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

Criminal Appeal
Case No. 16/3483 CoA/CIVA

BETWEEN: **PIERRE NOAL**
GLEN KOVOI
MICHAEL SAMUEL
BEN KORO

Appellants

AND: **PUBLIC PROSECUTOR**

Respondent

Coram: ***Hon. Chief Justice Vincent Lunabek***
Hon. Justice John von Doussa
Hon. Justice John Mansfield
Hon. Justice Oliver Saksak
Hon. Justice Daniel Fatiaki
Hon. Justice Dudley Aru
Hon Justice Mary Sey
Hon. Justice David Chetwynd

Counsel: *Mr. L. Malantugun for the Appellants*
Mrs. L. Matariki and Mr. D. Boe for the Respondent

Date of Hearing: *9th November 2016*

Date of Judgment: *18th November 2016*

JUDGMENT

Background

1. Following a comment posted on Facebook by the Complainant about bus and taxi drivers, on 13 March 2016, the Appellants who were amongst a group of bus and taxi drivers assembled at the Star wharf agreed to go after the Complainant to get her to

apologize. They drove to the Complainant's work place, went inside, and demanded that she follow them. She hesitated and one grabbed her and took her outside to their vehicle and they drove her to the Star wharf where the rest of the bus and taxi drivers were waiting. Upon arrival the Complainant was asked to apologize for her Facebook comments. Whilst in the process of doing so she was struck on the face by someone in the crowd, then driven back to her workplace by a taxi driver.

2. Following the incident, the Complainant filed a complaint with the Police and the Appellants were arrested and charged under the Penal Code [CAP 135] with offences of unlawful assembly, kidnapping, aiding and abetting kidnapping, intentional assault and threats to kill. The latter two charges were later dropped. After the trial began, the Appellants entered guilty pleas to the remaining charges and were sentenced as follows:-

Pierre Noal

- 2 years imprisonment on the charge of kidnapping and 9 months imprisonment on the charge of unlawful assembly;

Glen Kovoi

- 1 year and 9 months imprisonment on the charge of kidnapping and 9 months imprisonment on the charge of unlawful assembly;

Ben Koro

- 1 year and 9 months imprisonment on the charge of kidnapping and 9 months imprisonment on the charge of unlawful assembly; and

Michael Samuel

- 1 year and 9 months imprisonment on the charge of aiding and abetting kidnapping.

3. All sentences were ordered to be served concurrently.

Appeal and Grounds

4. This is an appeal against sentence only and the Appellants say that:-

(1) the primary Judge failed to follow precedent in his sentencing;

(2) the sentence did not reflect the seriousness of the offence (or more accurately the relative lack of seriousness of the offence);

(3) too much weight was placed on aggravating factors personal to the Appellants;

(4) the primary Judge failed to give adequate consideration to sections 57 and 58 of the Penal Code [CAP 135] in relation to suspension of sentences; and

(5) the sentences imposed were manifestly excessive.

5. The principle in relation to appeals against sentence stated by this Court in **Aru v. Public Prosecutor** [1986] VUCA 6 is that:-

> *"It is a well-established and recognised principle that the sentencing power is a discretionary one and so courts of appeal are loathe to interfere with sentences unless it can be demonstrated quite clearly that the trial judge erred. An Appellant must demonstrate clearly that the trial judge either erred in law or in fact in that he gave too much weight to adverse factors against the Appellant and or gave insufficient weight to mitigating factors in the Appellant's favour or that the sentence is so manifestly excessive on the face of it that clearly error in discretion is demonstrated thereby. It is not sufficient basis for disturbing the sentence merely because members of the Appeal Court might themselves have imposed a different sentence."*
>
> *(emphasis added)*

6. The Appellants therefore have a heavy onus to demonstrate that the primary Judge erred in the exercise of his discretion when issuing the sentences now under appeal. It is fair to say that the Appellants' focus was in large measure on whether their sentences should have been suspended.

