

**BETWEEN: PUBLIC PROSECUTOR**

**AND: LOID MARY ALBERT**  
Respondent

*Date:* 30<sup>th</sup> October 2023  
*By:* Justice W.K. Hastings  
*Counsel:* Ms L Lunabek for the Public Prosecutor  
Ms P Malites for the Defendant

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**JUDGMENT**

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Introduction

1. This is an application for leave to appeal out of time by the Public Prosecutor. I also heard the appeal itself.
2. Ms Malites opposed the application and submitted there was no merit in the appeal.
3. Section 200(3) of the Criminal Procedure Code provides:

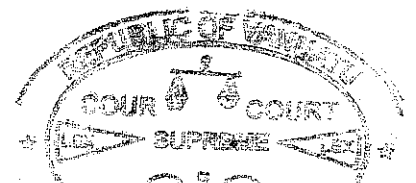
*(3) The Public Prosecutor may appeal to the Supreme Court on a point of law against any judgment of the Magistrates' Court.*

4. Section 201 sets out the procedure on appeal:

*(1) Every appeal shall be brought by notice in writing which shall be lodged with the registrar of the court to which the appeal is made (hereinafter called the "appeal court") within 14 days after the date of the order or sentence appealed against.*

...

*(3) Within 14 days after filing his notice of appeal under subsection (1), the appellant shall lodge with the said registrar a memorandum of appeal.*

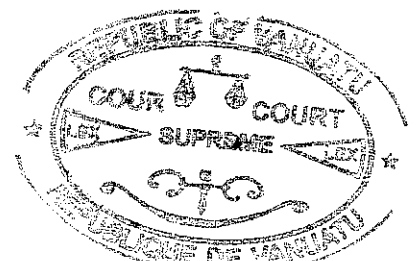


## Background

5. Ms Albert was charged under s 125(b) of the Penal Code Act [Cap 135] with misappropriation of property. That offence carries a maximum penalty of 12 years' imprisonment.
6. According to the Brief of Facts, she entered into a contract with UNELCO to remit money from SMAT meter top-up sales the week after she collected the payments from customers. UNELCO began to notice there were delays in the remittances. After investigating sales between 21 June 2021 and 27 September 2021, UNELCO discovered it had received remittances of VT 663,810 against sales of VT 1,248,465, a discrepancy of VT 584,655.
7. Ms Albert pleaded guilty and had repaid all the money by the time she was sentenced. The sentencing Magistrate identified the breach of breach of trust as an aggravating factor, and Ms Albert's early guilty plea and lack of previous convictions as mitigating factors. The sentencing Magistrate imposed a fine of VT 10,000.
8. Ms Malites was defence counsel and Ms Lunabek was the prosecutor at sentencing. Ms Malites said she advocated a suspended sentence of imprisonment for her client on the basis of significant mitigating factors. One of those factors was that Ms Albert entered into an arrangement with UNLECO to pay back the money with an additional amount for costs. On doing so, UNELCO promised to "commit to withdraw the case when full amount owed by the Debtor is cleared." The full amount was repaid. Ms Malites submitted the offending was motivated by need not greed because some of the amounts were used to pay for her daughter's school fees.
9. Although the Magistrate said the prosecutor did not refer to precedents, Ms Lunabek's sentencing submissions to the Magistrate refer to *Public Prosecutor v Baxter* [2013] VUSC 215 and *Public Prosecutor v Kalmet* [2014] VUSC 154, both of which resulted in suspended sentences of imprisonment for offending involving equivalent, or lower, misappropriated amounts.
10. Ms Lunabek submitted the fine of VT 10,000 was manifestly inadequate, and that the Magistrate erred in not imposing a custodial sentence, based on precedent cases. Ms Malites submitted that it was within the discretion of the Magistrate to impose a non-custodial sentence.

## Leave to appeal out of time

11. The Magistrate's decision is dated 10 August 2023. Any appeal needed to be lodged within 14 days. The Public Prosecutor tried to file the Notice of Appeal to the Supreme Court within time on 21 August 2023, but was told by Court staff that the Court required a Memorandum of Appeal to be filed with the Notice of Appeal. This meant there was much less time to draft the Memorandum of Appeal, which was eventually filed on 1 September 2023, with the Notice of Appeal and the application for leave to appeal out of time.



