

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

Criminal
Case No. 24/1407 SC/CRML

PUBLIC PROSECUTOR

v

PETUEL TASSO

Date of Plea: 24 May 2024
Date of Sentence: 29 July 2024
Before: Justice M A MacKenzie
Counsel: Ms. S. Langon (holding papers for Ms. G. Kanegai) for the Public Prosecutor
Mrs. P. Malites for the Defendant

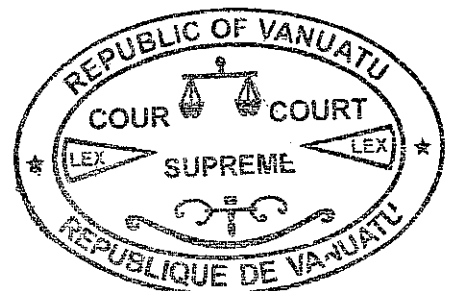
SENTENCE

Introduction

1. Mr Tasso, you appear for sentence having pleaded guilty to two charges relating to two different family members.
2. The lead offence is the charge of act of indecency with a young person, contrary to s98A of the Penal Code. The maximum penalty is 10 years imprisonment.
3. The second charge of domestic violence has a maximum penalty of 5 years imprisonment, and a fine not exceeding VT 100,000 or both.

The Facts

4. In relation to the act of indecency charge, on an occasion between 1 January and 31 December 2019 you made your 8-year-old niece touch your penis over your clothes. At the time you were aged 45 years.



5. In relation to the domestic violence charge, the victim is your son. On 2 June 2023, he had consumed alcohol with his friends. He was not at home. You instructed your daughter to ask him to return home. But he was asleep. You arrived at your son's location as your daughter was trying to wake him up. You lifted him and punched him on his body.

Sentencing purposes/principles

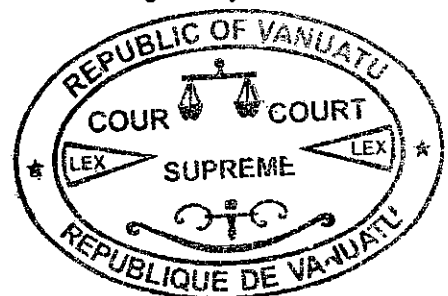
6. The sentence I impose must hold you accountable and must denounce and deter your conduct. This is particularly so given you deny the offending against your young female relative, as detailed in the Probation Report. The sentence should ensure you take responsibility for your actions, and help you to rehabilitate. It must also be generally consistent.

Approach to sentence

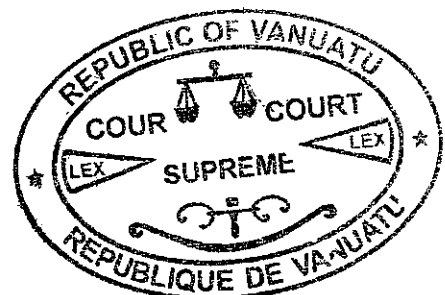
7. Sentencing involves 2 separate steps; *Jimmy Philip v Public Prosecutor* [2020] VUCA 40, which applied *Moses v R* [2020] NZCA 296.

Starting point

8. The first step is to set a starting point to reflect the features of the offending itself.
9. The lead offence is the act of indecency with a young person.
10. The aggravating factors here are;
 - (a) The serious breach of trust.
 - (b) The significant age difference between you and the victim.
 - (c) The victim's vulnerability because of her young age.
 - (d) The offending took place in the home where the victim was living with you. She was entitled to feel safe there.



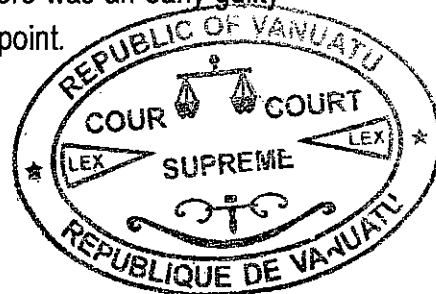
- (e) The intrusive nature of the sexual act. It was over clothes but you made the victim touch your private area, your penis.
11. There are no mitigating features of the offending itself.
 12. There are cases which assist with setting an appropriate starting point. They are *Public Prosecutor v Emile* [2021] VUSC 60, *Public Prosecutor v Moli* [2024] VUSC 107, *Public Prosecutor v Able* [2022] VUSC 235, and *Public Prosecutor v Ling* [2018] VUSC 241.
 13. These 4 cases are not squarely on point as they all involve touching of the victims' vaginas, a private area, over clothing. But they are helpful given that the act of indecency here was that you made the victim touch a private area, your penis, over clothing and involve broadly comparable aggravating factors.
 14. In *Public Prosecutor v Emile*, the starting point adopted was 3 years 4 months imprisonment. It was a one-off incident, involved a breach of trust, and a significant age disparity. It was brief in duration and did not involve skin on skin contact.
 15. In *Public Prosecutor v Moli*, the starting point adopted was 4 years imprisonment. The offending in Moli was more serious than the present case due to the repeated nature of the offending.
 16. In *Public Prosecutor v Able*, the starting point adopted was 3 years imprisonment. It was a one-off incident with a significant age disparity.
 17. Finally, in *Public Prosecutor v Ling*, the starting point adopted was 3 years imprisonment due to the victim's vulnerability as she was asleep and there was an age disparity. Mr Ling was 26 years old and the victim was 14 years old.
 18. These case show that the 5-year starting point suggested by the prosecutor is too high. Taking into account the aggravating actors I have referred to, and the cases I have just discussed, I adopt a starting point of 3 years imprisonment. I note in particular the breach of trust, the age disparity, the victim's vulnerability, that you made the victim touch your penis, but acknowledging it was a brief incident over clothes.
 19. In terms of the domestic violence charge, Ms Malites submits that the appropriate starting point is 9 months imprisonment with reference to the two cases cited in her written submissions. *Public Prosecutor v Mahit* [2023] VUSC 284 is helpful as it involved a one-off assault, which is the case here.



