

PUBLIC PROSECUTOR

v

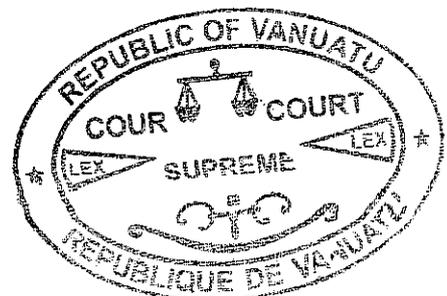
YVES ENKEY

Date of Plea: 24 May 2024
Date of Sentence: 9 October 2024
Before: Hon. Justice M A MacKenzie
Counsel: Public Prosecutor – Ms M Meltebury (Holding papers for Mr S Blessing)
Defendant – Ms A Sarisets (Holding papers for Mr E Molbaleh)

SENTENCE

Introduction

1. Mr Enkey appears for sentence in relation to 7 charges.
2. Mr Enkey pleaded guilty to 3 charges of domestic violence contrary to the Family Protection Act (charges 1, 2 and 5).
3. Mr Enkey was found guilty of 4 charges at a trial. The charges are;
 - a. Domestic violence contrary to the Family Protection Act (charge 3)
 - b. Attempted unpremeditated intentional homicide contrary to ss 28 and 106(1)(a) of the Penal Code [CAP 136] (charge 4)
 - c. Threat to kill contrary to section 115 of the Penal Code [CAP 136] (charge 7)
 - d. Attempted premeditated intentional homicide contrary to ss28 and 106(1)(b) of the Penal Code [CAP 136] (charge 8)



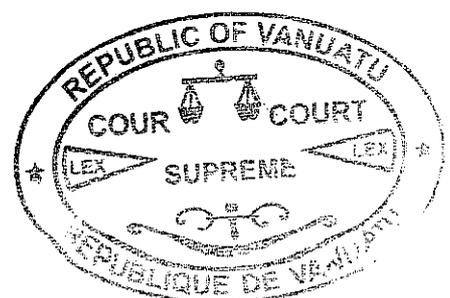
4. The maximum penalties for the offences are;
 - a. Domestic Violence -5 years imprisonment or a fine not exceeding VT 100,000
 - b. Attempted unpremeditated intentional homicide – 20 years imprisonment
 - c. Threat to kill – 15 years imprisonment
 - d. Attempted premeditated intentional homicide – life imprisonment

The Facts

5. The primary victim is Mr Enkey's partner, Regilla Arcknaveth. The charges arise from 3 separate but connected incidents over a period of approximately a month. They are set out in detail in the verdict judgment.

Incident one

6. On 17 January 2024, there was an incident of violence at home. Mr Enkey and Regilla drank kava and wine. Regilla went to bed and went to sleep. Mr Enkey woke up Regilla. He wanted to have sex, but she did not. Mr Enkey then became physically violent to Regilla. He accepts that he slapped her cheek and grabbed her while she was sitting on the bed and holding her tight as he pleaded guilty to 2 charges of domestic violence relating to these 2 incidents. (charges 1 and 2).
7. The level of violence then escalated. Mr Enkey put one hand over Regilla's mouth and the other on the back of her neck and squeezed, telling her not to cry so loudly. He grabbed and squeezed her hair again. Then Mr Enkey bit Regilla's ear, which bled. (charge 3). Mr Enkey then started squeezing the front of Regilla's neck, grabbed her by the neck and twisted her head. Regilla said that Mr Enkey had her in a head lock with his arm across her neck. (charge 4)
8. Regilla called out to her brothers for assistance. Mr Enkey was verbally abusive to one of Regilla's brothers. He pleaded guilty to a charge of domestic violence relating to telling him to shut his mouth, that he doesn't contribute and that Mr Enkey takes care of them all (charge 5).
9. Regilla went and stayed at her sisters. The incident was then reported to police. Mr Enkey was arrested and held in custody.



