



**[IN THE DISTRICT COURT OF JUSTICE SITTING
IN ITS FISHERIES JURISDICTION]**

NFA. 36/16

NATIONAL FISHERIES AUTHORITY

-v-

NGUYEN VAN PHUC

Defendant

Waigani: Kaumi PM

2017: January 27 February 24 March 3

***CRIMINAL LAW** – Fisheries Management Act 1998, Part VI, Jurisdiction, Procedure, Offences, Penalties and Liability, Division 1-Section 58 subsection (1) (h)-Being an operator of a foreign fishing vessel caused others to harvest sea cucumbers, Being an operator of a foreign fishing vessel used such vessel to fish for sea cucumbers in PNG fisheries waters otherwise than under an access agreement and in accordance with a valid and applicable licence contrary to s.58 (1) (d) and Being an operator without valid and applicable fishing licence use a Foreign fishing vessel to engage in processing sea cucumbers without a licence-Plea of Guilt-Offender harvested sea cumpbers during closure period-Mitigating and Aggravating Factors – Expression of Remorse–Prevalent Offence.*

***CRIMINAL LAW-** Fisheries Management (Amendment) Act-Offences, Penalties and Costs (Amendment of Section 58)- Increase in penalties-Maximum penalty in respect of a*

natural person, a fine not exceeding K500, 000.00. In default imprisonment for a term not exceeding five years- Sentence-Sentencing Guidelines discussed-Starting point-Relevant considerations are identified and considered.

CRIMINAL LAW- *Usual purposes of criminal sentencing such as Deterrence, Restitution or Rehabilitation are also relevant factors for consideration.*

PRACTICE AND PROCEDURE: *Courts not to be unnecessarily restricted in the exercise of sentencing discretion by principles such as no “disparity of sentence between co-accused” or no “quantum leap”*

PRACTICE AND PROCEDURE: *Charges arising out of the same or closely related facts or “one transaction”, will be treated as part and parcel of the same transaction for purposes of sentencing.*

PRACTICE AND PROCEDURE: *“One transaction” rule dictates that where two or more offences are committed in the course of a single transaction, all sentences in respect of the offences should be concurrent.*

PRACTICE AND PROCEDURE: *The "totality principle", that when the court has arrived at appropriate head sentences and decided whether they should be concurrent or cumulative, it must look at the total sentence and see if it is just and appropriate. If it is not, one or more of the sentences should be varied to get a just total.*

CRIMINAL LAW- *It is incumbent on criminal sentencing courts to exercise the people's power vested in them by the Constitution to impose sentences that are in touch with the aspirations and attitudes of the people of PNG.*

The offender pleaded guilty to illegally fishing live sea cucumbers.

Legislation Cited:

Constitution of Papua New Guinea

Fisheries Management Act 1998

Fisheries Management (Amendment) Act

District Courts Act chapter 40

Papua New Guinea National Fisheries Authority Judiciary Benchbook 2015

Cases Cited:

Acting Public Prosecutor v Don Hale Sc 564

The State v Irox Winston (21/09/00) N2304

Kovi v The State SC 789 (31/05/05) Waigani: Injia DCJ, Lenalia & Lay JJ

The State v Joe Sekin [2006] CR 1592 OF 2000

Jamie Maku v Dinh Van Tam NFA 36/16

State v Jason Dungoia (13/12/00) N2038

State v Michael Kamban Mani (21/05/02 N2246

State v Fabian Kenny (2002) N223

The State v JackVutnamur & Kaki Kialo (N0.3) (2005) N2919

The State v A. Juvenile "TAA" (2006) N3017

The State v Lucas Soroken Sembengo, Bob Alois Wafi & Raphael Lawrence Mandal
N2801

Kenneth Andrew v Dennis Kokowei & 5 Ors NFA 01-16 (5/02/16))

Counsel

Sergeant Bill Mohe of the National Fisheries Authority for the Informant

Offender in person.

SENTENCE

1. **KAUMI PM:** This is a verdict on sentence for a man who pleaded guilty to illegally engaging in fishing for sea cucumbers or (Beche-de-mer) in contravention of provisions of the *Fisheries Management Act 1998*.
2. At the outset of my judgment on sentence in respect of this defendant I would like to refer to a number of matters which are pertinent to the nature of the offences he has pleaded guilty to and to give prominence to the fact that they are IUU offences and which need to be highlighted at this juncture given the prevalence of IUU and the impact it has caused to the economies and fish stocks in Papua New Guinea and in the Pacific region of which we are an integral part of.

