

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
CRIMINAL DIVISION

Not Restricted

S CR 2015 0104

THE QUEEN

v

BALENGA KALALA

<u>JUDGE:</u>	WARREN CJ
<u>WHERE HELD:</u>	Melbourne
<u>DATE OF HEARING:</u>	16 November 2015
<u>DATE OF SENTENCE:</u>	11 December 2015
<u>CASE MAY BE CITED AS:</u>	R v Kalala
<u>MEDIUM NEUTRAL CITATION:</u>	[2015] VSC 713

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Crown	Mr D A Trapnell QC	Mr J Cain, Solicitor for Public Prosecutions
For the Accused	Mr I G Crisp	Thexton Lawyers

HER HONOUR:

Introduction

- 1 Balenga Kento Kalala, you have pleaded guilty to one count of incitement to murder, in that on or about 17 February 2015, you incited Kigwasa Rusomoka Fredy to murder your de facto partner, and the mother of your children, Noela Rukundo.
- 2 The maximum sentence for incitement to murder, both in Victoria and in Burundi is life imprisonment.¹
- 3 You are 39 years old. You came to Australia as a refugee. You are well educated, have maintained steady employment and established yourself as hardworking and reliable. You have no relevant prior convictions. Yet you have perpetrated a very serious offence, against a woman whom you claimed to love.
- 4 I will begin by setting out your background, before turning to the circumstances of the offence and other matters which the law requires me to consider.

Background

- 5 You were born in the Democratic Republic of the Congo, in an area close to the Burundian border. You are a member of the Bafuleru tribe. Your parents were farmers and still live in the Congo. Your siblings, two brothers and three sisters, are all in refugee camps in either Botswana or Burundi. Apparently, you regularly provide financial assistance to your relatives back in Africa.
- 6 You received a good education. After completing the Congolese equivalent of year 12 you undertook further studies, in French, and obtained a Diploma of Commerce and Management. However, you never worked in this field.
- 7 At the age of 24 or thereabouts you married a girl from your village, and together you had a son. About a year later a rebel group came through your village. The

¹ See s 321I of the *Crimes Act 1958* and art 211 of the Penal Code of Burundi.

rebels brutally killed your wife and young son, and tried to recruit you into their army. Fortunately, you managed to escape. You fled to Botswana, where you spent about 12 months in a refugee camp, before coming to Australia in 2004 as a refugee.

8 When you arrived in Melbourne, you had some friends here but no family. You soon commenced a de facto relationship with Ms Rukundo, and together you had three children: two sons (currently aged 10 and 11) and a daughter (aged 5). Ms Rukundo also has five children from previous relationships, and you all lived together. In your view, it was a fairly happy relationship; you and Ms Rukundo had arguments but continued to live together. In 2011 you travelled together to your respective home countries, in your view, again fairly happily.

9 Since arriving in Australia you have maintained steady employment. Initially, you worked in a seafood processing factory for 12 months, before enrolling in TAFE to improve your English skills. You then obtained employment in a warehouse in Campbellfield. You worked there for many years, initially as a packer and later as a forklift operator, until the business closed in 2011. Thereafter until your arrest you worked for a paint supply company in Footscray, as a picker and forklift operator. At that stage you were earning \$600 a week net.

10 Your friend, Matendo Byamasu, made a statement on your behalf. He described you as a mature man who is always ready to help others, and described how you would often give advice to the younger members of your community. He said he had never known you to be in trouble with the police.

11 The circumstances I have just described paint a picture of a hardworking, decent man, who abides the law and cares for his family. Yet you have committed a very serious offence.

Circumstances of the offence

12 On 21 January 2015, Ms Rukundo travelled to Burundi to attend her stepmother's funeral and visit relatives. It was intended that you would remain home and look

after the children.

