CHAPTER 21

SENTENCING

21.1 Sentencing in Vanuatu is governed by several sources: the provisions setting penal liability in the legislation creating each offence; some general provisions of the Penal Code which were introduced in 2006 (mainly dealing with non-custodial options); some provisions of the Judicial Services and Courts Act (dealing mainly with the sentencing powers of Magistrates Courts); and in certain important respects by common law. This chapter outlines the general process of sentencing and the general principles and methodology that shape sentencing in particular cases. These are matters governed mainly by common law. The chapter focuses on sentencing for the more serious offences that commonly lead to sentences of imprisonment.

Sentencing process and options

21.2 After an offender has been convicted, as the result of either a contested trial or a guilty plea, the court must determine a sentence. This involves a separate stage in the proceedings from that of the trial. Additional arguments are made by counsel. The range of matters in issue is broader than for a trial and the rules for the admissibility of evidence are much looser: for example, hearsay is not excluded. However, allegations of fact by the prosecution must be proved 'beyond reasonable doubt' if not agreed: see, for example*, Anderson v R* (1993) CLR 177, [1993] HCA 69; *R v Morrison* [1998] QCA 162.

21.3 Penal liability for each offence is determined either by the provisions creating that offence or, for some offences outside the Penal Code, by general penalty provisions of the particular legislation. Mandatory penalties are avoided. For example, even intentional homicide under the Penal Code s 107 carries discretionary sentences: see **Chapter 5**.

21.4 Sentences are discretionary even though the standard formula in the Code is simply to prescribe a penalty. The prescribed penalty is deemed to be the maximum for the offence, with discretion to impose anything up to that maximum. The Interpretation Act s 36(1) provides:

> Where in an Act of Parliament, a penalty is prescribed for an offence against that Act such penalty shall, unless the contrary intention appears, be the maximum penalty.

In *Public Prosecutor v Manap* [2018] VUCA 7, the Court of Appeal said:

> 26. We are satisfied that in the context of the penal provisions in the Penal Code imprisonment for life in s.106(1)(b) is intended to be a maximum sentence and lesser finite prison sentences may be imposed.
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> 27. There are a number of crimes in Vanuatu for which the penalty is life imprisonment. These crimes have the same formulation as s.106(1)(b). For example, killing an unborn child (s.113) *Penalty: imprisonment for life*; Aiding Suicide (s.116) *Penalty: imprisonment for life*; Sexual Intercourse Without Consent; *Penalty: imprisonment for life*.
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> 28. While a compulsory sentence of life imprisonment for premeditated homicide is not uncommon in the Pacific a compulsory sentence for the crimes in [27] above of life imprisonment would be exceptional. Further all of the imprisonment penalties in the Penal Code are expressed in the same way as the life imprisonment penalty in s.106(1)(b). For example s.106(1)(a) it is expressed as *Penalty*: "*imprisonment for 20 years*". Escaping from custody (s.84) "*Penalty: Imprisonment for 5 years*"; Idle and Disorderly (s.148) "*Penalty: imprisonment for 3 months*".
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> 29. If s.106(1)(b) required the imposition of a life sentence as the only sentence then for consistency given the identical wording all of the other finite sentences for crimes in the Penal Code, the expressed sentence would be the only sentence able to be imposed. We are satisfied Parliament could not have intended that result. For example the wide variety of circumstances possible in the crime of sexual intercourse without consent would not be able to be reflected in a range of sentences if life imprisonment was the only sentence.
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> 30. We are therefore satisfied that the sentence of life imprisonment in the Penal Code is a maximum and a judge may impose a lesser finite term of imprisonment or other appropriate penalty.

21.5 A sentence can be imposed only for an offence of which the person has been convicted. Therefore, where one offence is an aggravated form of another and the prosecutor wishes to argue that the aggravating factor was present, the aggravated offence must be charged. If it is not charged, the aggravating factor cannot be used to increase the severity of the sentence. For example, following a conviction for manslaughter, intent to kill cannot be treated as an aggravating factor in sentencing: murder should have been charged and proved at trial. In *Vakalalabure v The State* [2006] FJSC 8 at [55], the Fiji Supreme Court said:

> [I]t is a fundamental principle of our criminal law, inherited from England, that a person must not be punished except for offences for which he has been tried

> and convicted. It is a necessary corollary of this principle that a convicted person must not be sentenced for uncharged offences or matters of aggravation.

21.6 The purposes for which a sentence may be imposed are generally understood to be: just punishment; protection of the community; general and specific deterrence; rehabilitation of the offender; and denunciation of the conduct. See, for example, Sentencing and Penalties Act (Fiji) s 4; Sentencing Act (NZ) s 7; Penalties and Sentences Act (Qld) s 9. Any sentence must be justifiable by reference to these recognised purposes. They are reflected in a statement in *Public Prosecutor v Andy* [2011] VUCA 14 at [10]:

> These sections [in the Penal Code] refer to a number of particular matters but make no comprehensive statement as to the principles to be applied in fixing the correct sentence. Undoubtedly, these principles include the need to denounce the criminal conduct, the need to deter offenders and those in the community who might be tempted to offend, and the need to protect the community from those offenders. The harm and loss suffered by victims must also be recognized.

In addition, the Penal Code s 38(1) invites a court to promote reconciliation between offender and victim:

> Notwithstanding the provisions in this Act or any other Act, a court may in criminal proceedings, promote reconciliation and encourage and facilitate the settlement according to custom or otherwise, for an offence, on terms of payment of compensation or other terms approved by the court.

21.7 A sentencing court is instructed to always consider the possibility of non-custodial options. Section 37 provides:

> If an offender is convicted of an offence punishable by imprisonment, the court must in addition to other sentencing options it may impose, have regard to the possibility of keeping offenders in the community so far as that is practicable and consistent with the safety of the community.

