

**IN THE SUPREME COURT
OF THE REPUBLIC OF VANUATU**
(Criminal Jurisdiction)

Criminal Case No. 67/ 2014

PUBLIC PROSECUTOR

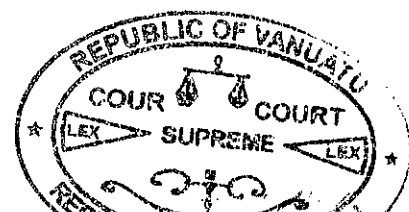
V

JOE SAWE

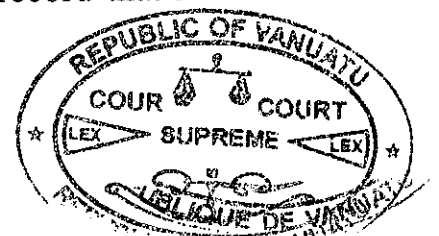
Hearing: Wednesday 19 August 2015 at 10 am, Isangel, Tanna
Before: Justice SM Harrop
Appearances: Betina Ngwele for the Public Prosecutor
Pauline Kalwatman (PSO) for the Defendant

SENTENCE

1. Mr Sawe is here for sentence on one count of aiding and abetting intentional assault causing permanent injury contrary to sections 30 and 107 (c) of the Penal Code having entered a guilty plea to that fresh charge earlier this week.
2. This is an unusual sentencing because Mr Sawe is both deaf and mute and at the outset of this hearing before dictating the sentence I have conveyed to him the essential outcome through the interpretation of a family member; that is a suspended term of imprisonment and a short sentence of community work.
3. This charge of aiding and abetting intentional assault on Welby Kamisak on the 29th of May 2013 at Hidden Treasure Resort on West Tanna arose in the following circumstances.

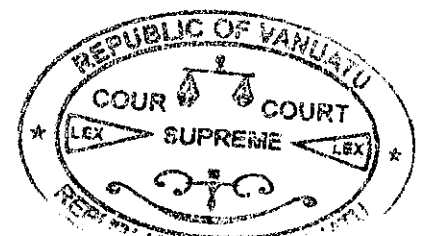


4. Mr Sawe's older brother Iaken Wana believed that Mr Kamisak has burnt his house down. Mr Wana, it appears, wanted to exact retribution on Mr Kamisak and to take the law into his own hands. So it appears that he arranged for his wife Iamel Lidja to contact Mr Kamisak and she lured him to go in the evening to Hidden Treasure Resort. He was told that he had to go by himself and not pick anyone else up on the road and when he reached the bungalow he was to go and park his truck down near a natapoa tree by the beach and walk towards the bungalow.
5. He did this and when he was walking towards the bungalow his phone rang again and the same woman asked him where he was and when then happened three torches were shone in his face. He could not see properly and he was then assaulted in a serious manner. He was hit with stones on the shoulder, legs, head and face causing him to fall. He begged out for the men not to kill him but nobody spoke or said anything and the attack continued.
6. The physical assault was carried out by Iaken Wana and Joseph Tapis. The reason Mr Sawe has been convicted of assisting them is that he held the victim by his shoulders while they assaulted him. Very serious injuries were sustained to the victim's eyes, his face and head, his nose, his Achilles tendon, his lower limbs and in particular there was an open fracture of one of his legs. He has suffered permanent injury as a result.
7. So Mr Sawe is here for sentence because he assisted the primary assailants and prevented or at least hindered the victim from defending himself. However it is important to record that he did



not himself assault the victim and therefore did not cause in any direct way any of these injuries. Mr Sawe was originally charged with assault but after discussions earlier this week a fresh count was added to the information of aiding and abetting and he pleaded guilty on the basis I have outlined. A nolle prosequi was then entered in respect of count 1, the assault count.

