

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

Criminal Appeal
Case No. 20/955 CoA/CRMA

BETWEEN: JIMMY PHILIP
Appellant

AND: PUBLIC PROSECUTOR
Respondent

Coram: Hon. Chief Justice V. Lunabek
Hon. Justice B. Robertson
Hon. Justice O. Saksak
Hon. Justice J. Mansfield
Hon. Justice D. Aru
Hon Justice G. A. Andrée Wiltens
Hon. Justice V. M. Trief

Counsel: Mrs. Pauline Malites for the Appellant
Ms. Marie Taiki for the Respondent

Date of Hearing: 6th July 2020

Date of Judgment: 17th July 2020

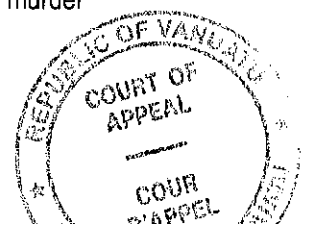
JUDGMENT

Introduction

1. Leave to appeal out of time has been considered and granted based on the merit of the appeal as we shall see in the analysis of this appeal. Mrs. Malites, on behalf of Mr. Jimmy Philip, appeals against the sentence delivered on the 5th April 2018 on one charge of premeditated homicide or murder of late Alice Karris.
2. The appeal was advanced on the basis that the sentencing judge was wrong in his assessment of the culpability and seriousness of the offending, and, therefore, fixing the starting point at 28 years imprisonment was too high rendering the end sentence of 26 years imprisonment manifestly excessive.

Background

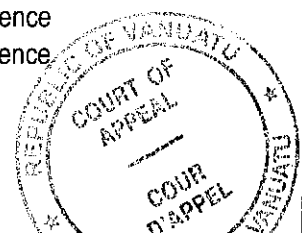
3. The particulars of this case show that on 16th June 2017, the Appellant unlawfully assaulted his partner Alice Karris with the intention of causing her death.
4. The Appellant Philip Jimmy was, following trial, convicted of the premeditated homicide or murder of the late Alice Karris.



5. Ms. Karris had died following a vicious prolonged and deliberate attack on her by the Appellant as the medical evidence revealed. A post mortem examination described extensive bleeding and blood clots under the covering of the skull (subgaleal haemorrhage the outer covering of the brain and hematoma). There were also haemorrhage and hematoma to the external surface of the thyroid gland and the front muscles of the neck. Those injuries could only have been caused by the brutal attack carried out by the Appellant.

Judge's Decision appealed against

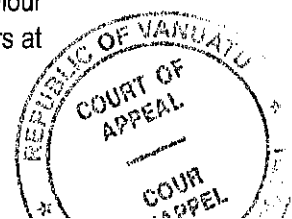
6. The primary judge referred to the recent discussions this Court had in **Public Prosecutor –v- Manap and Other [2018 VUCA, Criminal Appeal Case No. 2167 of 2017 (23 February 2018)]** to the effect that the sentence of life imprisonment in the Penal Code is the maximum and a judge may impose a lesser finite term of imprisonment or other penalty.
7. It was stated in Manap's case that "*after conviction for premeditated homicide if the sentencing judge concludes a finite sentence of imprisonment is appropriate then we consider the start sentence should generally be at least 20 years imprisonment. This will reflect the maximum sentence in unpremeditated homicide s.106 (1)(a).*" The primary judge adopted the approach to sentencing as out set in **Public Prosecutor –v- Kalosil and others [2015] VUSC 149**.
8. The judge observed that there is a need to adequately punish the Appellant for what he has done. The taking of another's life is the most serious offence in the criminal law and the sentence should reflect that. There is also the need to deter other men from using violence against women and to reinforce the need to respect the equal and human rights of women, particularly in the context of a domestic relationship.
9. The judge first looked at the seriousness of the offence and the culpability of the actual offending. The medical evidence overwhelmingly points to a prolonged and brutal attack by the Appellant. There were a number of aggravating factors apparent in the offending. This was domestic violence against a partner who was not only smaller but also affected by alcohol. She was defenceless and vulnerable. The Appellant's reasoning seems to have been that she (and her children) were a drain on his finances and she had disagreed with him. The Appellant was a man who was used to imposing his will through violence. There was a history of violence in the relationship and on occasion, the violence was directed at others.
10. The judge also considered that the callous disregard the Appellant had for his partner was further emphasised by his treatment of her after the attack. When the Appellant got on the bus with Ms Karris he sat on her body during the journey from Tana Russet to Malapoa.
11. During that journey he made it clear to witnesses just how little he thought of Ms Karris and how he wanted to get rid of her. When they arrived at their home at Malapoa he dragged Ms Karris from the bus by her legs, causing her head to hit first the bus floor, then the step and finally the ground. The judge noted the Appellant lied to paramedics to hide his guilt and also to the police to try and conceal what he had done.
12. The primary judge reasoned that the appropriate sentence without the aggravating factors would be 23 years imprisonment. Then taking the aggravating factors into account the start sentence is one of 28 years. He allowed 2 years deduction for mitigating factors. That left an end sentence of 26 years imprisonment.



