SENTENCING FOR SEXUAL OFFENCES: A COMMENT ON *WENU V PUBLIC PROSECUTOR* [2015] VUCA 51

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INTRODUCTION

In December 2015 the *Vanuatu Independent* ran a headline stating 'Call for longer rape sentences'. This article stated that between November 2014 and November 2015 the average sentence given in Vanuatu for cases involving rape or incest was 2.15 years.[1] The same issue of the *Independent* also gathered public comments about rape sentencing in Vanuatu. These comments suggest that there is widespread public concern about both perceptions of the increasing occurrence of sexual offences and the apparent failure of court sentences deter sexual offending.

This comment considers a recent opportunity that the Vanuatu courts had to discuss some of the issues relating to the prevalence of sexual violence in Vanuatu and what the appropriate sentencing response should be. It argues that the Court of Appeal missed an opportunity to take a rights-based stand on the sentencing of sexual offences in the face of evidence of the overwhelmingly high incidence of sexual violence in Vanuatu. This comment concludes by briefly considering some measures Vanuatu could consider to address the public perception of inadequate sentencing.

FACTS

Wenu had initially been charged with two counts of indecency without consent contrary to section 98 of the *Penal Code* [Cap 152].[2] The maximum sentence for this offence is 10 years if the victim is under the age of 15[3] and 7 years if the victim is older. Wenu pleaded guilty to one

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[1] Fern Napwatt, Richard Nanua, Brenda Daniel, Leah Lowonbu and Dephney David, 'Call for longer rape sentences' *The Vanuatu Independent* (Port Vila, Vanuatu) 5 December 2015, 1.

[2] It can be noted that section 98 of the *Penal Code* [Cap 152] was amended by the *Penal Code Amendment Act 2006*. The most recent consolidated Vanuatu legislation (2006) does not contain the amended section and sessional legislation must be referred to instead.

[3] Section 98A *Penal Code* [Cap 152] as amended by the *Penal Code Amendment Act 2006*.

charge and not guilty to the other. The prosecution entered a *nolle prosequi* in respect of the charge he pleaded not guilty to, and was discharged on that count.

The facts were not in dispute. Wenu, a man in his 50's, was living with the complainant's family at the time of the offence. He was the uncle of the complainant's father. The complainant was a mentally disabled 16 year old girl. Wenu asked her to get a knife, then followed her into the kitchen and 'groped her breast from behind'.[4] The groping was done through clothing.

THE DECISIONS

Supreme Court

The sentencing judge was the Hon Justice David Chetwynd. It was clear from the language used that Chetwynd, J strongly condemned Wenu's behaviour. In describing the facts of the case the judge said that he 'deliberately used the word grope with all the distasteful connotations it carries because what you did was unpleasant.'[5] The judge was also scathing of an apparent attempt by Wenu to blame the complainant for the offending, stating that 'It is hard to understand the somewhat twisted logic that a young 16 year old girl who is mentally disabled can be blamed for your actions.'[6]

Chetwynd, J began his consideration of sentencing by referring to *Public Prosecutor v Livae* [2014] VUSC 126, a case where a father had indecently assaulted his 18 year old daughter by touching the victim's breasts and vagina through clothing. Livae had admitted the offence to the police and pleaded guilty. In *Livae* the starting point for sentencing for indecency without consent involving touching through clothes was 2 years. Chetwynd, J did not accept this starting point on the grounds that 'I… intend to take a stand and raise the starting point for this kind of offence'.[7][8] Chetwynd, J was clearly concerned about the routine abuse that women in Vanuatu experience, and referred to data from the *Vanuatu National Survey on Women's Lives and Family Relationships 2011* (the *Vanuatu Women's Lives Survey*) which indicates that 48% of women have experienced physical or sexual non-partner violence since the age of 15.[9] In commenting on this data he stated that:

[4] *Public Prosecutor v Wenu* [2015] VUSC 159 [2].
[5] Ibid.
[6] Ibid [3].
[7] Ibid [5].
[8] Ibid [5].
[9] Vanuatu Womens Centre in partnership with the Vanuatu National Statistic Office, *Vanuatu National Survey on Women's Lives and Family Relationships* (2011). It can be noted that Chetwynd, J did not refer to the statistics on partner violence. Sixty percent (60%) of respondents indicated that they had experienced physical and/or sexual violence by partners (at 15).

