

BETWEEN: PUBLIC PROSECUTOR

AND: KENCY TUI JOHNNY
Accused

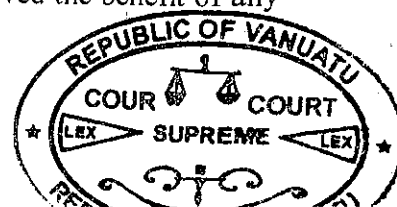
Coram: *Justice JP Geoghegan*

In attendance: *Counsel – M. Tasso for the Public Prosecutor*
Counsel – G. Takau for the Defendant

Date of Sentence: *14th March 2018*

SENTENCE

1. Johnny Kency Tui, you appear today for sentencing on three charges of sexual intercourse without consent and one charge of an act of indecency with a young person contrary to Section 98A of the Penal Code. The charge of sexual intercourse without consent carries a maximum term of life imprisonment. The charge of an act of indecency with a young person carries a maximum term of 10 years imprisonment.
2. I mention that because that really underlines the seriousness of this offending. You were convicted of these charges after a trial over the course of 4 days in December 2017 and February 2018. The reasons for your conviction are set out in my verdict judgment dated February 9th, 2018.
3. Briefly, the facts are that you and the 11 year old victim in this case lived in the same village. She looked after you and considered you to be something of a grandfather figure. It is clear that she went to your home relatively often to clean it and to do other tasks for you. Accordingly she trusted you. You have betrayed that trust. As stated in my judgment I consider it likely that this offending occurred within a relatively short space of time in August 2016.
4. The indecent assault consisted of you forcing the complainant to hold your penis. The three acts of sexual intercourse without consent all took place in your home when the complainant had come to your home either to get some sweets or to clean your house or to attend to the cutting of your fingernails and toenails. At these times she was isolated and vulnerable and you have taken advantage of that to satisfy your sexual desires.
5. I have read your pre-sentence report that tells me that you are a widower having lost your wife in 2006. You have 5 adult children. You have not received the benefit of any



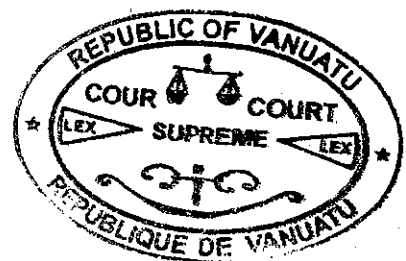
education to speak of, and you have sustained yourself through subsistence gardening. You are reportedly respected in your village and one of your sons has described you as a caring person and a family person. You are a first time offender.

6. Of some concern is the fact that you still do not accept responsibility for your offending. Your explanation for one of the incidents which occurred and which is referred to in the pre-sentence report stands in contrast to your statement to the police and what I found in my verdict judgment to have occurred. I acknowledge that you are prepared to undertake a reconciliation ceremony however given that the victim and her parents now live in Fiji the prospect of that may be remote.
7. Ms. Tasso in her submissions has referred to the guideline judgments in Public Prosecutor v Gideon¹ and Public Prosecutor v Scott². Those and other cases emphasise the need for the court to denounce and condemn in the strongest possible terms any behaviour involving the sexual abuse of children in our community. I have been referred to a number of authorities regarding sentencing but what is important is looking at the particular facts of this case together with your own personal circumstances. Perhaps the most similar case referred in Ms. Tasso's submissions is Public Prosecutor v Robert³ which involved the sentencing of a 62 year old offender in respect of sexual offending against a 7 year old victim. The end sentence in that matter was 6 years after the sentencing judge adopted a starting point of 9 years. Ms. Tasso suggests an end sentence ranging from 9 years after taking full relevant matters into account.
8. On your behalf Mr. Takau simply submits that any term of imprisonment should be suspended given your medical condition. He has submitted that you are medically incapable of being kept inside the Corrections Centre that you have medical problems with your knees and eyes and that you need someone to take care of you.
9. You may recall that when you first appeared for sentencing I referred to the fact that there was no evidence in respect of the medical conditions referred to by Mr. Takau in his submissions. I adjourned the sentencing to enable that evidence to be put before the Court. Mr. Takau has advised me this morning that while you went to Vila Central Hospital the doctors there were not prepared to give you any report or statements in respect of your medical condition. What is obvious to me however in my observations of you during the course of the trial and again today is that you are clearly elderly, that you have a frailty associated with your age and that you walk with the assistance of a cane.
10. In my assessment those matters can be accommodated by Corrections. It is their job in the event of any sentence of imprisonment to manage your medical care and in situations where your medical care is serious or complex the Parole Board can consider early release. Coming back to Mr. Takau's submissions however, his essential

