

BETWEEN: Public Prosecutor
Appellant

AND: Anne Marie Garae
Respondent

Coram: Hon. Vincent Lunabek, Chief Justice
Hon. Justice John von Doussa
Hon. Justice Ronald Young
Hon. Justice Oliver Saksak
Hon. Justice Daniel Fatiaki
Hon. Justice Dudley Aru
Hon. Justice Paul Geoghegan

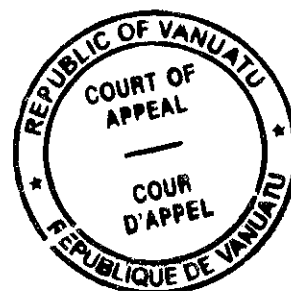
Counsel: Mr Ken Massing for Public Prosecutor
Mrs Jane Tari Aru for Respondent

Date of Hearing: Friday 11th July 2017

Date of Judgment: Friday 21st July 2017

JUDGMENT

1. This is an appeal by the Public Prosecutor against a sentence of 20 months imprisonment suspended for 3 years imposed by the Supreme Court in Luganville, Santo, on 20th March 2017.

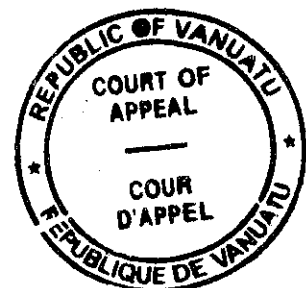


The Appeal Grounds

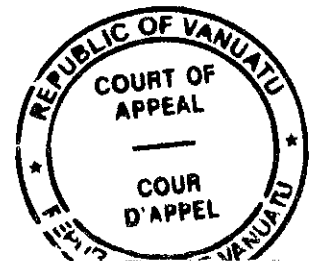
2. The appellant's case is that the sentencing Judge:
 - (a) erred in law when he relied on an incorrect fact, that is, Vt 11 million was repaid to the victim,
 - (b) erred in law when he placed too much weight on mitigating factors personal to the respondent.
 - (c) erred in law when he suspended the sentence of 20 months imprisonment imposed on the respondent.
3. It is submitted that the combination of these errors led to the imposition of a sentence which was manifestly inadequate.

Background facts

4. The Respondent is a woman of 47 years of age. She had been working for the complainant (Mr John Fordham) for 6 years or more. She was employed as a house-girl and part of her duties involved general house work.
5. While she was doing that work she found a bag under her employer's bed which contained large sums of cash.
6. She helped herself to some of that cash taking VT 50,000 to VT100,000 at a time. She did this several times a week beginning in 2013 until August 2016, a period of 3 years.

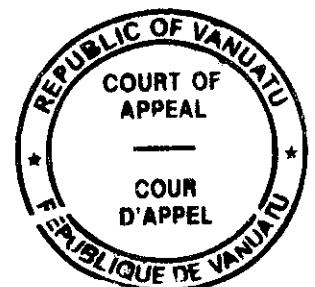


7. The respondent used the stolen money for the following purposes:
- built a concrete house and an underground well on the island of Ambae.
 - built a house and an underground well at Sara village, East Santo for her son.
 - paid for a vehicle which cost about Vt 1.4 million.
 - purchased a vehicle at Credit Corp for Vt 780,000 Vatu.
 - Kept some of the stolen money at AFIC Bank. She opened four different accounts. Two accounts were under her name. The total cash held in these two accounts is Vt 2,405,800. The other two accounts were under the names of her relatives but she financed those two other accounts with money she had stolen from her employer totalling Vt3,950,450. The total of stolen money and kept at AFIC Bank is VT 6,356,300
 - bought items such as a water tank, speakers and solar panel (the list of items were kept in the Preliminary Inquiry bundle of documents).
 - sent some of the stolen money to her relatives in Port Vila and Ambae Island.
8. It was initially alleged that the total amount of money that the respondent had stolen was Vt 44,133,810.
9. A complaint was lodged in August 2016 by the respondent's employer.
10. The respondent was arrested cautioned and interviewed by police. She admitted that she stole the cash money from her employer.
11. On the 27th October 2016, the respondent was charged with 1 count of Theft, contrary to section 125(a) of the Penal Code Act [Cap. 135] and 3



separate counts of Money Laundering, contrary to section 11 (2) (a) and 11 (3) (a) of the Proceeds of Crime Act [Cap. 284].