> There are any number of cases in this jurisdiction and others where the Court says something along the lines that it has a duty to provide the community or some particular section of the community, with protection. The alarming statistics available show that women in Vanuatu are routinely abused either violently, sexually or both…
>
> The Courts then have a duty to protect the community and women in particular from sexual (and physical) abuse. That can only be done by passing deterrent sentences. That the Courts have such a duty and can adopt such a stance has been accepted by the Court of Appeal.[10]

On the basis of the need for deterrent sentences Chetwynd, J raised the starting point for sentencing to 3 years. The age of the complainant and the familial relationship were aggravating factors that increased the sentence to 3 years and 6 months. No mention was made of the complainant's particular vulnerability due to her mental disability. From this a deduction of 33% was taken for the guilty plea, which is the standard practice in Vanuatu. A further 11 months was deducted because Wenu had no previous convictions, was previously of good character and had participated in a custom reconciliation ceremony. No details of the custom reconciliation ceremony were provided. Wenu's final sentence was 18 months.[11]

Chetwynd, J then considered whether the sentence should be suspended. In making his determination on this matter he relied on *Public Prosecutor v Gideon* [2002] VUCA 7, which held that 'It will only be in the most extreme of cases that suspension could ever be contemplated in a case of sexual abuse.'[12]

Chetwynd, J considered that 'the very robust guidance in Gideon'[13] meant that a fully suspended sentence would not be appropriate and would not provide 'censure or punishment'.[14] He did, however, hold that the delay of 3 years and 9 months between the date of the offending and the matter coming to court and the absence of evidence of further trouble in this time allowed him to suspend 9 months of the sentence for a period of 3 years.[15]

The Court of Appeal

[10] Ibid [4].
[11] Ibid [7].
[12] *Public Prosecutor v Gideon* [2002] VUCA 7 quoted in *Public Prosecutor v Wenu* [2015] VUSC 159 at [8]. *Gideon* involved a 25 year old man's rape of a 12 year old girl.
[13] *Public Prosecutor v Wenu* [2015] VUSC 159 [9].
[14] Ibid.
[15] Ibid.

The two grounds of appeal were that: (1) the sentence was manifestly excessive; and (2) that the sentencing judges did not properly consider whether to fully suspend the sentence.[16] The Court of Appeal upheld both of these grounds.

Most attention in the judgment was given to the issue of whether the sentence was manifestly excessive. The Court of Appeal was particularly concerned about the use of statistical material taken from the *Vanuatu Women's Lives Survey*. The Court of Appeal apparently did not find this data to be evidence that sexual violence is prevalent in Vanuatu, instead stating that:

> we are of the view that departure from guidelines based on prevalence must be supported by some evidence or at least a submission to that effect from the party seeking to persuade the court of its existence.[17]

Part of the Court of Appeal's concern arose from the fact that this material had not been introduced by counsel. The Court of Appeal was also troubled by the fact that counsel were not given the opportunity to make submissions on the statistical material,[18] and observed that other women's groups in Vanuatu could also have been invited to make submissions.[19] Further, the Court of Appeal held that it, and not the Supreme Court, is the appropriate body to develop sentencing guidelines based on prevalence, and that this would primarily occur when matters come before it on appeal due to sentencing being too low.[20]

Another issue the Court of Appeal had with the initial sentencing was its consistency with other decisions. The Court of Appeal held that *Livae* was not similar, as it involved touching of the vagina as well as of the breasts. Instead it held that the only case on point was *Tangiat v Public Prosecutor* [2014] VUCA 15 and that the sentencing judge was bound by *Tangiat*.[21] In *Tangiat* charges of sexual intercourse without consent and abusive or threatening language were not proved, and the offender was only convicted of indecent assault. The indecent assault was touching of the victim's breast through her clothes. The victim was an adult, although her exact age was not started. The starting point for sentencing for touching a breast through clothing, which the court in *Tangiat c*onsidered to be on the lower end of indecent assault, was 9 – 12 months.

The issue of whether sentence should be suspended was not discussed, other than to say that the Court of Appeal accepted the Appellant's submissions, with the position of the court following 'from the view we held on the first ground of appeal.'[22]

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[16] *Wenu v Public Prosecutor* [2015] VUCA 51 [5].
[17] Ibid [14].
[18] Ibid [15] – [16].
[19] Ibid [17].
[20] Ibid [18] – [19].
[21] Ibid [21].
[22] *Wenu v Public Prosecutor* [2015] VUCA 51[Unnumbered].

The Court then went on to apply the starting point of 9 – 12 months. No aggravating factors were discussed. The main mitigating factor was the guilty plea, which resulted in a deduction of 33% of the sentence. The custom reconciliation and a past clear record together accounted for a further 2 month deduction. Finally the delay of over 3 years between the date of offending and when the matter came to court resulted in a 1 month deduction. This left a sentence of 3 – 5 months. As the defendant had already spent 1 month in custody and parole is automatic after serving half of the sentence the defendant's 4 month sentence of imprisonment was suspended for 2 years and he was immediately released from custody.

