

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

Criminal
Case No. 24/1465 SC/CRML

PUBLIC PROSECUTOR

V

RAPHAEL GENESIS AFIKA

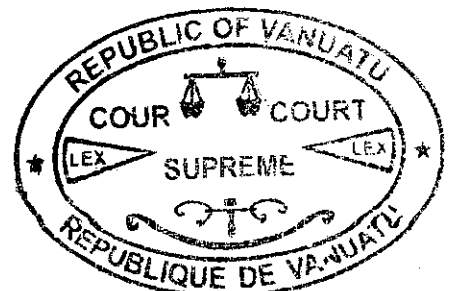
Date of Plea: 17 June 2024
Date of Sentence: 13 September 2024
Before: Justice M A MacKenzie
Counsel: Mr L Young for the Public Prosecutor
Mrs K Karu (Holding papers for Ms B Taleo) for the Defendant

SENTENCE

Introduction

1. Mr Raphael Afika, you appear for sentence having pleaded guilty to the following three charges:
 - a. Unlawful entry of a dwelling house contrary to s 143(1) of the Penal Code [CAP135].
 - b. Threat to kill contrary to s 115 of the Penal Code [CAP135] x 2.

2. The maximum penalties for these offences are:
 - a. Unlawful entry of a dwelling house – 20 years imprisonment. That is because it is used for human habitation.



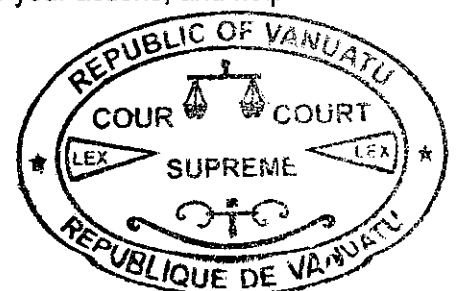
b. Threat to kill -15 years imprisonment.

The Facts

3. In the early hours of 12 December 2023, the two victims, Ms Bani and Ms Evera were asleep in Ms Evera's home. The house is at the Aore Adventist School on Santo. The victims are friends and are both teachers at the school.
4. At about 2am, Ms Bani woke to see you standing at the door of the room, armed with a firearm. Both Ms Bani and Ms Evera said you are very visible because you were using your phone as a torch. You told the victims to be quiet and not to make any noise or you would shoot them. You removed a bullet from the firearm and showed them the bullet.
5. You then put the firearm to Ms Bani's head and asked her to take off her clothes. She asked you to put the firearm down. You did but you picked it up again when Ms Bani did not take her clothes off. You pointed the firearm at Ms Bani again telling her to remove her clothes or you would shoot her dead.
6. Ms Bani told you she did not want to take off her clothes in front of her friend as she is in a relationship with Ms Evera's brother. You persisted in asking her to take off her clothes. When Ms Bani walked towards the door you blocked her from doing so, and asked the victims to hand over their phones, which they did. Ms Bani was able to escape from the house. However, you chased her as she ran towards another house. You then ran off towards the nearby village.
7. But you returned and pointed the firearm at Ms Evera and told her not to run or you would shoot her- or words to that effect. She begged you to let her go. You demanded that she take off her clothes and have sex with you before others come. You called out to her not to run or you would shoot her. She ran and hid in banana bushes.
8. When spoken to by police under caution, you admitted entering the house. You said it might be true that you threatened both victims. You told police that you were drunk and under the influence of alcohol and cannabis.

Sentencing purposes/principles

9. The sentence I impose must hold you accountable and must denounce and deter your conduct. The sentence should ensure you take responsibility for your actions, and help you to rehabilitate. It must also be generally consistent.



Approach to sentence

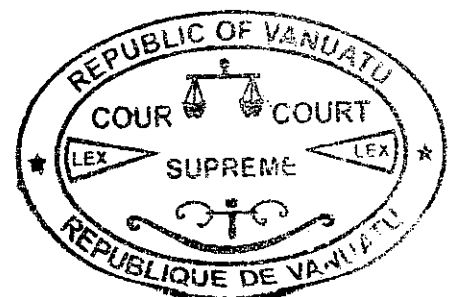
10. Sentencing involves 2 separate steps; *Jimmy Philip v Public Prosecutor* [2020] VUCA 40, which applied *Moses v R* [2020] NZCA 296.