12. On the 2nd November 2016, the respondent pleaded not guilty to all the charges laid against her.
13. Subsequently, on 13th March 2017, the prosecution amended the charges by deleting the amount of Vt 44 Million and substituting 15 Million. On the same date the respondent pleaded guilty to the amended charges of Theft and Money Laundering.
16. During the investigations, the following items were recovered by the police:-
 - (a) Cash totaling Vt 2.4 million .
 - (b) The Hilux vehicle with an estimated value of Vt 2.3.
 - (c) The AFIC Bank accounts totalling approximately Vt 6 million.
 - (d) Other goods recovered from the respondent's house worth approximately Vt 968,000.
 - (e) The two houses situated on Ambae and at Sara village in Santo were confiscated and restrained from being sold or disposed of by the respondent.
17. Accordingly, items worth approximately Vt 11 million were recovered within the Police warrants that were issued by the Court and there is likely to be additional value to be recovered from the two house properties.
18. The estimated sum that remains unrecovered is in the vicinity of Vt 3 million.



The decision of the Supreme Court appealed against

19. In his sentence of 16 March 2017, the Judge said:

“It is difficult to be exactly sure about how much remains to be re-paid. The Defendant says she has repaid Vt 11 Million plus but that she still owes Vt 3.26 Million. I have not been aware of any dispute about those sums.

...

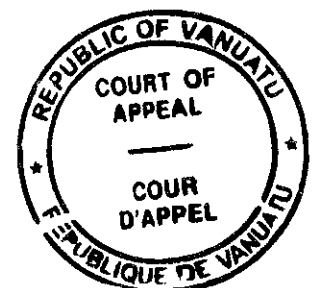
For the offence of theft the defendant Anne Mare Garae will be sentenced to 4 years imprisonment. For the three offences of money laundering the sentence each will be 18 months imprisonment to be served concurrently with each other and concurrently with the sentence of theft”.

20. In respect of the sentence for theft (of 4 years) the Judge reduced it by 18 months to take account of the respondents past good character and the repayment so far made. He also took into account the time the respondent had spent in custody pending trial. The balance sentence was then 30 months or 2 ½ years. He gave full credit for the respondent’s guilty pleas and deducted 10 months leaving a final sentence of 20 months imprisonment. The judge suspended it for a period of 3 years.

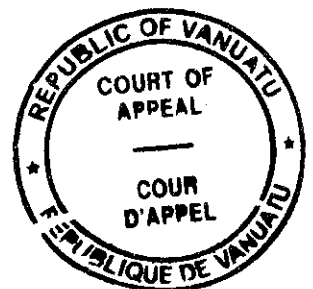
21. This sentence is now appealed against in this Court by the Public Prosecutor.

Discussion on the Appeal

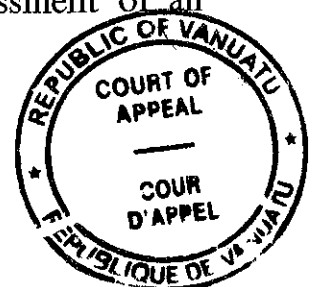
22. Before we discuss the grounds of appeal, we note that the Public Prosecutor abandoned his application to call fresh evidence in respect of the first ground of appeal. They also abandoned paragraphs (c), (d) and (e) of their submissions which relate to the first ground.



23. We now consider each ground of appeal in turn.
24. **Ground 1:** The learned judge erred in law when he relied on an incorrect fact, that is, Vt 11 million was repaid to the victim, therefore, the sentence was manifestly inadequate.
25. The Judge said at paragraph 7 of his sentence judgment that:
- “11 million plus has been repaid to the victim. And the remaining owed to the victim is 3.26 Million Vatu.”
26. The Public Prosecutor said that this statement was an incorrect statement of fact because Vt 11 was not the amount of money repaid by the respondent to the victim. But it was the money recovered.
27. We are of the view that this submission is misconceived. The Judge may have used a wrong word when he said “repaid”; however, we consider that what the Judge did is not wrong. The Judge has taken into account the loss suffered by the victim . The amount of Vt 11 million is the estimated value of the items recovered and that should be repaid to the victim in due course when the moneys retained by warrants are released. The victim has not lost it and the items and cash no longer belong to the respondent.
28. We, therefore, dismiss the first ground of appeal.
29. **Ground 2:** Placing too much weight on mitigating factors rendering the sentence inadequate.



