

PUBLIC PROSECUTOR

v

FRANCIS JOHNSON

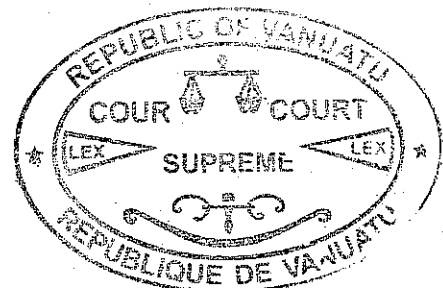
Date of Plea: 19 November 2024
Date of Sentence: 29 January 2025
Before: Justice M A MacKenzie
Counsel: Ms J Tete for the Public Prosecutor
Mr JS Garae for the Defendant

SENTENCE

Introduction

1. Mr Francis Johnson, you appear for sentence having pleaded guilty to the following charges:
 - a. Unlawful sexual intercourse contrary to ss 97(1) of the Penal Code [CAP135]
 - b. Act of indecency contrary to s98A of the Penal Code.

2. The maximum penalties for these offences are:
 - a. Unlawful sexual intercourse, contrary to s 97(1) of the Penal Code – life imprisonment
 - b. Act of indecency -10 years imprisonment



The Facts

3. You and the victim are related. You are the victim's uncle. At the time of the offending in 2021, the victim was aged 12 years. You were aged 39 years. The victim was living with you and her grandfather at Balon area.

Unlawful sexual intercourse

4. Between July and September 2021, you sexually offended against the victim by sucking her vagina on many occasions. Then on one occasion in September 2021, you accompanied the victim home. You were alone with the victim on the road, and it was dark. You pushed her onto a bush, put your hand inside her pants and started touching the outside of her vagina.

Act of indecency with a young person

5. During the incident on the road, you also took out your penis and showed it to the victim.
6. When spoken to by police in November 2021, you admitted touching the victim on the vagina when you accompanied her home and showing her your penis. You also admitted sucking her vagina since July 2021.

Sentencing purposes/principles

7. The sentence I impose must hold you accountable and must denounce and deter your conduct. The sentence should ensure you take responsibility for your actions, and help you to rehabilitate. It must also be generally consistent.

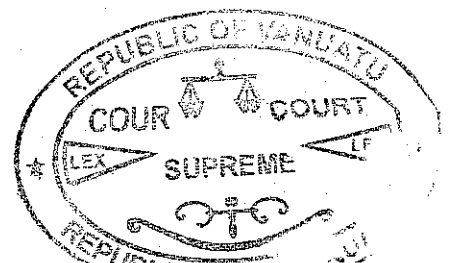
Approach to sentence

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

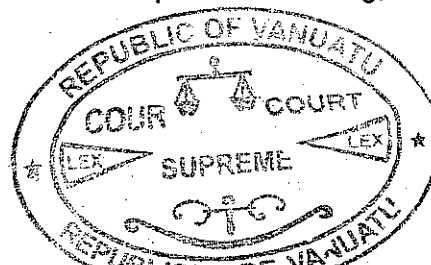
Starting point

9. The first step is to set a starting point to reflect the aggravating and mitigating features of the offending, and with reference to the maximum penalties for the offences.
10. The lead charge is unlawful sexual intercourse. I will set a starting point on a global basis to reflect the totality of the offending.
11. The aggravating factors here are;

- a. Breach of trust- you and the victim are related and lived in the same home.
- b. The majority of the offending took place in the home where the victim was entitled to feel safe.



- c. The victim was vulnerable because of her age and the age disparity. The victim was aged 12 years, and you were aged 39 years. The age disparity is 27 years.
 - d. The sucking of the victim's vagina was repetitive.
 - e. While not as intrusive as penile penetration, the offending nevertheless involved two different types of sexual acts; licking the vagina and digital penetration. The digital penetration incident occurred when the victim was highly vulnerable. It was dark and she was on the side of the road.
 - f. The emotional and psychological harm to the victim. While there is no specific information about the impact, it is well recognised that harm can be longstanding and may no manifest itself until many years down the track.
12. There are no mitigating features of the offending itself.
 13. The prosecutor submits that that the appropriate starting point for the unlawful sexual intercourse is 6-8 years imprisonment. Defence counsel submit that the appropriate starting point is 5 to 6 years imprisonment on a global basis.
 14. Both counsel have referred to a number of cases to assist the Court with setting an appropriate starting point. As Mr Garae recognises in his helpful written submissions, the offending in the present case does not involve penile penetration. Therefore, the two cases of most relevance are *Public Prosecutor v Andy* [2011] VUCA 14, and *Nampo v Public Prosecutor* [2018] VUCA 43. Both cases discuss the distinction between penile and other forms of sexual intercourse, which should be recognised for sentencing purposes. As explained in *Nampo*, it has been clear law in Vanuatu that penile intercourse as opposed to other forms of penetration of the vagina is "more serious" and "more physically intrusive"
 15. *Andy* involved unlawful sexual intercourse. The victim was aged 10 years and the defendant aged 30 years. The offending involved a one off incident of licking of the victim's vagina and then digital penetration. There was a breach of trust, and the victim was injured. The Court of Appeal said that a starting point of 6-7 years imprisonment was warranted. *Nampo* involved three charges of rape. The sexual intercourse was digital penetration. The victims were the defendant's three daughters aged 5, 14 and 17 years. The offending took place over a 12-month period. In recognising that penile penetration of the vagina is more serious than other forms of penetration, the Court of Appeal considered that the appropriate starting point was 8 years imprisonment. I accept that the offending in the present case is less serious than *Nampo*, and so a lesser starting point is appropriate.
 16. Taking into account both *Andy* and *Nampo*, and the aggravating factors here, particularly the victim's vulnerability, the breach of trust and the repeated offending, I adopt a global starting point of 6 years imprisonment.



Guilty plea and personal factors

17. You are entitled to a one-third discount for your guilty plea. There was an early guilty plea, which saved the victim from the trauma of having to give evidence. The sentence is reduced by 2 years.
18. You are now aged 42 years and are a first offender. Your counsel submits that you have a good work and community history and are remorseful. You were co-operative with police. For these factors, the sentence is reduced by 7 months (approximately 10%).
19. You were initially remanded in custody between 5 – 25 November 2021, a period of 20 days. That equates to an effective sentence of 6 weeks imprisonment. The sentence is reduced by 6 weeks for that factor. On 10 October 2024, you were arrested again and have been in custody since. I will address that shortly.

End Sentence

20. The end sentence is 3 years 3 months 2 weeks imprisonment for the charge of unlawful sexual intercourse. There is to be a concurrent sentence of 2 years imprisonment on the act of indecency charge.
21. I record that suspension of the sentence was not sought under s 57 of the Penal Code. As the Court of Appeal said in *Public Prosecutor v Gideon* [2002] VUCA 7, it will only be in an extreme case that suspension could ever be contemplated in a case of sexual abuse. This has been recently reaffirmed in *Public Prosecutor v Tulili* [2024] VUCA 54. While I note that you are a first offender and accept responsibility, you took advantage sexually of a vulnerable family member. There is nothing exceptional about the circumstances to justify suspension of the sentence, and I decline to do so.
22. I impose an immediate sentence of imprisonment of 3 years 3 months 2 weeks imprisonment. Following rearrest, you have been in custody since 10 October 2024. Therefore, the sentence is to be backdated to commence from that date.
23. You have 14 days to appeal against the sentence.
24. I make a permanent order suppressing the name and identifying details of the victim.

DATED at Port Vila this 29th day of January 2025

BY THE COURT

Justice M A Mackenzie

