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

Criminal Appeal Case No.02 of 2013

BETWEEN: SILAS ROBERT
Appellant

AND: PUBLIC PROSECUTOR
Respondent

Coram: ***Hon. Justice John von Doussa***
Hon. Justice Oliver Saksak
Hon. Justice Daniel Fatiaki
Hon. Justice Raynor Asher
Hon. Justice Robert Spear
Hon. Justice Dudley Aru
Hon. Justice Mary Sey

Counsel: *Mr. B. Livo and R. Tevi for the Appellant*
Ms. K. Tavoa for the State

Date of Hearing: *15 July 2013*

Date of Decision: *26 July 2013*

JUDGMENT

1. On 15 July 2013 at the conclusion of the hearing the Court allowed the appeal, quashed the sentences imposed on the appellant and ordered his immediate release from custody. The Court's reasons for its decision were reserved at the time and are now published.

2. On 5 February 2013 the appellant pleaded guilty and was convicted on an Information which charged him with two offences Unlawful Entry of a home belonging to George Bai and Theft of a circular saw.

3. On 8 May 2013 the appellant who had been released after his conviction was brought before the Supreme Court and was sentenced to concurrent terms of 15 months imprisonment and ordered to immediately serve 9 months imprisonment with the balance (6 months imprisonment) suspended for a period of 2 years. In substance, the appellant was sentenced to a partly suspended sentence pursuant to sections 57 and 58 of the Penal Code Act [CAP. 135].

4. The brief admitted facts in the case were that the appellant had broken a lock and unlawfully entered his employer's newly built house and stolen a circular saw which was later recovered and returned to the complainant.

5. By Memorandum of Appeal dated 13 June 2013 the appellant appeals against the severity of the sentences on the following (4) grounds:-

   "A. The learned Chief Justice erred by imposing a sentence of imprisonment (a sentence of last resort) rather than a community based sentence.

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B. *The sentence of 15 months imprisonment suspended after 9 months was manifestly excessive and failed to give weight to the mitigating factors (first time offender, has been in custody for two weeks, pleaded guilty, stolen item recovered, custom ceremony and remorseful, has a family, and ambition in life).*

C. *The learned judge erred by failing to give any reasons for imposing a partially suspended sentence rather than a fully suspended sentence.*

D. *That the learned judge erred by finding that stealing from the employer was an aggravating factor when it should have been regarded as a mitigating factor."*

6. We were greatly assisted by the detailed and comprehensive written submissions of both counsel at the hearing of the appeal which included a comparative table of sentences passed for offences of Unlawful Entry and Theft.

7. Although such a table needs to be viewed with caution, its utility lies in any discernible trend(s) that it may provide rather than in the specific sentences imposed in each case. In this latter regard appellant's counsel submits that "... (the cases) *demonstrate that the normal sentence for unlawful entry* (and theft) *for a young first offender who pleads guilty is either a community work order or fully suspended sentence*", in other words a community-based sentence.

8. In this appeal, which is largely conceded, we do not propose to deal with each of the grounds of appeal other than to highlight several aspects of counsel's submissions that will explain why we have decided that the appeal should be allowed. Suffice it to say we are persuaded that the trial judge erred in giving insufficient weight to mitigating factors in the appellant's favour and in not clearly explaining his reason(s) for not suspending the whole sentence of imprisonment imposed on the appellant.

9. In his sentencing remarks the trial judge accepted that the house that was unlawfully entered by the appellant was "*not for human habitation*". He also identified aggravating factors in the case, namely the breach of trust between the appellant and his employer and the broken door lock. Having regard to the provisions of Section 143 (2) of the Penal Code it is doubtful that a broken door lock is an aggravating factor in the commission of the offence of Unlawful Entry. The trial judge then adopted a starting point of 24 months imprisonment. Thereafter, he dealt with the mitigating factors highlighted in the appellant's pre-sentence report including; the fact that he was a first offender; the shame and regret expressed by the appellant; and the "*custom reconciliation to the victim complainant*".

10. For these mitigating factors the starting point was reduced by 6 months and then, by a further 3 months for "*other mitigating factors*" producing an end sentence of 15 months imprisonment on each count to be served concurrently.

