IN THE SUPREME COURT
OF THE REPUBLIC OF VANUATU

Criminal
Case No. 17/1005 SC/CRML

BETWEEN: **Public Prosecutor**

AND: **Marcellino Pipite**
Paul Teluluk
Silas Yatan
Tony Nari
John Amos
Arnold Prasad
Sebastien Harry
Thomas Laken
Jonas James
Jean Yves Chabod
Wilson Iauma
Defendants

Date: Wednesday, 13 June 2018

By: Justice G.A. Andrée Wiltens

Counsel: Mr J. Naigulevu for the Public Prosecutor

Ms C. Thyna for Mr Pipite

Mr L. Napuati for Mr Yatan

Mr N. Morrison for Mr Iauma

Mrs M. Nari for remaining Defendants

SENTENCE

A. Introduction

1. All the above-named defendants face one charge of conspiring to defeat the course of justice, laid contrary to section 79(a) of the Penal Code [Cap 135]. The maximum sentence for this offence is a term of 7 years imprisonment.

2. After trial in August 2016, all the defendants were convicted; and in September 2016 they were variously sentenced. All the defendants subsequently appealed their convictions, which appeals were allowed and a re-trial ordered.

3. All the defendants were arraigned at the commencement of the re-trial on 5 April 2018 before me. Despite their history of persistent denials of the charge, Mr Pipite, Mr Yatan, Mr Nari, Mr Amos, Mr Laken and Mr James all pleaded guilty. The other defendants pleaded not guilty. I checked with defence counsel that those guilty pleas were in accordance with their instructions - and that was confirmed to be the case. I then entered convictions against these defendants - hence, they are for sentence today.

B. The Facts

4. A previous criminal trial involving alleged corruption sets the scene for this particular offending. A large number of incumbent Members of Parliament were tried in 2015 in respect of numerous charges alleging the offering and accepting of bribes. At the conclusion of that trial, on 9 October 2015, these six defendants and a number of others, were found guilty by Justice Sey and convicted. All were then bailed pending sentence, which was to occur on 22 October 2015.

5. Co-incidentally, the President of Vanuatu was overseas between 5 and 11 October 2015. This is significant, as in his absence the Speaker of the House of Parliament stands in as Acting President, as provided for in the Constitution – Article 37. The Speaker at the time was Mr Pipite. Therefore, at the time of the verdicts being announced and the defendants being convicted, Mr Pipite's appointment as Acting President had only 2 more days to run.

6. On 10 October 2015, the day after verdicts were announced, a plan was hatched – there is no clear evidence as to whose idea this was. While the President was away, Mr Pipite was in a position where he could grant pardons to all those convicted under Article 38 of the Constitution. There followed, that day and the next, numerous clandestine discussions and meetings in person and by telephone at which this plan was debated and eventually agreed on. As a result, each defendant signed a formal request for a pardon to be considered. On 11 October 2015, Mr Pipite granted and signed official pardons for himself and the other 5 defendants – as well as others, who are not for sentence today.

7. There was evident haste involved, indicating that there was clear understanding that this could only be achieved while Mr Pipite was in his position of Acting President. Various locations were utilised - as Mr Pipite explained to some of the others involved, his office was too exposed to the public to be "safe" for such activity. Despite a number of criminal barristers being involved in the discussions and in preparation of the necessary papers, it is significant that at no stage did any of those wanting pardons consult the State Law Office or any senior Law Officers for legal advice. Indeed, when the final papers were being printed on letterhead at the State Law Office, a member of the President's staff warned of the propriety of the pardons – but he was berated by Mr Pipite and told to hurry up.

8. The pardons were publicly announced as being "...in the interests of unity and peace in Vanuatu"; and they were also formally Gazetted, no doubt to give them a greater veneer of authenticity and a degree of permanence. However, upon the return of the President to Vanuatu, all the pardons were revoked almost immediately.

