

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

**Criminal
Case No. 17/1026 SC/CRML**

BETWEEN: Public Prosecutor
Appellant

AND: Wycliff Boesel
Defendant

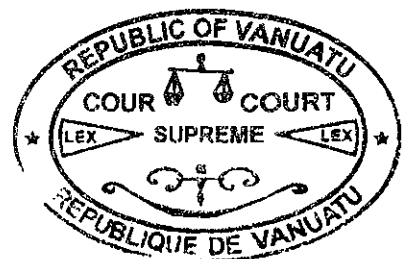
Date of SENTENCE: ***22nd day of August, 2017 at 9:00 AM***

Before: ***James Paul Geoghegan***

In Attendance: ***Damien Boe for the Public Prosecutor***
Tom Botleng for the Accused

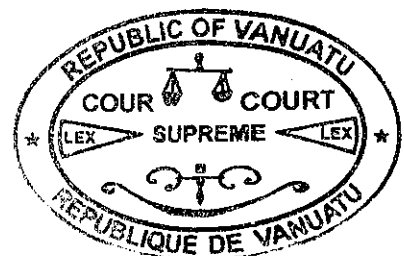
SENTENCE

1. Mr Boesel you are appearing in Court today for sentencing in respect of three counts of sexual intercourse without consent. As you are probably aware, the maximum penalty on each of these counts is one of life imprisonment. You pleaded guilty to these charges on the third day of your trial but after the complainant had spent almost an entire day giving evidence and being cross examined by your counsel.
2. The facts upon which you are being sentenced are these. The victim came to live with you and with your wife shortly after the death of her father in 2014. You and your wife offered her a position as a house girl. It is clear that at that time she was



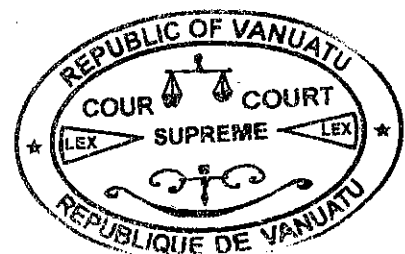
somewhat vulnerable and needed to support her children. The complainant looked on you and referred to you as her father and your wife as her mother.

3. The offences with which you were charged took place in February, March and April 2015, but what needs to be said is that it was the evidence of your victim, evidence which I accept as truthful, that there were significantly more incidents than these. The victim gave evidence that your offending behavior occurred on a weekly basis over a number of months. What I need to make clear however that you will be sentenced today on the basis of the charges you have pleaded guilty to, despite the evidence of your victim.
4. These offences all took place when you knew that your victim would be alone in the house. On those occasions it would have clear to you that she did not want to have sex with you but felt effectively powerless to resist you. In that sense, you significantly abused the position of trust that you occupied. You gave her money and told her not to tell your wife. It is clear that the sexual intercourse was unprotected and it resulted in the complainant becoming pregnant to you. When you discovered this you encouraged the victim to have an abortion and you made up a concoction of traditional herbs and lemon juice which you asked her to drink in an endeavor to induce a miscarriage.
5. It is clear from the evidence that during this time the victim felt completely unable to tell anyone what was going on. It was only when a couple of female members of her family could see she was pregnant that your offending was disclosed.
6. The child was born in December 2015. That fact alone will presumably cause the victim ongoing distress and difficulty.
7. There was clearly a degree of planning involved in your offending and I refer again to your ensuring that no one else would be in the house when this offending took place. In addition, there was a degree of deception with you on one occasion



proposing that you use leaves on the body of the victim as a custom remedy to reunite her with her husband. That was used by you to get the victim to remove her clothes, something she initially refused to do before you forced her to have sex with you.

8. I have read your pre-sentence report. It is clear that you are regarded as having many positive qualities. Your wife described you as hard working, responsible and honest. You are referred to by others as a skilful farmer and kind. You have a large family, four adult daughters and four sons who are still dependent on their parents. You are generally well thought of. You have no previous convictions.
9. It is extremely disappointing to read that you have minimized your offending by claiming, despite your guilty plea, that the sexual activity between you and the complainant was consensual and that your actions were caused by your relationship with your wife. I wish to make it clear to you and to other offenders like you that there cannot ever be justification of any kind for rape. It is as simple as that. I hope that your time in prison will give you an opportunity to reflect on that.
10. I acknowledge that a custom reconciliation has taken place as reported and that will be taken into account although I shall return to that later.
11. The Public Prosecutor has filed very helpful submissions in respect of this matter and has referred to a significant number of authorities. I do not intend referring to all of them. Suffice as to say that Mr Boe has referred to a number of aggravating features. Those that I accept are as follows:-
 - a) Your offending involved a breach of trust. It was clear that the victim looked upon you as her father.
 - b) The offending was repeated.
 - c) There is a degree of calculation in the offending and that you ensured that the victim would be alone, isolated and unable to call for help when your offending occurred. In addition, as I have said, there was



deception on your part involved with you proposing that you leaves on the body of the victim in the manner I have already referred to.

