

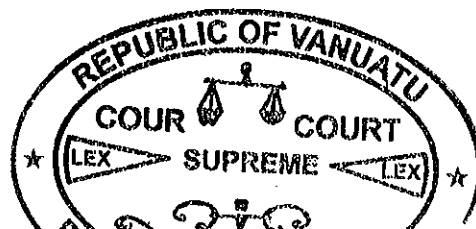
PUBLIC PROSECUTOR - v - PHILIP TENAKE

Coram: V. Lunabek CJ

Counsel: Mr Simcha Blessing for the Public Prosecutor
Mr Ronald Warsal for the Defendant

SENTENCE

1. Mr Philip Tenake, you appear today for your sentence. Philip Tenake, you are charged with one (1) count of premeditated intentional homicide, contrary to section 106(b) of the Penal Code Act [CAP.135] for shooting dead Mr Richard Eade Dick (the deceased) with a .22 Winchester rifle on 29 December 2011.
2. On 8 May 2012, you entered a guilty plea to that count. The summary of facts provided by the prosecution sets out the background of your disputes with the victim (deceased) leading up to your murdering the deceased. These facts are not disputed by you nor your lawyer. You accept these facts before you entered your guilty plea on 8 May 2012. They are set out below:
 - **Background of the parties**
3. Since 1999, a land dispute raged between the deceased Mr Richard Eade Dick and you and your family.
 - **The deceased**
4. The deceased is a naturalized citizen originally from New Zealand. He resides at Teouma and is a businessman by occupation. The deceased and his wife Muriel Eade are the legal owners of an expanse of land at Teouma. They purchased the land sometime in 1990 and have been hitherto leasing the land from customary land owners. Sometime in 1999 the deceased set about



developing and subdividing the land. For medical reasons, his wife returned to New Zealand in 2003 and she has never returned.

• **The defendant**

5. You are a medical practitioner from Aneityum. You and your family are residing on a residential plot belonging to the deceased adjacent to Teouma Gardens. You made an agreement with the deceased to purchase two (2) separate plots by installments. You made an initial deposit of vt160,000 for the land whereupon you and your family abode. You made a further deposit of vt180,000 for another land which you use primarily for gardening purposes. You failed to make further payments as per your agreement with the deceased.

• **The genesis of the dispute – Facts begetting your murderous intent**

6. The deceased made enquiries and followed up with you but you never responded. The deceased wrote a letter to you on the 26th of August 2009 demanding payment and advised that he had increased the price of the land to Vt2, 500, 000. The deceased also informed you that if you fail to settle the amount by 31st October 2009, you will be asked to leave the land, it will be sold to other buyers and your deposit will be kept in lieu of rent. The deceased made a subsequent follow up by letter on the 22nd of November 2009.
7. You are from Aneityum Island. You started making wild claims that you are the customary owner of the land that you bought from the deceased and you also claimed that you own the breadth of land from Teouma Garden to Malapoa Point. You also informed the deceased that the Chiefs of Eratap have advised you to remain on the land until the judgment of Civil Case No.141 of 2008 is delivered by the Supreme Court. You were willing to declare your claim to the deceased to whom you paid the land and the Chiefs of Eratap and Teouma and you made your decision clear in a letter you wrote to the deceased on the 6th of October 2009. The deceased and his employees wrote to you, they physically spoke to you regarding the outstanding installments, the Chiefs of Eratap held several meetings to settle your discord and ordered you to leave but you paid no heed to the deceased's concerns or the Chief's orders.
8. You and your family threatened to kill the deceased on several occasions. On one occasion the deceased and Mr Morris Lui went to your house to make payment enquiries. You, your wife and your son Mr Philemon Tenake uttered

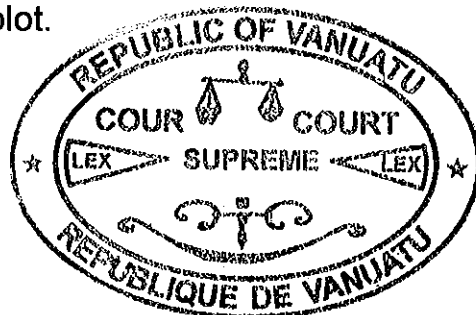


words to the deceased in the presence of Mr Lui to the effect that you were tired of the deceased bothering you and your family and that you will kill him.

9. The deceased engaged in another sale and purchase agreement with one Mr Timothy Tabe sometime in May 2011 for the purchase of the plot used by you for gardening. Mr Tabe was to purchase the land in installments. Mr Tabe made the first installment in the amount of VT50,000 and further installments.

