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

CRIMINAL APPEAL CASE No.03 OF 2008

BETWEEN: WELI MASSING
JOSEPH MASSING
API MASSING
GIDEON MASSING
DANIEL MASSING
MAHIT MASSING
ANDY MASSING
GEORGE MASSING
Appellants

AND: PUBLIC PROSECUTOR

Respondent

Coram: *Justice John von Doussa*
Justice Oliver Saksak
Justice Ronald Young

Counsel: *The Appellants on their own behalf*
Mr Bernard Standish for the Public Prosecutor

Date of hearing: *24 November 2008*
Date of judgment: *4 December 2008*

JUDGMENT

Introduction

When Willie Malon and his family approached the Appellants and their family about damage to crops, the Appellants attacked Willie Malon and stabbed him to death. The Appellants admitted their involvement in the killing to the police. They pleaded guilty to Intentional Homicide contrary to Section 106(1)(b) of the Penal Code Act [CAP.135].

On 19 December 2005 they were sentenced by Lunabek CJ. as follows: Mahit, Gideon, Hapi and Well Massing 18 years imprisonment; Daniel and Andy Massing 14 years imprisonment and Joseph Massing 10 years imprisonment.

The Appellants seek leave to appeal against their sentence as manifestly excessive.

The appeal was filed 2 years and 2 months out of time. Before we consider the merits of the leave application and the appeal itself it is necessary to briefly deal with the question of whether the Appellants' convictions are challenged.

Challenge to convictions

On 26 March 2008, the Appellants filed a Notice of Appeal and Notice for Leave to Appeal Out of Time. On 21 April 2008, an Amended Notice of Appeal was filed. The matter came before this Court on 24 April. In a judgment of 30 April the Court pointed out the grounds of appeal against sentence were mostly challenges to the Appellants' convictions. The Court adjourned the appeal to give the Appellants an opportunity to consider whether they wished to seek leave to vacate their guilty pleas.

The matter next came before this Court during the July 2008 sitting. No action had been taken by the Appellants to seek leave to withdraw their guilty pleas. Up until that point Mr Toa had acted for the Appellants. He then advised that he was no longer acting for the Appellants but another lawyer may be instructed. The appeal was therefore adjourned to this sitting of the Court.

At the July sitting this Court said:
"Whilst the Court has again allowed the application to be adjourned, we wish to make it clear that unless the Appellants take all necessary steps before the next sittings to withdraw their pleas of guilty and challenge their convictions, and further, have whatever application they file ready to be heard by the Court of Appeal on the first day of the next session, the Court will proceed to hear and determine the applications already on the Court of Appeal file."

The Court directed that each of the Appellants be served with the Memorandum.

When the case was called for hearing on 24 November, the Appellants remained unrepresented. No application for leave to withdraw their pleas had been filed nor any affidavits filed in support. We therefore advised the Appellants we would hear submissions only on the sentence appeal.

Facts

We take the facts from the summary prepared by the prosecution and accepted by counsel for the Appellants at sentencing. At the appeal hearing Well Massing, one of the Appellants, acted as spokesperson. His primary submissions related to the circumstances leading up to the killing. He said that the deceased was the aggressor, coming onto the Appellants land, and intending to kill members of the Massing family. He claimed the Appellants response was to try and remove him from their land and defend themselves. This version of the facts is in conflict with the statements made by the Appellants to the police and their counsel's acceptance at sentencing that the prosecution summary of facts was accurate.

As we understand it, given the grounds of the appeal were in part a criticism of then counsel's conduct in defending the Appellants a waver of privilege was signed by the Appellants in relation to their instructions to previous counsel. That previous counsel has sworn and filed an affidavit. His instructions from the Appellants were that the prosecution summary of facts was accurate. We therefore proceed as the Chief Justice did on the agreed summary of facts.

On the morning of 8 October 2005 the victim and 7 members of his family went to the Appellants' village to discuss damage to their crops. The Appellants were not at home so Willie Malon and his family returned to their own village. Late in the afternoon they noticed some further damage to the victim's yam crop.

In the meantime, the Appellants had discussed and agreed together to kill Willie Malon. They armed themselves and searched for him between 11.00AM and 1.00PM without success. They then went home.

After Willie Malon discovered the damage to his yam crops (that afternoon) he went with others of his family to the Appellants family to ask them about the damage. When they arrived the Appellants were present. Gideon Massing challenged Willie Malon to a fight. Mr Malon refused. As the tension rose Gideon Massing ordered the Appellants to go after the Willie Malon and his family. They did so. The victim and his family ran off. All of the Appellants except Joseph Massing armed themselves with a variety of stones, bows and arrows, a knife tied to a piece of wood, bamboo, bush knives and sharpened bamboo sticks.

