

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

Criminal  
Case No. 18/959 SC/CRML

**PUBLIC PROSECUTOR**

**v**

**PHILIP HURI  
BARRY BATI  
RADOL HURI**

**Coram:** Justice D. V. Fatiaki

**Date of Sentence:** 19 November 2018

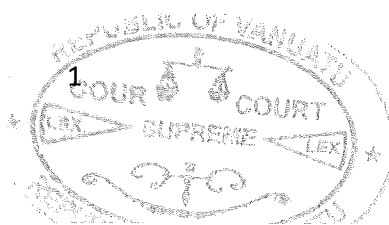
**Attendance:** Mr. K. Massing for the State  
Mrs. J. Aru for the 1<sup>st</sup> Defendant  
Mr. L. Tevi for the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants

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**SENTENCE**

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1. After several amendments, the final Amended Information dated 9 October 2018 charged the 3 named defendants separately and jointly with seven (7) offences as follows:
  - **Philip Huri** – separately on 2 counts of Unlawful Sexual Intercourse (Counts 1 & 2) and a joint charge with the second and third defendants of Unlawful Sexual Intercourse with the complainant who was under 13 years (**Count 3**);
  - **Barry Bati** – separately with an offence of Intentional Assault Causing Temporary Injuries (Counts 4 & 7) and an offence of Act of Indecency With a Young Person (Count 6). He was jointly charged with the first and third defendants in **Count 3** *ibid*);
  - **Radol Huri** – separately with Intentional Assault Causing Temporary Injuries (Count 5) and jointly with the first and second defendants, in **Count 3**.
2. At their arraignment on 12 October 2018, all 3 defendants pleaded “guilty” to the Counts on which each was charged separately and “not guilty” to **Count 3** which charged them jointly with Unlawful Sexual Intercourse with the complainant. A separate charge in **Count 4** of Intentional Assault Causing Temporary Injuries



against the second defendant only, was nollied by the prosecutor leaving Count 3 the only remaining charge which was tried.

3. At the end of the prosecution's evidence on Count 3, the Court upheld a "no case" submission and the defendants were found not guilty. The court then formally entered convictions on each defendants' guilty plea as follows:

- Philip Huri - Unlawful Sexual Intercourse With a Child under 13 years (Count 1)
- Unlawful Sexual Intercourse with a Child under 13 years (Count 2);

**Maximum Penalty: 14 years imprisonment**

- Barry Bati - Act of Indecency With a Young Person (Count 6);

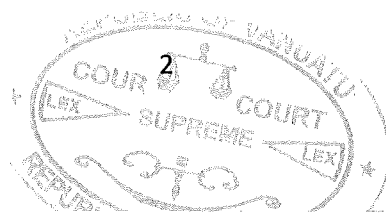
**Maximum Penalty: 10 years imprisonment**

- Intentional Assault Causing Temporary Injuries;
- Radol Huri - Intentional Assault Causing Temporary Injuries. (Count 5)

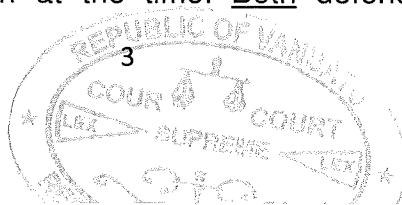
**Maximum Penalty: 5 years imprisonment**

Same day pre-sentence reports which had been ordered at the defendant's arraignment were provided and, after a reminder, sentencing submissions were eventually received from counsels. I am grateful for the assistance.

4. The largely undisputed facts of the case begins with the complainant leaving her home in **South West Bay, Malekula Island** in 2016 to live with the Huri family at **Lavatbala Village, North Pentecost**. She claims for the first year she was well cared for and then her mistreatment started in early 2017. On Easter weekend 2017 the first defendant who was living in the same house as the complainant, had sexual intercourse with her twice when she was still under 13 years of age (**Counts 1 & 2**). He also admitted having sexual intercourse with the complainant in October 2017.
5. In the October incident, although the complainant and the first defendant were caught "*red-handed*" in the act by the wife of the second defendant (**Asoii**), no charges were laid. Instead, the incident was reported to the second and third defendants who, quite unfairly and separately, administered summary whippings on the complainant only. Furthermore in the second defendant's case, he made the complainant strip naked before whipping her with a wooden branch.

