

PUBLIC PROSECUTOR - v - PAUL WARE

Coram: Chief Justice Vincent Lunabek

Counsel: Mr Bernard Standish for the Public Prosecutor
Mr Christopher Bennett and Mr Jacob Kausiama for the Defendant

SENTENCE

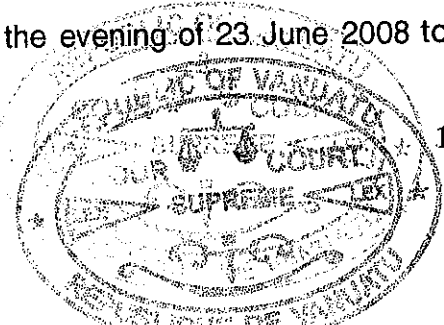
I - INTRODUCTION: NATURE OF INFORMATION CHARGE

This is the sentence of the Defendant, Paul Ware. Paul Ware you were charged with the following criminal offences:

- (1) Unlawful Entry, contrary to Section 143(1) of the Penal Code Act [CAP.135] [CAP.135] (in count 1);
- (2) Intentional Homicide, contrary to Section 106(1)(a) of the Penal Code Act [CAP.135] (in count 2);
- (3) Theft, contrary to Section 125(a) of the Penal Code Act [CAP.135]; and
- (4) Damage to Property, contrary to Section 133 of the Penal Code Act [CAP.135].

II - BACKGROUND INFORMATION: INVESTIGATION, PRELIMINARY INQUIRY, PLEAS.

You were interviewed by police over several days, in the presence of you lawyer. You admitted having attended at the Tak Store on the evening of 23 June 2008 to



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make a purchase, but denied any involvement in the killing of Mrs Leong ("the victim"). You told numerous lies to Police as to your whereabouts during the course of those interviews.

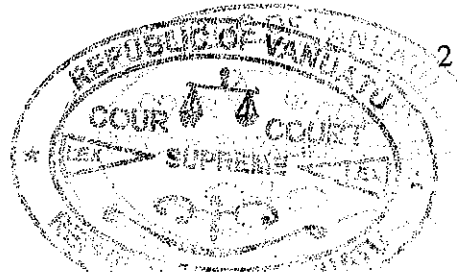
A crime scene had been established at the Tak Store. Scenes of crimes of crimes officers examined the store for the presence of fingerprints and other evidence. Your fingerprint was located on the monitor of the computer which you damaged during the commission of offences. Videotape from a number of CCTV's was obtained and that videotape showed the commission of the offences, although the quality of the tape was not sufficient, by itself, to identify you as the perpetrator.

A number of TVL telecards were located during the execution of the search warrant at the prisoner's home. Police enquiries with TVL revealed that those telecards had been issued and delivered to the Tak Store several days before the offences were committed.

Police seized a pair of Nike running shoes and a 500 Vatu note from which both had blood stains on them. Those items were forwarded to Australia for forensic analysis. The analysis revealed that the blood on the shoes and the money was identical to that of the victim.

You appeared in the Magistrate's Court where the case was adjourned several times. On 2 September 2008, at the conclusion of a Preliminary Inquiry, you were committed to stand trial in the Supreme Court.

You first appeared in the Supreme Court on 15 September 2008. The matter was adjourned until 23 September 2008, at which time proposed trial dates to run from 12-21 November 2008 were set down, together with a pre-trial conference on 15 October 2008. At the pre-trial conference on 15 October 2008, a further pre-trial conference was scheduled for 10 November 2008. At the pre-trial conference on 10 November 2008, the original trial dates were vacated on the indication given that you intended to plead guilty. The matter was adjourned until 19 November 2008 for further arraignment. On 19 November 2008, you were re-arraigned and again



pleaded not guilty to Intentional Homicide. The matter was adjourned until 15 December 2008 for conference, at which time it was adjourned for trial on 18-19 and 23-27 February 2009. On 17 December 2008, you applied for bail, which was refused. On 15 January 2009, at your request, you re-appeared in the Supreme Court and were once again arraigned. On that date, you pleaded guilty to all counts and the matter was adjourned until 18-19 February 2009 for sentence. A Pre-Sentence Report is passed on you today 20 February 2009.

III - SUMMARY OF FACTS

The summary of facts are contained in the prosecution briefs and also from my own viewing of the CCTV footage.

