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

Criminal Appeal
Case No. 23/2599 COA/CRMA

BETWEEN: WILLIE TULA
Appellant

AND: PUBLIC PROSECUTOR
Respondent

Date of Hearing:	***7 November 2023***
Before:	***Hon Acting Chief Justice, Oliver A Saksak*** ***Hon Justice Dudley Aru*** ***Hon Justice Mark O'Regan*** ***Hon Justice Richard White*** ***Hon Justice William Hastings***
Counsel:	***F Kalsakau for the Appellant*** ***BN Tamau for the Respondent***
Date of Judgment:	***17 November 2023***

JUDGMENT OF THE COURT

Introduction

1. The appellant, a 32 year old with no prior convictions, pleaded guilty to three offences: threatening to kill a person in contravention of s.115 of the Penal Code and two offences of domestic violence in contravention of s.10 of the Family Protection Act.

2. The primary Judge sentenced the appellant to imprisonment for two years, 8 months and two weeks for the s.115 offence and to imprisonment for two years for the two offences of domestic violence (*PP v Tula* [2023] VUSC 161). Although the Judge did not say so expressly, it was common ground that the two sentences are to be served concurrently. The Judge considered that suspension of the sentence would not be appropriate.

3. The appellant appeals to this Court, contending first that the Judge had commenced with a starting point which was too high and had thereby reached an end sentence which was manifestly excessive and that the Judge had erred in refusing suspension of the sentence.

4. For the reasons which follow, we consider that the appeal should be dismissed.

Factual Circumstances

5. The appellant lived with his de facto partner (who was the complainant) and their five year old son. On the night of 10 April, the appellant became intoxicated after drinking alcohol with other men at the family home. He entered the house and woke the five year old son. It seems that by this time the two other men had left. The boy saw that his father was drunk, became fearful and ran away to hide in the dark. The complainant intervened and tried to assist the appellant to bed, but he slapped her on the face and kicked her on the leg. It was this conduct which was the subject of the second charge of domestic violence.

6. The complainant tried to calm the appellant, asking him to sit still so that she could wash his face with water so as to clear his head. The appellant swore at her and threw the laundry basket at her. The complainant became fearful and went outside to hide with the son in the bushes. The appellant picked up a machete and went around the yard looking for them saying in Bislama "*the two of you are hiding from me but do you want me to cut up the things inside the house?*". This was the conduct which was the subject of the second count of domestic violence.

7. The appellant then went back into the house and damaged the fridge with the machete and broke cups and plates. He said that if the complainant did not show herself he would set the house on fire. He did in fact start a fire but neighbours put it out before it could spread. At about this time, the appellant told the complainant and the son that, if they reported him to the Police, he would kill them both on his release from custody. This was the conduct which was the subject of the charge of threat to kill.

8. The complainant made a prompt report to the Police and the appellant admitted his conduct when arrested on 11th April 2023.

The Sentencing approach

9. The Judge noted that the maximum sentence for the s.115 offence is 15 years and that the maximum sentence for an offence of domestic violence is imprisonment for 5 years or a fine not exceeding VT100,000, or both.

10. After identifying factors which aggravated the offences (to which we will return), the absence of mitigating features and some decisions concerning sentences for like offences, the Judge took five years imprisonment as a global starting point for the three offences. Although not convinced that the appellant was remorseful, the Judge reduced the starting point by 1/3 (20 months) on the account of the appellant having entered pleas of guilty at the first opportunity. The Judge then deducted a further 10% (6 months) from the starting point of 5 years, on account of the appellant's personal factors.

11. The Judge then gave the appellant credit for time he had spent in custody after his arrest on 11 April 2023 until being released on bail which, the Judge noted, was effectively 1 ½ months.

12. Thus, on count 1 (the threat to kill charge) the Judge imposed a sentence of imprisonment for 2 years, 8 months, and 2 weeks. On counts 2 and 3 (the domestic violence charges) the Judge imposed a single sentence of imprisonment for 2 years imprisonment. The Judge concluded "*on balance*" that the sentence should not be suspended, in exercise of the discretion under s.57 of the Penal Code.

