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**PUBLIC PROSECUTOR**

-v-

**JOHNATHAN MALIKUM**

**Coram:** Chief Justice Vincent Lunabek

**Counsel:** Mr Tristan Karae for the prosecution  
Mr Andrew Bal for the defence

**SENTENCE**

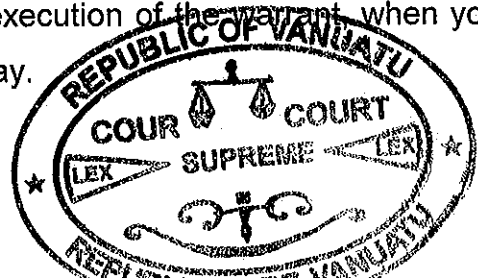
Johnathan Malikum, you appear for sentence today. The Court is informed that initially the prosecution charged you with one count of sexual intercourse without consent, contrary to section 91 of the Penal Code Act and one count of aggravated sexual intercourse with a child. Both offences carry each a maximum penalty of life imprisonment.

Under such circumstances, you do not have an automatic right of bail to remain in your village. You should be arrested and remanded in custody.

The Magistrate's Court should issue a warrant to remand you in custody pending pleas and determination or unless an application for bail was made by you or your lawyer to the Supreme Court for your release on bail. In your case none of these post-trial requirements were met.

A warrant was issued for the police to arrest you and bring you before the Supreme Court for pleas at Isangel, Tanna on Monday 23 August 2010 at 8.30am o'clock.

The Court is informed that at the time of the execution of the warrant, when you saw the police truck in your village, you ran away.



*[Handwritten signature]*

You were then arrested and brought before the Supreme Court on Tuesday 24 August 2010 for pleas. Before you entered pleas, your lawyer informed the Court that you ran away because it is the first time you will be arrested and brought before the Court and so you were afraid and you ran away.

The prosecution has amended the nature of the charges against you. You are then charged with one count of unlawful sexual intercourse, contrary to section 97(1) of the Penal Code Act and one count of sexual intercourse without consent, contrary to section 91 of the Penal Code Act.

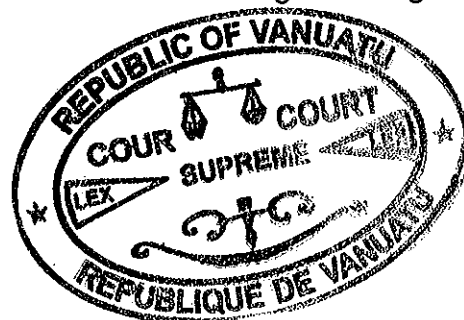
On 25 August 2010, you entered guilty pleas in relation to the offence of unlawful sexual intercourse in count 1 and sexual intercourse without consent in count 2 of the Information dated 14 August 2010. You were also convicted of these 2 offences accordingly.

You are now 16 years of age and you originate from Lenpakel Village, Lenakel, Tanna. You never attended school and you are not interested in schooling. You now live with your grandfather (Chief Peter).

On 3 November 2009, you committed an unlawful sexual intercourse and you sexually abused a child of 3 years of age by inserting a wood in her vagina.

Mrs Malie lasua is the mother of the child girl of 3 years of age. She was the complainant in this case who made the complaint against you to the police after your offending.

The facts of your offending are accepted by your lawyer on your behalf. They are this. On or about the 3<sup>rd</sup> November 2009, the mother of the victim Malie lasua, saw that her daughter (victim) was playing outside the house without panties. The mother then approached the child and asked her where her panties were, as she remembered that the little girl had wore them in the morning before going off to play.



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The victim who was 3 years of age at that time told her mother that she went to her one of her grandfather's house, Chief Pita. She further stated that you, Johnathan, called her to your house where you then took of the child's panties and used spat on her vagina and used a piece of wood to insert it into her vagina.

The mother of the victim child then reported this to the police. The police officer then took you in for questioning on the 4<sup>th</sup> February 2010. You were then cautioned and questioned. You made a statement and you admitted the allegations made by the victim child girl that you spat on her vagina and used a piece of wood to insert it into her vagina. You said that you did that to the child girl while you and her were outside of the house and that you only did it once to the little girl.

