IN THE COURT OF APPEAL
OF THE REPUBLIC OF VANUATU
(Criminal Appeal Jurisdiction)

Criminal Appeal
Case No. 19/895 COA/CRM

BETWEEN: John James Vira Leo

Appellant

AND: The Public Prosecutor

Respondent

Coram: ***Hon. Chief Justice Vincent Lunabek***
Hon. Justice John Hansen
Hon. Justice Daniel Fatiaki
Hon. Justice Dudley Aru
Hon. Justice Stephen Felix

Counsel: ***Mr Eric Molbaleh for Appellant***
Mr Simcha Blessing for Respondent

Date of Hearing: ***15th July 2019***
Date of Judgment: ***19th July 2019***

JUDGMENT

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1. This is an appeal against the conviction entered on 21 December 2018 and sentence imposed on the appellant by Wiltens J on 22nd February 2019.

2. The appellant was charged with the following 44 allegations of criminal misconduct.
   - Intentional assault, contrary to section 107 (b) of the Penal Code, Cap 135
   - Threatening to kill, contrary to section 115 of the Penal Code, Cap 135 (x 12)
   - Rioting, contrary to section 38 (3) and 70 of the Penal Code, Cap 135
   - Unlawful Entry, contrary to section 143 (1) of the Penal Code, Cap 135 (x 14),
   - Malicious dmage to property, contrary to section 133 of the Penal Code, Cap 135 (x 6),
   - Arson, contrary to section 134 (1) of the Penal Code, Cap 135 (x 8) and
   - Theft, contrary to section 122 (1) of the Penal Code Cap 135

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3. The appellant pleaded not guilty to the charges and the matter proceeded to full trial on 22-24 October 2018.

4. The following are alleged by the prosecution as summarised on the facts by the learned Judge in the Court below:

(i) In about December 2010, a customary caution or taboo was placed in respect of a certain area of the sea at or near to the boundary of Nageha village in Pentecost.Vira Leo played a part in imposing the ban, even though Nageha village had it's own Chief and Vira Leo had no express authority over the area in question nor the consent of members of the village to impose a ban. There had been no prior consultation.

(ii)The taboo was in relation to fishing and swimming. Mr Hopkins Binihi and Mr Harry Loloi were said to have broken the ban on about 10 December 2015 by taking sea urchins or *beche de mer*. Both denied that. They had been swimming but in an area outside the banned area, and while they did take *beche de mer*, it was from a permitted area.

(iii) The following day Vira Leo instructed a co-defendant, Viramauri, to speak to the two villagers. Viramauri told them that Vira Leo demanded an explanation from them. The two villagers decided to apologise with a tusked pig, and went to see Vira Leo in person. Vira Leo at first berated both of them, then punched Loloi's face and the back of his neck and his shoulder blade according to Loloi - before driving them both away by picking up a piece of wood as a weapon and chasing them while brandishing it.

(iv) Vira Leo followed after them, and threatened them by ordering to take their families away from the village by night fall or he would shoot them. Vira Leo then took a hoe and/or a shovel to Mr Loloi's house, causing damage to both the contents and the house, and to other houses, as well as the Nageha village church, before returning home. Mr Binihi and Mr Loloi were unable to stop Vira Leo as he had several of his followers with him. Several times they said they wanted to apologise and settle the matter, but Vira Leo was not interested in that. Vira Leo damaged the

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locks to the various houses in order to gain entry, damaged property inside the houses, and then threw personal belongings outside.

(v) Vira Leo was not finished, however, and he returned again to continue to damage villagers' houses. He threatened them again saying he would go and get a gun and shoot them before again leaving.

(vi) Vira Leo returned a third time and chased after Mr Loloi and Mr Binihi while brandishing a shovel. He said if they were still there the next time he came, he would shoot them. Mr Binihi and Mr Loloi considered they had no other choice, collected their families, abandoning their belongings, and fled to a nearby village.

(vii) At about 7am the next morning, some of the villagers who had fled returned to check on their properties. They observed Vira Leo and others further damaging their houses and saw Vira Leo break into houses with a burning branch which he used to set fire to a total of seven houses. They were burnt to the ground – the loss was said to be VT 5 million.

(viii) The villagers who fled found it impossible to re-settle, at least partly due to being further threatened by Vira Leo as he considered they had not gone sufficiently far away. Other villages did not want to get involved in their plight. The victims totalled some 32 or 35 people, according to Mr Binihi; some 16 of whom, according to Mr Loloi, were from Nageha village. There were some elderly persons driven from their homes, and some very young. They were forced to live in isolated bush areas and scavenge to survive. The inclement weather made matters much worse.

