

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

Criminal
Case No. 25/1316 SC/CRML

PUBLIC PROSECUTOR

v

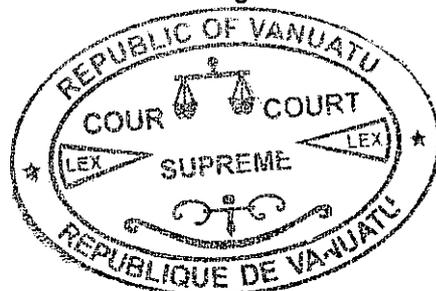
TUTA KAI

Date of Verdict: 17 December 2025
Date of Sentence: 6 March 2026
Before: Justice M A MacKenzie
Counsel: Public Prosecutor – Mr C Shem
Defendant – Mr H Vira

SENTENCE

Introduction

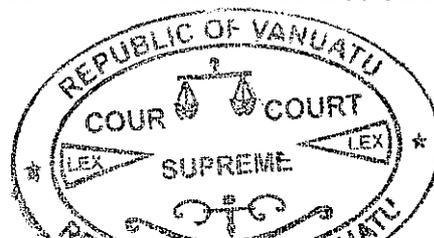
1. Mr Kai, you appear for sentence today in relation to 4 charges. You were found guilty of the following 4 charges at a trial:
 - Unlawful entry of a dwelling house (charge 1)
 - Two charges of sexual intercourse without consent (charges 2 and 3)
 - Threats to kill (charge 4)
2. The four charges relate to events which took place one evening in November 2024 at the victim, MJ's home, at Erakor.
3. You were found not guilty of a fifth charge, threats to kill. That charge related to an incident at Agatis in December 2024.



4. The maximum penalties for the offences are:
 - a. Unlawful entry of a dwelling house - 20 years imprisonment.
 - b. Sexual intercourse without consent – life imprisonment.
 - c. Threats to kill - 15 years imprisonment.

The Facts

5. You and MJ were in a relationship, which ended after you raped and threatened to kill her. This incident took place at her home at Erakor in November 2024.
6. One evening in November 2024, you arrived at MJ's home at Erakor, somewhere between midnight and 1 am. MJ was not expecting you that night. Her home at Erakor is a tent like structure, in an isolated area. MJ was asleep. She awoke to a light shining in her eyes.
7. You immediately grabbed MJ's hand and climbed on top of her. You did not say anything to her. You lay on her and pushed your penis into her mouth. She did not like it, so shook her head from side to side to try and get away from you. She tried to get your penis out of her mouth. When she shook her head, you told her that if she did not like it, you would end her life and go to prison.
8. Then you held her hands tightly with one hand and used the other to remove her trousers and underwear. You then pushed your hand into her vagina. The oral sex and digital penetration form the basis of one charge of rape. As I said in the verdict, ordinarily, separate sexual acts should be reflected in separated charges. However, Mr Shem confirmed that the Prosecution case was that it was a continuing course of conduct, so stood or fell together. MJ did not consent to these sexual acts.
9. After those sexual acts, and a threat to end her life, you told MJ that she must let you have sex with you, so she did. She did so because she was afraid of you. When you had sexual intercourse with MJ, you repeated the threat that if she did not let you have her body, you would take her life. MJ submitted to the sexual intercourse because she was fearful of what might happen to her. It was not a consent freely given.
10. Threats to kill were made, as have been detailed. The first threat to kill MJ was made after you put your penis in her mouth, which made MJ feel scared. You also said



you would take her life and that she was not to give her body to anybody. That threat was repeated when you had sexual intercourse with her.

Sentencing purposes/principles

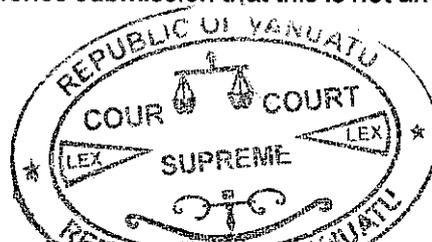
11. The sentence I impose must hold you accountable and must denounce and deter your conduct. The sentence should ensure you take responsibility for your actions and help you to rehabilitate. It must also be generally consistent.

