

PUBLIC PROSECUTOR

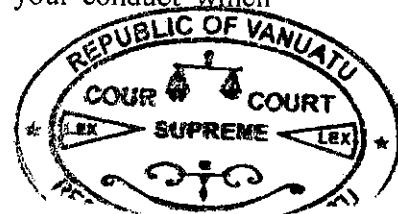
V

SAKA GIBIRI
BWANGO GOLE
TROVELI TAHI and
TUMU TAKARO

Ruling: Friday 5 February 2016 at 3:00 pm at Luganville
Before: Justice SM Harrop
Appearances: Ken Massing for the Public Prosecutor
Jane Tari (PSO) for the Defendants

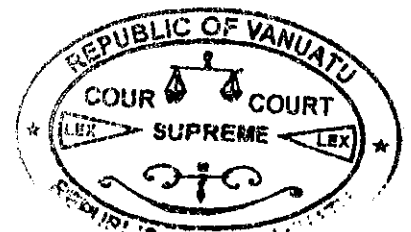
SENTENCE

1. Mr Gole, Mr Tahī and Mr Takaro you appear for sentence this afternoon having pleaded guilty at the first opportunity to a joint count of having sexual intercourse without consent with a 20 year old woman at Lolong village on Pentecost on 16 September 2015.
2. You have been in custody, I am told, since 5 December 2015 which is two months ago and so you have already served the equivalent of a four-month prison sentence while awaiting determination of this case.
3. These charges are serious indeed, the maximum penalty is life imprisonment and therefore there are no charges which are more serious on the Vanuatu statute book, even though premeditated intentional homicide would of course attract a much more significant penalty.
4. The usual response of course to a conviction for sexual intercourse without consent is a relatively lengthy sentence of imprisonment. As I will explain to you, I am not going to send any of you to prison today and based on what I have just said you will realise that that is very unusual. This is a case which is dominated not by any mitigating factors relating to your conduct which

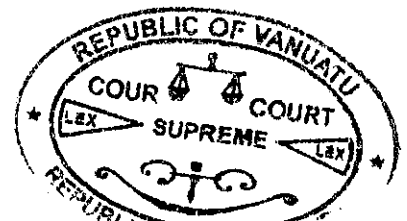


certainly warrants a sentence of imprisonment for all three of you but rather by your ages.

5. Mr Gole you were 18 years old at the time of this incident, Mr Tahī you were only 15 years old and Mr Takaro you were only 16 years old. I do not know how long you had been 16 at the time of the incident and accordingly I am going to treat you the same as Mr Tahī because as a matter of fairness to you it may be that you had only turned 16 very close to the incident. In my view a matter of a few weeks should not give rise to a distinction in sentence. In the case of both of you, the provision which primarily governs the sentencing is (or certainly in the case of Mr Tahī it does if not literally in your case Mr Takaro), is section 54 of the Penal Code which says that a person under 16 years of age is not to be sentenced to imprisonment unless no other method of punishment is appropriate.
6. There is a strong argument that with such serious offending as this nothing other than imprisonment is appropriate but I have come to the view having considered everything I have read in the submissions and the pre-sentence reports that there are alternatives which given your very young age, I am constrained to apply here, unusual though it is.
7. In your case Mr Gole I would have had no hesitation in sending you to prison for about three years but partly because of the way in which you co-offenders have been treated I am going to sentence you to a suspended sentence of imprisonment and you will also carry out a substantial sentence of community work, and supervision. I do not normally announce the outcome at the start of the sentencing but I have done it today because I want you to understand the result at the outset.
8. Turning back to the facts of the case, there were in fact four of you in the group which had sexual intercourse with the victim on 16 September at Loltong village during the Penama day celebrations. The other defendant is Saka Gibiri who has pleaded not guilty to the charge of sexual intercourse without consent; while he accepts he had sexual intercourse with the victim, he says it was with her consent.

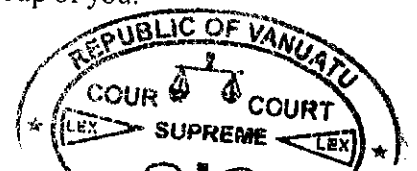


9. The facts indicate that the victim went to a shop to cook at a public stall which her family had leased during the Penama celebrations. On her way to the shop she saw a group of boys and that included the four of you. On her way back she decided to make a brief stop next to the locations where the organisers of the event were holding a dance. Shortly after that the first accused, that is Mr Gibiri, accosted her and without saying a word he held onto her hand and pulled her to an inconspicuous spot on the football field, she could not make out who the person was at that point but then she turned the light on and recognised him. He had sexual intercourse with her, she of course says that that was not consensual, he says it was and that issue will be determined at trial in due course.
10. Immediately after this, though, she noticed you Mr Takaro, you held her firmly and had sexual intercourse with her and next came the other two of you who also had sexual intercourse with her. Being aware of what was happening and what was intended she called out for help, it is noted that one or more of you blocked her mouth and told her to be quiet and threatened assault if she called out for help again. Each of you then had intercourse with her then, you all ejaculated in her vagina and then you left the scene.
11. Clearly there were aggravating features here including the fact that three of you were involved which must have increased the feeling of degradation, helplessness and vulnerability felt by the victim. You violated her effectively as a group and you assisted each other by restraining her and the threats that were made would have been reinforced by your numbers. Obviously the incident was prolonged by the fact that there were three occasions of intercourse as well. I accept there was no weapon used but there was obviously an oral threat made and this must have been a terrifying experience for her.
12. As I have already said there is no question that the usual response of the Court to this kind of conduct would be a significant prison sentence. Indeed one of the leading authorities *R v Ali August* [2000] VUSC 73, a judgment of the Chief Justice, mentioned that the usual starting point for a rape without aggravating features is five years imprisonment but where there is more than

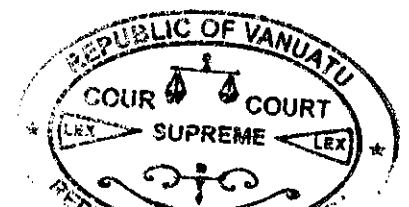


one offender involved then a starting point of around eight years imprisonment is required.

