

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

**Criminal Appeal
Case No. 23/601 COA/CRMA**

**IN THE MATTER OF: AN APPEAL FROM THE SUPREME COURT OF
THE REPUBLIC OF VANUATU**

Between: JESSY BAKEO
Appellant

AND: PUBLIC PROSECUTOR
Respondent

Date of Hearing: 8 May 2023

Coram: *Hon Chief Justice Lunabek
Hon Justice J Mansfield
Hon Justice R Young
Hon Justice O Saksak
Hon Justice D Aru
Hon Justice E Goldsbrough*

Counsel: *KB Karu for the Appellant
K Massing for the Respondent*

Date of Decision: 19 May 2023

REASONS OF THE COURT

1. Mr Bakeo was convicted after trial of attempted intentional homicide relating to a young girl called Heleno (section 106(1)(a) Penal Code Act) and three counts of threatening to kill (section 115 Penal Code Act). He had earlier pleaded guilty to a charge of intentional assault. He was sentenced to total of nine years, eight months and 20 days imprisonment with respect to the attempted intentional homicide, five years imprisonment with respect to the three threatening to kill charges, and one year six months with respect to the assault. All sentences were concurrent. Those sentences were cumulative on a prison sentence that Mr Bakeo was then serving.
2. Mr Bakeo appeals his conviction and sentence on the charge of attempted intentional homicide and his conviction on the charge that he threatened to kill Heleno.
3. The conviction for attempted intentional homicide arises from the Judges' factual findings that Mr Bakeo had held the victim's hair tightly in one hand, said he wanted to cut Heleno with a knife and



had put a knife to her neck with his other hand. The Judge concluded that this action together with threats made by Mr Bakeo, established an intention to kill the victim and an attempt to do so. The conviction for the threat to kill arose from the threat to cut Heleno.

Appeal grounds

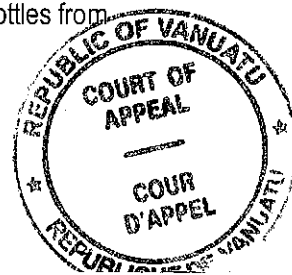
4. Mr Bakeo says that the facts found by the Judge only established a threat rather than an attempt to intentionally kill. There was no evidence of any attempt to cut the complainant with the knife, nor any injury to her. Counsel stressed that the appellant could have cut the complainant with a knife, but he ran off. Mr Bakeo submits that the inference taken by the Court from the facts of an intention to kill, was not available to the Judge. The inference available from the facts, was that this only a threat to kill and so the Judges conclusion was an error.
5. The second ground of challenge to the conviction arises from the elements of attempted intentional homicide.
6. At paragraph 3(b) of the verdict, when considering the elements of the charge required to be proved by the prosecution, the Judge said the prosecution needed to prove:

"The act would have resulted in the death of Heleno except that someone prevented Mr Bakeo from killing the complainant"

7. Counsel for the appellant submits that the fact that the act could have resulted in the complainant's death is not an element of the offending. The Judge therefore erred in taking this into account.
8. The third ground of appeal was that the act of holding a knife to the neck of the complainant could be considered as merely preparatory, rather than bearing a close relationship to the completion of the offence and therefore insufficient to establish an attempt. The appellant submitted that there was no evidence of any cutting of the neck and therefore the actions of the appellant were insufficient to constitute an attempt. Counsel for Mr Bakeo said that the actions of the appellant could be many things other than an intention to kill for example, to cause fear or an act of assault. The prosecution needed to establish that the actions of the appellant were to further his intention to kill, and they had failed to do so.

Background facts

9. Mr Aru one of the complainants in the threatening to kill conviction and Heleno's father, runs a kava bar. He uses empty bottles to fill customers' kava juice to take away. Mr Bakeo sells empty bottles. On 24 February, he went to Mr Aru's kava bar to try and sell empty bottles to Mr Aru, however Mr Aru had already bought empty bottles from another supplier. After he arrived, he went into Mr Aru's kitchen hoping to get some food but there was no food there.
10. It is suggested that Mr Bakeo was angry and upset that Mr Aru would not buy any empty bottles from him and upset that there was no food for him to eat.



