

Public Prosecutor

v.

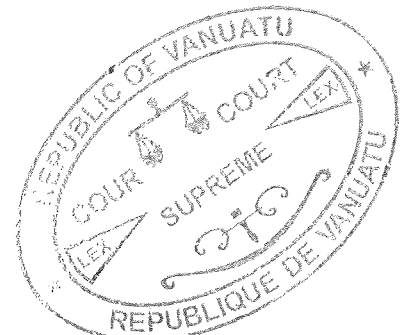
John James Vira Leo

Before: Justice G.A. Andrée Willens
Hearing: 22 February 2019
Counsel: Mr S. Blessing for the Public Prosecutor
Defendant in person

Sentence

A. Introduction

1. This sentencing concerns a series of criminal acts arising from an alleged failure by 2 villagers to comply with a customary ban imposed by Chief Vira Leo, and his response to that alleged breach of taboo. His response was to utilise a number of lieutenants, although he was the undoubted leader. For supposedly swimming in an area where they should not, and for collecting/removing beche de mer from an allegedly restricted area, the "behaviour-correcting" retribution imposed by Vira Leo and his 8 lieutenants involved considerable violence and serious threats to the person, as well as excessive violence and damage to property.
2. Justice Chetwynd sentenced four of the less involved defendants, namely Trisipa, Tarilape, Leonard Lini and Hani after they had pleaded to their involvement in the alleged offending. As a result of later pleas, I sentenced Viramauri, Bani, Vanua and Vanua Lini on largely the same charges.
3. The remaining defendant, Vira Leo, is to be sentenced today.



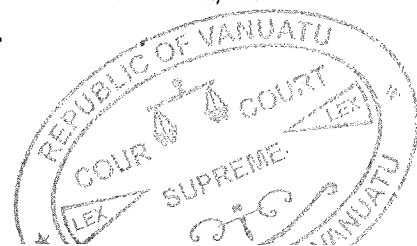
B. Charges

4. After trial, Vira Leo was convicted of the following charges:

- 1x Rioting, contrary to section 70 of the Penal Code – maximum penalty 10 years imprisonment;
- 12x Malicious damage, contrary to section 133 of the Penal Code – maximum penalty 1 year imprisonment;
- 7x Arson, contrary to section 134 of the Penal Code – maximum penalty 15 years imprisonment;
- 6x Threatening to kill, contrary to section 115 of the Penal Code – maximum sentence of 15 years imprisonment;
- 1x Intentional assault, contrary to section 107 of the Penal Code – maximum sentence of 5 years imprisonment; and
- 12x Unlawful entry, contrary to section 143 of the Penal Code – maximum sentence of 20 years imprisonment.

C. Principles

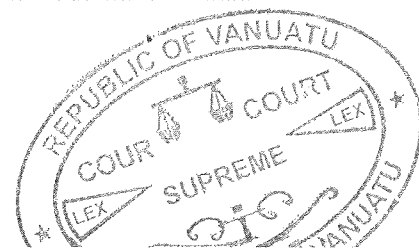
5. Consistency of sentencing is of paramount consideration in this case. Justice Chetwynd dealt with all 3 of the defendants on the same basis. They had pleaded guilty to 1x riot, 5x malicious damage and 6x arson charges. They were each given an end sentence of 2 years six months imprisonment, suspended for 2 years.
6. The defendants whom I later dealt with had pleaded guilty to the same charges - but some 8 months later, which reduced their available mitigation. Accordingly, Vanua and Lini were given end sentences of 2 years 8 months imprisonment, suspended for 2 years; and Bani, who pleaded guilty to an additional theft charge, to an end sentence of 2 years 10 months imprisonment, suspended for 2 years. The fourth defendant, Viramauri, was the second-in-command to Vira Leo and therefore was the most culpable of those who had pleaded guilty. He admitted 2 further theft charges and 1 of threatening to kill. Accordingly, he was sentenced to an end sentence of 3 years imprisonment. Due to his quite different personal circumstances, and to reflect his higher criminal culpability, his sentence was not suspended.
7. Vira Leo's position is that he was the leader of this group, and so his criminal culpability is greater than that of all of the others, who to a large degree were simply following the orders of Vira Leo, their Chief. In terms of comparing his criminal culpability with that of the others, he has the additional charges to be taken into account at sentencing of: 1x intentional assault, 6x threatening to kill, 1x arson, 12x unlawful entry and 7x malicious damage.



8. As well as parity of sentence, the other principles of sentences of particular importance in this case are that Vira Leo should be held accountable for the harm done and accept responsibility for that harm; his conduct needs to be denounced; and he and others in authority, need to be deterred from acting in this fashion in future. The community should be protected from such over-extension of custom authority resulting in criminal behaviour behaviour.

