

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

Criminal Case No.29 of 2013

PUBLIC PROSECUTOR
-V-
BARRY ISHMAEL

Coram: Justice D. V. Fatiaki

Counsels: Mrs. T. Harrison for the State
Ms. P. Kaluatman for the Defence

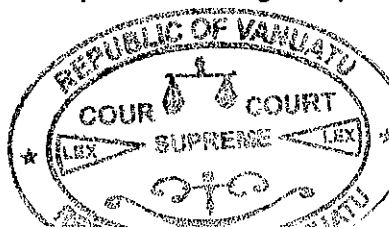
Date of Sentence: 16 September 2013

SENTENCE

1. On 19 August 2013 the defendant pleaded guilty and was convicted on one count of **Theft** contrary to **Section 125 (a)** of the **Penal Code**. Such an offence carries a maximum penalty of 12 years imprisonment. The particulars of the admitted charge are as follows:

"BARRY ISHMAEL between 11 January 2012 mo November 2012 you bin committim offence blong theft olsem you bin minim blo tekem VT1,197,677 long internal account blong National Bank 1234501 mo 1234502 mo creditim igo long personal accounts blong you 0079927001, 00799270025 and 0079927005 mo long ol taem ia you save gud se hemi property blong Vanuatu National Bank."

2. The brief facts of the case are that the defendant was employed by the **National Bank of Vanuatu (NBV)** as a data entry officer with responsibility for transactions involving the bank's internal "*General Suspense Account*". In that capacity over a period of several months in 2012 the defendant made numerous unauthorized withdrawals from the "*General Suspense Account*" which he directly credited to his personal savings and cheque accounts maintained at the bank.
3. An internal bank investigation was conducted into the defendant's "*suspicious transactions*" in January 2013. When he was interviewed, he frankly admitted taking the various amounts totaling **VT1,197,677** and spending it on personal expenses to meet his family's financial obligations and a holiday to Fiji.
4. The defendant's employment with the Bank was summarily terminated and the matter was reported to the police. During the police investigations the



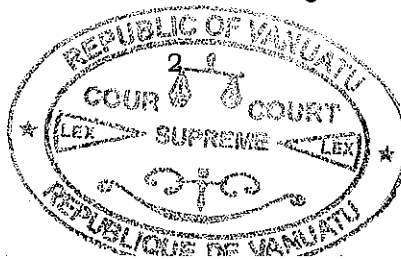
defendant was interviewed under caution and voluntarily admitted processing all the suspicious entries from the bank's "General Suspense Account" into his personal bank accounts and then spending the money on "unnecessary samting nomo olsem pem kakai mo drink".

5. The defendant's pre-sentence report discloses the following personal details:

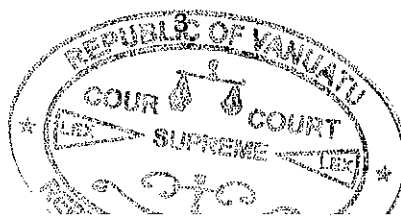
- The defendant is a native of **Nguna Island**, 24 years of age (**Dob: 21 March 1989**) single, and resides with his parents at Namba Two area in Port Vila;
- The defendant is the youngest son in a family of 3 children;
- The defendant completed his secondary education at **Matevulu** and **Malapoa College** and then attended a business course at the **Vanuatu Institute of Technology ("VIT")** in 2007;
- The defendant commenced employment with **NBV** as a trainee bank officer in August 2008 and was appointed Data Entry Officer (DEO) in the island Branch department on 1 January 2011;
- The defendant is an active member of the Presbyterian Church and a chief messenger in his community;
- The defendant regrets committing the offence and realizes the seriousness of his actions;
- The defendant is willing to perform a custom ceremony to his former employer and has offered to repay the bank in full;
- The defendant is presently gainfully employed with **Silae Holdings Ltd.** on a monthly salary of VT50,000;

6. In addition, defence counsel has provided recent correspondence with the bank which confirms and reinforces the defendant and his family's firm resolve and commitment to repay the bank as evidenced by the placement of the family home at Namba Two area, on the open market for sale and jointly executed Letter of Undertaking "... to clear the amount of VT1,197,677 that Barry Ishmael owes to the National Bank of Vanuatu". To its credit the bank accepts that "... settlement prior to 31st December 2013 represents a fair and reasonable time frame."

7. Defence counsel from a comparative analysis of past sentences imposed in eight (8) cases involving theft by bank officers identifies a broad range of sentences between immediate imprisonment and non-custodial community-based measures including, fully suspended prison sentences which counsel submits "would be within range for the present case".



