

PUBLIC PROSECUTOR
V
NIGEL CHARLES

Coram: *Hon. Chief Justice V. Lunabek*

Counsel: *Ms Marie Taiki for the Public Prosecution*
Ms. Barbara Taleo for the Defendant

Date of Plea: *22 August 2022*

Date of Sentence: *18 September 2023*

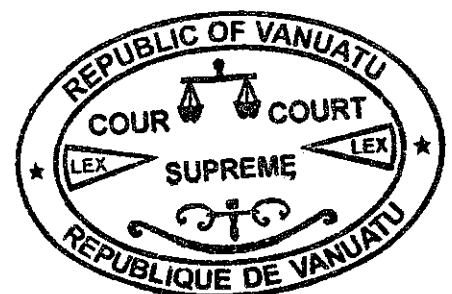
SENTENCE

Introduction

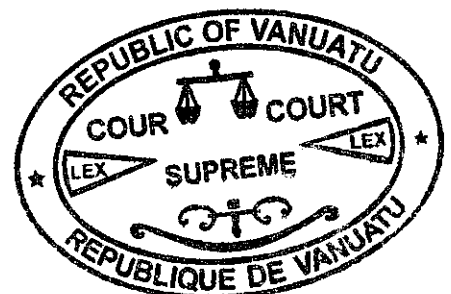
1. Mr. Nigel Charles ("*Mr. Charles*"), you appear for sentence today. On 22nd August 2023, you entered guilty pleas and were convicted on two counts of sexual intercourse without consent, contrary to Sections 90 and 91 of the Penal Code (the Act), and one count of intentional assault causing damage of a permanent nature, contrary to Section 107(c) of Penal Code.

Facts

2. Mr. Charles, you are from Vanualava in the Banks Groups of Islands. You are 35 years old at the time of the offense. The complainant and you are in a de facto relationship at the time of the offending and, you both resided together in the Nambatri area at that time.
3. The complainant woman is from an island of Torres Groups of Islands. She has three children of her own (16, 15 and 8-year-old respectively) from a previous relationship.
4. Sometime in 2020 the complainant was residing on Lamap, Malekula Island when she began communicating with you, Mr. Charles through mobile phone.



5. On 7 October 2021, Mr Charles, you were released on Parole. In November 2021, the complainant moved from Malekula to Port Vila, Efate. The complainant and you rented a guesthouse at Erakor. She found life in Port Vila difficult and she was struggling but you told her that you traveled through the Regional Scheme Employment (RSE) program.
6. In December 2021, the complainant became aware that you were an ex-detainee on parole when she started following you to the Correctional Department for you to sign in. She believed you were a changed man and chose to continue her relationship with you.
7. In the same month of December 2021, the complainant and you moved and rented a house in the Nambatri area around Le Lagon.
8. In January 2022, the complainant noticed your behaviours changed, she observed you became more aggressive and more violent.
9. On different occasions, from the month of January 2022 to December 2022, you would ask the complainant for sexual intercourse and you would penetrate the complainant's anus, the complainant would always reply to the effect that "*she was not someone else's wife but she is your wife, why would you do that type of action on her?*". On those different occasions, you would insist and force the complainant by threatening her that you are an ex-prisoner and that you could end her life. Even though the complainant did not consent to the sexual intercourse, she was afraid that you would harm her and so she would reluctantly allow you to penetrate her anus with your penis.
10. On one occasion in March 2023, she cannot recall the exact date but recalls she was at home at Nambatri, you had been drinking alcohol and you returned home. The complainant was asleep on the bed and you asked her for sex, she accepted thinking that you would have normal sexual intercourse with her, while you were having sexual intercourse with the complainant you told the complainant that you wanted to have sex by penetrating her anus with your penis. The complainant refused. The complainant told you that she was your wife and she was not someone else wife, she did not want you to spoil her in that way.
11. You did not listen to the complainant and proceeded to penetrate your penis into the complainant's anus when you knew that she was not consenting.
12. Later that night when the complainant went to the toilet, she noticed bleeding from her anus.
13. On 29 March 2023 in the evening the complainant and you were at home. You were listening to music playing loudly and the complainant told you not to play secular music instead you should play religious music when you heard her, you swore at her calling the complainant "*kokmit*". The complainant replied saying that "*ie stret name blong mi kokmit be yu kan face*". When you heard

