

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

Criminal
Case No. 24/462 SC/CRML

PUBLIC PROSECUTOR
V
SANDY MALYALKON

Coram: Hon. Chief Justice V. Lunabek
Counsel: BN Tamau for the State
C Dehinavanua for the Defendant
Date of Plea: 8 March 2024
Date of Sentence: 12 April 2024

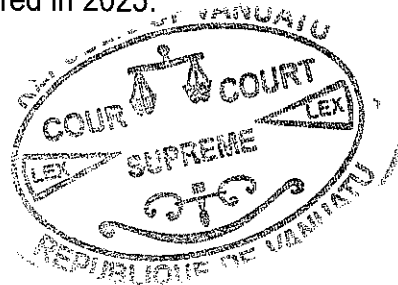
SENTENCE

I. Introduction

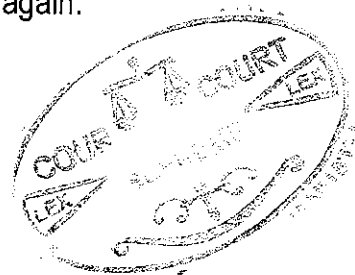
1. Mr. Sandy Malyalkon ("*Mr Malyalkon*"), you appear for sentence today. On 8th March 2024, you entered guilty pleas and were convicted on one count of act of indecency without consent, contrary to Section 98 of the Penal Code Act [CAP. 135] (Count 1), and five counts of domestic violence, contrary to Section 4(1)(e) of the Family Protection Act of 2008 (Counts 2, 3, 4 and 5).

II. Facts

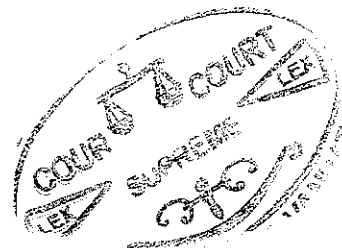
2. On 8th March 2024 when you pleaded guilty to the offences, you admitted the following facts.
3. The complainant (SM) is your biological daughter. She was 19 years old at the time of the offending. The offending occurred in 2023.



4. The complainant is your eldest child in the family. She had 2 younger sisters and they all lived with you (*"their father"*) and mother. You all lived in Pango. Since 2020, their mother travelled to work under the RSE scheme and had not yet returned home. The complainant and her sisters lived with you at Pango village while their mother was away.
5. Around March 2023, you started to sexually abuse the complainant. The complainant recalled that the first incident occurred one week before you travelled to New Zealand to work under the RSE scheme in March 2023. The incident occurred at night time. The complainant was sleeping inside her bedroom when she heard you came into the room and pushed your hands into her clothes and touched her breasts and her vagina. She felt very uncomfortable with you that she kept pushing your hands away from her body.
6. After that incident you warned her not to tell anyone otherwise you would assault her and had her admitted to the hospital. The complainant was forced to keep quiet and not report the matter to any of her family member.
7. You then travelled to New Zealand in March 2023. While you were in New Zealand, you had regular contact with the complainant through IMO calls. Later on, you encouraged the complainant to create a Facebook account. The complainant created a Facebook account as instructed by you. You continued to have regular contact with the complainant through Facebook and you told her that you would send her pictures of flowers and she would save them into her memory card. This went on until June 2023 when things changed. You stopped sending pictures of flowers. You started sending indecent pictures and videos with pornographic contents to the complainant. You went further to ask the complainant to take pictures of her vagina and send it over to you to see. The complainant felt uncomfortable with the way you were acting. She took a screenshot of all the messages you sent her and forwarded them to her mother and reported you to her mother. The mother was very angry so she called you and told you to stop.
8. This caused you to be very cross with the complainant. You told the complainant that you do not want to see her face again.



