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

Criminal Appeal
Case No. 21/678 SC/CRMA

BETWEEN: **Yalu Sawia**
Appellant

AND: **Public Prosecutor**
Respondent

Date of Hearing:	22 June 2021
Before:	Justice V.M. Trief
In Attendance:	Appellant – Mr L.J. Napuati
	Respondent – Ms M. Tasso
Date of Decision:	8 July 2021

JUDGMENT

A. Introduction

1. The Appellant Yalu Sawia appeals against his conviction and sentence by the Magistrates' Court and in the alternative, that the sentence be suspended.

B. Background

2. The complainant is Mr Sawia's wife, Fabien Sawia. On 12 August 2020, Mrs Sawia filed an Urgent Application for a Family Protection Order in Domestic Violence Case No. 2072 of 2020 ('DV 20/2072').

3. On 13 August 2020, the Magistrates' Court issued the family protection order sought (the 'Order').

4. On 16 September 2020, Mr Sawia attended the review hearing in the Magistrates' Court. He stated that alcohol consumption caused him to be violent. The Court ordered him to attend a custom meeting within 30 days and no alcohol for six months.

5. Mr Sawia failed to attend the review hearing in the Magistrates' Court on 16 October 2020. Mrs Sawia and Mr Sawia's father attended. Mrs Sawia told the Court that the Police had served the Order on Mr Sawia at their house but that he continued to threaten her and had used abusive words against her on a daily basis since receiving the Order. She stated that the previous day, Mr Sawia assaulted her in front of the children. She wanted a criminal charge laid against Mr Sawia for his breach of the court's order. Mr Sawia's father stated that his son (Mr Sawia) did not respect the Order; Mrs Sawia and his grandchildren continuously received abusive words on a daily basis. The Acting Chief Magistrate told Mrs Sawia to lodge a written complaint if she wished the Court to issue a criminal charge.

6. By letter dated 16 October 2020, Mrs Sawia complained that Mr Sawia had breached and continued to breach the Order by speaking abusive words to her ("tip skin", "fuck you", "kan face") and threatening to assault her.

7. On 16 October 2020, the Acting Chief Magistrate issued a judicial charge under s. 35 of the *Criminal Procedure Code* [CAP 136] (the 'CPC') in Criminal Case No. 2850 of 2020 alleging that Mr Sawia breached the Order, contrary to s. 21 of the *Family Protection Act* No. 28 of 2008 (the 'FPA') as follows:

> *COUNT 1: Breach of Court order issued on 13 August 2020 contrary to section 21 of the Family Protection Act No. 28*
>
> *PARTICULARS BLONG WRONG*
>
> ***Ialu Sawia** yu reside long Freshwota 2, Efate mo yu wok long Municipal long Port Vila. Long manis blong October mo September 2020, afta yu receivem Kot Oda blong DV 20/2072 mo kam long review hearing, yu bin brekem Oda blong Kot taem yu threatenem mo swear long Fabienne Sawia we hemi wife blong yu mo yu no attendem meeting olsem Kot e odarem yu blong mekem bifo 30 days.*

8. Also on 16 October 2020, the Magistrates' Court issued a warrant of arrest for Mr Sawia to be brought to Court on 23 October 2020 for plea.

9. Mr Sawia failed to appear on 23 October 2020.

10. On 23 October 2020, the Police cautioned and interviewed Mr Sawia. He signed an undertaking to attend the Magistrates' Court on 18 November 2020.

