

IN THE SUPREME COURT
OF THE REPUBLIC OF VANUATU

(Criminal Jurisdiction)

Criminal Case No.05 of 2005

PUBLIC PROSECUTOR

-v-

HAMILSON SUR

Cōram: Justice Treston

Mr. Tevi for Public Prosecutor

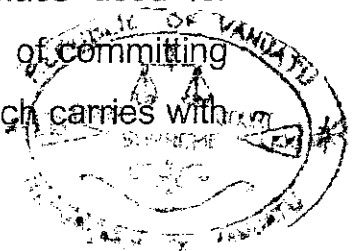
Mr. Tavoia for Defendant

Date of Hearing: 14th March 2004

Date of Sentence: 14th March 2004

NOTES OF ORAL SENTENCE

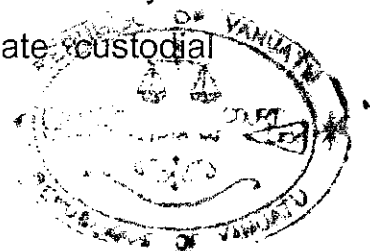
Mr. Hamilson Sur you have been charged with three offences today to which you have pleaded guilty. Of themselves they are all serious, the first charge is unlawful entry into a dwelling house, and that carries with it the maximum potential sentence of 20 years imprisonment because where you entered was a place used for human habitation and you entered there with intention of committing an offence. The second count was attempted rape which carries with



at the potential of life imprisonment and the third count involves indecent assault which because of the age of the girl concerned carries with it potential of 7 years imprisonment, so the overall potential maximum sentence is very high indeed.

The facts make disturbing reading because what happened was that at about 10 o'clock on 1 January 2005, you climbed in through a window and went inside the room where the 14 year old victim was. You took your clothes off, you removed her clothes and told her you wanted sexual intercourse with her but she refused and you kept on forcing her to the extent that you lay on top of her and tried to penetrate her vagina with your penis. You tried to spread her legs out to penetrate her and she suffered pain. You tried many times to penetrate her unsuccessfully. You then kissed her on the vagina and held her breast and kissed her on the mouth. By the time morning came, you got up, climbed through the window and left after the older woman Hansen had woken up and seen you. You admitted the offence when interviewed by the police. The medical report talks about a tearing to the victim's hymen, slight bruising and a bruised hymen and a bruised vagina wall. However, it seems that there had been an earlier rape of the victim earlier that night which could have caused most of those injuries.

The Prosecutor refers me to the case of Public Prosecutor v Ali August Criminal Case No. 14 of 2000. That case was approved by the Court of Appeal and although this is a case of attempted rape the comments in that case are relevant. The Prosecutor submits that the appropriate sentence for the attempted rape charges is five year imprisonment and that then should be an immediate custodial

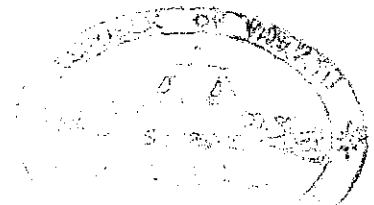


• sentence and no suspension and that there should be other terms imposed for the other offences.

Your lawyer submits to me that there are reasons why ultimately any sentence against you should be suspended. He tells me that you are twenty-four years of age and the first born in a family of five. I am told that you are living in a de-facto relationship with your girl friend who has a child of an earlier relationship. You live with her and take care of the child. You and your girlfriend both work for Tamanu Beach Resort, she as a housekeeper and you as a gardener. You have been there for 5 years working. You are a first offender and cooperated with the police and entered a guilty plea at the earliest opportunity. You have demonstrated your remorse and contrition in that way and have spared the victim the trauma of a Court hearing. In addition your family has performed a custom ceremony with the victim's family on your behalf so you should benefit from section 119 of the Criminal Procedure Code which says as follows: -

**"ACCOUNT TO BE TAKEN OF COMPENSATION BY
CUSTOM**

Upon the conviction of any person for a criminal offence, the court shall, in assessing the quantum of penalty to be imposed, take account of any compensation or reparation made or due by the offender under custom and if such has not yet been determined, may, if he is satisfied that undue delay is unlikely to be thereby occasioned, postpone sentence for such purpose"

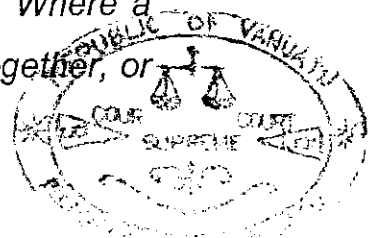


It is submitted to me that none of the aggravating features in the August case apply to you and other authorities are put forward to me which indicates that your sentence for the attempted rape charge should be about four years and in relation to indecent assault that the sentence should be something less and that there should a sentence imposed on the unlawful entering of the dwelling house but reduced somewhat.

As for the ultimate sentence your counsel submits that there should be a reduction of one-third for the plea of guilty and a further one-third in relation to the custom settlement ceremony. It is submitted that any sentence imposed on you should be suspended and that any appropriate sentences should be served concurrently and should be in the range of two to four years.