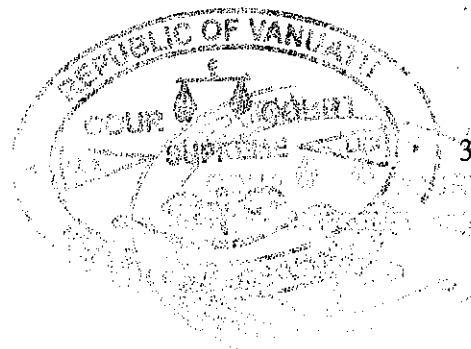
The facts in this case are not disputed by the defence. They are set out as follows:

Sometime between 23 June and 24 June 2008, you entered the Tak Store at Coffee Area, Port-Vila. That was about 19:42 hours (7:43PM as seen on CCTV footage). At about 19:47 hours (7:47PM) you left the shop without purchasing any goods from that shop.

Sometimes at about 20:02 hours (8:02PM) you enters the shop again, at that time you wore a bonnet hat, a black handbag on your shoulders and went straight to the right section of the shop as soon as you enter (or on the left section of the CCTV Footage). You were not seen again leaving the shop until 21:17 hours (9:21PM).

During those times you were in the shop, the shop assistances and the decease were carrying out their duties as usual and did not know that you were in the shop.

At 20:39 hours (8:39PM) the shop closes. The deceased locked the shutters and doors from the inside and remain inside the shop. She went to the staff counter to check the day's earnings.



While she was at the staff's counter, you walk and then crawl towards her. (It is to be noted here that inside the shop there are shelves placed around, so the deceased not see him). At that time you held an axe.

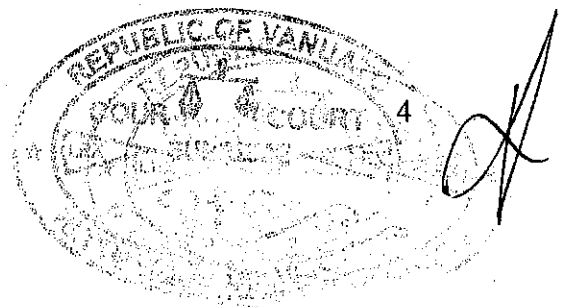
As soon as you approached the deceased you assaulted the deceased with the axe on her forehead and hold and pushed her down under the staff counter. You then assaulted her twice (2) again on her head as soon as you saw her move. After that you stayed around the counter for a while and then left to the left section of the shop (as seen on CCTV footage).

You walked around that section and then returned to the staff counter after you saw the deceased got up from under the counter. You approached her with a long object and held her left hand. While the deceased was struggling to get out of you, you took the axe and assaulted her three (3) times to the head. At that time they had moved from the staff counter to the first shelf in front as soon as you enter the shop. Behind that shelf the deceased fell to the floor. You continue to assault her three (30) time while she was on the floor with the axe. On the third occasion, you assaulted the deceased again with the axe when the deceased tried to get up. This caused her to fall down.

You decided to walk away but then return back and assaulted the deceased another four (4) times). The fourth time you gave a hard blow as you assaulted the deceased with the axe.

After those assaults on the deceased, you continue to observe her while walking around inside the shop. During those times you went to the staff counter and the deceased counter and took money and other items there. You also had you black hand bag again on you.

After some times inside the shop you observed that the deceased started moving, so you went up to a shelf that had bottles of Soya Sauce displayed on it and took one of the bottle and went and assaulted the deceased on it.



Then you went on walking around the shop and then went back to observe the deceased. You observed her moving, so you went to the shelf that had Soya Sauce bottles and took one bottle of Soya Sauce, went and assaulted the deceased twice (2) with that bottle.

After that you went around again and then went to the door, opened it and lay down doing something and then got up.

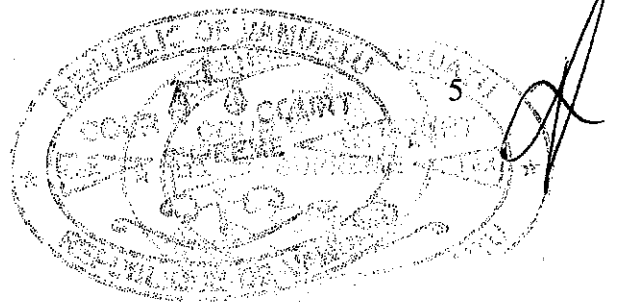
You went around the shop again and sometimes after, changed your clothes, and walk straight to the door again and did the same, open the door, and lay down doing something and then got up again and walk around the shop.