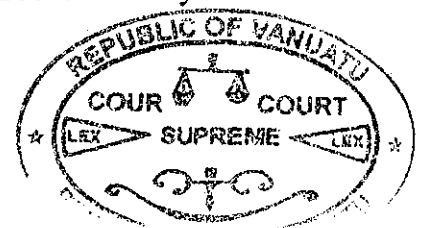
8. Iamel Lidja was also convicted of aiding and abetting the assault because she lured the victim to the scene. So there are two people who assisted with or facilitated this serious assault, albeit in quite different ways. Mr Lidja must have had some idea what was planned in order to be involved in the way she was but Mr Sawe says that he did not know until immediately before the incident what would happen. He thought they were going to this place simply to drink kava.
9. Regardless of how much prior knowledge there was, Mr Sawe certainly became aware of the assault and gave direct assistance to the other two. That not only made the assault easier but it may well have resulted in the injuries suffered being more serious because the victim could not defend himself, or at least not defend himself as well as he otherwise could have. So in my view the assistance you gave was more significant and more serious than that provided by Iamel Lidja.
10. Justice Sey sentenced the other three last year in December and her sentencing judgment is reported at [2014] VUSC 183; because that is available on Paclii I will not go over everything that Her Ladyship said.



11. The two primary attackers were sentenced to 2 ½ year's imprisonment but that was suspended for two years and they also received 150 hours community work and 12 months supervision. They also had pleaded guilty. Iamel Lidja simply received the suspended sentence with the same details but with no community work and no supervision. Because of the framework which Justice Sey's sentence provides I readily conclude that a suspended prison term is appropriate for you together with a shorter community work sentence. Given your disabilities I see no purpose in imposing a sentence of supervision.

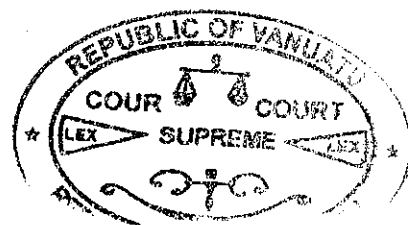
12. I have had the benefit of a helpful pre-sentence report and written submissions from both counsel. The pre-sentence report says that you are 39, you have never attended school, you are married with a wife and adopted child and you come from a family of nine and you are the second youngest child in the family. As I have already noted Iaken Wana is one of your older brothers. You are recorded as being a very helpful person in your home by your wife and also in the community. And even though you have a mental disability relating to your inability to speak and hear you are, as I know from the mental health assessment, an intelligent man with good judgment and a number of skills, in particular your wife mentions you are skilful in building, gardening, and piggery farming. You are a skilful diver relied on by the community to catch fish for important occasions and ceremonies.

13. You are willing to help anyone in the community who needs help. The Probation Officer spoke to an assistant chief Mr Iolu Tong who says that when you were a boy about three or four you and

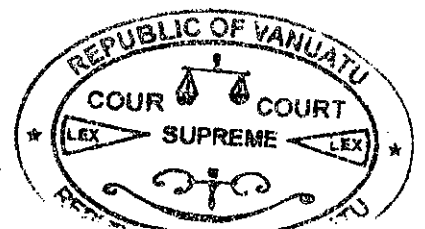


your father were picking fruit by throwing sticks at it and that you were hit on the head when a stick thrown by your father fell back down. That led to your inability to speak and to hear. I also understand that you suffered cerebral malaria in 1987 although it is not clear what effects that has had in addition to the pre-existing head injury.

14. You are a first time offender, you have pleaded guilty to this offence at the first opportunity. I say that because although you had been charged for quite a lengthy period with the assault, it was only on Monday that the charge, which was accepted ultimately as appropriate by the Public Prosecutor, was placed before the Court to allow you to plead guilty.
15. You have expressed using your own form of sign language your remorse for what happened. Your wife says that she sees you as having been used by your older brother on this occasion to help him do his business .The assistant chief says that he thinks you were tricked and influenced to go along with that.
16. Importantly, as indeed Justice Sey recorded, there was a custom reconciliation ceremony and the assistant chief told the Probation Officer that you were involved in that. So you have acknowledged your responsibility in the appropriate Vanuatu way long before you pleaded guilty. There was a presentation of three pigs, six stems of kava and some local root crops to the victim and in return he presented them you with a cow and pig and some root crops.

