

**PUBLIC PROSECUTOR**  
-v-  
**BRUNO NEPREI  
DONALD KATHY  
NIPIKO NAMARIAU  
RAMAP MARK NAMATAU  
DANIEL NETAI  
JOHNSON TUFNA**

**Coram :** Chief Justice Vincent Lunabek

**Counsel:** Mr Tristan Karae for the Public Prosecutor  
Mr Kiel Loughman for the Defendants

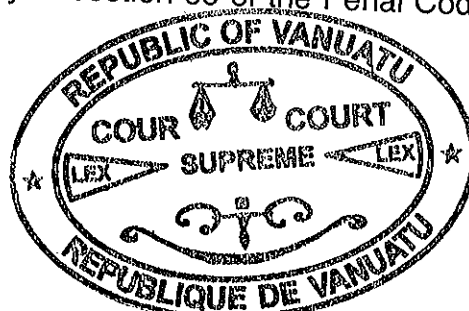
Date of plea hearing: 10 February 2011  
Date of sentence: 24 February 2011

**SENTENCE**

This is the sentence of the following six (6) Defendants: Bruno Neprei, Donald Kathy, Nipiko Namariau, Ramap Mark Namatau, Daniel Netai and Johnson Tufna. They entered their pleas in the Supreme Court at Dumbea, Port-Vila on 10 February 2011. Other 42 Defendants were sentenced at Isangel, Tanna, on 16 February 2011. Five (5) Defendants are yet to enter their pleas. I have recorded a minute and issued directions for their pleas to be adjourned to the Supreme Court next tour at Isangel, Tanna sometime in May 2011 and for two Defendants in Port-Vila as they are in Port-Vila.

In the present case, on 10 February 2011, Defendants: Donald Kathy, Nipiko Namariau, Ramap Mark Namatau, Daniel Netai and Johnson Tufna entered guilty pleas and were convicted on following offences:

- One count of Unlawful Assembly contrary to section 69 of the Penal Code Act [CAP.135]; and



- One count of Malicious Damage to property, contrary to section 133 of the Penal Code Act [CAP.135].

On the same date of 10 February 2011, Defendant Bruno Neprei entered a guilty plea and was convicted on one count of soliciting and inciting commission of Malicious Damage to property, contrary to sections 35 and 133 of the Penal Code Act [CAP.135].

The brief facts are set out by the prosecution. The defence counsel accepts these facts on behalf of the Defendants. They are set out below:

On 23<sup>rd</sup> September 2008, Digicel representatives and representatives of people from Envitana including people of Envitana had a meeting. The purpose of that meeting was to reach an agreement for Digicel Company to build a telecommunication tower at Envitana area, South West Tanna. After the meeting, the people of Envitana including their representatives agreed and signed an agreement then Digicel started to build the tower.

After the agreement, some of the Defendants, especially Bruno Neprei, Chief Yauhua Lounako and Chief Narwie expressed their thinking on the basis of some "custom road". They held several meetings with the idea to pull down the Digicel tower.

On 22<sup>nd</sup> January 2009, Chief Johnson Kuana of Ikakaha Village called on people from Envitana area to have a meeting as he was then informed that Bruno Neprei, Chief Iauhua and Chief Narwie wanted to pull down the Digicel tower. Chief Johnson Kuana sent Chief Nipiko to get Bruno Neprei, Chief Lounako and Chief Narwie to attend the meeting. They refused to attend the meeting. So after several attempts, Chief Johnson sent 7 men to call on Bruno Neprei, Chief Lounako and Chief Narwie to attend the meeting and say why they wanted to pull down the Digicel tower.

Bruno Neprei, Chief Lounako and Chief Narwie agreed and attended the meeting. Chief Johnson chaired that meeting. During the meeting, Bruno Neprei, Chief Lounako and Chief Narwie said they were going to pull down the tower and they gave one week to Digicel Boss to respond because they said that the Digicel tower was built on "Tabu" place. But Digicel did not respond.

