

IN THE COURT OF APPEAL OF
THE REPUBLIC OF VANUATU
(Criminal Appellate Jurisdiction)

Criminal Appeal Cases No. 11, 12, 13 and 14 of 2008

BETWEEN: PUBLIC PROSECUTOR
Appellant

AND: LOPEZ ADAMS
JAMES WETIES
MALON HOSPMANDER
ANDRE LESINES
Respondents

Coram: Hon. Justice Vincent Lunabek, Chief Justice
Hon. Justice John William von Doussa
Hon. Justice Ronald Young
Hon. Justice Oliver A. Saksak

Counsels: Mr. Bernard Standish for the Public Prosecutor
Mr. Hillary Toa for Respondent James Weties
Mr. Malcom for Respondent Malon Hospmander and Andre Lesines
Mr. Nalyal for Respondent Lopez Adams

Date of Hearing: 25 November 2008

Date of Decision: 4 December 2008

JUDGMENT

Introduction and background

These four separate appeals by the Public Prosecutor against the adequacy of sentence imposed in the Supreme Court were heard together by this Court.

Facts

From 21st May 2007 until 10th July 2007 a criminal enterprise involving forgery of cheques drawn by the Government of Vanuatu, and obtaining money by deception was perpetrated in Port Vila. The forgery involved fraudulent alteration of legitimately drawn cheques by changing the name of the payee and grossly inflating the amounts of the cheques. A total of 7 cheques were forged in this way. Six of the cheques were deposited into accounts and funds were then drawn upon. The presentation of the 7th cheque on 10th July 2007 resulted in the

discovery of the criminal enterprise and charges were preferred against 8 alleged participants.

The ringleader and mastermind of the criminal enterprise was one Salendra Sen Sinha, an Indo-Fijian who arrived in Vanuatu in late 2005. When the criminal enterprise was discovered, Salendra fled Vanuatu and returned to Fiji. He was on bail for other unrelated offences. He has not been returned to Vanuatu, despite request for extradition to face trial on charges arising from their criminal enterprise. However all the others who were alleged to have been involved with Salendra in the criminal enterprise stood trial in his absence.

Police laid charges in relation to individual cheques. Initially separate trials were conducted before Tuohy J., but subsequently matters were amalgamated and heard together. Verdicts were delivered on 11th March, 14th March, 15th April and 11th July 2008 respectively. Five persons were found guilty of charges arising out of the criminal enterprise namely: Lopez Adams, James Weties, Malon Hopsmander, Andre Lesines, the current respondents and Sandie Leo. There is no appeal with respect to Leo's sentence.

After the verdicts but prior to sentence Lopez Adams and Sandie Leo appealed against their convictions. This Court (differently constituted), dismissed those appeals on 25th July 2008.

On 5th August 2008 Tuohy J. sentenced the respondents as follows:-

Sandie Leo: to 3 years and 9 months imprisonment and a compensation order of VT70,000 for 12 counts of; uttering a forged document, obtaining property by deception and false pretences.

James Weties: to 2 years imprisonment on 5 charges, two of uttering a forged document, one of aiding a forgery, one of obtaining money by deception and one of obtaining money by false pretences;

Malon Hopsmander: to 15 months imprisonment and compensation order in the amount of VT90,000 on two counts of aiding a forgery;

Lopez Adams: his sentencing was adjourned to give him the opportunity to pay compensation on 7 October 2008. Dawson J. sentenced Adams to 12 months imprisonment together with compensation of VT4,800,000 on one count of aiding forgery.

Andre Lesines: compensation order of VT250,000 and 250 hours of community work on one count of aiding forgery.

The sole issue for the Court is whether the sentences were manifestly inadequate.

Overall offending

We first consider the overall culpability of the respondents and then each individual respondent. The appellant's case was that the judge had correctly identified the seriousness of this offending in his sentence of three years nine months imprisonment with respect to Sandie Leo. The appellant submitted that the culpability of Weties, Adams and Hospmander was at a similar level to Leo. The Prosecutor accepted Lesines' offending was at a lower level of responsibility but submitted a prison sentence was still justified for this offender. The appellant's case was that the judge failed to recognize the seriousness of the offending given that significant sums had been fraudulently taken by the respondents as a result of this offending. Counsel submitted the judge over emphasized the mitigating features.

We agree that there is little to choose between the culpability of Weties, Adams and Hospmander. Each had their own particular aggravating features. Weties was involved in more than one cheque fraud, Adams profited by some VT4.9 million and Hospmander used cheques received in his capacity as a member of parliament to defraud the state.

