

PUBLIC PROSECUTOR
V
PAUL SHEM

Coram: Judge Macdonald

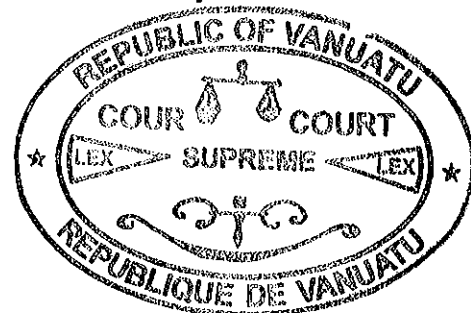
Public Prosecutor: Mr P Wirrick

Accused: Mr H Vira

Date of Sentencing: 30 September 2010

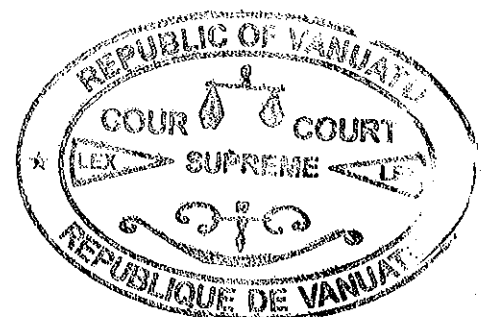
SENTENCE

1. Mr Shem you are for sentence having pleaded guilty to three counts of sexual intercourse without consent and one count of assault causing temporary damage. On the first three counts the maximum penalty is life imprisonment. For the assault it is one year's imprisonment.
2. Your pleas of guilty came on the morning of the trial. I sensed that this caught the prosecutor by surprise. All the prosecution witnesses were present at court, including the victim who had flown to Port Vila from the island of Tongoa. I suspect your realization that your co-offender was to give evidence against you might have contributed to the changes of plea.
3. I need to describe your offending. At around 4.00am on 18 January 2009 the victim and a friend were walking home from a party in the Switi area of Port Vila. As they walked along the road they had the cruel misfortune to meet you and

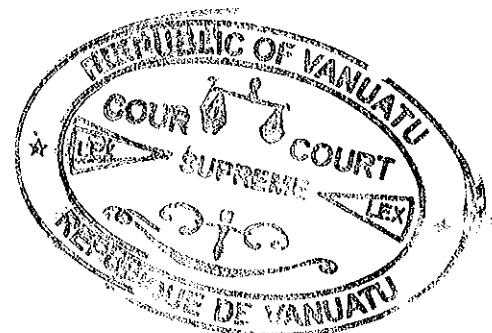


your co-offender Mr Kalia. The victim knew Mr Kalia as they had grown up in the same area. For some reason, and it seems to have happened pretty much straight away, you threatened both the victim and her friend. You then grabbed the victim by her wrist and demanded that she follow you. It seems that she might have sensed that something bad was likely to happen and so you clenched your fist and gestured that you would punch her if she refused. By this time her friend had escaped. Plainly the victim was afraid of you and she clung onto Mr Kalia. No doubt she hoped that he would protect her but sadly that did not happen. The three of you eventually made your way to an isolated area of bush. You told the victim to remove her pants. She refused so you punched her in the stomach which caused her to fall to the ground. You tried again to remove her pants but again she resisted. You responded by holding her head and forcing your penis into her mouth. That is count 1. You then forcibly removed her pants and underwear and you raped her. That is count 2. After you had finished Mr Kalia also raped her. And, after he had finished you raped her again. That is count 3. Just for good measure, while you were raping her on this last occasion you bit her on her right cheek causing pain, bruising and teeth marks. That is the assault; count 4. You left the scene but Mr Kalia accompanied the victim in her walk back towards Switi. A complaint was made to the police on 20 January 2009 and you were arrested soon after.

4. The victim was medically examined. There was a bite mark to her right cheek and a bruise to her abdomen. There was some inflammation and an abrasion to her vagina. I imagine that she would have recovered from those physical injuries but I doubt that she has recovered from the emotional or psychological impact from this terribly degrading ordeal. According to the pre-sentence report she still has nightmares about what happened (and it is now about 21 months ago) and she is still frightened when walking around with friends at night. Undoubtedly it will take her a long time to recover.