13. Mr Massing here submits that a five to seven year starting point would be appropriate. Ms Tari does not identify a starting point. I think from experience and by reference to authorities with which I am familiar a starting point of around six and half years would be appropriate here. Based on the nature of this offending and the aggravating features that is 78 months imprisonment. From that there would need to be a one-third credit for the guilty pleas which amounts to 26 months off or/and leaves me with 52 months or 4 years and 4 months.
14. Then I would need to factor in your ages and this is where the normal structured sentencing really has to be changed to reflect the impact of section 54 on Mr Tahu and Mr Takaro who as I say I am going to treat as they were both subject to that provision even though only one of them strictly is. In their cases non-custodial sentences are justified, in accordance with other case authorities. The likely end sentence for Mr Gole, as an 18 year old, factoring in his youth, would be around three to three and half years.
15. I should add you are all first offenders, you are otherwise of good character, you are remorseful, you are all said to have learned a major lesson from this, and there has been a custom reconciliation ceremony. So there are considerable mitigating factors in addition to the guilty pleas and your ages, but even so, I would end up with a sentence of at least three to three and half years imprisonment if you were all say, 25 years of age.
16. In the case of Mr Gole you were only 18 and I will deal with you last for a reason I will explain shortly.
17. As to the two younger ones, I am going to treat you the same and I am guided in my conclusion that the sentences should be community work and supervision by the authorities referred to by Ms Tari particularly *PP v. Ray* [2014] VUSC 100. I note there that the complainant was some 13 ½ years old which makes it an even worse offence than the present one where the victim was 20 and at least in theory better able to cope with what occurred but there is of course the aggravating feature here that there was a group of you.



18. Mr Tahi and Mr Takaro ,you will each be sentenced to **250 hours community work** and you will be directed to undertake a sentence of **supervision** which will include such conditions and programmes as directed by your probation officer but is to include the niufala rod programme. I observe at this stage that encouraging me further in the direction of a community-based sentence is the fact that you two have spent what is effectively a four month prison sentence already. That will have been a considerable shock to you and any deterrent effect that any prison sentence would have achieved is likely already largely to have been achieved. Also encouraging me in that direction is the reality that you are barely children and sentencing you to prison, putting you with older, hardened criminals is likely to be disastrous for you and the safety of the community over the long run. The prospects of rehabilitation and of avoiding further offending are greatly enhanced by your remaining in the community, giving something back, by way of community work and by directing you to get some help because obviously you need guidance as to what is appropriate behaviour towards a young woman. So those are the sentences that I impose on you.
19. Mr Gole you are in a different position because you are older and although 18 is still very young you should have known better than the others not to behave in this way. Had I been sentencing you alone (say the other two offenders in this group had not been identified and had escaped and never come before the Court), I would probably have sent you to prison for three to three and half years.
20. But the need for reasonable parity of treatment between like offenders is an important sentencing principle. After considerable thought, and with some hesitation, I have decided it would be wrong in the parity sense in to send you to prison. I think you could feel genuinely mistreated by the criminal justice system if you were sent to prison for three years but your co-offenders who are younger, but not that much younger, were sentenced to community work and supervision.
21. So what I have decided to do is to impose on you a **sentence of three years imprisonment, wholly suspended for three years;** that is the maximum

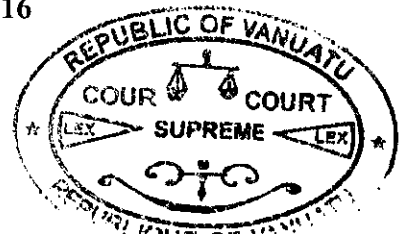


period for which I can suspend a sentence. What that means is that if you commit *any offence* during that three-year period you will be required to serve the three-year prison sentence as well as the sentence for whatever it is that puts you before the Court again. So there is a considerable incentive for you to keep out of trouble and to make sure that you do not offend again over the next three years. If you can do so then you will not go to prison and you will not serve a custodial penalty at all.

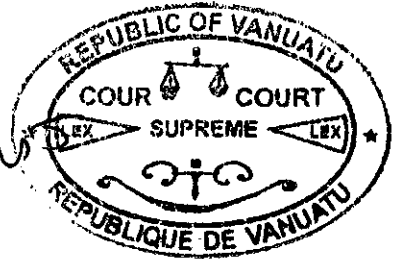
22. Mr Massing asked me to consider partially suspending your sentence but I have decided it is preferable for the parity reason I have mentioned to suspend the whole of the sentence. I am influenced in that decision by the fact you have had two months in custody already. That has given you a taste of what prison is like, at 18 it will have been a considerable shock to you and it will mean that you know very well, what lies in store for you if you commit any offence over the next three years.
23. You will also do community work and it is going to be at a higher level than the other two because of your age and your resulting greater criminal responsibility. You will serve **350 hours community work** and you will also be sentenced to **supervision** which will be on the same terms as the others.
24. Finally, I repeat that you are each very fortunate not to be going (back) to prison today. You could have had little complaint if I had decided there was no alternative. You need to understand that your appalling offending against the victim warranted a sentence of imprisonment and it is only because of your young ages that you have avoided that. So bear that I in mind in future and do not hesitate to tell all your young male friends how wrong it was in the eyes of the law to have done what you did.
25. 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



Spencer Harrop



SM HARROP
JUDGE