

PUBLIC PROSECUTOR

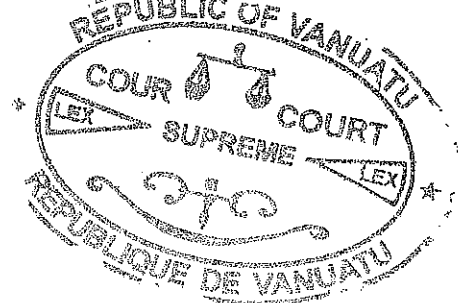
V

MALON HERU

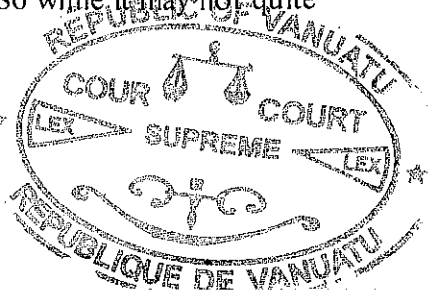
Sentence: Friday 10 July 2015 at 9:30 am at Liro, Paama Island
Before: Justice Stephen Harrop
Appearances: Damien Boe for the Public Prosecutor
Pauline Kalwatman and Stephen Carlo (PSO) for the Defendant

SENTENCE

1. Mr Heru, on the 8 July 2015, last Wednesday, you pleaded guilty to two offences which were committed sometime in 2010 in respect of the same girl [I will not name her to protect her identity], who was aged either 11 or 12 at that time; I note that the second count refers to her being 12 so I will adopt that age being more favourable to you.
2. The first count is one of attempted sexual intercourse without consent, otherwise known as attempted rape. Although it was an attempt only, the maximum penalty is still life imprisonment which is the penalty for the full offence of rape. The other offence is that of act of indecency with a young person, that carries ten years imprisonment. The indecency was the touching of the victim's breast outside her clothing as I understand on several occasions, but they were separate occasions from that of the attempted rape.
3. There was no complaint about what had occurred sometime in 2010 until the 7th of February 2013, so it may have been as much as three years after the incidents before there was any complaint raised. I infer indeed that had there not been complaint about sexual conduct by Ken Houman and Bruce Sam towards the same victim there may never have been a complaint raised against you. However that does not reduce the gravity of the offending.



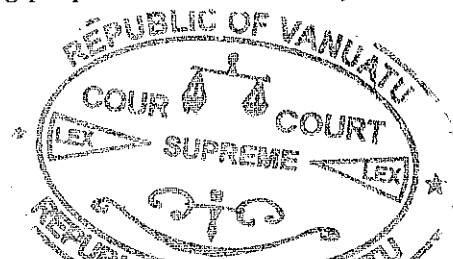
4. The victim could not recall the exact dates in 2010 when these offences occurred. As to the first, and by far the more serious, incident, she says that you approached her to ask her for help to look for a Vt 100 coin that you had lost at an abandoned house owned by Mr Roan. So you went there to look for the money. In the house you closed the door, grabbed and held her tightly and asked her to have sex with you. She said she was still in school and that she was too young. You did not take no for an answer and proceeded forcefully to remove her pants by untying the rope that was holding them up. As you began to remove her pants she started to cry, no doubt because she could see what was going to happen, but she acted quickly and she bit your hand which made you pull away; she quickly pulled up her pants and jumped through the window and ran away.
5. The second incident was also in 2010, she was in the kitchen when you approached her and asked if she would be willing to braid you hair, she agreed to do that and you closed the door to the kitchen then began grabbing her breasts. As I have already mentioned, I infer that this was over her clothing. She told you she did not like it. She slapped your hands several times but you kept fondling her breasts despite that refusal. When you were spoken to on the 8 February 2013, you admitted that you wanted to have sex with her but she had refused and that you had tried forcefully to remove her pants. You also admitted to the indecent assaults.
6. I note the aggravating features of the first offence. It involved some planning and a ruse to get her to go to the abandoned house. There were also quite substantial efforts made to have intercourse despite the fact she told you that she was still in school and too young. It appears to me, being realistic about it, that if she had not bitten your hand and jumped out the window when she could, you would have forced her to have sex, very soon after that, despite her clear refusal.
7. Ms Kalwatman in her submissions has highlighted the fact that this did not come as close to actual intercourse and some attempted rapes would. I accept that, because there was no exposure of your penis or her vagina, there was no touching of those areas on either side. But it seems to me I have to be practical and realistic about it and it is inevitable, as you indeed admitted to the Police, that forced sexual intercourse would have happened if she had not bitten your hand and run away. So while it may not quite



have got to the closest stage that an attempted rape might have without actually being rape, in terms of timing and intent it certainly was very close.

