

BETWEEN: Public Prosecutor

AND: Jacob Malau
Defendant

Date: Monday, 18 June 2018
By: Justice G.A. Andrée Wiltens
Counsel: Mr L. Young for the Public Prosecutor
Mr F. Tasso for the Defendant

SENTENCE

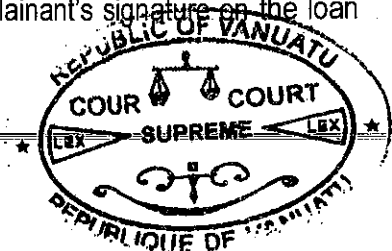
A. Introduction

1. Mr Malau pleaded guilty to:

- Forgery (x2), laid contrary to section 140 of the Penal Code [Cap 135]. The maximum sentence for this offence is a term of 10 years imprisonment.
- Offence resembling theft, laid contrary to section 126(b) of the Penal Code [Cap 135]. The maximum sentence for this offence is a term of 8 years imprisonment.

B. The Facts

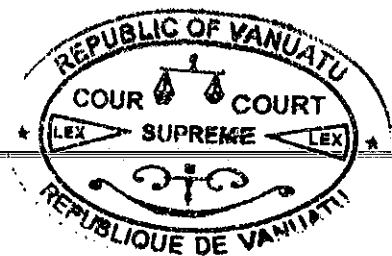
2. Mr Malau and the complainant used to work together in 2015. During their daily contact, Mr Malau persuaded the complainant to allow him to use the complainant's VT 1.2 million fibreglass fishing boat to commence a fishing business.
3. Instead, Mr Malau used the boat as security for a personal loan to purchase an outboard motor, without the complainant's authority. Mr Malau forged the complainant's signature on the loan application form.



4. A reference form, addressed to the Vanuatu Agricultural Development Bank (VADB") to support Mr Malau's loan application, apparently signed by a Church elder was also forged by Mr Malau.
5. Subsequently, when Mr Malau defaulted on his VADB loan, the bank seized the boat and on-sold it to recoup their losses.
6. Mr Malau admitted the offending to the investigating police in 2017, and he has repaid VT 20,000 to date to the complainant for his loss of the boat.

C. Submissions

7. Mr Young submitted that the authority of *Boesaleana v PP* [2011] VUCA 33 should be considered as it counselled against formulaic sentencing. He submitted *PP v Scott* [2002] 29 made it clear that personal factors are of only limited relevance when sentencing for this kind of offending. Mr Young further pointed to *RL v PP* [2018] VUCA 26 where delay prior to sentencing was considered, and the better way to deal with that rather than suspending the sentence was to allow a suitable reduction of sentence.
8. Mr Young submitted that the authority of *PP v Mala* [1996] VUSC 22 was instructional in setting the appropriate sentencing level in that it set a suggested tariff of 2 to 3 years of imprisonment for losses of between VT 1 and 5 million. Mr Young pointed out that this tariff had been supported by the Court of Appeal in other cases.
9. Mr Young also put forward the case of *PP v Tangarisi* [2014] VUSC 144 where forgeries of cheques to make them for larger amounts was dealt with. The sums involved were small. However CJ Lunabek made plain that the offence of forgery is a very serious offence of dishonesty, ordinarily warranting immediate terms of imprisonment. However, as there had been a 4 year delay in dealing with the matter, the defendants were given non-custodial sentences.
10. Mr Young also referred to *PP v Morris* [2011] VUSC 62, where a bank officer forged a cheque and stole VT 94,800. The sentence imposed was a 3 month term of imprisonment, without the sentence being suspended.
11. Finally Mr Young pointed to *PP v Kwani* [2012] VUSC 242, a case involving the charge of offence resembling theft with a loss of VT 1.5 million, where a start point of 3 years imprisonment was considered appropriate and an end sentence imposed which was not suspended.
12. Mr Young pointed to aggravating factors of the offending as follows:
 - The extent of the loss – VT 1.2 million;
 - Breach of trust between business associates; and
 - The planning involved.



13. Mr Young submitted that a start point of 4 years imprisonment for the forgery charges and 3 years imprisonment for the offence resembling theft charge should be set, the sentences to be served concurrently. He further submits that after mitigating factors are taken into account the sentence ought not to be suspended.

14. Mr Tasso referred me to the cases of:

- *PP v Mael* [2010] VUSC 14, which involved forgery and the loss of VT 452,000;

- *PP v Buleval* [2011] VUSC 257, which involved forgery and the loss of VT 922,000;
and

- *PP v Kalotti* [2007] VUSC 94, which involved forgery and theft and the loss of VT 539,000.

15. Mr Tasso relied on those cases to support his overall submission that imprisonment ought to be imposed, but suspended.

D. The Purposes and Principles of Sentencing

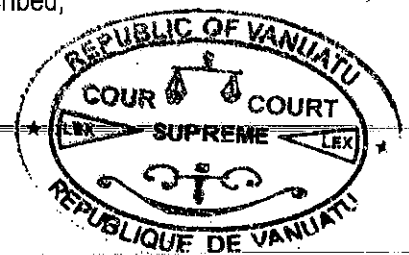
16. The main purposes of sentencing, as conveniently set out in Section 7 of the New Zealand Sentencing Act 2002, are to:

- hold the offender accountable for the harm done to the complainant and the community,
- promote a sense of responsibility for, and an acknowledgement of, the harm done,
- provide for the interests of the victim of the offending – including providing reparation for the harm done,
- denounce the offender's conduct,
- deter the offender and the public at large from this type of behaviour,
- protect the community, or
- assist in the offender's rehabilitation and re-integration.

