

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

Criminal
Case No. 24/1073 SC/CRML

PUBLIC PROSECUTOR

v

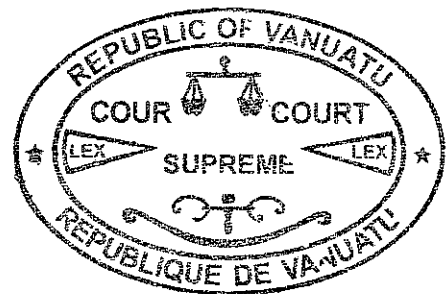
SAKSAK TOFOR

Date of Plea: 24 May 2024
Date of Sentence: 31 July 2024
Before: Justice M A MacKenzie
Counsel: Mr. J. Aru (holding papers for Ms. G. Kanegai) for the Public Prosecutor
Mrs. K. Karu for the Defendant

SENTENCE

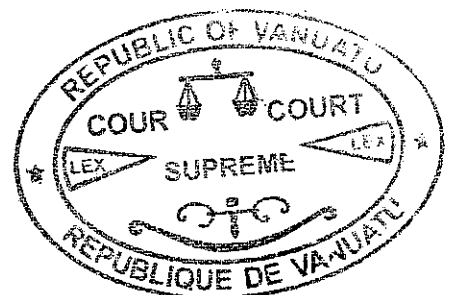
Introduction

1. Mr Tofor, you appear for sentence having pleaded guilty to three charges of sexual intercourse with a child under care and protection, contrary to s 96(1) of the Penal Code [CAP 135], one charge of Act of indecency contrary to s 98 (a) of the Penal Code and one charge of Domestic Violence contrary to ss 4 and 10 of the Family Protection Act.
2. The maximum penalties are;
 - a. Sexual intercourse with a child under care and protection -10 years imprisonment.
 - b. Act of indecency – 7 years imprisonment
 - c. Domestic Violence – 5 years imprisonment



The Facts

3. The offending here is sexual offending against your adopted daughter. At the time in 2023, she was aged 16 years. You were aged 50 years. Your wife adopted the victim, not long before the offending.
4. On 3 occasions in July, August and November 2023, you had sexual intercourse with the victim.
5. The first occasion was in July 2023. The victim was in bed asleep. She woke to her pants and underwear being removed. You told her not to make a sound or call out, otherwise you would kill her. You licked her vagina for about 20 minutes. Then you penetrated the victim's vagina with your penis. The victim was in pain and you instructed her not to move or call out, otherwise you would kill her. You had sexual intercourse with her 4 times that night. In the morning, there was blood in the bedding and the victim experienced pain, and felt like she could not walk due to the number of times you had sexual intercourse with her.
6. The second occasion was in August 2023. One night you went into the victim's bedroom, removed her clothes and penetrated her vagina with your penis. There was less pain this time.
7. The third occasion was in November 2023. You removed her clothes. She was crying. You penetrated her vagina with your penis for a long time. She recalled it being for about 2 hours. She was in pain due to the lengthy period of intercourse. You left the victim crying on the bed.
8. The domestic violence charge relates to a sexualised comment made by you to the victim sometime between July and November 2023. You said " *yu sitdaon gud, yu no look kan blong yu open bigwan we affa kan blong yu l red nomo mo krass blong yu hanghang nomo*". The English translation is words to the effect – " *You sit down properly, don't you see you've opened your legs wide and then your vagina is red and your pubic hair is hanging out*"
9. In terms of the act of indecency, sometime between July and November 2023, you kissed the victim on her cheek and touched her buttock without her consent.



Sentencing purposes/principles

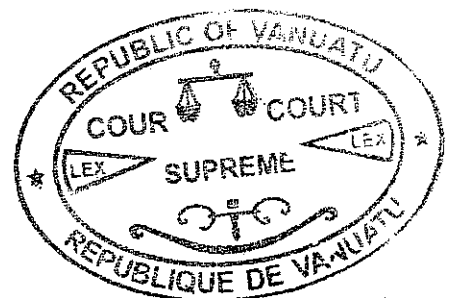
10. The sentence I impose must hold you accountable and must denounce and deter your conduct. The sentence should ensure you take responsibility for your actions, and help you to rehabilitate. It must also be generally consistent.

Approach to sentence

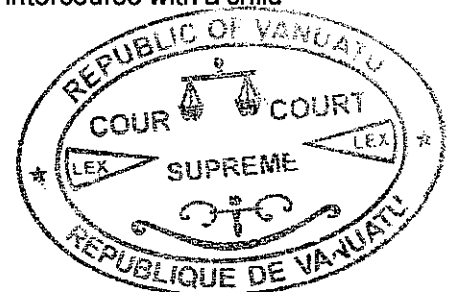
11. Sentencing involves 2 separate steps; *Jimmy Philip v Public Prosecutor* [2020] VUCA 40, which applied *Moses v R* [2020] NZCA 296.

