

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

Criminal
Case No. 20/2486 SC/CRML

BETWEEN: Public Prosecutor

AND: Kenneth Atuary
Defendant

Date: 28 October 2020
By: Justice G.A. Andrée Wiltens
Counsel: Ms B. Ngwele for Public Prosecutor
Mr L. Moli for the Defendant

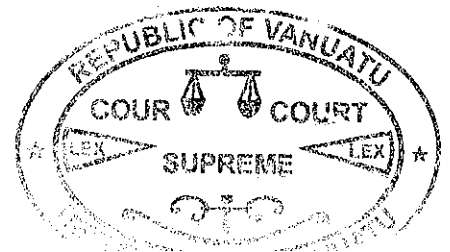
SENTENCE

A. Introduction

1. Mr Atuary pleaded guilty to a charge of sexual intercourse without consent and a second charge of intentional assault causing temporary injury.

B. Facts

2. Mr Atuary was with a group of others enjoying some drinks at Ifira Point on the evening of 26 June 2020. They then planned to attend a nightclub in town, but later decided instead to go to Erakor and avail themselves of some wine Mr Atuary had at his home. They all alighted the bus they were traveling on at the Erakor Half Road. Mr Atuary asked for someone to go with him to his house to fetch the wine he had there, but there was general reluctance.
3. Eventually Sylvie Harry was persuaded to go with Mr Atuary, despite her reluctance. She walked behind him, having been told it was not far. Mr Atuary continued to tell Sylvie it wasn't far, and they ended up at a beach, where Mr Atuary demanded sex.



4. Sylvie refused him. He grabbed her hand to force her but she pushed him away. However, Mr Atuary grabbed hold of the hood of the garment Sylvie was wearing and pulled hard, causing Sylvie to fall. He then assaulted her with punches to her right ear, then her left ear twice and finally to her chest. Sylvie was already sore having played rugby earlier in the day and the assaults took away her ability to resist. She had no energy to run away and just sat on the beach.
5. Mr Atuary lifted her up and carried her to a table, removed her clothes and commenced to lick her vagina for quite some time and he also touched her breasts. Mr Atuary then made Sylvie bend over and he had penetrative sexual intercourse with her. After a while Mr Atuary made Sylvie lie down on her back on some grass and he again had full sexual intercourse and ejaculated into her vagina. Afterwards, while Sylvie was struggling to put her clothes back on, Mr Atuary stood there watching her struggles and laughed at her.
6. Mr Atuary then finished the bottle of wine he had been carrying and led Sylvie back to the main road. On the way he again demanded sex. When Sylvie refused, he punched her in the face. Sylvie was looking for ways to escape, but Mr Atuary threatened to kill her if she tried to leave. They arrived at a nakamal, where Mr Atuary closed his eyes to go to sleep. Sylvie then took her chance and caught a bus to the Korman area. She told her parents what had occurred and the same day reported the matter to the police.
7. When Mr Atuary was cautioned by the police he admitted all the allegations. He stated he had been extremely drunk at the time.

C. Sentence Start Point

8. The sentence start point is assessed by having regard to the maximum sentence for the offending and factoring in the aggravating and mitigating aspects of the offending.
9. The maximum sentence for the offence of sexual intercourse without consent is life imprisonment; the maximum penalty for intentional assault causing temporary injury is 5 years imprisonment.
10. There is no mitigating aspect to the offending. However, there are aggravating factors, including:
 - The use of violence to enable the sexual intercourse without consent;
 - The age differential between them – Mr Atuary is 36 years old; Sylvie is only 18 years old and accordingly the power imbalance between them meant her ability to resist was reduced;
 - The additional indignities involved – the touching of Sylvie's breasts, the extended licking of her vagina, and the ridiculing of Sylvie while she was trying to dress herself;
 - The unprotected nature of the sexual intercourse which exposed Sylvie to unwanted pregnancy and sexually transmitted diseases;
 - Threat to kill to prevent Sylvie from leaving him;

- The repeat nature of the offending – violence to enable sexual intercourse, sexual intercourse on/at the table, followed by sexual intercourse on the grass, followed by gratuitous violence when further demands for sex were rebuffed, and finally the threats to not leave; and
- The element of planning/premeditation in leading Sylvie away from the others in the group to a secluded place where there was no possibility of interruption or assistance for her.

