IN THE SUPREME COURT OF NAURU **CASE NO 34 OF 2017**
AT YAREN
[CRIMINAL JURISDICTION]

Between: The Republic

APPELLANT

And: Ramon Gamboa

RESPONDENT

Before: Judge Rapi Vaai

APPEARANCES:
Appearing for the Appellant: S. Puamau

Appearing for the Respondent: A.Lekenaua

Date of Hearing: 14/9/18
Date of Judgment: 3/10/18

Judgment

1. This is an appeal by the Republic against sentence imposed on the respondent by the learned Magistrate for the seven offences of Obtaining Financial Advantage or Causing Financial Disadvantage by Deception.

2. The offences were committed over a period of fourteen days from the 2nd March to the 16th March 2017. The respondent pleaded guilty and was sentenced to 18 months imprisonment for each offence to be served concurrently.

3. The appellant now argues that the sentence was manifestly lenient.

The offending

4. The respondent was the financial controller of Capelle and Partner a commercial enterprise which operated inter alia a supermarket. One of the responsibilities of the respondent was to top up the cash of the ATM machine located within the supermarket when required. He did so by recording the amount of cash dispensed and cash rejected and inserting the new cassette of cash. The unused and rejected cash was then recorded and returned to the office.

5. On five occasions he took amounts between $5,000 to $9,700 by falsifying the recorded entries. On one occasion he stole $14,650 and on another he took $1,750. The total amounts dishonestly taken totaled $53,100.

6. When the offending was discovered, the respondent confessed to Capelle and Partner and to the police his wrong doing. He promised to reimburse and did pay back $33,885-68 before he was sentenced.
   A balance of $19,214.32 remains owing.

Sentence

7. The Magistrate considered and adopted the one transaction rule. He also identified the aggravating and mitigating factors. He then considered the culpability of the respondent and concluded three years imprisonment to be the appropriate sentence for each offence. This was based on the seriousness of the offending, the harm and loss caused or likely to cause, the pre-meditation as well as other aggravating factors. Three years he said was the maximum he could impose under the law.

8. The Magistrate then proceeded to consider other sentencing principles like the totality principle. He also considered section 279 (2) Crimes Act 2016.
   He says at paragraph 19:

> "I would sentence the accused to 3 years imprisonment for each offence and make the sentences concurrent but the court is required by section 279 (2) of the Crimes Act 2016 to take account of:

(o) the probable effect that any sentence or other order under consideration would have on any of the person's family or dependants.

He continued onto paragraph 20:

> "The defendant is a Filipino national who has not been able to see or be visited by his family for 8 months now since the offences were discovered. In *Senda v Republic (1975)* NRSC 7 Thomson CJ reduced the sentence of the defendant from 2 years to 12 months imprisonment on the grounds that he was the only Solomon Islander in Nauru and his sentence would be more onerous on him as his family would not be able to visit him. The Defendant is in a similar situation and I would reduce his sentence accordingly"

9. The Magistrate also considered and made further deductions for the fact that the Republic will be financially burdened to upkeep the respondent in the overcrowded jail.

10. He then sentenced the respondent to a total of 18 months imprisonment.

Appeal

11. The appeal against sentence is premised on the following grounds:
    (i) the learned Magistrate erred in law and in fact in finding that the respondent's offending formed a series to which the "one transaction rule" can apply.
    (ii) The learned Magistrate erred in law and in fact in first making a finding that the respondent offending formed a series to which the one transaction rule can apply even before arriving at a sentence on each individual count.
    (iii) the learned Magistrate erred in law in finding that the one transaction rule is imbedded in section 279 (2) (a), (b) and (c) of the Crimes Act 2016.
    (iv) the learned Magistrate erred in law and in fact on failing to properly take into account the aggravating factors of the respondent's offending.
    (v) the learned Magistrate erred in law and in fact in ordering that a sentence of 3 years imprisonment was appropriate for each count without paying particular attention to the different amounts stolen on each of the counts.
    (vi) the learned Magistrate erred in law in stating that the maximum sentence he could order was 3 years imprisonment when in fact the aggregate sentence he could order when passing sentence on a case with multiple counts is the maximum term of 6 years.
    (vii) The learned Magistrate erred in law and in fact in the application of section 279 (2) of the Crimes Act 2016.
    (viii) the learned Magistrate erred in law and in fact in considering the case of *Senda v. Republic (1975) NRSC 7* as the basis for reducing the Respondent sentence from three years to that of eighteen months.