You then walk to where new hand bags were displayed and removed one. You removed the things inside the new hand bag, remove the one on your shoulder and filled it inside the new hand bag and then approach the door wearing the new hand bag to your shoulders. You did the same, open it, lay down and then got up and walk around the shop.

You went to the door again, did the same but got up and went and observed the deceased. At that time you saw the deceased moved. You went to the shelf of the Soya bottles and took one of the bottles and went to where the deceased was, but decided to put back the bottle and went straight to the door. After that you return to observe the deceased. Then you went back to the door on several occasions, doing the same as stated above, open the door, lay down and stood up again. On the fourth occasion you open the door, lift the shutters up, closed the door while outside the shop, and close the shutters and left the premises. That was about 21:17hours (9:17PM).

During those times you were inside the shop, you damaged a monitor screen and stole from the shop some money, Telecom Vanuatu Limited, T-shirt, and a hand bag.

During those times you assaulted the deceased with the axe used the forehead of the axe not the sharp end.



After you left, the deceased got up and walked to the door, to her counter and then to the staff counter. During those times she struggled to walk properly. At the staff counter, she fell twice. The second time she fell to the floor she died. That was about 22:17 hours (10:17PM).

The next day, she was discovered by her husband, who informed the Police and the deceased body was removed to the hospital.

On 28 June 2008 a Post Mortem examination on the deceased was done, as shown in the photographs disclosed in the Preliminary Inquiry documents and a report was given. The Report reported that the cause of the death is acute blood loss, cerebral trauma and extensive comminuting fracture of the skull and repeated blunt force trauma to the head.

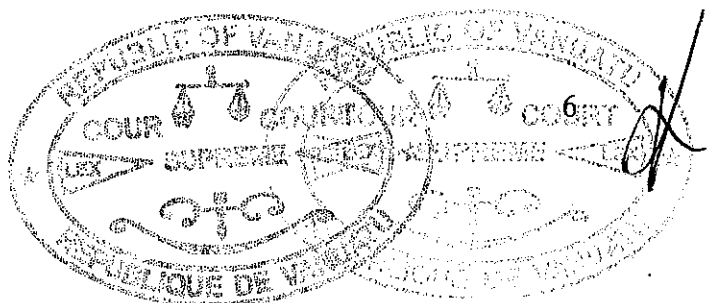
During the police investigation they had confiscated the T-shirt, hand bag, some money, Nike shoes, trousers and Telecom Telecards.

The Nike shoes and a 1 x VT500 note had blood stain on them, and were sent by the Vanuatu Police Force (VPF) to Australia to the Australian Federal Police (AFP) for forensic analysis. The results had shown that the blood on the Nike shoes and VT500 note are identical to the DNA profile obtained from the deceased.

III - THE LAW AND THE SERIOUSNESS OF THE OFFENCES

Defendant, Paul Ware, you have committed the following very serious offences. I set them out with their respective maximum penalties:

- (1) Unlawful Entry, contrary to Section 143(1) of the Penal Code Act. The maximum penalty for this offence is 10 years.
- (2) Intentional Homicide, contrary to Section 106(1)(a) of the Penal Code Act. The maximum penalty imposed by Parliament is 20 years imprisonment.



- (3) Theft, contrary to Section 125(a) of the Penal Code Act with a maximum penalty of 12 years imprisonment.
- (4) Damage to Property, contrary to Section 133 of the Penal Code Act. No maximum penalty is specified within the Penal Code Act [CAP.135] for this offence. As a result under the provisions of section 36 of the Interpretation Act, the maximum penalty is one of 12 months imprisonment and/or a fine of 5,000 Vatu.

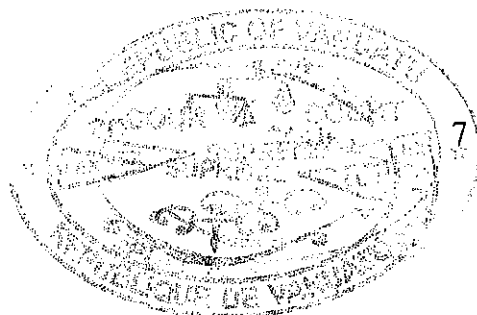
The statutory maximum penalties prescribed by the legislature for the above offences manifest its policy in the enactment of the maximum penalty which may be imposed. They are very serious offences. Intentional homicide falls within the classification of the most serious criminal offences.

