

PUBLIC PROSECUTOR

v

Mirtho WARSAL

Coram: *Hon. Chief Justice V. Lunabek*

Counsel: *M Tasso for the State*
A Sarisets for the Defendant

Date of Plea: *3 April 2023*

Date of Sentence: *12 May 2023*

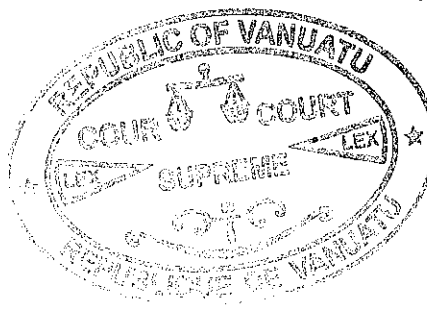
SENTENCE

A. Introduction

1. Warsal Mirtho, you appear today for sentence. You are charged with one count of sexual intercourse without consent. You initially pleaded not guilty to that offence. A trial was scheduled for 2 days to begin on 3rd April 2023.
2. On 3rd April 2023, before the trial started, your counsel informed the Court that you intended to re-plea on the count. You then re-pleaded and you pleaded guilty on that count.

B. Facts

3. You were 23 years old at the time of offending. You are from Santo island. You were a new recruit at the Police College at the time of the offending. The complainant is 17 years old.



4. On 23rd October 2022 the complainant joined a church group and attended a church service at the Police College. You were one of the new recruits of the police and you were at that time trained there. It was in the morning, the complainant entered the compound of the college and joined the service. After few minutes she went to the female bathroom, while she was in the bathroom you entered the same bathroom. You asked her name, she responded, you then asked to confirm her brother's name who happened to be also one of the new recruits at the Police College and she answered you, yes. You asked her: "*be bae yu solvem need blong me?*" she said no as they were in the church.
5. After saying these words, you tried to remove the trousers she wore under a dress. She put back her trousers on and pushed you out. You insisted "*please smol time nomo*". You took her by her right wrist and pulled her by force into the toilet and said "*please smol time nomo*". From there you undressed her, bent her over and penetrated her vagina with your penis from her backside. From the time you undressed the complainant to the point where you penetrated her vagina the complainant did not say anything nor did she called out for help as there were church group going on outside the toilet. Once you finished with the complainant, you removed yourself from her and said to her "*thank you blong solvem need blong mi*". She did not respond as she was afraid of you.
6. You then walked out of the toilet while she remained inside for a couple of minutes then she came out and went joining the congregation outside. She stayed for a while and felt pain on her vagina and decided to leave early to go home. At home she checked her vagina as she felt a liquid running out of her, she noted that it was a white liquid then she cleaned herself. After the incident the complainant felt disgusted, lonely ashamed, worry and she is scared of the police officers in uniform.
7. She mentioned to her brother Greg and later on to her mother of what happened to her. She reported the incident to the police.
8. You were cautioned on 4th November 2022 by the police and you agreed that you had sexual intercourse with the complainant but you said the sexual intercourse was consensual.

C. Sentence Start Point

9. To assess the sentence start point, I will consider the maximum sentence (penalty) set by the law. I will assess and factor the aggravating and mitigating factors relating to the offending.
10. Sexual intercourse is defined under Section 89A of the Penal Code (the "Act"). It provides:

"For the purposes of this part sexual intercourse means any of the following activities, between any male upon a female, any male upon a male, any female upon a female or any female upon a male:



- (a) *The penetration, to any extent, of the vagina or anus of a person by any part of the body of another person, except if that penetration is carried out for a proper medical purpose or is otherwise authorized by law; or*
- (b) *The penetration, to any extent, of the vagina or anus of a person by an object, being penetration carried out by another person, except if that penetration is carried out for a proper medical purpose or is otherwise authorized by law; or*
- (c) *The introduction of any part of the penis of a person into the mouth of another person; or*
- (d) *The licking, sucking or kissing, to any extent, of the vulva, vagina, penis or anus of a person; or*
- (e) *The continuation of sexual intercourse as defined in paragraphs (a), (b), (c) or (d); or*
- (f) *The causing, or permitting, of a person to perform any of the activities defined in paragraph (a), (b), (c) or (d) upon the body of another person."*

11. Sexual intercourse without consent is defined under Section 90 of the Act. It provides:

"Any person who has sexual intercourse with another person:

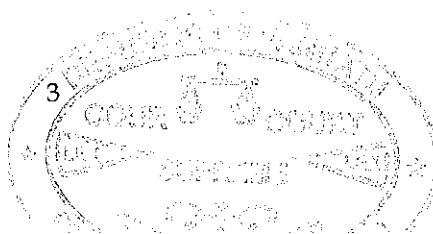
- (a) *Without that person's consent; or*
- (b) *With that person's consent if the consent is obtained:*
 - (i) *By force; or*
 - (ii) *By means of threats of intimidation of any kind; or*
 - (iii) *By fear of bodily harm; or*
 - (iv) *By means of false representations as to the nature of the act; or*
 - (v) *In the case of married person, by impersonating that person's husband or wife; or*
 - (vi) *By the effects of alcohol or drugs; or*
 - (vii) *Because of the physical or mental incapacity of that person.*

Commits the offence of sexual intercourse without consent."

12. Section 91 prohibits sexual intercourse without consent. It provides for a maximum penalty for life imprisonment for the offence of sexual intercourse without consent.

13. In this case, there is no personal factor of the offending but the following aggravating factors exist:

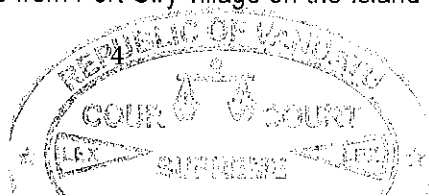
- The sexual intercourse was unprotected. The offender exposed the victim girl to teenage pregnancy and sexual transmitted diseases.



