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

CRIMINAL APPEAL CASE No. 02 OF 2015

BETWEEN: WILLIE APIA
Appellant

AND PUBLIC PROSECUTOR
Respondent

Coram: *Hon. Chief Justice Vincent Lunabek*
Hon. Justice Bruce Robertson
Hon. Justice Oliver Saksak
Hon. Justice John Mansfield
Hon. Justice Dudley Aru
Hon. Justice Stephen Harrop
Hon. Justice Mary Sey
Hon. Justice David Chetwynd

Counsel: *Saling Stephens for the Appellant*
Tristan Karae for the Respondent

Date of Hearing: *Tuesday 21 July 2015*
Date of Judgment: *Thursday 23 July 2015*

JUDGMENT

Introduction

1. Mr Apia, who served in the Vanuatu Police Force for 22 years and attained the rank of Senior Sergeant, was convicted in the Supreme Court on 12 June 2015 on six counts of forgery and one count of obtaining money by deception following a trial before Justice Fatiaki which ran for seven days in March and May 2015.

2. Justice Fatiaki sentenced Mr Apia to 5 years imprisonment. He appeals against both his conviction and the sentence imposed.

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3. A summary of the evidence heard and facts found by Justice Fatiaki is set out in his detailed judgment, *Public Prosecutor v Willie Apia* [2015] VUSC 63, and need not be repeated here. However, the essence of the prosecution case which His Lordship found established beyond reasonable doubt was summarised in his sentencing judgment as follows:

> *"5. Over a period of 4 months between January and May 2014, you personally made a large number of fake Road Tax Stickers: fake Government Receipts; fake Driving Licenses; fake Public Transport Driver's Permits and fake Motor Vehicle Insurance Certificates which you sold to many customers that had been found by "middle-men" recruited by you.*
>
> *6. This was an intentional fraudulent scheme designed to make as much money as you could from dishonest and naïve drivers. You used inside knowledge and information acquired from being a Police Officer experienced in conducting vehicle checks and you chose a time when there would be a peak demand for your fake documents.*
>
> *7. Although you claim that you were "forced" into making the fake documents and did it merely to "expose" the dishonest drivers, the Court did not believe you. Neither did the Court believe your claim that you had not received any money for the fake documents. Your offence was not prompted by human weakness or public duty, rather, it was pure "greed" that caused you to offend."*

The Conviction Appeals – Grounds and Submissions

4. Mr Apia appeals on the grounds that the primary Judge erred in that he:

> "1. *Failed to give any consideration and/or weight to the appellant's evidence and submissions at the trial hearing.*
>
> 2. *Wrongly made a finding of convictions in respect of 5 counts of forgery and 1 count of obtaining money by deception against the weight of the entire evidence adduced by the prosecution.*
>
> 3. *Wrongly held that the defence has not challenged the evidence of Melton Aru for the shortfall of the sum of Vt 1,440,220 from the custom revenue*

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collection an attempt to shift the burden of disprove ("sic") *on the defence.*

4. *Wrongly held that the appellant had received the sum of Vt 3,000 from Alan Samson and another Vt20,000 from Laurent Isaac without any documentary proof.*

5. *Branding the appellant as an untruthful, unbelievable and exaggerated law enforcement officer with 22 years experience in the Police Force which basically culminates to a dislike of the appellant in order to give a fair and impartial assessment in his entire evidence, thus the convictions.*

6. *Relied heavily on the evidence of Philip Kemu, Kendrick George and Michael Kemu, whom he branded them* (sic), *as "accomplices" when there is no corroborated and/or evidentiary material to confirm that the appellant had committed the offences of forgery and obtaining money by deception as charged.*

7. *Contradicting himself when handing down his verdict, when he said at paragraph 4 of the same that he was satisfied that the accomplishes are creditable and trustworthy witnesses but later said at paragraph 6 of his sentence that the appellant has an intentional fraudulent scheme designed to make as much money from dishonest and naïve drivers thus discrediting the evidence of the said accomplices."*

5. In his written and oral submissions, Mr Stephens submitted that Justice Fatiaki had wrongly refused to allow his client to give his evidence-in-chief by handing in a sworn statement he had made and that this meant he had no choice but to refrain from calling a further defence witness. He also contended counsel had unfairly been required to make submissions orally rather than in writing, with time for reflection.