COMMENTARY

Is there a need for judicial activism?

Chetwynd, J's sentencing decision is undoubtedly judicial activism. His introduction of statistical material, and his apparently personal assumption of responsibility to "take a stand" against sexual violence in Vanuatu goes beyond the purview of a Blackstonian living oracle who declares and applies the law but does not 'exercise any *personal* judgement in determining what the proper principle to apply to a case is.'[23]

Chetwynd, J's stance can, maybe, be compared to that of the Hon Justice Stephen Pallaras, in Solomon Islands. In a speech delivered at a Family Violence and Youth Justice Workshop in Honiara in 2014 Pallaras, J stated that 'Victims of sexual offences and family violence have been let down by the courts, let down by the police, let down by the prosecution and let down by the defence bar.'[24] He eloquently indicted both the judiciary and prosecutors of having failed both victims and the community as a whole by accepting low sentences in sexual offences cases:

> We were not serving the community well, victims (and this is an outrage) received no support whatsoever from government and little if any support from the prosecutors – who after all were the same people who were content to accept the inadequate sentences being passed as appropriate penalties…
>
> Why was there this deluge of offending? I believed that one of the reasons was because we as judges were failing in our duty – our duty to the law, our duty to the community and our duty to the hapless victims - by passing what I again respectfully considered to be sentences which were too lenient.

[23] Margaret Davies *Asking the Law Question* (1994) 26.
[24] Hon. Justice Stephen Pallaras 'View from the Bench is appalling' *Solomon Star* (Honiara, Solomon Islands) 2 September 2014, http://www.solomonstarnews.com/viewpoint/private-view/3812-view-from-the-bench-is-appalling (Accessed 9 December 2015).

> It may not have been the complete answer, but what we were doing wasn't helping.[25]

His speech goes on to detail his personal assumption of responsibility to alter this state of affairs, given that he held a position that provided him with an opportunity to foment change.

Chetwynd, J and Pallaras, J seem to share an activist zeal for addressing the deluge of sexual offending. They also share a similar background in that both judges are from outside of Melanesia and temporary appointments to the bench. Pallaras, J came from his position as the Director of Public Prosecutions for South Australia to serve a 2 year term on the Solomon Islands bench. Chetwynd, J arrived in Vanuatu in February 2015, in an appointment funded by the Commonwealth Secretariat. Although English he has spent much time working in developing country courts, including Solomon Islands and, most recently Turks and Caicos. Whether the nature of short term appointments create more drive to implement rapid change through activism rather than slow incremental change through the extension of precedents is an interesting question. Given the reliance of some courts in the region on short term judicial appointments it is probably a question that is worthy of further investigation.

It is not surprising that a decision driven by overt judicial activism would be appealed. It is also, maybe, unsurprising that a sentence of 9 months imprisonment for groping a breast seemed disproportionate, especially given that sentences for penetrative sexual offences are, often, light.[26] It can perhaps even be assumed that Chetwynd, J was being deliberately provocative and inviting the Court of Appeal to revise sentencing guidelines for non-penetrative indecent assault.

This raises the question of whether such judicial activism by a Supreme Court judge is appropriate. Developing sentencing guidelines is territory that the Court of Appeal carefully guarded as being its exclusive domain in the *Wenu* decision. However, in order for a case to reach the Court of Appeal there first must be a sentence that either the State or the accused wants to appeal. The Court of Appeal's observation that departures from sentencing guidelines are usually driven by the Public Prosecutor through the appeal of a light sentence implied that the Court of Appeal did not think that sentencing judges should use their discretion to impose heavy sentences. It is not, however, clear why this should be the case, at least in the absence of a binding Court of Appeal precedent.[27] Indeed, in the Solomon Islands context Pallaras, J argued that in an environment where sexual violence is accepted as a social norm and (maybe in part because of internalisation of this norm) prosecutors accept low sentences without appeal, a duty

[25] Ibid.

[26] A recent report indicates that between 2000 – 2014 the average sentence for sexual assault in Vanuatu was 3.58 years imprisonment. In 73 of the 105 cases that were included in the sample, the victims were children. About 18% of cases did not attract a custodial sentence. (International Centre for Advocates Against Discrimination, 'An Analysis of Sentencing Practices in Sexual and Gender Based Violence Cases in the Pacific Island Region (2015) 60.)

