

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

**Criminal Appeal
Case No. 20/940 COA/CRM**

BETWEEN: REMO LAVA, SAM NALAU and JOHN ROEL LAVA
Appellants

AND: PUBLIC PROSECUTOR
Respondent

Coram: *Hon. Chief Justice Vincent Lunabek
Hon. Justice John von Doussa
Hon. Justice Raynor Asher
Hon. Justice Oliver A Saksak
Hon. Justice Dudley Aru
Hon. Justice Viran M Trief*

Counsel: *Mrs Pauline Malites for the Appellants
Ms Betina Ngwele for Respondent*

Date of Hearing: *11th May 2020*

Date of Judgment: *15th May 2020*

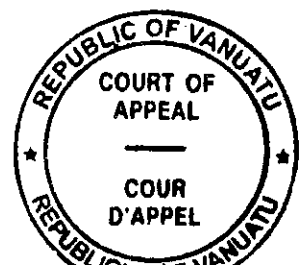
JUDGMENT

Introduction

1. On 21st April 2020 a judge in the Supreme Court sentenced Sam Nalau for Intentional assault causing death to 3 years and 2 months imprisonment, and his co-offenders Remo Lava for aiding and abetting to 2 years and 6 months imprisonment, and John Roel Lava to 2 years and 3 months imprisonment.
2. All three defendants appeal against their respective sentences on two grounds. The first is that the sentencing judge placed insufficient weight on their personal circumstances, including their unblemished records before and after their offending, and the custom reconciliation ceremony they performed. And second, that all three defendants should have had their sentences suspended due to the delay taken in prosecuting them.

The Facts

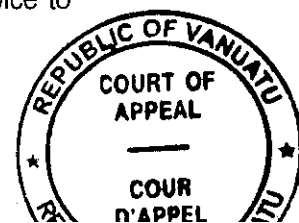
3. The deceased Mr Kelo Mahit was a 46 year old security guard at Blue Water wildlife and conservation area, where hunting, fishing and diving are prohibited.



4. On Good Friday 6th April 2012, Remo Lava and his 14 year old nephew were seen walking on the reef in the conservation area with a fishing net by the deceased's son Paul. Paul alerted his father who then approached Remo and his nephew with a loaded rifle. Paul also accompanied his father holding a bush knife. A conversation followed to ascertain where Remo and his nephew had come from and whether they had seen the prohibition signs put in place prohibiting fishing. Remo Lava stated they had not seen the signs and suggested they be shown them.
5. Mr Mahit and Paul then led Remo Lava to the prohibition sign. Remo's nephew did not accompany them at this point. As they approached the sign Remo asked Paul whether he was the one shooting at them every time they trespassed to the area to which Paul replied: "*We never shoot you with a gun.*" Remo then went up close to Paul and told him to stop lying. By this time Sam Nalau and John Lava had come on to the scene and joined them.
6. Remo Lava then grabbed Mr Mahit and tried to remove his rifle. He did not succeed so John Lava joined in and together they tried to take Mr Mahit's gun off him. The struggle continued and Sam Nalau then joined in. Their joint efforts to remove the gun failed so Sam Nalau punched Mr Mahit twice in the stomach. These caused Mr Mahit to release his grip on the gun. John Lava then took possession of it. Remo Lava then attacked Paul and chased him away from the scene.
7. Paul looked back from some distance away and saw Yahipe Napuaty come up and rush at his father yelling: "Hold him tight and I will hit him". Sam Nalau then held Mr Mahit while Yahipe Napuaty punched Mr Mahit in the ribs and in the neck. Mr Mahit fell to his knees and died instantly.
8. Paul went to seek help and returning to the scene with his brother, they saw their father alone on the breach, dead. They called the Police and ambulance who arrived later.
9. Investigations were carried out by the Police who charged Sam Nalau and Yahipe Napuaty with intentional assault causing death under section 107 (d) of the Penal Code Act [Cap 135] (the Act), and charged Remo Lava and John Roel Lava with aiding and abetting under section 30 of the Act.
10. An attempt was made to hold a reconciliation ceremony. Gifts of VT 300.000, 1 cow, root crops and calico were assembled to be given to Mr Mahit's family. However at the last minute Mr Mahit's family cancelled it. Instead the gifts were given to the Chiefs in the area where the event happened.

