

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

Criminal Case No. 37/ 2015

PUBLIC PROSECUTOR

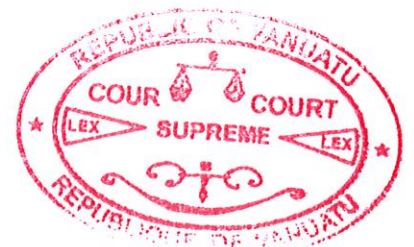
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ERIC YAN FROSTY

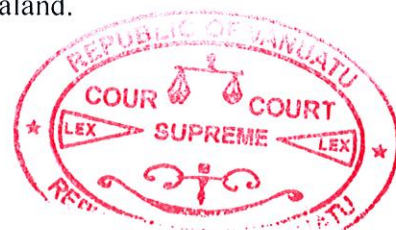
Hearing: *Wednesday 23 September 2015 at 9 am*
Before: *Justice SM Harrop*
Appearances: *Betina Ngwele for the Public Prosecutor*
Pauline Kalwatman (PSO) for the Defendant

SENTENCE

1. Eric Yan Frosty you appear for sentence today on one count of indecency with a young person against section 98 (a) of the Penal Code. The maximum penalty is 10 years imprisonment. You pleaded guilty to that count on the 13th of August and have been in custody on remand since 12 May 2015 so that is about 4 ½ months ago.
2. The offending occurred between February and the 8th of May 2015 and your 3 year old daughter is the victim. You are married and aged 23.
3. The brief facts are that the girl's mother, your wife, made a complaint on the 8th of May that she suspected you had been sucking your daughter's vagina since approximately February 2015. She was suspicious of that because she had seen the girl experiencing some pain at times when going to the toilet and also when she was drying her off after she had had a bath. You were never seen doing this but you were once seen biting her lips. Your wife felt that her life (that is the daughter's life) might be in danger so that is why she contacted the police.



4. When you were spoken to by the police on the 8th of May, you admitted under caution that the allegations were true. You said that you had kissed the victim on the mouth and licked her vagina several times but said you did that out of love for your daughter.
5. It is not clear how many occasions we are talking about between approximately February and the beginning of May but obviously there were several of them and you admit that.
6. There are obvious aggravating features here, you are the biological father of the victim so it is a gross breach of trust on your part to behave in this way. Secondly, she is only 3 and so there is high degree of vulnerability. She was unable to resist what you wanted to do to her. There is a significant age difference of some 20 years. There were a number of incidents over that period of 2 to 3 months. You had the opportunity to decide perhaps after the first incident that you should not be doing that but you carried on. There are also indications that she may have suffered some pain although it seems unlikely that that which would be caused by licking of the vagina would be anything significant.
7. There is no doubt as both counsel have submitted that a prison sentence must be imposed on you the leading case of *Gideon* in the Court of Appeal in 2002 makes clear and the only issue really on the sentencing is whether or not the appropriate prison sentence should be suspended in whole or in part.
8. Before I turn to assess that I mention the pre-sentence report which is particularly helpful to you because it gives me some information which has a significant bearing on my approach to the case. Without going through everything that is said, I note that you and your wife reside in Enimah Village on Tanna Island. As well as the daughter who is the victim, you have a 5 year old son and your wife is currently pregnant. You work as a farmer and that is the only source of income for you and your family. You are hoping to go and work in New Zealand on the RSE scheme. I might say that I should think this conviction will prevent your entry into New Zealand.



9. You have no previous convictions and during your time in custody since 12 May, the Correctional Officer Mr Seru Fred has reported that you have complied well with the rules and regulations of the Correctional Centre. He says you are quite a timid and humble person who always keeps to himself away from others in terms of bad influences. You say that you acknowledge the seriousness of the offence. You are planning to change your behaviour in future, you regret what happened, you are deeply sorry for it and you realise that your family has been already and will be affected significantly if you are sentenced to imprisonment.
10. You were seen by the probation officer as being genuinely remorseful during the interview. The probation officer was not able to contact your wife for her comments because there was no cell phone coverage where she was. The recommendation is for imprisonment recognising the seriousness of the offence but notes that the Court could consider a community- based sentence of community work and supervision and some special conditions are suggested.
11. Turning now to consider the starting point for imprisonment, the correct way to assess that is to take into account all of the aggravating and any ameliorating factors relating to the offending itself; that includes considering the maximum penalty and the starting points adopted in similar cases so that reasonable consistency is achieved. It does not include consideration of your personal aggravating or mitigating factors, that is done at the second stage of the sentencing as explained in the recent case of the *PP v. Moli* [2014] VUCA 37.
12. I am grateful for the research of both counsel as to the relevant cases. It is not necessary for me to refer to all of them particularly because one of the relevant authorities is a recent judgment of my own in *Kalkau* [2015] VUSC 99 and in that judgment I referred to a number of the other cases. That involved a one-off occasion of an uncle, who was 20, sucking the vagina of his 7-year old niece and there I adopted a starting point of 3 ½ years. This



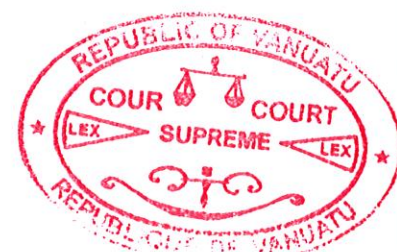
case is more serious because you are the biological father and there is the vulnerability of a 3 year old, who is too young to resist or react the repeated nature of the offending.

