

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

Criminal
Case No. 24/1028 SC/CRML

PUBLIC PROSECUTOR

v

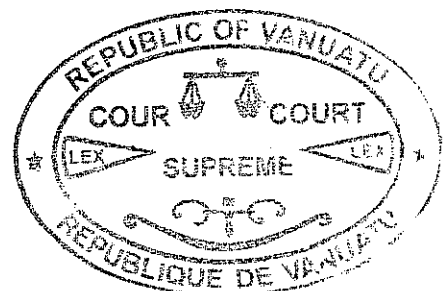
**BENAMI KALMATAK, ABEL NAR KALORIS, JACK ETIAN, JAMES FELEX, ESLY
KALTAF, KALSARAP KALOBONG**

Date of Plea: 24 May 2024
Date of Sentence: 5 August 2024
Before: Justice M A MacKenzie
Counsel: Mr K Massing for the Public Prosecutor
Ms A Sarisets (holding papers for Mr E Molbaleh) for the Defendants

SENTENCE

1. The defendants appear for sentence having pleaded guilty to various offences. There are three categories of defendants.

A. Category One
 2. **Benami Kalmatak, Jack Etian, and Kalsarap Kalobong** - Unlawful assembly and Idle and disorderly. Mr Etian was not initially present but arrived part way through sentencing.
B. Category Two
 3. **James Felex**- Unlawful assembly, Idle and disorderly, and intentional assault causing temporary injury.

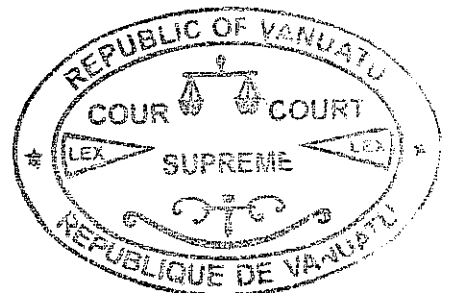


C. Category Three

4. **Esly Kaltaf**- Unlawful assembly, Idle and disorderly, intentional assault causing temporary injury, and malicious damage to property.
Abel Nar Kaloris- Unlawful assembly, Idle and disorderly, 2 charges of intentional assault causing temporary injury, and malicious damage to property.
5. The maximum penalties for the offences under the Penal Code [CAP135] are;
 - a. Unlawful assembly contrary to s69 of the Penal Code- 3 years imprisonment.
 - b. Idle and disorderly contrary to s148(b) of the Penal Code – 3 months imprisonment.
 - c. Intentional assault causing temporary injury contrary to s 107(b) of the Penal Code- 5 years imprisonment.
 - d. Malicious damage to property contrary to s133 of the Penal Code and s36(3) Interpretation Act [Cap132] – VT 5000 fine or 1 year imprisonment or both; Refer *Public Prosecutor v Toto* [2024] VUSC 9.

The Facts

6. An incident involving the 6 defendants took place at Erakor Village. The defendants were drinking on the public road at Erakor Village and were swearing and behaving in a disorderly manner.
7. There are two victims, one is a bus driver and the other, a passenger on the bus. The bus driver, Kenny Kalmanu, was dropping off a passenger at Erakor Village. Mr Kalmanu was assaulted by James Felex, so decided to follow the road to the beach. The defendants followed the bus. The bus had nowhere to go, as it was the end of the road and the wheel of the bus got stuck in the sand.
8. Three of the defendants, Mr Kaloris, Mr Felex, and Mr Kaltaf then assaulted Kenny Kalmanu. He was injured. The medical report shows that Mr Kalmanu sustained injuries to his face and left forearm.
9. In addition, Mr Kaloris assaulted the passenger, Jan Baptiste. He was injured. The medical report shows that he sustained injuries to his head, nose and shoulder.



10. Mr Kaloris and Mr Kaltaf used wood and stones to damage the glass door of the bus. Some of the other defendants then came to the assistance of the victims to stop further violence. They pushed the bus out of the sand, where it was stuck.
11. The defendants all admitted the offending.

