

MORE ON CUSTOMARY RECONCILIATION CEREMONIES IN SENTENCING FOR CRIMINAL OFFENCES

DON PATERSON* AND ANITA JOWITT†

INTRODUCTION

In an earlier case note in the *Journal of South Pacific Law*¹ there was some discussion about the extent to which customary reconciliation ceremonies were taken into account by the courts of Vanuatu when sentencing persons convicted of sexual offences. It was observed that there was some diversity about the extent to which such ceremonies were taken into account, and the weight to be given to them, and also some uncertainty as to the criteria to be applied and the detail with which the court should examine the circumstances of the making of the customary reconciliation.

The purpose of this note is to carry that discussion further by looking at all the cases recorded in PacLII for the years 2006 and 2007 relating to the sentencing for criminal offences, and to note the role played by customary reconciliations in those cases.

OVERVIEW OF SENTENCING JUDGMENTS FOR CRIMINAL OFFENCES IN 2006 AND 2007

Until 2006 sections 118 and 119 of the *Criminal Procedure Code* [Cap 136] provided that the court may facilitate reconciliation or customary settlement and must, during sentencing, take into account any customary compensation or reparation made by the offender. These provisions were superceded by the *Penal Code (Amendment) Act 2006*, which contains almost identical provisions in respect of the court role in recognising and facilitating customary reconciliation.² In 2006, PacLII recorded 33 Supreme Court judgments relating to the sentencing of persons convicted of criminal offences in 2006. In 2007 some 24 sentencing judgments were recorded in PacLII, making a total of 57 for the two year period.

No customary reconciliation referred to at time of sentencing

Of the 33 sentencing judgments recorded by PacLII in 2006, in 21 cases there is no reference to a customary reconciliation ceremony either having been promised or performed at all. In three cases the judgments indicate that customary reconciliation had been promised but not performed at the time of sentencing. In nine cases customary reconciliation had taken place at the time of sentencing.

* Emeritus Professor of Law, University of the South Pacific.

† Lecturer, School of Law, University of the South Pacific.

¹ Don Paterson, 'Customary Reconciliation in Sentencing for Sexual Offences: A review of *Public Prosecutor v Ben and Others* and *Public Prosecutor v Tarilingi and Gamma*' (2006) 10(1) *Journal of South Pacific Law* <http://paclii.org.vu/journals/fJSPL/vol10/12.shtml> (Accessed 1 June 2009).

² Sections 38 and 39.

Of the 24 sentencing judgments recorded by PaCLII for 2007, in 13 cases there is no reference to a customary reconciliation ceremony having been promised or performed at all. In five cases customary reconciliation had been promised but not performed at the time of sentencing. In four of those five cases the offer of customary reconciliation had been rejected by the complainant or family. In six cases the judgments indicate that a customary reconciliation ceremony had been made at the time of sentencing.

So, in the two year period 2006-2007, out of the 57 sentencing judgments recorded by PaCLII, in the majority of cases (34 or 60%) there is no mention of customary reconciliation at all.

This leaves a balance of 23 sentencing judgments (40%) in which customary reconciliation is mentioned in the judgments as having been made or promised by the defendant.

Customary reconciliation promised but not performed at time of sentencing

In nine of the 23 sentencing judgments in which customary reconciliation was mentioned a customary reconciliation had been promised but not performed:

- *Public Prosecutor v Rarip* [2006] VUSC 8;
- *Public Prosecutor v Loli* [2006] VUSC 35;
- *Public Prosecutor v Nouwai - Sentence* [2006] VUSC 86;
- *Public Prosecutor v Damasing* [2006] VUSC 101;
- *Public Prosecutor v Beau* [2007] VUSC 14;
- *Public Prosecutor v Maluk* [2007] VUSC 17;
- *Public Prosecutor v Mogeror* [2007] VUSC 83;
- *Public Prosecutor v Kamiti* [2007] VUSC 96;
- *Public Prosecutor v Pala* [2007] VUSC 89.

In four of these cases (*Loli*, *Beau*, *Pala*, and *Maluk*) the courts seem to have had little regard to such promises of customary reconciliation which have not materialised, and do not appear to have allowed the promises of customary reconciliation to influence the sentence that was imposed.

