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

Criminal Case No. 31/ 2015

PUBLIC PROSECUTOR

V

GEORGIE KALKAU

Sentence:	***Monday 3 August 2015 at 11:45 am***
Before:	***Justice SM Harrop***
Appearances:	***Betina Ngwele for the Public Prosecutor***
	Christina Thyna for the Defendant

SENTENCE

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1. Mr Kalkau, you are for sentence on one charge of indecency with a young person, that is a person under the age of 15, against section 98A of the Penal Code. The maximum penalty for this offence is a sentence of 10 years imprisonment.

2. The incident occurred on 2 February 2015. I will refer to the facts which are set out in the prosecutor's submissions and which I am told are accepted by you. I mention at this stage that those facts are more detailed and somewhat different from those which were contained in the brief facts provided prior to your entering your plea. For future reference, the Public Prosecutor should be consistent as to what the facts are at all times. A defendant pleading guilty is entitled to see what that prosecution summary of facts is prior to deciding whether or not to plead guilty because if he does plead guilty those facts are the facts on which sentencing

will take place. Accordingly for the prosecution to change the facts after the guilty plea by providing more detail is inappropriate, unless the defendant accepts them.

3. Here the victim is a seven- year old girl who lives with her parents at Eratap half road. I will not mention her name so as to protect her identity. At the time of the offending you were 20, so there is a 12 to 13 year age difference which is substantial. You are and were regarded by her as her uncle, being her mother's younger brother.

4. When you visited her house she and her brother were watching television in the sitting room. Her mother and father were not home and the only person at home with the children was another family member who was in the kitchen when you arrived. You went into the sitting room and after some time the other family member heard that the volume was very high on the television and went in to see what was happening.

5. To his surprise he saw you and the victim on a mattress with the door wide open as well as the windows, this was about lunch time. The brother was not in the room. The victim was leaning against the wall with her legs open and she was naked. You were lying down on her stomach with your head in between her legs licking her vagina. At the time she was playing a game on your mobile phone. Once she became aware that the other family member was watching, she quickly pushed your head away and ran into the bedroom. When you saw the family member you were very ashamed and hid your face in the mattress. When you were

spoken to you by the police you denied that there had been any sexual intercourse, it is accepted by the prosecution indeed that there was none, but you did admit immediately playing with the girl's vagina.

6. If first note the aggravating features of this offending. It has been suggested in submissions of both counsel that this is at the lower end of the spectrum of possible indecencies and comparison has been made to penetrative sexual contact. I do not accept that because if there was any sort of penetration then this would not be the charge but rather it would be sexual intercourse without consent, a charge which carries life imprisonment.

7. What you did is in my view more serious than touching the vagina with a hand through panties or other clothing; indeed it is arguably more serious than touching with a hand, skin to skin. It is a full on sexual connection and not far short of penetrative conduct, which as I say would attract a more serious charge. I accept that indecency involving masturbation to ejaculation would be more serious. I also accept a point made by Ms Thyna that it would be more serious if there were threats especially while brandishing a weapon or if there were several incidents and repeated offending of this kind. But as far as the act itself is concerned my view is that this is a serious example of indecency and not at all at the lower end of the scale.

8. I have already mentioned the age difference which at 12 to 13 years is substantial. This is a very different case from one involving say a 16 or 17 year old boy and a 15- year old girl. But

if such a boy and girl were engaged in the same sexual conduct it would still attract a 10 year prison sentence. Accordingly this case must be seen as more serious than many others that come before the Court. I note too that the victim here was only about half the age that a victim may be while still coming within the section; she was only 7 but a girl up to the age of 15 is equally protected by this law.

9. The next aggravating feature is the breach of trust, I accept that this is less serious than if you were a stepfather or father acting in this way in relation to a daughter but nevertheless it is an uncle-niece relationship and it is a gross breach of trust. She was entitled to feel safe with you and may well have allowed you to do this because of being allowed to play on your mobile phone whereas she might never have allowed a stranger to do that. On that basis you took advantage of her trust and the consequences for her mentally or being treated in that way by her mother's brother are likely to be serious and longlasting. I accept that the maximum penalty implicitly already gives some effect to those consequences and so care is needed with reading too much into that particular aggravating feature.

