

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

Criminal
Case No. 25/1305 SC/CRML

PUBLIC PROSECUTOR

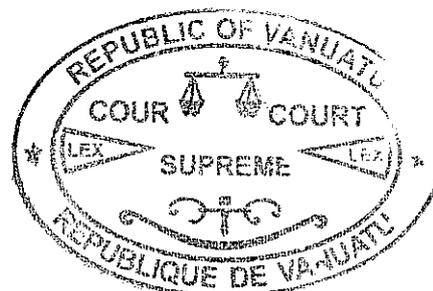
V

IAUNE UPAKAI, CASTELLO KAHUA, IATA IAUNAM, MOSES NAKAT

Date of Plea: 17 November 2025
Date of Sentence: 21 November 2025
Before: Justice M A MacKenzie
Counsel: Public Prosecutor – Ms M Kalwatong
Defendants – Mr R Melsul

SENTENCE

1. Four defendants pleaded guilty to charges arising out of an incident which took place at Lokotai village, Tanna on 18 February 2025.
2. *Defendant One* - Mr Upakai pleaded guilty to one charge of unlawful assembly contrary to ss 68(1) and 69 of the Penal Code [CAP 135], and one charge of intentional assault causing no physical injury contrary to section 107 (a) of the Penal Code [CAP 135].
3. *Defendant Two* - Mr Iaunam pleaded guilty to one charge of unlawful assembly contrary to ss 68(1) and 69 of the Penal Code [CAP 135], and one charge of intentional assault causing no physical injury contrary to section 107 (a) of the Penal Code [CAP 135].
4. *Defendant Three* - Mr Nakat pleaded guilty to one charge of unlawful assembly contrary to ss 68(1) and 69 of the Penal Code [CAP 135], and one charge of intentional assault causing no physical injury contrary to section 107 (a) of the Penal Code [CAP 135].



5. *Defendant Four* – Mr Kahua pleaded guilty to one charge of unlawful assembly contrary to ss 68(1) and 69 of the Penal Code [CAP 135].
6. The maximum penalties for the offences are:
 - a. Intentional assault causing no physical injury -1 years imprisonment.
 - b. Unlawful assembly - 3 years imprisonment.

The Facts

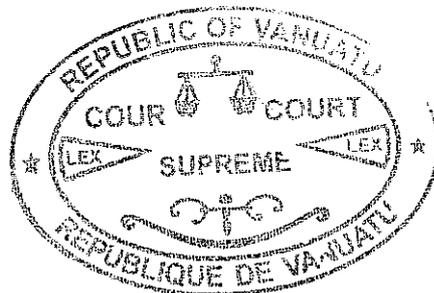
7. On 18 February 2025, there was to be a meeting at a Nakamal at Lokotai, Tanna to discuss an allegation that the victim was having an extra marital affair with a female. A few days earlier the victim had visited the Chief and made a custom apology for his behaviour. The summary of facts is silent as to what, if any, relationship there is between either the female or the victim and the defendants.
8. The four defendants were present at the Nakamal. After the victim arrived at the Nakamal and sat down, he was approached by all four defendants and assaulted. Mr Upakai hit the victim on his rib and forehead. Mr launam hit the victim to his backside. Mr Nakat and Mr Kahua and others gathered around the victim and continued to assault him to his body until he fell to the ground.
9. Under caution, all four defendants elected to speak in Court.

Sentencing purposes/principles

10. The sentence I impose must hold the defendants accountable and must denounce and deter their conduct. The sentence should ensure they take responsibility for their actions and help them to rehabilitate. It must also be generally consistent.