8. State counsel on the other hand refers to the guidelines provided in **Public Prosecutor v. Mala** [1996] VUSC 22 and other "*bank officer*" cases including the recent case of **Public Prosecutor v. Frank** [2012] VUSC 159 which involved the theft by a bank employee of VT3.4 million over 2 years and where a wholly suspended sentence of imprisonment was imposed.
9. In fully suspending the sentence of 18 months imprisonment in **Frank's** case the Chief Justice accepted that the defendant had reached an agreement with the bank to repay the stolen money and further, that the defendant was employed and had the capacity to repay the amount. Finally the Chief Justice recognized that sending the defendant to prison would nullify the defendant's ability to repay his liability to the bank.
10. State counsel also highlights the following aggravating factors in the case:
- Abuse of trust and authority entrusted by the defendant's employer;
 - Considerable degree of premeditation and planning went into the commission of the offence;
 - Repetition of the offending over a period of 1 year; and
 - The monetary loss to the defendant's employer of VT1,197,677;
- and counsel submits that an "*... end sentence of 18 months to 22 months should be appropriate*".
11. I have taken into account the written submissions of both counsels and the defendant's pre-sentence report.
12. I accept that this offence involves a serious breach of trust and authority on the defendant's part. It was also repeated and involved a large sum of money by local standards. The offence also reflects some naivety on the defendant's part in directly crediting his own personal accounts maintained with his employer as clearly reflected in the banks computerized records. In other words, there was no real attempt made by the defendant to conceal or cover-up the unauthorized transfers and its detection was inevitable.
13. Having said that, my view is that a sentence of imprisonment is inevitable in the defendant's case not only to reflect the seriousness of the offence but, moreso, to deter others holding similar positions who might be tempted to commit a similar offence. The court has a public duty to make it very clear that employees who steal large sums of money from their employers can expect to go to prison when they are caught.
14. Given the amount stolen in this case of just under **VT1,2 million** and bearing in mind past sentences drawn to the Court's attention, I adopt a starting point of two (2) years imprisonment. From that starting point I deduct nine (9) months in recognition of the mitigating factors including the

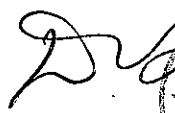


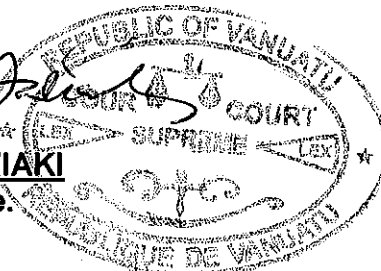
defendant's relative youth, his hitherto unblemished record and the offer to repay the amount stolen, making a sentence of fifteen (15) months. Finally, in recognition of the defendant's early voluntary admissions to his former employer and to the police re-inforced by his guilty plea in Court, I further reduce the sentence by five (5) months giving an end sentence of ten (10) months imprisonment.

15. I turn next to consider whether or not the sentence should be suspended and, in view of the circumstances and the character of the offender, I have decided to adopt an exceptionally lenient approach on the basis that the court should make every effort to keep young first offenders out of prison if it can be done without any danger to the community. The fact that the defendant is in regular employment also indicates he has the capacity to repay the bank and further, that someone else is willing to employ the defendant thus giving him a second chance to rehabilitate himself. Lastly, the willingness of the defendant's family to sell the family home in order to repay the bank for the defendant's crime reinforces the defendant's capacity to repay the bank and admirably demonstrates the extent to which the defendant's family will rally to support the defendant in his predicament.
16. Accordingly, I order the final sentence of ten (10) months imprisonment wholly suspended for a period of 3 years. The defendant is warned that this exceptional leniency will not be extended to him again, if he is convicted of another offence within the next 3 years. If the defendant stays out of trouble for the next 3 years which is a matter entirely in his hands, then, he will not have to serve this sentence. However, if the defendant re-offends then he will be sent to prison immediately to serve this sentence of 10 months imprisonment and moreover, his family's efforts and support would have been in vain.
17. For completeness, I order the defendant to pay compensation to the National Bank of Vanuatu in the amount of VT1,197,677 by **31 December 2013** with 5% interest calculated from 1 January 2013. Such interest sum is to be repaid by equal monthly installments of **VT20,000** until fully paid up and is to commence from 1 October 2013.
18. You have 14 days to appeal this sentence if you do not agree with it.

DATED at Port Vila, this 16th day of September, 2013.

BY THE COURT


D. V. FATIAKI
Judge.



The seal is circular with the text 'REPUBLIC OF VANUATU' at the top and 'LE JUDICIAIRE DE VANUATU' at the bottom. In the center, it says 'COURT SUPREME' and 'COURT SUPREME' with 'LEX' on either side. There is a signature inside the seal.