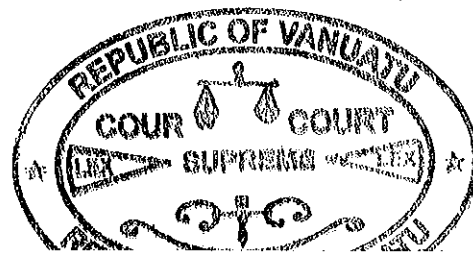



Later on sometime on 1<sup>st</sup> of February 2009, there was a big meeting taking place at lekuirvang village. The purpose of the meeting was for the Defendants to plan as to how they were going to pull down the Digicel tower. During the discussions, Chief Yauhua and Chief Narwie told other Defendants as to who and how some of the Defendants would remove the posts, the fence and the bolts on the foundation of the tower so that the tower could fall on the ground. After the meeting of 1<sup>st</sup> February, the Defendants spent the night in the nakamal. On 2<sup>nd</sup> February 2009, the Defendants assembled together and marched up toward the location of the Digicel tower. Chief Johnson was informed that Chief Yauhua and Chief Narwie lead the Defendants to the location of the tower. Then Chief Johnson sent messages to get police assistance at Isangel police station and he also contacted Digicel Company in Port-Vila about the situation. The police went to the place the tower was built. The police tried to reason Chief lauhua and Chief Narwie not to damage the tower. The Defendants did not listen to the police and the number of the police officers on the field were outnumbered and so they left.

After that the police officers left, the Defendants took firewood and coconut leaves and throw them at the foundation of the tower and also around engine box of the tower. The Defendants then removed the fences, dug the posts of the fences. At the same time, other Defendants removed bolts at the foundation of the tour. The Defendants then took a rengin wire of the tower and they fastened it on a tree and they pulled on it. Once all bolts were removed, the Defendants pulled on the rengin wire and the Digicel tower fell on the ground. When they pulled the tower down on the grounds, the Defendants shouted and climbed on the tower.

After they pulled the tower down on the ground, the Defendants made a big custom dance ceremony. During that custom dance ceremony, chief Yauhua Lounako and Chief Narwie lead the Defendants to the nakamal. There, Chief Narwie made custom payment with kava and food to the Defendants for the work they have done by pulling the Digicel tower down on the ground.

The complainant in this case filed an assessment report showing the total loss of equipment and recollection of the tour. The total loss was about USD256,516 which is equivalent to 23,000,000 Vatu.



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On 9<sup>th</sup> February 2009, police started the investigation in the matter and after caution, they interviewed the Defendants and the Defendants made statements admitting their involvements in the incident.

The provisions of the law you have broken are set out below:

- The first is the offence of Unlawful Assembly. It is defined by Section 68(1) of the Penal Code Act [CAP.135] in this way:

*"When three or more persons assembled with intent to commit an offence, or being assembled with intent to carry out some common purpose, conduct themselves in such a manner as to cause nearby persons reasonably to fear that the persons so assembled will commit a breach of the peace, or will by such assembly needlessly and without any unlawful assembly."*

Section 69 of the Penal Code Act prohibits unlawful assembly and it states:

*"No person shall take part in an unlawful assembly.*

*Penalty: Imprisonment for 3 years."*

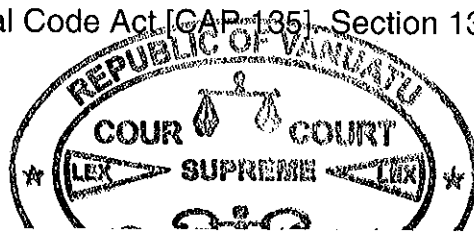
- The second is the offence of Malicious Damage to property. It is prohibited by section 133 of the Penal Code Act [CAP.135]. It states:

*"No person shall willfully and unlawfully destroy or damage any property which to his knowledge belongs to another."*

The penalty is set out in section 36(3) of the Interpretation Act [CAP.132] which provides that:

*"Where an Act of Parliament omits to prescribe a penalty for an offence created by the Act or for a contravention of a provision of the Act the penalty shall be a fine of VT5,000 or imprisonment for 1 year or both."*

The third is the offence of Soliciting and Inciting the Commission of an offence which is prohibited by sections 35 and 133 of the Penal Code Act [CAP.135]. Section 133 of



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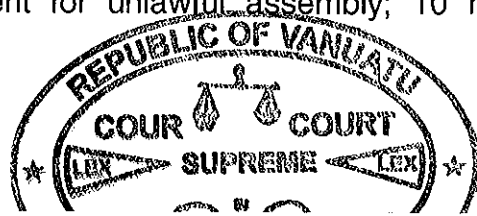
the Penal Code Act has been referred to above. Section 35 of the Penal Code Act says:

