

PUBLIC PROSECUTOR

-v-

SANDRINE NEMTEM

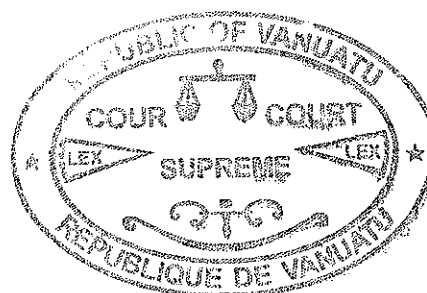
Coram: V. Lunabek – CJ

Counsel: Mr Simcha Blessing for Public Prosecutor
Ms Linda Bakokoto and Mr Henzler for Defendant

SENTENCE

1. Sandrine Nemten, you are charged with two separate informations of sexual intercourse without consent, unlawful sexual intercourse with child under 15 and Acts of Indecency, with a young person both dated 22 June 2017.
2. The complaints relate to two separate series of sexual offences committed on two children (minors) at Mae village, North East of Malekula in 2014 and 2015.
3. On 28th August 2017, you entered guilty pleas on offences of sexual intercourse without consent and Act of Indecency without consent, contrary to ss.90, 91, 97(2) and 98(a) of Penal Code Act [Cap 135] in criminal case no.1145 of 2017.
4. On 29th August 2017, you entered guilty pleas on offences of sexual intercourse without consent (count 1), unlawful sexual intercourse with child under 15 (count 2) and Acts of Indecency with a young person (count 3) contrary to ss.90, 91 and 98A of Penal Code Act, respectively on Criminal Case 1146 of 2017.
5. **Criminal Case No.1145 of 2017: Brief facts.**

A formal complaint was made against you for the offences of sexual intercourse without consent and act of indecency without consent. You are over 40 years of age. The complainant



is a 15 years old boy who attended year nine at College de Norsup on the North eastern part of the island of Malekula. The offence occurred in the year 2014. On the date of the incident in 2014, you invited the complainant to your home. You had dinner, when your son and grand son went to bed, you took that opportunity to advance your sexual gratification. You indecently touched the penis of that boy when he stood up to return to his home. The boy was surprised when you pushed your hands into his trousers and indecently touched his penis. The boy stated he had a strange feeling that he never had before in his life. When you indecently touched him you then told the boy to follow you in your kitchen. Inside the kitchen, you removed your clothes and lay naked on the floor with your leg wide open and spread apart. You also removed the boy's clothes. You then asked to sleep on top of you and choke on top of your vagina. You also instructed him to penetrate your vagina with his penis. The boy did so until he ejaculated and removed himself from you. The boy stated that when he removed himself from you he saw sperm on his penis.

Besides, you also demanded that the boy sucked your vagina. He refused but you forced him and he did suck your vagina.

In his police statement, the boy stated that he did not know what to do when he saw you naked on his sights.

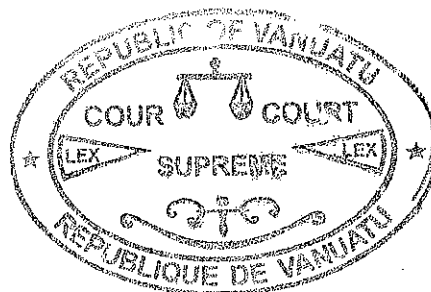
Besides, he stated also that after this first incident, you would indecently touched his penis after football whenever you met him.

Later the matter was revealed to the police where you were arrested and charged. You were cautioned and interviewed by the police where you denied the allegations made against you. You claimed that it was the complainant boy who initiated those sexual offences not you.

6. Criminal case No.1146 of 2017: Brief facts

A formal complaint was made against you for the offences of sexual intercourse without consent, unlawful sexual intercourse and acts of indecency with a young person.

You are over 40 years of age. You are from Mae village, North East of Malekula. The complainant is a boy who attended class five (5) at Mae Primary School. The offence occurred in year 2015 on Mae village. You initiated your scheme to sexual abuse on the complainant boy



by swearing and saying bad words at him such words as: "you fightem kok blo you" "you titi lo you."

On the first occasion you met the boy in the river where he was swimming. You saw him alone. You took that opportunity to sexually abuse him. You came to him and pretended that you were looking for river prawns. When you came close to him you indecently touched his penis and burdock. You then asked the boy to follow you to your home. The boy followed you to your home as you instructed him.

Once you were at your home with the boy, you started to touch his body. You then instructed the boy to have oral sex with you. The boy refused but later he was involved in the act as your forced him to do it. You then took all your clothes and his. You then forced the boy to penetrate your vagina while you lie naked on the floor. After sex, you instructed the boy to return home.

