

PUBLIC PROSECUTOR

V

GAUTIER WAIWAI

Coram: *Hon. Chief Justice V. Lunabek*

Counsel: *BN Tamau for the State*
J Tari for the Defendant

Date of Plea: *4 March 2024*

Date of Sentence: *23 April 2024*

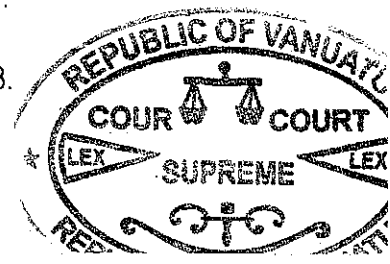
SENTENCE

I. Introduction

1. Defendant Gautier Waiwai ("*Mr. Waiwai*"), you appear today for sentence.
2. On the 6th of March 2024, you pleaded guilty to two separate counts of sexual intercourse with your step daughter (NW) of 15 years of age, and, at these times, she was under your care or protection, contrary to Section 96(1)(a) of the Penal Code Act [CAP. 135].

II. Facts

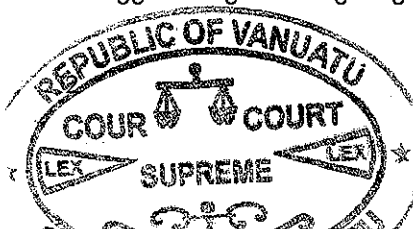
3. On the 6th March 2024, you admitted the following facts when you entered guilty pleas to those offences.
4. The complainant in this case was 15 years old and was your step daughter. Mr. Waiwai, you lived with the complainant's mother in a defacto relationship since 2012. At that time the complainant was around eight (8) years of age. You took care of the complainant with her younger sister as your own daughter until 2023 when the offending started.
5. The complainant was attending year 8 at Good Wills School last year 2023.



6. In her report to the police, she alleged that you had sex with her twice in 2023. The first time was around February 2023. She could not recall the exact date. The second time was on the 31st of October 2023.
7. On the month of February 2023, she recalls that at one time, in the early hours of the morning, while it was still dark and she was still asleep, she could feel that someone was lying on top of her. When she woke up, she saw you on top of her. She was shocked that she was fully naked at that time and she felt so much pain on her vagina. Mr Waiwai, you had your shirt on but no pants. She realized at that point that you were having sexual intercourse with her while she was asleep. Mr Waiwai, you quickly got off of her and before you left her, you told her not to tell anyone. The complainant's mother, who was there at that time knew that you had sex with the complainant. She confronted you immediately after, and you admitted that you had sex with the complainant. She was very cross with your and warned you to stop. You apologized and promised that you won't do it again.
8. That same year, the complainant's mother had to go back to Tanna to take care of her sick mother. She had to leave the complainant and her two other siblings with you, Mr Waiwai, so they could continue to go to school. Around October 2023 the complainant's mother was on Tanna.
9. On 31st of October 2023, around midnight, the complainant was sleeping at the house alone. Her younger sister was with their neighbours. She heard you came into the room, removed her clothes and started having sex with her. She struggled to get off of you but you overpowered her. You had sexual intercourse with her and then left.
10. The next day, the complainant went and reported the matter to her sister Nancy Nangia. They called her mother in Tanna and told her of their intention to report the matter to the police. The complainant's mother was reluctant to allow them to take that route and advised that they waited for her to return so they can ask the chiefs to look into the issue. The complainant disagreed with her mother so she approached her school principal and told him about the incident, and he then finally helped her to lodge her complaint with the police.
11. Mr Waiwai, you were subsequently arrested by the police. In your caution statement to the police, you admitted having sexual intercourse with the complainant twice as alleged by the complainant. You explained that it was kava that led you to do these things. You admitted that you were wrong but you were not sorry or regretted what you did.

III. Sentence Start Point

12. I will determine the sentence start point by reference to the maximum sentence of the offences available, then I will assess the aggravating and mitigating features of the offending,



and I will finally refer and consider comparable cases (if there is any) for consistency purposes.

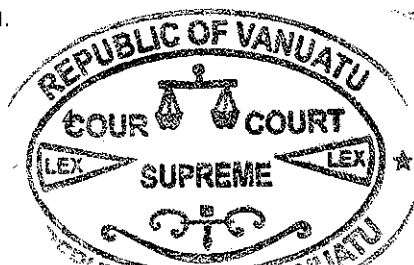
13. In this case, the maximum sentence of the offence of sexual intercourse with child under care or protection, contrary to Section 96(1)(a) is an imprisonment for 10 years.
14. I now consider the nature and seriousness of your offending. I note that there are no mitigating features leading to the offending but the following aggravating features exist:
 - The complainant was your step daughter;
 - The offending was repeated;
 - The offending took place at home where the complainant daughter is supposed to be safe and protected; your home is no longer a safe place for your step daughter;
 - There is a serious breach of trust between you, Mr Waiwai, and your step-daughter. She looked up to you for care and protection, but you failed her;
 - There is also a breach of trust between you and the complainant's mother. She trusted you, Mr Waiwai, to take good care and protect your step-daughter when she was away on Tanna island, you also failed her;
 - There is a huge age difference between you and the complainant. You are 57 years whilst the complainant is 15 years old.
15. The prosecution and the defence referred the Court to the following comparable cases to assist the court in the determination of the sentence start point.
16. The first case is that of Public Prosecutor v Manuel Malsungai [2011] VUSC 61. In Malsungai's case, the defendant is charged with one count of sexual intercourse without consent and one count of sexual intercourse with child under care or protection. The facts show that the complainant is the step daughter of the defendant. She was 14 years at the time of the offending and the defendant is between the age of 38 and 39 years. The sexual harassment occurred over a period of 7 months. It started by the defendant indecently touching the complainant and then proceeded to a full sexual intercourse involving oral and full penile penetration. The defendant before these incidents threatened the complainant to beat her up. The court in this case adopted a starting point of 8 years imprisonment to reflect the aggravating factors. In mitigation the court deduct 1/3 of the sentence to reflect the early guilty plea entered into by the defendant and a further 2 months deducted to reflect the other mitigating factors identified by the court. The court imposed an end sentence of 5 years and 2 months imprisonment.
17. The facts of the case of Public Prosecutor v Manuel Malsungai are a bit more serious than the present case.
18. The second case is that of Public Prosecutor v Boki [2020] VUSC 40. Here, the defendant is convicted on 4 counts of sexual intercourse with child under care or protection. The

