

IN THE COURT OF APPEAL
THE REPUBLIC OF VANUATU

(Criminal Appellate Jurisdiction)

Criminal Appeal Case No. 02 of 2009

PUBLIC PROSECUTOR

-V-

FRANCINE MULONTURALA
CATHERINE MELLEUR
TIMOTHY ANTOINE

Coram: *Hon. Chief Justice V. Lunabek*
Hon. Justice B. Robertson
Hon. Justice J. Von Doussa
Hon. Justice O. Saksak
Hon. Justice N. R. Dawson

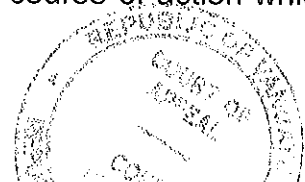
Counsel: *Mr. B. Standish and Mr. E. Molbaleh for Appellant*
Mr. C. Bennett and Mr. C. Tavoia for the Respondents

Date of Hearing: *13th July, 2009*

Date of Decision: *16th July, 2009*

JUDGMENT

1. This is a State appeal filed by the Public Prosecutor on 14 May 2009 against the sentences imposed on the Respondents by the Supreme Court on 8th May, 2009 at Lakatoro, Malekula.
2. When this case was considered in the Call Over on 6th July, 2009 we indicated that we required all three respondents to be present and that the State should make the necessary arrangements for that to occur.
3. Francine Mulonturala and Timothy Antoine duly appeared on the 13th July. We received a letter on behalf of Catherine Melleur indicating that in the view of a nurse at the Vao dispensary it is not appropriate for her to attend.
4. We have been conscious from information available to us that this woman was heavily pregnant, we did not want to take any course of action which



was intrusive but indicated that we needed proper information with regard to her non appearance.

5. We proceeded to consider the State appeal against the sentences imposed on the other two respondents.
6. Overnight of the 30th/31st October 2006, the Respondent and some other people were at the house of Francine Mulonturala in Vao on Malekula. They were praying over Marine Antoine a 14 year old girl who was sick.
7. Francine left the house and returned with a large stone. Looking at the face of the teenage girl she said:
"you are not Marine you are another person"
and hit her on the back side and then on her head with the stone.
8. She gave the stone to Catherine and said:
"the Holy Spirit gives you the right to hit the victim"
Catherine took the stone and hit Marine on the back and then the head. Francine hit Marine again and then passed the stone to Marine's father Timothy Antoine as she was saying:
"the Holy Spirit gives you the right to kill the person who changed your daughter".
9. Timothy then took the stone and hit his daughter, stepped on to her body, kicked her in the back. Timothy told Francine to take a cord or rope which they fastened up tight around her neck. As a result of all of this Marine died. They arranged for the Police to be immediately advised.
10. All three were initially charged with intentional homicide and were remanded in custody until a preliminary hearing on 1st December, 2006, when they were committed to stand trial at the Supreme Court. The charges then were Complicity to Intentional Homicide and Intentional Homicide, contrary to Sections 30 and 106 (a) of the Penal Code Act [Cap.135].
11. For reasons which are understandable they were granted bail on strict terms. Somehow through a variety of circumstances the trial was delayed and no further action occurred until May 2009.
12. The Constitution guarantees a within a reasonable time (Article 5 (2)(a)) trial and that has not occurred in this case. We do not overlook the fact that this happened on Malekula where there are less frequent Supreme Court sittings but it is essential that the Administration in the Magistrate's



Courts immediately advise the administration of the Supreme Court in Port Vila whenever there is a committal for trial on a Homicide or other serious case and arrangements are immediately made for that matter to be dealt with in a timely manner. We are not concerned to apportion blame but to note that what occurred was unsatisfactory and is a factor which we need to now take into account.

13. When the matter was eventually due for trial in May of this year discussions took place between prosecution and the representatives of the three accused Respondents. An alternative charge of Intentional Assault Causing Death contrary to Section 107 (d) of the Penal Code Act, was laid. Each of the accused Respondents at the first available opportunity pleaded guilty to those charges.
14. Butler J. was provided with same day reports and having considered them and the submissions made on their behalf, the Judge without reference to previous cases under the section (and no doubt without the assistance from counsel as to the applicable guidelines), proceeded to sentence.

15. Relevantly the Judge said:

"The purpose I adopt in sentencing is to deter you and others like you from acting in this way in the future. As a result of that purpose and as a result of the gravity of the offending imprisonment is the only sentence which can appropriately be imposed in this case. I differ from the prosecutor and defence counsel in that the starting point I adopt for a sentence of imprisonment is a term of 6 years. That includes the aggravating features as follows, a weapon was used in killing the victim. She was defenseless and of course there was a breach of trust because she was a relative of all of you and as a young person was entitled to expect protection from you not acts which lead to her death.