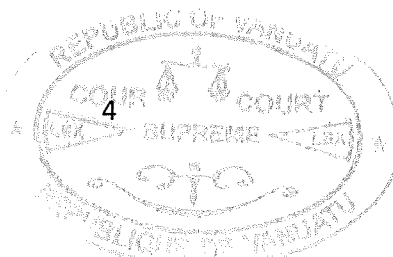


6. The whippings by the second and third defendants are alleged to have occurred in "*September 2017*" which is five (5) months after the Easter incidents (**Counts 1 & 2**) and a month before the last incident of sexual intercourse in early October 2017 which finally precipitated the whipping of the complainant. The amended September date which the prosecution accepted is not easily explained. Whatever the correct date, the whipping by the second defendant was videoed on a tablet by the third defendant and clearly shows that the complainant was completely naked during the whipping.
7. Although both defendants claim they were correcting or disciplining the complainant for having sexual intercourse with her "*brata*" and disrespecting the home in which she was staying in at the time, neither was related to her or had any guardianship responsibility for the complainant. I also note that the first defendant who was an active participant in the offending act, was not similarly whipped as he should have been, in fairness.
8. Furthermore, there can be no justification whatsoever for stripping the complainant naked before whipping her and for recording it on video. Both defendants accept as much in their police caution interviews when they said: "*no hemi no stret*" (second defendant) and "*Rabis spirit ikam long brain blo mi ia now mi tekem (video)*" (third defendant).
9. The offence of Intentional Assault Causing Temporary Injury which the second and third defendants are convicted of carries a maximum penalty of 5 years imprisonment. It is a relatively serious offence and in both defendants' cases, is aggravated by the use of a variety of instruments to whip the complainant. The non-whipping of the first defendant who was an active participant in the underlying offending act, is also self-evidently aggravating, as is, the third defendants' videoing of the complainant's whipping which borders on voyeurism.
10. In similar vein, the offence of Indecency With A Young Person carries a maximum penalty of 10 years imprisonment. In this case the gratuitous stripping naked by force of the complainant before being whipped by the second defendant is, objectively, "*an act of indecency*" which right-thinking members of society would denounce and condemn and which the second defendant accepts is so by his unconditional guilty plea.
11. The personal and mitigating factors of both defendants are – they have had little formal schooling. Both are married and brothers-in-law by marriage. Both maintain their households through subsistence gardening and earn money from planting cash crops (second defendant) and fishing (third defendant). Both are considered useful and helpful members of the community. Both are first offenders and both claim that they assaulted the complainant because what she did was "*unacceptable*" and disrespectful towards the family with whom the complainant was living with at the time. Both defendants frankly admitted

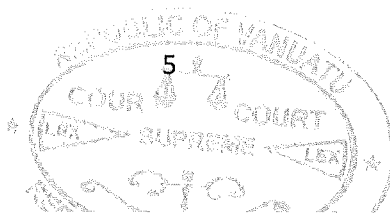


whipping the complainant in their police interviews and both pleaded guilty at the earliest opportunity. Both were remanded in custody for 3 months between 12 March and 19 June 2018. Additionally the second defendant expressed to the Probation Officer, his regret and deep sorrow for offending against the complainant in stripping her naked.

12. Both defendants also claim to have performed a custom reconciliation ceremony to their disrespected parents and to the complainant but, the complainant denied this and the probation officers who prepared the pre-sentence reports, were unable to contact the complainant's parents in Malekula to verify the defendants' claims. In that uncertain state, no discount will be given to the defendant on that score.
13. For the common offence of Intentional Assault Causing Temporary Injuries I adopt for each of the second and the third defendants, a starting sentence of 18 months imprisonment. For the offence of Indecency with a Young Person for which the second defence alone is charged and convicted, I adopt a concurrent starting point of 2 years imprisonment thus giving the second defendant an enhanced starting sentence of 2 years imprisonment for both the offences with which he has been convicted.
14. In respect of each defendant, given the close similarity in their respective mitigating factors, I deduct six (6) months giving a reduced sentence of:  $(18 - 6) = 12$  months imprisonment for the third defendant and  $(24 - 6) = 18$  months imprisonment for the second defendant. I reduce the sentences by a further one third ( $\frac{1}{3}$ ) in recognition of each defendants early guilty plea. The third defendant's end sentence is:  $(12 - 4) = 8$  months imprisonment and the second defendant receives an end sentence of:  $(18 - 6) = 12$  months imprisonment.
15. From those end sentences, I deduct the time that each defendant has already spent remanded in custody. The third defendant's end sentence is accordingly reduced to a final end sentence of:  $(8 - 3) = 5$  months imprisonment. The sentence of the second defendant is similarly reduced by 2 months giving him a final end sentence of  $(12 - 2) = 10$  months imprisonment. Each sentence is ordered to be served immediately.
16. Although defence counsel baldly submitted that your sentences should be suspended, I reject the submission for the following reasons: firstly, by your guilty pleas you both admit and accept that there was no possible excuse or justification for the public whipping of the complainant by you and secondly, because of the aggravated factors namely stripping the complainant naked by the second defendant before whipping her, and, the gratuitous videoing of the complainant's whipping by the third defendant.



