

BETWEEN: Victor Rory
Appellant

AND: Public Prosecutor
Respondent

Date of Hearing: 7 July 2020

Before: Justice V. Lunabek
Justice B. Robertson
Justice J. Mansfield
Justice D. Aru
Justice G.A. Andrée Wiltens
Justice V.M. Trief

Counsel: Ms J. Bani for the Appellant
Mr S. Blessing for the Respondent

Date of Decision: 17 July 2020

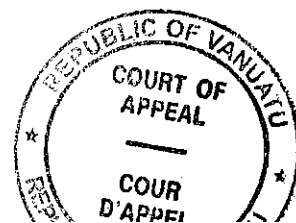
JUDGMENT

A. Introduction

1. After trial Mr Rory was convicted of 20 counts of firstly obtaining money by deception, and secondly a further 20 counts of money-laundering relating to the same funds. The maximum sentence for obtaining money by deception is a term of 12 years imprisonment; and for money laundering a term of 10 years imprisonment.
2. Mr Rory was given an end sentence of 8 years imprisonment on all charges concurrently, back-dated to take into account time already served.
3. Mr Rory appeals his convictions in respect of all 20 counts of obtaining money by deception, and also his sentence.

B. Facts

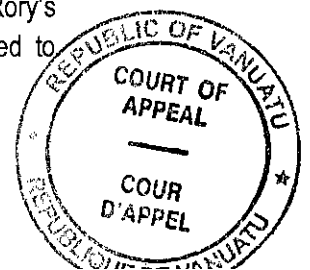
4. Mr Rory was a Principal Aid Negotiator within the Prime Minister's Office, who in 2015 assisted in obtaining for the people of Vanuatu certain aid money from the European Union ("EU") for the Vanuatu Government's then priority projects. He also played a role in disbursing those funds to the appropriate recipients in that he was a co-signatory on several of the bank accounts involved.



5. On 20 occasions from January 2016 to late December 2016, Mr Rory arranged for portions of the EU aid money to be withdrawn and paid into the bank account of Lambong Edition and Translation ("Lambong"). Lambong was an unregistered company which Mr Rory had taken over from his brother, and which ostensibly undertook translation work. Prior to 2016 Lambong had only twice undertaken paid translation work, earning VT 250,000 in 2014 and VT 450,000 in 2015.
6. The 20 suspect transactions came about as a result of Mr Rory getting his fellow co-signees to sign blank cheques without supporting documentation, which cheques Mr Rory then made out in favour of Lambong. The 20 amounts Mr Rory made the cheques out for totalled VT 14.9 million.
7. The co-signees were unaware the funds were going to Lambong, but understood instead that the cheques were issued for legitimate transactions and for the purposes the aid money had been granted to Vanuatu. In effect they trusted and did not question Mr Rory.
8. Lambong did no work entitling it to receive the VT 14.9 million from the EU aid money.
9. Mr Rory withdrew virtually all that amount during 2016 and by early 2017, with a balance of only VT 13,957 remaining when the account was closed in May 2017. The VT 14.9 million was not used for Government priority projects; it was used for Mr Rory's personal purposes.

C. Sentence

10. The primary judge took 10 years imprisonment as the starting point for the offences of obtaining money by deception and 7 years imprisonment for the related offences of money laundering. He considered that all the sentences should run concurrently.
11. In arriving at those start points, the primary judge took into account a range of factors:
 - The funds dishonestly obtained by deception were aid money for the benefit of the people of Vanuatu;
 - There were 20 instances of offending over a 12 month period;
 - The extent of the offending, namely VT 14.9 million;
 - The breach of trust involved ; and
 - The planning involved in the offending.
12. The primary judge then reduced the start point to take into account the fact that Mr Rory had served Vanuatu as a civil servant for over 10 years, making "...some useful contributions to the country". The overall sentence start point of 10 years imprisonment was reduced for Mr Rory's personal factors by 12 months. For obvious reasons the primary judge did not need to separately consider the sentence for the money laundering charges.



13. The other factor the primary judge took into account was the fact that Mr Rory should not be held solely responsible for the loss to the people of Vanuatu of VT 14.9 million – his co-signatories, as well as others within the programme who had monitoring obligations, could and should have raised the alarm prior to December 2016. As a result the primary judge reduced the overall sentence start point by a further 12 months.
14. The end sentences, imposed on all charges concurrently, was 8 years imprisonment.

