

BETWEEN: Iaken Timothy
Appellant

AND: Public Prosecutor
Respondent

Date of HEARING: 2nd day of February 2024
Before: Justice W. K. Hastings
Distribution: Mrs. K. B. Karu for the Appellant
Mr. K. Massing for the Respondent

JUDGMENT

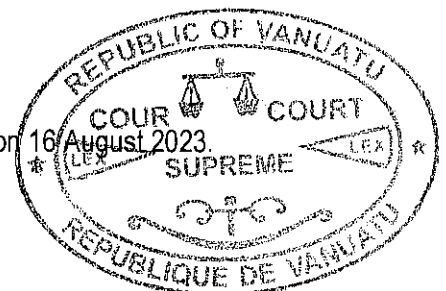
1. On 10 August 2023, the appellant pleaded guilty to one count of intentional assault contrary to subs. 107(b) of the Penal Code [CAP 135]. That offence carries a maximum penalty of five years' imprisonment. The appellant was convicted and sentenced. She appeals the end sentence of 9 months' imprisonment without suspension.

The facts

2. The appellant and the complainant are sisters. The appellant's husband had been having an affair with her sister for some years. That relationship produced two children. The appellant and her husband had six children together. The youngest is 6 years old.
3. On 13 January 2023, the complainant was walking home when her sister, the appellant, passed her in a bus. The appellant yelled something offensive to her sister. The bus drove on. When the complainant reached the Mango store, she saw the appellant waiting for her. The appellant attempted to hit the complainant with an umbrella, but the complainant blocked her attempts. The appellant then obtained a knife from her basket. The complainant ran away. The appellant chased her. The complainant fell. The appellant stabbed the complainant's backside twice. The complainant got up and ran away again.
4. At Port Vila Hospital, the complainant was found to have suffered two penetrating wounds which required dressing, and superficial grazing on her knees.

The Sentence

5. The appellant pleaded guilty on 10 August 2023. She was sentenced on 16 August 2023.



6. The Chief Magistrate adopted a starting point of 18 months' imprisonment after taking into account aggravating features related to the offending, including the use of a knife. After giving credit for the early guilty plea, remorse, the absence of previous offending and the fact the appellant was a mother of six children, the Chief Magistrate reached an end-point of 9 months' imprisonment. The Chief Magistrate then said, "*I now consider whether or not to suspend part or whole of the sentence.*"
7. Section 57 of the Penal Code gives the sentencing Court a discretion to suspend, in whole or in part, a sentence of imprisonment. It sets out the matters the Court considers when deciding whether or not to exercise its discretion to suspend a sentence of imprisonment:

57. Provision for suspension of sentences of imprisonment

(1) ...

(a) *if the court which has convicted a person of an offence considers that:*

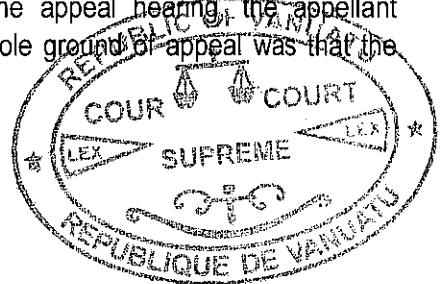
(i) *in view of the circumstances; and*

(ii) *in particular the nature of the crime; and*

(iii) *the character of the offender,*

it is not appropriate to make him or her suffer an immediate imprisonment, it may in its discretion order the suspension of the execution of imprisonment sentence it has imposed upon him or her, on the condition that the person sentenced commits no further offence ...

8. The Chief Magistrate did not refer to any of the criteria set out in subs. 57(1) in considering whether or not to suspend the sentence. She instead referred only to general deterrence. She said women are "*considered as vulnerable people in our society*" and reasoned "*women involving in assaults with weapon on another woman would surely defeat the idea of violence on women in our society.*" She said "*such behavior should stop in our society especially women fighting for love and using weapon to cause bodily harm on another woman.*"
9. The appellant appealed, submitting the Chief Magistrate erred in law by imposing "*a manifestly excessive sentence of 9 months without suspension.*" At the appeal hearing, the appellant abandoned her appeal against the start and end points. The sole ground of appeal was that the Chief Magistrate erred in not suspending the sentence.



