IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU
(Civil Jurisdiction)

Criminal Appeal
Case No. 24/1373 SC/Criminal

BETWEEN: WILLIAM AMOS
Appellant

AND: THE PUBLIC PROSECUTOR
Respondent

Date of Hearing:	*23 July 2024*
Before:	*Justice M A MacKenzie*
Counsel:	*Ms P Malites for the Appellant*
	Mr J Aru for the Respondent

DECISION

Introduction

1. On 7 February 2024, the appellant pleaded guilty to two counts of malicious damage to property contrary to s 133 of the Penal Code [CAP 135], one count of unlawfully entering a non-dwelling house contrary to s 143(1) of the Penal Code [Cap. 135] and one count of theft contrary to ss 125 (a) and 122 of the Penal Code [CAP 135].

2. The maximum sentences prescribed in the Penal Code [CAP 135] are:

   a. Malicious damage to property – 1 year imprisonment
   b. Unlawfully entering a non-dwelling house - 10 years imprisonment
   c. Theft -12 years imprisonment.

3. On 16 April 2024, the appellant was convicted and sentenced on all four charges in the Magistrate's Court to 18 months and 2 weeks imprisonment. ("the end sentence")

4. The appellant appeals the sentence on the following grounds:

a. The first ground is that the Magistrate erred when imposing an end sentence of 18 months 2 weeks imprisonment, resulting in a manifestly excessive sentence;

b. The second ground is that the Magistrate erred when she refused to suspend the sentence.

Result

5. After hearing oral argument from counsel, I allowed the appeal, and quashed the sentence imposed by the Magistrate. I re sentenced the appellant to 12 months 2 weeks imprisonment, suspended for 2 years.

6. I said I would give written reasons. These are my reasons.

The facts

7. On 6 November 2023, the appellant and his co offender Mr Peter met at Mr Peter's home. They travelled by bus to Club 21, and then walked towards Au Bon Marche Nambatu. At about 10 pm they arrived at the back of the Au Bon Marche Nambatu, and monitored the premises to see if there were any security personnel on the premises. Satisfying themselves that there were no security personnel, the appellant and Mr Peter gained access to the roof.

8. Once on the roof, the appellant and Mr Peter used a pair of pliers in their possession to remove metal roofing screws which held the metal roofing sheet in place. They gained entry into the building and located the offices. Once they had done so, they exited the building via the roof and bent the metal roofing sheet back into place. It was temporarily in place.

9. On 8 November 2023, the appellant and Mr Peter decided to steal items form the Au Bon Marche Nambatu. Again, they travelled by bus to Club 21 and then walked towards Au Bon Marche Nambatu. At about 9 pm they arrived at the back of the supermarket. Around 10.30 pm, seeing that the security officer was out of sight, they got onto the roof via the shipping container. They gained access to the building in the same way as they did on 6 November.

10. In gaining entry to the building, the appellant and Mr Peter broke 2 ceiling tiles and then landed on the floor. They then located the alarm system and CCTV system. They damaged these systems by cutting the electrical wiring with a knife in their possession. They were a Swann security system and a swann camera security. The appellant and Mr Peter unsuccessfully searched for cash stored in a safe in the office. They searched other offices and in doing so, caused damage to two office doors and two office drawers.

11. The appellant and Mr Peter took a number of items;

    a. 1 POS market network attached storage accessory
    b. 500 euro cash and 100 CFP France, both valued at VT 150,000
    c. 1 bottle Pierre Debrunet wine
    d. 1 bottle of black eagle
    e. 1 bottle golden circle orange juice
    f. 2 cartons Jack Daniels whiskey
    g. 6 bottles apple juice
    h. 1 cross packet of cigarettes
    i. 1 pair of binoculars
    j. Cash valued at VT 14,000

12. The appellant was cautioned on 25 November 2023 and made voluntary admissions that he broke into the ABM on 6 November 2023 and caused damage to the metal roof using a pair of pliers, and that he went in to locate the office. That on 8 November 2023 he gained entry to the ABM using the same entrance as on 6 November, and caused damage to the alarm and camera system. He admitted stealing multiple items.

The sentence imposed in the Magistrates' Court

13. The Magistrate took into account the maximum penalties for each offence, and established a global starting point of 2 years imprisonment for the four charges, with reference to aggravating factors related to the offending and a Supreme Court sentencing decision *Public Prosecutor v Fabrice Maleb & Ors* [2023] VUSC 200.

