

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

**Criminal Appeal**  
**Case No. 24/2547 SC/CRMA**

**BETWEEN: Philip Massing**  
Appellant

**AND: Public Prosecutor**  
Respondent

*Date of Hearing:* 8 October 2024  
*Before:* Justice V.M. Trief  
*In Attendance:* Appellant – Mrs P.K. Malites  
Respondent – Mr J. Aru  
*Date of Decision:* 21 October 2024

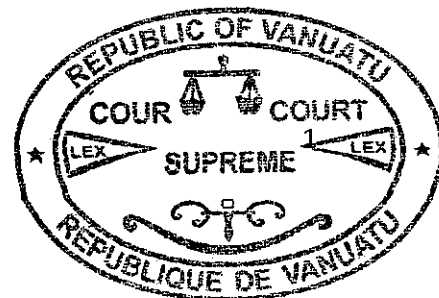
---

**JUDGMENT**

---

A. Introduction

1. On 1 March 2024, the Police conducted a search of the Appellant Philip Massing's residence on suspicion of unlawful possession of cannabis.
2. On 2 March 2024, Mr Massing and his co-offender Obed Massing were remanded into custody.
3. On 15 March 2024, the Magistrates' Court in CRC 24/618 committed the two accused for trial in the Supreme Court, and released Mr Massing on bail.
4. On 2 April 2024, Mr Massing pleaded guilty in the Supreme Court CRC 24/934 to unlawful possession of cannabis and attempted sale and supply of cannabis contrary to subs. 2(62) of the *Dangerous Drugs Act* [CAP. 12] (the 'Act'). The maximum



penalty for these offences is 20 years imprisonment and/or a fine of up to VT100 million.

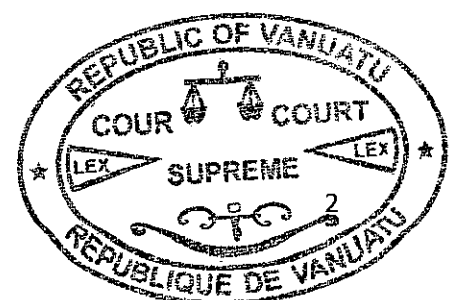
5. On 3 May 2024, the Police found Mr Massing in possession of 16 grams of cannabis and took him back into custody.
6. On 27 May 2024, the Supreme Court convicted Mr Massing and his co-offender Obed Massing of the two charges against them and sentenced Mr Massing to 18 months imprisonment, effective from 3 May 2024 (the date on which he was taken into custody and remanded on the fresh charge of unlawful possession of cannabis): Public Prosecutor v Massing [2024] VUSC 109 per Aru J.
7. On 9 August 2024, Mr Massing pleaded guilty in the Magistrates' Court CRC 24/2258 to the fresh charge of unlawful possession of cannabis. He was sentenced to 5 months imprisonment. The Magistrate incorrectly dated the sentence as "9 July 2024".
8. Mr Massing and Mr Massing appealed against the sentences imposed by Aru J in CRC 24/934. On 16 August 2024, the Court of Appeal in CRAC 24/1665 allowed their appeals and re-sentenced Mr Massing to 12 months imprisonment, with effect from 3 May 2024: Massing v Public Prosecutor [2024] VUCA 40.
9. The grounds of the present appeal are that the 5-month imprisonment sentence was manifestly excessive and that the Magistrate erred in not taking into account the time served in custody prior to sentencing.
10. No submissions were filed for Mr Massing as directed. Mrs Malites made oral submissions. Mr Aru relied on his written submissions and made oral submissions.

B. Consideration

11. Following Mr Massing's arrest and return to custody on 3 May 2024, the fresh charge against him of unlawful possession of cannabis should have been brought in the existing CRC 24/934 in the Supreme Court. Instead, the Prosecution laid it in new criminal proceedings in the Magistrates' Court CRC 24/2258.

