

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

Criminal Case No. 19/403 SC/CRML

PUBLIC PROSECUTOR

v.

ANTHONY KIEL

Coram: *Chief Justice Vincent Lunabek*

Counsel: *Mr S. Blessings for the State
Mr H. Rantes for the Defendant*

Date of Sentence: *3 October 2019*

SENTENCE

1. Anthony Kiel, this is your sentence.
2. You are charged with following six (6) counts:
 - Three (3) Counts of unlawful entry contrary to Section 143(1) of the Penal Code (counts 1, 3 and 5);
 - One (1) Count of Threats to Kill a person, contrary to section 115 of Penal Code (count 2);
 - One (1) Count of Intentional Assault causing temporary damage, contrary to Section 107(b) (count 4); and
 - One (1) Count of Intentional Assault causing permanent damage, contrary to Section 107(c) of the Penal Code Act (count 6).
3. On 22 July 2019, you entered a guilty plea on the charge of unlawful entry into the dwelling house of Talap William with intent to commit an offence (Count 1).
4. On the same date of 22 July 2019, you entered not guilty pleas in relation to the count of Threats to Kill a person (Count 2), two (2) Counts of Unlawful Entry into the dwelling houses of Martha Johnny and Namas Katen Kahy (Counts 3 and 5) and Intentional Assault Causing Temporary Damage (Count 4) and Intentional Assault Causing Permanent Damage (Count 6).
5. On 23 July 2019, after a two day trial conducted on the counts 2, 3, 4, 5 and 6, you were found guilty and convicted of these offences charged accordingly.



6. You are sentenced today 3 October 2019 on each and all six counts of offences contained in the Information (as amended) dated 22 July 2019.

7. Below are the following basic relevant criminal law provisions and maximum penalties:

(i) – *“Unlawfully Entering Dwelling Houses:*

143(1): No person shall enter or be in any house, building, tent, vessel or other place with intent to commit an offence therein;

Penalty: Imprisonment for 20 years where the place is used for human habitation.

(2) Subsection (1) shall apply whether or not the offender entered the premises with lawful authority or whether or not he broke any part of the premises in order to enter them and whether or not he obtained entrance by means of any threat or artifice, or by collusion with any person in the premises”.

(ii) – *“Threats to fill person:*

115: No person shall, knowing the contents thereof, directly or indirectly, cause any person to receive any oral or written threats to kill any person.

Penalty: Imprisonment for 15 years”.

(iii) *“Intentional Assault*

107: No person shall commit intentional assault on the body of another person.

Penalty: (a) If no physical damage is cause, imprisonment for 1 year;

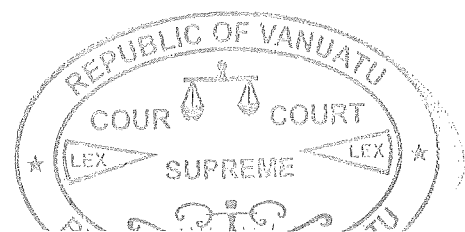
(b) If damage of temporary nature is caused, imprisonment for 5 years;

(c) If damage of a permanent nature is caused, imprisonment for 10 years;

(d) If the damage caused results in death, although the offender did not intend to cause such death, imprisonment for 14 years”.

8. These offences are serious offences as reflected in the maximum penalties imposed by law. It is noted that some of these penalties were increased by Parliament enactment of the Penal Code (Amendment) Act No. 13 of 2016 coming into force on 24 February 2017. When I sentence you today, I need to consider or take into account of the intention of Parliament to that effect. I also need to take into account of the serious nature and aggravating circumstances of your offending on the night of 22 December 2018.

9. I have the opportunity to peruse and consider the written submissions of the prosecution and your defence lawyer with respective authorities filed in support. I also have the opportunity to read and peruse the pre-sentence report filed by the probation officer.



10. I take this opportunity to thank prosecution and defence Counsel for their very helpful assistance. I also thank the probation officer for his useful report to assist the court.

11. The prosecution refers the Court to relevant case authorities including:

- **Kalfau –v- Public Prosecutor [1990] VUCA 9; Criminal Appeal Case 05 of 1989 (26 October 1990)** which provides a sentencing range for the relevant offences in question in this case and it also highlights principles on concurrent and consecutive sentences. In this case, the Court of Appeal quashed the initial cumulative sentence of 8 years and resented the Appellant to 6 years imprisonment on unlawful entry and theft.
- **Public Prosecutor –v- Walker [2007] VUSC 63; Criminal Case 20 of 2007 (14 June 2007)** and **Walker –v- Public Prosecutor [2007] VUCA 12** for offences involving threats to kill a person without the use of a weapon.