It is sometimes said that a court must choose the least severe option which will meet the recognised purposes of sentencing and that imprisonment is an option of last resort. Making imprisonment an option of last resort simply means that other options must be considered and rejected before a sentence of imprisonment is imposed. It does not mean that an offender must have a prior record involving other sanctions

and that a first offender cannot be sentenced to imprisonment. In *Public Prosecutor v Scott* [2002] VUCA 29, the Court of Appeal said:

> We note that the sentencing Judge indicated that for all first offenders an immediate term of imprisonment was automatically ruled out. That is not the law. If people with no previous convictions get a first conviction for a serious matter then they must expect to go to prison and there can be no possible practice which says that everybody is dealt with on a first charge with not more than a suspended sentence.

21.8 As revised in 2006, the sentencing options that may be available to a court include, in addition to a term of imprisonment to be served in custody: a compensation order (Code ss 40-49); discharge without conviction or punishment (s 55); suspension of sentencing (s 56); a term of imprisonment that is wholly or partly suspended (ss 57-58); a fine (ss 58C-58D); a supervision (probation) order (58F-58M); community work (ss 58N-68Z); an order for confiscation of property or for restitution to the victim (ss 58ZC-58ZD). Non-custodial sentences may be used even where an offence makes an offender liable to a term of imprisonment: s 58B. Sentences of supervision and community work may be combined and must then be served concurrently; s 52(2). However, a community based sentence, other than an order for restitution of property, must not be added to a term of imprisonment: s 52(3).

21.9 Eligibility for release on parole is not a matter that court can take into account in sentencing an offender. Nevertheless, the severity of a sentence of imprisonment is a function of not only the sentence actually imposed but also the minimum period that must be served before the offender is eligible for parole. Most offenders can be released on parole after serving half their sentence (8 years for offenders sentenced to life imprisonment): Correctional Services Act 2006 s 51. Release is automatic for offenders serving sentences of 12 months or less. For longer sentences, the expiry of the designated term brings eligibility for consideration by the Community Parole Board: s 51(1). Eligibility for parole does not necessarily mean that it will be granted. Release on parole is at the discretion of the Board, which will take account of not only the circumstances of the offence but also factors such as the offender's behaviour in prison. The Board must consider a pre-release report prepared by a probation officer together with any submissions by the offender or their lawyer or by the victim of the offence.

21.10 In calculating the time to be served in imprisonment, time spent in custody prior to trial is treated as a period of imprisonment already served. The Penal Code s 51(4) provides:

> If an offender has been in custody pending trial or appeal, the duration of such custody is to be wholly deducted from the computation of a sentence of imprisonment.

In practice, courts backdate the starting point of a sentence to reflect the time already spent in custody, so that parole eligibility is protected.

21.11 The Penal Code s 52(1) provides that sentences for multiple offences that were jointly tried are to be served concurrently unless the court orders otherwise.

21.12 A sentence of imprisonment may sometimes be suspended. This means that the sentence is served without the offender being held in custody, although it is still a sentence of imprisonment for purposes such as consequential civil disqualifications. Suspension is a discretionary matter, taking account of the circumstances and nature of the crime and the character of the offender: s 57(1)(a). The sentence may be suspended in whole or in part: Penal Code ss 57-58. There is no express limitation on the terms of imprisonment which may be wholly suspended under s 57. However, the option will usually be exercised with respect to terms of no more than a few years. Curiously, the option of a partial suspension is made available under s 58 only for terms of three years or less. This anomaly was the subject of critical comment in *Williams v Public Prosecutor* [2015] VUCA 29 at [19]:

> It appears to us somewhat anomalous that a sentence of more than 3 years imprisonment may be suspended in whole but cannot be suspended in part, whereas, a sentence of less than 3 years imprisonment can be.

21.13 A sentence is suspended for what is often called an 'operational period' of up to three years: s 57(1)(a). If the offender commits another offence punishable by imprisonment during the time of the operational period, the court has several alternatives. A court must order the original sentence of imprisonment to be served 'unless it is of the opinion that it would be unjust to do so'. If it would be unjust to make such an order, the court can impose a lesser term of imprisonment, substitute a non-custodial sentence, cancel the sentence, or decline to make any order: Code s 57(1)(d).

The relevance of custom

21.13 Some provisions make reference to the role of custom in responses to the commission of offences, particularly through payments of compensation:

- A court in criminal proceedings is invited to 'promote reconciliation and

encourage and facilitate the settlement *according to custom* or otherwise': s 38(1) [emphasis added]

- In assessing a penalty, a court 'must… take account of any compensation or reparation made or due by the offender under custom and if such has not yet been determined, may, if satisfied that it will not cause undue delay, postpone sentence for such purpose': s 39.

21.14 The operation of what is now s 39 was examined in *Public Prosecutor v Gideon* [2002] VUCA 7, where the prosecution successfully appealed against a suspended sentence for sexual abuse of a child aged 12. The court stressed that customary settlement should not affect the laying of criminal charges and also that the section concerns the amount but not the nature of a sentence: in particular, customary settlement could not justify imposing a non-custodial sentence in case where a custodial sentence would otherwise be appropriate. The Court of Appeal said:

> It is plain that customary settlement may occur at any one of three stages:
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> (1) before charge;
> (2) after charge and before conviction; and
> (3) after conviction.
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> In the case under appeal we were informed that customary settlement occurred at stage (2) and the trial Judge took this into account in imposing sentence on the respondent.
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> Customary settlement in this case was initiated by a letter from the village Chief to the respondent demanding the payment of a fine of VT30,000, a pig and mats by a specified date, failing which criminal charges would be laid against him. The demands of the letter were duly met but that did not prevent the criminal charge being laid against the respondent who might well entertain some sense of grievance.
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> We were not informed whether the complainant supported the settlement demands or received anything as a result of it. We are concerned however at the suggestion in the letter that performance of customary settlement could somehow influence the laying of criminal charges in this case. We desire to dispel any notion that customary settlement can have such an effect in an offence as serious as occurred in this case where the public interest dictates that criminal charges must be laid.