[27] It can be observed that in *Wenu* Chetwynd, J only had *Livae*, another Supreme Court case, brought to his attention as authority. It does not appear that he was aware of the Court of Appeal decision of *Tangiat*.

falls on the sentencing judge to engage in judicial activism to increase sentences.[28] How else will cases reach the Court of Appeal and thus enable the Court of Appeal to develop progressive sentencing guidelines?

On this reading of the sentencing decision, Chetwynd, J was not encroaching on the Court of Appeal's role as promulgator of sentencing guidelines, but was instead presenting an opportunity to the Court of Appeal to develop sentencing guidelines in light of statistical information on the prevalence of sexual offending in Vanuatu. With respect, I argue that the Court of Appeal missed this opportunity.

What is the place of statistical evidence?

The Court of Appeal's statement that the *Vanuatu Women's Lives Survey* is not evidence of the prevalence of sexual offending is somewhat surprising. This survey, which was conducted by the Vanuatu National Statistics Office and the Vanuatu Women's Centre, is the only quantitative study of violence against women in Vanuatu.[29] A total of 3,619 households were surveyed, and the selection of respondents was a random sample.[30] It used a methodology that had been developed by the World Health Organisation (WHO) and has been used in a number of countries.[31] The data from this survey is accepted as providing the first baseline data on violence against women in Vanuatu.[32]

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[28] Justice Stephen Pallaras 'View from the Bench is appalling' *Solomon Star* (Honiara, Solomon Islands) 2 September 2014, http://www.solomonstarnews.com/viewpoint/private-view/3812-view-from-the-bench-is-appalling (Accessed 9 December 2015).

[29] Vanuatu Women's Centre in partnership with the Vanuatu National Statistics Office, *Vanuatu National Survey on Women's Lives and Family Relationships* (2011) 14; UNICEF, 'Intersections of links between violence against women and violence against children in the South Pacific' (2015) 3.

[30] Ibid.

[31] A summary of the data from studies conducted in countries throughout the Pacific region can be found at UN Women Australia Committee, Eliminating Violence against Women in the Asia Pacific: it's all of our responsibility (2015).

[32] See UNICEF, 'Intersections of links between violence against women and violence against children in the South Pacific' (2015) 3 for an commentary on literature in this area. It can be noted that the 2012 *Alternative Indicators Survey* (Malvatumauri National Council of Chiefs and Vanuatu National Statistics Office, *Alternative Indicators of Wellbeing for Melanesia: Vanuatu Pilot Study Report* (2012)) contained a brief section on the perceptions of women community leaders on violence against women in their communities. It is not clear how many women responded. The data indicates that 41% of women leaders who responded were not aware of any domestic violence against women in their communities in the past 6 months (92) and that 70% were not aware of any sexual violence against women in their communities in the same time frame (93). Whilst this data is surprising, it is consistent with the findings from the *Vanuatu Women's Lives Survey* that women minimise the impact of violence in order to maintain relationships. (146) and that 43% of women have never told anyone else of violence they have experienced. Further, only 1% of women who told another about violence had told someone from a women's organisation. The gender dimensions of the *Alternative Indicators Survey* (for instance, not asking chiefs or church leaders the same set of questions of violence against women, not disaggregating data by gender in many instances and identifying the women community leaders to interview via the male chiefs) and the possible danger that the *Alternative Indicators Survey* downplays violence against women bear further examination.

It is, perhaps, understandable that the Court of Appeal in Solomon Islands initially said that Pallaras, J had 'no evidence before him of such an increase [in the amount of rape cases] and no statistical basis for that conclusion,'[33] given that he appeared to rely on the number of sexual offences cases that came across his desk. It can also be observed that when Pallaras, J later used statistics from a similar study conducted in Solomon Islands to support his stance on heavier sentencing in the light of prevalence, the Court of Appeal did accept these statistics as evidence.[34] It is less easy to understand what evidence would be needed to convince the Vanuatu Court of Appeal that sexual offending is widespread and commonplace. Unfortunately Vanuatu the Court of Appeal's position on the value of the *Vanuatu Women's Lives Survey* effectively renders well-established facts invisible to the courts.

The Court of Appeal's concern about counsel not presenting the statistics, or being given an opportunity to comment on the statistics during the initial sentencing hearing may possibly be viewed as an attempt by Court to restrain judges from going beyond the material presented to them by counsel. However, the hearing in the Court of Appeal did give counsel the opportunity to respond to the statistics. It also allowed the Public Prosecutor to adopt the statistical argument on prevalence and present it as its own submission. The concern that counsel did not present or have an opportunity to comment on statistics therefore appears to have been overcome by the appeal process. With this concern addressed it is respectfully argued that the Court of Appeal could have accepted the *Vanuatu Women's Live Survey* as evidence of prevalence and would then have been in a position to comment on the prevalence of sexual offending and whether sentences should be raised in order to denounce this state of affairs. Instead, the Court of Appeal appears to have fallen back on a procedural matter to avoid engaging with substantive legal arguments.