13. Although I would hesitate to describe it as an ameliorating factor I do think there is some force in Ms Kalwatman's submission that the long-term mental consequences for your daughter are likely to be fewer and less serious than they would have been for an older child in her position. That is simply because the ability of a 3-year old to remember is limited if it exists at all whereas by contrast say a 7 to 9 year old girl could well be traumatised by the memory and be greatly affected by the breach of trust.
14. Having said that there was pain , a degree of discomfort and unpleasantness and common sense would suggest that this kind of behaviour may well sexualise you daughter at an earlier age, in other words make her think that this kind of behaviour is appropriate for children to be involved in. That may cause her difficulties in her relationships with boys as she grows up. So I do not meant to suggest that because this is a 3- year old there will not be long term consequences; there may be.
15. Overall I think the least restrictive starting point I can adopt is one of 4 years imprisonment and Ms Kalwatman acknowledges that that is within range. I cannot accept Ms Ngwele's submission that an overall starting point of 5 years would be consistent with the authorities with similar facts. From that starting point of 4 years there must be first a deduction of one-third for your guilty plea. It was not strictly at the first opportunity but there was some sensible rearrangement of the counts, originally there were four and you did plead guilty as soon as the case was presented in its final form. Also it is important to note that you immediately admitted the offending when the police spoke to you so a full one third discount is appropriate.
16. Ms Kalwatman goes on to submit that I should give you an even greater discount than that to recognise that had you pleaded not guilty it would have been very difficult for the prosecution to prove this case. I accept that is the reality but I do not accept a greater discount than the already generous one



third should be given. It is however a matter than may I think, be considered in relation to the question of suspension. It goes to your genuineness of remorse and willingness to admit responsibility. The one-third deduction that brings it down to 32 months or 2 years and 8 months. From that I would deduct a further 15% because you are young, only 23, and because you have no previous convictions. That brings it down to 2 years and 3 months. In my view that is the appropriate end sentence which I must and will impose on you.

17. As to the question of whether that should be suspended there is wide power given to the Court under sections 57 and 58 of the Penal Code to suspend wholly or in part. The relevant criteria are the circumstances, the nature of the case, the nature of the crime and the character of the offender. You are a young first offender who has spent four and half months in custody and who admitted guilt immediately. Ms Kalwatman rightly points out that many similar cases have resulted in suspended sentences of imprisonment.
18. Particularly the time in custody here persuades me that I can properly suspend this sentence. You have already served the equivalent, allowing for parole at half sentence, of a nine-month prison sentence. Any deterrent effect that being in prison will achieve will have already been achieved by the time you have spent there. To put that another way, if I sent you to prison for more time from this point, it is unlikely to improve your risk of reoffending. If you have not already learnt the lesson that sending you to prison should teach you, then you are unlikely to learn it from this point on.
19. It is also relevant I think that your time in custody has been spent here in Vila but your family is in the village on Tanna. And although you have offended as family member it is also true that your family as a whole has been a victim of this because they will have been suffering from your absence, your inability to provide income for them.



20. You have a 5-year old son as well as your 3-year old daughter and as I have said your wife is pregnant. So they, if I do not suspend the prison sentence will be further victimised by your absence.
21. I think it is also important that you are described in such positive terms in the pre-sentence report. That suggests you are like to comply with the suspended sentence and you are likely to carry out community work and supervision if imposed on you.
22. I am also satisfied from what I have read that you are genuinely remorseful and I come back to the point of your willingness to plead guilty even though, tactically you could have decided even though you knew you were guilty to plead not guilty and put the prosecution to proof. They may well have had difficulty succeeding because the only people who know what happened were you and the 3-year old girl who could hardly have given evidence in support of that charge. The mother did not see what happened, she only suspected it.
23. If I sentenced you to prison today the effect of section 51(4) of the Penal Code is effectively that I ought to impose a sentence of 18 months imprisonment that is 27 months less 9 months that I have already mentioned. If I did that you would likely serve only half of that given your good behaviour in custody so you probably would serve only another 9 months in custody. When released on parole there could well be some parole conditions to be supervised by your Corrections Officer but essentially you would be at that point largely free of the criminal justice system.
24. By contrast, if I suspend your 18 months sentence for 3 years you will need to behave yourself for a much longer period and there is the other benefit of imposing community-based sentences. First, community work allows you to give something back the community because in a way you also have offended against the community. Secondly, supervision to try to address the course of your offending. The community I think will be much better served as will your family if you are able to be in the community from this point, subject to the risk of imprisonment if this suspension is triggered, and subject to a combination of punitive and therapeutic sentences.



25. So for all these reasons I have decided to sentence you to 18 months imprisonment but to suspend that sentence wholly for 3 years from today. You need to understand that if you offend in any way during the next 3 years so not just sexual offending but any sort of offending then you will be required to serve that 18 month prison sentence as well as whatever sentence you receive for that offence which triggers the cancellation of the suspension.
26. In addition you will complete **250 hours community work** and I sentence you to **12 months supervision** on the 3 conditions mentioned at the end of the pre-sentence report. They are:-
- 1) That you undertake the niufala rod programme and other rehabilitative sentences as directed by the probation officer.
 - 2) You are to undertake spiritual counselling with a church pastor as directed by the probation officer; and
 - 3) You are to undertake any rehabilitation or other programme organised by the probation services.
27. As I have already touched on, if I were to sentence you to serve your prison sentence and not to suspend it, then after you left prison you would not, or at least not necessarily, receive any help with the underlying course of what you did. Obviously there is an underlying problem. This is not normal behaviour and if you do not get help there is a risk that you may repeat it even though you have said you do not intend to do that. The supervision sentence ought to assist with addressing the problem.
28. Finally, you have 14 days to appeal this sentence if you wish to do so.

BY THE COURT

