



CC 42-1995

IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU

Criminal Case No 42 of 1995

PUBLIC PROSECUTOR

-V-

KEITH MALA

I find the guidelines as set out in the case of BARRICK (1985) 81 Cr App R 78 by the then Lord Chief Justice of England Lord Lane most helpful and I will adopt them and substantially repeat them here as this case provides an opportunity to make some observations upon the proper sentence to be passed in respect of certain types of theft and fraud as to which there has been recently an increasing number before the Court. The type of case with which we are concerned is where a person in a position of trust, for example, an accountant, solicitor, bank employee, manager of a company or public servant, has used that privileged and trusted position to defraud his partners or clients or employers or the general public of sizeable sums of money. He will usually, as in this case, be a person of hitherto impeccable character. It is practically certain, again as in this case, that he will never offend again and, in the nature of things, he will never again in his life be able to secure similar employment with all that that means in the shape of disgrace for himself and hardship for himself and also his family. This has been quite evident in the present case, where the defendant has shown that he has applied for one job after another and been turned down. In my view there can be no proper basis for distinguishing between cases of this kind simply on the basis of the defendant's occupation. Professional men should expect to be punished as severely as the others, in some cases more severely.

It is, one appreciates, dangerous to generalise where the circumstances of the offender and the offence may vary so widely from case to case. In the hope that they may be helpful to sentencers generally, and may lead to a little more uniformity, I make the following suggestions.

In general a term of immediate imprisonment is inevitable, save in very exceptional circumstances or where the amount of money obtained is small. Despite the great punishment that offenders of this sort bring upon themselves, the Court should nevertheless pass a sufficiently substantial term of imprisonment to mark publicly the gravity of the offence. The sum involved is obviously not the only factor to be considered, but it may in many cases provide a useful guide. Where the amount involved cannot be described as small but are less than 1 million vatu or thereabouts, terms of imprisonment ranging from the very short up to about 18 months are

appropriate. Cases involving sums of between about 1 million and 5 million vatu will merit a term of about two to three years' imprisonment. Where greater sums are involved, for example those over 10 million vatu, then a term of three and a half years to four and a half years would be justified.

The terms suggested are appropriate where the case is contested. In any case where a plea of guilty is entered however the Court should give the appropriate discount. It will not usually be appropriate in cases of serious breach of trust to suspend the sentence. As already indicated, the circumstances of cases will vary almost infinitely.

The following are matters to which the Court will no doubt wish to pay regard in determining what the proper level of sentence would be:

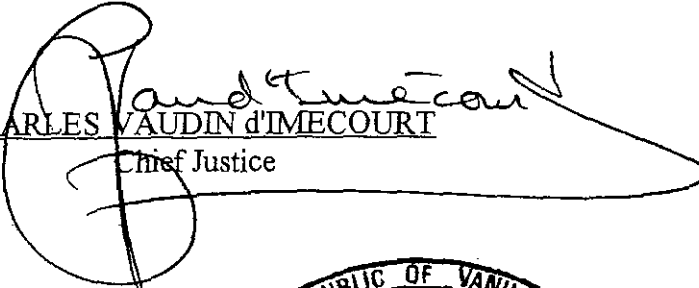
- (i) the quality and degree of trust reposed in the offender including his rank;
- (ii) the period over which the fraud or the thefts have been perpetrated;
- (iii) the use to which the money or property dishonestly taken was put;
- (iv) the effect upon the victim;
- (v) the impact of the offences on the public and public confidence;
- (vi) the effect on fellow employees and partners;
- (vii) the effect on the offender himself;
- (viii) his own history;
- (ix) those matters of mitigation special to himself such as illness; being placed under great strain by excessive responsibility or the like; where as sometimes happens, there has been a long delay, say over two years, between his being confronted with his dishonesty by his professional body or the police and the start of his trial; finally, any help given by him to the police.

In the present case, the defendant comes from an impeccable background and has served for many years in the public service of Vanuatu without a single stain on his character. It is as a result of indebting himself after seeking election as a member of Parliament in 1991 and failing to secure his seat that, I am told, this defendant offended. It seems that having resigned his post as a public servant to contest the election, he had no option but to seek employment in the private sector. He started offending almost from the very moment that he started his new employment. It was by pure accident that he was discovered in January 1994. Had it not been for that, it is clear that he would have continued offending. The period of dishonesty was a long one, between April 1992 and January 1994, almost two years. On the other hand, there has been considerable delay in bringing this case to Court. The police took over a year to investigate the matter and the case itself took a considerable time before it was listed before the Court. None of the delay was caused by the defendant, who pleaded guilty at the first opportunity afforded to him. Indeed he had made immediate

admissions to his employers and the police at the time of his arrest. It is submitted on his behalf that since the discovery of this offence, the defendant has become a changed character; that he has made a new life for himself and his family; that he has entered religion and is now a Pastor of the Apostolic church in Vanuatu. I have seen letters from the Solicitor-General, Mr Oliver Saksak and from Mr Thomas Bakeo. Both speak highly of the defendant and his evangelical work particularly with the young. Both say that he is a genuinely changed man.

Under the guidelines that I have set out above, Mr Mala would normally, on a plea of not guilty have qualified for a sentence of two to three years' imprisonment. On a plea of guilty, with the appropriate discount, he could have expected a minimum of 16 months' imprisonment. In the present case, the delay in bringing this matter to Court was totally inordinate and unreasonable. At the same time it has had this advantage, namely it has allowed the defendant to show that he could change his way of life and make something of it by helping others. He falls, of course, in the category of those who will I have no doubt, never offend again. On the other hand, I must also consider the deterrent effect of my sentence on the public. Normally, Mr Mala could have expected to go to prison for at least 16 months as I have indicated above, even though he has pleaded guilty; but because of the inordinate delay in bringing this matter to Court and the fact that I accept that Mr Mala has shown genuine remorse for his offences and the fact that I accept that he has completely changed his way of life and dedicated himself to the service of others, I feel that such a sentence is now uncalled for. Nevertheless, I cannot totally ignore his offending. In the very exceptional circumstances of this case I feel that a sentence of 3 months' imprisonment on each count concurrent will suffice. Therefore the total sentence in this case will be 3 months' imprisonment starting from today. If Mr Mala behaves himself in prison and I have no doubt that he will, he will have a remission of one month's imprisonment and will be called upon to serve only 8 weeks. In addition there will also be a restitution order in the sum of 1,770,000 vatu made to Juihi Bauerfield Limited, which shall be paid back by the defendant.

Dated this 2nd day of January 1996.


CHARLES VAUDIN d'IMECOURT
Chief Justice

