

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

**Criminal
Case No. 23/167 SC/CRML**

BETWEEN: PUBLIC PROSECUTOR

AND: MICHEL BENKOR
Defendant

Date of Trial: 13 & 14 June 2024

Date of Verdict: 12 July 2024

Date of Sentence: 16 December 2024

Before: Justice W. K. Hastings - via zoom link from the District Court in Wellington, New Zealand

Counsel: Ms. L. Lunabek for the Public Prosecutor – via zoom link from the Supreme Court in Port Vila

*Ms Taleo holding papers for Mr. J. Garae, for the Defendant – via zoom link from the Santo
Courthouse*

Defendant- via zoom link from the Area Administrator's Office in Pangl, South Pentecost

SENTENCE

1. Michel Benkor, I have found you guilty of intentional assault causing death contrary to s 107(d) of the Penal Code [Cap 135]. The maximum penalty for that offence is 14 years imprisonment.
2. At trial, the prosecution established that the deceased man, Rob Malwajaru, and six other men from Lonbwe village went down from Lonbwe to check on their water taro garden situated near Baie Barrier village. They were carrying bows and arrows. You, and about 15 men from Baie Barrier gathered on the beach holding knives, spears and stones. You and the men from Baie Barrier began to walk towards the men from Lonbwe at the other end of the beach, with increasing speed. You took a stone from the nearby river and ran

with the 15 other men from Baie Barrier towards the deceased and the other men from Lonbwe. All the men from Lonbwe retreated into the bush except the deceased who could not run as fast. Three eye-witnesses said they saw you throw the stone which hit the deceased's head and caused him to fall to the ground. I found these eye-witnesses to be credible witnesses. Your group then gathered around the deceased and said words to the effect that "we've got one". You and the men from Baie Barrier did nothing to assist the deceased. You just left him on the beach.

3. I also found that from the actions of your group, you and the others had formed a common intention to assault the men from Lonbwe and carried weapons to execute that purpose.
4. The post-mortem findings, the death certificate, and the photographs of the injuries establish that the stone that hit the deceased's head caused the damage that resulted in his death.
5. As a result, I was satisfied that the prosecution had proved beyond reasonable doubt that you assaulted the deceased, that you intended to assault the deceased, that the deceased's head was damaged by the assault, and that the damage caused by the assault resulted in the deceased's death. I found you guilty as charged.
6. I turn now to your sentence.
7. The sentence I impose must denounce your conduct, it must deter you and others from the same or similar offending, and it must hold you accountable for what you have done.
8. I identify the following aggravating factors related to this offending:
 - a. You used a weapon - a stone - to assault the deceased.
 - b. The deceased died as a result of the blow to his head.
 - c. You were one of a group of men.
 - d. There was premeditation. You and your group were armed, and you advanced as a group towards the men from Lonbwe.
 - e. There was no immediate threat from the deceased who was alone and outnumbered, nor was there an immediate threat from the rest of the Lonbwe group, who by this time had run into the bush. The deceased was vulnerable.

- f. You did not check on, or assist, the deceased who was lying in the sand. You instead gathered around the deceased, chanted, and said words to the effect “we’ve got one”. You then just left him on the beach.
9. There are no mitigating factors related to the offending. I understand the offending took place in the context of a long-simmering dispute between the villages of Lonbwe and Baie Barrier over food generally and this water taro garden specifically, but that does not excuse an assault on a man causing his death.
10. In *Public Prosecutor v Ierogen* [2002] VUCA 34, the Court of Appeal confirmed guidelines for the sentencing of offending under s 107(d) established by the Chief Justice in *Public Prosecutor v Malesu* [2001] VUSC 37:

The sentence to be imposed by the Court, under Section 107 (d) of the Penal Code Act, in disputed cases, depends on the particular circumstances and situations of each cases.

In situation where the defendant had a weapon (such as a gun, a knife or other dangerous objects) and use it to cause bodily harm to the body of another person and as a result of which the victim died, the sentence to be imposed in a disputed case ranges from 8 to 10 years. [I refer to this as band one].

In situations where the defendant uses his fist and legs to cause serious injuries to the body of another person and causes the victim’s death as the result of the injury, the sentence to be imposed is around four (4) to seven (7) years. [I refer to this as band two].

11. When the Chief Justice established the sentencing bands above, the maximum penalty for this offence was 10 years’ imprisonment. The maximum penalty increased to 14 years’ imprisonment on 24 February 2017. I have accordingly included in the cases discussed below the percentage of the maximum penalty at the time of the offending for each starting point so that the Chief Justice’s guidelines and comparisons with precedent cases are applied more accurately. The Chief Justice’s guidelines for band one cases where weapons are involved would attract a starting point of 80 to 100 percent of the maximum penalty. Band two cases where no weapons are involved, and where the defendant uses his fists and legs, would attract a starting point of 40 to 70 percent of the maximum penalty.