The Appeal to this Court

13. On appeals against sentence, this Court acts in accordance with the well known principle stated by Dixon, Evatt and McTiernan JJ in *House v The King* (1936) 55 CLR 499 at 505;

> *"it is not enough that the Judges composing the appellate Court consider that, if they had been in the position of the primary judge they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate Court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate Court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the Court of first instance."*

14. In the present case, Ms Kalsakau for the appellant sought to invoke both limbs of in *House v The King*, ie, by identifying specific errors by the Judge and by submitting, in the alternative, that even in the absence of specific error, the sentence imposed should be regarded as manifestly excessive.

15. In order to address the submission that the sentence is affected by specific errors, it is necessary to identify some further aspects of the Judge's reasons.

16. The Judge identified the following features as aggravating the offending and therefore to be taken into account in fixing the starting point in the manner indicated by *Public Prosecutor v Andy* [2011] VUCA 14 at [15];

    a) *The threat to kill was directed to both the complainant and the five year old boy;*

    b) *The use of the machete, which was characterised by the judge as a lethal weapon;*

    c) *The offending occurred in the presence of a child;*

d) *The offending took place in the complainant's home where she was entitled to feel safe;*

e) *The slap have been made to the complainant's face and the Judge noted that the head is the most vulnerable part of the body;*

f) *The gross breach of trust involved.*

17. Later, when distinguishing the case of *Public Prosecutor v Willie* [2022] VUSC 142 on which defence counsel relied on, the Judge said at [12]:

> *12. [Mr] Tula was armed with a lethal weapon, a machete, when he uttered to the complainant and their 5-year old son "if you report me to the Police, I will kill you both dead upon my release". He did so after the boy had understandably fled the house in fear of his father and after he slapped the complainant in the face and kicked her leg resulting in her also fleeing in fear. There is no basis to Ms Taleo's submission that Mr Tula's words were empty threats. Mr Tula's reaction to then search for them while armed with a machete, to threaten to destroy property in their house, then to do so with the knife, then set the house on fire and at the end of all of that to say to them that if they reported him to the Police, that he would kill them both on his release constitutes serious offending which must be marked by an appropriately severe sentence.....*

Regarding a breach of trust as an aggravating circumstance

18. Counsel submitted that it had been wrong for the Judge to regard the gross breach of trust as aggravating the domestic violence charges because, she submitted, it is inherent in the offence established by s.10 of the Family Protection Act that there will be a familial relationship between the offender and the victim and therefore that the offence will constitute a breach of trust.

19. This submission faces two difficulties. The first is that, while many s.10 offences will involve breaches of trust, such breaches are not an element of the offence nor necessarily an incident of every offence of domestic violence. This is evident from s.10 itself and from the definitions in ss.3 and 4 of the Family Protection Act. Section 10 provides (relevantly):

> *"A person who commits an act of domestic violence is guilty of an offence punishable upon conviction by a term of imprisonment not exceeding 5 years or a fine not exceeding VT 100,000 or both."*

20. Section 4(1) provides the meaning of the term "*domestic violence*":

> ***4 Meaning of domestic violence***
> *(1) A person commits an act of domestic violence if he or she intentionally does any of the following acts against a member of his or her family:*
>
> *(a) assaults the family member (whether or not there is evidence of a physical injury);*

(b) *psychologically abuses, harasses or intimidates the family member;*

(c) *sexually abuses the family member;*

(d) *stalks the family member so as to cause him or her apprehension or fear;*

(e) *behaves in an indecent or offensive manner to the family member;*

(f) *damages or causes damage to the family member's property;*

(g) *threatens to do any of the acts in paragraphs (a) to (f).*

21. The term "*family member*" used in s.4 is defined in s.3:

> ***3 Meaning of family member***
> *Each of the following is a member of a person's family:*
>
> (a) *the spouse of the person;*
>
> (b) *a child of the person and/or the person's spouse;*
>
> (c) *a parent of the person or the person's spouse;*
>
> (d) *a brother or sister of the person or the person's spouse;*
>
> (e) *any other person who is treated by the person as a family member.*

22. These definitions indicate that a relationship of trust is not a necessary incident of a s.10 offence. That is because persons may be in a familial relationship with the victims of their domestic violence but without having any obligation of trust or protection to the victim. By way of just one example, the offender and victim may live independently or be estranged. Thus, the appellant's submission breaks down at this point.

