

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

Criminal Case No. 56 of 2015

PUBLIC PROSECUTOR

-v-

JULIEN BANI MALEB

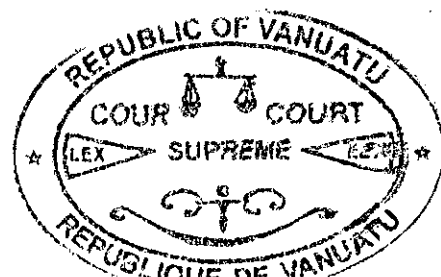
Coram: V. Lunabek, CJ

Counsel: Mr Ken Massing for the Public Prosecutor
Ms Jane Tari for Defendant

Date of Judgment: 10 July 2015

SENTENCE

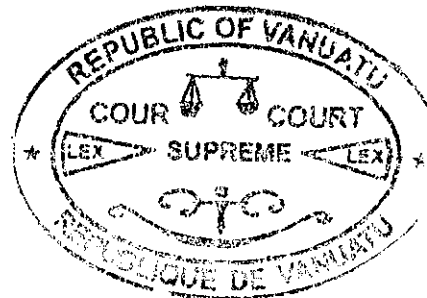
1. Julien Bani Maleb you appear today for sentence. You are a 24 year old man who lives at Banban Area, Luganville, Santo. You are in a de facto relationship and you have two children. You work for the Leeman Plantation for 2 years now. You are initially charged with one count of sexual intercourse without consent, contrary to ss. 90 and 91 of Penal Code Act [Cap 135].
2. On 29 June 2015 you entered a not guilty to the charge. A one day and half trial was scheduled to begin on 6 July 2015 at 9.00am o'clock.
3. On 6 July, before the trial the prosecution amended the charge and inserted an additional charge of act of indecency without consent, contrary to s.98(a) of the Penal Code.
4. You are then re-arraigned on the two counts in the amended information. You entered a not guilty plea on the offence under ss. 90 and 91 and you entered a guilty plea on the offence under s.98(a) of the Act.
5. The prosecution entered a nolle prosequi on the first count and directions were then issued for a pre-sentence report and submissions by the



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prosecution and your lawyer for your sentencing on the offence of act of indecency without consent, under s.98(a) on the second count.

6. The brief facts of this case are these.
7. A formal complaint was made against you for the offence of Act of Indecency without consent.
8. The incident occurred on the 7th day of May 2015 on Leeman plantation on the island of Santo. It occurred at around 1 o'clock in the afternoon.
9. The complainant is over the age of 18 but under 19 years at the time of the alleged incident. You are 24 years old at the time you committed the offence.
10. On the date of the incident you asked the complainant if she could provide you with water for you to drink. As the complainant gave you water you started to have a conversation.
11. While you and the complainant were having your conversation you asked the complainant if she had a boyfriend. You asked her you and her could start a relationship. As you and her were talking to each other you then walked straight to her and talked to her.
12. You grabbed her clothes and stopped her from running. You then tried to kiss her where she refused. You then held her neck and squeezed it. You further hurt her backside on a wooden chair. As you tried to remove her pants, you then tore her under pants and then you touched her vagina with your hands. The complainant screamed but no one could hear her.
13. As the complainant had a chance to escape, she ran and told you that she would report the matter to the police. When she reached her residence, she revealed what you had done to her to a woman named Annie. Annie in her statement to the police started that when she saw the complainant that time she was crying and shaking as she told what happened to her.
14. The medical report shows that there were bruises on her backside and neck.
15. You were arrested and cautioned by the police. You denied the allegation against you.



16. The law prohibits and sanctions the acts of indecency without consent. The law says:

"98. A person must not commit an act of indecency on, or in the presence of another person:

(a) without that person's consent;

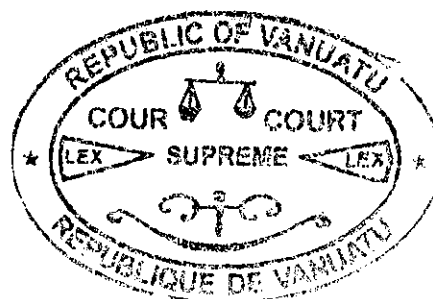
Penalty: Imprisonment for 7 years"(section 98(a) Penal Code)

17. You must now realise that engaging in an act of indecency with another person without that person's consent is a very serious crime as reflected by the maximum penalty of 7 years imprisonment set by law.

18. Your action on 7 May 2015 is unacceptable. You can only blame yourself. Yu must be responsible for your own action.

19. The pre-sentence report reveals that:

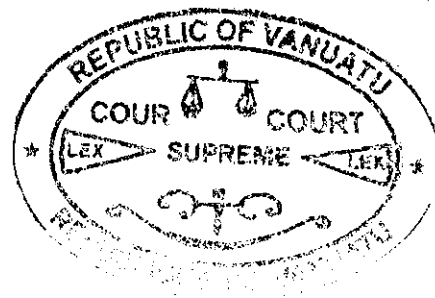
- you were a good and helpful person as described by your de facto wife;
- you worked as a maintenance person at the Leeman plantation and provided for your nuclear family both physically and financially;
- currently, due to this case, you have been left unemployed but you continue helping your wife to cook and sell cooked food at Kava Nakamal to sustain your family;
- your ambition is to become a ship crew leading you to attend Maritime College. However, your training is on halt pending the outcome of your case;
- you are an year 11 college leaver due to financial constraints you could not continue your studies;
- your chief, a Claude Bani stated that you are a quite person and "not your normal behavior to be involving in criminal activities";
- it is reported that you wanted to perform a custom reconciliation but you were asked to pay a fine of VT150,000 to which you did not



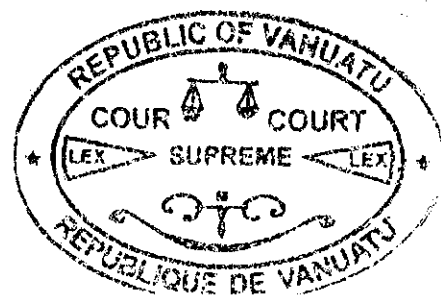
have with you. However, this showed your intention or willingness to perform a custom ceremony.

