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

Criminal Appeal
Case No. 25/2147 COA/CRMA
[2025] VUCA 37

BETWEEN: PUBLIC PROSECUTOR
Appellant

AND: BARNABAS GARAE
Respondent

Date of Hearing:	***11th August 2025***
Before:	***Hon. Chief Justice Vincent Lunabek*** ***Hon. Justice Mark O'Regan*** ***Hon. Justice Anthony Besanko*** ***Hon. Justice Oliver Saksak*** ***Hon. Justice Dudley Aru*** ***Hon. Justice Viran Molisa Trief*** ***Hon. Justice Maree Mackenzie***
Counsel:	***Mr Lenry Young for the Appellant*** ***Mr Kalo Shem Amos for the Respondent***
Date of Decision:	***14th August 2025***

JUDGMENT OF THE COURT

Introduction

1. The respondent pleaded guilty to three counts of domestic violence contrary to section 4(1)(a) of the Family Protection Act 2008. He was sentenced to a term of imprisonment of two years, suspended for one year. He was also ordered to do 50 hours of community work and to attend a rehabilitation programme offered by Correctional Services.

2. The Public Prosecutor appeals to this Court against the sentence. The sole ground of appeal concerns the decision of the primary Judge to suspend the sentence. No issue is taken with the other aspects of the sentencing decision.

The offending

3. All of the counts involved assaults by the respondent on his wife.

4. The first occurred in August 2024. The respondent gained access to the victim's Messenger account and read her messages. He formed the impression that a message to her was evidence that she was having an affair. She explained the circumstances were innocent but the respondent did not accept this and punched her in the head causing lacerations and bleeding, squeezed her neck and threw a can of fish at her, which hit her on the hip. This caused considerable pain.

5. The second count reflected an incident on 12 September 2024. The respondent again accessed the victim's phone and went through her messages. He found a message which appeared to be a spam message to which the victim had not responded. However, he again formed a view that this was evidence of an affair and repeatedly punched the victim on the left side of her head resulting in lacerations and bleeding. He then kicked her in the ribs. The young son then rushed to assist his mother and wiped blood from her face. The following day she was spitting blood and was taken to hospital, where she was given medication.

6. The third incident occurred on 22 January 2025. The respondent again accessed the victim's phone and read through her messages. There was a message between the victim and an officer of a company that was delivering cargo to the business for which the victim worked. The respondent punched the victim on the back with his right hand causing her to vomit, which in turn caused her to choke and lose consciousness.

Sentence

7. The primary Judge took a starting point of three years' imprisonment for the three counts on a concurrent basis. She allowed a deduction of 25 percent for the respondent's guilty plea and a further small deduction for other mitigating factors. This resulted in an end sentence of two years' imprisonment.

8. In assessing the starting point, the Judge had identified at paragraph 6 of her sentencing notes ten aggravating factors relating to the offending, which, in summary, were:

   (a) breach of trust;
   (b) offending on three occasions;
   (c) use of violence to control;
   (d) attacking the victim when she was in a vulnerable position (lying down or sitting down);
   (e) offending occurred in the home where the victim should feel safe;

(f) offending committed in the presence of respondent and victim's son;
(g) causing fear to the victim to impose control;
(h) jealousy resulting in violence;
(i) shame and humiliation felt by the victim as others witnessed the violence; and
(j) attacking the victim's head, ribs and backside.

9. Having set the sentence of two years' imprisonment, the Judge turned to the question of suspension of sentence. She dealt with this in her sentencing notes as follows:

> 21. You are 36 years old and you are in your prime years. In the [pre-sentence report], your partner stated that you are a role model at home as you support and care for your son. This is contrary to the acts of domestic violence that you committed in the presence of your son. Showing violence as the way to resolve matters in a home just creates an unsafe and insecure environment for a young child. If you truly care for your son, you will stop this behaviour. You must learn to control your jealousy and anger when you read messages sent to your partner from other males, especially when they are messages that do not suggest anything sexual. Your partner is not having an affair as you think and if you had used a good approach such as talking to her, you would have found out that there is nothing between your wife and the men who sent her messages.
>
> 22. You are a first offender and you are old enough to understand the consequences of domestic violence to stop them. You must create a safe and secure home for your partner and son as part of your support and care for them.
>
> 23. For the above reasons, I am suspending your sentence for 12 months, under my discretion in Section 57 of the Penal Code Act CAP 135. ...

10. As can be seen, the Judge did not specifically refer to the aggravating factors she had identified in paragraph 6 of her sentencing notes when setting out her reasons for suspending the sentence in paragraphs 21 to 23. We will come back to this later.

