CUSTOMARY RECONCILIATION IN SENTENCING FOR SEXUAL OFFENCES: A REVIEW OF *PUBLIC PROSECUTOR v BEN AND OTHERS*[*] AND *PUBLIC PROSECUTOR v TARILINGI AND GAMMA*[**]

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INTRODUCTION

This case note focuses on two recent decisions of the Supreme Court of Vanuatu and is designed primarily to draw attention to some issues which appear to arise in relation to customary reconciliation ceremonies which have been performed between offenders and victims, and their respective families and chiefs, in cases of sexual abuse, but it also draws attention to some other issues arising in relation to sentencing in such cases.

CUSTOMARY RECONCILIATION CEREMONIES

First, a word of explanation about customary reconciliation ceremonies. Amongst indigenous ni-Vanuatu, there is a very well established custom for a wrongdoer to perform a formal reconciliation with the victim. This practice is widespread and applies to all kinds of wrongdoings. Recently, for example, a Minister of government performed such a ceremony with a member of his department whom he had sworn at, and punched, because he had arrived late with a vehicle for use by the Minister.[1] The basic purpose of this custom of reconciliation is to restore 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. When there were no State courts and no State police, reconciliations between wrongdoers and victims were the only alternative to smouldering resentment which could at any time burst into the flames of intra-community fighting, arson and killing.
Now that there are State courts and State police which do provide an alternative, although not in reality in all parts of the country, the question arises as to the role of these reconciliation ceremonies. The answer has been provided in part by the legislature. The *Criminal Procedure Code* [Cap 136] provides as follows:

118. **<u>Promotion of reconciliation</u>** 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. **<u>Account to be taken of Compensation by Custom</u>** 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.

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. As so often happens, the devil is in the detail, and some difficult issues have started to emerge.

THE CASES

First however a brief description of the cases:

Public Prosecutor v Ben and others [2005] VUSC 108. In this case 7 young men, whose ages ranged from 15 to 23, pleaded guilty to the rape of a girl aged 15 on one occasion during the course of a public dance at a village in Efate on 26 December 2004. Each made a customary reconciliation with the victim and her family, and each was sentenced to 5 years imprisonment by the Supreme Court, even the three who were aged 15 years, and who are, by virtue of section 38(1) of the Criminal Procedure Code Cap 135, not supposed to be sentenced to imprisonment unless no other method of punishment is appropriate.

Public Prosecutor v Tarilingi and Gamma [2005] VUSC 141. A married man aged 41 pleaded guilty to 1 charge of rape and 1 charge of attempted rape of a girl aged 19 years in Port Vila, and the mother of the girl pleaded guilty to aiding the offences committed by the man. The man made two customary reconciliation ceremonies with the girl and her family and chiefs totalling VT 425,000, and was sentenced to 3 years imprisonment. The woman made one customary reconciliation ceremony to the girl and her deceased husband's family and chiefs totalling VT 151,000, and was sentenced to 3 years imprisonment suspended for 2 years.

ISSUES ARISING FROM THE CASES

Several issues of importance arise from these cases which have been summarised above.

Is section 119 Criminal Procedure Code exclusionary or complementary?

The legislation makes it clear that customary settlements must be taken into account by courts when they are considering the quantum of the punishment, but does that necessarily exclude customary settlements from being considered by a court when the court is exercising its general discretion as to what the nature of the punishment should be, for example, when a court is considering whether the punishment should be a fine or imprisonment, whether the punishment should be suspended or not, or when a court is considering whether to exercise its discretion under section 43 of the Penal Code Act to discharge without a conviction, and whether to exercise its discretion under section 45 of the Penal Code Act to order probation in place of, or in addition to, imprisonment or a fine?
The Court of Appeal in *Public Prosecutor v Gideon* [2002] VUCA 7 held quite firmly that "Section 119 is relevant to an assessment of the *quantum of the sentence* and not the nature of the sentence", so that a customary settlement was not a valid reason for suspending a sentence of imprisonment, even although it could be taken into account in determining the length of a sentence of imprisonment. It is not clear from the judgment whether this point was argued by counsel, and, with respect, the interpretation of section 119

which was adopted by the Court of Appeal is not beyond argument, and may need to be revisited.

