88-10-21 CAC No 05[1988]

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IN THE COURT OF APPEAL

OF THE REPUBLIC OF VANUATU

Appeal Case No. 5/1988

BETWEEN : TATAMAT SETH

Appellant

AND : PUBLIC PROSECUTOR

Respondent

Mr Hudson for the Appellant

Mr Baxter-Wright for the Respondent

JUDGMENT

This is an appeal by the Appellant against severity of sentence imposed upon him by the Supreme Court on 31st day of August, 1988.

The Appellant was an accounts clerk with Price Waterhouse, a firm of Chartered Accountants in Port Vila. Between October, 1985 and November, 1987, the Appellant altered 53 cheques belonging to his employer, cashed them and misappropriated the proceeds thereof for his own use. He pleaded guilty to 53 counts of misappropriation and was sentenced to 4 years on each count, all to be served concurrently.

The Appellant has contended that the sentence was excessive and set out in the Notice of Appeal some 7 grounds. Not all of them were argued.

It was submitted that the sentence was disproportionate to the offences and their circumstances. A table of previous sentences in similar cases was handed up to demonstrate disproportionality and disparity having regard to the amounts involved.

It was also contended that substantial restitution had been made, and that the Appellant was willing and able to make full restitution if he were not sentenced to imprisonment.

Finally much emphasis was placed on the fact that the Appellant had lost his previous employment, but he is presently employed at a much lesser salary. He has therefore been penalised to that extent but that he would be penalised much more harshly if he were sentenced to imprisonment and lost the current employment.

We do not doubt that these mitigating circumstances would have been submitted to the learned trial judge in the Court below. We note that the trial judge did make reference to taking the mitigating

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factors into account in reducing the length of sentence. We note that the Appellant agreed through Counsel to make immediate partial restitution in the amount of 90,000 Vatu, which we are now told was not infact paid.

The learned Acting Chief Justice did also consider carefully the application of Section 42, but in her discretion considered it inappropriate in this case in view of the amount involved, the period of time involved and the abuse of the position of trust. She felt compelled to impose a custodial sentence. She also found as matters of fact that each of the 53 offences needed forethought, in originally writing the cheques, leaving room for subsequent alteration and then each cheque being altered in several places.

We agree entirely with all of these statements. We find no error in them and indeed none was suggested by the Appellant.

The process of sentencing is a discretionary one and in order to be successful an Appellant must show that the sentencing court had erred in the exercise of that discretion by wrong application of principle of law or an over emphasis on some aggravating factor or an omission or an under valuation of some mitigating factor. If none can be so demonstrated then that the sentence itself is so manifestly excessive to manifest some error.

None of these have been demonstrated here. And whilst we ourselves may not have imposed such a sentence we cannot simply replace the sentence with our own views.

We therefore find the sentence not excessive and so dismiss the appeal.

DATED at Port Vila this 21st day of October, 1988.

Chief Justice
TONGA

Supreme Court Judge
PAPUA NEW GUINEA

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