17. I turn next to you **Philip Huri**. You have been convicted of 2 offences of Unlawful Sexual Intercourse with the complainant while she was still under 13 years of age and, at a time, when she was living as a guest in your parent's home. You were also living in the same house and you took advantage of that ready accessibility, to have sexual intercourse with the complainant on 2 separate occasions.
18. You claim that both incidents were consensual, but, the law clearly states that consent is no defence to the charge. In other words the law strictly prohibits sexual intercourse with a girl under 13 years of age under any and all circumstances even if she is acting foolishly or "*harassing*" you as you claimed to the probation officer.
19. I accept that you yourself were not yet 15 years of age at the time of your offending and that you did not know it was an offence to have sexual intercourse with a girl who is under 13 years of age. But you were the elder person and being in your parent's home, you had relatively more power and control over the situation.
20. You claim not to be aware of the complainant's age but that also is not a defence to the charge and in any event, you acknowledge that the complainant calls you: "*brata*" (brother). You plainly did not treat her like a brother would.
21. Philip Huri your offending is aggravated by its repetition, and went beyond sexual experimentation. It constituted sexual exploitation of a young defenceless and vulnerable girl who at the time, was a guest in your parent's home and far from her own parents and family who live on the Island of Malekula.
22. Your mitigating factors Philip Huri includes your relative youth at the time of offending, your early guilty pleas, and this being your first convictions. I also accept that you lacked knowledge and insight into your offending and you were in custody on remand for 3 months which is the equivalent of serving a 6 month prison sentence.
23. Philip Huri for your offending on Counts 1 & 2, I adopt a starting sentence of 5 years imprisonment on each count. I deduct 12 months for mitigating factors including your relative youth and the fact that you have never attempted to deny your part in the offences. This is also your first conviction and you are the only child living with and helping your elderly parents. From the resulting 4 years imprisonment I deduct one third ( $\frac{1}{3}$ ) in recognition of your early guilty pleas leaving an end sentence of  $(48 - 16) = 32$  months imprisonment. The end sentence must be further reduced by the 3 months you were remanded in custody between February and May 2018 giving a final end sentence of:  $(32 - 3) = \underline{29 \text{ months imprisonment}}$  on each count to be served concurrently.



24. I turn finally to consider whether or not I should suspend your sentence. After careful consideration I am satisfied that your sentence Philip Huri should be suspended for a term of 3 years for the following reasons:
- (i) At your young age you now have a criminal record;
  - (ii) A suspended sentence of imprisonment despite its suspension remains a custodial sentence;
  - (iii) I have been moved by your relative youth in that you have just turned 15 years of age;
  - (iv) Section 54 of the Penal Code directs that: "... a person under 16 years of age is not to be sentenced to imprisonment"; and
  - (v) You have already served the equivalent of a 6 months prison sentence which on remand.
25. Philip Huri what this suspended sentence means is that you will not be sent to prison today but, if you commit another offence within the next 3 years, then you will be required to serve this sentence of 29 months imprisonment in addition to any other sentence that may be imposed on you for your re-offending. Whether that happens depends entirely on how you behave in the next 3 years. If you stay out of trouble as I expect you will, then you will not be required to serve this sentence of imprisonment. But, if you abuse this Court's leniency and commit another offence, then, you can expect little mercy from the Court.
26. To help you remain within the law and increase your knowledge and awareness, I order you to serve a Sentence of Supervision of 12 months with a special condition that you actively participate in and complete any rehabilitation programme(s) that the probation service requires you to undertake especially modules on sexual offending, victim awareness and "*Jios blong good laef*".
27. Each of the three defendants is advised that he has 14 days to appeal his sentence if he does not agree with it.

**Dated at Luganville, Santo, this 19<sup>th</sup> day of November, 2018.**

**BY THE COURT**

**D. V. FATIAKI**

**Judge.**

