

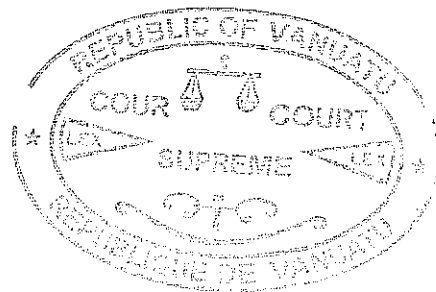
PUBLIC PROSECUTOR V RL

Before: **David Chetwynd**

Counsel: **Simcha Blessing for the Public Prosecutor
Nigel Morrison for the Defendant**

JUDGMENT

1. This is, as Mr Morrison has said, an unusual case. The Defendant has entered guilty pleas to attempted rape and the alternative charge of Unlawful Sexual Intercourse. The offence charged took place in 2005 and the victim was a 9 year old child.
2. The Defendant was originally charged with a number of offences with the Information containing 12 counts in all. A number of those counts could not be proceeded with because of the provisions of section 15 of the Penal Code. The majority of the charges alleged indecent assault on the same victim. The facts disclosed those offences took place over 10 years ago, some in 1999. Section 15 of the Penal Code says that, in respect of allegations of acts of indecency a prosecution cannot be commenced against any person after the expiry of 5 years from the date of the commission of the offence.
3. Attempted rape carries a maximum penalty of life imprisonment and therefore the limitation period is 20 years.
4. This course of abuse from sometime in 1999 when the victim was 3 years old and the defendant 15 or 16, has been admitted but he faces sentence for the one offence in 2005 when he was 18 or 19.
5. For the purposes of sentencing that does complicate matters. First, I cannot sentence the defendant for the offences he acknowledges to have occurred



before 2005. However, I believe I can take that early behaviour into account as an aggravating factor.

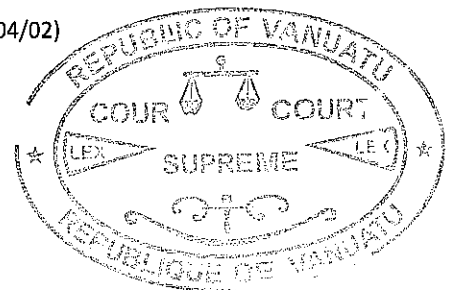
6. Second, when he committed these earlier acts prior to 2005 the Defendant have been a juvenile. It is doubtful he would have or could have been dealt with as an adult.
7. An attempted rape, or sexual intercourse without consent as it is more properly called, is treated very much the same as a completed rape as far as sentence is concerned. In other words the maximum penalty is life imprisonment. In this case a young adult man attempted the penile penetration of a young pre-pubescent girl.
8. The act caused her considerable pain, so much so that she was taken to hospital when she complained of stomach pain. Regrettably, because of her young age, she was not able to explain the cause of her pain and the true reason for it was not ascertained.
9. The starting point for any rape is 5 years imprisonment. Factors affecting that starting point are aggravating factors not personal to the defendant. The most obvious is the age difference. The defendant is 3 times the age of the victim. The very young age of the victim when the abuse stated is also a factor to take into account.
10. The offending also caused the victim pain. There was no doubt physical pain as the visit to the hospital shows. There was also mental pain. The victim still suffers from mental anguish and psychological damage 10 years on. She has the history of self-harm and an impaired sense of security and competence. She has very low self-esteem and acute anxiety. She will need help for some time to come. It has only been her intelligence and strength of character that has allowed her to succeed in life as she has done.
11. The victim was a family member and therefore the extreme breach of trust that such offending involved is also a factor to take into account.
12. The victim was abused in her own home and that too is an aggravating factor.



13. The attempted penetration also involved unprotected sexual acts with all the additional dangers that could entail.
14. Such sexual brutalisation must significantly aggravate the offending and the starting point for this offending is 10 years imprisonment.
15. The personal factor which mitigate the offence are the defendant's good character. It does seem from guidelines from the Court of Appeal that good character is of limited relevance. The sentence should be reduced by 6 months.
16. The defendant is remorseful and wants to engage in custom reconciliation. However, to me that comes 10 years too late and I bear in mind that after committing these offences the defendant prayed with the victim for forgiveness. I am only prepared to discount the sentence by a further 6 months in that regard.
17. Although to my mind real guilt was not accepted until many years after the offences were committed, and given there has been a gap of 10 years since the last offending I will give the defendant a full 1/3 reduction of the sentence for an early guilty plea. I do not think the delay can be take into account in any way because the victim was told not to say anything.
18. That leaves a sentence of 6 years. There is no prospect of suspending part or all of that sentence. The Gideon ¹guidelines require extreme exceptional circumstances to be demonstrated in order to suspend the sentence. The defendant will go to prison immediately for 6 years.
19. I cannot leave this case without expressing some concerns about the prosecution of this case. It was an extremely sensitive matter. Unfortunately the guidance that I tried to offer the prosecution in an earlier Minute was ignored. As was said in the case of Gideon;

“We are told that some of the allegations are not accepted or admitted. Those issues should have been sorted out prior to sentencing....

¹ PP v Gideon [2002] VUCA 7; Criminal Appeal Case 03 of 2001 (26/04/02)




Additional factors whether they be mitigation or aggravation must be established by the party asserting the particular circumstances.”

20. This is even more crucial when there may be an impact on the charges and or facts due to the limitation periods set out in section 15 of the Penal Code.

21. Finally, this judgment is entitled the way it is because I have previously made an order prohibiting the disclosure of the names of the victim and the defendant. The reason, in respect of the former is obvious. In regard to the latter, identifying the defendant would make it easy to identify the victim.

DATED at Port Vila this 12th day of December, 2017.

BY THE COURT


.....
David Chetwynd
Judge

