IN THE COURT OF APPEAL OF THE REPUBLIC OF VANUATU
(Criminal Appellate Jurisdiction)

Criminal Appeal Case No. 01 of 2010

LIVO WORAHESE
-V-
PUBLIC PROSECUTOR

Coram:	*Hon. Chief Justice V. Lunabek* *Hon. Justice B. Robertson* *Hon. Justice J. von Doussa* *Hon. Justice N. R. Dawson* *Hon. Justice D. Fatiaki*
Counsel:	*Mrs. Marisan P. Vire for the Appellant* *Mr. Lent Tevi for the Respondent*
Date of Hearing:	*21st April 2010*
Date of Decision:	*30th April 2010*

JUDGMENT

1. The Appellant has appealed the sentence imposed by Saksak J. on the 18th March 2010 for one charge of arson under section 134 (1) of the Penal Code Act [CAP. 135]. This charge has a maximum sentence of 10 years imprisonment.

2. The Appellant was sentenced to 2 years imprisonment. The sentence was suspended in part under section 58 of the Penal Code Act which had the effect of requiring the Appellant to serve 1 year in prison, with the second year suspended on the conditions imposed by the judge that he did not commit any offences against any Act, Regulation, Rule or Order within the next 12 months thereafter.

3. The Appellant has advanced four grounds of appeal. They are:-

   Ground 1 – the judge made an error of fact when he referred in paragraph 3 of the sentence to the Appellant setting fire to 4 buildings when it had already been agreed that he had set fire to only 3 buildings.

Ground 2 – It was said in paragraph 3 of the sentence that the victim and his family had been displaced by the Appellant's actions, when for other reasons, the victim and his family were already living elsewhere.

Ground 3 – The judge failed to give adequate weight to the mitigating factors advanced on behalf of the Appellant when imposing the sentence.

Ground 4 – The judge failed to take into account offers of compensation made by the Appellant to the victim.

4. Ground 1 The Appellant's submission that it was agreed prior to sentencing that there were only 3 buildings burnt down by the actions of the Appellant is accepted by the Respondent. The 3 buildings destroyed by arson were a sleeping house, a kitchen, and an incomplete house. The judge has simply made a mistake by referring to 4 buildings during sentencing.

5. The Appellant's submission is that the judge had "*a mental scenario of greater loss than reality*". In other words, the loss to the victim was only 75% as bad as the judge may have been thinking when he imposed the sentence.

6. Although only 3 buildings were burnt down, they still constituted all the domestic buildings of the victim and his family in the location where they apparently preferred to live. From that viewpoint it can be said that the victim has suffered a 100% loss of his domestic buildings notwithstanding that 3 buildings were destroyed and not 4.

7. The Court also heard that the Appellant when committing the arson, set fire to a torch of coconut leaves and went to each of the 3 buildings and used the torch to set each alight. The Appellant may be fortunate in having only 1 charge of arson laid against him and not 3 charges. As all 3 acts of arson have been included in 1 charge, the number must be considered by the Court as an aggravating factor when imposing a sentence. In all the circumstances it is difficult to find merit in the Appellant's first ground of appeal.

8. Ground 2 For the Appellant it was submitted that the victim and his family were not displaced from their home by the arson and therefore the judge should not have considered a displacement in their living arrangements as an aggravating factor. It was accepted by the Respondent that the victim and his family were living elsewhere at the time the arson took place.

9. The information before this Court indicated that the buildings that were burnt down by the Appellant had previously been lived in by the victim and his family, and they were their preferred living place. However they were at the time living elsewhere as they had been required to vacated the buildings due to an unspecified and almost certainly legally unenforceable

order by a chief or some other person which made them feel compelled to live elsewhere at that time.

10. The Appellant's submission that the victims were not displaced as they had already been displaced by other means has little to commend it. The victims primary living buildings and other personal items such as clothes and chattels were destroyed by the Appellant's actions and thereby prevented the victims from returning to their preferred accommodation and living place.

11. Ground 3 The mitigating factors advanced on behalf of the Appellant at sentencing was:-

(i) Guilty plea at first available opportunity;
(ii) Remorse for his actions;
(iii) Young person, 21 years of age;
(iv) A desire to commence study at USP;
(v) Twelve days earlier, members of the victim's family had assaulted the Appellant fracturing a bone in his right hand.
(vi) The Appellant's family had attempted reconciliation with the victim's family.

12. During sentencing the judge noted that the maximum sentence for an offence of arson is 10 years imprisonment. He began with a starting point of 4 years imprisonment after taking into account the sentencing factors of deterrence and the need to adequately punish offenders for this type of offending. He increased the sentence by one year to reflect the aggravating factors and then applied a reduction for the mitigating factors ending with a sentence of imprisonment of 2 years. He then further reduced the custodial term by suspending the second year of imprisonment.

13. The Appellant's submissions do not suggest any other starting point, but say that whatever it is, the end result should not be a custodial sentence.