20. The aggravating factors are the breach of trust and the actual use of violence- although it could be said they are inherent in the charge itself. On a stand alone basis I agree that a starting point of no more than 9 months imprisonment would be appropriate for the domestic violence charge.
21. Should the starting point be reduced for provocation? The defence submit that provocation is operative because you told the Probation report Writer that you were provoked when your son stated to swear at you.
22. S27 of the Penal Code addresses provocation. Provocation is something that can affect a starting point. However, there can be no reduction to the starting point for the domestic violence charge for 4 reasons;
- (a) There is no reference to the victim swearing at his father in the agreed facts, which must have been accepted when the plea was entered. Nothing to the contrary is recorded.
 - (b) In terms of s27(1), swearing at a parent may be morally reprehensible, but it is not an unlawful act.
 - (c) Assaulting a family member is disproportionate to any degree of provocation, arising from being sworn at.
 - (d) Swearing at a parent is not of such a degree as to deprive a normal person of his self-control.
23. There is one final consideration in terms of the domestic violence starting point. It is different in nature and time to the act of indecency and so a cumulative approach is warranted. But I must bear in mind totality. So, I increase the starting point by 3 months for the domestic violence charge to take totality into account.
24. The adjusted starting point for both charges then is 3 years 3 months imprisonment.

Guilty plea and personal factors

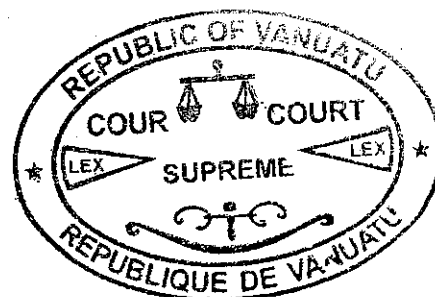
25. You are entitled to a one-third discount for your guilty plea. There was an early guilty plea. That equates to a discount of 13 months from the starting point.



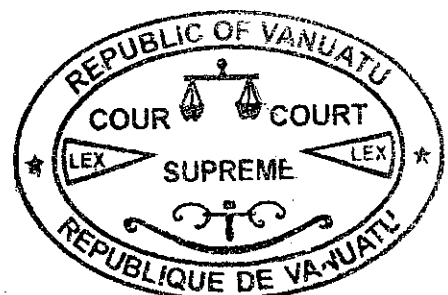
26. You are now aged 50 years and a first offender. You are described as a quiet person and a good person. It is suggested that this is out of character for you to behave like you did and that you have learnt a good lesson.
27. You have good support in the community.
28. You were willing to take part in a custom reconciliation ceremony.
29. The Probation report notes that you say that you regret your actions towards the victims, but also records your denial of the sexual offending against the victim. You told the Report Writer that you collided with the victim in a confined space where the victim's hands accidentally landed on your legs and not your penis.
30. I do not accept then that you are genuinely remorseful. Remorse need not be exceptional but on a robust evaluation it needs to be genuine. Courts look for tangible evidence. Your willingness to attend a custom reconciliation could point towards remorse. Balanced against that is your denial and minimisation of the sexual offending. I acknowledge that you pleaded guilty to the charge but your attitude and lack of meaningful acceptance of responsibility beyond the guilty plea means that any stated regret for your actions cannot be assessed as genuine.
31. As you are a first offender, were willing to attend a custom reconciliation, and have good community support, there is a further discount of 4 months from the starting point, which equates to 10 %.
32. You were in police custody for one day. You were remanded in custody for a period of one month from 13 November to 13 December 2023. This is an effective sentence of two months imprisonment. This was how the calculation was applied recently by Trief J in *Public Prosecutor v Saly* [2024] VUSC 112. So, I reduce the sentence by a further 2 months.

