

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

Criminal
Case No. 20/2201 SC/CRML

BETWEEN: Public Prosecutor

AND: Steven Malites
Defendant

Date: 13 August 2021
By: Justice G.A. Andrée Wiltens
Counsel: Mr P. Sarai for Public Prosecutor
Mr L. Moli for Mr B. Livo for the Defendant

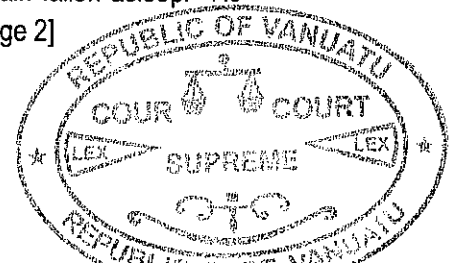
Sentence

A. Introduction

1. Mr Malites was found guilty after trial of two charges of unlawful sexual intercourse with a child under the age of 13 years (one being a representative charge), and a third charge of act of indecency with a young person.

B. Facts

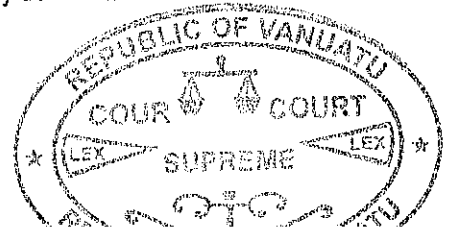
2. The complainant, JM, was born on 29 January 2009. Her complaint related to acts perpetrated by her uncle (her father's brother) Mr Malites, which she said had occurred in 2017, over a 2-week period. At that time she was only 8 years old.
3. One evening, JM went to bed to go to sleep. Later on, Mr Malites went into the same room. He first took off JM's clothes before placing his penis on her mouth. This woke JM up. Mr Malites then went away and lay down, and JM pulled a blanket over her and rolled over to go back to sleep. Mr Malites then returned subsequently after JM had again fallen asleep. He placed his penis onto her naked body and then sucked her vagina. [Charge 2]



4. Mr Malites then placed his penis onto JM's mouth again, before inserting it into her mouth. JM then felt what she described as water coming out of his penis, which she spat out after turning away from him. While JM was doing that, Mr Malites touched her anus. [Charge 3]
5. The "oral sex" acts were repeated on a number of occasions, but Mr Malites did not always ejaculate. [Charge 1]
6. JM told the Court that the first time this occurred and she woke up she wanted to scream. Mr Malites told her she mustn't scream or he would kill her. She did not tell her grandmother about what had occurred because of this threat.
7. The alleged offending came to light in 2020, when JM's mother was attempting to get her children to return for another holiday to their paternal grandparents on Wala Island. JM refused to go. When her mother asked why, JM told what Mr Malites had done to her when she last visited Wala Island. JM's mother then reported the matter to the police.

C. Sentence Start Point

8. The sentence start point is to be assessed by having regard to the maximum sentence available for this offending, and factoring in both the aggravating and mitigating aspects of the offending.
9. The maximum sentence for unlawful sexual intercourse is life imprisonment. The maximum sentence for doing an indecent act is 10 years imprisonment.
10. There are aggravating factors to this offending, which include:
 - The repeated nature of the offending (3 quite different charges);
 - The breach of trust - he is her uncle, she his niece. He was more than twice her age and therefore in a position of relative power which resulted in it being much more difficult for JM to resist due to her age;
 - The offending occurred at night in her grandmother's home where JM was then residing - where she should have been able to feel safe and secure;
 - There was skin-on-skin touching;
 - The extreme youth of JM, she being only 8 years old at the time;
 - JM was threatened that if she screamed she would be killed – a threat she took seriously in not promptly reporting the offending to her grandmother;
 - Some of the offending involved ejaculating into JM's mouth; and
 - No protection was used, thereby exposing JM to sexually transmitted disease.



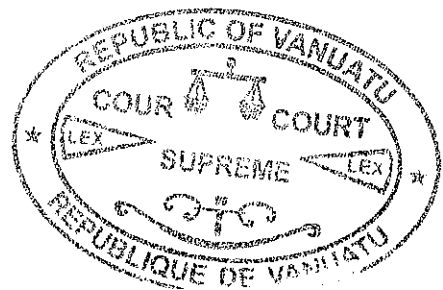
11. There are no mitigating aspects of the offending.
12. I adopt a sentencing start point of 7 years 6 months imprisonment, on a global basis for all 3 charges concurrently.

D. Personal Factors

13. Mr Malites was born on 10 April 2001 – he is currently 20 years old, single. At the time of the offending, he was only 17 years old. He is a traditional farmer in a small community with which he is well involved; and his Village Chief speaks highly of him. There has been no custom reconciliation ceremony, due to the JM's family refusing to participate – Mr Malites is willing to undertake this.
14. The Courts have frequently stated that where young offenders are to be sentenced, the sentencing principles of reformation and rehabilitation should be the foremost considerations, even when the offending, as here, can properly be regarded as very serious: *Heromanley v PP* [2010] VUCA 25 and *PP v Malkorkor* [2015] VUSC 147.
15. There are also numerous authorities dealing with the specific discounts available to young offenders. This relates to the scientifically established position that there are significant neurological differences between young persons and adults – and seemingly more so in the case of young males than young females. The New Zealand Court of Appeal authority of *Rolleston v R* [NZCA] 611 expounds on this.
16. Mr Malites has no previous convictions.
17. Mr Malites contested the matter at trial, as is his right. However, while this does not aggravate his offending, it is highly disturbing that he now acknowledges to the PSR writer that he accepts the prosecution case. That means he obliged the young victim to come to Court and relate what occurred to a room full of strangers, even though Mr Malites knew that what she alleged was the truth. That does not sit at all well with Mr Malites' claim of being remorseful. I do not accept that claim. A remorseful person would have recognised the wrong-doing and accepted it without requiring others to prove it.
18. For his personal factors, I reduce Mr Malites' sentence start point by 24 months for his youth and immaturity, and a further 6 months for his personal situation including a lack of previous convictions. There is no discount for the claimed remorse.

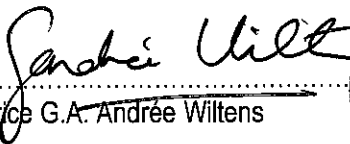
E. Sentence

19. Mr Malites is sentenced to an end sentence of 5 years imprisonment. That is imposed in respect of Charge 1. In respect of Charge 2 Mr Malites is sentenced to 4 years imprisonment. In respect of Charge 3 Mr Malites is sentenced to 2 years 6 months imprisonment. The sentences are all to run concurrently. Mr Malites has been remanded in custody since the time of his arrest. Accordingly, it is appropriate to back-date the start date of the sentence to 26 August 2020.



20. The end sentence will not be suspended. This offending is too serious and there are numerous precedent authorities indicating that suspension is almost always inappropriate where sexual offending is involved. The authority of *PP v Gideon* [2002] VUCA 7 demonstrates this. Despite Mr Malites' youth, there must be a deterrent element to the sentence to demonstrate the Court's repugnance for this sexual depravity on a young child.
21. Mr Malites has 14 days to appeal the sentence.

**Dated at Port Vila this 13th day of August 2021
BY THE COURT**


Justice G.A. Andrée Wiltens

