IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU
(Criminal Jurisdiction)

Criminal
Case No. 18/1358 SC/CRML

PUBLIC PROSECUTOR
v.
CONNIE SEWERE

Coram: ***Justice D. V. Fatiaki***

Counsel: *Mr L. Young for the State*
Ms P. Kalwatman for the Defendant

Date of Sentence: *27 July 2018*

SENTENCE

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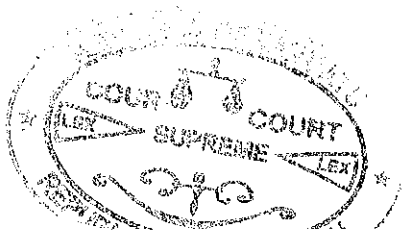
1. The defendant pleaded guilty and was convicted on 5 June 2018 for an offence of Misappropriation of a sum of VT6,527,775 from her employer Shane Royle the owner of Rapid Electric and Bayview Apartments in Port Vila. The offence occurred between 2006 and 2012 and involved the use of several stratagems by the defendant to convert rental monies collected from apartment tenants. The offences came to light after shortfalls were noticed in the bank deposits of rental receipts. An internal audit was then conducted in October 2011 and the full extent of the defendant's fraudulent activities was uncovered.

2. A formal complaint was first lodged by the defendant's employer with the police on 31 October 2011. I say "*formal*" advisedly, because the relevant police statement merely alleges that the defendant "*... has stolen a large* (unquantified) *amount of money ...*" and "*...* (the defendant) *has been given an opportunity to restitute ...*" and, failing which, "*... then charges are to be pressed*". Plainly recovery of the money was the primary concern of the complainant.

3. In this latter regard, defence counsel writes that pursuant to the "*restitution agreement*" reached between the defendant and her employer, the defendant continued in her employment and repaid the total sum of VT286,766 from her fortnightly wages. The defendant had also agreed to forego her leave and severance entitlement of VT285,847 and she had repaid a further sum of VT140,000 after her termination, from wages earned from her employment with the Department of Meteo and Climate Change. In December 2016 she became a permanent employee of the Department on a fortnightly salary of VT57,997.



She was suspended on half salary on 26 June 2018 pending the outcome of the present proceedings.

4. Needless to say reinstatement of the defendant's full salary and any possibility of her repaying the complainant is dependent on a sentence that allows her to remain in employment.

5. Defence counsel also submits there is still a dispute and some uncertainty as to the total amount that was allegedly misappropriated by the defendant. If I may say so, this submission tantamounts to a disagreement about the amount stated in the charge and undermines both the defendant's guilty plea and her unconditional admission of the prosecution's statement of the facts. In neither instance however, is there a total denial of criminal behaviour, rather, the denial is as to the amount alleged to have been converted by the defendant. This is a matter for the prosecution to establish and is clearly relevant to sentencing.

6. The importance of fixing an amount and providing particulars in a charge of Misappropriation was recently affirmed by the Court of Appeal in George Boar v Public Prosecutor Civil Appeal Case No. 18/1561 delivered on 20 July 2018 where the Court said (at paras. 17 to 19):

"This is an appeal from that judgment. We note that the proposed criminal charge was further amended on 1st December 2017 so the allegation was then that between 2009 and 2017 Mr Boar converted between VT964,751 and VT2,007,895 representing "the judgment sum less charges" and being money to which the clients were entitled. The lower figure is the amount specified in the Deed. The higher figure is the amount calculated on the basis of the PI statements of the clients.

It is apparent from the PI documents, particularly as disclosed in the appeal book, that Mr Boar's position simply is that he collected or received the sum of VT6,685,660, that he has paid to a representative of the clients VT1,500,000, and that he has applied the balance apart from the VT964,751 held by him on behalf of the clients to this costs. He asserts in his submissions that it was agreed between him and the clients that he would deduct his legal fees from the payments he had received, and would then pay the balance to the clients. His submissions suggests that, in addition to the VT1,500,000 payment referred to above, he has made other payments to certain of the clients. The Deed (and some other documents) suggest that he also paid VT170,000 and then VT817,751 in December 2012 and VT300,000 on 10 May 2017.

That is a matter which, from the point of view of the Public Prosecutor, should be clarified before the charge can proceed to a fair hearing. Any person facing a criminal allegation is entitled to have clarity and particularity as to what he is facing."

And later at para. 27:

"There is reason to doubt the Deed accurately reflects the amount Mr Boar holds or should hold on behalf of his clients. ***The act or acts of conversion, and the dates should be made clearer. The amount or amounts converted should be clear."***

And finally at para. 44(2):

"The charge as expressed before the Senior Magistrate and as subsequently amended does not adequately furnish the accused person, that is Mr Boar, with notice as to the charge he has to meet."

(my highlighting)

7. In the present case several different figures are mentioned or advanced as being the amount converted by the defendant including, a figure of **VT5,999,465** in the original charge dated 19 May 2015 on which the defendant was committed to the Supreme Court. Then there is the figure of **VT6,527,775** in the Information filed by the Public Prosecutor on 25 May 2018.