- 13 While Ms Rukundo was away, you were told by an acquaintance that she was seeing another man. There has never been any proof of the allegation. Although you had no proof, you became jealous and angry. In your police record of interview you also described frustration at not being able to access a particular bank account while Ms Rukundo was away. You speculated, again without proof, that Ms Rukundo had blocked the account and was spending the money for herself, with another man.
- 14 It was at that point that you asked your friend in Burundi, Kigwasa Rusomoka Fredy, to arrange for Ms Rukundo to be killed. On 17 February you transferred him about \$3,400 AUD via Western Union as payment for her murder.
- 15 You remained in regular contact with Ms Rukundo while she was away in Burundi. On 17 February you spoke with her over the phone while she was at her hotel. She spoke about the heat, and you advised her to go outside for some fresh air. After the conversation concluded, Ms Rukundo took your advice and walked out of the hotel and onto the street.
- 16 There she was approached by a man armed with a firearm and forced into a vehicle. In the vehicle were two more men. They covered Ms Rukundo's face and drove her to an unknown location.
- 17 There she met a fourth man, who explained that you had paid the four of them to kill her. He said, however, that they would not murder her as they did not wish to kill a woman, and because he knew her brother.
- 18 The man told Ms Rukundo that he would attempt to get more money from you. On 18 February, while Ms Rukundo was still being held, you had two consecutive conversations (in Swahili) with the kidnappers. During these conversations, the kidnappers informed you that they had completed the 'job', and that it was a 'big job'. They demanded more money. Although you did not indicate whether or not you would meet that demand, you expressed your gratitude to the kidnappers,

telling them they were 'like family', that you would have more 'jobs' for them, and that they should not let the issue of money come between you.

19 The same day, 18 February 2015, you transferred Mr Fredy a further \$3,400 AUD.

20 During the time Ms Rukundo was being held, you were contacted by her brother, Desire Shukurumungu. He lives in Burundi. The brother told you that Ms Rukundo was missing, and sought financial assistance from you to help find her. You forwarded him a total of \$545.00 AUD by way of two separate Western Union transactions for the purpose of paying the local police to commence an investigation into Ms Rukundo's disappearance.

21 You informed many people in your community that your wife had been killed whilst overseas in a tragic accident. The local African community in the western suburbs of Melbourne gathered around you and provided significant spiritual and financial support.

22 On 19 February 2015, Ms Rukundo was released by her kidnappers. There were indications that she was subjected to violence during her two days' captivity. However, in the absence of evidence I make no finding in that respect. Upon her release the kidnappers gave her a memory card containing the recorded telephone conversations between yourself and the kidnappers in relation to her proposed murder, as well as the Western Union receipts for the cash transfers to Mr Fredy.

23 Immediately after her release, Ms Rukundo telephoned Pastor Dassano Harruno Nantogmah in Melbourne. She explained her situation and requested his assistance to return home to Australia.

24 Ms Rukundo arrived in Melbourne on 22 February 2015 and confronted you at the family home. You expressed your surprise at seeing her alive but vehemently denied any wrongdoing. Indeed you threatened Ms Rukundo by telling her that you would do something that she would never forget.

25 Ms Rukundo called for the police to attend. When the police arrived, they requested

that you leave. The police at that time applied for an intervention order, which was granted and served upon you the following day.

