

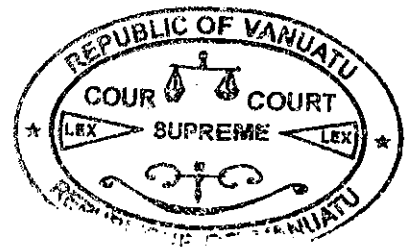
BETWEEN: Public Prosecutor
Prosecutor

AND: Andrew Kenneth
Bruce Richard Mitchelle and
Douglas Kalala
Accused

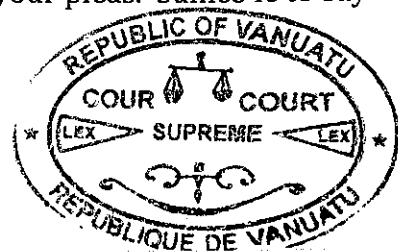
Date of SENTENCE: 15th day of May, 2017 at 9:00 AM
Before: JP Geoghegan
In Attendance: Marie Taiki for the Public Prosecutor
Nigel Morrison for Bruce Mitchelle
Harrison Rantes (PSO) for Andrew Kenneth
and Douglas Kalala

SENTENCE

1. Andrew Kenneth, Bruce Mitchelle and Douglas Kalala appear for sentence this morning in respect of a number of charges relating to possession or supply or cultivation of cannabis. They have all been charged on the same information and I referred yesterday briefly to the fact that I consider that a more appropriate course given that they are not jointly charged would be for each of them to be charged under separate information, however but for the present time is neither here nor there.

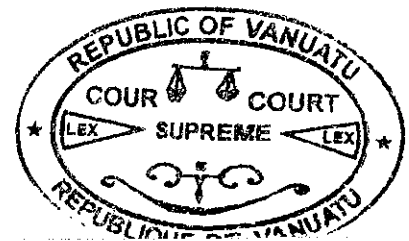


2. Mr Andrew Kenneth has pleaded guilty to one count of making a false declaration to customs contrary to section 170A of the Customs Act, an offence which carries a maximum term of imprisonment of six months or a fine of Vt 5 million. He has pleaded guilty also to one charge of possession of illegal drugs namely cannabis seeds contrary to section 2 (62) of the Dangerous Drugs Act. Mr Bruce Mitchelle has pleaded guilty to one count of supplying illegal drugs namely cannabis seeds contrary to section 2 (62) of the Illegal Drugs Act. Mr Douglas Kalala has pleaded guilty to one count of cultivation of illegal drugs namely cannabis plants contrary to section 4 of the Dangerous Drugs Act.
3. With reference to the drug offences all of these offences are serious charges. They all carry a term of imprisonment of up to 20 years and/or a fine not exceeding Vt 100 million. It will be plainly apparent from that maximum sentence alone that the Parliament of Vanuatu has deemed to treat these offences as very serious once.
4. Yesterday before I took the plea of Mr Mitchelle and confirmed the pleas of the other two offenders I confirmed with counsel the summary of facts which provides the basis for the sentencing of these offenders and I do not propose to repeat that now.
5. Mr Kenneth and Mr Kalala you have entered guilty pleas to your charges at the earliest opportunity. You are entitled to the allowances that come with that. Mr Mitchelle you entered a guilty plea at the commencement of your trial you, having entered a not guilty plea earlier. Accordingly you are not entitled to any allowance for an early guilty plea.
6. I am grateful to counsel for the submissions which they have provided at short notice and to Corrections for also producing very thorough and helpful reports at very short notice.
7. As I have said there is no need to refer to the summary of facts which I set out in full yesterday upon confirmation of your pleas. Suffice it to say

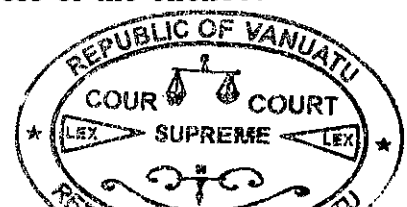


that Mr Kenneth you were in possession of eight cannabis seeds, Mr Mitchelle you supplied Mr Kalala with 15 cannabis seeds and Mr Kalala you cultivated a total of 52 cannabis plants with a dried weight of six kilograms.