11. Mr Bakeo had a bush knife. There was evidence before the Judge that when Mr Bakeo came into the kitchen, he said he would cut someone with a knife. He then cut a chair with his knife, a long bush knife, and left the kitchen. When he had arrived at the kava bar and saw the children, one of the witnesses said that Mr Bakeo told the children *"I will cut one of you with the knife"*. Some of the older children ran away.
12. Mr Bakeo then went over to Heleno who was a young child approximately three years of age. Heleno's evidence, accepted by the Judge, was that Mr Bakeo grabbed her hair with one hand and after saying to her that he would cut her neck with a knife, and that he would cut her dad with a knife, he put the knife against her neck. At that stage some of the other people present cried out to Mr Bakeo and ran toward him. Mr Bakeo let Heleno go and ran out of the yard and the kava bar.
13. After that incident, there was a series of confrontations with Mr Bakeo, a police officer and Mr Aru which gave rise to the other criminal charges. They have no direct relevance to the appeal against conviction.
14. As a result of the incident with the bush knife, Mr Bakeo was charged with attempted intentional homicide and threatening to kill Heleno.

The Judges Conclusions

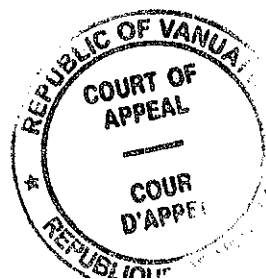
15. The Judge accepted the evidence of Heleno and accepted the evidence of the other men who were present at the kava bar when these events occurred. She rejected the evidence of Mr Bakeo, who gave evidence denying that he had put his knife to Heleno's neck. In particular, the Judge found:

"107. Mr Bakeo denied putting his knife to Heleno's neck, but this flew in the face of the eyewitness accounts given by the prosecution witnesses. Further, Heleno is of a very tender age to be giving evidence in court. However, she did come to court with her parents support and gave her harrowing evidence, I consider the inherent likelihood of her account was that what she and the other witnesses said happened, did happen and that they wanted the court to be told so that Mr Bakeo could be held to account.

108. I find it proved Mr Bakeo holding Heleno's hair tightly in one hand and putting his knife to her neck using his other hand, was an attempt intended to cause Heleno's death. Mr Bakeo had been saying since 21 February 2022, that he would cut someone with a knife. Mr Garae gave evidence that he heard Mr Bakeo say to the children that he would cut one of them with the knife. I find therefore that Mr Bakeo's actions toward Heleno, went beyond just thinking or talking about knifing someone, he acted with a premeditated design to kill Heleno".

16. The Judge therefore concluded that charge one, attempted intentional homicide, had been established. As to charge number two, which was an allegation that Mr Bakeo threatened to kill Heleno, the Judge said that Heleno had given evidence that she knows Mr Bakeo and then he said he would cut her neck. The judge concluded:

"113. I find it proved that Mr Bakeo directly, caused Heleno to receive an oral threat to kill her



and Mr Bakeo intended Heleno to receive the threat. As Mr Bakeo was holding a knife to Heleno's neck, I find proof that Mr Bakeo knew the content of a threat. Charge two has been established beyond reasonable doubt"

Discussion

17. Section 28 of the Penal Code describes the elements of an attempt in the criminal law of Vanuatu. As relevant, it provides section 28(1):

"An attempt to commit a criminal offence is committed if any act is done or omitted with intent to commit that crime and such an act or omission is a step towards the commission of the crime which is immediately connected with it, or would have been if the facts had been as the offender supposed them to be"

18. We consider therefore, that the elements of attempted intentional homicide to be proved beyond reasonable doubt are as follows:

- a) At the relevant time before the event occurred Mr Bakeo must have had an intention to kill Heleno,
- b) Mr Bakeo then must have undertaken an act, or omitted an act, as a step toward committing that crime.
- c) that act must be sufficiently proximate or immediately connected to the intention to kill.