Divergences as to weight to be given to customary reconciliation

Even with regard to assessing the quantum of punishment, there seems to be considerable divergence of practice within the Courts as to the weight that should be given to a customary reconciliation. As we have seen in *Public Prosecutor v Ben* (above) the Supreme Court reduced a starting point of 10 years imprisonment for 1 incident of a gang rape by 18 months on account of the customary settlement. That amounts to a deduction of 1/6 of the sentence on account of the customary reconciliation. In contrast, in *Public Prosecutor v Tarilingi and Gamma* (above**)** the Supreme Court reduced a starting point of 5 years for 1 incident of rape, and 1 incident of attempted rape, by 2 years having regard to the plea of guilty, the minimal force used, the custom reconciliation, and several other factors. That amounts to a reduction of 2/5 of the sentence. If one allows 1/3 of 5 years for the plea of guilty, as seems to be generally accepted, that means that the Court must have considered that, at most, the custom ceremony could have been considered to be worth a deduction of not more than 1/15 of the punishment. This, it will be recalled, was after there had been two customary reconciliation ceremonies to a total value of VT 425,000.
In *Public Prosecutor v Gideon* [2002] VUCA 7 the Court of Appeal held that a man who had had unlawful sexual intercourse with a 12 years old girl on 4 occasions should normally be sentenced to at least 6 years imprisonment, but that since the defendant had pleaded guilty and had also made a custom settlement the sentence should be reduced to 4 years. It would seem that the custom settlement must have been considered by the Court to be worth less than 1/3 of the punishment, perhaps half of one third, i.e. 1/6. On the other hand in *Public Prosecutor v Georges* [2004] VUSC 68, the Supreme Court held that where an accused had pleaded guilty to 3 counts of rape, and 1 count of attempted rape, the sentence should be reduced by 1/3 on account of a custom reconciliation.
It is clear that there is a great discrepancy as to the weight given by different Courts in these four cases to customary reconciliation ceremonies, but in none of these cases did the Courts draw attention to any particular features of the customary reconciliations that might justify the differences in weight which they were given.
It is interesting to note that in its most recent pronouncement upon the deduction to be made from a sentence of imprisonment for customary reconciliation ceremony in a case of intentional assault causing death, the Court of Appeal resisted giving any general formula on this issue, stating in *Public Prosecutor v Niala* [2004] VUCA 25:

> Counsel for the respondents endeavoured to persuade us that in accordance with the Chief Justice's decision in *Public Prosecutor v Saki Georges* Criminal Case No. 18 of 2004 there should be a reduction of 1/3 of any sentence for plea of guilty together with a further 1/3 by way of compensation by custom. That was a case which involved 2 counts of rape, and we do not consider that such a precise mathematical deduction is appropriate in this instance. We consider it appropriate to allow a further deduction of 18 months from the sentence for seven years imprisonment to recognise the custom compensation to reach a net four years.

Thus, in that case, a deduction of slightly more than 1/4 was allowed for the customary reconciliation.

Lack of criteria for assessing customary reconciliation

It is obvious that the form and content of customary reconciliation ceremonies may vary greatly, both in monetary value and also in timing.

Monetary value

In *Ben* where most of the defendants were unemployed villagers, most of the custom settlements involved payments of VT 20,000–VT 30,000, but the one defendant who was employed made a settlement worth VT 50,000. In *Tarilingi* where the defendant was employed in town, and where the incident had attracted considerable media publicity, the reconciliation ceremony involved the payment by the defendant of goods and money totalling VT 425,000 to the victim, her family and chiefs of their home island. In *Gideon* where the defendant was living in town, but it seems was unemployed, the customary settlement comprised the payment of VT 30,000 to the victim's family and a pig and a mat to the chief. In *Georges*, where the defendant was an unemployed villager, the custom settlement comprised 1 pig and 5 mats whose monetary value was undisclosed, VT 10, 000 and some kava. In no case did the court comment on the monetary value of the customary reconciliation ceremony, even in *Tarilingi* where the value of the customary reconciliation was clearly quite exceptional, especially bearing in mind that the defendant was self-employed, earning about VT 50,000 per month.

Timing

In *Gideon*, it appears that the custom reconciliation occurred before the criminal charge was laid in the courts, but in the other three cases it seems that the custom ceremony occurred after the charge was laid, but before conviction.
In none of the four cases did the court make any comment about the nature or the timing of the customary reconciliation ceremony. Are there no criteria that should be applied when considering what weight to be given to a customary reconciliation ceremony? Is the fact that the defendant is an unemployed villager, not relevant? Is the fact that the defendant is employed earning a certain level of wages not relevant? Are the circumstances of the offence not relevant to an assessment of the weight to be given to a customary reconciliation ceremony?

In *Niala* (above), the Court of Appeal drew attention to the fact that the customary reconciliation had been taken very soon after the incident of wrongdoing:

> In this case the compensation by custom was carried out expeditiously and genuinely. Ten pigs were provided to the family of the deceased on 29 March 2004 that was within two days of the incident itself which occurred on 27 March 2004. The remaining five pigs were provided on 20 July 2004 that was well before the sentencing which took place on 9 September 2004.
> This is not a case where the compensation by custom took place near to the sentencing date in order to influence the result of such sentencing. As we have said we consider that it was a genuine effort to compensate by way of custom and the number of pigs involved was of significant value.

