

BETWEEN: **JACK LUI**
Appellant

AND: **PUBLIC PROSECUTOR**
Respondent

Date of Hearing: 7 November 2023

Coram: Hon Justice Richard White
Hon Judge Mark O'Regan
Hon Judge Dudley Aru
Hon Judge Viran M. Trief
Hon Judge Edwin P. Goldsbrough
Hon Judge William K. Hastings

Counsel: B Livo for the Appellant
J Tete for the Respondent

Date of Judgment: 17 November 2023

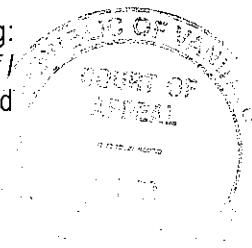
JUDGMENT OF THE COURT

Introduction

1. The appellant pleaded guilty to one count of threats to kill, one count of domestic violence and one count of intentional assault. On 21 August 2023 he was sentenced to 2 years imprisonment to be concurrent for all the charges.
2. He now appeals his sentence.

Background

3. The charges are set out in an amended information filed by the Prosecution on 14 June 2023 together with an amended brief of facts setting out the following facts. The victim of the offending is the appellant's de facto partner. On 22 December 2021 the victim was baking bread at their home. The appellant gave her instructions on how to prepare the bread dough but she paid little attention to what he said. The appellant became angry and chased her around the house. He grabbed her hand and threw her against the wall of their house and she cried out in pain.
4. The appellant took some bullets and threatened her calling out and pointing to the bullets saying: "hemia blong yu. Sapos mi sutum yu tet ol famli blo yu oli kam krae from yu" (this is for you. If I shoot you your family will come and cry for you) then pointing to another set of bullets in his hand



saying: "*hemia blo olgeta*" (*this is theirs*). After saying this he said: "*spos yu fraet yu haet bai yumas haet gud, spos mi harem se yu stap wea, ba mi jas kam from yu.*" The victim after hearing these words became concerned about her safety and left their home and went back to her home island.

5. In June 2022, the victim returned to Efate and on 23 January 2023 another incident occurred at their home at Eratap. On that day the appellant had broken off some parts of a flower planted by the victim and gave them to two individuals as planting materials. The victim became upset that she was not consulted. The appellant went inside the house and grabbed his gun and said to her: "*mi luk yu spos mi stum yu naoia bae blood l kamaot lo maot blong yu wetem nus blong yu*" (*I see you and if I shoot you blood will come out from your mouth and nose*).
6. After saying this the appellant hit the complainant on the head with a piece of wood and pushed her and she fell to the ground. He grabbed her hair and banged her head against the ground.

Decision

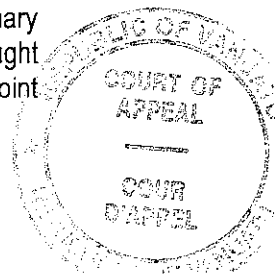
7. The primary judge noted that the offences charged were serious offences. Threats to kill being the lead offence with a maximum penalty of 15 years imprisonment. In arriving at the sentence start point, the primary judge also noted that there were a number of aggravating factors of the offending one of which is the fact that the defendant had a gun. That he "*fired into the air first then shoot three chickens*" to release his anger. Taking these factors into account the primary judge arrived at a total concurrent sentence start point of 5 years imprisonment.
8. Next the primary judge considered the mitigating factors personal to the appellant and allowed a 1/3 discount for the early guilty plea and noted that the presentence report stated that despite the custom reconciliation performed by the appellant the victim had not returned to the defendant's house. The primary judge said "*this indicates that she still feels unsafe and uncomfortable*".
9. The end sentence arrived at was a concurrent sentence of 2 years imprisonment on all three counts.

Appeal grounds

10. The appeal raises four main grounds namely that the primary judge: -
 - 1) Took into account certain facts as aggravating factors which were not part of the amended brief of facts;
 - 2) Made assumptions about the complainant's feelings not based on the evidence;
 - 3) Failed to deduct time spent in custody prior to the sentence; and
 - 4) Did not give enough consideration to suspending the sentence.

Discussion

11. The appellant in ground 1 submitted that the shooting of the three chickens with the gun was never part of the amended brief of facts filed on 14 June 2023. That this factor misled the primary judge to set a higher sentence start point of 5 years imprisonment when the prosecution sought a starting point of 2 – 4 years imprisonment and the appellant submitted a lesser starting point



of 18 to 20 months. The prosecution concedes that the primary judge mistook these factors but there were other factors present which when taken together would still warrant a starting point of 5 years imprisonment.

12. We agree. There were weapons present such as a gun and bullets shown to the victim with threats made to her life and a piece of wood was used to assault her. All these factors justified a starting point of 5 years.
13. In relation to ground 2, it was submitted that the primary judge relied on his own assumptions without any evidence from the victim that she felt unsafe and uncomfortable when the presentence report recorded that despite the reconciliation she had not returned to the appellant's house. It was further submitted that had this not been considered the sentence would have been suspended. The prosecution in response submitted that this was not part of the consideration undertaken by the primary judge regarding suspension of the sentence.
14. We agree it was not part of the primary judge's consideration whether or not a suspension of the sentence was justified mainly on this ground. The fact that the victim had not returned home after the custom reconciliation would indicate in our view that the custom reconciliation should be given very little weight when considering any deductions on the sentence start point. The primary judge deducted an overall figure of 16 months to reflect the appellant's clean past record, and background inclusive of the custom reconciliation.
15. We deal with grounds 3 and 4 together. The appellant submitted that the sentence should have been suspended had the primary judge given careful consideration to the mitigating factors identified namely; guilty plea, appellant being a first-time offender, performance of custom reconciliation, and the appellant's underlying medical condition. It was further submitted that a custodial sentence should always be a last resort.
16. Section 57 1) (a) of the Penal Code [CAP 135], provides that a sentence of imprisonment may only be suspended subject to the following conditions: -

".....

a) *If the Court which has convicted a person of an offence considers that:*

- i) *In view of the circumstances;*
- 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 it has imposed upon him or her, on the condition that the person sentenced commits no further offences against any Act, Regulation, Rules or Order within a period fixed by the Court, which must not exceed 3 years.

..."

17. The primary judge in our view did turn his mind to the above factors. He took an overall approach to say there were no exceptional circumstances to warrant a suspension of the sentence. Having considered the seriousness of the offending it was open to him to exercise his discretion not to suspend the sentence.




Result

18. The appeal is dismissed.

DATED at Port Vila this 17th day of November, 2023

BY THE COURT



**Hon. Justice R White
Judge of the Court of Appeal**