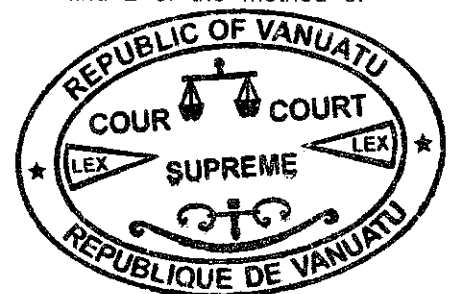


the complainant's words, you took a wooden broom and whipped the complainant's left hand until the broom broke, the complainant could sense that her hand felt broken.

14. After the physical assault on her hand, her hand got injured, and the complainant still had to do everything at home, she cooked, and cleaned, and she had to serve her food with her other good hand. The complainant's daughter helped to cook and wash. You did not feel sorry for the complainant or help around in the house.
15. The complainant did not go to the hospital until she felt her hand was too painful, she went to the hospital with her daughter. The complainant's hand had to be cemented.
16. A medical examination report was made on the complainant on 13 June 2023 based on the medical examination carried out by Dr Richie Ala who found the:
 - Lefthand Deformity/pain;
 - Xray shows distal fracture of the ulnar boneAs a result of his findings in his opinion, there was physical assault likely with a blunt object.
17. You were arrested and cautioned on 15 June 2023. You understood your rights. You stated in your record of the interview that (in answer to Question 29) everything the complainant alleged and the police read out to you was true. The complainant refused for you to penetrate her anus but you did not listen. You admitted that you whipped her hand with a wooden broom.
18. On 15 June 2023, I take it, that you were taken back into custody as you have breached your parole requirements by re-offending and thus, you were put back into custody to serve the remaining balance of your previous terms of imprisonment.

Sentence Start Point

19. Sexual intercourse without consent carries a maximum penalty of imprisonment for life. The maximum penalty for the offense of intentional assault causing damage of a permanent nature is imprisonment for 10 years. The offenses are very serious in nature.
20. I note that in this instant case, there is more than one charge and that the defendant was on parole when he committed the same type of offense of sexual intercourse, he was imprisoned in 2018.
21. I consider that an overall assessment is required and, I will do so on a concurrent basis using the two steps approach adopted in the Judgment of the **Court of Appeal in Philip v Public Prosecutor [2020] VUCA 40; Criminal case No. 955 of 2020 (17 November 2020)** to avoid any risk of double counting exercise in applying mechanically Steps 1 and 2 of the method of

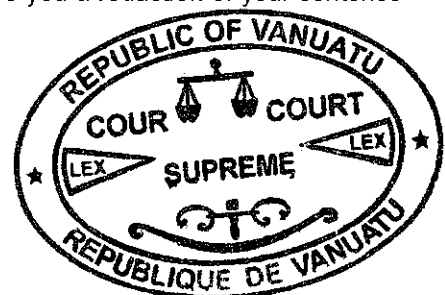


sentencing in **Andy v Public Prosecutor [2011] VUCA 14**. Reference is also made to the authority of **Moses v R (2020) NZCA 296**.

