

PUBLIC PROSECUTOR

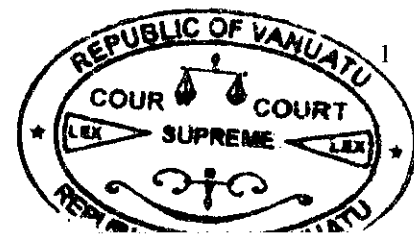
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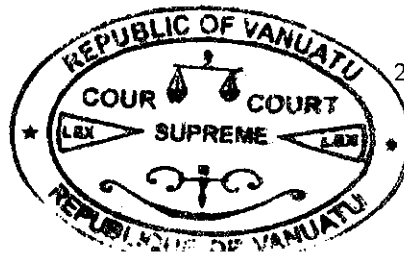
Sentence: *Monday 3 August 2015 at 2 pm*
Before: *Justice Stephen Harrop*
Appearances: *Damien Boe for the Public Prosecutor*
Pauline Kalwatman (PSO) for the Defendant

SENTENCE

1. Mr Ato you are 42 and here for sentence having pleaded guilty on 8 July to two counts of having sexual intercourse without consent with an 11-year old girl at Liro on the island of Paama on 12 September last year. One count involved your putting your penis inside her mouth and the other your licking, sucking and kissing inside her vagina. These are very serious offences carrying the highest penalty under the law of Vanuatu, life imprisonment.
2. Although you admitted this offending when you were spoken to by the Police you then pleaded not guilty on the 3rd of March and you maintained that plea over the ensuing four months despite the question of your plea being raised more than once at judicial hearings or conferences. The guilty plea came only on the day scheduled for the trial on Paama, 8 July and there was no indication of a change of plea before then.

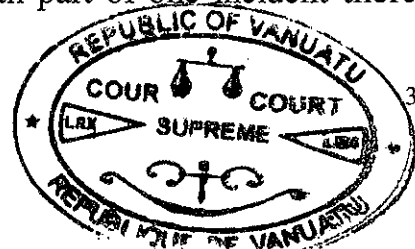


3. However, to be fair to you, as I understand it you always admitted the conduct I have mentioned but the charges before the Court did not contain the particulars which accorded with your admissions and which ultimately were made on the application of the prosecutor. So to put it simply your not guilty pleas were in response to allegations of full sexual intercourse rather than oral sex and the prosecution accepts there was not full sexual intercourse. So on that basis I think it is fair to give you nearly full credit for pleading guilty because it was only when the prosecution changed the charges to the appropriate charges that you could reasonably have been asked to plead guilty.
4. It appears that you may have some form of family relationship but the extent of that is not clear so I do not proceed on the basis of that being an aggravating factor, beyond the fact that you both reside on the island of Paama. If the prosecution wanted to put forward your relationship with the victim as an aggravating factor it was the Public Prosecutor's responsibility to ensure that that information was included in the facts and there has been no attempt to do that. It is only in the defence submissions that there arises a suggestion of some relationship but it is unfair to hold that against you when the Public Prosecutor has not put that forward.
5. On the 12th of September 2014, the victim and her friends went to cut firewood somewhere near where you were living. When you saw her you called out to her and sent her to the shop to buy a box of matches. When she came back you told her to go into the house and leave the matches there. When she went inside the house with the matches you followed her, closed the door behind you and held on tightly to her and told her not to call out or make any noise; you threatened to cut her with a knife if she



did so. I pause there to mention that there is no suggestion that you actually had a knife on you, nor is there any suggestion that you were brandishing the knife when you made that threat. It appears that a knife may have been lying on the floor nearby. Regardless, she was certainly frightened of what you might do to her so she kept quiet.