> It is not the function of this Court to comment on the wisdom, or desirability of requiring a sentencing court to take account of customary settlement in every conviction of a criminal offence, however heinous or trivial it may be. However, that is the law.
>
> We observe that Section 119 [now s 39] has no application at the charging stage and cannot be the basis for reducing an otherwise appropriate charge to a lesser charge. It must not be used as a bargaining chip in determining what is or is not an appropriate charge.
>
> Section 119 [now s 39] is relevant to an assessment of the *quantum of the sentence* and not the nature of the sentence. It can influence the length of a sentence of imprisonment or the amount of a fine, but not its fundamental nature. In other words the Section cannot alter what is otherwise an appropriate immediate custodial sentence into a non-custodial one as occurred in this case.

Sentencing discretion and appeals

21.15 The type and magnitude of a sentence is a matter for the discretion of the judge. Moreover, the sentencing discretion of a judge is wide. In *R v Smith* [2004] QCA 31 at [4], de Jersey CJ observed: 'Fortunately under our system of sentencing strait jackets are not the characteristic: the fully informed sentencing discretion is the hallmark.' In *Boesaleana v Public Prosecutor* [2011] VUCA 33 at [7], the court said that 'the sentencing of a prisoner is not an exact mathematical science but a nuanced art'.

21.16 A judge therefore can, and almost always will, choose a sentence below the statutory maximum for an offence. The maximum sentence is reserved for cases of the worst sort of their type and is rarely imposed. For example, in *Tekaei v Republic* [2016] KICA 11, the Kiribati Court of Appeal said with respect to manslaughter:

> [11] Sentencing for manslaughter is a difficult exercise because there is such a multiplicity of circumstances in which someone may cause the death of another by acting or omitting to do something unlawfully. There are consequently great differences in levels of culpability. Sentences therefore can vary considerably.
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> [12] … It must be borne in mind that the maximum sentence for manslaughter is life imprisonment, although, as in other jurisdictions, that is rarely imposed for this offence.

For an example of maximum sentences for aggravated sexual assault and premeditated intentional homicide, see *Public Prosecutor v Robert* [2019] VUSC 23.

21.17 The discretion available to a sentencing judge does not, however, convey carte blanche for the expression of personal opinions about an appropriate sentence. Sentencing, like the exercise of any statutory discretion, is subject to various constraints. In *R v Melano* [1995] 2 Qd R 186 at 189, the Queensland Court of Appeal said:

> [T]he court's discretion … is subject to inherent limitations; it cannot be exercised for a purpose other than that for which it is given, or by reference to extraneous considerations, and material considerations must be taken into account. And, of course, sentencing principles must be applied…

The principles that guide the exercise of sentencing discretion are derived mainly from the common law. See below, **21.20-21.33**.

21.18 Both the offender and the prosecution can appeal against a sentence: see **20.9**, **20.16**. No statutory criteria for allowing an appeal are specified. However, appellate courts have insisted that they should ordinarily interfere with the exercise of the trial judge's discretion only where the sentence is based on an error of principle or reasoning. In *Lowndes v R* (1999) 195 CLR 665; 163 ALR 483, the High Court of Australia said in a joint judgment, at 672:

> [A] court of criminal appeal may not substitute its own opinion for that of the sentencing judge merely because the appellate court would have exercised its discretion in a manner different from the manner in which the sentencing judge exercised his or her discretion. This is basic. The discretion which the law commits to sentencing judges is of vital importance in the administration of our system of criminal justice.

21.19 Some error of principle or reasoning might be disclosed in the sentencing judge's stated reasons. Alternatively, error might be inferred from the sentence itself. In order to be reviewable on the latter ground, the sentence must be 'manifestly inadequate' or 'manifestly excessive'. In *Public Prosecutor v Gideon* [2002] VUCA 7, the Vanuatu Court of Appeal expressly adopted following statement of principles from the High Court of Australia in *Skinner v. The King* [2013] HCA 32, (1913) 16 CLR 336 at 340:

> [A] Court of Criminal Appeal is not prone to interfere with the Judge's exercise of his discretion in apportioning the sentence, and will not interfere unless it is seen that the sentence is manifestly excessive or manifestly inadequate. If the sentence is not merely arguably insufficient or excessive, but obviously so because, for instance, the Judge has acted on a wrong principle, or has clearly

> overlooked, or undervalued, or overestimated, or misunderstood, some salient feature of the evidence, the Court of Criminal Appeal will review the sentence; but, short of such reasons, I think it will not.

21.20 In *Jackson v Public Prosecutor* [2011] VUCA 13 at [12], the Court of Appeal summarised the principles relating to sentence appeals by defendants:

> The principles to be applied by an appellate Court to an appeal against sentence by a defendant are clear. The Court will not interfere unless the sentence is manifestly excessive. This may be because the judge has acted on the wrong principle or has clearly overlooked, misstated or misunderstood a salient feature of the evidence. It may be because the sentence is so clearly wrong that it could not have been imposed without there being a miscarriage in the exercise of the discretion…

In *Public Prosecutor v Andy* [2011] VUCA 11 at [6], the Court of Appeal summarised the principles relating to sentence appeals by the prosecution in the same way:

> The Public Prosecutor has a right of appeal to this court against the sentence imposed by the Supreme Court under section 200(4) of the Criminal Procedure Code [CAP 136]. This court may intervene on a prosecutor's appeal if the sentence is manifestly inadequate. This may arise if the judge has acted on the wrong principle or has clearly overlooked, misstated or misunderstood a salient feature of the evidence. It may arise if the sentence is so clearly wrong that it could not have been imposed without there being a miscarriage in the exercise of the discretion…

Sentencing principles

21.21 The exercise of sentencing discretion is structured by set of entrenched principles: the principles of individualisation, proportionality, consistency, and totality. In Vanuatu, these operate as common law principles.