22. I will assess the criminal culpability of the offending by considering the maximum sentences available, and then, I will factor in the aggravating and mitigating factors of the actual offending of this case.
23. In this case, the maximum term available is a term of life imprisonment. There are no mitigating features of the offending. However, there are aggravating factors based on the authority of *Scott v Public Prosecutor [2002] VUCA 20*, as follows:
- There were breaches of trust involved in respect to your de facto wife;
 - The offending took place in your home, a place where your wife ought to be able to feel safe;
 - The force used is over and above that necessary to achieve non-consensual sexual intercourse;
 - The effects of the crime on the victim, who was emotionally traumatized, and the pain and suffering on her body – blood coming out of the victim's anus;
 - Threats that were an integral part of the offending (you made known to the victim that you were an ex-prisoner and could end her life if she refused you penetrating her anus with your penis).
 - The repeat nature of the offending (involving count 1 and count 2).
24. I take all these matters into account, on a global basis taking all the offenses, the appropriate sentence starting point for you, Mr Charles, is 8 years imprisonment.
25. I reject the prosecution submissions that the sentence start point of this case is between 10 years and 15 years imprisonment.
26. I have considered comparable cases such as *PP v Boesaleana [2020] VUSC 211*, although, the facts, in that case, were more serious than the present case as it involved 3 charges and 2 complainants (victims) (Wife and daughter) where the Judge imposed a sentence start point of 9 years imprisonment, the same reasoning and rational were advanced.

Personal Factors

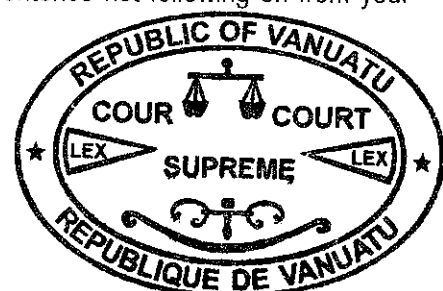
27. Mr Charles, you pleaded guilty to all 3 charges at the earliest available opportunity. This meant that your de facto wife would not give evidence, and it was an acknowledgment of the wrongdoing, coupled with the saving of time for the Court and expense, I give you a reduction of your sentence by 25% for this factor.



28. I do not treat this as remorse, given that this is a repeat offense of a similar kind in a more serious type than in your previous incarceration. The maximum reduction for prompt guilty pleas should be provided when the remorse is a genuine one.
29. It is noted that there is a need to calculate a discount for prompt guilty pleas at this point of the sentencing exercise, to have a less restrictive outcome appropriate in fairness to you, Mr Charles.
30. Mr Charles, you have relevant previous convictions. In August 2018, you were convicted of offenses of aggravated sexual intercourse without consent, contrary to sections 89 (a) and 97 A (e), (d), and one count of indecency with a young person, contrary to section 98A of the Penal Code [Cap 135]. This offending was against your step-daughter who at the time was between 12 years.
31. Mr Charles, you are not to be further punished for your previous offending, but an uplift to your sentence is required. Furthermore, this current offending occurred while you were serving parole. These two factors require an uplift of sentence in the order of 16 months imprisonment.
32. The PSR reports that Mr Charles, you have a pattern of offending. The main contributing factor to your offending was your inability to control your sexual desires that led to your offending.
33. You are 35 years of age at the time of offending in the current offending. You reported being under the influence of alcohol when you committed the offenses. You felt sorry for your actions and that you will not re-offend again in the future.
34. There is nothing in your circumstances that mitigates your offending.

End Sentence

35. Mr Charles, you are accordingly sentenced to 7 years imprisonment for each of the offenses of sexual intercourse without consent concurrently, and 3 years imprisonment for the offense of intentional assault causing damage of a permanent nature. The sentences are to be served concurrently. This means that you shall serve a term of 7 years imprisonment in total for all offenses.
36. The sentences are to run from 16 August 2023. Mr Charles, having been released on parole, you have been recalled and you are required to complete your previous sentence by the Community Parole Board. That sentence expired on 16 August 2023. You were remanded in custody pending your sentence in this case. There is no justification for your sentence not following on from your previous sentence.



37. The nature and seriousness of the offending do not justify that suspension of any or all of the sentences is appropriate. The principle of deterrence and accountability for your actions are the paramount sentencing principles in this instance. The public needs to be protected case, from you as a recidivist offender. Rehabilitation is not a priority consideration in your case, Mr. Charles.
38. Mr Charles, you have 14 days to appeal this sentence if you are unsatisfied with it. The 14 days starts at the date of this sentence.

Dated at Port Vila, this day of September 18, 2023

BY THE COURT



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Hon. Chief Justice Vincent LUNABEK