23. The second difficulty in the appellant's submission is that the Judge dealt with the aggravating features in a composite way, that is, without identifying the particular offence or offences which were affected by the identified aggravating feature. This being so, it is not to be supposed that the Judge intended to say that each identified aggravating feature was aggravating of each offence. It means only that the Judge has not identified the offences made worse by the particular aggravating features. Accordingly this ground of appeal fails.

24. We add that, while we are not satisfied that this ground is made out, we do suggest that it would be good practice for sentencing judges to identify the offences to which an identified circumstance of aggravation relates. This should enable judges to assess better the gravity of the particular offending for which sentences are being imposed and make apparent the judge's reasoning process.

Was the Appellant armed with the machete when he made the threat to kill?

25. As it is evident from the passages set out above, the Judge regarded it as significant that the appellant had been armed with the machete when he made the threat to kill. No doubt the Judge took this view because the threat could have been understood by the complainant and the child as a threat to kill them with the machete, and meant that they could think that the appellant had readily available means by which to make good his threat. The appellant's possession of the machete accordingly added to the seriousness of the threat and no doubt to the apprehension of the complainant and the 5 year old boy.

26. Counsel did not contest these matters but submitted that it had been wrong of the Judge to sentence on the basis that the appellant had the machete when he made the threat because it had not been established that the appellant still had the machete at that time.

27. Again, this submission faces difficulties. The first is that there was a proper basis in the Summary of Facts agreed between the prosecutor and the appellant for the Judge to sentence on the basis that the appellant had the machete when he made the threat. That Summary described the events as a continuum, without there being any suggestion that the appellant no longer had the machete at the time he made threat. We note in this respect that the offences to which the appellant pleaded guilty formed part of a single course of conduct occurring over a relatively short period of time.

28. Even if there was any ambiguity in the Summary of Facts, the Judge was entitled to proceed on the express concession of the appellant's counsel at first instance that, at the time of the making of the threat, "*the defendant was armed with a machete*".

29. We add that, whether the appellant was, or was not, holding the machete when he made the threat is of little significance, because both the complainant and the son are likely to have known that he had the means (and the evident disposition) to make good the threat, by reason of having immediate access to the machete.

Was there double counting in the references to the child?

30. The Judge had made two specific references to the child in the assessment of the aggravating features; that the threat to kill had been directed to both the complainant and the child, and that the offending had occurred in the presence of the child. Counsel contended that the involvement of the child should have been considered only once and that the two references by the Judge had led to the seriousness of the offences being overstated.

31. We think that this submission presupposes, incorrectly, that the assessment of circumstances of aggravation proceeds by an adding up of the identified individual aggravating factors. It does not. Instead the individual circumstances will ordinarily be evaluated in a nuanced way, so that notions of double counting are not appropriate. In any event, we consider that this criticism of the

Judge's reasons again overlooks that the Judge dealt with the aggravating circumstances in a composite way and without distinguishing between the individual offences. Plainly, it was an aggravating feature of the threat to kill that if was directed to two people and that one of them was a young child with limited ability to defend himself. The conduct constituting the first offence of domestic violence did not occur in the presence of the child but clearly the conduct constituting the second offence did. It was appropriate for the judge to treat that as a circumstance aggravating that offence.

32. Accordingly this alleged error is not made out. However we refer to our statement earlier of the desirability of sentencing judges identifying the particular offences to which the found aggravating circumstances relate.

The severity of the slap to the face and the threat to kill

33. While counsel accepted that a blow to the head, being a vulnerable part of the body, had the potential to result in very serious injury, she contended that the slap in this case was "*on the lower end of the scale*" and emphasized that it had not caused injury to the complainant. Counsel made a like submission with respect to the offence of threatening to kill, noting that the threat had not been followed by an actual attempt to carry it out. These two features mean, she submitted, that this was one of the less serious cases of domestic violence and one of the less serious kinds of threat to kill discussed in *PP v Brookman* [2012] VUSC 171.

