

BETWEEN: Kuvu Noel
Ron Tamtam
Joe Johnny
Bebe Stanley
Appellants

AND: Public Prosecutor
Respondent

Coram: *Hon Chief Justice Vincent Lunabek*
Hon Justice J von Doussa
Hon Justice J Hansen
Hon Justice O Saksak
Hon Justice D Aru
Hon Justice V Trief

Counsel: *P T Finnigan and E Nalyal — Counsel for Appellants*
D Boe — Counsel for Respondent

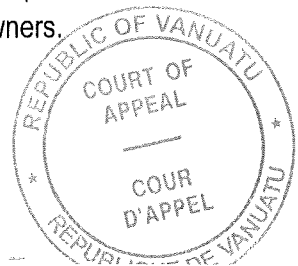
Date of Hearing: *4th November 2019.*

Date of Judgment: *15th November 2019*

JUDGMENT OF THE COURT

[1] Eighteen accused faced charges of unlawful assembly, riot, demanding money with menaces, unlawfully entering dwelling houses, and carrying firearms in a public place. The trial commenced on 5th August 2019. The two main prosecution witnesses were called and were heard through to the end of the morning of 6th August. Following lunch, on the application of counsel, all defendants were re-arraigned. On re-arraignment, the appellants pleaded guilty to Count 3, the charge of demanding money with menaces. A number of the accused pleaded guilty to Count 1, unlawful assembly, and the prosecutor entered nolle prosequi on all other charges against all defendants. The fate of those people who pleaded guilty to Count 1 is irrelevant for current purposes. This appeal concerns only the four appellants who pleaded guilty to demanding money with menaces.

[2] The complainant, a Mr Steven Remy, had an agreement with the customary owner, Mr Jerome Natu, to quarry sand on some land at the Teproma area of Santo. He also had a permit to quarry from the Ministry of Geology and Mines. Mr Natu had shown Mr Remy the Green Certificate in respect of the land concerned, and Mr Remy was satisfied that he was dealing with the true customary owners.



[3] However, it appears to be common ground that he was also aware of a dispute regarding Mr Natu's claim to the land. Mr Kuvu Noel, his family and supporters, were dissatisfied that the annual rent was paid to Mr Natu and they did not receive any of that money. Further they disputed customary ownership of the land. The Judge noted, and it is not disputed, that there were several altercations previously between the appellants' group and Mr Remy because they disputed Mr Natu's right to customary ownership and to contract with Mr Remy.

[4] The matter came to a head on 7th September 2018. After a short meeting at the Chiefs Nakamal, Mr Noel and a number of his relatives and supporters went and placed namele leaves at the side of the quarry at Teproma, and took away the keys to all the machinery so no further work could be undertaken. They then drove to Mr Noel's wharf, and assembled there, and entered into an agreement that they would go as a group and demand that Mr Remy pay quarrying royalties to them. They could not find Mr Remy at home, but went to his company site at Side River. Perhaps fortunately, Mr Remy was warned the group was coming, and called the police for assistance. He was so concerned that he locked his seven year old son in a container for safety. Six trucks, laden with Mr Noel's relatives and supporters, arrived containing between 20 and 30 men.

[5] It was clear from the evidence that these four appellants were those immediately adjacent to Mr Remy during the incident. The group as a whole was angry and hostile, and threats were made that, if they were not paid immediately, Mr Remy would be killed or suffer some lesser fate.

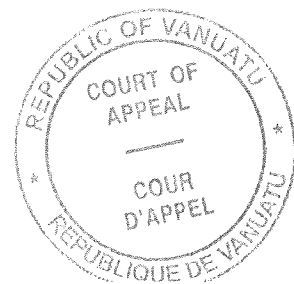
[6] The mob demanded to see Mr Remy's accounts and see what three years of royalties amounted to, but one of Mr Remy's employees was unable to locate the relevant statements on the computer. It was then demanded that Mr Remy pay them VT 1million immediately. The language used included, "give the money now"; "we won't leave till we get the money"; "if we don't get the money we'll kill you". Another person apparently said he was willing to go to jail for killing. It was clearly a very hostile crowd, and Mr Remy understandably said he felt he had no option in the circumstances but to sign a cash cheque for VT 1m. He asked for the return of his keys to all the machinery, but appeared to only get the key for one truck. The police arrived, and the group left the scene. They quickly went to the bank, cashed the money, and returned to Mr Noel's wharf where there was a distribution of the cash. The Judge noted that as well as the guilty plea the defendants Johnny, Stanley and Tamtam made partial confessions to the police but Mr Noel declined to comment.

