

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

Criminal Appeal Case No. 02 of 2012

BETWEEN: PUBLIC PROSECUTOR
Appellant

AND: ABRAHAM JIMMY and ELLEN TOM
Respondent

Coram: Hon. Chief Justice Vincent Lunabek
Hon. Justice John Von Doussa
Hon. Justice Ronald Young
Hon. Justice Oliver A. Saksak
Hon. Justice Daniel Fatiaki
Hon. Justice Dudley Aru

Counsel: Mrs. T. Harrison for the Appellant
Mr. L. Tevi for the Respondents

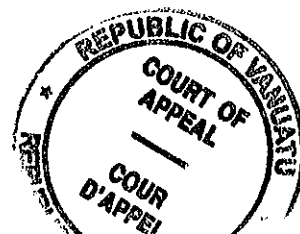
Date of Hearing: 23 April 2012

Date of Decision: 23 April 2012

JUDGMENT

Introduction

1. Abraham Jimmy and Ellen Tom plead guilty in the Supreme Court to burglary and theft from a farm house outside Port Vila. Mr. Jimmy also plead guilty to arson of a container and a shed used as a house which he and Ms. Tom has burgled. The judge sentence Mr. Jimmy to an 18 months term of imprisonment suspended 2 years together with 200 hours community work. Ms. Tom was sentence to 100 hours of community work.
2. The public Prosecutor filed appeals against both sentences. During the hearing of this appeal the prosecutor abandoned the



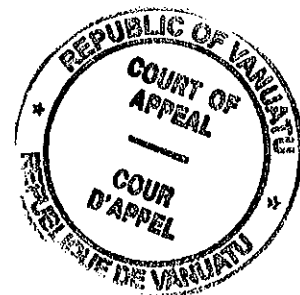
appeal against Ms. Tom's sentence. We therefore formally dismiss the appeal with respect to her sentence.

3. The Public Prosecutor appeals against Mr. Jimmy's sentence alleging it was inadequate because:
 - (a) it did not reflect the seriousness of the offending;
 - (b) the judge placed too much weight on mitigating matters and insufficient weight on aggravating matters;
 - (c) the sentence did not reflect guidelines judgments.
4. The Public Prosecutor submitted that we should remove the suspended part of the sentence so that Mr. Jimmy would serve an 18 months sentence imprisonment.

The Facts

5. In September 2011 the respondents broke into a storage container on the complainant's farm. They stole a number of items. Then Mr. Jimmy burnt down the storage container and a shed which had been converted into a house in which a farm labourer had been living whilst employed by the employment.
6. The total value of the property was said to be VT8 million but there is reason to doubt this figure. However there was substantial damage the majority of which was to the contents of the container. The respondents both admitted their involvement.

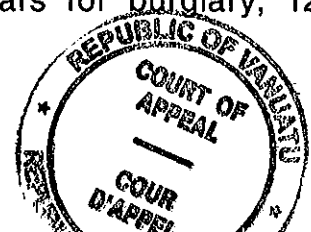
Sentencing remarks



7. As the sentencing judge noted there was an important background to the offending. The two respondents were effectively husband and wife. They had several children. Mr. Jimmy had been employed by the complainant for some time before the fire. Part of his employment was the provision of a house for his family.
8. During the six months preceding the fire Mr. Jimmy was seriously underpaid. He was entitled to VT 10,000 per week. Some weeks he received only VT 1,000 most weeks nothing at all. The judge at sentencing considered there was a unique set of circumstances which meant that a merciful sentence could be imposed. As to the facts the judge considered that as a result of the complainant's failure to pay wages the respondent was in a desperate situation. Further the respondent's personal circumstances were highly relevant. Mr. Jimmy is profoundly deaf and as a result unable to speak. He communicates by hand signals.
9. This disability further frustrated the respondent. He had an unblemished record before this incident. He was unlikely to ever offend again and the offending was out of character. The judge began with a six year prison sentence. He deducted 2 years for the respondent's disability and circumstances relating to his employment and a further one third for the respondent's guilty plea. He noted the respondent had spent some time in custody. In those circumstances he imposed a suspended prison sentence.