12. Section 201(3) of the Criminal Procedure Code anticipates that the memorandum of appeal must be filed within 14 days *after* filing the notice of appeal. The provision does not require the Memorandum of Appeal to be filed at the same the Notice of Appeal is filed. The law gives the appellant 14 days after filing the Notice of Appeal to file the Memorandum of Appeal. The advice given to the prosecutor who attempted to file the Notice of Appeal without the Memorandum of Appeal on 21 August 2023 was incorrect. Had the Notice of Appeal been accepted for filing on 21 August 2023, the prosecutor would have had 14 days within which to file the Memorandum of Appeal, and there would have been no need to apply for leave to appeal out of time. The application for leave to appeal out of time is therefore granted.

### The appeal

13. Did the Magistrate err in not imposing a non-custodial sentence? The short answer is no.

14. The Magistrate did not act outside of the discretion given by statute to impose a non-custodial sentence. In cases such as this, where an offender is convicted of an offence punishable by imprisonment, s 37 of the Penal Code requires the sentencing judge to “have regard to the possibility of keeping offenders in the community so far as that is practicable and consistent with the safety of the community.” Section 58B of the Penal Code gives the sentencing judge a discretion to impose a fine, community work or supervision as an alternative to imprisonment.

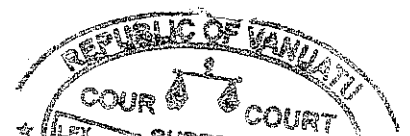
15. In *Gamma v Public Prosecutor* [2021] VUCA 62, the Court of Appeal confirmed that the statements made by the then Chief Justice Vaudin d’Imecourt in *Public Prosecutor v Mala* [1996] VUSC 22 “remain valid”. Those statements include:

*“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.”*

16. Within the guideline case of *Mala* itself, judicial discretion is acknowledged with the words “in general”, “save in exceptional circumstances” and the normative “should.” Indeed, it could not be any other way in light of the statutory provisions preserving judicial discretion. *Mala* is not a straightjacket. It was for the sentencing Magistrate, possessed of knowledge of the facts of the case and the sentencing submissions from both the prosecutor and defence counsel, to exercise the discretion entrusted to him by statute and impose a sentence permitted by statute. The Magistrate was within his discretion to impose a punishment that signalled his decision that this was an exceptional case on its facts.

17. The Magistrate did not err in imposing a non-custodial sentence.

18. Was the sentence manifestly inadequate? It could be said the sentence appears to be lenient, but on the facts of the case, it was not manifestly inadequate. In a sense, it could be said that a fine of VT 10,000 is a harsher penalty than the suspended sentence of imprisonment advocated before the sentencing Magistrate by Ms Malites. It has more immediate bite.



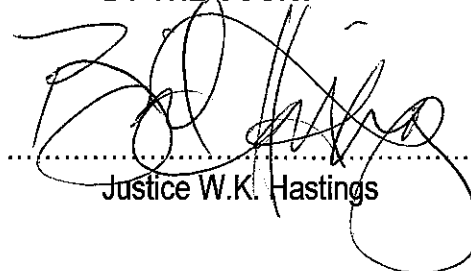
19. Sentencing is a discretionary exercise by first instance judges. An appeal court will only intervene if error is established, not because the appellate judge would have imposed a different sentence. Manifest inadequacy is a strict ground. An appellate judge must weigh the desirability of preserving judicial discretion with the need to maintain consistency in sentencing. To succeed in an appeal on this ground, it is not enough that the sentence is shown to be inadequate, it must be shown to be *manifestly* inadequate. Consistency in sentencing is important, but it is achieved through the consistent application of principle rather than outcome.
20. In this case, the Magistrate mistakenly thought the prosecutor did not refer him to precedent cases, but he nevertheless engaged in a standard sentencing exercise that took into account orthodox principles. The Magistrate identified deterrence as a purpose of sentencing and went on to consider aggravating and mitigating factors. It was for the Magistrate to assess the relative weight to be given to those factors. In the circumstances of the case, the Magistrate decided the mitigating factors sufficiently outweighed the aggravating factors that a fine was the appropriate punishment.
21. The sentence was lenient, but it was within the range of available sentences in the Penal Code Act and case law. It was not manifestly inadequate in the circumstances.

### Result

22. The application for leave to appeal out of time is granted.
23. The appeal is dismissed.
24. If costs cannot be agreed, they are to be taxed.

**Dated at Port Vila this 30<sup>th</sup> day October 2023**

**BY THE COURT**

  
Justice W.K. Hastings