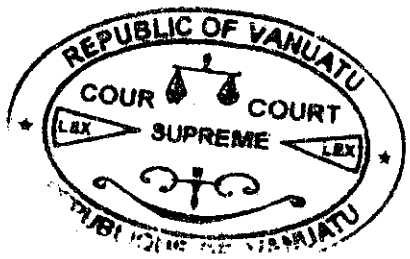
10. Finally I note that this occurred in her own home, where of all places she should feel and be safe. It is important to mention at this stage her own comments and those of her father about the effects that this incident had on her. She is only seven and understandably has felt scared of dealing with various other people since the incident. Her father mentions in the attachment to the pre-sentence report that she has had trouble concentrating at

school. He has tried his best to talk to her and now she is "doing okay". He says that cannot believe how you, as her uncle, could do this to her and that you have broken a trust which will never be restored. He also notes, and I will come to this later, that a customary ceremony has been held and that the gifts were accepted, but he also leaves it to the Court to decide on the case because he wants you to learn from what you have done.

11. I have been assisted by the pre-sentence report which I will briefly mention. This says that you were not able to complete primary school because of your father's sudden death. You do have some skills in gardening and you are of valuable assistance in the community. You are a first time offender at the age of 20 years and, importantly, you have been in custody when you were arrested for 2 months and 3 weeks from 17th February to 12th May so effectively 3 months and that is equivalent to serving a 6 month prison sentence.

12. You are recorded by the Corrections staff as well behaved while you were on remand. You are said to be very sorry for your wrongful actions. There is information that you are a person of good character, or were prior to this incident. Your mother says that this was a mistake and you are truly sorry for what happened and you want to become a better person and she is willing to help you do that.

13. I should mention that there are some comments in the report about another incident where some bite marks were found on the victim's body; I put those to one side because there is no charge



relating to any such conduct and there is no evidence that you were involved in anything of that kind. This was a one-off incident and I have described its details.

14. The custom reconciliation ceremony has occurred and that is very important in Vanuatu culture. I must and do take it into account in sentencing. As Ms Thyna has pointed out it is also important that it has been accepted by the victim's family who now leave it to the Court to make a decision. The items that you and your family presented were a big kava root, 3 traditional mats, 2 garments made of calico, a chicken and Vt 1,000. I accept that for a young person those are substantial contributions and clearly they were treated as such by the victim and her family. I should say though that at the age of 7 years this young victim will not have obtained much if any benefit from the custom reconciliation ceremony; she would simply not fully understand what was involved and I am not sure that she was even present. What I can accept though is that your willingness to undergo that reconciliation ceremony supports your genuine remorse.

15. I certainly intend to give you the maximum credit for your guilty plea which followed up your immediate acknowledgement of what you had done when you were spoken to by the Police.

16. The way in which I need to approach the determination of the final sentence is first to determine a starting point. There are many, many authorities because this kind of offending is regrettably very common. Ms Ngwele says that a starting point of about 4 years and 3 months could be justified. Ms Thyna says 1

to 3 years. I have read a number of relevant authorities and one which I found helpful but was not referred to by counsel (and I emphasizes is not a criticism because of the number of authorities there are) , is PP v. Jackson Mathew [2013] VUSC 79, where a starting point of 4 years imprisonment was adopted by Justice Spear. I accept that that case can be seen as more serious because there was a more serious breach of trust as the defendant was the step-father of the victim and a significant age gap of 34 years; the defendant was 43 , the victim was 9.

17. In the PP v. Lini Robson [2014] VUSC 127 Justice Fatiaki adopted a starting point of 3 years in a case where it was not clear that there was any vaginal touching at all. There was rubbing of the penis between the legs resulting in ejaculation. In PP v. Reinigment [2014] VUSC 118 there were 2 counts involving the same 13-year old victim. That involved exposure of naked penis and making the victim sit on the lap and masturbation to ejaculation and fondling of breasts. That was breach of trust by church elder towards a younger church member and a 3 year starting point was adopted.

18. Both counsel have referred to PP v. Kelep [2009] VUSE 111 but I note first of all as to the starting point it is not especially helpful because it was decided before the guideline judgment of PP v. Andy. Also it seems to me that case is considerably less serious than the present because it did not involve skin on skin touching, as I read it.

