

**IN THE SUPREME COURT
OF THE REPUBLIC OF VANUATU**
(Criminal Jurisdiction)

**Criminal
Case No. 17/3534 SC/CRML**

BETWEEN: **Public Prosecutor**
Appellant

AND: **Tyron Kalo**
Accused

Date of Call Over: *Friday 9th March 2018 at 9 am at Luganville*

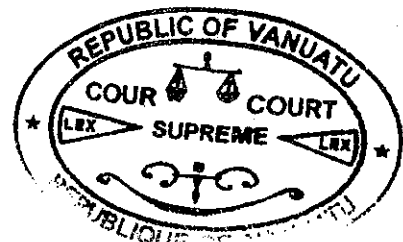
Before: *James Paul Geoghegan*

Appearances: *Damien Boe for the Public Prosecutor*

Jane Tari Aru for the Accused

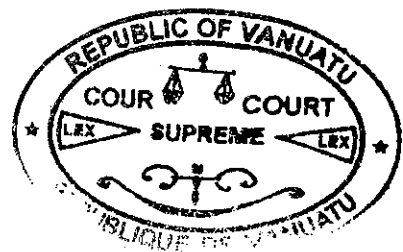
SENTENCE

1. Mr Kalo you appear for sentence today on one charge of attempted sale of cannabis contrary to section 2 (62) of the Dangerous Drugs Act Cap. 12 and one charge of possession of cannabis contrary to the same section.
2. The maximum term of imprisonment for offences of this kind is 20 years imprisonment or a fine of Vt 100,000,000. That underlines the seriousness with which drug offending is seen in Vanuatu. It must also be said however that the maximum term contemplates a very wide variety of offending from unsophisticated offending at the lower end to very sophisticated commercial orientated offending at the other.
3. In this case the summary of facts tells me that you were searched by a police officer on September 18th 2017 and the police officer uncovered a package of cannabis in your possession. You had apparently attempted to sell that cannabis from your home. A further 12 packages were found wrapped with aluminum foil along with an



amount of Vt 7,900. The total net weight of the 12 packages found was 1 kg, a not insignificant amount of cannabis.

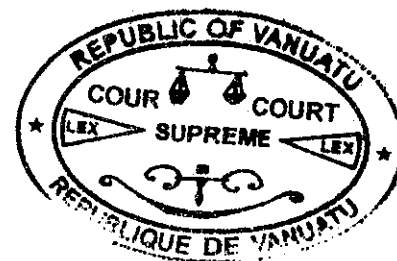
4. Your explanation was that you had received the cannabis from a friend who resides in South Santo.
5. I have read your pre-sentence report which tells me that you are in a de-facto relationship with your partner and that you have three sons, two of whom have special needs. Prior to your sentencing I had discussed that issue with you and have emphasized to you that while you have been on remand in custody in respect of your offending, your partner, the mother of these children, has had to carry on and in some way try to support them. You have come to a time in your life at the age of 31 where you really need to decide the sort of person you want to be and whether you want to be an offender who will spend considerable parts of your life in prison or whether you want to be a good and decent father to your sons and a good and decent partner to your wife. That is a decision that only you can make.
6. It appears that you have had limited education and limited support in the community. You appear to earn income through your farming skills and your reports tells me that you have bought a hectare of land at Monix Hill where you carry out your farming activities.
7. You have been on remand at the Luganville Correctional Centre since September 19th 2017. You are a second time offender, you having been previously sentenced to three years and four months imprisonment by the Supreme Court in 2005 on a charge of sexual intercourse without consent. You were also convicted on a charge of escaping custody. What needs to be acknowledged though is that you were 18 years old at that time.
8. The report refers to you failing to take full responsibility for your offending and that you told the report writer that it was not your intention to keep or sell packets of marijuana. That is a rather difficult contention to make now bearing in mind that you have pleaded guilty to attempted sale and possession.



9. I spent sometime today speaking with the report writer about his suggestion that sentences of community work and supervision could not be offered to you or recommended because of the fact that you are a second time offender, have a likelihood of re-offending and the fact that there would be minimal community support for you.
10. With reference to that I am satisfied that I could impose such sentences as it is clear that they would be supervised by Corrections. There is no history of you having been granted any community based sentence previously or having breached that sentence.
11. In all of the circumstances, the pre-sentence report recommends a brief term of imprisonment.
12. In his submissions the Public Prosecutor refers to the guideline judgments of Wetul v. PP¹ and Naoio v. PP². In Naoio the Court stated as follows:-
- "It will be noted also that Parliament had fixed the punishment for all drug offences ranging from a fine of up to Vt 100,000,000 in the passage quoted from the learn... and not Vt 1,000,000 as mentioned in the passage quoted from the learned trial judge's reasons for sentence, or a term of imprisonment up to 20 years. The Legislature clearly intends to give the Court a wide range of room within which to move in order to impose appropriate penalties for drug offences based on the circumstances of the particular cases before the Courts. . There are offences much more serious than those which the appellants were convicted of. For such offences, the Courts will no doubt consider meeting them with severe sentences."*
13. Accordingly, the Court has a wide range of sentencing options available depending on the particular circumstances of each case. The case of Wetul divided offending

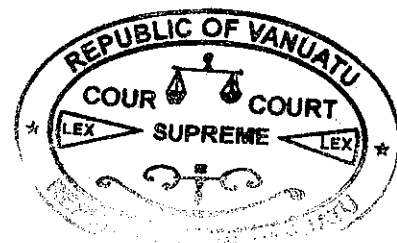
¹ [2013] VUCA 26

² [1998] VUCA 1.



