyond the maximum age for an offence under section 97(2), if the offence was committed in the months of January up to April 2018. On this difficulty being pointed out,



the prosecutor sought and was permitted to amend Count 3 by deleting the reference: "... to April 2018".

4. At his arraignment the defendant pleaded "*not guilty*" to Counts 1 & 2 and "*Guilty*" to Count 3. The prosecutor entered a "*nolle prosequi*" in respect of Counts 1 & 2 and the defendant was discharged on those 2 charges. On Count 3, after the defendant admitted the facts outlined by the prosecutor, he was convicted on his guilty plea to the offence of Unlawful Sexual Intercourse contrary to Section 97(2) of the Penal Code.
5. The brief facts are that the complainant who is related to the defendant's wife (as her niece) went to live with the defendant as the defendant's wife had recently given birth and needed help with house chores and with looking after her young family. On the date of the incident the defendant asked the complainant to accompany him ostensibly, to look for pigs. After walking for some considerable distance, the defendant sat down and asked the complainant if she had a boyfriend or no? The complainant replied she did not and was still sleeping in her parent's home. The defendant then suggested they have sexual intercourse and the complainant declined.
6. Undeterred, the defendant held the complainant tightly, felled her to the ground and forcefully removed her clothes. He then had penile intercourse with the complainant until he ejaculated in her. After he had finished the defendant told the complainant not to tell anyone about the incident or he would assault ("*kill*em") her. When they returned home, the complainant told her aunt what the defendant had done to her. The complainant later told her parents and the matter was reported to the police. The defendant was arrested and charged.
7. Upon his conviction a same day pre-sentence report was ordered together with sentencing submissions from counsels. I am grateful for the assistance provided. I extract the following personal details from the defendant's pre-sentence report:
 - The defendant completed year 7 in school and worked as a chef for 5 years. He is currently employed as a mechanic with China Civil Engineering Constructions Corporation (CCECC);
 - The defendant is 26 years of age, married with 3 children. He is the sole breadwinner and provider of his family;
 - The defendant is remorseful for his actions and claims that his actions towards the complainant was consensual;
8. If I may say so, it is clear from this latter claim that the defendant is quite ignorant of what constitutes the offence of Unlawful Sexual Intercourse with



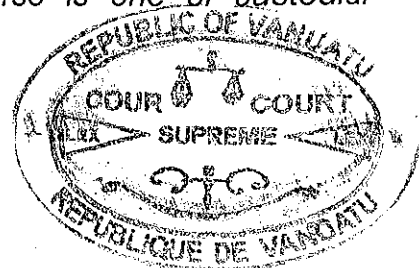
which he is charged. That offence under Section 97(2) of the Penal Code states explicitly:

"No person shall have sexual intercourse with any child under the age of 15 years but of or over the age of 13 years"

and subsection (3) provides:

"It is no defence to a charge under this section that the child consented or that the person charged believed that the child was of or over the age in question".

9. From the above provisions, the following are the important and unusual features of the offence:
 - (1) The victim of the offence is referred to as a "child";
 - (2) Consent of the victim to sexual intercourse is not a defence;
 - (3) The defendant's mistaken belief that the victim is older than she actually is, is also not a defence to the charge.
10. In other words by this offence, the law strictly prohibits sexual intercourse with a child under 15 years of age under any and all circumstances and irrespective of whether or not she was a consenting party to the intercourse (see: PP v Jude John [2016] VUSC 157).
11. Continuing with the defendant's personal details:
 - The defendant told the probation officer he is willing to perform a custom reconciliation ceremony to the complainant and her family;
 - The defendant is a first time offender and maintains good relations with his chiefs and community. He is considered a resourceful person and participates well in community activities;
 - The defendant pleaded guilty at the earliest opportunity and verbally apologised to the complainant in front of his wife and sought their forgiveness soon after they arrived home when the incident came to light. This is confirmed by the complainant; and
 - The defendant was remanded in custody for 2 months before being released on bail.
12. Defence counsel writes in his sentencing submissions that the defendant "... has good prospect of rehabilitation" but counsel accepts that "... the appropriate sentence for unlawful sexual intercourse is one of custodial sentence".

