

**IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU**
(Criminal Jurisdiction)

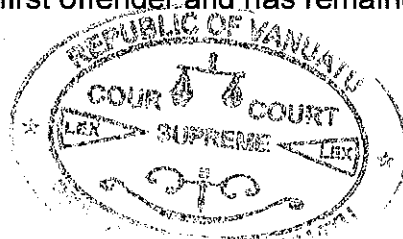
Criminal
Case No. 18/1363 SC/CRML

PUBLIC PROSECUTOR
v.
ESROM MAEL

Coram: Justice D. V. Fatiaki
Counsel: Mr L. Young for the State
Mrs K. Karu for the Defendant
Date of Sentence: 31 July 2018

SENTENCE

1. The defendant appears for sentence today in respect of his guilty pleas to 2 Penal Code offences, namely Intentional Assault causing permanent injury contrary to Section 107(c) and Malicious Damage contrary to Section 133. The brief facts admitted by the defendant is to the effect that on the day in question 26 August 2014, the defendant in a fit of anger, assaulted his wife at their home with an iron rod causing a "... fracture of the distal lateral border of (R) Radius" (right wrist). After assaulting his wife the defendant then turned his attention to his wife's clothes which he proceeded to tear up. The matter was reported to the police. During the course of police investigations, under caution, the defendant freely admitted wrong doing: "... *Mi save se mi wrong be mi kros tumas nao mi mekem fashin olsem*".
2. Although a pre-sentence report was ordered, none was provided. I am grateful, however, for the assistance provided in defence counsel's sentencing submissions. By way of background, the defendant is 28 years of age from Ambrym and living with his wife at Blacksands area with their 2 young children. The defendant is currently employed and supports his family from his earnings. Counsel also highlighted the following mitigating factors:
 - The defendant's early guilty pleas;
 - He cooperated with the police and freely admitted the offending;
 - The defendant and complainant are reconciled and have continued cohabiting since the incident;
 - The defendant is a first offender and has remained out of trouble since the offence in 2014;



- The defendant was remanded in custody for ¹4 months before being released on bail;
- The defendant expressed remorse to the probation officer; and
- The unexplained inordinate delay of 4 years in charging the defendant.

and defence counsel "*submits that a suspended sentence of 2 years is practical in this matter*".

3. Prosecuting counsel submits that the starting point for an offence of Intentional Assault causing permanent injury should be 3 years imprisonment then after discounting for mitigating factors including the defendant's guilty pleas, counsel "*seeks an end sentence of 16 months imprisonment and 3 months and 24 days for Malicious Damage*". Both sentences to be served concurrently.
4. In assessing an appropriate starting point in this case, I am mindful of the maximum penalties provided for Intentional Assault causing permanent injury namely, 5 years imprisonment and an offence Damaging Property which carries a sentence of a fine of VT5,000 or imprisonment for 1 year or both [see: s.36(3) of the Interpretation Act]. I am also satisfied that despite the complainant's broken wrist the present case is not the worst case of its kind nor is it aggravated by planning or repetition.
5. Having said that, the use of an iron rod to cause injury is, undoubtedly, an aggravating element as is, the permanent nature of the injury caused. The fact that the offence occurred within a domestic relationship where there is inequality of power and control is also an aggravating factor that cannot be ignored.
6. In Kevin Tari v Public Prosecutor [2011] VUCA 26 the Court of Appeal in adopting a starting point of 3 years as appropriate in that case of an intentional assault where the victim was struck in the eye with a bottle causing permanent injury, namely, the loss of sight in one eye said:

"Where an assault involves unprovoked violence and causes permanent serious injury, an immediate custodial sentence is appropriate".

7. However of greater relevance and similarity to the present case are cases dealing with "*domestic violence*" such as: PP v Leo [1994] VUSC 22; PP v Thomas [1994] VUSC 23; PP v Simeon [1994] VUSC 15; PP v William [2004] VUSC 87; PP v Batick [2015] VUSC 174; PP v Coombes [2016] VUSC 187; PP v Pita [2017] VUSC 177 and PP v Robert [2018] VUSC 118.
8. Twenty four years ago the former Chief Justice in imposing a sentence of 18 months imprisonment in PP v Tataki [1994] VUSC 12 where a wife was hospitalised for 6 days and off work for 12 days as a result of injuries inflicted on her by her husband, said:



"Assaults on women in Vanuatu have become a disease, it appears to have become almost an accepted fact of life in Vanuatu, and it is a growing disease.

