

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

Criminal Case No. 18/1172 SC/CRML

BETWEEN: Public Prosecutor

AND: BPT
Defendant

Before: Justice G.A. Andrée Wiltens
Hearing: 25 May 2018
Counsel: Ms L. Lunabek for the Public Prosecutor
Mr L. Moli for the Defendant

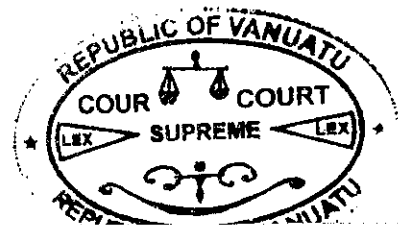
Sentence

A. Introduction

1. Both the defendant and the complainant, due to their ages, have name suppression.
2. BPT has pleaded guilty to unlawful sexual intercourse, contrary to section 97(2) of the Penal Code [Cap 135]. The maximum sentence for this offence is a term of 15 years imprisonment.

B. The Facts

3. On 26 December 2017 BPT was 16 years of age; CA was 14 years of age.
4. At about 8pm that evening, BPT instructed CA to follow him out from her aunt's home where they had been watching movies into some bushes. He further instructed her to remove her skirt, but CA indicated that she was afraid she may become pregnant. BPT assured CA she would not, and again instructed her to take off her skirt. CA did as she was told and removed



lay on top of CA and inserted his penis into her vagina. At the conclusion of sexual intercourse, BPT instructed CA not to tell anyone. However CA did tell her mother, which led to a report to the police and the arrest of BPT. When questioned about the matter BPT admitted having sex but said he had not used any force.

C. Submissions

5. Ms Lunabek referred the Court to the well-known and oft quoted precedent authorities dealing with the principles and purposes of sentencing as follows:

- *PP v Kalosil* [2015] VUSC 149; and
- *R v Engert* (1995) 84 Crim R 67.

6. The prosecution pointed to other authorities as to the appropriate level of sentencing:

- *PP v Langbell* [2005] VUSC 9
- *PP v Gideon* [2002] VUCA 7
- *PP v Vuti* [20012] VUSC154
- *PP v Tarising* [2014] VUSC73
- *PP v Nasip* [2010] VUSC 6.

7. Mr Moli further referred the Court to:

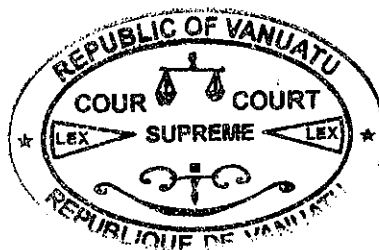
- *PP v Jonah* Criminal Case no. 17/3062
- *PP v Naline* Criminal Case no.16/221
- *PP v Daniel* [2014] VUSC 108
- *PP v John* [2016] VUSC 15.

8. The cases indicate a common start point for sentence for this type of offending is 2 imprisonment; and suspension of sentence has been ordered on numerous occasions primarily due to lack of previous convictions and youth.

D. Starting Point

9. The prosecution pointed to the following aggravating factors:

- The age of CA
- The offending occurring at night, and



- Lack of obvious consent by CA.

10. These are not aggravating factors that make the offending more serious:

- by law the complainant must be between 13 and 15 years of age, otherwise a different offence would be charged
- Whether the offence occurs by night or day cannot aggravate matters, and
- Consent is not an issue with this charge.

11. The prosecution submitted that the appropriate starting point in terms of *PP v Andy* [2011] VUCA 14 was 5 years imprisonment, relying apparently on the authority of *PP v Vuti*. Ms Lunabek does go on to submit that either a suspended sentence or a combination of supervision and Community Work are appropriate. Mr Moli suggested an end sentence of 12 months supervision.

E. Personal Factors

12. In terms of step 2 of *PP v Andy* Mr Moli made the following points:

- BPT is only 16 years of age and residing parents
- BPT has no previous convictions
- BPT co-operated fully with police enquiries
- BPT is remorseful
- The offending occurred while BPT and CA were "in a relationship". Mr Moli stressed that not only did CA not resist, but she actively consented to what occurred.