According to the medical examination on the child's vagina, the nurse reported that there were no bruises or injuries inflicted on the victim's vagina and that there was clear sign of the vagina being manipulated as it is clean and there was no mucus as if she has had a bath which was not the case.

When you committed the offences, you have broken laws of Vanuatu.

The first law you have broken is section 97(1) which prohibits unlawful sexual intercourse. It says:

*"97(1) No person shall have sexual intercourse with any child under the age of 13 years.*

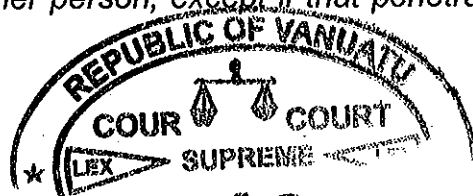
*Penalty: Imprisonment for 14 years."*

The second law you have broken are sections 89A, 90 and 91 of the Penal Code Act. Sections 89A and 90 of the Penal Code Act define sexual intercourse without consent in this way:

**"89A. SEXUAL INTERCOURSE**

*For the purpose of this Act, 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 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 paragraph (a), (b), (c) or (d); or
  - (f) the causing, or permitting or a person to perform any of the activities defined in paragraph (a), (b), (c) or (d) upon the body of the person who caused or permitted the activity."

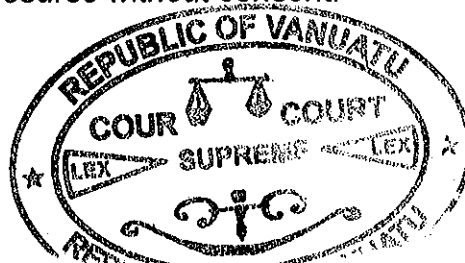
**"90. SEXUAL INTERCOURSE WITHOUT CONSENT**

Any person who has sexual intercourse with another person:

- (a) without the at 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 alcohol or drugs; or
  - (vii) because of the physical or mental incapacity of that person;
 commits the offence of sexual intercourse without consent."

Section 91 of the Penal Code Act punishes sexual intercourse without consent in this way:

"91. No person shall commit sexual intercourse without consent.  
Penalty: Imprisonment for life."



The prosecution referred to some court cases providing guidance in relation to sexual abuse offences. They are summarized below.

In **Public Prosecutor v. Gideon** [2002] VUCA 7 the Court held:

*"There is an overwhelming need for the Court on behalf of the community to condemn in the strongest terms any who abuse young people in our community. Children must be protected... If a twelve year old is acting foolishly then she needs protection from adults. It is totally wrong for adults to take advantage of their immaturity.*

...

*It will only be in the most extreme of cases that suspension could ever be contemplated in cases of sexual abuse...*

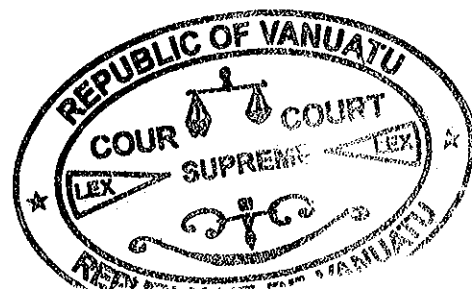
*Men must learn that they cannot obtain sexual gratification at the expense of the weak and the vulnerable. What occurred is a tragedy for all involved. Men who take advantage sexually of young people forfeit their right to remain in the community."* The guideline judgment is applied by the Courts since.

Johnathan, you must understand why imprisonment for sexual abuses is necessary.

*"A custodial sentence is necessary for a variety of reasons. The first is to mark the gravity of the offences, secondly to emphasize public disapproval. Thirdly, to serve as a warning to others. Fourthly, to punish the offender and finally to protect the children and in this case the child girl."* (**Public Prosecutor v. George Dick** [2004] Criminal Case No.01 of 2004).

