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

Criminal Case No.12 of 2012

PUBLIC PROSECUTOR
-V-
BENNY MALAPA

Coram: ***Mr. Justice Daniel Fatiaki***

Counsel: *Mr. D. Boe for the State*
Ms. P. Kalwatman for the defendant

Date of Decision: *6 November 2015*

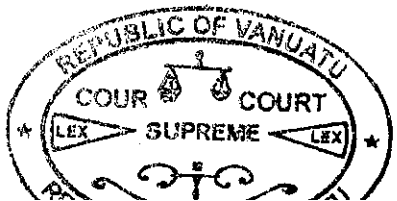
SENTENCE

1. This incident occurred on New Year's day 1 January 2012. On 16 February 2012 the defendant was committed for trial in the Supreme Court on 6 March 2012. The Information which was filed by the Public Prosecutor charged the defendant with Intentional Assault contrary to Section 107(b) of the Penal Code (Count 1); Malicious Damage to Property (Count 2); and 2 counts of Sexual Intercourse Without Consent (Counts 3 and 4) committed on the same day.

2. When the case was called on 6 March 2012 the defendant failed to appear. A bench warrant was issued for his arrest returnable on 3 April 2012, the next criminal call-over date. Again the defendant did not appear and the matter was adjourned to 12 April 2012. The bench warrant had lapsed by then. On 28 August 2012 a fresh arrest warrant was issued on the prosecutor's application.

3. For the next 34 months the case went into hibernation until an amended Information was filed on 3 June 2015. On 5 June 2015 the defendant voluntarily appeared in court with his parents and his plea was taken on the amended Information which charged him with 4 counts – 2 counts of Sexual Intercourse Without Consent, a count of Abduction and a last count of Intentional Assault. The Malicious Damage to Property count was removed and replaced by the Abduction count.

4. If I may say so there can be no excuse (certainly none was offered) for the extraordinary delay in executing the defendant's arrest warrant given that he lives at Mele village with his parents barely 7 km from the main police station, and further, that the defendant actually appeared and was dealt with by the Chief Justice in October 2014 (***see:*** Public Prosecutor v. Tangarisu, Malapa and Rakom [2014] VUSC 144. On that occasion the Chief Justice relevantly observed:



"... I note that you committed this offence in 2010 and I do not know why you have not been tried earlier and it is now 4 years. If I had sentenced each of you in 2010 I would have imposed on each of you a term of imprisonment sentence. Each of you must now understand that I will not impose on you an imprisonment sentence. However you are warned that the next time you commit this type of dishonest offending, you will be directly sent to prison."

Plainly the Chief Justice felt constrained by the delay to impose a non-custodial sentence.

5. Be that as it may on being arraigned the defendant pleaded "*guilty*" ("*I tru*") to all four (4) counts in the amended Information, but, after the prosecution summary of facts was outlined, the defendant indicated through his counsel that he was unable to agree or deny the facts because he was very heavily intoxicated at the time and had no independent recollection of the events of the evening when the offences allegedly occurred. The defendant was then permitted to change his pleas to one of: "*not guilty by reason of intoxication*" and a trial date was set for August 2015. The arrest warrant was cancelled and the defendant was bailed on strict conditions to appear for his trial in August 2015.

6. Unfortunately the August dates became unsuitable and fresh trial dates were fixed in October 2015. Eventually on 14 October 2015 (almost 4 years after his committal) the defendant appeared for his trial and at his counsel's request he was re-arraigned and this time, he entered "*guilty*" pleas to counts 1 and 4 and "*not guilty*" pleas to counts 2 and 3. The prosecutor entered a "*nolle prosequi*" on counts 2 and 3 and the defendant was discharged on those counts. Upon the defendant's admission of the facts he was convicted for offences of Sexual Intercourse Without Consent (Count 1) and Intentional Assault (Count 4). No prosecution witnesses had been summoned.

7. The facts of the case are that the complainant and a friend had been drinking and celebrating New Year's Eve 2012. The complainant's friend realized after they had left the party that she was missing her mobile phone so she sent the complainant to retrieve it. The complainant returned to the drinking place and learnt that the defendant had taken the mobile. On returning to inform her friend she saw the defendant following her. The defendant caught up with the complainant and her friend and there there was an exchange of words and the defendant slapped the complainant on the face causing her to fall onto the ground. The complainant's friend took flight after she was warned by the defendant not to interfere.

8. The defendant then proceeded to punch the complainant repeatedly in the face and he managed to drag her into a nearby kitchen where he threw the complainant on the earthen floor and the assault continued until the complainant became utterly helpless and semi-conscious. The defendant then

undressed himself and the complainant and forcibly had full sexual intercourse with the complainant in her semi-conscious injured state. After intercourse the defendant got dressed and fled the scene leaving the complainant naked, battered, and bruised.

