

**IN THE SUPREME COURT OF  
THE REPUBLIC OF VANUATU**  
(Criminal Jurisdiction)

Criminal Case  
No.18/1407 SC/CRML

**PUBLIC PROSECUTOR**  
V  
**MARY WOIMATE GARAE**

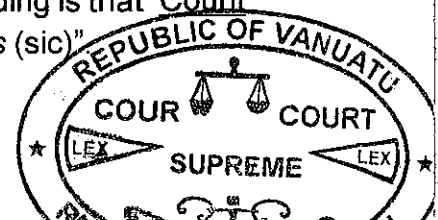
Date of Sentence: 19<sup>th</sup> October 2018  
Before: Justice D. V. Fatiaki  
In Attendance: Counsel – Mr S. Blessing for the State  
Counsel – Mr J. Boe for the Defendant

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**SENTENCE**

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1. On 5 June 2018 the defendant was convicted on her guilty pleas (“*hemi tru*”) to 2 counts of Obtaining Money by Deception contrary to Section 130B(1) of the **Penal Code** [CAP. 135] and a count of Money Laundering contrary to Section 11(2)(a) and 11(3)(a) of the **Proceeds of Crime Act** [CAP. 284]. Upon her conviction a pre-sentence and compensation report was ordered.
2. The different counts as framed are – a general deficiency Count 1 covering the whole period of offending and the total amount defrauded. Then Count 2 charges a specific transaction involving a named customer and a stated amount in which the defendant is alleged to have “... *by deception obtained money*” by transferring “... *an amount ... of VT200,000 to Bridgette Spooner*”. If I may say so, it is difficult on the wording of the particulars, to understand what the “*deception*” was, that was used by the defendant and how it can be said the defendant “*obtained*” the money when she transferred it to another person.
3. Furthermore, the dating of Counts 2, 3 and 4 is unhelpful, inexplicably wide and demonstrates thoughtless drafting in so far as the bank’s Cash Transfer Reconciliation Statement Summary in the depositions, clearly discloses that the transaction involving “*Bridgette Spooner*” and the “*VT200,000*” occurred on or about “*10.05.11*” which is the more appropriate date for the charges than the 13 months presently charged.
4. The reason(s) for the inclusion of the Money Laundering Counts 3 & 4 in the Information is also unclear. Likewise, there is no explanation of why the Counts were not charged as “*alternatives*” which they are, given that they both relate to the same victim and amount, and, the only difference in the wording is that Count 3 uses the word: “*acquire*” and Count 4 uses the word: “*posses (sic)*”



5. Having said that, the **Proceeds of Crime Act 2002** creates the basic offence of Money Laundering in Section 11(1) and subsection (2) then elaborates and identifies what type(s) of activities is included within the offence. Although subsections (3) and (4) enables the inclusion of Money Laundering offences in the Information that is not a sufficient reason for including them in this case as they add little to the over-all criminality of the defendant's actions or the likely length of sentence.

6. As was said by Chetwynd J. in Public Prosecutor v Garae [2007] VUSC 21:

*"I have indicated earlier in these proceedings that I was uncomfortable with the charges involving money laundering. It is probably correct to say the facts of the offences fit the definition of money laundering in the Proceeds of Crime Act [Cap 284] as amended, but overall, money laundering has connotations of a legal or quasi legal business or a person being used to receive proceeds of crime and then generating "clean" income with those funds."*

I agree and endorse those sentiments in this case so much then for the charges.

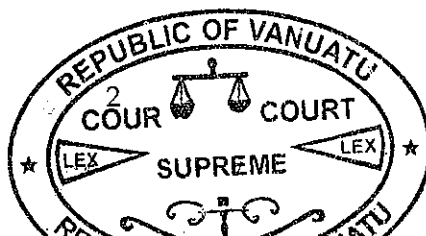
7. The defendant began working with the National Bank of Vanuatu (**NBV**) as a full-time teller on 28 January 2008. On 28 October 2008 she was appointed **Data Entry Officer** in the Island Branch Department. Her duties included processing vouchers from 6 rural branches and reconciling the cash Transfer General Ledger.