8. The figure of **VT5,993,465** is also listed in the letter of solicitors acting for Rapid Electrical as being the amount for which civil recovery proceedings will be issued against the defendant. It is also mentioned in the prosecution's statement of facts filed with the Information whereas in the PI papers, the Bayview Apartment Receipts and Deposits Reconciliation spreadsheet shortfall for the years 2007 to 2011 adds up to a total of **VT6,152,215** and the complainant's Discrepancies sheet which summarises all the spreadsheets discloses a total "*Amount Missing*" of **VT4,868,255**.

9. Finally, the Summary provided by the complainant's auditors ("**Annexure 7**") records 2 significant entries as follows:

"Cash receipted not banked ..... *- VT4,334,605*
Total rental not paid ..... *- VT1,658,860*
Which adds up to ..... ***- VT5,993,465"***.

This is the figure mentioned in the prosecution's statement of facts as being the total amount used by the defendant "*... for her own purposes*". The prosecution also accepts that the complainant "*... managed to obtain the* (unquantified) *remaining amount from the defendant*" which defence counsel calculates is: VT(6,527,115 – 5,993,465) = VT533,650.

10. From the foregoing there is an unverified uncertain range for the amount converted by the defendant of between VT4 million and VT6 million. Giving the defendant the benefit of the doubt and accepting that she has already repaid a considerable amount, I shall adopt the lesser figure of VT3 million for sentencing purposes.

11. It is common ground that despite the audit revelations and formal police complaint in October 2011, the defendant continued to work for the owner of Bayview Apartments until she was finally terminated almost a year later on 21 September 2012. On 27 September 2012 the "*formal complaint*" was resurrected in a second police statement of the complainant where he writes "*... I now wish to prosecute to the full extent of the law and gain compensation*".

12. Police investigations were conducted and the defendant eventually gave a caution statement to the police on 07 May 2013 confirming that she had taken money from her employer's companies Bayview Apartments and Rapid Electrical. Inexplicably, the defendant was not charged until May 2015 and another 3 years passed before she was finally committed to stand trial in the Supreme Court in May 2018.

13. Be that as it may the sentencing guideline case for offences of the type that the defendant committed is Public Prosecutor v Mala [1996] VUSC 22 where the former Chief Justice in adopting a judgment of Lord Lane in Barrick (1985) 81 Cr. App. R78 (UK) said:

"***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."*

(my highlighting)

(***see also****:* Public Prosecutor v Marae [1996] VUSC 24)

14. The highlighted passages makes clear that in the present case where the amount converted is in excess of VT3 million a starting point of 2 to 3 years is appropriate. This offence is further aggravated by the blatant breach of trust involved in the defendant's handling of her employer's cash receipts; the lengthy 5 year duration of the offending; and the use of the converted sums to feed the defendant's gambling addiction. In my view a starting point of 4 years imprisonment is wholly appropriate.

15. By way of mitigation I have considered the following:

- The defendant is 38 years from Orap Village, Malekula Island;
- The defendant completed primary and secondary education and was accepted at USP to further her studies;
- The defendant is married with two daughters and maintains a good relationship with her chief and community members;
- The defendant frankly admits to having a "*gambling problem*" which significantly contributed to her offending;
- The defendant is a first time offender and pleaded guilty at the earliest opportunity;
- The defendant readily admitted the offence to her employer and to the police;
- Defence counsel submits the defendant has already repaid a sum of **VT712,413** to the complainant;
- There has been a lengthy unexplained delay of 5 years in disposing of this case;
- The defendant is currently employed and has offered to repay the outstanding balance owed to her former employer; and
- the defendant has consistently expressed her remorse and apology to her former employer for her offending and "*promised not to reoffend again*" to the probation officer;

For the above mitigating factors except the guilty plea, I reduce the starting point by 12 months giving a second stage sentence of (48 – 12) = 36 months imprisonment which is further reduced by 12 months in recognition of the defendant's guilty plea leaving an end sentence of (36 – 12) = 24 months imprisonment.

16. I turn next to consider whether this is such an exceptional case as to warrant the suspension of the whole or part of the end sentence. In this regard I have considered the hitherto unblemished character of the defendant; the fact that the crime was committed to feed the defendant's gambling addiction and occurred

within a loose accounting system without regular checks. Finally, in view of the inordinately lengthy delay in finalising this case through no fault of the defendant and, given the defendant's willingness to repay the balance amount owing to her former employer and her current ability to make good on that offer, I shall take the exceptional course and order the defendant's end sentence of 2 years imprisonment be wholly suspended for a period of 3 years.

17. The defendant is warned that although she will not go to prison today, her suspended sentence means that if she is convicted of an offence in the next 3 years then she will be sent to prison to immediately serve this sentence of 2 years imprisonment. Whether that happens or not is entirely within the defendant's control but if she does reoffend in the next 3 years then she cannot expect any more leniency from this Court.

18. In addition, I impose a sentence of compensation on the defendant to pay the sum of VT3 million to her former employer in equal fortnightly instalments of VT30,000 commencing on 10 August 2018. All such instalments are to be paid to and receipted by the Accounting Officer responsible for Rapid Electrical and Bayview Apartments. I further order and direct that failure to pay any instalment will result in the total outstanding sum becoming due and payable and enforceable as a judgment debt.

19. The defendant is advised that she can appeal against this sentence within 14 days if she does not agree with it.

DATED at Port Vila, this 27th day of July, 2018.

BY THE COURT

D. V. FATIAKI
Judge.