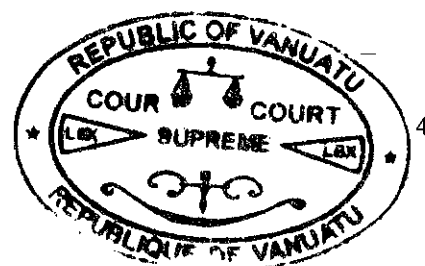
6. You took off her clothes, touched her body, told her to lie down and performed oral sex on her, then you took your penis out and told her to open her mouth and suck your penis. She cried and refused but you told her not to cry or you would cut her with a knife so she opened her mouth and you pushed your penis into her mouth. Someone called Abu Emma called out for her but you told her not to make any noise, you then used your tongue to lick, suck and kiss inside her vagina. She continued to cry and she felt sore in her private parts because this was the first sexual experience she had had. You then forced your penis into her mouth and forced her to suck it again. She again continued to cry and again you made a threat that if she did not agree to what you were doing you would cut her with a knife. After this she was allowed to leave and she went home crying and that is how the complaint was made.
7. There are obvious aggravating features about this offending. You are 42, she was only 11. There was obviously a degree of planning and a ruse used to get her to bring you matches. I accept that you may have had no idea she was going to come to cut firewood near to where you were living so the planning was not for a lengthy period, but once you saw her you thought of a way to get her to come inside. That shows some planning, some premeditation. There is then the obvious additional aggravating feature that you made three threats to cut her with a knife if she did not do what you wanted. And although this was all part of one incident there



were 2 separate incidents of sexual intercourse without consent involved in it. There is both the oral sex on you and you on her. Mr Boe submitted that the level of actual violence exceeded the usual level, I cannot accept that. I proceed on the basis that there was no particular violence beyond that inherent in the acts but there were serious and frightening threats which are obviously a relevant factor.

8. I have considered the pre-sentence report and the submissions made by your counsel as to mitigating factors. I note that you have no previous convictions at the age of 42 and you are entitled to credit for your many years of good behaviour prior to this incident. I also note your immediate admission of the offending and as I have said the prompt guilty plea once the charges were properly particularised to express exactly what had happened and what you had always accepted had happened. I also take into account your willingness to undergo a custom reconciliation ceremony.

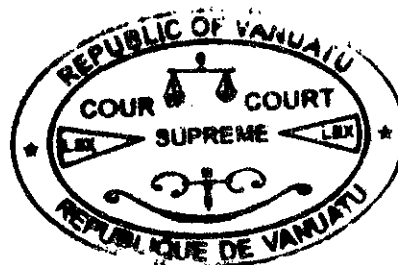
9. You have been in custody since you were arrested and although you went to Paama for the hearing I understand the victim and her family were back here in Port Vila so it was not possible to have a custom reconciliation ceremony on Paama as had been thought initially. Efforts have been made to see if that could occur prior to sentencing. I understand that the victim's family have wanted to put the ceremony off, for some reason I am not aware of, until September. I proceed on the basis that this delay is nothing to do with you and that your willingness to make reconciliation, which I note is at quite a significant level of Vt 60,000 having regard to your having been in custody for lengthy period.



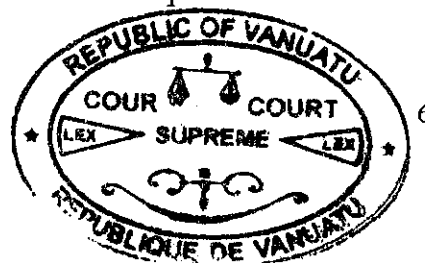
10. In terms of your personal circumstances, you are married with 2 children aged 6 and 3. Your elder child is a daughter and this causes me to wonder what sentence you would think the Court should impose on a man who might do this to your daughter when she was 11. How would you feel as her father? I expect you would want the Judge to send the offender to prison for a very long time.

11. In cases like this there are always serious and longstanding consequences for the victim. There is a good deal of scientific research about the effects on sexual abuse victims. They usually have great difficulty developing appropriate relationships with boys or men as they grow up and there can be a number of lifelong social and mental health consequences which typically are associated with this. At this stage it is too early to say how this particular victim will be affected by what you did but one can say with some confidence that she will suffer for many years from what you did.