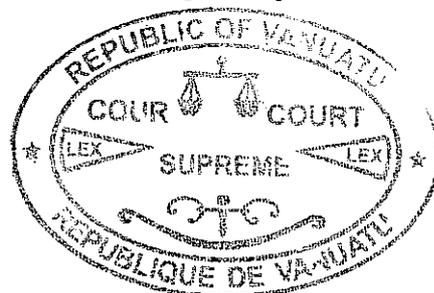
Approach to sentence

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

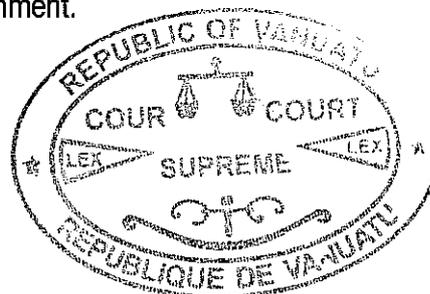


Starting point

12. The first step is to set a starting point, taking into account the aggravating and mitigating factors of the offending and with reference to the maximum penalties for the offences.
13. The offending arose out of one incident. In such circumstances, a global starting point is appropriate to reflect the culpability of each defendant: *Kalfau v Public Prosecutor* [1990] VUCA 9.
14. The aggravating factors are:
 - (i) *Defendant One* – Mr Upakai
 - a. There was an attack to the head, the most vulnerable part of the human body.
 - b. This was unprovoked, gratuitous violence. It was vigilante behaviour which has no place in a civilised society. If punishment was needed it should have been left to the Nakamal meeting. The defendants should not have taken the law into their own hands.
 - c. The victim was vulnerable as this was a group attack. He was outnumbered and defenceless.
 - d. There was planning, as this was a co-ordinated assault on the victim.
 - e. The harm caused to the victim. This must have been a frightening incident.
 - (ii) *Defendants Two, Three and Four* – Mr launam, Mr Nakat and Mr Kahua
 - a. This was unprovoked, gratuitous violence. It was vigilante behaviour which has no place in a civilised society. If punishment was needed it should have been left to the Nakamal meeting. The defendants should not have taken the law into their own hands.
 - b. The victim was vulnerable as this was a group attack. He was outnumbered and defenceless.
 - c. There was planning, as this was a co-ordinated assault on the victim.
 - d. The harm caused to the victim. This must have been a frightening incident.



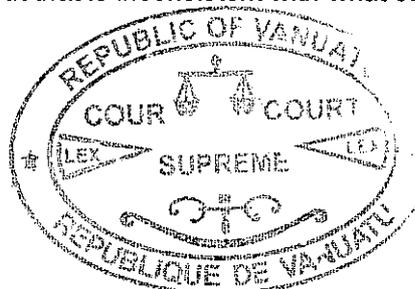
15. There are no mitigating features of the offending itself. In his helpful written submissions, Mr Melsul submits that the offending is mitigated by the fact that the defendants say they became involved because they were instructed to assault the victim by their Chief. Mr Melsul discusses customary practices, and contends the defendants acted under strong customary pressure.
16. I do not consider that pressure from their Chief is a mitigating factor of the offending. I make three points.
17. Firstly, there is no evidential basis for such a submission. The defendants are to be sentenced on the basis of the agreed summary of facts, which does not address whether the defendants were pressurized by their Chief.
18. Second, none of the defendants made such a claim when they were interviewed for the presentence report. What some of them said is that they acted as they did because of the victim's disrespectful behaviour by committing adultery with a family member. There is no mention in the presentence reports of pressure from the Chief.
19. Thirdly, in *Public Prosecutor v Alick* [2011] VUSC 54, a similar submission was made to the Court. Spear J said that if the defendants had been instructed by a Chief to assault the victim, Chiefs should know better. I endorse that observation. A customary or cultural practice that is illegal can never be condoned. If a Chief instructs others to carry out a criminal act, he is aiding and abetting such an act and should be charged. Such an instruction or pressure on others to commit a criminal act cannot be legitimised by the cloak of a customary practice.
20. Counsel have cited various cases to assist the Court with setting a starting point. I consider that two cases, *Public Prosecutor v Hosea* [2021] VUSC 145 and *Public Prosecutor v Jehu* [2020] VUSC 226 are the most useful comparator cases. These two cases involve multiple defendants sentenced for unlawful assembly and intentional assault. Both counsel rightly recognise that the offending in both cases is more serious than the present case.
21. In *Hosea*, 8 defendants pleaded guilty to charges of unlawful assembly, intentional assault causing temporary injury, and criminal trespass. The defendants gathered at a plantation on Gaua Island having planned to assault the victim. They went to the victim's house and assaulted him. He sustained serious injuries. The starting point adopted by the Court were concurrent sentences for each defendant as follows:
 - a. Unlawful assembly – 18 months imprisonment.
 - b. Intentional assault – 2 ½ years' imprisonment.
 - c. Criminal trespass – 7 months imprisonment.



