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

CRIMINAL APPEAL NO. 06 OF 2011

BETWEEN: HENRY MOLI
Appellant

AND: PUBLIC PROSECUTOR
Respondent

Coram: Hon. Justice B. Robertson
Hon. Justice O. Saksak
Hon. Justice J. von Doussa
Hon. Justice D. Fatiaki
Hon. Justice R. Spear

Counsel: Eric Molbaleh for Appellant
Tristan Garae for the Respondent

Hearing: 21 November 2011
Decision: 25 November 2011

JUDGMENT

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[1] On 9th September, 2011 the Appellant pleaded guilty to one count of Possession of Firearms with Intent to Injure, and to one count of Threatens to Kill. He was sentenced by the Chief Justice on 12th September 2011 to an effective term of three (3) years imprisonment for both counts made concurrent but with immediate effect. The defendant was a 32 year old man with no previous convictions.

[2] The appellant now appeals against that sentence on grounds that the learned Chief Justice had erred:-

"(a) in placing to much weight on the aggravating features;

(b) in placing insufficient weight on the mitigating factors including the guilty plea at the first available opportunity, the clear remorse, the lack of previous criminal convictions,

(c) by imposing full time imprisonment and refusing to suspend the sentence

(d) by placing too much weight on specific and general deterrence and insufficient emphasis on the appellant's prospective of rehabilitation

(e) by imposing a sentence that is manifestly excessive."

[3] The brief facts in the case are summarized in the prosecution's sentencing submissions made available to the primary judge as follows:-

"1. On or about the 29th September 2009 in the afternoon the complainant Mr Apo Batick and his two friends Mr Shildas Bule and Mr Ata Loah finished working in the gardens at Erangorango and were walking home on the road to their house in the area.

2. On their way home, they came across the defendant's dog that was running towards them and was barking at them. The complainant Apo Batick in his defense swung the knife intending to frighten the dog but the knife accidentally injured the dog on its left leg.

3. When this incident with the dog happened, the defendant was not only pissed because the complainant injured his dog but also because there were a lot of mischief in the area which the defendant and his family are tired and frustrated about. So the defendant took his rifle a. 22 and pursued the complainant and his companions. The defendant caught up with them and asked who knife his dog. Mr Ata told the defendant it was

the complainant. The defendant then took out a bullet from his pocket and inserted it into the rifle and threatened to shoot the complainant. Mr. Ata saw this and stood in front of the complainant to which the defendant said words to the effect: "you come out mi shootem him". This went on for some time then the defendant backed down as Mr. Ata talked him into calming down. The defendant said words to the effect "you lucky Ata mi look mi save Ata sapos ino Ata mi shootem tufala ia Shildas mo Apo.

4. *On 1st October 2009 the defendant was cautioned and interviewed regarding the allegations that were laid against him. The defendant admitted to the allegations against him and stated that he acted out of frustrations and angry because of the injury his dog suffered."*

[4] We deal with the appeal in a general manner rather than deal specifically with each of the five (5) grounds as listed.

[5] Counsel for the appellant submitted the sentence was excessive in comparison with the sentences imposed on the defendants in the case of Public Prosecutor v. Jean Mark Tamata, Criminal Appeal Case No. 3 of 2010. Counsel also referred to the cases of Kell Walker v. Public Prosecutor, Criminal Case No. 6 of 2007, Public Prosecutor v. Philip Enaus, Criminal Case No. 4 of 2008, Public Prosecutor v. Kauas Kalia, Criminal Case No. 7 of 2008, Public Prosecutor v. Kaloris Soalo, Criminal Case No. 144 of 2009, Public Prosecutor v. Anderson Moffet, Criminal Case No. 79 of 2010 and Public Prosecutor v. Raymond Clay, Criminal Case No. 126 of 2009.

[6] In the majority of those cases, with the exception of the Kell Walker and Tamata cases, the sentences imposed ranged from 1 year to 2 years 6 months but were all suspended. In Kell Walker's case the defendant's sentence of 2 years imprisonment was upheld on appeal on one charge of threats to kill contrary to section 115 of the Penal Code Act [Cap 135]. In *Tamata's case* the defendant's sentence of 2 years imprisonment with suspension was increased to 4 years imprisonment with no suspension. In that case the defendant actually shot his wife. He was charged with Attempted Intentional Homicide and Possession of Firearm with Intent to Injure.

[7] Mr Molbaleh argued and submitted that according to the principles set out by the Court of Appeal in Public Prosecutor v. Karl Andy [2011] VUCA 14, Criminal Appeal Case No. 9 of 2011, the starting point should have been 3 years instead of the 5 years used by the Chief Justice. The State through Counsel Mr Garae conceded that 3 years imprisonment would have been appropriately within the judge's sentencing discretion for a starting point. That had been their submission in the Supreme Court.

