

**IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU**
(Criminal Jurisdiction)

Criminal
Case No. 24/1659 SC/CRML

PUBLIC PROSECUTOR

v

GIDEON TOMOYAN

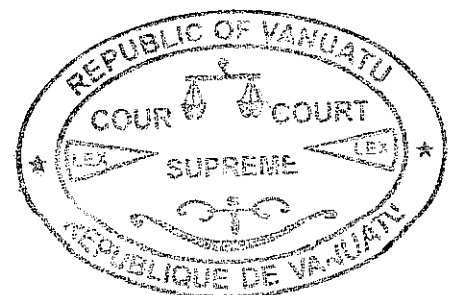
Date of Plea: 17 June 2024
Date of Sentence: 23 September 2024
Before: Justice M A MacKenzie
Counsel: Mr L Young for the Public Prosecutor
Mr JS Garae for the Defendant (Holding papers for Ms B Taleo)- via video link

SENTENCE

Introduction

1. Mr Gideon Tomoyan, you appear for sentence having pleaded guilty to the following two charges:
 - a. Threatening language contrary to s 114(1)(a) and (2) of the Penal Code [CAP135]
 - b. Criminal trespass contrary to s 144(a) of the Penal Code [CAP135]

2. The maximum penalties for these offences are:
 - a. Threatening language– 3 years imprisonment.
 - b. Criminal trespass -1 years imprisonment.



The Facts

3. On the night of 16 November 2023 at Ambrym, you entered the victim's property. He is related to you as apu or grandpa. You were armed with a knife. You used threatening and abusive language. You said words to this effect "*smelly penis, you are not from Fanla, you want me to burn down your house*". Two other people were there and were very scared. While there, you used the knife to cut down 3 fence posts.
4. Under caution, you admitted to police that you entered the victim's yard and used threatening and abusive words towards him. The next day you apologised and gave the victim VT 1000.

Sentencing purposes/principles

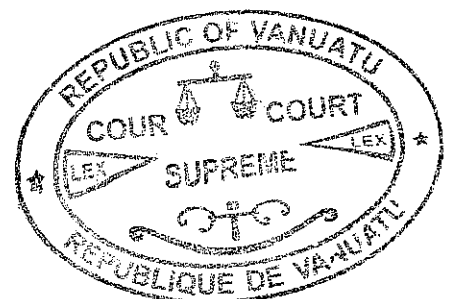
5. The sentence I impose must hold you accountable and must denounce and deter your conduct. The sentence should ensure you take responsibility for your actions, and help you to rehabilitate. It must also be generally consistent.

Approach to sentence

6. Sentencing involves 2 separate steps; *Jimmy Philip v Public Prosecutor* [2020] VUCA 40, which applied *Moses v R* [2020] NZCA 296.

Starting point

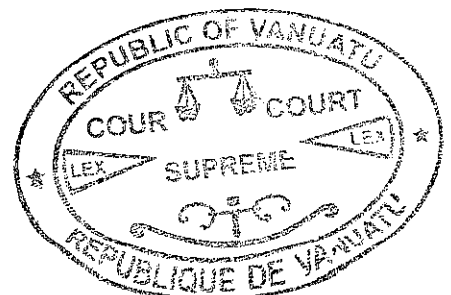
7. The first step is to set a starting point to reflect the aggravating and mitigating features of the offending, and with reference to the maximum penalties for the offences.
8. While the lead charge is threatening language, I will set a starting point on a global basis to reflect the totality of the offending. That is because here the offences are interconnected and form part of the overall transaction; *Kalfau v Public Prosecutor* [1990] VUCA 9.
9. The aggravating factors of the offending overall are;
 - a. The incident took place at night.
 - b. You were armed with a knife, a lethal weapon.
 - c. You caused damage to property.
 - d. Breach of trust- you are related to the victim.
 - e. Harm to those present- the victim's mother and the other person present were scared because of your behaviour.



10. There are no mitigating features of the offending itself. To be clear, the fact you were intoxicated is not a mitigating factor. It does not and cannot mitigate your actions.
11. Counsel have referred to cases to assist the Court with setting an appropriate starting point. The prosecutor submits there should be a starting point of 2 years imprisonment for the lead offence of threatening language, with a concurrent starting point of 6 months imprisonment for the criminal trespass. Ms Taleo submits that the appropriate starting point for the charge of threatening language is 12 months imprisonment and a concurrent starting point of 6 months imprisonment for the criminal trespass.
12. I do not intend to discuss the cases cited by counsel in detail. While consistency in sentencing is important, none of the cases are squarely on point. As the Court of Appeal said in *Kalfau*, sentencing is not an exact science, and the circumstances will vary from case to case. Both counsel cited *Public Prosecutor v Terong* [2023] VUSC 101. In that case, the victim was lured to a house where he was assaulted and threatened. The starting point for the threatening language charge was 2 years imprisonment.
13. Having regard to the aggravating factors I have referred to, and *Public Prosecutor v Terong*, I consider that there should be a global starting point of 2 years 3 months imprisonment. A key factor here is that you were in possession of a knife.

Guilty plea and personal factors

14. You pleaded guilty at an early opportunity. You are entitled to a one-third discount for your guilty plea. I have taken Mr Young's submission into account, but the plea has saved the victim and other witnesses the trauma of having to give evidence and re live what happened. That equates to a discount of 9 months from the starting point.
15. You are now aged 27 years. You are a first offender and are remorseful. You had been drinking and were unaware of your actions until the next day. You apologised the next day for your wrongdoing and there was a reconciliation. You gave the victim, his mother and your brother VT 1000 after shaking hands with them. You had heard a rumour that your apu had gone to a custom man and asked for black magic to send your wife away.
16. Given that you are a first offender, are remorseful and took part in a reconciliation, I reduce the sentence by 3 months to reflect those factors. That is about 10 percent.
17. You were remanded in custody from between 22 December 2023 - 8 February 2024, a period of 6 weeks and 4 days. That is an effective sentence of 3 months 1 week imprisonment. The sentence is further reduced by 3 months 1 week.



End Sentence

18. The end sentence is 11 months 3 weeks imprisonment for the charge of threatening language. There is to be a concurrent sentence of 6 months imprisonment on the criminal trespass charge.
19. Your counsel asks that the sentence be suspended pursuant to s 57 of the Penal Code. Under s57 of the Penal Code, there is a discretion to suspend the sentence. I must take into account the circumstances, the nature of the offending and your character.
20. This was poor behaviour on your part, which involved a breach of trust, you were in possession of a knife, and led others present to be scared. However, I acknowledge that you are a first offender, that you took part in a reconciliation, and are apologetic for your wrongdoing. You took immediate steps to put things right.
21. After weighing and balancing all the relevant factors, it is appropriate to suspend the sentence for 2 years. Suspending the sentence will meet the need for accountability, deterrence and denunciation. If you offend again in the next 2 years, you will need to serve the sentence of imprisonment in addition to any other penalty that may be imposed for the further offending.
22. You have 14 days to appeal against the sentence.

**DATED at Port Vila this 23rd day of September 2024
BY THE COURT**

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Justice M A MacKenzie