What is the place of the victim?

It was not only the fact of the prevalence of sexual violence that was rendered invisible by the courts in *Wenu*. The complainant is also effectively invisible. This is acknowledged to a degree by Chetwynd, J when he observes that nothing is known about the details of her mental disability, a fact that disappeared as an aggravating factor in both the Supreme Court and Court of Appeal decisions. We do not know why she complained. We do not know how she was affected. The Court of Appeal's characterisation of the offending as touching of a breast through clothing does not elicit a particularly visceral response. The Supreme Court's characterisation of the offending as groping a breast through clothing does increase a sense of violation. Groping does seem more morally offensive and invasive than touching. This is essentially a linguistic

[33] *Soni v Reginam* [2013] SBCA 6 [38].
[34] *Pana v Regina* [2013] SBCA 19[10] – [11]. The Solomon Islands Law Reform Commission report referred to in the judgment in turn referred to the *Solomon Islands Family Health and Safety Study*, which also used the WHO methodology.

game that demonstrates how the words a third party uses to describe an offence affect the reader's interpretation of the harm that the offending caused. It says nothing of the actual harm suffered by the victim. If, as commentators argue,[35] and the law is some jurisdictions requires,[36] the harm to the victim is to be taken into account by the courts in determining the severity of punishment of the offender, it follows that the courts must have access to information on the actual harm suffered by the victim.

Is there a place for human rights?

Another factor contributing to the invisibility of the victim is that, in the Court of Appeal, aggravating factors were not considered. In this case the victim was 16 years of age. She was mentally disabled. The offender was living in the victim's house and was an older relative, which suggests that he was in a position of trust, if not a position of care. It is respectfully argued that by ignoring these factors the Court of Appeal not only rendered the victim invisible, but missed an opportunity to comment on the human rights dimensions of sexual offending.

Vanuatu is a party to a number of human rights Conventions, including the Convention on the Rights of the Child (the CRC), the Convention on the Rights of Persons with Disabilities (the CRPD) and the Convention on the Elimination of Discrimination Against Women (CEDAW).[37] The CRC requires States to 'protect the child from all forms of sexual exploitation and sexual abuse',[38] and also requires States to 'take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.'[39] The CRPD requires States to 'take all appropriate legislative, administrative, social, educational and other measures to protect persons with disabilities, both within and outside the home, from all forms of exploitation, violence and abuse, including their gender-based aspects.'[40] CEDAW requires States to 'modify the social and cultural patterns of conduct of men and women, with a

[35] See, for example, Mirko Bagaric, 'Sentencing: The empirical and normative wasteland shows no sign of abating' (2013) 37 *Criminal Law Journal* 353, 355; Christine Forster,'Sexual Offences Law Reform in Pacific Island Countries: Replacing Colonial Norms with International Good Practice Standards' (2009) 33 *Melbourne University Law Review* 833, 838 – 839.
[36] See, for example, section 4(2)(e) *Sentencing and Penalties Decree 2009* (Fiji); section 8(f) *Sentencing Act 2002* (New Zealand). It can also be observed that precedent in Vanuatu requires harm to the victim to be taken into account as an aggravating factor in sentencing for both rape, or sexual intercourse without consent (*Public Prosecutor v Scott* [2002] VUCA 29) and unlawful sexual intercourse – where consent is not an element but the age of the victim is (*Public Prosecutor v Andy* [2011] VUCA 14).
[37] *Convention on the Rights of the Child (Ratification) Act 1992*; *Convention on the Rights of Persons with Disabilities (Ratification) Act 2008*; *Convention on the Elimination of all Forms of Discrimination Against Women (Ratification) Act 1995.*
[38] Article 34 CRC.
[39] Article 19(1) CRC.
[40] Article 16(1) CRPD.

view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.'[41] The provisions of these Conventions could be argued to place is a rights-based obligation on courts to consider the age of the victim, the disability of the victim and the gender dynamics of the offence as aggravating factors.

