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

Criminal Case No. 09 of 2012

PUBLIC PROSECUTOR
V.
IAN JOHN

Coram: ***D. V. FATIAKI***

Counsels: *Mr. S. Blessing for the State*
Ms. C. Thyna for the Defendant

Date of Decision: *4 October 2012*

SENTENCE

1. On **3 April 2012** the defendant was arraigned on an information charging him with an offence of Sexual Intercourse Without Consent. He pleaded "*not guilty*" and the case was adjourned until 12 April 2012 when a trial fixture was set for 3rd to 5th September 2012. On **2 May 2012**, the defendant was granted bail on condition that he appear for his trial on 3 September 2012 at 9.00 a.m.

2. On **3 September 2012**, the defendant and his counsel both failed to appear and a bench warrant was issued for the defendant's arrest. The next day **4 September 2012** the defendant appeared with his counsel and indicated that he wished to change his plea. The defendant was then re-arraigned and changed his plea to guilty ("*I tru*"). He also admitted a summary of facts that had been prepared by the prosecutor.

3. The defendant was convicted and remanded in custody to await sentence. A pre-sentence report and sentencing submissions were ordered and were received from both counsela.

4. The facts of the case are taken from those admitted by the defendant. In brief they may be summarised as follows:

5. On the day in question **19 December 2011** at about 6.00 p.m. when the complainant was returning home after work she was accosted by the defendant who held her hand and despite her resistance and protestations, the defendant pulled her to an isolated spot beside the road where he demanded to have sex with the complainant.

6. The complainant pleaded to be allowed to go home to her son but the defendant ignored her pleas and forced her onto the ground, digitally

penetrated her, and overcame what little resistance she could offer. He then had full penile intercourse with the complainant until he withdrew from her.

7. The complainant again pleaded to be released but the defendant refused saying he wanted to have sex with her "*all night until dawn*". The complainant then asked to go to the toilet and the defendant insisted that she go right where they were, in his presence. When the complainant saw the defendant was not paying attention she fled from the scene, completely naked, to a nearby house where the occupants came to her assistance and took her to the police station.

8. The complainant was medically examined on **21 December 2011** and her report recorded that she had sustained numerous abrasions to her face, legs, right arm and back as well as bruises and a laceration in her vagina.

9. A month later on **19 January 2012** the defendant was arrested and interviewed and he admitted having sexual intercourse with the complainant.

10. To the probation officer, the defendant explained that on the day of the incident he had been drinking since 8.00 a.m. in the morning and was drunk by the time he got hold of the complainant. In his own words:

> "*Mi wantem mekem from mi drong mo mi wantem kat sex tumas hemia nao mekem se taem Jenita itraem blo ronwe be mi fosem hem blong mi mas gat sex wetem hem, from nomo se mi drong mo mi harem se mi mas kat sex*" (translation: I wanted to have sex desperately because I was drunk which was why when Jenita tried to escape, I took her by force because I was drunk and I was really desperate to have sex).

11. **Section 21 (1)** of the **Penal Code** provides:

"*Voluntary intoxication shall not constitute a defence to any charge ... unless the intoxication was so gross a degree as to deprive the accused of the capacity to form the necessary criminal intention* (to commit the offence charged)."

and **subsection (2)** defines:

"*intoxication*" as *"the impairment of the mental and physical faculties of a person arising from the taking of any foreign substance* (such as alcohol)".

12. Plainly to be effective as a defence the defendant must be so drunk as to be incapable of knowing what he is doing and of forming an intent to commit the criminal act, in colloquial terms, the defendant must be "*blind drunk and incapable*".

13. In this case the defendant although allegedly drunk at the time of the incident, was able to form the criminal intention to have sexual intercourse with the complainant and was physically able to carry it out. In other words, he was fully aware of what he was doing at the time and completely unconcerned about the complainant's pleas and welfare. Drunkenness can never excuse what the

defendant did to the complainant, an innocent single mother on her way home from work who just happened to be at the wrong place at the wrong time.

14. The defendant and other like-minded young men must learn that women and young girls must be allowed to walk freely on public roads without the unwanted attention and advances of drunkards, and the Court will do everything in its power to ensure that public roads and thoroughfares continue to be safe places for women and young girls to walk without fear of being molested, at any time of the day or night.

15. The pre-sentence report contains the following personal details of the defendant:

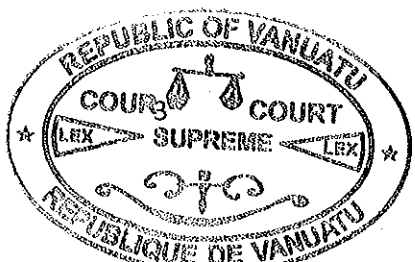
- He originates from Enkat village, Tanna and is 22 years of age;
- He only achieved grades 1 to 6 of primary education;
- He has been living in Efate for the past 10 years and is in a defacto relationship;
- He had worked as a casual labourer at various construction sites around Port Vila;
- He is presently unemployed but has plans to develop and build on a plot of land at Teoumaville;
- He is a first offender;
- He cooperated with the police investigation and admitted the offence in court;
- He admitted to the probation officer that he knew what he did was wrong and he is remorseful for his actions;
- He claims that he performed a custom ceremony to the complainant and gave her a mobile phone, some new clothes and VT15,000;
- He has been in custody since 4 September 2012.