11. The trial judge then, considered the question of whether or not to suspend the sentence and although accepting that a suspended sentence was appropriate

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in the circumstances of the case, declined to fully suspend the sentence and ordered the appellant to immediately serve 9 months imprisonment with the balance suspended for 2 years. In this latter regard we note that the trial judge rejected a community-based sentence as well as the submissions of prosecuting counsel for a wholly suspended term of imprisonment and community work.

12. We would merely observe that serving a non-parolable 9 months term of imprisonment before release is the equivalent of an effective sentence of 18 months imprisonment. Such a sentence would have more than satisfied the particular circumstances of this case. To then add to that sentence, a further sentence of 6 months imprisonment suspended for 2 years results, in our view, in a disproportionately harsh penalty.

13. Be that as it may the primary sentence of a partly suspended term of imprisonment is based on Sections 57 and 58 of the Penal Code which read:

> ***"PROVISION FOR SUSPENSION OF SENTENCES OF IMPRISONMENT***
>
> *(1) The execution of any sentence imposed for an offence against any Act, Regulation, Rule or Order may, by decision of the court having jurisdiction in the matter, be suspended subject to the following conditions:*
>
> *(a) if the court which has convicted a person of an offence considers that:*
>
> *(i) in view of the circumstances; and*
>
> *(ii) in particular the nature of the crime; and*
>
> *(iii) the character of the offender,*
>
> *it is not appropriate to make him or her suffer an immediate imprisonment, it may in its discretion order the suspension of the execution of imprisonment sentence it has imposed upon him or her, on the condition that the person sentenced commits no further offence against any Act, Regulation, Rule or Order within a period fixed by the court, which must not exceed 3 years; and*
>
> *(b) if, at the end of such period, the person the execution of whose sentence has been suspended in accordance with this section has not been convicted of any further offence against any Act, Regulation, Rule or Order, the sentence is deemed to have expired; and*
>
> *(c) if, before the end of such period, the person the execution of whose sentence has been suspended in accordance with this section is further convicted of any offence against any Act, Regulation, Rule or Order, the court shall order that the suspended sentence shall take effect for the period specified in the order made under paragraph (1) (a) of this section unless it is of the opinion that it would be unjust to do so in view of all the circumstances which have arisen since the suspended sentence was imposed, including the circumstances of any further offending, in no case concurrently with any subsequent sentence.*

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(d) Where a court decides under paragraph (1) (c) that a suspended sentence is not to take effect for the period specified in the order, then, subject to this Act, the court must either:

(i) order that the suspended sentence:
(ia) take effect with the substitution of a lesser term of imprisonment; or

(ib) be cancelled and replaced by any non-custodial sentence that could have been imposed on the offender at the time when the offender was convicted of the offence for which the suspended sentence was imposed; or

(ic) be cancelled; or

(ii) decline to make any order referred to in subparagraph (i) concerning the suspended sentence.

(2) The court must, when ordering the suspension of the execution of the sentence of imprisonment, explain clearly to the person sentenced the nature of the Order and must ascertain that he or she has understood its meaning.

POWER OF COURT TO SUSPEND SENTENCE IN PART

(1) If a court has decided that the case is so serious as to warrant imprisonment, and that it is not appropriate to suspend the whole sentence, it should consider whether there are grounds for suspending the sentence in part.

(2) A court may suspend a sentence in part if the sentence is for three years or less."

14. The sections are not easily reconciled and may even give rise to an inconsistency in so far as the power under Section 57 (to wholly suspend a sentence of imprisonment) is predicated upon a finding that immediate imprisonment is "*not appropriate*", whereas section 58 which contains the power to partly suspend a term of imprisonment is prefaced on a determination that the offence "... *is so serious as to warrant imprisonment and it is not appropriate to suspend the whole sentence*". In this latter instance, the Court is required to consider and identify grounds for only suspending the sentence in part.

15. Needless to say, in the absence of any articulation of the ground(s) and reason(s) for partly suspending a sentence of imprisonment, the exercise of section 58 remains unexplained and therefore difficult to justify.

16. The final matter that may be noted is the trial judge's treatment of the appellant's reported reason(s) or explanation for committing the offences, namely, the under-payment of his wages for two months and his pressing need for the money at the time owing to the advanced pregnancy of his wife who was expecting their first child. This was firmly rejected by the trial judge as "*not acceptable*".