21.22 A fundamental principle of sentencing is what might be termed *the principle of individualisation*. This is the principle that a sentence should be appropriate for all the features of the particular case, including not only the circumstances of and background to the offence but also the history and prospects of the offender. The sentencing process can involve a broad-ranging inquiry. This is quite unlike the trial process with its narrow concentration on whether the elements of the offence can be proved and whether the elements of any defence were present.

21.23 The kind of factors which may be taken into account are illustrated by the Fiji Sentencing and Penalties Act s 4(2):

> In sentencing offenders a court must have regard to —
> (a) the maximum penalty prescribed for the offence;
> (b) current sentencing practice and the terms of any applicable guideline judgment;
> (c) the nature and gravity of the particular offence;
> (d) the offender's culpability and degree of responsibility for the offence;
> (e) the impact of the offence on any victim of the offence and the injury, loss or damage resulting from the offence;
> (f) whether the offender pleaded guilty to the offence, and if so, the stage in the proceedings at which the offender did so or indicated an intention to do so;
> (g) the conduct of the offender during the trial as an indication of remorse or the lack of remorse;
> (h) any action taken by the offender to make restitution for the injury, loss or damage arising from the offence, including his or her willingness to comply with any order for restitution that a court may consider under this Act;
> (i) the offender's previous character;
> (j) the presence of any aggravating or mitigating factor concerning the offender or any other circumstance relevant to the commission of the offence; and
> (k) any matter stated in this Act as being grounds for applying a particular sentencing option.

The various factors fall into two broad groups. Characteristics of the offence are dealt with in paragraphs (a)-(e). Characteristics of the offender are covered by paragraphs (f)-(j). Although Vanuatu has no statutory counterpart to the Fiji list, similar considerations are taken into account as a matter of common law.

21.24 The individualisation principle does not mean that all factors have equal weight. In general, 'offence' factors are more important than 'offender' factors. Nevertheless, the offender's character is an important factor. In determining the character of an offender, a court may consider various aggravating or mitigating factors such as prior criminal record, contributions to the community and future prospects. 'General reputation', however, is not a matter for consideration in most jurisdictions. Ordinarily, 'character' is determined by reference to more reliable indicators.

21.25 A sentence should be proportionate to the gravity of the offence. This is generally called *the principle of proportionality*. The proportionality principle is also often called the 'retributive' principle in works on the philosophy of punishment. This

does not mean retribution in the sense of 'an eye for an eye'. The point is not that the punishment should mirror the crime but rather that the scale of punishment should be aligned to the scale of gravity for offences. As it was expressed in *Hinge v Public Prosecutor* [2019] VUCA 52 at [21]:

> The general principle of proportionality in sentencing conveys the idea that the severity of the punishment should fit the seriousness of the crime…

Thus, the severest punishments should be imposed for the worst offences and so on down the scale. In the leading case of *Veen v R (No 2)* (1988) 164 CLR 465 at 478; [1988] HCA 14, it was said that 'the maximum penalty prescribed for an offence is intended for cases falling within the worst category of cases for which that penalty is prescribed'. Proportionality is therefore a principle that can limit as well as justify punishment.

21.26 The proportionality principle is central to discretionary sentencing. Proportionality as a principle of discretionary sentencing has long been recognised at common law. The principle is also reflected in the design of penal liability for offences. Differences in the maximum penalties prescribed for offences express the legislature's assessment of differences in the seriousness of the offences. Compare, for example, the different maximum penalties for assault and its various compounds in the Code s 107: see **5.36**.

21.27 *Veen (No 2)* is particularly important because it asserted the paramountcy of proportionality over considerations of social protection. In essence, the offence is more important than the offender's record or prospects. With respect to the past, it was said at CLR 477 that 'the antecedent criminal history of an offender is a factor which may be taken into account … but it cannot be given such weight as to lead to the imposition of a penalty which is disproportionate to the gravity of the instant offence'. With respect to predictions of future dangerousness, it was said that 'a sentence should not be extended beyond what is proportionate to the crime in order merely to extend the period of protection of society from the risk of recidivism on the part of the offender'. It was, however, also acknowledged that a court may have regard to 'the protection of society as a factor in determining a proportionate sentence'.

21.28 Proportionality may be a difficult issue when a person is to be sentenced for more than one connected offence, such as several offences arising from the same transaction (for example, assaults on a group of persons) or a series of offences of a similar type (for example, a spree of burglaries). Imposing a number of separate, cumulative sentences could create a crushing burden, disproportionate to the criminality involved. *The principle of totality* has developed to avoid this outcome. The

totality principle holds that a court sentencing an offender for several connected offences should not simply impose a number of separate, cumulative sentences. It should instead consider what would be an appropriate *aggregate* sentence.

21.29 *A principle of concurrency* is a sub-principle to the principle of totality. The common law principle is written into the Penal Code s 52(1), which provides that sentences for multiple offences that were jointly tried are to be served concurrently unless the court orders otherwise. The principles governing joint trials mean that the offences must be connected: they must arise from the same transaction or be part of a series of offences of a similar type.

21.30 A method generally approved for determining and expressing an aggregate sentence is to impose for the most serious offence, called 'the lead offence', a sentence reflecting the overall criminality including the additional offences, and then to impose concurrent sentences for the other offences reflecting the criminality involved in them. An alternative is to set the appropriate sentence for the lead offence and then cumulatively to add to that the lesser sentences for other offending, taking the totality principle into account.

