

**IN THE SUPREME COURT OF  
THE REPUBLIC OF VANUATU**  
(Criminal Jurisdiction)

Criminal  
Case No. 18/1248 SC/CRML

**PUBLIC PROSECUTOR**  
**v.**  
**ROGER DAVID**

**Coram:** Justice D. V. Fatiaki

**Counsel:** Ms M. Taiki for the State  
Mr L. Moli for the Defendant

**Date of Sentence:** 10 August 2018

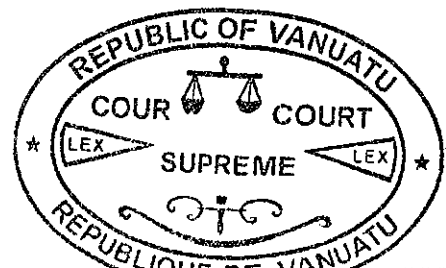
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**SENTENCE**

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1. The defendant pleaded guilty and was convicted for an offence of Intentional Assault contrary to Section 107(b) of the Penal Code [CAP. 135] and an offence of Obstructing Police Officer contrary to Section 73A. The maximum penalty for the offence of intentional assault causing temporary injuries [Section 107(b)] is imprisonment for 5 years and for obstructing a police officer in the performance of his public duties the penalty is "imprisonment for a term not exceeding 6 years or to a fine not exceeding VT300,000 or to both such fine and imprisonment".
2. The brief facts admitted by the defendant were that the complainant Tony Jack went to a nakamal to drink kava and returned home to Anamburu in the early morning hours with two tusker bottles which he began to drink. While drinking a boy, Naiu, ran past and warned him to watch out for the defendant. Soon after the warning, the complainant was struck on the face and fell to the ground and the defendant continued to throw punches to his body and ribs.
3. The complainant's medical report discloses he sustained the following injuries:
  - Swelling and bleeding on the left side of the face;
  - Bleeding from the nose;
  - Acute m/skeletal pain on left chest area; and
  - Swelling on both upper limbs and the left knee.

The doctor opined that the injuries were the result of multiple trauma physical assault.



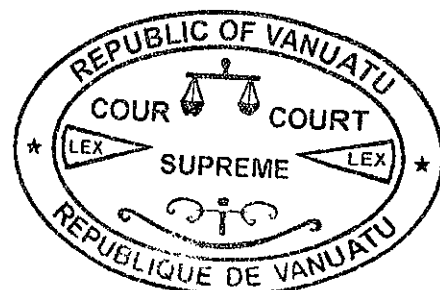
4. A complaint was lodged at the Vila Central Police Station and a team was dispatched. The defendant was arrested from his home at Namburu, Aneityum Community and escorted to the Police Station. On arrival at the Police Station Constable Brian George processed the defendant. Whilst he was being searched prior to being locked in the cell, the defendant got hold of Constable Brian George's uniform and pinned him to the wall until another constable intervened and freed Constable Brian George from the defendant's vice-like grip.
5. Under caution the defendant admitted assaulting the complainant and obstructing the police officer "*..mo rabbem police uniform blong hem*". Nowhere in his caution statement does the defendant say he was acting in self-defence or in retaliation. This omission is significant.
6. A pre-sentence report and sentencing submissions were ordered to assist the court in considering an appropriate sentence.
7. According to the pre-sentence report, the defendant is 27 years of age and originally hails from Port Patrick Village on Aneityum Island. He is single and lives with his parents at Anamburu area. He completed primary and secondary education up to year 12 but couldn't continue his education due to financial problems. He has skills in gardening, fishing and piggery farming and claims he gets on well and "*has no issues with his immediate family members in Vila and on Aneityum*".
8. I say "*claims*" advisedly, because the defendant's father clearly does not share the same feelings towards the defendant if the pre-sentence report accurately reflects this sentiments. In particular, the defendant's father told the report writer that the defendant:

*"... was violent every time when he got upset with any issues within their family (and) on one occasion (the defendant) assaulted him and he ended in a dispensary. (The defendant) is also violent with his brothers and sisters and they are all afraid of him ... currently when (the defendant) is remanded they are happy and feel safe by themselves. However if (the defendant) is released, he will have to go back to their home island as he cannot put up with his violent behaviours"*.

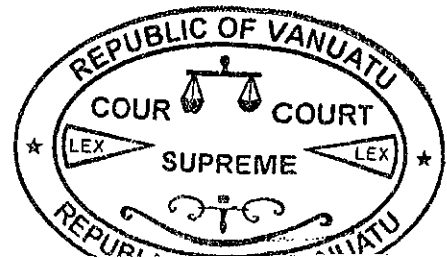
and later the father said:

*"... he will be happier that his son receives an imprisonment sentence" because "that will give him a chance to undertake the rehabilitation programs provided (in prison)."*

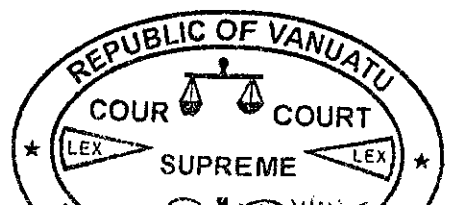
The defendant's father also declined to support the defendant "*...for a community based sentence.*"