In the other five cases the courts appeared to give at least some weight to the promised customary reconciliation which had not eventuated. In *Rarip* the Court fixed a starting point of seven years' imprisonment, reduced by one third because of a guilty plea. A further two months were deducted for time already spent in prison. Final sentence was four years and two months. Four months were allowed for other mitigating factors, including the defendant's 'resolution to pay the custom settlement fine in the future' although the judge commented that the failure to pay the custom settlement at the time of trial 'weighs a little with me I must say.'

In *Nouwai* the Court reduced the sentence by one third because of the defendant's 'pleas of guilty, the fact that you had have no previous convictions, your public apology and your willingness to undergo a custom ceremony.'³

In *Damasing* the Court fixed a starting point of three years imprisonment, but reduced it by one third because the defendant was 'aged 20... had a job... had no previous convictions and... pleaded guilty immediately'⁴ and 'also the fact that... [the defendant was] remorseful as shown by [his]willingness to undergo a custom ceremony although whether that takes place or not is still to be seen.'⁵ The judge did note that the plea of guilty was the main reason for the deduction.⁶

In *Mogeror* the Court fixed a starting point of 18 months imprisonment, and said: 'One third is deducted for the guilty plea. Two months is further deducted for the other mitigating features.'⁷ Mitigating features included the defendant's age, that he was a first time offender, that he pleaded guilty and that he had shown remorse.⁸ There was also a continuing determination on the part of the defendant to make a customary reconciliation,⁹ The sentence was suspended, with one of the conditions of the sentence being that the defendant had to organise a customary reconciliation ceremony with the victim and her family within 60 days,¹⁰ the judge apparently ignoring the family's earlier unwillingness to accept a custom reconciliation.¹¹

In *Kamiti* the Court decided to 'give you the full 1/3rd reduction in the sentence for the things in your favour, pleading guilty and the offer of a custom ceremony'.¹²

It should be mentioned that in five of the cases (*Kamiti*, *Mogeror*, *Nouwai*, *Beau* and *Maluk*) the customary reconciliation had not been performed because it had been rejected by the victim or family of the victim. The reasons for the rejections of the offers of customary reconciliations were not mentioned by the courts, except in one case, *Kamiti*, when the reason for the family's refusal to accept a customary reconciliation was stated by the Court to be that 'They say according to the pre-sentence report that you have done custom ceremonies in the past to say sorry but it has made no difference to your behavior.'¹³

Customary reconciliation performed at the time of sentencing

This leaves 14 out of the 57 sentencing judgments recorded by PacLII in 2006-2007 in which it is apparent that a customary reconciliation ceremony had occurred at the time of sentencing:

- *Public Prosecutor v Tahi* [2006] VUSC 11;

³ *Public Prosecutor v Nouwai - Sentence* [2006] VUSC 86 <http://www.pacii.org> [9].

⁴ *Public Prosecutor v Damasing* [2006] VUSC 101 <http://www.pacii.org> [4].

⁵ *Ibid* [12].

⁶ *Ibid* [13].

⁷ *Public Prosecutor v Mogeror* [2007] VUSC 83 <http://www.pacii.org> [18]

⁸ *Ibid* [10].

⁹ *Ibid* [17].

¹⁰ *Ibid* [20].

¹¹ *Ibid* [17].

¹² *Public Prosecutor v Kamiti* [2007] VUSC 96 <http://www.pacii.org> [10].

¹³ *Ibid* [9].

- *Public Prosecutor v Peter* [2006] VUSC 27;
- *Public Prosecutor v Gabriel* [2006] VUSC 31;
- *Public Prosecutor v Nako* [2006] VUSC 38;
- *Public Prosecutor v Jeffry* [2006] VUSC 40;
- *Public Prosecutor v Tabisap* [2006] VUSC 52;
- *Public Prosecutor v Seley* [2006] VUSC 66;
- *Public Prosecutor v Atuary* [2006] VUSC 98;
- *Public Prosecutor v Bob* [2007] VUSC 13;
- *Public Prosecutor v Isaiah* [2007] VUSC 15;
- *Public Prosecutor v Tokoro* [2007] VUSC 16;
- *Public Prosecutor v Napu* [2007] VUSC 18;
- *Public Prosecutor v Capten* [2007] VUSC 19;
- *Public Prosecutor v Naline* [2007] VUSC 78.