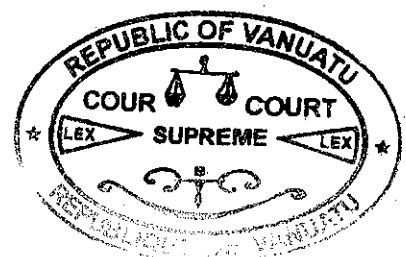
into categories. Category one consists of the growing of a small number of cannabis plants for personal use by an offender without any sale to another party occurring or being intended. Offending in that category is almost invariably dealt with by a fine or other non-custodial measure. Category two encompasses small sale cultivation of cannabis plants for a commercial purpose. That is, with the object of deriving profit. The starting point for sentencing is generally between two and four years but where sales are infrequent and of very limited extend a lower starting point may be justified. Category three is the most serious class of such offending. It involves, large scale commercial growing, usually with a considerable degree of sophistication and organization. The starting point in cases like that will generally be four years or more.

14. Mr Boe submits that your case comes within category two of the offending referred to in Wetul and I agree with that assessment. I note also that Mrs Tari agrees that this offending comes within category two. Mr Boe suggests a starting point of between 24 to 36 months imprisonment, taking into account the weight of the cannabis and your previous conviction for rape.
15. I need to say something about your previous convictions. Having a previous conviction is not always a personal aggravating factor which warrants an increase in the starting point. Much depends on the nature of the offending and the date of the offending. If the offending is similar to the offending in respect of which someone is to be sentenced then it is relevant and likely to be an aggravating factor. If it is not then there needs to be further consideration of its significance and relevance. Equally, if the previous convictions are historic in nature they may be less of an aggravating factor.
16. In your case there are two convictions, one for escaping custody and one for rape. They were entered in 2005 and 2006 some 12 to 13 years ago. There has been no offending since that time until the current offending. I do not consider them in the context of this sentencing to be aggravating factors, but they will however, affect any credit you would otherwise have received for a clean history in terms of offending.



17. I wish also to make an observation about the Public Prosecutors assertion that there has been an increase in cannabis cultivation and dealing in Vanuatu. If the Public Prosecutor wishes to make such a submission with the intention that it have an impact upon sentencing then it is appropriate to provide statistical or analytical evidence in support of such a submission. No such evidence has been provided here.
18. On your behalf, and not surprisingly, Mrs Tari focusses on your personal circumstances and the fact that you have a family to support. She also refers to the fact that you have already been in custody on remand since September 19th 2017, almost six months. Mrs Tari refers me to the Court of Appeal decision in Tavuti v PP³ where a street seller in possession of 145 grams of cannabis was seen as justifiably facing a starting point of 2 years imprisonment. Mrs Tari suggests a starting point of 2 years on that basis.
19. Looking at the facts of this case your role in all of this is somewhat unclear. I have not been told how many times you are alleged to have sold the cannabis, who it was sold to and for how much. All of that would be helpful information but perhaps it is simply unknown. However what we do know is that you were found with 1 kg of cannabis, divided into 12 separate packages of presumably around 80 grams each. You were also in possession of Vt 7,900 which was found with the cannabis and is strongly suggestive of a commercial enterprise.
20. In such circumstances, a starting point of 2 ½ years imprisonment would be appropriate taking into account that it involves a significantly greater amount of cannabis than was the case in Tavuti.
21. As I have explained I do not intend to take account of your previous convictions as personal aggravating factors warranting any uplift from that 2 ½ years starting point.

³ [2016] VUCA 41

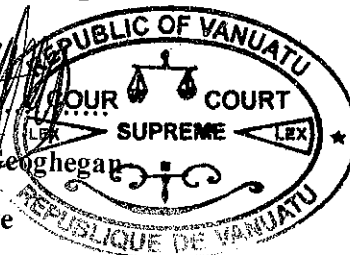


22. From that 2 ½ years I deduct 10 months for your early guilty plea which I accept was entered at the earliest opportunity. Because of your previous convictions I do not propose to make any further allowances. The end sentence is accordingly one of 1 year and 8 months imprisonment.
23. Before imposing that sentence I record that I have considered whether or not I should impose a community based sentence such as community work or supervision. I do not propose to do that as effectively you have served your sentence already and the imposition of community work and supervision would be a further penalty which in my assessment is unjustified.
24. Accordingly you are sentenced in respect of each charge to 1 year and 8 months imprisonment. That sentence in respect of each charge will run concurrently.
25. You may rest assured that if you re-appear before the Court on any similar offending the sentence will be very considerably greater.
26. I record that you have been on remand in since September 19th 2017 and that you would be entitled to be considered for parole either immediately or shortly. The calculation of your release date and eligibility for parole is a matter which can be calculated by the relevant authority.
27. You have 14 days to appeal this sentence.

DATED at Luganville this 9th day of March 2018

BY THE COURT

.....
James Paul Geoghegan
Judge

The seal of the Supreme Court of Vanuatu is circular. It features a central scale of justice. The words "REPUBLIC OF VANUATU" are written along the top inner edge, and "REPUBLIQUE DE VANUATU" along the bottom inner edge. In the center, the words "COURT SUPREME" are written, with "COURT" on the left and "SUPREME" on the right, flanking the scale. The word "LEX" is written on either side of the scale's base.