3. I am very grateful to Mr John Kasu the Managing Director of the Papua New Guinea National Fisheries Authority and his officers for the production of the Papua New Guinea National Fisheries Authority Judiciary Benchbook 2015 (**PNG NFA JBB 2015**) from which I have been gained great assistance and insight into the source of IUU.
4. The Papua New Guinea National Fisheries Authority Judiciary Benchbook 2015 was prepared as part of a range of reforms aimed at ensuring Papua New Guinea meets its international legal obligations to prevent Illegal, Unregulated and Unreported (IUU) Fishing.
5. The aim of this Benchbook being to provide the Judiciary with a summary reference document. It is a resource to inform the Judiciary on fisheries management matters about which they may not be familiar, and to assist in determining an appropriate level of penalty for offences which are not commonplace and if I may add the benefit of this book to the work of the Judiciary is of immense value and cannot be understated.
6. The Food and Agriculture Organization (FAO) of the United Nations defines Illegal, Unreported and Unregulated (IUU) fishing as:
 - Illegal fishing refers to activities conducted by national or foreign vessels in waters under the jurisdiction of a State, without permission of that State, or in contravention of that State's laws and regulations;
 - Unreported Fishing refers to activities which have not been reported or have been misreported to the relevant national authority, in contravention of national laws and regulations;
 - Unregulated Fishing refers to fishing activities in the area of application of a relevant regional fisheries management that are conducted by vessels without nationality, or by those flying the flag of a State not party to that organization, or by a fishing entity, in a manner that is not inconsistent with or contravenes the conservation and management measures of that organization; **PNG NFA JBB 2015**

7. The term “IUU fishing” has become a catch all term used world – wide to capture, in a single term, the major regulatory threats to sustainable fisheries from fishing that takes place outside the established legal framework for fisheries management. **PNG NFA JBB 2015**

8. PNG is a Party to the United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (in force as from 11 December, 2001) This places a significant range of international legal obligations on PNG to manage these stocks conservatively and cooperatively. In particular and in the context of this Benchbook, Article 19(2) requires that:

“Sanctions applicable in respect of violations shall be adequate in severity to be effective in securing compliance and to discourage violations wherever they occur and shall deprive offenders of the benefits accruing from their illegal activities.”

PNG NFA JBB 2015

9. The PNG National Fisheries Authority (NFA) is the enforcement agency for PNG’s fisheries legislation.

10. Breaching fisheries laws can be lucrative and fishery related crime has a long history of being linked to organized crime involving the transport of drugs and firearms, and people smuggling. Fisheries crimes can involve crossing international maritime boundaries in the commission of an offence and can involve breached of laws related to import and export, tax evasion, workers rights, quarantine, health and maritime safety.**PNG NFA JBB 2015**

11. PNG is a nation of more than seven million people, with more than eighty percent of our population living in customary communities, with most of these communities along the coastlines of our more than 600 islands. These communities represent the human victims

of fisheries crime who will suffer both economically and in terms of human health if our fisheries are no longer sustainable and no longer able to provide quality, healthy food.

PNG NFA JBB 2015

12. Because the potential profits from illegal fishing are so high, and because there are real human victims, fisheries offences need to be penalised at a level that is sufficiently harsh to create a deterrent effect to potential future offenders. **PNG NFA JBB 2015**
13. The offender, Nguyen Van Phuc 34 years of Binh Chau Village, Binh Son District, Quang Ngai Province, Vietnam pleaded guilty to three charges and was convicted on 27th January, 2017.
14. His first charge was that on 22nd December, 2016, within the fisheries waters of Laughan Island (Budibudi Island) in the Milne Bay Province being an Operator (Captain) of Foreign Fishing Vessel namely “QNG -90235 TS” did without a valid an applicable license caused other persons namely Tien Chanh and sixteen others (crews) to act on his behalf to harvest Sea cucumbers (Beche de mer) an activity for which a license is required under the Act (Fisheries Management) contrary to section 46 (1) (b) of the *Fisheries Management Act 1998* and thereby contravening Section 58 (1) (b) of the *Fisheries Management Act 1998*.
15. Secondly that being an Operator of Foreign Fishing vessel namely “QNG – 902335 TS” did use such vehicle to fish for Sea cucumber (Bech de mer) in PNG fisheries waters otherwise than under an access agreement and in accordance with a valid and applicable license contrary to Section 33 (2) of the *Fisheries Management Act 1998* and thereby contravening Section 58 (1) (d) of the *Fisheries Management Act 1998*.
16. Thirdly, that being an Operator of Foreign Fishing vessel namely “QNG – 902335 TS” to engage in processing Sea cucumbers (Beche de mer) an activity for which a license is

required under the Act (Fisheries Management) contrary to section 46 (1) (c) of the *Fisheries Management Act 1998* and thereby contravening Section 58 (1) (h) of the *Fisheries Management Act 1998*.

