

BETWEEN: NIMANI GISLAPNO
Appellant

AND: PUBLIC PROSECUTOR
Respondent

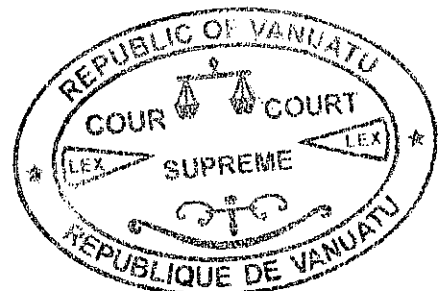
Date of Hearing: 11th day of March, 2024
Before: Justice W. K. Hastings
Distribution: Mrs. K. B. Karu for the Appellant
Mrs. M. Taiki for the Respondent

JUDGMENT

1. On 1 November 2023, the appellant pleaded guilty to one count of making a false statement contrary to s. 76 of the Penal Code [Cap. 135]. That offence carries a maximum penalty of three years' imprisonment. The appellant was convicted and was sentenced on 6 December 2023. He appeals the end sentence of 13 months imprisonment suspended for 24 months, a fine of VT 5,000 and an order that he pay prosecution costs of VT 5,000.

The facts

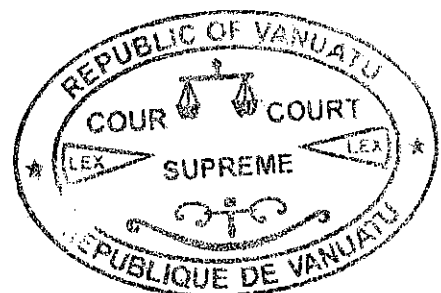
2. On 20 September 2020, an assault occurred at the Electro nightclub in Port Vila. Shortly afterwards, the victim died in Port Vila hospital. The assaulter has been convicted and sentenced in *Public Prosecutor v Iata* [2021] VUSC 45.
3. The appellant in this case was a probationary police constable and was a friend of Mr Iata. The appellant was at the nightclub the night of the assault.
4. The Police investigated the assault.
5. On 24 September 2020, the appellant was cautioned for alleged complicity in the assault and questioned. He told the police that he was in the nightclub with lots of other people, but he did not witness anyone being assaulted.



6. On 25 September 2020, a security guard at the nightclub was questioned. He said the appellant was present, and when the security guard asked if anyone had seen the assault, the appellant said that he and some others had assaulted the victim.
7. On 26 September 2020, the Police cautioned the appellant again, this time for making a false statement in his previous statement, and he was questioned. He admitted that he lied in his previous statement because he was in shock and still coming to grips with the fact that the victim had died. He said he lied to protect his friend Mr Iata.

The sentence

8. The appellant pleaded guilty on 1 November 2023 and was sentenced on 6 December 2023.
9. At the sentencing hearing, the prosecution submitted the appropriate starting point was between 24 to 30 months imprisonment. The defence submitted a starting point of 100 hours community work was appropriate.
10. The Senior Magistrate identified as aggravating factors the fact the defendant deliberately lied, that he was negligent and that he was a sworn police officer. The Senior Magistrate commented that *"Considering that the defendant is a police officer, there is a higher expectation for him as a law enforcement officer to act and behave in a way that reflects his work."* The Senior Magistrate adopted a starting point of 24 months imprisonment, and uplifted that starting point by 3 months *"considering the aggravating factors"* making a total of 27 months.
11. The Senior Magistrate then identified mitigating factors that reduced the starting point. Those mitigating factors were his admission of guilt, his suspension for 14 months on half pay, no back pay when he was reinstated, his youth (he was 24 at the time of the incident), and the delay of 2 years by the state in prosecuting the offence. After 33 percent was deducted from starting point for the guilty plea (the Senior Magistrate's math makes this equivalent to 9 months, which means she took 27 months as the starting point), the Senior Magistrate took a further 3 months reduction for *"other mitigating factors"* and another 2 months reduction *"for the 2 years delay by the State."* This brought the end point to 13 months imprisonment.
12. The Senior Magistrate suspended the sentence for 2 years because the appellant had had his *"fair share of punishment by being suspended and having your salary slashed by half."* She admonished the appellant to change his behaviour and to use this case to mould himself into a responsible adult so that he could better carry out his job as an enforcement officer now that he was three years older than he was at the time of the offending.

