

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

Criminal Appeal
Case No. 23/1798 COA/CRMA

BETWEEN: BILL IAKUMA, SIMEN KAPTEN, ROMIE NASSACK,
AND JACKSON KAMELU
Appellants

AND: PUBLIC PROSECUTOR
Respondent

Date of Hearing: 15 August 2023

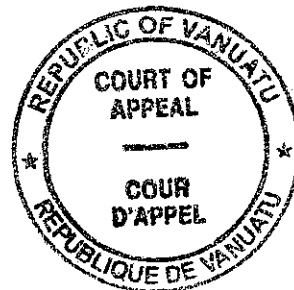
Coram: Hon Chief Justice V. Lunabek
Hon Justice JW von Doussa
Hon Justice R Asher
Hon Justice OA Saksak
Hon Justice VM Trief
Hon Justice EP Goldsbrough

Counsel: L Bakokoto for the Appellant
C Shem for the Respondent

Date of Judgment: 18 August 2023

JUDGMENT OF THE COURT

1. This is an appeal against sentence brought by Bill Iakuma, Simen Kaptén, Romie Nassack and Jackson Kamelu (Appellants) who were all sentenced at the same time for unlawful entry of a dwelling house and theft. Each received a partly suspended sentence of imprisonment together with an order requiring them to perform 150 hours of community work. It is against the decision not to wholly suspend the sentence of imprisonment and the number of hours of community work which leads to the submission that the sentences are manifestly excessive.
2. All four appellants were charged with unlawful entry of a dwelling house with intent to commit a crime. Bill Iakuma alone was charged with theft of a pair of shoes (recovered), and Jackson Kamelu similarly charged with stealing a second pair of shoes, also recovered. Simen Kaptén and Romie Nassack were charged with stealing 8 bottles of wine which were not recovered, but for which no value was determined.



3. The offences occurred during the day time when the dwelling house was not occupied. Video footage recorded the unlawful entry and the police soon arrested the Appellants. Some of the stolen property was recovered and returned to the owner. The stolen wine was not recovered. All of the four Appellants co-operated with the police investigation and admitted their guilt at the first available opportunity.
4. All of the Appellants are first time offenders.
5. The Appellants were each sentenced to imprisonment for their various offences: Kaptan and Nassack (the wine thieves) 13 months imprisonment and for lakuma and Kamelu (the shoe thieves) 10 months imprisonment. Those sentences of imprisonment were each partly suspended. Kaptan and Nassack were ordered to serve 3 months imprisonment with the balance of 10 months suspended for two years and lakuma and Kamelu 2 months imprisonment with 8 months suspended for two years. All four were additionally ordered to perform 150 hours of community work.
6. Whilst the sentencing remarks contain no reference to section 50 of the Penal Code, amended warrants of commitment show that the immediate sentences of imprisonment was ordered to start only after fourteen days after sentence had been delivered.

Discussion

7. Dwelling house burglary is and should, in our view, be regarded as serious and, even in the case of a first offender, can merit a sentence of imprisonment. But, as always, there are degrees of seriousness which attach to various scenarios. If the offence is committed during the hours of darkness when occupiers are most likely to be inside, perhaps sleeping, it should be regarded as more serious than an offence committed during the hours of daylight when the house is not occupied. If it is planned or premeditated it may be regarded as more serious, as it may be when gratuitous damage is caused during the commission of the offence. This list is not exhaustive.
8. This particular offence, in our view, falls in a less serious category. It was committed on the spur of the moment (there was no plan), it occurred during daylight when the house was not occupied, some of the stolen property was recovered and a customary reconciliation ceremony saw the exchange of goods of a value in excess of VT 30, 00 which would go some, if not all, of the way to compensate for the eight (not 9 as the judge referred to in his sentencing remarks) bottles of wine not recovered.
9. Whilst the offending does, in our view, merit consideration of a sentence of imprisonment, as it falls at the lower end of the scale, consideration of a wholly suspended sentence needs to be given.
10. Each of the Appellants was arrested and spent twenty one days in pre-sentence custody. They are entitled to be given credit for that when the sentence is finally determined in accordance with



section 51 (4) of the Penal Code. In his remarks the sentencing judge said "you were remanded in custody for about a month until you were granted bail". Twenty one days in actual custody represents a sentence of imprisonment of forty two days when automatic remission of 50% is taken into account.

