

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

Criminal
Case No. 24/1389 SC/CRML

PUBLIC PROSECUTOR

v

BAE KEVU

Date of Plea: 17 June 2024
Date of Sentence: 1 August 2024
Before: Justice M A MacKenzie
Counsel: Mr. L. Young for the Public Prosecutor
Mr. J. Vohor for the Defendant- via video link in Santo
Defendant on bail- via video link in Santo

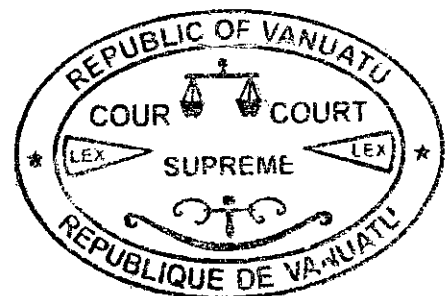
SENTENCE

Introduction

1. Mr Kevu, 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. This offending happened on Malekula Island. At the time of the offending the victim was aged 12 years and you were aged 48 years. There is a family relationship as your son is in a relationship with the victim's sister.



3. On 11 January 2024, a decision was made by the victim's mother that she and her children would stay overnight at the victim's sister's home. The victim slept in a bush kitchen. You and her brothers also slept in that area.
4. At about 10 pm, the victim felt you inserting your hand into her trousers and touching her bottom. You moved your hand and put it down her trousers and touched her vagina. The victim immediately stood up and wanted to run away as she was scared. You told her not to leave. On a pretext that she wanted to go to the toilet, you allowed her to leave. The victim immediately told her mother.
5. When interviewed by police, you made admissions to the offending.

Sentencing purposes/principles

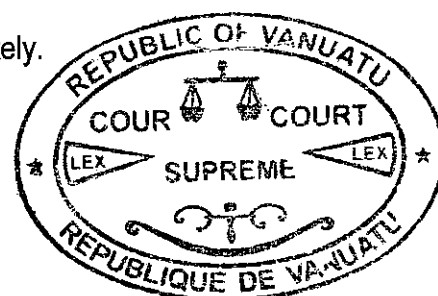
6. The sentence I impose must hold you accountable and must denounce and deter your conduct. The sentence should ensure you take responsibility for your actions, and help you to rehabilitate. It must also be generally consistent.

Approach to sentence

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

Starting point

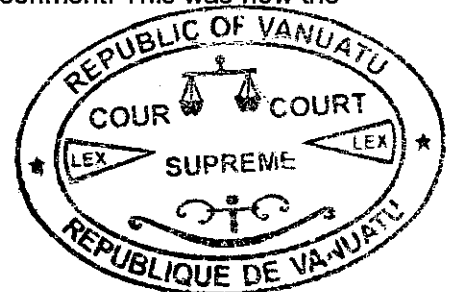
8. The first step is to set a starting point to reflect the features of the offending itself and with reference to the maximum penalty.
9. The aggravating factors here are;
 - (a) There is a breach of trust, as you and the victim are related. She refers to you as her "apu tambu"; grandpa.
 - (b) The victim's vulnerability because of her age and the age disparity. She was 12 years and you were 48 years. The age differential is 36 years.
 - (c) While opportunistic, the offending was deliberate as you as you took advantage of a situation that presented itself.
 - (d) Impact on the victim- she was scared and reacted immediately.



- (e) The offending involved skin on skin contact.
 - (f) The touching was intrusive as you touched her vagina, a private part.
10. There are no mitigating features of the offending itself.
 11. The prosecutor submits that a starting point of 3 years 4 months imprisonment is appropriate. Mr Vohor submits that a starting point of 3 years imprisonment is appropriate.
 12. I agree with counsel that *Public Prosecutor v Emile* [2021] VUSC 60 is of assistance as it involves broadly comparable offending. Mr Emile touched his 7-year-old granddaughter's vagina over clothing. He was 58 at the time. It was a one-off incident. The aggravating factors were a breach of trust, the age difference between them, the very young age of the victim, the fact that the offending occurred at a family function, and there was clearly pre-meditation involved. A starting point of 3 years 4 months imprisonment was adopted, reflecting that the offending did not involve skin on skin contact.
 13. Taking into account the aggravating factors, and that the touching in the present case involved the victim's bottom and vagina and was skin on skin, a slightly higher starting point than was adopted in *Emile* is warranted.
 14. The appropriate starting point is 3 years 6 months imprisonment.

Guilty plea and personal factors

15. There was an early guilty plea. While I agree with the prosecutor that the case was overwhelming, a one third discount is appropriate. It recognises that the victim was saved the indignity of coming to court and giving very personal evidence. That equates to a discount of 14 months from the starting point.
16. You are aged 48 years and a first offender. You are remorseful. You have family responsibilities, and are described as very skilful at gardening. You are willing to take part in a custom reconciliation ceremony. The victim's family have not accepted this so far.
17. For these factors, I reduce the sentence by four months, which is approximately 10 percent.
18. You were remanded in custody between 31 January and 16 February 2024, a period of 16 days. This is an effective sentence of one months imprisonment. This was how the



calculation was undertaken recently by Trief J in *Public Prosecutor v Saly* [2024] VUSC 112. So, I reduce the sentence by a further one month.

End Sentence

19. Taking the starting point and the deductions just discussed into account, the end sentence is 1 year 11 months imprisonment.
20. The written submissions do not make it clear as to whether suspension of the sentence is sought pursuant to s 57 of the Penal Code. The issue is not addressed. In any event, suspension of sentence is opposed by the prosecutor. Mr Vohor confirmed that suspension of the sentence is not sought. So, I will not consider that issue. Suspension would not be appropriate in the circumstances of this case. It would send a wrong message. Deterrence and denunciation are key sentencing principles. This type of offending against a vulnerable child needs to be marked.
21. You were held in custody pending trial for 16 days. Therefore, as you were held in custody pending trial before being granted bail, I consider that you are ineligible for the commencement of the sentence to be deferred pursuant to s 50 of the Penal Code. In this regard, I follow 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.
22. The sentence of 1 year 11 months imprisonment is to commence immediately.
23. You have 14 days to appeal against the sentence.
24. I make a final order suppressing the victim's name and identifying details.

DATED at Port Vila this 1st day of August 2024
BY THE COURT


Justice M A Mackenzie