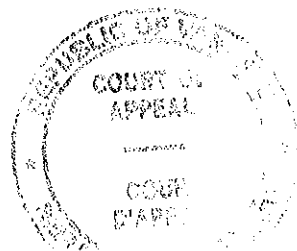
In mitigation I accept that all of you have pleaded guilty to this charge as soon as the charge was amended in the way which I have described. All of you are remorseful and none of you have any previous convictions. Those mitigating factors taken in combination reduce the sentence to one of three years imprisonment.

The Court has power to suspend a sentence of imprisonment. I suspect that what you did has its roots in old underlying superstitions

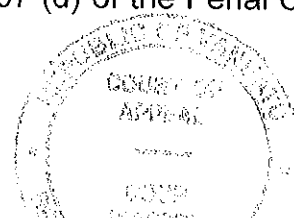


and systems that I as a European am not able to understand. I think that the sentences which I have imposed on you of 3 years imprisonment each should be suspended themselves to a term of 3 years. The effect of a suspended sentence of imprisonment means that if during the next 3 years anyone of you is convicted of any sort of offence or breach of the law of the Republic of Vanuatu then you can be brought before the Court and this prison sentence can be imposed in whole or in part. In addition to the suspended sentences of imprisonment which impose I sentence each of you to a term of supervision for a period of 6 months. I do that because each of you still have family responsibilities and none of you must ever behave in this way again towards anyone."

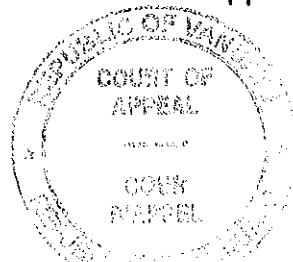
16. It was against the above sentences that the Public Prosecutor filed this appeal. The appeal is advanced on a number of grounds some of which overlap but maybe summarized as:-
- a) The lead sentence was contrary to decisions of this Court and decisions in the Supreme Court with regard to the approach to sentencing for intentional assault causing death as a result of which the sentence actually imposed on each respondents did not properly reflect the seriousness of the offence and placed insufficient weight on serious aggravating features.
 - b) The Judge place too much weight on mitigating factors personal to the respondent.
 - c) Although the Judge articulated his concern for denunciation and deterrence in fact he failed to reflect those principles in the sentence imposed.
 - d) The total suspension of sentence (without any reasons being identified for such an order) meant that the sentence imposed was manifestly inadequate.
17. The principles which apply to appeals by the State are now clear and need not be repeated. They are to be found in a number of decisions of this Court including Andrew Tom Naio and Noel Nathaniel v. The Public Prosecutor, CRAC 7 of 1997, PP v. Gideon, CRAC 3 of 2001, PP v. Willie CRAC 2 of 2004.



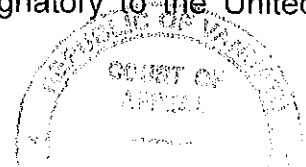
18. This Court in the Ierogen v. PP [2002], VUCA 34 CRAC 7 of 2002 set out the approach to be taken towards cases of Intentional Assault Causing Death. It was repeated and applied in PP v. Niala, Niala and Toaliu [2004] VUCA 25; CAC 6 of 2004.
19. We are satisfied that the sentence imposed in this case was so out of line with the approach which has pertained over many years to sentencing in respect of Section 107 (d) offending, that it is inevitable that this Court must reconsider the sentences imposed by the Supreme Court Judge.
20. Although we accept that the intentional assault in this case arose out of circumstances which are different from earlier ones, there can be no way of avoiding the conclusion that it was serious assault which had to be marked in a firm way.
21. A number of the earlier cases have involved issues of excessive drinking and retribution (neither of which applied here) but however misguided these Respondents may have been, it was an intentional assault on an innocent teenager. She was defenceless and sick. She had done nothing to provoke an attack upon her. The assault involved not only use of a weapon but also kicking and eventually the use of a rope leading to death.
22. There is nothing in Custom which could justify let alone explain what occurred. It is a perversion of any Christian principle to suggest that Western religious belief or practice had any sensible influence on this behaviour. The three people involved, her father, her aunt and her cousin all owed Marine care and support of a duty of care. What they did was of such a nature and force that they must each have understood the inevitable consequences of their wrongful behaviour.
23. The Prosecuting counsel in the Supreme Court had sought a starting point for the sentence of 5 years. The Defence counsel for the three accused Respondents (having highlighted their own particular circumstances) had submitted a starting point of 4 years. It is clear that the issue of suspension was not raised at all in the Supreme Court.
24. In light of the approaches referred to the cases above, the offending must be seen as attracting a starting point coming at the top end of criminality under the act or omissions covered by Section 107 (d) of the Penal Code Act.



