

PUBLIC PROSECUTOR

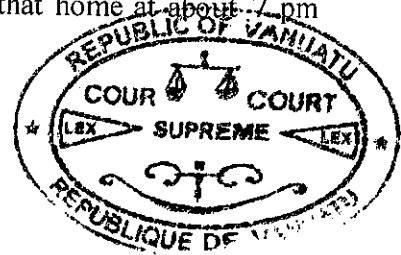
V

HARKENSON MOISE

Ruling: *Friday 5 February 2016 at 3:30 pm at Luganville*
Before: *Justice SM Harrop*
Appearances: *Ken Massing for the Public Prosecutor*
Jane Tari (PSO) for the Defendant

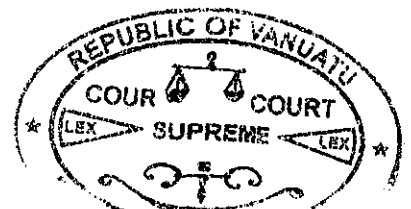
SENTENCE

1. Mr Moise you are here for sentence on one count of sexual intercourse without consent committed at Vinerara village on Ambae on 21 May last year. You entered a guilty plea at the first opportunity before the Supreme Court earlier this week and I note too that when you were interviewed by the police on the 3rd of December you fully and voluntarily admitted the allegation.
2. The maximum penalty for this offence is life imprisonment. Sexual intercourse without consent by way of digital penetration has the same maximum penalty as what I might call "ordinary rape". There were two penetrations one with one finger and then a second with two fingers but these were close in time and part of the same incident. The maximum penalty is life imprisonment as I say but I accept that a violation of this kind is to be treated as less serious than penile penetration.
3. The facts are that the victim is only 12 years old and she is related to you in some way, you are described as her "extended smol daddy". You are 17 and at the time of the incident were only 16 ½ or so. Both you and the complainant are students. You were living with her and her parents as a member of their family. The incident occurred at that home at about 7 pm



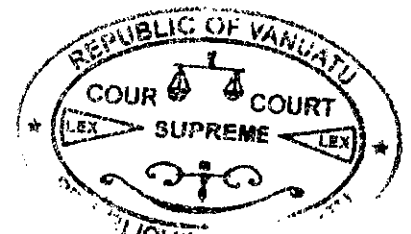
after evening devotion you accosted her, held onto her right arm, crapped her left arm squeezed her hands together, covered her mouth with your hand and digitally penetrated her vagina with your finger. In spite of the obvious resistance she had to that and the pain that she suffered you removed you finger but then inserted two of your fingers straight away again into her vagina. The incident was interrupted by her mother. She suffered considerable bleeding as a result, through the night and into the following day. However, she was ashamed of what had happened and did not tell anybody about the incident until they noticed her bleeding.

4. The formal complaint however was not lodged with the police until about the 9th of October and you were arrested on the 17th of November, you were temporarily detained but I think that you have been essentially on bail ever since and as I have already said you fully admitted what you had done when you were interviewed by the police.
5. The aggravating features here include the age of the victim at only 12, the breach of trust because you are related to her and living as a member of her family and it happened in her home, the fact there were two insertions rather than just one. The impact on the victim in the long term is unclear but one could expect there will be adverse mental consequences. That however is something which is reflected in the maximum penalty.
6. The pre-sentence report is I think of particular value to sentencing in this case. You have eight other siblings and you are the second oldest. You have completed education up to Year 8 at Walaha Secondary school. You have some skills in gardening and raising chickens and you want to become a carpenter. You depend on your parents for support and you are an active member of the Seventh Day Adventist Congregation.
7. Your brother told the probation report writer than you are very young and that you do not associate very much with other people except your family. You are described as a quiet and shy boy and it is noted that you say that what you did was the result of sexual gestures from the victim. Healthwise



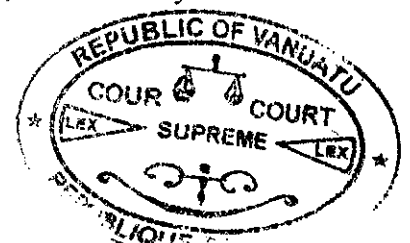
you suffered an incident when you are about five years old when you were hit on the head by a ball used for playing petanque and that almost cost you your life. I am not sure whether that has caused ongoing mental difficulties that certainly you appear to be relatively naïve and you are described as lacking insight into your offending. You say that the victim was acting in a sexual way and that you wanted to have sex with her because of that. Of course, the conduct of 12 year old girls should never be taken advantage of by those who are older. But I can accept that in the case of 17 year old boy who is somewhat naïve and uncertain, perhaps that was a contributing factor here. It is a different situation from an experienced adult taking advantage of a young girl and trying to blame that on her conduct.

