

**IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU**

(Criminal Jurisdiction)

Criminal

Case No. 20/1089 SC/CRML

PUBLIC PROSECUTOR

v

KENNETH ATUARY

Date: 9 September 2020
Before: Justice V.M. Trief
Counsel: Public Prosecutor – Mr P. Sarai
Defendant – Mrs P. Malites

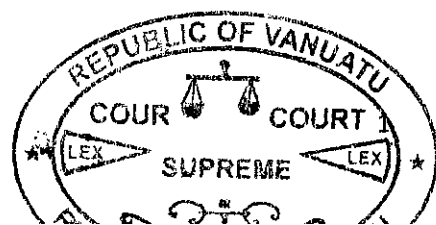
SENTENCE

A. Introduction

1. Mr Atuary pleaded guilty to one charge each of theft and possession of dangerous drugs. The maximum sentence for theft is 12 years imprisonment; for possession of dangerous drugs is 20 years imprisonment or a fine of VT100 million, or both.

B. Facts

2. In December 2019, Mr Atuary saw the complainant Annette Valivu in downtown Port Vila and offered to buy her lunch. She refused as she didn't know Mr Atuary but he was insistent. They had lunch together.
3. Mr Atuary asked Ms Valivu if he could make a call on her phone. She said yes. He took the phone and stepped outside the takeaway restaurant. After half an hour, Ms Valivu realised that he had stolen her phone. Mr Atuary has not returned the phone to her.
4. On 10 December 2019, Ms Valivu was in a bus going to town when she saw Mr Atuary. She stopped the bus and confronted him. He fled. She saw Police officer Alwin Sogovlea and reported the theft of her phone. Officer Sogovlea spoke with Mr Atuary following which he was arrested. He admitted the theft.



5. While under arrest, the Police found a bottle filled with 266.5 grams of dry cannabis materials in Mr Atuary's bag. He also admitted to possession of cannabis.

C. Discussion

6. An aggravating factor of the theft is that it was planned – Mr Atuary deceived Ms Valivu into having lunch with him and used the opportunity to take her phone from her. Another aggravating factor is that there is no prospect of Ms Valivu getting reparation for her loss of property.
7. There are no aggravating or mitigating factors related to the drugs offending.
8. The maximum penalties for this offending, the factors above and the quantity of drugs possessed require a global sentence start point of 15 months imprisonment.
9. Mr Atuary is 35 years old, a mature man. He is not a first time offender and has experienced imprisonment. In July 2019, he was convicted on 4 counts of obtaining money by false pretence. Mr Atuary has convictions from 2005, 2006 and 2007 for offences including theft which have not been 'omitted' or expunged by lapse of time pursuant to s. 58ZH of the *Penal Code*.
10. Even so, Mr Atuary has not been deterred from continuing to engage in dishonesty and other offending. Mr Atuary's personal knowledge of the consequences of criminal conduct but choosing to offend anyway means his offending is in a more serious category than someone without such previous convictions. An uplift of 1 month imprisonment is warranted.
11. Mr Atuary pleaded guilty at the first opportunity. He is entitled to a 25% deduction given the strength of the Prosecution case.
12. Finally, Mr Atuary is in a de facto relationship and has two children, aged 2 and 4. During his remand for this offending, his partner and children relocated to Tisman Village on Malekula. The eldest has commenced early childhood education there. Mr Atuary plans to plant kava at Tisman to generate income for their living and his children's school fees, and to support his widowed mother at Atchin, North East Malekula. Mr Atuary is currently employed part time at a Chinese store at Erakor Half Road. He maintains communication with his family at Tisman, and provides maintenance in kind and in cash. He joined Erakor community members to construct stalls for the Yumi 40 independence celebrations. I deduct 3 months for Mr Atuary's personal factors.

D. End Sentence

13. The sentencing principles applicable in this case are holding Mr Atuary accountable for his conduct, protecting the community, to denounce the criminal conduct, and to deter him and others from acting in this manner in future.
14. Taking all of those matters into account, the end sentence that must be imposed is 9 months imprisonment. I impose that on both charges concurrently. The sentences are



to commence on 2 June 2020 due to the 3 months and 7 days that Mr Atuary has spent in custody.

E. Suspension

15. Suspending Mr Atuary's sentence is within my discretion if immediate imprisonment is inappropriate in view of the circumstances, in particular the nature of the crime, and the character of the offender.
16. I decline to exercise my discretion in Mr Atuary's favour - Mr Atuary has previously offended in similar manner a number of times. The community needs to be protected therefore Mr Atuary must serve out his sentence. However, there are prospects for Mr Atuary's rehabilitation and reform once he has served his sentence given his plans to live with his young family and plant kava at Tisman on Malekula. Given his family situation and ambitions, I trust he will embark on that new course after completing this sentence.
17. The cannabis seized by the Police is to be destroyed.
18. Mr Atuary has 14 days to appeal this sentence if he disagrees with it.

**DATED at Port Vila this 9th day of September 2020
BY THE COURT**

UM Trief
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Viran Molisa Trief
Judge