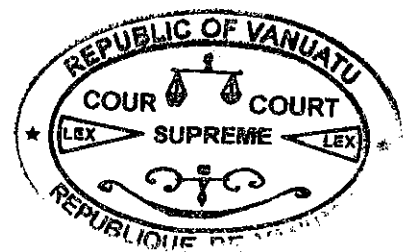
F. Pleas

13. BPT pleaded guilty at the first available opportunity. The discount available to him for that is a maximum of one-third of the sentence: see *PP v Andy*.

G. Sentence

14. The main purposes and sentencing principles in this type of offending are to:

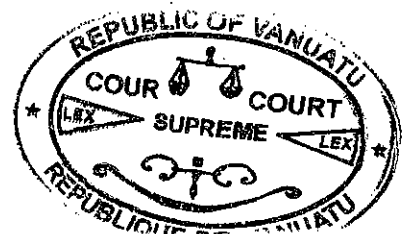
- hold the offender accountable for his conduct and the harm done
- promote a sense of responsibility for the harm done
- provide for reparation



- denounce the conduct
 - deter the offender and the public at large from this type of behaviour
 - protect the community
 - assist in rehabilitation and re-integration
 - take into account the gravity of the offending
 - take into account the seriousness of the offending in comparison with other offending, and
 - consider consistency of sentencing and parity of sentences.
15. I cannot see where Ms Lunabek finds within *PP v Vuti* a statement to the effect that the tariff for this type of offending is 5 years imprisonment. That seems to me to be too condign, and has perhaps come from a misreading of *PP v Langbell* – that involved sentencing for rape. Both counsel have also referred me to section 54 of the Penal Code, which deals with the sentencing of those less than 16 years old. That has no application here.
16. On the basis of parity with the majority of the various authorities provided, I set the start point for BPT's sentence at 24 months imprisonment.
17. BPT's personal circumstances dictate some reductions from that starting point. Firstly, I accept that he has co-operated with the authorities during the investigation. He has shown remorse for his actions and he has no previous convictions. He is still young with very strong prospects of rehabilitation. These factors combine to reduce the start point for sentence to 18 months imprisonment.
18. Lastly, BPT is entitled to one-third further discount for his prompt plea.
19. The end sentence is therefore set at 12 months imprisonment.

H. Suspension

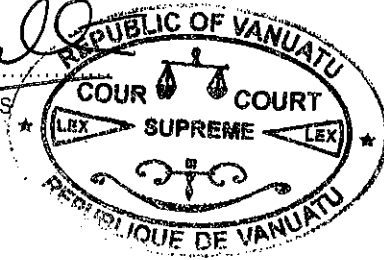
20. Section 57(1) of the Penal Code requires the Court to consider whether the end sentence should be imposed immediately or suspended. The Court has jurisdiction to suspend the sentence if immediate incarceration is not appropriate:
- In view of the circumstances,
 - In particular, the nature of the crime, and
 - The character of the offender.
21. In my analysis, BPT's sentence must be suspended – for the reasons articulated previously relating to his personal factors. To not suspend the sentence would be a harsh punishment for a young man with no previous convictions.



22. The sentence of 12 months imprisonment is accordingly suspended for 2 years. BPT needs to understand that he needs to remain offence free for 2 years from today, or he will be incarcerated for 12 months.
23. Suspending a sentence is often accompanied by a direction that the offender be subject to a period of supervision by the Probation service, to ensure that re-offending risks are minimised. I am satisfied that is warranted in this instance. BPT is therefore additionally ordered to undergo 15 months of probation supervision.
24. BPT has 14 days to appeal this sentence if he disagrees with it.

Dated at Port Vila this 25th day of May 2018
BY THE COURT

Gandhi Ull
Justice G.A. Andrée Willens

The seal of the Republic of Vanuatu Supreme Court is circular. It features a central scale of justice. The words "REPUBLIC OF VANUATU" are written along the top inner edge, and "REPUBLIQUE DE VANUATU" along the bottom inner edge. In the center, the words "COUR SUPREME" are written, with "COUR" on the left and "SUPREME" in the middle. "COURT" is written on the right. Two small triangles containing the word "LEX" are positioned on either side of "SUPREME". The seal is flanked by two stars.