

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

Criminal Appeal
Case No. 24/1665 COA/CRMA

BETWEEN: **OBED MASSING and PHILIP MASSING**
Appellants

AND: **PUBLIC PROSECUTOR**
Respondent

Date of Hearing: **5 August 2024**

Coram: **Hon. Chief Justice V. Lunabek**
Hon. Justice J. Mansfield
Hon. Justice R. Young
Hon. Justice O. A. Saksak
Hon. Justice V. M. Trief
Hon. Justice E. P. Goldsbrough

Counsel: **P. K. Malites for the Appellants**
L. Young for the Respondent

Date of Judgment: **16 August 2024**

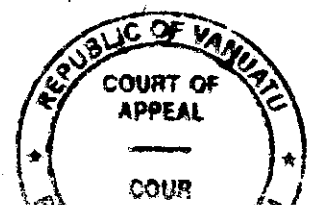
JUDGMENT OF THE COURT

Introduction

1. This appeal was heard together with Criminal Appeal Case 24/1651 Public Prosecutor v Kenneth Jack and separate judgments are given to avoid confusion of the facts and circumstances of the two cases.
2. The appellants Obed and Philip Massing appeal against the severity of their sentences and against the judge's non-suspension of their sentences. They had both pleaded guilty to unlawful possession of cannabis (Count 1), and to attempted sale and supply of cannabis (Count 2).

Background

3. The appellants are brothers from Melip Village, South Malekula. Obed Massing is 33 years old and Philip Massing is 28 years old. They both reside at Ohlen Freshwind Area. The Police executed a search warrant at their home on 1st March 2024 around 10:00am in their presence.



The Police found 2 big rolls of cannabis leaves wrapped in aluminium foil, 1 package of leaves wrapped in paper, a bottle containing small balls of leaves covered with aluminium foil, 1 box of smarties containing dried cannabis leaves and a plastic container with leaves. These were sold to youths around their area at VT 100 per ball.

4. Upon their arrest and interview under caution by the Police the appellants admitted to possessing the cannabis leaves found in their home. Philip Massing admitted to selling cannabis since 2008 and Obed Massing admitted selling cannabis since 2006.
5. The leaves were tested positive for cannabis by the Police on 7th March 2024. The total net weight was 157.5 grams.

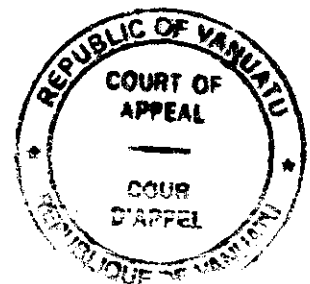
The Sentence

6. The sentencing judge considered the seriousness of the offences committed together with the aggravating features without any mitigating circumstances and applying Wetul v Public Prosecutor [2013] VUCA 26 and distinguishing PP v Nala VUSC 272 and PP v Kalo [2017] VUSC 116, imposed a start sentence of 3 years imprisonment for attempted sale and supply of cannabis and 1 year and 7 months imprisonment for unlawful possession of cannabis, making the sentences concurrent for 3 years.
7. In mitigation the judge reduced Obed Massing's sentence by 6 months and discounted it further by 27%, leaving his end sentence to be 20 months imprisonment. For Philip Massing the Judge reduced his sentence by 8 months for his mitigating factors and discounted it by a further 27% for guilty plea, leaving his sentence to be 18 months imprisonment.
8. The judge did not suspend the sentences. He said at [13] that:

"Considering the circumstances of the case and the facts that the defendants have been selling cannabis since 2006 and 2008 respectively, a suspended sentence would send the wrong message to the community. A custodial sentence is warranted to mark the seriousness of the offending and to protect the community. It will also serve as a deterrence to the defendants and the public at large from such offending."

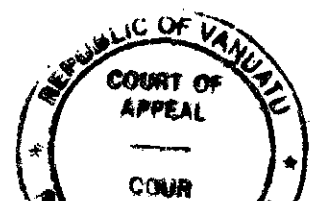
The appeal

9. The appellants appeal against the length of their sentences and against the non-suspension of their sentences of imprisonment.



