

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

Criminal Appeal
Case No. 20/803 SC/CRML

BETWEEN: John Peter Jubiter
(Appellant)

AND: Public Prosecutor
(Respondent)

Date of Hearing: 3rd July 2020
Date of Judgment: 8th July 2020
Before: Justice Oliver.A.Saksak
Counsel: Mr Roger Tevi for appellant
Ms Laura Lunabek for respondent

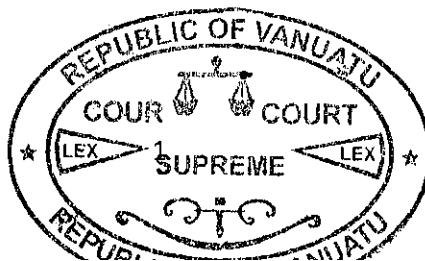
JUDGMENT

Introduction

1. The appellant was sentenced by a Magistrate in the Magistrates Court at Lakatoro on 4th May 2020 to a starting sentence of 36 months imprisonment. The sentence was reduced by 12 months for guilty plea and a further 6 months for mitigating factors to an end sentence of 18 months imprisonment, without suspension.
2. The appellant appeals against the non- suspension of his sentence.

Facts

3. The appellant was charged with Domestic Violence pursuant to sections 4 and 10 of the Domestic Violence Act No. 28 of 2008. The charge was laid by the Magistrate himself pursuant to the power stipulated in section 35 (1), of (2) and (3) of the Criminal Procedure Code Act [CAP.135].



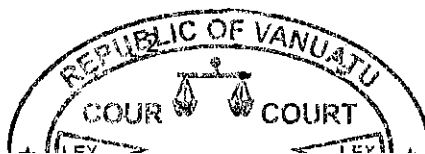
4. The victim's father made a complaint under oath directly to the Magistrate on behalf of the victim. The victim was locked in the residential house of the appellant at the relevant time. The father was concerned about the safety of his daughter and proceeded with the complaint on her behalf.
5. Upon that complaint a warrant of arrest was issued by the Magistrate. The appellant was arrested on 16th March 2020. He was brought to Court on the same date. A judicial charge was laid by the Magistrate but plea was adjourned to 20th March 2020 in order for the appellant to find legal representation and advice. He was released on bail to allow him to vote on 19th March 2020 in the general election.
6. On 20th March 2020 the appellant appeared in Court but the plea was adjourned to 26th March 2020 to enable him to get legal advice and representation.
7. On 26th March 2020 when the case was called for plea, there was no prosecutor and no defence counsel. The Magistrate read the charge to the appellant and he pleaded guilty. The Magistrate sentenced the appellant on his guilty plea to an end sentence of 18 months imprisonment. The Magistrate did not suspend the sentence.

Grounds of Appeal

8. The appellant raised 3 grounds of appeal as follows-
 - (a) That the Magistrate had failed to properly calculate the 1/3 for early guilty plea.
 - (b) That the Magistrate failed to take into account the mitigating factors of being a first time offender and for remorse.
 - (c) That the Magistrate gave too much weight to the aggravating

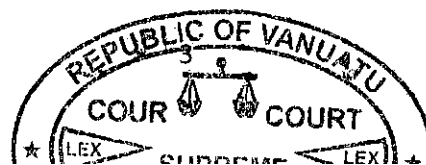
Discussion

9. At the hearing of the appeal Mr Tevi abandoned grounds (a) and (b) and advanced the appeal only on the third ground.
10. Mr Tevi submitted the sentence of 18 months imprisonment should have been suspended because the appellant was a first-time offender. Mr Tevi relied on the case of PP v Kalfau Nasse Crc 19/1089. The defendant in that case pleaded guilty to one count of Domestic Violence contrary to sections 4 (1) and 10(1) of the Domestic Violence Act, and to a second



count of cannabis leaves contrary to section 2 (62) and 17 of the Dangerous Drugs Act [Cap.12]. The judge sentenced the defendant to a starting sentence of 2 years imprisonment but reduced it to an end sentence of 12 months imprisonment with suspension for a period of 2 years.

11. The prosecution submitted first that the judicial charge was laid in an unusual manner because the complaint was made directly to the Magistrate. Ms Lunabek referred the Court to section 132 (2) of the Criminal Procedure Code Act [CAP 136] which states that in every trial for an offence which has not been the subject of an investigation by the Police where the Public Prosecutor, or assistant Public Prosecutor or a State prosecutor does not appear, the presiding magistrate may conduct the proceeding, but shall be bound by rules of procedure and evidence which would apply to a prosecutor, in addition to his duties and in his capacity as presiding magistrate. Ms Lunabek submitted however that having given the appellant an opportunity to get legal advice and representation, the Magistrate had complied with section 132 (2) of the Act.
12. Secondly Ms Lunabek submitted that as domestic violence offence was committed pursuant to sections 4 and 10 of the Domestic Violence Act carry a maximum sentence of 5 years imprisonment, the Magistrate lacked the jurisdiction to deal with the case and may have exceeded his jurisdiction by awarding a sentence of 3 years imprisonment as the starting sentence. For that reason Ms Lunabek proposed that if the appeal was allowed the case should be remitted for retrial pursuant to the Court's power stipulated in section 207 (1) (a) (i) of the Criminal Procedure Code Act.
13. I express a sympathetic view towards the submissions of the Prosecution because first this was not a State appeal. If it was, the Court has power under section 207 (2)(a) to quash the sentence of the Magistrate and to order a retrial. And secondly, the Prosecution could have filed a cross-appeal but did not. Therefore whilst those submissions are sound and valid the Court is not obliged to accept them.
14. That leaves the appellant's submission for a suspended sentence unchallenged. By comparison to the Nasse Case which was more serious with 2 separate charges, yet the defendant was sentenced to an end sentence of 12 months imprisonment, with suspension. For consistency the appellant's sentence should have been suspended. The only reasonable



explanation is that the Magistrate had no lawyers appearing at the plea to draw his attention to these cases for the purpose of assessing the appellant's appropriate sentence.

15. The laying of the charge by the Magistrate was unfortunate. Whilst the power to do so is stipulated under section 35 of the CPC Act, this power ought to be exercised sparingly and with caution. The appellant's case should not therefore be used as a precedent for other cases save for very exceptional circumstances.

The Result

16. The appeal is allowed. The appellant's end sentence of 18 months imprisonment is suspended for a period of 2 years on the condition that the appellant does not commit this same offence again, or any other criminal offences for which he would be charged and convicted. If he does, he will go to prison to serve his term of 18 months imprisonment.

DATED at Port Vila this 8th day of July 2020

BY THE COURT