- d) You had unprotected sex with the victim in circumstances where she then became pregnant and had a child.

12. All of these factors would in my judgment justify a starting point of 8 years in respect of one charge alone. The question is then what might be an appropriate starting point taking account of the fact that there are three charges. In that regard you would have heard me speak today to Mr Botleng at some length about the authorities that he relies on in submitting that an appropriate starting point taking into account all three charges would be one of five years imprisonment.

13. In that regard I refer to the authorities that he has submitted; PP v. Werere¹, PP v. Malsungai², PP v. Sawe³ and PP v. Pale⁴. I have not been provided with copies of those decisions. They all appear to have involved sentencing on representative counts which in some cases involve victims as young as 10. I am not able to comment on those judgments not having read them.

14. However I wish to make it clear as I did to Mr Botleng that I consider that a starting point of five years imprisonment simply does not reflect the gravity and the seriousness of your offending. It is difficult to justify why one of these offences should be seen as less serious than another.

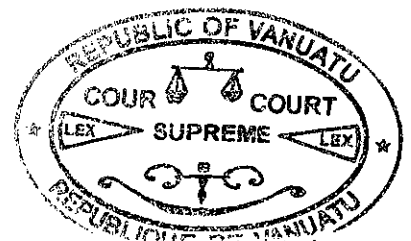
15. Accordingly in simple terms having arrived a starting point of 8 years in respect of one charge alone using a cumulative approach a starting point of 24 years could be adopted.

¹ [2013] VUSC 186

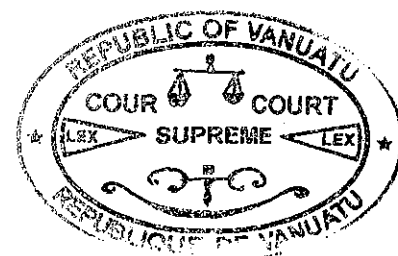
² [2011] VUSC 61

³ [2010] VUSC 24

⁴ [2015] VUSC 162

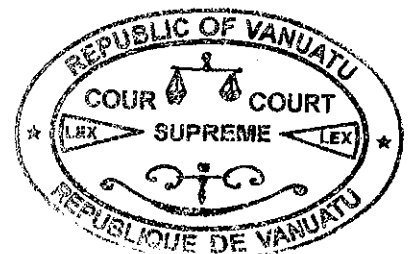


16. I consider however the principle of totality means that a starting point less than that is clearly appropriate. In this regard I note that the Public Prosecutor proposes a starting point of 15 years. As I have said however Mr Botleng on the other hand submits that a starting point of 6 years is appropriate and I recognize that I have referred to 5 but that the correct figure is 6.
17. I reject Mr Botleng's submissions as being completely misguided. Even if there was only one count of rape, this submission would in my assessment be unrealistic. In my assessment, Mr Botleng's submissions completely ignored the fact that there were 3 distinct rapes with a number of aggravating features with respect of each one.
18. In all of the circumstances, and applying the principle of totality, I consider that a starting point of 16 years is appropriate. There are no personal aggravating factors which would justify any further uplift.
19. I turn then to consider mitigating factors. The first is the issue of delay and there has been reference to the delay encountered in this matter. These offences occurred in February to April of 2015. I have clarified with counsel prior to commencing this sentencing that the matter was apparently first reported to the Police in Maewo in 2016, although it is not clear exactly when. Nothing then appears to have happened until the Santo police became involved in early 2017. There has therefore been some delay on the part of prosecuting authorities but it is clear that there was a significant delay in the complainant making a complaint to the police.
20. What has to be said is that there needs to be some understanding for victims in this situation. Victims will remain silent for reasons which are not readily apparent to others. It may be shame. It may be the fact that they do not have anyone they feel they can confide in. But we cannot necessarily on every occasion expect a victim to come forward immediately. I am however prepared to make some allowance for the



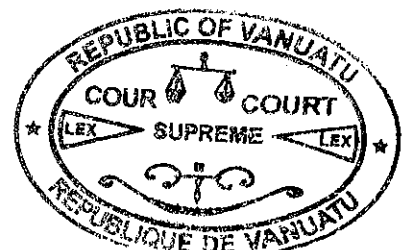
delay that has occurred and I consider than appropriate allowance is one of 6 months.