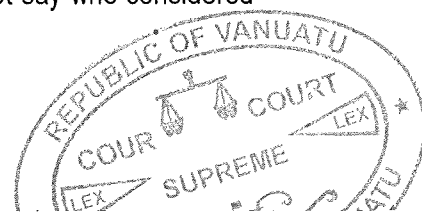
D. Facts

9. In about December 2010, a customary caution or taboo was placed in respect of a certain area of the sea at or near to the boundary of Nageha village in Pentecost. Both Mr Hopkins Binihi and Mr Harry Loloi told me that Vira Leo played a part in imposing the ban, even though Nageha village had it's own Chief and Vira Leo had no express authority over the area in question nor the consent of members of the village to impose a ban. There had been no prior consultation.
10. The taboo was in relation to fishing according to Harry Loloi, and swimming and fishing according to Hopkins Binihi. They were said to have broken the ban on about 10 December 2015 by taking sea urchins or *beche de mer*. Both denied that in evidence before me – they told me they had been swimming but in area outside the banned area, and while they did take *beche de mer*, it was from a permitted area.
11. The following day Vira Leo instructed a co-defendant, Viramauri, to speak to the two villagers. Viramauri told them that Vira Leo demanded an explanation from them. The two villagers decided to apologise with a tusked pig, and went to see Vira Leo in person. Vira Leo at first berated both of them, then punched Loloi's face and the back of his neck according to Binihi, or his shoulder blade according to Loloi - before driving them both away by picking up a piece of wood as a weapon and chasing them while brandishing it.
12. Vira Leo followed after them, and threatened them by ordering to take their families away from the village by night fall or he would shoot them. Vira Leo then took a hoe and/or a shovel to Mr Loloi's house, causing damage to both the contents and the house, and to other houses, as well as the Nageha village church, before returning home. Mr Binihi and Mr Loloi were unable to stop Vira Leo as he had several of his followers with him. Several times they said they wanted to apologise and settle the matter, but Vira Leo was not interested in that. Both told me that Vira Leo damaged the locks to the various houses in order to gain entry, damaged property inside the houses, and then threw personal belongings outside.
13. Vira Leo was not finished, however, and he returned again to continue to damage villagers' houses. He threatened them again saying he would go and get a gun and shoot them before again leaving.
14. Vira Leo returned a third time and chased after Mr Loloi and Mr Binihi while brandishing a shovel. He said if they were still there the next time he came, he would shoot them. Mr Binihi



and Mr Loloi considered they had no other choice, collected their families, abandoning their belongings, and fled to a nearby village.

15. At about 7am the next morning, some of the villagers who had fled returned to check on their properties. They observed Vira Leo and others further damaging their houses and saw Vira Leo break into houses with a burning branch which he used to set fire to a total of seven houses. They were burnt to the ground – the loss was said to be VT 5 million.
16. The villagers who fled found it impossible to re-settle, at least partly due to being further threatened by Vira Leo as he considered they had not gone sufficiently far away. Other villages did not want to get involved in their plight. The victims totalled some 32 or 35 people, according to Mr Binihi; some 16 of whom, according to Mr Loloi, were from Nageha village. Both told me there some elderly persons driven from their homes, and some very young. They were forced to live in isolated bush areas and scavenge to survive. The inclement weather made matters much worse.
17. Eventually one of the complainants reported the matter to the police. The villagers were then able to go back to their home villages, however it took over a year before their houses were rebuilt.
18. It became apparent, even while cross-examining the prosecution witnesses, that Vira Leo did not dispute much of the prosecution case. He agreed a fishing “gorogoro” (taboo) had been issued, and claimed customary authority, as Chief, to do that. He maintained that the 2 complainants had trespassed into the taboo area and were actually observed to gather *beche de mer*, in breach of the taboo. He says that was later admitted by the transgressors. He suggested that there was less damage caused than alleged, that only 4 houses were burnt, and that he only threatened to kill on the one occasion.
19. Vira Leo went further in his evidence in-chief. He told me that as a result of the transgressions by Mr Loloi and Mr Binihi, he as Chief, imposed “*leo ding vuha*” (the enforcement of customary laws). This was in the form of the 3 usual customary remedies; namely, a fine of 5,971 pigs or 242,150 of local currency (pig tusks) or cash VT 4,842,102, which if not paid forthwith, as this was a serious breach, would mean that they and their families had to leave the village voluntarily. If they did not leave voluntarily, then they would be forced to leave by way of a custom eviction. He told me the Paramount Chiefs had set the fine at that level.
20. Vira Leo’s position was that the fine was not immediately paid, that despite his efforts of encouragement there was no voluntary departure, and that what followed was all a part of a customary eviction; and therefore not justiciable under Vanuatu’s written laws. He indicated it was part of his duty as a local Chief to educate the general populace and deter others from similarly breaching taboos.
21. Vira Leo told me that actions carried out during *leo ding vuha* were not considered criminal offences, even if they might be under different circumstances. He did not say who considered



that to be the position, but he certainly was of that view himself. He said that the threats to kill, damaging property, arsons and other actions were all carried out as part of *leo ding vuha*. He would not say whether he adopted the same attitude to the allegations of assault, and the chasing of the alleged taboo breakers firstly to their village and then to other villages.

22. In cross-examination Vira Leo admitted hitting Mr Harry Loloï, chasing Mr Harry Loloï and Mr Hopkins Binihi away, damaging the houses and contents, and the threats to kill which he claimed were an attempt to teach them to behave as they should. He accepted that he was not alone in these various acts, that there were 9 in all involved; and he agreed that the others involved were his co-accused. Everything alleged, he said, was done as part of the “custom defence” rejected at trial.