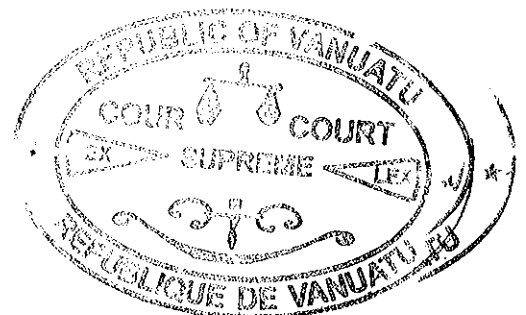


5. Mr Kalia pleaded guilty to one count of rape and received a suspended prison sentence (two and a half years suspended for two years). It was accepted that you were the principal offender and that he acted while under threats from you. His guilty plea came much earlier and he had no prior convictions. An issue of parity arises and I will return to that later.
6. Of course, I have yet to mention that when you committed these offences you were already a sentenced prisoner. On 27 January 2006 you received what was effectively a 16 year prison sentence for raping two 14 year old girls back in 2003. You were 18 at the time. You had been given a temporary release to attend a special function to celebrate your father's retirement. I make no comment on that. You absconded that same day and you committed these offences the very next day.
7. You are now aged 26. You have a partner and two daughters (aged 9 and 2). You have never attended school. You have skills in gardening and constructing local homes. You belong to a church. You claim to have an ambition to own a cattle farm and create a kava market in Santo where you have a plot of land. You have an eyesight problem but are otherwise in good health.
8. Your behaviour within the Correctional Centre has apparently not been good, although that has no bearing on the sentences to be imposed today. You have a number of prior convictions, in addition to the two rapes, but they relate to markedly less serious offending.
9. Mr Shem you are in a rare category of offenders, in that while serving a very lengthy sentence of imprisonment you now face the prospect of yet another very lengthy sentence for further offending. By definition that further offending can only have taken place in prison or following an escape from prison, which is your situation.



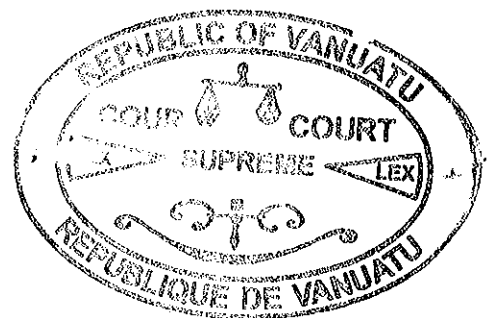
10. That makes sentencing a difficult exercise and in fixing the final sentence I must have regard to what lawyers refer to as the totality principle. I am acutely aware that if I impose the sentence that the current offending deserves, cumulatively on your sentence of 16 years, then it could result in a crushing sentence that might deprive you of any hope for the future. I accept that such a sentence is generally to be avoided except in exceptional cases.
11. So I need to place the 2003 offending alongside the current offending and then step back and look in a broad way at the totality of your offending. My task is to try and arrive at a sentence that is in proportion to the gravity of the overall offending.
12. In dealing first with the current offending the sentences to be imposed must meet the purposes of denunciation, deterrence, holding you accountable for the harm caused to the victim and protecting the community. Your criminal behavior makes you a person from whom the community, and women in particular, must be protected.
13. I have considered the guideline judgment in this jurisdiction of the Court of Appeal in **Public Prosecutor v Scott & Tula** [2002] VUSC 29, which indicates different starting points:

“For rape committed by an adult without an aggravating or mitigating feature, 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.

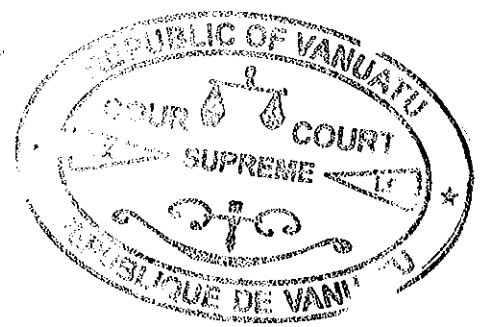


At the top of the scale comes the defendant who has committed the offence of rape upon a number of different women or girls. He represents a more than ordinary danger and a sentence of fifteen years or more may be appropriate.”

14. The Court of Appeal went on to list a number of matters that should be viewed as aggravating factors, and which would call for a sentence substantially higher than the starting point.
15. Mr Wiirick, for the Public Prosecutor, submits that you fall into either the category which has a starting point of 8 years, or one with a starting point of 15 years. As indicated to counsel previously I did not regard the 15 years as being a starting point. It refers to a “sentence of fifteen years or more”. So I regard it as a sentence. The additional words “or more” do not accord with it being “a starting point” either.
16. In my view you fall into the 8 year starting point category because the rapes were committed by two men acting together, and it involved the abduction of the victim and holding her captive, which is effectively what you did.
17. I then identify five additional aggravating factors, which require recognition in the form of a substantial uplift to the 8 year starting point. I am referring to:
 - 1) the multiple offences of rape;
 - 2) the associated violence and threats over and above the violence inherent in the rapes;
 - 3) the impact on the victim who was only 16;
 - 4) the commission of these offences having escaped from custody the day before; and
 - 5) your prior convictions, including two convictions for rape.

