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PUBLIC PROSECUTOR

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PETER ALBERT

Hearing: Monday 28 September 2015 at 10 am
Before: Justice SM Harrop
Appearances: Betina Ngwele for the Public Prosecutor
Andrew Bal (PSO) for the Defendant

SENTENCE

1. Mr Albert, after some delays occasioned by your failure to attend Court on 2nd July, you are now here for sentence on one count of arson. A helpful pre-sentence report has been prepared and Mr Bal has since your appearance on Wednesday, and indeed again on Friday, had the chance to discuss that report with you and to file some further written submissions which supplement those that he filed on the 3rd of August.
2. Your co-offender Harry Amos was sentenced to a suspended sentence of imprisonment, community work and supervision last Wednesday because I was not prepared to delay his sentencing any longer in view of the delays that had already occurred.
3. Arson is a serious offence and all too prevalent in Vanuatu. The maximum penalty of 10 years imprisonment reinforces that.
4. The facts of this case are summarized in the Public Prosecutor's submission. The building that you burnt was a restaurant at Takara village and the owner is someone who I understand built it on land which has been the subject of some historical dispute. He apparently had leased the land to some people in 2006 and there are people in the village who are not happy with him. They filed a Supreme Court claim but this was struck out in 2007.
5. The victim believes that as a result of that claim being struck out, this arson occurred because of the underlying land dispute. If so, that certainly would not be the first time that has happened in Vanuatu but it does not appear that



you personally had any particular disagreement with the victim or had any reason to do what you did. It is clear that you were angry and you made a plan to burn down the restaurant; initially you did not tell anyone of this but on the afternoon of 31 January this year you went to Harry Amos' house and asked him to accompany you to the beach so you could prepare to and then burn the house down. You are best friends. Although the brief facts say you were 25 at that time, I understand you were 23, having been born on 1st of January 1992. Harry Amos though is quite a lot younger. He is 16 and in fact was only 16 years and 1 month at the time of this offence on 1st of February.

6. Mr Amos agreed to accompany and help you and you went down to the beach early in the morning when it was still dark. I make the point here had you had the chance to think better of what you were doing and to decide not to do it. But you decided to carry on and you led this two-person team.
7. When you went down to the beach you first went to the plantation, you collected dried coconut leaves and placed them inside a hole in the ceiling of the restaurant where there was a broken ceiling panel, you lit a match and set fire to the coconut leaves. As a result the fire spread through the whole building and everything was destroyed. You left and went home. Nothing at all has been saved from the fire. The building was a complete loss.
8. I accept a point made by Mr Bal in his most recent submissions that this is however a property arson and not one where lives were put at risk. It is not the burning of a sleeping house at night for example but it is an offence at night which was no doubt chosen in order to facilitate your escape and to minimise your risk of detection.
9. The victim says that the monetary value of everything that was destroyed adds up to Vt 10,159,400, a very precise figure and there is a two-page document showing how that is calculated. Mr Bal has made the point, validly I think, that this is simply the victim's assessment of value, it is not an independent assessment of what has been lost. Ideally of course the Court would have some independent assessment of that. Ms Ngwele herself accepts that the assessment should be looked at with a degree of caution because of its author. I certainly take it with a grain of salt and do not make a finding that that what the property was worth. What can be said however is that this was clearly a commercial operation involving typical restaurant facilities which was totally destroyed. Whether the value was Vt 10 million or quite considerably less, it was nevertheless a very serious arson and although lives were not at risk, no doubt the income of the restaurant owner was put at risk indeed probably extinguished. So it is not something which easy to replace and even if it has been replaced (and I am not aware of that),



the reality is that there will have been a loss of income which is unlikely to be recovered unless there was insurance. Again, I have no information about that.

10. When you were spoken to by the police you chose not to say anything but to speak in Court. That was absolutely your right and no defendant who takes that position can ever be penalized for doing so. In any event you are entitled to the maximum one-third discount for pleading guilty. That is unaffected by what you said to the police.
11. There are undoubtedly aggravating features relating to this offending. I have already touched on some of them. First, the building was a total loss and whatever its true value and that of the contents, it is a substantial loss in terms of monetary value. There was clearly a degree of premeditation and planning and some motivation, apparently not relating to anything that had been done to you personally by the victim. Also, the offence was committed when it was dark and although you are young at 23, you were certainly old enough to know that what you were doing was wrong and you engaged Harry Amos in the process. I am sure he would not have been involved had you not encouraged him to be.
12. The pre-sentence report that has been prepared is helpful. It explains that you are 23 and single with no children. You live at the moment at Lausake Village in Emau Island. You have a good relationship with the community and live under the care of Chief Marie Pakoa who confirms that you are very helpful in the community. You have never been employed but you have skill in gardening and that is how you earn your income and you contribute to your family's needs through your gardening efforts.
13. You have no previous convictions and although the pre-sentence report says you are 22 I believe you were 23 at the time of the offence, having turned 23 just a month before. But it is recorded that you were angry about what had been happening about what had been happening around the property and your father says that there has been a longstanding issue and he has never seen you like that.
14. You told the probation officer you do feel sorry for what you did and you stated that at the time of the offending you could not control your anger, so you have shown some remorse and insight but of course it is a bit too late for that now. As I have already pointed out you had a chance to control your anger and to think better of this whole idea well before you actually set fire but you decided to go ahead having had that opportunity.
15. You have not performed a custom reconciliation ceremony towards the victim despite two attempts having been made but that is because the victim