(ix) Eventually one of the complainants reported the matter to the police. The villagers were then able to go back to their home villages, however it took over a year before their houses were rebuilt.

(x) Mr Vira Leo did not dispute much of the prosecution case. He agreed a fishing *"gorogoro"* (taboo) had been issued, and claimed customary authority, as Chief, to do that. The 2 complainants had trespassed into the taboo area in breach of the taboo. As a result of the transgressions by Mr Loloi and Mr Binihi, he as Chief,

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imposed "*leo ding vuha*" (the enforcement of customary laws). This was in the form of the 3 usual customary remedies; namely, a fine of 5,971 pigs or 242,150 of local currency (pig tusks) or cash VT 4,842,102, which if not paid forthwith, as this was a serious breach, would mean that they and their families had to leave the village voluntarily. If they did not leave voluntarily, then they would be forced to leave by way of a custom eviction.

(xi) The fine was not immediately paid. There was no voluntary departure and what followed was all a part of a customary eviction, and therefore not justiciable under Vanuatu's written laws. Mr Vira Leo indicated it was part of his duty as a local chief to educate the general populace and deter others from similar breaching taboos.

5. On 21st December 2018, the learned Judge returned verdicts of guilty on the following 39 charges after having satisfied himself that the prosecution had proved the appellant's guilt on each of these 39 charges:-
   - Intentional assault (x1)
   - Threatening to kill (6)
   - Riot (1)
   - Unlawful entry (2)
   - Malicious damage (12) and
   - Arson (7)

6. On 22nd February 2019, the learned Judge sentenced the appellant to 3 years and 9 months imprisonment.

7. The appellant appealed against his convictions and sentence. The grounds of appeal are contained in the Further Amended grounds of appeal dated and filed 9th July 2019.

8. However, Mr Molbaleh informed the count at the hearing of this appeal that all grounds of appeal filed in the Further Amended ground of appeal against conviction are abandoned by the appellant. The appellant will proceed only with one ground which is:

   " that the Judge erred in fact and law when he failed to find that the appellant was acting in accordance with customary law which took precedence over the Penal Code."

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9. In respect to his sentence, the appellant contended that the sentence of 3 years and 9 months imprisonment was excessive and the learned Judge had failed to consider-

(i) The appellant, as a chief, believed he was applying customary laws by enforcing their breaches; and

(ii)The end sentence for the appellant would be one of 2-3 years imprisonment suspended for 3 years.

10. We deal first with the appeal against conviction. Mr Molbaleh referred to Article 95 (3) of the Constitution and submitted that's customary law part of the laws of Vanuatu. They are applied and enforced by the chiefs. He submitted that the appellant as a custom chief was just applying customary laws by enforcing their breaches. He should not be convicted as he believed he has a right to do so under the customary laws. We reject that submission.

11. We note that Mr Molbaleh had failed to refer the Court to Article 47(1) of the constitution in relation to the applicability of custom by the Courts. Article 47(1) provides:

"the administration of justice is vested in the judiciary, who are subject only to the Constitution and the laws. The function of the judiciary is to resolve proceedings according to law. If there is no rule of law applicable to a matter before it, a Court shall determine the matter according to substantial justice and whenever possible in conformity with custom."

12. We agree with the prosecution submissions that *"custom"* and *"customary"* law are subservient to the Constitution and legislations enacted by Parliament. Customary law cannot be inconsistent with the Constitution and legislations enacted by Parliament. Customary law only applies if there is no rule of law applicable.

13. We endorse the statement made by the learned Judge in his judgment in *Public Prosecutor v Leo* [2018] VUSC 75; Criminal Case 2745 of 2016 (28 May 2018) where he said at paragraph 31:

"Customary considerations would only be a factor in the Supreme Courts' considerations if there were no rules of law applicable to what it was determining; and if it were possible to determine the matter on the basis of substantial justice. It is at that point that customary considerations would come into play, such that, if possible, the Court's determination on the basis of substantial justice would also conform with custom. Of the three bases on which the Court must make a determination, customary considerations are the least significant or compelling. The most compelling basis requires the Court to determine the matter in accordance with law; if no rules of law are in place, then the next basis of determination is substantial

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justice. If the matter is to be determined on the basis of natural justice, it is only then, if possible, that conformity with custom is to be considered"

and at paragraph 34 and 35:

Article 95 of the Constitution was inserted into the document to deal with transitional matters. What it plainly says is that customary law will continue to have effect as part of the laws of Vanuatu. Pre-independence, customary law played a relatively minor part in the way the laws were administered. Some thirty-eight years later, that continues to be the position. Article 95 was not ever intended to give greater prominence to customary considerations – just to maintain the status quo.
There has been no diminution of significance; neither has customary law taken on added significance; except in one area and that relates to ownership and use of land. Had Parliament wished, customary law in the area of alleged criminal misconduct could also have been devolved to the Chiefs – that has not occurred. There cannot be a clearer message of Parliament's intent than 38 years of silence in the face of many calls for change."

