

BETWEEN: Kenneth Kalo
Appellant

AND: Public Prosecutor
Respondent

Date of Hearing: 7 November, 2023

Coram: Hon. Acting Chief Justice Oliver A. Saksak
Hon. Justice Dudley Aru
Hon. Justice Mark O'Regan
Hon. Justice Richard White
Hon. Justice Edwin P. Goldsbrough
Hon. Justice William K. Hastings

Counsel: PK Malites for Appellant
C Shem for Public Prosecutor

Date of Judgment: 17 November 2023

JUDGMENT OF THE COURT

Introduction

1. The appellant, Kenneth Kalo, pleaded guilty in the Supreme Court to one charge of domestic violence contrary to s 4(1) of the Family Protection Act 2008, one charge of threatening to kill contrary to s 115 of the Penal Code [Cap. 135], and one charge of intentional assault contrary to s 107(b) of the Penal Code [Cap. 135]. The maximum penalty for threatening to kill is 15 years' imprisonment, the maximum penalty for domestic violence is five years' imprisonment or a fine of VT 100,000 or both, and the maximum penalty for intentional assault is five years' imprisonment.
2. The appellant was sentenced to imprisonment for two years and seven months on the threatening to kill charge, two years' imprisonment on the intentional assault charge, and six months' imprisonment on the domestic violence charge (*Public Prosecutor v Kalo* [2023] VUSC 164). The sentencing judge suspended these sentences for two years under s. 57 of the Penal Code and ordered the appellant to do 100 hours of community work.



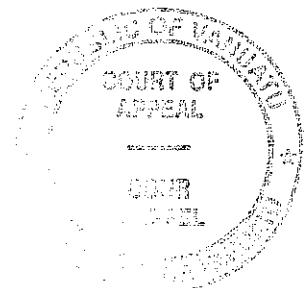
3. The victim of the offending was the appellant's de facto partner.
4. The appellant appeals to this Court against sentence.

Facts

5. The facts are set out in the judgment of the Supreme Court. For present purposes, it is sufficient to recount that the appellant went to the victim's workplace, a bar. He became angry with her, threw alcohol from a glass at her, and told her to go outside. She said she became afraid when he hit a table with his hand. A security guard prevented his re-entry to the bar. This was the basis for the first charge, domestic violence.
6. After this, the victim went to her friend's house where she stayed for the rest of the day. The appellant arrived that night and told her that if she did not come home with him, he would kill her with a hammer ("*Sapos yu no wantem folem mi go lo haos, bae mi kilim yu ded lo hammer*"). Afraid of what he said he would do, the victim went home with him. This was the basis for the second charge, threatening to kill.
7. When the victim returned home from work the next day around 10pm, she knocked on the door and the appellant opened it. When she tried to enter, he squeezed her neck with his hands. She managed to free herself and ran off. She returned a while later thinking he was no longer angry with her. As soon as she entered the house, he turned off the lights and assaulted her. Her sister said she saw the appellant kick her face and beat her repeatedly. As a result of the assault, she suffered a laceration on her forehead requiring five stitches, bleeding from her nose, a laceration on her upper lip and facial swelling. This was the basis for the third charge, intentional assault.
8. The appellant admitted his offending to the Police.

Supreme Court sentence

9. At the sentencing hearing, the prosecution submitted that a global starting point of between two and three years was appropriate. The defence submitted a global starting point of two years was appropriate. The sentencing Judge adopted a global starting point of four years' imprisonment.
10. The Judge commented there were no mitigating aspects of the offending but it was aggravated by the following factors:
 - a) the breach of trust;
 - b) the shame and humiliation caused to the victim at her workplace;



- c) the fact that some of the offending occurred in the home where the victim was entitled to feel safe and protected;
 - d) the fact that the offending occurred at night;
 - e) the repeated nature of the violence;
 - f) the demonstrated controlling attitude of the appellant;
 - g) the fact that there was some planning involved in switching off the lights before assaulting the victim; and
 - h) the effect the offending had on the victim, including fear and injuries to her head which is the most vulnerable part of the body.
11. The sentencing Judge then made a 25 percent allowance for the appellant's guilty plea. The Judge said the plea was made at the first opportunity and spared the victim having to give evidence, but the allowance was not greater because the prosecution case was strong. The 25 percent discount was applied to the global starting point.
12. The Judge allowed a further global discount of 15 percent to reflect mitigating factors including:
- a) the appellant was 27 years old, had a four year old son with the victim, and hoped to travel to Australia for seasonal work, to buy land, and to build a house for his family;
 - b) the appellant had no previous convictions;
 - c) the appellant was willing to perform a custom reconciliation ceremony but the victim refused;
 - d) he was said to be remorseful; and
 - e) he did not breach his bail conditions for two years.
13. After taking these mitigating factors into account, the sentencing Judge imposed the sentence set out in paragraph 2 above.

