

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

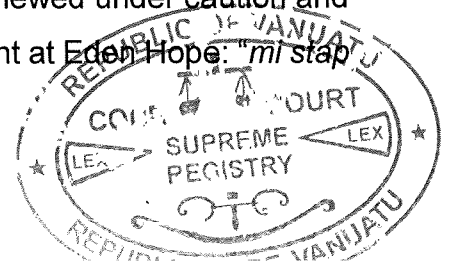
Criminal
Case No. 18/3269 SC/CRML

PUBLIC PROSECUTOR
v
DAVID TAHIN

Before: Justice Fatiaki
Appearance: K. Massing for the State
J. Garae for the Defendant
Date of Plea: 14 May 2019
Date of Sentence: 20 May 2019

SENTENCE

1. On 13 May 2019 the defendant pleaded not guilty ("*ino tru*") to an offence of Sexual Intercourse Without Consent (Count 1) and guilty ("*itru*") to an offence of Act of Indecency (Count 2) after the arraignment prosecuting counsel entered a "*nolle prosequi*" in respect of Count 1 and the defendant was immediately discharged.
2. The admitted facts tell of how the defendant had entered the house where the complainant (a foreign visitor) was sleeping in at Tasmate Village, West Coast Santo at the Eden Hope project in the night and had indecently touched her vagina and asked her for sex which she refused. Although the defendant continued to ask for sex the complainant consistently refused and eventually the defendant left. Several days later when news of the incident came to light, the Village Chiefs Council convened and the defendant was tried, convicted and traditionally fined VT10,000 for trespass and VT15,000 for his indecent behaviour towards the complainant.
3. A police report was made and the defendant was interviewed under caution and voluntarily confessed that what he did to the complainant at Eden Hope: "*mi stap*"



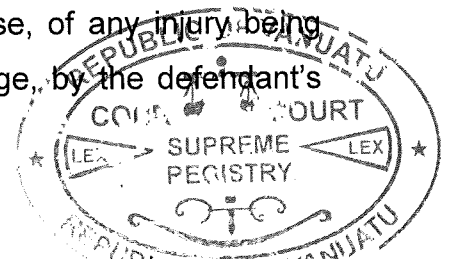
playplay nogud lo misis ia". The defendant was convicted on his guilty plea after he admitted the facts. A pre-sentence report was requested and provided.

4. I gratefully extract the following personal details and mitigating factors from the defendant's pre-sentence report:

- The defendant is 38 years of age from Tasmate Village, West Coast, Santo. He is married and has 2 children whom he supports with his extended family including his elderly widowed mother;
- He reached year 5 in primary school and has skills in gardening and building local houses. He also cultivates and sells kava, copra, and cocoa to earn an income to sustain his family's needs;
- The defendant is an elder of his local Presbyterian Church and maintains good relations with his family and community;
- The defendant suffers from Gastroesophageal Reflux Disease ("GRD") and also has untreated "*Hepatitis B Positive*";
- The defendant is a first time offender and admitted his "*mistake*" and "*regretted his actions*" to the probation officer. He said he was very sorry for his actions towards the victim during the preparation of the pre-sentence report (and) promised never to re-offend;
- The defendant was traditionally convicted and fined by his local Council of Chiefs and has paid a total fine of VT25,000 for trespass and his act of indecency;
- The defendant was remanded in custody from 19 September 2018 until 27 November 2018 (**over 2 months**) before being released on bail;

5. The offence is aggravated by the uninvited unlawful nocturnal intrusion of the defendant into the bedroom of the complainant a Danish national and visitor to the defendant's village who was entitled to expect that she would not be indecently assaulted and propositioned by a host villager.

6. The maximum penalty for an offence against Section 98(a) of the Penal Code is imprisonment for 7 years. It is less serious than an offence under Section 98A involving a child under 15 years of age which carries a maximum penalty of 10 years imprisonment. There is no suggestion in this case, of any injury being caused to the victim a grown woman of 23 years of age, by the defendant's



indecent touching or of the defendant forcing his intentions when the victim rejected his advances.

7. Prosecuting counsel submits that an end sentence of between 18 months and 2 years is appropriate in this case and if suspended, then a Community Work sentence and Supervision should also be imposed. Defence counsel submits the case warrants a starting point of 18 months imprisonment which should be reduced by a third and further reduced for mitigating factors giving an “*end sentence of 4 to 6 months*” (which is less than or equal to 33 ½ % of the start sentence) suspended for 2 years. I disagree with defence counsel.

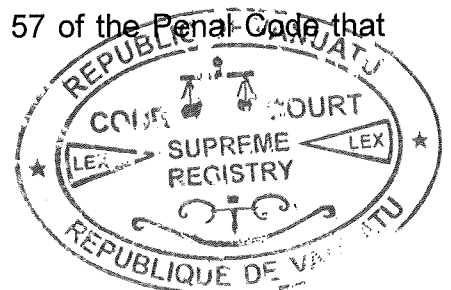
8. In Gigina v Public Prosecutor [2017] VUCA 15 the Court of Appeal said:

“... such large deductions (of well over 50% and sometimes up to 70 – 80% of the start sentence) undermine the sentencing process (and) make the starting sentence virtually meaningless (and) they mean that the dominant feature of any sentencing, the facts of the crime lose their importance.

Overall it will be rare for mitigating deductions including guilty pleas to total 50% and even rarer for them to exceed 50%”.

9. Notwithstanding counsel’s submissions, I adopt a starting sentence of 3 years imprisonment which is reduced by 12 months for mitigating factors including the traditional fine imposed and paid by the defendant a rural subsistence farmer, giving a mid-sentence of: (36 – 12) = 24 months imprisonment which is further discounted by a third to reflect the defendant’s early guilty plea leaving an end sentence of: (24 – 8) = 16 months imprisonment.

10. I turn next to consider whether or not to suspend the defendant’s sentence and, after careful consideration of the circumstances of the case, and noting the “*one-off*”, opportunistic nature of the defendant’s crime and the absence of any injuries or any attempt by the defendant to force the victim, and also considering the defendant having already been tried and paid a traditional fine of VT25,000 and his genuine remorse and ready admission to the police without any hesitation of his wrong doing and the 2 months remanded in custody and this being his first ever offence, I am satisfied in the words of Section 57 of the Penal Code that




“... it is not appropriate to make (the defendant) suffer an immediate imprisonment”.

11. Accordingly, the defendant's sentence of 16 months imprisonment is suspended for 2 years and the defendant is warned that although he will not go to prison today, if he is convicted of another offence in the next 2 years he will be sent to prison to serve this sentence of 16 months imprisonment before any other sentence that may be imposed for his re-offending. Whether that happens or not is entirely in the defendant's hands but if he breaks his “*promise never to re-offend*” and does commit another offence then he can expect no further leniency from the Court.
12. In addition and to assist in the defendant's rehabilitation, I impose a sentence of 12 months Supervision with a special condition that the defendant attend and complete any program on sex offending that is directed by his probation officer. The defendant is also required to perform 50 hours of Community Work under the direction and supervision of the probation officer. The defendant is warned that breach of his Supervision and Community Work sentences is an offence punishable by imprisonment or a fine and is itself a sufficient basis or reason to activate his suspended sentence of 16 months imprisonment.
13. The defendant is advised that he has 14 days to appeal the sentence if he does not agree with it.

DATED at Luganville, Santo, this 17th day of May, 2019.

BY THE COURT


D. V. FATIAKI
Judge.