12. It is important to say too that she is not the only victim. Your wife and children are in a very real sense victims too, although I hasten to act not in anything like the same degree as the young girl. Your wife in particular will have no doubt felt great shame and embarrassment and will continue to do so. Also your time in prison has already and will continue to deprive them of your role in their lives as a husband, a father and a provider. It needs to be remembered that, like the 11-year old girl, they have done nothing wrong. They are completely innocent victims and yet you have made them suffer through your actions on the 12th of September 2014.



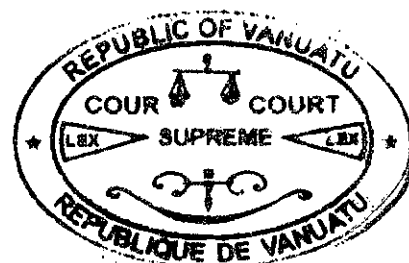
13. In terms of your other personal circumstances, I note that your father died following Cyclone Pam so you have yourself suffered a loss since the time of this offending. Also I note you are a farmer selling crops at the Liro market and that you are the sole breadwinner for the family which just emphasises my point about the effects your offending will have had and will continue to have on your family.
14. You have lived your whole life in Liro I think and I acknowledge the time you have already spent in custody away from the island in prison here in Port Vila will have been arguably more difficult for you than if you were from Port Vila and you had family nearby who could come to visit you.
15. I note that you are a deacon in the Presbyterian Church and this is put forward as a form of mitigation, a testament to your character. To me the opposite applies. You knew or ought to have known even more than other people that this is totally wrong and unChristian behaviour. You failed to practise what you apparently believe in and preach. You cannot both be a faithful member of a Christian church as you claim and behave in this appalling manner towards an innocent 11-year old girl. That is simply hypocrisy.
16. I do acknowledge that you were cooperative with the Police and as I have said before you admitted what you had done promptly and there are certainly indications of your remorse. You have some insight into how you have affected other people and of course you pleaded guilty and have agreed to undertake a reconciliation ceremony. Even though that guilty plea came late as I say I do recognise the importance of it because it avoided this young girl giving evidence in Court and being challenged about what happened and reliving the incident. I also provides for her a



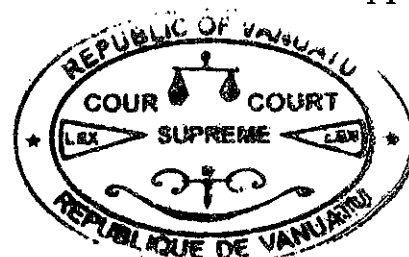
vindication. There are some people who commit offences like this who are found guilty after a trial yet still deny that they did anything wrong and the victim often feels that nobody believes her, even if the Court says the person is guilty. But you, by pleading guilty have stood up publicly and said her complaint is true.

17. So with those introductory comments I come to considering the appropriate sentence. There is no dispute between counsel that an unsuspended prison term must be imposed and I accept their view. However, there is a large discrepancy between their submissions about how long that should be. The Public Prosecutor who it seems to me largely looks at this case as if it was an ordinary rape case submits a starting point of about 8 years as appropriate taking into account all the aggravating features. Your counsel Ms Kalwatman, correctly in my view, highlights the fact that this is not a rape case, it involves, serious certainly, but less serious sexual intercourse without consent than full sexual intercourse. This is a case of a lesser form of sexual connection which nevertheless still comes within the definition of sexual intercourse without consent even though it is not literally sexual intercourse.

18. Your counsel has properly referred me to the case of PP v. Tugu [2012] VUSC 145 where Justice Spear was dealing with a case somewhat more serious than this and he said that if there had just been one victim he would have adopted a 3-year starting point. So there is a 5-year gap between the submissions of counsel about the appropriate starting point.



