

**IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU**

(Criminal Jurisdiction)

**Criminal
Case No. 19/526 SC/CRML**

PUBLIC PROSECUTOR

V

CLIFFORD TABI

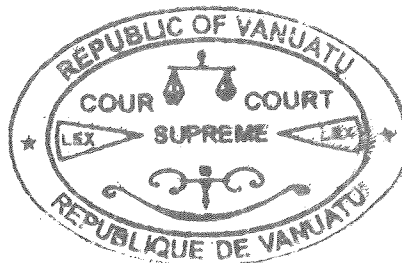
Before: *Justice D. V. Fatiaki*

Counsel: *Philip Toaliu for the Public Prosecutor
F. Tasso for the Defendant*

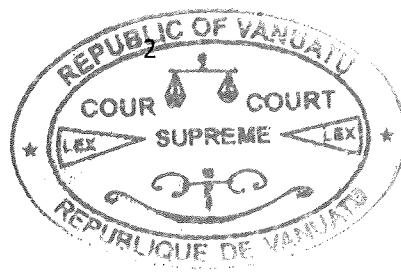
Date of Sentence: *19 June 2019*

SENTENCE

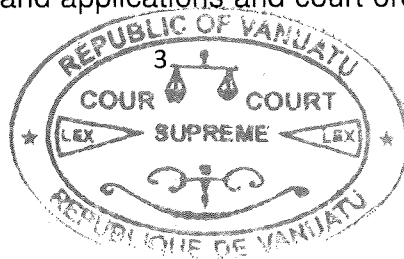
1. On 2 April 2019 the defendant pleaded guilty (“*tru*”) to an offence of Act of Indecency Without Consent contrary to Section 98 of the Penal Code. The defendant then admitted the brief facts outline by the prosecutor that on Tuesday 31 July 2018 in the afternoon the defendant asked the complainant to do his laundry. The complainant obliged and after she finished washing and hanging out the defendant’s laundry, he asked her to fold some clothes that was in his house, while he sat close by and watched the TV.
2. After the complainant finished folding the clothes, the defendant got up and approached the complainant and said to her “*mi wandem rapem yu wantime nomo*”. The complainant pushed the defendant and tried to run out of the house but, unfortunately, the defendant blocked her exit and locked the door. The defendant then proceeded to touch the complainant’s breasts and tried to push his hand inside her shirt. All the while the defendant continued to tell the complainant he wanted to rape her just once. He then attempted to force the complainant towards his bed but she ran to the door and there the defendant unsuccessfully tried to push the complainant’s hand towards his genitals.
3. The complainant then asked to go and relieve herself outside but the defendant told her she was lying. The complainant began to cry and it was only then that the defendant finally relented and let her out of his house.



4. When the defendant was interviewed by the police under caution he admitted locking his room door and asking the complainant for sex after she finished folding the clothes. He also said he eventually let the complainant out when he realized that what he was doing was wrong.
5. Upon his conviction a pre-sentence report was ordered on the defendant. It discloses the following personal details and mitigating factors:
 - The defendant is originally from Wujunmel Village on Pentecost Island but resided with his uncle at Freshwota 5 area in Vila at the time of offending;
 - The defendant was born on 02 November 1985 and was nearing 33 years of age at the time of the offence; he was raised in a Christian family and is a practicing member of the Church of Christ;
 - He completed Class 6 and has skills in joinery. He maintains a good relationship with his family and is an active and useful member of the community. He is active in church and youth programs. His offending is considered “*out – of – character*”;
 - The defendant showed insight into his offending and takes sole responsibility for it. He cannot explain or understand why he offended against his “*cousin sister*”. He admitted to the probation officer that his actions has violated the trust between them and ruined his reputation. The probation officer assessed the defendant as being unable to control his sexual thoughts and desires in an appropriate manner thus leading to his offending;
 - The defendant expressed to the probation officer his regret and remorse for the complainant and promised never to re-offend again after learning his lesson;
 - The defendant performed two (2) meaningful custom reconciliation ceremonies in Pentecost and then in Vila, to the complainant and her family called “*Tamwata*”. In both ceremonies the defendant donated VT8,000 cash and a custom mat from Pentecost called a “*sese temit*” which the complainant accepted. She has since moved on with her life and is now living in a “*defacto*” relationship with a man from Santo;
 - The defendant is a first offender and admitted his offending to the police. He pleaded guilty at the first opportunity thereby saving the complainant from the further trauma of having to testify about her ordeal in Court;