- **The actual offending**

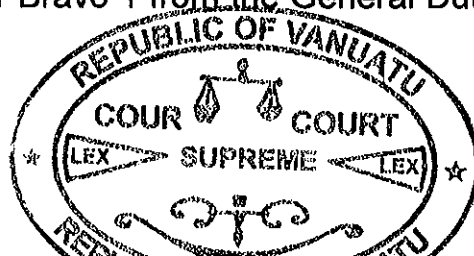
10. Events took a sinister turn on the 29th of December 2011 when you resolved to make good once and for all your murderous intention and took it upon yourself to murder the deceased.
11. On the 29th of December 2011, Mr Tabe and his wife decided to visit the land. They discovered that vegetables and other root crops were grown on the land. As they proceeded further up, they saw that you planted crops. Mr Tabe and you had never acquainted prior to the 29th December. Mr Tabe and his wife paid no attention to what you were doing and they continued to make their way further along the plots periphery. They noticed that someone had placed a 'Namele leaf' forbidding the public to enter the land. The placing of a 'Namele leaf' on the land means that access to the land is forbidden except with your permission.
12. As they were making their way back, they met you. A heated exchange between you and the Tabes occurred. You told Mr Tabe to get his money back from the deceased. You told Mr Tabe that you had already paid for the land and you are also the custom owner of the land. You also claimed that you owned the land from Eratap to Malapoa Point and your right of ownership had already been endorsed by the 12 Tribe Chiefs of Eratap. You and the Tabe's parted ways, and while he and his wife making ways toward the road, Mr Tabe immediately called the deceased, who was in Port Vila at the time, enquired as to ownership and informed him of your representations. Mr Tabe told the deceased to solve the problem forthwith or return him his monies. The deceased replied and said words along the lines of "No no no, *olfala ia i nogat right, yu wait long mi, bae mi kam antap ale umitu stretem. Mi taet long olfala ia* "(Translation: "No, no no he has no right, wait for me, I'll come and we'll settle it. I am tired of him") Mr Tabe therefore waited for the deceased at the road just a close distance from the plot.



13. A few minutes later, the deceased and two (2) acquaintances of his Mr Morris Lui and Mr Luke arrived. Upon arrival the deceased told Mr Tabe and his wife to accompany him and his acquaintances to the plot he had offered to sell to Mr Tabe. When they reached the plot the deceased tried to disentangle the rope that was used to fasten the 'Namele leaf' and Mr Luke sliced the tree with a knife. The deceased then removed the *Nalalas*, marked the edges of the plot and showed them to Mr Tabe and his wife.
14. When they were about to leave, you, Mr Tenake, shouted angrily at them and you said, interalia: "*Who ia stap toktok antap ia yu kam antap ia naoia!*" (Translation: *Who's talking over there, come over here now!*) Mr Lui responded that it was him. You then shouted, "*Hey olfala Dick yu no pulumaot Nalalas ia long graon blong mi, mi ia mi plantem Nalalas ia, mi ia mi owner blong graon*" (Translation: *Hey Dick, don't remove the Nalalas from my land, I planted the Nalalas and I am the owner of the land/ it's my land*). They saw that the deceased was about to make his way to talk to you so they advised him not to. The deceased told them that he intends to tell you to wait for the Court decision and to stop threatening Mr Tabe and his wife. He had nothing, no weapon or anything in his person that would provoke someone to attack him.
15. Notwithstanding the fact that they advised him against talking to you, the deceased was adamant on resolving the problem in an amicable way so he made way towards your house. Mr Lui re-cautioned the deceased but to no avail. The deceased walked towards the direction of the door of your house. The door was open at the time.
16. When you were about 10 to 15 metres from the door, the persons who accompanied the deceased heard a sudden gunshot. The deceased cried out for help. He held his hands to his chest and stepped backwards. He tried to speak but the modulation of his voice changed and he struggled to call out for help. Within less than a fleeting minute, he fell to the ground face forward. Mr Lui saw you standing at the door of the house. Mr Tabe and his wife took flight.

- **Investigation, report and arrest**

17. Mr Tabe immediately contacted the police by phone and reported the matter. At approximately 1:00pm the same day, the investigating officer Corporal Atis Yosef was radioed by call sign Victor Bravo 1 from the General Duties section



regarding the homicide. The police arrived at the crime scene at about 1.15pm. The police discovered the body of the deceased at the crime scene.