We do not however accept that on this State appeal the sentence imposed on Leo sets the benchmark for offending by Weties, Adams and Hospmander. The total sum involved in these frauds was over VT40 millions. This was therefore fraud on a large scale. Other than Salendra none of the respondents were involved in all of the dishonesty. However very little compensation (less than VT4 million) has been paid.

Counsel for Adams provided a useful schedule of the sentences imposed for major fraud cases in Vanuatu over the last 15 years or so. We reproduce this schedule as a useful annexure to this judgment to illustrate sentencing levels for such fraud. However each case has its own particular features making close comparison of ultimate sentences difficult.

James Weties

A Mr. Charley Sau received a legitimate cheque for VT20,000 from the Vanuatu Government. He sold the cheque to Salendra. Salendra altered the cheque to VT7,500,000 and made the payee Weties. Weties deposited the cheque into his account. Later he withdrew most of the money from his account and paid it to Salendra. Weties also assisted Salendra in another cheque fraud involving Leo by photocopying a cheque to facilitate the forgery.

Thirdly an MP Dunstan Hilton received a cheque from the Government for VT500,000. Somehow the cheque came into Salendra's hands. He altered the amount of the cheque to VT3,905,000 and the payee to Weties. Weties deposited the cheque into his account and shortly afterwards withdrew the whole amount paying most to Salendra.

Through Weties actions VT11,6 million was unlawfully obtained. It was accepted Mr. Weties personally profited by VT1 million. Salendra received the remaining money. Mr. Weties must be credited with paying VT440,000 in compensation. This was money still in a bank account which the judge ordered be paid to the state.

Two years imprisonment was a lenient sentence. However as the judge remarked Mr. Weties had a crime free past and a good record as a citizen. The judge accepted he was deeply remorseful for his actions and had paid all the compensation he could possibly pay. While at the very bottom of the range available to the judge for sentencing for this offending we do not consider 2 years imprisonment was outside of the range available to the judge.

Lopez Adams

The state filed appeals against the sentencing decisions of both Tuohy J. and Dawson J. The appeals are against the inadequacy of the prison sentence. The prison sentence was imposed by Dawson J. and it is therefore that sentence that is the subject of the appeal.

Justice Tuohy took a somewhat unorthodox procedure with respect Adams' sentencing.

The facts established that Adams had legitimately received a cheque from the government for VT78,500. He gave the cheque to Salendra. Salendra changed the amount to VT8,760,000 and gave it back to Adams. Adams banked the cheque and kept VT4,950,005 for himself and gave the rest to Salendra.

The judge considered Adams was the most morally culpable of all the respondents. He described him as an educated, intelligent man, who could not possibly have claimed Salendra duped him. He pointed out Adams had received the largest sum of all the respondents.

The respondent's counsel at sentencing suggested Mr. Adams could pay compensation for the full amount received by him *"quickly if he had the chance to sell assets"*. The judge therefore adjourned his sentencing for three months. He said *"I'm going to handle your case in this way, Mr. Adams. I'm going to adjourn the sentence for you. I'm going to make a compensation order now that you make a payment of VT4,8 million within two months from today. If that compensation payment is not made, I indicate to you now that your sentence will be 12 months imprisonment. If that compensation payment is made then the Court will consider a sentence which does not carry immediate imprisonment, community work of the highest possible amount and a suspended sentence from imprisonment."*

It was open to the judge to adjourn sentencing to give Adams a chance to make a substantial compensation payment. It was in the interests of the people of Vanuatu to have some of their money back and relevant to sentencing if a

substantial compensation payment was made. What however was not appropriate was for the judge to specify exactly what sentence would be imposed at the expiry of the two months depending upon whether the compensation payment was made or not. This approach created a particular difficulty in this case because Justice Tuohy was not available for sentencing after the two months. Justice Dawson completed the sentencing.

As it turned out at the expiry of the two months no compensation payment had been made. While Adams was only involved in one successful fraud it involved a very large sum of money, almost VT11 million. This was similar to the total amount involved in Weties' dishonesty. Adams received a large amount of money personally, some VT4.9 million, from the dishonest transaction. For all practical purposes Adams has paid no compensation although he appears to own assets valued at many times the compensation order. We acknowledge after the hearing of the appeal Adams paid VT330,000. While he is entitled to some credit for payment of this sum it is less than 10% of the compensation ordered and less than 5% of the total loss caused by him.

Finally as the sentencing judge remarked Adams was an intelligent aware businessman who must have understood from the beginning this was a substantial fraud on the government of Vanuatu.