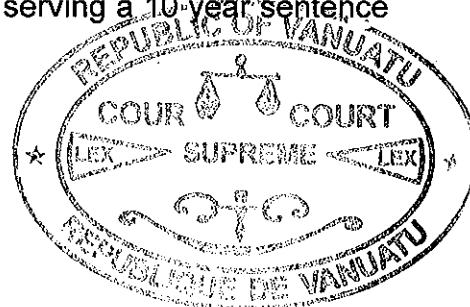


18. Arguably there was a further aggravating factor in the form of the premeditation involved after the chance meeting with the victim. However, in fairness I think that has probably already been taken into account in fixing the starting point.
19. I have treated the assault as an aggravating factor in respect of the rapes, and strictly speaking there was of course more than one assault in this one incident
20. In my view the aggravating factors I have identified require at the very least an uplift of 5 years.
21. The only mitigating factor is that you pleaded guilty, albeit at the last moment. Despite the lateness of those guilty pleas they still spared the victim from having to give evidence in court, which is always the most important feature. It should be recognized and it is by a deduction of one year.
22. Your counsel, Mr Vira, submits that I should take into account your remorse. However, that is difficult to reconcile with your very late guilty pleas and your comments to the probation officer that the victim consented.
23. On its own I consider that the current offending deserves a prison sentence of 12 years, with the only remaining questions being whether any adjustment is required for reasons of parity with your co-offender and whether the whole or part of the sentence should be added to your existing sentence by the application of the totality principle. On those two questions I had sought further assistance from counsel, and I am grateful to the prosecution for the further submissions filed.
24. The reason why parity is desirable was referred to by the New Zealand Court of Appeal in *R v Lawson* [1982] 2 NZLR 219:



“The Courts must bear in mind that public confidence in the administration of justice is best served if justice appears to be administered even handedly.”

25. On the test to apply the Court went on to say that it, “is not merely whether an offender feels a sense of grievance over the sentence imposed on him compared with that imposed on his fellow offender but whether the disparity is such as not to be consonant with the appearance of justice.”
26. I have also considered *Jimmy v The Queen* [2010] NSWCCA 60 and I accept the prosecution submission that the comparison between you and Mr Kalia is not a comparison of equals.
27. Unquestionably Mr Kalia received a merciful sentence but there is ample justification for a marked difference between his sentence and yours. I therefore do not see that any adjustment needs to be made for reasons of parity.
28. As to the totality principle I have to determine what sentence is appropriate to meet the overall gravity of your offending, that is, for the offending in 2003 and the current offending.
29. I acknowledge the submission from the prosecution, and it is a novel one, that I should consider making the sentence partly concurrent and partly cumulative. The submission is that the cumulative part, and therefore the effective part, should be in the region of 5 years.
30. I have given that anxious consideration. I have also looked for cases that are similar to yours in a factual sense, and by that I mean where a sentenced prisoner has further offended in prison or after escaping.
31. The Court of Appeal in New Zealand has recently considered this in *R v Connelly* [2010] NZCA 52. That involved a prisoner serving a 10-year sentence

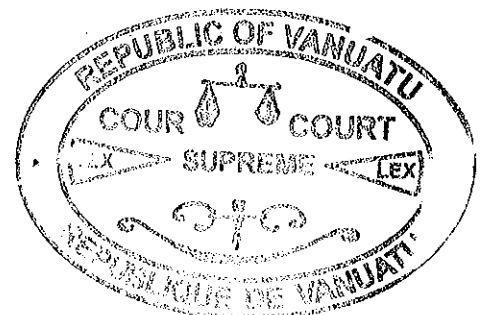


for wounding with intent to cause grievous bodily harm, who in prison committed the same offence against a fellow prisoner. In the High Court the sentencing judge considered that the offence warranted a sentence of 7 years four months imprisonment, but having regard to the totality principle he imposed a cumulative sentence of three years. On appeal that was increased to five years.

32. In the course of its judgment the Court referred with approval to the approach of the English Court of Appeal in *R v Ali* [1998] 2 Cr App R (S) 123. A prisoner serving 9 years for wounding participated in a prison mutiny and causing grievous bodily harm to two prison officers who were seriously injured. He received two concurrent 12 year sentences to be served cumulatively on the 9 nine years. The court recognized that for a 32 year old a 21 year prison sentence was a very long sentence but having regard to the gravity of the overall offending any regard to the totality principle could only be minimal.

33. Mr Shem I am afraid that I see you as being in a similar position. While serving a 16 year prison sentence for two very serious rapes, involving two 14 year old victims raped while you were armed with a knife and piece of wood, you have absconded from a temporary release and the next day you have raped a 16 year old victim in the most appalling circumstances. You had time to consider what you were doing and you must have known that you would be facing a further substantial prison sentence if apprehended. It is therefore difficult to see why on any logical basis the 12 years should not be added on in full, which would mean an overall sentence of 28 years. However, I accept that for a 26 year old that is a very long sentence indeed, and it might well have a crushing effect upon you.

34. In the end, and in deference to the totality principle, I allow a further deduction, albeit a minimal one, of two years. That takes the sentence for the current offending down from 12 to 10 years, but in my view that should be served cumulatively. To reduce the cumulative component to somewhere in the region



of 5 years, as suggested by the prosecution, would not in my respectful view meet the overall gravity of your offending.

35. On each rape count you are sentenced to 10 years imprisonment. On the assault you are sentenced to 9 months imprisonment. Those sentences are concurrent in themselves but cumulative on your existing sentence.

36. You have 14 days to appeal against this sentence.

**Dated at Port Vila, this 30th day of September, 2010
BY THE COURT**



**J. Macdonald
Judge**