21. The second factor is in relation to your previous convictions and your life free of offending until this occasion. The Public Prosecutor submits that an allowance of 6 months should be made for the fact that you have no previous convictions and that up until that time, the time of your offending, you appear to have been a responsible father, husband and member of the community.
22. Mr Botleng submits that one year would be applicable and appropriate also taking into account your remorse. I need to say something about your apparent remorse. Your pre-sentence report refers to your apparent lack of insight and remorse. It refers to you minimizing your offending and also justifying it because of your relationship with your wife. Your remorse is therefore in very considerable doubt and in my assessment it may take you some time to come to terms with your offending; your responsibility for it and your impact upon the victim. There can be no question that the impact on her is very considerable indeed.
23. Taking all matters into account however, I consider an appropriate allowance to be one of 6 months.
24. The third factor is the reconciliation ceremony. That reconciliation ceremony occurred in early 2017 and apparently after you had been charged. You did not attend that reconciliation ceremony as I am told by Mr Botleng that you were in Luganville attending to your brother's wedding.
25. Details of the payments made as a result of the reconciliation ceremony are set out in the pre-sentence report and in counsel's submissions. But what must be said is that the ceremony was conducted on the basis that what had occurred between you and the victim was a consensual sexual relationship. That is clear both from the timing of this ceremony and the fact that the victim was fined Vt 10,000 to be paid to



your wife. It is clear that you remained silent while this occurred. Accordingly this is not a ceremony conducted in an environment where you have admitted your guilt. It is one where you have permitted the victim to carry further blame. It will now be absolutely clear that the victim should never have paid a fine of Vt 10,000 and in all of the circumstances that should be returned to her immediately. Regrettably I am not able to order that to occur. But looking at the reconciliation ceremony in that way I consider that while an allowance should be made for it, the appropriate allowance is one of six months.

26. I turn finally to your guilty plea. The Public Prosecutor submits that the six month allowance should be made for the entry of a guilty plea and Mr Botleng agrees that that allowance is appropriate. I take a different view. Allowances for a guilty plea are made for a number of reasons. An early guilty plea relieves victims of crime of the stress of impending proceedings and in particular the stress of giving evidence. In rape cases this is an extremely important factor. At an administrative level it saves the State the cost of a trial. In this case your plea has come after the complainant had given evidence and been cross examined for almost a day. The victim was clearly distressed during parts of her evidence. There is no justification for any allowance for the entry of your guilty pleas and I make no such allowance.
27. Accordingly making allowance for an 18 month deduction in respect of the matters referred to. You are sentenced on each charge to 14 years and 6 months imprisonment. Those terms are to run concurrently.
28. I then turn to the issue of a suspended sentence, as it is submitted by Mr Botleng that there are extreme and exceptional circumstances to justify the suspension of this sentence.
29. Mr Botleng has acknowledged the Court of Appeal authorities of Scott and Gideon that have referred to the need for immediate custodial sentences in rape cases other than in wholly exceptional circumstances and the fact that only in the most extreme



cases of sexual abuse could suspension ever be contemplated. Mr Botleng has referred to delay. That has already been taken into account in a calculation of the sentence. Mr Botleng also submits that the timing of the complaint was linked to a complaint by you against certain persons from Maewo for damaged property. There is absolutely no evidence of this at all and such a submission is disregarded. It is not appropriate for such submissions to be made without any clear evidential foundation.

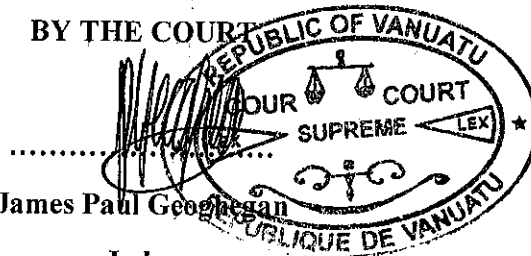
30. In short and with respect to Mr Botleng there is nothing extreme or exceptional in your case which would remotely justify the suspension of your sentence.

31. Accordingly Mr Boesel you are sentenced to imprisonment for 14 years and 6 months. Your sentence will be deemed to have commenced on June 26th 2017 when you were placed in custody on remand.

32. You have 14 days to appeal this sentence.

DATED at Luganville this 22nd day of August, 2017

BY THE COURT



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James Paul Geoghegan

Judge