Submissions

10. Mrs Karu submitted the Chief Magistrate gave insufficient weight to the fact that the appellant was a first time offender raising minor children at home, who suffered from undiagnosed depression as a result of her husband having a long-standing affair with her sister, an affair which has produced two children.
11. Mr Massing submitted the sentence imposed by the Chief Magistrate was within the range of available sentences given the facts and circumstances of this case. He submitted the Chief Magistrate did not err in declining to suspend the sentence because the need for general deterrence outweighed the factors that tended towards suspension.

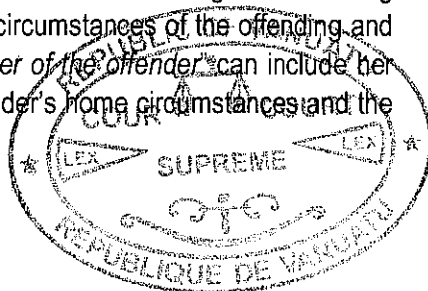
Discussion

12. I agree with Mr Massing that sentencing is a discretionary exercise by first instance Judges. An appeal court will only intervene if error is established, not because the appellate judge would have imposed a different sentence. Mr Massing submitted "*an appellate court must weigh the desirability of preserving judicial discretion with the need to maintain consistency in sentencing. Consistency in sentencing is important, but it is achieved through the consistent application of principle rather than outcome.*"
13. The Chief Magistrate was correct to recognize the need to deter violence against women. That message of deterrence was delivered when the Chief Magistrate established a starting point of 18 months imprisonment, correctly taking into account aggravating factors including the use of a knife on her sister who was vulnerable because she was on the ground after falling while trying to escape.
14. In deciding whether or not to suspend the end sentence however, the Chief Magistrate fell into error when she did not consider any of the criteria in subs. 57(1) which, in addition to "*the nature of the crime,*" include "*circumstances*" and the "*character of the offender*". In *Malau v Public Prosecutor* [2021] VUCA 48, the Court of Appeal said at paras 21 and 22:

21. ... *The proper exercise of a discretion necessarily involves a balancing exercise, which should also have taken into account factors which favoured suspension of the sentence.*

22. *This was an error of law as there needed to be a balancing exercise undertaken.*

15. The criteria set out in subs. 57(1) are to be taken into account when undertaking the balancing exercise. Consideration of "*circumstances*" can include both the circumstances of the offending and the circumstances of the offender. Consideration of the "*character of the offender*" can include her status as a mother. Both criteria permit consideration of the offender's home circumstances and the



fact she is a mother of dependent children. In considering whether or not to suspend the sentence, the Chief Magistrate gave no consideration to the significance of a fact she previously noted, that the appellant was the mother of dependent children.

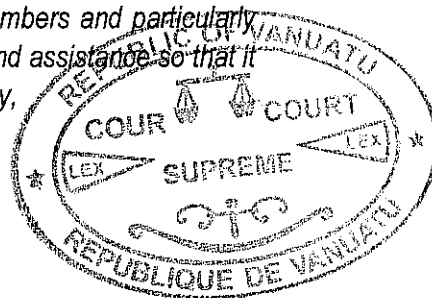
16. A great deal of research has been done on the effect of a mother's incarceration on her children. The findings of this research are summarized in Epstein, "*Sentencing mothers: the rights of the child and the duties of the criminal courts*", (2013) 8 *Contemporary Social Science* 130. Dr Epstein writes, "*parental incarceration is a strong risk factor for long-lasting psychopathology with antisocial outcomes. Parental incarceration might threaten children's attachment security because of parent-child separation, restricted contact with incarcerated parents, and unstable caregiving arrangements. Maternal incarceration tends to cause more disruption for children than paternal incarceration and may lead to greater risk for insecure attachment and psychopathology.*"
17. More recent research into the effect of a mother's incarceration on children is summarised in Minson, "*Direct harms and social consequences: An analysis of the impact of maternal imprisonment on dependent children in England and Wales*" (2019) 19 *Criminology & Criminal Justice* 519:

A child with an imprisoned mother is likely to suffer more negative effects of parental imprisonment than a child with an imprisoned father.

