

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

Criminal Appeal
Case No. 22/31 SC/CRMA

BETWEEN: Kami Kalwatman
Appellant

AND: Public Prosecutor
Respondent

Date of Hearing: 24 January 2023
Before: Justice V.M. Trief
In Attendance: Appellant – Mrs K. Karu
Respondent – Ms M. Tasso
Date of Decision: 23 February 2023

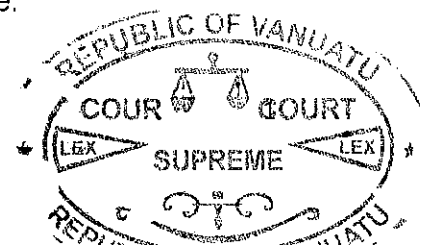
JUDGMENT

A. Introduction

1. This is an appeal against the sentence imposed by the Magistrates' Court.

B. Background

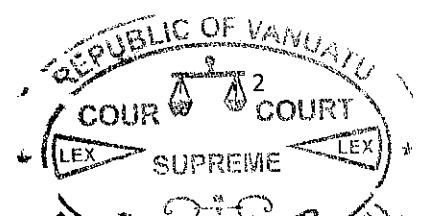
2. On 18 November 2022, the Appellant Kami Kalwatman pleaded guilty to being drunk and disorderly (Charge 1) and to malicious damage to property (Charge 2). He was unrepresented.
3. The facts of Charge 1 were that on 22 April 2022, Mr Kalwatman while under the influence of alcohol stood at the main road outside Breakas Resort at Pango village and disturbed members of the public using the road.
4. Police officers in a Police truck attended. They spoke with Mr Kalwatman and several other drunken young men on the road and told them to go home.



5. The facts of Charge 2 were that as the truck left, Mr Kalwatman picked up a stone and threw it at the right rear bumper of the truck. He fled when he heard the stone connect with the truck.
6. Also on 18 November 2022, the learned Magistrate heard submissions as to sentence. By written decision provided on 23 November 2022 but dated 18 November 2022, she sentenced Mr Kalwatman to consecutive sentences of 2 months imprisonment on Charge 1 and to 3 months imprisonment on Charge 3.
7. The Magistrates' Court warrant of imprisonment dated 18 November 2022 records concurrent sentences of 3 months imprisonment in relation to each charge.
8. Mr Kalwatman served time in custody from 18 November 2022 to 2 December 2022 when he was released on bail pending appeal (15 days).

C. Grounds of Appeal and Submissions

9. The grounds of appeal are as follows:
 - i) That the learned Magistrate erred in not affording the Appellant the procedural fairness required for an unrepresented person; and
 - ii) That the learned Magistrate erred in law in imposing a manifestly excessive and inconsistent end sentence.
10. Mrs Karu submitted that the learned Magistrate erred in not giving Mr Kalwatman any explanation of the nature of the charges, the legal implications of the allegations nor the opportunity to seek legal representation either as to the plea or in mitigation. She cited the Vanuatu Magistrates Bench Book 2004 as setting out a Magistrate's duties in that regard. There are no magistrate's notes recording that the learned Magistrate assisted Mr Kalwatman as she submitted should have been done.
11. Mrs Karu also submitted that the learned Magistrate erred in imposing a manifestly excessive end sentence as he is 20 years old, a first-time offender and dependent on his parents. He is unemployed. He offended due to peer pressure resulting in his drinking alcohol and as a result of his level of intoxication, he behaved in a disorderly manner. She submitted that he is remorseful (also demonstrated by his early guilty pleas), has stopped drinking alcohol and has good prospects of rehabilitation because of his youth and previous good character.
12. Additionally, Mrs Karu submitted that the learned Magistrate overstated the aggravating features of the offending and did not take into account any mitigating factors of the offending. She submitted there was only minor damage caused to the police vehicle being a mark of a stone on the rear right bumper.
13. Finally, it was submitted that the sentence was manifestly excessive being the maximum penalty prescribed for both offences and inconsistent with comparable cases *Public*



Prosecutor v Siti; Criminal Case No. 1768 of 2021 and *Public Prosecutor v Sope* [2020] VJSC 249.

14. Ms Tasso submitted in response that although Mr Kalwatman was unrepresented and there was no record of whether or not the learned Magistrate explained his rights to him, she did make a very generous discount on sentence (1 month for Charge 1 (30%) and 3 months (40%) for Charge 2) in consideration of his youth, early guilty pleas and first-time offending. Further, that the Magistrates Bench Book contained important guidelines but were not binding rules.
15. Ms Tasso conceded that the starting point adopted for Charge 1 was too high but that the starting point for Charge 2 was within range although the extent of damage caused was not clearly stated in the facts. She submitted that the 5 months starting point adopted for Charge 2 as the lead offence was justified given the damage was to a police vehicle used by first responders to an emergency and for law enforcement, a stone was used as a weapon, the offending occurred at midnight and Mr Kalwatman fled after hitting the truck with the stone. She submitted that the learned Magistrate did take mitigating factors into account.
16. Finally, Ms Tasso submitted that the end sentence of 3 months imprisonment was within range for Charge 2 and that the cases cited by Mrs Karu involved civilians and were therefore not as serious as the present case which involved law enforcement officers on duty at the time of the offending who were responding to a call-out.