20. I have received helpful sentencing submissions filed by the prosecution and your own lawyer which are of great assistance to me when I consider your sentencing.
21. The prosecuting counsel relies on the leading court of appeal judgment in *PP –v- Gibeon [2002] VUCA 7* which lays down the sentencing principle that children, young and vulnerable people in the society must be protected and that: *“men must learn that they cannot obtain sexual gratification at the expense of the weak and the vulnerable... Men who take advantage sexually of young people forfeit the right to remain in the community.”*
22. Prosecuting counsel also indicates the aggravating features in this case, including, the use of force or violence and the age difference. Counsel seeks a custodial sentence with a starting point raging from 3 to 3 and half years and to be suspended.
23. Your defence counsel, however, correctly distinguishes the sentencing precedent advanced by the prosecution by providing a comparative sentencing cases between the more serious charge of Act of Indecency with a young Person (s.98 A) which carries a 10 year maximum imprisonment sentence as compared to the 7 years maximum imprisonment sentence under s.98(a) in the present case.
24. Your counsel refers to the case of *Public Prosecutor –v- Livae [2014] VUSC 126, were Fatiaki J*, the sentencing judge, commenting on the Act of Indecency, without consent:

“it is undoubtedly a serious offence but it is also an offence that can be committed with varying decrees of seriousness from extended and repeated full digital penetration of a victim’s vagina to momentary touching of a victim’s private parts over her clothes.”
25. Your counsel submitted that indecent acts vary seriousness and the starting point should reflect wether the offence is at the lower or higher end of the scale. She says in your case, the offence involved the touching of the vagina and nothing more and the victim was not a child. She was 19 years old.



26. Your counsel relies on the case of *PP -v- Motoutorua [2010] VUSC 122*, where a suspended imprisonment sentence was imposed. She finally submitted that a suspended imprisonment sentence will be appropriate taking into account the time you have already spent in custody and also the mitigating factors.
27. In mitigation, your counsel refers to the following factors for the court to take into consideration:
- you are a young man of 24 years of age with a de facto wife and two children;
 - you pleaded guilty at the very first opportunity given to you by the court. This has saved the court's time and it indicates remorse on your parts. The guilty plea also means that the victim does not have to give evidence and therefore she avoids further trauma and emotional distress;
 - you have strong community support by your chief (chief Claude Bani); and
 - the offence is not in the higher end of the scale for acts of indecency.
28. I accept your counsel submissions that your offending in this case is not at the higher end of the case. However, it is a serious offence and as I mentioned earlier, a custodial sentence is necessary for variety of reasons: First, to mark the gravity of the offence. Second, to emphasize public disapproval. Third, to serve as warning to others not to commit similar type of offences. Fourth, to punish you for your offending and the last but not the least is to protect women.
29. You are sentenced to 30 months imprisonment including the aggravating factors. This sentence is reduced to 1/3 to reflect your early guilty plea and you are given an allowance of 10 months to reflect other mitigating factors. Your sentence of 30 months is now reduced to 10 months imprisonment after appropriate deductions made. I note that you have already spent a period of 15 days in custody. I deduct this period also from your 10 months imprisonment. You have an end sentence of 9 months and 15 days.
30. The next question is whether the circumstances of your offending in the present case justify a suspension of your imprisonment term of 9 months and 15 days.

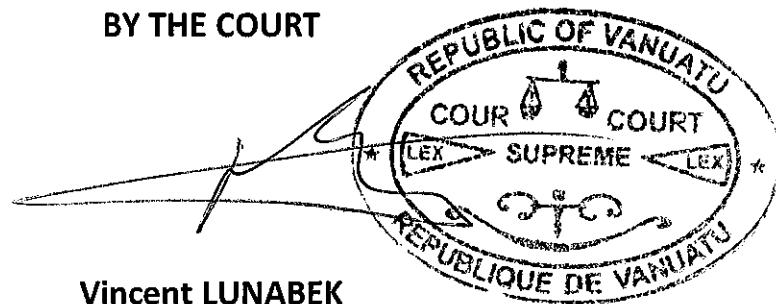


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31. I answer this question in the positive because in this case, I am satisfied from the following factors that it is not appropriate to make you suffer an immediate imprisonment, namely:
- the spur momentary nature of the offence;
 - the non-penetrative nature of the assault on the complainant;
 - the fact that you are a first time offender;
 - the absence of evidence or any possibility of repetition
 - your remorsefulness; and
 - you have already spent some time in custody
32. Accordingly, your sentence of 9 months and 15 days is suspended for a period of 2 years from today's date.
33. This sentence means that you are not going to custody today, but, if you re-offend and are convicted of another offence during the next 2 years, you will be sent to custody to serve this sentence of 9 months and 15 days in addition to any other sentence you may receive for your re-offending.
34. In addition to your suspended imprisonment sentence, you are ordered to perform 80 hours of community work.
34. You are fortunate today as you are not going directly to custody (prison). You better take this time to reform and rehabilitate yourself as a good and caring husband to your de facto wife and a loving and protective father to your children.
35. You have 14 days to appeal this sentence if you are unsatisfied with it.

DATED at Luganville, Santo this 10th day of July 2015

BY THE COURT



**Vincent LUNABEK
Chief Justice**