12. As to the offences of intentional assault, causing damage of temporary and permanent nature, contrary to section 107 (b) and (c) of the Penal Code, the prosecution noted the Penal Code (Amendment) Act of 2016 which increases the maximum penalty from 1 year to 5 years for offences under s.107 (b) and 5 years to 10 years imprisonment for damage causing permanent nature under s.107 (c). The following Supreme Court cases reflect this aspect:

- **Public Prosecutor –v- Qom [2018] VUSC 140; Criminal Case 1812 of 2018 (5 July 2018)** where the starting point sentence is 6 years and an end sentence of 3 years and 8 months.
- **Public Prosecutor –v- Quaga [2018] VUSC 163; Criminal Case 1924 of 2018 (10 August 2018)** where the starting point sentence is 5 years imprisonment and an end sentence of 2 years and 3 months.
- **Public Prosecutor –v- Napuati [2018] VUSC 193; Criminal Case 1219 of 2018 (10 September 2018)** where the starting point sentence of 20 years and an end sentence of 3 years and 4 months.

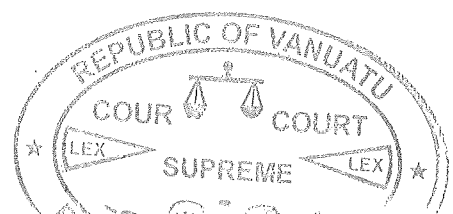
13. The prosecution submitted for following appropriate starting point sentences:

6 years imprisonment for unlawful entry;

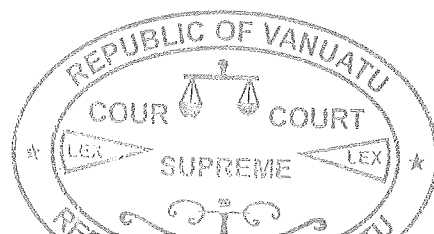
3 years for threats to kill a person; and

3 years imprisonment for intentional assault causing temporary injury contrary to s.107 (b) of the Penal Code; and

6 years imprisonment for intentional assault causing permanent injury contrary to s.107 (c) of the Penal Code.



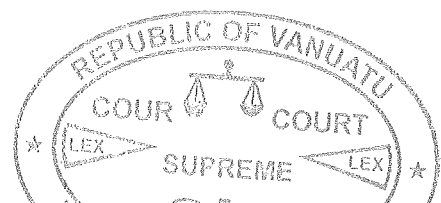
14. The prosecution further submitted that the cumulative total of these offences would be 30 years imprisonment. This total has to be reduced to a level that is just and appropriate reflecting the culpability of the offender and his previous offending. The prosecution submitted 6 years imprisonment will be an end sentence. It should not be suspended.
15. Your lawyer submitted to the following effect. The Defence concedes to the facts of this case. In mitigation, you are 23 years old and you are a single man. You attended Onesua Presbyterian College and later enrolled at the University of the South Pacific but you did not complete your studies. You have skills in gardening. You are a member of Presbyterian Church. You have also performed a custom reconciliation to maintain the unity between yourself, your family and the community members. The following items were presented: - 1 pig, 1 kava, 3 pieces of calico, 2 bundles of banana and 10 water taros. You were also remanded in custody since 25 December 2018 until you are sentenced today 3 October 2019.
16. Your lawyer asked the Court to consider the mitigating factors in order to reduce your sentence.
17. Your lawyer also refers the Court to **Andy –v- Public Prosecutor [2011] VUCA 11** on the approach to be taken in your sentencing in this case. Your lawyer refers specifically to the case of **PP –v- Kalsandy Basi, unreported Criminal Case 18/41 SC/CRML; (Supreme Court 7 September 2018)**. There, the Defendant was charged with three counts of unlawful entry into a dwelling house and 2 counts of act of indecency without consent. He pleaded guilty. He was found guilty. He was sentenced to 3 years imprisonment and suspended for a period of 3 years.
18. The Defence lawyer also refers to the case of **Public Prosecutor –v- Manses [2005] VUSC 151**, a case of unlawful entry and threats to kill a person. The Defendant pleaded guilty to the offences and he was sentenced to 3 years for unlawful entry and 2 years for threats to kill a person, ordered to be served concurrently. He further refers the Court to the cases of **Public Prosecutor –v- Kell Walker [2007] VUSC 07** and **Walker –v- Public Prosecutor [2007] VUCA 12** on unlawful entry and threats to kill a person.
19. He finally refers to the case of **Public Prosecutor –v- Quaga [2018] VUSC 163** and **Public Prosecutor –v- Giltrap [2019] VUSC 83** on offences of intentional assaults causing permanent and temporary injuries respectively on the bodies of the victims and the respective end sentences in those cases.
20. The Defence Counsel submitted that the end sentence for those offences in the present case would be 5 years imprisonment and to be served concurrently.



