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

Criminal Appeal Case No. 24/2207 COA/CRMA

BETWEEN: JEAN LUC TEVI
Appellant

AND: PUBLIC PROSECUTOR
Respondent

Date of Hearing:	***4 November 2024***
Coram:	***Hon. Chief Justice V. Lunabek*** ***Hon. Justice R. White*** ***Hon. Justice O. A. Saksak*** ***Hon. Justice D. Aru*** ***Hon. Justice V. M. Trief*** ***Hon. Justice M. A. MacKenzie***
Counsel:	***P. Malites for the Appellant*** ***L. Young for the Respondent***
Date of Decision:	***15 November 2024***

JUDGMENT OF THE COURT

Introduction

1. The appellant, now aged 35, was sentenced to imprisonment for 35 months and 1 week in respect of three offences:

   (a) a threat to kill, contrary to s.115 of the Penal Code (maximum penalty: imprisonment for 15 years);

   (b) domestic violence, contrary to s.10(1) of the Family Protection Act (maximum penalty: imprisonment for 5 years or a fine of VT100,000 or both);

   (c) intentional assault, contrary to s.107 of the Penal Code (maximum penalty: imprisonment for one year).

2. The sentencing Judge declined to suspend the sentence.

3. The appellant now appeals against the severity of the sentence. He contends that this Court should impose a lesser sentence, but does not contend that the substituted sentence should be suspended.

Factual circumstances

4. Each of the appellant's offences was committed against his de facto wife in a single course of conduct on 2 December 2023. At that time, the appellant's wife was six (6) months pregnant.

5. The offending began with the Appellant slapping his wife about her head. He was angry, having suspicions that she had been associating with another male and that that other male was the father of his wife's unborn child. This was the conduct constituting the offence of domestic violence against a family member in contravention of s.10 of the Family Protection Act.

6. The appellant then threatened to kill his wife, saying (in Bislama): "*Today I will kill you dead, and I will cut to death Marie Rose and I will cut your stomach and kill the one inside you*". The appellant's reference to Marie Rose was a reference to the daughter of his de facto wife who had been born during an earlier relationship. This conduct constituted the offence of making a threat to kill.

7. After a repetition of the threat, and being alarmed, the appellant's wife left for the safety of a neighbour's house. The appellant followed her there and, despite the neighbour's protestations, kicked her in the back and stomach in an apparent endeavour to make good his threat of harm to the unborn child. This conduct constituted the intentional assault, in contravention of s.107(b) of the Penal Code.

8. At the time of the offences, the appellant was affected by both kava and alcohol.

The approach to sentence

9. Understandably, the Judge regarded the Appellant's offending as serious: it involved repeated conduct, continuing even after the appellant had had the opportunity to calm down, had commenced in the family home in which his wife was entitled to feel safe, and had continued in the neighbour's house despite the neighbour's intervention.

10. The Judge considered it appropriate, correctly in our view, to regard the three offences as occurring in the one course of conduct and therefore for the sentences to be made concurrent. He imposed the same sentence for each of the three offences, and no complaint is made on the appeal about that.

11. The Judge commenced with a starting point of imprisonment for 40 months. He made a global reduction of 10% from that starting point on account of the appellant's late pleas of guilty and for his personal factors, and made a further reduction of 3 weeks on account of the time (thought by the Judge to be 11 days) which the appellant had already spent in custody. This resulted in the sentence of 35 months and 1 week to which we referred earlier.

The Starting Point

12. Ground one in the Notice of Appeal is that the Judge had erred in using "*a very high global starting point*". However, at the hearing, the appellant abandoned that ground. That appears to have been a wise decision as the Judge's starting point of 40 months may well have been lenient, particularly having regard to the evidence concerning the appellant's attempts to harm the unborn child and the fact that he was being sentenced for three offences. However, given that the starting point was not in issue on the appeal, it is not necessary to address it further.

Errors in the sentence

Allowance for time in custody

13. Both counsel agreed that the Judge was in error in the allowance for the time the appellant had already served in custody (11 days). In fact, the appellant had served 17 days in custody before being granted bail.

14. In accordance with the practice commonly adopted, this should have entitled the appellant to a reduction of 34 days. Counsel agreed that that practice should have been followed in the present case. We agree.

15. For this reason alone, the appeal must be allowed and the appellant re-sentenced.

Allowance for the late pleas of guilty

16. The appellant did not enter, or even indicate, pleas of guilty until the morning of the day on which his trial for the three offences was to commence. At that time, the prosecution had arranged the attendance of five (5) witnesses and had indicated to the appellant's counsel that it did not intend to call the appellant's wife as one of those witnesses.

17. As noted, the Judge made a global deduction of 10% from the starting point on account of both the late pleas of guilty and the appellant's personal factors.

