IN THE SUPREME COURT
REPUBLIC OF VANUATU
(Criminal Jurisdiction)

Criminal Case No. 1 of 2015

PUBLIC PROSECUTOR
-v-
CHARLE MARRANGO PAKO

Before Chetwynd J
Mr Karae for Prosecution
Mr Bal for the Defendant

Hearing 12th August 2015

Sentence

1. Charle Marrango Pako you have been convicted on two counts or charges involving sexual intercourse without consent. In brief, the facts as found were set out in my judgment of 12th June 2015 when I said the young victim spoke of two incidents, one in April 2014 and another in the following month of May. She was asked to describe what happened in April and she said you had used the second finger of your right hand and had been putting or pulling your hand backwards and forwards across "the front of her private parts" and pulling with the finger. She also described you touching her buttocks. She was asked what happened in May and she said the same thing happened. In cross examination she was asked if you had put your finger inside her private parts and she said that you had. She did not actually say that in her evidence in chief but the description she gave was a description of penetration. The victim was 9 years old at the time of the offences and you were 48 so there is a substantial age difference. You told her not to tell anyone what you had done or something bad would happen. From the evidence of the mother of the victim it is clear you were a neighbour and in the mother's words she treated you as a brother. The Pre-sentence report says that you too thought your relationship with the victim's family was a very good one prior to the offences being reported. The Pre-sentence report also refers to the mother's opinion that the victim was affected by the offences and for a time was unwilling to go out to play or be on her own. The family has moved from the area where the offences took place and this seems to have resulted in an improvement to victim's mental well-being.

2. It is on consideration of those facts that I can take the first steps referred to in the leading case on sentencing of Andy [1] and arrive at a starting point for sentencing purposes. The maximum sentence for what was commonly called rape is life

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[1] *Public Prosecutor v Andy* [2011] VUCA 14; Criminal Appeal 09 of 2010 (8 April 2011)

imprisonment [2] so clearly the offence is regarded as being very serious. When looking at the culpability of the defendant in this case and the seriousness of the offence there are aggravating factors. They are the very tender age of the victim, the differences in age between the defendant and the victim, the repetition of the offence (albeit over a short period) and the unspecified threat. There is no evidence of pre-meditation by the defendant in connection with the first incident.

3. I do not believe that anything turns on the point that this was digital penetration rather than penile penetration. If Parliament had intended digital rape to be treated any differently from penile rape the legislation would reflect that. It does not. The definition of sexual intercourse is set out in section 89A of the Penal Code. The offence of sexual intercourse without consent is committed no matter whether the penetration is digital, penile or for that matter by any other object. Where there is a difference between the types of penetration it is probably in the degree of violence used by the offender. It is probably correct to say that the degree of force or violence necessary to achieve digital penetration is less than that needed to complete penile penetration. That is clearly not a golden rule or anything approaching that state and there will no doubt be cases where an offender uses considerable violence where there is digital penetration just as there may be cases where minimal violence is used to achieve penile penetration. The aggravating factor is the degree of violence involved in the commission of the offence rather than the type of penetration. This much is clear from the case of Scott [3] where the court referred to, "*Violence... over and above the force necessary to commit rape*" as being an aggravating factor. In this case thankfully the degree of physical force used could be described as minimal.

4. Having said that, I have no doubt that the offences have had a traumatic effect on the young victim. She was sexually violated and abused and is likely to be marked for life by the experience. Sexual violation is not an experience any women should be subjected to let alone a 9 year old girl.

5. In all the circumstances I regret I cannot accept the views of the Public Prosecutor and Counsel for the defendant that the starting point in this case is between 5 and 6 years. I consider, taking the factors as set out above into account, a starting point of no less than 7 years is required. This is the upper limit set out in Andy which involved similar facts but where the charge appears, from the Appeal decision, to be one of unlawful sexual intercourse contrary to section 97(1) of the Penal Code, an offence carrying the maximum sentence of 14 years not life.

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[2] Section 91 Penal Code [Cap 135]
[3] *Public Prosecutor v Scott* [2002] VUCA29; CA 02-02 (24 October 2002)

6. Turning now to the second step as set out in Andy, I accept that the defendant is a man of previous good character. The Public Prosecutor raised the possibility that the defendant was convicted of a similar offence some years previously. However there is no record available which shows that conviction or indeed any other conviction. That being so the defendant is entitled to be treated as a man of previous good character. The defendant has also indicated that he is not adverse to reconciling with the victim and her family but that desire to reconcile, according to the pre-sentence report, seems to be somewhat conditional. As for the victim and her family, they say they could accept reconciliation at a later date but they feel that it is now still too early. The main problem is that the defendant does not accept the judgment of this court and he maintains he did not commit the offences. In the circumstances he can be given very little credit for anything other than his previous good character and I will only reduce the starting point sentence by 10 %.

7. The defendant has never accepted responsibility for his actions, has never admitted his guilt and there can be no credit given for a guilty plea.

8. As has been said in several earlier cases and as was set out in *Public Prosecutor v Gideon* [2002] VUCA 7, it is only in the most extreme cases that a suspended sentence will ever be contemplated in a case of sexual abuse. There are no extreme circumstances evident in this case which would enable the sentence to be suspended.

9. Charlie Marrango Pako you are sentenced to an immediate term of imprisonment of 6 years and 3 months. Your sentence shall be deemed to commence when you were taken into custody on 28th November 2014. That is in respect of the offence committed in April 2014. I will impose a similar sentence for the later offence committed in May but that sentence will be served concurrently. The total time to be served is 6 years and 3 months.

10. For the avoidance of any doubt I order that the name of the victim in this case shall not be disclosed nor shall any other information be disclosed which leads to her name being revealed. This is in order to protect her identity.

11. Charles Marrango Pako , you have the right to appeal against this sentence. You must lodge your appeal within 14 days. I suggest you take professional legal advice before making any decision about an appeal.

12th August 2015

Chetwynd J

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