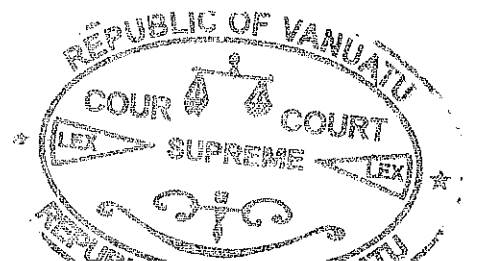
8. As to the indecency, I accept that touching of the breasts through clothing is much less serious than other forms of indecency which may be charged, such as touching of the vagina, but I note too that this touching persisted even after you had been told she did not like it and after she had slapped your hand. The facts of both of these offences clearly indicate that you had no respect for this young girl and it did not matter to you what her attitude was, you were going to have your way whether or not she was happy with it.
9. An important factor in sentencing for this kind of offence is the relative age of the two participants. You are now I think 24 ½, your date of birth being 2nd March 1991. So early in 2010 you were 18 and then you turned 19 on 2 March 2010. The age difference therefore was around six to seven years, which is a substantial difference at those ages. You were a strong young man and she was a vulnerable young girl of only 12.
10. I have received a pre-sentence report which is brief. It mentions that you acknowledge that you committed this offence due to your wrong thinking and you are remorseful for what was done to her. You did undertake a custom reconciliation ceremony to make peace between your family and hers and I have already mentioned in the course of sentencing Mr Sam this morning what was given the course of that ceremony. My understanding is that all three of you that is Mr Sam, Mr Houman and you, undertook a joint reconciliation ceremony because all of you had committed sexual offences against the same young girl.
11. The pre-sentence report correctly highlights that you are a first-time offender, you are single, a youth leader in the Presbyterian Church, you are remorseful and it suggest that a community-based sentence might be appropriate.
12. Without going through all of Mr Boe's submissions he rightly highlights the Court of Appeal observations in the *Gideon* case in 2002. There the Court of Appeal said:-

"There is an overwhelming need for the Court on behalf of the community to condemn in the strongest terms the any abuse of young people in our community.



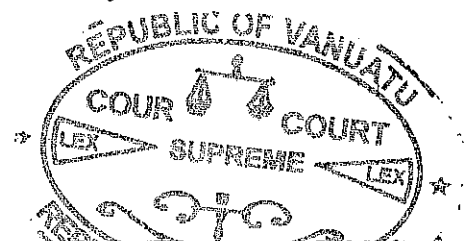
Children must be protected. It will only be in the most extreme of cases that suspension could ever be contemplated in a case of sexual abuse. There is nothing in this case which brings it into that category. Men must learn that they cannot obtain sexual gratification at the expense of the weak and vulnerable. What occurred is a tragedy for all involved. Men who take advantage sexually of young people forfeit the right to remain in the community."

13. So Mr Boe submits the only appropriate sentence is one of imprisonment but he notes the custom reconciliation ceremony and the guilty plea, although certainly long after the first opportunity and he submits an end sentence of around two years imprisonment which might properly be suspended and some 200 hours community work imposed.
14. Ms Kalwatman on your behalf as I have already mentioned endeavours to contrast this case with attempted rape cases which come closer to actual rape but as I have said I think that is not a submission I can place great weight on in these circumstances given your evident efforts and intent. She referred me to a couple of cases which I do not propose to go through in detail because they are clearly more serious than your case.
15. There is the case of *Sam* in 2004 where a 17- year old attempted to rape a four year old girl and there was an ultimate sentence of two years and eight months imprisonment. In the 2010 case of *Nauamikam*, which resulted in an end sentence of three years imprisonment, the victim was 14 years of age and the biological daughter of the offender who was 55. There were nine incidents over a two year period and obviously a substantial age difference and breach of trust.
16. I accept Ms Kalwatman's submission that this case too is clearly distinguishable from the present. She submits that in terms of *Gideon* there are exceptional circumstances here which warrant if not a something less than a prison sentence then at least a prison sentence which is suspended. She points out that you were on 18 at the time, perhaps 19. She highlights quite properly the very substantial delay in this matter being determined. As I have already noted you were not even complained about for about three years and it has taken another two years or so for this matter to finalised. She points out that in Constitutional terms that is far too long and I accept that. She suggests a starting point overall of some four years imprisonment but then deductions



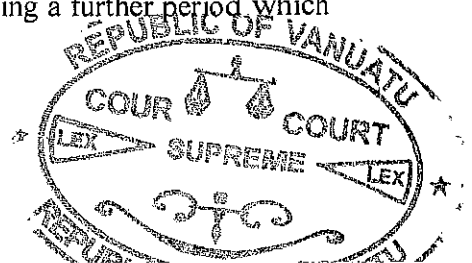
for guilty plea, custom reconciliation ceremony, admission to the Police and co-operation and she suggests a suspended prison sentence and community based sentenced imposed as well.