21.31 In *Boesaleana v Public Prosecutor* [2011] VUCA 33, the Vanuatu Court of Appeal summarised the principles of sentencing for multiple offences in this way:

> [6] There can be substantial debate as to the approaches which can be applied in sentencing. But it is essential that the Court does not become lost in formulae or arithmetic calculations but rather looks in a general and realistic way at the entire offending, assessing all relevant aggravating and mitigating factors, and then reaches a sentence which in its totality properly reflects the culpability which has been established.
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> [7] … it should be remembered that in any case the sentencing of a prisoner is not an exact mathematical science but a nuanced art. It is essential that every Judge, whatever methodology they employ, looks to see whether the overall sentence is commensurate with the established culpability of the particular accused person
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> …
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> [9] When a Court is having to sentence a convicted person who faces many counts and more than one victim, it is often beneficial to decide what is the most serious offending and to impose a lead sentence on that which properly takes account of all aggravating factors and then to impose concurrent sentences in respect of other offending as that is appropriate.

These comments were endorsed by the Court of Appeal in *Nampo v Public Prosecutor* [2018] VUCA 43 at [29].

21.32 In some instances where multiple offences are alleged, the prosecution will choose a limited number of 'representative counts' for prosecution. The cases selected will usually be those on which the evidence is strongest. A sufficient number will be charged to provide an adequate basis for sentencing. The remaining cases, however, will not be pursued in order to save time and resources. When this happens, a sentencing court is not entitled to impose a sentence in respect of the uncharged offences: *Mataunitoga v State* [2015] FJCA 70 at [24].

21.33 *The principle of consistency* or *parity* is a fundamental common law principle of sentencing. The consistency principle is the principle that similar cases should be treated alike. In *Nampo v Public Prosecutor* [2018] VUCA 42 at [30], the Court of Appeal said:

> While no two cases are identical and judges may differ in their view of the law, it is a fundamental principle of justice that like cases are treated in a consistent and like manner. There should be transparency in process and consistency in the treatment of all who have offended against the criminal law. Although uniformity is an impossible ideal, consistency in the sentences imposed by judges of the Supreme Court is a desirable feature of criminal justice.

Perfect consistency is unattainable in a system of discretionary sentencing. Nevertheless, it can be increased by attention to precedents or by the use of sentencing guidelines: see **21.53-21.58**.

21.34 Parity between co-offenders is particularly important. A marked disparity will generate a 'justifiable sense of grievance': see *R v Nagy* [2004] 1 Qd R 63; [2003] QCA 175. To avoid this, the higher sentence may have to be reduced on appeal, even if it is within the permissible range of options and would be acceptable if considered in isolation: *Green v R* (2011) 242 CLR 462; [2011] HCA 49. In that case, French CJ, Crennan and Kiefel JJ said at [40]: '[I]n appeals against severity of sentence by sentenced persons, the parity principle may support reduction of an otherwise appropriate sentence to one which, save for the application of that principle, would be erroneously lenient.' The same principle was endorsed for prosecution appeals but subject to a qualification for an appeal against a sentence so inadequate 'that it amounts to "an affront to the administration of justice" which risks undermining public confidence in the criminal justice system'. It was said at [42]: 'In such a case the Court would be justified in interfering with the sentence notwithstanding the resultant disparity with an unchallenged sentence imposed on a co-offender.'

Guilty pleas

21.35 Discounting sentences for guilty pleas is common in many jurisdictions. The practice is well established in Vanuatu, with potential for a discount of up to one-third of a sentence of imprisonment. In *Taviti v Public Prosecutor* [2016] VUCA 41 at [14], it was said:

> [14] We need to emphasise that it has always been the law in Vanuatu…that a reduction of sentence discount of one third is allowed as a matter of sentencing principle when a person pleads guilty at the first opportunity given to him or her by the Courts (see: *Public Prosecutor v. Scott* [2002] VUCA 29 and other cases).
> …
> [16] A guilty plea discount is important as a criminal sentencing principle and it justifies a reduction in an otherwise appropriate sentence for three reasons:
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> First, it relieves victims and witnesses of the trauma, stress, and inconvenience that is caused by a delay in resolving the case and by the trial itself, particularly the need to give evidence. Secondly, it avoids the need for a trial, with the attendant advantages of a reduction in Court delays and costs savings. Thirdly, it generally indicates a degree of remorse. At the very least, it represents an acceptance of responsibility for the offending. (*The Queen –v- Hessell* [2009] NZCA 450).

21.36 The amount of any discount is determined by a number of factors including the stage when the defendant indicated that there would be a guilty plea. An early indication of a guilty plea should attract a bigger discount than one which is entered late in the proceedings, such as at the commencement of the trial when the prosecution has had to expend resources in preparation and witnesses have had suffer the prospect of testifying. In *Public Prosecutor v Andy* [2011] VUCA 14 at [18], it was said:

> The greatest discount allowed under this head will be a discount of one third where the guilty plea has been entered at the first reasonable opportunity. A later guilty plea will result in a smaller discount. No discount is available under this head if the charges have been defended through a trial.

Nampo v Public Prosecutor [2018] VUCA 43 at [16] was an exceptional case where the Court of Appeal indicated that some reduction, albeit not the maximum, would be appropriate where a guilty plea to sexual intercourse without consent was entered in

the middle of a trial. Two victims had given evidence but the youngest victim had not yet testified.

21.37 There are two different views of the rationale for discounting sentences for guilty pleas, leading to potentially divergent views as to criteria for awarding discounts. These might be called 'the utilitarian view' and 'the moral view':

- *The utilitarian view*. On this view, the focus is on the beneficial consequences of a guilty plea. Discounts are given primarily to save the time and expense of trials and relieve witnesses from the stress and inconvenience of testifying, particularly victims of sexual abuse. The subjective state of mind of the offender (for example, the presence or absence of remorse) is immaterial; so, too, is whether a conviction would have been inevitable if the plea had been not guilty. This is the view which has generally been taken by appellate courts. See also the description of discounting as a 'purely utilitarian' exercise by Kirby J in *Cameron v R* (2002) 209 CLR 339; [2002] HCA 6 at [66].
- *The moral view*. On this view, discounts are reserved for persons who deserve them. The focus is on the subjective state of mind of the defendant, particularly the reasons for pleading guilty. Discounting reflects a moral distinction between some persons making guilty pleas and other defendants. This view found favour with the majority of the High Court of Australia in *Cameron*.