Literature from the United States and Europe links maternal imprisonment to a variety of negative consequences for children: diminished future outcomes due to disrupted primary attachments in childhood; disrupted education; difficulty in following a 'pro-social' pathway; a very high aggregate, in number and range, of worrisome adversities and risk factors; and care arrangements which may not be in the child's best interests; and finally a greater risk of dying [earlier] than adults who did not experience maternal imprisonment in childhood . Those who care for such children during their mother's absence are likely to suffer from a number of significant hardships affecting their ability to work, their economic stability, their family dynamics and their health (references removed).

18. The Convention on the Rights of the Child (Ratification) Act 1992 states in s 1 that the Convention "*shall be binding on the Republic of Vanuatu in accordance with the terms thereof.*" Bearing the above research in mind, the Preamble of the Convention states in part:

Convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community,



Recognizing that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding,

19. The Preamble emphasizes the importance of family to a child's development. Consistently with this, Article 3(1) of the Convention states:

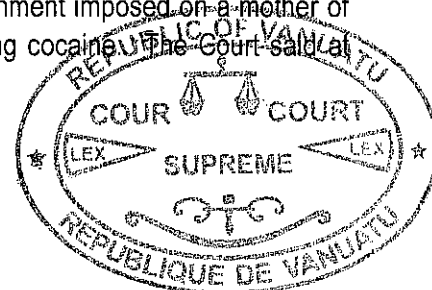
In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

20. The sentencing of the appellant by the Chief Magistrate was an action undertaken by a court of law. It is no great leap to say that it is also an action "*concerning children*" if the children's mother is sentenced to a term of imprisonment. Research shows that such an action adversely affects a dependent child's best interests if his or her mother is removed from the family. It may of course be appropriate to incarcerate a mother according to law if the culpability of the mother outweighs the best interests of the children in keeping the mother in the family, but there will be occasions where the balancing exercise tilts towards not incarcerating the mother because of the effect the mother's incarceration will have on her dependent children.

21. In *R (on The Application of Stokes) v Gwent Magistrates Court* ([2001] EWHC 569 (Admin)), the High Court of England and Wales judicially reviewed a magistrate's decision to sentence a mother of four children to prison for non-payment of fines. Although the High Court was concerned with Article 8 of the European Convention on Human Rights, the Court's comments at paragraph 36 addressed best practice when a sentencing judge is considering sentencing a mother of dependent children to prison:

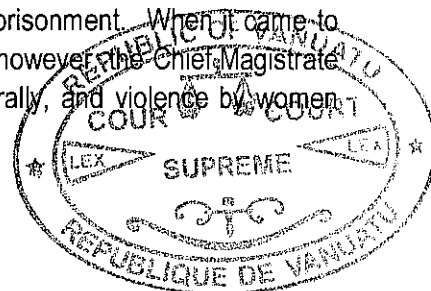
When a court ... is contemplating making an order which would separate completely a mother from her young children and send her to prison for a period of time with unknown consequences of the effect of that order on her young children, it must take into account the need for proportionality and must ask itself, given the seriousness of the intervention it is minded to make in terms of taking a mother away from her young children and imprisoning her: Is this proposed interference with the children's right to respect for their family life proportionate to the need which makes it legitimate?