D. The Appeal against Conviction

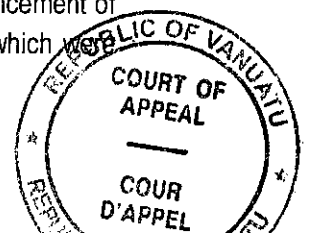
15. Ms Bani filed Amended Grounds of Appeal setting out four matters, three of which related to the convictions. At the commencement of the hearing, she abandoned the challenge on the basis of alleged counsel incompetence. That left two grounds of appeal against the convictions for this Court to consider.
16. The first ground of appeal was that the charges in relation to obtaining money by deception were insufficient. Each charge read similarly to Charge 1 cited below, with only the dates and the amount of money varying:

"Victor Rory, sometimes on 4th January 2006, by deception dishonestly obtained for you VT 800,000."

17. The second ground of appeal was that the primary judge did not distinguish between the elements of dishonesty and deception, and that he therefore erred in not ensuring that the element of deception was established beyond reasonable doubt in respect of each of the 20 relevant charges.

E. Discussion

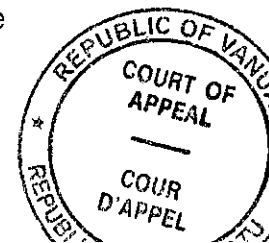
18. Ms Bani's main point in relation to the first ground of appeal is that each of the relevant charges did not fully set out the deception involved; and that as a result Mr Rory did not fully understand the charges against him. She pointed to the requirements set out in sections 71 and 74 of the Criminal Procedure Code [Cap 136] ("CPR") and submitted that they had not been complied with.
19. Mr Blessing conceded that the particulars of the charges could have been more fulsome. However, he maintained that the essential elements of the charge were included, albeit briefly. The charges, he maintained, met the requirements of sections 71 and 74 of the CPR. Further, he submitted that if there was a difficulty, the time to address such was at the commencement of the trial, by means of an application for further and better particulars.
20. Mr Blessing further pointed to the vast amount of other material available within the prosecution case from which Mr Rory was able to glean the entire case against him. In particular he pointed to the Summary of Facts (provided by the Public Prosecutor to Mr Rory through his counsel some time before the start of the trial), and the 6-page Memorandum of Agreed Facts which appended all the relevant documentary exhibits (also prepared before the commencement of the trial and which clearly indicates that Mr Rory perfectly understood the facts which were alleged against him, all of which he agreed to).



21. There is no merit in this point. Despite the brevity of the particulars of the charges, the essential ingredients were encapsulated. It is inconceivable, having regard to the material available to Mr Rory prior to the trial commencing, that Mr Rory was unaware of the full extent of the prosecution allegations against him. Finally, if there was an issue of this kind, it was incumbent on Mr Rory's counsel to raise the matter before the trial commenced.
22. Ms Bani's second ground of appeal centred on the primary judge's statement of the elements the prosecution was required to prove in relation to the obtaining money by deception charges. Her submission was that the primary judge had omitted an essential element, namely that of deception. She maintained the primary judge had conflated that aspect with the element of dishonesty, and that accordingly the convictions could not stand as one of the essential elements of the charge had not been found to be proved beyond reasonable doubt.
23. This submission did not take into account the fact that the Memorandum of Agreed Facts detailed the deception utilised by Mr Rory in relation to each of the 20 charges. It also ignored the findings in the primary judge's reasons for verdict, that Mr Rory's co-signatories had given evidence, which was accepted, that each had been deceived by Mr Rory's conduct. The judge went on to reject Mr Rory's evidence that the payments were genuine before discussing the element of dishonesty. The judge concluded that not only was Mr Rory's conduct in the circumstances dishonest, but it was deceptive – he was satisfied as to that beyond reasonable doubt.
24. We do not accept the criticism that the primary judge should also have listed deception as one of the essential ingredients of the charge in this case. The reason for that is that this element was acknowledged – accordingly, it did not need to be formally proved by the prosecution. The situation was akin to a rape trial focussing solely on the issue of consent, as the other legal ingredients are accepted.
25. For completeness, we record that it would have been highly improbable for the primary judge to have overlooked the aspect of deception given the prosecution's final submissions. This comprised a typed 47-page document, with pages 10 through 26 dealing specifically with the evidence the prosecution pointed to as evidencing Mr Rory's deceptive conduct.
26. We consider there is no merit in this second ground of appeal.