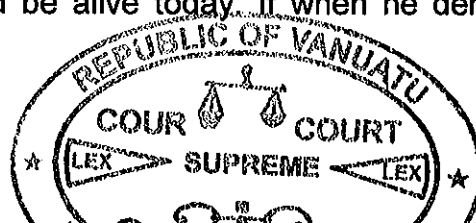
18. The police discovered a shot wound on the deceased's chest measuring approximately 10mm by 10mm located 60mm directly below his neck. The police concluded their investigation at about 3.00pm. Their investigation revealed that you were standing at close range when you fired the rifle. They suspected that you must have used the aid of a scope which led them to the conclusion that the shot was calculated and was intended to murder the deceased.
19. You were arrested the same day, the 29th of December 2011. You were re-cautioned on the 19th of January 2012 and interviewed. You waived your right to silence and made comprehensive representations to the police. You admitted under caution shooting deceased with a .22 Winchester rifle on his chest as alleged. You also confirmed that you had the intention to shoot and kill the deceased with the rifle.

- **The autopsy and cause of death**

20. The body of the deceased was brought into the Emergency Room at the Port Vila Central Hospital at approximately 2.30pm.
21. On immediate presentation at the hospital, the body of the deceased was wrapped in a body bag. His body was cold and rigor mortis was setting in. He was not wearing any clothes except for a pair of black shorts and was lying face up. His front was covered in specks of mud and water. He had no pulse, no breathing movement no heart beat and no blood pressure. He had no obvious wounds or fractures, the chest was normal and the abdomen was flat and normal. The examining doctor observed that he had a small punctured wound about one centimeter in diameter two inches below the manubrium sterni, slightly to the left of the sternum all consistent with the crime scene report. The Doctor hypothesized that his death was due to gunshot to the chest possibly injuring the heart and the great vessels. The Doctor immediately recommended an autopsy.
22. Doctor Michael Burke performed an autopsy on the body of the deceased on the 5th of January 2012. He is a registered medical practitioner practicing as a specialist in forensic medicine and pathology and is currently employed as a Senior Forensic Pathologist at the Victorian Institute of Forensic Medicine.



23. Dr Burke carried out external examination on the head and neck, chest and abdomen, upper limbs, lower limbs, external genitalia and back of the deceased. He also carried out a thorough internal examination of the body of the deceased. He examined inter alia, his cardiovascular System, respiratory system, gastrointestinal system, genitourinary system, resticuloendothelial system, endocrine system, central nervous system and musculoskeletal system.
24. Dr Burke concluded that the deceased was shot in the chest by a .22 rifle and that he died rapidly at the scene of the crime. The post-mortem examination showed a gunshot injury to the upper chest. The bullet entered the sternum (breast bone), fragmented, with the large projectile extending through the right lung and smaller fragments extending through the left lung. The gunshot injuries involved major pulmonary vessels and death occurred secondary to intrathoracic hemorrhage (blood loss).
25. The examination of the entrance wound to the upper chest was made somewhat difficult due to the injury being altered by post-mortem. There was cotton within the injury at the time of the examination and the injury clearly was larger than it had been following the incident. However there was no soot or tattooing seen around the injury. The post-mortem examination showed no evidence of any other significant injuries.
26. The facts and circumstances of your offending are particularly serious. The motivation of your crime is not quite clear, although, the facts show that you killed the deceased because of your own failure to honour your contractual obligations with the deceased in that you failed to make further payments of the plot of land you intended to purchase from the deceased despite the deceased's various notices and demands for you to settle the payment of his land as per your agreement with him. After you realized that the deceased has made another contractual arrangement to sell the plot of land your use for gardening to other people (Mr Timothy Tabe and his wife), you shot dead the deceased with your own .22 rifle after you threatened to kill him on previous occasions.
27. When considering your sentencing, the Court, on behalf of the community, condemns in the strongest terms your behavior and attitude leading to your horrible and heinous crime. This is an intolerable and unacceptable behavior. You must be responsible for your own act and you must be accountable for it. If you had decided to be faithful to the contractual obligations you entered with the deceased over the plot of land you used for gardening, instead of creating useless and baseless claims and excuses, Richard Eade Dick would be alive today. If when he demanded on



various occasions for you to make further payments to the plot of land you used for gardening and instead of inventing mountains of excuses, you had left his land he would still be alive. But you went on with you plan to kill him.