11. In February 2021, Mr Sawia pleaded guilty to the charge against him.

12. On 1 March 2021, the Magistrates' Court sentenced Mr Sawia to 10 months imprisonment.

13. By letter dated 8 March 2021, Mrs Sawia wrote that she was withdrawing her September 2020 complaint statement.

C. Grounds of Appeal and Submissions

14. Mr Napuati advanced the following grounds of appeal:

i) The learned Magistrate erred in law and fact in determining that Mr Sawia was charged with one count for breach of a domestic violence order issued on 16 August 2020 when no such order was issued on that date **[Ground 1]**;

ii) The learned Magistrate erred in law and fact in putting weight on the complainant's letter dated 16 October 2020 when it was never sworn as a complaint in accordance with s. 34 and subs. 35(2) of the CPC **[Ground 2]**, and in convicting and sentencing Mr Sawia when the complaint has been withdrawn **[Ground 4];**

iii) The learned Magistrate erred in law and fact in issuing the warrant of arrest against Mr Sawia when there is no evidence of proof of service of the notice of hearing on 23 October 2020 as required by s. 30 of the FPA and Mr Sawia was never given an opportunity to be [represented] by a lawyer in respect of the breach as confirmed in *re Civil Contempt of Court, de Robillard* [1997] VUCA 1 **[Grounds 3 and 6],** and in determining the application without all parties being present **[Ground 5]**;

iv) The Court below erred in fact and in law in failing to take into account that the complainant had invited Mr Sawia to return home and live with her and their children, soon after the protection order was made, so that in effect that order could not be said to be still in force or alive, and therefore was not capable of being breached **[Ground 7]**;

v) The learned Magistrate erred in law and fact in calculating 1/3 of the 12 months imprisonment sentence imposed and further failed to take into account mitigating factors **[Ground 9]**; and

vi) The sentence of 10 months imprisonment is manifestly excessive in the circumstances of this case **[Ground 8]**.

15. The appeal was opposed. The Respondent filed two sets of submissions.

16. I thank counsel for their submissions which assisted me.

D. Discussion

Ground 1: The learned Magistrate erred in law and fact in determining that Mr Sawia was charged with one count for breach of a domestic violence order issued on 16 August 2020 when no such order was issued on that date.

17. Mr Napuati properly conceded in his submissions that the only protection order was issued on 13 August 2020 therefore this was a minor error of fact in the judgment which in itself does not affect the judgment issued at all.

18. This ground of appeal therefore fails.

19. This being the only substantive ground of appeal relating to conviction, the appeal as to conviction must be dismissed.

20. I note also that Mr Napuati conceded at para. 2 of the Further Appellant's Skeleton Written Submissions filed on 7 April 2021 that Mr Sawia did breach the Protection orders.

Grounds 2 and 4: The learned Magistrate erred in law and fact in putting weight on the complainant's letter dated 16 October 2020 when it was never sworn as a complaint in accordance with s. 34 and subs. 35(2) of the Criminal Procedure Code [CAP. 136] ***[Ground 2]****, and in convicting and sentencing Mr Sawia when the complaint has been withdrawn* ***[Ground 4].***

21. Sections 34 and 35 of the CPC provide as follows:

> *34. Proceedings shall be instituted by the making of a complaint or a preferment of a charge.*
>
> *35. (1) Any person who believes from reasonable and probable cause that an offence has been committed by any person may make a complaint thereof to a judicial officer.*
>
> *(2) A complaint shall be made under oath and may be made orally or in writing but if made orally shall be reduced to writing by the judicial officer, and, in either case, shall be signed by the private prosecutor and the judicial officer:*
>
> *Provided that where the proceedings are instituted by a prosecutor or by a public officer authorised under section 33, a formal charge duly signed by any such person may be presented to a judicial officer and shall be deemed to be a complaint for the purposes of this Code.*
>
> *(3) Subject to subsection (4) the judicial officer upon receiving any such complaint shall, unless such complaint has been made in the form of a formal charge under subsection (2) draw up or cause to be drawn up and shall sign a formal charge.*
>
> *(4) Where the judicial officer is of opinion that a complaint or formal charge made or presented under this section does not disclose any offence, he shall make an order refusing to admit such complaint or formal charge and shall record his reasons for making such order.*
>
> *(my emphasis)*

22. It is common ground that there is no record in the Magistrate's notes that Mrs Sawia's complaint by letter dated 16 October 2020 was made under oath as required by subs. 35(2) of the CPC.

