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

CRIMINAL APPEAL CASE No. 04 OF 2014

BETWEEN: **MENSLEY MOLI**
Appellant

AND **PUBLIC PROSECUTOR**
First Respondent

Coram: *Hon. Chief Justice Vincent Lunabek*
Hon. Justice Bruce Robertson
Hon. Justice Daniel Fatiaki
Hon. Justice John Mansfield
Hon. Justice Dudley Aru
Hon. Justice Stephen Harrop

Counsel: *Mr Jacob Kausiama for the appellant (also present)*
Mr Tristan Garae for the respondent

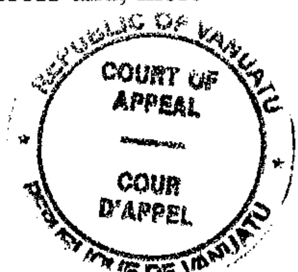
Date of Hearing: *12 November 2014*
Date of Judgment: *14 November 2014*

JUDGMENT

Introduction

1. Mr Moli appeals against a sentence of three years and two months imprisonment imposed on him by Saksak J in the Supreme Court at Luganville on 26 August 2014, following his plea of guilty to one charge of intentional assault causing permanent injury contrary to section 107 (c) of the Penal Code [Cap. 135]. This offence carries a maximum penalty of five years imprisonment.

2. Mr Moli, who was at the time of the offence aged 20, was involved in a land dispute with the victim Mr Vuti, then aged 23. On 26 June 2013 at around 2 pm, Mr Vuti was at home in his kitchen with his wife and young daughter. Mr Moli came into the kitchen with a knife in his hand and without saying a word swung the knife at Mr Vuti aiming at his left hand. He inflicted cuts twice, to the left side of that hand and across and, more



seriously, to his left elbow. While doing so he told Mr Vuti in no uncertain terms not to interfere further with his land.

3. Mr Vuti managed to escape and ran out of the kitchen in fear of further attack. Mr Moli chased him so Mr Vuti sought refuge at a neighbour's house. Mr Moli did not go into that house but stopped and returned to his village.

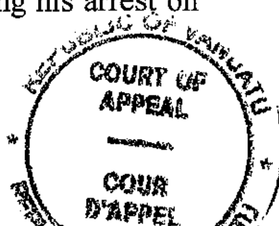
4. Mr Vuti was treated initially at the Amapelao Medical Centre but was sent on to the Northern District Hospital. However, because of the seriousness of the elbow injury, Mr Vuti was sent to Vila Central Hospital for further treatment including surgery. Medical records show that the injury was serious enough to risk the loss of part of his left arm and there was extensive damage to the muscles, the ulnar nerve and tendons. He spent some two months in hospital and has been left with scarring, reduced sensation in the area of the ulnar nerve, a weakened left finger and muscle wasting.

The Supreme Court Judgment

5. Justice Saksak, rightly in our view, regarded this as a serious example of an offence against section 107 (c). He decided that taking into account the aggravating features the appropriate starting point before considering personal mitigating factors was a sentence of four years and six months imprisonment. His Lordship then acknowledged Mr Moli's early guilty plea, his cooperation with the Police during investigations and interviews and the absence of any previous convictions. For these factors, one year and ten months was deducted, namely 40% of the starting point.

6. The Judge determined that the appropriate end sentence was three years and two months. At the hearing of this appeal counsel agreed with the bench that this involved an arithmetical error on his Lordship's part: 54 months less 22 months is 32 months, which is two years and eight months. Accordingly Justice Saksak erroneously imposed a sentence of six more months than he himself intended. For this reason alone the appeal must be allowed, unless we conclude that despite the error the end sentence was not manifestly excessive.

7. Mr Molbaleh on Mr Moli's behalf also points out that no account was taken by Justice Saksak of the time which Mr Moli spent in custody immediately following his arrest on



29 June 2013. There was some confusion about the extent of his incarceration on remand (in the Supreme Court defence counsel told the Court it had been from 26 June 2013 until 11 October 2013) but at the hearing of the appeal counsel agreed it had been for 19 days, from 29 June 2013 to 17 July 2013. Mr Massing accepts that section 51 (4) of the Penal Code requires that the duration of such custody is to be "wholly deducted from the computation of a sentence of imprisonment". This then requires a further reduction in the appropriate sentence, the appropriate extent of which we discuss below, even on Justice Saksak's view of the case.

Submissions on appeal and discussion

8. Mr Molbaleh submits that the starting point including aggravating features adopted by Justice Saksak was too high at 4 ½ years. He suggests it should have been between two and three years. On this basis an end sentence of somewhere between one and two years' imprisonment is suggested. Mr Molbaleh abandoned his initial submission that a suspended sentence of imprisonment was appropriate.

9. We regard this offending as serious and as warranting a starting point of at least four years imprisonment. Mr Moli, in a state of anger over a land dispute, invaded Mr Vuti's home and attacked him twice in the presence of his wife and young daughter. While it is not an aggravating feature of the offence that a permanent injury resulted, because that is inherent in the offence, nevertheless the extent of hospitalization and the risk of loss of limb indicates how significant the elbow injury was. Furthermore there was both premeditation and at least initially a post-attack chasing of the victim which indicates an intention to inflict further harm. The incident involved use a potentially lethal weapon and was done for a particular deterrent purpose in relation to a land dispute, reinforced by strong language uttered at the time of the attack.

10. We accept that the extent of the permanent injury is less debilitating than many cases under this section might involve, but the primary focus must be on the degree of criminality involved in the attack rather than on the ultimate outcome; both Mr Moli and Mt Vuti are fortunate the damage was not more severe. There was a real risk of loss of part of Mr Vuti's arm.

