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

Criminal Appeal Case No. 2089 of 2017

BETWEEN: PUBLIC PROSECUTOR
Appellant

AND: ANDERSON WARI
Respondent

Hearing: *13th September 2017*
Before: *Justice Chetwynd*
Counsel: *Mr Boe for the Appellant*
Mr Garae Respondent

JUDGMENT

1. This is an appeal by the Public Prosecutor against the sentence imposed by the Magistrate on the respondent for an offence of committing an act of domestic violence contrary to section 10 of the Family Protection Act No. 28 of 2008. Section 4 of the Act defines domestic violence:

> *(1) A person commits an act of domestic violence if he or she intentionally does any of the following acts against a member of his or her family:*
>
> *(a) assaults the family member (whether or not there is evidence of a physical injury);*
> *(b) psychologically abuses, harasses or intimidates the family member;*
> *(c) sexually abuses the family member;*
> *(d) stalks the family member so as to cause him or her apprehension or fear;*
> *(e) behaves in an indecent or offensive manner to the family member;*
> *(f) damages or causes damage to the family member's property;*
> *(g) threatens to do any of the acts in paragraphs (a) to (f).*

2. When sentencing, the Magistrate outlined the background to the case. He said that the complainant wife reported the circumstance to the police on 26th July 2017. The respondent was arrested and came before the Magistrate on 11th August. He was represented by counsel and pleaded guilty. The summary of facts showed that the complainant wife had approached the respondent and told him, in private, that she was dissatisfied and frustrated over what the respondent had said to or of another family member. The respondent retaliated aggressively and assaulted his wife causing minor injuries. The magistrate sentenced the respondent to 5 months imprisonment which term was suspended for 2 years.

3. What complicates this case is the fact that the respondent was on parole at the time he committed the act of domestic violence. In November 2013 the respondent was convicted on a guilty plea of one count of sexual intercourse with a child under his care and protection and one count of unlawful sexual intercourse with

a child under 13 years of age. He was sentenced to 6 years imprisonment. On 26th August 2016 the Community Parole Board met and granted the respondent parole from 23rd September 2016. He was released on the standard conditions of parole and on 4 special conditions.

4. There was apparently some discussion before the Magistrate and in this appeal on the question of whether the respondent's conviction for the offence of committing an act of domestic violence was a breach of the conditions of his parole. The Correctional Services Act No. 10 of 2006 deals with parole in Part 6 from sections 50 to 63 of the Act. Conditions of parole and the consequences of their breach are set out in sections 52 to 54:

52 Conditions of Parole

(1) The following standard conditions will apply to an offender released on parole:

(a) the offender must report in person to a probation officer as soon as practicable and not later than 72 hours after his or her release on parole; and

(b) the offender must report to a probation officer as and when required to do so by a probation officer and must notify the probation officer of his or her residential location; and

(c) the offender must not move to a new residential location without the prior written consent of a probation officer; and

(d) the offender must take part in a rehabilitative and reintegrative needs assessment and/or programme if and when directed to do so by a probation officer.

(2) The conditions imposed in paragraphs (1)(c) and (d) do not apply if, and to the extent that, they are inconsistent with any special conditions imposed by the Board.

53 Special conditions of parole

(1) The Board may impose such special condition or conditions related to the rehabilitation or integration of an offender as the Board thinks necessary.

(2) An offender may not be subject to a special condition that requires the offender to take prescribed medication.

54 Offence related to breach of parole

(1) An offender commits an offence if the offender fails without reasonable excuse to comply with any condition of parole.

(2) An offender who commits an offence against subsection (1) is liable on conviction to a fine not exceeding VT10000 or to imprisonment not exceeding 3 months.

5. It is clear that committing an offence whilst on parole is not a breach of the general conditions set out in section 52. The licence for the release of the respondent on parole does not contain any special condition or conditions relating to offences committed after release on parole either. In short the respondent did not breach the conditions of his parole. However, that is not an end to it. If a parolee commits an offence whilst on parole there may well be consequences as can be seen from sections 60 and 61 of the Act.

60 Variation or cancellation of parole

(1) An offender who is subject to parole, or a probation officer, may apply to the Board for an order under subsection (3) on the grounds that:

(a) the offender is unable to comply, or has failed to comply, with any of the conditions of his or her parole; or

(b) any programme to which the offender is subject, is no longer available or suitable for the offender; or

(c) having regard to any change in circumstances since his or her parole was imposed and to the manner in which the offender has responded to parole:

(i) the rehabilitation and reintegration of the offender would be advanced by the remission, suspension, or variation of conditions, or the imposition of additional conditions; or

(ii) the continuation of parole is no longer necessary in the interest of the community or the offender.

(2) A probation officer may apply for an order under subsection (3) if an offender who is subject to parole is convicted of an offence punishable by imprisonment.

(3) On application under subsection (1) or subsection (2), the Board may, if it is satisfied that the grounds on which the application is based have been established:

(a) remit, suspend, or vary conditions imposed by the Board; or

(b) impose additional conditions; or

(c) cancel the parole; or

(d) cancel the parole and substitute and impose a new term of parole with any new or special conditions it thinks necessary.

(4) If the Board cancels parole under this section, the parole expires on the date that the order is made or on any other date that the Board may specify.

(5) If an application is made under this section for the remission, suspension, or variation of any condition imposed by the Board, a probation officer may suspend the condition until the application has been heard and disposed of.

