

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

Criminal Appeal
Case No. CRMA 24/3020

[2025] VUCA 2

BETWEEN: JIAN WANG
Appellant

AND: PUBLIC PROSECUTOR
Respondent

Before: Hon. Chief Justice V. Lunabek
Hon. Justice M. O'Regan
Hon. Justice R. White
Hon. Justice D. Aru,
Hon. Justice V.M. Trief
Hon. Justice E.P. Goldsbrough
Hon. Justice M. Mackenzie

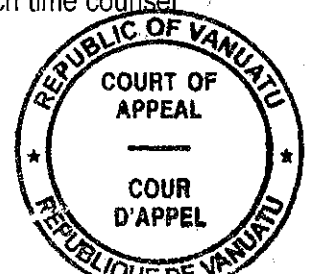
Counsel: J.C. Malcolm and S. Motuliki for the Appellant
L. Young for the Respondent

Date of Hearing: 3rd February 2025
Date of Judgment: 14th February 2025

JUDGMENT

Introduction

1. The appellant was charged with four counts of obtaining money by deception contrary to s 130B(1) of the Penal Code [CAP 135] and four counts of misappropriation contrary to s 125(b) of the Penal Code. In all cases, the charges of misappropriation were expressed to be alternative charges to the deception counts.
2. After a trial in the Supreme Court, the appellant was acquitted on four counts (counts 1–4). However, he was convicted on the other four counts (counts 5–8).
3. The trial Judge sentenced the appellant to a term of imprisonment of two years for the two counts of obtaining money by deception and a concurrent sentence of two years' imprisonment for the two counts of misappropriation.
4. The appellant appealed against sentence within time but did not initially appeal against conviction. The sentence appeal came before this Court at its November 2024 session, at which time counsel



for the appellant, Mr Malcolm, advised the Court that he had only just been instructed and that he would need to seek an adjournment until the February 2025 session. The adjournment was granted.

5. Subsequently, Mr Malcolm formed the view that the appellant also had grounds to appeal against conviction and sought an extension of time to appeal against conviction.
6. We are therefore required to determine:
 - a. Whether an extension of time to appeal against conviction should be granted;
 - b. If so, whether the appeal against conviction should be allowed in whole or in part; and
 - c. Whether the appeal against sentence should be allowed.

Extension of time

7. For reasons which we will come to, we consider it is clear that the convictions entered against the appellant in relation to counts 6 and 8 must be set aside. Counsel for the respondent accepted as much. In those circumstances, it is necessary to grant an extension of time to appeal against conviction. The extension is therefore granted.

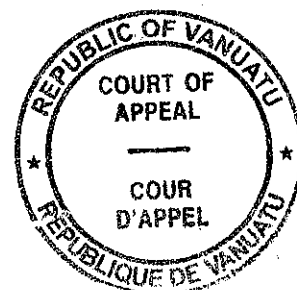
Appeal against conviction

8. The appeal against conviction was advanced on three grounds:
 - a. The verdict was unsafe because of deficiencies in the prosecution evidence;
 - b. The trial Judge's reasons for determining that the appellant was not a credible witness were inadequate; and
 - c. As counts 6 and 8 were alternatives to counts 5 and 7, the trial Judge erred in entering convictions against the appellant in relation to counts 6 and 8.

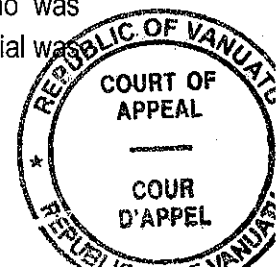
Alternative charges

9. We will deal with the third ground of appeal first. As already noted, counsel for the respondent accepted that the trial Judge had erred in entering convictions on counts 6 and 8 as they were alternatives to counts 5 and 7 on which convictions were also entered. We agree that concession was appropriately made. We will therefore quash the convictions entered against the appellant for misappropriation in counts 6 and 8 and the sentence of two years' imprisonment imposed in respect of those counts.
10. The remaining two points of appeal therefore relate only to counts 5 and 7, which were counts of obtaining money by deception.

Safety of verdict



11. In order to explain the points relating to the safety of the verdict, some background is required.
12. The state's case at trial was that the appellant had agreed with the complainant, Fan Enming and a third person, Lyu Qinglai, to establish a business. They entered into a Memorandum of Cooperation in relation to the proposed business on 6 February 2019. The State alleged that the appellant received two payments of VT 600,000 each from the complainant on 4 February 2019 and 6 February 2019, but did not apply this money to the establishment of the business and did not refund the money when asked to do so. In fact, the business was never set up. The State alleged that the obtaining of each of these payments by the appellant was obtaining money by deception, because he deceived the complainant into thinking that the money would be applied towards the setting up of the business but the appellant did not do this.
13. Mr Malcolm argued that there were issues that were of sufficient significance to render the verdict in relation to counts 5 and 7 unsafe. In particular he noted the following:
 - a. The evidence given by the complainant and the two other State witnesses, Lyu Qinglai and Xie Xia Fei (the wife of Lyu Qinglai), about the circumstances on which the payments made by the complainant to the appellant occurred was inconsistent in some respects.
 - b. The evidence accepted by the Judge was that one payment of VT600,000 was made on 4 February 2019 and another payment of VT600,000 was made on 6 February 2019. The appellant argues that since the Memorandum of Cooperation was entered into on 6 February, it was implausible that payment would have been made on 4 February, before the agreement was signed.
14. In relation to the first of those points, Mr Malcolm acknowledged that while there were inconsistencies in the evidence of the three State witnesses about the payments, those witnesses self-corrected during their evidence. Mr Malcolm asked the Court to give leave for the appellant to address the Court himself, because the appellant wished to augment the argument on this point and, given some difficulties of language (the appellant does not speak English and an interpreter was required for the purposes of the appeal), Mr Malcolm was not confident that he had expressed the points the appellant wished to make comprehensively.
15. We granted leave and the appellant addressed the Court. In essence his submission was that the Judge had misunderstood the transaction and that the discrepancies between the evidence given by the State witnesses was an indicator of his innocence rather than of his guilt. He submitted to the Court that he had no intent to offend, and his conviction was based on guesswork, which was unfair to him. He said the complainant and the other two State witnesses had conflicts of interest and that there was no real evidence that he had received the two payments of VT600,000 from the complainant.
16. We accept that there was some inconsistency in the versions given by the complainant, Lyu Qinglai and Xie Xia Fei, but those inconsistencies were not overlooked by the trial Judge who was nevertheless satisfied as to the truth of their evidence. The difficulty the appellant faced at trial was