34. As s.4 of the Family Protection Act indicates, the forms of conduct which will amount to an act of domestic violence are various and some will be more serious than others. There is no reason to suppose that the Judge overlooked that this was so. We do not regard the absence of an attempt to make good the threat to kill as significant. If there had been an attempt, the appellant would probably have been charged with the more serious offence pursuant to s.28 of the Penal Code. It is sufficient to resolve this ground of appeal by saying that we are not satisfied that the Judge made any error in characterising the overall offending as " *serious*", as indicated in [12] of the reasons set out above. This ground fails.

Setting fire to the house

35. It is evident from [12] of the sentence that the Judge regarded the appellant's setting fire to the house as part of his conduct contributing to the seriousness of the offending. Counsel for the appellant submitted that it had been wrong in principle for the Judge to regard the setting fire as an aggravating matter. She invoked the principle stated in *R v De Simoni* [1981] 147 CLR 383 at 383 at 389;

> *"[T]he general principle that the sentence imposed on an offender should take account of all the circumstances of the offence is subject to a more fundamental and important principle, that no one should be punished for an offence of which he*

has not been convicted..... The combined effect of the two principles, so far as it is relevant for present purposes, is that the judge in imposing sentence, is entitled to consider all the conduct of the accused, including that which would aggravate the offence, but cannot take into account circumstances of aggravation which would have warranted a conviction for a more serious offence"

36. Counsel noted that the *De Simoni* principle had been applied by the Chief Justice in *PP v Shing* [2015] VUSC 58 [21].

37. However, in urging the application of the principle on this Court, counsel did not identify the "*more serious offence*" for which the appellant could have been convicted for his setting fire to the house. She could have intended it to be arson [s.134 of the Penal Code] or malicious damage to property [s.133] but these offences concern conduct in relation to the property of another, and the property in this case appears to have been the appellant's own.

38. Quite apart from that consideration, it is noteworthy that the Judge did not mention the setting fire in [9] of the reasons in which the aggravating factors were identified. That conduct was mentioned only in [12] when, in the course of distinguishing *PP v Willie*, the Judge identified matters which indicated that the offending should be characterised as serious.

39. This ground of appeal fails.

Relevance of sentences in other cases

40. Counsel referred the Court to a number of sentences imposed in the Supreme Court for the offences of threatening to kill, intentional assault and domestic violence. These were *PP v Combe* [2016] VUSC 187*; Konpikon v PP* [2022] VUSC 96*; PP v Nakar* [2022] VUSC 59*; PP v Kalsa* [2022] VUSC 68 *and PP v Willie* [2022] VUSC 142. In each of these cases starting points of less than 5 years had been adopted. In the submissions at first instance counsel had referred the Judge to some, but not all, of these decisions.

41. It is important to keep in mind the proper role of resort to other sentencing decisions. In *PP v Andy* [2011] VUCA 14 at 16 and *Philip v PP* [2020] VUCA at [17], this Court has referred to the appropriateness of having regard to "*relevant judgments*" and "*comparable case authorities*" for consistency purposes. Comparable authorities are accordingly relevant to the extent they set out, or are indicative of prevailing sentencing standards, because it is by regard to these standards that consistency in sentencing is achieved. It is consistency in the application of the sentencing standards which is desired, not consistency with each other sentencing decision dealing with the same offence.

42. Obviously enough, the older an authority is, the less likely it is that it can be regarded as authoritative of a prevailing sentencing standard. That is because sentencing standards can

change over time. That may occur, for example, when the Court realises that an offence is occurring more frequently so that the sentences it imposes should reflect greater deterrence.

43. Moreover, as has been observed in other cases, the relevant comparison with other decisions is with the starting point. Thereafter, the decisions in other cases will often be influenced by factors relating to the particular offender, and by any time the offender has previously spent in custody. For these reason it will not usually be appropriate for counsel to engage in comparisons at minute levels of detail of the circumstances of individual cases and sentencing end points.

44. It has often been said that sentencing is not an exercise in logic. Nor should it be formulaic. Sentencing Judges do have discretion, within limits, in the fixing of an appropriate sentence in a given case. They can take account of the individual impressions of the accused which they form in the sentencing process and the submissions which may incline them to leniency. However, when sentencing judges do consider it appropriate to depart from a sentencing standard, it is desirable for them to give reasons for doing so. In this way there is transparency in the sentencing process. We did not consider that *PP v Willie* [2022] VUSC 142, on which the appellant placed particular reliance, should be regarded as indicative of a sentencing standard for the offences of threat to kill and domestic violence. The sentence imposed in ***Willie*** appears to be an instance of a merciful sentence and may well reflect particular impressions formed by the Judge during the sentencing process.