In this case, your offending in November 2009, was aggravated by the following factors:

- The girl you had sexually abused was a child of 3 years of age at the time of your offending.
- You used a piece of wood to penetrate her vagina.
- You were 15 years old and she was 3 years of age at the time of offending.
- You are the cousin of the child girl.



The offending and the circumstance of offending require custodial sentence over 6 years imprisonment.

However, I am mindful that you offended on 3 November 2009, when you were 15 years of age.

In mitigation, your lawyer informed the Court that you pleaded guilty at the first opportunity given to you. You have no previous conviction records. You are a first time offender. You admitted your offending to the police during your interview. You apologize because you realize that what you did to your small cousin sister on 3 November 2009, was wrong and you tell your lawyer to inform the Court that you will not commit the same offence or any other offences. You felt ashamed of your action and you moved out and you now live with your grand father. You assisted your grand father to do his gardening to sustain his and your daily needs.

Your lawyer refers to Article 37(b) of the Convention on the Rights of the Child (C.R.C.) which was ratified by Vanuatu as part of the laws of Vanuatu. Your lawyer told the Court that in your sentencing, the Court must have regard to Article 37(b) which says:

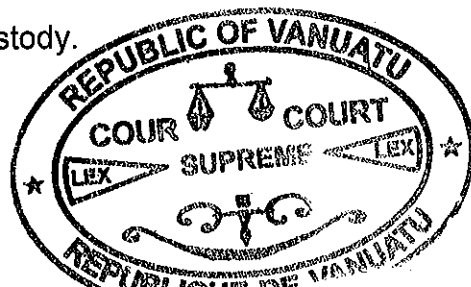
***“No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of the last resort and for the shortest appropriate period of time.”***

The Court remanded the prosecuting lawyer and your lawyer about section 54 of the Penal Code Act [CAP.135] which says:

***“54(1) A person under 16 years of age is not to be sentence to imprisonment unless no other method of punishment is appropriate.***

***(2) If a person under the age of 16 years of age is sentenced to imprisonment, the Court must give its reasons for doing so.”***

In the light of the provisions of Articles 37(b) of the CRC which was legislated domestically by Vanuatu Parliament under section 54 of the Penal Code Act [CAP.135], I am not going to send you to custody.



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In such circumstances, I sentence you as follows:

- 12 months probation and 50 hours community work for unlawful sexual intercourse, contrary to section 97(1) of the Penal Code Act.
- 24 months probation and 100 hours community work for sexual intercourse without consent, contrary to section 91 of the Penal Code Act.

You shall serve your probation and community sentencing order concurrently. This means you shall serve a total of 24 months supervision and 100 hours community work.

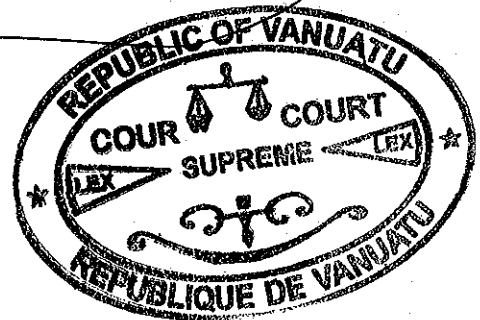
Johnathan, you are warned that the next time you commit the same offences again, you will go to prison.

You have 14 days to appeal this sentence if you are dissatisfied with it.

**DATED at Isangel, Tanna this 26<sup>th</sup> day of August 2010**

**BY THE COURT**

**Vincent LUNABEK**  
Chief Justice



OF

**IN THE SUPREME COURT OF  
THE REPUBLIC OF VANUATU**

**ORDER FOR SENTENCE OF COMMUNITY WORK**  
(Section 58N and 58G Penal Code Amendment Act 2006)

**Name: JOHNATHAN MALIKUM**

**DOB: 15 years.**

**Residential location: LENPAKEL VILLAGE, LENAHEL, TANNA**

At a sitting of the Supreme Court at Isangel, Tanna this 26<sup>th</sup> day of August 2010 YOU WERE SENTENCED TO:

