

BETWEEN: Public Prosecutor
Appellant

AND: James Tolak
Respondent

Coram: *Hon. Chief Justice Vincent Lunabek*
Hon. Justice Bruce Robertson
Hon. Justice Dudley Aru
Hon. Justice Gus Andrée Wiltens

Counsel: *Mr S. Blessing for the Appellant*
Mr. C. Leo for the Respondent

Date of Hearing: 16th July 2018

Date of Judgment: 20th July 2018

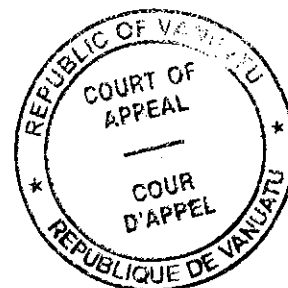
JUDGMENT

Introduction

1. This is a prosecution appeal against a sentence of 2 years imprisonment suspended for a period of three years with an order for 150 hours community work to be performed within 12 months.

Background

2. The brief facts are that the respondent is himself a business man and has his own shop. He would from time to time order goods from Fung Kwan Chee (FKC) store to sell in his shop. Between 13 June and 10 July 2016 he instigated an arrangement with his three co-accused who were employees of FKC store whereby they would in return for VT8000 per box allow him to take 64 boxes of knives from FKC store. He then on-sold those knives for VT1, 714, 800. The owners of FKC knew nothing of the arrangement. When they discovered the missing boxes of knives, the matter was reported to the Police and the offending came to light.



Grounds of appeal

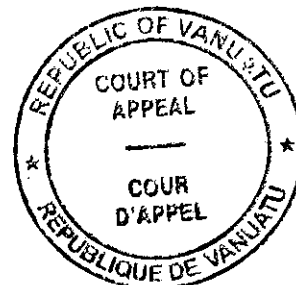
3. The appeal is made on two main grounds namely that the primary Judge:-
 - (i) Imposed an inadequate sentence and was wrong in suspending the term of imprisonment; and
 - (ii) Failed to order compensation.

Sentence

4. The respondent and the 3 co-accused were each charged with one count of theft contrary to section 122 and 125(a) of the Penal Code [CAP 135]. The maximum penalty for the offence of theft is 12 years imprisonment. The 3 co-accused entered guilty pleas and were sentenced separately. The primary Judge noted that there was a breach of trust and adopted a starting point of 3 years imprisonment. Deductions were made for their remorse and no previous records and early guilty plea. The end sentence for each was 16 months imprisonment suspended for 3 years. In addition they were ordered to do 100 hours community work.
5. The respondent netted VT 1.2 million from dishonesty. His actions were a brazen act of systematic planning to use FKC employees to steal from their employer on his behalf. He gained far more from this enterprise than the 3 co-accused and caused FKC to suffer substantial loss. He showed no remorse for his offending. The proper starting point therefore is 4 years imprisonment. The following deductions should then be allowed: 1 year for his previous clean record; 1 month for time already served whilst awaiting trial; and 3 months for the time that has lapsed since the non-custodial sentence was imposed, and because this is a prosecution appeal.
6. The end sentence that must be imposed is 2 years 8 months imprisonment.

Suspension

7. The primary judge was of the view that the respondent like the 3 co-accused "*poses no real risk to the community*" and suspended his sentence for a period of 3 years. The criteria for consideration before suspending a sentence are: circumstances of the case, the nature of the crime and character of the offender. (s 57 of the Penal Code).
8. The respondent knew that what he did in involving three others in his scheme was wrong but was not deterred. His offending is of a serious and cynical nature. Therefore his sentence cannot be suspended.



Reparation

9. The primary Judge recognised that:-

“In the meantime of course there is no reason why Mr Fung cannot institute civil proceedings against Mr Tolak. He would probably be able to recover far more that way than relying of the Proceeds of Crime Act. Mr Tolak may end up losing everything rather than just the contents of his bank accounts.”

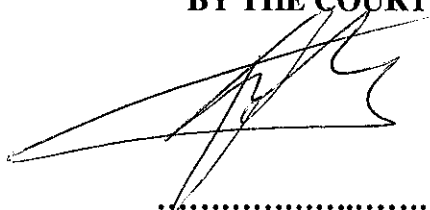
10. An order for restitution of property pursuant to s 58 ZD of the Penal code would have been appropriate. The respondent is therefore ordered to pay the owners of FKC store a sum of VT850, 000 in reparation.

Result

11. The appeal is allowed and a warrant of arrest will be issued for the respondent to begin serving his sentence in custody.

DATED at Port Vila this 20th day of July, 2018.

BY THE COURT



.....
Hon Vincent Lunabek
Chief Justice