45. In the present case, the Judge's starting point of 5 years is higher than the starting point of 4 years applied in several of the decisions to which counsel referred. We note however that the Judge was fixing a global starting point for all 3 offences. It is to be expected therefore that the global starting point would be higher than the starting point for the offence of threatening to kill considered by itself.

46. We also note that, when sentencing for one offence of threatening to kill and one offence of domestic violence in *PP v Iatu* [2023] VUSC 71, the Chief Justice described the appropriate starting point as being between 3 and 5 years imprisonment, thereby indicating the broad range of the sentencing standard.

47. When regard is had in the present case to the maximum penalty for the 3 offences and the appellant's culpability in each, we do not consider that the starting point of 5 years, while high, was outside the permissible range so as to warrant this Court's intervention.

48. Accordingly, this ground of appeal fails.

The deduction for personal factors

49. At the hearing of the appeal, the appellant's counsel submitted that the Judge had failed to place sufficient weight on the matters personal to appellant, with the consequence that the judge had not given the full reduction which was appropriate. It was not suggested that the Judge had

overlooked any relevant personal factor, only that the Judge had not given the identified personal factors sufficient weight.

50. Strictly speaking, this submission was not based on any of the grounds in the appellant's notice of appeal, but counsel of the Public Prosecutor did not object to it being raised and determined by the Court.

51. In our view, this submission must fail. The reduction of 10% (6 months) from the staring point of 5 years for personal factors was well within the sentencing discretion and no error in the Judge's assessment of the matters personal to the appellant has been shown.

Were the sentences manifestly excessive?

52. We turn now to counsel's reliance on the second limb of *House v The King*. We have reviewed the circumstances of the offending and of the appellant himself in the reasons above. It is not necessary to repeat what we have said. In our view, the sentence in the present case, while perhaps at the upper end of the available range, cannot be characterised as so severe as to warrant appellate intervention.

The refusal to suspend

53. In declining to suspend the sentence, the Judge said;

> *[22]"Mr Tula's previous clean record, attempt to perform custom reconciliation ceremony and work prospects favour suspension of sentence. However, the seriousness of the offending and Mr Tula's lack of insight into the offending or remorse due to his explanation of the offending being the result of anger at his de facto partner and child leaving the house out of fear of him count against suspension of the sentences. On balance, I decline to suspend the sentences of imprisonment.*

54. As it is evident, the Judge regarded the matters bearing on suspension under section 57 of the sentences as balanced.

55. In seeking to impugn the exercise of the discretion concerning suspension, the appellant's counsel relied on many of the same matters which she had raised in contending that the starting point of 5 years was too high. We have already rejected those criticisms of the Judge's reasons. The appellant also repeated many of the submissions that had been made to the Judge, without identifying any specific errors in the way the Judge had dealt with them.

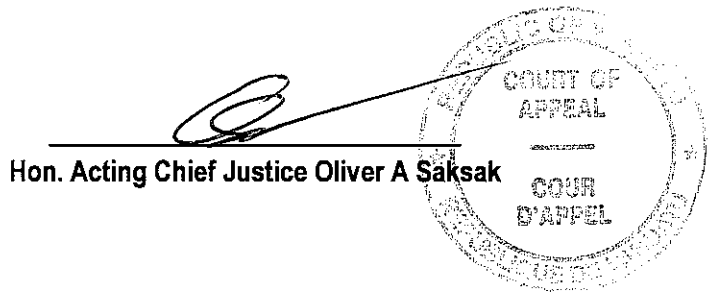
56. In the absence of a specific error, the appellant has to rely on the second limb of *House v The King*. In our view, the refusal to suspend was well within the sentencing discretion and the appellant has not shown any basis upon which appellate intervention would be justified. This ground of appeal fails.

Disposition of the Appeal

57. For the reasons set out above, the appeal is dismissed.

DATED at Port Vila this 17th day of November 2023

BY THE COURT



Hon. Acting Chief Justice Oliver A Saksak