*"It shall be unlawful to incite or solicit another person to commit any offence, whether or not that offence is committed. A person guilty of inciting or soliciting an offence may be charged and convicted as a principal offender."*

The penalty is set out in section 36(3) of the Interpretation Act [CAP.132] referred to earlier which is *"5,000VT or imprisonment for 1 year or both."*

In considering your sentencing, I peruse and consider the submissions of the Public Prosecutor and submissions made by your defence counsel on behalf of each and all of you before the Court today at Port-Vila, Efate. I have enquired from your counsel about the possibility of pre-sentence reports for each of you but they are dispensed with as your lawyer provided very detailed information on your personal history, your antecedents and matters of mitigation on behalf of each of you to assist the Court in your sentencing exercise.

The prosecution refers the Court to the case of **Public Prosecutor v. Jimmy Niklam & others**, Criminal Case No.04 of 2004. Briefly, on 6 July 2004, the people of Vanuatu went to the polls to cast their votes in a snap election called by the Government of Vanuatu. Mr Jimmy Niklam and Mr Iaris Naunun, both of Middle Bush, Tanna contested the elections for a seat each in the National Parliament. The unofficial results of votes cast in Tanna were announced on the national radio on 8<sup>th</sup> July 2004. The unofficial results showed that both Mr Niklam and Mr Naunun failed to secure a seat in the National Parliament. On 9 July 2004, the election coordinators with the assistance of the police transported the ballot boxes for the constituencies of Tanna and Tafea outer Islands to White Grass Airport. The Defendants, encouraged by their leaders, also went to the Airport and seized 4 boxes, broke them on the road and burned the voting cards, and all other documents. The cards and other contents are the properties of the Government of Vanuatu. The defendants were charged with the offences of unlawful assembly, contrary to section 69 of the Penal Code Act, Malicious Damage to property, contrary to section 133 of the Penal Code Act and Soliciting and Inciting the commission of the offence of Malicious Damage to property, contrary to sections 35 and 133 of the Penal Code Act [CAP.135]. They were sentenced to 24 months imprisonment for unlawful assembly; 10 months



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imprisonment for malicious damage to property and 10 months imprisonment for soliciting and inciting the commission of the offence of Malicious Damage to property. The Court suspended the imprisonment terms for a period of 2 years and ordered that they will run concurrently.

The prosecution submits that the Court should apply the rationale of sentencing in the case of **PP v. Jimmy Niklam & others**, Criminal Case No.04 of 2004 and in addition, order you to perform 200 hours community work.

In the present case, your offending and the circumstance of your offending are very serious offending. They are aggravated by the following factors:

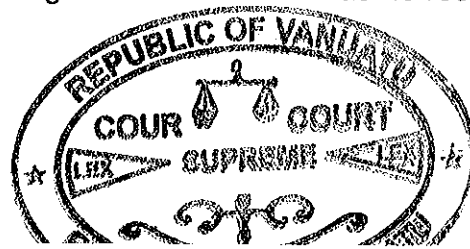
- There is a high degree of planning and pre-meditation.
- There was a criminal joint enterprise by a group of more than 50 persons.
- The value of the property damaged is roughly estimated at US\$256,516 which is equivalent to Vatu 23,000,000. It is a very substantial loss.
- Loss of mobile communication access on Envitana area by the people.

On your behalf, your lawyer submitted to the following effect:

**Removal of tower:**

Your lawyer informed the Court that you do not deny the fact that you are responsible for the removal of the Digicel Communications tower (hereinafter the tower) at Envitana area in South Tanna. In removing the tower you were not saying you oppose the services provided by Digicel, although that's how your actions have been interpreted by the members of the public.

Prior to the tower being built on the land, there were not full consultations with the chiefs of the area. When Defendant Bruno Neprei (in Vila) heard the tower was to be built on the site, he actually went up to Digicel Office to talk to the people responsible. He was told the person responsible was out of the office. He requested to see Iama Natuka, a Ni-Vanuatu employed by Digicel but there was no response. He later on met with that employee, Mr Iama Natuka, and conveyed his concern and that of the Defendants to him to inform the Digicel Office. There was no response.



### **Alternative site**

Your lawyer also informed the Court that Defendants Iauhua Lounako and Bruno Neprei suggested an alternative site still at Envitana to build the tower. That site was not taken.