13. It was this sentence which is now appealed.

Discussion

14. There is one ground of appeal in the Notice of Appeal which is that the learned sentencing judge erred in imposing a manifestly excessive starting point resulting in a manifestly excessive end sentence of 26 years imprisonment.
15. We note the Appellant's submissions disclose three grounds of appeal –
- (i) Starting point of 28 years which includes the aggravating features was such that it resulted in a sentence that was manifestly excessive;
 - (ii) The learned judge erred when he considered the history of violence during the relationship;
 - (iii) The learned judge erred when he took into account that the offender made no effort to seek medical assistance as an aggravating factor.
16. We further note that the above submission is made on the basis that the present offending does not fall into "the worst category but somewhere in the middle" when comparison is made to the starting points in the cases of **PP v Nalau** [2010] VUSC 183 and **PP v Saul** [2008] VUSC85.
17. We consider that the history of violence of the Appellant during the relationship and the lack or absence of medical assistance to the victim Ms Karris are matters that constituted aggravating factors personal to the offender (appellant) that are to be properly taken into account at the relevant step or stage of sentencing assessment exercise, i.e., after a starting point sentence has been assessed and set down (a figure X is set) by considering the aggravating factors relating to the nature of the offending, the seriousness and culpability of the offending, the maximum penalty and the comparable case authorities for consistency purposes.
18. The aggravating factors personal to the offender are then assessed or used in a sentencing exercise to increase or add to the starting point sentence already set to reflect the personals factors relating to the offender. They are not used or assessed to arrive at the initial starting point of the sentence. This is in line with the two step-process set out in **PP v Andy** [2011] VUCA 14 so as to ensure that there are no double counting considerations. See also the authority of **Moses v R** [2020] NZCA 296.
19. We do not agree with the sentencing judge's method of assessing the starting point of the sentence of the Appellant in this case. The Judge seemed to have all the aggravating matters listed at paragraphs 9, 10, 11 and 12 of his sentencing judgment under appeal in mind when he assessed the appropriate start sentence would be of 23 years. These aggravating factors include not only the seriousness of the offence and the culpability of the offending, but also the aggravating matters personal to the offender, such as the past history and his violent behaviour towards Ms Karris, which was on occasion directed to others. The summary of those matters at



paragraphs 9, 10, 11 and 12 in the judgment below shows the following aggravating matters that the Judge had in mind when he set the sentence starting point of 23 years:

- The medical evidence points to a prolonged and brutal attack by the Appellant;
- Domestic violence against a partner who was not only small but also affected by drink;
- Ms Karris was vulnerable and defenceless;
- The defendant's reasoning seems to have been that she (and her children) were a drain on his finances and she was disappointed with him;
- Defendant is a man who was used to imposing his will through violence;
- There was a history of violence in the relationship and on occasion was directed at others;
- The callous disregard the defendant had for his partner was further emphasised by his treatment of her after the attack;
- He made no effort to seek medical assistance until it was too late;
- When he got on the bus with Ms Karris he sat on her body during the journey from Tana Russet to Malapoa;
- During that journey he made it clear to witness just how little he thought of Ms Karris and how he wanted to get rid of her;
- When they arrived at their home at Malapoa, he dragged Ms Karris from the bus by her legs causing her head to hit first the bus floor, then the step and finally the ground;
- He lied to paramedics to hide his guilt and also to the police to try and diminish what he had done;

20. It is noted that when the judge took the aggravating factors into account he uplifted the start sentence of 23 years to 28 years imprisonment by considering these aggravated matters again.