17. As was required of me upon the receipt of your pleas of guilt upon arraignment I read the contents of the Summary of Facts and having satisfied myself of the sufficiency of evidence for the charge and your subsequent plea accepted your plea of guilty and convicted you as charged. To gain a better understanding and appreciation of the facts giving rise to the charge and my reasons for sentence I adopt the statement of facts in the Police Statement of Facts and state them in the following paragraphs.
18. On Thursday the 22nd December, 2016, in the afternoon, PNGDF patrol boat HMPNGS Seeadler which was engaged in conducting surveillance inside Milne Bay waters for illegal fishing was directed to proceed Budibudi Island (also known as Laughlan Islands) 200 nautical miles Northeast from Alotau town, Milne Bay Province after an aerial surveillance aircraft sighted three (3) illegal blue boats and informed them about it.
19. HMPNGS Seeadler and her crews (naval officers) proceeded there to the said location where they sighted the first Vietnamese blue boats namely QNg 90235 TS (FFV#1) conducting her illegal fishing therefore they closed up on her at about 1400 hours using the Patrol boat assault craft to apprehend them but they (FFV#1) crews sighted them and escaped.
20. A hot pursuit ensued after the defendant (Operator) now before the Court namely Nguyen. Van. Phuc and his crews were unable to stop their FV (FFV#1) despite radio calls and hand signals were done for them to stop which were ignored resulting in some warning shots being fired but they still did not stop.

21. They continued on at full speed until more shots were fired into the wheel house window and as a result they slowed down and stopped at GPS position on latitude: 09° 16.93'S & longitude: 153° 34.74'E, they were arrested and the crews were transferred onto the Patrol boat where as the defendant (Operator) and a crew remained on board their FFV and were escorted to Misima by three PNGDF naval officers.
22. After this HMPNGS Seadler went after the other two Vietnamese blue boats namely QNg 90402 TS (FFV#2) and QNg 90767 TS (FFV#3) while the defendant's boat (FFV#1) was escorted to Misima with him and his crew.
23. At Misima, arrangement was made for the two Vietnamese blue boats to be taken to Alotau, the provincial township of Milne Bay Province and on the 23rd December, 2016, then left Misima for Alotau.
24. In Alotau, FFV#1 namely QNg 90235 TS where the defendant and his seventeen (17) crew was thoroughly searched and as a result the certain items were found on board, 1 x fishing vessel, 46 x 200 litres blue containers full with diesel, 54 x 200 litres blue containers full with sea cucumber (Beche de mer), 1 x Compressor, 14 x gas cylinders for cooking, 9 x pair of flippers, 8 x oxygen diving compressor hose (100 metres long), 15 x diving masks, 11 x diving suits, 1 x 1 inch size net, 25 x 20kg bags of rice, 32 x cartons of noodles, 1 x gas stove and 10 x 50kg bags of salt.
25. Most of those items are normally used to harvest and process sea cucumber during harvesting and processing of sea cucumber on – board which clearly indicated that they were illegally harvesting sea cucumbers without a valid license inside the waters of Milne Bay.
26. After that further arrangements were made for the two Vietnamese blue boats (FFV#1 and FFV#3) including all the crews were taken to Port Moresby for further processing

and on Thursday the 05th of January, 2017, the two boats including all crews were escorted to Port Moresby where they arrived on Sunday the 08th January, 2017.

27. Here in Port Moresby on 25th January, 2017, the defendant who was the Operator (Captain) of FV QNg 90235 TS (FFV#1) was cautioned before the three (3) charges of him causing his sixteen (16) crews to fish for sea cucumber, used FV QNg 90235 TS to fish for sea cucumber (beche der mer) and also had no access agreement to conduct such fishing activity had whilst knowing very well that they had no license to do that in PNG waters (Milne Bay) were pointed out to him where he freely admitted to them.
28. As a result he was formerly charged, told of the Constitutional rights and finally detained in the police cell awaiting court appearances for all the three charges.
29. The maximum penalty for offences under section 58 (1) (d) and (1) (h) of the *Fisheries Management Act 1998*: - *Maximum penalty in respect of a natural person, a fine not exceeding K500, 000.00 in default imprisonment for a term not exceeding five years.*
30. The antecedent report of the defendant shows that he is married with one child and is employed as an Operator (Captain) of the said fishing vessel and resides at his home village (Binh Chau). His record of previous convictions is unknown
31. I administered allocatus you and the following is a paraphrased summary of what you said:
 - You were sorry;
 - You apologised to the government of Papua New Guinea;
 - That what you did was wrong;
 - You would accept any punishment from the law;
 - This was your first time;