6. For the respondent, Mr Karae simply sought to uphold the findings made by Justice Fatiaki as being justified on the evidence he heard.

The approach of this Court on an appeal against conviction

7. On an appeal of this kind, the task of this Court ultimately is to determine whether there has been a miscarriage of justice and particularly whether the findings that the elements of the charges have been proved are properly founded in admissible evidence. Where, as

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here, the defendant elects to give evidence, a Judge may not convict the defendant if his account might reasonably be true. That is simply a reflection of the burden and high standard of proof resting on the prosecution: if the defendant's account might reasonably be true then there is by definition a reasonable doubt about whether the prosecution case has been established. The corollary is that a trial Judge may only convict a defendant who gives evidence if satisfied that the defendant's account is not reasonably capable of belief and must therefore be rejected. Even if that stage is reached a conviction does not necessarily follow; the Judge must then put the defendant's evidence to one side and determine whether the prosecution evidence leaves him sure of guilt.

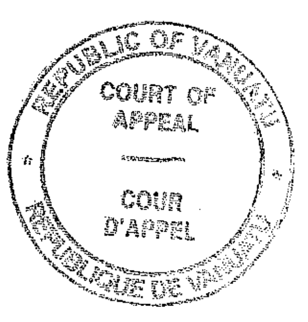
8. A defendant has no obligation to give evidence and it follows that if, when he does, his explanation is rejected by the Judge, that cannot in any way add to the prosecution case. The onus of proof never shifts from the prosecution, regardless of whether a defendant gives evidence.

9. This was a case where Justice Fatiaki did reject Mr Apia's evidence as untrue and unbelievable and, having considered the other evidence (including admissions made by Mr Apia), found that each of the contested elements of the charges was established beyond reasonable doubt.

10. Accordingly in this case the primary question for this Court is whether, in light of all the evidence heard by Justice Fatiaki during a lengthy trial, he was justified in rejecting the defendant's defence and in finding that the evidence adduced by the prosecution witnesses established each of the elements of the six charges beyond reasonable doubt.

Discussion and Decision

11. When he gave evidence Mr Apia conceded that he had forged each of the documents in question but he said that he was effectively forced by Philip Kemu to make those forgeries and that his intention was not criminal but rather fulfilling a public interest in exposing drivers who were prepared to use as genuine documents they knew to be forged.



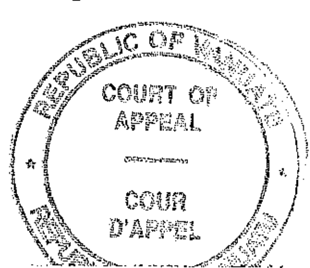
12. Even without reference to the details of the evidence, this explanation is inherently implausible, at least in the absence of express written authority from the Commissioner of Police and the Attorney-General to undertake such an entrapment exercise.

13. The primary Judge had the very considerable advantage over this Court that he heard and saw the defendant give evidence and how he performed under cross-examination. His conclusion at paragraph 43 of his judgment was forthright and leaves no doubt that he firmly rejected the defendant's account where it differed from those of the prosecution witnesses:

    "The defendant on the other hand was quite unbelievable in his evidence. He was conveniently selective in his answers and feigned ignorance with uncomfortable questions when cross-examined. I found his claims of being "forced" to make the forged documents untruthful, unbelievable, and exaggerated for a law enforcement officer with 22 years of experience in the Police Force. Neither do I accept that his intention in making the forged document was purely to "expose" dishonest drivers. Needless to say, in order for dishonest drivers to be "exposed" they must actually carry and use to the forged documents as if they were genuine".

