

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

**Criminal Appeal
Case No. 21/4118 CoA/CRMA**

BETWEEN: Obed Kanas
Appellant

AND: Public Prosecutor
Respondent

Coram: *Hon. Chief Justice V. Lunabek
Hon. Justice J. Hansen
Hon. Justice R. White
Hon. Justice D. Aru
Hon. Justice G. Andrée Wiltens
Hon. Justice V.M. Trief
Hon. Justice E. Goldsbrough*

Counsel: *Ms Linda Bakokoto for the Appellant
Mr Christopher Shem for the Respondent*

Date of Hearing: *8 February 2022*

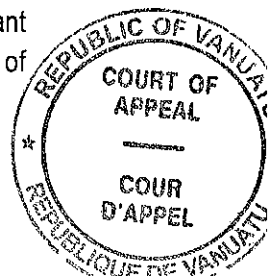
Date of Judgment: *18 February 2022*

JUDGMENT

1. This appeal arises from a sentence imposed in the Supreme Court on 30 November 2021. On that date, Obed Kanas (the appellant) was sentenced to an effective and immediate 12-month term of imprisonment following his conviction for three related offences. Those offences, which all arose from a single incident, included criminal trespass, unlawful entry of a dwelling house and intentional assault causing temporary injury.

Background

2. The appellant, according to the admitted facts of the various offences, went into the home of the complainant, a 66-year-old man living in Siviri Village, North Efate in the early hours of the morning, around 2.00am or 3.00am on 5 October 2018. He found him sleeping but woke him up by shining a bright torch into his face and demanded an explanation of his part in the death of another. Requiring the old man and his family to leave their home and go outside, the appellant struck the man on his neck causing him to fall. Outside the appellant struck him with a piece of



wood and was only stopped from further injuring the old man with a rock by the timely intervention of another. These circumstances form the basis of the three charges for which the appellant was convicted and sentenced in the Supreme Court.

3. The appellant gave notice of his intention to appeal against sentence on 14 December 2021 and filed a Memorandum of Appeal six days later, on 20 December 2021. The sole ground of appeal is that the learned sentencing judge erred by imposing a manifestly excessive end sentence of 12 months without suspension. During submissions on this appeal, counsel for the appellant made it clear that the length of the sentence imposed was not an issue on this appeal, merely the decision not to suspend the term of imprisonment.
4. Given that submission this Court does not intend further to comment on the length of the effective term of imprisonment imposed, merely the non-suspension.

Power of suspension

5. The power to suspend a sentence of imprisonment is found in Part 1 (A) of the amended Penal Code [Cap 135] at section 57 wherein it is provided that: -

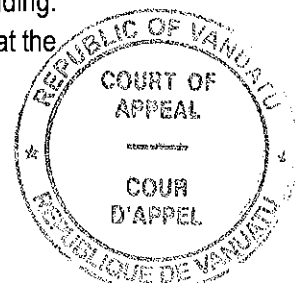
(1) *The execution of any sentence imposed for an offence against any Act, Regulation, Rule or Order may, by decision of the court having jurisdiction in the matter, be suspended subject to the following conditions:*

(a) *if the court which has convicted a person of an offence considers that:*

- (i) *in view of the circumstances; and*
- (ii) *in particular the nature of the crime; and*
- (iii) *the character of the offender,*

it is not appropriate to make him or her suffer an immediate imprisonment, it may in its discretion order the suspension of the execution of imprisonment sentence it has imposed upon him or her, on the condition that the person sentenced commits no further offence against any Act, Regulation, Rule or Order within a period fixed by the court, which must not exceed 3 years;

6. In submissions from the appellant, it was conceded that the power to suspend a sentence is discretionary. The appellant submits that the exercise of the discretion must both follow relevant authorities and involve a balancing exercise, taking into account relevant consideration. This submission is supported by *Malau v Public Prosecutor [2021 VUCA 48]*. The same authority is relied upon by the respondent.
7. After setting out the circumstances of the offending and the maximum available penalty for unlawful entry, the learned sentencing judge turned to mitigating factors related to the offending. He found none. He then turned to aggravating features of the offending and determined that the



starting point was a term of three years imprisonment, each offence attracting its own term of imprisonment (being 3 years, 2 years and 6 months) but all sentences to run concurrently.

