

## **CUSTOMARY RECONCILIATION IN SENTENCING FOR SEXUAL OFFENCES IN VANUATU**

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This paper seeks to explore how legal recognition of customary reconciliation can deliver justice to victims of sexual offences and communities of Vanuatu.

First, what is the process of reconciliation or customary reconciliation? The basic problem with reconciliation basic problem is that no-one agrees how to define it or do it. Johan Galtung once stated that, 'Reconciliation is a theme with deep psychological, sociological, theological, philosophical, and profoundly human roots – and nobody really knows how to successfully achieve it.'<sup>1</sup>

However, in its simplest terms, the basic purpose of customary reconciliation in Vanuatu has been described by Don Paterson as a ceremony that:

restores harmony and peace between the members of the community who have been affected by the wrongdoing. Because that is the purpose of the practice, reconciliation ceremonies are usually held as soon after the event as possible, and they are facilitated and, indeed often, ordered to be performed by chiefs to ensure the maintenance of law and order within the community.<sup>2</sup>

My research focuses on customary reconciliation in sentencing for sexual offences in Vanuatu. I will discuss customary reconciliation as a mitigating factor in reducing sentences for sexual offences in Vanuatu. I will draw examples from common law judgments as well as the work of different legal scholars.

Vanuatu is one of the most culturally diverse countries in the world.<sup>3</sup> Custom and tradition is one of the most important aspects of life as a ni-Vanuatu. Custom holds such an important position in Vanuatu that it has been incorporated into the laws of the country. In relation to this topic, we can see that the customary ways are taken into account in sentencing. For instance, up until February 2007 the *Criminal Procedure Code* [Cap 136] provided:

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<sup>1</sup> Quoted in David Bloomfield, 'On Good Terms: Clarifying Reconciliation' (Berghof Report 14, Berghof Research Centre for Constructive Conflict Management, October 2006) 4  
<http://www.berghof-center.org/uploads/download/br14e.pdf> (Accessed 16 April 2008).

<sup>2</sup> Don Paterson, 'Customary Reconciliation in Sentencing for Sexual Offences: A Review of Public Prosecutor v Ben and Others and Public Prosecutor v Tarilingi and Gamma (2006) 10 (1) *Journal of South Pacific Law* <http://www.paclii.org./journals/fJSPL/vol10/12.shtml> (Accessed 16 April 2008).

<sup>3</sup> Miranda Forsyth, 'Beyond Case Law: Kastom and Courts in Vanuatu' (2004) 15 *Victoria University of Wellington Law Review* <http://www.austlii.edu.au/nz/journals/VUWLRev/2004/15.html> (Accessed 16 April 2008).

118. Promotion of reconciliation Notwithstanding the provisions of this Code or of any other law, the Supreme Court and the Magistrate's Court may in criminal causes promote reconciliation and encourage and facilitate the settlement in an amicable way, according to custom or otherwise, of any proceedings for an offence of a personal or private nature punishable by imprisonment for less than 7 years or by a fine only, on terms of payment of compensation or other terms approved by such Court, and may thereupon order the proceedings to be stayed or terminated.

119. Account to be taken of Compensation by Custom Upon the conviction of any person for a criminal offence, the court shall, in assessing the quantum of penalty to be imposed, take account of any compensation or reparation made or due by the offender under custom and, if such has not yet been determined, may, if he [sic] is satisfied that undue delay is unlikely to be thereby occasioned, postpone sentence for such purpose.<sup>4</sup>

Paterson argues:

Clearly the legislature intends that customary reconciliations should be encouraged for offences of a personal or private nature which are punishable by imprisonment for less than 7 years, and that account must be taken of such reconciliations when assessing the quantum of punishment for all offences. But the detail as to how and when customary reconciliations are to be taken into account is not set out in the legislation and is left to the Courts to develop.<sup>5</sup>

The courts in Vanuatu have not consistently applied the provisions that have been set out in the *Criminal Procedure Code* [Cap 136]. This paper is based on analysis of the following three judgments:

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<sup>4</sup> These provisions were repealed with effect from February 2007 by the *Criminal Procedure Code (Amendment) Act 2007*. They have been replaced by the *Penal Code (Amendment) Act 2006* which provides:

**38 PROMOTION OF RECONCILIATION**

(1) Notwithstanding the provisions in this Act or any other Act, a court may in criminal proceedings, promote reconciliation and encourage and facilitate the settlement according to custom or otherwise, for an offence, on terms of payment of compensation or other terms approved by the court.

(2) Nothing in this section limits the court's power to impose a penalty it deems appropriate for the relevant offence.