Approach to appeal

11. In *Naio v Public Prosecutor* [1998] VUCA 1, this Court adopted the principles applying to sentence appeals that were set out in the decision of the High Court of Australia in *Skinner v R* (1913) 16 CLR 336 at 340 and stated that those principles should be applied in Vanuatu. In *Skinner*, the High Court said an appellate court considering a sentence appeal should not determine that a sentence was manifestly excessive or manifestly inadequate unless that was obvious, such as where the sentencing Judge had acted on a wrong principle, or had clearly overlooked, undervalued

overestimated or misunderstood some salient features of the evidence. That restraint applies with greater force when the appeal before the Court is a prosecution appeal.

12. More specifically, in relation to appeals related to the decision to suspend or refuse to suspend a sentence, this Court gave the following guidance in *Pipite v Public Prosecutor* [2018] VUCA 53 at [82]:

> The decision whether to suspend any prison sentence is an exercise of discretion by the sentencing Judge. And so, an appellant must show the Judge exercised the discretion improperly, for example he took into account irrelevant matters or failed to take into account relevant matters. It is not a question of whether this court agrees or disagrees with the Judge's decision.

13. This Court has also stated that, in a successful prosecution appeal, the Court will intervene only to the minimum extent necessary in the interests of justice: *Public Prosecutor v Tulili* [2024] VUCA 54 at [45].

14. There was no dispute that these principles apply in the present case.

Section 57(1)

15. Section 57(1) of the Penal Code Act provides as follows:

> ***57 Provision for suspension of sentences of imprisonment***
> *(1) The execution of any sentence imposed for an offence against any Act, Regulation, Rule or Order may, by decision of the court having jurisdiction in a matter, end it subject to the following conditions:*
>
> *(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 against any Act, Regulation, Rule or Order within a period fixed by the court, which must not exceed three years.*
>
> ...

16. As s 57(1) makes clear, a sentencing judge has a discretion to suspend or refuse to suspend a sentence of imprisonment. We will refer to this as the suspension discretion.

Analysis of the appellant's case

17. The essence of the appellant's argument is that the Judge, when exercising the suspension discretion, did not take into account all of the ten aggravating factors she had identified earlier in her sentencing notes when she was giving her reasons for setting the starting point. The appellant argues that this was clear because of the introductory words to paragraph 23 of the sentencing notes, "For the above reasons", which the appellant argued referred only to paragraphs 21 and 22, and not to the earlier analysis of aggravating factors. The appellant argues that this means she omitted from consideration matters such as the fact that the respondent used a can of fish as a weapon, that there was some planning involved, that the offences occurred in the home, the repeated nature of the offending (three offences) and the injuries suffered by the victim, all of which were relevant to the exercise of the suspension discretion.

18. It is clear the Judge did not specifically refer to those factors in the context of her exercise of the suspension discretion at paragraphs 21 to 23 of her sentencing notes. It is less clear that she did not take them into account. "For the above reasons" could be understood as referring to just paragraphs 21 and 22, but it could also be understood as referring to all that came before paragraph 23, and therefore include paragraph 6. We are not persuaded that the Judge was confining her reasons to paragraphs 21 and 22. We doubt that the Judge would, after her careful and comprehensive analysis of the factors leading to the setting of the starting point, have overlooked that analysis when she came to exercise the suspension discretion.

19. Even if we assume the Judge was referring only to the reasons in paragraph 21 and 22, that does not mean she ignored the earlier contents of her sentencing remarks. She was obviously aware of the aggravating factors set out in paragraph 6, given she had referred to them earlier in her sentencing notes.

20. The appellant argues that it was necessary for the Judge to undertake a balancing exercise of the aggravating factors against mitigating factors when determining whether to exercise the suspension discretion. In that regard, counsel for the appellant, Mr Young, referred to the decision of this Court in *Malau v Public Prosecutor* [2021] VUCA 48. In that case, this Court noted that the sentencing Judge in that case appeared to have taken into account in exercising the suspension discretion only aggravating factors of the offending. The Court added (at [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. This was an error of law as there needed to be a balancing exercise undertaken.*

21. The court in that case allowed Mr Malau's appeal against the decision of the sentencing Judge not to suspend his sentence and ruled that the sentence would be suspended for 12 months.

22. We do not think this Court was intending in *Malau* to establish a proposition that if a sentencing Judge did not undertake an analysis of aggravating and mitigating factors and explicitly referred to "balancing" those factors, an error of law would occur. Rather, we consider the Court was indicating that the suspension discretion involved a consideration of both the aggravating matters and the mitigating matters so that the Court can adequately address the three factors set out in s 57(1)(a); that is, the Court was indicating that a failure to consider one or the other would be the failure to take into account a relevant matter, and thus make the exercise of the discretion amenable to challenge on appeal.

23. The appellant also referred to the decision of this Court in *Kalo v Public Prosecutor* [2020] VUCA 39. In particular, Mr Young emphasised that *Kalo* was a case of domestic violence by a man against his wife, and this Court observed (at [20]):

> *A term of imprisonment was inevitable for this sort of domestic violence. A home should be a safe place and a sanctuary. The infliction of physical force by a man on a woman is always to be condemned.*

24. He argued this indicated that the suspension of the sentence in the present case was inconsistent with authority of this Court. We acknowledge the observation made in *Kalo*, but note that the sentence under appeal in that case was a suspended sentence, and no change was made to that sentence by this Court. So, while the Court was saying a sentence of imprisonment was inevitable, it did not appear to be saying that a refusal of suspension of that term of imprisonment was also inevitable.