9. The complainant's friend returned to the scene, helped the complainant to dress and reported the matter to the police. The defendant was arrested later that same day and was taken to the police station.

10. Meanwhile the complainant had been taken to the Vila Central hospital for treatment and because of the seriousness of her injuries she was admitted as an in-patient and underwent emergency surgery. The complainant remained in hospital under nursing care for two (2) weeks. She suffered multiple bruises and abrasions to the eyes and mouth and her face was grossly swollen and bloody. She also had a deep laceration in her anus and severe urinary and fecal incontinence and which necessitated Indwelling Catheters (IDCs) for the duration of her stay in hospital.

11. During his police caution interview conducted on 2 January 2012 the defendant explained that he had been drinking large quantities of alcohol including Tusker beer and Atlas for 2 straight days before the incident and was too drunk to recall what he had done to the complainant ("*Mi drong tumas, mi no save wanem mi stap mekem*"). Strangely though he does recall being questioned and beaten soon after the incident ("*Mi no save from mi drong tumas. Ol brata oli askem mi mo killem mi be mi no save from mi drong tumas*"). This particular recollection is confirmed by the arresting officers who attended the report and found the defendant being assaulted by a group of men. After the officers had freed the defendant they noticed he had a badly injured and bleeding mouth, a swollen face and a big cut to his left hand. The defendant had also soiled his trousers during the assault on him.

12. In light of this particular recollection, I am satisfied that the defendant's level of intoxication had <u>not</u> rendered him either temporarily comatose or incapable of knowing what he was doing or indeed, what was being done to him at the relevant time.

13. By all accounts the hapless complainant was subjected to a vicious, unprovoked, and sustained attack which rendered her semi-conscious and unable to call for help or resist the defendant's sexual acts on her. Although the defendant denied penetrating the complainant anally, her physical injuries from the brutal assault hospitalized her for 2 weeks and left her incontinent and needing indwelling catheters to remove waste from her bowels.

14. There are several aggravating features in the case highlighted in the prosecutor's sentencing submissions including the use of excessive violence; the non-use of a condom; the physical injuries and mental effect on the

complainant and the fact that the defendant is not a first offender "*... as per* (his) *pre-sentence report ...*".

15. As for the excessive violence, I note that it is the subject-matter of a separate charge of Intentional Assault and therefore cannot be considered an aggravating factor. Furthermore the conviction referred to in the defendant's pre-sentence report relates to an offence of Forgery that was committed in 2010 long before the present offence occurred and for which a conviction was entered and a non-custodial community service sentence was imposed only on 2 October 2014 long after the defendant had been committed for the present offences. Although strictly speaking it is a prior conviction, for present purposes I consider the defendant should be treated as a first time offender especially as his so-called prior conviction is for a materially different and wholly irrelevant type of offending.

16. In my view the sole aggravating feature in this case are the serious injuries sustained by the complainant which resulted in her being hospitalized for 2 weeks.

17. In his submissions State Counsel proposes a starting point of 5 years imprisonment increased to 8 years to reflect aggravating factors. Counsel accepts there should be a less than a ⅓ deduction for the defendant's guilty plea and "*1 year should be deducted for delay*" leaving an end sentence of 4 years imprisonment. On the question of suspension counsel submits:
"*... that the circumstances of this case does not fall within the principle which was drawn in the case of Public Prosecutor v. Scott [2002] VUCA 29 and ... Public Prosecutor v. Gideon [2002] VUCA, namely,* ***exceptional circumstances*** *...*".

18. The offence of Intentional Assault Causing Temporary Injuries contrary to Section 107**(b)** of the Penal Code incorrectly referred to as para. (c) in the prosecutor's submissions, carries a maximum sentence of imprisonment for 1 year. The more serious offence of Sexual Intercourse Without Consent contrary to section 90 and 91 of the Penal Code carries a maximum sentence of life imprisonment. In the present case although both offences are charged separately in the amended Information, I am content to treat them as occurring during the course of the same criminal activity for which concurrent sentences would be appropriate. For the offence of Intentional Assault, I impose a concurrent sentence of 9 months imprisonment.

19. I turn next to the more serious lead offence of Sexual Intercourse Without Consent and I consider that a starting point of 6 years imprisonment is appropriate.

20. By way of mitigation the author of the defendant's pre-sentence report notes that the main contributing factor to the defendant's offending was the

consumption of alcohol and his inability to control himself in an appropriate manner. Furthermore the defendant expressed insight to his offending and felt sorry for what he had done and promised never to re-offend in future. The defendant was also willing to perform a kastom reconciliation ceremony and pay VT500,000 by way of compensation but the complainant's family has demanded VT1.5 million.

