

IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU
PORT VILA

CRIMINAL CASE No. 14 of 1994

DATE :28th April, 1994

CORAM:	KENT J.
PROSECUTOR :	MR J. BAXTER-WRIGHT
DEFENCE:	MR S. JOEL for Petersen Benjamin and Simeon Paul MR. J. MALCOLM for Johnstone Tau

DEFENDANT/S

PUBLIC PROSECUTOR against

PETERSEN BENJAMIN;
SIMEON PAUL and
JOHNSTONE TAU

CHARGE:	MISAPPROPRIATION S 125(b) Penal Code Act CAP 135
PLEA:	ALL ACCUSED - GUILTY

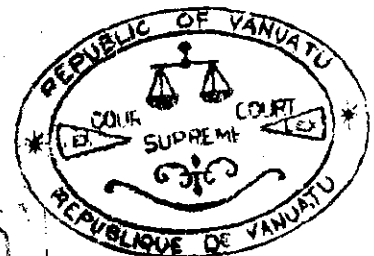
REMARKS:

Upon the application of the Learned Prosecutor, the information was amended, by reducing the amount appropriated to 8,078,541VT. The notes of evidence indicate that the prosecution did not insist that each of the accused actually shared equally in the monies taken and that Johnstone Tau, was not involved in the scheme at the beginning.

An opening was heard and pleas made upon behalf of each of the accused. They were remanded for sentence until today.

SENTENCE

1. Petersen Benjamin - Imprisonment for 2 years
2. Simeon Paul - Imprisonment for 2 years



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3. Johnstone Tau - Imprisonment for 1 year, suspended for 2 years.

RESTITUTION

1. Petersen Benjamin - You are ordered to pay restitution in the sum of 2,508,659VT, recoverable as a civil debt.

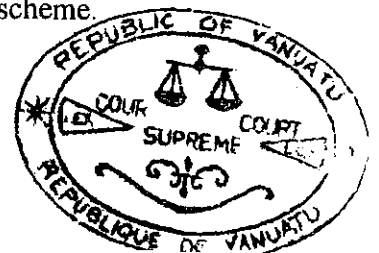
2. Simeon Paul - You are ordered to pay restitution in the sum of 4,939,882VT, recoverable as a civil debt.

3. Johnstone Tau - You are ordered to pay restitution in the sum of 530,000VT, within

REASONS FOR SENTENCE.

The charge before the Court and against all three defendants, alleges that between April 1992 and January 1993, the defendants, all employees of the Westpac Bank, Port Vila, misappropriated the amount of 8,078,514VT, the property of the Bank. I shall briefly set out the manner in which this money was misappropriated. It was not alleged that all the money was taken at the one time. Rather, what is alleged is a continuing and systematic series of stealing of funds from the bank. Without going into the fine detail of the banking system, within which framework the offence was committed, it is sufficient to say that the scheme involved foreign currency transactions, where customers of the bank, bought, in one way another, foreign currency, using their personal cheques, being vatu currency accounts. As the transactions involved foreign currency, there was a delay in the final processing of the complete transaction. Because of this delay, it was possible to incorrectly process the cheques, presented as payment for the foreign currency, be they bank drafts or travellers cheques and to process the cheques, as if they had been cashed at the bank. The cash was then taken, by one or other of the defendants, Mr Benjamin or Mr Paul. The delay in processing the foreign transactions, allowed for time for a subsequent misappropriation to take place and to provide the funds to apparently cover, within the system, the earlier misappropriation. Thus an ongoing and snowballing process was commenced.

The scheme was devised by Mr Benjamin and Mr Paul, without the involvement of Mr tau. Each of the two initially involved, carried out or caused to be carried out the steps necessary to cover the cashing of the cheques and the covering of the earlier transactions. Mr Tau was never involved in any of these transactions. The activities continued until such time as the amount referred to above had been taken. In the course of these events, Mr Tau sought from the other defendants a loan. This was provided from money which had been stolen from the Bank. It may be, that at first, Mr Tau was not aware that the money he received was stolen. He was soon to learn of this, however and thereafter willingly accepted further funds, knowing that they had been stolen from the Bank. Mr Tau, held a senior position in the Bank, to the other two. His willing participation, must therefore have provided a great deal of encouragement and comfort to the other two, in continuing their illegal scheme.