21.38 The difference between these two approaches is perhaps clearest in the treatment of cases where the offender pleads guilty knowing that conviction is inevitable anyway. On the moral view, the offender may not deserve a discount. On this approach, special leniency may be thought appropriate only for an accused who is willing to facilitate the course of justice in more positive ways, such as by cooperating in the pursuit of co-offenders, or who shows remorse and acceptance of responsibility or concern about the impact on witnesses of having to testify. On the utilitarian view, however, the offender can still qualify for a discount because pleading guilty has saved the State the time, effort and cost of conducting a trial and relieved witnesses from the burden of testifying.

21.39 Pacific jurisdictions have often referred to both utilitarian and moral considerations, without taking a firm position in support of one or the other of the competing general approaches. For example, see *Taviti v Public Prosecutor*, above at **21.35**; *Roni v R* [2008] SBCA 8; *Mataunitonga v State* [2015] FJCA 70 at [15]-[18]. In Vanuatu, some support for the utilitarian approach may be seen in the endorsement by the Court of Appeal of giving an additional discount, separate from that for the guilty plea, for assisting in the apprehension of other offenders. In *Taviti v Public Prosecutor* [2016] VUCA 41 at [15], it was said:

> …the proper method for encouraging offenders to provide the names of other offenders is to give an extra discount for assisting authorities, over and above the standard discount for a guilty plea.

Sentencing methodology

21.40 Sentencing principles are not considered and applied afresh in every case. The principles underlie patterns of decisions in which they are largely taken for granted. They are articulated mainly in difficult cases where their application is troublesome and in cases where sentences are reversed on appeal for departure from principle. Other methodologies are used to resolve the mass of cases.

21.41 Vanuatu courts generally adopt an approach to sentencing involving several stages. This method is also widely used in other Pacific jurisdictions. It is commonly called a 'two-stage' approach, although additional stages may sometimes be involved. The term 'staged sentencing' may more accurately describe the method.

- At the first stage, the focus is on the seriousness of the offence that has been committed. A 'starting point' sentence for the offence is established in light of what happened and the maximum penalty for the offence. This reflects the proportionality principle.
- At the second stage, the focus switches from the offence to the offender. Aggravating and mitigating factors relating to the offender, considered apart from the offence itself, are considered in order to fine-tune the sentence in light of the individualisation principle.

Final adjustments may be made for any other relevant factors, such as a guilty plea and time spent in custody awaiting trial.

21.42 In *Public Prosecutor v Andy* [2011] VUCA 14, the two stages were described in this way:

> *First Step: The Starting Point*
>
> [15] The starting point can be defined as the sentence of imprisonment that reflects the seriousness of the offence and the culpability of the actual offending; that is, the specific actions of the offender and their effect in the context of the specific charge and its maximum sentence. In this first step, there is no consideration of circumstances which are personal to the offender. The calculation has regard only to the seriousness of the offending.
>
> …
>
> *Second Step: Assessment of factors personal to the offender*

> [17] Once the starting point has been reached the Court, then embarks on the second step which is the assessment of the aggravating and mitigating factors relating to the offender personally. It is under this head that aggravating matters such as the past history of the offender will be considered. If there are previous convictions, particularly for a similar type of offence, this may result in the starting point being increased. Under this head, mitigating factors such as a lack of previous relevant convictions, good character and remorse will be assessed and may result in a reduction of the starting point to reach a second stage end sentence.

21.43 The starting point is the primary determinant of a sentence. Substantial additions to or deductions from the starting point can be made at the second stage. However, the starting point sets a framework from which it can be hard to escape. In *Gigina v Public Prosecutor* [2017] VUCA 15 at [32], it was observed: 'Overall it will be rare for mitigation deductions including guilty pleas to total 50% and even rarer for them to exceed 50%.'

21.44 The selection of a starting point was described as a 'value-judgment' in *R v Tiko* [2010] SBCA 7 at [23]:

> It is a value-judgment to be made on all the circumstances. It is, as has so often been said, an art rather than a science.

Two different approaches to selecting a starting point can be discerned in sentencing judgments.

21.45 In some cases, the judge simply identifies a starting point by making an overall assessment of the seriousness of the offence, taking account of the maximum penalty, any precedent sentences for offences of a comparable type and seriousness, and any aggravating or mitigating factors relating to the particular case. For cases where the offence has no clearly identifiable sentencing pattern or tariff, Palmer CJ in *R v Kada* [2008] SBCA 9 at [15] said that the starting point would have to be determined a matter of 'first principles':

> It was necessary for the sentencing judge to consider the sentence from first principles, bearing in mind the maximum sentence applicable to cases in the worst category of case and the objective seriousness of the offence in respect of each victim, the level of responsibility of each offender and their subjective circumstances.

21.46 For offences with a clearly identifiable sentencing pattern or tariff, a starting point is sometimes determined in two steps. An initial starting point is derived from

an analysis of sentences in previous cases that are comparable in type and seriousness. This reflects the consistency principle. The initial starting point is then adjusted to take account of any aggravating or mitigating factors relating to the events of the particular offence, reflecting the individualisation principle. This has been called 'the adjusted starting point' by the New Zealand Court of Appeal: see *Moses v R* [2020] NZCA 296 at [46].