**39 ACCOUNT TO BE TAKEN OF COMPENSATION PAYMENT**

When sentencing an offender, the court must, in assessing the penalty to be imposed, take account of any compensation or reparation made or due by the offender under custom and if such has not yet been determined, may, if satisfied that it will not cause undue delay, postpone sentence for such purpose.

Whilst the *Penal Code (Amendment) Act 2006* provides considerable guidelines for the court in ordering compensation, it does not provide any guidance to the courts in considering customary reconciliation ceremonies. The deficiencies that were present in the old *Criminal Procedure Code* provisions are still, therefore present. The arguments below, which are based on the old *Criminal Procedure Code* provisions therefore continue to apply to the new *Penal Code* provisions.

<sup>5</sup> Don Paterson, above n 2.

- *Public Prosecutor v Avock*<sup>6</sup>
- *Public Prosecutor v Ben and others*<sup>7</sup>
- *Public Prosecutor v Isaiah*<sup>8</sup>

These cases are examples of judgments in which the discretion of judge has affected the consistent interpretation and application of s118 and s119 of the *Criminal Procedure Code* [Cap 136]. Each of these cases is used to highlight a different issue relating to the difficulty of considering customary reconciliation in relation to the sentencing of sexual offences.

### THREE ISSUES ARISING FROM THE CASES

#### 1. Effect of customary settlements on sentencing

It is clear from the wording of section 119 that customary settlements ought to be taken into account when considering the quantum of punishment. But, one of the questions that arises is whether the quantum of sentencing only relates to the length of imprisonment, or whether it also relates to the nature of the sentence, or whether or not it should be suspended. If the law has provided that the courts take customary settlements into account then there is perhaps an argument that the court should have full discretion to decide on the nature of punishment and the length of sentence for serious sexual offences.

This matter had, apparently, been settled by the Court of Appeal in 2002 *Public Prosecutor v Gideon*.<sup>9</sup> In this case the court noted that:

We observe that Section 119 has no application at the charging stage and cannot be the basis for reducing an otherwise appropriate charge to a lesser charge. It must not be used as a *'bargaining chip'* in determining what is or is not an appropriate charge.

Section 119 is relevant to an assessment of the *'quantum of the sentence'* and **not** the nature of the sentence. It can influence the length of a sentence of imprisonment or the amount of a fine, but **not** its fundamental nature. In other words the Section cannot alter what is otherwise an appropriate immediate custodial sentence into a non-custodial one

However, this decision does not appear to have created a fixed rule. For instance, in the 2003 Supreme Court case of *Public Prosecutor v Avock*, 3 young men, whose ages ranged from 17 to 18 at the time of the offence,<sup>10</sup> pleaded guilty to the indecent assault of

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<sup>6</sup> [2003] VUSC 124 <http://www.pacii.org>.

<sup>7</sup> [2005] VUSC 108 <http://www.pacii.org>.

<sup>8</sup> [2004] VUSC 73 <http://www.pacii.org>.

<sup>9</sup> [2002] VUCA 7.

<sup>10</sup> The Court referred to the *Convention of the Rights of the Child* 'which provides that every child below the age of 18 years is not to be deprived of his or her liberty unlawfully or arbitrarily and that such detention should be used only as a measure of last resort and for the shortest appropriate period of time. However, the Court indicated that the appropriate time for considering that Act was at the time of sentence

a young girl. There was no penetration of the victim, but instead 2 offenders touched her vagina and one touched her buttocks. The victim was intoxicated and had 'passed out' at the time of the assault, so did not feel the offenders touching her. The crime carried a maximum sentence of seven years. The two who touched the victim's vagina were sentenced to 9 months imprisonment and the one who touched her buttocks was sentenced to 6 month imprisonment. However, the sentence was suspended for 2 years.

In considering issues of mitigation the court said:

By way of mitigation of course I take into account your relatively young age. I take into account and I give you credit for your early pleas of guilty. By those pleas, as it has been submitted, you have not put the victim through the agony and distress of having to give evidence at a defended trial. Each of you has also expressed remorse because of what happened. Each of you has previous good character. In addition it was a one-off incident on behalf of each of you and of course, as I have said more than once, custom reconciliation ceremonies have taken place and they involved significant amounts of value of goods etc.<sup>11</sup>

Indeed, in respect of the custom reconciliation the judge noted 'I must take into account your responsibility for harm not only to the victim but also to the community at large. The victim's interest have (sic) already been taken into account somewhat by the ceremonies which have taken place...' <sup>12</sup> This is despite the fact that elsewhere in the judgment it is indicated that reconciliation took place with members of the victim's family, and not the victim herself.