    Despite the submissions of Mr Stephens, we reject the contention that the primary Judge was not entitled on the evidence he heard from the defendant, in the context of the case as a whole, to reject his explanation. This is what any Judge must address whenever a defendant gives evidence offering a different explanation from that advanced by prosecution witnesses. The question for the Judge in that situation is whether the defendant's explanation should be accepted or at least may reasonably be true, or alternatively whether it should be rejected.

14. When considering the prosecution evidence following rejection of Mr Apia's account, Justice Fatiaki rightly reminded himself that Philip Kemu, Kendrick George and Michael Kemu were, if Mr Apia was guilty, accomplices both in relation to the forgery and obtaining money by deception charges. They could have been charged with counselling and procuring Mr Apia to make the forged documents and with finding him paying *"clients"*. His Lordship properly noted that their evidence therefore had to be carefully scrutinised and ought to be independently corroborated before he could accept and act on



their evidence. He noted indeed that without their activities the magnitude of Mr Apia's offending would have been considerably less.

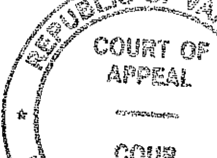
15. But having so reminded himself, including rightly noting that accomplices could not corroborate each other's evidence, the primary Judge found himself fully satisfied as to the truth of their evidence and as to their credibility and trustworthiness as witnesses. Not surprisingly, he noted that their evidence was materially confirmed by the defendant's own sworn evidence that he knowingly made forged documents at their request.

16. In relation to the count of obtaining money by deception, his Lordship found that: "……… *although the defendant denies charging or receiving any money for the forged documents, I prefer and accept the evidence of the prosecution witnesses whose evidence was not only detailed and given in the fortnight (sic) manner but also had a "ring of truth". Philip and Michael Kemu impressed me as honest, unsophisticated ordinary men who were duped into helping their "friend" in his fraudulent scheme. They did not try to down-play their roles and I accept their evidence that they receive no personal benefits and had always trusted the defendant because he was a Police Officer."*

17. Despite Mr Stephens' submissions, there is no justification for an appellate Court second-guessing these clear impressions reached by an experienced trial Judge after a lengthy trial. We also note his Lordship reserved his judgment and issued a thorough written judgment running to some 17 pages. As we have already noted he had the very considerable advantage of seeing all of the witnesses in person performing under cross-examination. We are not persuaded that his Lordship was not entitled to come to the conclusions he reached on the evidence he heard.

18. We therefore reject Mr Stephens' essential submission (covering his first two grounds) that the primary Judge's conclusion was against the weight of evidence. On the contrary they were conclusions reached after careful consideration and after correct self-direction.

19. As to ground 3, relating to the evidence of Melton Aru about the shortfall of Vt 1,440,220, we do not accept that Justice Fatiaki's observations in the sentence addendum amount to an attempt to shift the burden of proof onto the defence. As his Lordship points out, the defence at trial on count 6 was a complete denial of receipt of any money at all for the fake documents produced. For that reason, understandably, Mr Apia did not



put in issue the amount he had received or the extent of the shortfall to the Government revenue. That left the only evidence before the Court being that of the prosecution evidence through Mr Aru. The recording by the Judge that that evidence was not challenged does not reflect his placing any onus of defence because any prosecution evidence which is not challenged by contrary evidence or cross-examination is open for the Judge to accept, if he or she is satisfied as to the credibility and reliability of the witness giving it. There is in some circumstances an evidential or tactical onus on a defendant to challenge aspects of the prosecution case with which he does not disagree and a Judge is entitled to take into account the nature of the defence when assessing prosecution evidence. Here the defence effectively was that there was no need for the Court to look at the figures because the defendant had not committed any offence. The *way* in which he committed the offences was therefore not the primary focus of the case.

20. As to ground 4, the finding of receipt of Vt 3,000 by the appellant from Alan Samson and Vt 20,000 from Laurent Isaac, there does not need to be documentary proof before a witness's evidence as to such payments is accepted. The absence of it might mean a Judge has to be more cautious about accepting oral evidence to that effect but it was open to the primary Judge to reach the conclusions he did in paragraph 46 of his judgment on this issue, with or without documentary support. In the context of this operation, one would hardly expect to find receipts or other documentary proof of payment.