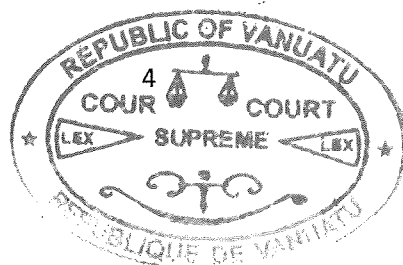


6. Prosecuting counsel accept the opportunistic solitary nature of the indecent touching of the complainant's breasts from outside her clothes and the unsuccessful attempt by the defendant to get her to hold his penis outside his clothes. Counsel also accepts that "... *the offence falls at the lower scale of offending*". Nevertheless counsel correctly submits the offence is aggravated by the obvious breach of trust in so far as the defendant and complainant are closely related as "*cousins*" and, by the fact that the defendant had lured the complainant into his house under the pretext of getting her to do his laundry and then to folding his uncle's clothes. The other aggravating factor is the forcible detention of the complainant by the defendant locking the house door to prevent the complainant's exit. There is also an age disparity of 14 years between the defendant and the complainant. Prosecuting counsel after referring to: Weny v Public Prosecutor [2015] VUCA 51 and Tangiat v Public Prosecutor [2014] VUCA 15 submits that "*a starting point of 13 months (imprisonment) is appropriate*".
7. Defence counsel on the other hand referred to two Supreme Court decisions namely, Public Prosecutor v Banga [2013] VUSC 34 and Public Prosecutor v Samuel [2009] VUSC 84 and submits that the defendant "... *should receive a suspended sentence*".
8. The offence of Act of Indecency Without Consent contrary to Section 98(a) carries a maximum sentence of 7 years imprisonment. It is certainly not the most serious sexual offence in the Penal Code and it can be committed with varying degrees of culpability and with or without the consent of the victim. It can range from the indecent propositioning of a victim, or the indecent touching of a victim's breasts or private part through her clothes, to the more invasive albeit non-penetrative "*skin to skin*" touching of the victim's naked genitalia.
9. The present case has been correctly described as being within "*the lower scale of offending*" where a non-immediate custodial sentence might be appropriate. The starting point, I adopt is 18 months imprisonment. I reduce the sentence by 6 months for mitigating factors and by a further one third for the defendant's guilty plea which has saved the complainant from the further trauma of having to testify about the sordid details in Court. The end sentence is: $(18 - 6) - 4 = 8$ months imprisonment.
10. The relevant timeline in this case commences on 31 July 2018 when the offence was committed. The case was then investigated and the defendant was interviewed under caution on 09 August 2018. In January 2019 the defendant was charged and his committal papers were filed in the Magistrate's Court where they remained for 3 unexplained months until the defendant's eventual committal in March 2019. In the absence of any bail or remand applications and court orders or any mention of the



same in the pre-sentence report, nothing is known about whether the defendant remained at liberty or was remanded in custody during those 3 months. This is an unsatisfied situation.


11. Whatever the situation may have been, the defendant and his relatives had already performed a custom reconciliation ceremony to the complainant and her family on Pentecost Island in August 2018 before his committal and again, in Port Vila in April 2019 after he was committed for trial.
12. I turn next to consider whether to exercise the Court's powers and suspend the defendant's sentence under Section 57 of the Penal Code as occurred in Wenu's case (op. cit) and in the Supreme Court cases of: Public Prosecutor v Livae [2014] VUSC 126 and Public Prosecutor v Mahit [2012] VUSC 231 which later case has some similarities to the present case in that the defendant a mature man of 38 years, lured a friend's 15 year old daughter into his car and indecently assaulted her over her clothes until she managed to escape when the car came to a stop at an intersection. In that case as in this, prosecuting counsel does not "*oppose any suspension of sentence*".
13. Accordingly, given the circumstances in this case where the defendant voluntarily released the 19 year old complainant from her captivity in his house and the fact that the indecent touching occurred outside the complainant's clothes and the defendant did not ever attempt to undress the complainant or himself throughout the incident and mindful of the two (2) custom reconciliation ceremonies performed by the defendant and his family and accepted by the complainant and her family, I am also satisfied that the defendant is sincerely remorseful and regrets what he did to his "*cousin sister*" and, by all accounts, has learnt a salutary lesson.
14. In those circumstances, I do not consider it appropriate to send the defendant to prison. The sentence of 8 months imprisonment is accordingly suspended for a term of 2 years. This means that the defendant will not go to prison today but, he is warned that if he is convicted of another offence within the next 2 years, then he will be sent directly to prison to serve this 8 months sentence plus any further time that he may receive for his re-offending.
15. The defendant is also sentenced to 12 months Supervision with a special condition that he undertakes and completes a sex offending awareness, victim awareness and other related rehabilitation programs directed by the Probation Service.
16. Finally the defendant is ordered to perform 100 hours of Community Work under the direction and supervision of a probation officer.

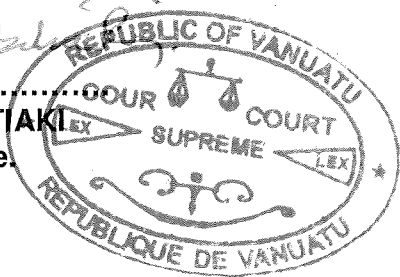


17. The defendant is informed of his right to appeal this sentence within 14 days if he does not agree with it.

DATED at Port Vila, this 19th day of June, 2019.

BY THE COURT


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D. V. FATIAKI
Judge.



The seal of the Supreme Court of Vanuatu is circular. It features a central emblem with a scale of justice and a book. The text 'REPUBLIC OF VANUATU' is written along the top inner edge, and 'REPUBLIQUE DE VANUATU' along the bottom inner edge. The words 'COURT SUPREME' are prominently displayed in the center, with 'LEX' on either side. A small star is visible on the right side of the seal.