

PUBLIC PROSECUTOR

v

MAXWELL PHILIP

Date of Plea: 14 July 2025
Date of Sentence: 25 July 2025
Before: Justice M A MacKenzie
Counsel: Public Prosecutor – Ms R Siri
Defendant – Mr JS Garae

SENTENCE

Introduction

1. Mr Maxwell Philip, you appear for sentence having pleaded guilty to a charge of act of indecency with a young person, contrary to s98A of the Penal Code [CAP 135]. The maximum penalty is 10 years imprisonment.

The Facts

2. The victim is your granddaughter who was aged 2 years at the time of the offending. You were aged 64 years.
3. On 4 March 2024 the victim was at her home in Malekula. She was playing with her brother. You called out to the victim to come and play inside. The victim's mother was outside hanging out washing and heard this. The victim's mother went to check on her daughter and saw you coming out of the shower and exposing your penis to the victim. The victim was taken outside by her mother.



4. Under caution, on 19 April 2024, you admitted what your daughter said was true, and that you were naked and caused the problem.

Sentencing purposes/principles

5. 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

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

Starting point

7. 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 penalty for the offence.
8. The aggravating factors here are:
 - (a) There is a gross breach of trust, as the victim is your granddaughter.
 - (b) The victim's vulnerability because of her age and the age disparity. She was aged 2 years, and you were 64 years. The age differential is significant.
 - (c) There was a degree of planning as you called to the victim to come inside.
 - (d) The victim is entitled to feel safe in her home.
 - (e) The nature of the indecency was the deliberate exposure of your penis to a very young child.
9. There are no mitigating features of the offending itself. The lack of skin-on-skin contact highlighted by the prosecutor is not a mitigating factor. Rather it is not an aggravating factor present here.
10. The prosecutor submits that a starting point of 18 imprisonment is appropriate. Defence counsel submits that the starting point is 6-18 months imprisonment. Their proposed starting points are with reference to the cases they have each cited in their submissions.

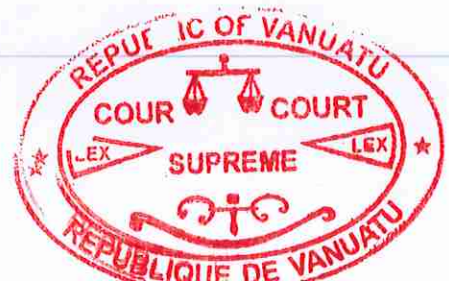


11. The cases counsel have referred to show a range of sentence starting points. Any cases that do not involve exposure of genitals are not of assistance. Also, cases that do not involve a one-off incident are not of much use as comparator cases. *Public Prosecutor v Robert* [2024] VUSC 281 is the most comparable to the present case, both factually and in terms of the aggravating factors taken into account. *Robert* involved a one-off incident where the defendant hid in banana bushes near the victim's home. The defendant then exposed his penis to the victim in a persistent manner. The aggravating factors taken into account were the age disparity (the victim was about 8 years and the defendant was 54), the breach of trust as there was a family relationship, and the exploitation of the victim's immaturity by exposing her to behaviour unsuitable for a child of such tender years. There was no skin-on-skin contact. The starting point adopted was 18 months imprisonment.
12. Acts of indecency can encompass a wide range of indecent actions. This was a one-off incident. It involved deliberate exposure of a man's private parts to a very young child. There was a gross breach of trust. It did not however, involve any skin-on-skin contact, so is towards the lower end of the of the spectrum of offending of this nature.
13. A starting point of 18 months imprisonment is appropriate taking into account the aggravating factors and *Public Prosecutor v Robert*. While the exposure of the genitals in the present case was not persistent as was the case in *Robert*, the circumstances here are equally as serious given the gross breach of trust and the extreme vulnerability of the victim at aged 2 years, absent in *Robert*.

Guilty plea and personal factors

14. The guilty plea came a long way down the track. You initially entered a plea of not guilty. The charge remained the same. There was an agreed amendment to the facts, but that could have been done much earlier. The Court was trying to schedule a trial and the witnesses believed they would have to attend and give evidence about sensitive matters. A full sentence reduction for guilty plea is not therefore available. Given the above factors, I reduce the sentence by 15%. A greater reduction would undermine the value of an early guilty plea. That reduces the sentence by 3 months.¹
15. You are now aged 67 years and a first offender. You live in Malekula. You have a good work and community history. You have had counselling which has been helpful for you to understand the offending. You say you have learnt your lesson. You are remorseful and regretful. For these factors, I reduce the sentence by 2 months (10%).
16. You have been remanded in custody since 8 May 2024, a period of approximately 14 months. That would equate to a sentence of 2 years 4 months imprisonment. The way

¹ In *Kavila v Public Prosecutor* [2022], the guilty plea came just before trial. The Court of Appeal said that a discount of 15% was not unreasonable. It should not have been more



I will deal with time spent in custody is to back date the sentence commencement date, so that presentence time in custody is appropriately taken into account.

End Sentence

17. The end sentence is 13 months imprisonment.
18. I do not consider suspension of the sentence. I agree with your counsel's submission that you should be released immediately due to the fact that you have spent longer than an appropriate sentence in custody. In those circumstances, to also suspend the sentence would be disproportionately severe.
19. The sentence is back dated to commence on 8 May 2024. Therefore, you are to be immediately released from custody.
20. One final matter is that Ms Siri asks the Court to consider making an order that you live elsewhere pursuant to s 58K(1)(3) of the Penal Code, given that you live in the same household as the victim. I agree there is a risk to the victim given her vulnerability and that the offending took place there. However, I cannot make such an order unless I impose a sentence of supervision and make it a condition of that sentence. The difficulty is that, as I have said, given the time spent in custody to date, any further sentence would not be warranted. It is the victim's mother's responsibility to keep her daughter safe. I ask Ms Siri to provide a copy of this sentence to Child Desk Services so that a check can be made as to the victim's safety. And of course, you could do the right thing, and live elsewhere.
21. You have 14 days to appeal against the sentence.
22. I make a final order suppressing the victim's name and identifying details.

DATED at Port Vila this 25th day of July 2025
BY THE COURT

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Justice M A MacKenzie