25. We are also mindful of the caution expressed in this Court's decision in *Konpikon v Public Prosecutor* [2022] VUCA 38. In that case the sentencing Judge had refused to suspend a sentence given the seriousness of the offending. It was argued that he had not taken into account mitigating factors, but this Court noted that he had set out those mitigating factors earlier in his sentencing notes. The Court said (at [10]):

> *In his remarks identifying mitigating factors the Judge illustrated he was well aware of many of the factors also relevant to suspension. There was no need for the Judge to repeat these factors when he came to consider suspension, they would have been part of the evaluation exercise he undertook.*

26. We adopt the same approach in this case. The fact the Judge did not specifically refer to all aggravating factors in paragraphs 21 to 23 of her sentencing notes did not mean she failed to take them into account when exercising the suspension discretion.

27. The appellant also referred to two recent Supreme Court decisions on similar facts, where suspension of sentence had been refused. The first of these was *Public Prosecutor v Sali* [2024] VUSC 112. The second was *Public Prosecutor v Albarni* [2024] VUSC 167. We accept that these cases are similar in nature to the present case, and indeed it could be argued that the offending in the present case was worse than in those cases. However, we do not gain a lot of assistance from other cases in which the suspension discretion has been exercised differently from in the case under appeal. It is not a question for us as to whether we think suspension should have occurred, but rather whether the Judge made an appealable error in determining to suspend the sentence in the present case, given the approach that is taken to appeals of this nature, as outlined in paragraphs 11 to 13 above.

Discussion

28. Drawing these threads together, we consider:

(a) Ideally a sentencing Judge should, when exercising the suspension discretion, make it clear that he or she has taken into all aggravating and mitigating factors that are relevant to the discretion. We see this as requiring a balancing of factors against, and factors for, suspension as indicated in *Malau*. That said, the question is whether the Judge has considered the factors appropriately, not whether he or she has used the term "balancing" in his or her sentencing notes.

(b) In this case, we are not convinced the primary Judge failed to do the exercise described at subpara a. above. But, on the approach we take to the case, it is not necessary for us to reach a concluded view on that. However, we do emphasise that any doubt about this could have been resolved in this case if the sentencing notes had clearly stated that the Judge had done the exercise.

(c) We accept that there is authority supporting a refusal to suspend in a case of this nature and we do not think a decision to refuse suspension in this case would have been vulnerable on appeal. But we remind ourselves that, on an appeal such as this one, it is not a question of whether or not we agree with the Judge; the question is whether an appealable error has been made.

(d) If we concluded the Judge had failed to do the exercise described in subpara a. above, we would need to resentence. In that regard, we note this Court's approach in *Public Prosecutor v Andy* [2011] VUCA 14, a case in which the Public Prosecutor successfully challenged a decision to suspend sentence. In that case, this Court said (at paragraph 14):

(i) The appropriate sentence on a successful Public Prosecutor's appeal such as this, where an offender faces the particular disappointment and disruption of having to go to prison after having apparently avoided that penalty, is the lowest that can be imposed within the range of available penalties.

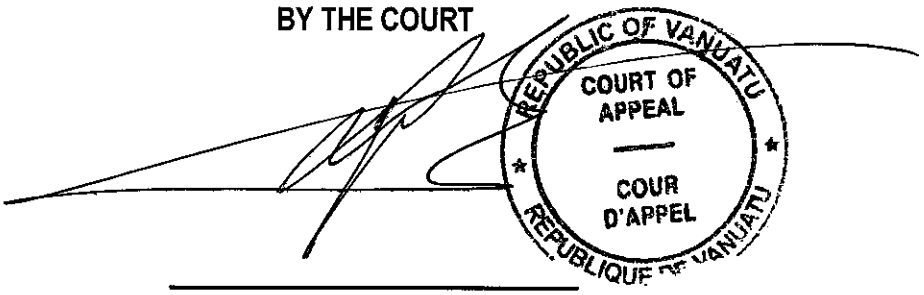
(ii) Applying that approach in *Tulili*, this Court, having decided that the Supreme Court should not have suspended Mr Tulili's sentence, nevertheless let the suspended sentence stand. In this case, we consider that would be the appropriate approach if we needed to resentence Mr Garae.

Conclusion

29 We conclude that, if the Judge had failed to take into account relevant aggravating features in exercising the suspension discretion, an appealable error would have occurred. But we are not convinced that she did, and even if she had, we would not have been disposed to alter the sentence. We therefore dismiss the appeal.

DATED at Port Vila this 14th day of August 2025

BY THE COURT



Hon Chief Justice Vincent Lunabek