

BETWEEN: John Ruben
Appellant

AND: Public Prosecutor
Respondent

Date of Hearing: 21 September 2020
By: Justice G.A. Andrée Wiltens
Counsel: Mr L. Moli for the Appellant
Ms J. Tete for the Respondent
Date of Decision: 29 September 2020

Judgment

A. Introduction

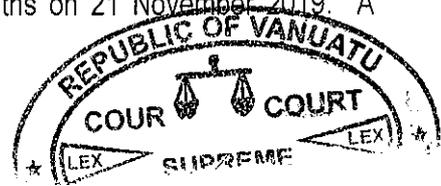
1. Mr Ruben appealed the decision of the Magistrate's Court to impose a final sentence of 9 months imprisonment in respect of 2 counts of domestic violence and 2 counts of breach of Protection Orders.

B. Appeal

2. The appeal was advanced on two bases. Firstly, it was submitted that the learned Magistrate had erred by not following the 3-step approach to sentencing as laid down by the authority of *PP v Andy* [2011] VUCA 14. Secondly, in any event, the end sentence imposed was manifestly excessive.

C. Facts

3. The admitted offending involved Mr Ruben and his de facto partner. The complainant was granted a Restraining Order against the appellant for 6 months on 21 November 2019. A



breach of the Order in December 2019 resulted in the Restraining Order being varied to also prevent the appellant from coming within 100 metres of the complainant.

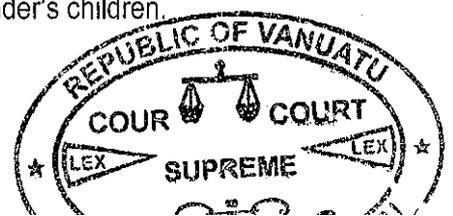
4. The Order was subsequently breached twice more, which resulted in the slightly duplicitous nature of the charges. The first was on 17 March 2020 and involved an assault which occasioned actual injury; the second was on 28 May 2020 and involved the appellant going to the complainant's address and having a verbal altercation.

D. Sentence

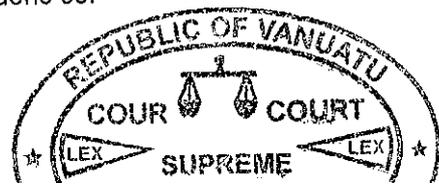
5. The learned Magistrate briefly set out the facts of the case and then adopted a sentence start point of 6 months imprisonment for both types of offending – a total of 12 months imprisonment. The aggravating factors were then listed, as were the mitigating factors. Those matters were then factored in, resulting in an uplift of 6 months imprisonment for the aggravating factors and a one-third reduction of sentence for the prompt guilty pleas entered. In that fashion the end sentence of 9 months imprisonment was arrived at. The learned Magistrate then declined to exercise his discretion by suspending the sentence.

E. Discussion

6. Mr Moli accepted that the 3-step sentencing has been overtaken by the 2-step calculation as set out in *Jimmy v PP* [2020] VUCA 40. Accordingly, the sentence start point is to be established by considering the maximum sentence(s) available, and the aggravating and mitigating aspects of the offending – step one. Thereafter the end sentence is arrived at by looking at whether there has been a prompt plea followed by considering all the personal aggravating and mitigating factors relating to the offender – step two.
7. It is apparent that the learned Magistrate erred in the process adopted. There is a real possibility that there was double-counting involved. Further, the aggravating and mitigating factors were not sorted into those affecting the offending and those affecting the offender. That is an error which can distort the correct process.
8. However, the real issue was not whether the correct procedure was adopted in coming to the end sentence, but whether or not the end sentence was manifestly excessive. Accordingly I now set out a more principled sentencing assessment.
9. The maximum sentence for breach of a protection order is 2 years imprisonment; the maximum sentence for the offence of domestic violence is 5 years imprisonment.
10. The aggravating features of the offending include, as listed by the learned Magistrate:
 - The seriousness and violence resulting in injury to complainant's head, gums and right hand;
 - Gross breach of trust;
 - Offending within the family home context; and
 - The offending occurred in the presence of two of the offender's children.



11. I would add to that, the repeat nature of the offending, with 5 criminal acts involving loss of control and the application of actual violence occurring within a relatively short space of time. Further, the effects of the offending on the complainant are aggravating.
12. There are no mitigating aspects of the offending.
13. Accordingly, the sentence start point, on a global basis taking all 4 offences into account on a concurrent basis, is 18 - 20 months imprisonment.
14. The relevant personal factors need to be considered next. Firstly, the appellant pleaded guilty promptly, saving Court time and expense, and sparing the need for the complainant to have to give evidence. A discount for this of 25% is available. The maximum available discount must reflect real contrition, which is not accepted given the repeat nature of the offending. The strength of the prosecution case is a further factor to consider.
15. The learned Magistrate listed the following further personal factors:
 - The lack of previous convictions;
 - The fact the appellant has 6 children whom he supports when he can – he was currently unemployed; and
 - The appellant took part in a custom reconciliation ceremony.
16. As stated earlier, it difficult to see real remorse where there is continued similar offending. I note the learned Magistrate gave the appellant the benefit of his claimed remorse.
17. For the additional factors personal to the appellant a further discount is available of 3 months imprisonment.
18. Lastly, the appellant should be credited with time already served prior to being sentenced, which amounted to 2 weeks.
19. On this basis, the appellant would be sentenced to an end concurrent sentence on all 4 charges of 10 to 11.5 months imprisonment. That is greater than the sentence imposed, and accordingly as the end sentence actually imposed cannot be said to be manifestly excessive, the appeal should be dismissed.
20. There is one final matters which must be addressed. Mr Moli made strenuous submissions to the effect that the sentence ought to have been suspended.
21. However, given the repeat nature of the offending and the type of offending perpetrated, it would be inappropriate to return the appellant to the environment where he has previously lost his self-control and offended. That would pose a real risk of his re-offending and would create a dangerous situation for his partner and their children. Accordingly, I am of the view that suspension of all or part of the sentence would be inappropriate.
22. Further, to succeed with this submission, Mr Moli needed to demonstrate an error in the exercise of the learned Magistrate's discretion. He has not done so.



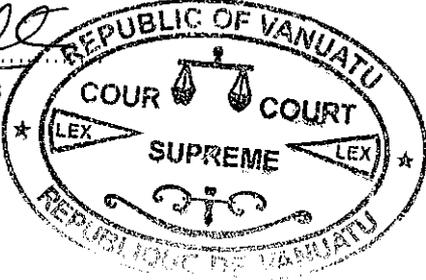
F. Result

23. The appeal against sentence is dismissed.

24. Mr Ruben must serve 9 months imprisonment in respect of all 4 charges concurrently.

Dated at Port Vila this 29th day of September 2020
BY THE COURT

G.A. Andrée Wiltens
Justice G.A. Andrée Wiltens

The seal of the Supreme Court of the Republic of Vanuatu is circular. It features a central scale of justice. The words "REPUBLIC OF VANUATU" are written along the top and bottom inner edges of the circle. The words "COURT" and "COURT" are positioned on either side of the scale. Below the scale, the word "SUPREME" is written in a larger font. Two small triangles containing the word "LEX" are located on the left and right sides of the seal. The entire seal is surrounded by a decorative border.