(ix) at any event the sentence of 18 months imprisonment is in all the circumstances manifestly lenient.

12. The 9 grounds advanced by the appellant in my view can be broken down to three categories:

(i) the applicability and relevance of the one transaction rule;
(ii) the adoption of 3 years as the starting point of sentencing; and
(iii) the relevance of the consideration which reduced the final sentence to eighteen months.

In essence it is the final sentence of eighteen months which the appellant in its written and oral submissions claim to be manifestly lenient.

Or as submitted by the respondents' counsel, the nine grounds of appeal can be encapsulated into two issues which are:

(a) the sentencing principles and guidelines adopted by the learned Magistrate, and
(b) having adopted the said principle arrived into sentencing the respondent to a lenient sentence given the nature and quality of the offending.

The One Transaction Rule

13. Both counsels have comprehensively dealt with the rule in their written and oral submissions. The rule has been used in the Australian criminal jurisdiction to recognize the general sentencing principle that when a court imposes sentences for more than one offence arising out of a single transaction, the sentences should be concurrent: *Ruane v. The Queen* [1]

14. The one transaction rule, also known as one episode,[2] part of one transaction or episode of offending,[3] is one of the sentencing principles which assists the Judge in the proper exercise of his or her discretion.

15. It follows therefore that even where offences may be characterized as arising from one transaction, the Judge is not obligated to apply concurrent sentences if it results in a sentence which is manifestly inadequate. As stated in the often cited case of *R v. While:*[4]

> "There is no hard and fast rule. In the end a judgment must be made to balance the principle that one transaction generally attracts concurrent sentences with

[1] [1979] I A Crim R 284
[2] Pearce v. The Queen [1998] HCA 57
[3] Dickens v. The Queen [2004] WASCA 179
[4] [2002] WASCA 112 (26)

the principle that the overall criminal conduct must be appropriately recognized and that distinct acts may in the circumstances attract distinct penalties. Proper weight must therefore be given to the exercise of the sentencing judge's discretion."

16. The concept of a single transaction, continuing episode, part of one transaction or continuing episode has no satisfactory definition and will always remain somewhat unspecific. The matter is really one of degree. The appellant written submissions in paragraph 12 cited a decision of the Fiji Supreme Court in *Wong Kam Hong v. The State* [5] which recognizes the uncertainty.

> "Fox and Freiburg, the learned authors of sentencing: State and Federal Law in Victoria, 2nd ed , Oxford University Press, 1999 comment that the so called "continuing episode" or one transaction rule provides no simple guide. They say that for every case that can be cited to illustrate the rule, another can be found that provides an exception."

17. Wells J in *Attorney General v. Tichy*[6] also acknowledged the uncertainty of the concept. He observed at page 93:

> "The practice of imposing either concurrent or consecutive sentences cannot avoid creating anomalies, or apparent anomalies, from time to time."

He continued:

> "what must be done is to use the various tools of analysis to mould a just sentence for the conduct of which the prisoner has been guilty. Where there are truly two or more incursions into criminal conduct, consecutive sentences will generally be appropriate. Where, whatever the number of technically identifiable offences committed the prisoner was truly engaged upon one multi-faceted course of criminal conduct, the judge is likely to find concurrent sentences just and convenient. There are dangers in each course. Where consecutive sentences are imposed it may be thought that they are kept artificially apart where they should, to some extent, overlap. Where concurrent sentences are imposed there is the danger that the primary term does not adequately reflect the aggravated nature of each important feature of the criminal conduct under consideration."

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[5] [2003] FLR 382
[6] [1982] SASR 84

Should the One Transaction Rule Apply?

18. The appellant submitted that the Magistrate erred in adopting the rule to the criminal offending of the respondent. There were seven separate choate crimes; the respondent dishonestly and deceptively obtained and took money belonging to his employer causing financial disadvantage; and the premeditation involved in each count was a clear signal that each count should have been treated differently.