22. Although *Stokes* concerned imprisoning a mother for non-payment of fines, the proportionality or balancing exercise has also been undertaken when mothers are sentenced for more serious crimes, as in this case. In *R v Lisa Ann Dawson* [2011] EWCA Crim 1947, the Court of Appeal of England and Wales overturned a sentence of 7 months and 2 weeks' imprisonment imposed on a mother of young children who was convicted of being concerned with supplying cocaine. The Court said at paragraph 20:



... Of course, the mere fact that an offender is a mother or father or other carer does not mean that she or he cannot be made the subject of an immediate sentence of imprisonment, and some crimes are so serious that only an immediate term of imprisonment will be appropriate. However, there are other cases in which the stress and disorientation caused to a family by the absence of a parent or other carer may justify either a noncustodial sentence or the suspension of a sentence of imprisonment, particularly where the length of any sentence could properly only be short. (my emphasis)

23. What this research and these cases suggest is that in order to comply with Vanuatu's obligations under the Convention on the Rights of the Child, judicial officers who are considering whether or not to suspend a sentence of imprisonment imposed on a mother of dependent children must bear in mind what the effect of the mother's imprisonment on the children will be. (*R (on the application of Amanda Aldous) v Dartford Magistrates' Court* [2011] EWHC 1919 (Admin)). This is within the scope of the subs 57(1) criteria. If the judicial officer does not have the information he or she needs in order to make this assessment, then the judicial officer should make enquiries to be properly informed.
24. I must emphasise that the existence of children cannot keep a mother out of prison who should properly be sent to prison. A balancing exercise must be undertaken when considering the s 57 criteria, which include "circumstances," for suspending a term of imprisonment. A three-step process is appropriate:
- a. The sentencing judge or magistrate should first be informed of the domestic circumstances of the female defendant, and if there are children, how they will be affected if their mother is sent to prison.
 - b. With that information in hand, the sentencing judge or magistrate must undertake the s 57 balancing exercise bearing in mind, under the Convention on the Rights of the Child, the best interests of any children who depend on their mother when deciding whether or not to suspend a sentence of imprisonment that would otherwise be imposed on their mother.
 - c. "When a case stands on the cusp of custody the balance is likely to be a fine one. In that kind of case the interference with the family life of one or more entirely innocent children can sometimes tip the scales and means that a custodial sentence otherwise proportionate may become disproportionate." (*R v Rosie Lee Petherick* [2012] EWCA (Crim) 2214).
25. In this case, the Chief Magistrate knew the appellant was the mother of six children. She took this into account as a mitigating factor in determining the sentence of imprisonment. When it came to considering whether or not to suspend the sentence of imprisonment however, the Chief Magistrate focused entirely on the need to deter violence against women generally, and violence by women



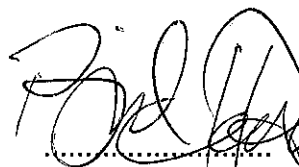
against other women. She did not consider the criteria (the circumstances, the particular nature of the crime, and the character of the offender) in s 57(1)(a) of the Penal Code. Proper consideration of those criteria require consideration of the best interests of dependent children in order to comply with Vanuatu's obligations under the Convention on the Rights of the Child.

Result

26. Having concluded that the Chief Magistrate erred by not considering the criteria in s 57 and the best interests of the appellant's dependent children when she exercised her discretion not to suspend the sentence, the appeal is allowed.
27. Having found the Chief Magistrate erred in not considering the subs. 57(1) criteria, I am prepared to restructure the sentence rather than return this matter to the Chief Magistrate. As I noted earlier, the starting point of 18 months and the end point of 9 months are appropriate. They reflect the appellant's culpability and the need for deterrence. Taking onto account the circumstances, both of the offending and the offender, including the existence of dependent children and their best interests, the serious nature of this crime, and the character of the appellant as a mother who is a remorseful first-time offender, and who accepted responsibility by pleading guilty at an early opportunity, the end sentence of 9 months' imprisonment is suspended for one year from today.

DATED at Port Vila this 14th day of February, 2024

BY THE COURT


Justice W. K. Hastings