21. Below are the sentencing facts summary. This was 22 December 2018 in the night between 12.00 am – 2.00am o'clock in the village of Lamtawakel, West Tanna where you and the victims live. You were drunk at that night. You unlawfully entered into one Talap William's house in the night when she was asleep. You asked her for sex she refused. You threatened to kill her with a knife. She shouted causing you to escape. You went then to the house of one Martha Johnny, a student girl of 13 years old. She too was already asleep when you unlawfully entered her sleeping house. It was when you were sitting on her, squizzing her mouth and trying to have sex with her that she shouted causing you to move away from her and you came back with a stone and threw it at her hitting her at her left shoulder causing her injuries of temporary nature. She felt very painful and she screamed. On the same night between the same times, you went to the house of one Namas Katan Kahy. You unlawfully entered her house pushing her door open as she did not lock her door from inside. She used a stone to close her door from inside before she slept. You pushed her door open and used a stone and threw it at her hitting her at her forehead. She too was already asleep. She was shaken and fell off her bed. She lost lots of her blood that night. She also lost two of her front teeth causing her injuries of permanent nature.

22. In this case, the following aggravating features exist:

- There were degrees of premeditation but not planning. You unlawfully entered the victims' houses one after the other. The first two (2) unlawful entries were with the motive to have sexual intercourse with the victims. But the third offence of unlawful entry (Namas Katan Kahy) the motive appeared to be of frustrations of not having sex with the 2 first victims or something to that unexplained chain of human irrationalities in such circumstances.
- Use of weapons. You took a knife when Talap William refused to have sex with you and you used the knife to threaten her. You also used stones to assault Martha Johnny and Namas Katan Kahy.
- The victims sustained serious injuries. Martha Johnny felt pain in her body and she had sustained temporary injuries. Namas Katan Kahy had lost lots of blood and she had sustained permanent injuries with the loss of her two front teeth.
- The impact of the offending on the victims and their families. The pre-sentence report confirmed the impact of offending on the victims. Ms. Talap William stated to the probation officer that your actions towards her crafted a fear in her. She said you had damaged her mobile phone also. Ms. Martha Johnny stated your actions feared her. The injuries she sustained on her left hand side affected her to do her daily roles including her studies at school. Mrs Namas Katan Kahy stated your



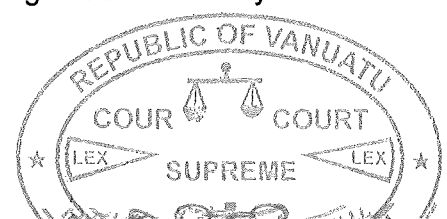
actions towards her made her feel she is no longer safe. The injuries on her forehead is affecting her in doing her daily duties and she feels the pain will have a lasting effect on her depending on her health medications.

- Breach of trust. The victims know you as you are from the same village with them. You are closely related to the victims, particularly Talap William. They do not have trust in you anymore.
- Time of offending was at night. The actions in the night were serious intrusions into private dwellings where the victims are safe and protected in their houses as the most fundamental unit for all families including the victims.
- You were drunk at the time. Your state of drunkenness is not an excuse but constitutes an aggravation into your offending.
- You have records of previous convictions for unlawful entry and theft and you spent time in custody in December 2016 to June 2018.
- Note: The prosecution seems to say that there is repetition of offending in the night of 22 December 2018. I confirm the similarities of offending in its modus operandi aspect but I say that the offending of unlawful entry constitutes separate offences involving separate victims with related offences. They may be tried separately on their own and if that is the case, then, there is no longer repetition of offending to take into account as aggravating factors for the purpose of uplifting the starting point sentence. It is important not to lose sight.

23. For sentencing purposes, I consider that the 3 offences of unlawful entry into the dwelling houses of 3 different victims on 22 December 2018 are separate but principal offences. The related offences occurring after each offence of unlawful entry will be considered together with its respective principal offence (unlawful entry) as a starting sentence process assessment consideration.

24. I accept the submissions of the prosecution of 6 years imprisonment as the starting point sentence on unlawful entry in counts 1, 3 and 5 separately and consecutively.