23. However, subs. 36(2) of the CPC provides:

> *36. ...*
>
> *(2) The validity of any proceedings taken in pursuance of a complaint or charge shall not be affected either by any defect in the complaint or charge or by the fact that a summons or warrant was issued without a complaint or charge.*
>
> *(my emphasis)*

24. Even though there was a defect in the complaint as there is no record that it was made under oath, the validity of the proceedings taken in pursuance of that complaint including the judicial charge and Mr Sawia's conviction and sentence are not affected pursuant to subs. 36(2) of the CPC.

25. Ground 2 is not made out.

26. Ground 4 asserts that the learned Magistrate erred in law and fact in convicting and sentencing Mr Sawia when there is now evidence that she has withdrawn the complaint. This ground overlooks that Mrs Sawia's letter retracting her September 2020 complaint statement is dated 8 March 2021, well after Mr Sawia's conviction and sentencing.

27. I accept Ms Tasso's submission that the fact that the complainant after the sentencing has written to retract the complaint is irrelevant to whether the conviction and sentence were sound.

28. Even if the complainant had retracted her complaint prior to the conviction and sentence, that does not automatically result in the criminal proceedings being discontinued. That is a decision solely for the Public Prosecutor or if the Court considered that insufficient evidence existed, the Court could have dismissed the charge. In any event, there was no withdrawal of the complaint prior to the conviction and sentence.

29. There is no merit in Ground 4.

Grounds 3, 5 and 6: The learned Magistrate erred in law and fact in issuing the warrant of arrest against Mr Sawia when there is no evidence of proof of service of the notice of hearing on 23 October 2020 as required by s. 30 of the FPA and Mr Sawia was never given an opportunity to be [represented] by a lawyer in respect of the breach as confirmed in In re Civil Contempt of Court, de Robillard [1997] VUCA 1 ***[Grounds 3 and 6],*** *and in determining the application without all parties being present* ***[Ground 5]****.*

30. Section 30 of the FPA provides as follows:

> *30. (1) Subject to subsection (2), a court may proceed to hear and determine an application for a protection order if the defendant is not present.*
>
> *(2) The court must be satisfied that:*
>
> *(a) the defendant has been served with a summons to appear at the hearing (see section 35(1)(a)); or*
>
> *(b) the defendant was required by conditions of bail to appear at the hearing (see section 35(1)(b)); or*
>
> *(c) having regard to the circumstances of the case all reasonable efforts have been made to give the defendant notice of the hearing.*
>
> *(my emphasis)*

31. Section 30 of the FPA relates to the hearing and determination of an application for a protection order in the absence of the defendant; it does not relate to the listing of a matter for plea to a criminal charge (as on 23 October 2020).

32. The learned Magistrate had the power to issue the warrant of arrest dated 16 October 2020. No error has been made out in her issuance of that warrant.

33. The warrant authorised the Police to bring Mr Sawia to the Magistrates' Court on 23 October 2020 for plea to the charge against him. No proof of service of the 23 October 2020 hearing was otherwise required.

34. Ground 3 asserts that there was no proof of service of Mrs Sawia's Urgent Application for a Family Protection Order before that application was heard and determined therefore the protection order granted should not have been issued in the first place. Ground 5 asserts that the learned Magistrate erred in determining the Urgent Application without all parties being present. However, the current appeal is **not** against the protection order made. This appeal is against Mr Sawia's conviction and sentence for criminal offending.

