IN THE COURT OF APPEAL
OF THE REPUBLIC OF VANUATU
(Criminal Appellate Jurisdiction)

Criminal Appeal
Case No. 21/4193 CoA/CRMA

BETWEEN: **Li Jianjun**
Appellant

AND: **Public Prosecutor**
Respondent

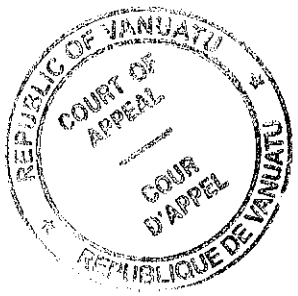
Coram:	***Hon. Justice Ronald Young*** ***Hon. Justice Dudley Aru*** ***Hon. Justice Richard White*** ***Hon. Justice Stephen Harrop*** ***Hon. Justice Edwin Goldsbrough***
Counsel:	***Mrs Mary Grace Nari and Mrs Meresimani Markward for the Appellant*** ***Mr Simcha Blessing for the Respondent***
Date of Hearing:	***9th November 2022***
Date of Judgment:	***18th November 2022***

JUDGMENT OF THE COURT

Introduction

1. On 17 December 2021 the appellant Mr Li Jianjun was convicted after a lengthy trial in the Supreme Court on 12 counts of misappropriation contrary to sections 123 and 125(b) of the Penal Code Act. On 19 July 2022 he was sentenced to 4 years and 6 months imprisonment.

2. He appeals against both conviction and sentence. He submits he was not afforded a fair trial pursuant to Article 5 (2)(a) of the Constitution and that the primary judge erred in convicting him based on doubtful and insufficient circumstantial evidence and in rejecting his evidence. If his conviction appeal fails, the appellant submits the sentence was manifestly excessive and that suspension of the prison sentence together with community work or a discharge without conviction is the appropriate outcome. Pending this appeal he was granted bail.



3. The respondent Public Prosecutor opposes both appeals, submitting that the charges were properly found proved and that the sentence imposed is appropriate.

Background

4. The appellant is Chinese but lives in Vanuatu. In August 2016 he had discussions with several Chinese nationals resident in China about purchasing a commercial building, the PYCD building in Port Vila. On 16 August 2016 an agreement was signed between 10 investors and the appellant ("the first agreement"). The investors contributed 10% of their proposed investment but the agreement did not proceed and was cancelled. The contributions of the investors who did not want to continue to explore the investment opportunity were refunded.

5. A fresh shareholders' agreement ("the second agreement") was signed on 17 January 2017, with both Chinese and English versions being prepared. Some of the original investors were no longer interested but others, including the three victims[1], Mr Wen Quigui, Mr Zhao Hanyi and Mrs Song Xiaoqi (on behalf of herself and her husband Zhang Yan) remained. Some new investors became involved. The three victims were original investors and "left their money in" to be applied to the second agreement along with further deposits to be made.

6. It is not necessary to set out in full the terms of the second agreement. The purpose of it was to establish a company called Noah Real Estate Investment and Development Management Limited Company ("*Noah Real Estate*"). The shareholders appointed the appellant as the initial chairman of the board and he was recorded as being "responsible for collecting the capital, taking care of the capital as the agent of all shareholders, external negotiations, the signing of the contract and the company bid for a licence."

7. An agreement for sale and purchase of the PYCD building was signed in January 2017 and the appellant paid the VT10 million deposit but this was forfeited when the contract did not proceed.

8. Although the second agreement did not specify it, the understanding was that the appellant would register Noah Real Estate and open a bank account at the National Bank of Vanuatu ("NBV") for the company. The appellant told the victims and other investors that he would deposit their money into his personal NBV account until he opened the company account but the latter was never opened and all the money ultimately came into

[1] *We refer to them as victims rather than complainants because the appellant was convicted in the Supreme Court.*

his personal account. The appellant did later register Noah Real Estate but did not open a bank account for that company.

9. For reasons which do not need to be traversed, difficulties relating to the number of investors in obtaining Vanuatu Investment Promotion Authority ("VIPA") approval for the registration of the company and other issues led to anger and distrust by members of the investor group towards the appellant.

10. The appellant later incorporated his own company, Moses Real Estate Ltd (where he was sole shareholder and director). He said he did so to avoid the VIPA problem with the number of investors.

11. The investors believed that their funds had been misappropriated by the appellant to his own personal use.

12. Ultimately this led the principal victim ("*Wen*") to lay a police complaint on 26 September 2017 and to charges being laid against the appellant.