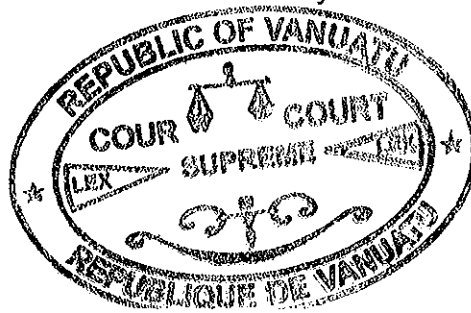
### **Decision to remove tower**

Your lawyer informed the Court further that a meeting was held sometime in January 2009 during which time it was decided that the tower would be removed. The decision to remove the tower was collective.

Your lawyer finally informed the Court and submitted as follows:

### **Matter in mitigation:**

1. You have removed the tower for a reason, while the reason may not justify your unlawful actions, it nevertheless shows that incoming development need to respect your custom and culture.
2. You are people who live in traditional ways all your life and you have very strong belief in your traditional ways and sites for gardening. An intrusion onto a sacred site where rituals are held for gardening was to you, disrespectful to your beliefs and custom.
3. You did not immediately decide to remove the tower without trying to find a solution. You attempted to contact Digicel but without very little or no success. You had an alternative site which you were prepared to have the tower built on.
4. Your actions do not mean you are opposed to the services delivered by Digicel. You know and realize the importance of the services Digicel is providing.
5. You realize your actions have affected many people in the area who were serviced by the tower. As a result of your actions mobile phones cannot be used in and around some coastal areas around South West Tanna.
6. You have had to live with the stigma of having been referred to as "trouble makers". You realize your actions have caused disunity amongst the nakamals around Envitana area. You would like to see your community unite again.



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## Reconciliation

7. Your Chiefs have asked for reconciliation between the nakamals three (3) times but those opposed to your actions have refused. In 2010, Defendant Narvie Netai took kava to Chief Nipiko Howan for reconciliation (the opposing Chief) but his kava was refused.

## Relocation of tower

8. You would like the tower to be rebuilt but relocated to the site you (Defendants) first proposed.
9. Costly  
You are very much aware that your actions have costs Digicel a lot of money. You can never repay that money but hope a new relationship can be fostered between your community and Digicel as the service provider.
10. You also realize your actions have cost the government a lot of money and time for having the Supreme Court to convene to deal with your case.

What follows are the particulars of each of you provided by your lawyers on your behalf:

## Defendant Bruno Neprei

You are from Envitana area, South Tanna. You are currently living at Teouma, Efate as a subsistence farmer. You are married and you have six children. Three of your children are still attending school (1 in Noumea, New Caledonia and 2 at Montmartre School). You pay the school fees of your 2 children at Montmartre School VT56,000 per term. Your lawyer provides a medical certificate dated 13 December 2010 which indicates you have psoriasis which is a chronic disease with a fluctuating course. You are on medications which are potentially toxic to your lungs and liver. Your disease requires monthly review in the outpatient clinics of the Vila Central Hospital to monitor its progress. You are remorseful for what you did. You pleaded guilty at the first opportunity given to you by the Court. You are a first time offender and you have no previous convictions. You would like the Digicel services to be restored but on a different location. Attempts were made on your behalf with other Defendants to reconcile with opposing group from Envitana but opposing group refused to reconcile with you and others.



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Defendant Donald Kathy

You are from Envitana area, South Tanna. You come to Vila town to look for a job. You are married and you have 3 children. None of your children attend school. You wife and children live at Envitana, Tanna. You are a subsistence farmer. You are a first time offender and you do not have previous convictions. You pleaded guilty at the first opportunity given to you by the Courts. You are remorseful for what you did. You too would like to see the Digicel services restored but on a different location. Attempts were made on your behalf with other Defendants to reconcile with opposing group from Envitana but opposing group refused to reconcile with you and others.

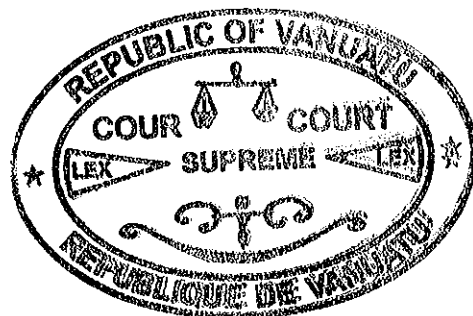
Defendant Nipiko Namariau

You are from Envitana area, South Tanna. You are married and have 4 children. None of your children attend school. Your eldest child is 10 years and your youngest 3. Your wife and children live on Tanna. You came to Port-Vila to look for a job. On Tanna, you were subsistence farmer. You are a first time offender and you have no previous convictions. You pleaded guilty at the first opportunity given to you by the Court. You are remorseful for what you did. You would like the Digicel services to be restored but on a different location. Attempts were made on your behalf with others to reconcile with Envitana opposing group but the opposing group refused to reconcile with you and others.

