

**IN THE COURT OF APPEAL OF
THE REPUBLIC OF VANUATU**
(Criminal Appellate Jurisdiction)

Criminal Appeal
Case No. 18/1634 CoA/CRMA
Case No. 18/2507 CoA/CRMA

BETWEEN: JOHNSON NAMRI
Appellant

AND: PUBLIC PROSECUTOR
Respondent

Coram: Hon. Justice John von Doussa
Hon. Justice Ronald Young
Hon. Justice Oliver Saksak
Hon. Justice Daniel Fatiaki
Hon. Justice Dudley Aru
Hon. Justice Gus Andrée Wiltens

Counsel: Mr. Brian Livo for the Appellant
Mr. Philip Toaliu for the Respondent

Date of Hearing: 6th November 2018

Date of Decision: 16th November 2018

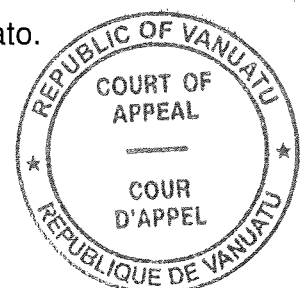
JUDGMENT

Introduction

1. On 26 March 2017 Mrs. Iato, Mr. Namri's wife was at the New Covenant Church, Port Vila. Mr. Namri entered the church and struck Mrs. Iato with a hammer on her head. He was charged and convicted of attempted premeditated intentional homicide and sentenced to 15 years imprisonment. He appeals against his conviction and sentence.

Conviction Appeal

2. The trial judge concluded that Mr. Namri had planned the attack, and when he struck Mrs. Iato with the hammer he was intending to kill her.
3. The appellant's case on appeal as to conviction is that the prosecution did not prove beyond reasonable doubt Mr. Namri intended to kill Mrs. Iato.

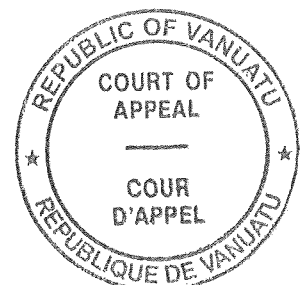


The Facts

4. Mr. Namri and Mrs. Iato are married and have six children. In late 2016 they separated. Mrs. Iato then began living at the church and Mr. Namri looked after the children. It seems he became frustrated with this arrangement and concerned about what his wife was doing at the church.
5. On 27 March 2018 he took a hammer from his house, put it into his backpack and took the bus to the church. When he arrived at the church he went into a room where his wife and two other women were present. The trial judge found that Mr. Namri then said "*me kam blong endem life blong you*" (I have come to end your life). He took the hammer out of his bag and struck Mrs. Iato on her head three times with the hammer. They then struggled, some of the other women present intervened and Mr. Namri left. There was considerable bleeding from Mrs. Iato's injuries. The medical report given in evidence identified the following significant injuries – a deep laceration to the occipital area; swelling to the front of the head; a deep laceration on the bilateral side of the head. Mr. Namri went to a local police station and surrendered immediately after the assault.
6. At trial Mr. Namri admitted charges of assault and a threat to kill but denied he had a premeditated intention to kill.

The Supreme Court Judgment

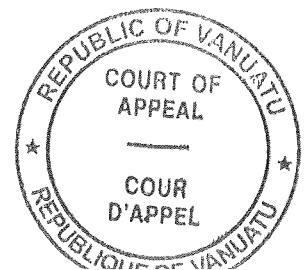
7. The trial judge identified the following elements of the charge of attempted intentional homicide to be proved by the prosecution: Mr. Namri did some act intended to cause the death of Mrs. Iato that went beyond just thinking or talking about it; Mr. Namri acted with premeditated design to kill Mrs. Iato; and the act would have resulted in Mrs. Iato's death "*except that someone prevented him (Accused) from killing the victim or Accused failed to do so*". The judge said that the defence was that Mr. Namri did not intend nor attempt to kill Mrs. Iato. His actions in assaulting and threatening her was a protest at her neglect of their children.