Sentencing purposes/principles

12. The sentence I impose must hold the defendants accountable and must denounce and deter their conduct. The sentence should ensure the defendants take responsibility for their actions and help them to rehabilitate. It must also be generally consistent.

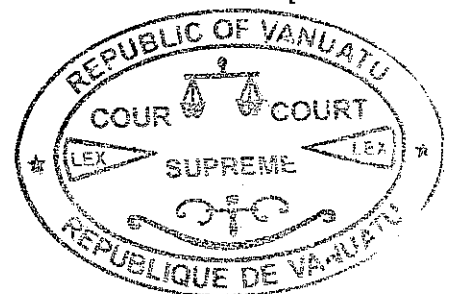
Approach to sentence

13. Sentencing involves 2 separate steps; *Jimmy Philip v Public Prosecutor* [2020] VUCA 40, which applied *Moses v R* [2020] NZCA 296.

Sentence – Category One - Benami Kalmatak, Jack Etian and Kalsarap Kalobong

Starting point

14. Mr Kalmatak, Mr Etain and Mr Kalobong are to be sentenced in relation to charges of unlawful assembly and Idle and Disorderly.
15. The first step is to set a starting point.
16. The aggravating factors are:
 - a. It was a joint criminal enterprise, involving multiple defendants.
 - b. There was planning because the defendants followed the bus.
 - c. The offending was unprovoked.
 - d. Their involvement in the unlawful assembly enabled 3 defendants in the group to assault the 2 victims and cause damage to the bus.
17. There are no mitigating features of the offending itself.
18. The Public Prosecutor submits that for these 3 defendants a global starting point of 2 years imprisonment is appropriate. This is with reference to *Public Prosecutor v Jack* [



2024] VUSC 49. Mr Molbaleh concurs with the proposed starting point. *Public Prosecutor v Jack* is not the most helpful case to assist with assessing an appropriate starting point as factually, it is too different. However, *Public Prosecutor v Bebe* [2023] VUSC 85 provides assistance. Amongst other charges, the defendants faced a charge of unlawful assembly. The Honourable Chief Justice set a starting point of 2 years imprisonment for each of the defendants. Bebe involved the defendants acting together to avoid being arrested by police. Violence ensued.

19. Taking into account the aggravating factors set out above and *Public Prosecutor v Bebe*, I adopt a starting point of 2 years imprisonment for each of these 3 defendants.

Step Two -guilty plea and personal factors

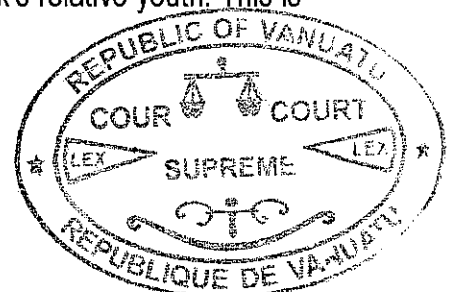
20. I will calculate the relevant adjustments for each of these defendants and then arrive at an end sentence.

Benami Kalmatak

21. The sentence is reduced by one third for the guilty plea, which equates to 8 months.
22. Mr Kalmatak is aged 21 years, and a first offender. He is remorseful, is willing to perform a custom reconciliation, and accepts that alcohol was a factor. Mr Kalmatak has good family support and co-operated with police. The sentence is reduced by 3 months to reflect these factors. This is approximately 13 percent.
23. Mr Kalmatak was remanded in custody for 14 days, from 25 April to 9 May 2023. This is an effective sentence of one month's imprisonment. The sentence is to be reduced further by one month.

End sentence

24. The end sentence is 12 months imprisonment.
25. Having regard to s 57 of the Penal Code, it is appropriate to suspend the sentence. I have had regard to the circumstances, the nature of the offending and Mr Kalmatak's character. This was foolish, drunken behaviour which frightened both victims given they were confronted by 6 men at night who then followed the bus. I also take into account his age, remorse, lack of prior history and early guilty plea, which favour suspension. A key factor in deciding to suspend the sentence is Mr Kalmatak's relative youth. This is



discussed in more detail when considering whether to suspend the sentences of the 3 defendants who played a greater role in the incident.

