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

Criminal Appeal
Case No. 17/2167 CoA/CRMA

BETWEEN: PUBLIC PROSECUTOR
Appellant

AND: SAEPUL MANAP
ANDI RIYADI
RIVA PRANGGA KLISWANRIO
ABDUL HASAN SIDIK
SUHERI MEIVAN
ADE MARWADI
Respondents

Coram:	***Hon. Chief Justice Vincent Lunabek*** ***Hon. Justice John von Doussa*** ***Hon. Justice Ronald Young***
Counsel:	*J. Naigulevi for the Appellant* *E. Nalyal for the Respondents*
Date of Hearing:	*19th February 2018*
Date of Judgment:	*23rd February 2018*

JUDGMENT

1. The six respondents pleaded guilty to premeditated homicide (s.106(1)(b) of the Penal Code). They were each sentenced to 18 years imprisonment. The Public Prosecutor appeals this sentence submitting:

   (a) The judge failed to take into account all aggravating features;
   (b) The judge should not have taken into account the respondent's allegations of mistreatment by the deceased;
   (c) The judge should have imposed a compensation award;
   (d) The sentence was manifestly inadequate.

2. Although a cross-appeal was not filed counsel for the respondents submitted the final sentences were manifestly excessive. In the interests of justice we consider both the appellant's and respondents' claims.

Facts

3. The judge in the Supreme Court said:

> *"The facts of the case begins in the port city of Kaoshing in Taiwan from where the **Tunago No. 6** ("the vessel") set sail on 7 May 2016 heading for fishing grounds in the Pacific. On board the vessel were its Chinese Captain **Xie Dingrong** and his Chinese Chief Engineer **Zhang Dapeng**. The remaining 26 crew members were comprised of 6 Vietnamese, 7 Phillipinos and 13 Indonesians including the 6 defendants.*
>
> *On the night of 7 September 2016 between 9 and 10p.m. while the vessel was on the high seas between Easter Island and Fiji, the defendants armed with a variety of dangerous weapons including fish gutting knives, a scissor and a hammer, entered the cabin of **Xie Dingrong** ("the deceased") whilst he was asleep and killed him using the weapons they had. After the killing was discovered the deceased body was placed in the ship's freezer and the vessel headed for Suva, Fiji.*
>
> *On 8 September 2016 the Chief Engineer **Zhang Dapeng** reported the killing to the owners of the vessels in Taiwan. The company's shipping agent in Fiji was subsequently informed and a report was lodged with the Fiji Police on 19 September 2016.*
>
> *On 23 September 2016 the vessel arrived in the port of Suva in Fiji and police investigations commenced. On 27 September 2016 **Suheri Meivan** and **Ade Marwadi** were interviewed under caution and the remaining 4 defendants were later interviewed on 29 December 2016. All defendants frankly admitted their respective roles in the killing of the deceased".*

4. As to the deceased's injuries the judge said:

> *"The deceased also had multiple incised wounds to the upper right arm and shoulder and the right hand showed a slash wound over the right index finger. Similar "defensive wounds" were noted to the left forearm and over the third and middle fingers of the left hand. He also had stab wounds to the abdomen with "an obvious extrusion of 200mm of loops of the small bowel". Finally multiple incised stab wounds were noted over the left thigh, left knee and left foreleg".*

5. Each of the respondents advised their lawyer and told the probation service that the killing arose from their anger and frustration at the way they had been treated by the deceased Captain. They complained of physical abuse, inhumane treatment compared with sailors of other nationalities on the ship, failure to pay wages and given pork to eat which as Muslims was objectionable.

The Sentence

6. The judge in the Supreme Court noted the Public Prosecutor's submission that this killing should be "*treated as belonging to the worst category of intentional homicide*". And so they sought life imprisonment.

7. The judge concluded that given the relative youth of the respondents (21 years – 25 years) a fixed term of years was preferable to life imprisonment.

