IN THE COURT OF APPEAL OF
THE REPUBLIC OF VANUATU
(Criminal Jurisdiction)

APPEAL CRIMINAL CASE No.7 & 8 of 1996

BETWEEN: Tui George Saipir

First Appellant

AND: Berry Max Jimmy

Second Appellant

AND: Public Prosecutor

Respondent

Ms Susan Bothmann Barlow for the Appellants
Mr Jon Baxter Wright for the Respondent
Date of hearing: 30 October 1996
Date of Judgement: 1st November 1996

JUDGEMENT OF THE COURT

Last Friday, we granted leave to these two young men to appeal against sentences imposed upon them in the Supreme Court by the Chief Justice sitting in Vila on the 6th day of December 1995.

Both of them had pleaded guilty to charges of premeditated intetional murder. Their pleas were entered in July but they were not sentenced at the time but remanded until after they have given evidence in the trial of Luciana Picchi which took place in October and November of 1995.

The experience of each of us has been that where it is intended that an accomplice is to be called to give evidence against a co accused, the normal practice has been for that person to be sentenced prior to giving evidence. When we raised this matter last week, Mr Baxter Wright referred to us a passage at 4-177 in the lastest edition of

Archbold which suggest that it is a discretionary matter and that there is some advantage in a Court being able to assess the culpability of all convicted people. We accept and appreciated the theoratical advantage thereof. But as this case has clearly demonstrated there can be severe disavantages in the postponement of sentence.

The maximum penalty for premediatated intentional homicide is life imprisonment. The learned Chief Justice sentenced each of these men to 20 years imprisonment.

The Appeal is pursuant to provisions of Section 26 (2) of the Courts Act which enables this Court to interfere with that exercise of dicretion only if the decision is shown to be manifestely wrong.

We are of the view that the proper course for us to assess the culpability of each of these men as against their own clear confession bearing in mind the aggravating factors with regard to the homicide and the mitigating factors which can be advanced in respect of each of them.

The learned trial judge obviously decided that life imprisonment (with or without recommendation as to minimum period to be served) was not necessary or appropriate. We are not required to reconsider that apsect of the matter.

Not for the first time in this session we have been anxious at the apparent uncertainity that exist in this jurisdiction about life imprisonment and what result from the imposition of that sentence. In many countries a sentence of life imprisonement will have a minimum period which has to be served. For example currently in New Zealand, it is ten years before a person can be considered for parole. A recent amendement in New Zealand permitted Judges to imposed periods beyond that minimum within which a person is not eligible for parole. On a few occasions periods up to seventeen years (in respect of

multiple killing) have been imposed. The New Zealand Court of Appeal have recently questioned the extent to which such recommendation have been made and has held that it is only in truly exceptional cases that something beyond the statutotary minimum is appropriate.

A number of counsel before us have suggested that if the Court does not impose some minimum period then a person in this country will be liable to be imprisoned for the whole of their natural life. We would urge as stongly as we can that those responsible for the determination of criminal policy, clarify this matter. Taking away the liberty of any subject (even one convicted of a grave crime) is a serious matter. There must be certainty about the nature and effect of Court Orders. The inability of responsible members of the Bar to give us any clarity of certainty in this area is of considerable concern.

In the instant case the learned Chief Justice, after he said he was sentencing them to 20 years noted:

" but with good behaviour a third would be taken off"

We understand that sort of regime applies in a number of countries but again no one was able to demonstrate to us the statutory basis for such comment. Also there is authority in many jurisdictions that the possibility of parole or remission or early release are not factors which a sentencing Court can take into account in determining sentence.

The main thrust of the argument advanced by Ms Bothmann Barlow was that the learned Chief Justice in the course of the sentencing said that he took into account a number of factors in mitigation of sentence. These include their pleas of guilty, their relative youth, the fact that they have no previous convictions, that they show considerable remorse, and that they have assisted the Court and cooperated with the authorities. Counsel for the Appellants contended that considering the Courts in many cases these substantial

mitigating factors would have had the effect of reducing what would otherwise have been an appropriate sentence by at least a third and perhaps even as much as a half.

Accordingly, Counsel submitted that the judge must have taken the view that the starting point for the sentence for these men was 30 to 40 years in prison, she submitted that level could not be sustained as against other sentences which have been imposed in this jurisdiction even for premeditated intentional murder.

Mr Baxter Wright provided very helpful material as to other sentences which have been imposed on murder convictions. He acknowledged that the sentences here imposed were at the top of the range.

One can not escape the sad reality that for whatever reason these two young men were on their own evidence willing to kill in one case for love and in the other case for money. Every civilised community has a right, if not a duty, to condemn those who are prepared to robe another of their life. A sentence must convey the community's condemnation of such behaviour. The Court has a duty to impose penalties which hopefully act to deter others who are similarly minded to act in such an outrages manner.

The court equally have a duty to ensure with sentences imposed are no greater than necessary to achieve the public's proper interest.

Reprehensible and deplorable though their actions were, we cannot accept that the proper starting point was a prison term of 30 to 40 years. That is not consistent with penalties which have previously been imposed in this country and bears no relationship to penalties imposed in nearby jurisdictions.

It is an essential principle of a criminal justice system which enjoys the necessary confidence of the community then there is equality

between like offending and a proportionality and relativity in respect of actual sentences.

On the basis of the information which we have been provided with, we are satisfied that the proper starting point in respect of this offending could not have been more than 25 years.

We are equally persuaded that in the circumstances of this case the mitigating matters which we have referred to above areimportant and to be marked as being of particular significant. The Chief Justice properly noted that for the cooperation of these men the other accused person would properly never had been brought to justice.

When one allows for their youth, the absence any criminal record, the plea of guilty their cooperation, coupled with genuine remorse we are of the view that a reduction from the proper starting point of 40% is in the parculier circumstances of this case appropriate. Accordingly we are satisfied that the appropriate sentence in respect of their offencing is 14 years.

Their appeals against sentence are accordingly allowed. The sentences of 20 years are vacated. Each is sentenced to 14 years imprisonment which sentences will be effective from 10th April 1995.

Justice ROBERTSON
Judge of Appeal

Justice DILLON
Judge of Appeal

Justice MUHAMMAD
Judge of Appeal

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