

(Criminal Jurisdiction)

PUBLIC PROSECUTOR

VS.

**JOHN DALA
JOSHUA ARU
BASIL SALE
ANDREW ARU
DENIS SALE
MALCOLM WELE
PATRICK ULI**

Mr Justice Oliver A. Saksak
Mrs Anita Vinabit – Clerk

Mr Parkinson Wirrick for Public Prosecutor and the State
Miss Jane Tari, Agent for Public Solicitor for the Defendants

SENTENCE

1. On 4th March 2010 these Defendants set out as a group from Maewo Island in a boat and headed for Lolowai, East Ambae. They were executing the Order of the Council of Chiefs to take back the two victims John Brian and Austin Wele, dead or alive. They landed at Lolowai beach and pulled their boat ashore. They then walked up to the Anglican Brotherhood at Tumsisiro. The leader of the group asked permission from the Head Brother for the release of the two brothers who were seeking refuge with the Brotherhood at the time. Their request was granted but on the condition that two Brothers were to accompany them to Gaeovo Village on Maewo. That was agreed, They then walked back to Lolowai beach and all got into the boat and left. Some distance away from the shore the two victims jumped into the sea and swam back to Lolowai beach. Some of the Defendants followed them and caught up with victim Austin Wele on the beach and brutally assaulted him causing his sudden death. The other victim John Brian ran into the hospital ward to seek refuge. Some of the Defendants followed him into the ward and dragged him out of the

ward where he was brutally assaulted. He died suddenly. His body was then dragged on the road to the beach and placed alongside that of Austin Wele on the beach. The Defendants then asked the Priest to say a prayer over the deceaseds. They then put the corpses into the boat and left for Maewo Island. On Maewo they had some ceremonies after which they prepared the bodies of the victims, took them in a boat and went far out into the sea and drowned the bodies. Those are the relevant back ground facts simply stated.

2. Out of the 10 Defendants involved, only these 7 Defendants were apprehended and charged as follows –

(a) John Dala – Inciting and Soliciting Intentional Homicide, Sections 35 & 106(1)(b) of Penal Code Act Cap 135 (the Act).

(b) All 7 Defendants – Unlawful Assembly, Section 69 of the Act.

(c) Patrick Uli, Malcolm Wele, Basil Sale (Charlie) and Joshua Aru – Intentional Homicide, Section 106(1)(b) of the Act.

3. On their arraignment, all the Defendants entered pleas of Not-Guilty and the matter proceeded to trial at Saratamata, East Ambae for 3 days. On 24th September 2010, the Court returned its verdicts as follows –

(a) John Dala – Not Guilty of inciting and soliciting.

(b) All 7 Defendants – Guilty of unlawful assembly.

(c) Patrick Uli, Malcolm Wele, Basil Sale and Joshua Aru – Guilty of Intentional homicide.

4. None of them appealed against their convictions.

5. Warrants of Remands were issued for the Defendants to be kept under remand pending their sentences in Luganville. However, 6 of the Defendants breached the order and returned to Maewo. Only John

Dala complied and was later transferred to the Correctional Centre in Luganville by the Probation Officer. Separate Warrants of Arrests were issued for the apprehension of the other 6 Defendants.

6. Article 5 of the Constitution of Vanuatu spells out clearly the fundamental rights and freedoms of every man, woman and child in Vanuatu despite their places of origin, religions or traditional beliefs, political opinions, language or sex. At the forefront of this list is the right and freedoms of life followed by right to liberty, security of the person and protection of the law. Protection of the law is qualified in sub article (2) to include –

“(a) everyone charged with an offence shall have a fair hearing, within a reasonable time, by an independent and impartial Court and be afforded a lawyer if it is a serious offence;

“(b) everyone is innocent until a Court establishes his guilt according to law.”

7. Section 22 of the Penal Code Act Cap 135 (the Act) provides for superior orders as follows –

“No criminal responsibility shall attach to an act performed on the orders of a superior to whom obedience is lawfully due, unless such order was manifestly unlawful or the accused knew that the superior had no authority to issue such order.”

8. Section 11 of the Act provides –

“(1) Ignorance of the law shall be no defence to any criminal charge.”

9. There is no law in Vanuatu giving powers to any Courts or other institutions or individuals to impose death penalties. And there is no

law in Vanuatu requiring a Court or other institutions or individuals to convict anyone charged with an offence unless they have received a fair and impartial hearing, and their guilt have been established by relevant and admissible evidence adduced to the required standard of proof beyond reasonable doubt.