21. As to ground 5, as we have already noted, the finding that Mr Apia was untruthful and that his account was unbelievable is the kind of assessment which any trial Judge is required to make having heard and seen a witness give evidence. Mr Stephens criticises this as revealing a "dislike" by the Judge of the appellant and that this led to an unbalanced and incorrect assessment of all of his evidence. We reject this. It is not a question of whether a Judge likes a witness but of whether he accepts or rejects the witnesses's evidence.

22. As to ground 6, we have already addressed the way in which the primary Judge addressed the evidence of the *"accomplices"* and we have found no error in his Lordship's approach.

23. As to ground 7, Mr Stephens submitted there was an inconsistency in the primary Judge describing the accomplices as credible and trustworthy witnesses but later saying when

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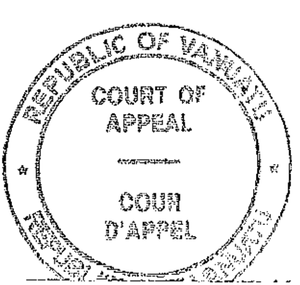
sentencing that they were dishonest and naïve drivers. We do not agree. Accepting for the moment that the three accomplices had themselves committed criminal offences, it does not necessarily follow that their evidence was unreliable. A person guilty of dishonesty in some manner is not necessarily an unreliable or untruthful witness. Caution, as the Judge expressly (more than once) applied here, is certainly required but it was reasonably open to His Lordship to make the findings he did.

24. As to Mr Stephens' complaint that the Judge was wrong to refuse to allow Mr Apia to give his evidence-in-chief by sworn statement, we endorse the approach taken by the Judge. Witnesses in a criminal trial must give oral evidence to the best of their recollection, if necessary with reference to primary documents (but not self-corroborating out-of-court statements) and to be available to be cross-examined. There are occasions when recourse to documents to refresh memory may be allowed but that does not derogate from the norm. In any event, we are not satisfied that any prejudice accrued to Mr Apia. He was well able to and did say everything he wanted to say in his defence, which the Judge clearly understood. If there was other evidence from his statement that he wanted to add, it is his counsel's fault if that was not given because it would have been a simple matter to turn each sentence in the statement into a question. Mr Stephens did not explain what other evidence Mr Apia would have wanted to give and how, if given, it would have made a difference to the outcome.

25. Mr Stephens also submitted that because of the Judge's ruling Mr Apia had no choice but to withdraw from calling a further proposed defence witness, Roy Seule, a police officer. We are unable to follow this submission. Mr Seule was apparently present at court and there is no reason why he could not have been called to give oral evidence in the usual manner. Being unable to refer to a previous sworn statement by Mr Apia cannot logically have had any bearing on whether Mr Seule was called.

26. We do not accept that any miscarriage of justice could have arisen from counsel being required to make oral rather than written submissions. The outcome of this case depended on the Judge's factual findings, in particular his impressions and assessment of the credibility of the key witnesses, rather than on some legal point.

27. After consideration of each of Mr Stephens' grounds and of the evidence and judgment given in the Supreme Court, we are satisfied there was no miscarriage of justice in the



findings of guilt which led to the six convictions. The appeal against the convictions is dismissed.

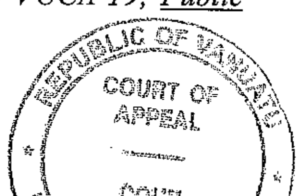
The Sentence Appeal

28. On 3 July 2015, Justice Fatiaki sentenced Mr Apia to five years' imprisonment and found that suspension was not justified. Mr Apia contends that that sentence was manifestly excessive, the starting point being too high and the imposition of consecutive rather than concurrent sentences inappropriate. Mr Stephens noted that the Public Prosecutor himself had suggested an end sentence of three years imprisonment. He submitted that in all the circumstances, suspension of a lesser term of imprisonment would have been justified and that the Court should also have taken into account the fact that Mr Apia was in custody from his arrest on 25 May 2014 until granted bail a month later.