*Was the sentence starting point too high?*

12. The Magistrate stated as follows in adopting a 12-month imprisonment sentence starting point:



*... there was no mitigating as to the offending and given the fact that the defendant is fully aware of his actions and the law after being recently indicted in the first case, he went ahead and reoffended and so the appropriate starting point should be 12 months imprisonment.*

13. Mrs Malites submitted that the 12-month imprisonment sentence starting point that the Magistrate adopted was high and that the Magistrate erred in not properly considering Mr Massing's personal factors particularly his time served in custody prior to sentencing, resulting in a manifestly excessive end sentence.
14. On the other hand, Mr Aru submitted that the 12-month sentence starting point was within range given that the offending was committed whilst on bail and that Mr Massing had prior convictions for similar offending.
15. I consider that a sentence starting point of 12 months imprisonment is within the acceptable sentencing range: see Public Prosecutor v Tamrock [2024] VUSC 175 and Public Prosecutor v Wilson [2024] VUSC 59.
16. This ground of appeal fails.

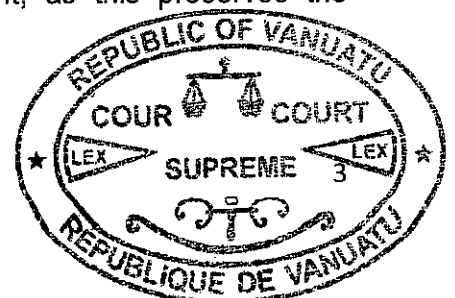
*Was the period of time served in custody prior to sentencing taken into account?*

17. The Magistrate adopted a sentencing starting point of 12 months imprisonment and then deducted one third for the guilty plea leaving a running total of 8 months. The Magistrate noted that Mr Massing had been remanded in custody for 3 months 5 days and then deducted the 'rounded-up' period of 4 months from the sentencing start point. She then pronounced that the end sentence was 5 months imprisonment.
18. There was an arithmetical error in the Magistrate's calculation of sentence. Following the discounts that she articulated, the correct calculation of the end sentence should have been 4 months imprisonment.
19. However, the calculation was also erroneous for the following reason. The Court must deduct the duration of time served in custody pursuant to subs. 51(4) of the *Penal Code* [CAP. 135]:

51. ...

- (4) *If the offender has been in custody pending trial or appeal, the duration of such custody is to be wholly deducted from the computation of a sentence of imprisonment.*

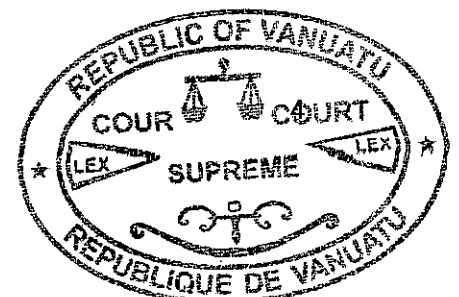
20. The time that Mr Massing served in custody of 3 months 5 days equated to an effective sentence of 6 months 10 days imprisonment, as this preserves the



defendant's parole rights provided in subs. 51(1) of the *Correctional Services Act* No. 10 of 2006:

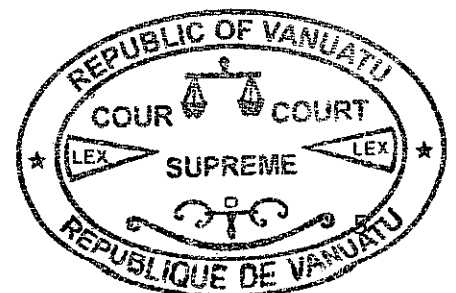
51. (1) *Subject to subsections (2) and (3) and section 51A, a detainee is eligible for consideration by a community parole board for release on parole upon the expiry of a half of his or her sentence.*