8. In January 2013 whilst internal investigations were being conducted into the transactions of another bank officer (Barry Ishmael) who also worked in the Island Branch Department, "*suspicious*" cash transfers were noted being made from the General Ledger into the defendant's personal bank account maintained at the bank.

9. The defendant was questioned by senior bank officials and she frankly admitted processing the "*suspicious*" transactions and transferring the various amounts into her personal bank account and other joint accounts controlled by her.

10. In respect of the particular transaction involving "*Brigette Spooner*" and the "*VT200,000*", the defendant admitted processing the particular transfer to her personal bank account by using the ID of Barry Ishmael after he had logged into the bank's computer system.

11. The defendant was suspended on 22 January 2013 to allow for further investigations to be carried out. A week later she was terminated on 28 January 2013 for "*gross misconduct*" in that she had fraudulently obtained from the bank over a period of 18 months, between June 2011 and December 2012, an amount

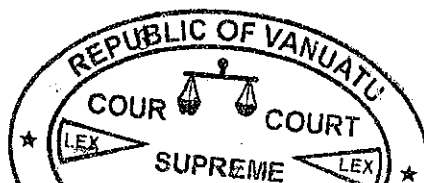


of VT3,439,040. An official complaint was laid with the police on 30 January 2013.

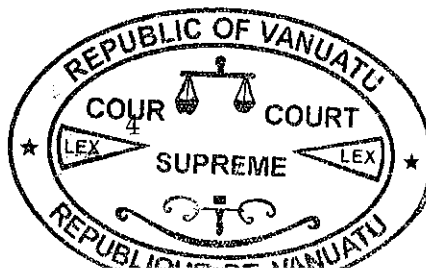
12. During the course of police investigations the defendant was interviewed under caution and she frankly admitted committing the offences of Obtaining Money by Deception. She also admitted spending the money "... long going here and there mo long ol recreational samting mo ol social samting nomo, ol kakai, drinks hemi nomo". Furthermore: "... ol transactions ia hemi mani blong ol customer we oli no kam claimem over some yia or long wan longfala period of time" and finally, she confessed: "... yes mi admitim se hemi wan fasin blong stil and that mi shame long hem".

13. From the defendant's pre-sentence report I extract the following personal details and mitigating factors:

- The defendant originated from **Loquiriutaro Village, East Ambae** and is the eldest of four children;
- She attended Vila North Primary School to year 6, Malapoa College to year 10 and Vureas Secondary School to year 13. She undertook IT computer courses for 2 ½ years at USP but could not afford to finish;
- The defendant was born on **8 September 1986** and is now 32 years of age. She is married and has 3 children – 8 years; 5 years and an 8 month old infant. Her husband is unemployed and the defendant is the sole provider for her family;
- She worked as a survey officer in a **UNICEF** funded project in 2007 then she joined the **NBV** as a teller in 2008 and was later promoted **Data Entry Officer** the position she held until her termination in January 2013;
- After her termination the defendant was employed for several months at the Public Service Commission (**PSC**) office until she was charged with the offences. The defendant is currently employed as a full-time Assistant in her mother-in-law's business since 20 June 2018;
- The defendant is a first offender and willingly assisted the police with their investigations;
- The defendant has consistently admitted her wrong-doing to her employer then to the police and finally she pleaded guilty at the earliest opportunity. She told the probation officer "*she is really sorry*" and deeply regrets her offending;
- It has taken more than 5 years to finalize the case since the complaint was first lodged with the police on 30 January 2013;
- The defendant has not re-offended after charges were laid against her in this case on 11 April 2013;
- According to a Compensation Report prepared by the Probation Officer, the defendant has agreed to re-pay **NBV** the total amount defrauded by way of monthly installments of VT50,000. She has already repaid the sum of VT400,000 in June 2018 and VT50,000 in July 2018 which the bank confirms receiving;



