

**PUBLIC PROSECUTOR**  
**V.**  
**STEVEN MORSEN SILAS**

**Coram:** Justice D. V. Fatiaki  
**Counsel:** Mr. T. Karae for the State  
Mr. J. Kausiama for the defendant  
**Date of Sentence:** 8 August 2013

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**SENTENCE**

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1. On 27 June 2013 the defendant pleaded guilty to an offence of Unintentional Harm Causing Death contrary to Section 108(c) of the Penal Code Act [CAP. 135]. He had also been charged with the more serious offence of Intentional Homicide which he denied and which was later withdrawn by the prosecutor.
2. Section 108(c) provides that no person shall unintentionally cause damage to the body of another person through recklessness and if damage so caused results in death the maximum penalty is imprisonment for 5 years. "Recklessness" for the purposes of the criminal law includes knowingly taking a risk which causes injury to a person. (see: Section 6).
3. The particulars of the charge which the defendant admitted are:  

*"... long namba 25 February 2013 long Malapoa area yu bin unintentionally shutum man ia OBED TERRY long body blong hem wetem wan .22 mekem se hem ie result long death blong hem."*

In brief, the defendant was charged with unintentionally discharging a .22 firearm which caused the death of OBED TERRY.
4. The facts which the defendant admitted tells of how he and a group of family members including the deceased had gone to the Finance Department on 25 February 2013 to enquire about the final payments for the lease of customary land at Ambrym Island on which Ulei Airport is built.
5. After spending most of the day in town they bought some kava from Anamburu and headed for Malapoa Whitewood to consume it. On the way two members of the group got off at Tebakor to buy some tobacco.



6. On arrival at Malapoa Whitewood at the home of James Terry, the remainder of the group got off the bus and went to prepare the kava. A member of the group Jimmy Isaiah saw a .22 rifle on a table and enquired about it. At that moment the defendant picked up the rifle and Jimmy told him to remove the magazine and ensure that there was no bullet left in the barrel. The defendant cocked the rifle ejecting an empty shell. He then removed the magazine and handed it and the empty shell to Jimmy who headed to the house with the magazine for safe-keeping.
7. On the way he heard the rifle discharge and at the same time the deceased called out: "*Apu Steven i shutum mi*". The deceased was rushed to Vila Central Hospital where he was examined and underwent emergency treatment and his condition was stabilized. Unfortunately the deceased's condition deteriorated during the night and he died at 04.00 a.m. on 26 February 2013.
8. The deceased's medical report reveals that on arrival at the hospital he had "*a single bullet wound entry on his right lateral aspect of his chest, no exit wound was noted*". A post mortem x-ray also revealed that "*the bullet lodged in the vicinity of the heart with shrapnel lodged in the myocardium*". The cause of death was a gunshot to the chest causing myocardial injury and lung parenchymal injury.
9. The matter was reported to the police and the defendant admitted under caution that the rifle had accidentally discharged as he was lowering it to his lap. He does not know how it happened nor had he pulled the trigger. He was shocked and threw the rifle on the ground.
10. The police enquiries did not include charges for offences under the Firearms Act [CAP. 198]. Suffice to say that the situation in which the rifle was left out in the open, unattended and loaded was fraught with danger and should not have occurred. The fact that the licensed owner of the firearm in question was born in 1991 and therefore barely 22 years of age at the time of the offence is also a disconcerting matter.
11. Furthermore, the absence of any charges under the Firearms Act means that the Court lacks the necessary powers to order forfeiture of the offending firearm. (see: **Section 39** of the **Firearms Act** read with **Section 58ZC** of the **Penal Code**).
12. Having said that the defendant who is 30 years of age must bear full responsibility for his recklessness which has claimed the life of a close relative. That is a heavy burden that he must carry for the rest of his life and nothing this Court says, and no sentence this Court imposes, will bring his "*apu*" back to life.
13. The Court of Appeal in considering a similar case of accidental shooting causing death in **Newell v. Public Prosecutor** [1998] VUCA 2 relevantly observed:

*"Dealing with cases of this sort creates some of the most difficult sentencing tasks in any Court. This is a matter which in general conversation would be described as an accident. In the laws terms it*



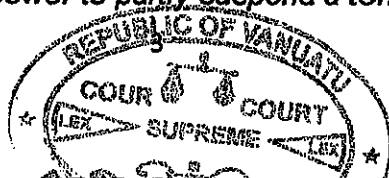
*is a situation where death result from an unlawful act. That in law is not an accident but is unintentional harm causing death. A criminal court in determining sentences on this sort of charge cannot possibly put a value or an appreciation of the life which has been lost. It is unfortunate (particularly when people are grieving and hurt) that sometimes there is a suggestion that the Court minimize the value of the life which was taken. What the court is concerned to do is to assess the criminal culpability of the wrong doer. In a case such as this a Court cannot ignore the reality that (the defendant) as a teenager faces a life time in which he lives with the knowledge that as a consequence of his careless act a life was taken."*

And later the Court said:

*"Of course it is always dangerous for anybody (young or old) to fool with a firearm increase ... but we are persuaded that it could not in the circumstances of this case be concluded that no other method of punishment (other than immediate imprisonment) was appropriate."*