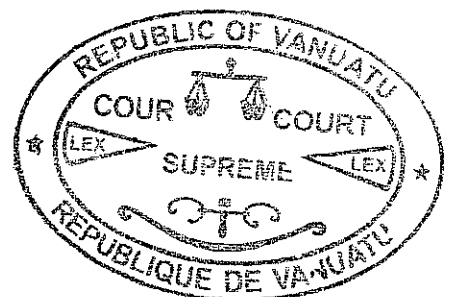
26. The sentence is to be suspended for 12 months. Mr Kalmatak is warned that if he is convicted of any offence in the next 12 months, that he will be taken into custody and serve his sentence of imprisonment as well as the penalty for the further offending.
27. I also impose a sentence of 60 hours community work.
28. There is 14 days to appeal.

Jack Etian

29. The sentence is reduced by one third for the guilty plea, which equates to 8 months.
30. Mr Etian is aged 20 years, and a first offender. He was 18 at the time of the offending. Mr Etian is remorseful, and is willing to perform a custom reconciliation. He has good prospects of rehabilitation. Notably, Mr Etian has significant family responsibilities. His upbringing was difficult due to his mother passing away and the care he provides for his grandmother. Mr Etian co-operated with police. The sentence is reduced by 5 months to reflect these factors. This is approximately 20 percent.
31. Mr Etian was remanded in custody for 14 days, from 25 April to 9 May 2023. This is an effective sentence of one month's imprisonment. The sentence is to be reduced further by one month.

End sentence

32. The end sentence is 10 months imprisonment.
33. Having regard to s 57 of the Penal Code, it is appropriate to suspend the sentence. I have had regard to the circumstances, the nature of the offending and Mr Etian's character. This was foolish, drunken behaviour which frightened both victims given they were confronted by 6 men at night who then followed the bus. However, I also take into account his youth at the time, remorse, family responsibilities, lack of prior history and early guilty plea, which favour suspension. As just noted, a key factor favouring suspension is Mr Etian's relative youth.



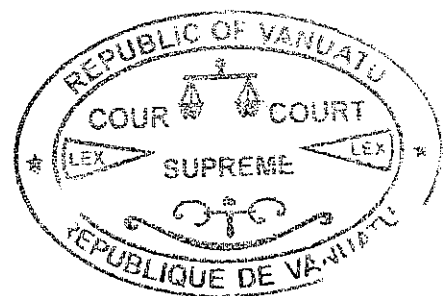
34. The sentence is to be suspended for 12 months. Mr Etian is warned that if he is convicted of any offence in the next 12 months, that he will be taken into custody and serve his sentence of imprisonment as well as the penalty for the further offending.
35. I impose also a sentence of 60 hours community work.
36. There is 14 days to appeal.

Kalsarap Kalobong

37. The sentence is reduced by one third for the guilty plea, which equates to 8 months.
38. Mr Kalobong is aged 19 years, and is a first offender. He was 18 at the time of the offending. Mr Kalobong is remorseful and is willing to perform a custom reconciliation. He accepts that alcohol was a factor. Mr Kalobong has good family support and co-operated with police. The sentence is reduced by 4 months to reflect these factors. This is approximately 15 percent.