Paul Ware, the unlawful taking of another person's life is never justified and is rightfully condemned by the community. The Parliament, in setting a maximum penalty of 20 years imprisonment, has indicated that the Courts are to impose condign punishment for offences of this type. The offending in this case was particularly serious.

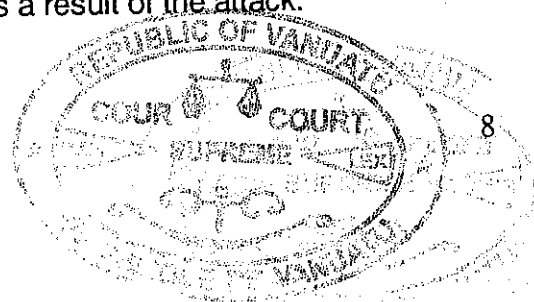
I note that the first offence you committed was that you were unlawfully entering into Tak Store with the intention of committing a criminal offence in the shop. If your primary motivation was to rob the store, you needed only to show the victim the weapon you held in order to demand that she handed over the money to you. However, instead you killed her and the circumstances of the killing of the victim old woman is one of the most serious examples of intentional homicide ever seen in Vanuatu.

IV - AGGRAVATING FACTORS

The following aggravating features accompanied the crimes you had committed:



1. The offences involved a high degree of planning. You entered the Tak store about 30 minutes prior to closing time, made a small purchase and then walked back outside. It can reasonably be concluded that you did so to check to see what staff were on duty inside the store, prior to committing the offences.
2. The only person on duty was the victim, a vulnerable woman 66 years of age (DOB 14 May 1942), who was slightly built, weighing only between 40-60 kilograms.
3. You re-entered the store and hid inside until the store was closed for trading.
4. You emerged from your hiding place, armed with a small axe, and approached the victim from behind while she was concentrating on reconciling the store's daily takings.
5. You struck the victim in the head, from behind, without warning. You repeatedly struck her even when she was disabled from the initial blows. The attack was vicious, brutal and cowardly. It was unnecessary to continue attacking the victim in the manner in which you did. The attack was extremely callous and in the nature of torture of the victim.
6. You remained in the store for a lengthy period of time while the victim lay dying on the floor. You provide no assistance to her, nor did you notify anyone that she was severely injured (once you stole the property, it would have been possible for you to notify the ambulance, the hospital or police that a woman had been injured in the Tak Store. If you had done so and she had received medical attention, her life may have been able to have been saved).
7. The victim took several hours to die. From when you first struck her with the axe, she would have been in severe pain. At some point, she would have become aware that she was going to die as a result of the attack.



8. The offences occurred apparently in contravention of the conditions of Ministerial release on licence for earlier offending. On 24 August 2000, you were sentenced to a term of 14 years imprisonment in the Supreme Court of Vanuatu by Coventry J, but you were subsequently released on licence by the responsible Minister pursuant to the now repealed Prisons (Administration) Act after you had served approximately only three years of that sentence.

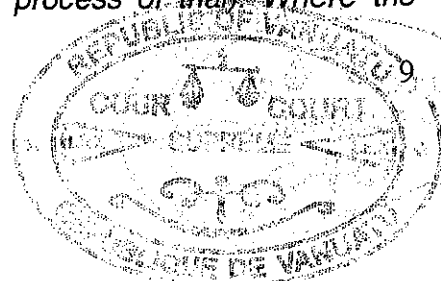
V - SUBMISSIONS AND CONSIDERATIONS FOR SENTENCE

The prosecution submits that the starting point for the offence of intentional homicide should be the maximum penalty available, namely 20 years imprisonment. The prosecution relies on the persuasive authority of the Australian Case of **In Veen v. The Queen** (No.2) (1988) M.C.A 14. In the joint reasons for the majority of the High Court of Australia (Mason CJ; Brennan, Dawson and Toohey CJ) it was stated (at paragraph 15):

*"The second subsidiary principle material to this case is that the maximum penalty prescribed for an offence is intended for case falling within the worst cases for which that penalty is prescribed. **ibbs v. the Queen** (1987) 61 ALJR 525 at 527; 74 ALR at 5. That does not mean that a lesser penalty must be imposed if it be possible to envisage a worse case; ingenuity can always conjure up a case of greater heinousness. A sentence which imposes the maximum penalty offends this principle only if the case is recognizably outside the worst category."* (emphasis added)

The defence submits that the applicable precedent in relation to a charge of intentional homicide contrary to Section 106(1)(a) of the Penal Code Act [CAP.135] is the case of **Public Prosecutor v. Sawan and Others** (Criminal Case 199 of 2002). In that matter the Court set out that-

"For intentional homicide committed by an adult without any aggravating or mitigating features, the figure of 10 to 12 years should be the starting point in a contested case (that is a case going through the process of trial). Where the



intentional homicide is committed by two (2) committed (2) or more men acting together, the starting point should be 15 years.