19. It was submitted (at paragraph 18 and 19 of submissions) that the ratio in *R. Faithful*[7] is clearly analogous to the present appeal so that the Magistrate was in error by focusing on form rather than the subject of the conduct.

    In *R v. Faithful* the accused had pleaded guilty to two counts of stealing as a servant. Count 1 involved theft of $18,152 between 1 April 1998 and 7 August 2003. Count 2 was in the same terms as count 1 (including the same period of offending) save that the amount stolen was $843,059. It was held:

    > "Each charge involved numerous individual thefts which increases the moral culpability of the conduct. I would characterize that as different invasions of the same legally protected interest rather than a single invasion."

20. The appellant also took exception to the Magistrate's remarks at paragraph 12 of his decisions:

    > "the defendants offences followed a single modus operandi, against one victim and took place over a 14 day period and formed a series to which one transaction rule can apply. Since the 7 counts were committed using one modus operandi and since he has repaid a large sum of money without details of which counts of the charge these repayments were applied to, I will use the one (sic) transaction rule to sentence the defendant."

21. Repayments of money by the respondent, the appellant argued, is a factor irrelevant when considering whether the one transaction rule applies.

22. It was also contended that the Magistrate erred in law when he considered the applicability of the one transaction rule first before he determined the appropriate sentence for each of the seven offences.

[7] [2004] WASCA 39

This submission is grounded in *Dickens v. The Queen*[8] which outlined the stages in sentencing which the judge should follow when determining whether the sentences for more than one offence should be cumulative or concurrent. The 3 stages are:

(i) Determine the appropriate sentence for each offence;
(ii) Assess whether the sentences should be made concurrent or consecutive; and
(iii) Review the total sentence to be imposed by reference to the principle of totality.

23. The respondent on the other hand submitted that failure to follow the sentencing process above should not in itself be an error of law. Counsel cited *R v. Symonds*[9] a judgment of the South Australian Court of Criminal Appeal which stated:

> "In *Major*[10] the court was not stating a process that must be followed in the sense that failure to follow it is itself an error of law in the sentencing process."

24. It was also submitted by the respondent that the offending satisfied the application of the one transaction rule.

The nature of the offending against the one complainant on seven occasions was similar over a relatively short period of time.

Reliance was placed in the decision of Milhouse CJ in *R v. Botelanga* [11] which concerned a defendant who pleaded guilty to 12 counts of forgery, 12 counts of uttering and 12 counts of obtaining money by false pretense which arose out of 12 incidents within 4 months. Total amount stolen was $78,644 and none was recovered.

On each count of forgery and of uttering a sentence of 12 months was imposed.

On each count of obtaining by false pretense (which attracts 7 years imprisonment) a sentence of 2 years, 3 months was imposed. Applying the one transaction rule the sentences were served concurrently.

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[8] Supra
[9] [1999]SASC 217
[10] [1998] 70 SASR 488
[11] [2010] NRSC 17

Consideration of the One Transaction Rule

25. If a series of offences are more closely connected in nature, time and circumstance they are more likely to be characterized as part of one transaction or episode of offending: *Dickens v. The Queen.*[12]
But the courts have also cautioned that offences committed over a short period of time may still require cumulative sentences: *R v. Harris.* [13]

26. The 7 counts against the respondent involved the 7 incidents of thefts over a period of 14 days using the same method. The case of *R v. Faithful*[14] can be distinguished on the basis that each charge involved numerous individual thefts over a lengthy period of time.

27. It was blatantly obvious to the Magistrate and to the appellant that the one transaction rule should apply.
The appellant acknowledged the applicability of the rule in its written sentencing submissions in the lower court. Paragraph 46 of the appellants sentencing submission says:

> "However since the offence is in series over a span of 8 days it would be appropriate for the court to make the sentences on each count served concurrently"

It was also submitted at paragraph 45 of the same submissions:

> "When these counts are viewed collectively as a series of offending within a short span of days, the offending should be regarded to be on the higher scale..."