Incident Two

10. Mr Enkey was released on bail. Mr Enkey was not to have contact with Regilla but he did. The nature of the contact is detailed in the verdict judgment. They met up in person and there was also contact by phone. Mr Enkey wanted to have sex with Regilla. She rebuffed his requests. As a result, Mr Enkey threatened her. He said he would get hold of her and kill her. That if she was not going to have sex with him, he would find her anywhere on the road and kill her. If he did not find her, he would kill her brothers. She confirmed that what she meant when she used the word kill was that Mr Enkey would kill her dead. (charge 7)

Incident Three

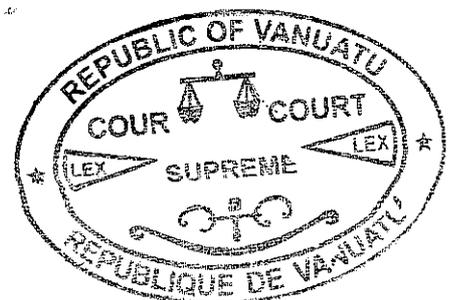
11. On 22 February 2024, Regilla sent Mr Enkey a text message telling him that whatever problems they had, there should be no family interference. Shortly thereafter, Mr Enkey arrived at Bladiniere estate. Regilla saw him at the gate with a knife. When she saw him come through the gate, Regilla ran away to try and get into the house. Mr Enkey caught up with her and stabbed her in the back. She fell down. Mr Enkey stabbed her to the eyebrow, cheek and near her eye. He also stabbed her to the arm and leg. (charge 8)
12. Someone alerted Regilla's brother. When Mr Enkey realised, he dropped the knife and ran off. Regilla was taken to hospital by police.
13. Regilla suffered injuries from the violence inflicted on both occasions. In January, she was medically examined 2 days after the incident. The medical report noted Regilla's ear had bruises, swelling, was red and tender. In February, she was medically examined the same day. The medical report noted that Regilla had a number of puncture and laceration wounds likely secondary to injury with a sharp bladed weapon. There was a laceration to her forehead, one to her cheek and a laceration to Regilla's upper back.

Sentencing purposes/principles

14. The sentence I impose must hold Mr Enkey accountable and must denounce and deter his conduct. The sentence should ensure he takes responsibility for his actions and assist in his rehabilitation. It must also be generally consistent.

Approach to sentence

15. Sentencing involves 2 separate steps; *Jimmy Philip v Public Prosecutor* [2020] VUCA 40, which applied *Moses v R* [2020] NZCA 296.

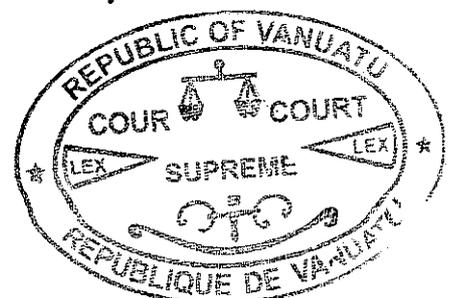


Starting point

16. The first step is to set a starting point to reflect the aggravating and mitigating features of the offending and taking into account the maximum penalties for the offences. All 3 incidents involved domestic violence against the primary victim. Although they did not occur at the same time, they are a connected series of incidents which took place over approximately a month. The Court of Appeal has discussed concurrent and consecutive sentences in a number of cases. There is a useful summary of the approach in *Nampo v Public Prosecutor* [2018] VUCA 43.
17. *Boesaleana v Public Prosecutor* [2011] VUCA 33 is helpful in assessing the appropriate approach to sentencing in this case. It involved various charges of a sexual nature, varying in seriousness. The Court took the rape charges as the lead offending, and said that where sentencing involves many charges, it is often beneficial to decide what is the most serious offending and to impose a lead sentence on that which properly takes account of all aggravating factors and then to impose concurrent sentences in respect of other offending as that is appropriate.
18. There is no dispute between counsel that the most serious offence is the attempted premeditated intentional homicide incident in February 2024. But as was said in *Boesaleana*, it is essential that the Court looks in a general and realistic way at the entire offending.

Aggravating factors

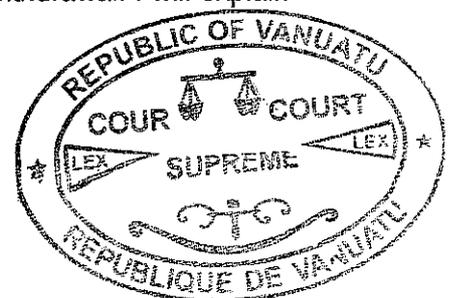
19. The aggravating factors of the offending overall are;
 - a. Scale – there were two serious incidents of physical violence a month apart.
 - b. The domestic violence offending involved a breach of trust, as Mr Enkey and Regilla were partners.
 - c. The January and February 2024 violence incidents took place at home. Regilla was entitled to feel safe in her own home.
 - d. Mr Enkey targeted Regilla's neck in the January incident, a vulnerable part of the body.
 - e. Both the January and February incidents included an attack to the head.
 - f. The repeated use of a lethal weapon, a knife, during the February incident.