19. In PP v. Massing [2003] VUSC 121 which is case referred to by Ms Thyna the starting point was 3 years.

20. Overall, I consider, having regard to the aggravating features, the authorities I have considered and the maximum penalty of 10 years, an appropriate starting point, the least restrictive one I can properly justify here before I consider personally mitigating factors, is one of 3 ½ years imprisonment or 42 months. Arguably I could have justified 3 to 6 months more than that.

21. The next question is what deduction should be made from that to reflect mitigating factors relating to you? As I have already mentioned, your early guilty plea and immediate acknowledgement of responsibility justifies a full one-third discount or 14 months so that brings it down to 28 months or 2 years and 4 months.

22. I want to emphasise there is considerable value, to the victim particularly, in a guilty plea. It also saves the cost of a trial. It would be relatively easy for a defendant in your position to say, well there is a 7-year old complainant and there must be a reasonable chance that she will not be able to persuade the Court that I have committed any offence. But you decided to take responsibility for what you had done as soon as you were spoken to by the Police and you followed that up by a guilty plea which meant that she did not have to give evidence. She did not have to relive the incident. That is why the one-third discount is fully justified in this case.

23. The second point is your age. You were only 20 at that time and that is by significant contrast with a number of the other cases that

I have mentioned, quite often the fathers or stepfathers are 20 years or more older than the victim. I accept that you are still at a stage where you are learning about the right way to behave and a discount reflecting your youth is appropriate. That closely aligned to the fact that you have not previous convictions and you are clearly otherwise someone of good character and I accept that that is something you are entitled to put in this scales and to have credit for.

24. I have also already mentioned the custom reconciliation ceremony and how important that is. It cannot be easy for a defendant and his family to make that public acknowledgment of responsibility and remorse but you have done that. There is perhaps some degree of duplication with the credit for guilty plea but I give full credit to you for being involved in that ceremony and again I note that it was accepted by the family of the victim.

25. Overall, I consider the appropriate discount for your youth, your previous good record and the custom reconciliation ceremony to be a further 8 months or so bringing the end sentence down to 20 months. This reflects a discount of over 50% from the starting point of 42 months. In this way I have come to the view that the least restrictive end sentence is one of **20 months imprisonment**.

26. The next question that I need to determine is whether under section 57 of the Penal Code that sentence should be suspended in whole or in part. This is a situation where somewhat unusually both the prosecution and the defence submit that this should occur

but of course in the end it is my decision whether that is appropriate under the law.

27. The starting point must be comments of the Court of Appeal in PP v. Gideon [2002] VUCA 7 ; that remains the leading case for sentencing for sexual offences involving children. The Court of Appeal there said:- *"There is an overwhelming need for the Court on behalf of the community to condemn in the strongest terms any who abuse young people in our community. Children must be protected. Any suggestion that a 12 year old has encouraged or initiated sexual intimacy is rejected. If a 12 year old is acting foolishly then they need protection from adults. It is totally wrong for adults to take advantage of their immaturity".*

28. And then the Court said: *"Importantly for present purposes it will only be in a most extreme of cases that suspension could ever be contemplated in a case of sexual abuse. There is nothing in this case which brings it into that category. Men must learn that they cannot obtain sexual gratification at the expense of the weak and vulnerable. What occurred is a tragedy for all involved. Men who take advantage sexually of young people forfeit the right to remain in the community."*

29. So the question is whether this is one of those rare cases where suspension could even be contemplated, never mind actually imposed. There is effectively in cases of this kind as a result of the *Gideon* judgment a strong presumption against suspending sentences of imprisonment.

30. Section 57 directs me to consider 3 matters, which are conjunctive so all three need to be considered. These are the circumstances, the particular nature of the crime and the character of the offender. As to the circumstances I take a broad view of what may be considered. Everything about the case comes within that broad phrase in my view. Here there is not much which would point towards suspension, I have already highlighted the aggravating features and there are no ameliorating aspects of the offending itself or the circumstances surrounding it.

31. As to the nature of the crime I have already highlighted that I think this is indecency towards the higher end of the scale of possibilities. As to your character, I do accept you are relatively young, you were of good character before this and you have no previous convictions. So that points towards suspension being appropriate.

