

PUBLIC PROSECUTOR

V

BASIL TAIKA

Date of Sentence: Friday 5 February 2016 at 9:30 am at Luganville

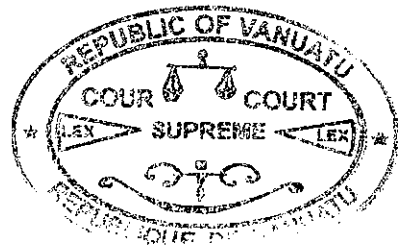
Before: Justice SM Harrop

In Attendance: Ken Massing for the Public Prosecutor

Jane Tari (PSO) for the Defendant

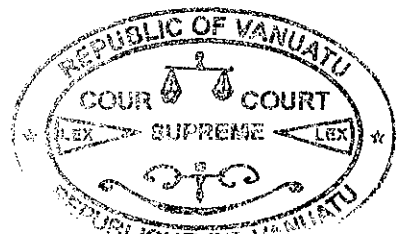
SENTENCE

1. Mr Taiaka you are here for sentence on one count of indecency with a young person. You had earlier faced a charge of sexual intercourse without consent but that was not pursued by the Public Prosecutor and so of course the factual allegation relating to that is put entirely to one side. This is a serious charge and the maximum penalty is ten years imprisonment under section 98 A of the Penal Code.
2. You are 56, or you were at that time, and the victim is a six year old girl with whom you have a relationship of de facto grandfather to granddaughter. The nature of the assault is touching her vagina with your hands following your removal of her pants.
3. The facts are briefly stated, the incident occurred in a village called Naone in South Santo in December 2015, there is just one occasion and it was a relatively brief incident. During that month the victim and her twin sister went to live with one of their relatives in another village where you live. On the day of the incident you were there with her and as I have said you removed her panties and touched her vagina with your hands. She felt bad

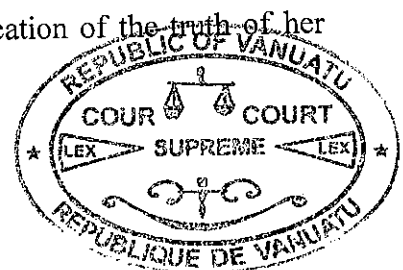


about it. She cried and was afraid and the matter was revealed to the parents and then of course on to the Police. You were cautioned, arrested and interviewed and you admitted what you had done.

4. The aggravating features beyond those which are inherent in the offence itself are the significant age difference of some 50 years, obviously somebody of your age and position in the community is expected to protect younger members of the community not take advantage of situations to gratify your own sexual desires. Secondly, her youth and vulnerability at age six, she was obviously in a position where she could not reasonably be expected to resist you or avoid what you intended to do. An older girl might have been able to resist more readily. The third and important aggravating factor is your relationship with her. You are her de facto grandfather so it is a gross breach of trust on your part; as I have already said with that relationship you should be nurturing her and helping her to grow up rather than committing serious sexual offences against her.
5. In determining the appropriate sentence I have to assess the appropriate starting point and that is done by factoring in the maximum penalty, the circumstances of the offending including its aggravating features, the starting point adopted in similar cases and the general principles applicable to sentencing for this kind of offending in Vanuatu, as developed by the Supreme Court and the Court of Appeal over the years. Regrettably there are many, many cases to which reference could be made but I do not propose to go through those because the principles are well established. The Courts have repeatedly said that imprisonment is the necessary sentence for adult men who interfere in this way with young girls.
6. As to what counsel say about this, Mr Massing submits having regard to authorities that a starting a starting point of around two to three years imprisonment would be appropriate having regard to the aggravating features. He acknowledges as of course I do, and this will come up later in my decision, that there is a need to reduce that to reflect mitigating factors.

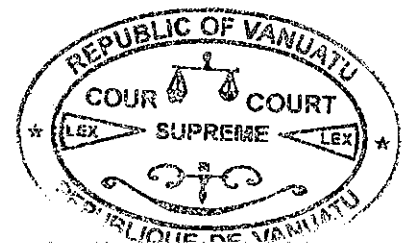


7. The submissions on your behalf do not identify a starting point but it is suggested that an end sentence of about two years is appropriate but that that should be suspended and a community based sentence of 100 hours imposed. I should say on the question of suspension, Mr Massing submits there should be no suspension for this kind of offending even though there have been other cases where the Courts have done that. He submits the Court needs to give a strong deterrent message particularly because this kind of offending is very common on Santo.
8. I have myself had cause to consider cases which are similar to this in recent months. In the *PP v. Kalkau* [2015] VUSC 99, which was a more serious case than this because it involved licking of the vagina of a relative, I decided a starting point of 3 ½ years imprisonment was appropriate. While I accept that your touching of the victim's vagina was less serious than that, nevertheless it was skin-on-skin touching and so it is more serious than touching of breasts and more serious than touching of the vagina over clothing; you also removed her panty to allow this to happen. There was also *PP v. Frosty* [2015] VUSC 152 where the defendant had been sucking his 3 year old daughter's vagina; a starting point of four years was adopted.
9. Weighing everything up I have decided that a starting point of 2 ½ years imprisonment is appropriate here. I think I could have justified slightly more but I am required to adopt the least restrictive starting point I reasonably can, so that is 30 months imprisonment.
10. From that starting point there need to be deductions for mitigating factors. First of all you pleaded guilty and you must receive a 1/3 discount for that, so that is 10 months reducing it to 20 months. I should say that a guilty plea in a case like this has particular value because it avoids the victim having to come to Court and relive the incident and it avoids the cost of putting on a trial. Also where a child is the victim quite often they are not believed by adults to whom they disclose the offending, so it is a vindication of the truth of her