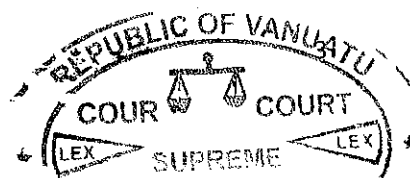
D. Discussion

First ground of appeal

17. It is accepted that there is no record of whether or not the learned Magistrate explained Mr Kalwatman's rights to him or gave him the opportunity to seek legal representation. Even so, the learned Magistrate took into account the available mitigating factors personal to Mr Kalwatman. There was no suggestion that there were other mitigating factors that were not taken into account.
18. It was suggested that the mitigating factor of the offending that the damage to the truck was very minor was not taken into account. However, the facts did not make clear the extent of the damage caused to the truck. In the circumstances, the learned Magistrate cannot be criticised for failing to take that into account that there was only minor damage when that was not made clear in the facts.
19. I therefore conclude that the learned Magistrate did not err in not affording Mr Kalwatman the procedural fairness required for an unrepresented person.

Second ground of appeal

20. Section 148(b) of the *Penal Code* [CAP. 135] prescribes the offence of drunk and disorderly as follows:



148. *No person shall –*

...

(b) *be found drunk and disorderly, or behave in a riotous or disorderly manner, in any public place (including the premises of any police station);*

...

Penalty: Imprisonment for 3 months.

21. Section 133 of the *Penal Code* prescribes the offence of malicious damage to property as follows:

133. *No person shall wilfully and unlawfully destroy or damage any property which to his knowledge belongs to another.*

22. Section 36(3) of the *Interpretation Act* [CAP. 132] provides as follows:

36. ...

(3) *Where an Act of Parliament omits to prescribe a penalty for an offence created by the Act or for a contravention of a provision of the Act the penalty shall be a fine of VT5,000 or imprisonment for 1 year or both.*

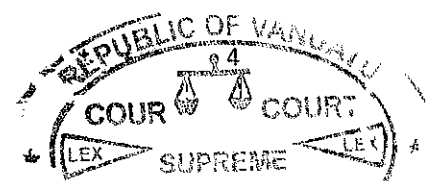
23. The maximum penalty for the offence of idle and disorderly is 3 months imprisonment; for malicious damage to property, it is a VT5,000 fine or 1 year imprisonment or both.

24. Ms Tasso conceded that the starting point adopted for Charge 1 (3 months) was too high. Accordingly, the sentence for Charge 1 will be quashed.

25. In *Public Prosecutor v Siti*, the defendant was arrested for being idle and disorderly. He was also using abusive and threatening language. The Court considered that the 15 days that the defendant in that matter had spent in custody was more than sufficient for his sentence and gave him an absolute discharge on both charges of idle and disorderly and possession of 5 grams of cannabis.

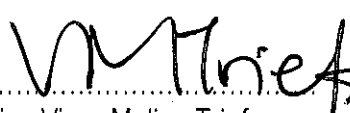
26. Mr Kalwatman was not using abusive and threatening language. He did not have on his person any cannabis. He was however heavily intoxicated and stood in the middle of the road, disturbing the traffic. Although the facts are different, I consider like in *Siti*, that the 15 days that Mr Kalwatman has spent in custody to be more than sufficient as his sentence for Charge 1. Accordingly, Mr Kalwatman will be given an absolute discharge in respect of Charge 1.

27. As to Charge 2, I agree with Ms Tasso that the offending was aggravated by the damage caused to a police vehicle which was being used by police officers who were on duty and were responding to a call-out, a stone was used which could have also caused harm to the officers and the offending occurred at night. Accordingly, the starting point adopted of 5 months imprisonment was warranted and within range. The learned Magistrate took into account the mitigating factors of Mr Kalwatman's youth, prompt guilty pleas and previous clean record and came to an end sentence of 3 months imprisonment. This was within range. It was not excessive.



28. Mr Kalwatman has already served 15 days in custody which is an effective sentence of 1 month's imprisonment. Given his remorse, youth and prospects of rehabilitation, I consider that it is not appropriate to make Mr Kalwatman suffer immediate imprisonment to serve the remainder of his sentence in respect of Charge 2. The balance of that sentence is entirely suspended. The suspension of sentence is to run for 1 year. Mr Kalwatman needs to remain offence-free to avoid having to serve the remainder of the sentence.
29. In addition, I impose a sentence of 50 hours' community work.
- E. Result and Decision
30. The appeal is **allowed**.
31. The sentence imposed by the Magistrates' Court in respect of Charge 1 is quashed.
32. The Appellant is given an absolute discharge in respect of Charge 1.
33. As to Charge 2, the sentence imposed by the Magistrates' Court is maintained but as Mr Kalwatman has already served an effective sentence of 1 month's imprisonment, the remainder of the sentence is suspended for 1 year.
34. In addition, Mr Kalwatman is to complete 50 hours' community work.

**DATED at Port Vila this 23rd day of February 2023
BY THE COURT**


Justice Viran Molisa Trief