The Supreme Court was aware of the decision in *Gideon*, stating

The Court of Appeal in the case of *Public Prosecutor v Gideon* Criminal Appeal Case 03 of 2001 said that it would be only in a most extreme of cases that suspension of any sentence of imprisonment could ever be contemplated in a case of sexual abuse. Although your case does not fall within the definition of an extreme example, it is my view that the mitigating factors in each of your cases is sufficient to allow me to deal with you by leaving you in the community.<sup>13</sup>

Unfortunately no reference was made to the clear statement in *Gideon* that customary reconciliation cannot be a mitigating factor in respect of the suspension of a sentence. It may be that the other mitigating factors, on their own, would have provided the court with ground for suspending the sentence. However, the repeated reference to the customary reconciliation, when other mitigating factors were not repeated, indicates that it may have been at the forefront of the judge's mind when he exercised his discretion to suspend the sentence.

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and each of these accused is now aged 18 years or more...' and so the *Convention on the Rights of the Child* was not a relevant consideration.

<sup>11</sup> *Avock*, above n 5.

<sup>12</sup> *Avock*, above n 5.

<sup>13</sup> *Avock*, above n 5.

It can, maybe, be concluded that section 119 of *Criminal Procedure Code* [Cap 136] is being used here not only to affect the quantum, but the nature of the sentence. The new *Penal Code* provisions do not clearly provide that reconciliation is only to be taken into account in relation to the quantum of sentence, and so, whilst there is currently no case law on whether the courts will interpret the new statutory provisions narrowly, in future the use of customary reconciliation will maybe be used to affect the nature of the sentence as well. But, will this lead to justice?

## **2. Weight given to customary reconciliation in sentencing**

A second question that arises is how much of a mitigating factor customary reconciliation should be. This question is highlighted by *Public Prosecutor v Ben*. In this case 7 young men pleaded guilty to the “gang rape” of a 15 year old girl. All were first offenders and were aged between 15<sup>14</sup> and 23 at the time of sentencing. Whilst the maximum term of imprisonment for this offence is life, the Supreme Court decided that the appropriate starting sentence was 10 years. From this that court said:

I allow you as the Chief Justice has suggested in the *August case* a deduction of one-third for your pleas of guilty. I also allow in that deduction other matters such as your previous unblemished records, your apologies to the victim and to the Court and to your village and the relative young age of some of you. I also allow you approximately a further 18 months reduction in sentence for the compensation by way of custom.<sup>15</sup>

As the offenders had already spent some time in prison waiting for trial, the final sentence was 5 years and 1 month.

This amount of the deduction of the sentence on account of customary reconciliation was 15%. This was despite the fact that the custom reconciliation payments were amounts of between Vt19,200 and VT 49,250, with the average being VT1,266, and the fact that

the victim has not obtained all of the items and moneys that were paid by way of compensation but that some of that has, according to custom, been distributed to her parents and families, but I take into account that compensation and reparation made under custom.<sup>16</sup>

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<sup>14</sup> In deciding a custodial sentence the judge noted ‘I know that section 38 (1) of the *Criminal Procedure Code* [CAP. 135] (sic, the Act being referred to is the *Penal code*) provides that no person under 16 years of age shall be sentenced to imprisonment unless no other method of punishment is appropriate. All of you, however, carried out very adult behaviour in relation to raping this victim. I have already made quite clear my view, as set out by the Chief Justice previously, that the offence of rape requires an immediate custodial sentence unless there are wholly exceptional circumstances. Each of you at 15 years of age carried out, as I say, an adult action in relation to a helpless victim. Despite what the prosecution says I do not consider any other method of punishment other than imprisonment for such a serious offence is appropriate.’ No reference was made to the *Convention on the Rights of the Child*.

<sup>15</sup> *Ben*, above n 6.

<sup>16</sup> *Ben*, above n 6.

An issue is whether the victim has been awarded justice by the criminal justice system. Incarceration within the criminal justice system serves a number of purposes, including deterrence, rehabilitation, incapacitation and retribution.<sup>17</sup> One question is whether the punishment awarded to the offenders in this case plays a retributive role, or is proportionate to the pain, suffering and humiliation that they caused the victim and her family.

Another issue is whether society as a whole has been awarded justice by the criminal justice system. The number of months that was reduced based on customary reconciliation arguably exceeded what it rightfully ought to have been, with the court not taking into account the nature and seriousness of the offence. By doing this, the deterrence effect may have been undermined by the sentencing.

