

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

Criminal Case No. 55 of 2013

PUBLIC PROSECUTOR

-v-

**FRANK MAHIT KAL
JOEL AVOCK MASIAL
WILLIE WAKON
TONY JACK
DANIEL KALSAU**

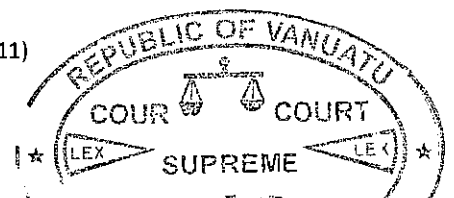
*Before Justice David Chetwynd
Hearing 29th September 2016
Mr Garae for the Public Prosecutor
Mr Livo for Frank Mahit Kal, Willie Wakon, Tony Jack and Daniel Kalsau
Mr Napuati for Joel Avock Masial*

Sentence

1. It is easiest to deal with the three defendants Tony Jack, Willie Wakon and Daniel Kalsau. These three defendants were all convicted of unlawful assembly. The full circumstances of their offending are set out in my written decision of 22nd August 2016. I will not repeat them in detail. It is enough to say the three defendants were part of a drunken crowd of young men who stoned a residential compound. They had gone to the compound at the behest of Joel Avock Masial because there had been an incident earlier between Joel Avock Masial and a resident there. All the defendants in this case had gone to teach the resident a lesson. Unfortunately the actions of Joel Avock Masial and Frank Mahit Kal resulted in the death of that resident, the late Mr David Ben Ngara.

2. As has been pointed out in submissions sentencing involves a three step process as set out in the case of *Andy*¹. The first step is to establish a starting point, "*The starting point can be defined as the sentence of imprisonment that reflects the seriousness of the offence and the culpability of the actual offending; that is, the specific actions of the offender and their effect in the context of the specific charge and its maximum sentence*". The next step "*is the assessment of the aggravating and mitigating factors relating to the offender personally. It is under this head that aggravating matters such as the past history of the offender will be considered. If there are previous convictions, particularly for a similar type of offence, this may result in the starting point being increased. Under this head, mitigating factors such as a lack of previous relevant convictions, good character and remorse will be assessed and may result in a reduction of the starting point to reach a second stage end sentence*". Following this the Judge will as a third step, "... consider what

¹ *Public Prosecutor v Andy* [2011] VUCA 14; Criminal Appeal 09 of 2010 (8 April 2011)



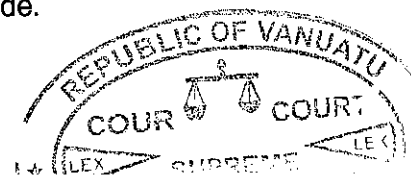
discount from the second stage end sentence should be applied for a guilty plea. The greatest discount allowed under this head will be a discount of one third where the guilty plea has been entered at the first reasonable opportunity. A later guilty plea will result in a smaller discount. No discount is available under this head if the charges have been defended through a trial".

3. None of the five defendants in this case entered a plea of guilty. None of them are entitled to any discount.

4. The maximum sentence for unlawful assembly is 3 years. This was a serious incident involving the stoning of residences and the death of a man, albeit not at the hands of the defendants Jack , Wakon and Kalsau. Drunken behavior is one thing but this went beyond mere drunken behavior with residents fearing greatly for their safety. The starting point should be 2 years. None of these three defendants have been in trouble with the law previously and should be given credit for that. They are all young men. Unfortunately none of them have expressed true remorse and so the maximum that can be deducted from each sentence is 1 year. They have all been in custody pending trial at one time or other and have spent 5 months in prison. That would equate to a 10 month prison sentence and they must be given credit for that. That would leave them with a final sentence of two months to serve. The sentence of two months will be suspended for two years. In addition the three defendants Tony Jack, Willie Wakon and Jack Kalsau will undertake 50 hours of community work. The three defendants are required to report to a probation officer so that the community work can be organized.

5. Joel Avock Masial and Frank Mahit Kal were both convicted of unpremeditated homicide contrary to section 106 (1) (a) of the Penal Code. The maximum sentence is 20 years. Causing the death of another person is always a serious offence. The sad death of the late Mr Ngara was not planned. This was a stupid drunken escapade by the two young men and fueled by alcohol they did not think about the consequences of what they started. However, even in their drunken state they must have thought no good would come of their behavior. Even in their drunken state they must have realised their behavior was reckless in the extreme. Foolish drunken young men they might have been but they are still responsible for the death of another man. The starting point for their sentence should be 6 years. Again, before this incident both young men had not been in trouble with the law. They are young men and that too is something to consider in whether there should be any reduction in their sentences. However, once again there is no evidence of true remorse. It is my view that the only reduction I can make is in respect of their previous good character and their age. The sentence will be reduced to 5 years. I have been informed of custom reconciliations that have been attempted. A further 6 months can be deducted from their sentences in respect of those attempts. That leaves a sentence of 4 years six months. Like the other three defendants these two have been remanded pending trial for 5 months. They too are entitled to a reduction of 10 months and so the final sentence is one of 3 years and 8 months. I do not feel that the sentences can be suspended.

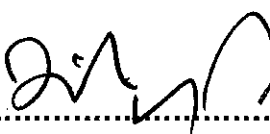
6. Joel Avock Masial and Frank Mahit Kal were also convicted of unlawful assembly. It seems to me that the sentence of two years imposed on the other three defendants should be handed down to these two. Those sentences of two years will be served concurrently to the sentence imposed for intentional homicide.



7. Before leaving this matter I should comment on custom reconciliation. It seems to be a hindrance to full reconciliation that it cannot be said with any certainty which stone thrown by which defendant resulted in Mr Ngara's death. The answer to that question will never be known and just as in law the two can be held jointly and equally responsible for the death I wonder if that can be case in custom. It would be unfortunate if full reconciliation was not possible because it will never be known for certain that one particular stone thrown by one particular defendant killed Mr Ngara.

Dated at Port Vila this 29th day of September 2016

BY THE COURT


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D. CHETWYND
Judge