28. Premeditated intentional homicide is prohibited under s.106(b) of the Penal Code Act [CAP.135] and is sanctioned to imprisonment for life as its maximum penalty. In your sentencing the Court initially considers the statutory maximum penalty prescribed by the legislature for this offence [i.e. imprisonment for life]. The maximum penalty imposed manifests the policy of Parliament of the maximum penalty (of life imprisonment) which may be imposed.
29. When the Court considers your sentencing, the Court must juggle various principles, purposes and considerations. The exercise of sentencing an accused person in the circumstance of your case is not a purely logical exercise because the sentencing judge must exercise his sentencing discretion by giving weight to each of the purposes of punishment. The purposes of criminal punishment are various: Protection of the society, deterrence of the offender like you and others who might be tempted to offend, retribution and reform. The purposes overlap and none from the others when determining what is an appropriate sentence in a particular case. The purposes as guideposts to the appropriate sentence but sometime they point in different directions.
30. One of such principles is that the penalty prescribed for an offence is intended for cases falling within the worst category of cases for which that penalty is prescribed. Those principles are elucidated in **Veen v. The Queen (No.2)** [1988] HCA 14, where the High Court of Australia clarified that (the principle) does not mean that a lesser penalty must be imposed if it be possible to envisage a worse case; ingenuity can always conjure up a case of greater heinousness. A sentence which imposes the maximum penalty offends this principle only if the case is recognized outside the worst category (at paragraph 15).
31. The same principles are also found in the judgment of the New Zealand Court of Appeal in the **Queen v. Filo** [2007] NZCA 29. They are followed in **Public Prosecutor v. Wari and Wako** [2000] VUSC 48; Criminal Case No.11 of 2000 (24 August 2000); **Public Prosecutor v. Nalau** [2010] VUSC 183; Criminal Case No.143 of 2009 (8 December 2010). Also in **Morris Ben v. Public Prosecutor** [1993] VUCA 3, the Court of Appeal following these principles, held:

"The Court is of the view that the learned Chief Justice has placed too much emphasis upon the removal of the Appellant from society in order to protect it from further attacks. The purpose of imposing a custodial sentence is not only to protect society from the prisoner, but also to punish the prisoner for his crime. Whilst it is clear that a judge may take into account the needs of society it is not appropriate to increase the sentence purely for the protection of society. A judge should not impose



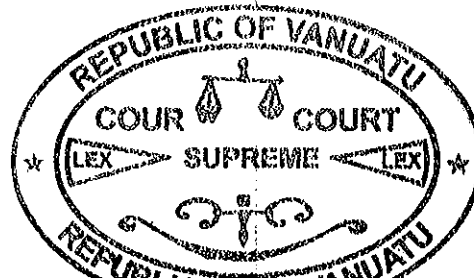
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*sentence longer than that which is appropriate in the circumstances of the case simply for the purpose of protecting society, although the protection of society is a matter to be considered in imposing the sentence: see **Veen v The Queen (No 2) [1988] HCA 14; (1988) 164 CLR 465.***

32. That is the same question this Court is facing whilst considering your sentencing today. That question has been partly answered by the Court of Appeal in **Public Prosecutor v. Andy** [2011] VUCA 14; Criminal Appeal Case 09 of 2010 (8 April 2011) when the Court of Appeal sets out the sentencing approach to be followed by the Courts in Vanuatu. In **Public Prosecutor v. Andy** [2011] the Court of Appeal stated:

“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. 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... 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... Once this process has been completed, as a third step, the trial judge will then consider what discount from the second stage end sentence should be applied for a guilty plea. The greatest discount allowed under this head will be a discount of one third where the guilty plea has been entered at the first reasonable opportunity. A later guilty plea will result in a smaller discount. No discount is available under this head if the charges have been defended through a trial.”

33. In the present case, the circumstance and the seriousness of your offending are aggravated by the following factors:
- (a) You used a weapon, namely a .22 Winchester rifle with homicidal intent. Your shot was calculated to effect death. You shot the upper chest of the victim. The bullet of your rifle entered the victim's sternum (breast bone), fragmented, and the larger projectile extended through to the right lung of the deceased and smaller fragments extended through to his left lung. Death occurred secondary to blood loss (intrathoracic hemorrhage) and was the direct result of the gunshot;
 - (b) The one ill-fated decision to use a firearm and the one fatal shot robbed the victim of his life. This was a unwanted taking away of a life and a unfortunate loss of life.

