

PUBLIC PROSECUTOR

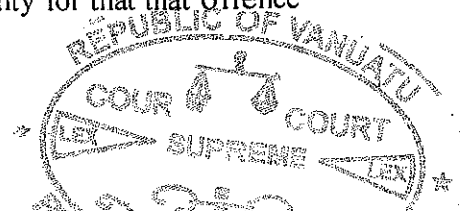
V

KEN HOUMAN

Sentence: Wednesday 8 July 2015 at 2 pm at Liro, Paama Island
Before: Justice Stephen Harrop
Appearances: Damien Boe for the Public Prosecutor
Pauline Kalwatman and Stephen Carlo (PSO) for the Defendant

SENTENCE

1. Mr Houman, you appear for sentence today on two counts of sexual offending to which you pleaded guilty back on 3 September 2013. That in itself makes this an unusual sentencing; it is most unfortunate that for some reason, and I do not know the reason, the sentencing that was supposed to take place in December 2013 did not occur. It is not your fault that it did not occur and I intend to reflect the delay in sentencing in determining the appropriate sentence. Any person who pleads guilty to offences is entitled to be sentenced reasonably promptly once everything is in readiness and it is unfair to you to have had this matter outstanding for so long. I might add, it is also unfair to the victim to have had left unfinalised charges to which you pleaded guilty so long ago.
2. The first charge is unlawful sexual intercourse contrary to section 97 (2) of the Penal Code and that alleges that you had sexual intercourse with the victim [to whom I will not refer by name to protect her identity] in November 2012 when she was 14 years old. The second is that of indecency with a young person contrary to section 98A. The victim is the same young woman and it is said that sometime in the year 2012, on several occasions you touched her vagina. It is one of the quirks of the sentencing regime for sexual offences here in Vanuatu that in terms of maximum penalty it is the indecency charge which is the lead charge. The maximum penalty for that that offence



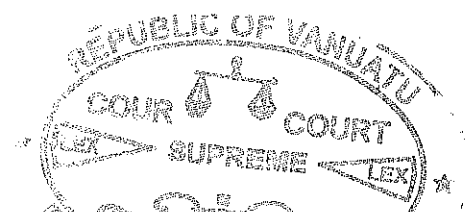
is 10 years' imprisonment whereas the maximum penalty of unlawful sexual intercourse where the girl is between 13 and 15 is only 5 years imprisonment. So touching the victim's vagina is deemed twice as serious as having full sexual intercourse with the same victim. That does not make sense and I intend to proceed on the basis that the sexual intercourse is the very much the more serious incident. Because the two offences are of the same type and relate to the same complainant I am going to impose concurrent sentences.

3. The facts in more detail, as set out by the Public Prosecutor, are that the victim was approached by you at night time when she was at home. You told her to follow you to a house to get a mobile phone. When you arrived you closed the door and grabbed her. I pause at this stage to mention that obviously, there was a degree of planning involved. You then removed her t-shirt, bra, skirt and panty and made her lay on the floor. You lay on top of her and after several attempts you inserted your penis into her vagina. She felt pain and told you of that but you continued until you ejaculated. Again I pause to mention that you obviously therefore exposed her to the risk of pregnancy as well as sexually transmitted disease. After you had finished, you told her to get dressed and to go and shower.
4. After this incident you continued to be sexually intimate with her in a way that she was not comfortable with and relevantly that involved your taking her aside to toilets or to a secluded area, in some instances involved touching her vagina. This came to the notice of the chiefs and the police were notified. You were interviewed on 8 February 2013 and you admitted what had happened. That was followed by your promptly pleading guilty to the charges once they were formally before this Court.
5. Your early guilty plea entitles you to a substantial discount of one-third off your sentence. Some people may think that this kind of discount, when you have readily admitted the offences, is too much but it is well accepted by the law that that level of discount is appropriate. There are several reasons for that, first it avoids the State prosecuting you at a trial and arranging a trial at considerable expense, on a remote island in this case, but much more importantly it avoids the victim having to come to Court to be challenged in public about what happened and to have to relive the incident she went through. Also, it is a public acknowledgment by the defendant of what



happened. There are some defendants who never admit what happened and even if they are convicted after a trial they continue to deny that the complainant has told the truth. This in itself can be very hurtful for victims.

