

**BETWEEN: ROGER RONY, ALEX DENNY,  
ANDRE TEMAKON**

Appellants

**AND: PUBLIC PROSECUTOR**

Respondent

**Coram:** Hon. Chief Justice Vincent Lunabek  
Hon. Justice John von Doussa  
Hon. Justice Ronald Young  
Hon. Justice Oliver Saksak  
Hon. Justice Daniel Fatiaki  
Hon. Justice David Chetwynd  
Hon. Justice Paul Geoghegan

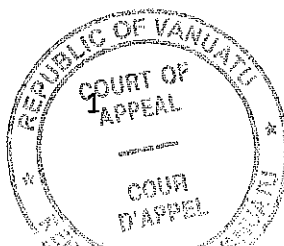
**Counsel:** Ms. Pauline Kalwatman for the Appellants  
Ms. Betina Ngwele the Respondent

**Date of Hearing:** 10 July 2017

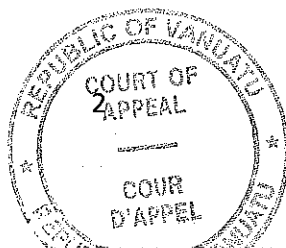
**Date of Judgment:** 21 July 2017

## **JUDGMENT**

1. This is an appeal against the sentence(s) imposed on the Appellants after they pleaded guilty to offences of Unlawful Entering Dwelling House; Theft; Malicious Damage to Property and Accessory after Theft.
2. The brief facts of the case are that in October/November 2016 there was a series of burglaries committed at Samoa Point, Havana Harbour in which five different residences were broken into and from which assorted items were stolen including, assorted liquor, cash, mobile phones, laptops, a fishing net and an air rifle. Subsequent Police investigations recovered some of the properties and 4 offenders were charged including Donald Raprap who masterminded and participated in all but one of the offences, and the 3 appellants.
3. The Information which comprised a total of 13 counts charged each defendant as follows:-



- **Donald Raprap** was charged with five counts of Unlawful Entering Dwelling House, five counts of Theft and one count of Malicious Damage to Property ;
  - **Alex Denny** was jointly charged with Donald Raprap on 4 counts of Unlawful Entering Dwelling House; four counts of Theft and one count of Malicious Damage to Property ;
  - **Roger Roney** was jointly charged with Donald Raprap on one count of Unlawful Entering Dwelling House and two counts of Theft jointly with Donald Raprap on one count and alone in another count;
  - **Andre Temakon** was charged with one count of Accessory to Theft.
4. Each Defendant pleaded guilty at his arraignment on 7 March 2017 and all were sentenced on 26 May 2017 after the Court received pre-sentence reports and sentencing submissions.
5. The Defendants were sentenced as follows:-
- **Donald Raprap** was sentenced to 4 years imprisonment on each of the Unlawful Entering Counts as well as on each of the Theft counts and to 3 months imprisonment on the Malicious Damage to Property count. All sentences were ordered to be served concurrently making an end sentence of 4 years imprisonment "... with effect from 25 November 2016" (being the date when he was first remanded into custody after being charged).
  - **Alex Denny** received identical terms of 4 years imprisonment for each of his Unlawful Entering and Theft counts as well as 3 months for Malicious Damage to Property. All his sentences were also ordered to be served concurrently making an end sentence of 4 years imprisonment but, unlike with Donald Raprap his sentence was made "...effective from today's date." ie 26 May 2017.
  - **Roger Roney** received 4 years imprisonment for his single count of Unlawful Entry and for his 2 counts of Theft he received a single undivided sentence of 4 years imprisonment. That was an error [*see*: s.140 (3) of the Criminal Procedure Code]. However, both sentences were ordered to be served concurrently and suspended for a period of 2 years.
  - **Andre Temakon** was sentenced for his single offence of Accessory after Theft to a term of 4 years imprisonment suspended for 2 years.
6. The latter three (3) Defendants appealed on several grounds against the sentence(s) imposed on them as follows:-
- For Roger Roney and Andre Temakon

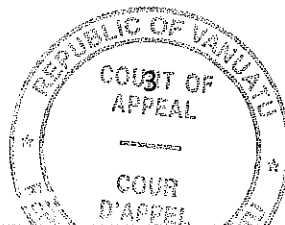


- “1. That the learned judge erred by imposing the same 4 year sentence on all Defendants;
2. That the 4 years sentence for these two appellants was manifestly excessive.”

