

BETWEEN: Public Prosecutor

AND: Henry Tom

Date of Hearing: 24 October 2019
Court: G.A Andrée Wiltens
Counsel: Mr K. Massing for the Public Prosecutor
Mr E. Molbaleh for the Defendant

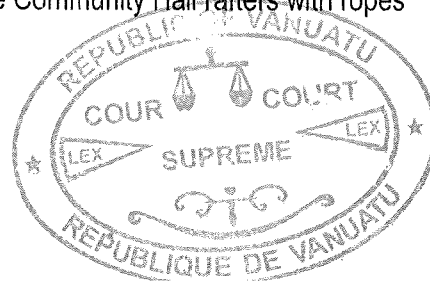
SENTENCE

A. Introduction

1. Mr Tom pleaded guilty to a charge of inciting and soliciting intentional homicide. The maximum sentence for such offending is a term of life imprisonment.

B. Facts

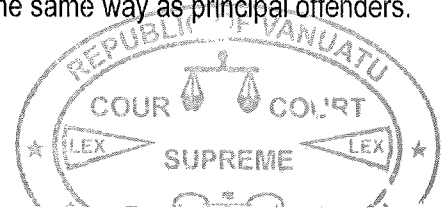
2. In 2014, the community of Akam Island in Southern Malekula were shocked by three unusual deaths, which led to a suspicion of witchcraft being involved. There were accordingly 3 public meetings held at which the causes of death for each of the departed was communally examined in June, October and November 2014. The meetings were led by the local Chiefs.
3. The 3rd meeting involved allegations of witchcraft against two persons in particular, namely Songi Samuel and Simeon Bahavus (the deceased). At the commencement of the second day of that meeting, there was an interruption to the proceedings caused by Mr Tom, apparently unable to control his anger. He incited and solicited 5 others to assault the two deceased until they were dead – he offered them bush knives to use. Those 5 men did so assault as instructed, and they went on to hang the two victims from the Community Hall rafters with ropes around their necks until both were dead.



4. The amended summary of facts records that once he had so instructed the 5 assailants and given them the knife(s), Mr Tom left the scene and took no further part in the matter.
5. The deceased both suffered greatly prior to their deaths. There are numerous injuries to both cadavers, and significant findings of blood within the Community Hall quite inconsistent with a hanging, but totally consistent with a great deal of violence having been meted out to the deceased prior to that.
6. When arrested and interviewed, Mr Tom denied the allegations against him.

B. Start Point

7. This is extremely serious offending, with several aggravating factors. The deceased were the subjects of public and barbaric execution on the pretext of their have exercised witchcraft causing one or more of the suspicious deaths that concerned the community. The fact that more than one innocent life was taken makes the offending more serious. This was a planned and pre-meditated double homicide, committed only after other serious forms of violence had been meted out. The offenders took the law into their own hands, without any justification. There must have been traumatic consequences for the families of the deceased.
8. The root cause for this offending stems from the intervention by Mr Tom – without his involvement, the offending would likely not have escalated to what actually occurred. However, there was a large group who have been convicted of an unlawful assembly, who undoubtedly also contributed to the deaths by angrily supporting Mr Tom's incitement. Each of those defendants has been given sentences of 12 months imprisonment suspended for 2 years together with 80 hours of community work.
9. It is important to consider parity of sentence. The start point adopted for Mr Tom's co-accused for committing the intentional pre-meditated homicides was 24 years imprisonment – the end sentences that were imposed for each was 15 years imprisonment, back-dated to when they were first remanded in custody. The end sentences were arrived at taking into account their prompt guilty pleas, their lack of previous convictions, their youth and the custom reconciliation ceremony that was performed. Those sentences have not been appealed.
10. There is a significant difference between Mr Tom and the 5 men he inveigled to act in this manner in that Mr Tom is a Village elder, a Chief. The men who followed his instruction were described by Chief Justice Lunabek when sentencing them as largely uneducated, simple villagers who earned their livelihoods as farmers. They were of relative youth, and pleaded guilty promptly. Those factors led to discounts applying to their sentences imposed, which are not available to Mr Tom.
11. The law provides that those who incite and solicit may be charged and convicted as a principal offender – section 35 of the Penal Code. However, those who conduct themselves in that fashion, such as Mr Tom, should not also be sentenced in the same way as principal offenders.

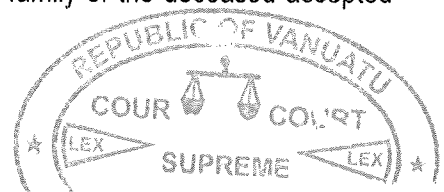


It is quite a different matter to seek to persuade others to do something as opposed to actually taking people's lives. In my view, those who committed the homicide are more culpable than one who merely incites or solicits that conduct – that is so despite the fact that the maximum penalty is identical. I note that Mr Massing submitted a lesser starting point for Mr Tom than the Chief Justice adopted for the 5 men who caused the deaths.

12. The Court of Appeal in *Namuly v Public Prosecutor* [2011] VUCA 25 considered the sentence start point of 10 years imprisonment as inadequate, suggesting a start point of 12 – 13 years more appropriate for inciting and soliciting one death. In this case, there are two deaths, making this a more serious case. Mr Molbaleh was unable to submit otherwise.
13. Mr Molbaleh also submitted that the fact Mr Tom left the scene prior to the killing was mitigatory. I disagree.
14. The appropriate start point for Mr Tom's offending, had he been the sole cause for the two deaths, would also have been set at 15 years imprisonment. However, there was something of a mass hysteria prevalent at the time. While that was most probably escalated by Mr Tom's conduct, the 5 men who actually caused the deaths were undoubtedly also spurred on by the prevalent mood of the gathering, which was clearly one of anger and desirous of revenge for the suspicious death being investigated. In the circumstances, the sentence start point that I adopt for Mr Tom is one of 12 years imprisonment.