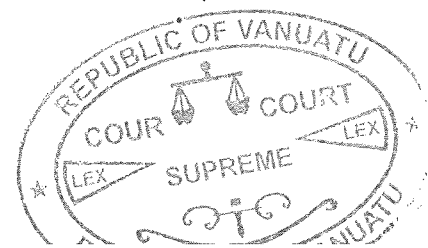
E. Submissions

23. Mr Blessing has provided a number of guideline authorities that deal with appropriate sentencing levels in relation to the various charges Vira Leo faces, and has made submissions suggesting a suitable sentence starting point for each type of offending. This is rather unhelpful, as it does not address the totality of the criminal culpability which must be looked at when assessing the appropriate start point.
24. Vira Leo has provided a lengthy document entitled “Final Submission Prior to Sentencing”. It too is unhelpful. It rehearses much of his argument, pre-trial and during the trial, in which he maintained that customary law enabled him to act as he did, and that the criminal law should play no part in what transpired. It effectively amounts to an appellate submission. I placed little weight on it, other than to demonstrate a lack of remorse.

F. Sentence

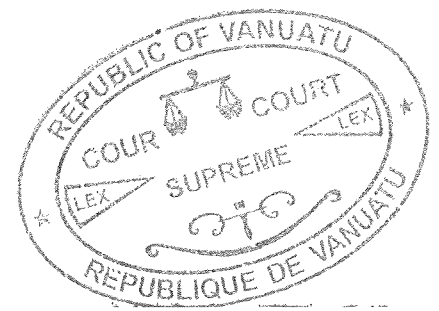
25. There are clearly a number of aggravating factors to the offending:

- Premeditation and planning;
- Vira Leo's encouraging others to also break the law;
- Total destruction of homes and personal property;
- The value of the damage caused – with a loss of over VT 5 million;
- Taking the law into his own hands to impose his beliefs on others from a neighbouring village and to exert control over others;
- The significant and unwarranted suffering and hardship caused to the victims – not only at the time, but which is enduring. I take into account under this head the victim impact



statements which are set out in Mr Blessing's submissions and which spell out the traumatic effect on the victims of this offending.

26. The Pre-Sentence Report confirms Vira Leo is 59 years old, married with two adopted children. He is the leader of the custom movement on Pentecost Island, and has healthy relationships with his immediate family. His relationship with other villages has unfortunately "...gone from bad to worse". He reports no health issues and has no previous convictions. The PSR comments that he has strong belief in custom rules, principles and values and that nothing "...can change his mindset" regarding those matters.
27. The PSR also records that a custom ceremony has taken place, in which no less than 5,000 pigs were gifted to various custom Chiefs during a 5-day tour of Pentecost. However, the actual village affected by Vira Leo's offending and the victims were not party to any such ceremonies, although Vira Leo states that he is willing to perform a ceremony with them "...once the time is right".
28. Taking all those matters into account, I adopt a start point for Vira Leo's criminal culpability reflected in the totality of his offending of seven years imprisonment. That is 12 months more than the start point for Viramauri, his second-in-command – which accurately reflects not only Vira Leo's greater involvement in the offending but also his additional convictions. A significant discount, namely 18 months, was given to Viramauri for his previous clear record considering his then age. It is fair and consistent that Vira Leo receive the same, though on reflection, this could be seen as very generous.
29. I am prepared to further discount Vira Leo's sentence by 3 months for the custom ceremonies he has undertaken and the promise to engage in a similar ceremony with the actual victims.
30. The last mitigating factor that I consider is Vira Leo's genuine belief that he was entitled, as a matter of custom, to act in this way. That cannot be a defence to his criminal offending, but I consider it is important I take this into account in determining the appropriate end sentence. I accordingly further reduce Vira Leo's sentence by 18 months to reflect this factor.
31. Vira Leo is therefore sentenced to an end sentence of 3 years 9 months imprisonment. The sentence is to run from 21 December 2018.
32. In comparison with the sentences imposed on the other defendants, I am satisfied that parity has been achieved to reflect each person's involvement and culpability.
33. The sentences, all to be imposed concurrently, are therefore as follows:
 - Rioting: 18 months imprisonment;
 - 12x Malicious damage: 9 months imprisonment;



- 7x Arson: 3 years 9 months imprisonment;
- 6x Threatening to kill: 3 years imprisonment;
- Intentional assault: 6 months imprisonment; and
- 12x Unlawful entry: 2 years imprisonment.


34. 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 if immediate incarceration is inappropriate in view of the circumstances, in particular the nature of the crime, and the character of the offender.

35. I am unwilling to exercise my discretion in Vira Leo's case. The offending is just too serious, and there is a distinct lack of remorse shown. In my view, the issue of parity with the others also precludes such lenience.

36. Vira Leo has the right to appeal his sentence – he has 14 days in which to do so.

Dated at Port Vila this 22nd day of February 2019

BY THE COURT


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Justice G.A. Andrée Wiltens

