

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

Criminal Appeal Case No. 04 of 2012

BETWEEN: **KALVAU MOLI**
Appellant

AND: **PUBLIC PROSECUTOR**
Second Appellant

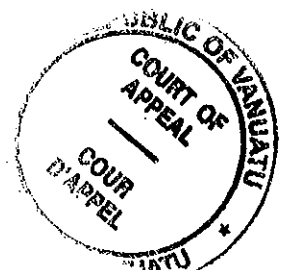
Coram: *Hon. Justice Daniel Fatiaki*
Hon. Justice Robert Spear

Counsel: *Saling Stephens for the Appellant*
John Timakata for the Respondent

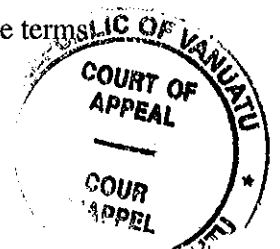
Date of Hearing: *14th September 2012*

Date of Decision: *14th September 2012*

JUDGMENT OF THE COURT



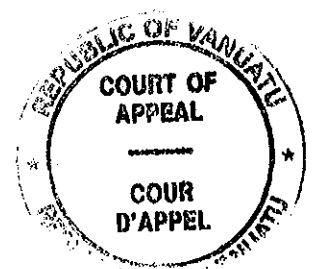
1. Kalfau Moli appeals against a sentence of 12 months' imprisonment suspended for 16 months imposed on each of 2 charges of Unlawful Assembly and Obstructing the Police. The sentencing hearing took place on 5 July 2012 following pleas of guilty being entered by the appellant together with 11 co-defendants.
2. The principal grounds of appeal are:
 - a) that the primary Judge "*misstated the defendant's involvement in the commission of the offences and treated him indifferently to the rest of the defendants*".
 - b) That the sentence was otherwise manifestly excessive.
3. This case has its genesis in a public disturbance that took place on 20 May 2011 at the **NISCOL** offices in Luganville. A police team arrived to execute a search warrant on the **NISCOL** premises. At one time, there were over 100 people standing in the way of the police and obstructing the police from executing the search warrant. Regrettably, matters became heated and it is clear that there was some aggression and hostility shown to the Police.
4. Twelve of those assembled were subsequently arrested by the Police and each was charged with these 2 offences. Some of the twelve pleaded guilty to the charges at the outset of the prosecution. The remainder initially pleaded not guilty but all had changed their pleas to guilty by 29th March 2012.
5. The case came on for sentencing on 5 July 2012. The primary judge placed the 12 defendants into 4 separate categories which were established to differentiate the degree of seriousness of offending for each group. Kalfau Moli and 2 others were placed in Category 4 which was reserved for those who committed the most serious offending. They were described as the "*main leaders and instigators of the offending committed against the police on 20th May 2011.*"
6. The primary judge described the culpability of those in Category 4 in these terms



"Their participation and actions are seen as the most serious and had it not been for their mitigating factors, immediate custodial sentence would have been appropriate. However, only suspended sentences under section 57 of the act will be appropriate for the following mitigating factors:-

- a) Early guilty pleas*
- b) First time offenders.*
- c) Expressions of remorse and apology at least by Mr Kalfau Moli.*

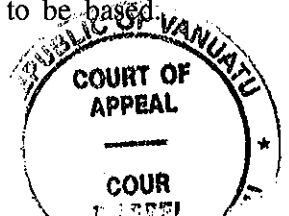
7. Kalfau Moli appealed his sentence. This appeal would have been heard in the next scheduled sessions of the Court of Appeal in October 2012. However, as it happened, an extraordinary session of the Court of Appeal was convened to sit this week in respect of two civil appeals involving political parties that required urgency. The urgency arose because the national elections are to be held on 30 October 2012. Mr Stephens (who was not counsel for Kalfau Moli at the sentencing hearing) applied for an expedited hearing of this appeal given that Mr Moli intends to stand for Parliament and the sentence that was imposed on him on 5 July 2012 disqualifies him from doing so. While that disqualification factor is one that could justify an expedited hearing, we observe that it could never be considered an appropriate factor to be taken into account when determining an appropriate sentence. Fortunately, time was available to hear the appeal.
8. An oral decision has been able to be given today principally because of certain concessions that have been made by Mr Timakata. We consider that the concessions were both appropriate and responsible on his part. Those concessions relate to our concerns about the factual basis upon which the sentence proceeded.
9. In the sentencing decision, certain background facts were set out which do not appear to be in contention. However, the primary judge then proceeded to explain that, *"each defendant will be sentenced on the basis of their admissions to the undisputed facts and on the basis and extent of his involvement in the offending as revealed by the following statements."*