Approach to sentence

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

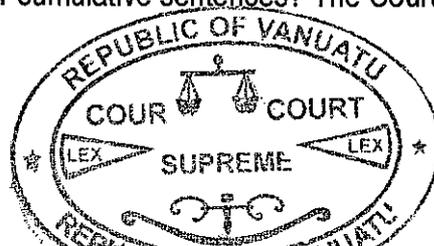
Starting point

13. 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 penalties for the offences.
14. The aggravating factors of the offending are:
 - a. The offending involved a breach of trust. That is because you and MJ were in a relationship.
 - b. Scale of the rape offending- while this was a continuing course of conduct, there were different types of non-consensual sexual activity, being oral sex, digital penetration and sexual intercourse
 - c. You made threats to kill MJ to instil fear and overcome resistance to the rapes.
 - d. There was a degree of planning. You went to MJ's home that night with the intention of having sexual intercourse with her.
 - e. MJ was exposed to the risk of sexually transmitted diseases as the sexual intercourse was unprotected. I reject the defence submission that this is not an



aggravating factor. Any time there is unprotected sexual intercourse, there is a risk of diseases. The prosecution did not need to call evidence about your sexual history- in any event, it would have been irrelevant to the essential elements of rape.

- f. MJ was entitled to feel safe in her own home. She was vulnerable and powerless given the threats and the fact that her home at Erakor was isolated.
 - g. Impact on the victim - this can only have been a traumatic experience for the victim. While I accept that there is no victim impact statement, I had the benefit of seeing MJ and hearing her evidence. It was clear from her evidence, that this was a traumatic experience. Of note, MJ's immediate reaction the next day was to leave her home at Erakor and seek refuge elsewhere.
- 15. There are no mitigating features of the offending itself.
 - 16. Both counsel submit the starting point should be 8-10 years imprisonment.
 - 17. 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 without any aggravating or mitigating factors, the starting point is 5 years imprisonment. If the defendant has gained access to the victim's home, the starting point should be 8 years. As detailed in *Scott*, rape is aggravated by various factors, none of which are overly relevant to the present case.
 - 18. While you went to MJ's home that night without warning or invitation, the serious aggravating factors here are the breach of trust and that MJ was entitled to feel safe in her own home. The standout aggravating factors are the scale of the offending, as there were two rapes, and the threats to kill you made in order to instil fear in MJ, and importantly, to overcome resistance to the rapes. She was vulnerable and powerless in that situation. It can only have been a traumatic and frightening experience for MJ, particularly given that her house is isolated. These factors, particularly that there were two rapes, mean a starting point above 5 years imprisonment is required.
 - 19. There are 4 charges for sentence. But they arise out of the one incident. So, then the question is whether to impose concurrent or cumulative sentences? The Court

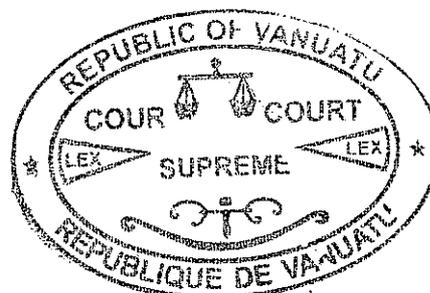


of Appeal has discussed concurrent and consecutive sentences in a number of cases including *Kalfau v Public Prosecutor* [1990] VUCA 9, *Boesaleana v Public Prosecutor* [2011] VUCA 33 and *Apia v Public Prosecutor* [2015] VUCA 30. Where a number of offences are part of one incident, concurrent sentences should be imposed. This is the approach I intend to take in this case.

