

**IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU**
(Criminal Jurisdiction)

Criminal Case No. 60 of 2010

**PUBLIC PROSECUTOR
V.
KIKI KALORAN JIMMY**

Coram: Justice D. Fatiaki

Counsel: Mr. L. Malantugun for the State
Mr. A. Bal for the Defendant

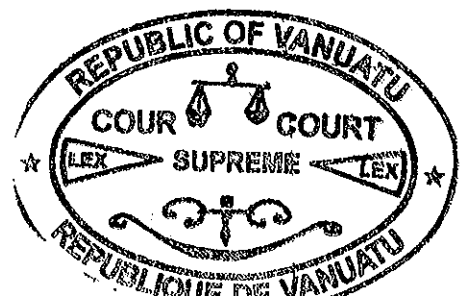
Date of Sentence: 9th June 2010

SENTENCE

Kiki Kaloran, on 1st June 2010 you pleaded guilty and were convicted for Possession of a Prohibited Substance namely 0.64 grams of dried cannabis leaves. This is an offence under section 2 (13) of the Dangerous Drugs Act [CAP. 12].

The offence that you admitted occurred on Friday 12th June 2009 when you were found by the police on the road leading to Star Wharf. You were arrested, taken to the police station and searched, and the dried cannabis leaves were found in a pocket of your clothing.

Kiki Kaloran, the offence of Possession of a Prohibited Substance carries a maximum penalty of a fine of up to VT100 million or imprisonment for up to 20 years or both.



Having said I accept that the quantity of cannabis leaves in your possession was 0,64gm is sufficient only for your personal consumption.

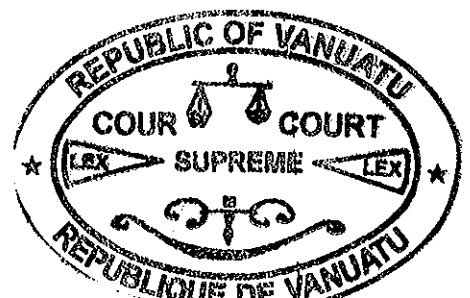
I take into account that you readily admitted the offence when confronted by the police and also when you first appeared in Court. On that day the Court expressed the view that you appeared familiar to the Court and you frankly admitted that you had appeared before the Court on an earlier occasion.

I have perused the judgment of the Court delivered on 6th November 2009 and note that in that case you were convicted of 2 offences under the Dangerous Drugs Act namely, Supplying Cannabis Leaves and Possession of Cannabis Leaves. Both offences were alleged to have occurred on 28th February 2007. On that occasion this Court sentenced you to concurrent terms of 6 months and 2 months imprisonment suspended for 12 months. (See Criminal Case No.109 of 2009)

Now barely 6 months later within the operational period of your suspended sentence you have been convicted again for Possession of a Prohibited Substance namely dried cannabis leaves.

Kiki Kaloran, let me remind you of what the Court said when it suspended your sentence of 6 months imprisonment on 6th November 2009. The Court clearly warned you in these terms:-

"I must warn you Kiki Kaloran, if you breach that condition and are convicted of any offence within the next 12 months you may be required to immediately serve this sentence of 6 months imprisonment in addition to whatever other sentence is imposed on you for your reoffending".



The particular 'condition' that the Court was referring to then and which is contemplated by section 57 (1) (a) is a condition "*that the person sentenced commits no further offence ... within the (12 month) period fixed by the Court*".

Section 57 of the Penal Code Act [CAP. 135] which deals with suspended sentences of imprisonment relevantly provides:-

"PROVISION FOR SUSPENSION OF SENTENCES OF IMPRISONMENT

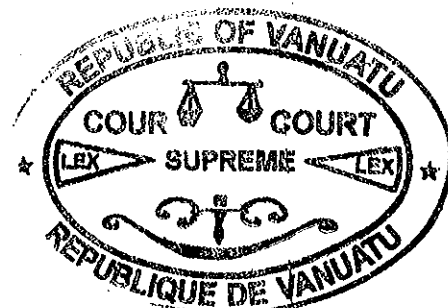
(1) The execution of any sentence imposed for an offence against any Act, Regulation, Rule or Order may, by decision of the court having jurisdiction in the matter, be suspended subject to the following conditions:

(a) if the court which has convicted a person of an offence considers that:

- (i) in view of the circumstances; and*
- (ii) in particular the nature of the crime; and*
- (iii) the character of the offender,*

it is not appropriate to make him or her suffer an immediate imprisonment, it may in its discretion order the suspension of the execution of imprisonment sentence it has imposed upon him or her, on the condition that the person sentenced commits no further offence against any Act, Regulation, Rule or Order within a period fixed by the court, which must not exceed 3 years; and

(b) if, at the end of such period, the person the execution of whose sentence has been suspended in accordance with this section has not been convicted of any further offence against any Act, Regulation, Rule or Order, the sentence is deemed to have expired; and



(c) if, before the end of such period, the person the execution of whose sentence has been suspended in accordance with this section is further convicted of any offence against any Act, Regulation, Rule or Order, the court shall order that the suspended sentence shall take effect for the period specified in the order made under paragraph (1) (a) of this section unless it is of the opinion that it would be unjust to do so in view of all the circumstances which have arisen since the suspended sentence was imposed, including the circumstances of any further offending, in no case concurrently with any subsequent sentence.