- You asked for a short term of imprisonment so you could go back to your wife and child in Vietnam.
32. The submission on sentence in response by the NFA prosecutor is summarily paraphrased in following manner:
- This is a very prevalent offence;
 - There was a need for a substantial amount of fine or a term of imprisonment of between 3 to 5 years to deter like-minded persons who be harbouring notions of illegally harvesting Papua New Guinea's fisheries products especially sea cucumbers;
 - That the Court order that the cost of the whole NFA operation that led to his apprehension be met by this defendant and his co-defendants and if they were not able to do so by a certain date then a term of imprisonment of 6 months be imposed as the NFA had expended a substantial amount of money in the whole operation before, during and after it;
 - The NFA prosecution has submitted the costing of the whole operation and the court is also in receipt from the prosecution a report from the National Agriculture Quarantine and Inspection Authority regarding their inspection of the said vessel in which they recommend its destruction by burning due to its infestation by vermin i.e rats and cockroaches and it not being in a good sanitation condition.
33. I ordered an inspection of the boat in the company of NFA officials and the defendant which was duly carried out on the afternoon of 27th January, 2017.
34. These brief submissions give this court some assistance as it determines the relevant issue and that is, what the appropriate sentence in your case is.
35. My practise of sentencing over last 10 years has been to adopt the practise in the superior courts which has been for the Supreme Court to give sentencing guidelines in the course of deciding criminal appeals or reviews. These guidelines often coined as 'starting points

for various types of cases'. The National Court then applies those starting points in the course of looking at the circumstances peculiar to each case i.e. identifying the aggravating and mitigating circumstances.

36. We in the District Court as a 'creature of statute' are obliged to adjudicate within the precincts of the empowering legislation, paying attention to and applying where appropriate the guidelines used for sentencing in the superior courts i.e. National and Supreme Courts.
37. In 2015 the total number of fisheries cases dealt with by District Courts in Papua New Guinea particularly in Daru, Alotau, Waigani, Madang, Wewak, Vanimu, Kokopo and Lae was 92. In 2016 the total was 202, an increase of 110 matters. Contraventions of the provisions of the *National Fisheries Management Act 1998* are not only prevalent but increasing exponentially in Papua New Guinea.
38. Again I have conducted a search for published judgments on sentences with respect to offences contrary to section 58 (1) (d) and (h) of the *Fisheries Management Act 1998* in our jurisdiction that would assist in terms of clear guidelines as to what appropriate considerations to be taken on board in arriving at a sentence but have found none that would be of assistance to me. Time and again over the last ten (10) years I have stated in numerous published verdicts on sentence of mine and I reiterate here for repetition is good for re-emphasis ***that in our jurisdiction this paucity of such published judgments in similar cases and in fact for other offences as well is regrettable as the development of guidelines and pertinent considerations for sentence is crucial if for reasons of uniformity and consistency.***
39. This paucity of relevant guidelines in our jurisdiction leaves me no option but to look for assistance in the superior jurisdiction and I find that in the pertinent judgment of the Supreme Court in *Kovi v The State* SC 789 (31/05/05) Waigani: Injia DCJ, Lenalia & Lay JJ to whom I am indebted.

40. The sentencing principles enunciated by the Supreme Court in this case in which it said in outlining them that the determination of an appropriate punishment for a particular case is an exercise of judicial discretion, the process involving the consideration of such factors as:
- [i] the serious of the offence;
 - [ii] the gravity or otherwise of the offence;
 - [iii] the personal circumstances of the defendant which aggravate or mitigate the punishment;
 - [iv] the interests of the community in ensuring the punishment achieves its purposes and thereby curtailing the use of a tariff.
41. There are sufficient Supreme and National authorities that provide that not only is sentencing a community responsibility but that it is incumbent upon the sentencing Courts in discharging this duty when exercising this people's power to reflect their attitude towards a particular offence and impose a sentence that is correspondent to it. *Acting Public Prosecutor v Don Hale* Sc 564, *The State v Irox Winston* (21/09/00) N2304.
42. Bearing in mind the sentencing principles enunciated by the Supreme Court in *Kovi v The State* (above) and *Acting Public Prosecutor v Don Hale* (above), *The State v Irox Winston* (above) I now proceed to address the main issue and that is what the appropriate sentence in the matter is.
43. To determine the appropriate sentence I will adopt Cannings. J's decision making process in *The State v Joe Sekin* [2006] CR 1592 OF 2000 which in its format is encapsulating in its effect and style and which I reproduce here:
- Step 1: What is the maximum penalty?
 - Step 2: What is a proper starting point?
 - Step 3: What is the head sentence for the offence?

- Step 4: Should the pre-sentence period in custody be deducted from the term of imprisonment?
- Step 5: Should all or part of the sentence be suspended?