The second incident occurred still in 2015, when the boy met you on his way from the shop. You called him and asked him if you and him could tell stories. When he went to meet you, you indecently touched his penis. After sucking his penis, you told the boy to go back home.

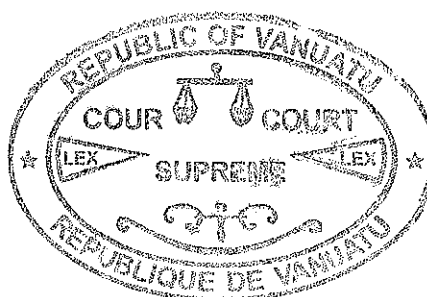
The last incident occurred on 1 November 2015. It was a Sunday morning, when you lied to your son to go to church. Instead, you went and asked the same boy to follow you to the plantation to check your cows. While you and the boy were in the plantation you indecently touched his penis while you were doing that act on that boy then fled the scene were your son chased him.

It was this incident that the offence was revealed publicly. Your son went to the boy's parents and told them that he saw the boy complainant and her mother in the plantation.

When the boy was asked by his parents about the incident, the boy revealed to them of the other incidents to them. That is when the matter was reported to the police.

You were arrested and later charged.

You were cautioned and interviewed by the police. You admitted sexual intercourse but you denied you initiated. You put the blame on the complainant.



7. On 31 August 2017, Mr Simcha Blessing acting on behalf of the Public Prosecutor and Ms Linda Bakokoto your lawyer, acting on your behalf, filed a Memorandum of Agreement to the following effect:

1) that the guilty pleas for (you) Defendant entered on 29 August 2017 with respect to:

a) 1 Count of unlawful sexual intercourse, contrary to section 97 (2) of the Penal Code [Cap 135]; and

b) 1 Count of Act of Indecency with a young person, contrary to section 98A of the Penal Code [Cap 135]; be vacated and (you) the Defendant be discharged accordingly.

8. On that basis, in Criminal Case 17/1146 you are only to be sentenced on Count 1 of Sexual intercourse without consent, contrary to ss.90 and 91 of Penal Code.

9. The Penal Code Act (Cap 135) prohibits agreed sanctions sexual intercourse without consent in section 90 and 91.

The sections provide as follows:

Any person who has sexual intercourse with another person –

(a) without that person's consent; or

(b) with that person's consent if the consent is obtained –

(i) by force; or

(ii) by means of threats of intimidation of any kind; or

(iii) by fear of bodily harm; or

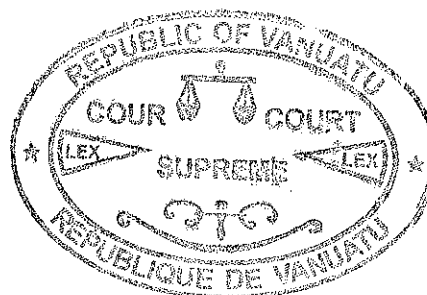
(iv) by means of false representation as to the nature of the act; or

(v) in the case of a married person, by impersonating that person's husband or wife; commits the offence of rape. The offence is complete upon penetration.

91. Punishment of Sexual Intercourse without consent

No person shall commit sexual intercourse without consent.

Penalty: Imprisonment for life.



10. In their submissions, the Prosecution refer the Court to guideline judgments on this type of offending in PP –v- Ali August of Criminal Case No.14 of 2000 which was referred to with approval by the Court of Appeal in Public Prosecutor –v- Scott [2002] VUCA 29; CAC 02-02 (24 October 2002).

11. The relevant part of the said guideline judgments is this:

“The offence of rape is always a most serious crime. Other than in wholly exceptional circumstance, rape calls for an immediate custodial sentence. This was certainly so in the present case. 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. That is a trite observation, but these in cases of rape vary widely from case to case.

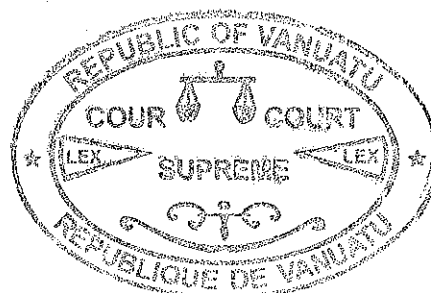
For rape committed by an adult without an aggravating or mitigating feature, a figure of five years should be taken as the starting point in a contested case. Where a rape is committed by two or more men acting together, or by a man who has broken into or otherwise gained access to a place where the victim is living, or by a person who is in a position of responsibility towards the victim, or by a person who abducts the victim and holds her captive the starting point should be eight years.

At the top of the scale comes the defendant who has committed the offence of rape upon a number of different women or girls. He represents a more than ordinary danger and a sentence of fifteen years or more may be appropriate.