13. The Public Prosecutor alleged that the appellant had "wasted and converted"[2] for his personal use funds which had been entrusted to him for the purposes of establishing Noah Real Estate and purchasing the building.

14. After a number of amendments to the charges, which do not need to be traversed, on 13 June 2019 the appellant faced trial on 24 counts of misappropriation to which he pleaded not guilty.

15. After three days of evidence the prosecution asked for an adjournment because its other witnesses were in China. When the case resumed on 10 September 2019 the appellant had engaged new counsel and the prosecution elected not to proceed on 12 of the counts because those witnesses were not available.

16. The 12 remaining counts involved just the three victims. The total sum allegedly misappropriated was VT 11,415,245; the sum involved in the counts relating to Wen was VT 6,181,400 , for Song Xiaquin (and her husband Zhang Yan) VT 3,613,845 and for Zhang Hangi VT 1,620,000.

17. The prosecution case, during which 13 witnesses were called, closed on 18 December 2019. The appellant made a "no case" submission which the primary judge rejected. The appellant appealed unsuccessfully to this court.

[2] To use the words of section 123.

18. The trial resumed on 7 December 2021 with the defence case. The appellant gave evidence and called four other witnesses. The trial concluded on 14 December 2021 and the judgment was delivered promptly, on 17 December 2021.

The Supreme Court Verdicts

19. The primary judge found that the appellant had received into his personal bank account all of the victims' VT11,415,245 investment funds, pursuant to either the first or second agreement. From that account there were during 2017 substantial withdrawals, including VT 25,553,111 within a period of 25 days. After the substantial deposit by Wen on 6 February 2017 of VT 3.8 million, the appellant's account had a credit balance of VT 32,432,130. By 31 October 2017 the balance was only VT 3,406,638. The only withdrawals from the account which were labelled as being returns to investors (not the victims) were payments of VT 8 million and VT 1,600,000 on 19 May 2017. There were no funds transferred to any bank account belonging to Noah Real Estate, the entity the second agreement had required to be established to receive and deal with the funds. Ultimately there were four bank accounts opened for a different company set up by the appellant, Noah *Investment* Company Ltd ("Noah Investment").

20. The primary judge was not satisfied, contrary to a prosecution submission, that the appellant had used shareholder funds to purchase certain vehicles. Nor was he satisfied that shareholder funds had been spent on establishing or running Noah Investment and another company called Noah Restaurant Ltd. However, he saw it as significant that the appellant had managed to establish Noah Investment and open four bank accounts for it, when "he could not do the same for Noah Real Estate Company Limited to transfer shareholders' money for safe custody and operation out of his personal account and monies."

21. The primary judge's key finding was that the appellant had "held on to the victim's funds and withdrawn them for his other personal use which was not authorised by the shareholders within the terms of their shareholders agreement".

22. The judge rejected the appellant's argument that because VIPA had not granted approval, Noah Real Estate could not be incorporated and no bank account could be opened for it. The appellant's own evidence showed that Noah Real Estate was registered and he had had no trouble opening four bank accounts for Noah Investment.

23. The judge found the evidence from the defence witnesses to be of little or no assistance to his case. He described the appellant's own evidence as inconsistent and lacking credibility in parts.

24. Accordingly the judge found that the prosecution had proved all the elements of the remaining 12 charges of misappropriation beyond reasonable doubt. Guilty verdicts were therefore returned

The appellant's grounds of appeal and submissions

25. For the appellant, Mrs Nari and Mrs Markward first contended that the appellant had not had a fair trial because what he regarded as a critical document, a notebook which was seized by the police in the course of their investigation, had not been returned to him. This they submitted had impeded his defence of the charges as it contained a record of investments.

26. For the Public Prosecutor Mr Blessing was sceptical that the notebook even existed; he submitted the appellant's claim that it did exist was a fabrication. There had been no mention of this issue during the prosecution case and no complaint to the trial judge, on the basis of its absence, of an unfair trial.

27. Assuming for present purposes the existence of the notebook and that it contained what Mrs Nari contended it did, we are unable to see that the appellant's defence could have been materially impeded by its absence. Mrs Nari confirmed before us that there was no dispute that the appellant had received into his personal account all of the money involved in the 12 counts. A record of his having received those payments therefore could not have assisted his defence, which did not include a denial of receipt of the victims' funds.