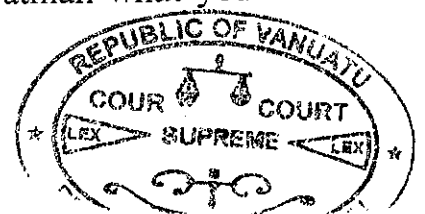


17. The submissions by Ms Ngwele on behalf of the Public Prosecutor submit that a prison sentence with a starting point of about three years is appropriate and that the end sentence should be suspended for two years.
18. Ms Kalwatman in her submissions, reinforces the sincerity of your remorse, the fact that you are a hardworking farmer. She submits, rightly I think, that because of your disability which must make life more difficult for you than for others in the community, a merciful and lenient sentence is appropriate. I also accept her submission that you were led to the criminal crime scene by the other defendants and were not an instigator. She submits that these matters including the other mitigating points which I have already mentioned should lead the Court to impose a sentence of community service only and not any suspended prison sentence.
19. While I accept the force of what Ms Kalwatman says, in my view the seriousness of the assault with which you assisted means a prison sentence is entirely justified but I immediately accept that it should be suspended. That must of course be the case by reference to the sentences imposed on the others because they were much more heavily involved and much more criminally responsible and yet they too received suspended prison sentences. But I accept that your role is considerably less than theirs.
20. Although you have the difficulty of living with your substantial disabilities you nevertheless understand what is right and wrong and must take responsibility for what you did. You do not have



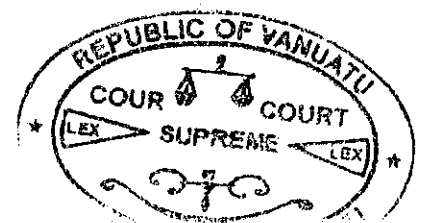
any mental disorder and you are able as an adult to make up your own mind about what you do and do not do.

21. Having said that, I accept that your disabilities would have made you more vulnerable to peer pressure from your older brother and you certainly would not have been involved in this without him. So I accept that you deserve a merciful and sympathetic sentence but nevertheless one taking into account the gravity of the offending which you assisted.
22. It is also relevant, and this is another point made by Ms Kalwatman, that it is now two years and three months or so since the incident and you have been living with this hanging over you and on bail conditions. There has also been no indication of any further offending by you during that period so it seems to me that you present a limited risk of further offending.
23. I think also I should record that you deserve particular credit for pleading guilty and acknowledging the role that you did play. It would have been very easy for someone with your disability to literally "play dumb" and to say you knew nothing about the matter, you were not involved.
24. If you had entered a not guilty plea, as you were fully entitled to, I do not think the prosecution would have found it easy to prove the case against you simply because I would have had to hold that you were not fit to stand trial because of your inability to communicate during the trial and to give instructions in light of developments at trial. But you did not do that. You acknowledged what you had done and that it was wrong. You told Ms Kalwatman what you



had done and the way that you had been involved and the prosecution accepted that version of events and amended the information to allow for that.

25. So I think that reinforces the qualities of your character and the positive things that have been said about you. It also reinforces the theory (if I can put it that way) of the assistant chief that you were really tricked on some level to become involved in this.
26. So when I weigh all of those things up, while I consider that a suspended prison sentence is appropriate I am going to make it considerably shorter than the others. I am going to impose a sentence of **12 months imprisonment suspended for 12 months from today.**
27. That means that if you offend in any way within the next 12 months, you will be required to serve that 12-month prison term. Because I have a good deal of confidence that that will not be the case it is appropriate that a short sentence of community work is imposed so that you can give something back to the community for what you have done wrong . Again because of your lesser role and because of your disabilities which may not make it easy to undertake that sentence, I am going to impose a short sentence of 40 hours community work on you.
28. If you disagree with this sentence then you have 14 days to appeal against it.



BY THE COURT

Joseph Mtan