The offence of intentional homicide should in any event be treated as aggravated by any of the following factors:-

- 1) Violence is used
- 2) A weapon is used to commit the offence
- 3) The Defendant has previous convictions for serious intentional assault or intentional homicide.

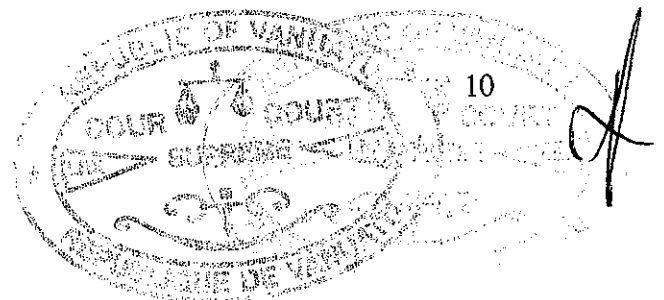
If the Defendant pleads guilty, the sentence should be reduced by $\frac{1}{3}$ on the circumstances of the particular case. Previous good character is of minor relevance."

Recently the Court of Appeal in **Public Prosecutor v. Nof** [2008] VUCA 24 considered a prosecution appeal in respect of a charge of intentional homicide contrary to Section 106(1(a) of the Penal Code Act [CAP.135] where the sentencing Judge had considered the case of **Public Prosecutor v. Sawan and Others** (Criminal Case 199 of 2002) as guidance in fixing the sentence. The Court of Appeal stated:

"There can be no criticism of the judge's starting point for the offending of 14 years before the actual mitigating factors."

The defence, therefore, submitted that the Court in this matter would adopt the reasoning expounded in **Public Prosecutor v. Sawan & others** (Criminal Case 1999 of 2002).

I bear in mind that criminal sentencing exercise is not an easy task in giving punishment. The purposes of criminal punishment are various: protection of the society, deterrence of the offender and of others who might be tempted to offend, retribution and reform. They can overlaps and none can be considered in isolation from the others when determining what is an appropriate sentence in a particular case. They are guideposts to the appropriate sentence but sometimes they point in different directions: [**Veen v. the Queen** (No.2) at para.13].



When I consider the appropriate sentence as a starting point I am going to impose on you I bear in mind that this is not the first time you have committed an intentional homicide crime.

In June 2000, you were charged with intentional homicide, unlawful entry, theft and trespass in relation to the killing of the then proprietor of Goodies Money Exchange, Justin West. You pleaded guilty to an alternative charge of Intentional Assault Causing Death contrary to Section 107(d) of the Penal Code Act [CAP.135] and guilty to the remaining charges. In sentencing you, Coventry J said (in **Public Prosecutor v. Wari (sic) and Wako** [2000] VUSC 48:

"I turn to Paul Wari. Your record is bad. You have several previous convictions for theft and unlawful entry. The latest of those attracted a sentence of 3 years imprisonment in total.

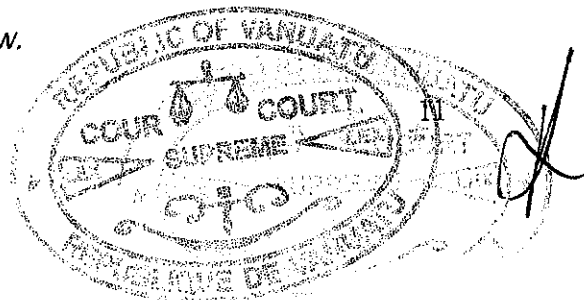
You were released on licence on 31st December 1999. This tragedy happened on 9 June. I cannot tell from the face of the papers before me if these offences were committed whilst on licence. It is almost certain they were. In any event whether during the period of the licence or shortly after its expiring that is an aggravating feature.