8. He adopted a start sentence of 30 years, deducted 2 years for their "*unblemished record*" remorse and cooperation.

9. He deducted a further year for the deceased's conduct toward the respondents reducing the start sentence to 27 years. Finally he deducted one third for the respondents' early guilty plea leaving the final sentence of 18 years.

Discussion

10. The first ground of appeal complains that the judge did not list all the alleged aggravating features of the facts in his sentencing remarks when he said:

> *"I turn next to consider the appropriate starting point for this offence bearing in mind how the offending arose, what happened during the offending and the effects on the victim's family and relatives viewed within the context of the maximum penalty that can be imposed for the offence".*

11. Further the Prosecutor submits that in his other reference to a start sentence the judge mentioned only the mitigating facts. The judge said:

> *"The starting point I adopt for all defendants is a term of 30 years imprisonment from which I deduct two (2) years in recognition of each defendant's unblemished past, the remorse each expressed to the probation officer, and their cooperation with police inquiries. Furthermore, although not amounting to a defence of "provocation" in terms of Section 27 of the Penal Code, I accept that the defendants had been subjected to discrimination, mistreatment and verbal and physical abuse by the deceased over an extended period leading up to and including on the fateful day".*

12. While it is to be preferable for a sentencing judge in his remarks to identify aggravating and mitigating factors a failure to do so is not an appeal ground, by itself.

13. A challenge by appeal to a Supreme Court sentence is unlikely to be advanced by a cross check of the sentencing judge's remarks to see if all possible aggravating or mitigating factors have been specifically mentioned.

14. In this case however the judge included a comprehensive summary of aggravating factors in his remarks. He said:

> *"The offending in this case was brutal, premeditated, and merciless. It was perpetrated late at night by at least 4 armed defendants acting at the same time, against their unarmed defenceless captain sleeping in his cabin. It involved the premeditated use of lethal weapons such as fish gutting knives, a scissor and a hammer.*
>
> *The attack was indiscriminate and sustained even when the victim called out and unsuccessfully tried to get away from his attackers and defend himself. The ferocity and frenzied nature of the attack is evidenced by the location, nature, and number of injuries that were inflicted on the deceased's body. In total there were approximately 41 slash and stab wounds to the deceased's scalp, face, neck, upper torso, both his arms and hands and his abdomen and left thigh and leg. There can be no doubting the homicidal intentions of the deceased's attackers nor has this court ever had to deal with a case such as this of wanton uncontrolled, violence with such a disdain for human life.*
>
> *Nothing this Court says today will bring back the life of Xie Dingrong the father of a young girl who is now orphaned and the husband of Bai Yuchua who is now a widow. No sentence this Court passes will reverse the tragic personal consequences that have been inflicted on his family and relatives. This is a heavy burden that each of you must personally bear for the rest of your life knowing that you willingly and knowingly participated in the taking of Xie Dingrong's life. Fortunately for you, Vanuatu unlike your own country, does not have the death penalty".*

15. The fact the judge did not recount these features of the killing immediately before he considered the proper start sentence is of no relevance. We reject this ground of appeal.

16. The second ground of appeal relates to the deduction of one year for the alleged conduct by the deceased toward the respondents as we have set out at [4].

17. The respondents' submission was that the deceased's conduct explained why they acted as they did and provided some limited mitigation.

18. The appellant's submission was that the judge should not have accepted the respondents' assertion of mistreatment by the deceased. In the respondents' submissions filed before sentencing they outlined their complaints against the deceased Captain. These complaints had also been raised with the Fiji Police before deportation, and with the Probation Service. At sentencing the Public Prosecutor did not respond to these assertions of mistreatment. As far as the sentencing judge was concerned therefore the claims were unchallenged. If challenged then the respondents would have needed to prove, on the balance of probabilities, that the mistreatment occurred. Such a hearing now is no longer a sensible possibility. In the circumstances we consider the judge made no error. We reject this ground of appeal.

