

BETWEEN: Jimson Noses

Appellant

AND: Public Prosecutor

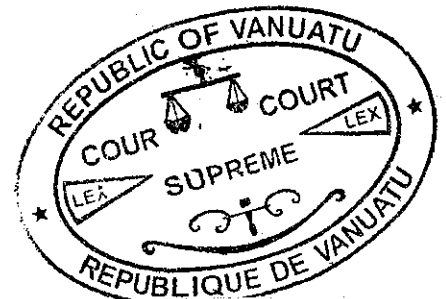
Respondent

Date of HEARING: 28th day of March, 2018 at 2:00 PM
Before: Justice Oliver Saksak
In Attendance: Lorenzo Moli for the appellant
Philip Toaliu for the respondent

JUDGMENT

Introduction

1. On 13th December 2017 the Magistrates Court at Lakatoro sentenced this appellant Jimson Noses Verlili and another defendant Abel Kition as follows:-
 - a. Jimson Noses-
 - 5 months imprisonment for one count of malicious damage to property- section 135 of the Penal Code Act Cap.135 (the Act).
 - 2 years imprisonment for unlawful entry- section 143 (1) of the Act and
 - 2 years imprisonment for theft- section 125 (a) of the Act.
 - b. Abel Kition-
 - 5 months imprisonment for malicious damage to property,
 - 2 years imprisonment for unlawful entry as a co-offender, and
 - 2 years imprisonment for theft
2. All these sentences were made to run consecutively making a total sentence of 4 years and 5 months for each.



3. Jimson Noses appealed separately against his sentence. He applied to be remanded on bail pending the determination of his appeal.

Bail was granted on 24th December 2017.

4. Abel Kition on the other hand has appealed separately after obtaining leave to appeal out of time. He is however in custody serving his sentence at the Correctional Centre in Luganville, Santo. His appeal will be heard and dealt with separately in due course.

5. As for Jimson Noses Verlili, he appealed against his sentence on grounds that-

- a) The learned Senior Magistrate erred in imposing a consecutive sentence,
- b) The sentence was manifestly excessive, and
- c) The learned Senior Magistrate erred in failing to apply the three-stage process in the PP.v. Kal Andy Case, [2011] VUCA 14.

At the hearing of the appeal on 28th March, Mr Toaliu conceded to the grounds of appeal and to the resentencing of the appellant. As a result the Court allowed the appeal. I now provide the reasons.

Reasons

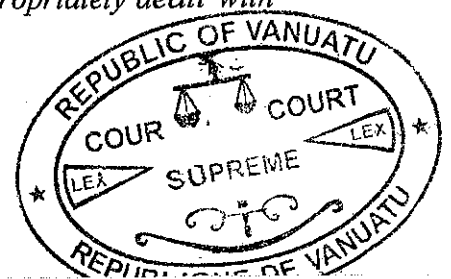
6. In his oral written submissions Mr Moli relied on-

- a) Archibold Criminal Pleadings Evidence and Practice 41st Edition paragraph 5-23 which states:

“ a good working rule is that consecutive sentences should not be passed for offences arising out of the same transaction. ”

- b) Kalfau.v. Public Prosecutor [1990] VUCA 9 where the Court of Appeal said:

“ a series of offences that form part of the same overall transaction and cause harm to the same person may be appropriately dealt with by a concurrent sentence. ”



- c) Apia.v. Public Prosecutor [2015] VUCA 30 where the Court Appeal said:

“ With respect to the primary judge, we do not agree this was a case for cumulative sentencing. The facts pertaining to the charge of obtaining money to deception were closely related to those of the forgery counts. They were all part and parcel of Mr Apia’s criminal operation.”

- d) Heromanley v Public Prosecutor [2010] VUCA 25 where the Court of Appeal dealt with consecutive sentences imposed for unlawful entry, theft and malicious damage as follows:

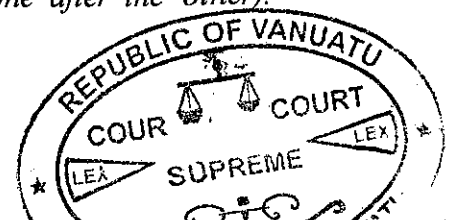
“ this was a single criminal enterprise in which an unoccupied house was broken into and property stolen. All offences were directed towards achieving that one purpose and all would have occurred within a short span of time. We are satisfied that the trial judge erred in ordering that the prison sentences be served cumulatively and thereby imposed a sentence which was excessive in these circumstances.”

- e) Section 52 of the Penal Code Act Cap.135 which states the Concurrent Sentences Rule as follows:

“ (1) If a person is convicted on more than one charge of an offence tried jointly, the respective sentences of imprisonment imposed for such offences are deemed to be concurrent sentences, unless the court otherwise orders.”