28. The offences did not disclose distinct conduct, it was the same conduct repeated over a span of fourteen days; a one multi-faceted course of criminal conduct over a period of fourteen days. It could not be described as either sophisticated or prolonged.

29. It was proper to adopt the one transaction rule.

30. The submission by the appellant that failure by the Magistrate to follow the three stages of the sentencing process laid down in *Dickens v. Queen* resulted in an error of law is rejected.

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[12] Supra
[13] [2007] NSWCCA130
[14] Supra

Counsel for the respondent correctly submitted that failure to follow the process does not amount to an error of law. The process was commended not commanded by *Dickens v. The Queen.*

The point was clarified by the High Court of Australia in *Johnson v. The Queen* at [26]:

> "...The joint judgment in *Mill* expresses a preference for what should be regarded as the orthodox, but not necessarily immutable, practice of fixing a sentence for each offence and aggregating them before taking the next step of determining currency"

Sections 278 and 279 Crimes Act 2016

31. Purposes of sentencing which the court may impose are pursuant to section 278

(i) to ensure the offender is adequately punished
(ii) to prevent crime by deterring offender and other people...
(iii) to protect the community
(iv) to promote rehabilitation
(v) to make the offender accountable
(vi) to denounce conduct
(vii) to recognize the harm

32. Section 279 (1) requires the court to impose a sentence that is of a severity appropriate on all the circumstances of the offence.

Sections 279 (2) provides that in addition to any other matters, the court must take into account whichever of the following are relevant and known to the court:

(a) nature and circumstances of the offence;
(b) any other offences required or permitted to be taken into account;
(c) if the offence forms part of a course of conduct consisting of a series of criminal acts of the same or a similar character - the course of conduct;
(d) ...
(e) ...
(f) the effect of the offence on any victim;
(g) ...
(h) the degree to which the person has shown contrition for the offence by taking action to make reparation;
(i) if the person pleaded guilty;
(j) the degree to which the person co-operated in the investigation of the offence;
(k) the deterrent effect...

(l) the need to ensure that the person is adequately punished;
(m) ...
(n) the prospects of rehabilitation;
(o) the probable effect that any sentence or other order under consideration would have on any of the person's family or dependents.

33. The appellant contended that the Magistrate fell into error in holding that section 279 (2) (a) (b) and (c) Crimes Act 2016 embedded the one transaction rule into Nauru law.

34. It seems to be the understanding of the appellant that the Magistrate meant section 279 (2) (a) (b) (c) makes it mandatory for the court to adopt the one transaction rule to the exclusion of the other sentencing principles.

That is not the case. The Magistrate acknowledged and applied the totality principle. He also took into account other considerations required by Section 279 (2) to be taken into account.

35. Sections 278 and 279 codify and embrace into statutory form all the legal principles and rules of sentencing including the common law principles, the purpose of which is to assist the sentencing judge in the exercise of his or her discretion in the sentencing process, and to minimize or avoid unjustifiable discrepancies in sentences which in turn could lead to loss of public confidence in the sentencing process.

<u>The three years starting point and tariff.</u>

36. At paragraph 15 to 17 of the sentence, the Magistrate considered the culpability of the accused which he said was highest on the scale due the harm it caused, the premeditation and the aggravating factors. He then concluded at paragraph 17:

> "I have considered the seriousness of the offending the aggravating factors, the mitigating factors and all the circumstances of each offending which were the same for each count and consider that a sentence of 3 years imprisonment as appropriate.
> This is the maximum sentence that I can give for any offence."

37. The 3 years maximum imprisonment is enacted by section 7 Criminal Procedure Act ("the Act") which provides that the District Court may not pass sentence of imprisonment exceeding three years for any one offence.
But the appellant contended that the 3 years provided by the Act referred to the final sentence only, not the starting point of sentence.

Secondly, it was contended that pursuant to sections 8 and 9 of the Act the Magistrate can combine any two or more sentences provided the aggregate sentence does not exceed six years.

38. It was also submitted that the Magistrate fell into error when he took into account the mitigating and aggravating factors when he determined the starting point of sentence. The determination of the starting point should have focused on the objective seriousness of the offence alone. Aggravating and mitigating factors are then subsequently considered to upgrade or lower the starting point of sentence.