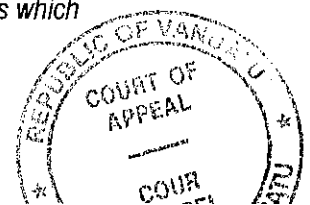
21. There is obviously a double counting exercise in respect to the sentence start point of 23 years on the matters taken into account as aggravating factors to arrive at 28 years imprisonment as the starting point of the sentence. In this case, the sentencing exercise by the sentencing judge seemed to be based on a misapplication of the guideline of sentencing approach that the Court of Appeal set in PP v Andy [2011] VUCA 14. In Andy, this Court stated:

13. *"At a sentencing hearing, a court will always have regard to the maximum sentence that has been prescribed by Parliament as a critical reference point. That being the maximum penalty imposed by Parliament for the most serious offending, it provides a standard against which a sentence for offending of lesser culpability can be assessed.*

14. *The first task of the Court is to set the starting point bearing in mind the maximum penalty for offending of the most serious culpability.*

First Step: The Starting Point

15. *The starting point can be defined as the sentence of imprisonment that reflects the seriousness of the offence and the culpability of the actual offending; that is, the specific actions of the offender and their effect in the context of the specific charge and its maximum sentence. In this first step, there is no consideration of circumstances which*



are personal to the offender. The calculation has regard only to the seriousness of the offending.

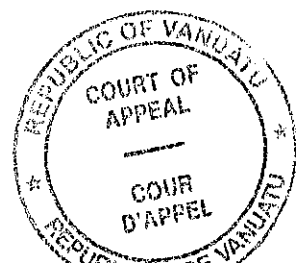
16. *In a case such as this where the charge ... the factors to be taken into account in fixing the starting point will include how the offending arose; what happened during the course of the offending and the effects on the victim. Through this process of assessment, bearing in mind the principles of sentencing and the maximum term, a correct starting point of imprisonment is ascertained. If there are relevant judgments relating to the type of offending, these will be considered in the course of the sentencing process to ensure consistency of sentencing.*

Second Step: Assessment of factors personal to the offender

17. *Once the starting point has been reached the Court, then embarks on the second step which is the assessment of the aggravating and mitigating factors relating to the offender personally. It is under this head that aggravating matters such as the past history of the offender will be considered. If there are previous convictions, particularly for a similar type of offence, this may result in the starting point being increased. Under this head, mitigating factors such as a lack of previous relevant convictions, good character and remorse will be assessed and may result in a reduction of the starting point to reach a second stage end sentence".*
22. In this case, the primary judge seemed to apply Andy's steps 1 and 2 in a mechanical way by mixing up the two-steps starting point sentencing approach. This amounts to a substantial error in the sentencing of the Appellant by the sentencing judge.
23. There is merit in this appeal. Leave to appeal out of time is therefore granted.
24. We will re-sentence the Appellant based on the aggravating factors summarised in paragraph 18 above. Based on these factors, we consider the appropriate starting point sentence is one of 23 years imprisonment.
25. We will allow one year reduction for the lack of previous convictions and a further one year for his remorse. The end sentence is of 21 years imprisonment.

Decision

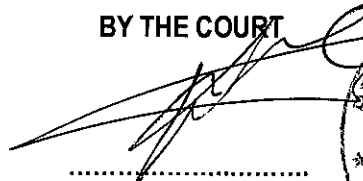
1. Leave to appeal out of time is granted.
2. The appeal is allowed.
3. The end sentence of Jimmy Philip of 26 years imprisonment imposed in the court below is set aside.
4. The Appellant Jimmy Philip is re-sentenced to 21 years imprisonment.



5. This sentence of 21 years imprisonment is deemed to be effective from 16th June 2017, the first date, he had been taken into lawful custody.

DATED at Port Vila this 17th day of July, 2020

BY THE COURT



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Hon. Chief Justice

Vincent Lunabek

