

BETWEEN: **Public Prosecutor**
 Appellant

AND: **Amos Bong**
 Respondent

Date of Hearing: 29th April 2019
Date of Decision: 10th May 2019

Before: Justice J. von Doussa
 Justice R. Young
 Justice O. Saksak
 Justice D. Aru
 Justice D. Fatlaki
 Justice G.A. Andrée Wiltens
 Justice S. Felix

Counsel: Mr S. Blessing for the Appellant
 Ms K. Karu for the Respondent

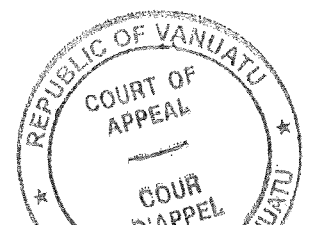
JUDGMENT

A. Introduction

1. This is a prosecution appeal against sentence. Mr Amos Bong was sentenced to an end term of 8 months imprisonment in respect of 22 charges of obtaining money by deception and 1 charge of obtaining credit fraudulently, as a result of which Mr Bong dishonestly obtained for himself the sum of VT 622,000.
2. The appellant submitted that for several reasons the end sentence imposed was manifestly inadequate.

B. The Facts

3. An amended Statement of Facts was tendered to the Court at sentencing. It contains significant inaccuracies, and does not deal with charges 31 or 32. The lack of attention to detail and accuracy undoubtedly made the sentencing Judge's task much more difficult. To establish a person's criminal culpability, a real focus on the facts of what the offender actually did in the course of his/her criminal offending is crucial. The nature of the charges assists in determining culpability, but a close examination of the essence of what was done is ultimately determinative. It is the role of counsel to assist the Court in this regard.
4. Between June 2015 and January 2018, Mr Bong promised more than 20 unsophisticated residents of Port Vila, and farmers from Erromango, that he would arrange employment for



them in Australia under the Recognised Seasonal Employment Scheme (“the RSE Scheme”). In return Mr Bong demanded from each, the pre-payment of a sum of money ranging between VT 5,000 and VT 39,000, which he said was needed to arrange for each victim’s visa, and their medical and police clearances. In each case Mr Bong simply kept the cash without keeping his side of the bargain or taking any steps towards doing so; and then he made himself scarce.

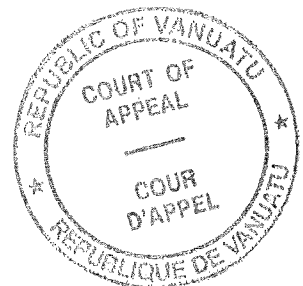
5. During this same period, Mr Bong practised 3 further deceptions. He persuaded his victims by dishonesty that he was in a position to sell them VT 220,000 worth of timber, VT 40,000 worth of kava and a motor vehicle for VT 80,000. In each instance, he obtained cash in advance, but he was never in a position to be able to give either possession or good title. Further, once he had the cash, Mr Bong gave excuses or simply made himself scarce so the victims were unable to contact him.
6. The total amount lost by victims was VT 622,000.

C. The Sentence

7. The sentencing Judge adopted a sentencing start point of 30 months imprisonment. This was apportioning 18 months imprisonment for Mr Bong’s criminal culpability, which was in line with Court of Appeal authority namely *PP v. Tavdey* [2017] VUCA 11, and an uplift of 12 months imprisonment for the number of victims deceived, the 4 years of offending and Mr Bong’s previous convictions.
8. The sentencing Judge then allowed a deduction of 3 months imprisonment due to Mr Bong’s unemployed status with his family, including 5 school-aged children, being wholly dependent on him. The sentence was further reduced by one-third to acknowledge Mr Bong’s prompt pleas to the charges; and finally by a further 10 months to take into account the time he had spent in custody prior to sentencing.
9. The end sentence of 8 months imprisonment was not suspended, primarily due to Mr Bong’s previous sentence not having had the desired effect of preventing further offending; plus the need for deterrence generally.

D. The Appeal

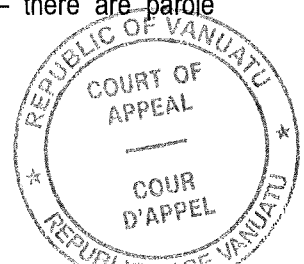
10. Mr Blessing advanced 3 grounds of appeal.
11. Firstly, he submitted that the sentencing Judge had not correctly set the starting point for the offending, which ultimately resulted in a manifestly inadequate sentence. He submitted that this Court should raise the sentencing start point to 4 years imprisonment due to the number of aggravating factors; and there should then be a further uplift to 5 years imprisonment for Mr Bong’s two previous convictions and his offending while subject to parole. Mr Blessing accepted that what he was submitting to this Court had not been put to the sentencing Judge.