End sentence

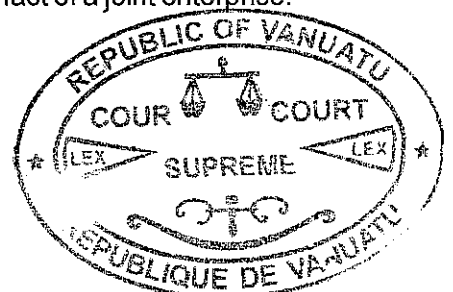
39. The end sentence is 12 months imprisonment.
40. Having regard to s 57 of the Penal Code, it is appropriate to suspend the sentence. I have had regard to the circumstances, the nature of the offending and Mr Kalobong's character. This was foolish, drunken behaviour which frightened both victims given they were confronted by 6 men at night who then followed the bus. However, I also take into account his age, remorse, willingness to perform a custom reconciliation, lack of prior history and early guilty plea, which favour suspension. As noted, a key factor favouring suspension is Mr Kalobong's relative youth.
41. The sentence is to be suspended for 12 months. Mr Kalobong is warned that if he is convicted of any offence in the next 12 months, that he will be taken into custody and serve his sentence of imprisonment as well as the penalty for the further offending.
42. I impose also a sentence of 60 hours community work.
43. There is 14 days to appeal.



Sentence – Category Two- James Felex

Starting point

44. Mr Felex is to be sentenced in relation to charges of unlawful assembly, Idle and disorderly, and intentional assault causing temporary injury.
45. The first step is to set a starting point.
46. The aggravating factors are:
 - a. It was a joint criminal enterprise, involving multiple defendants.
 - b. There was planning. because the defendants followed the bus down the road.
 - c. The offending was unprovoked.
 - d. Their involvement in the unlawful assembly enabled 3 defendants in the group to assault the 2 victims and cause damage to the bus.
 - e. The victim assaulted by Mr Felex was the bus driver. Mr Kalmanu was vulnerable because he was outnumbered, and he was struck to the head.
 - f. The victim suffered physical injuries and mental harm.
47. There are no mitigating features of the offending itself.
48. The prosecutor submits that the appropriate starting point is 16 months imprisonment with reference to *Public Prosecutor v Wari* [2023] VUSC 105, which is more serious than the assault on Mr Kalmanu in the present case. Also, it involves domestic violence. The key aggravating factor here is the pack mentality, as the victim was assaulted by 3 of the defendants. As such, the victim was vulnerable and outnumbered. He sustained injuries.
49. A more comparable case is *Public Prosecutor v Toto* [2024] VUSC 9. The case involved 5 defendants, all police officers, who were charged with either intentional assault causing temporary injury or malicious damage to property. For the assault charge, the starting points ranged from 12 months to 2 years imprisonment, depending on the circumstances of the particular assault. One of the defendant's, Mr Toto, assaulted a female victim to the head using a dry coconut leaf branch. The starting point adopted was 18 months imprisonment. The starting point adopted for another defendant; Mr Kalontas was 12 months imprisonment. He assaulted a victim by slapping him and punching him in the ribs. One of the aggravating factors was the fact of a joint enterprise.



I need to take care to guard against double counting because Mr Felex has pleaded guilty to a charge of unlawful assembly.

50. On a stand-alone basis, the starting point for the assault on Mr Kalmanu here would be in the vicinity of 16 -18 months imprisonment. While there is no breach of trust as was the case in *Public Prosecutor v Toto*, the key aggravating factor is the pack mentality – the victim was assaulted by 3 defendants. It was a very frightening experience for him.
51. Given the two year starting point adopted for unlawful assembly and idle and disorderly, the starting point for Mr Felex must be higher given his involvement in the assault on the bus driver. I must take into account totality in setting a global starting point to reflect his part in this incident, so I apply an uplift of 6 months imprisonment for the assault.
52. I adopt a global starting point of 2 years 6 months imprisonment, taking into account totality.

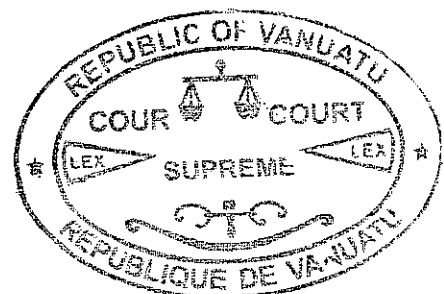
Step Two

Guilty plea and personal factors

53. The sentence is reduced by one third for the guilty plea, which equates to 10 months.
54. Mr Felex is aged 21 years, and a first offender. He was 20 at the time of the offending. He achieved well educationally. Mr Felex is remorseful and is willing to perform a custom reconciliation. Mr Felex accept that alcohol was a factor. He has good family support and co-operated with police. The sentence is reduced by 4.5 months to reflect these factors. This is approximately 15 percent.
55. Mr Felex was remanded in custody for 14 days, from 25 April to 9 May 2023. This is an effective sentence of one month's imprisonment. The sentence is to be reduced further by one month.