16. For her part, the complainant denies ever receiving a custom ceremony from the defendant (she claims it was his chief that gave her the items). She says that she suffered a lot of bodily injuries during the incident and since then, she has had to put her marriage plans on hold and she fears that she may never get married "*... as the incident has affected her mental state of mind.*"

17. Defence counsel in her brief belated submissions urges a sentence of 2 years imprisonment on the basis of the defendant's guilty plea and because, "*... there are no aggravating factors*". I cannot agree.

18. On the other hand, I have been much assisted by the prosecution's comprehensive sentencing submissions from which I extract the following:

> "*A charge of rape calls for an immediate custodial sentence and it will only be in wholly exceptional circumstances that a Court may consider otherwise. The present case subsides within cases involving abduction of a victim for which the appropriate starting point would be 8 years.*



The State further accentuate that this Court must take into consideration the principals of sentencing outlined in the case of Public Prosecutor v. Andy [2011] VUCA 14.

The aggravating features that accompanied the crime are obvious. They are:

(a) The defendant abducted the victim from a place in public and took her to an inconspicuous or an otherwise deserted place.

(b) There was the added indignity of inserting his fingers into her vagina before he raped her. She was further subjected to humiliation and shame in as much as the defendant forced her to urinate and defecate in front of him and caused her to scurry along a public road fully naked and exposed.

(c) A further aggravating factor is the psychological harm suffered by the victim.

The most powerful mitigating factor in favour of the defendant is that he is a first time offender and has an unblemished record. He is not entitled to the full utilitarian benefit of a guilty plea as the plea was not entered at the first reasonable opportunity but was entered before trial and after the prosecution had already summoned witnesses and was ready to open the case.

.... The sentence imposed must serve to mark the gravity of the offence, it must emphasis public disapproval, it must serve as a warning to others, it must punish the defendant and last but by no accounts least, it must serve to protect women in our community.

As per guideline authorities and comparative sentences for the offence of sexual intercourse without consent by penal (sic) penetration, the only appropriate penalty is immediate incarceration. It is submitted that the appropriate head sentence that would sufficiently reflect the defendant's culpability against a reference point of life imprisonment, is 9 years imprisonment. There are no aggravating features personal to the defendant that would warrant a further uplift from the head sentence.

It is further submitted that the defendant is not entitled to the full one-third reduction for his guilty plea for as much as it was not entered at the first reasonable opportunity. A five to ten (percentage?) reduction will be justified."

19. With those submissions I am in general agreement.

20. In **Obed v. Public Prosecutor** [2004] VUCA 24 where the facts are similar to those in the present case, a Peace Corps volunteer was accosted and dragged into bushes off a track and was forcibly raped despite her pleas for the rapist to stop. The Court of Appeal reduced the sentence of 30 years imposed by the Supreme Court to one of 7 years imprisonment where the appellant was an unmarried man of 20 years who had pleaded guilty to the charge.

21. In reducing the sentence the Court of Appeal endorsed and adopted the relevant sentencing guideline laid down by the Chief Justice in **Public Prosecutor v. Ali August** [2000] VUSC 752 when he said:

> *"for rape committed by an adult without any aggravating or mitigating features, a figure of five years should be taken as the starting point in a contested case, where rape is committed by two or more men who has broken into or otherwise gained access to the place where the victim is living , or ... by a person who abducts the victim and holds her captive the starting point should be eight years."*
>
> (my underlining)

22. The Court of Appeal also granted the appellant a significant reduction of 3 years imprisonment in recognition of his early admission of the offence "*within 48 hours of its commission and later repeated before the trial judge*" thereby saving the complainant from *"the embarrassment and the additional trauma of having to relive her ordeal as a witness in Court and being subjected to searching cross examination."*

23. From the foregoing I am satisfied that the appropriate head sentence in the defendant's case, which is aggravated by the injuries sustained by the complainant and by the defendant's persistence in the face of the complainant's resistance and pleas to be allowed to go home even after intercourse had taken place, is a sentence of eight (8) years imprisonment.

24. From that head sentence I deduct two (2) years in recognition of the defendant's guilty plea and the fact that he is a first time offender who has been in custody since 4 September 2012. The final end sentence is therefore (8 – 2) = six (6) years imprisonment with immediate effect.

25. You have 14 days to appeal against this sentence to the Court of Appeal if you do not agree with it.

DATED at Port Vila, this 4th day of October, 2012.

BY THE COURT

REPUBLIC OF VANUATU COUR SUPREME COURT LEX LEX REPUBLIQUE DE VANUATU

D. V. FATIAKI
Judge.