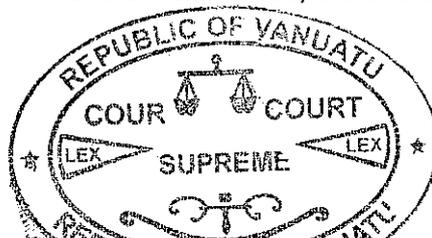
20. The lead offence is the second rape which involved penile penetration.
21. As the Court of Appeal said recently in *Mettek v Public Prosecutor* [2025] VUCA 41, sentencing is not an exact science because the circumstances will vary, so comparisons with other cases are at best an imprecise guide. In his written submissions, Mr Shem cited various cases to assist the Court with selecting the appropriate starting point.
22. I consider that two of the cited cases, *Public Prosecutor v Mariwota* [2021] VUSC 283 and *Public Prosecutor v Boedovo* [2025] VUSC 151 provide some assistance in setting the appropriate starting point. In *Mariwota*, the defendant had nonconsensual sexual intercourse with the 18 year old victim on two consecutive days in 2020. On both occasions, the defendant had a knife. While no threats were made, the presence of the knife led to the victim to be fearful. The starting point adopted was 8 years imprisonment. In *Boedovo*, the defendant raped an inexperienced young girl when she was at home with family. This was on a New Year's Eve into New Year's Day. The defendant put his penis into the victim's mouth and then there was nonconsensual sexual intercourse. The starting point adopted was 8 years imprisonment to reflect the fact there were two rapes.
23. A global starting point is appropriate to reflect the totality of the offending. To set the starting point, I have considered both the aggravating factors, the guideline case of *Scott*, and the two cases I have referred to by way of comparison. The scale of the offending, the breach of trust and the threats to kill to ensure compliance with your sexual demands, warrant a starting point of 8 years imprisonment on a global basis. That reflects your overall culpability.

Personal Factors

24. You were found guilty of the charges at the trial. Therefore, the sentence cannot be reduced for a guilty plea.



25. Your personal circumstances are set out in the presentence report. You are aged 47 years and are from Ambrym Island. Usually, you live at Pango village. You are well regarded in your community. While the presentence report notes that you had been remanded in custody on other occasions, there is no suggestion that you have any previous convictions.
26. You have been in employment and report that you have serious health issues, which involve you left eye and arthritis in your knee. It would seem that you have not sought medical assistance for those matters. Without medical information to verify your self-report, no sentence reduction is available for that factor. You maintain your innocence, which is your right. You told the presentence report writer that you were willing to perform a custom ceremony after the legal processes have concluded. You have not done so to date.
27. The only personal factor capable of reducing the sentence is your otherwise good character. For that factor, I reduce the sentence by 6 months, which equates to a reduction of approximately 6%.
28. Your counsel seeks a reduction for your readiness to do a reconciliation ceremony. To date, there has been no custom reconciliation or custom payment. Given that you told the presentence report writer that MJ's narrative is false, any reconciliation ceremony would be meaningless. Because it is not clear what you would be apologising for. It would not be a genuine attempt by you to put things right. Accordingly, no reduction is available for that factor.
29. You have been remanded in custody since 27 December 2024. That needs to be taken into account. I intend to do so by backdating the sentence start date. I will come to that shortly.
30. The end sentence is 7 ½ years imprisonment on a global basis. There are to be concurrent sentences imposed on each charge as follows:
- a. Each charge of sexual intercourse without consent – 7 ½ years imprisonment.
 - b. Unlawful entry of a dwelling house – 2 years imprisonment.
 - c. Threats to kill – 3 years imprisonment.
31. I am not asked to suspend the sentence. For the sake of completeness, I will address the issue of suspension. Under section 57 of the Penal Code, there is a



discretion to suspend an imprisonment sentence. I must take into account the circumstances, the nature of the offending and your 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 was reaffirmed by the Court of Appeal in *Tullii v Public Prosecutor* [2024] VUCA 54.

32. It is a matter of weighing and balancing the factors which point towards suspension and those which point towards away from suspension. This is serious offending. You raped your partner twice, and used threats to kill to get your way, and overcome resistance. MJ was fearful. I accept you are well regarded in your community and have no previous convictions. But, the circumstances, both in relation to the offending and you 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 overall nature of the offending. A stern response is needed. The sentence will not be suspended.
33. The sentence is to commence immediately. You have been remanded in custody since 27 December 2024. Accordingly, the sentence start date is backdated to commence on 27 December 2024.
34. You have 14 days to appeal against the sentence.
35. I make a permanent order suppressing the names and identifying details of the victim.

**DATED at Port Vila this 6th day of March 2026
BY THE COURT**

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Justice M A MacKenzie

