

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

Criminal
Case No. 17/1221 SC/CRML

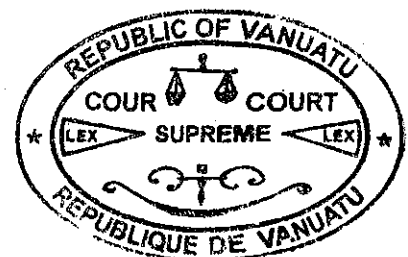
BETWEEN: **Public Prosecutor**

AND: **Tchawie Wabayat and**
Remo Misak (Kelwet Joely, Atanas James
Ali)

Date of SENTENCE: *4th day of August, 2017 at 10:00 AM*
Before: *James Paul Geoghegan*
In Attendance: *Counsel - Marie Taiki for the Public Prosecutor*
Counsel - Brian Livo (PSO) for the Accused

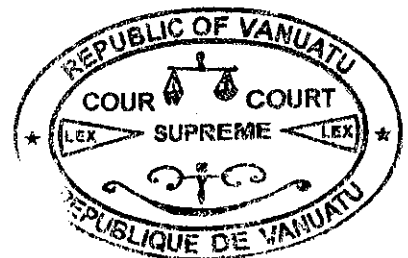
SENTENCE

1. Mr Wabayat and Mr Misak you appear for sentencing today in respect of a number of charges arising out of the burglary of shop premises in Tebakor on December 25th 2016.
2. On June 8th, Mr Wabayat you pleaded guilty to one count of soliciting theft, one of unlawful entry and one of theft and Mr Misak you pleaded guilty to one count of complicity to theft and one count of complicity to unlawful entry. When I had



remanded you for sentence on that date Mr Misak I had referred to you facing three charges but that was an error and in fact you only ever faced two charges and pleaded guilty to both.

3. The charge of theft carries a maximum penalty of 12 years imprisonment, the charge of unlawful entry a maximum penalty of, in this case, 10 years imprisonment given that the premises were commercial premises. The charges of complicity and soliciting carry the same maximum penalties.
4. The brief of facts which has been provided for the Court provides the factual basis for your sentencing and that tells me that this offending occurred in the afternoon or evening of Christmas Day 2016 in respect of commercial premises known as Mok Store Hardware located at Tebakor. You, Mr Wabayat were a former employee of that store and you then engaged not just Mr Misak but two other defendants, who are yet to be dealt with in respect of this matter, in a plan to break into the premises. It appears clear from the information that I have read and particularly from the presentence report that that really was in retaliation for what you felt had been unfair treatment by your former employer.
5. You Mr Wabayat and a co-offender affected entry to the premises through a window. You have then taken an assortment of items with a calculated value of Vt 282,390.
6. You Mr Misak have acted as a look-out while the burglary was occurring. You then went and obtained a vehicle so that you and your co-offenders could leave with the stolen goods. There is agreement between Mr Livo and Ms Taiki that in respect of those goods the great majority of them have in fact been returned to the owner and it is only the perishable goods taken that have been kept and disposed of by you.
7. For the Public prosecutor, Ms Taiki suggests a starting point of two years imprisonment in respect of each of the three charges faced by your Mr Wabayat.



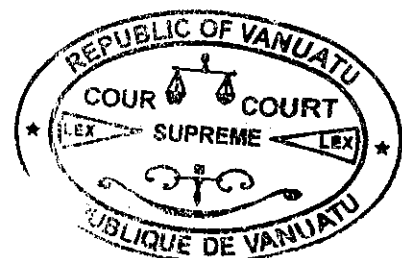
Not surprisingly she refers to the fact that the offending appears to have been your idea and that as a former employee engaged in the premises you were familiar with their layout. She submits an end sentence of 12 months to 2 years imprisonment taking into account your guilty plea, your lack of previous convictions, your co-operation with the Police and the period of one month which you spend in custody on remand.

8. In respect of you Mr Misak, Ms Taiki also proposes a starting point of two years in respect of each offence with an end sentence of around 12 months imprisonment taking into account the mitigating factors which are the same as those which I have just referred to in respect of Mr Wabayat. There is no dispute that each of you was held in custody on remand for one month.
9. On your behalf Mr Livo submits that I should treat you both in the same way and that the appropriate starting point should be one of two years. He has referred to the cases of PP v Noal¹, PP v Martin² and PP v Tamaki³ in support of that submission. He also refers to the same mitigating factors which have been referred to by Ms Taiki.
10. Although there are a number of charges this relates to one burglary of commercial premises involving the theft of a moderate amount of property most of which was recovered. Having said that, however, it appears clear to me that you Mr Wabayat were the main player in this offending having worked at the premises previously and knowing their layout. Accordingly I do not consider that there should be the same starting points for each of you.