STEP 1: WHAT IS THE MAXIMUM PENALTY?

44. The prescribed penalty for the three offences for which the defendant has pleaded guilty to and been convicted contrary to sections 58 (1) (d) and 58 (1) (h) of the *Fisheries Management (Amendment) Act*: - *Maximum penalty in respect of a natural person, a fine not exceeding K500, 000.00 in default imprisonment for a term not exceeding five years.*

STEP 2: WHAT IS A PROPER STARTING POINT?

45. In addressing what a proper starting point should be I adopt comments I made in a similar fisheries case of *Kenneth Andrew v Dennis Kokowei & 5 Ors* NF 01-06 (5/02/16), *“Again here I am handicapped by the paucity of appropriate relevant sentencing guidelines, trends and proper starting points in our jurisdiction which would be very helpful in terms of what I should consider as pertinent considerations in contemplating what sentence would best befit this crime. And the predicament I find myself in is largely due to the failure, reluctance or sheer indifference by courts in our jurisdiction to appreciate the importance of such aspects of sentencing and publish judgments in like offences if for two reasons, UNIFORMITY AND CONSISTENCY in sentencing! I am for the want of a better phrase “left to my own devices” so to speak”*. I will start from the half way point of K250, 000.00 or 3 years.

STEP 3: WHAT IS THE HEAD SENTENCE FOR THE OFFENCE?

46. In arriving at what the head sentence should be for the offences I take into consideration matters I consider to be aggravating in nature.

This case involved the deliberate and calculated illegal fishing of sea cucumbers (beche-der-mer) by the defendant which is in such high demand in the Asian market. In fact there have been successful prosecutions for breaches of this ban by foreigners and

nationals alike in this country by courts of the inferior jurisdiction and the defendant was well aware of this.

47. I consider the route and distance he took to reach PNG to be an aggravating factor because it demonstrated his determination to travel thousands of nautical miles to break our laws despite the long and dangerous journey in a small blue boat.
48. On Tuesday the 20th of September, 2016, his boat was part of a total of four Vietnamese blue boats left a Port called Saki situated in Quang Ngai Province, Vietnam. From that port, (Saki), they travelled 699.86 NM (1296.14 km) all the way to Philippines.
49. Another 1,209.42 NM (2239.85km) they took from Philippines to Malaysia and then all the way to New Caledonia where they covered another 4,001.93NM (7411.57km). In New Caledonia, it was alleged that they were harvesting sea cucumber (beche-der-mer) there and whilst doing that one of their blue boats was caught by the New Caledonia Authority and as a result three (3) of their blue boats with their captains and crews escaped and decided to come all the way to Papua New Guinea to fish for sea cucumber.
50. They travelled another 895.42 NM (1658.32km) from New Caledonia to Papua New Guinea where they were caught harvesting sea cucumber (Beche-der-mer) inside Milne Bay waters. The total distance that they covered travelling from Saki port (Quang Ngai), Vietnam all the way to Papua New Guinea was 6,806.63NM (12,605.88km)
51. The defendant was apprehended within the Territorial Zone which is limited by 12 nautical miles (nm) which is measured at the Lowest Astronomical Tides (LAT) in seaward direction from the shoreline or the reef showing above the chart Datum. This 12nm are sovereign waters of PNG. He was stealing beche der mer at a remote location at Budi Budi Island which was within our territorial waters and 200 nautical miles northeast from Alotau.

52. In order to gain an appreciation of the sheer magnitude of the problem of policing our territorial waters faced by PNG NFA, PNG Defence Force Maritime Element and RPNGC Water Police our geography should be noted and that is Papua New Guinea has 75% water mass and 25% land mass and of which Papua New Guinea has 14 maritime provinces, one more additional to make it 15 with the National Capital District considered as a Maritime District.
53. The coastline is more than 2,500 nautical miles with more than 750,000 square nautical miles of water which includes exclusive economical zone (EEZ) which also contains archipelagic waters considered as Internal Waters which further includes Territorial Seas, sovereign waters of PNG. In these waters, there are over 600 islands sparse out but grouped around certain areas in six (6) Maritime Provinces.
54. These islands in Papua New Guinea are remote and isolated with no habitants in some of these islands and it is this scenario that presents easy undetected movement of vessels such as Vietnamese blue boats to conduct illicit and illegal activities without much threat from the relevant authorities.
55. Given the lack of resources faced by these relevant authorities and their inability to provide a constant necessary deterring posture, continued breaches of the provisions of the *National Fisheries Management Act 1998* have occurred and Vietnamese blue boats are obviously well aware of this handicap and have increased their presence exponentially in our territorial waters and this defendant is part of this” blue boat invasion”.
56. Another matter which I consider to an important aggravating factor is that the beche-de-mer (sea cucumber) fishery was once worth K40 million in exports, with catches nearing 700 tonnes in 2006. The fishery is now closed because stocks have fallen to dangerously low levels as a result of illegal fishing. Bech-der-mer can fetch more than K50, 000 per