21. Accordingly, the Magistrate erred in that she only deducted 4 months instead of 6 months 10 days for the time that Mr Massing had spent in custody prior to sentencing.
22. However, it became clear during the hearing of the appeal that there was a further issue in relation to the computation of Mr Massing's sentence of imprisonment because the 3 months 5 days' time spent in custody had already been taken into account by the Supreme Court in the sentences that it imposed when it back-dated those sentences to commence on 3 May 2024 when Mr Massing was arrested and again remanded into custody: *Public Prosecutor v Massing* [2024] VUSC 109 at [14]. The Supreme Court had also already taken into account the time served in custody in March 2024 when it deducted one month from its sentence starting point: *Public Prosecutor v Massing* [2024] VUSC 109 at [11].
23. Accordingly, it was erroneous for the Magistrate to deduct the period of time served in custody prior to sentencing as that had already been taken into account by the Supreme Court in CRC 24/934 and by the Court of Appeal in its re-sentencing.
24. This ground of appeal is made out.
25. I directed the filing of further submissions to assist the Court as to whether Mr Massing's imprisonment sentence in the present matter should run concurrently or consecutively to the sentences imposed by the Supreme Court in CRC 24/934 and re-sentenced by the Court of Appeal in CRAC 24/1665.
26. Again, no submissions were filed for Mr Massing as directed. Mr Aru filed further submissions.
27. Mr Aru submitted that Mr Massing's offending in the present case, although similar in nature, was not part of the overall transaction which resulted in the charges that Mr Massing was convicted of and sentenced in the Supreme Court. He submitted that therefore, the sentencing in the present matter cannot be appropriately dealt with by a concurrent sentence. I agree – see *Kalfau v Public Prosecutor* [1990] VUCA 9.
28. For the reasons given, the sentence imposed by the Magistrate must be quashed and this Court re-sentence Mr Massing. Further, the sentence in the present matter



must run consecutively to the sentences imposed by the Supreme Court in CRC 24/934 and re-sentenced by the Court of Appeal in CRAC 24/1665.

29. I turn now to re-sentencing.
30. The sentence starting point is 12 months imprisonment.
31. One third is deducted from the sentence starting point for the guilty plea (12 – 4= 8 months).
32. There are no other personal mitigating factors as the time that Mr Massing has spent in custody prior to sentencing has already been taken into account by the Supreme Court in its sentences imposed in CRC 24/934 and on re-sentence by the Court of Appeal.
33. An uplift of 1 month is added for the following personal aggravating factors: (i) offending whilst on bail; and (ii) prior convictions for similar offending (8 + 1 = 9 months).
34. Taking into account mitigating and aggravating factors personal to the offender is part of the second step of the sentencing exercise set out by the Court of Appeal in Philip v Public Prosecutor [2020] VUCA 40 at [21], citing Public Prosecutor v Andy [2011] VUCA 14 at [13]-[17].
35. Given the sentence imposed in the present appeal must be served consecutively to the sentences already being served, I must stand back and look at the total. I do so and consider that the totality principle requires a further reduction of 3 months as an end sentence of 6 months imprisonment is just and appropriate (9 – 3 = 6 months): Kalfau v Public Prosecutor [1990] VUCA 9.
36. Taking all matters into account, Mr Massing is re-sentenced to an end sentence of 6 months imprisonment.
37. The applicable sentencing principles are general and specific deterrence, and holding Mr Massing to account for his offending.
38. There are no exceptional circumstances to warrant suspension of the sentence.
39. For the reasons set out earlier, the end sentence is to be served consecutively to the sentences imposed by the Supreme Court in CRC 24/934 and re-sentenced by the Court of Appeal in CRAC 24/1665.



C. Result and Decision

40. The appeal is **allowed**. The Appellant's sentence imposed by the Magistrates' Court in CRC 24/2258 is **quashed**.
41. The Appellant is re-sentenced to an end sentence of 6 months imprisonment, to be served consecutively to the sentences imposed by the Supreme Court in CRC 24/934 and re-sentenced by the Court of Appeal in CRAC 24/1665.

DATED at Port Vila this 21<sup>st</sup> day of October 2024

BY THE COURT

*VM Trief*  
.....  
Justice Viran Molisa Trief

