IN THE COURT OF APPEAL OF
THE REPUBLIC OF VANUATU **Criminal Appeal Case No. 05 of 2010**
(Criminal Appellate jurisdiction)

BETWEEN: **PASCAL TABI**
Appellant

AND: **PUBLIC PROSECUTOR**
Respondent

Coram: *Hon. Chief Justice Vincent Lunabek*
Hon. Justice John Mansfield
Hon. Justice Edwin Goldsbrough
Hon. Justice Nevin R. Dawson
Hon. Justice Daniel Fatiaki

Counsel for the Appellant: *E. Molbaleh*
Counsel for the Respondent: *S. Blessing*

Date of hearing: *25 November 2010*
Date of decision: *3 December 2010*

JUDGMENT OF THE COURT

1. This is an appeal against sentence imposed on 15 October 2010 following conviction for an offence under Section 106(1)(b) of the Penal Code [CAP 135]. The sentence is forty three years and seven months imprisonment expressed to run consecutively to an earlier sentence imposed by the Magistrates' Court.

2. Pascal Tabi, the appellant, killed his wife at their home in Beleru, Santo, on 1 May 2010. They had been together at their home, had taken kava and had been in domestic discussions when he took a bush knife to her and caused injury to her head and neck. As his victim ran out of their house and fell the Appellant woke his daughter and told her that he may have killed her mother.

3. Outside and whilst she lay on the ground alive, the victim spoke some words suggesting that she thought she might be about to die. At that the Appellant struck a blow to her head

with a wooden stick killing her. After the killing the Appellant set about destroying the body in a fire he then prepared.

4. This is the scenario on which the Court was obliged to sentence the Appellant at first instance. The sentence is appealed on the ground that it is manifestly excessive amongst other grounds. In this appeal that issue is conceded by counsel for the Respondent. Given that the Respondent concedes the sentence to be manifestly excessive, it is not necessary for this court to determine any of the alternative specific grounds of appeal but only to resentence the Appellant based on the facts of the offence as shown.

5. The sentencing judge sets out in his judgment the submissions made before him during the sentencing process both from the prosecution and the defence. Following that, the sentencing judge makes no particular findings based on either submission, other than a rejection of remorse. It must therefore be the case that the submissions made by the defence were accepted by the sentencing judge, for were it to be otherwise there would have been a requirement to hold an inquiry into disputed matters, to establish the sentencing basis. In some jurisdictions this may be referred to as a *Newton*[1] hearing.

6. It is significant that the Appellant in the Court below submitted that he was remorseful. This was not accepted by the sentencing judge although why this was not accepted is not apparent from the sentencing remarks. If the sentencing judge felt that remorse was something that may have an effect on the final sentence and that he could not accept defence submissions on the point, he should have heard further submissions on that and, if necessary, heard evidence. It is difficult in principle to reject defence submissions without that inquiry if it goes substantially to influence any final sentence or order.

7. Contained in the submissions of the prosecution there were issues said to indicate premeditation. Whilst the sentencing judge made no finding as to premeditation, that may have been a factor in the length of sentence. It is not clear that the issues referred to by the Respondent as indicative of premeditation can only be seen as such. There is a suggestion, for example, that destruction of the body is suggestive of a degree of planning, yet there is

[1] R v Newton (1983) 77 Cr App R 13

no evidence one way or another to support this. Disposal of the remains could just as well be an indication of panic. The inferences available would be different had it been the case that the Appellant had the fire already built prior to committing the fatal assault on is wife. Yet that is not the case, as evidenced from the witness would was alerted to the incident by the sound of wood being chopped.

8. A significant and aggravating feature of the offence was indeed the failure on the part of the Appellant to stop his violent behaviour after inflicting the first two knife wounds. Rather than desist, the Appellant continued and struck a further and fatal blow to "finish her off". That is demonstrative of the disregard for life that so marks this offence as being within the worst categories of its kind.