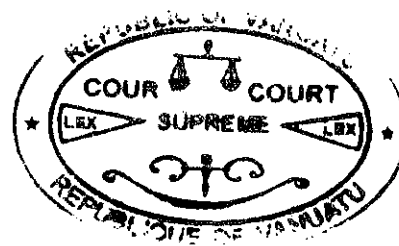
19. I proceed on the basis that there is no doubt that oral sex is to be treated as markedly less serious than full sexual intercourse but on the other hand I do not accept that a 3-year starting point is sufficient.
20. These were two separate occasions, albeit within the same incident, of oral sex. That involved oral sex on her and involved penetration of her vagina with your tongue. She particularly did not wish to suck your penis but you made her under threat to do that. And those threats were made three times during the incident. This was undoubtedly traumatic and painful for her and I add that there is a substantial age difference and inherent degree of domination reinforced by your threats.
21. Now I accept that the Tugu case was more serious purely in the sense that there were two victims. But in other respects this case is more serious, Mr Tugu was only 16 or 17, you are 42, that is a big difference in terms of maturity and understanding of what is acceptable. The girls in the Tugu case were 9 and 7, so on one level it can be said that that was a more serious case as compared with offending against an 11-year old. Indeed that is what Ms Kalwatman submits. I am not sure that is right. There is I think a respectable argument that sexual offending against an 11-year old girl who is becoming aware, or at least closer to becoming aware, of her sexuality may have greater adverse consequences for her than if she had been offended against when she was 7 or 9 and did not really understand what was happening.
22. By comparison with the Tugu case where a 5-year starting point was adopted for that young man against two complainants, I have come to the view that a 4 ½ year starting point is appropriate here because of the various aggravating features that I have identified. The Court of Appeal



has repeatedly, but most notably in the Gideon case in 2002, emphasized the need to issue a strong deterrent sentence for men, particularly older men, who behave in this totally unacceptable way towards young children. The consequences for young children for the rest of the lives are likely to be significant.

23. So I consider that a starting point of 4 ½ years or 54 months imprisonment is appropriate. From that I deduct 25% for your guilty plea, that is not quite the full credit that I would give normally but I do think that you have to bear some responsibility for not having pleaded guilty until the last minute. It would have been easy for your counsel to say to the prosecutor that you acknowledged the oral sex and that you would plead guilty to charges which provided those particulars and yet nothing was done to clarify those matters until we were all on the Island of Paama recently. That meant that the State was put to the considerable cost of having all of us be there and it also meant that the victim would or may have thought until the day of the trial that she would have to give evidence. So while I still acknowledge significant value in the guilty plea and I do acknowledge that the prosecution also has responsibility for not having particularised its charges as early as it should have, nevertheless I cannot give you the full credit. So 25% is about 14 months that brings it down to 40 months, or 3 years and 4 months.

24. Now there are some other mitigating factors, the fact that you are a first offender at age 42. You have had many years of blameless behaviour and a willingness to undergo a custom reconciliation ceremony. I would deduct a further 20% or 8 months or so for those matters. And that brings me to an end sentence of 32 months or **2 years and 8 months**. I am satisfied that that is an appropriate end sentence and that sentence is



imposed concurrently on the two charges and the sentence is to be treated as having begun on the day that you were taken into custody so that you obtain the appropriate benefit to which you are entitled for the time you have already spend in custody. In reality your sentence started then even though you had not at that point pleaded guilty and been convicted.

25. For the avoidance of doubt I suppress the name of the victim to protect her identity. I should say also that as I said when remanding you from Paama back to Vila, I envisaged that Corrections would prior to sentencing arrange for you to attend the custom reconciliation ceremony when the victim and her family were ready for that so that while you would still technically be in custody and you would be under the control of a Corrections officer as you were when you were on Paama. I think it is important that you be given the opportunity post-sentencing to take part in that ceremony. It is of course primarily for the benefit of the victim and her family and it is in the interests of justice that you take part. So while you are not to be released for the ceremony, you should be attending in a less restrictive form of custody. I leave the details of how that works to the Corrections Department of course because that is a matter for them.

26. Finally, you have a right to appeal against this sentence within 14 days if you wish to do so.

BY THE COURT