- g. Both incidents involved persistent and deliberate behaviour by Mr Enkey- in the January incident, the neck squeezing was preceded by violence which escalated in seriousness, including biting Regilla's ear. In February, Mr Enkey chased Regilla as she tried to get away from him and he took advantage of her vulnerability when she was on the ground after being stabbed in the back.
- h. Both attacks were unprovoked and in the context of Mr Enkey being angry with Regilla, and not getting what he wanted. They demonstrate coercive control by Mr Enkey. As the New Zealand Law Commission said in recommending a new offence of strangulation, strangulation in an intimate partner context is a unique form of coercion and control.
- i. The physical and psychological harm suffered by Regilla. She was injured, as evidenced by the medical reports. In particular, the medical evidence confirmed that Regilla suffered lacerations to her head and back during the February incident. While not permanent, they were serious. Having presided at the trial, it is clear that these were very traumatic incidents for Regilla emotionally and psychologically. After the February knife incident, she resolved to end the relationship because of her fear that she would die. The pre-sentence report notes the toll that these two incidents have taken on Regilla – constant confusion, fear, blurred memory and recurring flashbacks.
- j. As well as the physical violence, Mr Enkey also threatened to kill Regilla and her brothers. The aggravating feature of the threat to kill charge is the psychological harm it caused Regilla, because the threat was made after the January incident, so Regilla knew Mr Enkey was capable of serious violence towards her. It also shows Mr Enkey's controlling behaviour as he had a condition not to contact her, yet he did.

Voluntary withdrawal?

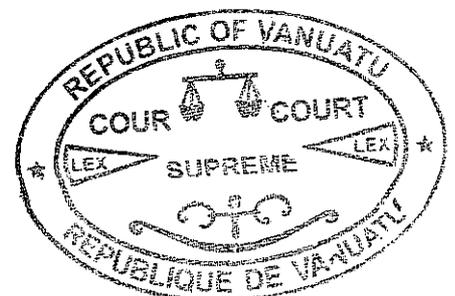
- 20. In terms of mitigating features of the offending, Mr Molbaleh submits that there should be a discount of 6-12 months imprisonment because Mr Enkey voluntarily withdrew from the attempt. Section 28(5) of the Penal Code provides that criminal responsibility of a person committing an attempted offence is diminished where there is a voluntary withdrawal from the attempt before the offence has been committed.
- 21. In his written submissions, Mr Molbaleh does not expand on how he says that Mr Enkey withdrew and whether that submission relates to both the January and February attempted intentional homicide incidents. I proceed on the basis that the submission relates to both incidents. I do not consider there was a voluntary withdrawal on either occasion. Mr Enkey is not entitled to a discount for voluntary withdrawal. I will explain why.



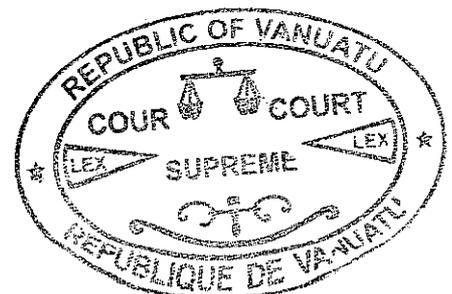
22. In terms of the January incident, Regilla's evidence, which I accepted, is that the incident ended when Regilla called out for help from her brothers. One of her brothers came to her assistance and told her to go outside. This is consistent with her brother Gouthier's evidence. It was at that point that the violence ended. Consistent with the Court of Appeal's approach to this issue in *Bakeo v Public Prosecutor* [2023] VUCA , I do not consider that Mr Enkey voluntarily withdrew from the attempt. He withdrew when someone came to Regilla's assistance.
23. In terms of the February incident, Mr Enkey chased Regilla with the knife. Regilla called out to her brother. Importantly, Charlie Arcknaveth's unchallenged evidence was that he heard his neighbour call out to him loudly. He ran outside and saw Mr Enkey holding a knife and stabbing Regilla with it. He tried to intervene and help Regilla but was scared of Mr Enkey. He looked for a piece of wood to hit Mr Enkey with, but he then ran away. Again, consistent with *Bakeo*, I do not consider that Mr Enkey voluntarily withdrew from the attempt. He withdrew when Regilla called out to her brother, who came to his sister's aid. It was at that stage that he dropped the knife and ran off.

