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

Criminal Appeal
Case No. 23/3276 SC/CRMA

BETWEEN: JOHN NAMAKA
Applicant

AND: PUBLIC PROSECUTOR
Respondent

Hearing: ***27th day of May, 2024***
Before: ***Justice W. K. Hastings***
Counsel: ***Ms. F. Kalsakau for the Applicant***
Mrs. M. Tasso for the Respondent

DECISION

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1. On 25 May 2023, the appellant pleaded guilty to one count of unlawfully entering a non-dwelling house contrary to s 143(1) of the Penal Code [Cap. 135 (Penal Code)]. The maximum penalty for that offence is 10 years imprisonment. He also pleaded guilty to one charge of theft contrary to s 122(1) of the Penal Code. The maximum penalty for that offence is 12 years imprisonment.

2. The appellant was convicted and sentenced on both charges on 7 November 2023.

3. He appeals the end sentence of 26 months on both charges on the following grounds:

   a. The first ground is that the Magistrate erred when she disregarded the fact that the appellant was 17 years old at the time of the offending, resulting in a manifestly excessive sentence;

   b. The second ground is that the Magistrate erred when she adopted a starting point of 43 months imprisonment, resulting in a manifestly excessive sentence; and

   c. The third ground is that the Magistrate erred when she refused to suspend the sentence.

4. The appeal was filed 7 days out of time, but the respondent did not oppose leave. Leave to appeal out of time is granted.

REPUBLIC OF VANUATU COUR COURT LEX SUPREME LEX REPUBLIQUE DE VANUATU

The facts

5. On the morning of 19 March 2023, the manager and head chef of the K2 restaurant came into work and discovered that the restaurant had been entered sometime the night before, and that items valued at VT 357,000 had been taken. None of the items have been returned.

6. The police took statements from 4 witnesses.

7. The first statement was from the security guard who had gone home at 12.30am on 19 March 2023 to have a cup of tea. He said he was gone for less than 30 minutes, and when he returned, the restaurant door was wide open and things had been thrown around. He did not see the appellant or his associate Tom Maki.

8. The second statement was from a chef who noticed the door and a window open when she got to work at 8.30am on 19 March 2023. She noticed that a laptop and alcohol were missing.

9. The third statement was from a security officer who worked next door. He saw the appellant and his associate Tom Maki in an empty yard opposite the restaurant at around 1pm on 19 March 2023. He said he thought they were hiding bottles of wine in their trousers.

10. The fourth statement was from a man who said that the appellant and Tom Maki stole the items from inside the restaurant. The summary of facts does not state how this witness came to have this knowledge.

11. Under caution, the appellant admitted the offending.

The sentence in the Magistrates' Court

12. The Magistrate took into account the maximum penalties for each offence, and established what she referred to as a starting point of 40 months imprisonment on both charges. After establishing the starting point, she then identified the following aggravating factors related to the offending (my comments are in parentheses):

    a. There was planning involved, (inferred from the fact the offending took place when the security guard left the premises for 30 minutes);

    b. The offending happened at night when no one was at the restaurant (this is an aggravating factor when a dwelling house is entered because of the risk of confrontation with residents who are ordinarily home at night; it has much less significance as an aggravating factor when a non-dwelling house is entered at night as is the case here because the risk of confrontation is lower than it would be during the day);

c. The items were consumed and disposed of with no prospect of their return;

d. The effect on the restaurant (this is relatively less significant aggravating factor as the offending does not involve the violation of a private space, is limited to financial and property damage, and the effect on employees is less than if a home had been invaded);

e. The loss suffered by the victim (this loss is financial, insurable and is included in the effect on the restaurant mentioned above);

f. The fact that two offenders were involved.

13. The Magistrate added 3 months to the starting point of 40 months after considering these aggravating factors, and reached a new starting point of 43 months imprisonment.

14. As an aside, it is good sentencing practice to consider the aggravating factors of the offending when deciding the starting point, rather than as an uplift to a starting point seemingly based only on the maximum penalty.

15. The Magistrate then took into account the following personal mitigating factors:

a. The guilty pleas entered at the first available opportunity;

b. Remorse and contrition on the basis of his admission to the police;

c. He was a first time offender without previous convictions;

d. He was remanded in custody for 14 days from 27 April 2023 when he was arrested until he was granted bail on 11 May 2023.