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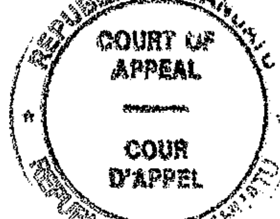
10. This case clearly called for a strong deterrent sentence, not only to hold Mr Moli accountable for what he had done but also to send a clear message of general deterrence to any member of the community minded to respond in this manner to being upset and angry about a land (or any) dispute.

11. Without in any way derogating from this, we nevertheless consider, with respect, that Justice Saksak's starting point was too high. Regard must be had, as Mr Molbaleh submitted, to the maximum penalty of five years imprisonment. One can conceive of much more serious assaults with much more significant permanent injuries than this case involves. If a person inflicting that kind of injury in anger denied responsibility, showed no remorse but was found guilty at trial and had a lengthy list of previous violent convictions then a starting point around four and half or the maximum five years would be appropriate. In short, there needs to be room at the top of the sentencing range for that kind of case.

12. Mr Molbaleh urged the Court to impose a sentence consistent with other sentences for similar offending. He referred the Court in particular to *Public Prosecutor v. Michel* [2012] VUSC 245. However the offending in that case was if anything less serious than the present yet the Chief Justice still considered four years to be the appropriate starting point. It involved kicking the victim with safety boots to his mouth resulting in the loss of two teeth and serious cuts to his cheek.

13. We consider that the least restrictive starting point for this case, taking into account its aggravating features, is four years imprisonment i.e. 48 months.

14. We note that there was some confusion in the Supreme Court and on Mr Molbaleh's part as to what a starting point is. This Court has made clear in the guideline case of *Public Prosecutor v Andy* [2011] VUCA 14 (at paragraph 15) that the starting point *"can be defined as the sentence of imprisonment that reflects the seriousness of the offence and the culpability of the actual offending: that is, the specific actions of the offender and their effect in the context of the specific charge and its maximum sentence. In this first step, there is no consideration of circumstances which are personal to the offender. The calculation has regard only to the seriousness of the offending."*



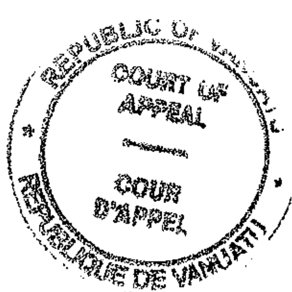
14. It is essential for proper assessment of sentences on appeal that sentencing judges determine the starting point in this way and that counsel compare cases by reference (at least primarily) to their starting points, not their end sentences. The former comparison is helpful to the pursuit of consistency between like cases because it focuses only on the offence including all its aggravating features. Offences can be compared but often the aggravating and mitigating factors relating to an offender cannot; in particular there is a considerable difference between an offence committed by a first offender who pleads guilty and the same offence committed by a career criminal who does not.

15. As to personal mitigating factors, Mr Moli is entitled to the maximum one-third discount for pleading guilty at an early stage. We consider that Mr Moli's cooperation with the police should be subsumed within this discount, which is already substantial; it is all conduct which reflects his early acceptance of responsibility. That amounts to a 16-month reduction in the prison sentence taking it down to 32 months, or two years and eight months.

16. It is also necessary and appropriate to recognise Mr Moli's relative youth and his absence of previous convictions. A further reduction of around 10%, or three months, is appropriate, bringing the sentence down to 29 months or two years and five months.

17. As noted above, it is then necessary to give effect to section 51 (4) of the Penal Code in relation to the 19 days spent in custody by Mr Moli. Section 51 (4) directs that this period be wholly deducted from the duration of the sentence of imprisonment. In our view, it is also appropriate to take section 51 of the Correctional Services Act 2006 into account i.e. the eligibility of Mr Moli for release on parole upon the expiry of half of his sentence. If only 19 days is deducted from his sentence then he would be unfairly penalised by comparison with the position he would have been in had he been on bail between arrest and sentencing and instead the 19 days had been part of his prison sentence. In fairness the 19 days he spent in custody should be treated as the equivalent of a 38-day prison sentence.

18. Rounding it off we would for this reason deduct a further two months from the sentence bringing it down to 27 months or 2 years and 3 months.



19. The task of an appellate Court is not to focus unduly on the components of a sentence but on the overall sentence. The question for us therefore is whether our assessment of the appropriate end sentence, of two years and three months imprisonment, means that the sentence imposed of three years and two months was manifestly excessive. Self-evidently it was as it is nearly 30% more. Even on our view of the sentence Justice Saksak ought to have imposed on his own approach to the matter, which would have resulted in a sentence of two years and seven months, there is still a discrepancy of some 10%. Given however that the comparison we are required to make is with the sentence actually imposed, not the one we think Justice Saksak intended on his view of the case to impose, there can be no doubt that the appeal must be allowed and that we ought to substitute our view of the appropriate end sentence.

20. We also take into account that Mr Moli has for the last three months or so been incarcerated on the incorrect basis and understanding that he must serve a sentence of three years and two months imprisonment and was therefore not eligible for parole until he had served 19 months, as opposed to 13 and a half months. Justice Saksak did not intend that. The sentence imposed was as we have noted substantially more than it ought to have been and the unfair mental effect on Mr Moli reinforces our view that we should interfere with the sentence.

21. The appeal is allowed accordingly. In accordance with section 207 (1)(a)(ii) of the Criminal Procedure Code we reduce the sentence imposed on Mr Moli in the Supreme Court to one of two years and three months imprisonment.

DATED at Port-Vila this 14th day of November 2014

BY THE COURT

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

Vincent LUNABEK
Chief Justice