Starting point

24. Mr Blessing submits that there should be a starting point of 13 -15 years' imprisonment for the lead charge of attempted premeditated intentional homicide. Mr Molbaleh submits that the starting point should be 8 years imprisonment. Mr Blessing submits that 2 cases in particular are of assistance in selecting the appropriate starting point for the lead offending. The cases are *Namri v Public Prosecutor* [2018] VUCA 52 and *Bakeo v Public Prosecutor* [2023] VUCA 24. Mr Molbaleh also relies on *Namri*.
25. *Namri* involved family violence. Mr Namri and his wife were separated. His wife started living at a church. One day Mr Namri took a hammer from home, took a bus to the church, said he was going to end her life and struck her on the head 3 times with the hammer. The wife sustained injuries. On appeal, the Court considered that the appropriate starting point was 8 years imprisonment. The Court said it was appropriate that the sentence reflected the particular seriousness of an assault on a woman arising from a family dispute.
26. The Court of Appeal upheld the 10 year global starting point adopted in *Bakeo*. The starting point took into account a charge of attempted unpremeditated intentional homicide, 3 charges of threatening to kill and a charge of intentional assault. The attempted homicide charge involved Mr Bakeo holding a bush knife to the neck of a 3-year-old child after saying he would cut her neck with a knife and that he would cut her dad with a knife. The Court of Appeal said that if the attempted intentional homicide was considered on its own, a starting point of less than the 8 years in *Namri* would have been appropriate.



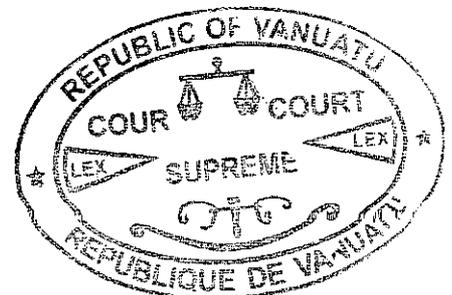
27. There are 2 other cases which provide some assistance as they both involve a charge of attempted intentional homicide where a knife was used, although they are not family violence related.
28. In *Public Prosecutor v Narau* [2021] VUSC, Mr Narau was returning to his village when he encountered the victim. He asked the victim if he had any tobacco and became angry when the victim said he did not. Mr Narau became angry, tackled the victim to the ground and cut his throat with a machete he had in his hand. The victim sustained a 7 cm laceration. The starting point adopted was 7 years imprisonment.
29. In *Public Prosecutor v Sepa* [2021] VUSC 59, Mr Sepa was at home and took a knife and stabbed another male occupant with it. The victim sustained serious injuries and was hospitalised for several days. A medical report indicated multiple sharp deep wounds all over his body which required surgery. The starting point adopted was 10 years imprisonment on the basis that the circumstances were more serious than *Namri*.
30. In the present case, Regilla was injured when she was stabbed by Mr Enkey but the injuries were not as serious as was the case in *Sepa*. However, *Sepa* did not involve domestic violence. The breach of trust, that Regilla was entitled to feel safe in her own home and the serious psychological harm she suffered are important aggravating factors here. *Namri* is of assistance because it did involve premeditated domestic violence with the use of a weapon, although I accept Mr Blessing's submission that the circumstances in the present case are more serious than *Namri*.
31. I consider that the appropriate starting point for the attempted premeditated intentional homicide offending is 14 years imprisonment, taking into account *Bakeo*, *Namri* and *Sepa*, together with the aggravating factors I have referred to. To be clear, the starting point reflects the totality of the offending in relation to Regilla. This is a case of serious domestic violence which took place over the space of a month. Mr Enkey demonstrated coercive and controlling behaviour towards Regilla with the use of physical violence and threats. Here, there were 2 separate incidents of serious domestic violence, one targeting the neck, a vulnerable area and the other using a weapon, capable of inflicting lethal harm. The two incidents of violence took place at home where Regilla was entitled to feel safe.
32. On a standalone basis, I consider that the February incident alone would justify a starting point of in the vicinity of 10 years imprisonment. I assess that incident to be more serious than *Namri* because of the nature of the weapon, the fact that Mr Enkey stabbed her in the back as she was trying to get away from him, and Mr Enkey should not have had any contact with her at all.