The sentence

[7] The Judge noted aggravating factors as:¹

- (i) a background to the offending, as it was not the first instance of difficulties over the quarrying of sand;
- (ii) there was an element of organisation and planning, as the Judge said: "This was a concerted plan involving the attendance by no less than six trucks and between 20–30 men at the quarry, Mr Remy's home, and finally his yard"

¹ *Public Prosecutor v Noel* [2019] VUSC 108; Criminal Case 2809 of 2018 (8 August 2019).



- (iii) more than one threat was made by a number of individuals, and the Judge found, "most notably, by Mr Kuvu Noel";
- (iv) the nature of the threats that were made by the hostile gang.

[8] For the charge the appellants pleaded guilty to, the Judge considered the offending merited a starting point of three years and six months' imprisonment.

[9] He accepted by way of mitigation the submission that there was a land dispute which was currently in limbo, but went on to say: "... even if that is correct, they cannot have considered themselves entitled to demand money with menaces."

[10] He noted that the appellants had no previous convictions, excepting Mr Noel's driving conviction, which he ignored for sentencing purposes, and they were all hardworking members of the community who had complied with bail conditions for over a year. He considered those mitigating factors warranted a reduction from the start point of five months.

[11] In relation to the guilty pleas, the Judge stated:

[23] All the defendants have had ample opportunity to plead prior to partway through a second scheduled trial, after the first 2 prosecution witnesses had completed their evidence. Apart from Mr Kuvu Noel, each has also made certain statements to the police which ought to have resulted in earlier pleas of guilty to at least some of the charges in view of the admissions made. In Vanuatu, the authorities have made it very plain that the maximum reduction for prompt pleas of guilty, plus co-operation with the authorities, is a one-third discount.

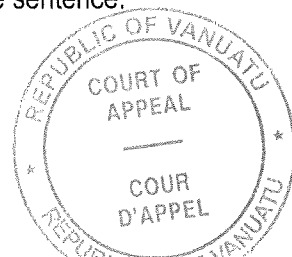
[12] He then found that for these four appellants the appropriate discount in the circumstances was 12.5 per cent.

[13] In relation to suspension he referred to s 57 of the Penal Code, and the criteria to be assessed under that section. He stated:

30. This case involves offending that was committed deliberately, in the knowledge that it was wrong. These defendants took the law into their own hands, and in the absence of any custom reconciliation ceremony, there is a real risk of further dispute between Mr Kuvu Noel, his family members and his supporters and Mr Natu and Mr Remy. In these circumstances, I do not think suspending all or part of any of the sentences is appropriate for those charged with Charge 3 [demanding with menaces] — it is very serious offending, with a maximum sentence available for conduct of this type of 15 years imprisonment.

[14] The Judge made compensation orders against the four appellants that they should pay back the VT 1million to Mr Remy, after their release from prison, to the effect that each of them was to repay VT 250,000 by way of monthly instalments of VT 50,000 every first working day of the five months following their release from imprisonment.

[15] He then sentenced the four appellants to two years, nine months' imprisonment commencing 7th August 2019, to pay the compensation ordered upon release, and refused suspension of the sentence.



The appeal

[16] On 20th August 2019 an appeal was lodged against the sentence of imprisonment, the failure to suspend, and, that if restitution was combined with imprisonment, the sentence was manifestly excessive.

[17] Then, on 2nd September 2019, an amended notice and grounds of appeal was filed, appealing both conviction and sentence.

[18] Following the call over on the first day of this session, certain issues were raised by the Court with counsel, relating to the conviction appeal. Counsel advised he wished to take further instructions from the appellants. The hearing of the appeal was adjourned to 2 p.m. that day. When the matter was recalled Mr Finnigan stated that, as a result of taking further instructions, the appeal against conviction was withdrawn.

The appellants' submissions

[19] A lengthy part of these submissions rehearsed matters that were also put forward in support of the abandoned conviction appeal. This dealt with the land issue and the appellants' submission that they considered they had rights as customary owners to require Mr Remy to pay them royalties for the quarrying of the sand.

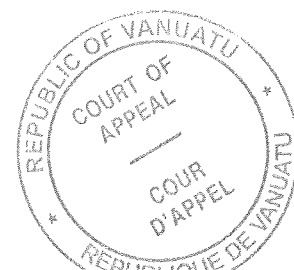
[20] It was further submitted on behalf of the appellants that there was no evidence before the Judge that any of the four appellants made the utterances described in the judgment. Indeed, the submission went so far as to say there was no evidence of menaces being made by these four appellants at all. But we accept that there was no evidence of direct threats from Mr Noel (as the judge found). However, that is subject to our findings of the effect of what Mr Noel said below.