It is not uncommon for courts in the region to be mindful of the Convention based rights of juvenile offenders when determining sentencing. For example, in 2015 in Vanuatu the CRC was used in this way in 4 cases. *Public Prosecutor v Malkorkor* [2015] VUSC 147 involved a gang rape where the age of the victim was not known.Of the four offenders, two were 18, 1 was 22, and one had a birth certificate that indicated he was 25 but the judge assessed his age as being 17. All offenders except for, arguably, one were not children for the purposes of the CRC. Non-custodial (suspended) sentences were given to all offenders. *Public Prosecutor v Markmoi* [2015] VUSC 94 involved an unlawful sexual intercourse case where the victim was 14 and the offender was 17. The offender was given a non-custodial (community service and supervision) sentence. *Public Prosecutor v Kaloran* [2015] VUSC 29 again involved an unlawful sexual intercourse case. In *Kaloran* the victim was under the age of 13 and the offender was 15. The offender was given a non-custodial (supervision) sentence. *Public Prosecutor v Rommona*, reported with *Public Prosecutor v Kaloran* [2015] VUSC 29, also was an unlawful sexual intercourse case. In *Rommona* the victim was 5 and the offender was 13. The offender was given a non-custodial (supervision) sentence. In all of these cases, in addition to the courts referring to section 54 of the *Penal Code* [Cap 135], which prohibits the imprisonment of offenders under the age of 16 unless no other method of imprisonment is appropriate, Article 37(b) of the CRC was used in support of not jailing the offenders. It can be noted that in the last 3 cases, it is not clear why they were not prosecuted under the more serious sexual intercourse without consent (rape) provisions rather than "sex with a young person" provisions. In can also be noted that in none of the above instances were Article 19(1) or Article 34 of the CRC, which relate to child victims of sexual abuse being given protection, referred to.

It is less common for Conventions to be used in reference to victim's rights during sentencing. Victim's rights are, however, sometimes explicitly mentioned during sentencing decisions. One of the first instances of this occurring was the Fiji case of *State v Bechu* [1999] FJMC 3. In that case, when sentencing the offender to 5 years imprisonment for rape, the Magistrate commented that:

> 'Men should be aware of the provision of 'Convention on the Elimination of all forms of Discrimination against Women' (CEDAW), which our country had ratified in 1981. Under the Convention the State shall ensure that all forms of 'discrimination against women' must be eliminated at all costs.

[41] Article 5(a) CEDAW.

> The Courts shall be the watchdog with this obligation. The old school of thoughts, that women were inferior to men; or part of your personal property, that can be discarded or treated unfairly at will, is now obsolete and no longer accepted by our society.
>
> I hope that this sentence imposed on you, shall be a deterrent to all those, who are still practising this outmoded evil and cruel behaviour.'

Another example, from Papua New Guinea, is *State v Noimbik* [2007] PGDC 63. In *Noimbik* the offender was found guilty of child abuse contrary to section 95(2)(a) of the *Child Welfare Act* [Cap 276]. The fifth aggravating factor listed was that 'the defendant's conduct towards the child not only breached our domestic law as I have mentioned above but has transcended international boundary and gone into violating an international law – the *Convention on the Rights of the Child* which Papua New Guinea is a signatory to.'[42] This offence carried a maximum sentence of 1 year imprisonment, and the offender was sentenced to the maximum. Magistrate Monouluk also took the opportunity, when sentencing, to comment on the inadequacy of Papua New Guinea's law in the area, and relied on the CRC in his call to Parliament to increase sentences:

> At this juncture may I take this opportunity to say that the maximum penalty under Section 95(2)(a) Child Welfare Act (supra) of K400. fine and/or 12 months imprisonment does not reflect well the seriousness of the offence we see today. One has to look at the nature surrounding this offence itself – the nature of the ill- treatment upon the child, the age of the child and the life time injury sustained and say that indeed the penalty aspect of the law is insensitive and does not give the sentencing court sufficient room to move in considering an appropriate penalty for more serious forms of ill-treatment of a child like we see today.
>
> If PNG is serious about its international commitment to give a high priority to the rights of children, to their survival, their protection and development, and still remembers its obligation under Article 19 of the Convention (supra) then it must act now to make appropriate legislative changes.[43]

It can be noted that, the Papua New Guinea *Child Welfare Act* [Cap 276] was replaced by the *Lukautim Pikinini (Child) Act 2009*. The maximum sentence for ill-treatment of a child is now 2 years,[44] which is still short of the 3 year maximum sentence that Monouluk, M recommended.[45]

Chetwynd, J provides another example of rights-influenced sentencing, in the Vanuatu case of *R v Molisingi* [2015] VUSC 47. In this case he used the CRC to characterise the offending as child sex abuse, although the CRC was not specifically mentioned when aggravating features were listed.

[42] *State v Noimbik* [2007] PGDC 63 [18].
[43] *State v Noimbik* [2007] PGDC 63 [22] – [23].
[44] Section 133 *Lukautim Pikinini (Child) Act 2009*.
[45] *State v Noimbik* [2007] PGDC 63 [24].

