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

Criminal Appeal Case No. 02 of 2010

**KEVIN HEROMANLEY**
**DAVID TANGA**
**CHARLOT JEAN BAPTISTE**
**KELLY HEROMANLEY**
**NANDO KAI**
**MICHAEL PAUL**
**-V-**
**PUBLIC PROSECUTOR**

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|---|---|
| ***Coram:*** | *Hon. Chief Justice V. Lunabek*<br>*Hon. Justice J. von Doussa*<br>*Hon. Justice R. Young*<br>*Hon. Justice N. R. Dawson*<br>*Hon. Justice D. Fatiaki* |
| ***Counsel:*** | *Mr. E. Molbaleh for the Appellants*<br>*Mr. B. Standish for the Respondent* |
| ***Date of Hearing:*** | *6th July 2010* |
| ***Date of Decision:*** | *16th July 2010* |

# JUDGMENT

1. This is a case which involved the unlawful breaking and entry into an unoccupied house at night on 24th October 2007 and the stealing therefrom of a large sum of money (said to be in excess of VT6 million) and other valuable items. The incident involved a group of young men who all participated in the criminal enterprise in different capacities and benefited from it in varying degrees.

2. On 25th February 2010, 15 defendants including the 6 appellants were jointly arraigned before the Supreme Court at Luganville on an information which charged offences of:-

- Malicious Damage to Property contrary to section 133 of the Penal Code which by virtue of section 36 of the Interpretation Act [Cap. 132] carries a maximum penalty of a fine of VT5,000 or imprisonment for 1 year or both;
- Unlawful Entry contrary to section 143 of the Penal Code which carries a relevant maximum penalty of imprisonment for 20 years;
- Aiding Unlawful Entry contrary to section 30 and 143 of the Penal Code which is punishable in like manner as a principal or sole offender (*see*: section 32 of the Penal Code) i.e. 20 years imprisonment;
- Theft contrary to section 125 (a) of the Penal Code which has a maximum penalty of imprisonment for 12 years; and
- Receiving Property Dishonestly Obtained contrary to section 131 of the Penal Code for which a maximum sentence of a fine of VT5,000 or imprisonment for 1 year or both is provided by section 36 (3) of the Interpretation Act.

3. All defendants except one, appeared in Court and although most of the defendants who were charged with Malicious Damage, Unlawful Entry and Theft pleaded guilty, only 3 of the 9 defendants charged with Receiving Stolen Property Dishonestly admitted the offence. The missing defendant eventually appeared in Court on 15th March 2010 and pleaded guilty to a single charge of Receiving Stolen Property Dishonestly.

4. All defendants who pleaded guilty were convicted on their respective pleas and remanded in custody to await sentencing. The adult offender who appeared later was also convicted but he was granted bail. Pre-sentence reports were ordered in respect of the convicted defendants as well as written submissions from counsels involved in the case.

5. The remaining defendants who were all charged with Receiving Property Dishonestly Obtained and who had pleaded not guilty, were acquitted after the prosecution indicated it did not wish to proceed against them.

6. On 8th April 2010 the appellants appeared before the trial judge and were sentenced as follows:-

(a) Kevin Heromanley (Date of birth: 6 April 1992)
*For Unlawful Entry – 3 years imprisonment.*
*For Malicious Damage – 2 years imprisonment.*
*For Theft – 3 years imprisonment.*
*These sentences are to be served consecutively making a total of 8 years imprisonment at the Correctional Centre in Luganville. There is a parole eligibility after having served up to half of the total sentence.*
*Restitution – Section 58 Z D*
*I hereby Order the defendant to repay the sum of VT1,736,000 within 24 months after he has completed his sentence. All payments must be made to the Registry of the Court in Luganville. Failure to pay will result in imprisonment for 1 week for every VT1,000 which remains unpaid.*

(b) David Tanga (Date of birth: 25 February 1986)
*For Unlawful Entry – 3 years imprisonment.*
*For Theft – 3 years imprisonment.*
*These sentences are to be served consecutively making a total of 6 years imprisonment at the Correctional Centre in Luganville. There is a parole eligibility after having served up to half of the total sentence.*
*Restitution – Section 58 Z D*
*I hereby Order the defendant to repay the sum of VT1,488,000 within 24 months after he had completed his sentence. All payments must be made to the Registry of the Court in Luganville. Failure to pay will result in imprisonment for 1 week for every VT1,000 which remains unpaid.*