Clear indication of weight to be given to customary reconciliation in only three cases

In only three cases did the Court make reasonably clear what weight it gave to the customary reconciliation that had occurred. In *Peter*, the Court deducted one third from the starting point of 5 years imprisonment for the pleas of guilty, and another one third 'for the customary reconciliation and other mitigating factors.'¹⁴

In *Jeffry*, the Court deducted one third from a starting point of four years of imprisonment for the plea of guilty and a further allowance for the custom settlement and other mitigating factors', which was not specified but which must have amounted to a deduction of approximately one quarter, because the final sentence was for two and a half years.

In *Gabriel*, the Court reduced a starting point of six years imprisonment to four years because of 'all the mitigating factors' which were stated to include 'your plea of guilty, the fact that you are a first offender, that you express remorse and carried out a customary settlement'. Clearly the allowance for the customary settlement must have been substantially less than one third, presumably one twelfth if equal weight was given to each specified factor.

In five cases, *Tabisap*, *Seley*, *Napu*, *Capten*, and *Naline*, customary reconciliation was referred to by the Court as one of several factors influencing the decision to impose a certain punishment, but without attempting to specify what degree of weight was given to it. In five cases, *Nako*, *Atuary*, *Bob*, *Isaiah*, and *Tokoro*, customary reconciliation was referred to by the Court as one of the reasons for suspending a term of imprisonment, but again without attempting to apportion any particular weight to it. In *Tahi* the defendant was convicted but discharged. Again the weight given to the customary reconciliation, as one of a number of mitigating factors, is not clear, although it appears that the discharge occurred primarily because of his young age.

Description of features of customary reconciliation in only seven cases

¹⁴ *Public Prosecutor v Peter* [2006] VUSC 27 <http://www.paclii.org> [58].

It is also worthy of note that only in seven of the 14 cases (*Peter, Atuary, Nako, Tokoro, Napu, Capten* and *Gabriel*) were the features of the customary reconciliations that were performed described in any detail by the Court. This suggests that in the other seven cases the Court did not consider that the contents of the customary reconciliation were sufficiently important or relevant to be described in any detail.

Customary reconciliations recognised as restoring harmony to the community in very few cases

It is quite remarkable that the courts in so few sentencing judgments took cognisance of the significance of custom reconciliations as evidence not only of contrition and remorse by the defendant, but, more importantly, as evidence that harmony has been restored to the community. In only three out of the 14 cases in which customary reconciliation is stated to have occurred at the time of sentencing did the court expressly refer to the customary reconciliation as a “healing process” and enabling the parties to live together again peacefully: *Napu; Naline* and *Tokoro*.

In *Atuary* and *Capten*, the customary reconciliation was regarded as an indication of remorse of the defendant. In *Gabriel* and *Tahi* it is also implied that the customary reconciliation indicated remorse.

In *Peter, Jeffry, Tabisap, Nako, Seley, Isaiah*, the customary reconciliation performed by the defendant was simply described by the Court as an unspecified “mitigating factor”.

It is difficult to judge the effect of the customary reconciliation in *Bob*, as the defendant appeared to be an unwilling participant, with the defendant agreeing in cross-examination that ‘he had paid a fine of VT10.000 and a pig to reconcile with families. He agreed he remained silent in the meeting because he was afraid of being assaulted by his relatives. He simply followed orders.’

COMMENT

The majority of sentencing judgments make no reference to customary reconciliation

Perhaps the most obvious comment is that in the majority of the cases of sentencing judgments there is no reference to customary reconciliation. This figure is higher than one might expect, given the importance that is usually thought to attach to customary reconciliation in Vanuatu. This is especially interesting given the fact that during this period, 32 of the cases related to offences of a sexual nature, particularly rape, unlawful intercourse with a minor and incest. Such offences are of a personal nature, and one might perhaps have expected a higher proportion of customary reconciliations in such circumstances.