Evidence of circumstances of reconciliation ceremony

In *Georges* the judgment indicates that the victim and her mother were questioned by the court as to whether they were satisfied with the custom settlement, and they affirmed that they were. However, in *Ben, Tarilingi*, and also *Gideon*, there is no indication in the judgments that the victim and her family were questioned by the Court as to whether they accepted the custom settlement, although statements were apparently made by their counsel to indicate that they were satisfied. Moreover, the purpose of customary reconciliations is not just to assuage the feelings of victims and their families, but to ensure that all members of the community, families of the wrongdoer and families of the victim, are settled and reconciled. In none of the judgments in *Ben* and *Tarilingi*, and also in *Georges* and *Gideon*, is there any

indication that the Court questioned the chiefs of the parties as to whether these customary reconciliations had restored harmony to their respective communities, or indeed whether the chiefs were present to be questioned. In *Tarilingi*, representatives of the chiefs who had negotiated the very substantial custom reconciliation in that case were in fact present in the court room, hoping to be able to explain to the Court what had transpired, but they were not called upon by the Court to speak.

As a matter of general principle, should courts accept statements from the bar table and letters handed in by counsel as proper evidence of the circumstances and effects of customary reconciliation ceremonies, or should they enquire more thoroughly into those circumstances?

Evidence of effect of offence upon the victim

In *Gideon* evidence was given to the Court by the victim which indicated physical and psychological harm to the victim, and account was taken by the Court of Appeal of that. That with respect seems perfectly proper, and in accordance with basic principles of evidence. In *Ben,* however, it seems that the victim did not complain of any physical or psychological effects but was described by the Court as "making somewhat light of" the effects. Nevertheless the Court held that "the deep seated effects of these events upon her will no doubt not manifest themselves until later". But what evidence was there before the Court that this would happen? There are persons in Vanuatu who are qualified to give expert evidence as to the effects upon victims or sexual offences, but should Courts attempt to do so without any professional training or interview with the victims?

If the persons involved and the community are satisfied that all has been resolved, what role is there for the State?

The discussion in the preceding section about the restoration of peace and harmony to the community raises a rather more difficult jurisprudential, and practical, question encapsulated in the heading to thus section. If the victim and her family are satisfied, and if peace and harmony has been restored to the community, as appears to have occurred in all five cases, what further interest does the State have in the matter?

This issue is raised even more acutely, if, as in *Ben*, the victim has so far forgiven one of the wrongdoers as to agree to marry him, and this is approved by the community, what further interest does the State have in the matter?

If those who are most closely connected with the incident are willing to allow relations in the community to return to normalcy, does the State have any reason to rupture those relations again by tearing members away from that community, and punishing them far and beyond what the community has accepted as legitimate? There is, of course, always the danger that the victim and her family may be pressured into accepting a customary reconciliation that is inadequate or incomplete or inappropriate, as may heave happened in *Ben*, and there is always the danger that the offender may be pressurised into making a customary reconciliation that was excessive and unnecessary, as may have happened in *Tarilingi*, which makes it all the more important, as suggested earlier, that courts should obtain direct evidence of the circumstances of the customary reconciliation ceremony.

An alternative to lengthy custodial sentences

Finally, mention should be made of a matter that is not directly related to customary reconciliation ceremonies, but is related very directly to the punishment that is ordered by the Courts for sexual offenders.

In *Gideon*, the Court of Appeal made it clear that, except in most exceptional cases, the punishment for rape must be a custodial sentence, not a suspended sentence, and further that that sentence should be, at

the very minimum, 3 years. The physical conditions of prisons in Vanuatu were condemned by Amnesty International several years ago, and have deteriorated since then. The treatment of prisoners by prison custodians has been vividly portrayed by the editor of the Vanuatu Daily Post as brutal and dehumanising,[2] and has given rise to a mass break out by prisoners who have sought the assistance of their chiefs to protect them from the maltreatment meted out to them in the prisons.[3] There must be concern as to the long term physical and psychological effects upon persons who are incarcerated for lengthy periods of time in such conditions for sexual offences, especially when, as in *Ben,* they are youths no more than 15 years of age.

It is therefore much to be hoped that the present appalling prison buildings will be demolished and replaced by new prison buildings and farms with the assistance of financial and other aid that has been assured by the New Zealand Government, and that the *Penal Code (Amendment) Bill* will be passed soon by Parliament to allow for periods of supervised community work.

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[*] [2005] VUSC 108.

[**] [2005] VUSC 141.

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[1] *Vanuatu Daily Post*, 19 April 2005, 1.

[2] *Vanuatu Daily Post,* April 4, 2006, 5

[3] *Vanuatu Daily Post*, May 8, 2006, 1;

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