14. The aggravating factors the Magistrate considered relevant were:

    a. The offending happened at night time. (this is an aggravating factor when a dwelling house is entered because of the risk of confrontation with residents who are ordinarily home at night; it has much less significance as an aggravating factor when a non-dwelling house is entered at night as is the case here because the risk of confrontation is lower than it would be during the day);

    b. There was planning and pre meditation involved

    c. The offence of malicious damage to property happened twice.

    d. Loss caused to the property.

e. The loss caused to the shop. None of the stolen property was returned to the shop owner.

15. Notably, the Magistrate did not take into account, as an aggravating factor, that two offenders were involved. This was an aggravating factor that could properly have been taken into account.

16. The Magistrate then took into account the following personal mitigating factors:

a. That the guilty pleas were entered at the first available opportunity. One third was to be deducted for this factor.

b. That the appellant was a first time offender without previous convictions and complied with bail conditions. There was to be a further 3 month deduction from the starting point;

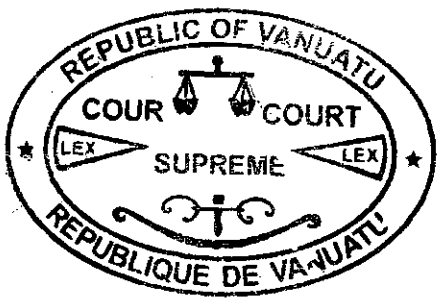
c. That the appellant was remanded in custody for 7 days equivalent to 14 days in custody. The Magistrate said the 14 days was to be deducted from his sentence accordingly.

17. The Magistrate then calculated the sentence as follows;

> *"18. The Court sentence you to 20 months imprisonment. The Court further deduct 14 days from your sentence for the time you spent in custody. This leaves an end sentence of 19 months and 2 weeks.*
>
> *19. You being having no criminal records; the Court reduce a further 2 months from your sentence. You shall serve a term of 18 months and 2 weeks imprisonment. You shall serve your terms on 30 April 2024."*

18. The Magistrate did not explicitly consider suspending the sentence under s 57(1) of the Penal Code[CAP 135]. Rather, the Magistrate said;

> *"16. William Amos as the one who planned and premeditated the offence and being of older age than Sebas Peter, the Court finds it appropriate for you to be incarcerated for being the one who cohered Sebas Peter as a teenager to commit the offence as charged."*



Submissions

The Appellant

19. The appellant's submissions were filed shortly before the appeal hearing commenced. The grounds of appeal were refined in the written submissions to the following;

    a. Ms Malites acknowledged that the sentence starting point adopted in the Magistrate's Court was within range but submits that the end sentence was manifestly excessive because the Magistrate failed to apply a discount for the early guilty plea and applied an inadequate discount for time spent in custody; and

    b. That the Magistrate fell into error in declining to suspend the sentence. Primarily this is because the Magistrate did not consider whether or not to suspend the sentence under s 57 of the Penal Code [CAP 135]. Rather, the Magistrate ordered the appellant to immediately start serving the sentence of imprisonment.

20. In oral submissions, Ms Malites conceded that Mr Amos had only been remanded in custody for 7 days, so that the Magistrate's calculation that the sentence was to be reduced by 14 days was correct. I agree. The Magistrate's approach is unimpeachable; see *Malvaru v Public Prosecutor* [2011] VUCA 34 and *Public Prosecutor v Saly* [2024] VUSC 112.

21. The two key issues from the appellants' point of view are how the Magistrate arrived at an end sentence of 18 months 2 weeks imprisonment and the failure to properly consider whether or not the sentence should be suspended under s 57 of the Penal Code [CAP 135].

The Public Prosecutor

22. Mr Aru filed helpful written submissions, amplified by oral submissions.

23. In terms of the first ground of appeal, Mr Aru submitted that the Magistrate correctly approached the sentencing exercise, including the appropriate discounts. However, Mr Aru acknowledged that the Magistrate did not actually apply all the indicated discounts.

24. Mr Aru submitted that the Magistrate, while not explicit in her consideration of s 57 of the Penal Code [CAP 135], was nevertheless correct to not suspend the sentence, when the factors in s57 are considered, given the offending was very serious. The appellant and the co offender broke into the supermarket twice, loss was suffered and it was pre meditated.

25. I note that in the submissions filed in the Magistrate's Court for sentencing, the Prosecutor invited the Magistrate to consider suspending the sentence for both offenders, due to their young age and significant prospects of rehabilitation.