Defendant Ramap Mark Namatau

You are a youth of 15 years old. You have no formal education and you are currently in Port-Vila since early 2010 to look for a job. You are a first time offender and you have no previous convictions. You plead guilty at the first opportunity given provided to you by the Court. You are remorseful for what you did. You would like the Digicel services to be restored but on a different location. Attempts were made to reconcile with Envitana opposing group but opposing group refused to reconcile with you and others.

Defendant Daniel Netai



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You are from Envitana area, South Tanna. You are 20 years of age. You are married with 2 children. None of your children attend school. Your wife and children live on Tanna. You came to Port-Vila to look for a job since September 2010. You are a subsistence farmer. You are a first time offender and you have no previous convictions. You are remorseful for what you did. You would like the Digicel services to be restored but on a different location. Attempts were made on your behalf to reconcile with Envitana opposing group but they refused to reconcile with you and others.

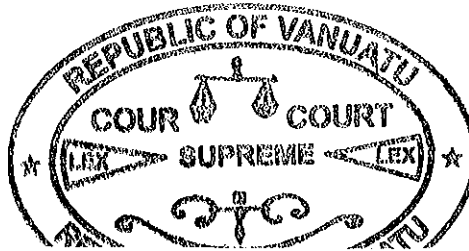
#### Defendant Johnson Tufna

You are from Envitana area, South Tanna. You are married. You have 2 children aged 8 and 4 respectively. None of your children attend school. You are currently employed at Melektri area, Port-Vila, Efate, working in the plantation. You send money to Tanna for your children. You are a first time offender and you have no previous convictions. You are remorseful for what you did. You plead guilty at the first opportunity given to you by the Court. You would like the Digicel services to be restored but on a different location. Attempts were made on your behalf to reconcile with Envitana opposing group but they refused to reconcile with you and others.

On your sentencing, your lawyer refers the Court to the following cases:

- **PP v. Chief Henry Cyrel Manlaiwia & ors**, Criminal Case No.24 of 1997;
- **PP v. Chief Koloran Maripopongi & ors**, Criminal Case No.25 of 1997;
- **PP v. Niklam & ors**, Criminal Case No.24 of 2004.

The circumstances of the above cases arose out of concerns of the custom of local people and their practices as they are in direct conflict with the criminal laws of Vanuatu. In **Manlaewia and Maripopongi cases**, the disputes were over rules of customs as to who should be the paramount chief. The **Niklam case** was about the execution of Orders issued in custom by the custom chiefs and leaders. The present case is about the concerns by one part of the local community of Envitana area to protect and preserve their traditional site which culminated in unlawful actions committed by the Defendants out of frustrations and as reactions to the refusal of their proposed site.



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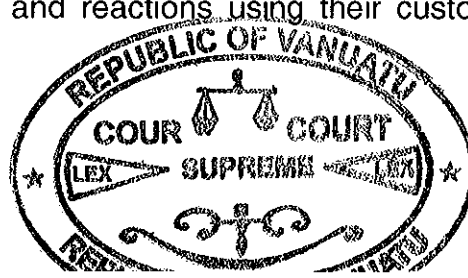
Your lawyer submitted that in the light of the above cases, the appropriate sentence that the Court should pass on each and all of you for your offending should be a suspended custodial sentence.

In the present case, I have considered the prosecution submissions and submissions of your lawyer and all what your lawyer informed the Court about on your behalf. I have also perused and considered the relevant provisions of the law and the case authorities provided by the prosecution and your lawyer, I must inform each and all of you that your offending constitute very serious offences which attract custodial sentence. It appears that your unlawful actions were carried out as a result of your frustrations, lack of understanding and communication, reactions after you realized that your proposed site to build Digicel tower was refused and that the tower was built on your traditional site you use for special custom ceremonies.