In sexual offence cases the crimes are usually very serious, and the victim experiences particular pain, humiliation and suffering. To leave decisions as to weight to be given to customary reconciliation to judicial discretion may lead to injustice, particularly in a society like that of Vanuatu, where '[t]he view that domestic violence is an acceptable aspect of marriage or cohabitation is not a fringe or extreme position'<sup>18</sup> and violence against women is normalised.

### **3. Evidence of circumstances of reconciliation ceremony**

As we have seen from the above 2 cases, the customary reconciliation was not made with the victim but with the victim's family. This may be a circumstance that is relevant in considering the extent to which a victim's interest is truly taken into account during the reconciliation ceremony. This is a difficult question, particularly as much literature indicates that the concerns of the female victim are not taken into account within contemporary custom.<sup>19</sup> To what extent should, or can, the court consider customary reconciliation when a ceremony has taken place with members of the victim's family but when the victim does not want to reconcile but is forced to reconcile with the offender?

Another issue that arises, which is slightly easier for courts to inquire into, is the extent to which the courts should take into account the fact that a customary reconciliation process has been offered by the offender but has been rejected by a victim and her family. This situation occurred in *Public Prosecutor v Isaiah*. In this case an uncle, aged 21 at the time of sentencing, pleaded guilty to three counts of unlawful sexual intercourse with his niece, who ended up pregnant as a result of the incidents. Count 1 was a representative count of 4 incidents of sexual intercourse in 2002 and count 2 was a representative count

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<sup>17</sup> Sharon Dolovich, 'Legitimate Punishment in Liberal Democracy' (2004) 7 *Buffalo Criminal Law Review* 307.

<sup>18</sup> Merrin Mason, 'Domestic Violence in Vanuatu' in Sinclair Dinnen and Alison Ley (eds), *Reflections on Violence in Melanesia* (2000) 119.

<sup>19</sup> See for example Roslyn Tor and Anthea Toka, 'Gender, Kastom & Domestic Violence' (Vanuatu Department of Women's Affairs, 2004).

of 7 counts of sexual intercourse in 2003. Count 3 involved one occasion in 2004. He agreed to customary reconciliation. However, the victim and her family did not accept it.

The court began with an initial sentence assessment of 5 to 6 years. After mitigating factors has been taken into account the final sentence was 3 1/2 year's imprisonment. The court took into consideration customary reconciliation as one of the mitigating factors for reducing the sentence, along with the offender's age, his guilty plea, and the fact that he was a first offender. However, in this case the victim and the family had not accepted customary reconciliation.

We are faced with the issue of whether this sentence is fair to the victim and her family. Should the court should consider the family's rejection of the reconciliation efforts and hence, make a ruling that is in line with their wishes? Here the offender broke the trust of the victim and the court only took into account the fact that the offender tried to reconcile with the victim and her family. In this case the court awarded more regard to the offender's efforts rather than the opinion of the victim and her family.

## CONCLUSION

After analysing the cases and dealing with the three issues from the cases, namely: the effect of customary reconciliation sentencing; the weight given to customary reconciliation in sentencing; and evidence of circumstances of reconciliation ceremony it can be seen that some difficult issues arise. Certainly customary reconciliation should not be the only, or overriding, factor that should be taken into account when sentencing. Factors such as the nature and seriousness of the sexual offence and the impact of the offence on the victim are also important.

However, the argument can be taken further than that. It can be argued that customary reconciliation is a mitigating factor that does not really serve a purpose of compensating for a victim's pain and suffering, and therefore does not serve a restorative purpose to the victim. Further, if the courts repeatedly reduce the sentences of sexual offender, there is a danger that the victims (and potential victims; as a gendered crime this is all other women) will feel that there is little deterrence effect and that nothing has been done to serve justice, or the interests of the public. Indeed, '[t]he Pacific Islands Forum Secretariat has drafted model sexual offences legislation which provides that traditional forms of reconciliation are not to be taken into account by judges in sentencing an offender for a sexual offence.'<sup>20</sup> Having considered some of the issues highlighted by selected case law from Vanuatu, it can be seen that recognising customary reconciliation gives rise to potential injustice to the predominantly female victims. In my personal opinion, I support the stance in the Pacific Islands Forum Secretariat model law and strongly disagree with the process of customary reconciliation in sentencing for sexual offences.

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<sup>20</sup> New Zealand Law Reform Commission, *Converging Currents: Custom and Human Rights in the Pacific* Study Paper 17 (2006) 96.