35. There is no merit in Grounds 3 and 5.

36. Ground 6 asserts that Mr Sawia was never given an opportunity to be represented by a lawyer in respect of the breach. With respect, I disagree. In Mr Sawia's statement to the Police on 23 October 2020, he stated that he would retain a lawyer. He signed an undertaking to attend the Magistrates' Court on 18 November 2020. Ms Tasso submitted that the case was adjourned to 9 December 2020, 9 February 2021 and 1 March 2021. By 25 February 2021, Mr Sawia was represented by counsel Mr Lorenzo Moli of the Public Solicitor's Office who on that date filed his Defence Sentencing Submissions. Accordingly, Mr Sawia was afforded every opportunity to be legally represented and to be heard on relevant issues: *In re Civil Contempt of Court, de Robillard [1997] VUCA 1.*

37. Ground 6 also fails.

Ground 7: The Court below erred in fact and in law in failing to take into account that the complainant had invited Mr Sawia to return home and live with her and their children, soon after the protection order was made, so that in effect that order could not be said to be still in force or alive, and therefore was not capable of being breached.

38. Whether or not Mr Sawia was living with Mrs Sawia at the time is irrelevant to whether or not he breached the Order. Ms Tasso is correct in her submission that even if the complainant had invited Mr Sawia home, this does not equate to an invitation to be abused and threatened by him. Just because two members of a household agree to live together does not mean that one consents or agrees to violence from the other!

39. Mr Napuati did not cite any statutory provision or caselaw to support the contention that because Mr Sawia had been invited home, the Order could not be said to be in force or alive and thus capable of being breached. With respect, Mr Napuati did not do so because there is no law to that effect. This ground is roundly rejected.

Ground 9: The learned Magistrate erred in law and fact in calculating 1/3 of the 12 months imprisonment sentence imposed and further failed to take into account mitigating factors.

40. Ms Tasso accepted that 1/3 of the 12 months imprisonment sentence start point is 4 months. Therefore 12 months minus 4 months equates to 8 months imprisonment, **not** 10 months imprisonment. Accordingly, the learned Magistrate erroneously calculated the deduction for Mr Sawia's guilty plea.

41. Mr Napuati also submitted that the learned Magistrate erred in failing to take into account mitigating factors. These were stated to include no prior criminal convictions, Mr Sawia is a councillor of the Port Vila Municipal Council, his cooperation with the Police and his remorse for what happened.

42. It is accepted that the learned Magistrate did not make any deduction for Mr Sawia's personal factors. Taking into account the following personal factors, a further 2 months is deducted from the sentence start point:

    a. Mr Sawia is 43 years old. He is in a *de facto* relationship and has 6 children, of whom 4 are at school. He pays their school fees;

    b. He is a councillor of the Port Vila Municipal Council. Mr Sawia's conviction is a fall from grace however as a leader, he also has a responsibility to the community to set an example. He has failed to do so by committing domestic violence and failing to comply with the Court Order made for his wife and family's protection;

    c. Mr Sawia's support for his extended family, for the Port Vila community specifically the Fresh Wota community and for the Tanna community in Port Vila and in the islands;

    d. His cooperation with the Police; and

    e. The reconciliation ceremony performed.

43. I do not accept that Mr Sawia has no prior criminal convictions as he was convicted on 12 November 2018 for failure to maintain family and on 11 July 2017 for malicious damage to property.

44. An end sentence of 6 months imprisonment is substituted. The sentence is back-dated to run from 22 June 2021 to take into account the 2 weeks 3 days that Mr Sawia has served in custody.

Ground 8: The sentence of 10 months imprisonment is manifestly excessive in the circumstances of this case.

45. The maximum sentence available for breach of protection order is 2 years imprisonment or VT50,000 fine or both.

46. Mr Napuati submitted that the starting point of 12 months imprisonment was excessive given there was only 1 count against Mr Sawia and there was no physical harm unlike in *Namri v Public Prosecutor* [2017] VUSC 113 where 5 months imprisonment was imposed for 2 counts involving physical harm. I cannot agree because the *Namri v PP* judgment ended with the Supreme Court quashing both convictions and the sentences imposed as there was no complaint, no charge put, no opportunity given to obtain legal representation or to be heard on relevant issues before conviction and sentence, and no reasons given. Accordingly, *Namri v PP* is not persuasive authority as to the appropriate sentence start point.