We consider therefore Adams' culpability to be similar to that of Weties. Adams' sentence of 12 months imprisonment was therefore in our view manifestly inadequate. We have concluded that 2 years imprisonment imposed on Weties was at bottom of the range available to the Court. We therefore quash Adams' sentence of ~~12~~² months imprisonment and substitute instead a sentence of 2 years imprisonment.

Malon Hospmander

Hospmander was a Member of Parliament at the relevant time. He was convicted in relation to two cheques. The first was a Member's allocation cheque issued to him on behalf of the Unua Community for the sum of VT 500,000. This cheque was sold to Salendra by Hospmander for VT1,000,000. The respondent Lesines acted as a conduit between Hospmander and Salendra. The cheque was altered by Salendra from VT500,000 to VT 11,805,000. The second cheque was for VT500,000 payable to another member of Parliament Noel Tamata. This was given to Mr. Hospmander who sold it to Salendra for VT1,000,000. He kept part of the money for himself. Salendra altered the cheque to VT26,800,000 however the fraud was discovered before he could cash this cheque.

The Public Prosecutor submitted that this sentence was manifestly inadequate on the same grounds advanced in relation to Adams and Weties.

The judge did not consider that Hospmander's offending was as extensive as Leo or Weties. The judge identified the serious aggravating feature that the cheques

that were used were received by Hospmander not in his personal capacity, but as an MP for his community.

It is true that this respondent did not commit as many individual instances of dishonesty as Leo or Weties. Nor did he receive as much money as Adams from the fraud. However his actions caused a loss of VT11 million to the government of Vanuatu. He profited in the sum of VT1 million. Most seriously he used his position as an MP, a position of high trust in the community, to defraud the very people he had been elected to serve. The compensation ordered to be paid by him was for less than 10% of the sum he received and less than 1% of the sum he helped to defraud the government of. Although in his case there are different aggravating features we also consider his culpability to be at a similar level to Weties and Adams. We therefore quash the sentence of ~~12~~¹⁸ months imprisonment and substitute one of 2 years imprisonment. ✓

Andre Lesines

Lesines, at the relevant time, was a political advisor to the Ministry of Foreign Affairs and thereby part of the parliamentary system and in a position of trust. Lesines acted as a go-between between Salendra and Hospmander. He received VT250,000 for assisting in the fraud committed by Hospmander. The judge concluded that Lesines knew, when he acted as the go-between, that Salendra was going to dishonestly alter the parliamentary cheque.

Ordinarily such dishonesty would justify a short term of imprisonment. The respondent breached his position of trust by facilitating the defrauding of the Government of Vanuatu for personal reward. While he offered compensation when the matter came for sentence he had paid no compensation despite apparently having assets of VT10.5 million.

The judge acknowledged Mr. Lesines had shown remorse. However, that can have little effect on sentence given he pleaded not guilty and denied his involvement in the offending and the judge found he lied at trial.

In the circumstances however, given that this is a state appeal, we think it would now be unfair to impose a short prison sentence in place of the community work sentence he received. Therefore we dismiss the state appeal relating to Mr. Lesines.

In summary therefore:-

1. With respect to Weties the Public Prosecutor's appeal is dismissed;
2. With respect to Adams the Public Prosecutor's appeal is allowed. The sentence of 12 months imprisonment is quashed and a sentence of 2 years imprisonment is substituted;

3. With respect to Hosprmander the Public Prosecutor's appeal is allowed. The sentence of 15 months imprisonment is quashed and a sentence of 2 years imprisonment is substituted;
4. With respect to Lesines the appeal is dismissed.

All compensation orders remained as imposed in the Supreme Court.

Finally we wish to observe that those who defraud the public purse in such a serious way can expect deterrent sentences well beyond those imposed in this case in the future. When the Government is defrauded all of the people of Vanuatu loose. The substantial funds stolen in this case could no doubt have been used to improve the lives of many citizens of Vanuatu. This illustrates how seriously aggravating such thefts are and why deterrent sentences are called for.

DATED at Port Vila, this 4th day of December, 2008.

