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

**Criminal Appeal Case No. 03 of 2010**

**BETWEEN: PUBLIC PROSECUTOR**
Appellant

**AND: JEAN MARC TAMATA**
Respondent

**Coram:** **Hon. Chief Justice, V. Lunabek**
**Hon. Justice J. von Doussa**
**Hon. Justice R. Young**
**Hon. Justice N. R. Dawson**
**Hon. Justice D. V. Fatiaki**

**Counsel:** **Mr. Benard Standish for the Appellant**
**Mr. Collin Leo for the Respondent**

**Date of Hearing:** 6th July, 2010

**Date of Decision:** 16th July 2010

# JUDGMENT

1. On 18th May 2010 the respondent pleaded guilty to offences of Attempted Intentional Homicide and Possession of a firearm with Intent to Injure before the Supreme Court at Luganville and was sentenced on 4th June, 2010 to: *"a term of imprisonment of 2 years, but suspended for 2 years on supervision".*

2. The wording of the sentence is unfortunate in that it can give the mistaken impression that the respondent's sentence of imprisonment was suspended with supervision as a condition of the suspension. Section 57 of the Penal Code which deals with the power of a Court to suspend a sentence of imprisonment imposes a single condition for such suspension namely, *"that the person sentenced commits no further offence against any Act, Regulation, Rule or Order "within the period fixed by the court...."* There is no power to impose additional conditions on a suspended

sentence. Furthermore Section 58F establishes supervision as a complete stand-alone sentence in its own right which may be additionally imposed with a suspended sentence of more than 6 months imprisonment albeit that the operational period of the suspended sentence sets the maximum period for which the sentence of supervision may be imposed (*see:* Section 58G).

3. The Public Prosecutor now appeals against the sentence imposed on several grounds including:

> *"(iv) The presiding Justice erred by taking into account material which:*
> - *Was not prepared for the purposes of the sentencing proceedings;*
> - *Was not sufficiently contemporaneous as to attract any, or any significant, weight;*
> - *Did not address issues of insanity, fitness to plead to criminal charges or diminution of criminal responsibility and was therefore, irrelevant or of extremely limited relevance.*
>
> *(v) The presiding Judge erred in imposing a wholly suspended sentence of imprisonment and in imposing a sentence of supervision.*
>
> *(vi) In all the circumstances, the sentence imposed by the presiding Justice was manifestly inadequate."*

4. This being an appeal by the Public Prosecutor, pursuant to Section 200(4) of the Criminal Procedure Code [Cap.136], we remind ourselves of the approach that this Court takes in considering such an appeal which has been firmly established by several decisions of the Court including, Naio v. Public Prosecutor [1998] VUCA 1; Public Prosecutor v. Gideon [2002] VUCA 7; Public Prosecutor v. Atis Willie [2004] VUCA 4. More recently, in Public Prosecutor v. Mulonturala [2009] VUCA 38 where the Court in overturning a wholly suspended sentence of imprisonment on a charge of Intentional Assault causing Death, said:

> *"This is a State appeal and the Court of Appeal will interfere only to the least extent which is essential in the interest of justice."*

5. The brief facts in the case are conveniently summarized in a document prepared by the public prosecutor at the trial, as follows:

"1. *The victim in this case is Mary Tamata, 36 years of age and is the wife of the accused.*

2. *At around 9:15 am on the 20th of April 2010 the victim, Mary Tamata, lodged a complaint against her husband alleging that the Accused intentionally shot her using a .22 rifle.*

3. *At around 6:30 am on the 18th of April 2010 at Beleru Village, Santo the accused intentionally shot the Complainant from behind at a range of 15 – 20 metres at their residence in Beleru.*

4. *At the time of the shooting the Complainant was walking away from her husband who was holding the rifle because he had attempted to shoot a wild chicken earlier that morning. The Complainant was walking towards the road in order to wash her muddy slippers in the puddles of water.*

5. *The Complainant and the Accused had had an argument the previous night (17th April 2010).*

6. *Immediately after the Complainant was shot she cried out in a loud voice and walked towards the residence of Davida Joe to seek help. Davida Joe had heard the Complainant cry out and was then walking towards her.*

7. *The Complainant then told Mr. Davida Joe that she had been shot by her husband John Mark Tamata. Davida Joe then walked with the Complainant to his residence which is located close by.*

8. *The Complainant was then driven to the Police Station where a medical report was issued and then to the Northern Provincial Hospital in Luganville by a Public Transport vehicle which was passing by at the time. The Complainant was accompanied by Davida Joe and Frank Tamata (the Respondent's brother).*

9. *At around 3:00 pm on the 18th April 2010 the Accused was arrested at Beleru and was subsequently charged with the above mentioned offences.*

10. *The Accused was then interviewed by PC Kali Wilson on the 27th April 2010 at around 10:08 am and at question 75 of the Records of Interview the Accused admits shooting his wife with criminal intent.*