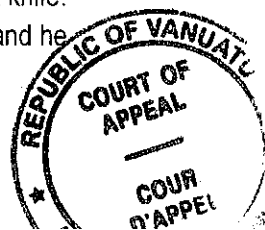
19. The analysis by the Judge in this case, was that there were two legal ingredients to attempted intentional homicide. She said they were:

- "a) *Mr Bakeo attempted an act intended to cause the death of Heleno Silli that went beyond just thinking or talking about it; and*
- b) *the act would have resulted in the death of Heleno except that someone prevented Mr Bakeo from killing the complainant"*

20. To return therefore to the challenges to the verdict by Mr Bakeo and to consider the first ground of appeal.

21. We are satisfied on the basis of the evidence that the Judge considered was cogent that the prosecution had clearly established that Mr Bakeo intended to kill. The evidence is in our view overwhelming. Contrary to the submissions of the appellant, the actions of Mr Bakeo and the inference available from his actions, should not be seen in isolation from what he said that day before he held the knife against Heleno's neck.

22. Prior to the act of holding the knife to Heleno's neck, Mr Bakeo had made threats of violence towards Heleno by saying he would cut her neck and by telling her that he would cut her father with a knife. When he first arrived at the kitchen, he threatened that he would cut someone with a knife, and he

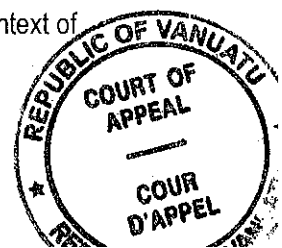


cut a chair with his knife. He said to the children present in the kava bar that he would cut one of them with a knife. These threats occurred immediately prior to holding his knife at Heleno's neck. One of the witnesses said that Mr Bakeo had been making threats about cutting necks since 21 February, a few days earlier.

23. Given the repetitive threats to use a knife on someone's neck and the fact that Mr Bakeo held the knife at Heleno's throat and with his other hand grabbed her by the hair, we are satisfied that the inference available beyond reasonable doubt from those actions and his statements, is an intention to kill. We agree with the Judge's conclusions
24. The fact that Mr Bakeo ran away when others at the kava bar called out to him, does not change our conclusion. The intention to kill was present and the action of holding the knife to Heleno's neck had already occurred before he ran off, having been challenged by others in the room. We do not consider that those events, after his actions and after the intention was developed, is relevant in assessing an intention to kill.
25. The second challenge related to the Supreme Court's assessment of the requirement that the act would have resulted in the death, except for someone preventing Mr Bakeo from killing the complainant.
26. We agree with the appellant, that proposition is not an element of the charge of attempted intentional homicide. It does not have to be established that the act itself would have resulted in the death of Heleno, or that subsequent intervention for the reasons we have given, is relevant. As this court said in *Namri v Public Prosecutor [2018] VUCA 52*, prevention is not an element of a charge where an attempt to commit a crime is alleged.

"Often such attempts will be stopped by others, sometimes the accused will stop. But these events follow the required physical (actus reus) and mental (mens rea) elements of the crime"

27. We do not consider the fact that the Judge wrongly added that additional element to the charge, has any relevance to this case. The fact the Judge considered the question of the likelihood of prevention, is not relevant to an assessment of whether Mr Bakeo committed the crime. As this Court pointed out in *Namri* these events occurred after the crime was alleged to have occurred and so could not have influenced an analysis of culpability. And so, while we accept the Judge was wrong to analyse the elements of the charge in that way, we do not consider it affects the verdict.
28. The third ground of appeal relates to the question of whether what Mr Bakeo did was merely preparatory to completing the completed offence and whether it was sufficiently proximate to the completion of the offence. Mr Bakeo submitted the act of holding a knife to Heleno's neck, was merely preparatory and didn't bare a relationship to the completion of the offence. What was required to constitute an attempt was actual cutting of the neck.
29. We reject that analysis. We consider that the holding of the knife to Heleno's neck, in the context of