14. We further agree with the statement made in *PP v Georges Lingbu* Appeal Case 3 of 1983 where Chief Justice Cooke held that unfamiliarity with the Constitution was no excuse and that customary law applied only to matters not covered by the Constitution or the Penal Code; and in PP v Kota [1993] VULawRp 7 where Justice Downing made several pertinent comments as follows:

"There is a conflict I believe between the Constitution and the Statutory Law of Vanuatu on the one hand, and Custom. I wish to make it clear that this conflict is not a conflict between Custom and English or French Law, but between Custom and the Law of Vanuatu as passed by Parliament and [the] people of Vanuatu. It raises the question of the role of Chiefs. I think it stems from a misunderstanding of the power that the Chiefs now are able to exercise, and I think that the Chiefs must realise that any powers they wish to exercise in Custom is subject to the Constitution of the Republic of Vanuatu, and also subject to the Statutory Law of Vanuatu...

The Constitution by Article 5(1)(b) provides for the liberty of people. It also by Article 5 (1) provides for the freedom of movements. The Constitution provides therefore that no person shall be forced by another to do something against his or her will. The section 105 of the Penal Code makes it quite clear that no person shall by force compel any person to go from any place to another...

...this has arisen again from the fundamental misunderstanding of the constitutional rights by Chiefs, together with those around the Chiefs, whether they be assistants or members of committees of the communities."

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15. For the foregoing reasons, we agree with the submission of the Public Prosecutor that the appellant has not established any error that goes to his convictions. Accordingly this part of the appeal fails and is dismissed.

16. We now deal with the appeal against sentence. Two grounds were advanced:-

a) That the starting point sentence was excessive as the appellant, as a chief, believed he was applying customary laws by enforcing their breaches; and

b) That the end sentence should be one of 2-3 years imprisonment and suspended for 3 years.

17. As to the first ground of appeal on sentence, the appellant received a starting point sentence of 7 years imprisonment which included the following aggravating factors:
- Premeditation and planning
- Vira Leo encouraging others also to break the law;
- Total destruction of homes and personal property;
- The value of the damage caused- with a loss of over VT 5 million;
- Taking the law into his own hands to impose his belief on others from a neighbouring village and to exert control over others.
- The significant and unwanted suffering and hardship caused to the victims- not only at the time, but which is enduring (victim impact assessment report).

18. The starting point sentence of 7 years imprisonment is appropriate taking into account that the appellant, not only, is the ring leader, but he is also a custom chief who encouraged others to commit serious crimes. He was also an active participant to these crimes.

19. On the second ground of appeal, two points were raised without details:

a) The first is in respect to the end sentence of 3 years and 9 months imprisonment. We consider this end sentence is proper taking into consideration the fact that the deductions allowed for mitigating factors were very generous. The Court should not interfere with it.

b) The second point is in respect to whether or not the end sentence of 3 years and 9 months imprisonment should be suspended. We consider the provisions of section 57 of the Penal Code. In this case, in view of the nature of the crimes, the particular circumstances of these crimes and the character of the offender, we consider that the learned Judge was right in refusing to suspend the sentence. In our opinion the Appellant failed to show that the leaned Judge erred in applying his discretion not to suspend this imprisonment sentence.

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20. In our view, custom chiefs who incite solicit or encourage other people including their followers to participate in the commission of serious crimes and/or they are also active participants of those crimes, must go to prison.

21. We endorse the statement made in the recent Supreme Court case of Public Prosecutor v. Kaper [2018] VUSC 169 where the Court said of the role of Chiefs:

"....A united and peaceful community cannot be achieved by taking the law into your own hands and inciting violent and unlawful behaviour from your tribesmen and members of the community.

(The) power and influence of a chief .....must be exercised with restraint to do good and to prevent wrong-doing and lawlessness which is the very opposite of a peaceful community ..... Remember also that the law exists for all and there are lawful processes and procedures for the resolution of all problems in Vanuatu society including for land disputes.