10. There was no statement made by Kalfau Moli to the police. Indeed, only one of the 12 arrested made a statement to the police. Accordingly, in respect of Kalfau Moli, the statements that were considered by the primary judge were the depositions placed before the Magistrate's Court at the preliminary hearing from various police officers and also comments attributed to the defendant in his pre-sentence report. The primary judge also had regard to the written submissions advanced by both the prosecution and the defence counsel.
11. In the sentencing comments in respect of Kalfau Moli, the primary judge explained that the sentencing of Kalfau Moli would be on the basis that he was one of the leaders and instigators of the large public disturbance that took place as well as the obstruction of the police as they were carrying out their lawful duty of executing the search warrant.
12. We are unable to understand, with the greatest respect to the sentencing judge, how that conclusion was reached from the material with which we have been provided. The submissions from defence counsel in respect of Kalfau Moli take issue with any such suggestion that he was a leader and instigator of what became something of a mob involved with the obstruction of the police. Indeed, those defence submissions go so far as to attempt to undermine the pleas of guilty that were entered to the charges of obstructing and unlawful assembly and, to that extent, they can have no currency.
13. In particular, however, defence counsel submitted at the sentencing hearing,

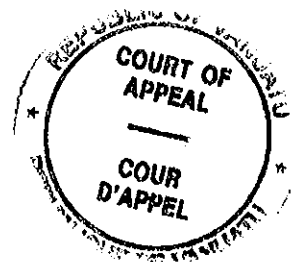
"Mr Moli did not deliberate, premeditate, organize a group of people at the wharf as most of these people were casual employees on the cargo boats or employees at NISCOL".

14. Having regard to that challenge to any suggestion that Kalfau Moli was one of the leaders and instigators of the group assembled, it became difficult for us to understand how the sentencing judge proceeded to sentence him on his own version of the events and without a formal determination of that dispute as to the facts
15. Once a conviction has been entered, it is always important for a sentencing judge to clearly identify the factual basis upon which the sentencing decision is to be based.



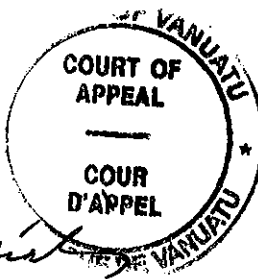

Where there are co-defendants, it is similarly important to be able to explain why different sentences are imposed on different co-defendants. Where the convictions arise through a defended hearing or a full trial then, of course, the trial judge will have reached a concluded view as to that factual sentencing basis. However, where pleas of guilty are entered, the conventional approach is for a summary of facts to be presented by the prosecution. Where there is a dispute taken with any aspect of that summary of facts, a disputed facts hearing (or 'Newton' hearing) is required if that dispute is considered to have sentencing significance.

16. There appears to have been no summary of facts presented to the Supreme Court although there was a summary of facts placed before the Magistrate's Court incidental to the committal proceedings. In the Supreme Court, at the sentencing hearing, it appears that there was a clear dispute taken on behalf of Kalfau Moli as to his role and, in particular, any suggestion that he was a leader or instigator of the unlawful assembly and the obstruction. The sentencing judge, however, proceeded to sentence Kalfau Moli on the basis of his assessment of the depositions taken from the police officers involved and which formed part of the committal papers. He has done so without resolving the dispute raised clearly and properly by counsel for Kalfau Moli in the written sentencing submissions.
17. In our view, that makes this an unsafe basis on which the sentence was determined. This is a matter that has been discussed extensively with counsel during the course of this appeal hearing. Mr Timakata accepts that it is appropriate for the appeal to be allowed and the matter returned to the Supreme Court for the sentence to be reconsidered.
18. Mr Stephens has taken instructions from his client and, while they would prefer a fine to be imposed in place of the suspended sentence of imprisonment, the reality, is that this Court remains unsure exactly what role, within the convicted 12, Mr Moli played and what sentence should be imposed on him. In short, the factual basis on which sentencing should take place remains unresolved.



19. Accordingly, the appeal is allowed, the sentence of 12 months' imprisonment suspended for 16 months is quashed, and the case is referred back to the Supreme Court for the Mr Moli to be sentenced afresh.
20. Mr Stephens seeks cost on this appeal. We consider that it is appropriate for Mr Moli's reasonable expenses particularly the filing fee on the appeal to be allowed but not for legal expenses.

FOR THE COURT



The seal is circular with the text "COURT OF APPEAL" at the top and "COUR D'APPEL" at the bottom. The words "OF VANUATU" are written along the top inner edge, and "VANUATU" is written along the bottom inner edge. A horizontal line is drawn across the center of the seal.

Hon. Justice D. FATIAKI