End sentence

56. The end sentence is 14 months 2 weeks imprisonment.
57. Having regard to s 57 of the Penal Code, it is appropriate to suspend the sentence. I have had regard to the circumstances, the nature of the offending and Mr Felex's character. This was foolish, drunken behaviour which frightened both victims given they were confronted by 6 men at night who then followed the bus. Mr Felex then took part in assaulting the bus driver.

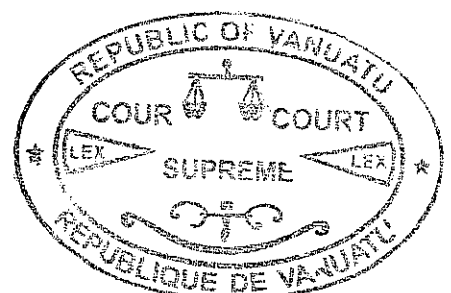


58. However, I also take into account his age, remorse, willingness to perform a custom reconciliation, lack of prior history and early guilty plea, which favour suspension. Mr Felex has good prospects of rehabilitation. A key factor is Mr Felex's relative youth. With relatively young offenders, the purposes of accountability, deterrence and denunciation can often give way to the need for rehabilitation. In this regard, I refer to the observations about the impact of youth on sentencing in *Heromanley v Public Prosecutor* VUCA 25. In that case, the 6 defendants were aged between under 18-23 years at the time of the offending. It was serious offending. One had a relevant prior conviction.
59. The sentence is to be suspended for 1 year 6 months. Mr Felex is warned that if he is convicted of any offence in the next 18 months, that he will be taken into custody and serve his sentence of imprisonment as well as the penalty for the further offending. The suspension period is longer than for the 3 lesser offenders to reflect his greater involvement in the incident.
60. Suspension of the sentence is consistent with *Public Prosecutor v Toto* [2024] VUSC 9, where despite the breach of trust by police officers, the sentences were suspended. I discuss *Public Prosecutor v Toto* in more detail when considering whether to suspend the sentences of imprisonment imposed on Mr Kaltaf and Mr Kaloris.
61. I also impose a sentence of 60 hours community work.
62. There is 14 days to appeal.

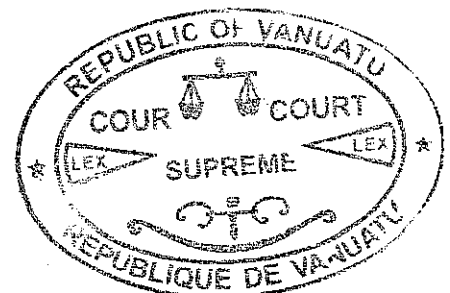
Sentence – Category Three - Esly Kaltaf and Abel Nar Kaloris

Starting point

63. The first step is to set a starting point.
64. The starting point for these two defendants should be higher than the starting point for Mr Felex given their greater involvement in the incident overall.
65. The aggravating factors are:
- a. It was a joint criminal enterprise, involving multiple defendants.
 - b. There was planning because the defendants followed the bus down the road.
 - c. The offending was unprovoked.