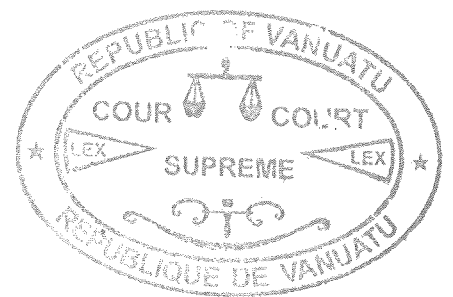
C. Personal Factors

15. Mr Tom has no previous convictions. He has maintained that status for a considerable time as he is currently some 66 years of age. He is entitled to some credit for that. Similarly, he is entitled to a small amount of credit for the lack of any further offending in the last 5 years. For this factor, I reduce the start point of sentence by 10 months.
16. The PSR reveals that he is married, with 4 children and some grandchildren. Mr Tom has many skills, having attended courses designed to enable him to better contribute to his community such as carpentry, mechanic engineering, joinery and plumbing. He has also made a significant contribution to his community by way of donations such as water tanks and a boat. He has been active within church circles as well. Mr Tom is the main bread-winner for his family.
17. Mr Molbaleh has tendered a number of statements as to Mr Tom's good character. I accept that, this incident apart, Mr Tom was an upstanding and fully contributing member of his community. These personal factors enable a further reduction from the sentence start point. I allow a further 8 months for that factor.
18. I note that there has been a custom reconciliation ceremony, involving the family of the two deceased, the community, all Nasara Chiefs and church leaders. The ceremony involved the killing of one or more pigs. The PSR writer reports that the family of the deceased accepted



the apology and offer of peace within the community that the ceremony represented. I am prepared to allow a reduction from Mr Tom's sentence start point for that factor of 4 months.

19. I note that the community has additionally agreed to take responsibility for the needs of the son of the late Mr Bahavus – that is not mitigation for Mr Tom.
20. Mr Tom claims to be remorseful. That is difficult to accept. The offending took place in November 2014. Up until yesterday, Mr Tom maintained that he was not responsible. A truly remorseful person would have admitted the offending at a far earlier time. I do not accept Mr Tom's claim that he is truly remorseful. What I do accept is his acknowledgement of wrongdoing, but that is reflected in discount available for his plea.
21. Nor do I accept that he co-operated with the authorities during the investigation and prosecution of this matter, as suggested in the PSR. There is no reduction of sentence for either of these aspects.
22. I note further that there has been some delay in this case. The event occurred in late 2014, and it will be concluded almost 5 years later. Mr Molbaleh submitted his client was not at fault for any of the delay – he has simply been waiting for his trial to be called on. Mr Massing submitted the delay was entirely the fault of Mr Tom. Counsel were unable to assist the Court with accurate information regarding this issue.
23. The Court file reveals the following appearances, although I accept there may well have been more:
 - on 31 January 2015 a Magistrate granted Mr Tom bail (I'm not sure on what basis);
 - on 3 March 2015, Mr Tom pleaded not guilty on arraignment and was remanded in custody;
 - on 22 May 2015 Mr Tom was granted bail in the Supreme Court;
 - on 20 August 2015 Mr Tom was absent from a call-over and it was recorded he had breached his bail by not appearing as required on 3 August 2015 – no warrant was ordered however;
 - at the next hearing, on 1 September 2015, Mr Tom was again absent, but no warrant was issued;
 - on 19 October 2016 Mr Tom was absent from Court and a warrant of arrest was issued;
 - the Warrant was further extended on 2 May 2017; and
 - on 1 March 2018, the Warrant had not been executed.



24. Taking those matters into account, there is no mitigation available to Mr Tom for that delay, as he is primarily the cause of it, having initially breached his bail and then successfully evaded the execution of the Arrest Warrant for some 18 months prior to being remanded in custody.
25. In all the circumstances, I am prepared to reduce the sentence start point by 22 months imprisonment to take into account Mr Tom's personal factors.

D. Plea

26. Mr Tom pleaded guilty before me, but that was not his first opportunity to do so. By pleading guilty on the day of trial, he saved the necessity for a criminal trial. However, he could, and should, have done so sooner to reflect some remorse for his conduct and to spare the need for family members of the deceased to have to give evidence. He has had ample opportunities to do so – I note that the majority of the others involved were sentenced in April 2015. For Mr Tom's belated guilty plea I therefore reduce his sentence start point by a further 15%.

E. Suspension

27. The Court has a discretion, in certain legislated circumstances, to suspend the period of imprisonment imposed, either wholly or in part. Due to the type and seriousness of this offending, a suspended sentence would be wrong in principle. Accordingly, I decline to exercise my discretion in Mr Tom's favour -- there can be no suspension of any part of his sentence. After all two innocent men lost their lives as a result of the offending by Mr Tom and the others. Deterrence must be a significant factor of the sentencing process.

F. End Sentence

28. The sentence Mr Tom must serve is set at 8 years 6 months imprisonment. The start date for the sentence is back-dated to 12 May 2019 to reflect the time he has already served.
29. Lastly, I compare this sentence with the sentences imposed on the others involved in the offending. I am satisfied that Mr Tom's sentence is on a parity with the sentences of the others involved.
30. Mr Tom has the right to appeal this sentence within 14 days if he so chooses.

Dated this 24th day of October 2019 at Lakatoro Supreme Court


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Justice G.A. Andrée Wiltens