Cases in which customary reconciliation had not been performed at the time of trial

There is a divergence of judicial views as to the weight to be given to a willingness to perform customary reconciliation when sentencing

Given the small number of cases in which the defendant expressed willingness to perform a customary reconciliation but in which no reconciliation had been performed at the time of sentencing not a great deal can be made of the fact that there was a considerable divergence of views as to the weight to be given to customary reconciliations that have not been performed. There are, however, notable inconsistencies. In *Kamiti* the Court seems to have deducted about one sixth¹⁵ for a customary reconciliation which was offered, but rejected by the victim's family and so not performed; in *Nouwai* the Court seems to have allowed one twelfth¹⁶ for a customary reconciliation which was offered, but rejected by the victim's family and so not performed; in *Mogeror* the Court made some allowance for a customary reconciliation that was offered, but rejected by the victim's family and so not performed; in *Damasing* and *Rarip* the Court made some allowance for willingness to participate in a customary reconciliation, although there was no mention at trial that the reconciliation had not taken place because it had been rejected; in *Beau* and *Maluk* the Court made no allowance for a customary reconciliation that was offered, but rejected by the victim's family and so not performed; and in *Loli* and *Pala* the Court made some allowance for willingness to participate in a customary reconciliation, although there was no mention at trial that the reconciliation had not taken place because it had been rejected.

This suggests a lack of conceptual clarity as to the reason why customary reconciliation should be recognised as a mitigating factor. If the mitigation value of a customary reconciliation is that it signifies the defendant's remorse, then an offered reconciliation that has not been performed due to the refusal of the victim and her family should be recognised. If, however, the mitigation value relates more to the restoration of harmony within a community, then it is less clear why a reconciliation that has not been performed, or has only been performed with certain members of the defendant's community should be recognised. Similarly, if the mitigation value relates to compensation of the victim and her family, then it is less clear why a reconciliation that has not been performed should be recognised.

The role of the court in promoting customary reconciliation

Under section 119 of the *Criminal Procedure Code* [Cap 136], now superceded by section 39 of the *Penal Code (Amendment) Act 2006*, the court has the power to postpone sentencing in order to allow for a customary reconciliation to occur. The Court only considered the possibility of postponing sentence to allow for customary reconciliation in one decision, *Nouwai*. In that case, as the victim and her family were 'not open to that there [was] no point in postponing the sentence.'¹⁷

This suggests that the courts may be missing some opportunities to promote local solutions to disputes. However, in this the courts have to be careful not to "force" customary reconciliation on unwilling victims, as seems to have happened in *Mogeror*, in which arrangement of a customary reconciliation with the victim and her family was made a condition of the defendant's suspended sentence, despite the fact

¹⁵ Assuming that equal weight was given to each mitigating factor mentioned by the Court.

¹⁶ Assuming that equal weight was given to each mitigating factor mentioned by the Court.

¹⁷ *Public Prosecutor v Nouwai - Sentence* [2006] VUSC 86 <http://www.paclii.org> [5].

that the victim and her family had clearly rejected participating in a customary reconciliation.

Cases in which customary reconciliation had been performed at the time of trial

There is a small number of judgments in which customary reconciliation is regarded as a specifically identifiable factor in sentencing

Another very striking feature of the above summary is the small number of cases in which the court has specifically identified customary reconciliation as a factor in its decision as to the sentence to be imposed. In only three cases involving customary reconciliation which had been performed did the court identify customary reconciliation as a specifically identifiable factor influencing its decision as to sentencing, rather than one of a number of general mitigating factors.

There is a divergence of judicial views as to the weight to be given to customary reconciliation when sentencing

Given the small number of cases in which the courts did identify customary reconciliation as a quantifiable factor in its decision, not a great deal can be made of the fact that there was a considerable divergence of views as to the weight to be given to customary reconciliations that have been performed. It is however, notable that in *Peter*, the Court seems to have allowed about one third for the customary reconciliation that was performed; in *Jeffry*, the Court seems to have deducted about one quarter for the customary reconciliation that was performed; and in *Gabriel*, the Court seems to have allowed only about one twelfth for the customary reconciliation that was performed. In the other 11 cases in which a customary reconciliation had been performed it is not possible to ascertain the weight given to this factor as compared to other mitigating factors.

Inasmuch as the effect of customary reconciliation that is performed is the same in all cases - the acceptance of the offender back in the community without any further reproach or blame for what was done by the offender and the return of harmony to the community - the courts should surely adopt a uniform approach to the effect of a customary reconciliation in all cases. It should not fluctuate from one case to another.

