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

Criminal Appeal Case No. 04 of 2003.

BETWEEN: PUBLIC PROSECUTOR
Appellant

AND: MAXON TOA
Respondent

Coram: **Hon. Chief Justice Vincent Lunabek**
Hon. Justice Bruce Robertson
Hon. Justice John W. von Doussa
Hon. Justice Daniel Fatiaki
Hon. Justice Patrick Treston

Counsel: Mr. Macintosh for the appellant
Mr. Toa for the respondent

Hearing Date: 28th October 2003.
Judgment Date: 31st October 2003.

JUDGMENT

This is an appeal by the Public Prosecutor against a sentence imposed on Maxon Toa in the Supreme Court sitting in Luganville on the 7th August 2003. On that date Mr. Toa entered a plea of guilty to one charge of intentional assault causing injury that resulted in death contrary to Section 107 (d) of the Penal Code. The maximum penalty provided is 10 years imprisonment.

That was the first day of a proposed trial. An alternative charge under Section 106 had been laid but the prosecution accepted that, on the plea of guilty, the trial did not need to continue.

The allegation made against Mr. Toa arose out of an incident which happened in the early hours of 3rd January 2003 at Nanuku village on Malo island. The respondent and some relatives and friends had been to a dance. The deceased had also been there. There was some animosity between the two groups. As Mr. Toa was leaving the dance he was assaulted and punched twice by the

deceased. The respondent was also anxious about another man who was nearby holding a bottle. After he had heard some comments about which he was concerned, Mr. Toa pulled a knife from his pocket and stabbed the deceased about five times before running away.

Attempts were made to have the man who had been attacked taken to hospital but he died on the way.

The sentencing judge took into account the fact that Mr. Toa who was aged 24, was a first time offender who showed deep remorse and regret and had indicated a willingness to perform a custom ceremony although this offer had been turned down by the family and relatives of the deceased.

The judge treated the matter as one in which the respondent had made a full and frank confession to the police during interviews. He found that the assault was in no way premeditated as the knife was one which the respondent normally carried for the purposes of cutting up his tobacco.

It was common ground that the first violence had been offered by the deceased but the judge noted that the respondent had gone too far in using a knife. The Judge remained of the view that there had been some aggravation on the part of the deceased.

The judge was persuaded that he should be lenient. He concluded that because of the seriousness of the assault a custodial sentence was required but that twelve months imprisonment would be sufficient and having regard to the fact the man had already been in custody at that time for five months an effective term of only seven months was necessary.

The sentencing notes make no reference to any of the relevant decisions of this Court or the Supreme Court about cases of this sort. We are not aware whether these were brought to the judge's attention.

A preliminary point of procedure arises. When the matter was called before us the respondent was not present and it appeared somewhat unclear as to whether he was aware that this appeal had been filed.

It is essential in appeals filed by the Public Prosecutor on the basis that a sentence imposed is wrong in principle or manifestly inadequate that the person who has been sentenced is personally served with the notice of appeal. Counsel should never assume that they have the ability to act without reference back to their client. These are cases where the prosecution will be seeking either the imposition of an actual custodial sentence (if one has not been imposed) or a longer custodial sentence. It is intolerable that an exercise of this sort should be contemplated without the person whose liberty is at stake is advised and given the opportunity to be personally involved in the proceeding.

As Mr. Toa was in the prison at Luganville he was able to be brought to Court at short notice and the matter proceeded.

There is no argument as to the proper manner of interpretation of Section 200 of the Criminal Procedure Act [CAP. 136] which provides the rights of appeal to a public prosecutor. It is beyond question. It was discussed by this Court in *Andrew Tom Naio and Noel Nathaniel and the Public Prosecutor Criminal Appeal Case No. 7 of 1997*. The principles were reaffirmed in *Public Prosecutor and Gideon Criminal Appeal Case No. 3 of 2001*.

Nor is there doubt about the guidelines which are to apply in respect of the sentencing of offenders who plead guilty to or are convicted of charges under Section 107 (d) of the Penal Code.

The issues were considered by this Court in *Public Prosecutor v. Richard Clifford Ierogen Criminal Appeal Case No. 7 of 2002* where the Court quoted with approval the comments of the learned Chief Justice in *Public Prosecutor and Joseph Malesu Supreme Court of Vanuatu Criminal Case No. 9 of 2001*.

These are the rules which apply. Good justice is consistent justice in which like matters are treated in a like way.

In the submissions of the Public Prosecutor we were provided with a useful and comprehensive consideration of comparative sentences in recent times for offences of this sort. All of them demonstrated that actual terms of imprisonment had been imposed.

There is nothing in the circumstances of this offending or this offender which could possibly justify treating the matter other than within the normal guidelines

which the Court of Appeal have determined to be applicable. Upon the basis of existing authority it is clear that a sentence in the range of four to six years imprisonment would not have been interfered with by the Court of Appeal.

What matters can be brought in support of the position of the respondent ?

The lack of premeditation we recognise as part of the circumstances of the case but on the other hand (as opposed to a number of earlier cases where there had been only a kick or a punch and only one injury on the deceased person) in this case the respondent delivered five separate wounds with a knife. One to the chest which was four centimeters wide and seventeen centimeters deep, one to the right shoulder which was three to four centimeters in width, one to the left arm which was four centimeters in width, one to the abdomen which was four to five centimeters in width and one to the right hand which was four centimeters in width. When those uncontroverted facts are looked at, this is a matter which comes at the higher end of offending under this particular section.

We accept that the plea of guilty is a matter to be taken into account and in respect of which some allowance is made. It was five months after charge but we accept that it was made at the point where it became apparent that if he pleaded guilty the prosecution would not offer evidence on the more serious charge.

The issue of custom settlement is raised but it has little relevance in this case where the connections of the deceased did not see it as an appropriate means of dealing with the matter.

On an appeal by the prosecution, where the Court is satisfied that the sentence cannot stand, it will impose the minimum period which will meet the demands of justice in a particular case.

In a society where the carrying of knives in public is not an altogether uncommon occurrence the Courts have a duty to clearly and unequivocally signal that the introduction of a knife into any sort of dispute between young men is totally unacceptable and where that leads to death (as it did in this case) the person will forfeit the right to remain in the community. A Court must always have regard to the circumstances of the offender but equally it needs to weigh the public interest in condemning gratuitous violence, seeking to deter those who act in violent ways, and in punishing those who needlessly take the life of another human being. These are matters equally to be considered.

We have concluded that the absolute minimum period of imprisonment which must be served by this man is 3 years. We have noted above our assessment of the sort of sentence which would have withstood an appeal by a sentenced person had it been imposed in the first instance. That assessment should be kept in mind (along with the other decisions of this Court) in determining sentences if regrettably further cases of this type arise in the future.

The appeal is accordingly allowed. The sentence imposed in the Supreme Court is quashed. Mr. Toa is sentenced to a term of 3 years imprisonment effective from the date of his initial sentencing on the 7th March 2003.

Dated at Luganville, this 31st day of October 2003.

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Hon. V. Lunabek CJ.

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Hon. J. B. Robertson J.

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Hon. J. von Doussa J.

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Hon. D. Fatiaki J.

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Hon. P. Treston J.