Starting point

11. The first step is to set a starting point to reflect the aggravating and mitigating features of the offending, and with reference to the maximum penalties for the offences.
12. While the lead charge is unlawful entry of a dwelling house, I will set a starting point on a global basis to reflect the totality of the offending. That is because here the offences are interconnected and form part of the overall transaction; *Kalfau v Public Prosecutor* [1990] VUCA 9.
13. The aggravating factors of the offending overall are;

Unlawful entry of a dwelling house

- a. Time of entry- you entered the house at 2 am, and when the occupants were sleeping. Entry at night creates a heightened risk of confrontation as people are highly likely to be at home and in bed asleep. This is a significantly aggravating factor.
- b. An overlapping factor is that the victims were vulnerable because they were in bed and asleep in a bedroom, you blocked Ms Bani's exit from the bedroom and took their phones from them. These things increased their vulnerability because they were unable to seek help easily.
- c. There was some form of planning or premeditation because you were in possession of a firearm and the purpose of going into the house was clearly sexually motivated.
- d. You were armed with a lethal weapon, a loaded firearm, and on your own admission were intoxicated. That is a potent and dangerous combination.
- e. To effect the purpose behind going into the house, you used the firearm to instil fear and to intimidate Ms Bani when you held the gun to her head and asked her to remove her clothes.

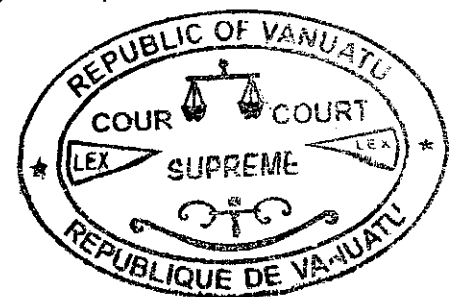


Threat to kill

- f. You threatened both victims.
- g. The nature of the threat to kill - you threatened to kill both victims by saying you would shoot them dead.
- h. At the time you made the threats, you were holding a firearm, so you had the ability to immediately put the threat into effect.

Harm

- i. The harm caused to the victims, emotionally and psychologically arising from both your presence in the house in the middle of the night and threatening to kill them can only be significant. It must have been a terrifying incident.
14. There are no mitigating features of the offending itself. To be clear, the fact you were intoxicated is not a mitigating factor. It does not and cannot mitigate your actions.
 15. Counsel have cited a number of cases to assist the Court with setting an appropriate starting point. The prosecutor submits there should be a starting point of 5 years imprisonment for the lead offence of unlawful entry into a dwelling, with a concurrent starting point of 3 years imprisonment for the threats to kill. Ms Taleo submits that the appropriate starting point for the charge of unlawful entry of a dwelling is 3 years imprisonment and a concurrent starting point of 2 years imprisonment for the threats to kill.
 16. I do not intend to discuss all the cases cited by counsel in detail. While consistency in sentencing is important, none of the cases are squarely on point. As the Court of Appeal said in *Kalfau*, sentencing is not an exact science, and the circumstances will vary from case to case. No two cases are ever the same. In both *Public Prosecutor v John* [2018] VUSC 74 and *Public Prosecutor v Jack* [2021] VUSC 152, starting points of 4 years imprisonment were adopted for a dwelling house burglary.
 17. In *John*, the defendant entered a bush kitchen at 4pm in an intoxicated state. He assaulted the victim and threatened to kill her dead. There was no weapon. In *Jack*, the defendant entered two dwellings in the early hours of Christmas day and stole items.
 18. As to threats to kill, both *Public Prosecutor v Enaung* [2017] VUSC 7 and *Public Prosecutor v Iautu* [2023] VUSC 71 would indicate that a starting point of 3 – 4 years imprisonment may be appropriate when there is a threat to kill and a weapon is involved. In *Iautu*, the weapon was a machete. The starting point was 3 years imprisonment. In



Enaung, the defendant threw a stone at the victim after making a threat to kill him and then chased him with a knife and an axe. The starting point was 4 years imprisonment.