(c) Charlot Jean Baptiste (Date of birth: 1 January 1992)
*For Unlawful Entry – 3 years imprisonment.*
*For Theft – 3 years imprisonment.*
*These sentences are to be served consecutively making a total of 6 years imprisonment at the Correctional Centre, Luganville. There is a parole eligibility after having served up to half of the total sentence.*
*Restitution – Section 58 Z D*
*I hereby Order the defendant to repay the sum of VT4,500 within 6 months after he had completed his sentence. All payments must be made to the Registry of the Court in Luganville. Failure to pay will result in imprisonment for 1 week for every VT1,000 which remains unpaid.*

(d) Kelly Heromanley (Date of birth: 1993)
*For Aiding Unlawful Entry – 3 years imprisonment.*
*For Theft – 3 years imprisonment.*

*These sentences are to be served concurrently making a total of 3 years at the Correctional Centre in Luganville. There is a parole eligibility after having served up to half of the total sentence.*
*Restitution – Section 58 Z D*
*I hereby Order the defendant to repay the sum of VT60,000 within 12 months after he had completed his sentence. All payments must be made to the Registry of the Court in Luganville. Failure to pay will result in imprisonment for 1 week for every VT1,000 which remains unpaid.*

*(e) Nando Kai (Date of birth: 1 April 1994)*
*For Aiding Unlawful Entry – 3 years imprisonment.*
*For Theft – 3 years imprisonment.*
*These sentences will be served concurrently making a total of 3 years imprisonment at the Correctional Centre in Luganville. There is a parole eligibility after having served up to half of the total sentence.*
*Restitution – Section 58 Z D*
*I hereby Order the defendant to repay the sum of VT22,000 within 6 months after he had completed his sentence. All payments must be made to the Registry of the Court in Luganville. Failure to pay will result in imprisonment for 1 week for every VT1,000 which remains unpaid.*

*(f) Michael Paul (Date of birth: 17 July 1989)*
*For Receiving Property Dishonestly Obtained – 10 months imprisonment at the Correctional Centre in Luganville. There is an automatic release on parole after having served up to half of the total sentence.*
*Restitution – Section 58 Z D*
*I hereby Order the defendant to repay the sum of VT450,000 within 12 months after he had completed his sentence. All payments must be made to the Registry of the Court in Luganville. Failure to pay will result in imprisonment for 1 week for every VT1,000 which remains unpaid.*

7. In summary, the appellants who are mostly all young men between the ages of 17 and 23 years were sentenced to immediate terms of imprisonment ranging from 10 months to 8 years together with restitution of varying amounts.

8. The appellants now appeal against the sentences imposed on them on the ground that they are manifestly excessive and, in one instance, the sentence imposed exceeded the maximum sentence that could be imposed for the offence.

9. When the appeal was called at the last session of the Court of Appeal on the 30th April 2010, the appellants were each granted bail pending the hearing and determination of their appeals. By then each of them had already served over 3 weeks of their prison sentences. When that period is added to the time that each appellant had spent in pre-trial custody (from at least 29 October 2009), it added up to a period of approximately 6 months in custody. This translates into an equivalent effective sentence of 12 months imprisonment as release on parole is automatic after half the sentence is served when the sentence of imprisonment is for 12 months or less.

10. The appellants' Memorandum of Appeal sets out 10 grounds in support of their appeals against sentence as follows:-

(i) The presiding Justice erred by improperly taking into account elements of the offences as aggravating factors;

(ii) The presiding Justice erred by placing too much weight on aggravating factors;

(iii) The presiding Justice erred by placing insufficient weight on the mitigating factors personal to each Appellant including their pleas of guilty at the first available opportunity, their young ages, their clear remorse, and their lack of previous criminal convictions;

(iv) The presiding Justice erred by not properly considering alternatives to full time imprisonment;

(v) The presiding Justice erred by accumulating sentences on the Appellants Kevin Heromanley, David Tanga and Charlot Jean Baptiste;