21. I treat the defendant as a first offender who has pleaded guilty albeit belatedly but at the first real opportunity after there had been an earlier change of plea. For these two matters of mitigation I deduct 2 years leaving a sentence of 4 years imprisonment. Next, in recognition of the long delay in finalizing the case and the fact that the defendant has already received a brutal summary punishment for his offending at the hands of relatives, I deduct a further 12 months leaving an end sentence of 3 years imprisonment. [***see:*** Public Prosecutor v. Edmond [2011] VUSC 323 and more recently Public Prosecutor v. Malon Heru [2015] VUSC 88].

22. If I may say so the long delay also indicates that for the past 3½ years the defendant has not re-offended and has successfully kept out of trouble. He also entered into a "*defacto*" relationship and now has a young child. Hopefully that added responsibility will continue to be a stabilizing factor in the defendant's future life.

23. I turn next to consider whether this is an appropriate case for the exercise of the court's discretion under Section 57 of the Penal Code to suspend the sentence in full.

24. In Public Prosecutor v. Scott (ibid) the Court of Appeal affirmed what was said in Public Prosecutor v. Ali August [2000] VUSC 73 that:

> "*The offence of rape is always a most serious crime. Other than in wholly exceptional circumstances, rape calls for an immediate custodial sentence. ... a custodial sentence is necessary for a variety of reasons. First of all to mark the gravity of the offence. Secondly to emphasize public disapproval. Thirdly to serve as a warning to others. Fourthly to punish the offender and last but by no means least, to protect women ... the length of the sentence will depend on the circumstances ...* (which) ... *in cases of rape vary widely from case to case*".
>
> (my underlining)

25. In this particular regard defence counsel writes:

> "*The question of suspension is not an easy one. This is a serious example of an act of rape. However the most significant factor is the unfortunate delay and the mitigating features ...*"

such as, the defendant's relative youth at the time of the offence (22 years); his co-operation with the police; his sincere and genuine remorse; and this being his first prison sentence. Defence counsel further submits:

"*A suspended sentence would balance the need for punishment, protection of the community and rehabilitation. Mr. Malapa is a young offender who has always accepted his guilt.*

An alternative would be a partly suspended sentence".

26. In this latter regard defence counsel cites the recent decision in Public Prosecutor v. Houman [2015] VUSC 87 in support of a suspension of any term of imprisonment imposed and where there had been a delay in sentencing of almost 2 years after the defendant had pleaded guilty in that case. In counsel's submission:

"*The delay is a form of punishment ...* (the defendant) *... had hold on the fear inside him since the date of offence. It has interfered with his peace of mind, anticipating the consequences of his action ...*".

27. Although I do not consider that this is an "*exceptional*" case to warrant a complete departure from the established sentencing principles for an offence of rape or sexual intercourse without consent, for the following reasons, I consider that the defendant's sentence should be suspended in part: (1) The lengthy delay of almost 4 years in bringing the case to a conclusion; (2) The absence of any recurrence or offending during that lengthy delay; (3) The fact that the defendant is to be treated as a first offender; (4) The defendant's guilty plea and remorse; and (5) The defendant's relative youth at the time of offending.

28. Accordingly and in exercise of the court's powers under Section 58(1) of the Penal Code, I order that half the end sentence of three (3) years imprisonment be suspended for 2 years. What this sentence means is that although the court has determined that the case is "*so serious as to warrant a sentence of imprisonment*" it does not consider it to be so serious as to warrant the defendant serving the entire term of imprisonment.

29. Benny Malapa, in summary, the sentence of this court is as follows:

For the offence of Intentional Assault you are sentenced to 9 months imprisonment to be served concurrently with the sentence of 3 years imprisonment imposed for the offence of Sexual Intercourse Without Consent making a total effective sentence of 3 years imprisonment for both offences. Of that 3 years sentence you are required to serve a term of 18 months immediately, and after that, you will be released with the balance of your sentence ie. 18 months being treated as a suspended sentence for a term of 2 years.

30. What a suspended sentence means is that if after your release from prison you are convicted of any other offence within the next 2 years after your release then you will be returned to prison to serve the unexpired portion of your sentence **ie**. 18 months imprisonment.

31. If you do not agree with this sentence you may lodge an appeal in the Court of Appeal within 14 days.

DATED at Port Vila, this 6th day of November, 2015.

BY THE COURT

REPUBLIC OF VANUATU COUR COURT SUPREME LEX LEX REPUBLIQUE DE VANUATU

D. V. FATIAKI
Judge.