12. Secondly, Mr Blessing submitted the 3-month reduction taking Mr Bong's family circumstances into account was simply wrong in principle. Such matters, in his submission, ought not to be treated as mitigation.
13. Thirdly, Mr Blessing pointed to the discount for 10 months already served prior to sentencing as being incorrectly calculated. He submitted the appropriate term was actually 7.5 months, and he supplied the dates demonstrating that.
14. Ms Karu submitted that the start point adopted was appropriate, and she accepted the uplift to 30 months imprisonment. She maintained it was in order for the sentencing Judge to reduce the start point as a result of Mr Bong's family circumstances. She accepted as correct that Mr Bong's incarceration prior to sentencing was 7.5 months, not 10 months. Ms Karu defended the sentence as being appropriate in all the circumstances, and considered it unfair if the sentencing were to now be completed on a different basis to that undertaken originally.

E. Discussion

15. We assess this appeal on the basis of the factual information before the Judge at sentencing. However, after that assessment we identify a range of factors which only came to light at the hearing of this appeal.
16. This is an appeal, in part, based on additional information from the prosecution, provided for the first time to this Court. Criticism is levelled against the sentencing Judge, when in fact the Judge was not assisted by the poor standard of the sentencing materials provided by the prosecution – and in several ways the sentencing Judge's task was made more difficult than it should have been as a result of being given inaccurate details. We considered it unfair to now deal with sentencing on a quite different basis, taking into account matters not raised at Mr Bong's sentencing.
17. The sentencing Judge partly conflated steps 1 and 2 of *R v. Andy* [2011] VUCA 14 when he combined the facts of the offending with a personal factor, Mr Bong's previous conviction. However, the overall effect was to set a start point for sentencing commensurate with Mr Bong's criminal culpability as that issue was put to the sentencing Judge together with his previous conviction. We consider the start point of 30 months imprisonment adequately reflects this combination, although we would not have interfered had a higher starting point been identified. We note the Judge was incorrectly told the loss was VT 908,000 when it was VT 622,000, and also incorrectly that the offending occurred over 4 years when it was 2.5 years. These errors favour the appellant.
18. This Court would not ordinarily contemplate a reduction for hardship in the family following criminal conduct. However we understand the merciful approach to Mr Bong's family circumstances, especially as the end sentence was not suspended.
19. We agree that Mr Bong was entitled to a one-third discount for his prompt pleas.
20. This Court considers it best to back-date sentences rather than to attempt to convert time spent in custody prior to sentence into a discount from the end sentence – there are parole



consequences for the prisoner which dictate that to be the better course. Both counsel at sentencing invited the Judge to deal with this point on the basis of 10 months in custody being the appropriate term. However, in fact, Mr Bong had only spent 7.5 months in custody.

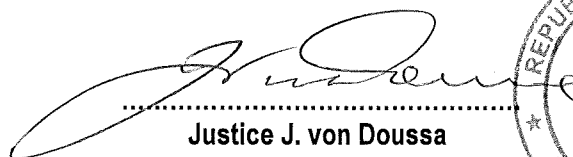
21. In the end result, the difference between the end sentence imposed and what this Court would have imposed, looking at the same material as the sentencing Judge, is a matter of only a few months of imprisonment. We note that this is a prosecution appeal, and that Mr Bong has completed the sentence imposed. For these reasons we hold that the end sentence imposed is not manifestly inadequate.
22. Lest there be a temptation to use this case as a sentencing authority for this type of criminal offending, we emphasise that this situation is unique. The sentence imposed should not be seen as a precedent – it is a one-off.
23. Had the sentencing submissions been more helpful we suggest Mr Bong may well have been sentenced to an end term of 30 months imprisonment, on the following basis. The lead offending is the numerous RSE Scheme deceptions, which form a pattern of offending. The appropriate start point for that would be 18 months imprisonment. There would then need to be an uplift to take into account the further similar offending, namely obtaining money when promising to supply goods. This further offending involved significant sums of money, and accordingly merits an additional 18 months imprisonment. So, for the criminal culpability, Mr Bong's appropriate start point would have been 36 months imprisonment.
24. On top of that, there would need to be an uplift to reflect Mr Bong's 2 previous convictions (one more than revealed to the Supreme Court), similar to the extent that they also involved dishonesty, and to reflect that 12 of the RSE Scheme deceptions were committed while Mr Bong was subject to parole. The appropriate further uplift in our opinion would be 9 months imprisonment.
25. Allowing Mr Bong the maximum discount for his early guilty pleas of one-third of the sentence, we consider that an end sentence of 2 years 6 months imprisonment was merited. We would have back-dated that by 7.5 months from the date of sentencing.
26. Mr Bong should count himself fortunate that the actual sentencing did not follow this path.

F. Result

27. For the reasons stated earlier, the appeal is dismissed.

Dated at Port Vila this 10th day of May, 2019.

BY THE COURT


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Justice J. von Doussa