tonne. The raw product is dried and then sold to Chinese, Hong Kong, Singapore, Taiwanese, Malaysian, Korean, and Japanese markets. The illegal sector attracts massive profits with retail prices for dried bech-der-mer reported as high K500, 000 per tonne, as food medicine, and as an aphrodisiac. This makes an illegal fishing trip into PNG waters a potentially extremely profitable venture. Illegal fishing has destroyed this industry taking jobs and wages from ordinary PNG citizens in coastal communities. **PNG NFA JBB 2015.**

57. PNG is a nation of more than seven million people, with more than eighty percent of our population living in customary communities, with most of these communities along the coastlines of our more than 600 islands. These communities represent the human victims of fisheries crime who will suffer both economically and in terms of human health if our fisheries are no longer sustainable and no longer able to provide quality, healthy food. **PNG NFA JBB 2015.**
58. Because the potential profits from illegal fishing are so high, and because there are real human victims, fisheries offences need to be penalised at a level that is sufficiently harsh to create a deterrent effect to potential future offenders.
59. The facts of this case show that thousands of sea cucumbers were harvested. This harvesting of thousands of sea cucumbers was not a result a single act of diving done on one day by one person but the result of a devious plan of well-resourced and blatant dives over a period of time by a group of determined men on a mission. As a result I give this case on scale of one to ten a rating of eight out of ten on a scale of criminality or seriousness and this categorization places it in the worst category of cases. A head sentence of K50, 000.00 is appropriate or in default four years imprisonment with hard labour.

STEP 4: SHOULD THE PRE-SENTENCE PERIOD IN CUSTODY BE DEDUCTED FROM TERM OF IMPRISONMENT?

60. The defendant was arrested on the 22 December, 2016, for these offences and to date has been in custody for a period of 3 months and it is proper that that period be deducted from the total sentence.

STEP 5: SHOULD ALL OR PART OF THE SENTENCE BE SUSPENDED?

61. In the consideration of whether a custodial sentence should be suspended in part or in its entirety I have to decide which of these two options would enhance the personal deterrence, retribution and rehabilitation of the defendants.
62. To ensure the purposes of retribution and rehabilitation sentences should not be too lenient so as to firstly cause a disservice to the community by failing to deter such a defendant and secondly not adequately correspond to the gravity of the offence and having the resultant impact on the rehabilitation of the defendants.
63. In *St v Jason Dungoia (13/12/00) N2038* Kandakasi. J stated that “The usual purpose of criminal sentencing such as deterrence, restitution or rehabilitation are also relevant factors for consideration and so are requirements to carefully consider and take into account the factors for and against a prisoner before sentencing him or her”.
64. The facts of this matter show that on board the vessel which you were the operator or captain of were 46 x 200 litres blue containers full of diesel, 54 x 200litre blue plastic drums full of harvested sea cucumbers which were gutted and salted for preservation for the 7200 kilometre trip back to Saki situated in Quang Ngai Province, Vietnam.
65. The total dry weight of the catch of the two Foreign Fishing Vessel team of QNG 90235 TS and QNG 90767 TS of which your boat was a part of was 3158.85 kilograms or

3.15885 tonnes and its value in PGK was K1, 438, 606.10 or US\$ 467, 079.90. The breakdown of this is as follows:

Name	Dry weight	Value in US\$	Value in PGK
White Teat	2638.86 kg	US\$411,662.16	K, 307,111.00
Tiger (Leopard)	43.39 kg	US\$2,516.62	K7, 751.19
Black Teat	161.58 kg	US\$20,035.92	K61,719.87
Stone fish	82.30 kg	US\$82.30kg	K23,827.50
Prickly	193.30kg	US\$25,129.00	K77,397.32
TOTAL	3158.85kg	US\$467,079.90	K1,438,606.10