- d. Their involvement in the unlawful assembly enabled 3 defendants in the group to assault the 2 victims and cause damage to the bus.
 - e. The victim assaulted by Mr Kaltaf and Mr Kaloris was the bus driver. Mr Kalmanu was vulnerable because he was outnumbered, and he was struck to the head.
 - f. Mr Kaloris also assaulted the passenger. So, he assaulted both victims.
 - g. Both victims suffered physical injuries and mental harm.
 - h. Mr Kaltaf and Mr Kaloris caused damage to the bus. This was a gratuitous act by both defendants.
66. There are no mitigating features of the offending itself.
67. Mr Kaltaf is to be sentenced for unlawful assembly, Idle and disorderly, intentional assault causing temporary injury and malicious damage to property. The starting point will need to be slightly higher than the starting point adopted for Mr Felex because Mr Kaltaf pleaded guilty also to malicious damage.
68. In terms of the malicious damage charge, *Public Prosecutor v Toto* also provides assistance. The starting point adopted for the malicious damage was 6 months imprisonment. One malicious damage charge involved a defendant breaking a door using an item to do so. The other malicious damage charge involved another defendant breaking cups, plates and containers in the kitchen of one of the victims. Given that Mr Kaltaf and Mr Kaloris damaged the glass door of the bus using makeshift weapons, then I consider that like, *Toto*, there should be a starting point on a stand-alone basis of 6 months imprisonment. However, I must take into account totality.
69. For Mr Kaltaf, I adopt a global starting point of 2 years 8 imprisonment to reflect his overall culpability but taking into account totality.
70. Mr Kaloris is to be sentenced for unlawful assembly, Idle and disorderly, 2 charges of intentional assault causing temporary injury and malicious damage to property. The starting point needs to reflect that he assaulted both victims, and the malicious damage charge. On a standalone basis the starting point for the assault on the passenger would be at least 12 months imprisonment, with reference to *Public Prosecutor v Toto*. The present case does not involve a breach of trust, but the extent of the assault is greater.
71. For Mr Kaloris, I adopt a global starting point of 3 years 2 months imprisonment to reflect his overall culpability but taking into account totality.



Step Two -guilty plea and personal factors

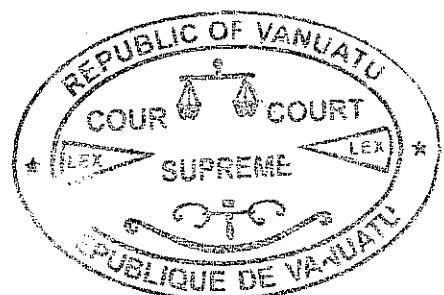
72. I will calculate the relevant adjustments for each defendant and then arrive at an end sentence.

Eslly Kaltaf

73. The sentence is reduced by one third for the guilty plea, which equates to 11 months.
74. Mr Kaltaf is aged 19 years. He was 18 at the time of the offending. He is remorseful and is willing to perform a custom reconciliation. He accepts that alcohol was a factor. Mr Kaltaf good family support and co-operated with police. The sentence is reduced by 3 months to reflect these factors. This is approximately 10 percent.
75. Of concern is that this is not Mr Kaltaf's first time before the Court. He committed another offence in 2023 and is serving a sentence of community work currently. He is complying with the sentence. I do not know if the other offending was before or after the offending here. I do not know either what the offence was.
76. Mr Kaltaf was remanded in custody for 14 days, from 25 April to 9 May 2023. This is an effective sentence of one month's imprisonment. The sentence is to be reduced further by one month.

End sentence

77. The end sentence is 17 months imprisonment.
78. Having regard to s 57 of the Penal Code, it is appropriate to suspend the sentence. This decision though is very finely balanced. I have had regard to the circumstances, the nature of the offending and Mr Kaltaf's character. This was foolish, drunken behaviour which frightened both victims given they were confronted by 6 men at night who then followed the bus. Mr Kaltaf took part in assaulting the bus driver and caused damage to the bus. I am concerned that this is not Mr Kaltaf's first time before the Court. But he is complying with the current sentence of community work.
79. I also take into account his age, remorse, willingness to perform a custom reconciliation and early guilty plea, which favour suspension. The key reason for suspending the sentence is Mr Kaltaf's age, having regard to *Heromanley v Public Prosecutor*. I refer to and adopt the discussion about youth and sentencing when deciding whether to suspend Mr Felex's sentence.