30. The Public Prosecutor submitted that the Judge placed too much weight on mitigating factors when he sentenced the respondent. It is said the Judge did this when he gave 18 months deduction for her past good character, the repayment so far made and the time already spent in custody. The Judge also gave her a deduction of 10 months for her early guilty pleas.
31. It is contended that the Judge gave a total deduction of 28 months to reflect the mitigating factors personal to the respondent and on the other hand, the remaining balance left was 20 months imprisonment. This clearly shows that the percentage of deduction of the mitigating factors personal to the respondent is very high. It represents roughly 58% deduction to reflect the mitigation.
33. The Public Prosecutor referred to the judgment of this Court in Gigina v. Public Prosecutor [2017]. VUCA 15 where it was stated:
“Over all it will be rare for mitigation deductions including, guilty pleas to total 50% and even rarer for them to exceed 50%.
34. It was submitted, therefore, that based on the ratio of Gigina, the Judge erred in law when he put more weight to the mitigating factors.
35. It is finally submitted that the weight that should be given to all mitigating factors should be 18 months leaving an end sentence of 30 months.
36. We note that in this case, the Judge adopted a 4 years imprisonment starting point . He then deducted more than 50% maximum for guilty plea and other mitigating factors. We note it was generous but the Judge provided reasons for it in his sentence. The amount of Vt 11 million recovered by the police would normally be a factor taken into account in the assessment of an



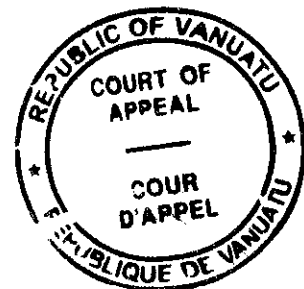
appropriate starting point. In this case it has been taken into account as a personal mitigating factor. There is no dispute that the appellant spent one month in custody on remand which, taking into account parole provisions, is the equivalent of two months. Accordingly the allowance for the recovery of property and other mitigating factors was 16 months. The Public Prosecutor submitted that the appropriate allowance should be between 8 and 10 months.

37. We consider that an argument about 6 extra months given for the mitigating factors is not sufficient to establish that the end sentence is manifestly inadequate. For this reason, we dismiss the second ground of appeal.

38. **Ground 3: The Judge erred in law when he suspended the sentence of 20 months imprisonment.**

39. This ground of appeal is a substantive one. The Public Prosecutor submitted that the Judge erred in law when he suspended the sentence of 20 months imprisonment. It is said that in this case, the following aggravating factors were present:

- (i) – The offending was repeated for a period of 3 years.
- (ii) – The amount that the respondent took was a huge sum of money.
- (iii) – There was a serious breach of trust.
- (iv) – There was a degree of planning.
- (v) – The effect on the victim (the victim suffered a substantial loss in his company).
- (vi) – The recovery of more than Vt 11 Million leaving the sum of Vt 3 Million plus that is unrecovered.



40. It is submitted that these aggravating factors outweigh the mitigating factors referred to earlier and that the circumstances of this case taken in total, are very serious in nature.

42. The Public Prosecutor referred the Court to the Provision for suspension of sentence of imprisonment. Section 57(1) of the Penal Code is the relevant provision which provides:

“57. (1)

(a) if the Court which has convicted a person of an offence considers that:

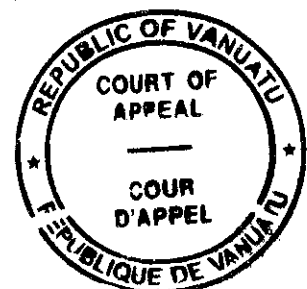
(i) in view of the circumstances; and

(ii) in particular the nature of the crime; and

(iii) the character of the offender,

It is not appropriate to make him or her suffer an immediate imprisonment, it may in its discretion order the suspension of the execution of imprisonment sentence...”

43. We note that this case involved theft and money laundering of an amount of Vt 15 million. It is a substantial sum of money stolen by the respondent. The respondent is a woman who struggled to help her children and family. However, we consider the circumstances of this case, the particular nature of the crime and the character of the offender do not justify the suspension of 20 months imprisonment. We agree with the Public Prosecutor that the Judge erred when he suspended the end sentence of 20 months imprisonment.

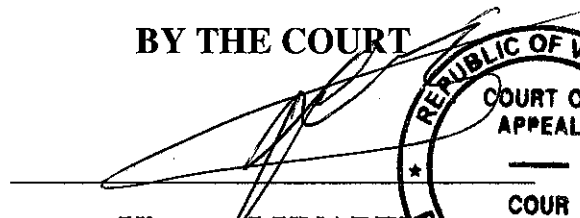


Result

44. The suspended sentence of 20 months imprisonment for a period of 3 years is quashed. Given that the appellant has already served four months of the suspended sentence it is appropriate to recognize that and accordingly the term of imprisonment imposed is 16 months. The sentence is to take immediate effect.

DATE at Port Vila, this 21st day of July 2017.

BY THE COURT



Vincent LUNABEK

Chief Justice