12. The prosecution has referred me to a number of judgments that are useful in establishing a starting point in this case.
13. A starting point of 10 years' imprisonment (71 percent of the maximum penalty) was adopted in *PP v Willie* [2021] VUSC 164, for an intentional assault causing death where the defendant reportedly punched and kicked his partner in the head and stomach.
14. A starting point of 7 years' imprisonment (70 percent of the maximum penalty) was adopted in *PP v Naliu* [2014] VUSC 151, on a charge of intentional assault causing death in which the defendant hit the deceased's face with a stone.
15. A starting point of 8 years' imprisonment (57 percent of the maximum penalty) was adopted in *PP v Vira* [2023] VUSC 147, on a charge of intentional assault causing death where the defendant stabbed the deceased with a small knife.
16. A starting point of 6 years' imprisonment (43 percent of the maximum penalty) was adopted in *PP v Lata* [2021] VUSC4 5, on a charge of intentional assault causing death where the defendant punched the deceased once on his face, causing him to fall backwards, hitting his head on the floor.
17. Mr Garae has referred me to *Lava v PP* [2020] VUCA 28, in which the Court of Appeal did not disturb a starting point of 4 years' imprisonment (29 percent of the maximum penalty) on a charge of aiding and abetting an intentional assault causing death in which the defendant played no direct role in the assault which consisted of 2 others punching the deceased in the ribs and neck.
18. In *PP v Rexley* [2021] VUSC 99, a starting point of 4 years 6 months' imprisonment (32 percent of the maximum penalty) was adopted on a charge of intentional assault causing death in which the defendant slapped the victim's face causing her to fall to the ground after which he kicked her ribs.
19. In *PP v Warawara* [2012] VUSC 29, a starting point of 4 years' imprisonment (40 percent of the maximum penalty at the time) was adopted on a charge of intentional assault causing death, where the defendant punched the deceased's face causing him to fall and hit his head on concrete.
20. In practice, none of the cases referred to me by the prosecution or the defence in which weapons were used have attracted starting points within the Chief Justice's band one guideline, even though *Naliu* (70 percent of the maximum penalty) and *Vira* (57 percent of the maximum penalty) appear to fall within band one because they involved weapons. On the other hand, those cases that appear to fall within band two because they do not

involve weapons have starting points from 29 to 71 percent of the maximum penalty in force at the time of the offending. One may conclude that the Chief Justice's guidelines are just that, guidelines that are a useful guide when a sentencing judge considers a starting point on the facts of each case.

21. On the basis of the aggravating factors I have identified, your offending is more serious than *Lava*, *Rexley* and *Warawara*, but less serious in the sense that your offending did not involve a stabbing with a sharp knife. Your case did however involve using a stone as a weapon. I consider your case is therefore similar to *Naliu*, but with the additional aggravating factor of the number of men involved in the assault on the deceased.
22. Taking all matters into account, a starting point of 8 years and 6 months imprisonment is appropriate. At 61 percent of the maximum penalty, this is lenient and well below the Chief Justice's guideline for offending with a weapon (80 to 100 percent of the maximum penalty), but in between *Naliu* (70 percent of the maximum penalty for offending involving a stone) and *Vira* (57 percent of the maximum penalty for offending involving a knife).
23. I turn now to personal mitigating factors. I will identify the percentage discount from the starting point that is appropriate for each factor:
 - a. You are a first-time offender. This warrants a discount of 10 percent from the starting point.
 - b. You were relatively young at the time of the offending. You were 24. A discount of 5 percent from the starting point is appropriate.
 - c. You have expressed remorse. This is recorded in the pre-sentence report. A further discount of 5 percent from the starting point is appropriate.
 - d. You were willing to engage in a custom reconciliation ceremony, but I am told the deceased's community would not accept it. Your willingness to engage in a custom reconciliation ceremony warrants a further discount of 5 percent.
 - e. The pre-sentence report sets out some relevant personal factors. You are a farmer. You plant kava and taro to sustain your family. You have a wife and are about to have a baby. You care for your disabled sister and help your mother. You are also experiencing stomach pains, but you are yet to see a doctor. Your contribution to your family and your community, without any offending in the 2 years since the incident, deserves a discount of 10 percent.
 - f. There will be no discount for a guilty plea because we went to trial.

24. These discounts total 35 per cent from the starting point. That is the equivalent of a discount of 36 months, which brings me to 66 months, or 5 years and six months imprisonment.
25. You were remanded in custody for 350 days, which is equivalent to 2 years' imprisonment, which brings me to an end point of 3 years and 6 months imprisonment.
26. I turn now to consider whether your sentence should be suspended.
27. Section 57(1)(a) of the Penal Code states:

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,*

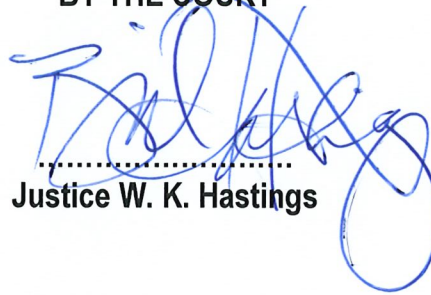
it is not appropriate to make him or her suffer an immediate imprisonment, it may in its discretion order the suspension of the execution of imprisonment sentence it has imposed upon him or her, on condition that the person sentenced commits no further offence against any Act, Regulation, Rule or Order within a period fixed by the Court which must not exceed 3 years;

28. The nature of this crime is serious. A man has lost his life. He lost his life in what was essentially a battle that took place in the midst of a long-standing dispute between two villages over rights to land and food resources. This is a dispute that your chiefs and the government need to do more to resolve. I identified a number of positive circumstances when I considered your personal mitigating factors. They are significant.
29. Mercy is often overlooked in sentencing. In the appropriate circumstances, it can have a significant effect on a sentencing judge's exercise of discretion. Having considered the particular nature of your offending, the circumstances in which your offending took place, and your character, I will exercise my discretion to suspend your sentence for three years.
30. For the reasons I have set out, and to achieve the purposes of denunciation, deterrence and accountability, I sentence you to 3 years and 6 months imprisonment, suspended for 3 years.

31. You have 14 days to appeal this sentence.

DATED at Port Vila this 16th day of December, 2024

BY THE COURT



Justice W. K. Hastings