9. This was a criminal conspiracy to do a lawful act by unlawful means. The lawful act was to seek the pardons. The unlawful means involved a gigantic conflict of interest on the part of Mr Pipite to contemplate pardoning himself and the others convicted of bribery offences. There simply could not be any independent assessment as to whether it was (i) appropriate, or (ii) in the public interest for these pardons to be granted. Mr Pipite was also, in attending to the issuance of the pardons, clearly acting in breach of section 24 of the Leadership Code. Indeed all those involved, as members of Parliament, were also in breach of the Leadership Code.

10. There is little doubt that some of these defendants played more significant roles than others in carrying out the plan – for example Mr Pipite played a central role. However, it seems wrong to me to hold any one more criminally responsible than the others – after all, they are not charged with the various acts involved in carrying out the plan. What I see here is a group of self-interested men, each quite audaciously, attempting to evade the consequences of their earlier corrupt behaviour by seeking to secure pardons for themselves. They are in all in the same position. I therefore intend to deal with each defendant in the same manner, regardless of the steps each took towards implementing the overall plan.

11. I note that all the defendants were parliamentarians, and held prominent public positions – they are intelligent and worldly-wise. It cannot seriously be suggested that any of the defendants were unaware of Mr Pipite's and their own conflicted positions, or that it was legally permissible for them to take advantage of what was being proposed.

C. Submissions

12. Mr Naiguleu has advanced the authorities of *PP v Emellee* [2005] VUCA 11; *PP v Pipite and Others* [2016] VUSC 133; and *PP v Natuman and Maralau* Criminal Case no. 16/1758 per Geoghegan J as being helpful in setting the appropriate sentencing level. These cases stress the seriousness of this type of criminal conduct.

13. Mr Naigulevu also cited *R v Taouk* (1992) 65 A Crim R 412, where it was articulated that an offender's position in the community can be relevant in assessing the gravity of the offending.

14. Mr Napuati, for Mr Yatan, has also cited authorities he considers relevant, namely *PP v Kalosil* [2015] VUSC 149 and *PP v Leo* [2017] VUCA 38. Both are examples of suspended sentences being imposed.

15. Ms Nari for Mr Nari, Mr Amos, Mr Laken and Mr James, relied mainly on personal matters to advance her mitigation for her clients. Ms Nari also put forward other cases where suspended sentences were imposed.

16. Ms Thyna relied on *Siply v PP* CAC 15 of 2016 as authority that mitigating factors plus the discount for an early guilty should equate to an overall discount of 3 years imprisonment. She also relied on other cases where suspended sentences had been imposed. She submitted the

end sentence should be 2 years imprisonment, suspended for 2 years, plus 150 hours of community work.

D. The Purposes and Principles of Sentencing

17. The main purposes of sentencing, as conveniently set out in Section 7 of the New Zealand Sentencing Act 2002, are to:

- hold the offender accountable for the harm done to the complainant and the community,
- promote a sense of responsibility for, and an acknowledgement of, the harm done,
- provide for the interests of the victim of the offending – including providing reparation for the harm done,
- denounce the offender's conduct,
- deter the offender and the public at large from this type of behaviour,
- protect the community, or
- assist in the offender's rehabilitation and re-integration.

18. All of those considerations have valid application to sentencing in Vanuatu.

19. The principles of sentencing, set out in section 8 of that same New Zealand Act involve a number of mandatory considerations, including the following pertinent matters:

- take into account the gravity of the offending, and the degree of individual culpability,
- take into account the seriousness of the offending in comparison with other types of offending, as indicated by the maximum penalties prescribed,
- impose the maximum penalty prescribed if the offending is within the most serious of cases for which that penalty is prescribed – unless the circumstances relating to the offender make that inappropriate. Similarly, impose near to the maximum sentence if the offending is near to the most serious of cases for which the penalty is prescribed, again subject to the same qualification,
- consider the desirability of consistency of sentencing and parity of sentences,
- take into account any information concerning the effect of the offending on the victim,
- take into account any particular circumstances of the offender to ensure disproportionately severe sentences are avoided,

- take into account the offender's background to see if wholly or partly rehabilitative sanctions are appropriate,

- take into account the outcomes of any restorative justice processes undertaken, and

- impose the least restrictive sentence that is appropriate in the circumstances.