what happened immediately before, given Mr Bakeo's threats, illustrates that what he did was well beyond mere preparation to commit the completed offence. It had a very close relationship to completion of the offence and was clearly proximate to the completion of the offence. This was not a case where for example Mr Bakeo, angry and upset with others, went to a shop and brought a knife. Mr Bakeo's actions could hardly be closer to the completion of the act of intentional homicide. Holding a large knife to the neck (an especially vulnerable part of human anatomy) of a young girl, having threatened to cut her neck and having grabbed her by the hair, all illustrate the proximity to the intended act. We reject this ground of appeal

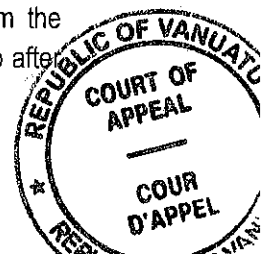
30. We are satisfied therefore, that the Judge was correct in convicting Mr Bakeo on the charge of attempted intentional homicide. The appeal against conviction will therefore be dismissed

Count two

31. The appellant submits that if this court confirms the conviction in count one, we should discharge the appellant on count two. It is based on the same factual allegations as count one.
32. We agree. Count two alleges that Mr Bakeo had said to Heleno, that he would cut her neck as he held the knife to her neck. This evidence was, as we have noted, legitimately used as part of the evidence to establish the attempted intentional homicide. It illustrated Mr Bakeo's state of mind and therefore helped establish what he intended to do. In those circumstances we consider it would be unfair to enter a conviction based in part of the facts that gave rise to the conviction in count one. We therefore allow the appeal against conviction on count two quash the conviction and the sentence imposed.

Appeal against sentence

33. The appellant was sentenced to a total of nine years, eight months and 20 days imprisonment, made up as follows:
- a) attempted intentional homicide - nine years, eight months and 20 days imprisonment,
 - b) counts two, three and four, threats to kill - five years' imprisonment; and
 - c) intentional assault causing temporary injury - one year, eight months imprisonment.
34. The sentences imposed were concurrent although were not to commence until an existing prison sentence had been served.
35. Mr Bakeo says the Judge adopted too high a starting point; wrongly failed to give a deduction or failed to give an adequate deduction for Mr Bakeo's "mental condition" and the fact that he was a MindCare patient; wrongly refused to recognise Mr Bakeo had voluntarily withdrawn from the attempt; and failed to reduce the sentence imposed for an assault by the police on Mr Bakeo after



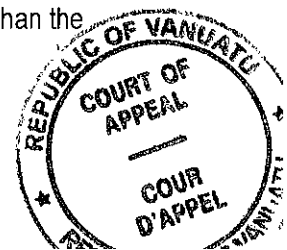
his arrest. Mr Bakeo did not pursue the latter appeal point.

36. To understand the appeal against sentence, it is necessary to briefly recount the facts as the Judge found them to be, in relation to accounts three and four of threatening to kill, and count five, the assault.
37. After Mr Bakeo left at the house where he had attempted to kill Heleno, he went to a local store. He was approached by Heleno's father Mr Aru and a police constable. Mr Bakeo pointed his knife at the police constable and threatened him. He threatened to cut off police constable's head. Mr Bakeo chased the constable around a truck. Mr Aru was using a piece of firewood to try and defend the police constable from Mr Bakeo's attack. Mr Bakeo then turned from the police constable, toward Mr Aru with the knife. He threatened to "knife him to death". Mr Bakeo then chased Mr Aru and cut him on the left forehead and stabbed him in the neck when Mr Aru fell to the ground.
38. Mr Aru suffered temporary injuries from the stab wound on his arm, and a superficial knife wound to his left forearm and a superficial knife wound on his left shoulder. After Mr Bakeo's attack on Mr Aru, the police constable intervened with another piece of firewood, eventually further police officers arrived, and Mr Bakeo was arrested.