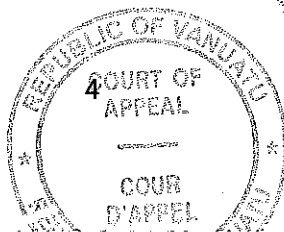
- For Alex Denny

- “1. That the learned Judge failed to take into account the punishment already suffered by the appellant as a result of being assaulted by correctional center officers.
2. That there was disparity with the sentence imposed on Donald Raprap.”

7. In this judgment we propose to deal with the appellants in reverse commencing with **Alex Denny** who complains that he was assaulted by correctional officers whilst he was on remand awaiting his committal.
8. In support of this complaint **Alex Denny** swore and filed a declaratory statement in the Magistrate Court on 23 January 2017. In it he describes two incidents of assault on 13 and 17 January 2017. In the first incident he was struck several times on the head and sworn at and an electric cord was also used to hit his back. In the second incident, the correctional officers unsuccessfully attempted to force a “*protection wrapping*” he had into his mouth and again he was whipped with the electric cord and a hot rice cooker was placed on his back. During both incidents he was hand-cuffed and seated on a chair at the Custom Support Unit Office. His requests to be medically examined were refused until a few days later when he was escorted twice to the Vila Central Hospital. No medical report(s) were annexed to the sworn statement and Appellants’ counsel informed the Court at the hearing of the appeal that the Magistrates Court may have misplaced the Appellant’s medical report.
9. A copy of the Appellant’s declaratory statement was provided to the trial judge and was referred to in defence counsel’s sentencing submissions as “... *a form of punishment and must be taken into regard during mitigation*”. This submission and the appellant’s declaratory statement is no-where mentioned in the sentencing of the Appellant nor is it referred to in the Appellant’s pre-sentence report prepared by the probation officer.
10. In support of this ground of appeal counsel relies on the judgment of this Court in Koilo v. Public Prosecutor [2010] VUCA 27 where the Appellant’s lengthy prison sentence was reduced by 6 months for a second assault by Police officers which the Court described as “*a flagrant breach of right while he was in the States lawful custody*” and “*a seriously lawless act*” after the Court had made it clear that it had a continuing interest in Mr. Koilo’s welfare.



11. Although **Koilo's** case is factually distinguishable from the present case, the principle remains that it is the exclusive function of the Courts to punish those who have broken the law.
12. Accepting that it is not the function of the Courts to discipline police or correctional officers, where an accused person has been remanded into custody by a Court order to await his committal, trial or sentence then the treatment and welfare of such a remandee is a matter of concern for the Court that remanded him. In our view the Court is entitled to take cognisance of any ill-treatment that the remandee may have suffered at the hands of the correctional officers while in lawful custody, and to mark its disapproval by the grant of bail or by a reduction in any sentence imposed.
13. Accordingly there will be a further reduction of 4 months to the appellant's end sentence reducing it to 3 years and 8 months.
14. As for the Appellant's second ground of appeal namely, the disparity of his sentence and that of the principal mastermind Donald Raprap, we accept that ground of appeal.
15. Section 51(4) of the Penal Code (cap 135) clearly states:  
  
*"If the offender has been in custody pending trial ..... the duration of such custody is to be wholly deducted from the computation of a sentence of imprisonment".*
16. The intention and purpose of the deduction is clearly to take into account the loss of liberty of an offender in custody pending his trial during which time he was ineligible for parole. (see: Withford v. Public Prosecutor [2007] VUCA 20).
17. The section refers to a sentence of imprisonment and may be given effect to in different ways, by the sentencing Court giving an allowance in the computation of the sentence imposed or by dating the commencement date of the sentence to the date when the offender was first remanded in custody as occurred in the sentence of Donald Raprap.
18. The difference of about 6 months arose as a result of the different commencement dates ordered by the trial judge. Both Alex Denny and Donald Raprap were remanded in custody at the same time and accordingly should have received the same consideration regarding time spent in custody. There is no proper basis for the disparity.
19. We allow the Appellant's appeal on this ground and order that his reduced sentence of 3 and 8 months years shall commence from 25 November 2016 the date when he was first remanded in custody.