The judgments lack detailed descriptions of the customary reconciliations

It is, however, difficult to gauge whether the effect of the customary reconciliation was the same in each case as there is little description of the reconciliations and discussion of their impacts. That there was a lack of detailed description of the customary reconciliation in half of the cases in which a customary reconciliation had been performed at the time of sentencing suggests that in most cases the courts did not regard the customary reconciliation as being of much significance.

This cannot be extended to its fullest logical conclusion, however, because in one of the cases that the customary reconciliation was not described in detail, *Jeffry*, the court did in fact expressly identify it as a factor influencing its decision about the sentence to be imposed.

The lack of discussion also suggests that courts do not consider the nature or quality of the customary reconciliation that occurred to be of great importance. Instead, the question of whether a customary reconciliation has occurred can be answered “yes” or “no”, and if the box is ticked yes then there will be some mitigation of sentencing. This approach means that someone can “go through the motions” of performing a customary reconciliation with no sense of remorse, as in *Bob*, and have his customary reconciliation treated with as much weight as someone who underwent three customary ceremonies to reconcile with the victim, the victim’s family, and the chiefs, as in *Tokoro*. This blanket acceptance of customary reconciliations as being qualitatively equal, has the potential to devalue a significant aspect of local order.

There is a small number of cases in which the significance of customary reconciliation as a means of restoring peace and harmony in the community is identified

As mentioned earlier, it was only in three out of the 14 sentencing cases in which a customary reconciliation had occurred that the court referred to the fact that the customary reconciliation had healed the community and restored it to harmony. Surely the fact that the victim and the family of the victim and the community are now at peace with the defendant is a very relevant and important factor when a court of the State is purporting to express the attitudes and views of the community as to the punishment that should be imposed upon that defendant? The peace and harmony of the community would seem to be an especially relevant factor when a court is considering whether or not a sentence should be suspended.

Indeed one might well ask: if the victim and family are at peace with the offender, and the community are at peace with the offended what role does a court of the State have to play? And yet in the three cases in which the court recognised that peace and harmony had been restored to the community (*Napu*, *Tokoro* and *Naline*) the court of the State went ahead and imposed a State punishment upon the defendants.

The courts have addressed this question to a degree, noting that in cases sexual offences State punishment play a role in deterrence, and in the State denunciation of conduct that may be largely accepted by some members of society.¹⁸ However, failing to consistently consider the qualitative effects of particular customary reconciliations, and the purpose of State punishment in specific cases in which harmony has been restored, does raise the possibility that the State courts produce judgments that are not seen as being just by the communities affected by them.

Unspecified effect of customary reconciliation in suspension of sentences

One would think that, as a matter of principle, the fact that there had been a customary reconciliation which had brought harmony to the community and allowed the offender to return freely to the community, would be a very significant factor to be considered

¹⁸ See, for example, *Public Prosecutor v Gabriel* [2006] VUSC 31 <http://www.pacilii.org>, a case involving incest, where the judge stated ‘I take into account that I must hold you accountable for the harm done not only to the victim but also to the community. You must be held responsible and I must denounce your conduct and deter you and other likeminded offenders, and there are all too many facing this sort of offence. I need to protect not only the victim, your eldest daughter, but also the community generally and other young girls who are also abused in this way.’

when deciding whether to allow a sentence to be suspended; and almost a *sine qua non* without which suspension of sentence could not be considered.

However, that does not seem to be the way customary reconciliation is viewed by the courts. In no case in which a sentence was suspended was customary reconciliation singled out as a significant reason for the suspension.

CONCLUSION

In the view of the writers it is clearly undesirable that customary reconciliations are not specifically identified as a factor when courts are considering the appropriate sentence for an offence; it is undesirable also that there should be inconsistency between different courts as to the weight which is given to customary reconciliations; and it is undesirable also that customary reconciliations, when they are taken into account by a court, are regarded only as evidence of remorse by the defendant and that the wider significance of the reconciliation as healing the peace in the community is ignored.

There are several ways in which the present situation could be improved. First, the judges could, at their annual conference, discuss these issues and resolve that judicial practice will change. Alternatively, a conference or workshop could be convened to discuss these issues and pass resolutions which could be regarded by the courts as expressions of community attitudes. Third, legislation could be enacted to provide guidance for the courts. If the Law Commission, which has lain dormant since its creation nearly thirty years ago, is resuscitated and revived, perhaps it could take responsibility for preparing a draft of such legislation.