(vi) The presiding Justice erred by not taking into account pre-sentence custody as required by section 51 (4) of the Penal Code Act [CAP. 135];

(vii) The presiding Justice erred by placing too much emphasis on specific and general deterrence and insufficient emphasis on the Appellants' prospects of rehabilitation;

(viii) The presiding Justice erred in improperly ordering excessive restitution without evidence of capacity to pay and by failing to cap the default period for non-payment of restitution at six months

imprisonment as required by section 58ZD (3) of the Penal Code Act [CAP. 135]

(ix) The presiding Justice erred in taking into account *Public Prosecutor v. Killion and Others* and *Public Prosecutor v. Atuary* as precedents for the offending committed by the Appellants;

(x) The presiding Justice erred in imposing sentences which were manifestly excessive.

11. We do not propose to deal separately with all of the grounds of appeal in light of the Public Prosecutor's concession that the trial judge's sentencing remarks were "*infected with error*" and therefore "*the appeals against sentence must be upheld and alternative sentences imposed*".

12. By way of illustration however, we highlight the more serious of those "*errors*":-

- Section 52 (1) of the Penal Code provides that:-

> "*if a person is convicted on more than one charge of an offence tried jointly, the respective sentences of imprisonment imposed for such offences are deemed to be concurrent sentences unless the Court otherwise orders*".

- In respect of the first 3 named appellants, Kevin Heromanley, David Tanga and Charlot Jean Baptiste, the trial judge ordered that their sentences of imprisonment be served consecutively. No reasons were given for such an order which not only avoids the general rule laid down in section 52 (1) but also detracts from well established sentencing principles dealing with concurrent and consecutive sentences.

- The relevant sentencing principles were affirmed in *Kalfau v. Public Prosecutor [1990] VUCA 9* when the Court of Appeal in reducing a

sentence of 8 years imprisonment imposed on a first offender which "*may have a crushing effect*", said:-

> "*The general rule in sentencing is that sentences for separate offences should normally be consecutive but this may be modified in two main ways. In the first case, a series of offences that form part of the same overall transaction and cause harm to the same person may be appropriately dealt with by a concurrent sentence.*
>
> *The second basis for modification is where, having passed a proper sentence for each of a number of offences, the aggregate effect of making them consecutive will produce an inappropriate total. Thus in any case where the Court has imposed a number of consecutive sentences, it should stand back, in effect, and look at the total. It was suggested in Smith v R (1972) Crim LR 124 that if, at such a point, the total is substantially above the normal level of sentence appropriate to the most serious offence for which the accused is being sentenced, the court should reduce that total to a level that is "just and appropriate."*
>
> *Even where the total does not offend against that principle, the court may in an appropriate case reduce it if, in the circumstances of a particular accused, the effect would be crushing.*
>
> *It should finally be pointed out that the reduction of the total is best achieved by making some or all the penalties concurrent rather than to reduce the sentence for any individual offence below the proper level."*

- This was a single criminal enterprise in which an unoccupied house was broken into and property stolen. All offences were directed towards achieving that one purpose and all would have occurred within a short span of time.

- We are satisfied that the trial judge erred in ordering that the prison sentences be served cumulatively and thereby imposed a sentence which was excessive in these circumstances.

- For the offence of Malicious Damage to Property contrary to section 133 of the Penal Code Act [CAP. 135], in the absence of a prescribed penalty, section 36 (3) of the Interpretation Act [CAP.

132] provides a maximum penalty of "*a fine of VT5,000 or imprisonment for 1 years or both*". In the face of that penalty the sentence of 2 years imprisonment imposed by the trial judge on Kevin Heromanley upon his conviction for an offence of Malicious Damage to Property was clearly an unlawful sentence;

- Given the claimed loss of VT6,100,000 cash and the recovery of VT3,100,000 the unrecovered balance was VT3,000,000. To recoup that amount the trial judge imposed the following sentences of restitution on the appellants:-

| | | |
|---|---|---|
| - | Kevin Heromanley | VT1,736,000; |
| - | David Tanga | VT1,488,000; |
| - | Charlot Jean Baptiste | VT4,500; |
| - | Kelly Heromanley | VT60,000; |
| - | Nando Kai | VT22,000; |
| - | Michael Paul | VT450,000 |
| | Total | VT3,760,000 |

These amounts, if fully paid up, would give the complainant an unexpected and unwarranted windfall of VT760,000 in excess of the value of the cash he claims was stolen.