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17. This "*factor*" received quite a different treatment in the recent more serious case of **Public Prosecutor v. Jimmy and Helen Tom** [2012] VUCA 1. In that case not only had the defendant stolen numerous items from a storage container belonging to his employer. Additionally, he had set fire to the premises causing VT8 million loss to his employer. In that case too, the trial judge accepted that there had been significant non-payment of wages for 6 months prior to the commission of the offence and imposed a wholly suspended sentence of 18 months imprisonment.

18. This Court in dismissing the State's appeal in the above case against the leniency of the sentence imposed said (at paras. 17 & 18):

> *"Typically a burglary followed by the arson of the building burgled would result in a sentence of imprisonment. This approach was reflected in the Judge's starting sentence for the overall offending of six years imprisonment. However he was entitled to take into account the highly relevant background facts relating to the respondent's desperate circumstances. This desperation, caused in part by the complainant's failure to pay wages played a part in this offending. This was a man without a criminal record before these events. The Judge was also entitled to take into account the respondent's disability. Such a disability would make it that much more difficult for the respondent to cope with his loss of pay. Further any sentence of imprisonment would inevitably be more difficult for the respondent. Finally he was entitled to credit for the way in which he had managed his life before these events.*
>
> *This was an unusual set of circumstances. A merciful sentence was open to the Judge."*

(*see also*: **PP v. Firiam and others** [1998] VUSC 87; **PP v. Bwibwi** [2010] VUSC 10 and **PP v. Mercy Ehndvaum** [2004] VUSC 61 where weekend periodic detention and community-based sentences were imposed for similar offences where the defendant/employee had not been paid wages and stole from his/her employer. Notably, in the Mercy case the employer's failure to pay wages was treated by the trial judge as "... *a mitigating factor special to the defendant*".

19. At the hearing of the appeal the Public Prosecutor accepted that the sentence for this particular offending should be at the lower end of the scale and that justice would be adequately served by a short wholly suspended prison term coupled with a community work order. In brief, the appeal was being conceded.

20. Additionally, the trial judge in sentencing the appellant appears to have glossed-over the mitigating effects of a guilty plea and an accepted custom reconciliation. Certainly no discrete allowance has been made for either factor nor has any reason(s) been given for not wholly suspending the sentence of imprisonment.

21. In **Public Prosecutor v. Andy** [2011] VUCA 14 this Court in elaborating on the approach that should be adopted in the sentencing process and in treating a guilty plea as a discrete factor or consideration over and above mitigating factors relating to an offender personally, said (at para. 18):

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> *"as a third step, the trial judge will then consider what discount from the second stage end sentence should be applied for a guilty plea. The greatest discount allowed under this head will be a discount of one third where the guilty plea has been entered at the first reasonable opportunity. A later guilty plea will result in a smaller discount. No discount is available under this head if the charges have been defended through a trial."*

22. In similar vein, this Court in **Edgel v. Public Prosecutor** [2011] VUCA 37 in discussing the provisions of Section 119 of the Criminal Procedure Code and Sections 38 and 39 of the Penal Code dealing with compensation or reparation made under custom and in reducing the sentence by 10 months, said (at para. 15):

> *"Given the social and cultural significance of performing a customary reconciliation ceremony amongst the indigenous people of this country, especially where the same has been accepted by the injured party, we are satisfied that the appellant deserves, if not a separate, then, a greater discount for that important statutory mitigating factor."*

23. In this particular regard the appellant's pre-sentence report relevantly states:

> *"The appellant confirmed to the writer of the report that, he has done a custom ceremony to the victims family recently on Tuesday 12 February 2013* (a week after the appellant pleaded guilty) *he stated that the items presented to the victims family are as follows, one (1) mat, one (1) stump of kava and 1,000 vatu. The offender's father confirmed that* (the appellant) *asked for forgiveness to his victim and they accepted it during the custom reconciliation ceremony."*

24. In our view the maximum sentence of imprisonment that could have been imposed was in the order of 12 months. For the reasons we have given it should have been suspended. A sentence of community work would have been appropriate, but will not be imposed given that the appellant had been in prison since 8 May 2013.

25. For the foregoing reasons the appeal was allowed and the sentences were set aside. As the Court was firmly of the view that a non-immediate custodial sentence was the appropriate penalty and as the appellant had already served over 2 months in custody (which equates to an effective sentence of 5 months imprisonment), the Court ordered the appellant's immediate release.

DATED at Port Vila, this 26th day of July, 2013.

ON BEHALF OF THE COURT

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Hon. Justice John von Doussa.