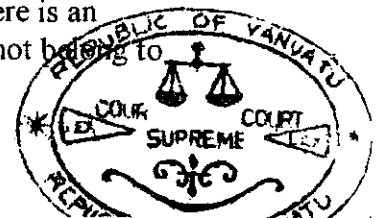


The scheme thus described, was deliberate and sophisticated. It was conducted by the defendants using the knowledge that they had gained as part of their training in the Bank, and their subsequent understanding of Banking procedures. I have in other cases suggested that offences of misappropriation may have come about, at least in part, as a result of the person in a position of trust and responsibility, not having been given sufficient training and understanding of their proper functions, by those responsible for their training and supervision. This does not appear to be the case here. None of the defendants claim that this is so and rather, the opposite appears to be the case. It was because they had a good understanding of their jobs that they were able to effect this scheme.

Each of the defendants received different amounts as a result of their participation. Mr Benjamin received 2,508,659VT, Mr Paul, 4,939,882VT and Mr Tau, 530,000VT. In Mr Tau's case, this sum was able to be calculated, because he kept a precise record of the monies he received. When confronted with the allegations, he revealed the records which he kept to the Bank officials who investigated the matter. Indeed, after some hesitancy in coming forward, each of the defendants soon admitted their involvement, perhaps as a result of being confronted with the results of the careful investigation of the irregularities, by Mr David Ross, a senior employee of the Bank. In subsequent interviews with the police, all defendants were co-operative and freely admitted their guilt. This co-operation has saved the Bank, the Public Prosecutor and the Court and therefore the community a great deal of time and money and is I think, an indication that each of the defendants is genuinely remorseful, for what they have done.

Why did they do it in the first place? Each of them claims and I accept that it is so, that they intended to repay the money taken. This vain expectation is not uncommon in offences of this nature. It is probable, that there are hardly any cases however, where people who do this over any long period of time, are in fact ever in a position to pay the money back. In any event, even if they do, the crime is still committed. People are not entitled to help themselves to other peoples property. Despite this, it is apparent that it is happening frequently in the community. Wages are not high and here in Port Vila, the cost of living is high. Perhaps this has something to do with the problem. It is not however the only answer. Perhaps it is partly to do with the concept of a cash economy being, in historical terms a new feature of the community here. Whatever, there needs to be found an answer to the problem. As I have repeatedly observed, the practice of simply the Courts gaoling people when caught, does not solve the problem. Equally, a failure to punish will not solve it.

Mr Benjamin, seems to have had a problem with both drinking and gambling. Like many others before him, when he stole he believed that he would have a big win, pay back what he had taken and probably have enough left over to be comfortable. It doesn't work. Inevitably such a dishonest course of action leads to disaster. In my early years as a solicitor, an employee of the firm for whom I worked thought that he could pay back what he had stolen by winning at gambling. When realising that the situation was out of control, he took his own life. The course of action undertaken by the defendants here can only lead to disaster. For this reason alone and not for fear of punishment at the hands of the law, all people would be well advised not to begin. Jobs are lost, families are hurt and promising careers are destroyed. There is an additional and basic consideration. It is wrong to take that which does not belong to



you. It is harmful, not only to the person whose property is taken, but to society as a whole. A community can only function well, if all members of it are willing to treat one another fairly. The majority of people do so.

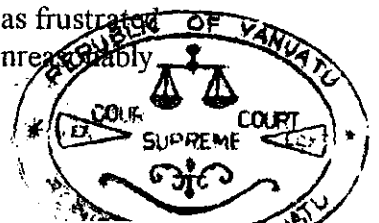
I think that an understanding of the matters to which I have referred, will assist in decreasing this type of offence and unless and until such an understanding becomes widespread, the gaoling of offenders will be ineffective. In the meantime, in cases such as these, the Courts will often have little choice.

Mr Malcolm, appearing for Mr Tau, addressed the Court first on behalf of the defendants. Mr Tau was involved in the matter for 4 months. A considerably shorter period than the others. He achieved a good position in the bank and he is a married man with 3 children, all at school. Of significance in his case, he has since his dismissal from Westpac, been employed in a senior position in another bank. This is a remarkable situation. His present employers are so impressed by him, that they are prepared to make him a loan of the 530,000VT he has taken, to repay the Westpac Bank. His salary will then have deductions made from it, to repay the loan. Restitution is of course an important consideration, but it is not the only one. It is submitted that he has shown remorse and I accept that. His admissions were made, when it would have been very difficult for the Bank to have found objective proof against him. He is deserving of credit for this. It is probably an indication that he is unlikely to offend again, another important consideration. It is likely that if he goes to gaol, he will not be able to continue his current employment after release. This poses a significant sentencing problem.