9. On the month of September 2023, you returned from New Zealand and returned to live with the complainant and her two sisters in Pango. It was observed that your attitude changed after your return. You were always drunk and were always very strict on the complainant and her siblings. One night on the month of September, you went out drinking. When you returned home, you assaulted the complainant on her face. The complainant sustained serious injuries to her face. Her eyes were swollen and she had missed school for a week.
10. Further on 24th of November 2023, the complainant and her sisters attended a music night at Pango French School. You went out drinking and when you returned, you came to fetch them from school compound and you all returned home. When you all got home, the complainant and her sisters saw that you were too drunk so they told you to go to bed. The complainant and her sisters also went to bed. The complainant lied down on her bed watching movie on her phone. Immediately after, she felt you came on top of her and lie down on her back. She jumped off the bed and headed towards the door. You quickly got up and pulled her back and you went outside and locked the door. You were worried that she might ran off and reported you to the neighbours. You stood outside the room and swore at the complainant and her sisters calling them "o/ tipskin".
11. Again, on 28th November 2023, you went out drinking again. When you came back, you passed out just outside the house. The complainant and another family member helped to get you inside the house. They put you inside your room. The complainant went back to her room. Immediately after, you woke up and called out to the complainant to go to your room. She came and stood at the door and asked you what you wanted. You told her that you wanted her to sleep with you in your room. She scolded at you and left. She went back to their bedroom and locked the door. You came after her and started knocking on the door. You insisted that they opened the door. The younger sister got up and opened the door while the complainant opened another door and ran out of the room. You ordered the younger sister to lock the main door so you pursued the complainant. You chased the complainant around the room. The complainant

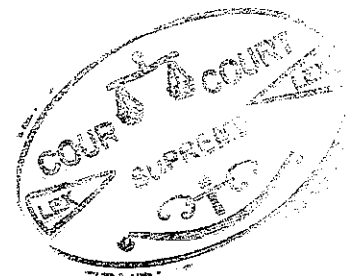


could not sleep that night because she was scared of you. She stayed awake until the next day and went straight to her uncle and reported you. The matter was later referred to the police.

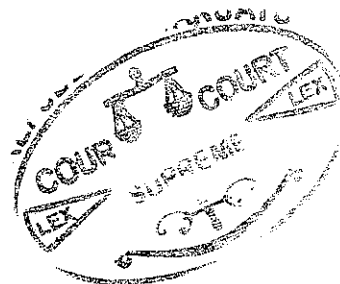
12. In your caution statement to the police, you elected to remain silent.

III. Sentence Start Point

13. The sentence start point is determined by reference to the maximum sentence available, the assessment of the aggravating and mitigating factors of the offending and by considering and reflecting on relevant comparable cases (if any).
14. The offence of indecency without consent, contrary to Section 98 carries a maximum sentence of 7 years imprisonment. The offence of domestic violence carries a maximum sentence of 5 years imprisonment or a fine not exceeding VT100,000, or both.
15. In this case, there are more than one charge. I need to assess the overall culpability of the offending on a concurrent basis and I do so presently.
16. This will be reflected into two steps approach considerations set out in the case of Philip v Public Prosecutor [2020] VUCA 490 adopting Moses v R [2020] NZCA 296.
17. Here, the maximum term available is a term of 7 years imprisonment on a concurrent basis.
18. In this case, there is no personal mitigating factors leading up to the offending, but the following aggravating factors of the offending exist:
 - There is a serious breach of trust. The complainant trusted the defendant as her father to lover her and protect her;
 - There is a repetition of violent behavior;



- There is some degree of pre-meditation on the part of the defendant;
 - The series of offending occurred in the complainant's home where she and her siblings were supposed to feel safe and protected;
 - The defendant shows no remorse at all;
 - The injuries suffered as a result of the assault.
19. I take all these matters into account, on a global basis taking all the offences, the appropriate sentence start point is in the range of between 3 – 5 years for the charge of acts of indecency without consent and 1 – 2 years for domestic violence.
20. I set the sentence start point at 3 years and 6 months imprisonment concurrently to reflect the circumstances of the present case. I do so after I have considered following comparable cases referred to the Court by the prosecution and defence.
21. The first case is Public Prosecutor v Molgos [2021] VUSC 172, where the Court adopted a sentence start point of 36 months imprisonment for acts of indecency without consent (Count 1) and 20 months imprisonment for domestic violence (Count 2). The facts of Public Prosecutor v Molgos are less serious than the present case.
22. The second case is that of Public Prosecutor v Bong Tasso [2021] VUSC 155, Criminal Case 1162 of 2021 (29 June 2021) where the defendant pleaded guilty to one charge of domestic violence and a charge of act of indecency without consent. The offending occurred in their home. The court sets 3 years imprisonment as the starting point for the lead charge of act of indecency. The Court imposed an end sentence of 12 months imprisonment on the lead offence (act of indecency) and 4 months imprisonment for the offence of domestic violence to be concurrent with the head charge. The end sentence is

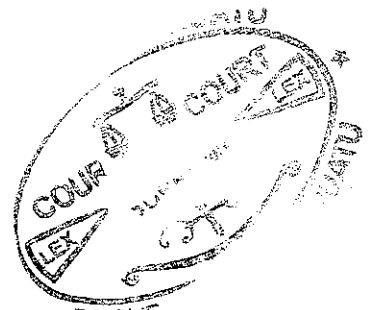


suspended for a period of 2 years. The facts of Public Prosecutor v Bong Tasso [2021] are less serious than the present case.