- She maintains good relations with her siblings, her parents and the community as well;
  - The defendant is considered a hard-working, self-made woman. She has 3 kava bars, 2 rent house apartments and 2 shops;
14. Whilst accepting a starting point of 3 years imprisonment and the unavoidability of a term of imprisonment for the defendant's offending, defence counsel nevertheless, submits, that the term of imprisonment should be suspended in the defendant's case.
15. Prosecuting counsel submits on the other hand "... *that general and specific deterrence must be the paramount considerations in this case*". Whatsmore an analysis of sentences in comparable cases suggest a starting point ranging "... *between 2 and 8 years imprisonment*". As for suspension, counsel submits that "... *an immediate term of imprisonment is the only appropriate sentence*".
16. I accept the offences with which the defendant has been convicted are serious offences that warrant a term of imprisonment. Having said that, it should be a concern for the defendant's employer that internal checks did not detect the defendant's defalcations earlier than January 2013, when such defalcations had been occurring on a fairly regular monthly basis since June 2011. Furthermore, there is an element of naïve inevitability in the commission of the offences in so far as the illegal cash transfers were almost all transacted by the defendant using her own computer log-in ID and were mostly transferred directly into her personal bank accounts maintained with her employer. In other words, the defendant herself created a computer trail that eventually led directly to her detection and apprehension.
17. In considering the appropriate sentence in this case, I have borne in mind the fact that the bank has been defrauded of a large sum of money. I am also mindful that the maximum penalty for an offence of Obtaining Money by Deception is imprisonment for 12 years and for an offence of Money Laundering a fine of VT50,000,000 and/or imprisonment of 25 years. Plainly both offences with which the defendant has been convicted are serious offences.
18. The defendant's offending is also aggravated by the following factors:
- The serious breach of trust involved in an employee defrauding her employer;
  - The extended period of 3 years over which the offending occurred;
  - The substantial sum of VT3,439,040 that was defrauded from innocent bank customers;



- The degree of concealment and planning involved in the commission of the offence which included, using a colleague's computer ID to transact some of the illegal cash transfers and using several bank accounts to disperse the illegal proceeds;

19. In Public Prosecutor v Kal Andy [2011] VUCA 14 the Court of Appeal described the "first task" of a sentencing court is to set the "starting point bearing in mind the maximum penalty set by Parliament and looking at the seriousness of the offence and the culpability of the actual offending. The court also recognized that "... relevant judgments relating to the type of offending will be considered in the course of the sentencing process".

20. In this latter regard in the case of Public Prosecutor v Mala [1996] VUSC 22 the former Chief Justice considered a case where:

*"... a person in a position of trust, for example, an accountant ... bank employee, manager of a company or public servant, has used that privilege and trusted position to defraud ... employers or the general public of sizeable sums of money ..."*

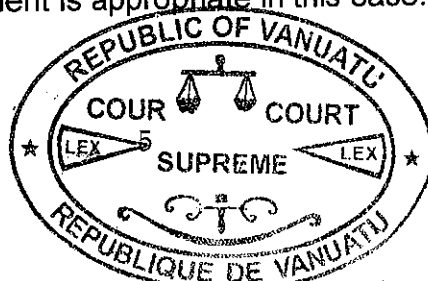
And later, in laying down a sentencing guideline in that case where a company employee misappropriated a sum of VT1,770,000 over a period of 2 years, the Chief Justice said:

***"In general a term of immediate imprisonment is inevitable, save in very exceptional circumstances or where the amount of money obtained is small. Despite the great punishment that offenders of this sort bring upon themselves, the Court should nevertheless pass a sufficiently substantial term of imprisonment to mark publicly the gravity of the offence. The sum involved is obviously not the only factor to be considered, but it may in many cases provide a useful guide. Where the amount involved cannot be described as small but are less than 1 million vatu or thereabouts, terms of imprisonment ranging from the very short up to about 18 months are appropriate. Cases involving sums of between about 1 million and 5 million vatu will merit a term of about two to three years' imprisonment. Where greater sums are involved, for example those over 10 million vatu, then a term of three and a half years to four and a half years would be justified.***