9. Disposing of the corpse was also suggested to be an attempt at concealing the crime, perhaps part of a plan to deny responsibility for it. That may well have been an instinctive reaction to the horror of the crime. It was, though coupled with a number of other steps intended to conceal the crime and deflect the attention of the authorities from it. However, given that the Appellant admitted his crime to a pastor by 28 May 2010 when in custody on another matter, the attempt at concealment was not sustained to the trial date. The admission to the pastor was quickly followed by an admission to the police and thereafter a guilty plea to the offence.

10. It is clear from the submissions that both the Appellant and the Respondent regarded the acts of the Appellant subsequent to the killing as aggravating the offence. That is a proper view to take. It does not, however, have the significance to elevate this crime to the worst example of an intentional homicide. It demonstrates a lack of respect for human remains that deserves note, yet respect for human life must remain of at least the same or greater significance to society than respect for those remains. It is certainly an aggravating feature of this case.

11. At trial a guilty plea was entered following the admission to the police. Although this came after some attempts to hide the crime, including false reports of a disappearance and the destruction of remains referred to above, it came in quite a short period of time after

the offence. There was no wasted witness or court time, and no long period of uncertainty for the deceased relatives or extended family. The guilty plea was not a result of overwhelming evidence being brought or available to the court but recognition of the admission earlier made by the Appellant. This deserves recognition in the sentencing process.

12. It is well established that a guilty plea entered at an early stage may attract a substantial discount in sentence[2]. Whether the guilty plea is also taken to indicate remorse or not, it merits consideration in the sentencing decision. Quite what the discount for a guilty plea should be in each particular case is a matter of discretion for the court but such factors as the time when the plea was indicated, the strength of available evidence, the benefit of sparing witnesses a difficult or distressing experience and the practical effect of saving the resources needed for a contested trial may all properly be taken into account.

13. To arrive at an appropriate range of sentence the Court will consider cases which have gone before. Counsel helpfully provided this court with cases showing the available range of sentence, which cases no doubt led to the concession that this particular sentence was outside of the available range.

14. The circumstances of this offence require a custodial sentence reflecting the loss of life, the brutality of inflicting a second, fatal, wound after two head wounds inflicted with a bush knife on a spouse in a domestic setting. There is little by way of mitigation put forward as regards the offence itself. There is to be taken into account the early guilty plea and the remorse as demonstrated by the admission to the pastor and admissions to the police, balanced by the attempts the conceal the crime and the heinous disposal of the remains of the deceased.

15. A range of twenty five to thirty years imprisonment appears to be indicated in these circumstances. Taking into account the limited mitigating factors a sentence towards the top end of that scale appears to be appropriate. That appears to this court to be a sentence of twenty seven years. Thereafter a discount for the early guilty plea of one third of the

[2] Massing v PP [2008] VUCA 23: PP v Mulonturala [2009] VUCA 38

head sentence should be applied, leaving a sentence of eighteen years imprisonment, reduced by the time already spent in custody prior to sentence, five months, leaving a balance of seventeen years and seven months to be served.

16. The Magistrates' Court in sentencing the Appellant for other offences expressed the view that any subsequent sentence of imprisonment should run consecutively to its own sentence. Such an order is beyond the jurisdiction of that court in sentencing, for it cannot bind the Supreme Court when sentencing or indeed any other magistrates' court faced with sentencing this offender on a different occasion. Two offences attracting custodial sentences does not necessarily require the court to consider the total effect of cumulative sentences but regard may be had by any sentencing court to the total effect of all sentences known to be in effect at the time of sentencing. Given that principle, this court is of the view that the totality of the Appellant's criminal conduct is adequately taken into account with this sentence of seventeen years and seven months running concurrently with the total period of imprisonment to which the Appellant is already subject. This sentence will take effect from the original date of sentence imposed by the Supreme Court, that is to say 15 October 2010.

DATED at Port Vila, this 3rd day of December 2010

BY THE COURT

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Chief Justice Vincent Lunabek

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Justice J. Mansfield

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Justice E. Goldsbrough

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Justice N. R. Dawson

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Justice D. Fatiaki

REPUBLIC OF VANUATU COURT OF APPEAL COUR D'APPEL