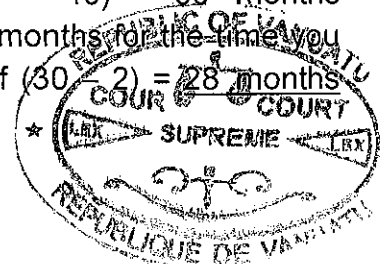


13. Prosecuting counsel for his part, highlights the following aggravating factors in the case:

- Breach of trust – the victim being a close relative of the defendant calling him "*cousin papa blong mi*";
- The age difference of 10 years between the defendant and his victim;
- Unprotected sex and ejaculation which exposed the victim to STD and the real possibility of an unwanted pregnancy;
- The element of planning in getting the victim to leave the home under the pretext of looking for pigs;
- The use of a threat in an attempt to silence the victim from reporting the incident; and
- The psychological and emotional impact on the victim who told the probation officer that she "... *has lost trust in (the defendant) as they are close relatives*" and she "... *still feels down on what has happened to her*".

and counsel submits after referring to the leading case of Public Prosecutor v Gideon [2002] VUCA 7 that a starting point in this case should be in the range of 5 to 7 years and the sentence "*should not be suspended considering the nature of the offending*". Counsel also orally highlighted the change in the maximum sentence for the offence from 5 years to 15 years by a Penal Code amendment passed by Parliament in 2016.

14. John Albie, the offence that you have been convicted of is a serious offence. It used to carry a maximum penalty of 5 years imprisonment but Parliament, in its wisdom, has recently trebled that maximum penalty to 15 years imprisonment. The courts are duty-bound to reflect that legislative will and concern in the sentences it passes for the offence of Unlawful Sexual Intercourse which is prevalent.
15. Having said that I accept that this was a solitary incident and there is no danger of a repetition as the complainant has returned to live with her parents. I accept that no weapon was used to frighten the complainant and no injuries were sustained by her as a result of the intercourse. In this case John Albie, I adopt a starting sentence of 5 years imprisonment which I reduce by 15 months for mitigating factors leaving a second stage sentence of $(60 - 15) = 45$ months imprisonment.
16. I further reduce the 45 months by one third ie. 15 months in recognition of your early guilty plea, leaving an end sentence of $(45 - 15) = 30$ months imprisonment. As required by law, I deduct a further 2 months for the time you spent remanded in custody leaving a final sentence of $(30 - 2) = 28$ months imprisonment.



17. I have considered whether or not this sentence should be wholly suspended and am satisfied in the words of Section 58 of the Penal Code, "... *that the case is so serious as to warrant imprisonment and that it is not appropriate to suspend the whole sentence*". Mindful however that the defendant has already spent 2 months on remand and that his innocent wife and children will be further denied the presence and support of their husband, father and provider and accepting that the absence of a prison on Tanna means that the defendant will be transported to a different island and will be inaccessible to his family for regular prison visits, I am satisfied that the sentence of 28 months imprisonment should be suspended in part.
18. Accordingly, the defendant is required to immediately serve half his sentence namely 14 months imprisonment and the remaining 14 months is suspended for a period of 12 months.
19. What this sentence means, John Albie, is that you will be returned to prison to serve a sentence of 14 months imprisonment and upon your release from prison, your remaining sentence of 14 months imprisonment is suspended for 12 months and need not be served in prison if you stay out of trouble for 12 months after your release.
20. However, you are warned that if you should re-offend and be convicted in the 12 months after your release from prison, then you will be sent back to prison to serve the suspended term of 14 months imprisonment. Whether that happens or not is entirely in your hands, but, if you re-offend, you cannot expect any further leniency from this court.
21. You have 14 days to appeal this sentence to the Court of Appeal if you do not agree with it.

DATED at Isangel, Tanna, this 24th day of August, 2018.

BY THE COURT