- The offending occurred at the Police College where the civilian should be able to feel safe as it is a place where law enforcement officers are trained.
 - You were recruited and trained at that college as a law enforcement officer.
 - The effect of this offending upon the victim whether physical or mental (After the offending, the victim felt disgusted, lonely, worry and she is afraid the police officers in uniform).
 - There was force used beyond the commission of the offence of sexual intercourse without consent as the victim girl was grabbed by her wrist and pulled into the ladies toilet.
 - There is a differential age between you (23 years old) and the victim (17 years old) at the time of the offending.
14. The Prosecution referred to the guideline judgments of Public Prosecutor v Scott [2002] VUCA 2, Public Prosecutor v Gideon [2002] VUCA 7 and Public Prosecutor v Harry Rite [2016] VUCA, Criminal Appeal Case No. 1735 of 2016.
15. The prosecution referred to the case of Public Prosecution v Harry Rite [2016] as a comparable case. There, the offender was 21 years old at the time of offending while the victim was 16 years old. The offence occurred at Santo. The offender was a taxi driver. He drove past and saw the complainant who was on her way to school. He stopped and offered her a ride. She accepted and got into the taxi. Instead of taking her to her school he took her to Suranda area. He demanded her for sexual intercourse with her. She refused. He insisted to the point where the victim gave in as the place was too remote for her to call out for help. After the intercourse, he took the victim back into his taxi and dropped her off at her school. The incident came to light when the victim disclosed it to her friend at the school nurse. The offender was charged and he pleaded guilty to one count of sexual intercourse without consent. The court imposed a sentence start point of 9 years imprisonment inclusive of the aggravating factors. It is noted that the facts of Rite's case and the present case may be different but the age of the parties involved were very similar. In Rite's case, the complainant was 16 years old and the offender was 21 years old. In the present case, the victim is 17 years old and the offender 23 years old. Those two (2) cases involve young offenders and victims.
16. I adopt a sentence start point of 8 years imprisonment instead of 9 years imprisonment which reflected the abduction of the victim and other aggravating circumstances in the case.

D. Mitigating Factors

17. The pre-sentence report shows that you were 23 years old when you committed this offence. You are now 25 years of age. You come from Port Olry village on the Island of Santo. You are currently



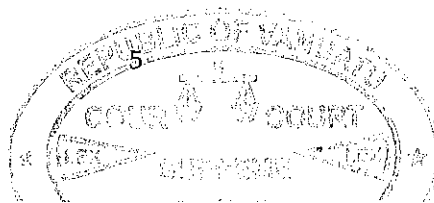
residing at Anamburu area, Port Vila. You reached year 13 at College de Luganville, Santo but you did not complete it. You live in a defacto relationship with your partner. You have a son of 2 years old with your partner. She is undertaking studies at the National University of Vanuatu with a fully scholarship funded student.

18. You are a first time offender. You do not have previous conviction. You have a clean record. I give you an allowance of 6 months to reflect your clean record.
19. You said that you are sorry for your offending towards the victim and you deeply regretted your actions. I take it that you have insight and you are remorseful for your wrong doing. I allow you a further 6 months for that.
20. I consider you were a young man at the time of your offending. You did not have maturity and you were lacking sound decision. I allow a further reduction of 2 months to reflect the fact that you were a young person when you committed this offence.
21. You did not plead guilty at the first opportunity given to you. I note the amendment referred to by your counsel was about a typing error over the year of offending (not 2023 but 2022). The amendment is not about the nature of the offence to justify a full one third reduction of your sentence start point. I allow 5% for your guilty plea at the date of the trial (3rd April 2023).

E. End Sentence

22. Your end sentence is 6 years imprisonment.
23. The report indicates you are not remanded into custody and you are on bail awaiting your sentence.
24. Six (6) years imprisonment is your end sentence. This is a serious case. The circumstances do not justify a suspension of this imprisonment sentence.
25. The community needs to be protected. Young people and vulnerable members of the community need to be protected. This imprisonment sentence has a deterrent effect on you and others who may be tempted to commit similar offence in the future.
26. The Court of Appeal in its judgment in Public Prosecutor v Gideon [2002] VUCA 7 emphasised that:

"There is an overwhelming need for the Court on behalf of the community to condemn in the strongest terms any who abuses young people in the community... it is totally wrong for adults to take advantage of their immaturity. It will be in the



most extreme of cases that suspension could ever be contemplated in case of sexual abuse... 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".

27. You shall start to serve your imprisonment sentence of 6 years after 14 days that is on Friday 26th May 2023. But you can elect (choose) to serve your imprisonment term of 6 years earlier than on Friday 26th May 2023. Section 50 of Penal Code applies to your situation. Section 50 says:

"Commencement of sentence

50. If the offender has not been held in custody pending trial and no warrant of arrest or remand is issued against him or her at the time of conviction in the circumstances authorized by the rules of criminal procedure, no sentence of imprisonment may be enforced until the time of appeal against such sentence has expired or the offender earlier elects to begin serving his or her sentence."

28. If you fail to start serve your imprisonment sentence of 6 years on Friday 26th May 2023, the Correctional Services Centre in Port Vila shall apply for a warrant of arrest against you and once arrested, you will be brought and kept in custody to start serving your imprisonment term of 6 years.
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29. You have 14 days to appeal against his sentence if you are unsatisfied with it. This 14 years starts today at the date of this sentence.

DATED at Port Vila, this 12th day of May 2023

BY THE COURT

Hon. Chief Justice V. Lunabek