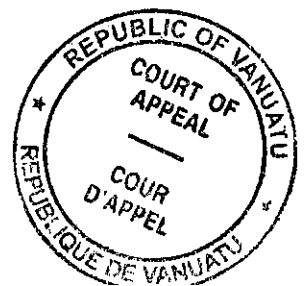
F. The Appeal against Sentence

27. Ms Bani's point was that the sentence start point of 10 years imprisonment was too high given the maximum penalties available, the facts of the case, Mr Rory's personal circumstances and the submissions filed by the prosecution which sought a lower starting point of only 7 to 8 years imprisonment.
28. In particular, Ms Bani submitted there was insufficient credit for Mr Rory's lack of previous convictions, his substantial contributions to Vanuatu, his remorse and his offer to make reparation.



G. Discussion

29. We note that the primary judge made no mention in his sentencing remarks of the fact that Mr Rory had no previous convictions. We note further, that in his oral submissions Mr Blessing conceded that to adopt 10 years as the starting point for this offending would leave little room for offending of an even more serious nature than Mr Rory's to be properly addressed. Mr Blessing concluded that a start point of 7 to 8 years was appropriate.
30. We do not accept Ms Bani's submissions that the primary judge overlooked or gave insufficient credit for Mr Rory previous service to Vanuatu. Equally, we agree with the primary judge that there is no evidence of remorse on Mr Rory's part. Even to this day he does not accept his culpability; and we note his lack of participation in a custom reconciliation ceremony.
31. Mr Rory's offer of reparation, if he were given a suspended sentence, was simply unrealistic. His offending is far too serious for a suspended sentence to be contemplated. We note that even now there is no explanation provided as to where the funds went – it must be accepted that all the money is lost forever to the people of Vanuatu.
32. However, we agree with Ms Bani's point that the start point adopted was too high. That was an error by the primary judge.
33. The start point we adopt as being appropriate, on a totality basis, is 8 years imprisonment. We agree that the sentences should run concurrently.
34. The start point of 8 years imprisonment is arrived at by having regard to the maximum sentences for the two types of offending, namely 12 and 10 years imprisonment respectively.
35. The second aspect of setting the sentence start point is to consider the circumstances of the offending, in this case really the aggravating factors of the offending. They include the following:
- The gross abuse of trust by Mr Rory, given his position and responsibilities;
 - The degree of planning and calculation involved in the offending;
 - The extent of the offending – dishonestly obtaining by deception a total of VT 14.9 million, and the money laundering of those funds, over the course of 12 months;
 - The repetitive nature of the offending – 40 charges in all;
 - The colour of the funds – this was aid money donated by an international organisation for the benefit of the people of Vanuatu;
 - The damage to the reputation of Vanuatu resulting from this offending, and the prejudice to Vanuatu receiving similar future funding; and
 - The lack of reparation.



36. The final step in the sentencing process is to have regard to Mr Rory's personal circumstances. There is no demur or challenge to the primary judge's reduction from the sentence start point of 12 months for that aspect, nor for the reduction of a further 12 months due to the fact that others were involved who could/should have intervened to prevent the extent of this offending. We consider those reductions appropriate. We do not see Mr Rory's lack of previous convictions warranting a greater discount, having regard to the number of offences committed and the period of his offending.

H. **Result**

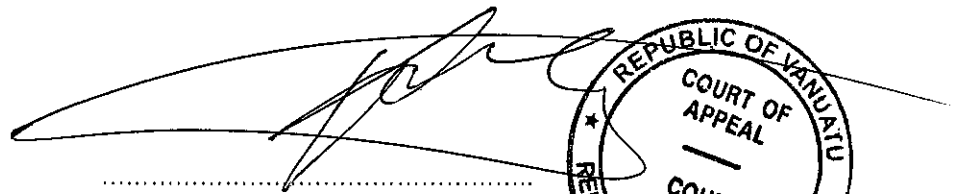
37. The appeal against conviction is dismissed.

38. The appeal against sentence is allowed. The sentence of 8 years imprisonment on all charges concurrently is set aside.

39. Mr Rory is instead sentenced to 6 years imprisonment on all charges concurrently. His sentence is to commence as from 1 April 2019, to preserve his parole rights.

Dated at Port Vila this 17th day of July 2020

BY THE COURT


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Chief Justice V. Lunabek