6. Before I move on to the submissions that have been made and the pre-sentence report, I note your respective ages at that time. My understanding is that you did not turn 17 until 11 December 2012. You are now about 19 ½, but I think you were still 16 at the time of this offending. I also understand that although the charge mentions that the complainant or the victim was 14 it is possible that she was only 13. However, you are entitled to be sentenced on the basis that is mentioned in the charge, because that is what you have pleaded guilty to. The upshot is that you were 16 and she was 14.
7. That is a small age difference and it is highly relevant in assessing the gravity of the offending when there are two teenagers involved. It is also relevant because of its influence on the possible sentencing outcomes. If you had still been 15, for example, the Court could not have sent you to prison unless there was no other alternative. There is effectively a presumption against sending any person under 16 to prison. You were older than that and so you are liable to imprisonment, but not by very much.
8. The helpful pre-sentence report that was prepared in September 2013 mentions that you have skills in gardening, fishing and mechanical work. You are hoping to become an expert auto mechanic and you want to manage your own business one day. You are described as a youth leader in the community here in Liro and you have no health or medical problems. You work hard and you do not consume kava or cannabis.
9. You are a first-time offender and therefore entitled to be treated as someone who was of good character prior to these incidents. You say you had made a plan with the victim to have sex and that you only did that because she agreed, she consented. You say rather curiously that if you had known that Mr Sam and Mr Heru were also having sex with her, you would not have done so. I do not understand why that would have made a difference, but you do say that you felt what you did was normal because she agreed to have sexual intercourse with you.
10. You must understand that it is no defence for her to consent at that age. She is too young to be able to consent and it is not a mitigating factor that she did consent, if



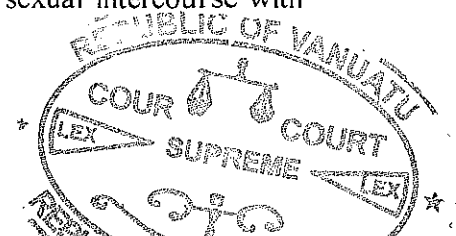
indeed she did. Where it is relevant is that there is no aggravating feature which is often present in a case like this such as threats made by the offender against the victim. So the fact she consented is relevant in the sense that it confirms she was not forced to do this under threat of or actual violence.

11. It is also noted that you have undertaken a custom reconciliation ceremony with the following items exchanged: a pig, 18 kava root stumps, 20 mats and Vt18,000.
12. I understand that indeed the custom reconciliation ceremony involved Mr Heru and Mr Sam as well , they were also involved in sexual offending against this victim and that all three of you contributed in an appropriate way to those items. I mention at this stage that under the law here in Vanuatu, the Court must, and so I will, take into account the custom reconciliation ceremony because it is an important part of Vanuatu culture and reflects an appropriate, meaningful, apology made by you and your family in response to the victim's family. I understand that her grandfather accepted this as a sign of peace and klinim fes. Having said that, where the victim of this kind of offending is a relatively young girl I wonder how much real benefit and assistance *she* obtains from this kind of ceremony. I also note that the probation officer was not able to contact her because this report was prepared in Port Vila and communications did not allow her to be spoken to, so it is not clear as to the extent to which she personally and indeed her grandfather accepted these items.
13. You are recorded as being remorseful and feeling guilty to tarnishing your family's name. You promise not to offend again. One of the benefits of there being a delay in sentencing is that is that there is no suggestion that you have been involved in any further offending of this or any other kind since December 2012, so I can place more weight on your promise that you will not reoffend again. As you might expect judges are often told that by defendants at the time of sentencing but at that stage it is too early to tell whether they are genuine in what they say. However, in your case, nearly three years later you have not done anything more, so I take that into account.
14. In terms of the submissions I will mention these fairly briefly since, as I have already mentioned to you before this sentencing began, this is a case where I am satisfied in all



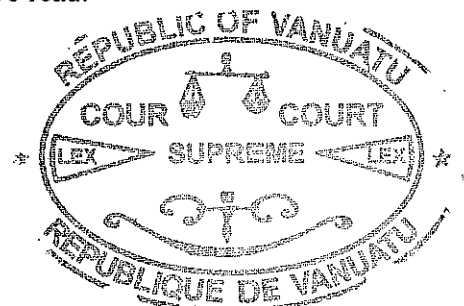
the circumstances that while a prison sentence is appropriate, it is also appropriate to suspend it.