***The terms suggested are appropriate where the case is contested. In any case where a plea of guilty is entered however the Court should give the appropriate discount. It will not usually be appropriate in cases of serious breach of trust to suspend the sentence. As already indicated, the circumstances of cases will vary almost infinitely.***

(my highlighting)

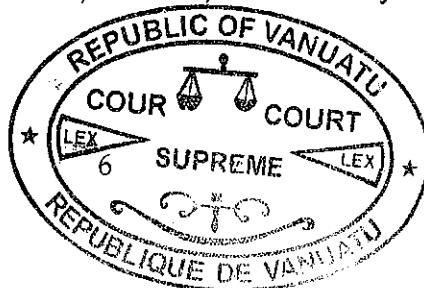
21. In the present case given the aggravating factors and recognizing that the guideline in Mala's case was set 22 years ago, and involved a sum slightly less than half that which was misappropriated in this case, I consider that a "starting point" of 4 years imprisonment is appropriate in this case.



22. From that starting sentence I deduct 12 months for mitigating factors including the inordinate delay in finalizing the case, leaving a mid-sentence of  $(48 - 12) = 36$  months and a further 12 months is deducted in recognition of the defendant's early guilty pleas leaving an end sentence of  $(36 - 12) = 24$  months imprisonment.
23. Although I accept that deterrence is an important consideration in the sentencing of offences involving an employee's breach of trust causing financial loss to his/her employer, the fact that the defendant has been convicted and is unlikely ever, in future, to be employed in a similar position of dealing with or handling money is itself a deterrent factor as is the likelihood of an order of restitution which ensures that the defendant receives no financial benefit from his/her criminal activity.
24. In this latter regard in Public Prosecutor v Rapulpul [2017] VUSC 22 the sentencing judge in suspending the term of imprisonment imposed in that case said:

*"One of my principal reasons for suspending the sentence is so that the defendant can repay what she has stolen. I will therefore also make an order that the defendant Alice Rapulpul should, pursuant to section 58ZD of the Penal Code [Cap 135], make restitution of the sum of VT 789,700. In addition I make an order that the defendant should make restitution within a period of two years and in default shall be liable to be sentenced to imprisonment in accordance with subsection 2 and 3 for a term not exceeding 6 months."*

25. Similarly in this case I am satisfied that the defendant's end sentence of 2 years should be wholly suspended for a period of 3 years. In reaching that view I have considered the lengthy delay in finalizing it and the naïve inevitability of the crime coupled with the lack of effective internal checks. The character of the offender is also characterized in her frank admissions once detected and has genuine effort in starting to repay the defrauded amount without a court order. It should be noted that a suspended sentence besides being a sentence of imprisonment, also has an element of personal deterrence built into it as reflected in the period of suspension.
26. The defendant is warned that the nature of a suspended sentence is such that if she commits and is convicted of any offence in the next 3 years then her suspended sentence of imprisonment will be activated and she will be required to immediately serve this sentence of 2 years imprisonment imposed for this offence before serving any additional sentence that may be imposed for her re-offending. That is an eventuality that is entirely within the defendant's control and I urge her to stay out of trouble for, at least, the next 3 years if she values her family and her liberty.



27. In addition to the suspended sentence of imprisonment I impose an order of restitution on the defendant to repay to the National Bank of Vanuatu (**NBV**) the sum of VT3,439,040 less any amounts already repaid at the monthly rate of VT50,000 commencing from 26 October 2018 until fully repaid.
28. The defendant is advised that she has 14 days to appeal this sentence if she does not agree with it.

**DATED at Port Vila, this 19<sup>th</sup> day of October, 2018.**

**BY THE COURT**



**D. V. FATIAKI**  
Judge.

