

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

**Criminal Appeal
Case No. 21/1839 CoA/CRMA**

BETWEEN: WALTER MALAU
Appellant

AND: PUBLIC PROSECUTOR
Respondent

Coram: *Hon. Chief Justice V. Lunabek
Hon. Justice J. Mansfield
Hon. Justice R. Young
Hon. Justice O. Saksak
Hon. Justice D. Aru
Hon. Justice G. Andrée Wiltens*

Counsel: *Mr A. Bai for Appellant
Mr P. Sarai for the Respondent*

Date of Hearing: 5 July 2021

Date of Judgment: 16 July 2021

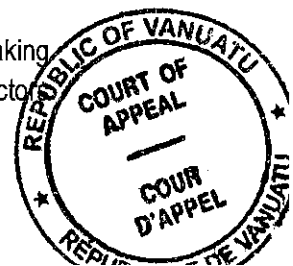
JUDGMENT OF THE COURT

A. Introduction

1. This was an appeal against sentence, Mr Malau having pleaded guilty to a charge of domestic violence and been sentenced to 7 months imprisonment.

B. The Decision

2. On October 2019, Mr Malau was involved in an exchange of text messages with Ms Barron with whom he was having an affair. There were issues regarding money and he was unhappy that she was going to meet another man.
3. In the course of the text messages Mr Malau stated that if he found Ms Barron with another man he would punch her and use firearms against them both. He stated that he was serious.
4. The particulars of the charges recited that Ms Barron was psychologically abused, harassed and intimidated; and that she feared for her life.
5. The primary judge adopted a sentence start point of 12 months imprisonment, taking into account the maximum sentence available and the aggravating and mitigating factors of the offending. That was not challenged.



6. A deduction from that start point was allowed for Mr Malau's guilty plea, which was entered at the earliest opportunity. This was originally challenged in the written grounds of appeal, but at the substantive hearing the point was not advanced. Mr Bal rightly did not pursue the contention that a 1/3 deduction was always warranted in respect of prompt pleas, as that does not reflect the law.
7. The primary judge allowed a further 2 months deduction for Mr Malau's personal circumstances. That was also unchallenged. That led to the sentence of 7 months imprisonment.
8. The primary judge next considered whether the sentence should be suspended in whole as part. In this regard the primary judge recorded:

"... The sentence is imposed to denounce such criminal conduct, to hold Mr Malau accountable for his criminal conduct to deter him and others from such offending and to protect the community.

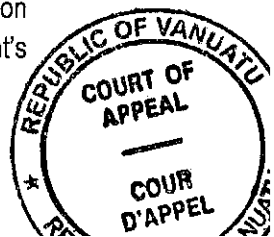
The end sentence will not be suspended. Given the nature of the offending of violence threatened within a domestic relationship, by a currently serving Police officer who has acted contrary to his sworn oath to uphold the law, the sentence will not be suspended."

C. The Appeal

9. Mr Bal also did not press his second written ground of appeal, namely that the primary judge had erred in law and fact "...in putting more weight on the aggravating factors than the mitigating factors of the offending." As Mr Sarai had succinctly responded, there were no mitigating aspects of the offending. This contention accordingly held no merit.
10. The final ground of appeal was that the end sentence should have been suspended.
11. Mr Sarai agreed with this contention before us. Indeed the submissions before the primary judge by both prosecution and defence counsel were to the effect that a suspended sentence was appropriate.
12. We now address this issue.

D. Discussion

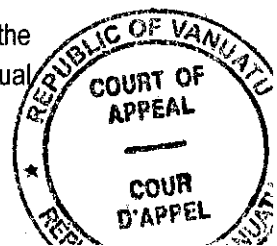
13. This Court cannot deal with appeals against sentence by way of consent orders.
14. In order to succeed in an appeal against sentence an appellant must demonstrate an error by the sentencing judge.
15. In this instance, the primary judge was considering whether to exercise a discretion which is provided for in section 57(1)(a) of the Penal Code. Accordingly, the appellant's



burden in this appeal was to demonstrate that the primary judge had erred in not exercising the discretion to suspend the 7 month imprisonment term by either:

- not taking into account a relevant consideration, or
- taking into account an irrelevant consideration.

16. Counsel's written submissions unfortunately did not address this.
17. In oral submissions, Mr Bal submitted the primary judge had erred in recording comments by Ms Barron which were reported in the Pre-Sentence Report to the effect that *"Mr Malau had continued calling and stalking her until now."* Mr. Bal submitted this was an error in that the assertion was unrelated to the charge to which Mr Malau had pleaded guilty.
18. Further, he pointed to the fact that this allegation was not accepted by Mr Malau, as evidenced by the sentencing submissions filed on his behalf which included: *"...they are both living their own lives now without any disturbances from each other."*
19. Mr Bal submitted that the primary judge must have taken the continuation of Mr Malau's alleged conduct into account when deciding to not suspend the end sentence.
20. This Court considers these post-offending statements, at best, as neutral, neither favouring the appellant nor adversely affecting him. The primary judge simply recorded what was in the Pre-Sentence Report, and did so under the heading of Personal Factors. There is no indication the primary judge accepted this allegation, and we note it is not a factor listed favouring not suspending the sentence.
21. However, as earlier recorded in paragraph 8, the primary judge appears to have only taken into account aggravating factors of the offending when considering whether to suspend the sentence or not. The proper exercise of a discretion necessarily involves a balancing exercise, which should also have taken into account factors which favoured suspension of the sentence.
22. This was an error of law as there needed to be a balancing exercise undertaken.
23. Accordingly, the appeal must be allowed in respect of the suspension aspect. Rather than remitting this matter back to the primary judge, in the interests of avoiding further delay, this Court will now undertake that exercise.
24. We consider that the factors which favour suspension of the sentence include the following: the prompt guilty plea, the lack of previous convictions, the willingness of Mr Malau to engage in a custom reconciliation ceremony, and his claimed remorse (supported by the Pre-Sentence Report writer). The offending appears to have been out of character. Further, while not in any way condoning what occurred, we note that the conduct was of very limited duration and involved threats, not actual violence.
25. We consider that the factors which favour not suspending the sentence include the following: the offending involved more than one threat, the threats occasioned actual



fear on the part of Ms Barron, the threats involved the use of a firearm (we note that Mr Malau had access to such weapon by virtue of his occupation), and the offending was contrary to Mr Malau's professional oath of upholding the law.


26. On balance, weighing these factors, we consider the end sentence should be suspended. The period of such suspension will be 12 months.

E. Result

27. The appeal is allowed.
28. Mr Malau's end sentence of 7 months imprisonment is now suspended for a period of 12 months. Mr Malau must remain offence-free for that period in order to avoid incarceration in relation to this offending.

DATED at Port Vila, Vanuatu, this 16th day of July, 2021

BY THE COURT


.....
Hon. Chief Justice
Vincent Lunabek

