

PUBLIC PROSECUTOR - v - JOSEPH JAMES

Coram: *V. LunabeK CJ*

Counsel: *Ms Kayleen TAVOA, Public Prosecutor
Mr Andrew BAL for the Defendant*

SENTENCE

Joseph James, you appear today for sentencing on one count of sexual intercourse without consent, contrary to section 91 of the Penal Code Act [CAP.135] ("the Act"). You entered not guilty plea on 5 February 2013 for that charge. You accepted that you had sexual intercourse with the complainant in this case on the date of 3rd November 2012 at Malapoa beach as alleged. However, you contended that it was a consensual sexual intercourse. After the trial, the Court convicted you on the charge of sexual intercourse without consent in its verdict dated 23rd March 2013. You are now sentenced on facts as found by the Court the summary of which is as follows:-

The complainant (KS) had few beers on the night of 2nd day of November 2012 before she went into club Planet 107. At the club she met with you. You bought few drinks for her and another woman. You ended up with the complainant at Kawenu beach in the morning of 3rd November 2012. During the journey to Kawenu, the complainant no longer remembered any thing because she was too drunk. She was in a dead sleep at Kawenu beach just upon arrival there. As you conceded the opportunity for you to have sex with her was no longer possible. You stayed with her.

At about 2.00pm in the afternoon the complainant was awoken by voices of children shouting. She realised that you were on top of her and had sexual



intercourse with her. She could feel your penis inside her vagina and she could feel the roots of the mangroves on her backside.

She struggled to find a way out of you but she could not make it. In response you fought her in the right lower side of her jaw. You also held her head and banged it on the sand.

A police officer named Peter Maru who was at that time watching soccer at Kawenu field heard people called out and called for police. He went on the beach and saw you and he recognised you on top of the complainant. The police officer could observe the complainant struggled as the sand coming up.

He went over and spoke to you about what you were doing in public place. In response you responded by saying you bought drinks for the complainant.

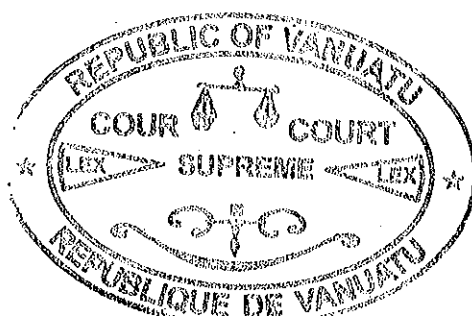
You were taken to police station where you were kept in cell 6. The complainant was taken to hospital for medical examination.

In the hospital the complainant was examined by Doctor Tony Harry. The medical results showed the following findings:-

- Tenderness (injury inside the body – internal injury)
- No outside bruises
- Physical injury on the jaw
- Genital full of sands

The offence of sexual intercourse is a very serious offence. It carries a maximum penalty of imprisonment for life. The maximum penalty imposed by law reflects the seriousness of the offence. Your offending in the present case, is aggravated by the following factors:-

- Your offending occurred by the effects of alcohol on the complainant when she was still in dead sleep.
- You used force or physical violence on the body of the complainant when she struggled to get out of you. Evidence of tender on her body and physical injury on his jaw.
- The impact of your offending on the complainant – ashamed to go out in public – could not concentrate on he job as she always think about the offence – loss of respect from people to her – spoiled her marriage with her husband.



The appropriate sentence is ~~7 years~~ imprisonment as a starting point based on the guideline judgments of **PP v. Scott** [2002] VUCA 29; **PP v. Gideon** [2002] VUCA; **PP v. Hinge** [2008] VUCA 30; **PP v. Andy** [2011] VUCA 14 and others referred to in the prosecution submissions.

The Court condemns your offending in the strongest terms as it is not acceptable and not tolerable in the society. Only custodial sentence is justified other than in wholly exceptional circumstances for the following reasons:-

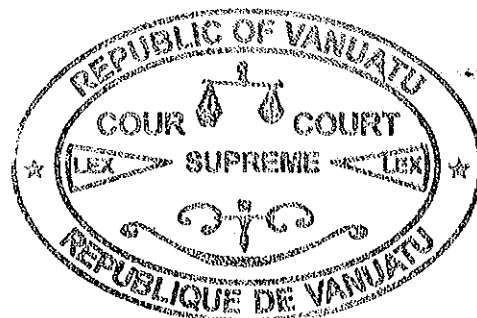
- It reflects the seriousness and gravity of your offending.
- The public disapproves this type of offending.
- It sends warnings to others in the society who will intend to commit same offence to go to custody.
- In your case, it punishes you for your serious offending coupled with the aggravating circumstances.
- It is a measure to protect women and vulnerable people in the society.

In mitigation, I accept what your lawyer told the Court. You are a first time offender; you do not have a previous conviction; you are remorseful for your actions. You are the sole bread winner for your family and your family depended on you for financial needs and also daily needs; you have three children and you pay the school fees for your children. You promised not to commit the same offence or any other offence again.

On balance between aggravating and mitigating factors, I give you an allowance of 12 months for the above mitigating factors. I give an allowance of 6 months for the custom ceremony performed the detailed of which are contained in the pre-sentence report provided by the Probation Office to assist the Court in your sentencing.

A period of 1 month be given to you to reflect the deduction of pre-custody period from 4th November 2012 to 4th December 2012.

You receive an end sentence of 5 years and 3 months with immediate effect.



ORDER

1. You are ordered to serve an imprisonment term of 5 years and 3 months with immediate effect.
2. You have 14 days to appeal this sentence if you are not satisfied with it.

DATED at Port-Vila this 17th day of April 2013

BY THE COURT



**Vincent LUNABEK
Chief Justice**