39. The 3 year starting point adopted by the Magistrate was conceded to by the appellant as the acceptable starting point because in the appellants view it was within the tariff, but not because of the reasons given by the Magistrate. A range of between 2 to 5 years was proposed by the appellant as appropriate for Nauru, which according to the appellant, has no available tariff.

40. The suggested tariff was considered suitable after consideration of two Fijian authorities on sentencing for similar offending.
The first one is *State v. Sharma*[15] which held that the tariff for obtaining a pecuniary advantage by deception under the new penal code should be 2 to 5 years with 2 years reserved for minor offences with little and spontaneous deception. The top end of the range will obviously be reserved for fraud of the most serious kind where a premeditated and well planned cynical operation is put in place.

The second case is *Koroivuki v. The State*[16] in which the Supreme Court said:

> "In selecting a starting point, the court must have regard to a objective seriousness of the offence. No reference should be made to the mitigating and aggravating factors at this stage. As a matter of good practice the starting point should be picked from the lower or middle range of the tariff.

Discussion of the Starting Point of Sentence and Tariff.

41. Section 8 of the Criminal Procedure Act 1972 is subject to the provisions of the Criminal Code 1899 and any other written law.

The Crimes Act 2016 is one of the written law which empowers the court to pass sentence. It also provides for the purpose of sentence as well as sentencing considerations (sections 277-282.)

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[15] (2010) FJHC 623
[16] (2013) FJCA 15

42. Section 8 of the Criminal Procedure Act empowers the court to combine two or more sentences authorized by law to pass on particular offence. If for instance an offence is punishable by a term of imprisonment or a fine or by performing community work, the court can impose one of the sentences or combine 2 or all of them.

    Section 9 (3) then provides that if the District Court pass imprisonment sentences to be served cumulatively the aggregate of the sentence shall not exceed 6 years.

43. Section 9 does not come into play as contended by the appellant for the very simple reason that the sentences imposed by the Magistrate were to be served concurrently. Concurrent sentences were also suggested by the appellant in the lower court and in this appeal. In any event a combination of sentence in the form and manner contended by the appellant is contrary to section 9 of the Act and would result in a severely crushing sentence. To achieve the result desired by the appellant was for the Magistrate to impose a lesser separate sentence for the offence involving the theft of the smallest amount of $1,750 to be served cumulatively with the other 6 offences.
    No such proposition was made.

44. In the determination of the starting point of sentence I agree with the appellants that the Magistrate should focus on the culpability of the accused; the objective seriousness of the offending and the harm caused or likely to be caused. Aggravating and mitigating factors are them considered to upgrade or lower the sentence.

45. I do however disagree with the appellant's contention that Nauru has no tariff and a tariff of 2 to 5 years was appropriate.

    Millhouse CJ did set the tariff in 2010 in *Republic v. Botelanga*[17] in which the accused, an employee in the Department of Finance pleaded guilty to 12 counts of forgery, 12 counts of uttering and 12 counts of obtaining money by false pretense. Obtaining money by false pretense has a penalty of up to 7 years imprisonment. A total of $78,644 was stolen over a period of 4 months and none was recovered.

    A sentence of 2 years and 3 months was imposed for obtaining money by false pretense after making deductions for the guilty plea and first offender status.
    The final sentence of 2 years and 3 months suggests a starting point of sentence of about 3 years to 3 years 6 months.

[17] (2010) NRSC 17

46. Although it is helpful to look at other jurisdictions for assistance in setting the tariff, caution must be taken as the maximum penalties for similar offending may be different, the prevalence of similar offending would undoubtedly also be different. The maximum penalty in Fiji is 10 years imprisonment which justifies a tariff of 2 to 5 years for Fiji.

47. The offence of obtaining money by false pretense or obtaining financial advantage by deception is obviously a very rare offence in Nauru and cannot be described as prevalent as in other jurisdictions.
A starting point of 2 years to 3 years 6 months is the appropriate tariff.

48. It therefore follows that the 3 years adopted by the Magistrate was within range. It is at the higher end of the scale due to the objective seriousness of the offending. The culpability of the respondent considered by the Magistrate was highest on the scale.

