

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

Criminal
Case No. 24/1408 SC/CRML

PUBLIC PROSECUTOR

v

PAKOA SAMUEL SANDY

Date of Verdict: 16 December 2024
Date of Sentence: 12 March 2025
Before: Justice M A MacKenzie
Counsel: Ms S Langon for the Public Prosecutor
Mrs P Malites for the Defendant

SENTENCE

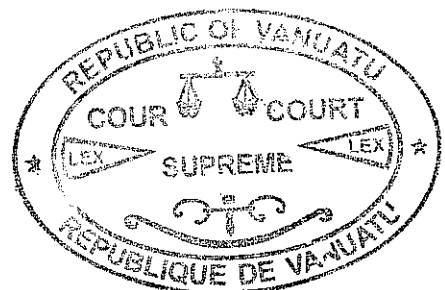
Introduction

1. Mr Pakoa Sandy appears for sentence having been found guilty following a trial of two charges:¹
 - a. Sexual intercourse without consent, contrary to ss 90 and 91 of the Penal Code [CAP 135]. The maximum penalty is life imprisonment.
 - b. Domestic violence contrary to s 4 of the Family Protection Act. The maximum penalty is 5 years imprisonment.

The Facts

2. As at the date of the incident on 28 July 2023, the victim was living with Mr Sandy and his family. The victim was aged 20 years and Mr Sandy was aged 33 years. Mr Sandy is the victim's uncle.

¹ For the verdict judgment, see *Public Prosecutor v Sandy* [2024] VUSC 339



3. When Mr Sandy raped the victim no one else was home. In the lead up, it was apparent to the victim that Mr Sandy was upset because he believed his wife had been unfaithful and had decided that it was "payback" time. The victim tried to get away from Mr Sandy and go outside but he held her hands tight, and she fell. Mr Sandy dragged her on the bricks into the house and then pulled her into the bedroom. Once in the bedroom, Mr Sandy said they were going to have sexual intercourse. The victim said "no". In fact, she said "no" three times. She was scared and started crying. Mr Sandy put a blanket over her head and then had sexual intercourse with the victim. He told her not to tell anyone.
4. Under caution, Mr Sandy said that he and the victim did have sexual intercourse but that it was consensual. He also admitted that he dragged the victim on the bricks/concrete into the house.

Sentencing purposes/principles

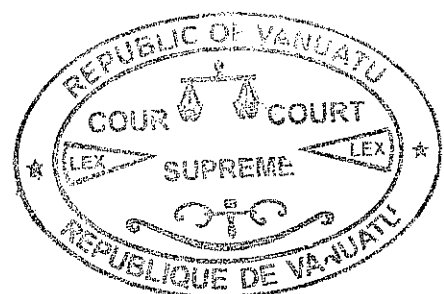
5. The sentence I impose must hold Mr Sandy accountable and must denounce and deter his conduct. The sentence should ensure Mr Sandy take responsibility for his actions and help him to rehabilitate. It must also be generally consistent.

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.

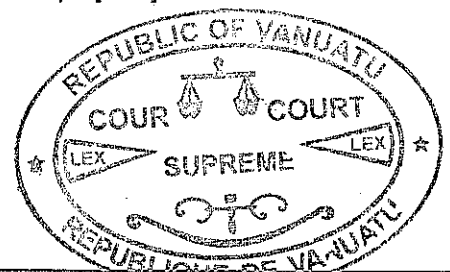
Starting point

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 offences.
8. The aggravating factors of the offending are:
 - a. There was a breach of trust as the victim was living with Mr Sandy and his family and they are related- she is his niece.
 - b. The victim was vulnerable because of the power imbalance arising from the age disparity. She was 20 and he was 33 years.
 - c. The rape took place in the victim's home where she was entitled to feel safe.