[8] Mr Molbaleh indicated to the Court at the outset that the appellant contested the fact that he had put ammunition into his rifle on 29th September 2009. Mr Garae confirmed that was always the position. The pre-sentence report indicates that whilst the appellant did not dispute the summary of facts produced by the Prosecutions *"however he added he did not load the gun at the time and had no intention to shoot or kill the victims."*

[9] Where the appellant contested the fact that he was alleged to have put ammunition into the rifle with intent to shoot Apo Batick, the proper course should have been to set the case down for a hearing on this disputed question of fact. As that

course was not adopted, the Court had to sentence on the basis that the rifle was not loaded. Loading the rifle would be an aggravating factor but when denied and not otherwise proved, must be ignored.

[10] The next point we enquired into from counsel was the length of time between the lodging of complaint and investigation and the laying of charges. Both counsel were unable to provide any assistance on this aspect.

[11] From the records it is clear the complainants Apo Batick and Shildas Bule made statements to the police on the very next day after the incident on 30th September 2009. The appellant made a statement to the police which is dated 1st September 2009 but that must be an error. (It must have meant 1st October 2009.) It appears the last witness statement was taken on 14th October 2009.

[12] It was not until almost 18 months later on 29th March 2011 that a charge of Threats to Kill was laid under section 115 of the Penal Code Act. The matter was brought before the Magistrate's Court for Preliminary Inquiry on 6th July 2011. The Senior Magistrate found there was prima facie case and ordered the appellant to appear before the Supreme Court on 9th August 2011.

[13] On 5th August 2011 the prosecutions filed a new Information with an additional charge of Possession of Firearm with Intent to Injure laid under section 26 of the Firearms Act. On 9th August pleas of guilty were entered and sentencing submissions were fixed for 12th September 2011. On the set date the appellant was sentenced to 3 years imprisonment on both counts running concurrently. The appellant has been in

custody serving his imprisonment term for a little more than 2 months. The delay from offending to charge was for some 1 year and 5 months altogether.

[14] We noted that no consideration was made in respect of the considerable delay taken in prosecuting this complaint in the calculation of the sentence.

[15] By comparison to all the cases referred to by counsel the starting point of 5 years imprisonment on each count appears excessive. In the ensuing 17 months after the event, the appellant had forgotten about the case and was living a normal life with his family and was not a menace to the victims or anyone else. It appears the victim had also concluded that the matter was at an end.

[16] We noted that the Chief Justice had initially imposed a starting point of 5 years imprisonment on each of the two offences after considering seven aggravating features, however there was a reduction of 1/3 reflecting the appellant's guilty pleas and other mitigating factors. The end sentence was therefore 3 years imprisonment on each count made to run concurrently. Delay was not included as a mitigating factor on sentencing.

[17] For these reasons we allow the appeal and set aside the sentence of 12th September 2011. The proper starting point for an unloaded rifle would be:

For Count 1: 24 months imprisonment

For Count 2: 24 months imprisonment

They are so interrelated we agree with the Chief Justice they should run concurrently.

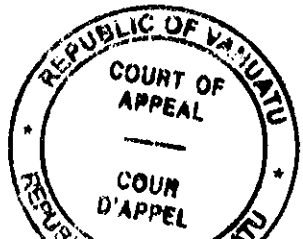
[18] For good character and remorse, 6 months needs to be deducted and a further 6 months for a guilty plea at the first available opportunity leaving a balance of 12 months. Finally, for the unexplained but substantial delay, 8 months should be deducted leaving a balance of 4 months imprisonment as the effective sentence which justice now requires.

[19] When a firearm (even an unloaded one) is presented in a heated argument, an operative prison sentence will be required. In a case like this with a mature man of good character who acts irresponsibly on the spur of the moment the clang of the prison gates will provide the salutary message without the need for a lengthy sentence. No actual harm or damage arose and the community is better served by Mr Moli being able to work and support his family.

[20] We have no doubt this man has learnt his lesson. Others will see that loss of liberty is a consequence of presenting a firearm.

[21] The appellant has served 2 months of that sentence from 12th September 2011. He is entitled to automatic parole on the 4 months so the 2 months he has served is sufficient.

[22] Accordingly, we ordered the immediate release of the appellant on 21 November 2011. We now allow the appeal and quash the sentence imposed and substitute it with one of four months on each count to be served concurrently. He is released on parole in the meantime.



DATED at Port Vila, this 25th day of November 2011

BY THE COURT

Hon Justice B. ROBERTSON

Hon. Justice J von DOUSSA

Hon. Justice O. SAKSAK

REPUBLIC OF VANUATU
COURT OF APPEAL
COUR D'APPEL
REPUBLIQUE DE VANUATU

Hon. Justice D. FATIAKI

Hon. Justice R. L. SPEAR