8. All of the pre-sentence reports are positive reports.
9. Mr Kenneth you are referred to as being 27 years old with a wife and two children. You clearly have a lot of ability and considered undertaking law and in fact, as I read the report, completed two years of study in law at USP.
10. Mr Mitchelle you are a 42 year old New Zealander living on Lamén Island but as I have clarified with Mr Morrison today you have a wish to return to New Zealand. You are reported as having been very helpful to the people of Lamén Island in your time there. I will expand further on your personal circumstances as Mr Morrison has told me that you are selling a small house which you built on Lamén Island as you wish to return to New Zealand. The reason for that is that you have no employment, you have no income, the last six months have been very difficult for you in terms of constrictions in respect of your bail and have had an impact on your ability to earn an income. You have been largely reliant on your elderly parents in New Zealand in terms of them supplying you with money, a situation really which is rather sad bearing in mind your age and your assumed ability to care for yourself.
11. Mr Kalala you are 36 years old and you have a wife and four children. You are also responsible for the care of your parents. Both you and Mr Kenneth have been described as having good relationships with community members.
12. Each of you are first offenders and are referred to as being remorseful and I accept that remorse as being genuine and that must have an impact on the overall penalty.

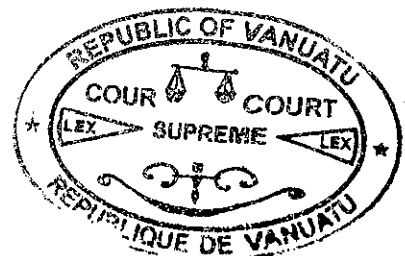


13. The submissions that I have received referred to a number of cases and I don't propose to refer to each of those with the exception of the Court of Appeal decision in Wetul v. PP [2013] VUCA 26, which is a helpful guideline case from the Court of Appeal as to sentencing levels and categories in offending of this kind. Essentially what it does is to separate offending into three broad categories.
14. Category one consists of growing a small number of cannabis plants for personal use and without any evidence of sale to any other party. The Court of Appeal referred to the fact that offending in that category can almost invariably be dealt with by fine or another non-custodial measure. That of course depends on the facts of each case.
15. Category two encompasses small scale cultivation with cannabis plants for a commercial purpose. That is with the object of deriving profit and there the starting point for sentencing is generally between two and four years although again if the offending is less serious a lower point can be justified.
16. Category three is the most serious class of offending and involves large scale commercial growing usually with a considerable degree of sophistication and the starting point there will generally be four years or more.
17. What must be emphasized is that each case must be treated on its own specific facts.
18. In terms of each case I intend to look at each of you individually as I must of course. Looking at you Mr Kenneth I have to say from the start that with respect of Ms Taiki's reference to aggravating factors in terms of your offending I do not accept that the factors referred to by the prosecution are aggravating factors and if I can expand on that for a moment, Ms Taiki has referred to the seriousness of the offences and



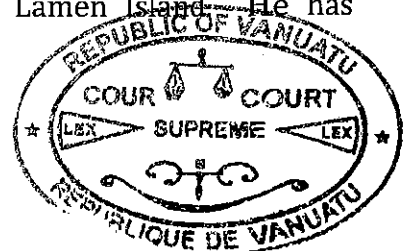
aggravating factor. It is not an aggravating factor. This sort of offending is serious but the degree of the offending will affect the seriousness of it and in this case we are dealing with a low level offence. Ms Taiki refers to the fact that you made intentional false declarations to Customs. Again, intention is a component of the criminal offence. Without intention, putting aside the issue of strict liability, there can be no offence. So the fact that you intentionally made that false declaration is not aggravating. What might make an aggravating factor is the degree of the offending, in other words the type of goods affected by the false declaration. The fact that you knew that the seeds were cannabis is also not an aggravating feature. If I can put it another way if you didn't appreciate that the seeds were cannabis that would be a mitigating factor but the fact that you knew that they were cannabis is not in itself an aggravating feature. There is reference to the fact that you possessed eight cannabis seeds and that is an aggravating factor. It is not. It is simply a factor which has to be weighed in the overall level of seriousness of the offending and as I have said the possession of eight cannabis seeds puts you certainly in category one and at the lower end of category one.

19. Accordingly where you are concerned I can see no aggravating features of the offending and there are no aggravating features personal to you which will have an effect upon the appropriate starting point. I consider you as coming firmly within category one and that it is not appropriate for any prison sentence to be imposed on you. I do consider however that there needs to be some deterrent element and some penalty as I know that there is concern among the community about the extent to which marijuana is being grown and used in some communities.
20. I consider it appropriate accordingly to sentence you to 80 hours community work and to supervision for a period of six months with a special condition that you undertake and complete such programs as



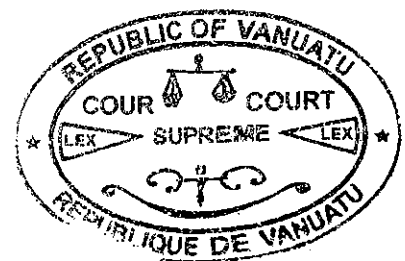
directed by your Probation Officer and to the satisfaction of your Probation Officer.