- d. The victim was exposed to the risk of pregnancy and sexually transmitted diseases as the sexual intercourse was unprotected.
- e. The rape was committed with the use of force beyond the commission of the offence, as when the victim tried to get away from Mr Sandy, he dragged her inside along some bricks and then pulled her into the bedroom.
- f. Impact on the victim- this was a traumatic experience for the victim. She was dragged into the house and then pulled into the bedroom. Her evidence was that she was scared and cried. It is likely that the incident will have an enduring emotional impact on the victim.
9. There are no mitigating features of the offending itself.
10. Counsel have both cited cases to assist the Court with setting an appropriate starting point. The prosecutor submits there should be a starting point of 8-10 years imprisonment. The defence submit that the appropriate starting point is 8 years imprisonment.
11. Because the offending is rape, *Public Prosecutor v August* [2000] VUSC 73 and *Scott v Public Prosecutor* [2002] VUCA 29 apply. *Scott* is the guideline case for rape. According to *Scott*, where a rape is committed by a person who is in a position of responsibility towards the victim, the starting point is 8 years imprisonment. Mr Sandy was in a position of responsibility towards the victim, as she was living in his home with his family, and he is her uncle. And where any one or more of the aggravating factors identified in *Scott* are present, the starting point should be significantly higher than the figure suggested as the starting point. Here, one of the aggravating factors set out in *Scott* is present- violence over and above the force necessary to commit the rape. Physical force was used by Mr Sandy to get the victim into the house and into the bedroom.
12. The cases cited by both counsel indicate a starting point range of between 8-10 years imprisonment, depending on the aggravating factors.² I focus on cases which involve force beyond the commission of the offence, because the real issue is the extent to which the starting point should be increased to reflect that factor. It is not in dispute that Mr Sandy was in a position of responsibility towards the victim.
13. Both counsel cited *Warsal v Public Prosecutor* [2023] VUCA 39, as a comparator case. In *Warsal*, the Court of Appeal upheld the 8 year starting point adopted in the Supreme Court. The defendant was 23 years and the victim 17 years. The defendant was a recruit at the police college, and the victim was a visitor. The defendant approached the victim

² The cases referred by counsel were *Public Prosecutor v Kalo* [2018] VUSC 114, *Warsal v Public Prosecutor* [VUCA] 39, *Public Prosecutor v Harry Rite* [2016] VUSC 82, and *Public Prosecutor v Karapia* [2024] VUSC 79

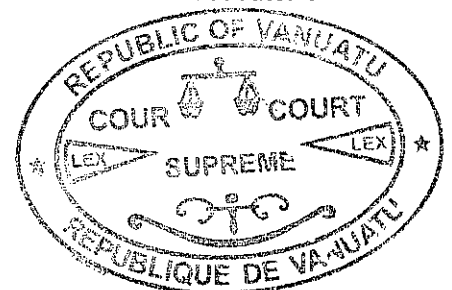


in the female toilets and asked her to have sex. She said "no". The defendant tried to remove her pants. She resisted and then the defendant pulled her by force into the toilet, undressed her and had sexual intercourse with her. Afterwards the victim felt disgusted, lonely, ashamed and scared of police officers in uniform.

14. There is *Public Prosecutor v Kalo* [2018] VUSC 114. *Kalo* involved a one-off incident of sexual intercourse. The defendant asked the victim to have sexual intercourse. She refused, so Mr Kalo forced her by holding her hands and pulling her into a bush area underneath a tree. He then had sex with her. The victim was vulnerable by virtue of her mental health. She had a mild intellectual disability. The Court adopted a starting point of 10 years imprisonment.
15. I consider that the starting point in the present case should be higher than 8 years, imprisonment given the position of responsibility and the violence used, beyond the commission of the offence, with reference to *Scott*. The offending in the present case is more serious than *Warsal* comparatively, given the greater degree of force involved to compel the victim, that here there is a breach of trust, and the power imbalance arising from the greater age disparity. I consider *Kalo* to be more serious than the present case because the victim in that case was very vulnerable.
16. Given the aggravating factors I have referred to, and in particular with reference to *Scott*, *Warsal* and *Kalo*, I adopt a starting point of 9 years imprisonment. I will not identify a separate starting point for the domestic violence charge because I have treated the violence as an aggravating feature of the rape.

Personal factors

17. Mr Sandy is aged 34 years and is a first offender. He was 33 at the time of the offending in 2023. Mrs Malites says he was 32 years, but the presentence report confirms that he was 33 years. Mr Sandy has a wife and three children. He owns a poultry farm at Teouma. He provides support for his extended family, and is well regarded in his community, as evidenced by the character reference provided by Chief John Sunny Pakoa Matisa. I accept that Mr Sandy is of otherwise good character and that the sentence should be reduced to reflect that, and his personal circumstances.
18. Mrs Malites submits that Mr Sandy has shown a high level of remorse for his actions and has apologised to the victim through her parents and the Chiefs. It is correct that there has been a custom payment. This must be taken into account under s 39 of the Penal Code. On 30 August 2023, Mr Sandy made a custom payment in accordance with the Euta Council of Chiefs meeting held on 9 August 2023, which was a custom reconciliation ceremony. The victim accepted the custom reconciliation and the payment, which was 1 buluk (VT 60,000), a fine of VT 50,000, 10 mats (VT 20,000), and kava and food (VT 20,000). I accept, taking into account both *Public Prosecutor v*