22. In *Jehu*, 6 defendants pleaded guilty to various charges, ranging from unlawful assembly, intentional assault causing no physical damage and malicious damage to property. In 2010, a large group of individuals, including the defendants, gathered at a village. They were concerned the two victims were using black magic, so decided to attack them. One of the defendants had a slingshot, which was used to project stones at one of the victims, who was hit several times. Other defendants joined in the attack by throwing stones at that victim and a house. The victim was taken to a neighbour's place and the defendants then started throwing stones at the victim and the neighbour's house, causing damage to the house. The victim needed medical attention as he had sustained relatively serious injuries. Global starting points were adopted for each defendant based on their individual culpability, ranging from 3 years imprisonment for the more serious offending to 2 years 4 months imprisonment for the least culpable.
23. The offending here is markedly less serious than the offending in both *Hosea* and *Jehu*. While the defendants gathered to assault the victim, the assaults carried out are less serious than either *Hosea* and *Jehu*, the victim was not injured, and no weapons were used. As such, the starting point for each defendant must be less than the starting points adopted in *Hosea* and *Jehu*.
24. I need to take into account the differing levels of culpability for each defendant, together with the aggravating factors and the approach taken in *Hosea* and *Jehu*.
25. *Defendant One* – Mr Upakai. He is the most culpable given the nature of the assault on the victim, as he hit him to the rib and head. I adopt a global starting point of 2 years 2 months imprisonment.
26. *Defendant Two* – Mr launam. He is not as culpable as Mr Upakai as the extent of his assault on the victim was to hit him on the backside. I adopt a global starting point of 22 months imprisonment.
27. *Defendants Three and Four* – Mr Nakat and Mr Kahua. They are the least culpable. They joined in the assault but there is little detail as to any specific assault on the victim. I adopt a global starting point of 20 months imprisonment for these defendants.

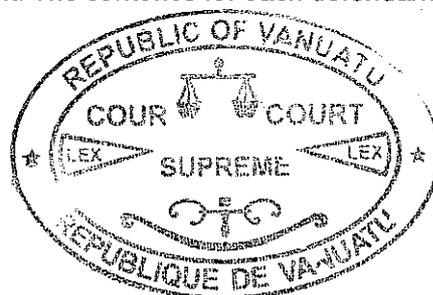
Step Two - guilty plea and personal factors.

28. The four defendants pleaded guilty at the first available opportunity. The sentence for each defendant is reduced by one third for that factor.
29. In terms of personal mitigation, each defendant is a first offender and is well regarded in their community. They are remorseful, which I accept is genuine. Mr Melsul submits there has been a custom reconciliation process, but that is inconsistent with what each



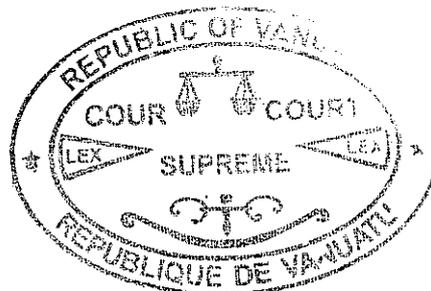
defendant told the presentence report writer which is that there had not been a custom reconciliation, but they are willing to do so.