Starting point

39. The Judge adopted a starting point of 10 years imprisonment, taking into account the attempted intentional homicide the threat to kill Heleno, the subsequent threats to kill and an assault. The Judge considered there was no factual mitigation but there were aggravating features; a breach of trust given the support the victim's family given Mr Bakeo; the use of a weapon being the bush knife; the age differential between Heleno and Mr Bakeo; the fact that the offending occurred in Heleno's house; the fear to others of the violence and subsequent offending that is the threats to kill and assault.
40. The Judge recognised Mr Bakeo was a MindCare patient and deducted three months imprisonment for personal factors. As to a claim for diminished responsibility, the Judge said:

"11. No deductions are made for diminished responsibility as submitted by Mrs Karu, as s.24 of the Penal Code provides for "whenever criminal responsibility is diminished by law...". However, none of the diminished responsibility submitted on Mr Bakeo's part occurred "by law"
41. The Judge deducted one third from the start sentence of the assault sentence, to reflect Mr Bakeo's earlier guilty plea
42. In support of the appeal Mr Bakeo noted this Court in *Namri v The Public Prosecutor [2018] VUCA 52*, imposed a start sentence of eight years imprisonment for a single charge of the more serious offence of attempted premeditated intentional homicide. In that case Mr Namri had been physically violent to the victim. Counsel submitted Mr Bakeo's actions were significantly less serious than the facts in *Namri* and justified a lower start sentence.



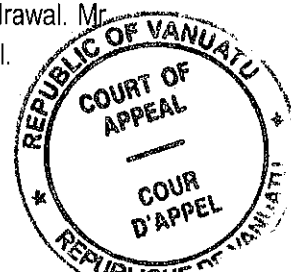
43. In *Namri*, the appellant planned and then attacked his wife with a hammer, hitting her three times on the head. There were significant injuries. This Court noted this was a planned, brutal attack causing serious, but not permanent injuries. Based on that assessment, the Court considered a start sentence of eight years was appropriate.
44. The facts of this case relating to the attempted killing, were not as violent as *Namri*. However, there were additional features of this case that added to the overall seriousness of the events that day, so justified a higher start sentence. The attempt related to a very young girl. She had a large knife held to her throat. The offending occurred in her house where she was entitled to feel and be safe. This would have been a traumatic event for her and her family
45. Given the Judge had decided all sentences would be concurrent, the start sentence had to reflect the total criminality of that day. There were two other very serious threats to kill, made with a large bush knife and the serious assault using the bush knife as a weapon.
46. We accept that if the attempted intentional homicide was considered on its own, a starting point of less than the eight years in *Namri*, was appropriate. However, when the further serious offending is taken into account in this case, we are satisfied that a starting point of 10 years imprisonment for the overall criminality that day was within the range available to the judge.

Voluntary withdrawal

47. Section 28(5) of the Penal Code provides:

"The criminal responsibility of a person committing an attempted offense who voluntarily withdraws from the attempt before he offence has been committed it shall be diminished"

48. Counsel submits that Mr Bakeo had the opportunity to use the knife but did not do so, and then immediately afterwards left the house which was a voluntary withdrawal from the attempt. Consistent with s.28(5) the Judge should have given Mr Bakeo a reduction in his sentence. Counsel accepted that she had not made any such submission to the sentencing Judge and so the Judge, in sentencing remarks, did not mention section 28(5) of the Penal Code.
49. In the Judge's conclusions as to verdict, the Judge accepted the evidence that Mr Bakeo had only let go of Heleno's head and left her house, when others present who had seen him with the knife against Heleno's neck called out to him and ran toward him. It was at that stage that he let go of Heleno and left.
50. We do not consider that this evidence establishes that Mr Bakeo voluntarily withdrew from the attempt. He withdrew when those present called out to him and ran towards Heleno. In those circumstances, we do not consider on the Judge's findings, there was a voluntary withdrawal. Mr Bakeo, therefore was not entitled to any reduction in his sentence for voluntary withdrawal.