28. The appellant's defence, as articulated before us, was that all of the money, in relation to the first 11 counts, had been reimbursed (or offered to be) to the victims by him. The notebook was not asserted to contain any signed acknowledgement of receipt of such reimbursements by the victims so it could not have assisted on this issue. As to Count 12, relating to the VT 3.8 million paid by Wen into the appellant's bank account on 6 February 2017, the appellant's defence is that while this sum had not been reimbursed to Wen, it did not need to be reimbursed to him (and it was not misappropriation for it not to be) because it did not represent funds from Wen personally, but rather from him on behalf of others.

29. Even if the missing notebook had recorded disputed transactions (not that Mrs Nari suggested it did) i.e. reimbursement payments, then the appellant should in any event

have had no difficulty establishing by other evidence available to him, such as bank account transactions, that such payments had been made.

30. Finally, it appears there was no submission made to the trial judge by either the appellant's original counsel or Mrs Nari as to the fairness of the trial, whether in relation to the missing notebook or otherwise.

31. We therefore reject the first ground of appeal against conviction.

Was there proof beyond reasonable doubt of misappropriation of the victims' funds?

32. For convenience we combine here discussion of the appellant's second and third grounds of appeal.

33. Section 123 of the Penal Code defines misappropriation: "A person commits misappropriation of property who destroys, wastes or converts any property capable of being taken which has been entrusted to him for custody, return, accounting or any particular manner of dealing (not being a loan of money or of monies for consumption)."

34. Self-evidently to succeed on such a charge the prosecution must prove beyond reasonable doubt the following elements:

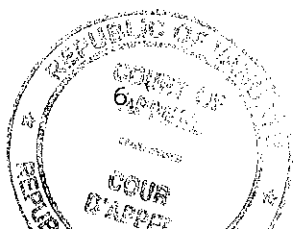
(a) the defendant has been entrusted with property capable of being taken;

(b) that property was entrusted to the defendant for the purpose of custody, return, accounting or any particular manner of dealing (not being a loan of money or of monies for consumption);

(c) the defendant has destroyed, wasted or converted the property entrusted to him

35. There is no dispute about the first two elements here. The appellant was expressly entrusted with investor/proposed shareholder funds pursuant to the second agreement for the purpose of establishing Noah Real Estate. The first stated project of that company was to purchase the commercial building and the appellant was responsible for "collecting the capital, taking care of the capital as the agent of all shareholders, external negotiations, the signing of the contract and the company bid for a licence".

36. The sole disputed question is whether the prosecution proved beyond reasonable doubt that the appellant wasted or converted the funds which he undoubtedly received on that basis.



37. There is no reason to think that the appellant would have "wasted" the funds so it becomes a question of whether he "converted" them.

38. In this context conversion simply means the defendant must be proved to have used the money for a different purpose than its intended purpose.

39. Here, the purpose for which the appellant undoubtedly received the shareholders' funds was not the purpose for which the funds were used because Noah Real Estate never became operational and the building it was to be incorporated to purchase was never purchased.

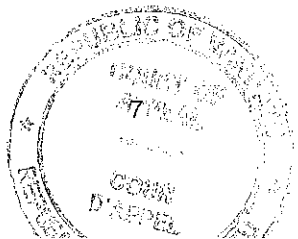
40. Because the funds were received into the appellant's personal bank account, which he controlled as to all deposits and withdrawals, it is evident that whatever he used the money for was by way of unauthorised conversion from its originally intended purposes. By obvious inference he must have used the money for one or more personal purposes that he decided to spend it on. Those personal purposes are unclear but, whatever they were, they did not include the purposes for which he received the money.

41. Misappropriation is a serious criminal offence carrying a maximum penalty of 12 years imprisonment. It therefore must be accepted that the conversion involved must have been a deliberate and dishonest one.

42. Here the appellant maintains that he reimbursed all of the victims' funds (in relation to the first 11 counts). He also said that in some instances his offers of reimbursement had been rejected; the victims refused his money because they wanted him to go to jail.

43. We consider there was ample evidence on which the judge was entitled to, and did, reject that contention and the appellant's overall defence that he had acted appropriately in relation to the victims' funds. We accept that the judge, for the reasons he gave, was entitled to conclude that the transactions in the appellant's personal bank account, in the context of all of the evidence, demonstrated that all of the victims' money was spent by him for personal purposes. By 31 October 2017 the balance in the appellant's account was only some VT 3,406,638, a long way short of the VT 11,415,245 which needed to be repaid to the victims.

44. Even without reference to the evidence, it is difficult to understand why these three investors who had, according to the appellant, received their money back in full, would make a complaint of misappropriation to the police and pursue it throughout a lengthy



trial. Proof of reimbursement would, on the face of it, be easy for the defendant to identify through pointing to some bank account or other documentary record of transfer of funds.