End Sentence

33. Taking the starting point and the deductions just discussed into account, the end sentence is 1 year and 8 months imprisonment.



34. Your counsel asks that the sentence be suspended pursuant to s 57 of the Penal Code. Under s57, I must take into account the circumstances, the nature of the offending and your character. In *Public Prosecutor v Gideon* [2002] VUSC 7, the Court of Appeal said that it will only be in the most extreme of cases that suspension could ever be contemplated in a case of sexual abuse. I accept that the offending in *Gideon* was far more serious than the present case.
35. I also accept that there are cases where sexual offending has resulted in a suspended sentence. In *Achary v Public Prosecutor* [2023] VUCA 44, Mr Achary was found guilty of 5 charges of indecent assault. The complainants were adult females. Mr Achary occupied a position of power over the complainants. The indecent touching was over clothing and did not involve the genital area. The Court of Appeal upheld the primary judge's decision to suspend the sentence. Mr Achary had good prospects of rehabilitation and the offending involved a significant fall from grace. Recently, in *Public Prosecutor v Daniel*, 19 July 2024, Case number 23/1038, Trief J exercised her discretion to suspend a sentence imposed for 2 charges of act of indecency. The victim was between 16 and 17 years old and the defendant was 31 years old. While acknowledging that it was sexual offending, Trief J considered that it was at the lower end of the scale, Mr Daniel had family responsibilities, a clean record and good prospects of rehabilitation.
36. I acknowledge that you are a first offender, that you were willing to attend a custom reconciliation ceremony and that the offending is not as serious as the offending in *Gideon*. It was a 'one off' incident of relatively brief duration, over clothing. These factors favour suspension.
37. While the offending is not at the most serious end of the spectrum for sexual offending, it nevertheless involved a breach of trust, a vulnerable victim, a significant age disparity and you making the victim touch your penis. Other relevant factors are your denial of the sexual offending despite pleading guilty, lack of insight and minimisation. These factors point away from the sentence being suspended. Therefore, the aggravating features of the offending, coupled with the lack of insight arising from the denial of the sexual offending mean that the sentence will not be suspended. I do not consider that there are good prospects for rehabilitation given the factors outlined in considering whether to suspend the sentence. Your situation is different, for example, to the circumstances in *Public Prosecutor v Daniel*, where the sentence was suspended. That is because in the present case the victim is younger than the teenage victim in *Daniel*,



the age disparity is much greater, and I do not consider that you have good prospects of rehabilitation.

38. It would send a wrong message to suspend the sentence, both to you and the public. This type of offending against a vulnerable child needs to be marked. Accountability and both general and specific deterrence and also denunciation are to the fore in the circumstances of this case.
39. The sentence is 1 year and 8 months imprisonment, to commence immediately.
40. You have 14 days to appeal against the sentence.

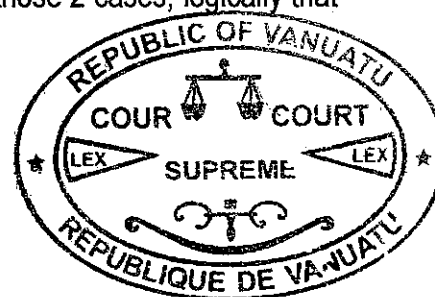
Addendum

41. After the sentencing had concluded, counsel queried the immediate start of the sentence via the Court Clerk, having regard to s 50 of the Penal Code. I confirmed that the sentence was to start immediately.
42. Section 50 of the Penal Code says:

50. Commencement of sentence

If the offender has not been held in custody pending trial and no warrant of arrest or remand is issued against him or her at the time of conviction in the circumstances authorised by the rules of criminal procedure, no sentence of imprisonment may be enforced until the time of appeal against such sentence has expired or the offender earlier elects to begin serving his or her sentence.

43. Mr Tasso was held in custody pending trial for 1 month and 1 day. Therefore, he was held in custody pending trial before being granted bail, and so I consider that he is ineligible for the commencement of the sentence to be deferred. In this regard, I have followed the recent approach taken by the Honourable Chief Justice to sentence commencement in circumstances where a defendant has been in custody for a short period of time and then released on bail pending sentence. I refer to, for example, *Public Prosecutor v Iamak* [2024] VUSC 90 and *Public Prosecutor v Isno* [2024] VUSC 94. While s50 of the Penal Code is not explicitly addressed in those 2 cases, logically that



must be the approach taken by the Honourable Chief Justice to s50, given that the Court ordered the sentences to commence immediately.

DATED at Port Vila this 29th day of July
BY THE COURT

[Handwritten signature]
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Justice M A MacKenzie