¹ [2002]VUCA 7

² [2002]VUCA 29

³ [2017]VUSC 47

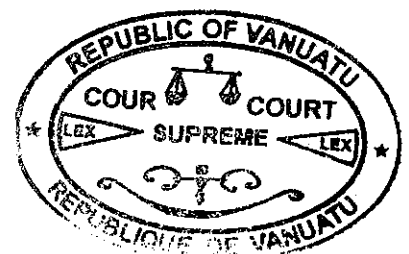


submission is that realistically he recognises imprisonment as an obvious outcome today but again emphasises because of your personal circumstances that that sentence if imposed should be suspended.

11. The first task which I have in sentencing is to fix a starting point regarding your offending. That starting point needs to take into account any aggravating factors present in the offending. In this case those factors are firstly the breach of trust involved in your offending given the relationship between you and the victim and secondly the young age of the victim. She was a child who was entitled to feel safe and secure in your care.
12. The starting point in one of the lead charges of sexual intercourse without consent could easily in my assessment be justified at 10 years. The difficulty is that here there are three such counts and it would be wrong to ignore that. Accordingly a cumulative starting point of 25 – 30 years would offend against the principle of totality and would be unjust.
13. In Public Prosecutor v Kavila⁴ I adopted a starting point of 20 years regarding five counts of sexual intercourse without consent one of indecent assault and one of threatening to kill. In Public Prosecutor v Boesel⁵ I adopted a starting point of 16 years in a matter involving three counts of sexual intercourse without consent. The offending in that case was similar to the offending here in the sense that it involved a significant breach of trust. Looking at this offending I consider that a starting point of 16 years properly takes into account the nature of the offending. There are no personal aggravating features which warrant an increase in that starting point.
14. Having defended these charges you are not entitled to any allowance which would otherwise be granted for a guilty plea.
15. The most significant mitigating factor is your age and the impact of a prison sentence upon you. In that regard I have no doubt that it would be difficult for you to undergo a sentence of imprisonment and that is a matter which may properly be taken into account by the court in determining the ultimate sentence to be imposed.
16. Unfortunately counsel have not referred me to any authorities regarding this particular matter. However I consider that your particular circumstances would justify a reduction of 5 years from the starting point which I have adopted.
17. I take into account your lack of previous convictions and in that regard consider that you are entitled to a further 12 months reduction from the starting point.
18. The application of those allowances means that the end sentence point is one of 10 years imprisonment. I have considered whether or not it would be appropriate to suspend your sentence. As I have said there is no medical evidence before me and your age in itself cannot in my assessment provide justification for the suspension of a

⁴ [2017]VUSC 160

⁵ [2017]VUSC 123




sentence such as this for offending of this kind. As I have said earlier the previous authorities which I have referred to have emphasised the need for the court to underline the fact that children must be protected from men who take advantage of their age to commit sexual offences. Sexual offenders cannot expect to remain in the community. I do not consider that there is anything exceptional here which justifies imposing a suspended sentence and you do not meet the criteria for the imposition of a suspended sentence. I accordingly decline to suspend your sentence.

19. Accordingly in respect of each count of sexual intercourse without consent you are sentenced to 10 years imprisonment. On the count of indecency with a young person you are sentenced to 2 years imprisonment. These sentences will run concurrently.
20. You have 14 days in which to appeal this sentence.

DATED at Port Vila, this 14th day of March, 2018.

BY THE COURT


JP GEOGHEGAN
Judge.

