

PUBLIC PROSECUTOR VS- KEN TABERA

Coram: *Mr. Justice Oliver A. Saksak*

Counsel: *Ken Massing for Public Prosecutor
Jane Tari for Defendant*

Date of Pleas: *18th April 2017*

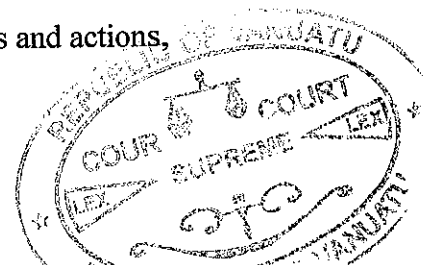
Date of Sentence: *21st April 2017*

SENTENCE

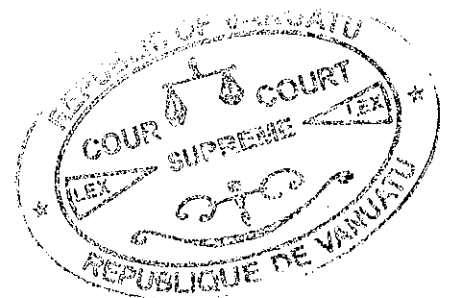
1. Ken Tabera, you are for sentence today for having pleaded guilty on 18th April 2017 to-
 - a) 3 Counts of sexual intercourse without consent contrary to sections 90 and 91 of the Penal Code Act Cap.135 (the Act) – Counts 1, 3 and 5, and
 - b) 2 Counts of incest contrary to section 95 (1) (a) of the Act- Counts 4 and 6.

An alternative charge of unlawful sexual intercourse (section 97 (1)) laid under count 2 was withdrawn by the Prosecution on 18th April. The Order issued on 18th April records that position.

2. Following your guilty pleas in relation to the five charges in Counts 1, 3, 4, 5 and 6, you are hereby accordingly convicted on all five charges.
3. The maximum penalty for the offence of sexual intercourse is life imprisonment. Parliament has recently increased the maximum penalty for incest from 10 to 15 years.
4. These very high penalties show the seriousness of these offences. The Court bears this in mind when assessing your sentence which must serve the following purposes-
 - a) Mark the seriousness of your offendings,
 - b) Mark public condemnation or disapproval of your conducts and actions.



- c) Deter you and other like-minded persons,
 - d) Protect the young, the weak and vulnerable and the public generally,
 - e) Punish you adequately.
5. The above are the sentencing purposes well established at common law. The cases cited by Mr Massing are R v Radich [1954] NZLR 86, Veen.v. The Queen (No.2) [1988] HCA 14 [1988] 164 CLR 465. Those principles have been adopted by the Court of Appeal of Vanuatu in classic cases of PP.v. Scott [2002] VUCA 29 and PP.v. Gideon [2002] VUCA 7.
6. In assessing and considering your sentences the Court will adopt the principles set out in the above cases as well as the method set out by the Court of Appeal in PP.v. Andy [2011] VUCA. Both the Prosecution and defence counsel have relied on those cases in their written submissions.
7. The facts are contained in the Brief of Facts filed by the prosecution on 11 April 2017. You have agreed to those facts. Relevantly they can be summarised in the following manner:-
- a) Your victims were and are 2 young girls, members of your family by names of TB and PT.
 - b) TB was almost 6 years old at the time of first offending in May 2015 and PT was almost 4 years old at the time of the first incident and 4 years 7 months old at the time of the second incident.
 - c) The first victim TB is your niece and the second victim PT is your biological daughter.
 - d) On the first victim TB the offending against her started in May 2015 at Aron baratu village, North Pentecost in the sleeping room of your house. Jarina Woi went into the house and saw you sucking TB's vagina. You were angry and assaulted her. You threatened to beat her to death if she reported you to anyone.
 - e) In February 2016 you committed the offence again by sucking the vagina of PT, your daughter. Again Jarina Woi saw what you did at the time but she fled the scene and you further threatened her to death.



f) Finally on 24th November 2016 you committed the offence by inserting your finger into PT's vagina.

