

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

**Criminal Appeal
Case No. 22/1653 CoA/CRMA**

BETWEEN: SEKDAH SOMON
Appellant

AND: PUBLIC PROSECUTOR
Respondent

Coram: *Hon. Justice John Mansfield
Hon. Justice Mark O'Regan
Hon. Justice Oliver Saksak
Hon. Justice Dudley Aru
Hon. Justice Viran M Trief
Hon. Justice Edwin Goldsbrough*

Counsel: *Mrs J. T. Aru and L. Bakokoto for the Appellant
Mr J. Naigulevu for the Respondent*

Date of Hearing: *15 August 2022*

Date of Judgment: *19 August 2022*

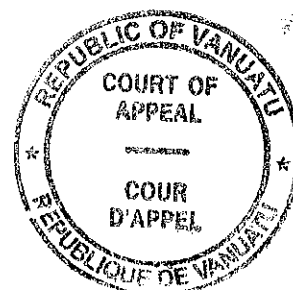
JUDGMENT OF THE COURT

Introduction

1. This is an appeal against sentence. The appellant Sekdah Somon was sentenced on 22 June 2022 to 14 years imprisonment and VT 60,000 fine.

The Decision

2. The appellant was charged in an amended Information filed on 27 September 2020 containing ten (10) counts relating to offences perpetrated against 102 victims of Bangladeshi origin. Following a trial, the appellant was convicted on 29 October 2021 on the following charges namely:
 - 2 counts of trafficking in person contrary to s 102(b) of the Penal Code [CAP 135] (the Act);
 - 2 counts of slavery contrary to s102(a) of the Act;

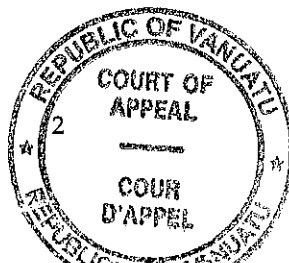


- 2 counts of money laundering contrary to s11 (3) a) of the Proceeds of Crime Act [CAP284];
 - 2 counts of threats to kill contrary to s115 of the Penal Code;
 - 2 counts of intentional assault contrary to s107(b) of the Penal Code; and
 - 1 count of employing non-citizens without work permits contrary to s6(1) of the Labour Work Permits Act [CAP 187].
3. On 22 June 2022 the appellant was sentenced to a total of 14 years imprisonment and VT 60,000 fine. On the charge of trafficking and slavery a starting point of 11 years was uplifted to 14 years imprisonment as the end sentence. On the charge of money laundering a starting point of 9 years was uplifted to 11 years imprisonment as the end sentence. On the charge of intentional assault a starting point of 6 months was uplifted to 18 months imprisonment as the end sentence. On the charge of threats to kill a starting point of 4 years was reduced to 3 years imprisonment as the end sentence and on the charge of employing non-citizens without work permits a starting point of 3 months was uplifted to 3 months imprisonment and VT60,000 fine as the end sentence.
4. The primary judge set out his sentencing approach as follows:

"60. The sentencing approach is to take a starting point that reflects the culpability of your respective offending in light of the maximum penalties available for the offending. In this present case, trafficking and slavery are the more serious offences, having the higher maximum penalty. The appropriate approach here is to identify an overall starting point to cover the totality of the offending, because of the interconnectedness of the trafficking and slavery offending. The two sides of the same coin. The trafficking offences capture the means by which you brought the victim to Vanuatu for the purpose of exploiting them, the slavery offence capture the means by which you exploited them once here in Vanuatu.

61. In practice, whether I take trafficking as the lead offence and uplift for slavery, or whether I assess an overall starting point for both the trafficking and the slavery offences together as lead offences, it will make little or no difference to the final outcome. What is appropriate is that the starting point should reflect both sets of offending as well. This type of case warrants custodial sentence. I bear in mind that the total period of imprisonment must not be wholly out of proportion to the gravity of the overall offending and must be proportionate.

62. The Court must then consider whether there is any personal aggravating or mitigating factors for which uplifts or discounts should be made. Finally, I will consider whether I should suspend the term of imprisonment if I sentence each of you to a term of imprisonment."