17. All of those considerations have valid application to sentencing in Vanuatu.

18. The principles of sentencing, set out in section 8 of that same New Zealand Act involve a number of mandatory considerations, including the following pertinent matters:

- take into account the gravity of the offending, and the degree of individual culpability,
- take into account the seriousness of the offending in comparison with other types of offending, as indicated by the maximum penalties prescribed,



- impose the maximum penalty prescribed if the offending is within the most serious of cases for which that penalty is prescribed – unless the circumstances relating to the offender make that inappropriate. Similarly, impose near to the maximum sentence if the offending is near to the most serious of cases for which the penalty is prescribed, again subject to the same qualification,
- consider the desirability of consistency of sentencing and parity of sentences,
- ~~take into account any information concerning the effect of the offending on the victim,~~
- take into account any particular circumstances of the offender to ensure disproportionately severe sentences are avoided,
- take into account the offender's background to see if wholly or partly rehabilitative sanctions are appropriate,
- take into account the outcomes of any restorative justice processes undertaken, and
- impose the least restrictive sentence that is appropriate in the circumstances.

19. Again, all of those considerations have valid application to sentencing in Vanuatu.

E. Starting Point

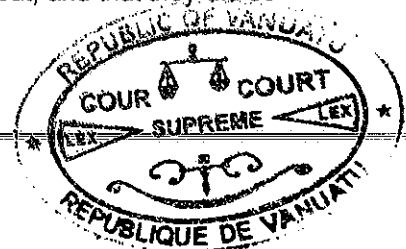
20. The appropriate starting point in terms of Step 1 as prescribed by *PP v Andy* [2011] VUCA 14 needs to be determined.

21. Taking everything into account, I set the start point for the offending for Mr Malau, on a totality basis and bearing in mind that there are 3 offences involved, at 3.5 years imprisonment.

F. Personal Factors

22. In terms of step 2 of *PP v Andy*, Mr Tasso points to the following:

- Mr Malau is 59 years old, married, father of six of his own children and 4 more children who have been adopted. The youngest 5 of the children are still at school;
- He is the sole breadwinner. He has a strong work ethic and good relations with his community;
- The offending only came to light due to Mr Malau's incapacitation which prevented him from working and continuing to meet his obligations. He says the bank were very quick to step in and re-possess and sell the boat, and that they did so without notice;



- He has no previous convictions;
- He co-operated with police inquiries, and he is said to be remorseful; and
- Mr Malau is prepared to pay the complainant's loss, and has already voluntarily paid VT 20,000 towards that.

G. Pleas

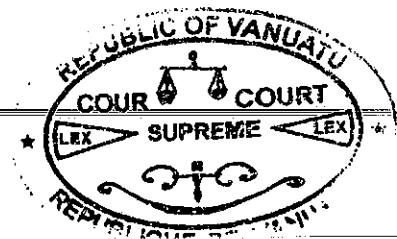
23. A guilty plea, at the first available opportunity, merits a maximum discount of up to 1/3 from the final sentence: *PP v Andy*. Mr Tasso submits that Mr Malau is eligible for the maximum discount.
24. However, Mr Malau did not present himself at arraignment. The reasons for his absence have not been made known to the Court. A warrant of arrest was issued; and after he was arrested, he was arraigned and then he pleaded. In the circumstances, the maximum discount available for Mr Malau is 30%.

H. Sentence

25. From the start point of 3.5 years imprisonment, I am prepared to allow discounts for the lack of previous convictions, his remorse and his personal circumstances, his offer to compensate the complainant and his steps towards doing that. I allow a generous reduction from the start point of 10 months imprisonment for those factors.
26. I further reduce Mr Malau's sentence for his pleas by 30%, namely by a further 10 months imprisonment.
27. The end sentence that I arrive at is 22 months imprisonment, which I impose on all 3 charges concurrently.

I. Suspension

28. Section 57(1) of the Penal Code requires the Court to consider whether the end sentence should be imposed immediately or suspended. The Court has jurisdiction to suspend the sentence, in whole or in part, if immediate incarceration is inappropriate:
- In view of the circumstances,
 - In particular, the nature of the crime, and
 - The character of the offender.
29. In my analysis, there are compelling reasons which enable me to suspend the sentence. Firstly, there is the lack of previous convictions. Secondly Mr Malau has an enormous task in caring for such a large family, and there is no one else who could step in. Thirdly, if Mr Malau were to serve an immediate sentence of imprisonment, then he would not be able to work to



contribute to his family, AND to be able to make the compensation payments I am about to compel him to make to the complainant.

30. The sentence of 22 months imprisonment is accordingly suspended for 2 years. Mr Malau needs to understand that he needs to remain offence free for 2 years from today, or he will be incarcerated for 22 months.
31. Suspending a sentence is often accompanied by a direction that the offender be subject to a period of supervision by the Probation service, to ensure that re-offending risks are minimised. I am satisfied that is not required in this instance. Further, due to his family and financial circumstances I do not impose a term of community work – that would be too onerous.
32. I direct Mr Malau to pay to the complainant the full extent of the loss. He has already paid VT 20,000 towards that. I therefore direct that he pay the sum of VT 1,180,000 – which he agrees to. He is able and offers to pay that at VT 5,000 per fortnight, the first payment being on 2 July 2018 and every fortnight thereafter until the full amount has been paid.
33. Mr Malau has 14 days to appeal the sentence if he disagrees with it.

Dated at Port Vila this 18th day of June 2018
BY THE COURT

Gardie Wilton
Justice G.A. Andrée Wilton