9. The defendant is described in the pre-sentence report as a *"first time offender"* who and pleaded guilty at the earliest opportunity once the charge and facts were appropriately amended.
10. As for the defendant's so-called clean record, prosecuting counsel correctly disclosed that the defendant has a record of a prior conviction for interalia Intentional Assault on 30 September 2015 where the defendant received a fine of VT1,500 plus VT1,000 costs in the Efate Island Court.
11. In evaluating the defendant's offending, the probation officer *"... assesses that (the defendant) was trying to justify himself and blaming the victim"*. He further identified that *"...(the defendant) was not yet ready to be released (presumably from remand) and need to be closely involved with the rehabilitation programs to help address his violent behaviour"* through anger management awareness training provided by the probation services.
12. In similar vein, defence counsel writes that the defendant was continually assaulted on the way to the police station and at the station and that caused the defendant to retaliate by shoving the Police officer against the wall and pulling his uniform. This claim which is unsupported by a medical report, was never made by the defendant when giving his caution statement to the police nor did defence counsel see fit to raise it during the arraignment as he should have done, if there was any truth in the claim and/or counsel intended to raise it as mitigation in his sentencing submissions. I reject this submission as a belated baseless attempt to excuse and justify the defendant's unprovoked aggressive behaviour during his police lock-up.
13. Having said that, I accept the following mitigating factors drawn from the defendant's pre-sentence report and defence counsel's submissions:
  - The defendant is 27 years of age (DOB: 20 September 1991) from Port Patrick Village, Aneityum Island and has completed year 12 of secondary school;
  - He is living in a de facto relationship and his wife is currently pregnant. Although unemployed the defendant earns some money from selling kava;
  - The defendant pleaded guilty at the earliest opportunity;
  - The defendant told the probation officer *"he deeply regrets his offending and wished he had approached (the complainant) in a different manner"*;
  - The defendant has been, according to the pre-sentence report, remanded in custody from 18 September 2017 till now which is a period of over 10 months.



14. The length of remand remains doubtful however, in view of two (2) Magistrate Court bail orders dated 19 December 2017 in PI Case No. 83 of 2017 (included in the PI papers) and an earlier order dated 18 January 2017 in PI Case No.17/5 MC/PRIN (attached to the prosecutor's sentencing submissions), where the defendant was charged with Intentional Assault causing no permanent injuries and was ordered "*to attend the Magistrate's Court at Port Vila on 31 January 2017 at 10:30am for plea*". Nothing is known about the defendant's plea but defence counsel writes the defendant is: "*currently in custody for 1 month.*"
15. Relying on the latter bail order, prosecuting counsel suggests that the present offence which occurred on 8 April 2018, was committed while the defendant was on bail. I confess that in the absence of the Magistrate's Court record of the proceedings in Criminal Case No. 17/138 I am unable to accept the correctness of the submission of this being an aggravating factor. Notably defence counsel's submission is that the defendant "*has been on remand since 10 April 2018*" which is a considerably shorter period. Furthermore although unclear about the end results, the above-mentioned cases appear to concern charges of: Intentional Assault. Plainly, the defendant cannot be treated as having an unblemished record nor can it be said that the present offence is "*out-of-character*". He can receive no discount on that score.
16. Be that as it may, prosecuting counsel suggests a starting point of 9 months imprisonment for both offences with an appropriate uplift for the defendant's past conviction for a similar offence evidencing the defendant's tendency to resort to violence whenever he is angry. Counsel also accepts that, consistent with other cases, it is open to the court to suspend the defendant's sentence, which is what defence counsel seeks for the defendant.
17. In the present case having regard to the repetitive nature of the assault after the complainant had fallen on the ground and the number and nature of the injuries sustained by the complainant and mindful of the increased maximum sentence of 5 years imprisonment for an offence of Intentional Assault Causing Temporary Injuries since February 2017, I adopt a starting point of 18 months imprisonment. I reduce that starting point by 3 months for mitigating factors and a further 5 months for the defendant's guilty pleas giving an end sentence of  $(18 - 3 - 5) = \underline{10 \text{ months imprisonment}}$ .
18. I turn finally to consider, whether or not to suspend the defendant's end sentence as prosecuting counsel accepts I may do so. Bearing in mind the circumstances of this case including the fact that the defendant has been in remand at least, since 10 April 2018 (equivalent to a substantive sentence of 6 months imprisonment) and the nature of the crime where the defendant allegedly took it upon himself to summarily punish the complainant for disobeying a chiefly decree against loud music and noise, and, this being the



first sentence of imprisonment being imposed on the defendant who expressed his genuine regret and remorse for his actions, I am able to be lenient and accordingly suspend the end sentence for 2 years.

19. The defendant is warned that although he will not be returned to prison today his suspended sentence means that he must behave himself and not re-offend for the next 2 years. If he stays out of trouble for that length of time then he will not have to serve this sentence, but, if he commits another offence and is convicted in the next 2 years, then he will be arrested and returned to prison to serve this sentence of 10 months imprisonment in addition to any other sentence he may receive for his re-offending.
20. To assist the defendant to remain out of trouble, I impose a sentence of 12 months Supervision and direct as a special condition that the defendant undertakes counselling and anger management programs as directed by the probation service. The defendant is also warned that failure to comply with any condition attached to this sentence of Supervision is an offence, for which the defendant's suspended sentence may be activated.
21. For completeness, I impose a concurrent sentence of 6 months imprisonment for the offence of Obstructing a Police Officer.
22. The defendant is informed of his right to appeal this sentence within 14 days if he does not agree with it.

**DATED at Port Vila, this 10<sup>th</sup> day of August, 2018.**

**BY THE COURT**



**D. V. FATIAKI**  
**Judge.**