complainant was his adopted daughter who lived with him and his wife since she was 3 years old. At the time of offending, the complainant was 14 years old and the defendant was 42 years old. The defendant had sex with the complainant on four different occasions. The court in sentencing the defendant, adopted a sentence start point of 8 years imprisonment. After some deduction to reflect the mitigating factors personal to the offender, the end sentence imposed is one of 6 years and 17 days imprisonment.

19. The facts of the case of Public Prosecutor v Boki are more serious than the present case.
20. The prosecution referred to a third case of Public Prosecutor v Amos [2016] VUSC 199. Here, the defendant is convicted on 4 counts of sexual intercourse with child under care or protection and one count of act of indecency.
21. The complainant in this case is the defendant's step daughter. The complainant is 14 years of age. The defendant had sex with the complainant twice. During the first incident, he entered the complainant's room while she was asleep and tried to remove her blanket. The defendant approached her while she was lying down on the bed. The defendant removed her trousers, and had sex with her three times. The defendant also attempted to push his finger into the victim's vagina. The court in sentencing the defendant, adopted a starting point of 6 years imprisonment. After the court took into account the mitigating factors personal to the offender, the end sentence imposed is one of 4 years imprisonment. The facts of this case are slightly similar to the present case.
22. The prosecution and the defence counsel submit that, in the present case, an appropriate sentence start point is in a range between 4 – 6 years considering all the above factors.
23. I take all these matters into account, on a global basis taking all the offences, I set the sentence start point at 5 years imprisonment concurrently to reflect the circumstances of the present case (as there is more than one charge).

IV. Personal mitigating factors of the defendant

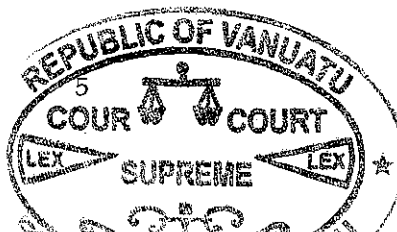
24. Mr Waiwai, you are 58 years old. You came from a catholic mission area in the village of Sesivi in North Ambrym. You are currently a resident of Erangorango area in Port Vila, Efate.
25. You completed your primary education at Sesivi Primary School. You started Year six (6) level but you did not complete as you were disciplined and departed school.
26. You stated that you were formerly a brotherhood and worked as a brotherhood for four years.
27. Your goal in life is to raise domestic chickens at home and sell them to earn income to pay the tuition fees for your children.



28. You have three children (two boys and a step daughter). Your step-daughter is your victim.
29. You have good relationship with your family, community and the chief.
30. You were living in a defacto relationship with Helen Waiwai and you have been living together for 10 years. But Mrs Helen Waiwai is no longer residing with you due to your offending.
31. You advised you have kidney problem.
32. You were the bread winner of the family in the late 1990's. Currently you are self-employed.
33. You are a first-time offender. You have no previous conviction.
34. You have justified your offending by your intoxication problem of kava which triggered you to commit the offending.
35. The court does not accept that justification. I agree and accept what the writer of the pre-sentence report said in his report that it was your inability to control your sexual desire that triggered your offending.
36. You asked for forgiveness from your brothers, sisters and the community of what you did. You wanted to apologize to the victim but she never turned up. You regretted your actions and said sorry for the wrong you have done to the victim.
37. You said that you had given VT5,000 to your partner and VT2,000 to the victim when you committed the first offending. But you paid no compensation to the victim after the second offending. You are willing to pay a custom compensation should the victim is willing to accept it.
38. Your sentence of 5 years imprisonment is reduced ~~to~~ 8 months to reflect your mitigating factors.
39. Your sentence is further reduced by 33% for your guilty pleas at the first opportunity given to you by the authorities.
40. Your sentence of 5 years imprisonment is now reduced to 35 months (i.e. 2 years and 11 months).

V. End Sentence

41. 35 months (2 years and 11 months) is your end sentence.



42. You were remanded in custody for 2 months and 13 days from 16 November 2023 to 29 January 2024. You are currently on bail awaiting your sentence.
43. The period you have already spent in custody will be deducted from your end sentence term of 2 years and 11 months imprisonment.
44. The remaining balance of your end sentence term now is 2 years 10 months and 17 days imprisonment.
45. I consider but I decline to suspend your imprisonment term of 2 years 10 months and 17 days.
46. Imprisonment is necessary to reflect the seriousness and gravity of your offending. It is necessary to reflect that the society disapproves your offending. The last but not the least is to protect women and girls from sexual abuse and violence based on the authorities of Public Prosecutor v August [2000] VUSC 73 and Public Prosecutor v Gideon [2002] VUCA 7.
47. You shall serve this sentence from the date of this sentence.
48. You have 14 days to appeal this sentence if you are unsatisfied with it.

DATED at Port Vila, this 23rd day of April, 2024.

BY THE COURT

Hon. Chief Justice Vincent LUNABEK