47. Mr Napuati further submitted that swearing without any physical harm requires a lesser sentence starting point. With respect, the form of the violence is not what constituted the offence – Mr Sawia's breach of the Order is what constituted the offence. Further, the FPA does not provide that one form of violence is more serious than another. Accordingly, I reject the submission that a lesser starting point was required.

48. Even if there was no physical harm, Mr Sawia's abusive words and threats alone were hurtful and harmful and caused Mrs Sawia trauma and fear. Mr Sawia's actions created a dangerous situation for the complainant in her own home where she is entitled to be safe and protected.

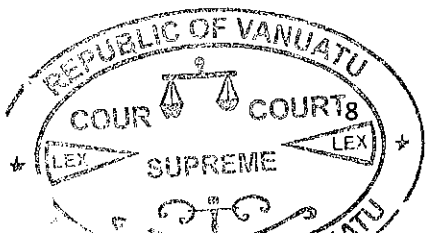
49. Mr Napuati also relied on the Supreme Court's judgment in *Ruben v Public Prosecutor* [2020] VUSC 237. In that case, the Supreme Court held that the Magistrates' Court's end sentences could not be said to be manifestly excessive and dismissed the appeal. The sentences upheld were for 9 months imprisonment concurrently in respect of 2 counts of domestic violence and 2 counts of breach of protection orders.

50. On the contrary, the sentence imposed for Mr Sawia was within range.

51. The learned Magistrate declined to impose a fine, stating that a sentence of imprisonment was appropriate since Mr Sawia breached a direct order of the Court. Further, as pointed out by Ms Tasso, the breach occurred almost immediately after the 16 September 2020 review hearing which Mr Sawia attended and it was a continuing offence from September to October 2020 involving repeated verbal abuse, threats of violence and inflicting psychological trauma on the complainant.

52. Given Mr Sawia's attendance at the review hearing and his statement then that alcohol consumption caused him to be violent, I reject all submissions that Mr Sawia did not know that there was a protection order against him as he was not served with the orders. It was also at that review hearing that the Court ordered Mr Sawia to attend a custom meeting within 30 days. He did not do so therefore this was one of the particulars of the charge against him. A charge that he accepted when he pleaded guilty to it.

53. I accept Ms Tasso's submission that clearly the learned Magistrate considered that specific and general deterrence, and the protection of the complainant, were important sentencing factors.



54. Mr Napuati made strenuous submissions that the sentence should have been suspended. He urged me to reconsider suspension of the sentence in view of the circumstances of the case, the nature of the crime and the character of the offender.

55. However, given that Mr Sawia attended the review hearing in the Magistrates' Court and knew of the protection order that had been made, however still engaged in repeated breaches of the Order from September to October 2020, given that Mr Sawia has previous criminal convictions and his position as a leader with a responsibility to the community to set an example, I am of the view that suspension of all or part of the sentence would be inappropriate.

56. Finally, to succeed with this submission, Mr Napuati needed to demonstrate an error in the exercise of the learned Magistrate's discretion. He has not done so.

E. Result

57. The appeal against conviction is dismissed.

58. The appeal against sentence is allowed only in relation to the erroneous calculation for the guilty plea deduction and failure to make a deduction for Mr Sawia's personal factors. Having taken these into account, an end sentence of 6 months imprisonment is substituted.

59. The sentence is back-dated to run from 22 June 2021 to take into account the 2 weeks 3 days that Mr Sawia has served in custody.

60. For the reasons given, I am of the view that suspension of all or part of the sentence would be inappropriate. Mr Sawia is to serve his sentence of imprisonment.

DATED at Port Vila this 8th day of July 2021
BY THE COURT

.....
Viran Molisa Trief
Judge

REPUBLIC OF VANUATU COUR COURT LEX SUPREME LEX REPUBLIQUE DE VANUATU