Diminished responsibility

51. Section 24 of the Penal Code provides as follows

"Whenever criminal responsibility is diminished law, the punishment shall be mitigated at the discretion of the court"

52. Pursuant to section 24 of the Penal Code, the judge gave no deduction for diminished responsibility, considering that Mr Bakeo had not established that he had diminished responsibility by law.

53. We agree that section 24 does not in Mr Bakeo's place, provide a statutory path for seeking a reduction in sentence and as we understood the position counsel for Mr Bakeo did not claim that her client's situation came within s.24.

54. However, we do not consider the fact that Mr Bakeo's circumstances are outside s.24, prevents judicial consideration of properly established relevant mental illness, or other reduced mental capacity, as a basis for reduced culpability and therefore a reduced sentence.

55. Both the Supreme Court and this Court had available to it a medical report by Dr Jimmy Obed. Dr Obed a psychiatrist, had been asked to assess whether a defence of insanity was available for Mr Bakeo. He concluded that the defence was not available but in the course of his report he made some observations about Mr Bakeo's mental health

56. As relevant he said:

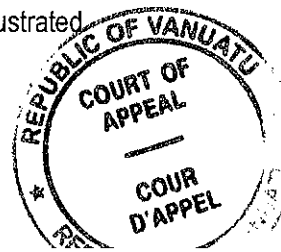
"Mr Bakeo's limited capacity to reason at the time of the offence, diminished his ability to consider alternative choices of his actions and to fully reason about the consequences of his actions.

Mr Bakeo's diminished ability to reason, could be attributed to an underlying psychotic episode possibly triggered by use of illicit substance at, or around, the time of the offence"

57. There was evidence that Mr Bakeo had consumed marijuana shortly before the offending.

58. The Judge gave a three-month deduction from the sentence for personal circumstances, including the fact that Mr Bakeo was a patient at MindCare Clinic. It seems probable that Mr Bakeo first saw the MindCare clinic after these events when a plea of insanity was being considered.

59. We consider a further deduction in mitigation for what is Mr Bakeo's limited intellectual function, apparently arising from his mental illness. As Dr Obed observed it was likely that Mr Bakeo had a limited capacity to reason, to weigh up alternative actions and to consider the consequences of his actions. These factors are directly relevant to Mr Bakeo's offending and the choices he made that day. It is difficult to understand why Mr Bakeo reacted so violently that day. He had been frustrated

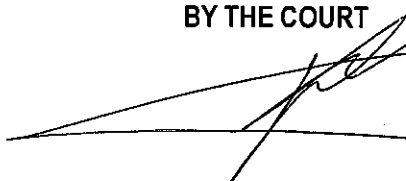


by the refusal to purchase his empty bottles and the fact there was no food for him to eat. But his reaction to these relatively minor frustrations was wholly out of proportion. This reduced capacity diminished his responsibility for the offending. In those circumstances we consider a total reduction of 12 months imprisonment was proper rather than the three months given

60. The fact that we have discharged Mr Bakeo on count two, the threat to kill Heleno, does not affect our overall view of the appropriateness of the start sentence
61. In summary therefore the appeal against conviction on count one attempted intentional homicide is dismissed. The appeal against conviction on count two a threat to kill is allowed and the conviction quashed
62. The appeal against sentence is allowed. The sentence imposed is reduced by a further nine months so that the sentence for the attempted intentional homicide is now eight years, 11 months and 10 days imprisonment.

DATED at Port Vila, this 19th day of May 2023

BY THE COURT



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Hon. Chief Justice V Lunabek