Discussion

10. At the hearing of the appeal Counsel for the Public Prosecutor accepted that starting sentences imposed by the Judge were excessive in the particular circumstances. The Public Prosecutor submitted a starting sentence of two years imprisonment was sufficient. We heard Mrs Malites only in relation to the appeal against the non-suspension. Her argument and submission was that the judge had taken into account an irrelevant factor of their admissions of selling cannabis since 2006 and 2008 for which they were not charged at any time. Counsel relied on the case of R v De Simoni [1981] 147 CLR 383 which was applied in PP v Shing [2015] VUSC 58.
11. Mrs Malites also submitted on the basis of Nalau v Public Prosecutor [2021] VUCA 48 that the judge did not carry out a proper balancing exercise of the aggravating features with mitigating factors in not suspending the appellants' sentences.
12. Mrs Malites made the same submissions she made in relation to the non-suspension of the sentence of Kenneth Jack in Criminal Case 24/1651 PP v Kenneth Jack.
13. Mr Young for the Public Prosecutor and respondent explained the change in position of the State from the Supreme Court where submissions were made favouring suspension due to there being no pre-sentence report at the time. However having seen the pre-sentence reports, the sentence should not be suspended in respect to either appellant.
14. We reiterate what we said about the balancing exercise by the judge in the case of Kenneth Jack.
15. We note the difference in the quantities of the cannabis in Kenneth Jack's case which was 1.42 kilograms. In this case the net weight was 157.5 grams. However the appellants admitted under caution to the Police that they were engaging in the business of sale of cannabis since 2006 for Obed Massing and since 2008 for Philip Massing. Although they were not charged for these admissions they admitted being long-termed dealers. They benefitted from the sale and supply of cannabis. They put young people at risk of adverse effects of the substances. Their characters were tainted by those actions. That distinguishes their case from De Simoni and Shing's cases.
16. We agree with the Public Prosecutor that the Judge's starting sentence, at 3 years imprisonment was too high. We consider taking account of the amount of cannabis seized a starting sentence of 2 years imprisonment was appropriate. Applying the discounts for personal circumstances for Obed (6 months) and Philip (8 months) which were not challenged and the discount of 27% for the guilty pleas leaves sentences of 13 months for Obed and 12 months for Philip.
17. As to suspension the Judge emphasised the purpose of his decision to impose sentences without suspension in paragraph 13 of custodial sentence. We agree the judge exercised his discretion correctly in not suspending the sentences of the appellants. It would send the wrong message to the community if admitted long-term cannabis suppliers had their sentences suspended. We therefore reject the appeal against the refusal to suspend the sentences of imprisonment.

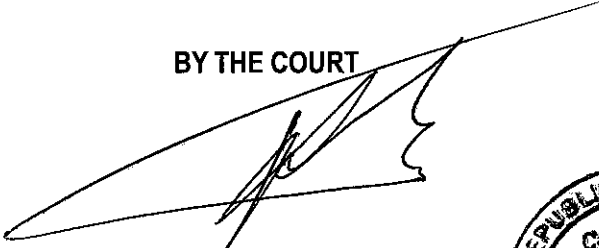


Result

18. In the circumstances, we allow the appeal against sentence and reduce the appellants' sentences of imprisonment sentence of, 13 months imprisonment on both counts, concurrent for Obed, and 12 months imprisonment on both counts concurrent for Philip.
19. We accordingly quash Obed Massing's sentence of 20 months imprisonment and Philip Massing's sentence of 18 months imprisonment.
20. We resentence Obed Massing to 13 months imprisonment and Philip Massing to 12 months imprisonment also.
21. We refuse the appeal against the refusal to suspend the sentences of imprisonment.
22. Philip Massing's sentence is confirmed to have commenced on 3rd May 2024 as he has been in prison since then. Obed Massing's sentence is effective immediately as of today.

DATED at Port Vila, this 16th day of August, 2024.

BY THE COURT


Hon. Chief Justice, Vincent Lunabek