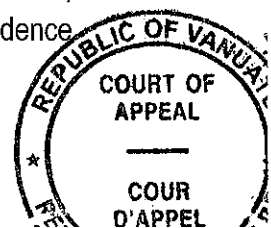


that Lyu Qinglai was present when the first payment of VT600,000 was made by the complainant to the appellant and was able to give eyewitness evidence of that. The appellant himself acknowledged that a business arrangement was proposed involving him, the complainant and Lyu Qinglai and the appellant had prepared the Memorandum of Cooperation which provided for money to be paid by the complainant and Lyu Qinglai for the purposes of that business arrangement. The appellant acknowledged he had received VT600,000 from the complainant on 6 February 2019 but said this was repayment of a loan he had made earlier to the complainant so the complainant could pay a friend called Chris. He denied having received VT600,000 from the complainant on 4 February.

17. We see no error by the trial Judge in his assessment of the evidence before him. The evidence of the State witnesses clearly established the payments of VT600,000 were made by the complainant to the appellant on 4 February and 6 February 2019. The trial Judge was entitled to accept their evidence and reject that of the appellant, given that the appellant's explanation of the payment on 6 February (and its alleged repayment soon after) was unsupported by any other evidence and was inconsistent with the payment requirements under the Memorandum of Cooperation.

Credibility finding in his verdict

18. The Judge concluded that nothing in the evidence of the defendant relating to counts 5–8 was consistent with his innocence. He gave five reasons for that conclusion. The appellant argues that these were not adequate reasons for making an adverse credibility finding.
19. The first reason was that there was no other explanation for the fact that the complainant sought help from the police inspector to recover the money he had paid to the appellant. The Judge asked the rhetorical question, why would the complainant do this if he had never made the payment. We agree that the fact that the complainant involved the police does not, of itself, say anything about the truthfulness or otherwise of the appellant's evidence.
20. The second and third reasons were the fact that the appellant was living in hotels paying expensive room rates when he was not working. The Judge considered this was consistent with his having received the payments from the complainant. However, there was no evidence of this and for that reason we do not think it could be brought to bear on the assessment of the appellant's evidence.
21. The fourth reason was that the appellant had said the complainant paid him VT600,000 on 6 February 2019, being repayment of a loan the appellant made earlier to the complainant so the complainant could pay "Chris". However, no evidence was led from Chris to confirm this. We accept that this could give rise to an adverse inference that Chris (if he existed) was available and was not asked to give evidence. But there was no evidence to that effect either.
22. The fifth reason was that the appellant had not called his wife to give evidence. There is nothing to indicate what she would have said or whether she was available to give evidence.
23. We accept therefore that there is some substance to the submission that none of these reasons strongly indicated one way or the other the truth or otherwise of the appellant's evidence. However, the Judge's observations in this context were secondary to his overall conclusion that the evidence



by the prosecution witnesses was more consistent with the circumstances under which the Memorandum of Cooperation was signed and with the terms of that document. The State witnesses' evidence was mutually supportive.

24. We are not satisfied that the shortcomings in this reasoning are such as to undermine the verdict.
25. The appeal against conviction is therefore dismissed, except to the extent that we set aside the convictions on counts 6 and 8.

Appeal against sentence

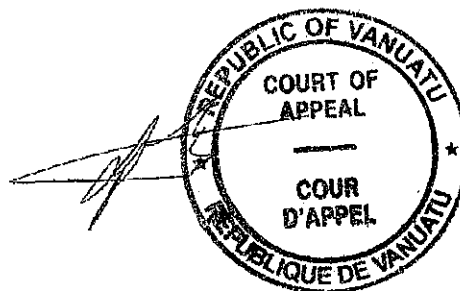
26. The appeal against sentence was advanced on the sole ground that, if the convictions on counts 6 and 8 were set aside, then there should be a reduction in sentence.
27. We can deal with this shortly. As we see it, the sentence reflected the Judge's assessment of culpability, and that assessment has not changed by the setting aside of the convictions on the alternative counts. We do not consider there was any basis to reduce the sentence imposed by the Judge in light of the setting aside of the convictions on counts 6 and 8. There was no other basis for challenge to the sentence and no such challenge made.

Result

28. The appeal against conviction is allowed only to the extent that the convictions on counts 6 and 8 are set aside. The convictions on counts 5 and 7 remain.
29. The sentence of two years' imprisonment imposed on the appellant in relation to their convictions on counts 6 and 8 are also set aside, but this leaves in place the concurrent sentence of two years' imprisonment imposed in relation to counts 5 and 7. The end result is that there is no change to the appellant's sentence.

DATED this 14th day of February 2025

BY THE COURT



Hon. Chief Justice, Vincent Lunabek