The Sentence

11. The sentencing judge took into consideration first the two aggravating factors of the offending which were, (a) a group of 4 adults carrying out the assault on Mr Mahit and his young son of 17 years old, and (b) the unprovoked attack. Next the judge considered the mitigating factors by acknowledging that Sam Nalau had tried twice to

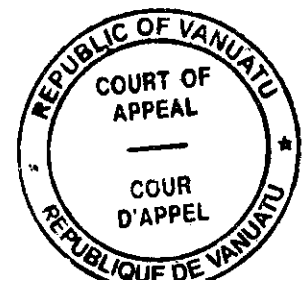


revive Mr Mahit indicating his regret and remorse. The Judge found that the appellants were the aggressors, not Mr Mahit, and sentenced them on that basis.

12. The Judge considered the starting sentence by adopting the sentencing principles set out in Public Prosecutor v Ierogen [2002] VUCA 34 and sentenced Sam Nalau and Yahipe Napuaty to a start sentence of 5 years imprisonment and Remo Lava and John Lava to a starting sentence of 4 years imprisonment.
13. In mitigation the judge considered the personal factors of each of the appellants. These included their ages, marital status, employment status and character and antecedents. The judge considered the young age of John Lava. For each appellant the judge made discounts and deductions of 4 months for Sam Nalau, Yahipe Napuaty and Remo Lava and for John Lava, a discount of 8 months.
14. The appellants had been arrested on the day of the offences but the preliminary inquiry did not take place until 6 October 2017. For the delay the judge discounted the sentence by 4 months for each appellant. And for assistance the appellants had given the police enabling the identification and conviction of Yahipe Napuaty the judge discounted 6 months for each appellant.
15. The appellants initially pleaded not guilty but changed their pleas on the second morning of the fourth scheduled trial. For their belated pleas the judge discounted 10% for each appellant.
16. For other factors, the judge discounted another 3 months in favour of Sam Nalau for his attempts to revive Mr Mahit. Finally the judge took into account the pre custodial period of 6 weeks by Remo Lava, Sam Nalau and John Lava.
17. The Judge therefore arrived at the end sentences of 3 years and 2 months imprisonment for Sam Nalau, 2 years and 6 months imprisonment for Remo Lava and 2 years and 3 months imprisonment for John Roel Lava.
18. Finally the judge rejected the appellant's submissions for suspended sentences.

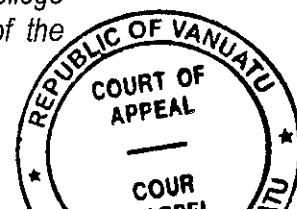
Submissions

19. The appellants submitted the judge had erred in not placing sufficient weight to their personal factors and by not suspending their sentences due to the delay and their good behaviour during the delay period.
20. The respondent argued there was no error made by the sentencing judge in the exercise of his discretion. Ms Ngwele submitted the allowances made for mitigating factors were more than generous and reflected sufficiently the extent of the involvement of each appellant.