You are still a young man. I give you great credit for the fact you admitted these matters to the police and you have pleaded guilty. This is particular so given the seriousness of the offences.

I also accept that you went out on that evening you did not intend to kill or seriously harm anyone. I also accept that even after you had assaulted Justin West you did not intend he should die.

You say that there was a fight with him and he had a knife. There is a kitchen-knife in one of the photographs. You say you ran around the room for a while trying to avoid him. You say you got the knife from him and then you fought. You hit him to the face and body and he fell. You then tied his hands and legs and then took the key and left.

But you severely beat a man much older than yourself. You tied his hands and you tied his feet and you left him. It might be if you had not done that or you had called help immediately he would not have died. I don't know.



You didn't go home or go away then. You continued with your plan, took the key to his shop and set off to steal from that shop. It was then you were caught. By that time Justin West was dead. You escaped and were arrested later.

The Penal Code says the maximum sentence for this offence is 10 years. This case must come at the top end of the scale. I accept you have no previous convictions for violence to the person.

Giving credit for the guilty plea and the other matters I have mentioned I sentence you on count 1 to eight years.

...

If a person unlawfully enters the house of another there is always the risk there is someone in there and they are awake or wake up. There is always the possibility then that violence will occur. That is caused because of the unlawful entry. That is what happened in this case.

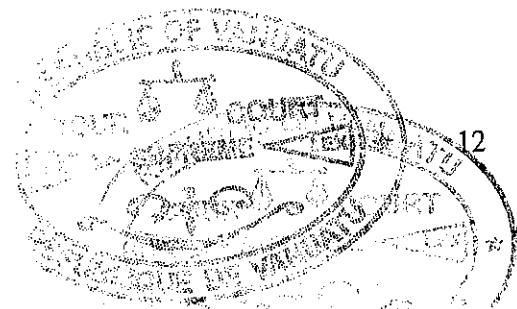
If you had not decided to steal the key to steal from Goodies Shop Justin West would be alive today. You even went to the shop in the afternoon. If when he woke up you had left his house he would still be alive. But you went on with your plan.

I give credit for your admissions and guilty plea.

Whilst there are no specific deterrent sentence or extended sentence provision in Vanuatu I find the correct sentence for the unlawful entry, count 3 is 6 years. I order count 2, no separate penalty, count 4 – 3 years concurrent and count 5, no separate penalty.

I have sentenced you to 8 years for the assault and a total of 6 years for the other offences. The question is whether these sentences should run concurrently or consecutively. Each sentence can stand separately on its own for the offence concerned. If they are to run consecutively I must look to the overall sentence in relation to the wrong doings. The circumstances of each could be regarded as aggravating the other. I must also look to the deterrent effect.

It is also clear you are a very dangerous man and the public should be protected from you. The maximum that could have been ordered for the unlawful entry is twenty years. If one regards the death as a severely aggravating feature of that, then credit of approximately one third for the mitigation 14 years would be within the correct range.



I do consider each of these two offences as separate entities and not aggravating features of each other.

I therefore consider they should run consecutively.

The total sentence is 14 years. The question of release on licence is not a matter for the court but for the minister. The release by Presidential pardon is not a matter for me. I would suggest that it is not appropriate in your case."

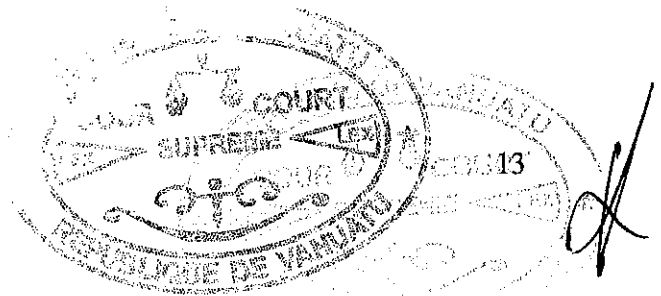
The present case before my Court, is a serious example of intentional homicide. It falls within the worst category of cases for which the maximum penalty is prescribed.