25. A starting point of 5 years must be viewed in all the circumstances as being extraordinarily merciful.
26. We accept that there is justification for a discount because of the plea of guilty at the earliest possible opportunity. We note however that the alternative charge should have been explored in December 2006 when the committal for trial was made and not upon the eve of the trial 2 ½ years later.
27. We also accept that each of the Respondents who are mature adults have not previously appeared. But the final sentence of 3 years imprisonment determined by the Judge can only be viewed as the absolute minimum which could be contemplated and must be seen as involving an allowance for everything which could be said on their behalf.
28. The Judge in the Supreme Court was correct when he said the Court has power to suspend a sentence of imprisonment but Section 57 of the Penal Code Act [Cap.135] makes clear the course which must be followed. Section 57 (1)(a) (i)-(iii), says:
- “(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...”*
29. Regrettably the Judge did not articulate any reasons for the course of action which was adopted so we must look at those criteria.
30. The only matter in the circumstances which we see of being of relevance is the time delay to which we will return.
31. As far as the nature of the crime which is the particular matter to which Parliament has indicated reference must be made, this was very serious offending with tragic consequences. The accused each were able to bring their good character to bear and they had spent a month in prison in 2006 but the culmination of these factors do not make it inappropriate for an immediate term of imprisonment.



32. Without immediate imprisonment the message of deterrence which the Judge was concerned to send is simply not there.
33. The Judge in sentencing the Respondents concluded that a 3 year term of imprisonment was sufficient. We are of the view that it was an extraordinarily merciful response to what each of the Respondents had involved themselves in.
34. We see no basis in view of the nature of the crime and the character of the offenders that any suspension could have been justified but for the question of the inordinate delay.
35. This is a State appeal and the Court of Appeal will interfere only to the least extent which is essential in the interest of justice.
36. We have concluded in the very unusual circumstances which have transpired and because the Judge took the extraordinary step of suspending the entire sentence and creating false expectations that particular mercy should be extended. We have already said that these Respondents should have been dealt with at least by May of 2007. Nothing happened until May 2009.
37. For that reason we are persuaded that the justice of the matter now requires that 2 years of the 3 years sentence be suspended for a term of 3 years.
38. The 2 respondents currently before the Court namely, Francine Mulonturala and Timothy Antoine are required to immediately serve a term of imprisonment of 1 year. There should be no doubt that it is only the time lag which occurred which justifies any suspension in this case. It should not be assumed that every time there is a delay suspension will be appropriate. It is the unique circumstances of this case including the fact that the respondents were led to believe that they would not have to go to prison and other arrangements which have been made between the parties which has led to that conclusion. It is a reflection of the facts of this case and not a principle of general application.
39. One matter should be particularly clear. We have been told that a daughter of the respondent Francine Mulonturala has now been effectively taken over by the family of Timothy Antoine as a means of recompense for the lose of his daughter. That is not a factor which we have given any weight to at all. Vanuatu is a signatory to the United



Nations Convention on the Rights of Children. A child used to deal with the responsibilities of adults is abhorrent and unacceptable. Whatever arrangements may be made for payments in vatu or in other commodities or animals according to custom is an issue which can be considered in mitigation. However, the transfer of a child can never be a relevant factor and it has been totally ignored for the purposes of this sentencing exercise.

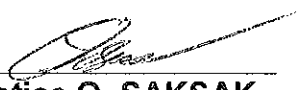
40. In the very unusual circumstances of this case accordingly we allow the State appeal against sentence in respect of Francine Mulonturala and Timothy Antoine. The merciful 3 year term of imprisonment is confirmed. Each will immediately serve a term of 1 year imprisonment as from this day and there will be suspension in respect of the balance of 2 years.
41. Catherine Melleur must appear before the Court of Appeal at the next session on Monday 19th October, 2009 when the State Appeal against her will be considered.
42. We were not invited to differentiate between the 2 respondents before the Court this session. Whether there is an argument to differentiae in respect of Catherine Melleur is for another time.

Dated at Port Vila, this 16th day of July, 2009

BY THE COURT



Hon. Chief Justice V. LUNABEK



Hon. Justice O. SAKSAK



Hon. Justice B. Robertson



Hon. Justice J. von DOUSSA



Hon. Justice N. R. Dawson