29. Rather surprisingly, Mr Karae having been trial counsel and the one who prepared the sentencing submissions proposing an end sentence of three years imprisonment, maintained before us that the Judge's setting of the end term of imprisonment at five years was appropriate.

30. Because Justice Fatiaki's sentencing remarks are relatively succinct we set out in full the material paragraphs (which follow the three paragraphs set out earlier in this judgment) :

> "8. *You have only yourself to blame for your criminal activities which were organized and repeated and had a direct and detrimental impact on the government's revenue that was meant to be collected by the Customs and Revenue office. You betrayed your oath to uphold the law and you have brought shame and dishonor to your uniform. Your activities also undermined the general image of the Vanuatu Police Force and the efforts of other honest and hardworking police officers who struggle daily to uphold the law and protect society.*
>
> 9. *Furthermore as a result of your offending a great deal of man-hours and resources had to be diverted in investigating and compiling the case against you.*
>
> 10. *In assessing what is an appropriate sentence in your case I have considered the following past judgments that were drawn to my attention by the prosecutor: <u>Public Prosecutor v. Mala</u> [1996] VUSC 22; <u>Public Prosecutor v. Leo</u> [2008] VUSC 62; <u>Gamma v. Public Prosecutor</u> [2007] VUCA 19; <u>Public</u>*



Prosecutor v. Mael [2010] VUSC 14; Public Prosecutor v. Tureleo [1995] VUSC 16 and, more recently, Public Prosecutor v. Williams [2015] VUSC 71.

11. *I remind myself that the maximum penalty for an offence of Forgery is 10 years imprisonment. Furthermore your offending constituted a serious breach of public trust where you abused your power and position as a long-serving police officer. Also by your "scheme" you provided dishonest drivers with an avenue to avoid having to pay the correct fees to the proper collecting authorities thereby committing offences themselves. A sentence of imprisonment is not only justified but necessary to punish you for your criminal behavior and to deter others from committing similar offences.*

12. *For each offence of Forgery I adopt a starting point of 5 years imprisonment.*

13. *For the offence of Obtaining Money by Deception I remind myself that the total amount you obtained was a sum just short of VT1.5 million. For this offence I adopt a starting point of 2 years imprisonment.*

14. *Furthermore I order the sentences on the Forgery counts to be served concurrently making a total of 5 years imprisonment but that sentence is made consecutive to the sentence imposed on the count of Obtaining Money by Deception on the basis that it is a separate and distinct offence that would not have been committed if, indeed, you were truly only interested in exposing dishonest drivers as you claim. The cumulative sentence for all your offences is: **(5 + 2) = 7 years imprisonment**.*

15. *I turn next to consider mitigating factors in the case. According to your pre-sentence report you are 41 years of age and originated from Yopna village on Epi Island. You completed year 6 on Epi and then attended Matevulu College up to year 10. You later attended the Institute of National Technology (INTV) before joining the Vanuatu Police Force where you served for 22 years and attained the rank of senior sergeant. You were based at the Bauerfield Airport Police Post at the time of the offences.*

16. *You have 3 daughters from a failed de facto relationship and have been caring for your daughters single-handedly since your partner left you in 2011. You should be commended for that. I also accept that a prison sentence will have a devastating impact on your daughters but that is an unavoidable consequence whenever a family loses the support of its head and sole bread winner. You should have thought of your family's welfare before committing any offences.*

17. *Having said that, I accept that this is your first conviction and you told the probation officer that you felt guilty and sorry for tarnishing your good name and reputation and you promise never to re-offend. You also expressed a willingness to perform a kastom reconciliation ceremony and to undertake a community based sentence.*

18. *Although I am required to take into account any compensation or reparation made, I note that none has been made or offered so far. Nor do I consider that a compensation order is appropriate given your loss of employment and the absence of an independent source of regular income.*