20. Again, all of those considerations have valid application to sentencing in Vanuatu.

E. Starting Point

21. Mr Naigulevu made no submission as to the appropriate starting point in terms of Step 1 as prescribed by *PP v Andy* [2011] VUCA 14. Indeed, neither did any of the defence counsel.

22. All the precedent authorities tendered stress the seriousness of this type of offending which involves the undermining of the judicial process. That being the case, I consider that this Court must look near to the top of the sentencing range, bearing in mind the maximum penalty prescribed. I note that Justice Chetwynd adopted a start point for this offending of 4 years imprisonment. I consider that to be lenient; indeed too lenient.

23. The most telling aspect of this criminal culpability requires examination of the roles within the community of the persons involved. Mr Pipite was the Speaker, and Acting President of Vanuatu at the time. Mr Nari was the Minister for Infrastructure and Public Utilities. Mr Yatan was the Parliamentary Secretary for Research. The other defendants were members of Parliament, all of some standing. All these defendants were "leaders" as that term is used in the Constitution and the Leadership Code, with resultant obligations to the community. For persons of this standing and seniority to indulge in such serious offending as this, it behoves this Court to look to very near the maximum penalty in adopting the appropriate start point.

24. There are innumerable examples of entirely selfless politicians doing absolutely marvellous selfless service for their communities world-wide.

25. However, by their actions, each of these defendants has demonstrated whole-hearted self-interest. To imagine, from their perspectives, that the interests of the community required each of them to be entirely exonerated for offering and/or taking monetary bribes for matters of political expediency simply beggars belief. In effect, each was saying to the world at large, that they were above the law. And proof that their stated reason for requiring the pardons was entirely misconceived can be seen after the President returned to Vanuatu and almost immediately reversed the decisions – all hell did not break loose within the community. All that happened was that the perpetrators were returned to facing sentencing, without any ramifications within the community at large.

26. However, as the audacity of the plan struck a chord with news organisations around the world, there is little doubt that Vanuatu's international reputation was diminished by the defendants' actions.

27. Can one imagine a worse case of this type, than a person of the standing of the Acting President of the nation conspiring with others of extremely high standing to attempt to pervert

course of justice to arrange pardons from criminal convictions involving corruption for themselves? To answer my own question - I suggest not.

28. It cannot be forgotten that the defendants were not men of good standing – each had been convicted, days earlier for very serious criminal conduct which ultimately resulted in them all being sent to prison for various terms, with no suspension of sentence. Mr Nari was sentenced to 3 years 6 months imprisonment for giving a bribe of VT 500,000 and receiving a bribe of VT 1 million; all the others were sentenced to 3 years imprisonment for accepting VT 1 million bribes.

29. Taking everything into account, I set the start point for the offending for each defendant at 5 years imprisonment.

F. Personal Factors

30. In terms of step 2 of *PP v Andy,* there is a similarity of factors for each of the defendants, taken from Pre-Sentence Reports, by their sworn statements filed, and counsel's written submissions:

- They are all middle-aged family men, with continuing family and business commitments, which will become difficult to meet if incarcerated

- They have all made significant contributions to Vanuatu and to their individual constituencies, as well as to their local communities – they have strong community ties and good prospects of rehabilitation

- They are all said to be remorseful – they have apologised and have or have attempted to participate in custom reconciliations

- They allege they were led astray by the various lawyers involved, most of whom were given immunity from prosecution, which is unfair. The allegation is that the lawyers involved were the main architects and players in this plan, yet they have escaped justice

- The Public Prosecutor has made a promise, of some sort, to support suspended sentences – and apparently the police had offered immunity to some defendants, which offer was later retracted.