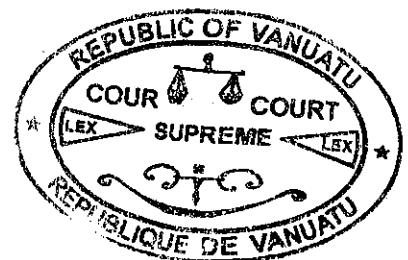
¹ [2005] VUSC 102

² [2010] VUSC 131

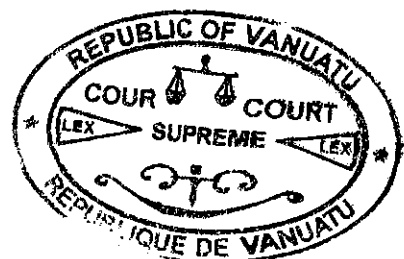
³ [2011] VUSC 220



11. Looking firstly at you Mr Wabayat, I consider an appropriate starting point to be one of two years and six months imprisonment. There are no personal aggravating factors which would justify any uplift from that starting point. I take account of your expressed remorse as referred to in your pre-sentence report and the fact that you are a first time offender and deduct four months for those factors. I deduct a further two months for take account of the time spent in custody on remand. That reduces the sentence to one of 24 months imprisonment. Allowing for a full one third deduction for your guilty plea leaves an end sentence of 16 months imprisonment.
12. In your case Mr Misak I consider an appropriate starting point to be one of two years imprisonment. I make the same allowance as I did for Mr Wabayat in terms of remorse, the fact that you are a first time offender and for the time spend in custody. That would reduce the two years to 18 months imprisonment. Allowing a one third deduction for your guilty plea leaves an end sentence of 12 months imprisonment.
13. The issue is then whether I should suspend your sentences. In that regard I note the criteria set out in section 57 of the Penal Code which requires me to consider the circumstances, the particular nature of the crime and your respective characters.
14. As I have said this was not a particularly sophisticated burglary and one which involved the theft of a moderate amount of property most of which appears to have been recovered. It is certainly not the most serious offending of its kind. You are both first time offenders. You both have children who are dependent on you and particularly and so in your case Mr Misak. On that topic you may well wish to reflect on your behavior and your conduct and consider whether you would want any of your children standing in the place that you are standing in today. I think the answer to that question is self-evident but children learn from the behavior and the conduct of their parents. So it is up to you to ensure that they do not travel the same path that you have.



15. I accept that you have both been remorseful and it appears that that is genuine. In your case, Mr Misak you have a certificate in Tourism and a hope to gain employment in that area. This conviction in itself may prove a barrier to that but that is a necessary consequence of your actions.
16. In your case Mr Wabayat, I am pleased to hear that you appear to have gained employment and the pre-sentence report refers to your skills as a builder. Each of you clearly had the ability to have a positive future if you wish. You have also had time in custody and I hope that that is been a wake-up call for each of you.
17. In all of the circumstances I consider that suspension of your prison sentences would be appropriate. They will be suspended for a period of two years. What you need to know is that if before the end of that two years, you are convicted of any further offence then you will be required to serve the term of imprisonment which is going to be imposed today unless the Court is satisfied that such a course would be unjust. If you do not reoffend during that suspended period of two years then you will not go to prison.
18. In addition to the suspended sentence and in order to underline the unacceptability of your offending I will also impose supervision and community work.
19. Accordingly, in your case Mr Wabayat you are sentenced to 16 months imprisonment in respect of each charge. Those terms are to run concurrently. That sentence will be suspended for two years. You are sentenced to supervision for a period of 12 months on the conditions that you undertake the Niufala Rod Program, that you undertake an alcohol and drug awareness program, that you undertake a victim awareness program and that you undertake counselling with your Pastor and Chiefs. You are also sentenced to 150 hours community work.



20. In your case Mr Misak, you are sentenced to 12 months imprisonment in respect of each charge with those terms to run concurrently. That sentence will be suspended for two years. You are sentenced to supervision for 12 months on the same conditions as those which apply to Mr Wabayat. You are also sentenced to community work for 130 hours. You are sentenced to less community work than Mr Wabayat as I have taken the view that he was the main player in this offending.

21. You have 14 days from today to appeal your sentence.

DATED at Port Vila this 4th day of August, 2017

BY THE COURT

.....
James Paul Geoghegan

Judge