Discussion

26. The approach to an appeal against sentence is well settled in Vanuatu. On appeal, this Court acts in accordance with the well known principle stated by Dixon, Evatt and McTiernan JJ in *House v The King* (1936) 55 CLR 499 at 505;

> *"it is not enough that the Judges composing the appellate Court consider that, if they had been in the position of the primary judge they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate Court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate Court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the Court of first instance."*

27. Also, see for example, *Tula v Public Prosecutor* [2023] VUCA 53 where *House v King* was applied.

Appeal Ground One: The End Sentence

28. It is not in dispute that the Magistrate made an error in reaching an end sentence of 18 months 2 weeks imprisonment. How the Magistrate reached such an end sentence is confusing.

29. Firstly, the Magistrate adopted a starting point of 2 years imprisonment, and then turned to consider a guilty plea credit and a discount for personal factors. She said the guilty plea discount was one third, and applied a discount of 3 months for personal factors relating to a lack of previous convictions and compliance with bail conditions. The final reduction was 14 days to reflect that the appellant has spent 7 days in custody. No challenge is made to the sufficiency of the reductions indicated by the Magistrate. However, the Magistrate did not apply the indicated discounts. If she had, the end sentence would have been 12 months 2 weeks imprisonment.

30. But then later in the sentencing judgment, the Magistrate appears to re visit the sentence calculation (at 18 and 19). This is because she said that the appellant was sentenced to 20 months imprisonment, and then deducted 2 months and 14 days from the sentence (14 days for time spent in custody and 2 months for a lack of prior history) to arrive at an end sentence of 18 months and 2 weeks imprisonment. This is, on the face of it, inconsistent with the starting point and reductions earlier indicated.

31. As the Magistrate did not in fact apply the discounts as indicated and then appears to have adopted a different approach to assessing the end sentence, without explanation later in the sentencing, the end sentence was in error.

32. Because it was in error, I will consider afresh the end sentence. Sentencing involves 2 separate steps; Jimmy Philip v Public Prosecutor [2020] VUCA 40, which applied Moses v R [2020] NZCA 296.

Starting point

33. The starting point is not in dispute, and nor could it be. The starting point was adopted with reference to the aggravating factors identified by the Magistrate and a comparator case, *Public Prosecutor v Maleb* [2023] VUSC 200.

34. The Magistrate correctly identified the aggravating factors. That there were 2 offenders could properly have been taken into account as an aggravating factor, but that would not materially affect the 2 year starting point initially adopted. Arguably, the starting point could have been higher, when other cases are taken into account. The Magistrate took into account *Public prosecutor v Maleb*, which I consider to be less serious. In that case, 3 co offenders unlawfully entered a school premises at night. One of the co offenders returned the next night and stole a laptop and accessories. Variously, they pleaded guilty to unlawful entry, theft and malicious damage. It is less serious because it did not involve the same level of premeditation and the items taken must have been of lesser value when compared with the items taken by the appellant.

35. There are 2 other cases which are relevant. In *Public Prosecutor v Molsir* [2024] VUSC 37, a starting point of 20 months imprisonment was adopted for offending involving the defendant breaking into a restaurant and taking a cash box and some minced meat. In *Namaka v Public Prosecutor* [2024] VUSC 137, the starting point considered appropriate on appeal was 30 months imprisonment. The appellant in that case broke into the K2 restaurant overnight and took items valued at VT 357,000.

36. The present case is more serious than *Molsir* and is at least as serious as *Namaka.* It is more serious that *Molsir* because in that case there was one incident and a very

modest amount of property was taken. It is at least as serious as *Namaka*, because of the significant amount of property taken in both cases.

37. The starting point in the present case could have been up to 30 months imprisonment given my assessment of the cases I have referred to, comparative to the appellant's offending. However, a starting point of 2 years imprisonment was within range. A starting point of 20 months imprisonment would not however been in range, given the aggravating factors identified by the Magistrate and that the offending was decidedly more serious than the offending in *Molsir*.

Adjustments to the starting point

38. In terms of adjustments to the starting point, I agree with the Magistrate's assessment that one third was warranted for the guilty plea. The guilty plea was entered at an early opportunity. Similarly, a discount of 3 months, as initially applied by the Magistrate, for a lack of prior criminal history and compliance with bail was warranted. The appellant was aged 21 years at the time. A modest reduction could have been applied, but even so, a discount of 3 months equates to approximately a 13 percent discount. It sufficiently takes into account all personal mitigating factors. As already said, the sentence was correctly reduced by 14 days for time in custody.

End sentence.

39. Therefore, the end sentence is calculated as follows:

Starting point – 24 months imprisonment

Deductions – 8 months guilty plea, 3 months personal mitigating factors and 14 days for time in custody. Total deductions are 11 months 2 weeks.