*I take the view, as I have said on numerous occasions before, that **the courts are there also to protect the individuals, women particularly, from violence at the hands of men. We do not find it an accepted form of behaviour and will do everything we can to discourage it. Nor does the fact that the victim is the defendant's wife, render assaults on women more acceptable or less serious. A wife is as entitled as anyone else to the protection of the law. The court has a duty also to punish those who commit violent crimes and to try to deter them from behaving in a like way again.***

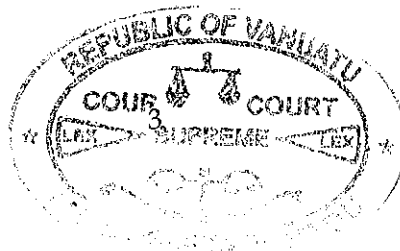
*The court has also a duty to deter others from behaving in a like way. I would be failing the victim of this very violent, unprovoked assault and the women of Vanuatu generally if I took a different approach. I know that it takes enormous courage for women in Vanuatu to bring charges against a man, even more so when the man is her husband, because usually the whole family will put pressure on her to drop it. She is the one who is made to feel guilty, because she has complained, often of the most horrendous assault upon her. If the Court then fails to treat the matter seriously, the Court fails her and society at large. **It must be extremely rare, if ever, that such a serious assault on a woman by a man, even her husband, does not attract an immediate term of imprisonment.** Any Court taking a different course, would be acting irresponsibly and would be failing in its duty to protect the public and particularly the women of this country."*

(my highlighting)

9. In similar view in PP v George Daniel [2005] VUSC 15 where the defendant punched his estranged spouse in the eye causing her to permanently lose functional sight, the Supreme Court imposed a sentence of 16 months immediate imprisonment and said:

"When I look at this case in general terms, it is difficult for the Court to separate the catastrophic and life changing injury to the victim as a result of your assault, from the assault itself."


10. Bearing the above cases in mind and considering the maximum sentence of 5 years imprisonment, I consider that a starting point of 3 years is appropriate in this case.
11. I deduct one year for the Defendant's past unblemished record, his cooperation with the police enquiries including his voluntary admission of wrong doing and his expression of remorse to the probation officer. This gives a second stage sentence of $(36-12) = 24$ months imprisonment which is further reduced by 8 months in recognition of the defendant's early guilty pleas giving an end sentence of $(24-8) = 16$ months which must be reduced by a further ~~4~~ months being the period that the defendant has already spent in custody. This leaves a final end sentence of $(16-4) = 12$ months imprisonment.
12. For the offence of Damaging Property I impose a sentence of 3 months imprisonment to be served concurrently with the above sentence of ~~12~~ months imprisonment.



13. I turn next to consider whether this is an appropriate case for suspension and I have considered all the circumstances including the lengthy delay in finalizing this case and the fact that the parties have resumed cohabitation and are living as one happy and united family and there has been no recurrence of violent behavior by the defendant, in the past 4 years since the offences were committed. The salutary lesson that the defendant would have learned from his brief incarceration on remand (the equivalent of a sentence of 2 months imprisonment) should not be down-played or ignored either.
14. I am also mindful of the non-life threatening spontaneous nature of the offending where an iron rod was used once on the arm of the victim in circumstances that suggest it was being used to disarm her. Likewise the defendant is a first offender who admitted his wrong doing to the police and pleaded guilty at the first opportunity. He has reconciled with the complainant and re-established their family and that status quo should not be disturbed if at all possible.
15. In light of the forgoing, the sentence of 15 months imprisonment is suspended for 3 years. The defendant is warned that he is very fortunate not to be going to prison today but if he reoffends in the next 3 years then he can expect to serve this sentence of 15 months imprisonment along with any other sentence he may receive for his reoffending. Whether that happens or not is entirely in the defendant's hands but, if he reoffends within the next 3 years, then he cannot expect this Court to extend to him the same leniency it has shown him today.
16. The defendant is advised that he may appeal this sentence within 14 days to the Court of Appeal if he does not agree with it.

DATED at Port Vila, this 31st day of July, 2018.

BY THE COURT


D. V. FATIAKI
Judge.