In sentencing each and all of you, the Court must inform you that Vanuatu as an independent and sovereign nation has laws for everyone including each and all of you. As citizens of Vanuatu, each and all of you including your chiefs, are subject to the laws of Vanuatu. Each and all of you must understand that you cannot take the law into your own hands to do justice to yourselves out of frustrations, reactions, misunderstanding and lack and/or poor communications.

Your custom motives or custom rationals may be the basis of your actions. However, your custom and traditional practices are not excuses for each and all of you to commit criminal offences as you did on 2 February 2009 when you were unlawfully assembled together, maliciously damaged the Digicel tower causing its fall on the ground with the encouragement and incitement of some of your custom chiefs and leaders. Your offending resulted in substantial losses of VT23,000,000 to Digicel. Further one part of Tanna Island people could no longer have access to their mobile phone communications. This has far reaching effect on the telecommunications and economic developments on Tanna and Vanuatu.

Custom chiefs and leaders shall refrain from soliciting and inciting their people to commit criminal offences out of frustrations and reactions using their custom and



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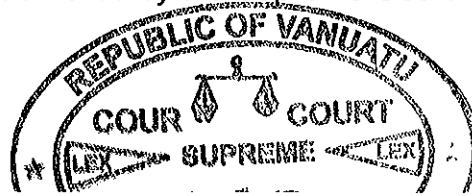
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traditional practices as justifications for the breaking of the criminal laws of the Republic of Vanuatu.

In the present case, I have balanced the aggravating factors with the mitigating factors and after I have cross referenced each with the other, I sentence each and all of you in this way:

### **ORDER FOR SENTENCE**

1. Donald Kathy, Nipiko Namariau, Ramap Mark Namatau, Daniel Netai and Johnson Tufna, each and all of you are sentenced to 2 years imprisonment for Unlawful Assembly, contrary to section 69 of the Penal Code Act [CAP.135]; and
2. Each and all of you are sentenced to 11 months imprisonment for Malicious Damage to property, contrary to section 133 of the Penal Code Act [CAP.135]; and
3. The terms of imprisonment imposed on each and all of you are concurrent to each other.
4. Defendant Bruno Neprei, you are sentenced to 11 months imprisonment for Soliciting and Inciting the commission of the offence of Malicious Damage to property, contrary to sections 35 and 133 of the Penal Code Act [CAP.135]. I accept the evidence of your health conditions and I decide to suspend your imprisonment sentence under s.57 of the Penal Code Act instead of sentencing you under s.58G of the Penal Code (Amendment) Act. Your sentence of 11 months imprisonment is suspended for a period of 3 years under s.57 of the Penal Code Act [CAP.135].
5. For Defendants, Donald Kathy, Nipiko Namariau, Daniel Netai and Johnson Tufna, your respective imprisonment terms are suspended for a period of 3 years from today's date i.e. 24 February 2011 under s.58G of the Penal Code (Amendment) Act No.14 of 2007 [CAP.135].
6. During such period of 3 years suspension, each of you must not re-offend. If any of you re-offend again before the end of 3 years suspension period, you shall be charged and convicted on the new offence and your respective current suspended terms of 2 years imprisonment (and 11 months for Defendant Bruno Neprei) shall be reactivated by the Supreme Court.



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7. In addition to your suspended terms of imprisonment under s.58G of the Penal Code Act, Defendants Donald Kathy, Nipiko Namariau, Daniel Netai and Johnson Tufna are ordered to perform each 100 hours community work.
8. Defendant Ramap Mark Namatau, in light of the protective effect of section 54 of the Penal Code Act [CAP.135], you are sentenced to 12 months supervision for the offence of Unlawful Assembly, contrary to section 69 of the Penal Code Act [CAP.135] and 10 months supervision for the offence of Malicious Damage to property, contrary to section 133 of the Penal Code Act [CAP.135] and to be concurrent to each other. This means you shall be under supervision for a total period of 12 months to complete your supervision sentence.
9. Each and all of you who are sentenced today 24 February 2011, is entitled to appeal his sentence within 14 days if you are not happy with your sentence.
10. Your sentence is a criminal sentence imposed on each of you for the criminal offences each of you had committed against the criminal laws of Vanuatu.
11. As a final note/observation, if Digicel Company issue civil proceedings against each and all of you, you must understand that that is a different process from a criminal process.

**DATED at Port-Vila this 24<sup>th</sup> day of February 2011**

**BY THE COURT**

**Vincent LUNABEK**  
**Chief Justice**