21. I now turn to you Mr Mitchell. It is unclear as to where you obtained the cannabis seeds which you supplied to Douglas Kalala but the essence of the matter is that you supplied him with a relatively small number of seeds, namely 15. There is no suggestion that this was done for any commercial purpose but your decision to do so was extremely unwise. Having said that there is no distinction under the law in terms of penalty between possession and supply.
22. I would not normally consider a sentence of imprisonment to be appropriate but Mr Morrison has spoken to me at some length about your personal circumstances and your personal circumstances are relevant in terms of penalty.
23. In that regard that Mr Morrison has emphasized the fact that you do not have an income and that you have been living at a very subsistence level on Lamén Island. You are selling your home in order to return to New Zealand and I have been advised that you have a buyer so that your return to New Zealand could be effected presumably very quickly. Mr Morrison has referred to a suspended sentence of imprisonment.
24. The difficulty with that of course is that on the assumption that you did not commit any further offences, a suspended sentence would effectively give you a free pass. It would enable you to leave Vanuatu without having suffered any penalty at all, although I acknowledge that a suspended sentence certainly becomes a penalty if that sentence is triggered. In your circumstances however I consider that there should be the imposition of community work.
25. Mr Morrison has addressed me at some length also on the effect of your bail conditions given that you are living on Lamén Island. He has

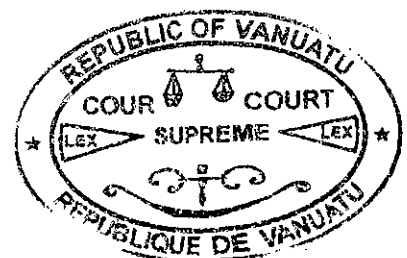


submitted that over the last six months you have effectively been impeded in terms of your everyday life by having to report to the Police each Monday and Friday and I accept that in that regard that is an additional imposition on you which is not being suffered by the other offenders.

26. Weighing up all of your personal circumstances and the facts that I have just referred to I consider that I can deal with you adequately by simply imposing a sentence of community work. What you do have to know however is that if you ever come back to Vanuatu and you repeat this sort of offending you will be going to prison. There will be no exception or no accounting other than a prison sentence.
27. Given your particular circumstances I consider that a community work sentence of 60 hours should be imposed on you and accordingly you are sentenced to 60 hours community work.
28. Douglas Kalala I regard your offending as the most serious of the three offenders. You have gone to some trouble to cultivate 52 plants which is a significant number. It is difficult to accept frankly that those plants were for your own personal use. But what has to be recognized is that there are no indications at all that you had intended to sell or supply the cannabis to others. There is no evidence of the state of health of the plants and whether they were all harvestable and in those circumstances it is appropriate to give you the benefit of the doubt although I do so rather reluctantly. Notwithstanding that, I do not consider that your offending could properly be considered as coming within category one of Wetul. It also has to be said that it does not sit comfortably within category two. At the end of the day, however, I must deal with this matter on the basis of the circumstances as they are presented. I consider that your offending requires an element of deterrence and denunciation.



29. Accordingly I consider the sentence of imprisonment to be appropriate and a starting point of 12 months imprisonment as appropriate taking into account the number of plants cultivated by you. Allowing two months for your personal circumstances as set out in the pre-sentence report and allowing for your early guilty plea the end sentence is one of six months and two weeks imprisonment. I am satisfied that in your case it is appropriate to suspend that sentence. You are a first time offender. You are clearly making a valuable contribution to your community and to your immediate family and you have a wife and four children to support. No useful purpose in my view, is served by sending you to prison.
30. Accordingly you are sentenced to six months and two weeks imprisonment suspended for a period of 18 months.
31. Your counsel has probably talked to you about the meaning of a suspended sentence but what that means is that if you remain offence free for a period of 18 months then you will not be required to serve your sentence of imprisonment. If you commit any further offences however, you will serve the sentence that I have just passed and I hope that you understand that.
32. You are also sentenced to 100 hours community work and 6 months supervision with a special condition to undertake and complete such programs as directed by your Probation Officer and to the satisfaction of your Probation Officer.
33. Each of you have 14 days from today to appeal these sentences.



DATED at Rovo Bay this 15th day of May, 2017

BY THE COURT

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JP GEORGEGAN
Judge