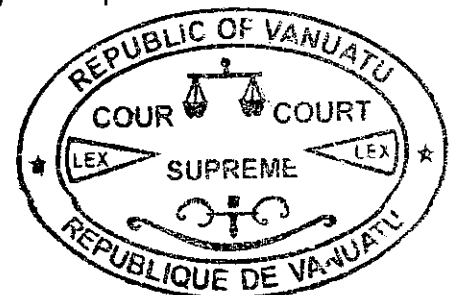
19. The unlawful entry in the present case is significantly aggravated by the fact that it was in the middle of the night, the vulnerability of the victims and the presence of a loaded firearm. The loaded firearm is the standout aggravating factor. It can only be described as a terrifying incident given those factors, along with the sexual motivation and the threats to shoot the victims, which the victims knew the defendant was capable of carrying out. The present case is far more serious than any of the cases cited by counsel given the aggravating factors I have detailed.
20. Therefore, I adopt a global starting point of 6 years imprisonment to reflect the totality of the offending.

Guilty plea and personal factors

21. You pleaded guilty at an early opportunity. You are entitled to a one-third discount for your guilty plea. I have taken Mr Young's submission into account, but the plea has saved the victims the trauma of having to give evidence and re live what happened. That equates to a discount of 2 years from the starting point.
22. You are now aged 24 years, nearly 25. You are a first offender. Currently, you are working and have good relationships with family, chiefs and attend church activities. You have apologised for your wrongdoing but when interviewed for the pre sentence report you said you could not recall what happened because you were under the influence of alcohol at the time. You took part in a custom reconciliation with one of the victims, the school and the church. There is a report available to the court and there was a good outcome.
23. Given that you are a first offender, are remorseful and took part in the custom reconciliation, I reduce the sentence by 8 months to reflect those factors. That is about 10 percent.
24. You were remanded in custody from between 3 January 2024-20 February 2024, a period of 6 weeks and 6 days. That is an effective sentence of 3 months 2 weeks imprisonment. The sentence is further reduced by 3 months 2 weeks.

End Sentence

25. The end sentence is 3 years 2 weeks imprisonment for the charge of unlawful entry of a dwelling house. There is to be a concurrent sentence of 3 years imprisonment on each charge of threat to kill.



26. Your counsel asks that the sentence be suspended pursuant to s 57 of the Penal Code. The prosecutor opposes suspension of the sentence. Under s57 of the Penal Code, there is a discretion to suspend the sentence. I must take into account the circumstances, the nature of the offending and your character.
27. I acknowledge that you are a first offender, that you took part in a custom ceremony, and are apologetic for your wrongdoing. You are also working and well regarded in your community. These factors favour suspension.
28. On the other hand, this is serious offending. It is a serious example of unlawful entry into a dwelling house. It was at night, was sexually motivated and significantly you had a loaded firearm. The firearm was used to instil fear and intimidate the victims. This can only have been a terrifying event. There is a need for accountability, deterrence and also denunciation. A stern response is required. These factors point away from suspension of the sentence.
29. There is a need for rehabilitation given that you were intoxicated. But I do not see anywhere that you have done anything to address this to date.
30. After weighing and balancing all the relevant factors, the sentence will not be suspended. While I acknowledge the positive factors relating to your character, the nature and circumstances of the offending mean that that the sentence should not be suspended. Accountability, deterrence and denunciation require a term of imprisonment in this case.
31. The sentence of 3 years 2 weeks imprisonment is to start immediately. While you have been on bail, you were remanded in custody for 6 weeks 6 days. Section 50 of the Penal Code does not then apply; *Jack v Public Prosecutor* [2024] VUCA 39.
32. You have 14 days to appeal against the sentence.

DATED at Port Vila this 13th day of September 2024
BY THE COURT

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Justice M A MacKenzie