[21] It was further submitted, on behalf of Mr Noel, that he in fact was there to bring a calming influence to the situation to ensure it did not get out of hand. In the initial appeal against sentence there are extensive grounds, including the complaint that the Judge was wrong to say, "Mr Kuvu Noel said that Mr Remy was fortunate that he was there as "... they are here for killing you and burn all your property because you stole their land".² It is submitted the Judge misunderstood the Bislama meaning of 'kilmyu', which translates into English "I will hit or fight you". The Bislama translation of the English expression "I will kill you" is "bae mi kilim ded yu".

[22] Overall these submissions amount to a claim that the Judge has seriously overstated the aggravating features set out above.

[23] In relation to the discount for the guilty plea it is submitted that, given their claim of right, it was not unreasonable for these appellants to initially plead not guilty to the charge, and they should have received a discount of at least 25 per cent.

² *Public Prosecutor v Noel* [2019] VUSC 108; Criminal Case 2809 of 2018 (8 August 2019) at 10.



[24] Then, at paragraph 34 of the appellants' written submissions are set out 13 factors said to support that the sentence was manifestly excessive. It is unnecessary to set these out in full here. Many of them run counter to the guilty pleas and a number overlap.

[25] The submissions then deal with the question of suspension, and goes on to what is an appropriate sentence.

[26] By reference to the Penal Code and authorities Mr Finnigan said the sentence should have been suspended. He stressed the fact the appellants were all hard working members of the community and good family men. He also stressed the appellants' version of events as set out in submissions above.

[27] Next, as with the appeal against the length of the sentence, it is said that there was a real basis, i.e. there was a right, to confront Mr Remy because Mr Natu had breached a restraining order (that Mr Remy was not subject to) regarding the quarrying.

[28] It was further submitted that despite the claims and allegation, no actual violence occurred, and this was down to Mr Noel, who ensured no violence erupted despite the threats. In those circumstances, it was submitted a proper alternative course was to impose a fine and a restitution order.

[29] He submitted the final sentence should have been a fine and an order for restitution. We have to say that the version of events advanced by the appellants in this appeal is totally at odd with their pleas and what actually transpired.

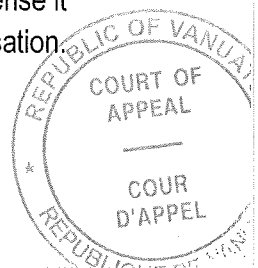
The respondent's submissions

[30] Mr Boe filed lengthy and helpful written submissions. In essence they supported the Judge's findings, the sentence imposed and the refusal to suspend. Mr Boe pointed out this was serious offending. He went further and submitted, that if anything, the sentence imposed was lenient.

Decision

[31] As we have noted, the matter of rights is an important background factor to this offending, but the reality is that these appellants pleaded guilty to demanding money with menaces, and three of them made partial admissions. As the Judge noted, even if they believed in those rights, that did not entitle them to demand money with menaces. We agree. Many of the matters sought to be relied on in this appeal are subsumed by their admissions of guilt.

[32] We are also satisfied that it does not assist these appellants that they were not specifically identified as to the making of any of the statements set forth in the sentencing notes. They were the four that surrounded Mr Remy, and were the ringleaders of this enterprise. This was serious unlawful behaviour led by Mr Noel, and the other appellants, that incited a hostile and angry mood in their supporters to go and confront Mr Remy and to demand money. Mr Finnigan attempted to characterise it as some sort of quiet outing where they went to enforce their rights and request legitimate compensation.



Again, the ready answer to that is their plea of guilty to this serious offence. But it is also clear on the evidence that this mob had been whipped up into a fervour of hostility and taken to find Mr Remy at the behest of Mr Noel and the other appellants as the leader of this enterprise. The level of fear engendered (because of past behaviour) before they even arrived is evident in the fact that Mr Remy considered it was necessary to lock his young son in a container for safety.

[33] Much was made by Mr Finnigan of Mr Noel's statement that suggested he was in some measure a peacemaker. We are satisfied it makes little difference whether the words he stated were, "they are here for killing you and burn all your property", or "they are here to hit or fight you and burn all your property". We note that in the amended Notice of Appeal, filed on 2 September 2019, the accompanying memorandum refers to a statement of Jeffery Sul that, "I heard Kuvu told Steven Remy 'lucky I followed the boys otherwise they would kill you'".