21.47 Whichever way the starting point is derived, care needs to be taken to ensure that a particular factor is not taken into account more than once. 'Double-counting' must be avoided. For example, consider sentencing for an offence of robbery contrary to s 137 of the Penal Code where a weapon was used. If the use of a weapon was taken into account in identifying sentences for comparable cases, it should not be treated additionally as an aggravating factor in the particular case. It would, however, be appropriate to take account of resulting injury if that had not already been used to identify sentences in comparable cases. In Fiji, where reference to sentencing tariffs is common practice, concerns about double-counting have often been expressed by appellate courts: see, for example, *Senilolokula v State* [2018] FJSC 5 at [22]; *Kumar v State* [2018] 30 at [57]; *Nadan v State* [2019] FJSC 29 at [38]-[40].

21.48 A further complication is that the terms 'aggravating' and 'mitigating' factors can be ambiguous in the context of sentencing methodology:

- The terms can be used to refer to characteristics of the offence. For example, assessments of the gravity of an offender's conduct may take account of whether the person was a leader or a follower, how much injury was caused, and what was the person's state of mind and motivation. In this sense, aggravating and mitigating factors are taken into account at the first stage when the focus is on the offence.
- The terms are also used to refer to characteristics of the offender, such has their age, prior record, circumstances and prospects. In this sense, aggravating and mitigating factors are taken into account at the second stage when the focus is on the offender.

Both usages are defensible as a matter of ordinary language and are found in sentencing judgments. See, for example, *Philip v Public Prosecutor* [2020] VUCA 40 at [17], where reference was made to both 'aggravating factors personal to the offender' and 'aggravating factors relating to the nature of the offending'.

21.49 Nevertheless, the different usages of 'aggravating and mitigating factors' can cause confusion. This happened in *Philip*, where the Court of Appeal concluded that the trial judge had improperly considered aggravating factors relating to the offender when fixing a starting point.

21.50 The dividing line between offence factors and offender factors can be debatable. Consider the following passage from the judgment of the Court of Appeal

in *Philip*:

> [17] We consider that the history of violence of the Appellant during the relationship and the lack or absence of medical assistance to the victim Ms Karris are matters that constituted aggravating factors personal to the offender (appellant) that are to be properly taken into account at the relevant step or stage of sentencing assessment exercise, i.e., after a starting point sentence has been assessed and set down (a figure X is set) by considering the aggravating factors relating to the nature of the offending, the seriousness and culpability of the offending, the maximum penalty and the comparable case authorities for consistency purposes.

Philip was a case where a relationship of domestic violence eventually led to an intentional homicide. The Court of Appeal correctly observed that the background of violence in the relationship was an aggravating factor relating to the offender rather than the offence. It was not part of the incident which led to the conviction for intentional homicide. However, the offender's failure to seek medical assistance for his partner following his brutal attack upon her was arguably an incident of the offence and therefore appropriately considered alongside its brutality in the assessment of the seriousness of the offence. Ultimately, it may make no difference where this particular aggravating factor enters into the mathematical calculation. However, lack of clarity over the dividing line between offence and offender is apt to generate the kind of confusion which occurred when the trial judge was sentencing the offender in *Philip*.

21.51 In *Moses v R* [2020] NZCA 296, the New Zealand Court of Appeal examined different methods of calculating proportional discounts for guilty pleas within staged sentencing. This discount has often been calculated as a proportion of the sentence that would be imposed at the end of the second stage, after aggravating and mitigating factors relating the offender have been taken into account. This was the approach taken by the Vanuatu Court of Appeal in *Andy*, where discounting for a guilty plea was treated as a 'third stage' in sentencing. However, this approach will make the size of the discount dependent on what adjustments have been made relating to the offender: in particular, the amount of the discount would be reduced by personal mitigating factors of the offender. The court in *Moses* could see no justification for reducing a discount because of such mitigating factors. The court therefore concluded at [46] that the discount should be applied to 'the adjusted starting point', that is, to the sentence calculated at the end of the first stage taking account of the nature of the offence and any aggravating or mitigating features associated with it. This was effectively endorsed by the Vanuatu Court of Appeal in *Philip v Public Prosecutor* [2020] VUCA 40 at [18]. In that case, the Court of Appeal approved the analysis of the

first two stages in *Andy* but then added without discussion the cryptic comment: 'See also the authority of *Moses v R* [2020] NZCA 296.' This has been interpreted as a signal of the approach the Court intends to take in relation to guilty pleas. In the result, sentencing practice in Vanuatu has fallen into line with that recommended in *Moses*. The determination of a discount for a guilty plea is the first part of the second stage where the focus switches from the offence to the offender.

21.52 An alternative approach to sentencing methodology is called 'instinctive synthesis'. This rejects separate stages and anything akin to mathematical calculations. Instead, according to the correct methodology for sentencing is said to be 'instinctive synthesis', in which a single intuitive judgment is made about how all the relevant factors bear upon an appropriate sentence. This approach has been favoured by the High Court of Australia: *Markarian v R* (2005) 215 ALR 213; [2005] HCA 25, [39]. In the Pacific, however, staged sentencing has been preferred. The Supreme Court of Fiji commented In *Qurai v State* [2015] FJSC 15 at [51]:

> The two-tiered and instinctive synthesis approaches both require the making of value judgments, assessments, comparisons (treating like cases alike and unlike cases differently) and the final balancing of a diverse range of considerations that are integral to the sentencing process. The two-tiered process, when properly adopted, has the advantage of providing consistency of approach in sentencing and promoting and enhancing judicial accountability, although some cases may not be amenable to a sequential form of reasoning than others, and some judges may find the two-tiered sentencing methodology more useful than other judges.

21.53 Sentencing guidelines offer another way to structure sentencing discretion. Sentencing guidelines are general directions, usually issued by appellate courts, as to the type of sentences which may be appropriate in particular types of cases. In most jurisdictions where they are issued, trial judges are required to take them into account but retain discretion over the final result in the individual case.