G. Pleas

31. Counsel have submitted that these defendants pleaded guilty at the first available opportunity, thereby being eligible to receive the maximum 1/3 discount available for prompt pleas: see *PP v Andy.*

32. However, these pleas were NOT entered at the earliest opportunity. These pleas were entered after a contested trial and after being sentenced, when most refused to accept their convictions; and after appeals against their convictions – when again there was no acceptance

of their convictions. The pleas entered before me in April 2018 are at a late stage in the criminal process – the charges emanated from acts done in October 2015, 2.5 years before the pleas were entered.

33. I acknowledge that the guilty pleas are an acceptance of wrong-doing, and that there will be a saving of Court time and costs as a result. However, the maximum discount is no longer available at this time – a generous discount, given the effluxion of 2.5 years, will be to reduce the final sentences by 15%.

H. Sentence

34. A number of these defendants have advanced their medical or health issues as mitigation. I do not accept that any defendant is in a position where that factor has actual significance when looking at the appropriate sentences. I repeat that observation in relation to difficult financial circumstances.

35. I note that the public apologies and custom reconciliation ceremonies were not undertaken spontaneously by the defendants of their own free will – they did this so as to comply with their parole requirements. As such, these measures cannot properly be considered as mitigation.

36. I am not prepared to sentence Ms Nari's clients on the basis she submitted they entered their guilty pleas. She submitted that Mr Nari was pleading due to documents being prepared in his office, and his desire to take the blame so that others could go free. She submitted that Mr Laken had pleaded as he given some cash for the purchase of a flash drive which was used to save the letters seeking pardons. She submitted that Mr Amos had pleaded guilty as he had assisted in printing off some of the documents. Finally she submitted that Mr James had pleaded guilty as he had signed the letter seeking the pardon.

37. These defendants are to be sentenced for entering into a criminal conspiracy. They all wanted for themselves a pardon to negative the criminal convictions each was waiting to be sentenced for. They all steps, of various kinds to ensure the agreement was carried out. It's on that basis that they must be sentenced. I see little to differentiate between them.

38. The submissions filed aimed at discharges without conviction are incredibly naive, wholly misconceived, and quite concerning in providing hope where none should exist. Were the Court to consider such a ludicrously lenient and inappropriate sentence the judiciary would deserve the undoubted opprobrium that would follow.

39. Personal circumstances can really only have limited mitigatory effect when the Court considers this type of serious offending. I accept that each defendant has suffered a steep fall from grace; and I take into account that Justice Sey, when sentencing for the bribery charges, imposed 10 year bans on public service. The 3 days each defendant spent in custody is a further factor I take into account. The discount that I allow for personal factors is 4 months imprisonment.

40. As previously stated, I am prepared to further discount the sentences that need to be imposed by 15 % for when the guilty pleas were entered.

41. The end sentence that I arrive at, in respect of each defendant is 3 years 10 months imprisonment.

I. Suspension

42. Section 57(1) of the Penal Code requires the Court to consider whether the end sentence should be imposed immediately or suspended. The Court has jurisdiction to suspend the sentence, in whole or in part, if immediate incarceration is inappropriate:

- In view of the circumstances,
- In particular, the nature of the crime, and
- The character of the offender.

43. In my analysis, there are numerous compelling reasons which militate against suspension:

- All the defendants are intelligent, mature men – they should have known better than to get involved
- They all knew very well what they were doing and that it was wrong – yet they went ahead anyway
- They all have previous convictions, of a significant type, which merited terms of immediate imprisonment
- The extremely serious nature of the offending involved, especially given their positions in the community
- To suspend the sentences would be to send entirely the wrong message to the community. Not only must the conduct be denounced, there must be a serious deterrent message sent, so that the gravity of this offending is well recognised by all.

44. Each defendant will serve an end sentence of 3 years 10 months imprisonment.

45. The defendants have 14 days to appeal their sentences if they disagree with it.

Dated at Port Vila this 13th day of June 2018
BY THE COURT

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Justice G.A. Andrée Wiltens

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