17. Having regard to the other authorities in the general area of rape, there being no useful authority on attempted rape put before me, I am in no doubt that a sentence of imprisonment must be imposed and the only real question is whether this is one of the exceptional cases where it may properly be suspended and accompanied by community work.
18. To follow the correct process as set out in the *PP v. Andy* [2011] VUCA 14, I first have to identify a starting point for the lead charge. This is not easy because there are very few attempted rape cases, indeed none has been cited to me by the Public Prosecutor, but taking into account the aggravating features of the case and the usual starting point for a full offence of rape of around six or seven years imprisonment, I consider that a starting point of around three and half years for the attempted rape would be appropriate. I have decided to approach the case by adding into the starting point six months for the other offence of indecent touching. So four years is the starting point taking into account the aggravating features of both offences which are involved. That is 48 months imprisonment.
19. There must then be some credit given for your plea of guilty but I emphasise this was not done at the earliest opportunity or anything like it. I have had some explanation this morning as to why there may have been a delay but the reality is you had a clear opportunity to plead guilty on the 3 September 2013 before Justice Sey. Ken Houman took that opportunity but you did not.
20. The result is that the victim would have thought until earlier this week that you denied the incident, that she would have to come to Court to give evidence and be cross-examined. Also, the Public Prosecutor had to proceed on the basis that there would be a trial and to arrange the witnesses and indeed to come to Paama, so there have been costs of one kind or another. This matter could have been resolved in Port Vila if you have pleaded guilty there back in 2013. That said, I am prepared to acknowledge that there is value in a guilty plea. It is a public acknowledgment of responsibility and it does avoid



the victim having to give evidence and to relive what must have been a frightening experience for her; here I am referring particularly to the attempted rape.

21. The most generous I can be, I think, is to reduce the sentence by some 15%, or about 8 months or so, down to 40 months. Then there must be credit for your contribution to the custom reconciliation ceremony, the fact you have no other convictions, your relatively young age at the time of 18 or 19 and the lengthy time that has passed since this offending, without any further offending. As I have already touched on, it is not fair either to you or to the victim to have had this matter unresolved for such a lengthy period as five years, although as I say if you had pleaded guilty in September 2013, you could have reduced that considerably.
22. But one advantage of the delay is that you can now point to a lengthy period of five years without any further offending. The facts here as I have already highlighted suggested strongly that you are a risk to young girls, that you would not stop when they said "no". But to your credit you have given no further indication of that kind of behaviour. So in that sense the delay has been of advantage to you because if I were sentencing you shortly after the incident in 2010 I would have factored in what appeared to be your presenting a significant risk to the community.
23. Overall, I would deduct a further 20% or so, about eight months, for the custom reconciliation ceremony, your youth, absence of convictions and the delay and that brings me down to about 32 months or two years and eight months. I would impose that prison sentence on the lead charge and a concurrent sentence of 12 months imprisonment on the indecency charge.
24. The question then is whether those sentences should be suspended. Can the purposes of sentencing in this kind of case still be achieved by a suspended sentence together with community work? In this regard, I need to look at section 57 of the Penal Code which sets out the criteria that I may take into account. Here I think they can properly result in a suspended prison sentence which will still mark this out as a serious sexual offence against the vulnerable young girl. You will still be receiving a prison sentence of two years and eight months and liable to serve it if you offend during a further period which



I will determine shortly. But the dominant factors in my conclusion that suspension is appropriate are your age at that time, 18 or 19, the lengthy period since these incidents in 2010 without further offending and the demonstration during that period that you are not the risk to young girls that aspects of this offending suggest that you were.

25. Because you have not offended again since 2010, there is now no particular reason to think that you will in the future. You are now 24 and, especially with a suspended sentence hanging over you to encourage you further in the right way to behave, I have some confidence that you will not offend again. To put it in another way, one of the main reasons for imposing a sentence of imprisonment which is to be served is to protect the community, to protect potential victims in the community from the risk of being offended against by you. Here, as your conduct over the last five years has shown, you can live in the community without committing further offences, so the community does not need that protection from you.
26. The sentences that I mentioned earlier will be suspended for two years. I should add here that you have been on bail conditions, which have included not offending further since April 2013, so in effect you have already been on a form of suspended sentence for some two and half years.
27. You need to understand that if you do offend in any way, not just in sexual way, over the next two years then you will be required to serve the prison sentences that I have mentioned, so that would mean you could be required to serve a sentence of two years and eight months imprisonment. If, as I hope, you not called on to serve that sentence then, aside from the fact of your convictions, you will suffer no consequences for what you did. So it is appropriate that community work be imposed as well. Whenever you offend against a particular person in the community, you also offend against the community standards as reflected in the criminal law. So giving something back to the community by doing some community work is an appropriate sentence.
28. I should mention too that the fact of your convictions for this serious offending is itself a form of penalty because if you were convicted of further sexual offending, you would be given a very stringent sentence, because you would be a repeat sex offender. You are in that position now and will be for the rest of your life.



29. I have come to the view that a sentence of 300 hours community work should be imposed. I consider as I have already indicated that this was a serious case of attempted rape and that a deterrent sentence needs to be imposed, not only to deter you but also to deter anyone else who might be inclined to behave in this way. I emphasise that the usual sentence for sexual offending of this level of seriousness is a prison sentence which is not suspended, so it is a special case where I have decided, for all the reasons mentioned, that your prison sentence will be suspended. The level of community work reflects that seriousness as well.
30. You have 14 days to appeal against the sentence if you are dissatisfied with it. If you are dissatisfied, then you should talk to Ms Kalwatman immediately after this hearing and she will help you to lodge and advance an appeal.

BY THE COURT