Ground 1

7. In their first ground of appeal, the Appellants say that the primary Judge failed to follow existing precedent. It was submitted that **Kilman v Public Prosecutor** [1997]

VUCA 9 and **Public Prosecutor v Moses** [2011] VUSC 246 were not followed. By comparison, they submit that these two cases were more serious yet the defendants received suspended sentences. The conduct in ***Kilman*** was said to involve planning, show of guns, the defendants' faces were painted black and they were in military uniforms as they were law enforcement officers and they pleaded not guilty to the charges and there was a trial.

8. In ***Moses***, the Appellants submitted that there was trespass, the Complainant was assaulted before being dragged into a truck and taken to a place where he suffered further serious assaults.

9. This submission in our view is misconceived as it fails to acknowledge the fact that the primary Judge considered and discussed a number of authorities in his sentencing remarks (**R v. Spencer & Thomas** (1983) 5 CR App R, 5; **Public Prosecutor v. George** [2016] VUSC 67; **Public Prosecutor v. Urinmal** [2013] VUSC 95 and **Public Prosecutor v. Amkori** [2011] VUSC 246) and including ***Kilman*** and ***Moses*** before reaching his end sentence. At paragraph 14 the primary Judge stated that:-

> *"All of these cases show the different circumstances in which kidnapping occurs. But there is also a need to refer to them as the Court must endeavour to achieve consistency in sentencing despite the different circumstances of different cases. What can be said is that when looked at overall, this case could not be regarded as being as serious as those cases and in my assessment a lower starting point is therefore warranted.*

10. Furthermore at paragraph 21 and 22, the primary Judge said:-

> *"21. Mr Bal on your behalf focussed on the decision in the PP v. Kilman[5] and I think he has done that for two reasons. Firstly, the fact that that case involved a plan to kidnap the President of the Republic and secondly, the fact that the offenders in that case received a suspended sentence of two years imprisonment. In fairness to Mr Bal he also recognises and refers to the subsequent cases of George and Moses which I have already referred to.*

22. On your behalf Mr Bal emphasizes the fact that in this case there were no weapons involved and in addition the relatively brief period during which Ms Lengkon was detained. Both of those points are well made and distinguish this case from others that I have referred to."

11. We are not persuaded that the primary Judge fell into error on this ground. It is important to be conscious of consistency of sentencing. The primary Judge was clearly aware of that. He was also aware that no two cases will be identical on their facts. There are elements of ***Kilman*** in particular which make its circumstances quite different ones, and the reference to some facts relevant to the sentencing discretion there did not require that the sentences imposed in this matter be suspended.

Ground 2

12. As to the second ground of appeal, the Appellants submit that the sentence imposed did not reflect the seriousness of the offence. Put in another way the Appellants say that the offending did not warrant a sentence of an imprisonment term.

13. The offence of unlawful assembly under section 69 of the Penal Code is punishable by a maximum penalty of 3 years imprisonment. Kidnapping as provided under section 105 is punishable by a maximum penalty of 10 years imprisonment. As a matter of sentencing practice, the primary Judge considered relevant authorities to ensure consistency in sentencing and after taking into account aggravating factors arrived at a starting point for each Appellant. He then considered mitigating factors. Despite the Appellants guilty pleas, we agree with the primary Judge that the Appellants were not entitled to the full one third discount as their guilty pleas were entered after the trial had began. The one third discount is only available when a guilty plea is entered at the first available opportunity. (**Public Prosecutor v Gideon** [2002] VUCA 7 and **Public Prosecutor v Scott** [2002] VUCA 29).

14. Further allowances were then made for first time offending and for the expression of remorse before arriving at the end sentence.

15. It was further submitted by the Appellants that by stating maximum penalties for the offences of unlawful assembly and kidnapping, Parliament has given the Courts room to exercise discretion when sentencing to impose sentences which fit the nature, gravity and circumstances of the crime. The primary Judge in our view exercised the discretion accordingly to fit the nature, gravity and circumstances of the Appellants offending. It is necessary to recognize that the offences involved forcing a young woman from her place of work and taking her to a place where a number of men were present and apparently very angry with her. It must have been a very scary and threatening and potentially dangerous environment. She did not know what was to happen to her. In fact she was physically assaulted there (although not by the present appellants). On the appeal, counsel for the Appellants did not argue that her conduct was more than a public and general expression critical of the cleanliness of certain buses or taxis. There was no attempt to justify the conduct, and there could not have been.