I go back to the Ali August decision to quote some of what the Chief Justice said

" The offence of rape is always a serious crime. Other than in wholly exceptional circumstances rape calls for an immediate custodial sentence. This was certainly so in the present case. A custodial sentence is necessary for a variety of reasons. First of all to mark the gravity of the offence. Secondly to emphasis public disapproval. Thirdly to serve as a warning to others. Fourthly to punish the offender, and last by no means least, to protect women. ...For rape committed by an adult without any aggravating or mitigating features, a figure of five years should be taken as the starting point in a contested case. Where a rape is committed by two or more men acting together, or



by a man who has broken into or otherwise gained access to a place where the victim is living, or by a person who is in a position of responsibility towards the victim, or by a person who abducts the victim and holds her captive the starting point should be eight years. ...The offence of rape should in any event be treated as aggravating by any of the following facts:

- (1) Violence is used over and above the force necessary to commit rape;
- (2) A weapon is used to frighten or wound the victim;
- (3) The rape is repeated;
- (4) The rape has been carefully planned;
- (5) The defendant has previous for rape or other serious offences of a violent or sexual king;
- (6) The victim is subject to further sexual indignities or perversions;
- (7) The victim is either very old or young;
- (8) The effect upon the victim, whether physical or mental, is of special seriousness.

Where any one or more of these aggravating features are present, the sentence should be substantially higher than the figure suggested as the starting point.

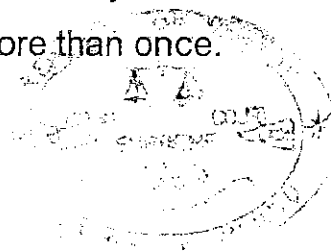
The fact that the victim may be considered to have herself to danger by acting imprudently (as for instance by accepting a lift in a car from a stranger) is not a mitigating factor... Previous good character is of only minor relevance."



Although your lawyer submits to me that there are none of the aggravating features set out by the Chief Justice in your case, with the greatest respect I disagree. After all there was some force over and above the force necessary to attempt the rape that was used. The attempted rape was repeated over a significant period. There appears to have been some elements of planning because you knew immediately where to enter the property to find the young victim. The victim was subject to further sexual indignities by your oral sex and at fourteen years of age she could be called quite young. There are other aggravating features over and above those referred to by the Chief Justice as well.

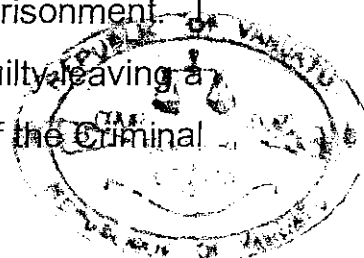
First there were clearly some injuries from your repeated attempts to rape the victim, second, there was an unlawful entry of these premises, third, there was the disparity in age between you and the victim, namely ten years, and finally there was the overall combination of unlawful entering the premises and sexual assaults.

The Chief Justice said that only in wholly exceptional circumstances would any sentence for rape result in anything other than an immediate custodial sentence. I understand that this is attempted rape but the penalty is the same (see section 28 (4) of the Penal Code CAP 135). I immediately say in your case that any suspension is inappropriate and as also been said in the case of *Public Prosecutor v Gideon* Criminal Appeal Case No. 03 of 2001 it will only be in a most extreme case that suspension could ever be contemplated in a case of sexual abuse. That is particularly so with the combination of offences that I have referred to more than once.



When I consider your sentencing as well as balancing the aggravating and mitigating factors, I must also refer to other matters. Although, the mitigating factors include your plea of guilty, your remorse, your previous good character and good work record and the custom settlement, the overall situation is that the aggravating features clearly outweigh the mitigating ones. For that reason I consider that not only is a suspension of sentence inappropriate but also I consider that your sentence should be cumulative and not concurrent. This was a very serious combination of offences involving violation not only of the victim but also of the safety of her dwelling and in addition you did not confine yourself to the attempted rape but then indecently assaulted her in another serious way.

Having said all that I consider that, the appropriate sentences are as follows and I remind you that I must take into account the need to hold you accountable for what you did, I must denounce your conduct, I need to deter you and other like minded offenders from such behaviour and I need to not only protect the victim but also the community at large from you and this activity. The offence is somewhat puzzling to me because you had your own girlfriend in the vicinity and you chose to try to force yourself upon a very young victim nearby. The appropriate sentence on count 1 in my view is 6 years imprisonment. As I say I disagree that there are no factors in the August case recitation of aggravating matters. The aggravating features increases the starting point, in my view, from 5 years to 9 years imprisonment and in relation to count 3 the indecent assault, I am of the view that the appropriate sentence is 3 years imprisonment. That $6 + 9 + 3 = 18$ years imprisonment. I immediately reduce that by one-third for your plea of guilty leaving a balance of 12 years imprisonment. Under section 119 of the Criminal

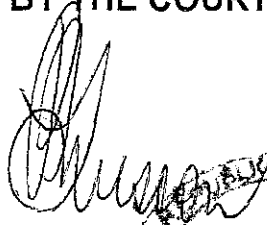


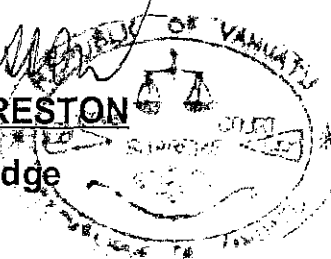
• Procedure Code, I allow you another 3 years for the custom settlement undertaken. That leaves a sentence of 9 years imprisonment. The Chief Justice's reduction of one-third for a custom settlement is in my view not binding.

There is no question about any further reduction for any time that you have spent in custody because you have not been in custody until now so I today sentence you to 9 years imprisonment. You have 14 days to appeal that sentence.

Dated AT PORT VILA, this 14th day of March 2004

BY THE COURT


P. I. TRESTON
Judge

The seal of the Republic of Vanuatu Court of Appeal is circular. It features a central emblem with a scale of justice and a book. The text "REPUBLIC OF VANUATU" is written along the top inner edge, and "COURT OF APPEAL" is written along the bottom inner edge. There are also some smaller, less legible text elements within the seal.