32. I have given anxious consideration to this issue, particularly because both prosecution and defence support suspension. There are number of similar cases in which suspension has been applied but equally there are some where it has not been applied. Ms Thyna referred me to PP v. Livae [2014] VUSC 126, where Justice Fatiaki imposed a suspended sentence but I note that the charge there was committing an act of indecency without consent which is less serious, carrying a 7 year prison sentence. There was a squeezing of the victim's breasts, the victim being the defendant's daughter, and indecent touching of the vagina. There was an age gap of some 24 years, the defendant was 42 and the victim was his 18 year old daughter. In the end, Justice Fatiaki

noted that the period spend on remand was a significant factor pointing towards suspension and he decided in the end that 3 year suspension of a 12 month prison term was appropriate.

33. Ms Thyna has referred me to a number of other cases notably PP v. Albert [2013] VUSC 117 where Justice Fatiaki, in what was arguably a more serious case, imposed a suspended sentence. There are 14- month prison term was suspended for 3 years and community work and supervision was imposed. That case involved two incidents and the victim was the defendant's step daughter. There he had rubbed his penis on her vagina until he ejaculated. And then there was a second incident a few months later when he forced the victim to masturbate him until he ejaculated. I would accept that those examples of indecency are more serious than this case is and there were 2 incidents with a more significant age difference because the defendant was 37 and the victim was 14. So I accept that consistency with that case would certainly suggest there should be suspension here.

34. On the other hand in the Mathew case to which I have already referred Justice Spear was dealing with a defendant offending against his stepdaughter. He was 43 and she was 9 . His Lordship decided that an immediate sentence of imprisonment was required and declined to suspend the two year prison sentence that he thought was appropriate there.

35. As I said earlier in this judgment there are many cases of this kind which have come before the Supreme Court and it is certainly possible to find support in one or more cases for or against

suspension. In the end, what other authorities have said is less important than doing what I think is the right thing so far as you are concerned in relation to this incident. I have given careful consideration to this and have decided that I can justify suspending this sentence of imprisonment.

36. A key factor in my reaching that decision is the fact that you were remanded in custody for nearly three months from the 17th of February, so you have served the equivalent of a six-month prison term which means the appropriate prison sentence to impose would now be 14, not 20, months. If I sentence you to serve 14 months imprisonment now, you would actually serve only 7 months before being eligible for parole. Based on your performance while on remand, and your age, it is likely you would promptly obtain parole. So there would only be a relatively short further time in custody.

37. You have at the age of 20 experienced for nearly three months what it is like to be in prison. I think for someone like you, as compared with older offenders, that will have been a very significant experience. One of the reasons why the Courts imprison defendants is to deter them from further offending. The Court hopes that people will not like being in prison and that it will make them think twice before they offend again. Here you have received that message of deterrence already and I think that tips the balance in favour of suspension.

38. You have been on bail for a lengthy period and there has been no suggestion of any breach of bail or of any further offending so I

think the risk to the community if I impose a suspended sentence is clearly less than might first appear from the nature of this offending. That is reinforced by your good behaviour both before you offended and while you were in prison on remand.

39. I therefore sentence you to 14 months imprisonment but that sentence will be suspended for two years. That means that you will not go to prison immediately and you will not do so at all if you keep out of trouble for the next two years. But if you commit any offence of any kind during that period then you can be asked to serve this prison sentence.

40. It is appropriate that I impose a sentence of community work and supervision because you have, as well as offending against the victim, offended against the community. I impose as sentence of 200 hours community work having taken into account the reality that you have spent some time in prison and therefore already effectively served a deterrent sentence.

41. In addition I impose a sentence of supervision for 12 months on such conditions as the probation officer thinks fit. Ms Thyna suggested some conditions but I do not think I have the power to impose conditions of the kind she suggests, such as staying away from the victim or other young girls. You need to understand however that if you were to offend in any sexual way in future, never mind within the next two years, you would almost inevitably face a lengthy sentence of imprisonment given your conviction on this occasion. I will direct however that you undertake whatever programme is considered appropriate by

probation, including the Niufala Rod Program but I leave it to the Supervising Probation Officer to determine whether there are other forms of programme and assistance from which you may benefit having regard to your character and the nature of this offending.

42. You have 14 days to appeal against this sentence if you wish to do so.

BY THE COURT