61 Recall of offenders on Parole

(1) The Director or a probation officer may make a recall application to the Board if an offender has been released on parole or compassionate leave on the grounds that:

(a) the detainee poses an undue risk to the safety of the community or to any person or class of persons; or

(b) the offender has breached his or her parole conditions; or

(c) the offender has committed an offence punishable by imprisonment.

(2) When the application to recall is made, the sentence to which the application relates ceases to run from that date until the application has been decided.

6. The consequences of an application being made are then set out in sections 62 and 63:

62 Interim recall order

(1) If applied for by the Director or probation officer, an interim recall order must only be made by the chairperson of the Board if the chairperson is satisfied that the detainee poses an undue risk to the community or a person or class of persons or is about to abscond.

(2) If the chairperson decides not to make an interim order then the offender must come before the Board for the application to be decided as notified and the chairperson may issue a warrant for his or her attendance if required.

(3) If an interim recall order is made the detainee must be retained in a correctional centre until the date that the recall application is heard.

63 Recall Order

The Board may make the final recall order and if this occurs, the offender must return to the correctional centre and serve out his or her sentence or until further release under the provisions of this Act.

7. There is clearly a two stage process where either the Director of Correctional Services or a probation officer applies to the Community Parole Board for a recall. The Chairperson of the Board then either issues an interim recall order or the parolee has to come before the Board for it to consider the question of recall. These provisions mean this aspect of the consequences of a parolee committing an offence would not be the sentencing court's concern. Presumably the sentencing court would be expected to notify the Director of the conviction and the Director would in turn notify the appropriate probation manager or officer. In practical terms, a pre sentence report would most likely be called for by the sentencing court after conviction but before sentence and notification would probably be to the probation officer providing the report who could then notify the Director. However, the point to

note is the question of whether there should be a recall or an application for a recall is not one for the sentencing court.

8. The relevance of a conviction of a parolee for the sentencing court is simply that the convicted parolee would not be able to assert he or she was a person of good character. The previous conviction would be a matter that the sentencing court would or most certainly should take into account.

9. In regard to the appeal, it is necessary to look at the Magistrate's reasons for sentence in more detail. Having heard the appellant it is only necessary to consider the suspension of the sentence by the Magistrate. The appellant accepts that a non parole sentence of 10 months is within the range of sentences that could have been imposed. The appeal is put on the basis that it was wrong for the sentence to have been suspended.

10. The Magistrate discusses the release on parole and rightly concludes that the respondent was charged with domestic violence not for breach of parole. The Magistrate then goes on to consider the financial support that the respondent provides for the family. It seems to be for this reason that the sentence of 5 months is suspended. The Magistrates states:

> *"Hence, having considered the aggravating and mitigating features of this case, I am satisfied that the defendant needs time of varying his behaviour and also that the family desperately needed him for his assistance in meeting family welfare. Thus a suspended sentence is hereby ordered."*

11. It is not entirely clear how those considerations meet the conditions for suspension of a sentence as set out in section 57 of the Penal Code [Cap. 135]. I certainly do not see them as being concerned *"in particular with the nature of the crime"* or "*the character of the offender".*

12. When the character of the offender is considered it cannot be said he is a man of good character. He has a previous conviction. Not only, that on consideration of the nature of the crime and taking into account the definition of an act of domestic violence as set out earlier (see paragraph 1 above) it is clear that this latest conviction is for an offence similar in nature to that for which the respondent was previously convicted. An act involving sexual abuse of a family member is also an act of domestic violence.

13. That can only leave the condition as set out in section 57(1) (a) (i) of the Penal Code, *"in view of the circumstances*". Whilst the subsection is phrased in such a way as to allow a magistrate or judge to cast the net wide, there is no reference to ***all*** the circumstances. Financial hardship which might be faced by the family does not seem to me to be part of the consideration of the circumstances. Consideration

of the circumstances must be consideration of the circumstances of the offending and/or the offender. I would also suggest that to take into consideration the circumstances of the family when the offence is one of committing an act of domestic violence against at least one member of that family is not a proper consideration of the provisions of section 57 of the Penal Code. For these reasons I consider the Magistrate was wrong to suspend the sentence.

14. As indicated earlier, the appellants do not challenge the length of the sentence imposed. I am inclined to say that given the maximum sentence permitted under the Family Protection Act and taking in consideration the amendments to maximum sentences under the Penal Code (Amendment) Act No. 15 of 2016 for assaults, the sentence is a bit on the light side. However it is within a reasonable range. Going forward, as the maximum sentence for an assault under section 107(a) of the Penal Code (an assault which results in no physical damage), has now been increased to 12 months it might be thought appropriate that an assault or act of domestic violence causing injuries should attract a minimum sentence of 12 months. It should also be remembered that an offence under section 10(1) of the Family Protection Act is in addition to and not in substitution for any other offence constituted by an act of domestic violence.

15. The appeal is allowed and the order suspending the sentence is quashed. The effect of this decision is the Respondent will be taken into custody to serve the 5 months sentence of imprisonment. The Director of Correctional Services will also be given a copy of this decision and he can then make a decision as to whether to make an application for recall pursuant to section 60 or 61 of the Correctional Services Act.

DATED at Luganville this 14th day of September 2017.

BY THE COURT

D. CHETWYND
Judge