16. The Magistrate reduced the sentence by one third, or 14 months, for the guilty plea, and reduced it by a further 3 months for the other mitigating factors, reaching an end point of 26 months imprisonment.

17. The Magistrate considered suspending the sentence under s 57(1) of the Penal Code. She declined to do so because the appellant had breached his bail by not coming to Court, resulting in his bail being revoked.

Submissions

18. Ms Kalsakau submitted the Magistrate gave insufficient weight to the fact that the appellant was 17 years of age at the time of the offending. She submitted the appellant's age engaged Article 37(2) of the United Nations Convention on the Rights of the Child:

> *The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;*

19. As a signatory to that Convention, Vanuatu is bound by its provisions.

20. Ms Kalsakau also submitted the appellant was not the primary offender, the stolen items were not in his possession, and that when he is sentenced on a second set of charges resulting from offending whilst he was on bail on the present charges, he will end up serving a lengthy sentence of imprisonment "*for a juvenile his age.*"

21. On the second ground, Ms Kalsakau submitted the Magistrate gave too much weight to the aggravating factors related to the offending when adopting the starting point, and insufficient attention to s 37 of the Penal Code which provides that:

> *If an offender is convicted of an offence punishable by imprisonment, the court must in addition to other sentencing options it may impose, have regard to the possibility of keeping offenders in the community so far as that is practicable and consistent with the safety of the community.*

22. On the third ground, Ms Kalsakau submitted that the Magistrate failed to place sufficient weight on the matters set out in s 57(1) of the Penal Code:

> *The execution of any sentence imposed for an offence against any Act, Regulation, Rule or Order may, by decision of the court having jurisdiction in the matter, be suspended subject to the following conditions:*
>
> *(a). if the court which has convicted a person of an offence considers that:*
>
> *(i). in view of the circumstances; and*
>
> *(ii). in particular the nature of the crime; and*
>
> *(iii). the character of the offender,*

it is not appropriate to make him or her suffer an immediate imprisonment, it may in its discretion order the suspension of the execution of imprisonment sentence it has imposed upon him or her, on the condition that the person sentenced commits no further offence against any Act, Regulation, Rule or Order within a period fixed by the court, which must not exceed 3 years.

23. Ms Tasso submitted the starting point was not manifestly excessive, and was, in fact, generous. She submitted that all the aggravating factors of the offending and the mitigating factors personal to the appellant were appropriately considered. She relied on *Public Prosecutor v Kalwatman* [2022] VUSC 51. That case concerned 4 offenders who entered into a place where shipping containers were stored, and stole a number of items. From a starting point of 48 months (36 months for the defendant who was less involved because he only helped others steal the items), the sentencing judge reached end points of 30 months (23 months for the less involved defendant). The sentencing judge suspended all of the sentences for 2 years.

24. Ms Tasso submitted the Magistrate took into account the Convention on the Rights of the Child at paragraph 20 where she said:

The Court considers CRC, however, the behaviour and actions of the defendant does not show that he is remorseful for what he has done. He has not been attending Court, since he was released on bail, showing that he does not take responsibility for the consequences of his actions.

25. Ms Tasso made no particular submission with respect to the Magistrate's decision not to suspend the sentence, but did submit that the sentencing Magistrate "*is entrusted with a broad discretion to impose a sentence that falls within a range that may be appropriate given all the circumstances of the case.*"

Discussion

26. I will consider the second ground of appeal relating to the starting point first, then move on to the first ground of appeal relating to youth, and the third ground of appeal relating to suspension.

Starting point

27. In the ground of appeal relating to starting point, Ms Kalsakau submitted the starting point of 43 months was manifestly excessive and cited *Iakuma v Public Prosecutor* [2023] VUCA 43 in support. The Court of Appeal in that case (involving a dwelling house, not a non-dwelling house as this case does) made no reference to the starting point because the appeal was only concerned with the decision not to wholly suspend the sentence and the number of hours of community work. For those

reasons, it is not helpful as a precedent in establishing whether the Magistrate adopted an appropriate starting point in this case.