11. The judge assessed a starting point of 28 months for Kapten and Nassack and 22 months for lakuma and Kamelu. The Appellants make no submission on the disparity and so there is no need for this court to consider whether the difference in terms of imprisonment is warranted. He then set out various discounts that he intended to apply to reach the end sentence. 10% was awarded for being first-time offenders, 5% was awarded for remorse, and cooperation, 33% for an early guilty plea. That would have the effect of reducing the starting sentences from 28 and 22 months to 13.44 and 10.56 months. Then the judge says "most significantly, you performed a customary reconciliation" but does not attribute any percentage discount to that and, finally, refers to the entitlement to some credit for the pre-sentence custody of "about a month".
12. In effect, the sentencing judge only took off the .44 and .56 of a month from the discounted sentences for these two factors. The end sentences were 13 months and 10 months.
13. Sentences of imprisonment are provided for in the Penal Code. The first provision appear in section 37. It provides: -

"If an offender is convicted of an offence punishable by imprisonment, the court must in addition to other sentencing options it may impose, have regard to the possibility of keeping offenders in the community so far as that is practicable and consistent with the safety of the community."

Given the nature of the offences, we are satisfied that a custodial sentence is indeed warranted.

14. Suspended sentence of imprisonment are provided for in section 57 of the Penal Code which provides: -

'57 (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'

15. Partly suspended sentences are provided for in section 58 of the Penal Code which provides: -



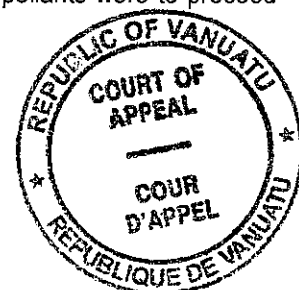
'58(1) If a court has decided that the case is so serious as to warrant imprisonment, and that it is not appropriate to suspend the whole sentence, it should consider whether there are grounds for suspending the sentence in part.

(2) A court may suspend a sentence in part if the sentence is for three years or less.'

16. A partly suspended sentence allows the offender to experience custody whilst not depriving him or her of their liberty for the whole period of imprisonment. Just as a wholly suspended sentence of imprisonment, is still imprisonment, more so a partly suspended sentence puts into effect the clanking of the prison doors effect some regard as deterrent. That deterrent was, perhaps, not necessary in this case as each Appellant had already experienced that very effect when they spent 21 days in pre-sentence custody.
17. A partly suspended sentence also requires the sentencing judge to undertake a balancing exercise between the need for a custodial sentence and the factors which weigh in favour of the offender. Having considered all of those factors, beginning with the nature and seriousness of the offences and the factors leaning towards suspension, we consider that a wholly suspended sentence together with a modest order for community work, is the appropriate sentence in this case.
18. The attention of this Court was also drawn to the number of hours of community work ordered to be performed. Counsel for the Respondent made the helpful concession that the order requiring 150 hours of unpaid community work, where the maximum number of hours permissible is 240, is excessive. He suggested an order between 50 and 80 hours as reasonable. We do not disagree and set the number of hours at 50.
19. A further provision of the Penal Code must be considered within this appeal and that is section 50. Section 50 does not apply to every offender, only those who appear before the Court to be sentenced whilst on bail. It provides:-

'If the offender has not been held in custody pending trial and no warrant of arrest or remand is issued against him or her at the time of conviction in the circumstances authorised by the rules of criminal procedure, no sentence of imprisonment may be enforced until the time of appeal against such sentence has expired or the offender earlier elects to begin serving his or her sentence.'

20. At the conclusion of his sentencing remarks, the judge made reference to the right to appeal within 14 days. No reference is made to whether the provisions of section 50 apply to these appellants. It is therefore not clear from the judgment whether the Appellants were to proceed directly into custody or benefit from 14 days to prepare themselves.



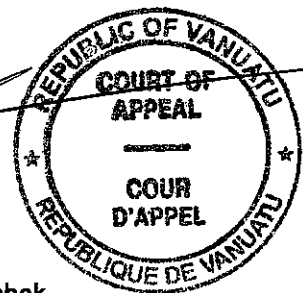

21. That only becomes clear from the amended warrant of commitment of imprisonment prepared and signed by the sentencing judge. It should have appeared in the sentencing remarks as, unlike the right of appeal, which applies to every person sentenced, section 50 applies in only limited circumstances. When the original warrant of commitment had been recalled by the issuing of an amended warrant, steps should have been taken to recall the original warrant from circulation.
22. In addition, whilst this appeal was pending, an application should have been made before the 14 period ended, for a stay of the decision. Otherwise, the Appellants were at risk of being arrested and detained under the sentence. Counsel are reminded that filing an appeal does not automatically stay the sentence. The assumption on which counsel acted in this case, that the Appellants could remain at large pending the appeal was wrong.

Decision

23. The appeal is allowed. The sentences of imprisonment in the case of all four Appellants are confirmed in length but wholly suspended for the same period of two years. The effect of suspension has already been explained to the Appellants and does not need to be repeated. The number of hours of community work to be performed is reduced from 150 to 50 hours. That work must be completed within the next twelve months.

Dated at Port Vila, this 18th day of August 2023

BY THE COURT



Hon. Chief Justice Vincent Lunabek