14. In order to reduce the sentence of the judge this Court must be satisfied that the sentence imposed was wrong in principle or manifestly excessive. It is clear to this Court that the crime of arson in this jurisdiction is becoming more prevalent, particularly in Santo, where this offending occurred. It was quite proper therefore for the judge to give weight to the sentencing factor of deterrence to discourage this form of offending. The starting point of 4 years imprisonment and the addition of 1 further year for the aggravating factors was not unreasonable and the reduction of 3 years plus converting 1 remaining year into a suspended sentence gave substantial weight to the mitigating factors. This Court accepts that a custodial sentence must be imposed for this offence and it cannot be said that the sentence imposed by the judge was wrong in principle or manifestly excessive.

15. Ground 4. At sentencing the judge noted that the victim had not cooperated with regard to compensation offered by the victim and then went on to impose a sentence after saying "*the Court will not be concerned with the compensation aspect*".

16. The Appellant submits that the judge should have taken into account the compensation offered. It was confirmed before this Court that an offer of some building materials to assist the victim to rebuild and VT180,000 to be paid at the rate of VT10,000 per month was still open.

17. Section 40 of the Penal Code Act [CAP. 135] says:-

> "*SENTENCE OF COMPENSATION*
> *40. (1) A court must consider and may impose a sentence of compensation in monetary terms or otherwise if an offender has, through or by means of an offence of which the offender is convicted, caused a person to suffer:*
>
> *(a) death, or injury; or*
>
> *(b) loss of or damage to property; or*
>
> *(c) emotional harm; or*
>
> *(d) loss or damage consequential on any emotional or physical harm or loss of, or damage to, property."*

18. It then goes on to say:-

> "*(5) When determining the amount or type of compensation to be made, the court must take into account:*
>
> *(a) the offender's sources of income; or*
>
> *(b) any offer, agreement, response, measure, or action made or taken between the offender and the victim."*

19. Section 40 (1) requires that a Court consider an offer of compensation. It is not discretionary and cannot be waived by the non-cooperation of the victim. Imposing a sentence of compensation is discretionary after taking into account section 40 (5). The judge erred in not considering the Appellant's offer of compensation.

20. This Court has formed the view that an offer of building materials by the Appellant may not be useful in the circumstances where it is still unclear whether the victim and his family are able to return to the land where their buildings once stood. However the offer of payments of money should not

be overlooked and after taking into account section 40 (5), and the Compensation Report, it appears the Appellant does have the means and ability to pay the monetary compensation offered by him. It is therefore appropriate that a compensation order be made as part of the sentence imposed.

21. When imposing the sentence of imprisonment, the judge said "*I must make it clear to you that the 1 year (12 months) imprisonment that you must serve is to be without parole. You must serve the whole 12 months and thereafter be released*".

22. The judge has made an error by imposing a '*without parole*' condition to the sentence of 12 months imprisonment. Section 51 (1A) of the Correctional Services (Amendment) Act 2007 says:-

> "*(1A) Where an offender is sentenced to a term of imprisonment and part of that term is suspended, that offender's eligibility for parole will be determined by the period of imprisonment that is to be served, which does not include the period of imprisonment that is suspended.*"

As the second year of the Appellant's sentence has been suspended, then the Appellant's eligibility for parole must be based upon a sentence of imprisonment for 1 year.

23. Section 51 of the Correction Services Act 2006 says:-

> "***51. Eligibility of Parole***
>
> *(1) Subject to subsection (2) and subsection (3), a detainee is eligible for consideration by a community parole board for release on parole upon the expiry of a half of his or her sentence.*
>
> *(2) An offender sentenced to a term of imprisonment of 12 months or less, will be automatically released on parole after serving a half of his or her sentence.*"

24. Section 51 (2) provides that the Appellant would be entitled to parole automatically after serving six months of his sentence and that could not be changed by the sentencing judge.

25. The Appellant's sentence needs to be adjusted to take into account his right to automatic parole after six months and his offer of compensation must be considered. The appeal is allowed. The sentence imposed in the Supreme Court is quashed and in its place the appellant is sentenced to:-

(i) Two years imprisonment from the 18th March, 2010;

(ii) The second year of the sentence of imprisonment is suspended pursuant to section 58 of the Penal Code Act [CAP. 135];

(iii) The Appellant is to pay compensation to the victim of his offending for the amount of VT180,000, payable at the rate of VT10,000 per month, the first payment to be made on 1st November, 2010 and monthly thereafter until it is paid in full.

DATED at Port Vila, this 30th day of April, 2010.

BY THE COURT

.....
Chief Justice Vincent Lunabek

.....
Justice J. Bruce Robertson

.....
Justice John von Doussa

REPUBLIC OF VANUATU COURT OF APPEAL COUR D'APPEL

.....
Justice Nevin R. Dawson

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Justice Daniel Fatiaki