

**IN THE COURT OF APPEAL OF
THE REPUBLIC OF VANUATU**

(Appellate Jurisdiction)

Criminal Appeal

Case No. 18/1646 CoA/CRMA

BETWEEN: JOSHUA COLLEN TORSEN

Appellant

AND: PUBLIC PROSECUTOR

Respondent

Coram: *Hon. Chief Justice Vincent Lunabek
Hon. Justice Bruce Robertson
Hon. Justice John Mansfield
Hon. Justice Oliver Saksak
Hon. Justice Daniel Fatiaki*

Counsel: *Mr. Less Napuati for the Appellant
Mr. Lenry Young for the Respondent*

Date of Hearing: *Monday 9th July 2018 and Wednesday 18th July 2018*

Date of Judgment: *Friday 20th July 2018*

JUDGMENT

Introduction

1. This appeal is against conviction and sentence on one charge of causing loss by deception, contrary to section 125 (c) of the Penal Code [CAP 135].
2. In the Supreme Court, Mr. Torsen agreed to the prosecution's summary of facts, entered a guilty plea and on 30 May 2018, he was sentenced to a term of 8 months imprisonment.
3. The appellant, initially, filed a notice of appeal on 12 June 2018 against his sentence of imprisonment of 8 months on the basis that the trial judge erred in law in not suspending it.
4. The appellant further filed amended grounds of his appeal on 25 June 2018 challenging his conviction and sentence to be set aside on the principal ground



that the appellant's former counsel wrongly advised the appellant to plead guilty when he had a valid Seasonal Employment Licence Certificate issued by the Commissioner of Labour on 16th February 2012 and a Certificate of Registration of Business Name of Islanders Seasonal Workers Agency issued by Vanuatu Financial Services Commission dated February 2012.

5. On Monday 9 July 2018, when we heard this appeal, Mr. Napuati informed us that the appellant would no longer proceed with the appeal against his conviction but he would proceed only with the appeal against his sentence. However, Mr. Napuati while making submissions in relation to the sentence of the appellant could not resist raising the issue of the validity of the appellant's Seasonal Employment Licence Certificate issued to him in February 2012 and Certificate of Registration of Business name of Islanders Seasonal Workers Agency issued to him also in February 2012.
6. We pointed out to Mr. Napuati that the issue of the validity of the appellant's Seasonal Employment Licence Certificate and that of the Certificate of Business name of Islanders Workers Agency are challenging the conviction. Mr. Napuati informed us he wanted to progress with his challenge.
7. We adjourned the hearing of this appeal to Wednesday 18th July at 10.30am. We directed the appellant through his counsel to file an application for leave to appeal the conviction out of time with amended grounds of appeal and a sworn statement from the appellant's former counsel. We directed the prosecution to file relevant additional materials in relation to the appellant's Seasonal Employment Licence Certificate and his Certificate of Registration of Business Name including related materials.

Leave to appeal conviction out of time

8. The test to be applied is set out by the Court in **Gamma -v- Public Prosecutor [2007] VUCA 19:**

"The Applicant must demonstrate some special feature or features particular to the case that lead to the conclusion that in all the circumstances justice requires that leave be given. Amongst the considerations which will also be relevant in that overall assessment

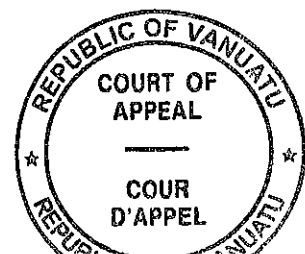


are the strength of the proposed appeal and the practical utility of the remedy sought, the length of the delay and the reasons for delay, the extent of the impact on others similarly affected and on the administration of justice, that is floodgates considerations, and the absence of prejudice to the Crown".