- f) The Vanuatu Magistrates Bench Book which provide for concurrent and consecutive sentences as follow:

“ When more than one offence is tried together and the offender is convicted on more than one charge, the respective sentences are deemed to be concurrent sentences (served at the same time), unless you order them to be served consecutively (one after the other).



Section 39 (1) Penal Code. This will most often occur when more than one charge arises from one event. For example, if an offender commits theft and damages property at the same home, the two separate offences should be treated as one transaction and the sentences of imprisonment should run concurrently, unless there is a good reason to do otherwise.”

7. As for the second ground of sentence being manifestly excessive, Mr Moli relied on the Court of Appeal Case of Robert.v. Public Prosecutor [2013] VUCA 25 where for offences of unlawful entry and theft, the Court of Appeal accepted appellant’s Counsel’s submission that the comparative table of sentences provided to the Court demonstrated that the normal sentence for unlawful entry and theft for a young first offender who pleads guilty, is either a community work or a fully suspended sentence.
8. Mr Moli submitted that in this case the Senior Magistrate should have suspended the sentence but did not, and failed to provide any reasons for not suspending the sentence.
9. As for the third ground, Mr Moli relied on the case of Public.v. Andy and the three steps sentencing process established in that case being-
 - a) The starting point,
 - b) Assessment of Factors Personal to the appellant, and
 - c) Deduction for Guilty Plea.

Mr Moli submitted the Senior Magistrate failed to follow these three steps process.

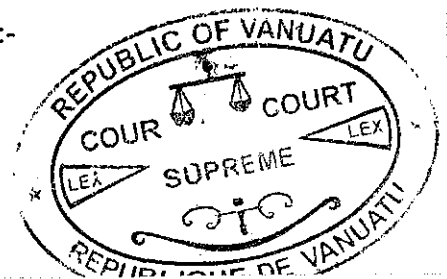
10. Finally Mr Moli submitted that the appeal should be allowed and the appellant be resentenced by imposing a starting point of 2 years imprisonment for unlawful entry and shorter concurrent sentences for theft and malicious damage, a reduction of 6 months for good behavior, remorse and delays, and allowing a 1/3 reduction for guilty pleas. The end sentence

should therefore have been 12 months suspended for 2 years on good behavior.

11. The principle of sentencing laid down in Archbold Criminal Pleadings Evidence and Practice are adopted in the Vanuatu Magistrates Court Bench Book. Those principles are clearly confirmed and upheld by the Court of Appeal all the cases relied on by Mr Moli in support of the grounds of appeal. In particular is the case of Heromanley.v. PP where the offences committed were unlawful entry and theft.
12. The facts of the case were that on 18th November 2016 both defendants (now appellants) entered Lakatoro School compound. Jimson Noses broke into the school office and removed three boxes. Abel Kition kept watched outside. They took the boxes to a sea coast and broke them open. Only one box had money in it in the sum of VT 257.000. They threw the empty boxes into the sea. They divided the money between themselves. The police recovered VT 109.400 but the balance of VT 147.600 was not accounted for.
13. Clearly the offences committed by both offenders formed part of the same overall transaction. And harm was done to the same person, in this case an institution, the Lakatoro School. It was clearly a single criminal enterprise. I am satisfied that the Senior Magistrate had erred in imposing consecutive sentences not only on this appellant, but also equally on Abel Kition.
14. Be that as it may, the Prosecution had no way to defend this appeal and simply conceded to all the grounds raised by the appellant. Prosecutions also conceded to the resentencing of the appellant Jimson Noses in the manner proposed by Mr Moli.

The Result

15. That being so, the appeal is hereby allowed. The sentence of the Magistrates Court dated 13th December 2017 is hereby quashed and set aside. The Court resentences the appellant Jimson Noses Verlili as follows:-



- a) For unlawful entry- starting point of 2 years imprisonment concurrent
- b) For theft- starting point of 1 year imprisonment made concurrent, and
- c) For malicious damage- 2 months imprisonment made concurrent.

The total concurrent sentence is therefore 2 years or 24 months imprisonment.

16. In mitigation, 6 months are deducted for good character, remorse and delays leaving the balance of 18 months. And finally for the guilty plea, a further 6 months is deducted representing a 1/3 reduction, leaving the end sentence at 12 months imprisonment. And applying the principle in Robert's case, the end sentence of 12 months imprisonment shall be suspended for a period of 2 years from the date hereof, on good behavior. This suspension is made under section 57 of the Penal Code Act.

DATED at Port Vila this 4th day of April, 2018

BY THE COURT

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Oliver .A. Saksak

Judge