Discussion

21. The appellants do not challenge their sentence starting points of 4 and 5 years imprisonment.
22. These sentence starting points were within the range set by the Court in Public Prosecutor v Ierogen [2002] VUCA 34.
23. In relation to Ground 1 of the appeal Mrs Malites argued and submitted the judge should have given more weight to the personal factors of each appellant. These factors included the intended reconciliation and the crime free life each appellant had lived before and after the offending. Counsel argued insufficient weight was given to the reconciliation ceremony. Counsel submitted this ceremony is recognised by section 38 of the Act.
24. The judge turned his mind to and took account of the appellants' personal factors. These are recorded in the Sentencing Decision at paragraphs 18-27.
25. Section 38 of the Act provides " ... a Court may, in criminal proceedings promote reconciliation and encourage and facilitate settlement according to custom or otherwise, for an offence, on terms of payment of compensation or other terms approved by the Court". (emphasis added).
26. Any promotion of customary reconciliation instigated by the Court for the purposes of settlement for a criminal offence should focus primarily on the situation of the victim.
27. Here the gifts went to the chiefs of the area in which the offence occurred and not to the victim and/or his surviving relatives.
28. Mrs Malites made reference to cases such as Andy, Hinge [2008] VUCA 30, Korthy [2019] VUCA and Malkorkor [2015] VUSC 147 where the courts gave greater discounts of 15%, 25%, and 28.2% for personal circumstances. These were sexual and misappropriation cases with different facts and circumstances. Niala's case [2004] VUCA 25 was a similar case to this case where the defendant was charged under section 107 (d) and was given a 22% discount for reconciliation. The facts and circumstances of that case were different and the relatives of the deceased were present at the reconciliation and accepted the gifts as settlement.
29. We are satisfied the judge made no error of law in discounting only 4 months for personal circumstances including the attempted reconciliation in relation to Sam Nalau and Remo Lava.
30. For John Lava, the judge considered his personal factors in paragraphs 20 and 27. In [20] the judge said: "*John Lava is living in a defacto relationship with 2 young children. The PSR records his currently being 34 years of age- however Mrs Malites has provided evidence in the form of what she described as a passport to the effect that his date of birth is 4th June 1993. This document is in fact a Vanuatu Maritime College Safety Certificate qualification. If that document is correct, then at the time of the*



offending, John Lava was 18 years 9 months old. John Lava is a farmer by occupation. He is supported by his chief who had filed statements as to his responsible character."

31. The judge sentenced John Lava on the basis that he was born on 4 June 1993, and this appeal has preceded on the same basis. At [27] the judge said:

"John Lava was still not 19 years old at the time, and considerably younger than the other participants. His youth and immaturity require a greater discount. Accordingly his start sentence is reduced by 8 months for his personal circumstances"

32. The total discount for youth was therefore 4 months. Mrs Malites submitted the appropriate deduction made in relation to John Lava for his personal factors should have been 10 months and that his end sentence should have been much lower than 2 years and 3 months imposed by the judge.

33. From the facts as set out by the judge in the sentencing decision at [6] John Lava only assisted Remo Lava by attempting to remove the gun from Mr Mahit's hands. Only after Sam Nalau had punched the deceased in his stomach twice causing Mr Mahit to lose his grip on the gun, that John took the gun. That is all John did but he was sentenced with the same starting sentence of 4 years imprisonment as Remo Lava.

34. In our view that sentence was disproportionate to his level of participation in the offending and to his personal circumstances given his youth. We are satisfied an error of law has been demonstrated by the sentencing judge but only in relation to John Lava and not to Sam Nalau and Remo Lava. We allow the appeal on this limited ground and only in respect of appellant John Roel Lava and reduce his end sentence by a further 5 months.

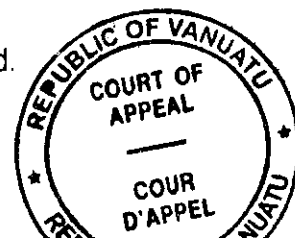
35. Finally in relation to Ground 2: Suspension of sentence. The sentencing judge refused to suspend the sentences saying at [39]:

"Suspending sentence cannot possibly be countenanced- there are ample authorities to support that statement... what is required is a deterrent sentence, not only for these defendants, but for the entire community to realise that conduct of this type which results in needless loss of a valuable life will, in almost every instance, be visited by terms of actual imprisonment. Anything less than that is likely to be inadequate to reflect society's abhorrence for this type of offending"

36. In this case the violent attack on Mr Mahit led to his death. We consider the judge was correct to refuse to suspend the sentences for the reasons he gave. That remains so in the case of John Roel Lava even though his sentence is now being reduced to one of 1 year and 10 months.

The Result

37. The appeal against sentence by appellant Remo Lava and Sam Nalau is dismissed.



38. The appeal is allowed in relation to the sentence of John Roel Lava. We quash his sentence of 2 years 3 months and resentence him to 1 year and 10 months imprisonment without suspension. This sentence is backdated to 21st April 2020.

DATED at Port Vila this 15th day of May 2020

BY THE COURT



Hon. Vincent Lunabek
Chief Justice

