

IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU

Criminal
Case No. 17/3085 SC/CRML

BETWEEN: Public Prosecutor

AND: Joe Kalsakau
Defendant

Date: 20 December 2018
By: Justice G.A. Andrée Wiltens
Counsel: Ms L. Lunabek for the Public Prosecutor
Mr F. Tasso for the Defendant

SENTENCE

A. Introduction

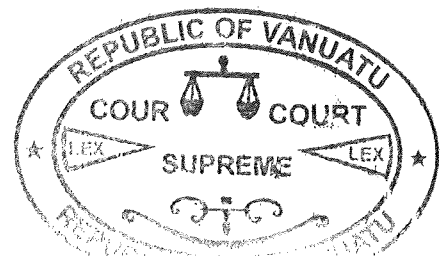
1. Mr Kalsakau pleaded guilty to a charge of sexual intercourse without consent, with a maximum sentence of life imprisonment.

B. Facts

2. In January 2016 the complainant was only 16 years of age, Mr Kalsakau was 19. He asked her on 3 occasions to go with him, but she refused. Finally he grabbed her by the hand and made her go with him out to the bush. There he took off her clothes, made her lie down and had sexual intercourse with her without her consent.
3. Mr Kalsakau admitted the offending when questioned by the police after his arrest.

C. Aggravating Factors of the Offending

4. There are two aggravating factors to the offending – firstly, the young age of the complainant – she was only 16 and still attending school; and secondly, the fact that no protection was used – thereby exposing the young girl to unwanted pregnancy and/or sexually transmitted disease.



D. Mitigating Factors of the Offending

5. There are no mitigating factors relating to the offending.

E. Start Point

6. Mr Toaliu submitted that the aggravating factors should be reflected in an uplift of 12 months imprisonment over the usual starting point of 5 years imprisonment for this type of criminal behaviour as set out in *PP v Scott* [2002] VUCA 29. Mr Tasso, for reasons not clearly enunciated, submitted the appropriate start point for sentencing was 4 years imprisonment.

7. The start point for this offending, as required to be identified by *PP v Andy* [2011] 14, is set for Mr Kalsakau at 5 years 4 months imprisonment.

F. Personal Factors

8. Mr Kalsakau has a clear previous record. He is still relatively young, currently being 22 years old – he was 19 when he offended. Those factors enable a discount of 6 months imprisonment from the start point.

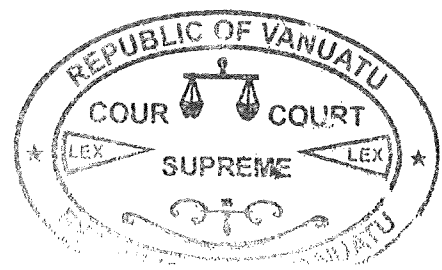
9. There is some confusion regarding whether there has been 1 or 2 custom reconciliation ceremonies. Mr Kalsakau says there have been 2, and that significant items were exchanged to demonstrate his remorse. However, one of the letters identifying this is said to be from Chief Bob – but Chief Bob denies writing any such letter, or being aware of any ceremony. I give Mr Kalsakau the benefit of the doubt – I am prepared to accept that there was at least one ceremony. A further reduction from the start point is accordingly made of 8 months imprisonment.

10. The final matter of mitigation is Mr Kalsakau's plea. The plea was entered on the day of trial – after the complainant had come to Dumbea from Epi Island with her mother and young child. She was very nervous and apprehensive about having to give evidence, to the obvious delight of Mr Kalsakau. He smirked when counsel invited me to re-arraign him and when he pleaded guilty. I saw no remorse at that time; and I note from the PSR that he is still minimising his offending. I ignored his comments in the PSR to the effect that the complainant had consented – I had ensured his plea was in accordance with his instructions to counsel and that he fully understood the summary of facts.

11. A discount is allowed for prompt guilty pleas due to the saving of Court time, the acceptance of wrong-doing, the inherent remorse, and the sparing of a victim from having to come to Court and re-live her ordeal. Mr Kalsakau qualifies for some reduction due to accepting his wrong-doing and saving some Court time. However, I do not accept his plea indicated remorse, and it certainly did not spare the victim from having to come from Epi in the expectation of having to testify. For his guilty plea, I allow Mr Kalsakau a 10% reduction from the start sentence.

G. End Sentence

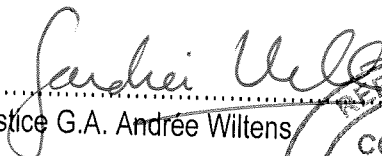
12. Taking all of those matters into account, the end sentence that be imposed is one of 3 years 9 months imprisonment. I impose that to commence from the date of his incarceration, namely 19 September 2017.



H. Suspension

13. 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 inappropriate in view of the circumstances, in particular the nature of the crime, and the character of the offender.
14. There is ample authority setting out that only in extremely rare and special cases can suspended sentences be properly imposed where sexual offending is involved: *PP v Gideon* [2002] VUCA 7. Suspending Mr Kalsakau's sentence would be wrong – he is to serve his sentence.
15. Mr Kalsakau has 14 days to appeal this sentence if he disagrees with it.

Dated at Port Vila this 20th day of December 2018
BY THE COURT


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Justice G.A. Andrée Wiltens