21.54 Sentencing guidelines can take different forms. Loose guidelines simply specify a range of sentencing purposes and/or a range of specific factors to be taken into account, or they rank or otherwise assign weights to the various purposes and factors. See, for example, the discussion of the proportionality principle by the High Court of Australia in *Veen (No 2)* above, **21.25**-**21.27**.

21.55 Tighter structure can be imposed by numerical guidelines which signify expectations about actual sentences for cases with certain features, usually objective features of the offence. For example, in *Apia v Public Prosecutor* [2015] VUCA 30 at [33], the Court of Appeal upheld some guidelines for sentencing in fraud cases:

In *Public Prosecutor v Mala* [1996] VUSC 22, the then Chief Justice set out some guidelines for fraud sentencing which have since been consistently applied. Relevantly his Lordship said:

> Where the amounts involved cannot be described as small but are less than Vt 1 million or thereabouts, a term of imprisonment ranging from the very short to about 18 months is appropriate. Cases involving sums of between about Vt 1 million and Vt 5 million will merit a term of about 2 to 3 years imprisonment. Where greater sums are involved, for example Vt 10 million a term of 3 ½ years to 4 ½ years would be justified.

21.56 The Court of Appeal has also offered some forthright directions on sentencing for offences of sexual coercion:

- In *Public Prosecutor v Scott* [2002] VUCA 29, the Court of Appeal adopted the following statement of principles by Lunabeck CJ in *Public Prosecutor* v. *Ali August*, Criminal Case No. 14 of 2000:

  > For rape committed by an adult without an aggravating or mitigating feature, a figure of five years should be taken as the starting point in a contested case. Where a rape is committed by two or more men acting together, or by a man who has broken into or otherwise gained access to a place where the victim is living, or by a person who is in a position of responsibility towards the victim, or by a person who abducts the victim and holds her captive the starting point should be eight years.
  >
  > At the top of the scale comes the defendant who has committed the offence of rape upon a number of different women or girls. He represents a more than ordinary danger and a sentence of fifteen years or more may be appropriate.
  >
  > Where the defendant's behaviour has manifested perverted or psychopathic tendencies or gross personality disorder, and where he is likely, if at large, to remain a danger to woman for an indefinite time, a life sentence will [*sic* not] be appropriate.

  The Court also listed a number of aggravating factors, such as the use of a weapon, careful planning, and the effect of the rape on the victim.
- In *Public Prosecutor v Hinge* [2008] VUCA 30, it was said:

  > In our view therefore the appropriate starting point to reflect the rape

> together with the kidnapping and threats of violence was at least 8 years imprisonment. We stress the importance of Supreme Court Judges adhering to this guideline judgment.

- Criteria for suspending sentences were addressed in *Public Prosecutor v Gideon* [2002] VUCA 7:

> It will only be in a most extreme of cases that suspension could ever be contemplated in a case of sexual abuse. There is nothing in this case which brings it into that category. Men must learn that they cannot obtain sexual gratification at the expense of the weak and the vulnerable. What occurred is a tragedy for all involved. Men who take advantage sexually of young people forfeit the right to remain in the community.

- The message about suspensions was repeated in *Gigina v Public Prosecutor* [2017] VUCA 15:

> [26] In her submissions counsel for the Appellant referred to a number of Supreme Court sentencing decisions involving various sexual assaults. Of the sixteen Supreme Court decisions referred to all but two resulted in suspended prison sentences. All involve sexual assaults of young persons 18 years and younger, several under 10 years of age.
> [27] In *Public Prosecutor v Gideon* [2002] VUCA 7 this Court made it clear that suspending prison sentences for those convicted of sexual crimes would be rare. This was repeated by us in *Public Prosecutor v Bae* [2003] VUCA 14. We emphasis again these observations.
> [28] The Supreme Court cases referred to by the Appellant are cases involving the sexual assault of young children some involving serious intrusive sexual assaults. Other than in extraordinary circumstances sentences for this type of serious offending should not be suspended. We emphasise that it would be only in the most extraordinary situation for imprisonment to be suspended in such cases.
> [29] A sentencing Judge will therefore need to identify the extraordinary circumstances in the Judge's sentencing remarks should the Judge consider suspension is warranted.

21.57 Guideline judgments need to emanate from the Vanuatu Court of Appeal itself. Borrowing from other jurisdictions was condemned in *Namri v Public Prosecutor* [2018] VUCA 52:

> [26] Mr. Namri was sentenced to 17 years imprisonment. In the absence of any guideline judgments in Vanuatu the sentencing judge was significantly influenced by the United Kingdom Guideline Sentencing levels as identified by that country's Sentencing Council. Based on that Council's guideline the judge identified a start sentence of 18 years. From that he deducted one year for the fact Mr. Namri was a first time offender and time spent in custody pre-trial (1 year 6 months).
> [27] We do not consider it was appropriate for the sentencing judge to use the UK sentencing guidelines to identify an appropriate starting sentence for the offending. The UK sentencing guidelines were developed to suit that country's criminal justice system. The guidelines are designed as a whole, to reflect relative culpability and sentencing levels across a wide range of offending.
> [28] Selecting and applying one area of such a guideline as was done in this case can result in a level of sentence wholly out of proportion to other areas of established sentencing in Vanuatu.

21.58 Guidelines are not binding rules. In *R v Millberry* [2003] 1 WLR 546; [2003] 2 All ER 939 (CA) at [34], the English Court of Appeal said:

> It is essential that having taken the guidelines into account, sentencers stand back and look at the circumstances as a whole and impose the sentence which is appropriate having regard to all the circumstances. Double accounting must be avoided and can be a result of guidelines if they are applied indiscriminately. Guideline judgments are intended to assist the judge arrive at the correct sentence. They do not purport to identify the correct sentence. Doing so is the task of the trial judge.

This passage highlights the ultimate supremacy of judicial discretion in sentencing matters.