Where the defendant’s behaviour has manifested perverted or psychopathic tendencies or gross personality disorder, and where he is likely, if at large, to remain a danger to woman for an indefinite time, a life sentence will not be appropriate.

The offence of rape should in any event be treated as aggravated by any of the following factors:

- (1) Violence is used over and above the force necessary to commit rape;*
- (2) A weapon is used to frighten or wound the victim;*
- (3) The rape is repeated;*
- (4) The rape has been carefully planned;*
- (5) The defendant has previous convictions for rape or other serious offences of a violent or sexual kind;*
- (6) The victim is subject to further sexual indignities or perversions;*
- (7) The victim is either very old or young;*
- (8) The effect upon the victim, whether physical or mental, is of special seriousness.*



Where any one or more of these aggravating features are present, the sentence should be substantially higher than the figure suggested as the starting point.

If the defendant pleads guilty, the sentence should be reduced by 1/3 depending on the circumstances, including the likelihood of a finding of not guilty had the matter been contested.

The fact that the victim may be considered to have herself in danger by acting imprudently (as for instance by accepting a lift in a car from a stranger) is not a mitigating factor, and the victim's previous sexual experience is equally irrelevant. But if the victim has behaved in a manner which was calculated to lead the defendant to believe that she would consent to have sexual intercourse, then there should be some mitigation of the sentence. Previous good character is of only minor relevance."

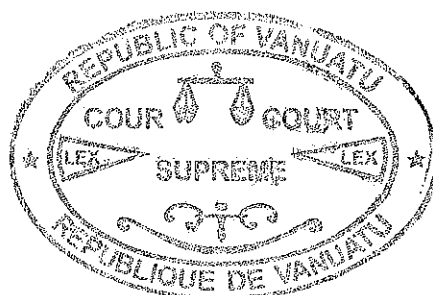
12. The court of Appeal in Scott emphasizes this point:

"There can be no room for any deviations from those fundamental and essential principles. The rights of women must be recognised maintained and upheld."

13. I apply the above principles in this case. Mrs Sandrine Nemten, you now understand that the rights of children (girls and boys) as the vulnerable people in the community must be recognised, maintained and upheld at all times,
14. The pre-sentence report reveals that you knew that what you did was wrong but you stated your husband was too old at the age of 102 and could not consent for sexual intercourse. This leads you to fulfil your sexual desires and commit the offences.
15. The court cannot accept this type of offending and the Court condemns your offending in the strongest terms. That condemnation of your offending behaviour is made by the Court for and on behalf of the Community to protect children in the community.
16. You are a mature woman and a mother, you should have known better to seek counselling to address your sexual desires.
17. The circumstances of the cases considered in this sentence, justify that you are going to receive a custodial sentence.
18. In the two cases here, not only you committed the offences as alleged but the following factors are the aggravating factors which constitute the basis upon which an appropriate starting point sentence will be assessed:

1. In the Criminal Case Number 17/1145

- a) Age disparity – the victim was 15 years old whilst you were 36 years at the time of offending. 21 years is the differential. It shows you are an



adult and mature woman. The victim was a child and he needs protection from you.

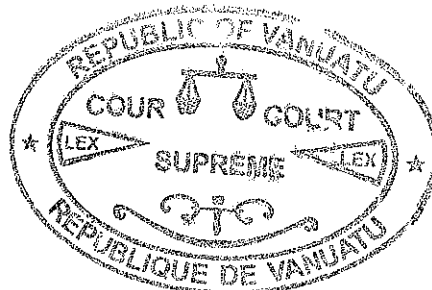
- b) Repetition of offending – you touched victim’s penis before the first intercourse and continued to indecently assault him the same way after football whenever you crossed paths with boy.
- c) The victim was subjected to further sexual acts apart penile intercourse. The victim sucked your vagina on your instructions.
- d) The effect upon the victim. The victim was almost a child at the time of offending who had not had been exposed to sexual acts, let alone oral and tremendous.
- e) You exposed the victim to sexually transmitted diseases. You were a sexually experienced woman. Your offending exposed a young innocent victim to sexually transmitted diseases.

2. In the Criminal Case number 1146 of 2017

- a) Age disparity – the victim was 13 years old whilst you were 37 years old at the time of offending. The age differential is 24 years. It shows you as an adult and mature woman. The child boy needs protection from you.
- b) Repetition of offending. You had sexual intercourse with the victim on two occasions in 2015.
- c) Degree of pre-meditation. There is evidence indicating some degree of premeditation on the first occasion when intercourse occurred and the last occasion when the victim was subjected to further sexual acts apart penile intercourse. The victim sucked your vagina on your instructions.
- d) The effect upon the victim. The victim was almost a child at the time of the offending who had not had not been exposed to sexual acts, let alone oral and penile intercourse. The trauma and physiology effect must have been tremendous. You exposed the victim to sexually transmitted diseases. You were a sexually experienced woman. Your offending exposed a young innocent victim to sexually transmitted diseases.