I accept and respect the role of traditional kastom chiefs in resolving disputes and in maintaining peace in rural village communities but, equally, the written laws of Vanuatu which includes the Penal Code, exists to guide and help all people to live peacefully and free. It protects both the victim and the offender equally and provides an avenue for calmly addressing grievances and resolving disputes after hearing all sides.

Given the prevalence and frequency of this type of group-offending being instigated and incited by customary chiefs, the time is fast-approaching when deterrent immediate custodial sentence will be imposed on the chiefs who must bear the greater responsibility for such offences."

and later:

"It should not be necessary for the court to say that traditional chiefs wield extra-ordinary powers and influence in a traditional and rural village setting and, as with all power, it is capable of being directed towards doing good or towards evil and wrong-doing. The blind unquestioning obedience of tribal members to a chiefly edict/decree places an enormous burden on chiefs to ensure that the decisions and orders they issue to their followers is reasonable and lawful at all times and does not provoke a breach the laws of the land which applies to all inhabitants of Vanuatu from Torba to Tafea. The law also exists for the guidance and protection of all members of society and applies equally to all including traditional kastom chiefs and their people.

As was said by the Chief Justice in Public Prosecutor v Bruno Neprei and 52 others [2011] VUSC 8 which may be conveniently described as the "Digicel Tower case":

"In sentencing each and all of you, the Court must inform you that Vanuatu as an independent and sovereign nation has laws for everyone including each and all of you. As citizens of Vanuatu, each and all of you including your chiefs, are subject

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to the laws of Vanuatu. *Each and all of you must understand that you cannot take the law into your own hands to do justice to yourselves out of frustrations, reactions, misunderstanding and lack and/or poor communications.*

Your custom motives or custom rationals may be the basis of your actions. However, your custom and traditional practices are not excuses for each and all of you to commit criminal offences as you did ....

Custom chiefs and leaders shall refrain from soliciting and inciting their people to commit criminal offences *out of frustrations and reactions using their custom and traditional practices as justifications for the breaking of the criminal laws of the Republic of Vanuatu".*

More recently, in Public Prosecutor v Philip [2013] VUSC 24 which might be conveniently referred to as the "*Burning of Blackman Town case*" the Chief Justice said:

*"... **Retaliation or revenge is against the law as it is motivated by your personal vendatta and ... you end up breaking the law by committing offences yourselves. You must stop offending individually and/or grouped together as you did** .... In this case, the victims of your crimes are innocent persons.*

This is not the first time that the Courts have to deal with this type of offending on the Island of Tanna. *Below are some of the examples of such type of cases dealt with by the Supreme Court at Isangel Tanna ....:*

- ***PP v. Jimmy Niklam & others,*** *Criminal Case No.04 of 2004;*

- ***PP v. Bruno Neprei & others,*** *Criminal Case No.113 of 2010;*

- ***PP v. Iavilu Tess & others,*** *Criminal Case No. 105 of 2011.*

The common trend that is emerged from the analysis of these cases reflects common custom practices used - in that:

- Chiefs called and held meetings in nakamal;

- Persons assembled together in the nakamal;

- Persons so assembled in nakamal are not necessarily from the same nakamal. They may be from various nakamals, villages or areas. They were called to join through the custom process of "custom roads" or "custom linkages".

- Chiefs informed persons so assembled in the nakamal of the purpose of the meetings.

- The above cases show that the purposes of the meetings were to commit crimes;

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- Chiefs solicited and incited the persons so assembled to carry out criminal activities jointly and together.

- Persons so assembled planned and carried out the joint criminal activities as ordered and directed in the nakamal.

The above common custom practices described are used against the law. They could not be part of accepted custom practices. They are abuses of custom practices in the manner they were used to commit criminal activities.

And later he said of the relationship between custom and statute law:

"All persons living in Vanuatu including Tanna Island, are protected by the laws of Vanuatu and the properties of all persons in Vanuatu including Tanna Island, are also protected by the laws of Vanuatu. ***Your customs and /or practices are also subject to the laws of Vanuatu. This means that if your customs or practices are against the law, you cannot apply them anymore. If your customs or practices are not against the law but you use them to achieve an unlawful purpose such as committing criminal offences, then, you have abused your customs or practices.*** *Such abuses of customs or practices are condemned as they are not acceptable customs or practices. They are against the law".*

22. The appeal against the sentence is without merit and is accordingly dismissed.

23. The sentence imposed by the sentencing judge is upheld.

DATED at Port Vila this 19th day of July 2019

BY THE COURT

REPUBLIC OF VANUATU COURT OF APPEAL COUR D'APPEL REPUBLIQUE DE VANUATU

VINCENT LUNABEK

Chief Justice