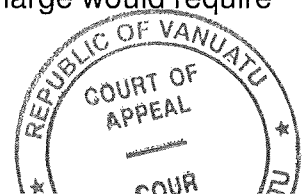
8. The judge rejected Mr. Namri's claim that he did not deliberately hit Mrs. Iato on the head with the hammer. The judge was satisfied when Mr. Namri used the hammer to hit Mrs. Iato he was intending to kill her. Further the judge said the fact Mr. Namri took the hammer with him to the church, that before he struck Mrs Iato he said he was going to end her life and he then struck her on her head with the hammer, all went to prove a premeditated intention to kill.
9. As to the final element of the charge the judge said Mrs. Iato prevented Mr. Namri from killing her when she struggled with him. And so the judge convicted Mr. Namri.

This appeal

10. The appellant's case is that the evidence relied upon by the trial judge did not establish beyond reasonable doubt an intention to kill.
11. Three facts are relied upon. First, the appellant submits that it is significant Mr. Namri chose a small hammer to attack Mrs. Iato. Mr. Namri could have chosen a larger hammer or a knife if he had really intended to kill. Choosing to use a small hammer showed all Mr. Namri intended was, to cause harm but not to kill.
12. Second the appellant submits that causing serious bodily harm is not sufficient to prove an intention to kill. As to this ground of appeal the appellant says the judge did not properly resolve a factual dispute. Mr. Namri's evidence was that he had not deliberately hit Mrs. Iato on the head with the hammer but her head injuries were caused in the struggle.
13. Third, the appellant says these events occurred in the presence of others and this supports the claim there was no intention to kill.
14. Finally, in response to the trial judge's identification of the need for prevention of the killing, the appellant submitted the evidence established Mr. Namri voluntarily stopped his attack.
15. We are satisfied there was sufficient evidence to establish the offence of attempted premeditated homicide beyond reasonable doubt.



16. As to the use of a small hammer, the focus of the trial judge was correctly on what was actually used rather than the use of any other weapon. It may be if Mr. Namri had used a more directly deadly weapon he would have killed his wife. But the weapon he chose did cause significant injury and was capable of causing her death. The use of this particular weapon was only one factor the judge took into account in assessing intention. There was no error in the judge's approach in relation to the use of the hammer.
17. As to the injuries, the appellant's submissions that the - "*hammer did not make contact with the complainant with any significant force*" is simply speculative. The only evidence, in fact, established serious injuries to Mrs. Iato's head.
18. The judge made it clear in his judgment that he accepted the evidence of Mrs. Iato and the other witnesses as to how Mrs. Iato's injuries to her head were caused. This was hardly surprising. Mr. Namri's claim that these injuries occurred when he struggled with his wife and the hammer touched his wife's head did not match the deep cuts and other injuries to her head. Mrs. Iato's evidence of the attack was supported by the evidence of the other woman present.
19. As to the public aspect of the assault, the appellant submits if there was a genuine intent to kill then the attempt would have been clandestine.
20. This submission is speculative. It is essentially a submission that Mr. Namri would have been more likely to have killed Mrs. Iato if he had done so in secret. Given Mrs. Iato eventually fought off the attack that claim does not seem to be correct. But again this case was correctly decided on the evidence the judge had, not on speculation.
21. Finally the issue of prevention. We do not consider the judge was correct in identifying the prevention issue as an element of the charge. A charge of attempted premeditated intentional homicide has the following elements required to be proved.
22. First, an accused intended to kill; second, the intention to kill was formed before the killing (premeditation); and finally, what the accused did was an attempt to intentionally kill. The prevention claim as an element of the charge would require

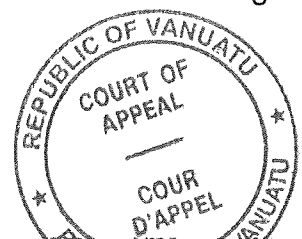


speculation as to what might have happened if the intended attack had carried on without any identified end. Often such attempts will be stopped by others. Sometimes the accused will stop. But these events follow the required physical (actus reus) and mental (mens rea) elements of the crime. We reject this ground of appeal.