19. The prosecution submitted that the appropriate sentence in the two cases will be as follows:

- In criminal case No.1145 of 2017, the appropriate starting point sentence should be within the range to 6 and 8 years.



- In criminal case No.1146 of 2017, the appropriate starting point sentence should be within the range of 7 and 9 years imprisonment.
20. The next relevant question is whether the sentence in the two cases should be consecutive or concurrent.
 21. The facts to be taken into consideration are these:-

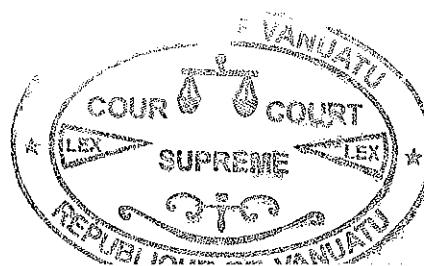
In both cases you committed these offences against two different victims at different times. The first series of sexual offending took place in 2014 and the second series of sexual offending took place in 2015.
 22. I accept the prosecution submission that the sentences should be made consecutive. The cumulative starting point should be between 12 – 16 years.
 23. Having considered so, it is part of the Court's duty to stand back and consider whether the total would produce an inappropriate total sentence and then to make appropriate adjustments.
 24. I am guided by the Court of Appeal judgment in *Kalfau –v- Public Prosecutor* [1990] VUCA 9; Criminal Appeal Case 05 of 1989 [26 October 1990] referred to by the Public Prosecutor in their submissions. The Court stated the general rule as follows:

The general rule in sentencing is that sentences for separate offences should normally be consecutive but this may be modified in two main ways. In the first case, a series of offences that form part of the same overall transaction and cause harm to the same person may be appropriately dealt with by a concurrent sentence.

*The second basis for modification is where, having passed a proper sentence for each of a number of offences, the aggregate effect of making them consecutive will produce an inappropriate total. Thus in any case where the Court has imposed a number of consecutive sentences, it should stand back, in effect, and look at the total. It was suggested in *Smith v R* (1972) Crim LR 124 that if, at such a point, the total is substantially above the normal level of sentence appropriate to the most serious offence for which the accused is being sentenced, the court should reduce that total to a level that is "just and appropriate."*

Even where the total does not offend against that principle, the court may in an appropriate case reduce it if, in the circumstances of a particular accused, the effect would be crushing.

It should finally be pointed out that the reduction of the total is best achieved by making some or all the penalties concurrent rather than to reduce the sentence for any individual offence below the proper level.



25. I consider adjustments and consider a total appropriate sentence of 11 years imprisonment as a starting points on both cases in respect of the offences of sexual intercourse without consent. You are also sentenced to 3 years imprisonment as a starting point for the offence of Act of Indecency without consent in Count 2 of the information in Criminal Case No.17/1145. Your total sentence of 11 years should be run concurrently with your sentence of 3 years on Act of Indecency. This means that you have a total sentence of 11 years imprisonment as you shall serve together and the same time with your imprisonment sentence of 3 years.
26. In mitigation, I take into account of the following factors: you are a first time offender. You say sorry for what you did. You do not have a chance to attend formal school. You have a good relationship with the chiefs and the community. You are a self-employed person in your gardens. You raised pigs and chicken as your source of income. You are a hard working mother. You admit what you did was wrong. You plead guilty to these offences, although, not at the earliest opportunity given to you by the Court. Your total sentence of 11 years will be reduced by 20%.
27. You remaining sentence term is 8 years. I reduce it further for 3 months to take into account of the custom ceremony you have performed to the victims and your family. I reduce it further by 3 months to reflect your other mitigating factors. You have an end sentence of 7 years and 6 months imprisonment.
28. You have already spent a period from 26 May 2017 to 1 September 2017 in custody making a total of 4 months in custody waiting for trial. I deduct also that period of 4 months to you remaining term sentence. Your final term sentence is 7 years and 2 months imprisonment.
29. I consider whether or not I can suspend that 7 years and 2 months imprisonment term.
30. The nature of your offending, the circumstances of your offending and the Guideline authorities are against a suspension of imprisonment term of this type of offending. They are so serious warranting for custodial sentence imposed to be served.
31. You are therefore ordered to serve your imprisonment sentence term of 7 years and 2 months with immediate effect.
32. You have 14 days to appeal this sentence if you are unsatisfied with it. The 14 days start today.

Dated at Lakatoro, Malekula this 1st day of September 2017

BY THE COURT

Vincent LUNABEK
Chief Justice