Compensation

19. As to compensation the judge said:

> *"The Public Prosecutor also sought a monetary compensation order in a supplementary sentencing submission on the basis that the defendants caused the death of Xie Dingrong thereby victimising his wife and daughter who were financially dependant on him.*
>
> *I accept that the Court is obliged to consider a sentence of compensation ("must") in terms of Section 40 of the Penal Code but the sentence remains discretionary ("may impose"). The Court is also required to take into account the right of the deceased's dependant family and relatives to bring civil proceedings in relation to the loss they have suffered as well as the offenders sources of income [**see**: Subsections (3), (4) and (5)].*
>
> *As to the deceased family's right of action, Section 1 the Fatal Accidents Act 1976 (UK) which applies in Vanuatu gives a deceased person's dependants a right to bring a claim for damages where death is caused by any wrongful act. As for the defendants "sources of income", other than an unhelpful statement that the defendants salaries are "... handled by agents who hired them in-country ... and that the balance of their salaries would be deposited in their bank accounts in their homeland (Indonesia)", nothing is known of the amount(s) involved and how any such extra-territorial sums would be accessible by a compensation order granted by this Court.*
>
> *In all the circumstances I do not consider that a compensation sentence should be imposed in this case".*

20. The Public Prosecutor said the judge should have obtained a report under s.41 of the Penal Code to ascertain the financial capacity of the respondents to pay

compensation. While the Prosecutor sought compensation in the sentencing submissions they did not invite the judge to obtain a s.41 report.

21. The only evidence before the judge was that the respondents' salaries, which in any event would have stopped when they were arrested in Fiji in September 2016 a year before sentencing, were paid to their Indonesian bank accounts.

22. In those circumstances there seems little or no prospect of collecting compensation. If we allowed the appeal on this ground there seems little prospect, now 18 months since the killing, of a productive enquiry regarding the respondents' capacity to pay compensation. We reject this ground of appeal.

23. The final ground of appeal is the claim that the final sentence of 18 years imprisonment was manifestly inadequate. At the commencement of this appeal we raised with counsel for the appellant and respondents the meaning of s.106(1)(b) of the Penal Code. This provides:

> ***"106. Intentional homicide***
>
> *(1) No person shall by any unlawful act or omission intentionally cause the death of another person.*
>
> *Penalty:*
>
> *...*
>
> *(b) if the homicide is premeditated, imprisonment for life".*

24. On its face there is only one sentence for premeditated homicide; life imprisonment. The Courts in Vanuatu however have seen life imprisonment in s.106(1)(b) as a maximum penalty rather than the only penalty.

25. After raising this concern the Prosecutor then submitted that s.106(1)(b) provided the only penalty for premeditated homicide; life imprisonment. In the alternative he submitted the start sentence was manifestly inadequate (and so the final sentence was also). He submitted the proper start sentence was 40 years imprisonment.

26. We are satisfied that in the context of the penal provisions in the Penal Code imprisonment for life in s.106(1)(b) is intended to be a maximum sentence and lesser finite prison sentences may be imposed.

27. There are a number of crimes in Vanuatu for which the penalty is life imprisonment. These crimes have the same formulation as s.106(1)(b). For example, killing an unborn child (s.113) *Penalty: imprisonment for life*; Aiding Suicide (s.116) *Penalty: imprisonment for life*; Sexual Intercourse Without Consent; *Penalty: imprisonment for life*.

28. While a compulsory sentence of life imprisonment for premeditated homicide is not uncommon in the Pacific a compulsory sentence for the crimes in [27] above of life imprisonment would be exceptional. Further all of the imprisonment penalties in the Penal Code are expressed in the same way as the life imprisonment penalty in s.106(1)(b). For example s.106(1)(a) it is expressed as *Penalty*: "*imprisonment for 20 years*". Escaping from custody (s.84) "*Penalty: Imprisonment for 5 years*"; Idle and Disorderly (s.148) "*Penalty: imprisonment for 3 months*".