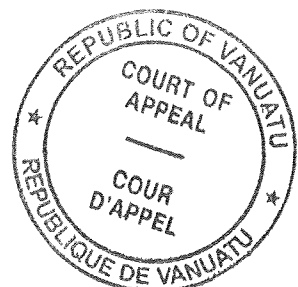
23. There was understandably no challenge to the prosecution claim that this was a planned attack. And so the issue for trial was whether the planned attack was to kill and that the attack itself was with an intention to kill.
24. The judge was entitled to accept Mr. Namri's statement immediately before the attack that he was intending to kill his wife, and his use of a hammer to hit her on her head as establishing the intent to kill, and an attempt to kill.
25. For these reasons the appeal against conviction is dismissed.

Sentence Appeal

26. Mr. Namri was sentenced to 17 years imprisonment. In the absence of any guideline judgments in Vanuatu the sentencing judge was significantly influenced by the United Kingdom Guideline Sentencing levels as identified by that country's Sentencing Council. Based on that Council's guideline the judge identified a start sentence of 18 years. From that he deducted one year for the fact Mr. Namri was a first time offender and time spent in custody pre-trial (1 year 6 months).
27. We do not consider it was appropriate for the sentencing judge to use the UK sentencing guidelines to identify an appropriate starting sentence for the offending. The UK sentencing guidelines were developed to suit that country's criminal justice system. The guidelines are designed as a whole, to reflect relative culpability and sentencing levels across a wide range of offending.
28. Selecting and applying one area of such a guideline as was done in this case can result in a level of sentence wholly out of proportion to other areas of established sentencing in Vanuatu.
29. Given our conclusion that it was not appropriate to rely upon the UK sentencing guides we will consider the sentencing afresh.



30. This was a very serious charge. The maximum penalty is life imprisonment. Mr Namri planned to kill his wife. He tried to carry out the plan by striking his wife on the head at least three times with a hammer. The assault caused her serious but apparently not permanent injury. This would have been a terrifying event for Mrs. lato, given the suddenness of the attack and given the use of a weapon. It is fortunate she was ultimately able to fight him off. Finally it is appropriate that the sentence reflects the particular seriousness of an assault on a woman arising from a family dispute.
31. Counsel for the appellant has identified a number of cases in Vanuatu where the offenders have been convicted of intentional homicide. Some involve brutal killings. The sentences range from 8 years to 17 years.
32. We consider the appropriate start sentence to reflect the relevant facts as we have identified is 8 years imprisonment.
33. Counsel for the appellant submits there are four deductions which should be made from that start sentence. First the appellant at 43 years of age has had, until this event, a crime free past. We see no reason to differ from the sentencing judge's decision to deduct 12 months for his previous good character.
34. Secondly, Mr. Namri spent 1 year 6 months in prison. He is entitled to have that period deducted from his start sentence.
35. Thirdly, the appellant submits that the start sentence should be further reduced by virtue of s. 28(5) of the Penal Code [CAP. 135]. That sub-Section states:
- "(5) The criminal responsibility of a person committing an attempted offence who voluntarily withdraws from the attempt before the offence has been committed shall be diminished".*
36. The meaning of this section appears to be that where a defendant, having attempted the crime, voluntarily withdraws before the full crime is committed has diminished responsibility and therefore would be entitled to a reduced sentence.



37. We do not consider the facts in this case established that Mr. Namri voluntarily withdrew from his attempt. This was not an issue raised before the sentencing judge. In his decision on verdict the judge said:

"The Accused continued to hit the complainant on her head but at the same time the victim (complainant) struggled and grabbed the Accused inside the small sized room and pushed him outside the room. The Accused was prevented by the victim from killing her".

We therefore make no allowance pursuant to Section 26(5) of the Penal Code.

38. Finally the appellant submits the judge should have given a deduction on sentence given the appellant immediately surrendered to the police. The allowance of 12 months by the sentencing judge which we have acknowledged as appropriate was, the judge said, also for cooperation with the police. No further allowance is required.

39. The appeal on sentence is allowed. We therefore sentence Mr. Namri on the charge of attempted premeditated intentional homicide to 7 years imprisonment but back dated to commence from 31st March 2017.

40. As to the other two charges they are incorporated within the attempt charge.

41. We simply convict and discharge on those counts.

DATED at Port Vila, this 16th day of November, 2018.

BY THE COURT



Hon. John von DOUSSA
Judge.