45. It is also difficult to understand why such investors would refuse to accept an unconditional offer of full reimbursement, if one were made. If they thought the appellant had committed a criminal offence they could still make a police complaint even after accepting reimbursement.

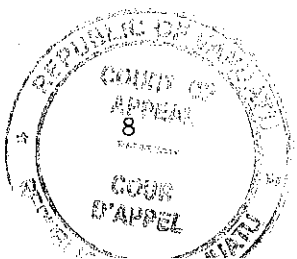
46. The victims here were adamant that they had not been repaid nor offered repayment. The appellant's contrary position, in light of the use for unclear personal purposes of substantial sums of money withdrawn from his personal account during 2017, was rejected by the trial judge. Although it would have been preferable for the primary judge to have given more particular reasons why he found the appellant's evidence to be inconsistent and lacking in credibility, in parts, we consider there were sufficient grounds in the evidence justifying that conclusion.

47. It is also apparent from the judgment as a whole that the judge did carefully consider whether it was safe to draw the critical adverse inferences against the defendant. He expressly rejected two of the prosecutor's suggested inferences but upheld his key submission that the evidence showed that the appellant had spent all of the victims' money on unspecified personal purposes.

48. Although of course the appellant carried no burden of proof, this was a case where on the face of the transactions in the personal bank account which he alone controlled there was strong support for the prosecution case. Having elected to give evidence the appellant failed to provide a credible explanation. The judge was entitled to weigh this when deciding whether to draw the adverse inference he drew against the appellant.

49. Rejecting a defendant's evidence is a fundamental judicial decision in the course of a criminal trial. Where a defendant gives evidence then, unless the court is safely able to reject his account, then the defendant must be found not guilty because by definition there is a reasonable doubt about his guilt; to put this another way, if it is reasonably possible that the defendant's account is true then the prosecution has failed in its task to prove its case to the necessary very high standard.

50. Our task on appeal, having regard to the grounds of appeal, is to give full and fresh consideration to the correctness of the primary judge's decision in the context of all of the evidence he heard or received and to decide whether the verdicts were safe.



51. However, in a substantial trial such as this one where the primary judge has received and considered the evidence over such a lengthy period, including the defence evidence shortly before his verdict was reached, we must take into account the significant advantages the primary judge had in assessing that key issue of whether or not the appellant's evidence left him with a reasonable doubt about guilt: see *Boilhilan v Public Prosecutor* [2022] VUCA 6. [3]

52. While this was a case featuring documentary and circumstantial evidence, at its heart was a credibility dispute between the victims on the one hand and the appellant (and his partner) on the other. The judge had to resolve that. He had the considerable advantages of hearing and seeing the witnesses give their evidence-in-chief, then being challenged in cross-examination about their respective positions.

53. The prosecutor Mr Blessing made quite detailed written closing submissions about why the appellant's evidence should be rejected as inconsistent[4]. These may well have been in the primary judge's mind in making his briefly-stated conclusion rejecting the appellant's evidence.

54. Mr Blessing made several points which appear to us to be founded in the evidence. Some of these were, together with further points we make:

(a) Nowhere in the We-Chat transcripts provided to the court had the appellant ever mentioned to the investors that he was having difficulties with completing registration of the Noah Real Estate and opening a bank account for the company due to the VIPA policy or legal obligations;

(b) The chats make clear the anxiety of the shareholders about the money being deposited into the company's bank account but the appellant appeared to be making excuses rather than explaining with reasons why he was not able to do this;

(c) The appellant's assertion that he had repaid the victims' money was not supported by reference to any bank account transactions. We observe that by far the most substantial payment the appellant received, that of VT3.8 million by Wen on 6 February 2017, was a transfer from his bank account to the appellant's account. That was by contrast with the other payments made by or on behalf of the three victims, most of which involved the use of intermediaries. Any repayment to Wen

[3] *At 56-57, citing Dovan v PP [1988] VUCA 7*
[4] *At paragraphs 18-29 of his closing submissions.*

could readily be achieved by the appellant making a return transfer between the same two Vanuatu bank accounts, yet that clearly did not happen;

(d) We reject as untenable the suggestion that there was no need to reimburse Wen because the funds did not represent his money but rather payments he had made to the appellant on behalf of others. Even if that were true, reimbursement should have been made to him so that he could account to those for whom he had made payments. Alternatively, if the appellant had decided to refund those who he understood had contributed to that VT3.8 million payment from Wen, one would have expected an honest person in his position to have made and carefully documented those payments and provided proof of them to Wen. Or, he could have refunded the money to Wen while making it clear that he was holding Wen responsible for returning the money to those who had originally provided it. None of that occurred;

(e) The appellant said in evidence in chief that he had never signed the second agreement, yet clearly he did as he was forced to acknowledge in cross-examination.