15. The Public Prosecutor submitted that having regard to the relative ages of the two of you, your absence of previous convictions, your guilty plea, a starting point of some three to four years imprisonment and an end sentence of some two years imprisonment on the unlawful sexual intercourse charge would be appropriate. In respect of the indecency charge a starting point of 12 to 24 months but an end sentence of around 11 months imprisonment concurrently with the other one should suffice; overall it was submitted that you should be sentenced to somewhere between 18 and 24 months imprisonment with suspension for two years and 150 hours community work together with supervision. As to the latter I mention at this stage that it does not seem possible for a supervision sentence to take place here but I do note that informal supervision appears to have been provided already by your elder sister, Jessica Touanianu, who has spoken to you about this matter as recorded in the pre-sentence report and says she has given you good advice about the way to behave in the future. Given your absence of any further offending I can only assume that your sister's advice has indeed been good advice and that you had followed it.
16. The defence submissions involve a rather higher starting point of six to eight years imprisonment, which I think given your ages is too high, but an end sentence in range of two to three years imprisonment was suggested for the lead offence. Ultimately with the mitigating factors it was submitted that a custodial sentence of two years would be appropriate with that suspended and 100 hours community work imposed.
17. In assessing the appropriate starting point, I note again that this case involved two teenagers with perhaps only about two years difference in age and that you were not much older than the age at which imprisonment could not, except in exceptional circumstances, be imposed. I have already said that I cannot regard as an ameliorating factor that the victim consented but I do accept that the absence of force or threat and the absence of any breach of trust and domination by you (which is again often present with older man such as a father or stepfather) is a relevant factor. However, you need to understand that these are serious criminal offences and that is why a prison sentence is appropriate; even at your age it is a serious offence to have sexual intercourse with



someone who is deemed unable to consent because of their age. And as I said you exposed her to the risk of pregnancy and sexually transmitted disease as well.

18. This was a one-off incident, so far as the intercourse was concerned, but I do not overlook there were ongoing unwanted incidents of sexual conduct, albeit falling short of sexual intercourse. I think overall, and taking both counts into account, a starting point of about 3 ½ years would be appropriate that is 42 months imprisonment.
19. From that starting point a discount of 1/3 for pleading guilty must deducted, that is 14 months and brings it down to 28 months or two years and four months, I think then a further seven months or so must be deducted for the other matters I have mentioned, the custom reconciliation ceremony, your absence of previous convictions, your age and your evidence of previous good character.
20. So that would leave an end sentence of around 20 or 21 months imprisonment but I am going to reduce that by another three months or so, to make it 18 months, and that is because of the delay in sentencing which I have already said is unacceptable and not your fault.
21. Whenever a sentence of that length is considered the Court must consider whether or not it should be suspended and section 57 of the Penal Code contains some criteria to be applied. I think these are wide enough to include the very unfortunate delay in sentence and also the absence of any further charges. I take those into account as supporting the suspension; also we have the small age difference here and although as I have said more than once, consent is not something I can take into account. I certainly can take into account the absence of other aggravating features which are often present in this kind of offending.
22. All of those things lead me to conclude that this is one of those relatively rare cases of sexual offending against a young woman where suspension is appropriate. The Court of Appeal, in the leading case of *Public Prosecutor v Gideon* [2002] VUCA 7, said that it is only in exceptional circumstances that there would be suspension of a prison term, but I think this is one of those cases where it is justified and I consider that it is consistent with other sentencing decisions in this area that I have read.



23. So the sentences that I come to in terms of imprisonment are a sentence of 18 months imprisonment on the unlawful sexual intercourse count, but wholly suspended for 18 months. I have, again because of the period of time since you pleaded guilty I have suspended that for a shorter period that I normally would have. As to count two, you are sentenced to 12 months imprisonment but wholly suspended for 12 months. That sentence is concurrent with the other one. So the total sentence is 18 months imprisonment, suspended for 18 months.
24. I need to tell you that the effect of a suspended sentence is that if you were to offend at any time on any sort of offence within the next 18 months then you can be required to serve that prison sentence. If you keep out of trouble for the next 18 months then there will be no consequences at all. So all you need to do is behave as you have been behaving over the last couple of years since you pleaded guilty and you will have no consequence from that suspended sentence.
25. Because I have some confidence that that will be the position, you therefore would suffer no real consequence other than the conviction which in itself may have consequences, so it is appropriate that I impose a community work sentence as well. It is of course primarily the victim who has been offended against here, but also you have offended against the community's standards, so giving something back to the community by way of a community work sentence is appropriate.
26. I have decided to impose community work hours at the 150 hour level as submitted by the prosecution. This is only slightly more than the 100 hours indeed that was accepted as appropriate by Mr Livo.
27. Finally, you have a right to appeal against this sentence within 14 days if you are dissatisfied with it; if you wish to appeal you should tell Ms Kalwatman immediately so that she can file the necessary papers..

BY THE COURT