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. This and the fact that he has not taken anything the like the sums that the others did, clearly allows for his case to be distinguished from the others.

Accordingly, I have given to him an opportunity that no doubt many will regard as being too lenient. I do believe however, that having become involved, perhaps innocently at first, he was in fact afraid to reveal the situation, when he found out what the true position was. This is I think understandable, and whilst he should have revealed the truth and should not thereafter have had anything to do with the scheme, he succumbed to a human weakness, which if others are truly honest with themselves, would have found it difficult to have behaved differently. When a person has a belief that they will be treated badly, it is very hard for them to come forward and confess. I do not seek to require of Mr Tau, a level of courage greater than that which I would expect to find in many others. He has therefore the opportunity to establish that the faith that has been shown in him, is not misplaced. I have some concern about the course I have followed in his case and I trust that he does not let himself or the community down.

Mr Joel made submissions on behalf of Mr Benjamin and Mr Paul. They both commenced with the Bank in 1986. Solid and promising careers have been lost now. Mr Paul, in interview, indicated that he was unhappy with the Bank and was frustrated in his position. It was explained in the plea, that he felt that he had been unreasonably



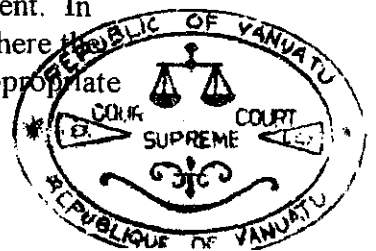
overlooked for promotion. In a sense, then, it is said, he is less culpable, because of this sense of grievance, whether it was justified or not. To some extent this may reduce his culpability, but it cannot operate as an excuse. He, as was Mr Benjamin, was co-operative and I am satisfied that they are both remorseful. Their pleas of guilty, likewise are of benefit to them in reducing the sentences imposed.

Both of these defendants are family men, who have now lost their careers and their families must suffer greatly. It was conceded in submissions and I think correctly, that the magnitude of these offences, the systematic way in which the offences were carried out and therefore the dishonesty that this reveals, means that even though they are first offenders, gaol is inevitable. I add, that the breach of trust involved is a significant feature here.

It is therefore my unpleasant duty to impose the sentences I have. I hope that the sad example of ruined careers, which this case represents serves as a lesson to others and will prevent offences of this kind happening again.

Because of the matters referred to above, the sentences I have imposed are appreciably less than might otherwise have been the case. In addition, I think that it is unlikely that these defendants will offend again, but it must be realised that no-one is entitled to steal the property of another and that there are cases where first offenders, without prior convictions will be gaoled.

In assessing the period of imprisonment to be applied in any case, there is a matter to which I think I should refer. Many members of the community express the view that sentences of imprisonment are sometimes too short. Let me assure you that the deprivation of liberty, even for a short time, is a severe punishment. It is important too, to understand the conditions in which people are held in our gaols here. The conditions are harsh and the gaols both here in Port Vila, are in urgent need of upgrading. I do not criticise anyone for this, but I feel that I must bring it to public attention. This is not a wealthy Country and in spending government monies, priorities have to be considered. From my own observation, it is clear that our hospitals are also in need of funds, to improve their standards. I make no comment as to how the priorities should be set, it is not my business. It is significant however, that complaints regarding the condition of the gaol in Santo, come not only from the prisoners, but from the Police officers, who act as prison officers there. Their complaint is not made upon their own behalf, but on behalf of the prisoners. Not only are the gaols physically below an acceptable standard, but the services and activities provided, need to be improved. In Port Vila, the food of the prisoners is supplemented by a local business. There is no such support in Santo. The Chief Justice has for a long time expressed concern about the standard of food provided to prisoners and I believe that as a result of his representations, the standard and quantity has improved. It should still be improved further. There are very few programs of education and training available, which would assist in the rehabilitation of offenders. In Port Vila, a handwritten inscription can be seen as one leaves the Gaol, describing it as "Waste Time Hotel." Whilst these problems remain, I believe it is proper, in fixing sentences, to take into account the Gaol conditions. It means that gaol is indeed a harsh punishment. In theory, it is the deprivation of liberty which comprises the punishment. Where the conditions themselves, amount to further punishment, I believe that it is appropriate



that sentences should be reduced, taking into account this additional punishment. Accordingly, in passing sentences for the present, I will take this factor into account.

~~Judge~~

~~DATE:~~

Robert J.

JUDGE

28/4/94.

