

BETWEEN: Public Prosecutor
Appellant

AND: Andfalo Vemboe
Respondent

Date of Hearing: 9 November 2020
Before: Chief Justice V. Lunabek
Justice J. Mansfield
Justice R. Young
Justice D. Aru
Counsel: Mr D. Boe for the Appellant
Mr R. Willie for the Respondent
Date of Decision: 20 November 2020

JUDGMENT

1. Four people, two men and two women, decided to kill a woman by witchcraft. They reached the agreement on 18 October 2019 and they commenced its execution on 22 October 2019. At about 2am that day the four Defendants went to the victim's house. There, she was assaulted but before they could kill her, they were disturbed and ran off.
2. One of those involved Ms Andfalo who initially pleaded guilty, changed her plea to not guilty but was then convicted after trial. The Judge sentenced her to four years imprisonment suspended for a period of two years from the date of the sentence.
3. The Prosecution now appeals against that sentence. They say the sentence was manifestly inadequate and they say the Judge's decision to suspend that sentence was the inappropriate exercise of his discretion.
4. Ms Andfalo made a statement to the Police. It seems that the four people involved in this attempted murder, decided that the victim was a witch and that they should kill her. One of those involved and his wife went into the victim's house. Ms Andfalo waited outside. The two people inside dragged the victim out into the bush. Ms Andfalo and the fourth person involved, went into the bush. The victim was hit over the head with a large battery and then cut on the top of her head. Others from her household intervened and Ms Andfalo and the others then fled.
5. In her statement to the Police, Ms Andfalo confirmed that she was in the bush with the victim and the others and she was watching while the others were trying to kill the victim. There was a victim impact report that confirmed that the victim suffered significant injuries, continuing disabilities and



significant trauma from the attempt to kill her. The victim had a period of hospital treatment after the attack.

6. The Judge at sentencing, noted that one of the other accused, who may have been more involved in the violence but who pleaded guilty, was sentenced to six years and ten months imprisonment for what was described as "*his leading role in this offending*".
7. The Judge decided that Ms Andfalo had significantly less involvement in the offending. He decided that the proper start sentence was five years imprisonment for the offending. He traversed her background and noted that she had a history of teaching and nursing without previous convictions. She was 71 years of age with high blood pressure. In those circumstances, the Judge reduced the start sentence by one year to four years imprisonment. He decided that although Ms Andfalo was not remorseful and no reconciliation ceremony had been undertaken (she was not prepared to do so) because her "*part in the execution was minimal and her withdrawal when there was intervention*" and her previous clean past meant the sentence should be suspended for a period of two years.
8. The Appellant says that the Judge's start sentence was inadequate and that the Judge was wrong to suspend the sentence of imprisonment. The Prosecution submitted in the Supreme Court and reiterated their submission before us that the start sentence should have been ten years imprisonment with some small reduction for personal factors. As to suspension, they submitted there was no basis in such a serious case as this for suspension. They submitted that this was a clear case where the protection of society was important given the seriousness of the offending.
9. Ms Andfalo supported the Judge's decision. She submitted that her involvement had been minimal; she had been passive and had simply stood by. She did not enter the house when the woman was taken from the house and she did not use any violence or any weapons. Because her involvement in the offending was at the lowest end, the five years starting point was appropriate. In addition, given her long history of good conduct, her age and her health, suspension was the appropriate sentence.
10. We are satisfied the sentence was manifestly inadequate. The Judge who sentenced the co-offender Mr Trief, identified a start sentence for his involvement, which was, as the Judge found, as the prime instigator, of ten years imprisonment. We agree that was an appropriate start sentence for that co-offender.
11. Mr Trief had claimed in his statement that Ms Andfalo was the one who used the knife to cut the victim. Ms Andfalo denied using the knife and said Mr Trief was trying to shift responsibility for his use of the knife. It is not possible for this Court to resolve that difference and therefore it is proper we proceed on the basis that Ms Andfalo did not use the knife.
12. It is clear that Ms Andfalo did participate in the planning for the attempted murder. She came to the house, but we accept she did not enter the house. She then went with the others when the victim was taken from the house and she watched. Of course, by doing so, she was supporting the actions of assaulting and cutting the victim. But we accept that she was not directly involved in any of the violence. Finally, we accept that she, along with the others, left before they could

carry out the killing when they were disturbed. What must be kept in mind, however, is that Ms Andfalo with others, planned to kill the victim. They were close to carrying out their plan. It was only through the intervention of others that the killing did not occur.

13. We are conscious this is a Prosecution appeal against inadequacy of sentence. We therefore consider that the least increase in the start sentence from the Judge's five years that we can apply is one of seven years imprisonment. A start sentence significantly higher could have been justified but for the reasons given, we have adopted seven years as the appropriate starting point.
14. From that sentence of seven years we think there are two appropriate deductions. The first for Ms Andfalo's good life; she is entitled at 71 years to call upon her record. She has been a productive member of society. We consider that a reduction of 12 months imprisonment for that good conduct is appropriate.
15. Finally, we are conscious of her age and health. While neither are extreme, the fact is that a sentence of imprisonment for someone in their 70s and beyond is more onerous than for a younger person. We deduct a further six months for that factor and her health concerns. That brings us to a net sentence of five and a half years imprisonment.
16. The next question is whether there is any basis on which that sentence could be properly suspended. We think the Judge erred in suspending his sentence. This was extremely serious offending. It was a planned attempt to kill someone. Significant steps were taken towards carrying it out. It was on the verge of being carried out when a third party intervened. Only then did those involved retreat.
17. While we have already noted Ms Andfalo's past we do not think that her past good conduct is such that it compels a suspension. We note that even today she has no remorse and there has been no reconciliation ceremony because she has not been prepared to perform such a ceremony.
18. In those circumstances, we are satisfied, even though this was the exercise of a discretion that the Judge was plainly wrong in his decision to suspend the sentence of imprisonment.
19. We therefore allow the appeal. Ms Andfalo spent 243 days in custody before sentencing. This period in custody must be deducted from the sentence of 5 years and six months imprisonment. There will be no order as to suspension.

DATED at Port Vila this 20th day of November 2020

BY THE COURT

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Chief Justice V. Lunabek