- Although section 58ZD of the Penal Code under which the sentence of restitution was imposed, does not expressly require the Court to consider the offenders' ability to pay the restitution ordered, the failure to conduct such an enquiry may well result in the offender receiving an additional sentence of imprisonment of 6 months when he has no prospect of payment and with no tangible benefit whatsoever for the victim of the offence.

- The appellants were young school leavers with little or no employment prospects, all were unemployed and therefore personally unable to pay any compensation or make restitution if ordered. In

those circumstances the orders of restitution were futile and ought not to have been made.

- What is more the source or factual basis for arriving at the various amounts imposed in the restitution orders is not disclosed either in the prosecution facts outlined for sentencing or in the judge's sentencing remarks. There are some figures mentioned in the appellants' pre-sentence reports and in the appellants' caution interview statements but no attempt has been made to reconcile those figures with the amounts that were recovered from each of the appellants.

- In this latter regard the appellant Michael Paul who was ordered to pay VT450,000 in restitution, is recorded in his police statement as having returned several sums of money to the police during the investigations. These payments were confirmed in a letter from the Acting Senior Probation Officer dated 5th July 2010. This raises serious questions about the accuracy of the restitution orders.

13. In light of the foregoing errors the appeal is allowed and the sentences of all 6 appellants are quashed.

14. We turn next to consider afresh how best to deal with the appellants and what penalty should be imposed for their offending in this case. This was serious offending. The appellants planned to break into a house to see what they could steal. They did so at night. However before they broke into the house they ensured the occupants had left. They stole a large amount of cash and property. A significant portion of the cash and property has been recovered.

15. In the present case four of the six appellants were under 18 years of age at the time of offending and the remaining two were 20 and 23 years of age respectively.

16. At the time of the offending none of the appellants had prior convictions except David Tanga who had previous convictions for similar offending. All voluntarily admitted their part in the commission of the offence to the police when interviewed. All appellants pleaded guilty at the earliest opportunity and all have offered to perform a custom reconciliation ceremony to the victim of their crimes.

17. Whilst the sentencing of young offenders is never an easy task the objectives and the interests of society are not seriously in doubt. It is to enable young offenders to be rehabilitated and grow up to become responsible law-abiding members of society. This purpose is discernible from the provisions of sections 37, 54 and 58H of the Penal Code Act [CAP. 135]. In the sentencing of young offenders we consider that the dual purposes of punishment and deterrence may need to give way to reform and rehabilitation.

18. We consider that the imposition of an immediate sentence of imprisonment on these young first offenders with the inevitable consequence of exposing the appellants to long term hardened criminals would be counter-productive and inappropriate.

19. Each of the appellants has served an effective sentence of 12 months imprisonment. While there was justification for varied lengths of sentences to reflect varied involvement in the offending we consider a sentence of imprisonment of 12 months would have adequately covered the worst offending in this case. Since the appellants' release from custody in April 2010 their conditions of bail have meant they have been under close supervision. We have been told there have been no problems with the appellants' behaviour during this time.

20. As to the orders for restitution given the inability to pay we quash those orders with respect to each appellant. The victim retains his civil remedies with respect to the claimed loss.

21. As to the sentences of imprisonment each sentence with respect to each appellant is quashed. The effect of this order is that each appellant has effectively served a sentence of 12 months imprisonment. Each appellants' convictions remain. To assist the appellants' rehabilitation and reintegration into the community we impose on every appellant a sentence of supervision for 9 months. With the special condition that each appellant undertake the Niu Fala programme.

**DATED at Port Vila, this 16th day of July, 2010.**

**BY THE COURT**

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**Chief Justice Vincent Lunabek**

.....
**Justice John von Doussa**

.....
**Justice Ronald Young**

REPUBLIC OF VANUATU COURT OF APPEAL COUR D'APPEL

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**Justice Nevin R. Dawson**

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**Justice Daniel Fatiaki**