In contrast, the Solomon Islands case of *R v Vuda* [2008] SBHC 118 is tantalising in that the judge did acknowledge the CRC, but this did not, apparently, affect sentencing. The sentencing decision began by Hon Justice Mwanesalua acknowledging that the victim was a child under international law,[46] discussing various other apparently aggravating factors including the infliction of injuries, particular humiliation or degradation due to ejaculation over the victim's stomach, and the offender's breach of bail conditions.[47] Whilst it appears that obligations under the CRC may be taken into account, Mwanesalua, J then goes on to say that the only serious aggravating feature was ejaculation over the victim's stomach[48] and uses, as his sentencing starting point, rape with no aggravating features.[49]

The disparity in the body of case law relating to the use of Convention standards to recognise offender's rights rather than victim's rights is undoubtedly worthy of further consideration. However, if offender's rights are recognised as mitigating factors it is not conceptually clear why victim's rights should not be recognised as aggravating factors.

WHERE TO FROM HERE?

If prosecutors were not previously aware of the *Vanuatu Women's Lives Survey*, Chetwynd, J's decision introduces this to them. This may lead to prosecutors using the statistics to argue that prevalence of sexual offending means that the courts have an obligation to increase sentencing to both express societal condemnation and, hopefully to increase deterrence. Further, the Court of Appeal has indicated that sentencing judges can, and maybe should, invite submissions from third parties such as women's groups, when determining sentences. This, maybe, would be a way to ensure that court decisions take public opinion into account.

The above paragraph suggests that prosecutors and judges can address the issue on a case by case basis. There are less *ad hoc* ways of addressing issues as well. The commentary above indicates that legislating to include victim impact statements and/or legislating to require particular factors to be considered as aggravating factors may lead to a broader range of relevant factors being consistently considered during sentencing. There are other possible reforms as well, including raising maximum sentences,[50] introducing mandatory minimum sentences,[51] reintroducing the

[46] *R v Vuda* [2008] SBHC 118 [2].
[47] *R v Vuda* [2008] SBHC 118 [3]-[5].
[48] *R v Vuda* [2008] SBHC 118 [8].
[49] *R v Vuda* [2008] SBHC 118 [10].
[50] Whilst the sentence for sexual intercourse without consent (or rape) is already life imprisonment, some other sexual offences have smaller maximum sentences. Hon. Justice Stephen Harrop (another external addition to the bench, having come from New Zealand) commented recently about the inadequacy of maximum sentences for incest cases, commenting that: 'I am unable to understand why the penalty for sexual intercourse without consent against section 91 of the Penal Code, for what might be called an "ordinary" rape, is imprisonment for life but that for rape of a 13 year old child, who is in the offender's care and in a relationship of trust with him, is at most 10 years imprisonment.' *Public Prosecutor v A R* [2015] VUSC 31 [34] – [37]. This case involved a charge of incest under section 95 of the *Penal Code Act* [Cap 152]. Harrop, J also commented about section 96, which provides a maximum penalty of 10 years for sexual intercourse with a child under the offender's care and protection.

use of assessors for sentencing,[52] improving information on sentencing by developing a sentencing database,[53] passing a law that provides clearer sentencing guidelines[54] and establishing a sentencing council.[55] None of these options are without challenges.

Next steps?

Several years ago an article on consistency in respect of the effect of a customary reconciliation ceremony in sentencing suggested three ways forward: 'First, the judges could, at their annual conference, discuss these issues and resolve that judicial practice will change. Alternatively, a conference or workshop could be convened to discuss these issues and pass resolutions which could be regarded by the courts as expressions of community attitudes. Third, legislation could be enacted to provide guidance for the courts.'[56] These suggestions apply equally to other sentencing related issues as well.

Judicial conferences and/or public conferences do help to bring issues into the open, and are, maybe, an appropriate forum to discuss legislative reform options in more detail in the first instance. It may also be appropriate consider options within a regional forum. Regional leaders have made a commitment to 'enact and implement legislation regarding sexual and gender based violence to protect women from violence and impose appropriate penalties for perpetrators of violence'[57] Rather than Vanuatu, and other countries, independently repeating research into sentencing practices and sentencing reform options, furthering the discussion in a regional forum may be a more efficient way to use resources.

It should also be remembered that higher sentences do not, necessarily lead to a reduction in the frequency or severity of offending. As Sir Bruce Robertson notes, 'Too often, there are

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[51] This proposal tends to be controversial in other jurisdictions. See, for example, See, for example, Law Council of Australia, 'The Mandatory Sentencing Debate' http://www.lawcouncil.asn.au/lawcouncil/index.php/law-council-media/news/352-mandatory-sentencing-debate (Accessed 9 December 2015); Gerry Ferguson and Benjamin L Berger, 'Recent Developments in Canadian Criminal Law' (2013) 37 *Criminal Law Journal* 315, 315-316.