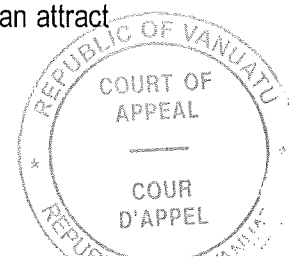
[34] We do not take this statement, in the context of what was occurring, as an effort by Mr Noel to calm things down as submitted. In context Mr Noel and the other three appellants have taken a hostile mob of 20 to 30 people, that they had incited close to a frenzy, in six vehicles to surround Mr Remy and threaten him. The appellants demanded money from Mr Remy with menaces. Rather than being some sort of effort to calm the mob, we are satisfied the words he spoke, whatever version is accepted, is a reverse threat — "If you don't pay, see what is likely to happen to you." In the context of this incident no other interpretation makes sense.

[35] It was put to Mr Finnegan that it could be seen as 'vigilante' behaviour. He considered that overstated the matter. With due respect, we consider it a completely appropriate word to apply to the behaviour that occurred in this case. This was a hostile mob, whipped to a fervour and intent on taking the law into their own hands. These four appellants must have been well aware their real complaint was with Mr Natu, and they should have ensured that was pursued in a lawful manner rather than the actions they took. In those circumstances, we consider the starting point adopted by the Judge was soundly based. Whatever belief there was in their rights there were, in fact, lawful means of addressing the grievances that were in train at the time. Rather, they turned to serious criminal behaviour to extort money from Mr Remy.

[36] We are also quite satisfied that the Judge has not overstated the aggravating features. They accurately encapsulated what occurred during this incident. The aggravating features confirm the seriousness of this offending.

[37] The mitigating features were properly considered by the Judge and given an adequate allowance which we understood to be accepted.

[38] In relation to the plea, the 12.5 % reduction allowed by the sentencing Judge was appropriate in all of the circumstances. Whatever claims there may have been of rights, there were partial admissions from 3 of the appellants, and they all knew what they had done. (Again evidenced by their guilty pleas). They chose not to plead on any of these charges until after they had put the prosecution evidence to the test. It was only then they indicated that they would plead guilty to the charge of demanding money with menaces. It is accepted that this shortened the trial, but pleading guilty at such a late stage can attract only a modest discount. We concur with the discount applied by the judge.



[39] This was serious offending that must be condemned. It is not the first time in Vanuatu that land disputes have led to some parties taking the law into their own hands. It is to be noted that the offence carries a maximum sentence of 15 years' imprisonment, which shows how seriously Parliament considers offending of this sort to be. The submission that there was no actual violence is of no assistance to the appellants. If there had been actual violence they would no doubt have faced even more serious charges. The sentencing Judge appropriately judged the culpability of these men for this serious offending and applied appropriate discounts for mitigating factors and the guilty plea.

[40] The suggestion in the submissions that the seriousness of this offending could be met by a fine and restitution cannot be treated seriously.

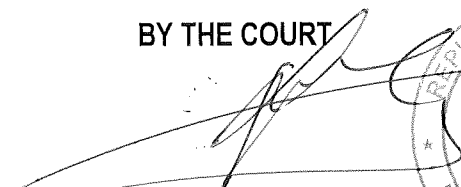
[41] The sentencing judge correctly considered the factors set out in s 57 (1) (a) of the Penal Code [CAP 135]. In considering whether or not to suspend sentence of imprisonment the sentencing judge must consider the circumstances, the character of the offending, and in **particular**, the nature of the crime. (Our emphasis). On one hand these were hard working useful members of society. But here the circumstances can only be described as vigilantism. The offence they pleaded to was treated as serious by the legislature in setting a maximum sentence of 15 years. The nature and circumstances of this offence were serious. Considering all the s 57 (1) (a) factors the judge clearly reached the right conclusion in refusing suspension. With serious offending, where there is a deliberate and conscious decision to flout the law, suspension will seldom be appropriate. The judge was correct not to suspend this sentence.

[42] The judge properly made a restitution order against these men, to be paid on their release from prison. The addition of that restitution order added to the sentence of imprisonment does not make it manifestly excessive. Rather it properly seeks to place Mr Remy in the position he would have been in but for this offending.

[43] The appeal is dismissed.

DATED at Port Vila this 15th day of November 2019.

BY THE COURT



**HON CHIEF JUSTICE
Vincent Lunabek**