30. I will address briefly each defendant's personal circumstances:
- a. Mr Upakai - He is 43 years and has a wife and 2 children. He is a subsistence farmer and does some small building construction work in his community. He is well regarded in his community. He is a first offender and is remorseful. He is willing to take part in a custom reconciliation.
 - b. Mr launam - He is 33 years and has a wife and 2 children. He grows vegetables in his garden to sell at the market. He is well regarded in his community. He is a first offender and is remorseful. He is willing to take part in a custom reconciliation.
 - c. Mr Nakat - He is 36 years and has a partner and one child. He is a subsistence farmer and does some small construction work. He is well regarded in his community. He is a first offender and is remorseful. He is willing to take part in a custom reconciliation.
 - d. Mr Kahua - He is 21 years and has a wife and 2 children. He is a schoolteacher. He is well regarded in his community. He is a first offender and is remorseful. He is willing to take part in a custom reconciliation.
31. The sentence for each defendant is reduced by 10 percent for remorse, willingness to take part in a custom reconciliation, and that they are first offenders of good character.
32. Mr Melsul submits that the sentence for each defendant should be reduced for delay of 9 months between interview and plea, co-operation with justice and custom reconciliation. The sentences will not be reduced for any of these factors. While there has been a delay it is not to the extent that it is unfair or prejudicial, and for all but one week, the defendants have been on bail. All four defendants elected to only speak in Court which is their absolute right, but that is inconsistent with co-operation with police. The fact they complied with bail conditions is something the defendants were required to do and is not a sign of co-operation warranting a sentence reduction. Finally, given the conflicting information regarding custom reconciliation, the sentence cannot be reduced for that factor, but their willingness to do so is a mitigating factor.
33. Each of the four defendants was remanded in custody for 7 days, from 20 – 27 February 2025, an effective sentence of 2 weeks imprisonment. The sentence for each defendant is reduced by 2 weeks for that factor.



End sentences

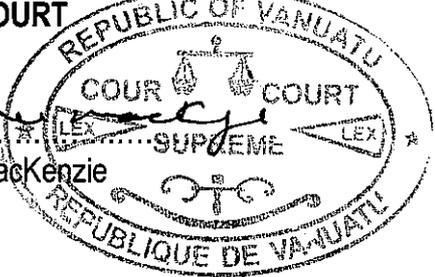
34. *Mr Ukapai* - The end sentence is 14 months 2 weeks imprisonment for the lead offence of unlawful assembly. There is to be a concurrent sentence of 6 months imprisonment for the assault charge.
35. *Mr launam* - The end sentence is 12 months 2 weeks imprisonment for the lead offence of unlawful assembly. There is to be a concurrent sentence of 4 months imprisonment for the assault charge.
36. *Mr Nakat and Mr Kahua* - The end sentence is 11 months imprisonment for the lead offence of unlawful assembly. There is to be a concurrent sentence of 2 months imprisonment for the assault charge (Mr Nakat only)
37. I am asked to suspend the sentences of each defendant. The prosecutor does not appear to oppose this but submits that community work and supervision should be imposed if the sentence is suspended. Under s 57 of the Penal Code, I must have regard to the circumstances, the nature of the offending and your character.
38. This was a serious incident of vigilante behaviour, and the victim was defenceless and vulnerable, as it was a group attack. Those factors point away from suspension. I also take into account that each defendant is a first offender, is remorseful and willing to perform a custom ceremony, which all favour suspension. I take into account also that each defendant has served the equivalent of a two week sentence. Suspending the sentence, in combination with community work and supervision will meet the need for accountability, deterrence, denunciation and rehabilitation.
39. The sentence for each defendant is to be suspended for 12 months. Each defendant is warned that if they are convicted of any offence in the next 12 months, they will be taken into custody and serve their sentence of imprisonment as well as the penalty for the further offending.
40. In addition, each defendant is sentenced to 12 months supervision to assist with rehabilitation. Each defendant is to be sentenced to community work as follows:
 - a. Mr Ukapai - 80 hours community work
 - b. Mr launam – 60 hours community work
 - c. Mr Nakat and Mr Kahua – 50 hours community work.
41. Each defendant is ordered to pay compensation in the sum of VT 10,000 to the victim within 28 days.



42. Each defendant has 14 days to appeal.

DATED at Port Vila this 21st day of November 2025.
BY THE COURT

name
.....
Justice M A MacKenzie

The seal of the Republic of Vanuatu Supreme Court is circular. It features a central emblem with a scale of justice and a sword. The text "REPUBLIC OF VANUATU" is written along the top inner edge, and "REPUBLIQUE DE VANUATU" along the bottom inner edge. In the center, the words "COUR" and "COURT" are positioned on either side of the scale, and "SUPREME" is written below it. The word "LEX" appears on two small banners flanking the central text.