10. These 7 Defendants acted in blatant disregard for the right and freedom to life of late John Brian and Austin Wele when they brutally assaulted them at Lolowai Bay and in the Hospital Ward causing them sudden deaths. The body of late John Brian was dragged along the road all the way down to the beach and left with that of Austin Wele where the sea rolled them over and spread their blood everywhere in the Bay. There was total lack of any respect, mercy and compassion in the hearts of the Defendants at the time.
11. In their defence, the Defendants told the Court and remained firm in their positions that they were merely carrying out the orders of their chiefs. Indirectly, they were relying on Section 22 of the Act claiming they acted under superior orders. However, it is abundantly clear that the order was manifestly unlawful and therefore Section 22 could not afford them any possible defence. They could have been advised to plead guilty at the first available opportunity but that was not the case.
12. What it all boils down to is that the Defendants took the law into their own hands. The consequences of their actions was that two brothers lost their lives one after the other on the same day. The offendings took place in a public place within reach and view of the members of the public. Patients at the Lolowai Hospital were unnecessarily disturbed. Fear gripped patients and members of the public who stood by and watched helplessly for fear they too would face some repercussions. One of the Defendants Patrick Uli had a shot gun. An axe was used to assault Austin Wele. A stone or piece of rock was

used. And a spring wire was seen by a nurse witness for the prosecution. There was much shouting, talking and running. There was indeed a breach of the peace. Evidence infers there was a plan. The plan was executed in a timely manner.

Those are the aggravating features of the Defendants' offendings.

13. For the extenuating or mitigating factors, it appears there are only two factors that are of any relevance and these are –

(a) All the Defendants are first-time offenders; and

(b) The various custom ceremonies performed by the Chiefs of Maewo on behalf of the Defendants on Maewo and on Ambae.

The Court will allow some credit for these.

14. Much case law have been cited by the Prosecutor and defence counsel for which the Court is grateful. Two case authorities that are relevant and which this Court places much assistance and reliance are the cases Well Massing and 7 Others v. PP Criminal Appeal Case No. 3 of 2008 and PP v. Sawan and Others Criminal Case 199 of 2002.

15. The Defendants committed very serious criminal offences resulting in double murder of two innocent lives who had neither been charged, tried nor convicted by any competent Court. The only appropriate penalties to be imposed by the Court will be custodial sentences. This will serve as a –

(a) public disapproval for the Defendants' actions;

(b) deterrence to the Defendants and to others; and

(c) adequate punishments to the Defendants.

16. Therefore, for the offence of unlawful assembly, the Court sentences John Dala, Patrick Uli, Malcolm Wele, Basil Sale (Charley), Joshua

Aru, Denis Sale and Andrew Aru each to 8 years imprisonment. 8 years is in the view of the Court the starting point. For Patrick Uli, Malcolm Wele, Joshua Aru and Basil Sale their sentences will be served concurrently with their sentences for the Intentional Homicide charge.

17. For the Intentional Homicide charge, Patrick Uli, Malcolm Wele, Joshua Aru and Basil Sale are each sentenced to 20 years imprisonment. 20 years is the starting point for this offence based on its aggravating circumstances.

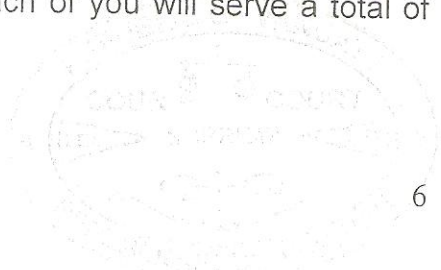
18. The Court allows a credit of 1/3 deduction from each Defendant's sentence calculated as follows:-

(a) John Dala, Denis Sale and Andrew Aru their sentences 8 years are reduced by 2 years and 8 months for being first-time offenders and for customary reconciliations performed on their behalf. In effect each of these three Defendants will serve a total of 6 years and 4 months.

For John Dala, he has been in continued custody from 24th September 2010 to today, a total of 6 months and 14 days. These are also deducted from your total sentence of 6 years. That leaves the balance of 5 years 6 months and 16 days.

For Denis Sale and Andrew Aru, your sentences of 6 years and 4 months will go back to the date on which both of you returned to custody from Maewo.

(b) For Patrick Uli, Malcolm Wele, Joshua Aru and Basil Sale, your sentences of 8 years imprisonment for unlawful assembly will be served concurrently with your 20 years sentences imposed for Intentional Homicide. That means each of you will serve a total of 20 years imprisonment.



However, the Court also allows a reduction of 1/3 from your total sentences being in respect of your mitigating factors:

- (a) being first-time offenders, and
- (b) for customary reconciliation done on your behalf by the chiefs. This means that 6 years and 8 months are deducted from the 20 years sentence leaving the balance of 14 years and 4 months to serve.

In total, each of you will serve a total of 14 years and 4 months imprisonment for both offences you committed. Your sentences start on the date you returned to custody from Maewo.

- 19. Each of you have a right of appeal against this sentence within 14 days from today.
- 20. The Court is well aware of the fact that three persons namely Danstan Aru, Allen and Warren were part of the group but have not been apprehended and charged. It is the responsibility of the State through the Office of the Public Prosecutor and the Police to ensure that these three persons are apprehended and dealt with in the same way as these Defendants.

DATED at Luganville this 10th day of March 2011.

BY THE COURT


OLIVER A. SAKSAK

Judge