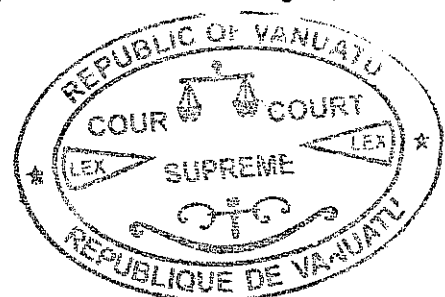
80. In deciding to suspend the sentence, I have also considered *Public Prosecutor v Toto*, where sentences of imprisonment were suspended for all 5 defendants, who were police officers. Police officers have a responsibility to uphold rather than break the law and should have known better. Whereas here, the offending involved immature, drunken behaviour. Whilst inexcusable, it is difficult to think that the present offending is more serious than police officers assaulting people and damaging property.
81. The sentence is to be suspended for 2 years. Mr Kaltaf is warned that if he is convicted of any offence in the next 2 years, that he will be taken into custody and serve his sentence of imprisonment as well as the penalty for the further offending. The period of suspension is to reflect his history and greater level of involvement. It will meet the need for accountability, deterrence and denunciation.
82. I also impose a sentence of 100 hours community work. This is to reflect Mr Kaltaf's greater culpability.
83. There is 14 days to appeal.

Abel Nar Kaloris

84. The sentence is reduced by one third for the guilty plea, which equates to 12.5 months.
85. Mr Kaloris is aged 22 years. He is remorseful and is willing to perform a custom reconciliation. He accepts that alcohol was a factor. Mr Kaloris has good family support and co-operated with police. The sentence is reduced by 4 months to reflect these factors. This is approximately 10 percent.
86. Of concern is that this is not the first time Mr Kaloris has been before the Court. He committed another offence when aged 20 years. This was an assault. He is serving a sentence of community work currently.
87. Mr Kaloris was remanded in custody for 14 days, from 25 April to 9 May 2023. This is an effective sentence of one month's imprisonment. The sentence is to be reduced further by one month.

End sentence

88. The end sentence is 1 year 8 months 2 weeks imprisonment.
89. Having regard to s 57 of the Penal Code, I must take into account the circumstances, the nature of the offending and Mr Kaloris' character. By the narrowest of margins, I have decided to suspend the sentence.



90. This was foolish, drunken behaviour which frightened both victims given they were confronted by 6 men at night who then followed the bus. Mr Kaloris took part in assaulting the bus driver, assaulted the passenger and caused damage to the bus. I am concerned that this is not Mr Kaloris' first time before the Court and that his prior conviction is an assault matter. That indicates that the sentence imposed for the assault has not had much deterrent effect. Mr Kaloris needs to understand that violence in the community will not be tolerated. These factors point away from the sentence being suspended.
91. I also take into account his age, remorse, willingness to perform a custom ceremony and early guilty plea, which favour suspension. The key reason for suspending the sentence is Mr Kaloris's age, having regard to *Heromanley v Public Prosecutor*. I refer to and adopt the discussion about youth and sentencing when deciding whether to suspend Mr Felex's sentence.
92. In deciding to suspend the sentence, I have also considered *Public Prosecutor v Toto*. What I said about that case in relation to Mr Kaltaf applies equally to Mr Kaloris. Whilst inexcusable, I cannot say that the circumstances here are more serious than police officers assaulting people and damaging property.\
93. The sentence is to be suspended for 2 years 3 months. Mr Kaloris is warned that if he is convicted of any offence in the next 2 years 3 months, that he will be taken into custody and serve his sentence of imprisonment as well as the penalty for the further offending. This period is to reflect his history and greater level of involvement than the other co offenders and to ensure that the need for accountability, deterrence and denunciation come to the fore.
94. I also impose a sentence of 100 hours community work. This is to reflect Mr Kaloris' greater culpability.
95. There is 14 days to appeal.

**DATED at Port Vila this 5th day of August 2024
BY THE COURT**

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Justice M A MacKehzie