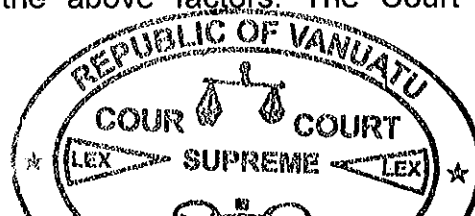


- (c) You lured the victim to his death. You demanded the victim to confront you, who ia stap toktok antap yu kam ia naoia!" (Translation: "who's talking over there, come over here now!") You waited for the deceased to walk toward your house. When the deceased approached the house, you shot the deceased at point blank. The shot was calculated, précised and designed to kill the deceased. The deceased had no weapon in his person to provoke such a pusillanimous attack from a distance or that would suggest that he was presenting imminent danger.
- (d) While the deceased was crying out for help, you provided no assistance to him. You were the only one who could have assisted the deceased. The rest of your family were not at home and the persons who accompanied the deceased took flight as soon as they heard the shot and the deceased receding. It would have been possible for you to notify the ambulance, the hospital or the police immediately. If you have done so and the deceased received immediate medical attention, the victim's life may have been able to have been saved.
- (e) The victim took about 30 to 60 minutes to die. From where you shot him, the deceased would have been in severe pain. At some point, he would have become aware that he was going to die as a result of the shot.

34. The Court considers a starting point head sentence ranging between 20-25 years imprisonment. I consider 23 years imprisonment as the appropriate starting point for you taking into account of the circumstance and seriousness of your homicidal shot of the deceased and the aggravating factors as described which you and your lawyer accepted before you entered your guilty plea and upon which your lawyer also accepted in his sentencing submissions on your behalf.

35. I now assess any aggravating and mitigating factors relating to you personally in order to balance them with the aggravating factors assessed in respect to the seriousness of your offending. When I consider this assessment, I take into account of your past history. The pre-sentence report dated 24 May 2012 shows that you are from Analkawat village, on the island of Aneityum and you reside with your family at Etas area, Efate. You are 64 years old. You started your education at Lenakel Primary School on Tanna (year unknown). You furthered your education to a nursing school in the Solomon Islands. You attended a Nursing School in 1970 and graduated with a Certificate of Nursing in 1972. Your ambition is to become a doctor. You have other skills. You are the only one to work in your garden as you have retired as a practicing nurse and you have grown up children. You live with your wife. You are suffering from high blood pressure (hypertensive) and you are also suffering from minor stroke in 1998 and again in 2010.

36. You are a first time offender and you do not have any previous conviction. You have good cooperation with the police authorities and you are an old man. Some reduction allowance will be given to reflect the above factors. The Court reduces your


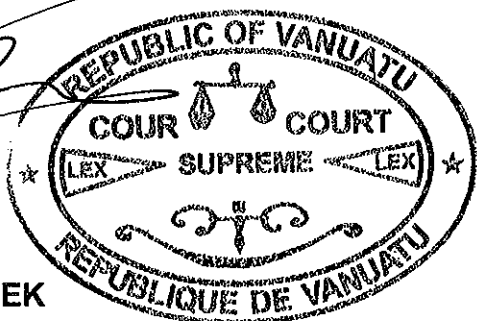


sentence for 6 months. The Court notes that you file a sworn statement to show that you have performed a custom ceremony to chiefs from your community at Etas, Chief of Eratap (custom owners of land upon which you reside and offended upon), and other Chiefs of Efate including the New Zealand High Commission in Vanuatu and I understand this custom process was for you to "clean up your face" with the community. However, I do not think there is evidence of specific custom reconciliation ceremony you performed to the family of the deceased and which are accepted by the family of the deceased. Your sentence is further reduced by 6 months. This allowance should be more than 6 months if there is evidence of custom reconciliation ceremony directly to the family of the deceased and accepted by them.

37. It is to your credit that you pleaded guilty at the first opportunity given to you by the Court. Your sentence is now reduced to 22 years. It will be reduced by $\frac{1}{3}$ to reflect your guilty plea at a reasonable opportunity given to you by the Court.
38. Your sentence is finally reduced to 15 years imprisonment after the one third guilty pleas allowance is granted. You have already spent 5 months and 12 days in custody. That period is taken and counted in your credit as already served by you since your sentence will be deemed to start from 29 December 2011, the date you were arrested and detained until you are sentenced today 4 July 2012.
39. You are ordered to serve a term of 15 years imprisonment. Your sentence of 15 years is deemed to start on 29 December 2011. You have 14 days to appeal your sentence if your are unsatisfied with it.

DATED at Port-Vila this 5th day of July 2012

BY THE COURT

**Vincent LUNABEK
Chief Justice**