11. *The Accused at question 74 of the Records of Interview admits that he does not have a valid license for the .22 rifle which he used to shoot his wife.*

12. *The .22 rifle which the accused used in committing the offences is owned by James Koroka and was borrowed by the Accused at the time the offences were committed."*

6. The procedure to be followed in a trial before the Supreme Court after a guilty plea has been entered by an accused person is set out in Section 160 (1) of the Criminal Procedure Code [Cap.136] as follows:

> *"160. (1) The information shall be read and if necessary explained or interpreted to the accused person and the Registrar shall call upon him to plead thereto. If he pleads guilty the court shall hear his advocate and if the court is satisfied that the accused person understands the matter and intends to admit, without qualification, that he committed the offence charged and that the case does not involve any issue which ought to be tried, the court may convict him on his plea."*

7. In this instance a perusal of the original Supreme Court file record indicates that the respondent was represented by counsel at the arraignment and after his pleas were taken the written brief facts of the case were handed up to the sentencing judge by the prosecutor and a copy supplied to defence counsel. Defence counsel is then recorded as asking for a proper pre-sentence report to be prepared within 2 weeks and the same was ordered by the sentencing judge. There was no denial of any of the facts outlined nor was the respondent's mental state at the time of the commission of the offences, raised as an *"issue which ought to be tried."*

8. Although there is no record of formal convictions being entered by the trial judge after the pleas were entered and the facts outlined, we note that Section 58E of the Penal Code which deals with the Court's power to order a pre-sentence report clearly anticipates that the subject person of the report has been *"convicted"* of an offence punishable by imprisonment.

9. On 19 May 2010 prosecuting counsel filed his sentencing submissions and on or about 26 May 2010 the respondent's pre-sentence report was filed. It records that the respondent *"does not dispute the summary of facts"* and, although the report acknowledges that *"... the Court will be considering a custodial sentence given the violent nature of the offending"*, nevertheless, it identified a sentence of supervision

with special conditions as an alternative. On 4 June 2010 defence counsel filed his sentencing submissions.

10. More importantly for present purposes, the pre-sentence report attached a medical report addressed to the respondent's employer dated 15 September 1992 which diagnosed the respondent as suffering from a *"mental depression called psychosis"*. The report also recommended that the respondent be given early retirement on medical grounds or leave without pay for a year. The contents of the medical report was extensively referred to in defence counsel's sentencing submissions to the sentencing judge.

11. Notwithstanding the omission to investigate the respondent's mental state, the sentencing judge was clearly persuaded by defence counsel's sentencing submissions. This is made clear in his sentencing remarks where he said:

> *"4. This is a case that is different in its nature and circumstances from all the cases cited by Mr. Leo such as Vinagre (1979) 69 Cr. App R.104 and PP v. Justine Abel [2006] VUSC 30; CRC 10 of 2006. However, the principle about the abnormalities of the mind as defined by Lord Parker CJ in the case of Byrne [1960] 2QB396 at p. 403 places much weight on defence Counsel's submission that even if a custodial sentence were to be imposed, it should be suspended based on your medical report.*
>
> *5. These two offences were committed in concert and as such, it is the view of the Court that only one term of sentence should serve to cover both offending.*
>
> *6. In view of the seriousness of these charges, the Court is of the view the appropriate sentence should be a custodial sentence. However, having had regard to your medical report and the recommendations by the Probation Officer, it is proper in the circumstances that the sentence be suspended and made into a supervision order. These options are available to the Court sections 58 F and 58 G, 58 H, 58 I and 58 J of the Penal Code Act Cap 135, as amended.*
>
> *7. Accordingly, the Court hereby convicts you on both counts and sentences you to a term of imprisonment of 2 years, but suspended for 2 years on supervision.*
>
> *8. The special conditions of your supervision are –*
> *a) You must not re-offend.*
> *b) You must receive some spiritual counseling.*

c) *You must undertake any rehabilitative programs as may be directed by the Probation Officer in charge of you during your term of supervision*

9. *That is the sentence of this Court."*

(our underlining)

12. It is not in conformity with the law to pass a single sentence in respect of convictions entered for two separate offences as occurred in this instance. Section 187(1) of the Criminal Procedure Code Act [Cap.136] requires a judge on convicting an accused person upon any count of an information to pass sentence according to law. Section 52 (1) of the Penal Code [Cap.135] also provides that where an accused is convicted on more than one charge of offences tried together, the respective sentences of imprisonment imposed (plural) are deemed to be concurrent unless the court orders otherwise, and finally, section 95 of the Criminal Procedure Code requires the judgment in the case of a conviction to specify the offence of which an accused person is convicted *"as well as the punishment to which he is sentenced."*

13. In the present case the sentencing judge correctly recorded convictions on both counts but imposed only one sentence.