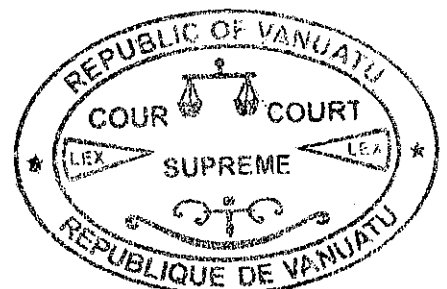


Submissions

13. The appellant submitted that the aggravating factors that added 3 months to the starting point should have been included in the starting point. Mrs Karu submitted that "*deliberately lying*" was an element of the offence and should not have been considered as an aggravating factor by the Senior Magistrate. She also submitted that the starting point of 24 months was too high. She referred me to *Public Prosecutor v Winslett* [2002] VUSC 47 in which a starting point of 6 months imprisonment was adopted for failing to declare previous overseas convictions in a statutory declaration. Mrs Karu submitted that the Senior Magistrate should have given the mitigating factors of no previous convictions, the loss of VT 175,000 during his suspension on half pay, and his youth more weight. She submitted the appellant should merely have been warned.
14. The respondent conceded the appeals against the fine and the award of costs. Mrs Taiki agreed that the aggravating features of the offending should have formed part of the starting point rather than an uplift. She submitted that because the appellant "*deliberately lied*" to protect his friend, it was properly considered to be an aggravating factor. She submitted a starting point of 24 months was appropriate.

Discussion

15. For this appeal to succeed, there must be some error of principle made in the sentencing exercise. It is not enough for the appellate judge to consider he or she may have reached a somewhat different starting or end point. The appellant must demonstrate that the sentencing judge erred in legal principle, mistook the facts, took into account something she should not have, or failed to take into account something she should have. For the appeal to succeed, the sentence must be so out of range that it is either manifestly inadequate or manifestly excessive.
16. Although the Senior Magistrate should have reached the starting point by including the matters she took into account in the uplift, I do not think that made the end sentence manifestly excessive. It was within range, albeit at the high end. The Senior Magistrate gave appropriate weight to the most significant aggravating factor, that the appellant, a police officer, lied to the police to protect his friend. I agree with Ms Taiki that this could have resulted in a police officer concealing the perpetrator of an assault causing death from a police investigation into the circumstances of that death. Fortunately the appellant admitted he lied in time. To my mind, this makes the appellant's case worse than *Winslett*. The people of Vanuatu are entitled to trust sworn police officers to act with integrity and not to lie to protect a friend.
17. I also think the Senior Magistrate gave appropriate weight to mitigating personal factors. The appellant's age of 24 years at the time of the offending warrants a fairly minimal discount for youth.



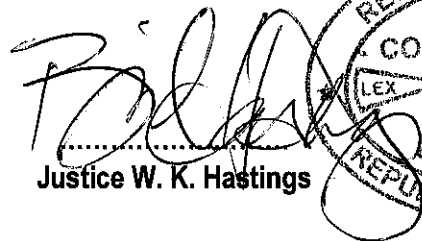
18. I accept that the appellant suffered during the disciplinary process, but that is to be expected. Criminal proceedings are a different matter, and the Senior Magistrate appropriately took into account the disciplinary process when she decided to suspend the sentence of imprisonment under s 57 of the Penal Code [Cap 135].
19. For these reasons, I can see no error in the Senior Magistrate's approach that has resulted in sentence that is manifestly excessive in the circumstances.

Result

20. The appeal with respect to that part of the sentence awarding costs to the prosecution and the fine is allowed. The orders that the defendant pay prosecution costs and a fine are quashed.
21. The appeal with respect to the rest of the sentence is dismissed.

DATED at Port Vila this 20th day of March, 2024

BY THE COURT


Justice W. K. Hastings