End sentence – **12 months 2 weeks imprisonment**

Appeal Ground two: Should the sentence have been suspended ?

40. Ms Malites submitted that the Magistrate fell into error when she declined to suspend the sentence, because she did not consider the factors in s 57 of the Penal Code. Conversely, Mr Aru submits that while the Magistrate did not explicitly consider s 57, the decision not to suspend the sentence was correct, as detailed above.

41. s 57(1) of the Penal Code [CAP 135] says:

> *The execution of any sentence imposed for an offence against any Act, Regulation, Rule or Order may, by decision of the court having jurisdiction in the matter, 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; and*
>
> (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 offence against any Act, Regulation, Rule or Order within a period fixed by the court, which must not exceed 3 years.*

42. The Magistrate did not consider s 57 of the Penal Code [CAP135]. She erred in not doing so and not addressing the matters listed in s 57(1) of the Penal Code. There was an error in the exercise of the sentencing discretion. The Magistrate took into account the planning and pre mediation and that the appellant was older than the co offender. I accept they are relevant to the exercise of the discretion under s 57, but a proper assessment would take all relevant factors into account.

43. In terms of the factors in s57 of the Penal Code [CAP 135], the offending was serious. It was pre meditated, and involved the unlawful entry on 2 separate occasions into a supermarket. Damage was caused and property was stolen. Those matters point away from the sentence being suspended. Deterrence, denunciation and accountability are important considerations for offending which is deliberate and causes loss.

44. But on the other hand, the appellant pleaded guilty at an early opportunity, and is still relatively young. He was 21 years at the time of the offending and is still 21. He had no prior criminal history, and complied with bail. Ms Malites submits that the appellant has good prospects of rehabilitation. These factors point towards the sentence being suspended.

45. The magistrate understood that the appellant was aged 22 years, which might explain why she did not take it into account at all in the sentencing exercise. Youth is a personal mitigating factor and it is relevant also to whether a judge should exercise the discretion to suspend a sentence of imprisonment under s 57 of the Penal Code [Cap 135], as

discussed by Hastings J recently in *Namaka V Public Prosecutor* (at 33). Hastings J considered both the United Nations Convention on the Rights of the Child and a New Zealand Court of Appeal case, *Churchward v R* [2011] NZCA 531. *Churchward* has been recently affirmed in *Dickey v R* [2023] NZCA 2. Youth is relevant in sentencing because there are age related neurological differences between young people and adults. Also, young people generally having a greater capacity for rehabilitation than older offenders.

46. Consistent with the recognition that younger people generally have a greater capacity for rehabilitation than adults, in *Public Prosecutor v Maleb*, Trief J suspended a sentence of 12 months imprisonment for 2 years for one of the offenders, aged 21 years. Trief J said that the offending was serious, but his previous clean record, willingness to perform a custom reconciliation ceremony and prospects of rehabilitation favoured suspension of sentence.

47. In the present case, the appellant is relatively young. His age, early acceptance of responsibility, and a lack of prior criminal history all indicate good prospects of rehabilitation. These factors favour suspension, notwithstanding the serious nature of the offending. The sentence may have been suspended by the Magistrate if she had explicitly turned her mind to the factors in s 57(1) of the Penal Code [CAP135].

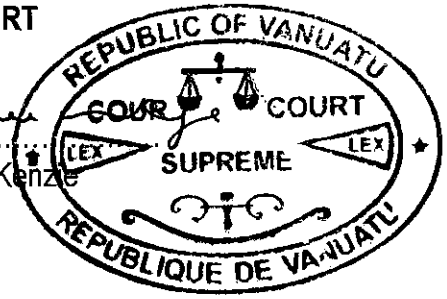
48. Accordingly, the sentence of 12 months 2 weeks imprisonment is to be suspended for 2 years, consistent with the period of suspension for the co offender. The appellant is warned that if he is convicted of any offence during that 2 year period he will be taken into custody and serve the sentence of imprisonment, in addition to the penalty for the further offending.

The co offender's sentence

49. Ms Malites raised the issue of the co offender's sentence in light of this appeal being granted. However, there has not been an appeal filed by the co offender against sentence. I agree that the co offender's sentence will need to be quashed as the end sentence was also 18 months 2 weeks imprisonment, but was suspended. According to the sentencing decision, the co-offender was aged 19 years.

50. I invite Ms Malites to urgently file an appeal so that the sentence can be corrected. I should deal with such appeal.

DATED at Port Vila this 25th day of July 2024
BY THE COURT



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Justice M A MacKenzie