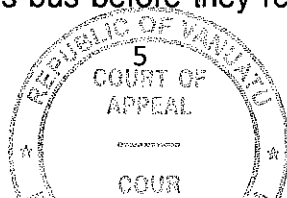


## Roger Rony

20. Although he was a co-defendant charged with Donald Raprap on one count of Unlawful Entering Dwelling House and one count of Theft involving the same house, he received an end sentence of 4 years for each offence which was identical to the sentence received by another co-defendant Alex Denny who was jointly charged with Donald Raprap in four (4) different house-breakings and thefts.
21. The disparity in the sentencing of Donald Raprap's co-defendants is plain. Whereas Alex Denny's offending was repeated, Roger Rony participated in only one incident and yet both received the same end sentence without any consideration as to their different personal mitigating factors. In this regard whilst Alex Denny had a prior conviction for identical offences in 2009 for which he received a sentence of imprisonment, Roger Rony was a first offender. No discount has been given for Roger Rony's unblemished past as it should have been. We allow a reduction of 12 months for that mitigating factor.
22. Notwithstanding the identified differences between Alex Denny and the Appellant both in their offending and in their personal circumstances, section 32 of the Penal Code provides that "*a co-defender shall be punishable in like manner as a principal or sole offender*". In the present case the chosen starting point for the Unlawful Entering and Theft counts which carried maximum penalties of 20 years and 12 years respectively, was 7 years imprisonment which we consider within the appropriate sentencing range.
23. Although it is not wrong in principle to adopt the same starting point for a principal offender and his co-defendant(s), as between co-defendants however, an allowance should be made to reflect the nature of their participation in the commission of the offence(s) and their overall culpability. For example, a co-defendant who has participated in 4 house breakings and theft is objectively more culpable than a co-defendant who participated in only one house breaking and theft. A further allowance of 18 months is given for that disparity making a reduced end sentence of 18 months imprisonment.
24. The appeal is allowed and the Appellant's end sentence is reduced to 18 months imprisonment. We make no alteration to the order wholly suspending the sentence.

## Andre Temakon

25. He was charged with a single count of Accessory after Theft and received a sentence of 4 years imprisonment suspended for 2 years. He took no part in any of the housebreakings or Thefts and his only involvement in the case was that he drove Donald Raprap in his bus to North Efate where Donald Raprap loaded some items onto his bus before they returned to Port Vila. He accepts



that he had reason to suspect that the loaded items comprising 3 laptops and an air rifle were stolen property.

26. Section 34 of the Penal Code (cap 136) provides:

*"(1) An accessory after the fact shall mean a person who, knowing or having reasonable cause to suspect that another person has committed a criminal offence, shelters such person or his accomplice from arrest or investigation, or has possession of or disposes of anything taken, misappropriated or otherwise obtained by means of the offence or used for the purposes of committing the offence.*

*(2) Subsection (1) shall have no application to any ascendant, descendant, sibling or the spouse of the person sheltered.*

*(3) An accessory after the fact shall be punished as a principal offender."*

27. As to what constitutes an "accessory after fact" reference may be made to the judgment of the House Lords in Sykes v. DPP [1962] AC 528 where Lord Denning said at p 561:

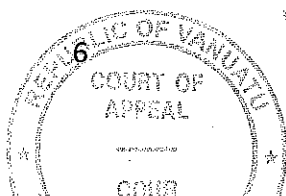
*"The classic definition of an accessory after the fact is when a person knowing that a felony to have been committed, receives, relieves, comforts or assists the felon... These are all active acts of assistance from which it can be inferred that he assented to the felon going free..."*

28. In the present case the particulars of the offence charged Andre Temakon inter alia with having reason to believe that Donald Raprap had stolen the items he loaded onto the Appellant's bus and failing to report his suspicions to the Police so that Donald Raprap could be arrested.

29. In our view the offence of being an "accessory after the fact" requires the accused to do something active to, in the words of the section, "shelter" the person he knows or suspects has committed a criminal offence. It is not enough that the accessory merely fails to report the suspected offender to the Police. In order to commit the offence the accused person must perform some positive act with intent to enable the primary offender to escape arrest or investigation. Failing to report one's suspicions to the Police is not enough.

30. In the absence of any allegation of the Appellant committing some positive act of assistance to enable Donald Raprap to escape arrest and punishment the charge was seriously defective and could not be cured by the Appellant's guilty plea.

31. When the defect was pointed out to counsel for the Public Prosecutor at the hearing of the appeal, she very properly and fairly conceded that she was unable to support the Appellant's conviction.



32. Accordingly the Appeal is allowed and the Appellant's conviction and sentence are set aside.

33. In summary the result of the appeal is:

- (1) The sentence of Alex Denny is reduced to 3 years and 8 months with effect from 25 November 2016;
- (2) The sentence of Roger Rony is reduced to 18 months imprisonment suspended for 2 years;
- (3) The conviction and sentence of Andre Temakon are quashed and set aside.

**DATED at Port Vila this 21<sup>st</sup> day of July, 2017**

**BY THE COURT**

  
**Hon. Vincent Lunabek**  
**Chief Justice.**