25. I now consider the sentencing of offences in counts 1 and 2. I consider 4 years imprisonment as an appropriate starting point sentence for threats to kill Talap William with a knife. The sentence of 6 years imprisonment and that of 4 years imprisonment shall run concurrently which means a total sentence of 6 years imprisonment for counts 1 and 2. I consider your mitigating factors. I give an allowance reduction of 2 years leaving an outstanding sentence of 4 years. I



take out one third for your early guilty plea in count 1. Your end sentence in counts 1 and 2 is of 2 years and 8 months imprisonment.

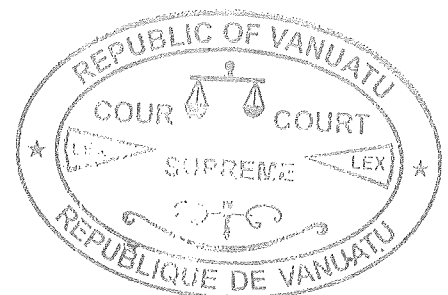
26. I then consider the sentencing of offences in counts 3 and 4. I consider 3 years imprisonment as a starting point sentence for intentional assault causing temporary injury, contrary to section 107 (b) of the Penal Code. The sentence of 6 years imprisonment in count 3 and that of 3 years imprisonment in count 4 shall have concurrent effect which means a total sentence of 6 years imprisonment for counts 3 and 4. I give you an allowance of 2 years reduction for the mitigating factors. Your end sentence for counts 3 and 4 is of 4 years imprisonment.
27. I further consider the sentencing of offences in counts 5 and 6. I consider 5 years imprisonment as a starting point sentence for intentional assault causing permanent nature, contrary to s.107 (c) of Penal Code. The sentence of 6 years imprisonment and that of 5 years imprisonment shall have concurrent effect which means a total sentence of 6 years imprisonment for counts 5 and 6. I give you an allowance of 2 years reduction for the mitigating factors. Your end sentence in counts 5 and 6 is of 4 years imprisonment.
28. I come up with a total cumulative sentence of 10 years and 8 months imprisonment. The judgment of the Court of Appeal in **Kalfau v Public Prosecutor [1990] VUCA 9** will be of assistance. The relevant sentencing principles are these:

"We pass to consideration of the total sentence passed.

The general rule in sentencing is that sentences for separate offences should normally be consecutive but this may be modified in two main ways. In the first case, a series of offences that form part of the same overall transaction and cause harm to the same person may be appropriately dealt with by a concurrent sentence.

*The second basis for modification is where, having passed a proper sentence for each of a number of offences, the aggregate effect of making them consecutive will produce an inappropriate total. Thus in any case where the Court has imposed a number of consecutive sentences, it should stand back, in effect, and look at the total. It was suggested in *Smith v R (1972) Crim LR 124* that if, at such a point, the total is substantially above the normal level of sentence appropriate to the most serious offence for which the accused is being sentenced, the court should reduce that total to a level that is "just and appropriate.*

Even where the total does not offend against that principle, the court may in an appropriate case reduce it if, in the circumstances of a particular accused, the effect would be crushing.



It should finally be pointed out that the reduction of the total is best achieved by making some or all the penalties concurrent rather than to reduce the sentence for any individual offence below the proper level.”

29. Applying the sentencing principles highlighted in **Kalfau v Public Prosecutor [1990] VUCA 9**, I consider that the aggregate effect of this cumulative sentence of 10 years and 8 months imprisonment will be crushing on you as a young and single man of 23 years of age despite your records of previous convictions for these types of offences. I pause and reflect on how I can reach a sentence that is just and appropriate in the circumstances. I therefore order that the 4 years imprisonment in counts 3 and 4 and the 4 years imprisonment in counts 5 and 6 shall be of concurrent effect which means an effective sentence of 4 years imprisonment. The final sentence is a cumulative effect of the 4 years and the 2 years and 8 months imprisonment for counts 1 and 2 making a total end sentence of 6 years and 8 months imprisonment. That is the total end sentence I am imposing on you today.
30. I sentence you to 6 years and 8 months imprisonment in this case. This sentence is deemed effective from 25 December 2018 (the date you are remanded in custody which effectively takes into account the time you have already spent in custody before your conviction and sentence).
31. A warrant of imprisonment shall be made in execution of this sentence.
32. You have 14 days to appeal this sentence if you are unsatisfied with it. The 14 days starts today.

DATED, at Port Vila, this 3rd day of October, 2019.

BY THE COURT



Vincent LUNABEK
Chief Justice.