refused and so you are entitled to credit for your willingness to do that. Obviously you cannot do it if he does not wish to, that is his right. The recommendation of the pre-sentence report correctly is for imprisonment but it is acknowledged that if there were suspension then community work and supervision could be imposed.

16. My task first of all is to assess what is called the starting point. That is the appropriate sentence for this offence having regard to the maximum penalty, to other similar cases, to the aggravating features of the offending itself and that is before I come to consider the personal mitigating factors which would reduce that.
17. Counsel agree and so do I that a prison sentence is required for this serious arson offence and the only issues I have to determine are how long should that sentence be and whether it should be suspended.
18. The Public Prosecutor submits an appropriate starting point is around 4 ½ years. She refers me to a number of cases, *PP v. Tuku* [2014] VUSC 161, the leading Court of Appeal case of *Worahese v. PP* [2010] VUCA 11, *PP v. Japeth* [2014] VUSC 157 which is one of my own decisions and *PP v. Heron* [2015] VUSC 68.
19. Having considered those authorities carefully I cannot accept that a 4 ½ years starting point is justified in this case. The *Japeth* case did have a 4 year starting point so that is getting close to 4 ½ years but it involved 15 arsons and 47 buildings together with a number of aggravating features. The other cases I have mentioned were less serious and adopted starting points of around 3 years.
20. I accept Mr Bal's submission that because this is just one building it is a less serious case than the *Japeth* case but this is not just about the number of buildings. This was a valuable building and the contents were also valuable. By contrast for example in the *Tuku* case the sum lost or the value of the items lost was only Vt 140,000. There are clearly other aggravating factors here in addition to the value of the property lost. There is the planning the pre-meditation the decision to get Mr Amos to help you. Also you appear to have taken the law into your own hands rather than trying to have a land dispute resolved in a civilised manner through the Court system.
21. And as I have commented you appear to have committed this offence in anger although it is not clear to me that the victim had personally done anything to make you angry. And as I have noted this was a commercial building so a loss of profit has no doubt resulted. Your circumstances are such that you cannot make any sort of recompense so even if the victim had



been willing to go to a custom reconciliation ceremony the reality is that any offer you could have made would have been a small and token one though no doubt valuable in terms of any apology. I cannot make a compensation order which is futile and so in this case I am in no position to do because of your financial position.

22. So the victim has suffered a very serious loss here without any chance of recovery and as I have noted you were clearly the primary offender it was your "beef", if I can put it that way; without your motivation there would have been no fire. You were unable to control your anger and you had time to think about it but proceeded anyway.
23. When I weigh all of those things up I am satisfied the least restrictive starting point I can adopt is 3 ½ years imprisonment, that is 42 months.
24. Turning then to the mitigating factors which apply here and which must be deducted from that starting point, most importantly there is the guilty plea. The one-third discount for your guilty plea at the first opportunity amounts to 14 months, so that brings it down to 28 months or 2 years and 4 months.
25. In addition you are relatively young and the age of 23 and a first offender. You have been willing to undertake a custom reconciliation ceremony and I would deduct a further six months or 20% on account of those factors. So that brings it down to an end sentence of 22 months or 1 year and 10 months.
26. Now the question of suspension. I have wide power to suspend prison sentences but I am not prepared to suspend it here.
27. This is a very serious arson. It is without any justification, it was planned and premeditated, there has been a substantial loss with no prospect of compensation or recovery and in my view it would send the wrong message to suspend this particular sentence.
28. I acknowledge that there have been other arson offences committed where suspended sentences have been imposed but I have to determine the sentence in the particular case taking into account all of the factors.
29. Mr Bal has submitted that the fact that there was no risk to people sleeping, that you were only 23 and that the co-offender received a suspended sentence should persuade me to suspend, but I am not persuaded by those factors.
30. In relation to your co-offender's sentence, I see no parity issue in not suspending your sentence. There are substantial differences between you and



Mr Amos. First, in relation to particular roles, you were the prime motivator and very much the primary offender. Second, and importantly, there is a significant difference in your ages. You were seven years older than him and he was only 16 years and one month. As I noted in sentencing him, if he had been one month and one day younger I could not have sent him to prison at all, never mind imposed a suspended sentence, except in exceptional circumstances.

31. So for those reasons I am satisfied it is appropriate to suspend his prison sentence, but not yours. I therefore sentence you to imprisonment **for one year and ten months**. If you wish to appeal against this sentence you have 14 days to do so.

BY THE COURT