29. If s.106(1)(b) required the imposition of a life sentence as the only sentence then for consistency given the identical wording all of the other finite sentences for crimes in the Penal Code, the expressed sentence would be the only sentence able to be imposed. We are satisfied Parliament could not have intended that result. For example the wide variety of circumstances possible in the crime of sexual intercourse without consent would not be able to be reflected in a range of sentences if life imprisonment was the only sentence.

30. We are therefore satisfied that the sentence of life imprisonment in the Penal Code is a maximum and a judge may impose a lesser finite term of imprisonment or other appropriate penalty.

31. In 2016 Parliament passed the Penal Code Amendment Act (No. 15), commencement date 24 February 2017 and in 2017 the Penal Code Amendment Act No. 10 commencement date 16 June 2017.

32. These two amendment Acts provided different wording than the 1981 Penal Code for the new penalties identified in each amending Act. The amending Acts provide for new offences and for new penalties of existing crimes. The penalties for the crimes covered in the 2016 amended statutes are finite terms but then the wording "*not exceeding*" is used. For example; incest without consent (s.95(5), (6) is "*a term of imprisonment not exceeding 20 years*"; illicit firearms trafficking (s.146A) "*A fine not exceeding VT25 million or a term of imprisonment not exceeding 15 years or both*".

33. These two amendment acts therefore make it clear that where a finite penalty is nominated it is a maximum and a lesser penalty may be imposed. However there are two references to life imprisonment in the 2016 amendment. Section 95(8) identifies the crime of incest with a person under 16 years. Section 95(9) provides for the penalty. It states that the penalty on conviction is "*life imprisonment*". There are no qualifying words indicating the life imprisonment sentence is a maximum. Section 97(1), sexual intercourse with a child under 13 years has its sentence increased from 14 years to life imprisonment by the 2016 amendment. The penalty provision now reads "*Penalty: imprisonment for life*".

34. We do not consider these changes affect the respondents' position in this case. The murder for which they were sentenced occurred in September 2016 before any possible charges intended by Parliament to the Courts interpretation of life imprisonment as a maximum penalty for murder.

35. However there is now some uncertainty about Parliament's intentions regarding life imprisonment sentences. Given the significance of such sentences urgent attention is needed to address this uncertainty.

36. After conviction for premeditated homicide if the sentencing judge concludes a finite sentence of imprisonment is appropriate then we consider the start sentence should generally be at least 20 years imprisonment. This will reflect the maximum sentence in unpremeditated homicide (s.106(1)(a)).

37. The appellant's case is that the facts of this case are some of the worst to come before the Vanuatu courts. They stress the 41 wounds to the deceased's body and therefore the ferocity of the attack. A start sentence of 40 years imprisonment

was therefore justified. Further the appellant's say the discount of one third should not have been given as this was not a guilty plea at the earliest time. They point to the time between their arrest in Fiji in September 2016 and their charge and plea in Vanuatu in June/July 2017.

38. As to the later submission we are satisfied the respondents' plea was at the earliest possible time after they were charged in Vanuatu, some seven days. We do not consider their time in Fiji is relevant to this calculation.

39. The respondents submit that the starting sentence should have been between 25 to 27 years imprisonment. They suggest the Court should deduct 15% for personal circumstances, two years for mistreatment by the captain, a further modest deduction for the difficulties the Indonesian respondents will have in prison and one third for the guilty plea. This would result in a final sentence of approximately 13 ½ years.

40. As to the proper starting point the sentencing judge said:

"I turn next to consider the appropriate starting point for this offence bearing in mind how the offending arose, what happened during the offending and the effects on the victim's family and relatives viewed within the context of the maximum penalty that can be imposed for the offence.

In this later regard I am mindful of the provisions of Section 51(3) of the Correctional Services Act No. 10 of 2006 which states:

"If an offender is sentenced to life imprisonment the offender will be eligible for consideration by a community parole board for release on parole after serving 8 years of his sentence".