66. The facts also show that your modus operandi of harvesting sea cucumbers was the same as the one used by other blue boats which is rather crude and involved diving with the use of eight diving compressor hoses which were all 100 meters in length which allowed your divers to stay on the ocean floor for extended lengths of time fishing for sea cucumbers, certainly much longer than the more conventional method of using scuba diving air tanks. And again I repeat here what I said in another fisheries case involving a Vietnamese blue boat not so long ago on 1st July, 2016, in Alotau in the matter of *Jamie Maku v Dinh Van Tam* NFA 36/16, “that this method of diving though crude was ruthlessly effective” and in this instance netted the aforementioned catch and undoubtedly would have increased had not been for the excellent combined operation by the law enforcing agents from the National Fisheries Authority and Lieutenant Commander Douglas Inau and his crew of naval officers of HMPNGS Seadler of the PNG Defence Force Maritime Element despite dangerous odds and the aerial surveillance air craft, indeed all must be commended.
67. The facts also show that before your apprehension when you were first sighted at about 1400hrs you escaped apprehension by the Patrol boat assault craft and this ensured a hot pursuit. Radio signals and hand signals were used to signal you to stop but you and the other two blue boats continued to escape. This prompted the naval officers to fire shots

but despite this you persisted in your attempts to escape at full speed. Your actions necessitated shots being fired into the wheel house and this finally caused you to slow down until you stopped at the GPS position on latitude: 09° 16.93'S and 153° 34.74'E, and you were eventually arrested.

68. These circumstances are further aggravated by the fact you were part of a team of three boats who all attempted to escape apprehension and were only caught by the persistence and determination by the law enforcers at great cost, stress and hardship to them. Furthermore another aggravating factor is that the vessel was devoid of passports, seaman books or any form of identification of yourself and your crew and the vessel for that matter. It appears you spared little to avoid detection.
69. This operation was mounted of course at great expense to the State when the costs of logistics, the cost of the combined team leaving their normal day to day jobs to execute the operation and the prosecution of this matter are considered.
70. The cost to PNG NFA for this single operation which netted the arrest of this defendant and the other 49 defendants has been very high with a grand total of K473, 203.34 up to the 27th January, 2017, and this amount will no doubt increase. This money has been expended on officers involved in this operation particularly on travel allowance, accommodation, transport, interpreters, boats charters, sea going allowance, blue boat processing, fuel, rations and watch keeping of boats. This are funds which otherwise could have been used by NFA to fund its much valued community programs across this nation.
71. And it goes without saying that the State will continue to expand much needed resources on maintaining you when you are incarcerated.

72. This Court is asked to have regard to certain factors when determining a penalty by the empowering legislation. Section 58 subsection 11 of the *Fisheries Management Act 1998* reflects PNG's international law obligations and states that consideration may be given by the Court to the level of penalty imposed be adequate in severity to discourage further offences, and should deprive offenders of the benefits accruing from their unlawful activity. **PNG NFA JBB 2015**
73. A deterrent sentence is therefore called for to help deter you and other like-minded persons from committing this kind of offence. As a matter of fact as I sentence you today I note previous penalties of fines of K5, 000.00 and up to K20, 000.00 and prison terms of two years have not had the desired deterrent effect instead the opposite seems to be the order of the day and your arrest and conviction bear testimony to this. Given the trend and increased rate of offending by Vietnamese blue boats it is incumbent upon the court to act with determination and in direct correlation to this and so the sentences must increase proportionately.
74. I have taken into account your plea of guilty, your antecedents, your lack of prior convictions and your remorseful comments in allocatus, all factors which I consider to be mitigating in nature and in your favour, but against them are aggravating factors I have alluded to, and I find that those in your favour pale into insignificance when compared to those against you and this as a matter of law must be reflected in your sentence.
75. In your allocatus, you pleaded for mercy and cited the well-being of your family as the reason for your plea but let me tell you the following in response. The highest courts of this country the Supreme and National Courts have said that before anyone decides to embark on a life of crime, he or she must carefully consider the fact that if they are caught by the law and imprisoned it is their loved ones who are most vulnerable in such circumstances who will suffer the consequences of their incarceration. Therefore your plea for mercy though being appreciated by this court is rather misplaced in the circumstances.

76. In my view the option of a suspension of the entire sentence would not serve the purposes of criminal sentencing in the personal deterrence, retribution and rehabilitation of the defendants. Indeed the amended and increased penalty prescribed for this offence alone indicates two important factors that this Court must appreciate and they are firstly, that the concern and gravity which the people of this country through their legally mandated representatives in Parliament have for the contravention of this provision and secondly, it also expresses their concern for the preservation and protection of our flora and fauna and so this dictates that not only is sentencing a community responsibility but that it is incumbent upon the sentencing Courts in discharging this duty when exercising this people's power to reflect their attitude towards a particular offence and impose a sentence that is correspondent to it. *Acting Public Prosecutor v Don Hale (above)*, *The State v Irox Winston (above)*. Obviously previous sentences in similar cases have failed to stem the tide of foreigners eyeing our waters as easy pickings so what needs to be done to stem this flow is for the courts to impose increased sentences that directly correlate to the incidence of increasing number of Vietnamese blue boats or what is commonly known as the "blue boat invasion" plying our waters for beche de mer.
77. As a matter of fact you knew you were wrong in the first place coming here to steal PNG's sea cucumbers and you admitted to this fact when I gave you the opportunity to address this court in allocatus so I find your plea for leniency misplaced, self-serving and unconvincing. You have by your actions plotted and charted the course this court shall take with respect to your sentences. In addition to this it is interesting to note that when I administered allocatus to the defendant in the matter of *Jamie Maku v Dinh Van Tam* NFA 36/16 in July, 2016, the defendant and indeed all the other Vietnamese defendants then pleaded ignorance of our fisheries law and today a little over 6 months you have changed tack by choosing not to plead ignorance but to make admission and plea for mercy and leniency. It would seem that the message is circulating amongst crews of the Vietnamese blue boats about what to say in allocatus.