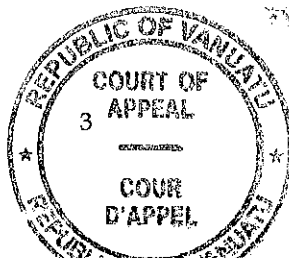
5. Taking people trafficking and slavery as the lead offences, the primary judge when considering the starting point of sentence also took into account the appellant's high culpability before setting a global starting point of 11 years imprisonment.
6. The primary judge then considered aggravating and mitigating factors personal to the appellant. The aggravating factors he took into account were recorded in paragraph 131.1(a) of the Sentences as follows:

"(a) Somon Sekdah: prior "bad" character; evidence of prior planning; offence committed by a group in Vanuatu as well as abroad; offence was motivated by financial gain; vulnerable victims were targeted; weapons were used to frighten and injure victims; deliberate use of gratuitous violence and degradation; curtailment of personal rights and property; victims were assaulted in the presence of others; abuse of authority; victims were sometimes exposed to serious injury and hazardous working conditions; there were multiple victims and incidents; no contrition. His prior bad character relates to the evidence of police investigation in Mauritius and some evidence that he had trafficked Bangladeshis whilst in South Africa."

7. The only mitigating factor personal to the appellant was the fact that he was a first time offender. Taking this factor into account the starting point of 11 years was uplifted by 3 years to 14 years imprisonment.

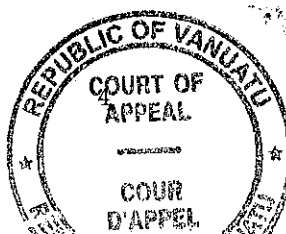
The Appeal

8. The appeal is against the severity of the sentence. A Notice of Appeal was initially filed on 6 July 2022 with two grounds which were further refined in an amended Memorandum of Appeal filed on 11 August 2022. This was filed without leave. We consider that leave should have been sought and given that there was no objection to leave being granted, we granted the necessary leave. The order sought was a reduction of the end sentence.
9. The appellant advanced his appeal on two main grounds stating that the primary judge:
 - (a) imposed an excessive uplift by taking into account irrelevant matters resulting in a manifestly excessive end sentence; and
 - (b) failed to give proper weight to the mitigating factor.



Discussion

10. There were two limbs to the appellant's submissions in relation to the first ground relating to the 3 year uplift. The first was that the primary judge took into account aggravating factors that are factors aggravating to the offending (rather than relating to the appellant personally) and were already considered by the judge in coming to a starting point, resulting in double counting. The second was that the primary judge took into account irrelevant matters. The appellant argued that the primary judge was wrong to find there was evidence of 'bad' character in relation to the appellant and this should not have been considered as an aggravating factor. He also argued lack of contrition should not have been considered as an aggravating factor and some factors characterised as aggravating factors formed the elements of other charges for which the appellant was convicted and sentenced resulting in double counting.
11. In relation to the second ground it was submitted that the primary judge did not give sufficient weight to the fact that the appellant was a first time offender and was entitled to some discount for this.
12. We accept that lack of contrition should not have been treated as an aggravating factor. Lack of contrition or remorse means an offender cannot claim any credit for those factors, but it is not an aggravating factor. The evidence relating to 'bad' character (conduct by the appellant in Mauritius and South Africa that did not lead to convictions in either country) was not a factor that should have been given much significance. We also accept that the other factors considered above as aggravating factors are in relation to the offending and not personal aggravating factors in relation to the offender.
13. In light of those conclusions, we turn to consider whether the end sentence was manifestly excessive. In our view, a starting point of 14 years imprisonment would not have been excessive, given the aggravating factors relating to the overall offending. It was open to the primary judge to come to the view that while 11 years may have been an appropriate starting point for the slavery and people trafficking offences if those were the only charges the appellant faced, it was appropriate to increase that to 14 years given the appellant's culpability included the money laundering counts, the assaults and threats to kill. The sentence for slavery and people trafficking was to be the lead sentence for all the offending. As the lead sentence, it would in practical terms define the actual term of imprisonment the appellant would face.



14. Many of the factors set out above as aggravating factors are relevant to that exercise. We adopt that approach which leads us to conclude that a starting point of 14 years imprisonment was appropriate for the appellant's offending. This leaves personal aggravating and mitigating factors. The only aggravating factor is the 'bad' conduct which is relatively minor as it did not lead to convictions in either Mauritius or South Africa. The only mitigating factor is no prior convictions. These essentially balance each other out so there is no need for an uplift or a discount.
15. Having reconsidered the sentence imposed by the primary judge, we conclude it was not manifestly excessive.

Result

16. Although we accept some errors in the expression of the primary judge's sentence, we come to the same conclusion as he did as to the length of the sentence. The appeal is therefore dismissed.

Dated at Port Vila this 19th day of August 2022

BY THE COURT


Hon. Justice Oliver A. SAKSAK