This may be contrasted with subsection (1) which provides that:

"... a detainee is eligible for consideration by a community parole board for release on parole upon the expiry of a half of his or her sentence".

*The meaning and effect of the above provisions is that if the Court imposes a "term of years" which is less than the maximum but more than 16 years, say 20 years, then the defendants would <u>not</u> be eligible for parole until <u>after</u> they had served half of the sentence **<u>ie.</u>** 10 years, but, if the Court imposed the maximum sentence possible, namely, "life imprisonment", then the defendants would be eligible for parole after serving exactly 8 years.*

Even accepting that a "term of years" has a finite duration as opposed to a sentence of "life imprisonment", the difference in the minimum length of incarceration between the sentences before parole eligibility, is significant and, in my view, constitutes an incongruous result and may well be contrary to the purpose and objects of the Correctional Services Act No. 10 of 2006 to ensure that sentences are administered in

a fair and effective manner and that offenders detained in correctional centres receive "fair treatment".

41. The sentencing judge, in fixing the start sentence and in reaching a final sentence, should not have taken into account the parole provisions in the Correctional Services Act 2006. The parole provisions in that Act set out eligibility for parole. The decisions about actual parole are to be made by a Community Panel and will in part be based on the circumstances of the prisoner many years from sentencing. The sentencing judge's function is to sentence based on the facts of the crime, the maximum penalty, any appellate guideline judgments and the aggravating or mitigating circumstances of the offender. Any anticipated parole for a prisoner is simply irrelevant to this function.

42. In a review of sentencing for premeditated homicide there do not appear to have been any sentences of life imprisonment imposed since Public Prosecutor v. Iakis, Posen and Nerep [1994] VUSC 4 and Public Prosecutor v. Kalopat [1997] VUSC 7. These decisions were prior to any parole system first introduced in the Correctional Services Act.

43. We are satisfied that the offending in this case, as set out by the sentencing judge (see 13 of this judgment), justified a start sentence of 26 years imprisonment. For example we consider the facts in Public Prosecutor v. Saul [2008] VUSC 85, where a starting sentence of 27 years was imposed were more serious than the current case. In Saul four offenders broke into an elderly woman's house. She was raped and then murdered by Mr. Saul. He had previously been employed by the victim. He was an escapee from prison when he offended.

44. In Public Prosecutor v. Nalau [2010] VUSC 183 Mr. Nalau unlawfully entered the victim's house at night. He tortured the two victims and then attacked them with a hammer killing both victims. The sentencing judge considered a sentence of life imprisonment could be justified but concluded because of the offenders' age (18 years at the time of offending) a finite sentence, after mitigating factors, of 23 years should be imposed.

45. Finally in Massing v. Public Prosecutor [2008] VUCA 23 eight offenders stabbed the victim to death using knives, bush knives and other weapons after a dispute over crops. The start sentence was 20 years imprisonment.

46. These cases were as serious or more serious than the current offending.

47. As to mitigation we consider that a one year deduction for a crime free past and any remorse and one year for the behavior of the deceased toward the respondents is appropriate.

48. We also consider a further 6 months should be deducted to reflect the fact that imprisonment for these six Indonesian men, far from their home, will be particularly onerous.

49. That reduces the start sentence to 23 years 6 months. We consider the 9 year deduction for their guilty too great. We think in this case a 25% deduction is sufficient. This would reduce the 23 years 6 months sentence to close to the final sentence reached by the judge; 18 years imprisonment.

50. Given that conclusion we do not consider the final sentence either manifestly inadequate or excessive.

51. Finally the judge at sentencing recommended the respondents be deported when they become eligible for parole. While the judge's recommendation had no legal effect we consider a judge should not express any view about deportation. The question of deportation is one for the Immigration authorities in Vanuatu.

52. For the reasons given the appeal against sentence is dismissed.

DATED at Port Vila, this 23rd day of February, 2018.

BY THE COURT

Hon. Vincent LUNABEK
Chief Justice.