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> 19. *For mitigating factors I am able to reduce your cumulative sentence by a generous two (2) years giving you an end sentence of* ***(7 – 2) = 5 years imprisonment.***
>
> 20. *I have considered and am satisfied that suspension is not justified in your case and accordingly I order that you, Willie Apia, are to serve a term of 5 years imprisonment with immediate effect."*

31. With respect to the primary Judge, we do not accept this was a case for cumulative sentencing. The facts pertaining to the charge of obtaining money by deception were closely related to those of the forgery counts. They were all part and parcel of Mr Apia's criminal operation. We consider the appropriate course was to set an overall starting point encompassing all of the offending and to impose concurrent sentences on all six charges.

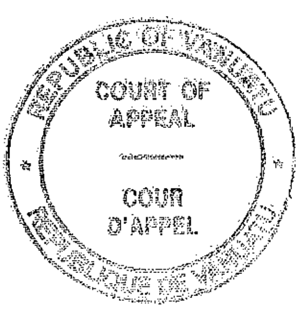
32. Because of this error of principle we need to re-sentence.

33. In *PP v. Mala* [1996] VUSC 22, the then Chief Justice set out some guidelines for fraud sentencing which have since been consistently applied. Relevantly his Lordship said:

> *"Where the amounts involved cannot be described as small but are less than Vt 1 million or thereabouts, a term of imprisonment ranging from the very short to about 18 months is appropriate. Cases involving sums of between about Vt 1 million and Vt 5 million will merit a term of about 2 to 3 years imprisonment. Where greater sums are involved, for example Vt 10 million the a term of 3 ½ years to 4 ½ years would be justified."*

34. Here, although disputed by the appellant, the amount by which the revenue as defrauded was found to be Vt 1,440,220. Without going into detail, we uphold the primary Judge's approach that this conclusion was justified on the evidence of Melton Aru.

35. On this basis, if the fraudster were an ordinary citizen we consider that the appropriate starting point before considering personal mitigating factors would be around two years' imprisonment.



36. Here, however, we agree with the primary Judge that a strong deterrent sentence is required taking into account the gross breach of public trust which dishonest offending by a senior police officer represents. The consequences in financial terms, while relevant, are less significant than the damage done to the image of the Police Force and to the public's faith in those who are sworn to uphold, rather than breach, the law.

37. The least restrictive starting point that was appropriate in this case was a sentence of 4 years imprisonment taking into account the maximum penalties available.

38. As to mitigating factors, the primary Judge accepted that Mr Apia had no previous convictions and that he was remorseful for tarnishing his good name and reputation and promised never to reoffend. The latter is however difficult to reconcile with his not guilty pleas, his giving evidence denying criminal responsibility and his appeal against conviction.

39. The primary Judge's discount, which he himself described as generous, of two years for these mitigating factors cannot be justified. That was nearly a 30% discount from the seven years' starting point.

40. A discount of six months properly recognises Mr Apia's previous good character, the fact that because of his former position he has suffered a very substantial fall from grace and the reality that he will likely experience greater hardship in serving a term of imprisonment and as to his future prospects than would other offenders.

41. This brings us to an end sentence of three and a half years' imprisonment but we accept there should be a further deduction because the primary Judge made no allowance for the month which Mr Apia spent in custody prior to being granted bail. The deduction should be two months to recognise that, taking into account parole, serving one month in custody is equivalent to a two-month prison sentence.

42. We allow the appeal against sentence and quash the sentence of five years' imprisonment and impose one of three years and four months, imposed concurrently on all six charges, effective from 3 July 2015.

43. We agree with the primary Judge that the nature of Mr Apia's offending means that suspension of the term of imprisonment is out of the question. Suspension would

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undermine the strong deterrent message which the courts need to send not only to Mr Apia but to anyone else in an analogous position who may be minded to act corruptly and dishonestly. A public official who abuses his position in this manner for personal gain forfeits his right to remain in the community.

DATED at Port Vila this 23rd day of July 2015

BY THE COURT

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Vincent LUNABEK
Chief Justice