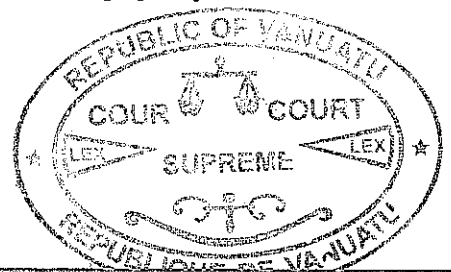
Andy [2011] VUCA 14, and *Edgel v Public Prosecutor* [2011] VUCA 37, that the sentence should be reduced for the custom reconciliation and custom payment.

19. Mrs Malites submits that the sentence should be reduced by 12 months (11% of the starting point) for personal factors and a further 12-18 months (11-17% of the starting point) for the custom reconciliation and custom payment. In making that submission, she places weight on *Edgel*, and submitted that in *Edgel*, 2 years was deducted on appeal for custom reconciliation, personal circumstances and remorse shown. That is not in fact the reduction applied in *Edgel* on appeal. When the Supreme Court sentencing decision and the appeal decision are read together, a 10% reduction was applied for all personal factors on appeal.³ In *Andy*, the sentence was reduced by approximately 15% for good character, remorse and compensation.
20. I consider that the sentence should be reduced to take account of Mr Sandy's good character, family responsibilities and that there was a custom payment made. I must take into account the custom payment, which was substantial. But I do not accept that Mr Sandy is remorseful, so as to warrant a separate reduction for remorse. Mr Sandy cannot be genuinely remorseful and regretful for the rape of his niece because he continues to maintain that the sexual intercourse was consensual. He is entitled to his view, but that is incompatible with genuine remorse for raping the victim. Any remorse then is hollow.
21. I consider that the proposed reductions which equate to between 22-28 % of the starting point are too high, particularly when *Edgel* and *Andy* are taken into account. I assess that the appropriate reduction is 15 months imprisonment which equates to approximately 14 % from the starting point sentence.
22. Mr Sandy was remanded in custody between 19 September 2023-13 November 2023, and was then granted bail. That period of remand was approximately 2 months. That is an effective sentence of approximately 4 months imprisonment. The sentence is further reduced by 4 months for that factor. Bail was revoked on 16 December 2024, and Mr Sandy has been in custody since. I will back date the sentence start date to reflect that.

End Sentence

23. The end sentence is 7 years 5 months imprisonment for the charge of sexual intercourse without consent. There is a concurrent sentence of 12 months imprisonment for the domestic violence charge.
24. Th defence submissions do not suggest that the sentence should be suspended pursuant to s 57 of the Penal Code, which in any event, is opposed by the prosecutor.

³ A 10% reduction was applied at sentence for the late guilty plea: See *Public Prosecutor v Edgel* [2011] VUSC 70.



25. Under s 57, I must take into account the circumstances, the nature of the offending and Mr Sandy's character. In *Public Prosecutor v Gideon* [2002] VUCA 7, the Court of Appeal said that it will only be in the most extreme of cases that suspension could ever be contemplated in a case of sexual abuse. That has recently been reaffirmed by the Court of Appeal in *Tulili v Public Prosecutor* [2024] VUCA 54.
26. Mr Sandy is a first offender and is well regarded in his community. However, this was serious offending, given the aggravating factors detailed above. Mr Sandy used force to rape his niece who should have been able to feel safe at home. The circumstances, both in relation to the offending and Mr Sandy personally, are a long way from being exceptional or extreme so as to warrant suspension of the sentence. Accountability, deterrence and denunciation are important sentencing purposes, given the nature of the offending. A stern response is needed. Exploitive sexual behaviour towards vulnerable young females must be strongly condemned, as recognised by the Court of Appeal in *Public Prosecutor v Gideon* and *Scott*. Suspension of the sentence would send a very wrong message both to Mr Sandy and others. I decline to suspend the sentence in all the circumstances.
27. The sentence is to commence immediately. The sentence start date is therefore backdated to commence on 16 December 2024, when bail was revoked.
28. Mr Sandy has 14 days to appeal against the sentence.
29. I make a permanent order suppressing the name and identifying details of the victim.

**DATED at Port Vila this 12th day of March 2025
BY THE COURT**

Justice M A Mackenzie