- 12 MONTHS PROBATION AND 50 HOURS COMMUNITY WORK (in relation to count 1);
- 24 MONTHS PROBATION AND 100 HOURS COMMUNITY WORK (in relation to count 2);
- All sentences of Community Work to be served concurrently. This means you shall serve 100 hours community work

<b><u>Case number:</u></b>  CR Case 03 of 2010	<b><u>Offence:</u></b> <ul style="list-style-type: none"><li>- 1 count of unlawful sexual intercourse, contrary to section 97(1) of the Penal Code Act;</li><li>- 1 count of sexual intercourse without consent, contrary to section 91 of the Penal Code Act;</li></ul>
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The Penal Code Amendment Act 2006 requires you to:

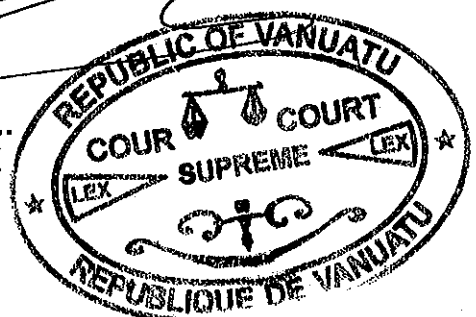
1. You must report to a Probation Officer as soon as practicable and not later than 72 hours, after sentence is passed.
2. You must report to a Probation Officer as directed at any other time during the sentence for the purpose of monitoring the sentence.
3. You must report to a Probation Officer, within 72 hours, if you move to a new residential location.
4. You must work as directed by the Probation Officer until the total number of community work hours is finished.

Other rules of the Community Work sentence will be explained to you when you meet your Probation Officer.

**DATED at Isangel, Tanna this 26<sup>th</sup> day of August 2010**

**BY THE COURT**

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Vincent LUNABEK  
Chief Justice





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**IN THE SUPREME COURT OF  
THE REPUBLIC OF VANUATU**

**ORDER FOR SENTENCE OF SUPERVISION**  
(Section 58F & G Penal Code (Amendments) Acts 2006 & 2007)

Name: JOHNATHAN MALIKUM

DOB: 15 years

Residential location: Lenpakel village, Lenakel, Tanna.

At a sitting of the Supreme Court at Isangel, Tanna, this 26<sup>th</sup> day of August 2010, you were sentenced to 12 months and 24 months supervision and you shall serve them concurrently. This means you shall serve a total of 24 months supervision on following convictions for:

<u>Criminal Case number:</u>	<u>Offence(s):</u>
CR Case 03 of 2010	<ul style="list-style-type: none"> <li>- 1 count of unlawful sexual intercourse, contrary to section 97(1) of the Penal Code Act;</li> <li>- 1 count of sexual intercourse without consent, contrary to section 91 of the Penal Code Act;</li> </ul>

In addition to the standard conditions of Supervision (to be given to the offender) the Court has imposed the following Special Conditions:

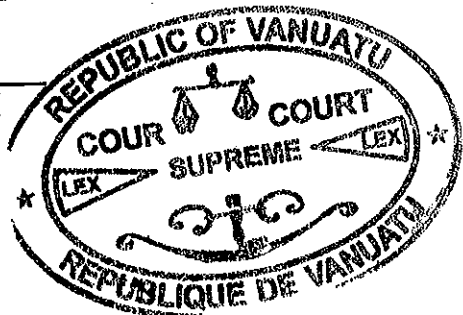
Special Condition:

- No special conditions imposed by the Court

DATED at Isangel, Tanna this 26<sup>th</sup> day of August 2010

BY THE COURT

Vincent LUNABEK  
Chief Justice



## Standard Conditions Of Supervision

1. You must report in person to a probation officer as soon as practicable and not less than 72 hours after the sentence is imposed.
2. You must report to a probation officer as and when required to do so by a probation officer and must notify the probation officer of your residential location.
3. You must not move to a new residential location without the prior written consent of a probation officer.
4. You must take part in a rehabilitative and re-integrative needs assessment and/or programme if and when directed to do so by a probation officer.

**Other rules of the sentence of Supervision will be explained to you when you meet your Probation Officer.**

