

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

Criminal Appeal Case No. 01 of 2013

**BETWEEN: JONATHAN JAMES, CELEB JOHNNY AND  
PHILIP TOM**

Appellants

**AND: PUBLIC PROSECUTOR**

Respondent

**Coram: Honourable Chief Justice Vincent Lunabek  
Honourable Justice John von Doussa  
Honourable Justice Oliver Saksak  
Honourable Justice Daniel Fatiaki  
Honourable Justice Raynor Asher  
Honourable Justice Dudley Aru  
Honourable Justice Mary Sey**

**Counsel: Andrew Bal for the Appellants  
Gregory Takau for the Respondent**

**Date of Hearing: 17<sup>th</sup> July 2013**

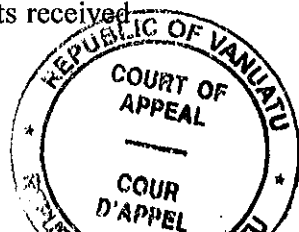
**Date of Judgment: 26<sup>th</sup> July 2013**

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**JUDGMENT**

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1. These appeals by Jonathan James, Caleb Johnny and Philip Tom, are from the decision of Spear J of 19 April 2013, where he sentenced six defendants including the three appellants. They had all pleaded guilty to two serious counts of assault. The end sentences ranged from a non suspended term of imprisonment of 2 years and 6 months for the principal offender, down to a sentence of supervision for Joseph Tama, who at 14 was the youngest and least culpable offender.
2. The complainants were a young couple who had been set upon by the six men including the three appellants and badly beaten. Sticks and stones were used as weapons, and the beating only stopped when third parties intervened. They were left unconscious and injured. As a consequence of the injuries the complainants received



they had to forego valuable scholarships that may not be available to them again, and their lives have suffered a significant setback. It is not necessary to set out the facts in further detail, as the judge's assessment of culpability and the terms of the sentences of imprisonment are no longer under challenge. Given the gravity of the offending the appellants should regard themselves as fortunate that there was not an appeal filed by the Public Prosecutor.

3. The three appellants aged 19, 16 and 20 respectively fell into the middle of the range of culpability. Nevertheless, there were differences in age and circumstances. Jonathan James was sentenced to 12 months imprisonment with the sentence being suspended for a period of two years, and 200 hours community work. He was also sentenced to three years supervision. Caleb Johnny was also sentenced to 12 months imprisonment suspended for 2 years, with 150 hours of community work and supervision for 3 years. Philip Tom was sentenced to 12 months imprisonment suspended for 1 year. He was placed on supervision for a term of 3 years. These sentences were not challenged, save for the technical issues dealt with hereunder.

### **THE ISSUE**

4. Section s.58F(2) of the Penal Code Act provides that a sentence of supervision may be for a period of not less than 6 months and not more than 2 years as the Court thinks fit. The Prosecutor accepts that the period of supervision imposed in respect of Jonathan James, (3 years), and Philip Tom (3 years) exceeded the maximum period of supervision of two years. He accepts that the appeal must be allowed to reduce those periods of supervision down from 3 years to the maximum of 2 years. We will allow that limited aspect of the appeal, reducing those sentences of supervision to 2 years. The period of supervision imposed in respect of Celeb Johnny does not change as it was for 2 years.
5. As the appeal proceeded counsel for the appellants developed a further submission, that in relation to Philip Tom the supervision order must be reduced to 1 year rather than the imposed 3 years. This was because the term of a supervision order could not exceed the operational period of any suspended sentence under s.58G(2), which in the case of Philip Tom was 1 year.

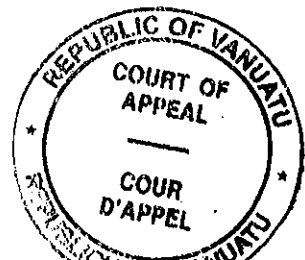
### **ANALYSIS**

6. This submission has highlighted an apparent conflict between sections s.58F(2) and s.58G(3) of the Penal Code. These two sections provide:

#### ***SENTENCE OF SUPERVISION***

***58F. (1) A court may sentence an offender to supervision if:***

- (a) *The offender is convicted of an offence punishable by imprisonment;*  
*or*
- (b) *The offender is convicted of an offence and the enactment prescribing the offence expressly provides that a community based sentence may be imposed on conviction.*



(2) The sentence may be for a period of not less than six months and not more than two years as the court thinks fit.

**POWER OF COURT TO IMPOSE A SUPERVISION ORDER OR A COMMUNITY ORDER IN ADDITION TO IMPOSING SUSPENDED SENTENCES OF MORE THAN 6 MONTHS**

**58G.**

...

(2) The supervision order must be for a period not exceeding the operational period of the suspended sentence

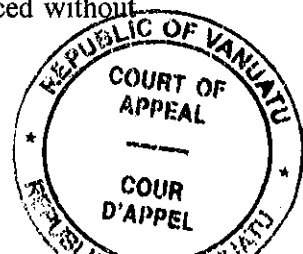
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(emphasis added)

7. The conflict between section s.58F(2) and s.58G(2) is that under the first section the sentence of supervision may be between 6 months and 2 years. In contrast, under section s.58G(2), any sentence of supervision must not exceed the operational period of a suspended sentence, which could be for a minimal term. There is an obvious problem if that is so, as it is often defendants who receive a short suspended sentence, particularly young offenders who could suffer detriment from a period in a prison cell. Their offending may require instead, using the various sentencing options, a lengthy period of supervision.
8. To give s.58G(2) primacy would be also against the evident policy behind Part 1A of the Penal Code, which sets out supervision as one of the range of sentencing options that are available, and provide for it to be up to 2 years. It would greatly limit supervision as a sentencing option if it were limited to the period of suspension. The irony could be also that when the offending is so serious as to warrant a sentence of imprisonment which is then suspended, the maximum for supervision reduces to the term of suspension, while if the offending is so lacking in culpability that no sentence of imprisonment is required, supervision of up to two years can be ordered. The worse offending would require the lesser supervision penalty. That cannot have been the intention of Parliament.
9. We are therefore of the view that s.58G(2) must be read subject to s.58F(2) which has primacy. We appreciate that this is to read down s.58G(2), but it is necessary to do so to implement the evident intention of Parliament, which was to create supervision as a full sentencing option, not arbitrarily limited if there happens to be a short suspended sentence.

**RESULT**

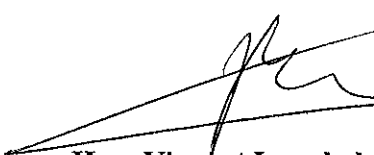
10. The appeal is allowed.
11. The sentences of supervision of Jonathan James and Philip Tom are reduced without opposition, from periods of 3 years to 2 years.



12. In other respect the sentences are unchanged, and in particular, for the reasons given, we decline to reduce the sentence of supervision of Philip Tom by a further year to 1 year's supervision.

DATED at Port Vila this 26<sup>th</sup> day of July, 2013

ON BEHALF OF THE COURT



Hon. Vincent Lunabek  
Chief Justice