23. The third and last case referred to the Court is the case of Public Prosecutor v Tenkon [2023] VUSC 56. In that case (Public Prosecutor v Tenkon), the defendant was convicted after trial of four charges of indecency without consent and three charges of domestic violence involving his 16 years old biological daughter. The Court adopted a global sentence start point of 5 years and 3 months imprisonment. The circumstances of the case of Public Prosecutor v Tenkon [2023] VUSC 56 are more serious than the present case.

IV. Personal Mitigating Factors of the Offender

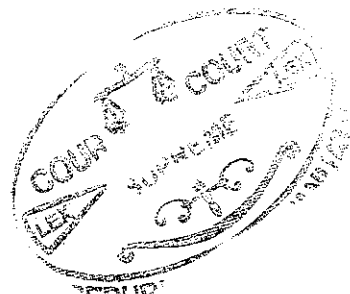
24. Mr. Malyalkon, you are 41 years old and you came from Ambrym Island.
25. You live in a defacto relationship with a woman and you both have three (3) daughters, ages from 17 years to 20 years old.
26. Your partner and you are the only bread winners for your family.
27. Your partner is currently overseas working on the seasonal workers' scheme. You have not seen your partner for almost 3 years.
28. You are a primary school leaver. You did not complete you education due to financial difficulties.
29. You have skills in gardening and fishing. Your ambition in life is to work for a better future for your children.
30. You have good relationship with your family and community.
31. Your brother James Malyalkon highly spoke of you about your ideas in your family with the events like children's day, mothers' day, family day.



32. Mr. James blamed your partner for staying too long overseas that caused you to behave in this bad manner. I reject this blame on your partner. I think and I agree with the writer of the pre-sentence report that the main contributing factor to your offending was your inability to control your anger and sexual desire that led to your offending.
33. You are a first-time offender. You do not have previous conviction.
34. You were remorseful when mentioned about the offending and about the victims.
35. Your sentence is reduced to 5 months to reflect these mitigating factors.
36. You have performed a custom compensation ceremony to the victims. The victims accepted the amount of VT15,000 you gave them with the root crops.
37. Your sentence is further reduced by 1 month to reflect the custom compensation.
38. Your sentence is further reduced by 33% to reflect your guilty pleas given at the first opportunity to the authorities.
39. The remaining balance of your sentence is 24 months imprisonment.

V. End Sentence

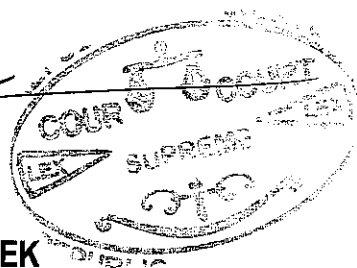
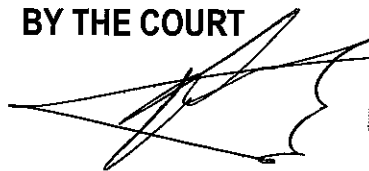
40. 24 months imprisonment is your end sentence.
41. You have already spent 3 months and 8 days in pre-custodial period from 8 November 2023 to 16 February 2024 before you were released on bail awaiting sentencing. The time you have already spent will be taken into account in your favour and I now deduct this to your end sentence of 24 months imprisonment.
42. The remaining balance of your imprisonment term in the present case is 20 months and 22 days.



43. I consider whether or not to suspend your imprisonment sentence of 20 months and 22 days.
44. I do so by considering the nature and seriousness of your offending, your character as an offender. In the present case, I decline to suspend your imprisonment term sentence of 20 months and 22 days.
45. The imprisonment is necessary to mark the seriousness and gravity of your offending and the disapproval of the society of this kind of offending. And also, it is necessary to protect women and girls from sexual abuse and violence based on the authorities of the Public Prosecutor v August [2000] VUSC 73, Criminal Case No. 014 of 2000 (28 November 2000) and Public Prosecutor v Gideon [2002] VUCA 7, Criminal Appeal Case No. 03 of 2001 (26 April 2002).
46. Your sentence of 20 months and 22 days imprisonment shall be effective at the date of this sentence.
47. You have a right to appeal this sentence if you are unsatisfied with it. The 14 days starts at the date of this sentence.

DATED at Port Vila, this 12th day of April, 2024.

BY THE COURT



Hon. Chief Justice Vincent LUNABEK