

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

CRIMINAL CASE NO.16/2281/SC/CRML

PUBLIC PROSECUTOR

V

KEVIN VIRAKIH

Coram: Justice Mary Sey

**Counsel: Mr. Simca Blessing for the Public Prosecutor
Mr. Eric Molbaleh for the Accused**

Date of Decision: 15 December 2016

SENTENCE

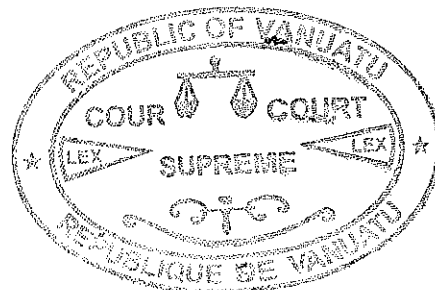
1. **Kevin Virakih**, you appear for sentence today having been convicted, after trial, of the offence of sexual intercourse without consent contrary to sections 89A, 90 & 91 of the Penal Code [Cap 135]. The facts upon which you were found guilty and convicted are contained in the judgment on verdict delivered on 8 November 2016 and need not be repeated in detail. Suffice to say that on or about 4th of January 2016 at Port Vila, you had sexual intercourse with the complainant Melinda Virakih without her consent.
2. The offence of sexual intercourse without consent is defined under section 90 and prohibited and punishable under section 91 of the Penal Code as follows:

"90. 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 sexual intercourse without consent.

91. *No person shall commit sexual intercourse without consent.*

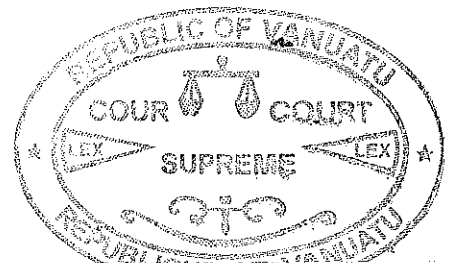
Penalty: Imprisonment for life."

- 3. Undoubtedly, the seriousness of the offence is reflected in the penalty of imprisonment of life.
- 4. As the Chief Justice remarked in **Public Prosecutor v Ali August [2000] VUSC 73; Criminal Case No 014 of 2000 (28 November 2000):**

"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.

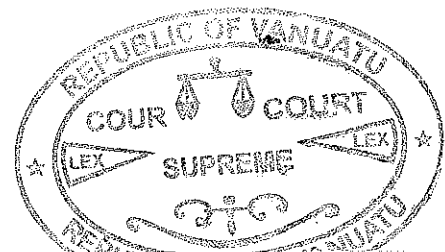
For rape committed by an adult without an aggravating or mitigating feature, a figure of five years should be taken as the starting point in a contested case....."

- 5. The State urges me to rely on sentencing guidelines for the offence of sexual intercourse without consent set out by the Court of Appeal in **Prosecutor v Scott [2002] VUCA 29**, I note in particular the Court's pronouncement that:



"The time has long come when all men must know and understand that women have the right to control what they do with their bodies and what sexual activity they involve themselves in. If they cannot or will not recognise that fundamental position then they cannot remain within the community."

6. **Kevin Virakih**, in sentencing you I adopt a starting point of 4 years imprisonment. Taking into account the family situation and the traumatic effect your offending has on the complainant who is your adopted sister, there is need for a further uplift of your sentence. Mr. Blessing has drawn my attention to aggravating factors in your offending such as your persistent sexual harassment of your victim culminating in the act of sexual intercourse without consent. Your culpability is furthermore aggravated by your breach of trust and abuse of your position in your relationship towards her as an adopted brother.
7. It is beyond dispute that you have succeeded in ruining the complainant's relationship with her adoptive parents who are also your parents. I therefore deem it necessary to add another 1 (one) year to your sentence to reflect these aggravating factors, thus bringing the total sentence to 5 years. You are not entitled to one third reduction which reflects the benefit of an early guilty plea because you protested your innocence and you put the complainant through the ordeal of testifying and thereby reliving the horrific moments of the 4th of January 2016.
8. With regards to your mitigating factors, I have had the benefit of receiving a pre-sentence report by the probation services as well as submissions from your defence counsel Mr Molbaleh. I note that you are a first time offender and you cooperated with the police during the investigation. You are 27 years of age and you have been residing at Fresh Water area where you look after the family business (Rental Apartments). You have a daughter who is living with her mother. You live under the community care of Chief Tahi Vuti who has stated that you are a very active youth in the community. You are a young man who could not complete college due to lack of school fees. You grew up with your biological mother as your biological father died few years ago. You are interested in small business such as managing rental apartments and selling



kava and you have skills in gardening and planting crops and kava. I give you an allowance of 1 (one) year deduction for the fact that you are a first time offender, your good standing prior to your offending and your own hardworking for your community and family and for the remorse you are said to have shown including an expressed willingness to perform a custom reconciliation.

9. In arriving at your end sentence, I am mindful of the underlying principles enunciated by the Court of Appeal in **Public Prosecutor v Kevin Gideon [2002] VUCA 7** that *“men must learn that they cannot obtain sexual gratification at the expense of the weak and the vulnerable. What occurred is a tragedy for all involved. Men who take advantage sexually of young people forfeit the right to remain in the community.”*
10. **Kevin Virakih**, considering the circumstances of your offending, I find that an end sentence of 4 years imprisonment without suspension is appropriate in this case. You have served a pre-custodial period which should be deducted in computation of time.
11. You have 14 days to appeal against this sentence if you do not agree with it.

DATED at Port Vila, this 15th day of December 2016.

BY THE COURT



M.M.SEY
Judge