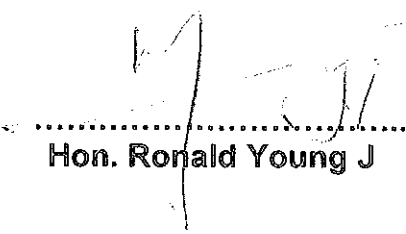
BY THE COURT



.....
Hon. Vincent Lunabek CJ



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Hon. John W. von Doussa J



.....
Hon. Ronald Young J



.....
Hon. Oliver Saksak J

Summary of convictions found in Vanuatu case law

Case	Charges	Amount involved	Period over which fraud took place	Position of Trust?	Sentence		Quotes
					Prison	Restitution	
Public Prosecutor v Tureleo [1995]	Fraud	6 million vt	12 months	Yes (Public Servant)	2 years	Yes	"a gross breach of trust by a senior and trusted employee working in a Government Department, which involves a very considerable sum of money over a lengthy period of time"
Public Prosecutor v Sope Maautamate [2002]	Forgery	USD 5 million + USD 18 million Breach of Leadership Code		Yes (Member of Government)	3 years (pardoned after 3 months and 3 weeks)	No	"The higher up in government a person goes the greater that trust. These forgeries were able to be carried out as a result of the position you held. That is a gross breach of trust. It brings disgrace upon yourself and it brings disgrace upon the country as a whole and the people."
Public Prosecutor v Ravolou [2003]	Misappropriation	4,178,002 vt	19 bank customers, personally known to the defendant. Committed both multiple (7-10) and one-off offences against a same client.	Yes (senior banking officer)	2 years	No	"The defendant holds one of the senior positions in the National Bank of Vanuatu. It is unfortunate to see that the defendant has abused that position for her self-gain. The objective seriousness of her offending is high in terms of her breach of trust."
Public Prosecutor v Kalo [2001]	Insurance fraud	22,467,040 Vt	2 years	Yes (Insurance Agent)	46 months (1 month per count of	No	The defendant [...] is in a position of privilege and trust and has used that trusted

											<p>position to defraud the insurer of a considerable sum of 22,467,040 Vt during a period of 2 years.</p> <p>"The defrauded amount of 22,467,040 Vt is extraordinarily substantial, and the period of 2 years is quite a lengthy one."</p> <p>"the quality and degree of trust reposed in the offender including his rank. Clearly a greater degree of trust and a higher rank means the offence is more serious"</p> <p>"the monetary value is not the only factor to bear in mind"</p>		
Public Prosecutor v Mala [1996]		1,770,000 Vt	2 years		Yes	3 months	Yes				Yes		
Public Prosecutor v Marae [1996]	Misappropriation	1,348,000 vt Re-offender	12 months		Yes	9 months	Yes	100 000 vt / month					
Public Prosecutor v Rasu [2005]	<u>Pako Tamata:</u> Aiding & Abetting Theft; Receiving money dishonestly		13 counts		Yes	32 months Suspended	No						
	<u>Eric Lapi</u> Attempted aiding & abetting	756,325 vt				12 months Suspended	No						
	<u>Patricia Rasu</u> Forgery Theft	4,452,419 vt	3 months 33 counts		Yes	3 years	No						

	<u>John Jack</u> Aiding & abetting Being an accessory Receiving property dishonestly					32 months Suspended	No	"You are a first-offender. You have a business which is helping people in Laganville & contributing to the economy of this Country"
Public Prosecutor v Ehdvaun [2004]	Forgery Theft Misappropriation	865,179 Vt	6 months 30 counts	Yes (Treasurer of the Central Credit Union)	6 months Periodic detention	Yes 14 000 vt / month	Yes	"The misuse and misappropriation of monies while entrusted in the position of Treasurer of the CCU is an aggravating feature"
Public prosecutor v Benjamin, Paul and Tau [1994]	<u>P. Benjamin</u>	2,508,659 Vt	"A considerably [longer] period than [4 months]"	Yes (Bank Employee)	2 years	Yes	Yes	"The scheme thus described, was deliberate and sophisticated. It was conducted by the defendants using the knowledge that they had gained as part of their training in the Bank"
	<u>S.Paul</u>	4,939,882 Vt	"A considerably [longer] period than [4 months]"	Yes (Bank Employee)	2 years	Yes	Yes	"...It was conceded in submission and I think correctly, that the magnitude of these offences, the systematic way in which the offences were carried out and therefore dishonesty that this reveals means that even though they are first offenders, jail is inevitable. I add that the breach of trust involved is a significant feature in this case."

	J. Tau	530,000 Vt	4 months	Yes (Senior position in a Bank)	1 year Suspended	Yes	<p>"Of great significance in Mr Tau's case, is the fact that he was not the designer of the scheme here. Had it not been commenced by the other two, it is extremely unlikely that he would have offended at all."</p>
Public Prosecutor v Gama [2005]	Theft Misappropriation	18,660,386Vt	3,5 years 148 counts	Yes (team leader/supervisor in a bank treasury department)	8 years	No	<p>"After all, this was sophisticated systematic and calculated course of action over a lengthy period demonstrating premeditation, planning and plain avarice"</p> <p>"Clearly a greater degree of trust and a higher rank means the offence is more serious"</p>