- 26 After the police left, Pastor Nantogmah arrived. He called you back to the house. When you arrived, you confessed your offending, first to the pastor in private, and subsequently to Ms Rukundo. You begged for her forgiveness.
- 27 On 26 February, Ms Rukundo made a formal statement to police, and provided them with the evidence that the kidnappers had provided to her. The same day, an interim intervention order was issued against you.
- 28 On 28 February, at the request of the police, Ms Rukundo spoke with you on the telephone in a conversation which was recorded. During your conversation you once again made full confessions. You explained that you believed she was having an affair and that you wished her dead because you loved her. Once again you begged for her forgiveness and expressed regret.
- 29 On 2 March, an intervention order was issued with full conditions, naming you as the respondent. Following the hearing, you were arrested and taken to be formally interviewed. You cooperated with the police, but initially denied any involvement in the kidnapping and related events. Indeed, you provided a contradictory version of events. The pretence lasted for hours. However, once the police described Ms Rukundo's version of events, your conversation with Pastor Nantogmah and played the recorded conversations, your demeanour changed; you became solemn and tearful. Importantly, you made full and frank admissions, and you confirmed the contents of the recorded conversations between yourself and the kidnappers and also the recorded conversation between you and Ms Rukundo.
- 30 During your police interview, you repeatedly begged for forgiveness. You said you did not know why you committed the offence. You said 'sometimes [the] devil can come into someone to do something but after they do it, they start thinking "why I did that thing?" later' and you said that the devil sent you to do these things. You said your heart was heavy. You expressed concern for your children and your

relatives back home, and about how they would cope without your support.

Impact on the victim

31 Ms Rukundo made a victim impact statement. I have taken into account those parts of her statement which relate to the impact of this crime.

32 I accept that your offending has had a devastating effect on Ms Rukundo. In her statement she wrote of loneliness and isolation, having been shunned by her community for speaking out about these events; she said she feels as though people blame her for this crime. She wrote of sleepless nights and trouble eating, of suicidal thoughts and panic attacks, of requiring medication, and of financial troubles. It is clear from her statement that she is scared for her safety, and worried about her and her children's futures. You acknowledge, through counsel, that the effect of your offending on Ms Rukundo has been profound.

33 Although your children did not make victim impact statements, these events have no doubt had a profound effect on them too. Ms Rukundo in her statement wrote of one child experiencing difficulties.

Gravity of the offence

34 Incitement to murder is a very serious offence; its seriousness is borne out in the maximum penalty set by Parliament – life imprisonment.² This Court has said some cases of incitement to murder may warrant more serious punishment than some cases of murder.³ The offence covers a broad range of offending.

35 The Crown submitted and I accept that your offending is a very grave example of incitement to murder. The target was your de facto partner of 10 years, the mother of your three children and five others. It involved a great breach of her trust. Had Ms Rukundo's kidnappers completed the job, eight children would have lost their mother. It was premeditated and motivated by unfounded jealousy, anger and a

² *R v Massie* (1991) 1 VR 542, 553 [41] (Brooking JA, Winneke P and Batt JA agreeing).

³ *Ibid.*

desire to punish Ms Rukundo. You sent her to her kidnappers by telling her to go outside her hotel in full knowledge that they were waiting to take her, and in full expectation that she would be killed.

36 This makes your offending all the more serious. You placed her in an extremely vulnerable position, at the mercy of her kidnappers. At no point did you attempt to call the murder off. Indeed, upon being informed that the job was done you expressed gratitude, not regret, and you sent Mr Fredy further funds.

37 These factors indicate a high degree of moral culpability. Such behaviour is totally unacceptable and cannot not be tolerated. People should be able to expect protection from their partners, not violence.⁴ Family violence is an issue with which our community is tragically plagued. Your offending was a bad example. A clear message must be sent to the community. General deterrence and denunciation are therefore important sentencing considerations in this case.

Factors in mitigation

38 I have taken into account the mitigating factors put forward by counsel on your behalf.

39 First, I acknowledge that you have no prior convictions and are of previous good character, and that your offending was therefore out of character. I appreciate that you had a difficult upbringing in the Congo and were forced to flee your homeland in very upsetting circumstances. Since coming to Australia you have established yourself as a hardworking and reliable employee, and you have worked hard to improve your English and provide for your family, including for those of Ms Rukundo's children who are not your own. As the Crown noted on the plea, however, offences of this type are often committed by people with no prior convictions who are otherwise of good character.