Final sentence of 18 months

49. With a starting point of 3 years considered to be appropriate, the appellant submitted that the Magistrate should then take into account the aggravating factors like:
    (a) Serious breach of trust;
    (b) Total loss of $19,214.52; and
    (c) Cynical premeditation.

    which warranted a condign increase in sentence.

    Thereafter a reduction for the respondents' guilty plea should be made.

    After deduction for the guilty the appellant submitted at paragraph 64:

    > "It was at this point the learned Magistrate needed to take into account the one transaction rule and the overall totality principle of 6 years ... in respect of multiple convictions... and the maximum statutory penalty of 7 years on respect of each individual count- a sentence of 3 – 5 years would intuitively be appropriate in light of the overall criminality exhibited by the respondent."

50. It was also contended that the Magistrate made an error when he discounted the sentence from 3 years to 18 months to account for the probable effect of the sentence on the respondent's family.

Discussion of the final 18 months sentence

51. The 18 months discount from the 3 years sentence was for the probable effect of the sentence on the respondents family (paragraph 20 of the sentence) and for the fact that

the government of Nauru will have to expend taxpayers money to keep the respondent in prison.
I agree with the appellant that the reduction was not warranted nor justified under section 279 (2) Crimes Act.
And if warranted, it was manifestly excessive.

52. The contention by the appellant that the 3 years sentence should be upgraded to account for the aggravating factors of serious breach of trust, total loss of about $19,000 and cynical premeditation is also not justified. These factors play a role in the determination of the culpability of the respondent and are relevant on considering whether the offending was at the lower or higher point of the tariff. Three years is at the higher end of the scale, correctly so due to the breach of trust and premeditation.

53. The guilty plea by the respondent calls for reduction in the sentence as the appellant correctly submitted.

    Guilty plea at the earliest opportunity or fast track plea as it is known in jurisdiction like Australia has attracted reductions of 25% to 35%
    In *Chad Johnson v. The Queen*[18] it was recognized at paragraph 23:

> "To give the appellant the benefit of the so called 'fast track plea' a benefit which was in recognition of his early plea of guilty, was a recognition which all criminal jurisdictions in this country afford to accused persons in various ways and in varying degrees according to the circumstances from time to time".

54. The respondent was entitled to 12 months reduction in sentence to account for his guilty plea.

    He is entitled to further reductions for other considerations which the court must consider pursuant to section 279 (2) Crimes Act. Those considerations include:

    (i) the degree to which the person has shown contrition for the offence by taking action to make reparation
    (ii) the degree to which the person co-operated in the investigation of the offence
    (iii) the prospects of rehabilitation

[18] (2004) HCA 15

Four months reduction for the above mitigating factors would in my view be justified in the circumstances which leaves an end sentence of 20 months.

Since there was abuse of trust, other factors like good character, first offender status, and the impact on the respondents' family have very little in mitigation because of the expressed need for a general deterrent sentence. (See Warner on sentencing, 2ED, paragraph 12.205). Costs and expenses to keep the respondent in prison does not factor at all in the sentencing process.

There are no aggravating factors personal to the respondent which warrants an upgrade to the sentence.

55. But the court, when dealing with multiplicity of offences, must not content itself by doing the arithmetic and passing sentence which the arithmetic produces.
It must look at the totality of the criminal behavior and ask itself what is the appropriate sentence for all the offences: *Mill v. The Queen.*[19] Applying the totality principle, the 3 year sentences for each offence which the appellant accepted as the starting point and which the Magistrate adopted (for different reasons) was the appropriate sentence.

The end sentence of 18 months is in line and within range with the sentence of 2 years and 3 months imposed in *Republic v. Botelanga.*[20] The mitigating factors in favor of the respondent justified a lesser sentence than the one imposed in *Republic v. Botelanga* and cannot be labelled as manifestly inadequate.

Results

1. The appeal is dismissed
2. Costs follow the event. Appellant to pay costs of $1000.

Dated this 3rd day of October 2018

Judge R. Vaai

SUPREME COURT OF NAURU

[19] (1988) 166 CLR 59 at 63.
[20] Supra