8. The learned sentencing judge then turned to mitigating factors relating to the offender and determined to allow a discount for an early guilty plea of one-third, and a further third for what was described as showing remorse, being a first-time offender and 'other personal factors'. This exercise reduced the starting point down from three years to 12 months.
9. The 'Other personal factors' were not set out in the sentencing remarks. In its submission, the respondent submits that this expression takes into account a delay period of three years in the case progressing from offence to sentence. In his submission, the appellant suggests that the same delay was not taken into account as it was not referred to in particular in the sentencing remarks.
10. As far as suspension was concerned, it was dealt with by the sentencing judge at paragraph 16 of his sentencing remarks where he says simply: - "I reject defence submission that your sentence should be suspended."

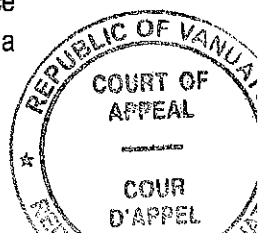
Discussion

11. *Malau* (referred to above at paragraph 6) is a useful authority to refer to in determining this appeal. At paragraph 14 of the reported judgment this Court decides that in an appeal against sentence an appellant must demonstrate an error by the sentencing judge. So much is already agreed within this appeal. It continues, at paragraph 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."*

12. In *Malau* this Court noted that it appeared from the record that the sentencing judge took into account only aggravating factors of the offending (at paragraph 21). That, in our view, cannot be said to be the case here and thus the balance of paragraph 21 of *Malau*, wherein it was said that the proper exercise of a discretion necessarily involves a balancing exercise was complied with here. In the absence of the balancing exercise, this Court in *Malau* found an error of law. We do not agree with the submission that the balancing exercise was not undertaken in this case.
13. It may have been better if the Judge had referred to the factors which led him to reject the defence submission on suspension. Those factors do not need to be set out at any great length, but a



short summary may avoid later suggestion that the balancing exercise was not undertaken. However, here it is clear from the two preceding paragraphs in the sentencing remarks that the learned judge had taken into account matters put forward as mitigation.

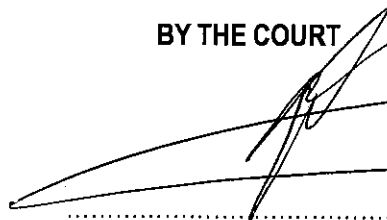
14. Counsel emphasised the delay of three years from 5 October 2018 before the appellant was charged on 22 September 2021. The appellant had not been responsible for that delay. Counsel submitted that account had not been taken of the delay in the appellant's favour. This is not the occasion to consider the significance of prosecution delay in the sentencing process. It is sufficient to say that we are satisfied, given the generosity in ordering a second one third reduction, that it was, indeed, taken into account within the 'other personal factors' category. This included the notion submitted on this appeal that the delay had allowed the appellant to demonstrate his ability to be a law abiding and useful member of the community in the interim period.
15. As for what reason or reasons might have been given for the decision not to suspend, it appears to this Court that a simple sentence indicating that the offences were too serious in nature to consider suspending the sentence, which, had the occasion arisen, would have been our reasons.

Decision

16. In the absence of an error by the Judge, this Court cannot interfere with the discretion exercised in the sentencing process. This appeal is therefore dismissed and the sentence of 12 months imprisonment without suspension confirmed.
17. The appeal is dismissed. The sentence of the court below is confirmed.

Dated at Port Vila this 18th day of February 2022

BY THE COURT



Chief Justice V. Lunabek