28. It has been difficult to find any Court of Appeal cases that discuss starting points for offending under ss 143(1) and s 122(1) of the Penal Code where a non-dwelling house is involved. Resort must be had to an assessment of aggravating factors and their treatment in comparable Supreme Court cases. In *Public Prosecutor v Molsir* [2024] VUSC 37, a starting point of 20 months was adopted for offending in which the defendant broke into a restaurant and took a cash box and some minced meat. The aggravating factors identified were:

    a. The offending was planned and premeditated;
    b. The offender took multiple items;
    c. The offender caused damage to the victim's property; and
    d. The offending was committed at night.

A mitigating factor related to the offending was that the stolen items were recovered.

29. The present case warrants a starting point higher than 20 months because the items were of much greater value, they were not recovered, and two offenders were involved (although the appellant was not the principal offender of the two). The Magistrate correctly identified these as aggravating factors in her judgment, but from the list of cases she considered at para 5, she appears to have taken into account starting points for sentences concerning entry into dwelling houses, rather than non-dwelling houses. Entry into a dwelling house at night is a significant aggravating factor because it risks confrontation with sleeping inhabitants. That risk, and its significance as an aggravating factor, does not exist when a non-dwelling house is entered at night. Consideration of dwelling house cases would have made the starting point adopted by the Magistrate manifestly excessive in the circumstances of this case. Taking into account the aggravating factors in this case, a starting point of 30 months was appropriate.

Youth and the Convention on the Rights of the Child

30. I now move on to consider the ground of appeal concerning youth as a personal mitigating factor and Ms Kalsakau's submissions on the Convention on the Rights of the Child.

31. Article 37(2) of the Convention states that imprisonment shall be used only as a measure of last resort and for the shortest appropriate period of time. The Article requires special consideration of the offender's youth. It is therefore appropriately considered when mitigating factors relating to the offender are taken into account to reach an end point, and when suspension is being considered. It is not particularly helpful to consider the Convention when adopting a starting point because the Convention refers to personal characteristics of the offender, not to characteristics of the offending. See for example *Public Prosecutor v Molsir* [2020] VUSC 135, a case cited to the Magistrate by defence counsel that involved 4 defendants, 2 of whom were youths. Justice Andree Wiltens took into account the age of the young offenders, and the Convention, as mitigating personal factors. That resulted in reductions from the starting points of 31% in one case and 44% in the other. Justice

Andree Wiltens also took into account their youth when he exercised his discretion to suspend both sentences.

32. Ms Kalsakau submitted that the Magistrate "*disregarded the juvenile age of the appellant.*" She did not. She referred to the appellant's age at para 14 of the sentencing decision when she described him as "*a juvenile of 17 years*" and his lesser role as an accomplice of Tom Maki. She also considered the Convention at para 20 of the sentencing decision but decided that the appellant's behaviour in not attending Court and breaching bail tended against giving him the benefit of its provisions.

33. The Magistrate did not disregard the appellant's youth or the Convention. She referred to both in the correct places – in the calculation of the end point, and in deciding whether or not to suspend the end sentence. Where the Magistrate erred however was in not recognising the appellant's youth as a mitigating personal factor, thereby not giving it any weight in discounting the starting point, and in not applying the Convention for reasons unrelated to the Convention when considering suspension.

34. In *Public Prosecutor v James* [2022] VUSC 77, a case involving similar charges, Justice Trief gave a 50% discount from the starting point for the youth and immaturity of the 15 year old accomplice to the principal offender. As mentioned above, discounts between 30% and 45% for youth have been given to other offenders.

35. Considerable research has been undertaken on youth offending and the role played in brain maturation. The New Zealand Court of Appeal summarised much of this international research in the context of sentencing in the case of *Churchward v R* [2011] NZCA 531 at paragraphs [77], [78] and [81]:

> *[77] Youth has been held to be relevant to sentencing in the following ways:*
>
> *(a) There are age-related neurological differences between young people and adults, including that young people may be more vulnerable or susceptible to negative influences and outside pressures (including peer pressure) and may be more impulsive than adults.*
>
> ...
>
> *(c) Young people have greater capacity for rehabilitation, particularly given that the character of a juvenile is not as well formed as that of an adult.*