40 I consider that you have good prospects of rehabilitation and that the need for

⁴ *Felicite v The Queen* (2011) 37 VR 329, 333 [20] (Redlich JA, Harper JA agreeing).

specific deterrence is moderated by your clean record. I acknowledge also that your offending was connected to a particular circumstance – namely your unfounded belief that Ms Rukundo was being unfaithful – which may be unlikely to occur again.⁵ However, upon your release you may be faced with similarly provocative angering circumstances, and it is important that you be deterred from reacting in a similar fashion in future. Hence, specific deterrence is relevant to a modest extent.

41 Secondly, I acknowledge that you made full admissions at an early stage – to your pastor, to Ms Rukundo and importantly to the police – and that on several occasions you expressed regret and begged for forgiveness. I find in your behaviour some remorse. However, I find your level of remorse to be tempered by the fact that you initially denied any wrongdoing – indeed you engaged in a charade of sorts – until you were confronted with the overwhelming evidence against you. In the meantime you accepted the spiritual and financial support of your community on the pretence that Ms Rukundo died in an accident. Your remorse is also tempered by your various attempts to shift the blame for your actions – whether it was to the ‘devil’, to Ms Rukundo for not leaving sufficient money while she was away, or to the person who told you she was having an affair. Finally, I note that in your record of interview, the focus of your ‘remorse’ was primarily the effect your conviction would have on you, your relatives in Africa and your children, rather than the consequences of your offending for Ms Rukundo. You were concerned about how *you* would pay *your* mortgage and what would happen to *your* job. In the circumstances, whilst relevant, I do not consider your level of remorse to be a particularly significant mitigating factor.

42 Thirdly, and in any event, I acknowledge that your early guilty plea has saved the justice system considerable time and expense and, importantly, has spared Ms Rukundo the further trauma of a trial. You are therefore entitled to a discount.

43 Fourthly, a report of forensic psychologist Associate Professor Andrew Carroll was tendered on your behalf. He found no evidence that you were mentally ill at the time

⁵ See *R v Najibi* [2015] VSC 260 [45] (Emerton J).

of your offending. He concluded that your offending was motivated by anger, and that the subsequent attribution of your behaviour to the 'devil' was probably a 'defensive manoeuvre to externalise responsibility'. You told the psychologist that you knew what you were doing was illegal. Associate Professor Carroll said, and I accept, that your mental state deteriorated following incarceration, and that, given your history of trauma, you are more vulnerable than the average person to excessive anxiety when subjected to stress. Your counsel urged that you be viewed as a person with a troubled background who was susceptible to anxiety. However, Associate Professor Carroll said in his report there was no good evidence you were suffering from any mental illness at the time of your offending. It appears that you are now not suffering from any diagnosable mental disorder, and that there is no other evidence that your mental health issues will make prison more burdensome than average for you, or that prison will have a disproportionately adverse effect on your mental health. I note that none of the *Verdins* principles⁶ were agitated or engaged.

- 44 While all the factors to which I have referred must properly be accorded weight in mitigation, the sentence I impose must also necessarily be proportionate to, and reflect the gravity of, the crime, the impact on the victim, and the need for specific and general deterrence,⁷ which I have also described.

Sentence

- 45 This brings me to your sentence.
- 46 Balancing all the factors I sentence you as follows.
- 47 Balenga Kalala, would you please stand.
- 48 You are convicted of one count of incitement to murder. I sentence you to a term of imprisonment of 9 years, with a non-parole period of 6 years.

⁶ *R v Verdins* (2007) 16 VR 269.

⁷ *DPP v Smeaton* [2007] VSCA 256 [22] (Dodds-Streeton JA, Maxwell P agreeing).

- 49 Pursuant to s 6AAA of the *Sentencing Act*, I declare that were it not for your guilty plea, I would have sentenced you to a term of imprisonment of 10 years and 6 months, with a non-parole period of 7 years and 6 months.⁸
- 50 I declare that the period of pre-sentence detention reckoned as having been served is 284 days up to but not including today and direct that this declaration and the period be entered into the records of the Court.

⁸ See *Sentencing Act 1991* s 6AAA.