11. The start point adopted for this offending, on a totality and concurrent basis, is 9 years imprisonment.

D. Personal Factors

12. Mr Atuary pleaded guilty at the first opportunity. That has spared Sylvie the need to give evidence, and saved Court costs and time. It is also an acknowledgement of wrong-doing and a possible indication of remorse. I do not consider the prosecution case to be terribly strong, and therefore the pleas have additional mitigatory value. The mitigation available for this factor is a 33% reduction from the sentence start point.

13. Mr Atuary is 36 years old with two young children and a pregnant de facto partner to support. He was previously employed with CCECC.

14. For these personal factors I further reduce the sentence start point by 4 months.

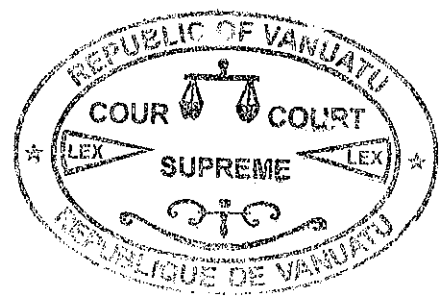
15. However, there is an aggravating personal factor that must also be considered, namely his previous and current convictions.

- In 2004 Mr Atuary was convicted of 10 separate offences all involving dishonesty. On 9 of those charges he was convicted and released on a good behaviour bond for 2 years. On the 10th charge he was convicted and ordered to serve a 2 month imprisonment sentence;

- In 2005 he was convicted of a further 3 offences of a similar type. He was sentenced to 4 weeks imprisonment and a further good behaviour bond for 6 months;

- Later in 2005 he was convicted of a further 5 offences, involving damage to property and trespass as well as dishonesty. He was sentenced to 3 months imprisonment;

- In 2006 he was convicted of 4 more dishonesty charges and sentenced to 10 weeks imprisonment;



- In 2007 he was convicted of 4 further charges involving dishonesty and sentenced to 8 months imprisonment;

- In 2009 he was convicted of abduction, intentional assault, threat to kill and sexual intercourse without consent. He was sentenced to 9 years imprisonment;

- In 2010 he was convicted of unlawful entry and sentenced to 1 month imprisonment; and

- Currently, Mr Atuary is serving a 9-month prison term for possession of dangerous drugs.

16. For this series of previous convictions there has to be an uplift of sentence, not to again deal with the culpability by way of punishment, but to reflect the fact that despite all the opportunities provided, Mr Atuary has not availed himself of the opportunity to rehabilitate and has demonstrated that he is a danger to the community. He well knows the consequences of re-offending but continues to deliberately act contrary to the law. The uplift appropriate in this instance is 8 months imprisonment.

E. Sentence

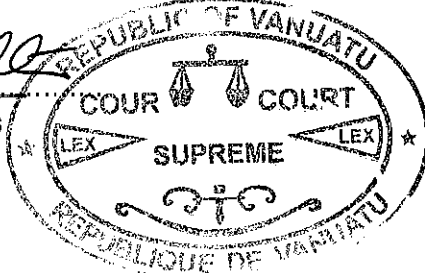
17. The end sentence I impose is 5 years 8 months imprisonment for the offence of sexual intercourse without consent. The sentence is to commence from the conclusion of his present sentence, as this offending is of a different nature and took place at a different time. For the offence of intentional assault, the sentence imposed is 10 months imprisonment concurrently.

18. I am not prepared to suspend any part of the sentence. The nature and seriousness of the offending precludes such leniency, especially when taking into account the numerous previous convictions accumulated by Mr Atuary. He is a danger to the community, and the sentencing principle of rehabilitation must play a very reduced role in this case. The safety of the community is the paramount sentencing consideration.

19. Mr Atuary has 14 days to appeal this sentence if dissatisfied with it.

**Dated at Port Vila this 28th day of October 2020
BY THE COURT**

Justice G.A. Andrée Wiltens
Justice G.A. Andrée Wiltens

The seal of the Supreme Court of Vanuatu is circular. It features a central scale of justice. The text "REPUBLIC OF VANUATU" is written along the top inner edge, and "REPUBLIQUE DE VANUATU" along the bottom inner edge. In the center, the words "COUR" and "COURT" are on either side of the scale, with "LEX" and "SUPREME" below. There are small stars on the left and right sides of the seal.