Starting point

12. The first step is to set a starting point to reflect the aggravating and mitigating features of the offending, and taking into account the maximum penalties for the offences. The 3 charges of sexual intercourse with a child under care and protection is the lead offending.
13. The aggravating factors are;
 - (a) There was planning and pre meditation
 - (b) The victim is a close family member. She is your adopted daughter. As such, there is a significant breach of trust. The victim should have been able to look to you for care and protection but you failed her. You used the victim for your own sexual gratification.
 - (c) There were 3 instances of sexual intercourse over a period of months. The first occasion involved you having sexual intercourse with the victim 4 times.
 - (d) The offending took place at home where the victim was entitled to feel safe.
 - (e) The victim was vulnerable because of her age, and the power imbalance arising from the age disparity of 34 years.
 - (f) The victim was exposed to the risk of sexually transmitted diseases.
 - (g) You used a threat to kill to compel compliance on the first occasion.
 - (h) The victim suffered physical harm.
14. There are no mitigating features of the offending itself.



15. Counsel have both cited cases to assist the Court with setting an appropriate starting point. The prosecutor submits that the appropriate starting point is 7.5 years imprisonment. Ms Karu submits that the appropriate starting point is between 5-7 years imprisonment.
16. A leading case in this area is *Public Prosecutor v Gideon* [2002] VUCA 7. Gideon involved a charge of unlawful sexual intercourse laid under s 97(1) of the Penal Code, which I acknowledge is different to the charge in the present case. It involved a higher maximum penalty. But nevertheless, it is of assistance. The victim was 12, the defendant was in a position of trust in relation to the victim, and was much older. The defendant was the boyfriend of the victim's sister, the victim suffered harm, the intercourse happened on 4 occasions and the victim was told not to tell. The Court of Appeal said the starting point should have been not less than 6 years imprisonment. I consider that in the present case the starting point should be higher than 6 years imprisonment given that the breach of trust here is greater than in *Gideon*. You were one of the victim's parents and she should have been able to look to you for guidance and protection, not abuse.
17. The prosecutor referred to *Public Prosecutor v Peter* [2020] VUSC 117 and *Public Prosecutor v Stanley* [2018] VUSC 256 in proposing a starting point of 7.5 years imprisonment. Starting points of 7 years imprisonment were adopted in both those cases. In *Public Prosecutor v Peter*, Mr Peter was sentenced in relation to one charge of sexual intercourse with a child under care and protection. The victim was a close family member aged 17 years. The offending was repeated, there was violence and the victim became pregnant as a result. *Stanley* involved a 16-year-old victim. Mr Stanley was sentenced in relation to 4 charges of sexual intercourse with a child under care and protection. The victim regarded the defendant as her father. He made a threat to kill her if she got a boyfriend. He tried to bribe her to withdraw her complaint.
18. Ms Karu cited *Public Prosecutor v Waiwai* [2024] VUSC 55 in her written submissions. The case involved 2 charges of sexual intercourse with a child under care and protection. The victim was the 15-year-old step daughter of the defendant. There were 2 separate instances of sexual intercourse. The starting point adopted was 5 years imprisonment. The aggravating factors are similar to the present case. However, the present case is more serious given that you face 3 charges and that on the first occasion you had sexual intercourse 4 times with the victim, there was a threat to kill to compel compliance and the physical harm suffered by the victim.
19. *Public Prosecutor v Boki* [2020] VUSC 40 was considered in setting the starting point in *Public Prosecutor v Waiwai*. *Boki* involved 4 charges of sexual intercourse with a child



under care and protection. The victim was the defendant's adopted daughter. It is more serious than the present case as although the frequency of the sexual intercourse is comparable, it was accompanied by force and the use of weapons. The starting point adopted was 8 years imprisonment. The relevance of *Boki* is that it suggests that the starting point adopted in *Public Prosecutor v Peter* was generous to the defendant.

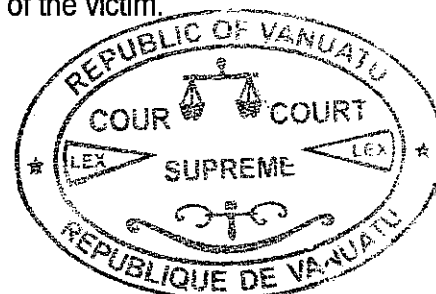
20. No two cases are ever the same. The present case is more serious than *Waiwai* so the starting point must necessarily be higher than 5 years imprisonment. It is less serious than *Boki* and broadly comparable to *Peter* and *Stanley*, acknowledging though that there was violence in *Peter*. But as just noted, arguably there was a merciful starting point in *Peter*.
21. Taking the cases I have referred to into account, the aggravating factors that I consider relevant I adopt a global starting point of 7 years imprisonment. This encompasses the domestic violence charge and the act of indecency, which show your entitled behaviour towards the victim.

Guilty plea and personal factors

22. You are entitled to a one-third discount for your guilty plea. There was an early guilty plea. That equates to a discount of 28 months from the starting point.
23. You are now aged 51 years and a first offender.
24. You are very remorseful and take full responsibility.
25. I reduce the sentence by 8 months to reflect a lack of prior history and remorse, which I assess to be genuine having reviewed the pre-sentence report. This equates to approximately 10 percent.

End Sentence

26. Taking the starting point and the deductions just discussed into account, the end sentence is 4 years imprisonment.
27. You were remanded in custody on 20 December 2023. The sentence start date is 20 December 2023 to reflect the time already spent in custody.
28. I make a final order suppressing the name and identifying details of the victim.



29. You have 14 days to appeal.

DATED at Port Vila this 31st day of July 2024
BY THE COURT

man
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Justice M A MacKenzie