78. No court should be unnecessarily burdened in the exercise of their sentencing discretion by such principles, as no “disparity of sentence between co-accused” or no “quantum leap” for there is nothing legislated dictating this and they should be guided by the purposes of criminal sentences more than not., And so Courts should impose sentences that though might be viewed by some as “quantum leaps” or “disparity of sentence” are nevertheless sentences that correctly reflect the peculiar circumstances of a particular case. The authority for these sentiments was stated by Kandakasi. J in *St v Fabian Kenny (2002)N223*.
79. The three charges for which you have pleaded guilty to arise out of the same or closely related facts or “one transaction”, and I will treat them as part and parcel of the same transaction for purposes of sentencing.
80. I note that the “one transaction” rule dictates that where two or more offences are committed in the course of a single transaction, all sentences in respect of the offences should be concurrent. See *The St v Jacky Vutnamur and Kaki Kialo No 3 (2005) N2919* ; *The St v Lucas Soroken Sembengo, Bob Alois Wafu & Raphael Lawrence Mandal N2801* ; and *The St v A Juvenile, "TAA" (2006) N3017*. They were armed robbery cases but the same principles apply irrespective of the nature of the crime.
81. I am also conscious of the "totality principle", that when the court has arrived at appropriate head sentences and decided whether they should be concurrent or cumulative, it must look at the total sentence and see if it is just and appropriate. If it is not, one or more of the sentences should be varied to get a just total.
82. Having alluded to the above sentencing principles this court takes them into consideration when contemplating the appropriate sentences to impose on the defendant.
83. This Court is of the view that a concurrent sentence would correctly reflect the serious and peculiar circumstances of the immediate matter and corollary that it would not be

crushing on the defendant and indeed not manifestly excessive but just. These offences were committed by a man determined at all cost to break our laws. Offences of this nature are becoming commonplace along the remote coastal areas and islands of our country today and must be stamped out and in my adamant view its prevalence does not in any way or form lend it any legitimacy or credence.

SENTENCE

84. Nguyen Van Phuc having found you guilty of being an operator of a Foreign Fishing Vessel without a valid and applicable licence caused others to act on your behalf to harvest sea cucumbers, an activity for which a licence is required contrary to section 46 (1) (b) and contravening section 58 (1) (h) of the *Fisheries Management Act 1998* you are fined K50, 000.00 in default are to serve a sentence of four years imprisonment with hard labour.

85. Nguyen Van Phuc having found you guilty of being an Operator of Foreign Fishing vessel namely “QNG – 902335 TS” to engage in processing Sea cucumbers (Beche de mer) an activity for which a license is required under the Act (Fisheries Management) contrary to section 46 (1) (c) of the *Fisheries Management Act 1998* and thereby contravening Section 58 (1) (h) of the *Fisheries Management Act 1998* you are fined K50,000.00 in default are to serve a sentence of four years imprisonment with hard labour.

86. Nguyen Van Phuc having found you guilty of being an operator of a Foreign Fishing Vessel did use such a vessel to fish for sea cucumber in PNG fisheries waters otherwise than under an access agreement and in accordance with a valid and applicable licence contrary tp section 33 (2) of the *Fisheries Management Act 1998* contravening section 58 (1) (h) of the *Fisheries Management Act 1998* you are fined K50, 000.00 in default are to serve a sentence of four years imprisonment with hard labour.

87. The default terms of four years are to be served concurrently.

88. As you are still in custody the period where you have already spent 3 months in remand this period of time shall be deducted from this term of four years.
89. All exhibits are forfeited to the National Fisheries Authority pursuant to section 62 (1) of the *Fisheries Management Act 1998* and this includes the vessel QNG – 90235 TS.
90. In passing I strongly recommend that given the unsanitary condition and vermin infestation of the said vessel QNG -90235 TS that the National Fisheries Authority destroys it after 30 days.

Police Prosecution for the Informant

Defendant in person