18. The appellant contends that this reduction was inadequate.

19. The rationale for reducing an otherwise appropriate sentence on account of an offender's pleas of guilty is well known: see *Pipite v Public Prosecutor* [2018] VUCA 53 and *Taviti v Public Prosecutor* [2016] VUCA 41 at [16]. In the latter case, this Court identified three principal reasons for a reduction in sentence on account of a plea of guilty:

> *"First, it relieves victims and witnesses of the trauma, stress, and inconvenience that is caused by a delay in resolving the case and by the trial itself, particularly the need to give evidence. Secondly, it avoids the need for a trial, with the attendant advantages of a reduction in Court delays and costs savings. Thirdly, it generally indicates a degree of remorse. At the very least, it represents an acceptance of responsibility for the offending. (The Queen –v- Hessell [2009] NZCA 450).*

20. An aspect of the second rationale is the public benefit resulting from the saving of Court and prosecution resources resulting from pleas.

21. Having regard to these rationales, it was not correct for the Judge to say in this case that "*the only value of your late guilty plea was to save [the witnesses] the further anxiety of giving evidence in Court*".

22. In the present case, even though the appellant's pleas of guilty were made late, the rationales identified above still entitled him to some reduction from the starting point.

23. Sentencing practice in Vanuatu requires sentencing judges to identify separately the reduction allowed for pleas of guilty. The staged approach to sentencing outlined in *Public Prosecutor v Andy* [2011] VUCA 14 at [15] – [19],as varied in *Philip v Public Prosecutor* [2020] VUCA 40 at [21], requires that mitigating factors and reductions for guilty pleas be addressed separately. The deduction for a guilty plea, when applicable, is a discrete stage in the process. It is generally calculated as a percentage of the starting point.

24. We add that identifying separately the reduction allowed for a plea of guilty adds to transparency in the sentencing process, allows offenders to see the effect which their pleas have had on the ultimate sentence and provides some indication to future offenders (and those advising them) of the reductions which can be expected in particular circumstances.

25. As to the extent of the reduction which was appropriate in this case despite the late pleas, we note that this Court said in *Jackson v Public Prosecutor* [2011] VUCA 13 at [17] in relation to pleas entered just prior to the start of the trial that:

> *"... A discount of as low as 10% to15% for the guilty pleas alone would have been realistic. ...."*

26. In this case the pleas were entered immediately before the trial was due to commence. Courts should maintain a clear distinction between the reductions available in that circumstance and the reductions available when pleas are made or indicated at an earlier time. For this reason, we think that a reduction of 10% for the appellant's late pleas of guilty would have been appropriate.

27. It follows that the Judge's *global* reduction of only 10% for *all* factors was in error. Both this error and the Judge's error as to the limited significance to be given to the late pleas also warrant the appeal being allowed and the appellant being re-sentenced.

Reduction for personal factors

28. In relation to the appellant's personal circumstances, the Judge said only:

> *"You have not appeared before in a Court charged with criminal offences. That is to your credit. You told the officer who wrote the Pre-Sentence Report that you had your suspicions after reading the text messages on your partner's mobile phone and that raised the question of who may have fathered the unborn child. You have made offers of reconciliation although that has not taken place."*

29. The Judge said that there were no other mitigating factors.

30. However, on the appeal, counsel noted that the materials before the Judge had disclosed additional matters concerning the appellant's personal circumstances: he has three (3) children for whom he is a responsible parent; that he provides appropriately for his family; that he is remorseful and that he had made that remorse manifest by apologising for his conduct.

31. In relation to reconciliation, the Judge said "*You have made offers of reconciliation although that has not take place*".

32. However, there had been a custom reconciliation ceremony between the appellant's family and the complainant and her family at Luganville on 19 February 2024. The complainant and her family have accepted that reconciliation, including the reparation of a mat, a pig and some kaikai. Counsel for the Public Prosecutor submitted that account could not be taken of this ceremony or the reparation because the appellant had not participated personally. Counsel accepted however that the reason the appellant had not attended was because he had been precluded by the terms of the bail granted on 20 December 2023 from leaving Port Vila without the leave of the Court.

33. While it is generally to be expected that reconciliation ceremonies will be conducted in person, that is not required by s.38 of the Penal Code. Further, by its use of the term "*must*", s.39 of the Penal Code *requires* a sentencing court, in assessing the penalty to be imposed to take account of any "*compensation or reparation made or due by the offender*" – see the discussions in *Public Prosecutor v Gideon* [2002] VUCA 7 of the former s.119 of the Penal Code.

34. In our view, s.39 is sufficiently flexible to encompass compensation or reparation made by an offender through the agency of others.

35. Accordingly, the sentencing Judge erred in failing to have regard to the evidence of the custom reconciliation and to the reparation made to the wife and her family.

36. The appellant's personal circumstances together with the additional mitigating circumstances to which we have referred warranted by themselves a further reduction of 10% (4 months). This also means that, in allowing a global reduction of only 4 months for the late pleas of guilty *and* the appellant's personal circumstances, the Judge erred.

Conclusion

37. For the reasons given above, the appeal is allowed. The sentence imposed by the sentencing Judge is set aside. In its place, the appellant is sentenced to imprisonment for 31 months and 26 days, with that sentence to be taken to have commenced on 10 July 2024. A fresh warrant of commitment will be issued to the Director of Correctional Services.

DATED at Port Vila, this 15th day of November, 2024

BY THE COURT

REPUBLIC OF VANUATU COURT OF APPEAL COUR D'APPEL REPUBLIQUE DE VANUATU

Hon. Chief Justice Vincent Lunabek