14. With that guidance in mind I turn to consider the appropriate sentence in this case. I have been much assisted by the prosecutor's and defence counsels' sentencing submissions as well as the pre-sentence report provided by the probation service.
15. State counsel identifies the mitigating factors in the case as being, the defendant's guilty plea, and the fact that he is a first offender and counsel proposes a partly suspended sentence of imprisonment which requires the defendant to serve half of the term of imprisonment imposed.
16. This proposal is similar to the sentence imposed in **Public Prosecutor v. Peter Jimmy** [2012] VUSC 228 where a partly suspended sentence of 18 months imprisonment was imposed on a similar charge. However the facts of that case are easily distinguished from the present in so far as the defendant started a fight with the deceased causing him to fall heavily on concrete and rendering him unconscious from severe heard injuries he had sustained. Similarly, in **Public Prosecutor v. Varasmaite** [2011] VUSC 289 a partly suspended sentence of imprisonment was imposed for the more serious offence of Attempted Intentional Homicide where a shot gun was intentionally fired at two people fishing in customary waters in breach of a "tabu" imposed by the village chief. Those cases are plainly different and more serious than the present case.
17. Additionally, the Court of Appeal recently considered the relationship between **Section 57** (power to wholly suspend) and **Section 58** (power to partly suspend) of the **Penal Code** in **Silas Robert v. Public Prosecutor** [2013] VUCA 25 and said (at paras. 14 and 15):

*"The sections are not easily reconciled and may even give rise to an inconsistency in so far as the power under Section 57 (to wholly suspend a sentence of imprisonment) is predicated upon a finding that immediate imprisonment is "not appropriate", whereas section 58 which contains the power to partly suspend a term of imprisonment is*



*prefaced on a determination that the offence "... is so serious as to warrant imprisonment and it is not appropriate to suspend the whole sentence". In this latter instance, the Court is required to consider and identify grounds for only suspending the sentence in part.*

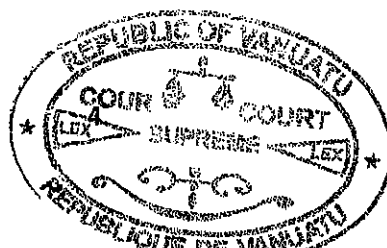
*Needless to say, in the absence of any articulation of the ground(s) and reason(s) for partly suspending a sentence of imprisonment, the exercise of section 58 remains unexplained and therefore difficult to justify."*

18. In this latter regard no attempt has been made in the prosecutor's submissions to explain or justify a partly suspended sentence. No reason has been given as to why it is considered that this offence "*is so serious as to warrant imprisonment*" nor has any reason(s) been advanced for excluding Section 57.
19. Be that as it may, in the court's view reckless behaviour involving a lethal weapon such as a potentially loaded firearm which results in fatal injury is behaviour which must be strongly deterred and warrants a sentence of imprisonment in almost every instance.
20. Defence counsel for his part, advances the personal circumstances of the defendant by way of mitigation viz, 27 years of age in a stable defacto relationship with a child of 4 years attending pre-school; in regular employment with a construction company and an active member of his church "*sowing faith*" ministry. He also cooperated fully with police enquiries and "*made admissions to the offence in terms of the charge ultimately preferred against him*". Defence counsel urges a wholly suspended prison sentence and community work.
21. Although a life has been needlessly lost which is undoubtedly, an aggravating factor, the defendant's "*criminal culpability*" lies in the recklessness of his actions in carelessly handling a firearm in close proximity to family members and after a shell casing had been ejected from the rifle's barrel upon it being cocked. This however is not a case of a gun owner intentionally using his firearm to threaten and/or shoot at people nor is it a case of a person being killed in a struggle involving a loaded gun.
22. The probation officer in the pre-sentence report also records that:

*"(the defendant) showed a lot of remorse, emotionally expressing himself in tears. He told the writer that over reflecting back to his offending, he sometimes felt like committing suicide as he loved his brother just like any other family members."*

And later:


*"(the defendant) blames himself for this incident (the defendant) pointed out that he is using every financial means to try to prepare for a custom reconciliation."*



23. Notwithstanding those mitigating factors, this is a case involving an extremely dangerous lethal weapon being handled in a reckless manner resulting in a loss of life and therefore deserving of a starting sentence of 24 months imprisonment.
24. In recognition of mitigating factors personal to the defendant I reduce the starting sentence by a term of 9 months resulting in a sentence of 15 months which is further reduced by 5 months on account of the defendant's early guilty plea making a final sentence of 10 months imprisonment.
25. I turn next to consider the provisions of Section 57 and in view of all the circumstances and in particular the accidental nature of the crime involving close family members, and the previous good character of the defendant, I am willing to wholly suspend the final sentence for the maximum allowable term of 3 years. The defendant is warned that any re-offending in the next 3 years will result in him having to immediately serve this sentence of 10 months imprisonment along with to any other sentence he may receive for his re-offending.
26. In addition, the defendant is ordered to perform a customary reconciliation ceremony to the parents and family members of the deceased Obed Terry within 3 weeks to be facilitated and reported on by a probation officer.
27. Finally and mindful that the defendant is in regular employment and the deceased is survived by a widow and five dependant children, I order the defendant to pay compensation to the deceased's widow of VT1 million payable in monthly instalments of not less than VT20,000. This compensation order is to be monitored and supervised by a probation officer.
28. You have a right to appeal against this sentence if you do not agree with it by filing a Notice of Appeal within 14 days.

**DATED at Port Vila, this 8<sup>th</sup> day of August, 2013.**

**BY THE COURT**

  
**D. V. FATIAKI**  
Judge