(d) Where a court decides under paragraph (1) (c) that a suspended sentence is not to take effect for the period specified in the order, then, subject to this Act, the court must either:

(i) order that the suspended sentence:

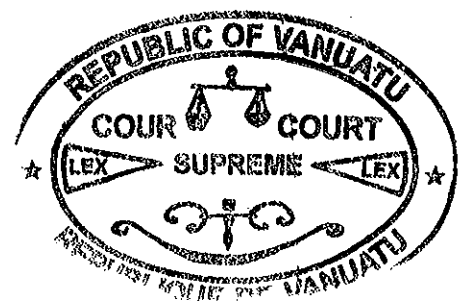
(ia) take effect with the substitution of a lesser term of imprisonment; or

(ib) be cancelled and replaced any non-custodial sentence that could have been imposed on the offender at the time when the offender was convicted of the offence for which the suspended sentence was imposed; or

(ic) be cancelled; or

(ii) decline to make any order referred to in subparagraph (i) concerning the suspended sentence.

(2) The court must, when ordering the suspension of the execution of the sentence of imprisonment, explain clearly to the person sentenced the nature of the Order and must ascertain that he or she has understood its meaning."

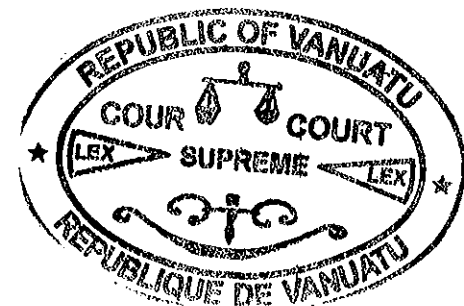


It will be seen from a comparison of section 57 (1) (a) and sections 57 (1) (b) and (c) that the triggering event (for want of a better term) contemplated by each paragraph is not the same. In paragraph (a) the event is the “*commission*” of a further offence within the operational period of the sentence, and, in paragraphs (b) and (c) the triggering event for the activation of a suspended sentence of imprisonment is the further “*conviction*” of any offence within the operational period. Needless to say the commission of an offence may be separated by days, weeks and, more often, months before a conviction is entered for the offence.

The present case provides a vivid example of the Court’s dilemma. The Defendant was given a suspended sentence on 6th November 2009 and the 12 months suspension period fixed by the Court will therefore expire on 6th November 2010. This latest conviction is clearly within the 12 month suspension period and satisfies the requirements of paragraph (c) as a triggering event for the activation of the suspended sentence.

However, the offence for which the Defendant has been convicted was committed “*on the 12th of June 2009*” which is 5 months BEFORE the Defendant’s suspended prison sentence was imposed, and, equally plainly, is NOT in breach of the “*condition*” contemplated by paragraph (a) of section 57 (1) which was the “*condition*” imposed by the Court when it suspended the Defendant’s sentence of imprisonment.

The question(s) that arise in this case are: is there a conflict between paragraphs (a) and (c)? and if so, which paragraph should prevail? and, if there is doubt about the true meaning and intent of section 57 (1)? or there is an irreconcilable internal conflict between the various paragraphs of the section, then should not the Defendant be given the benefit that doubt?



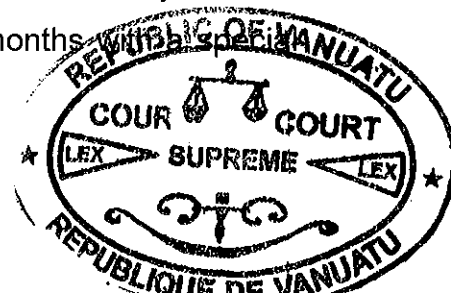
Needless to say although strictly, speaking, the Court is dealing with the situation contemplated by paragraph (c) *ie.* the activation of a suspended sentence, it is not thereby absolved from considering paragraph (a) *ie.* the suspension of the sentence “*in accordance with*” which paragraph, the suspension order was made in the first place.

It might be that the discrepancy in the triggering events might be resolved by reading “*commits*” in paragraph (a) as being conclusively established by the entering of a conviction for the offence so-committed but that would ignore the clear requirement that the offence committed within the operational period be a “*further offence*” which in my view can only mean an offence committed AFTER the suspended sentence was imposed.

It is unfortunate that this offence which was committed in June 2009 was not brought to the Court’s attention in November 2009 (as it should have been) nor is it known why there has been such a lengthy delay in bringing the matter to trial, but, whatever the reason for that omission, the Defendant should not be made to suffer its consequences.

Accordingly, I am reluctantly driven to conclude in this case, that it would be “*unjust*” to activate the Defendant’s suspended sentence in this instance. The suspended sentence therefore remains extant and will eventually expire on 6th November 2010. The defendant is warned that any further conviction or re-offending between now and 6th November 2010 will result in his immediate imprisonment for 6 months.

The sentence of the Court for this latest conviction of Possession of a Prohibited Substance is a sentence of imprisonment which equates with the number of days already spent by the Defendant in remand whilst awaiting this sentence *ie.* 8 days imprisonment. In addition, to help you reform and rehabilitate yourself I order that you undergo a sentence of Supervision for 12 months



condition that you undertake a literacy program at Wan Smol Bag and you undertake church programs with Pastor Rodney Lambert of Potters House.

Kiki Kaloran, you must consider yourself extremely fortunate that your suspended sentence of imprisonment was not activated today. I also trust that your brief taste of life in prison will be an experience you would not like to repeat and that you will make a decision to change your life, stay out of trouble, and away from cannabis. You have an extremely loving, caring, and supportive mother and I urge you not to waste her efforts to assist and guide you.

For completeness I order the 0.64 grams of dried cannabis leaves recovered from the defendant to be forfeited and destroyed after the appeal period expires.

If you disagree with this sentence you may file a notice of appeal within 14 days.

DATED at Port Vila, this 9th day of June, 2010.

BY THE COURT



D. FATIAKI
Judge.