complaint that you immediately accepted you had done that and you have carried that through with your guilty plea. So in my view the 1/3 discount is entirely justified.

11. There are other mitigating factors which are highlighted by counsel and of course by the pre-sentence report which I have also read. They are the fact that you are a first offender, you are generally of good character and you are very remorseful and regret your actions. It is also pointed out that you have spent about 36 days in custody already.
12. The pre-sentence report does mention that your nephew commented that this was not the first time you had committed such acts but I am also told you have no previous convictions and so I am going to put those comments to one side. What is more concerning though is that you regarded the matter, as far as the probation officer records it, as a form of playing and that you did not know or realize your actions were against the law. I have to say that it is difficult to believe and obviously other adults to whom the incident was reported knew very well it was against the law and that is why the police were involved.
13. Also it is concerning to note that you said to the probation officer that the victim was naked at that time which could have contributed to the offending. There is an inference there that you may be saying that she is somehow to blame for leading you on. I am cautious in drawing that conclusion because it could be read another way, but if that is what you were meaning it is absolutely wrong: no young girl leads an adult on in any way whatsoever. The responsibility of an adult in that situation is to ensure that there is no sexual contact whatsoever, regardless of what the child might do. A six year old is simply too young to understand the significance of sexual matters but as an adult you know about all of that.
14. You have not yet performed any custom reconciliation regarding the matter because you were brought to Luganville and remanded in custody and so you have not had the opportunity but you have expressed willingness to perform



one to the victim and her family is you are given a chance in the community. I must and do give you credit for that attitude.

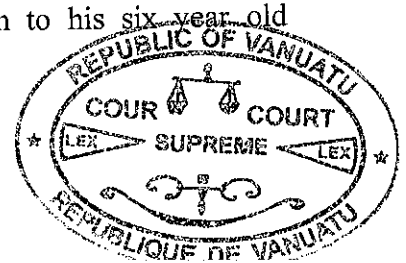
15. I would reduce the sentence by a further six months on account of these other mitigating factors, apart from the guilty plea and that brings it down to 14 months imprisonment.

16. Then we come to the question of whether that should be suspended as Ms Tari submits should occur and Mr Massing says should not occur. I immediately accept that there have been cases of a broadly similar nature where suspension has been applied including some where I have been the judge. And one example is the Banga case which has been mentioned. But equally there have been a number of other cases where suspension has been declined. So it is a matter of considering the particular case rather than being unduly distracted by what Judges have done in similar cases.

17. The usual response is not to suspend in a case like this and that is because of what the Court of Appeal said in the well-known case of *PP v. Gideon* [2002] VUSC 7; although that was a case of unlawful sexual intercourse that the principles still apply. The Court there said:

"There is an overwhelming need for the Court on behalf of the community to condemn in the strongest terms any who abuse young people in our community. Children must be protected. Any suggestion that at 12 year old has encouraged or initiated sexual intimacy is rejected. If a 12 year old is acting foolishly then they need protection from adults. It is totally wrong for adults to take advantage of their immaturity. And it was further said, men must learn that they cannot obtain sexual gratification at the expense of the weak and the vulnerable. What occurred is a tragedy for all involved. Men who take advantage sexually of young people forfeit the right to remain in the community."

18. Having reflected on this carefully I come to the position that this was a gross breach of trust by a de facto grandfather in relation to his six year old



granddaughter and it involved skin-on-skin touching. In those circumstances I am not prepared to suspend the prison sentence.

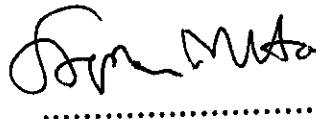
19. I am conscious of the requirement of section 37 of the Penal Code to keep offenders in the community so far as that is consistent with public safety but I think a deterrent sentence is required to emphasise how wrong this kind of conduct is. I do not have information before me from the Public Prosecutor explaining how common this is in Santo so I rest my decision on the basis that the starting point here is an unsuspended prison sentence and I am not persuaded to differ from that.

20. I therefore sentence you to **14 months imprisonment** which will be deemed to have started on 30 December 2015, the date when you were taken into custody.

21. If you wish to appeal against this sentence you have 14 days to do so.

DATED at Luganville, this 5th day of February, 2016.

BY THE COURT



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SM HARROP
JUDGE