Submissions and Decision

10. Firstly the prosecutor says the sentence did not reflect the seriousness of the offending. She emphasized that the three offences had maximum penalties of 20 years for burglary, 12



years for theft and 10 years for arson. The prosecutor emphasized the amount of damage at VT 8 million. She submitted the suspended prison sentence did not reflect this loss. This leads to the second point of challenge. The prosecutor says the judge over emphasized mitigation and under valued aggravation. The appellant complained the judge had failed to take into account seven aggravating features the appellant had identified at sentencing.

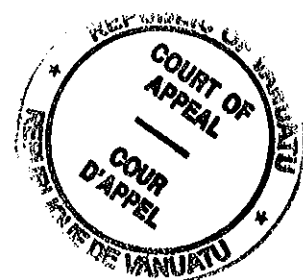
11. We consider each of the seven factors alleged to be aggravating:
 - a) The appellant said the respondent had absconded while on bail. We are satisfied that was not the case.
 - b) The respondent took the law into his own hand. We agree this was a relevant factor at sentencing.
 - c) The appellant claimed there had been a previous theft by the respondent. This was not established and not relevant.
 - d) The appellant noted the arson and destruction of property. This was no more than a description of the offence and therefore not an aggravating feature.
 - e) Premeditation. In the sense meant by the prosecution any premeditation was no more than an element of the charges and not aggravating.
 - f) The value of the house and contents. The sentencing judge correctly identified the value of the property destroyed was relevant to sentence.
 - g) No compensation was payable by the respondent. This was the absence of a mitigating factor (payment of compensation) rather than an aggravating feature.

12. Further the prosecutor says the judge placed too much emphasis on the respondent's loss of wages. Finally the prosecutor says



the judge did not take sufficient notice of what were said o be guideline judgments.

13. We consider this later point first. We mention only one of the judgments identified by the prosecutor to illustrate the judge's starting sentence of six years imprisonment was well within the range available.
14. In Jackson v. Public Prosecutor [2011] VUCA 13 this Court described the facts as a rampage of violence to property. Five houses were burnt down. There were people in the houses who were able to escape. The total value of the property destroyed was substantial but not as great as the present case. The "leader" of the group men who were convicted of the arsons had a start sentence of four years imprisonment reduced to three years for his guilty plea. This court described the sentence as lenient in dismissing Mr. Jackson's appeal.
15. This case is quite different from Jackson. In Jackson five houses were burnt. More importantly there were occupants in the houses when they were set alight. There were real danger to life. Here the judge noted that the respondent had known there was no-one in the shed when it has set alight. Indeed there was evidence the shed was not being lived in at the time of the fire.
16. Further in the case the Judge recognized there was particular relevant mitigation relating to the facts and the appellant's personal circumstances. To suspend the sentence of imprisonment was a merciful sentence but in the particular circumstances we are satisfied it was within the sentencing Judge's discretion.



17. Typically a burglary followed by the arson of the building burgled would result in a sentence of imprisonment. This approach was reflected in the Judge's starting sentence for the overall offending of six years imprisonment. However he was entitled to take into account the highly relevant background facts relating to the respondent's desperate circumstances. This desperation, caused in part by the complainant's failure to pay wages played a part in this offending. This was a man without a criminal record before these events. The Judge was also entitled to take into account the respondent's disability. Such a disability would make it that much more difficult for the respondent to cope with his loss of pay. Further any sentence of imprisonment would inevitably be more difficult for the respondent. Finally he was entitled to credit for the way in which he had managed his life before these events.
18. This was an unusual set of circumstances. A merciful sentence was open to the Judge.
19. Finally we understand the appellant has now completed his 200 hours community work. To now require him to go to prison would be inappropriate and wrong in the circumstances. We see no error in the Judge's approach to this sentence.
20. The appeal is dismissed.

DATED at Port Vila, at 23rd day of April, 2012.

BY THE COURT

Chief Justice/Vincent Lunabek