Mr Malon was unable to outrun the Appellants. He was felled by a stone thrown by Gideon Massing. The group surrounded him and Mahit Massing stabbed him twice with a knife. The victim, in defence, struck Hapi Massing on his finger. Hapi responded by cutting off of the victim's thumbs and stabbed him on the shoulder. Shortly afterwards the victim died.

Leave application

The Appellants had 14 days to appeal their sentence: s.201 of the Criminal Procedure Code [CAP.136]. The Judge told them about their appeal rights at the end of the sentencing. The appeal was therefore filed some 2 years and 2 months out of time. This Court has power to extend time: S.201(6) of the Criminal Procedure Code [CAP.136].

Generally the interests of justice determine whether leave should be given in such cases. Factors that are relevant include: the length of delay; the reasons for delay; the strength of the appeal; and any effect on the crown or the administration of justice. Where a very strong case on the merits is made out the interests of justice will generally be served by giving leave: ***Gamma v. Public Prosecutor*** [2007] VUCA 19; ***R v. Knight*** [1998] NZLR 583.

Here the length of delay is considerable; over 2 years. There is little or no coherent reason for the delay. The Appellants suggested that there were difficulties in completing the appeal formalities because they were in maximum security prison. While there may be some difficulty in gaining immediate access to

prisoners in maximum security this could not possibly explain a delay of more than 2 years.

The other factor mentioned by the Appellants is that they feared a reaction by the deceased's family if they appealed. As the prosecutor submitted the Appellants were imprisoned in Efate and the deceased relatives live in Ambrym. In any event beyond an assertion there is no evidence to give substance to this fear.

We turn therefore to the merits. We are satisfied that the Chief Justice's starting point of 20 years for the primary offenders included all factual aggravating features was correct. We are also satisfied that the Chief Justice correctly identified in his sentencing the relative culpability of each Appellant.

This was very serious offending. The Appellants decided early on 8 October 2005 to kill Mr Malon. They armed themselves and they searched for him for over 2 hours. Although they could not find him he came to their house. The victim rejected violence as a way of resolving the dispute. He was vulnerable and set upon by at least seven armed men. They showed him no mercy. Given these serious aggravating features the starting point of 20 years imprisonment for the most serious offenders was well justified.

As we understand the Chief Justice's sentencing remarks, he concluded that all of those who had armed themselves and chased and caught the victim were to have similar starting sentences. Some had starting sentences of 20 years reduced to 18 years after deductions for mitigating factors. Some, who were young men, (Daniel Massing and Andy Massing) had their starting sentence reduced to 16 years to reflect their youth. While Mahit Massing was also young he had stabbed the deceased and killed him. His starting sentence of 20 years was reduced to 18 years without any deduction for his youth.

Joseph Massing was 18 years of age at the time of the killing. He was unarmed. His starting sentence was 12 years imprisonment was reduced to 10 years for his guilty plea and time spent in custody.

Each of the Appellants therefore had 2 years deducted for time spent in custody (just over 1 month) and more particularly their pleas of guilty and their crime free past.

The Appellants confessed to the police and pleaded guilty at the first available opportunity to this most serious crime. None had previous convictions. While previous good conduct may pale into insignificance against such a brutal crime it is vital courts give recognition to clear, early, admissions of guilt by significant discounts of sentence. Without the Appellants acceptance of their actions a successful prosecution against all Appellants for intentional homicide may not have been a certainty.

We consider therefore each of the Appellants should have received a discount of one third from their starting sentence taking into account (primarily) their confession and early guilty plea, crime free past and time spent in custody.

We consider therefore that the 20 years starting sentences should have been reduced to 13 years and four months.

The 16 years starting sentences (properly reduced for their youth) should have been reduced to ten years and eight months.

And finally the 12 year starting sentence should have been reduced to 8 years.

Conclusion

We return to the question of leave to appeal out of time. We are satisfied that the deduction for the mitigation circumstances by the sentencing Judge was inadequate. Given the strong merits of the appeal we consider it is in the interests of justice to give leave to appeal.

We allow the appeal, quash the sentences and impose the following sentences:

(a) Mahit Massing - 13 years and 4 months imprisonment

(b) Gideon Massing - 13 years and 4 months imprisonment

(c) Well Massing - 13 years and 4 months imprisonment

(d) George Massing - 13 years and 4 months imprisonment

(e) Hapi Massing - 13 years and 4 months imprisonment

(f) Daniel Massing - 10 years and 8 months imprisonment

(g) Andy Massing - 10 years and 8 months imprisonment

(h) Joseph Kenneth - 8 years imprisonment

DATED at Port-Vila this 4th day of December 2008

BY THE COURT

Hon. John von DOUSSA J

Hon. Oliver SAKSAK J

Hon. Ronald YOUNG J