Grounds 3 and 4

16. We consider these two grounds together as the factors complained of are part and parcel of the primary Judge's assessment of whether or not the sentences should be suspended.

17. Under ground 3, the Appellants submit that the primary Judge placed too much weight on aggravating factors personal to the appellants and highlighted the following factors being: *"Arrogant kidnapping, potential dangers to the victim, offences were committed in central Port Vila, offences committed in broad daylight , it did not involve immature youths but mature people of 30 and 50 year olds, action was deliberate, appellants felt that they were above the law, the appellants thought they could take the law into their own hands and public concerns regarding offending against women as increasing".*

18. As to the fourth ground, the Appellants submit that the primary Judge failed to give consideration to sections 57 and 58 of the Penal code in relation to the suspension of sentences.

19. The Appellants argued that they admitted to being arrogant but not really serious or grave and that they did not intend to kill or injure the complainant. Furthermore, the Appellants say that the offences were committed in broad daylight in Vila so it was not really serious and that what they did was merely to remind the complainant and to warn her about future comments on Facebook about taxi and bus drivers.

20. The submission in our view reaffirms the arrogance and total disregard for the rule of law displayed by the Appellants and promotes male chauvinism which cannot be tolerated in this modern day Republic. Furthermore, this submission fails to recognize and appreciate the freedoms of the individual enshrined in the Constitution including the right to freedom of expression under Article 5 (1) g) and the rights of women under the Convention on the Elimination of all forms of Discrimination against Women (CEDAW) which has been ratified by Parliament.

21. Section 57 (1) (a) of the Penal Code sets out three factors which require consideration if a judge is considering suspending a sentence – the circumstances of the case, the nature of the crime and the character of the offender. The primary judge at paragraph 28 stated:-

> *"28. Having arrived at those sentences I then need to consider whether pursuant to sections 57 and 58 the sentences should be suspended in whole or in part. I take into account the matters set out in section 57 (1) (a)(1) to (3)."*

22. In his assessment under section 57 (1) (a) the primary Judge acknowledged that the Appellants were the sole breadwinners of their families with no previous convictions as opposed to the factors complained of in ground 3. Following that assessment the primary Judge concluded that the sentences will not be suspended. In our view, the Judge properly took account of the relevant factors in deciding whether or not to suspend the sentences. There were, as he noted, factors pointing in each way. We

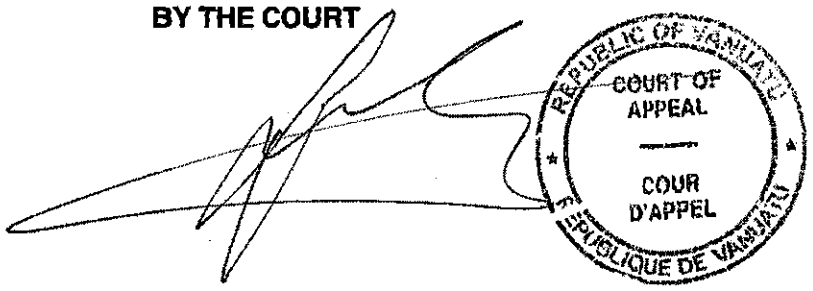
do not consider that the exercise of the discretion not to suspend the sentences is shown to be erroneous, and we would not overturn it.

23. In relation to ground 5, complaining of the head sentence, after having made the above observations, we are of the view that the sentences are not manifestly excessive. To conclude, the sentences reflect the seriousness of the offending and there was nothing improper about the primary Judge's exercise of discretion.

24. The appeal is therefore dismissed.

DATED at Port Vila this 18th day of November, 2016

BY THE COURT



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Hon. Vincent Lunabek

Chief Justice