

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

Criminal Appeal
Case No. 19/2247 CoA/CRMA

BETWEEN: Dick Tari
Appellant

AND: Public Prosecutor
Respondent

Coram: *Hon. Chief Justice Vincent Lunabek*
Hon. Justice John Hansen
Hon. Justice Dudley Aru
Hon. Justice Gus Andrée Wiltens
Hon. Justice Viran Molisa Trief

Counsel: *Linda Bakokoto for the Appellant*
Ken Massing for the Respondent

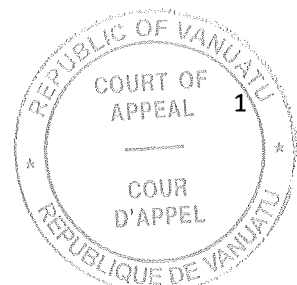
Date of Hearing: 6 November 2019

Date of Judgment: 15 November 2019

JUDGMENT

A. Introduction

1. The appellant was sentenced to 4 years imprisonment on 13 counts of obtaining money by deception contrary to s. 130B(1) of the *Penal Code* [CAP. 135]. The maximum penalty for this offence is 12 years imprisonment.
2. This appeal is on the ground that the primary Judge erred by imposing a manifestly excessive starting point of 7 years which resulted in a manifestly excessive end sentence of 4 years imprisonment.



B. Background

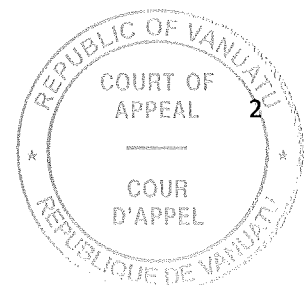
3. Mr Tari's offending occurred over a period of 2 years from January 2017 to December 2018 where he obtained money from various individuals in Port Vila under the pretext that he was a seasonal work agent for a farmer in Australia. He collected different amounts of money from different men and women. Other individuals aided Mr Tari in his offending, collecting money also from people on Pentecost and Santo. Mr Tari told the people that he obtained money from that the money would be used to pay for their travel, passports, visas and medical checks in preparation for them going to Australia to work. This never eventuated nor did he return the money to any of them.

C. The Decision

14. The primary Judge treated Count 2 as the lead offence. It is unclear why he did so but it may be inferred that this count involved the significant amount of VT2,144,000 as well as more victims (60 people in total) than were involved in the other counts. The Judge ordered 4 years imprisonment for Count 2 which was ordered to be served concurrently with Count 1 (3 years imprisonment) and Counts 3-13 (6 months imprisonment on each count).
15. In addition to the end sentence of 4 years imprisonment, the primary Judge also ordered that Mr Tari make restitution of the sum of VT2,862,895 to the Court on behalf of the people that he obtained monies from. He must pay the sum ordered within 3 years after his release from detention on parole or after serving his full sentence of imprisonment.

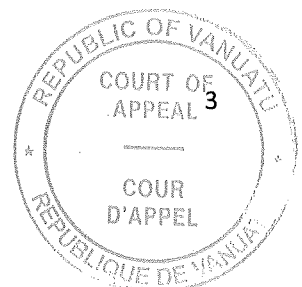
D. Submissions

16. The appellant submitted that the correct starting point for the appellant's offending is 4 years which is consistent with *Apia v PP* [2015] VUCA 30; *PP v Tavdey* [2017] VUCA 11; *PP v Bong* [2019] VUCA 40; and *PP v Connie Sewere* [2018] VUCA 57 for similar offending. Nine months at least should be deducted for factors personal to the appellant, and then a one third discount for his early guilty plea which would result in an end sentence of 26 months. This should not be suspended.
17. The prosecution accepted that the starting point the primary Judge adopted was too high. In the Supreme Court, it had submitted that the appropriate starting point was 3-4 years and that the sentence should not be suspended.



E. Discussion

18. There are a number of aggravating factors to the offending. Firstly, there is the large number of people from whom Mr Tari obtained money by deception – 105 victims. Secondly, there was a breach of trust involved with each of the victims. Mr Tari took advantage of honest, vulnerable people who gave him money in the expectation that he would help them obtain seasonal work in Australia. Mr Tari took advantage of their hopes and dreams, with no hope of recovery. Third, Mr Tari's repeated offending took place over a prolonged period of 2 years. There was clearly premeditation involved and he also used others to aid him in his offending although it is unclear if any of them were also charged with criminal offences. Finally, the significant amount of VT2,862,895 was involved.
19. In the circumstances, we consider that these aggravating factors required a starting point of 4 years 6 months imprisonment.
20. In mitigation are Mr Tari's remorse, his expressed willingness to pay back the amounts to the victims, that he is a first time offender, his previous employment as a Government teacher willing to serve in remote locations and his personal circumstances. We would deduct 9 months from the starting point for the mitigating factors and then apply a one third discount for his early guilty plea, resulting in an end sentence of 2 years 6 months imprisonment.
21. This sentence is backdated to 8 March 2019 when Mr Tari was first remanded in custody.
22. It is unfortunate that information was not provided to the primary Judge as to what, if any, Mr Tari's continuing job prospects are as a Government teacher. That could have assisted the Court in its consideration of whether or not to suspend Mr Tari's sentence. On the information that is available, in view of the circumstances, and in particular, the nature of the crime, and the character of the offender, there will be no suspension of sentence.
23. The restitution order that the primary Judge made was for Mr Tari to make restitution to the Court within 3 years after his release from detention on parole or after serving his full sentence of imprisonment. Subsection 58ZD of the *Penal Code* provides that the court may order restitution by the offender to the person lawfully entitled to possession of the property. The persons lawfully entitled to possession of monies that Mr Tari pays by way of restitution are the victims of his offending. This Court has made enquiries of the Office of the Public Prosecutor who confirmed that they do not have the details of all the victims. Moreover, it is unclear by what mechanism monies could be returned to the victims. The order also does not set out what is to happen in the event of default which is required for the order to be effective. Accordingly, we would quash the restitution order made in the Supreme Court.



F. Result

24. The appeal is allowed. The end sentence of 4 years imprisonment is quashed. Instead, Mr Tari is sentenced to 2 years 6 months imprisonment backdated to 8 March 2019.

25. The restitution order made on 14 August 2019 is quashed.

**DATED at Port Vila this 15th day of November 2019
BY THE COURT**

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Hon. Chief Justice Vincent Lunabek