55. We dismiss the second and third grounds of appeal.

Result of the appeal against conviction

56. While of course each of the counts must be considered separately and each constitutes a trial within the trial, this was a case where both prosecution and defence understandably dealt with them in a blanket manner, with the exception, from the defence perspective, of Count 12. For that reason we have not discussed the detail of each of the counts.

57. We are satisfied that the appeal against conviction must be dismissed in respect of all 12 counts. We reject each of the points on appeal advanced by the appellant. The primary judge, through a combination of documentary and circumstantial evidence coupled with drawing justifiable inferences and making credibility findings against the appellant, reached what we consider are proper verdicts of guilty on each of the 12 counts.

The appeal against sentence

58. In his brief sentencing judgment on 19 July 2022 the primary judge noted the aggravating features of the misappropriation offending: "*The amount involved was VT 11,415,245 belonging to 3 Chinese foreign nationals who upon trust, paid monies to the defendant to be invested into property namely, the purchase of the Pty CB building in Port Vila. The*

defendant however dishonestly put those monies to further his own financial interests. He therefore caused substantial losses to these investors. There monies have never been returned. There was a serious breach of trust, a degree of planning was involved, and subterfuge used by the defendant to cover up the reality of the situation."

59. His Lordship referred to *PP v Mala* [2015] VUCA 30 and *PP v Alexin John* [2021] VUSC 170 as guideline authorities but noted the amounts involved in those cases were less and that the facts and circumstances were very different.

60. His Lordship adopted a starting point of seven years' imprisonment, but took account of the appellant's age, his young family, his clean past record and other personal factors and his willingness to repay the money. For these mitigating factors he reduced the sentence by two years and six months (an approximately 36% deduction from the starting point) and reached an end sentence of four years and six months imprisonment, imposed concurrently on each of the 12 counts. He rejected Mrs Nari's submission that the prison sentence should be suspended.

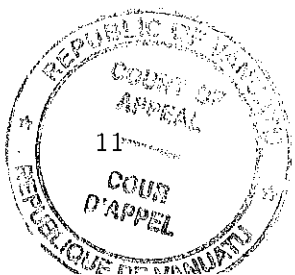
61. Before us Mrs Nari submitted that the end sentence was manifestly excessive and that a starting point of two years imprisonment would have been appropriate. She further submitted that, whatever the starting point was, the end sentence of imprisonment should have been suspended with community work imposed. She added that a discharge without conviction could have been justified in all the circumstances.

62. For the respondent Mr Blessing accepted the starting point may have been near the top of the available range but submitted that the end sentence was well within range and certainly not manifestly excessive.

63. Although the judge placed weight on the breach of trust, we observe that all cases of misappropriation by definition will involve a breach of trust of one kind or another, so that is not in itself an aggravating feature.

64. But this was a case involving a significant sum of money, three victims and a greater breach of trust than might sometimes arise involving dishonest conduct over a period of some months, some planning and as the judge put it "subterfuge".

65. Notwithstanding those aggravating features we consider the starting point was somewhat high but on the other hand the discounts for mitigating factors for a defendant who had not pleaded guilty were in our view generous.



66. The end sentence, which is the focus on an appeal against sentence rather than how it is reached, was well within the available range and certainly not manifestly excessive.

67. We agree with the primary judge that this is not a case where suspension of the imprisonment sentence is warranted.

68. The appellant's appeal against sentence is dismissed.

69. The appellant will need to report to the Port Vila Correctional Facility to commence his sentence of imprisonment at **9am on Monday 20 November 2022**. The appellant's current bail conditions, imposed pending the hearing of this appeal by this court in its judgment of 29 July 2022, will continue until that time.

70. A fresh warrant of imprisonment will need to be signed by a single Supreme Court judge.

71. It appears that the appellant was in custody between the date of sentence, 19 July 2022 and the Court of Appeal granting him bail on 29 July 2022. On that basis, pursuant to section 51(4) of the Penal Code we direct that the prison sentence is deemed to have commenced on Thursday, 10 November 2022.

72. In case there has been additional time in custody of which we are not aware, leave is granted to Mrs Nari to apply (on notice to the Public Prosecutor) to a single Supreme Court judge requesting an earlier starting date of the sentence of imprisonment than 10 November 2022.

Dated at Port Vila this 18th day of November 2022

BY THE COURT

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Hon. Justice Dudley Aru