33. The domestic violence charge in relation to Regilla's brother is at the lower end of the scale as it did not involve any actual violence. The starting point I adopt is 6 months imprisonment. It is to be concurrent.

Guilty plea and personal factors

34. No discount is available for the charges that Mr Enkey was found guilty of. Mr Enkey is in theory entitled to a discount for the guilty pleas to charges 1,2 and 5. However, I decline to apply a discount. The pleas did not have any impact on the trial as Regilla still had to recount traumatic details about the domestic violence she suffered, as charges 1 and 2 related to the January incident. The guilty pleas did not save Regilla from needing to give evidence, and did not save any time or resources.
35. Mr Enkey is aged 38 years and is from Malekula. He has a tourism certificate, and his main skill is cooking. Until he was remanded in custody, Mr Enkey was a chef at the Grand Hotel in Port Vila. He is a first offender and is supported in the community by his brother. Mr Enkey is willing to perform a custom reconciliation ceremony, which is a sign that he is willing to make amends. Regilla is willing to accept a custom ceremony. The pre-sentence report records that Mr Enkey accepts committing the offences and is sorry for his wrongful actions towards Regilla. Any remorse needs to be tempered by the minimisation of the offending discussed in the pre-sentence report, and that Mr Enkey did not accept responsibility for the most serious offending.
36. Mr Blessing submits that Mr Enkey is not entitled to the benefit of any discount for good character given the history of unreported domestic violence. Mr Molbaleh takes issue with that submission on the basis that he has not been charged with that offending. I consider that a discount is available to Mr Enkey for his prior clean record, because the relevance of the unreported domestic violence was for context or background purposes. I do not think that prevents a discount for his prior clean record.
37. Taking into account that it is Mr Enkey's first time before the court, his willingness to make amends by performing a custom ceremony, and an emerging willingness to accept responsibility for the violence towards Regilla, I reduce the sentence by 12 months, which is 7 %.
38. One final adjustment is to adjust the sentence to take into account of offending on bail. Mr Enkey was subject to bail conditions, including a condition not to have any contact with Regilla. I increase the sentence by 6 months to reflect the offending on bail. After the January incident, Mr Enkey was granted bail. He breached the non association condition by phoning Regilla and threatened to kill her and then went to Regilla's property and stabbed her.



End Sentence

39. The end sentence for the charge of attempted premeditated intentional homicide offending is 13 years 6 months imprisonment. (charge 8)
40. There are concurrent sentences of imprisonment in relation to the other charges as follows;
- Charge 1 – 12 months imprisonment
 - Charge 2- 12 months imprisonment
 - Charge 3- 2 years 10 months imprisonment
 - Charge 4- 7 years imprisonment
 - Charge 5- 4 months imprisonment
 - Charge 7-2 years 10 months imprisonment
41. The sentences will not be suspended. Under s57, I must take into account the circumstances, the nature of the offending and Mr Enkey's character. Mr Enkey is a first offender. That however needs to be balanced against that fact that this was serious domestic violence which was took place over a period of a month. Both incidents of physical violence show coercive and controlling behaviour by Mr Enkey. The second incident was premeditated and an escalation in seriousness. Regilla had the courage to speak up. She has been significantly impacted by the violence at the hands of someone she should have been able to trust. The offending overall is too serious. Accountability, deterrence and denunciation are factors which weigh heavily in the balance. Suspending part or all of the sentences would send a very wrong message to both Mr Enkey and the community about domestic violence. It needs to be strongly condemned. Intimate partners should be treated with dignity and respect and not controlled and abused physically and emotionally.
42. Mr Enkey has been remanded in custody since 1 March 2024, according to the pre-sentence report. The sentences are to commence immediately, and the start date is back dated to commence on 1 March 2024.
43. Mr Enkey has 14 days to appeal.

**DATED at Port Vila this 9th day of October 2024
BY THE COURT**

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Hon. Justice M A Mackenzie