14. Be that as it may, the sentencing judge also plainly relied upon the respondent's 1992 medical report to order a suspension of the sentence of 2 years imprisonment imposed on the respondent. In doing so we are satisfied the sentencing judge fell into error.

15. Both offences with which the respondent was charged, pleaded guilty, and was convicted required the formation of a criminal intent on the part of the respondent. In the absence of clear medical evidence of the respondent's incapacity to form the necessary intent at the time of the commission of the offences, it was not open to the sentencing judge to find, in effect, that the respondent's mental condition diagnosed in 1992 for early retirement purposes, had persisted for some 18 years and was still operative at the date of the commission of these offences. This was especially so in the face of defence counsel's somewhat inconsistent assertion in June 2010, that: *"(the respondent) was recently offered a job with the Public Service Commission for a position in the Lands Department."*

16. We are also satisfied from a consideration of the depositions, that the actions and utterances of the respondent leading up to and after the commission of the offences including his voluntary admissions to the police during his caution interview on 27 April 2010, are not those of a mentally impaired person with an incomplete recollection of events. A plea of insanity was not raised by the respondent nor were the provisions of Section 92 Criminal Procedure Code [CAP 136] (dealing with a defence of insanity) referred to either by the judge or in defence counsel's request for a pre-sentence report. Indeed it appears that guilty pleas were entered on the dual assumptions that he was fit to enter his pleas and that he was sane at the time of the commission of the offences.

17. We reject defence counsel's submission that the *"disease of the mind"* within the meaning of Section 20 (2) of the Penal Code need not be contemporaneous or subsisting at the time of the commission of the offences.

18. For the sake of completeness we have considered whether or not Section 25 of the Penal Code might have application in the present circumstances, but are satisfied that it is excluded by the opening words of the Section which contemplates the unsuccessful raising of a plea of insanity. We also decline counsel's invitation to order a medical examination of the appellant at this late stage of the proceedings in the absence of any compelling reasons for doing so.

19. In light of the foregoing errors in the sentencing exercise conducted by the sentencing judge the appeal must be allowed and the appellant sentenced afresh.

20. In doing so we ask ourselves what is the minimum appropriate sentence that the interests of justice requires to be imposed in this case where the respondent, intending to kill his wife, shot her in the back at close range with a .22 calibre rifle.

21. The medical report of the wife's injuries is significant. It records:

> *"On examination the patient was in moderate pain. A puncture wound was seen over the left shoulder blade area. X-ray examination revealed a bullet deeply lodged in the root of the neck close to the left internal carotid artery. From such an injury this incident could have turned fatal for this*

*mother Major vessels like sub clavian artery, common cartoid, internal jugular vein could have been severed cutting off blood supply to the brain.*

*At this stage it is not necessary to remove the bullet. She is being treated conservatively including antibiotic cures."*

23. We acknowledge that the respondent was a first time offender and pleaded guilty at the earliest opportunity but by any measure this was a most serious intentional offending. It is sheer good fortune that the consequences were not fatal. Any person who behaves in such a cowardly manner towards his spouse who should be able to look to him for love and protection, and uses a lethal weapon in the process, must expect to go to prison.

24. Given the unfavourable family history of domestic violence noted in the respondent's pre-sentence report and its most recent manifestation and escalation using a firearm and the other aggravating circumstances identified, we consider the appropriate sentence based on those facts is one of 7 years imprisonment. From that sentence we deduct 3 years for mitigating factors including the respondent's early admission of the offences to the police and his guilty pleas as well as the fact that he is a first time offender leaving a sentence of 4 years imprisonment to be served. We are also mindful that this was a State's appeal against the sentence imposed.

25. We do not consider that the circumstances of the case or the nature of the crime committed by the respondent or his personal character are such as to persuade us to suspend any part of the sentence.

26. Accordingly the formal orders of the Court are:

(1) The appeal is allowed and the sentence is set aside; and

(2) The respondent is sentenced as follows:
On Count 1: Attempted Intentional Homicide contrary to sections 28 and 106 (1) (a) of the penal Code [Cap 135], we impose a sentence of 4 years imprisonment; and

On Count 2: Possession of a Firearm with Intent to Injure contrary to section 26 of the Firearms Act [Cap 198], we impose a concurrent sentence of 12 months imprisonment.

27. The respondent is required to serve a sentence of 4 years imprisonment with immediate effect.

**Dated at Port Vila, this 16th day of July, 2010**

**BY THE COURT**

**Hon. Chief Justice, V. Lunabek**

**Hon. Justice John von Doussa**

REPUBLIC OF VANUATU COURT OF APPEAL COUR D'APPEL REPUBLIQUE DE VANUATU

**Hon. Justice N. R. Dawson**

**Hon. Justice R. Young**

**Hon. Justice D. V. Fatiaki**