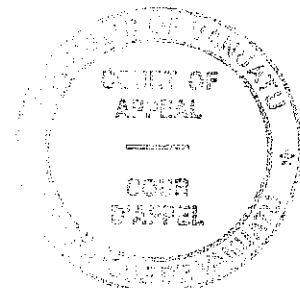


Ground of appeal

14. The appeal is advanced on the ground that the starting point of four years' imprisonment was too high, resulting in a manifestly excessive end sentence.
15. Counsel for the appellant Mrs Malites submitted that the starting point was out of line with the sentencing submissions made to the Judge, and with comparable authorities in the Supreme Court. She also submitted that the sentencing Judge wrongly considered fear to be an aggravating factor of the threatening to kill charge, and wrongly considered the physical injuries to the head to be an aggravating factor of the intentional assault charge. She submitted both were inherent in the charges themselves. She submitted that on the facts of this case, the Judge ought to have adopted a starting point no higher than three years.
16. Mr Garae for the Public Prosecutor submitted that the sentencing Judge made no error and was not bound by the Supreme Court judgments referred to the Judge. He submitted the end sentence was within range, was not manifestly excessive, and indeed could be considered lenient in light of the suspension.
17. We will deal with each of these submissions in turn.

Supreme Court authorities

18. Mrs Malites referred to a number of Supreme Court authorities on sentencing for domestic violence, threatening to kill and intentional assault. She submitted the sentencing Judges in those cases referred to aggravating factors equivalent to, or worse than, the aggravating factors in this case, but adopted starting points of between three years and three years and six months' imprisonment. Those authorities included *Public Prosecutor v Willie* [2022] VUSC 135, in which the Supreme Court adopted a starting of three years for offending involving hanging the victim by an electric wire wrapped around her neck in front of her children; *Public Prosecutor v Nimani* [2023] VUSC 186 in which the Supreme Court adopted a starting point of three years' imprisonment for offending involving beating the victim with a branch and later a piece of timber that caused a laceration requiring five stitches; *Public Prosecutor v Isaac* [2022] VUSC 220 in which the Supreme Court adopted a starting point of three years' imprisonment for offending involving three victims, the use of a bush knife to cut the clothing of one of the victims and throwing the other victims against a wall and a door; and *Public Prosecutor v Kalsa* [2022] VUSC 68 in which the Supreme Court adopted starting point of three years and six months' imprisonment for offending that took place over a year and involved the use of a knife, destruction of property and squeezing of the victim's neck.



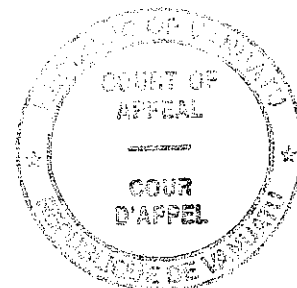
19. We accept that it is important to maintain consistency in sentencing. In *Public Prosecutor v Philip* [2020] VUCA 40, this Court said that the starting point is established by “considering the aggravating factors relating to the nature of the offending, the seriousness and culpability of the offending, the maximum penalty and the comparable case authorities for consistency purposes.” Similarly, this Court said in *Nampo v Public Prosecutor* [2018] VUCA 43, that while no two cases are identical, “it is a fundamental principle of justice that like cases are treated in a consistent and like manner.” Nevertheless, the use of numerous first instance sentencing cases must not be allowed to overwhelm the sentencing Judge’s assessment of the facts of the case before him or her. Consideration of comparable case authorities was merely one of four factors identified by this Court in the passage cited from *Philip* that are used to establish a starting point. The sentencing Judge’s primary concern must be to impose a sentence that reflects the relevant purposes of sentencing, which in cases such as this must include deterrence, and the culpability of the offender being sentenced. We see no error in the sentencing Judge not explicitly referring to each of the authorities referred to by the Judge in the sentencing judgment.

Aggravating factors

20. Mrs Malites accepted there were a number of aggravating factors in this case, but she took issue with the sentencing Judge’s identification of fear and the physical injuries suffered by the victim to her head as aggravating factors. She submitted fear was inherent in the charge of threatening to kill, and the injuries to the victim’s head were inherent in the charge of intentional assault.
21. We disagree. Fear is not inherent in the charge of threatening to kill. It is not an element of the offence so it cannot be inherent in it. The prosecution does not have to prove the victim had fear as a result of the threat in order to succeed in a prosecution for threatening to kill. Similarly, s 107 of the Penal Code makes it clear that an intentional assault can be committed if no physical damage is caused. The elements of the offence concern the *mens rea* and *actus reus* of the offender, not the victim. The effect of the offending on the victim is relevant only to sentence. The extent of the victim’s fear and the injuries caused by the offending were properly considered as aggravating factors by the sentencing Judge.

The fact of suspension

22. We consider it would be artificial not to take into account the fact that this sentence was suspended in deciding whether the end sentence was manifestly excessive. The appeal is from the order of the Supreme Court. The order of the Supreme Court included suspending the end sentence of two years and seven months for two years. Suspension introduces a degree of leniency into the end sentence. The suspension of the end sentence therefore is relevant to our assessment of whether the end sentence was manifestly excessive.



Result

- 23. Although the Judge's starting point of four years' imprisonment was towards the top end of the available range, we are satisfied that the starting point adopted by the Judge, in light of the aggravating factors the Judge took into account and the sentence suspension, did not produce a manifestly excessive end sentence.
- 24. We therefore dismiss the appeal.

DATED at Port Vila this 17th day of November, 2023.

BY THE COURT


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Hon. Acting Chief Justice Oliver A. Saksak