36. The New Zealand Court of Appeal cited additional factors that have been recognised in particular by the England and Wales Sentencing Guidelines Council:

> *[78] ... offending by a young person is frequently a phase that passes fairly rapidly and thus a well-balanced reaction is required in order to avoid alienating the young person from society; and criminal convictions at this stage of a person's life may have a disproportionate impact on the ability of the young person to gain meaningful employment and play a worthwhile role in society.*

37. The New Zealand Court of Appeal went on to state:

> *[81] These neurological factors can lead to a reduction in culpability of young people as compared to adults. This does not mean that young persons should not take responsibility for their actions — it is merely that their actions may be partly explicable (but not necessarily excusable) by their state of neurological development.*

38. In this case, the Magistrate erred when she did not identify the age of the appellant as a mitigating factor in paragraph 13 of her decision where she listed the mitigating factors, and, not having identified it, did not give an appropriate discount for youth in line with other sentencing decisions mentioned.

39. The appellant was 17 at the time of the offending, older than the defendants in both *Molsir* cases. The discount for youth must be adjusted proportionately as, in the absence of any contrary evidence, the appellant's brain was relatively more developed at the time of the offending. Recognition of youth as a mitigating factor, and a discount of 25% from the starting point, were warranted.

Suspension

40. I turn now to the Magistrate's decision not to suspend the appellant's sentence. She considered the Convention in this part of her decision. She gave the appellant's bail breaches and non-appearance in Court as the reasons for not applying the principles of the Convention to the appellant. This is an error. The Convention applies to the appellant because of his age. The only reason the Convention would not apply to the appellant is if he is too old. His bail breaches, non-appearance at court and other bad behaviour are irrelevant to the issue of whether or not the Convention applies to him. While such behaviour is not to be condoned, it is not a relevant consideration.

41. The Magistrate also considered the appellant's behaviour in deciding not to suspend the sentence. Section 57 is broad enough to consider this as a factor in deciding on whether or not to suspend a sentence of imprisonment, but other things must also be considered, including the appellant's character, the nature of the crime and the circumstances. Of particular significance is the appellant's youth and, that he was, as the Magistrate said, a first time offender. In *Iakuma*, both *Molsir* cases, *Kalwatman*, and *James*, the defendants received suspended sentences. The Magistrate erred in not addressing the matters listed in s 57(1) of the Penal Code. Had she done so, the balance would have tipped in favour of suspension.

Result

42. In the result, there were errors in adopting the starting point, in not properly considering the appellant's youth as a personal mitigating factor, and in the Magistrate's consideration of suspension.

43. The appeal is allowed.

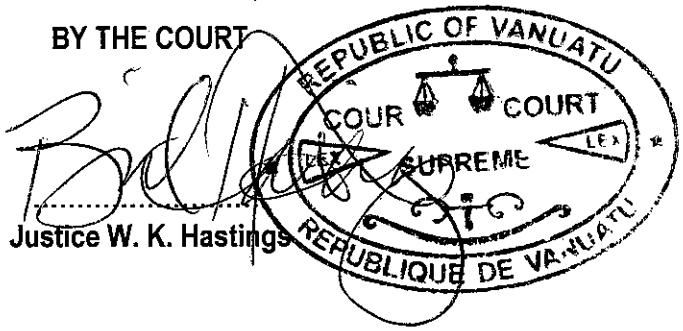
44. The appellant is resentenced as follows. From a starting point of 30 months imprisonment, the appellant is entitled to discounts of 33% (or 10 months) for his guilty pleas, 25% (or 7 months and 2 weeks) for his youth, and 10% (or 3 months) for remorse and his previous clean record. That brings me to an end point of 9 months and 2 weeks.

45. The time he has spent in custody must be deducted from the end point. He was remanded in custody for 14 days between the time of his arrest and the time he was granted bail. His bail was revoked on 7 July 2023 but he could not be found. I am told he has been in custody since 7 November 2023 when he was sentenced, which until now, is a period of 6 months and 3 weeks. In total, he has been in custody for 7 months and 1 week, the equivalent of a sentence of 14 months and 2 weeks.

46. As a result, the appellant is to be immediately released.

DATED at Port Vila this 30th day of May, 2024

BY THE COURT



Justice W. K. Hastings