8. You are willing to perform a custom reconciliation but it has not been possible for probation to explore that further because they could not through poor communication reach the victim and her family. The recommendation in the pre-sentence report is for a sentence of supervision.
9. The submissions of counsel are somewhat opposed. Mr Massing submits that a starting point of a prison sentence of around 3 ½ to 4 years would be appropriate and that an end sentence of 2 to 2 ½ years should result. However he accepts that this is a case where suspension of such a term could properly be considered given your age of only 16 ½ at that time. In making that concession which I consider is quite proper he no doubt has in mind 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. Now of course you were a little more than 16 at that time and you are 17 now but nevertheless the principles which lie behind that provision still apply I think to you with considerable force.
10. Mr Tari urges me to impose a suspended sentence and probation and community work.
11. The way in which I need to proceed is to assess a starting point based on the facts of the case, the aggravating features, the maximum penalty and the



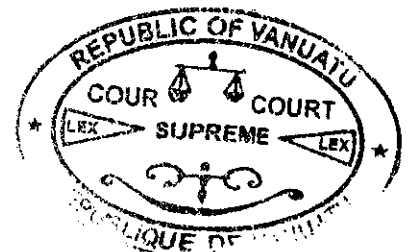
starting points that have been adopted in other cases of digital penetration. As I have already observed, digital penetration is undoubtedly less serious a sexual violation than penal rape so on the spectrum of possible examples of sexual intercourse without consent, it is by comparison towards the lesser end of the scale. Any particular offence in the Penal Code may be committed in more or less serious ways and the Court must consider the overall gravity in all the circumstances of the particular case. Nevertheless it is, I emphasise, a gross violation of this young girl's body and that is why it attracts that penalty. Parliament has not imposed a lesser penalty for that so weight needs to be given to that. But I acknowledge that in overseas jurisdictions there is a distinction made between penile and digital violation and as Justice Spear said in the case of *PP v. Enoch Tau* [2012] VUSC 219, it is appropriate that the distinction which is drawn overseas is applied here.

12. His Lordship there adopted a starting point of 4 years imprisonment and I do the same. That is consistent also with *PP v. Jeffery* [2010] VUSC 41 which Mr Massing mentioned in his submissions.
13. Deducted from that must of course be one-third for your guilty plea, that amounts to 16 months and brings it down to 32 months, or 2 years and 8 months. Then I come to your age and apparent lack of maturity which is a major sentencing consideration here. In addition, you are a first offender of good character and you are willing to undertake a custom reconciliation. I would reduce the sentence further by ten months on account of those considerations and that brings it down to 22 months.
14. In the *Tau* case Justice Spear came to a similar conclusion, there a two-year prison sentence and he suspended one of the two years. However I note that was in respect of an adult and I think given your age and immaturity, it would be wrong to require you to serve any prison sentence. I emphasise that that is not because of anything to do with the offence itself, because it is a serious offence which deserves imprisonment when looked at in isolation from the offender, but I think serving a prison sentence for somebody as young and as immature as you could be disastrous for you, in terms of your



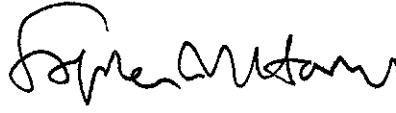
future and for the community. I say that because you could well through conduct with hardened criminals at an impressionable stage increase the risk of your offending in the future whereas if you remain in the community I think there is a reasonable prospect that with help that may be avoided. I therefore think it is in the interest of the community as well as you that you not serve a prison sentence.

15. I suspend the 22 month prison sentence for two years. That means is that if you commit any offence of any kind during that period of two years, you will be required to serve the 22 month prison sentence as well as the sentence that is given for the offence which triggers that. So there is a considerable incentive for you to keep out of trouble. I urge you to do that so that you do not have to go to prison. It is up to you whether that happens or not.
16. In addition, and because I hope and expect that you will not be serving any prison time, I am going to sentence you to 200 hours community work. That is a way of putting something back to the community against which you have offended. Even though the offence of course was directed against the young girl, what you have effectively done is infringed community standards, as reflected in the criminal law.
17. I also sentence you to supervision for 12 months and that will be on the condition that you undertake such programmes as recommended by your probation officer but in addition that is to include the niufala rod programme. I will make no direction about the undertaking of a custom reconciliation ceremony but given the family relationship which applies, this is something which should be explored by you in connection with your probation officer. It is the appropriate thing to do in the Vanuatu culture but it does of course require both parties to wish to be involved. You are prepared to do it. But it may be that the victim and her family are not prepared to and if not that is their right.
18. You have 14 days to appeal against this sentence if you wish to do so.



Dated at Luganville this 5th day of February 2016

BY THE COURT



SM HARROP

JUDGE