I bear in mind that in **Morris Ben v. Public Prosecutor** [1993] VUCA 3, the Vanuatu Court of Appeal (Gibbs, Los and Downing JJA) held:

*"The purpose of imposing a custodial sentence is not only to protect society from the prisoner, but also to punish the prisoner for his crime. Whilst it is clear that a judge may take into account the needs of society it is not appropriate to increase the sentence purely of the protection of the society. A judge should not impose sentence longer than that which is appropriate in the circumstances of the case simply for the purpose of protecting the society, although the protection of society is a matter to be considered in imposing the sentence: see **Veen v. the Queen (No.2)** (1988) 164 CLR 465." (Emphasis added)*

Defendants, Paul Ware, your previous convictions of Intentional Homicide indicate a premeditation to commit the particular type of offence of which you are convicted. It is, therefore, the duty of the Court, for the protection of the public, to take them into consideration and lengthen the period of imprisonment.

In sentencing you, I consider your antecedent history, I bear in mind of the serious circumstances of your current offending, I accept the prosecution submissions that the maximum sentence of 20 years imprisonment is the appropriate sentence as a starting point for the offence of Intentional Homicide contrary to Section 106(1)(a) of the Penal Code Act [CAP.135].



VI - MITIGATING FACTORS

I hear and consider all what your counsel says. Your guilty plea is the only factor that could legitimately be raised in mitigation and it is so considered and taken. However, I will give very little weight to your guilty plea in this case for the following reasons:

1. The prosecution case against you was overwhelming strong. It included eyewitness evidence as to your loitering outside the Tak Store minutes before the crimes; the presence of your fingerprint on the damaged computer monitor; the presence of the victim's blood on the shoes you wore and on a 500 Vatu note stolen by you after you attacked the victim; the location of the stolen Telecards (issued and delivered to the Tak Store only days before the crimes) at your home. In all of the circumstances, there was no real possibility that you could have successfully defended the charges.
2. The plea of guilty was not an early plea, but was quite late and after the Court had set the matter down for trial twice.
3. The plea of guilty was not accompanied by any true remorse. You told a series of lies to police (lies told from a consciousness of guilt).

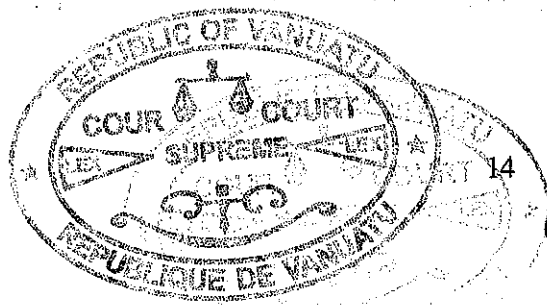
For these reasons, the Court gives credit for your guilty plea and allows a small discount of 2 years for the late plea of guilty.

You have served a period of 8 months and 3 days in custody since 25 June 2008. This period is also deducted from the imprisonment term you are going to serve.

ORDER

You are ordered to serve:

- (1) 17 years imprisonment for Intentional Homicide, contrary to Section 106(1)(a) of the Penal Code Act with immediate effect (in count 2).
- (2) In addition you are sentenced to:

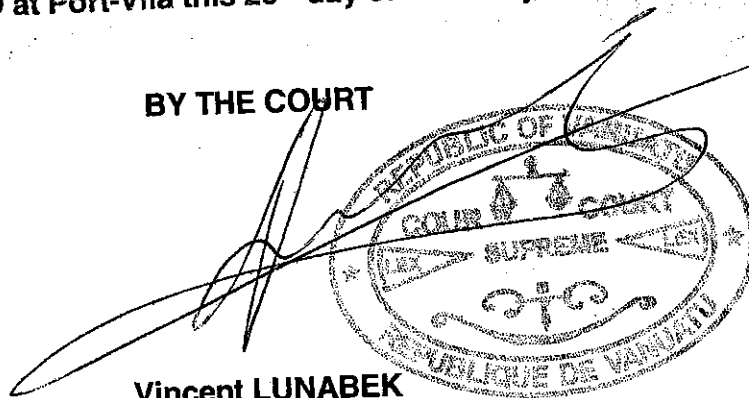


- 5 years imprisonment for unlawful entry, contrary to Section 143(1) of the Penal Code Act (in count 1).
 - 6 years imprisonment for theft, contrary to Section 125(a) of the Penal Code Act (in count 3).
 - 6 months imprisonment for damage to property, contrary to Section 133 of the Penal Code Act (in count 4).
- (3) You shall serve your sentences in counts 1, 3 and 4 concurrently with your sentence in count 2.

You have 14 days to appeal.

DATED at Port-Vila this 26th day of February 2009

BY THE COURT



Vincent LUNABEK
Chief Justice