[52] The *Courts Act* [Cap122] used to provide for two advisory assessors to be used in all Supreme Court proceedings (section 14(1)). Assessors were not used in practice and the use of assessors was removed when the *Judicial Services and Courts Act 2003* was introduced.

[53]This proposal has been raised in other jurisdictions. See, for example, New Zealand Law Reform Commission, *Sentencing Guidelines and Parole Reform* Report 94 (2006) 22.

[54] Examples from other jurisdictions exist. See, for example, the *Sentencing Act 2002* (New Zealand); the *Sentencing and Penalties Decree 2009* (Fiji).

[55] Sentencing councils appear to be gaining traction globally and there is considerable variation in the roles and composition of sentencing councils. See, for example: the New South Wales Sentencing Council http://www.sentencingcouncil.justice.nsw.gov.au/; the Sentencing Council of England and Wales https://www.sentencingcouncil.org.uk/; the Sentencing Advisory Council of Victoria https://www.sentencingcouncil.vic.gov.au/ The most recent sentencing council is that of Scotland, which was established in October 2015 https://www.scottishsentencingcouncil.org.uk/.

[56] Don Paterson and Anita Jowitt, 'More on Customary Reconciliation Ceremonies in Sentencing for Criminal Offences' (2008) 12(2) *Journal of South Pacific* Law 39, 47.

[57]'Pacific Leaders Gender Equality Declaration' (Pacific Islands Forum Communiqué, 30 August 2012, Cook Islands, 43rd). This Declaration was affirmed in 2015 (46th Pacific Islands Forum Communiqué, 10 September 2015, Port Moresby, Papua New Guinea [38]).

unrealistic expectations, particularly about the notion of deterrence.'[58] Higher sentences may, however, be part of a solution. The *Vanuatu Women's Lives Survey* indicated that 39% of women in Vanuatu have been forced to have sex by their husbands or partners,[59] 33% reported being sexually abused by a non-partner once they were over the age of 15 and 30% reported being sexually abused when under the age of 15.[60] In contrast, in the similar survey conducted in Fiji 28% reported having been forced to have sex by their husbands or partners,[61] 9% reported being sexually abused by a non-partner once they were over the age of 15, and 16% reported being sexually abused when under the age of 15.[62] In Fiji the current tariff for rape of a juvenile is 10 – 16 years imprisonment[63] and rape of an adult is 7 – 16 years imprisonment.[64] Comparatively heavy sentences for rape are now routine.[65] This is not to say that heavier sentences in Fiji are the sole factor that causes less sexual offending, as causality is far more complex. It does, however, lend further support to the concept of a regional forum to share what works, both in respect of sentencing and in respect of other interventions to reduce sexual violence.[66]

[58] Hon Sir Bruce Robertson, 'Sentencing Address' (2013) *Journal of South Pacific Law* CP-18, 19.
[59] 57.
[60] Ibid, 95.
[61] Fiji Women's Crisis Centre, *Somebody's Life, Everybody's Business* (2013) 48.
[62] Ibid, 59.
[63] *State v Vueti - Sentence* [2015] FJHC 1004.
[64] *State v Rabutoro - Sentence* [2015] FJHC 993.
[65] There is no data on current sentencing practices throughout the Pacific a review of High Court cases from December 2015 indicates that only in 1 rape case was the sentence less than 10 years imprisonment. (*State v Vueti - Sentence* [2015] FJHC 1004 2 counts of rape and one of sexual assault of child by adoptive father: 10 years 7 months imprisonment; *State v Koroivosa - Sentence* [2015] FJHC 997 rape of a child: 10 years imprisonment; *State v Rabutoro - Sentence* [2015] FJHC 993 gang rape of a 20 year old: 14 years imprisonment; *State v Nasaqia - Sentence [*2015] FJHC 978 rape of a child: 10 years imprisonment; *State v Valekula - Sentence* [2015] FJHC 962 rape of a child by guardian: 12 years 7 months imprisonment; *State v Singh* [2015] FJHC 963 2 counts of rape, 2 counts of attempted rape and 1 count of indecent assault of children: 14 years 10 months and 15 days imprisonment; *State v Basaga - Sentence* [2015] FJHC 946 7 counts of rape of adult by stepfather: 9 years and 9 months imprisonment.)
[66] The *Vanuatu Women's Lives Survey* contains 30 recommendations to address violence against women and is a good place to begin in considering other interventions.