9. We now consider the test in this case. The offence is said to have been committed sometimes in 2012. The complainant said he gave the money VT168, 000 to the appellant in October 2012 to cover airfares for him and his wife. He could not recall the exact date in October. The appellant was charged in April 2018 and sentenced in May 2018. There is then a substantive delay of 6 years. The next consideration is whether there is merit in the proposed appeal. The appellant said he had a valid Seasonal Employment Agency Certificate from February 2012 until it was suspended on 22 August 2012. The appellant further said that his business licence with VFSC was valid from February 2012 to 30 November 2012. The appellant accepted that the Commissioner of Labour had suspended his licence on the basis of section 6 (5) of Seasonal Employment Act of 2007 which provides:

"It is a condition of a licence that the licensee must not charge a person for any services provided by the licence to the person to obtain seasonal employment for the person."

10. The suspension of the appellant's licence to recruit seasonal workers was valid for 60 days from 22 August 2012. The suspension letter required the appellant to refund all the money he had collected from workers who had registered with Islander's Seasonal Workers Agency. The appellant accepted collecting money from the complainant in 2012. It is not disputed that was in October 2012. In October 2012, the licence of the appellant was still suspended. The appellant was unlawfully collecting money in October 2012. Although, we note that the judge did not know that there had been a valid licence in 2012, the proposed appeal had no prospect of success in any event. Leave to appeal out of time is refused. Mr. Napuati on behalf of the appellant accepted this conclusion at the hearing.



11. Before we leave this aspect of the appeal, we need to say something about the allegations of incompetency made against the former counsel of the appellant. In this case, we do not see any error made by the former counsel of the appellant when he received instructions from the appellant and advised him to plead guilty. It is noted that this type of allegation is used as an excuse to question and challenge conviction after an accused like the appellant in this case accepted the prosecution summary of facts, entered guilty plea on the charge alleged against him and sentenced. This is dangerous as it may undermine the criminal justice process. It will only be in extraordinary circumstances that allegations of counsel incompetence will be justified. New counsel must be vigilant to ensure there is a proper foundation available and not file such application in a casual or routine manner. It is a residual power which the Court of Appeal will only exercise when fully justified.

Appeal against Sentence

12. Mr. Napuati accepted the starting point sentence of 15 months and the end sentence of 8 months imprisonment imposed on the appellant.
13. Mr. Napuati, however, submitted that the primary judge erred in not suspending the imprisonment term of 8 months. He further submitted that had a pre-sentence report been made before the sentence, the sentencing judge would have had material before him that the appellant had made arrangement with his two sons who are working in Australia to re-pay the outstanding amount of money and the appellant had already repaid an amount of 67,000 Vatu to the appellant. Mr. Napuati submitted that that factor would justify a suspension of the term of 8 months imprisonment.
14. We note that apart from the part payment of VT 67,000 by the appellant, the outstanding balance of 101,000 Vatu had not been re-paid when the appellant was sentenced on 30 May 2018. If the appellant wanted the Judge to take this factor into consideration in his sentencing the appellant should have re-paid the balance outstanding or ask for his sons to repay the complainant before he was sentenced.
15. The absence of a pre-sentence report in the sentencing of the appellant, although ordered by the Court, would not change the circumstance of this case



as it may show the intention to repay but the actual reparation was not made by the appellant. We reject the appellant's submissions on this point.

16. We note the Judge's analysis of the circumstance of this case in relation to the appellant in refusing to suspend the sentence and we note in particular what the judge stated in relation to the appellant's previous offending and we agree with him when he said:

"...despite Mr. Torsen's personal issues with his health and inability to work, ... Despite the significant lapse of time since his previous convictions, this is still his 7th conviction involving dishonesty. Further, ... his unfortunate financial situation and prospects provide a real temptation to relapse – that must be deterred, and the community protected. There will accordingly be no suspension of the sentence."

Result

17. We dismiss the appeal. We direct the appellant to resume serving his term of imprisonment with immediate effect.

DATED at Port Vila, this 20th day of July, 2018.

BY THE COURT



Vincent Lunabek

Chief Justice