8. Sexual intercourse is defined in section 89 A of the Act (as amended) to mean:

a) "the penetration, to any extent, of the vagina or anus of a person by any part of the body of another person, except of that penetration is carried out for a proper medical purpose or is otherwise authorised by law...",

b)N/A,

c)N/A, or

d) The licking, sucking or kissing, to any extent, of the vulva, vagina, penis or anus of a person, or....."

(My underlining for emphasis)

9. Incest is prohibited by section 95 of the Act which states-

1. " Incest is sexual intercourse between-

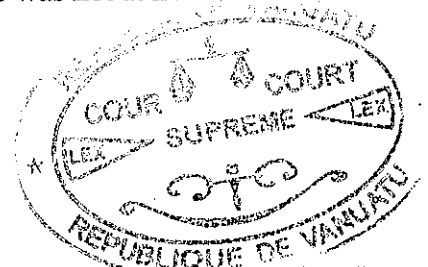
(a) a parent and child (including an adopted child).."

(My underlining for emphasis)

10. With those given definitions, therefore your actions or conducts on TB in May 2015 amounted to sexual intercourse without consent. And further your actions or conducts on PT on 14th February 2016 and on 24th November 2016 amounted to sexual intercourse without consent and also to incest.

11. From the facts as provided, the following aggravating features are obvious-

- a) There were 2 separate victims,
- b) The victims are young girls of 4 years 7 months and 6 months(at offendings)
- c) There is an age disparity of about of about 21 and 23 years between you and them, you being 27 years old.
- d) Repetition of offences on the daughter PT,
- e) Serious breach of trust,
- f) Impact, mentally and physically on the victims, and
- g) Some degree of planning occurring only when your wife was not at home.



12. Considering all those facts and features together, your offendings fall within the higher end of the scale for these offences. It is clear from the authorities of Scott and Gideon the only appropriate penalty this Court will impose is to be a custodial sentence.

13. I consider that the lead offence is sexual intercourse without consent. And as it happened with two different and very young victims on different dates with repetitions on the second victim, the starting point shall be 12 years imprisonment on each count to be served concurrently.

And for incest, the starting point shall be 6 years imprisonment on each count to be served concurrently with the sentence for sexual intercourse without consent. There will be no uplift.

14. You are therefore sentenced as follows:-

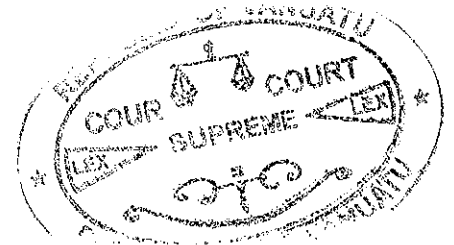
- a. For sexual intercourse without consent- Counts 1 , 3 and 5- Imprisonment for 12 years on each count made to run concurrently.
- b. For incest- Counts 4 and 6- 6 years imprisonment to run concurrently with the sentence for sexual intercourse without consent.

The total concurrent sentence is therefore 12 years imprisonment.

15. I now consider your mitigating factors as per your pre-sentence report and your defence submissions. First, the Court allows 1/3 reduction for guilty pleas at first opportunity. Second, the Court notes the other mitigating factors such as-

- a) Clean past with no previous criminal record,
- b) Good co-operation with police during investigations,
- c) Custom reconciliation showing remorse , and
- d) Pre-custodial period from 26th February 2017.

For those factors in (a) to (c) together, a deduction of 4 months is made. The end sentence is therefore 7 years and 8 months imprisonment.



And to take account of the factor in (d) above, the sentence of 7 years and 8 months shall be backdated to 26th February 2017.

16. Ken Tabera, the Court now sentences you to an end sentence of 7 years and 8 months imprisonment as a concurrent sentence for all the charges in Counts 1, 3, 4, 5 and 6. Your end sentence is deemed to have commenced on 26th February 2017 when you were first taken and remanded in custody.

17. That is the sentence of the Court. You have a right to appeal against this sentence within 14 days if you are not happy with it.

DATED at Luganville this 21st day of April 2017

BY THE COURT



OLIVER.A.SAKSAK

Judge

