

**BETWEEN:** Chen Tian Lin  
Appellant

**AND:** Public Prosecutor  
Respondent

*Date of Hearing:* 19 November 2021  
*Before:* Justice V.M. Trief  
*In Attendance:* Appellant – Mr N. Morrison  
Respondent – Mr L. Young  
*Date of Decision:* 25 November 2021

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**JUDGMENT**

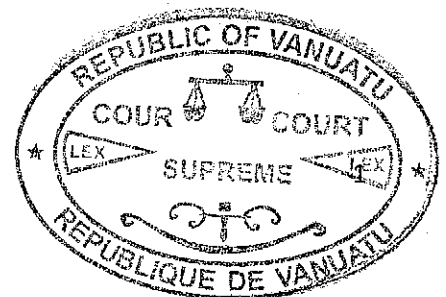
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A. Introduction

1. The Appellant Chen Tian Lin appeals against his sentence by the Magistrates' Court including on the ground that it was manifestly excessive.

B. Background

2. On 25 August 2021, at Au Bon Marche No. 2 (the 'shop'), Mr Chen filled two cartons with VT29,100 worth of canned goods but paid for only 2 cases of Vanuatu Water. He took the goods outside and was stopped shortly afterwards. All of the goods were returned. The loss to the shop was nil as it had been paid for 2 cases of water that were not bought.
3. Mr Chen was charged with 1 charge of theft contrary to para. 125(a) of the *Penal Code* [CAP. 135].
4. He pleaded guilty at the first available opportunity.



5. On 4 November 2021, he was sentenced to 16 months imprisonment less 4 days served. 8 months was to be served and 7 months 26 days was suspended. No suspension period was specified. He was fined VT10,000 and VT2,000 costs.
6. After serving another 4 days in custody, he was bailed on 8 November 2021 pending appeal.

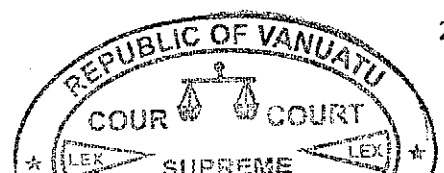
C. Grounds of Appeal

7. The sentence is appealed on the following grounds on which it is said the Hon. Magistrate erred in law and facts by:
  - a) Giving insufficient weight to mitigating factors including the information in the pre-sentence report and not taking into account that Mr Chen paid for 2 cartons of water;
  - b) By proceeding without the benefit of a pre-sentence report;
  - c) By taking into account in her sentence improper matters including going beyond the summary of facts accepted by Mr Chen, and wrongly including dishonesty and the value of goods as aggravating factors ;
  - d) By not considering that the sentencing goal of deterrence would be met by a community-based sentence or fine; and
  - e) Imposing a manifestly excessive sentence in all of the circumstances. Mr Morrison submitted that a wholly suspended sentence with possibility of community work and/or fine is the appropriate sentence in all of the circumstances. He submitted that a sentence of full-time imprisonment in all of the circumstances is unreasonably harsh and such sentence only arises through error.

D. Discussion

8. It is accepted for the Respondent that the Hon. Magistrate erred in taking into account in her sentence matters beyond the accepted summary of facts namely that Mr Chen had stolen goods in a similar manner from the same shop 6 days previously which was caught on video by the shop. Mr Young also accepted that increasing the sentence start point by 6 months for these matters was excessive and improper. I note also that these matters were also taken into account in deciding against suspension of the whole of the sentence.
9. As to the other matters alleged to have been improperly taken into account, I agree with Mr Morrison's submission that the Hon. Magistrate erred in including dishonesty as an aggravating factor for theft. Dishonesty is part of the offence of theft as defined in subss 122(1) and (3)(a) of the *Penal Code*:

122. (1) *A person commits theft who, without the consent of the owner, fraudulently and without a claim of right made in good faith, takes and carries away anything capable of being stolen with intent, at the time of such taking, permanently to deprive the owner thereof;*



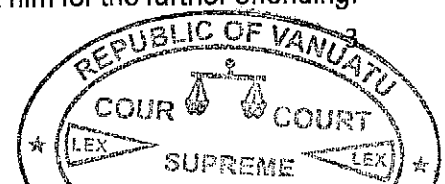
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(3) For the purpose of subsection (1) –

(a) The word “takes” includes obtaining physical control –

(i) by any trick...

10. I also agree with Mr Morrison's submission that the value of the goods was incorrectly included as an aggravating factor of the offending when all of the goods were returned and the shop received payment for goods that were not bought.
11. Accordingly, the sentence in the Magistrates' Court must be set aside and substituted by the sentence in this Court and I need not deal with the remaining grounds of appeal.
12. The sentence start point is assessed having regard to the maximum sentence available, and the mitigating and aggravating factors of the offending.
13. The maximum sentence provided in the *Penal Code* is 12 years imprisonment.
14. The offending is mitigated by the return of all the goods taken. In fact, the shop benefitted from the payment of 2 cartons of water that were not bought.
15. The offending is aggravated by the planning involved.
16. The factors set out above require a sentence start point of 12 months imprisonment.
17. I deduct 33% from the sentence start point for Mr Chen's prompt guilty plea.
18. An uplift of 1 month is warranted as Mr Chen has a previous conviction for bribery under the *Value Added Tax Act* [CAP. 247].
19. Mr Chen is 58 years old, married and has a son and two grandchildren. He owns a shop in Port Vila. He is stated to have accepted responsibility for his offending and is remorseful. He does not speak English.
20. I reduce the sentence start point by 2 months for Mr Chen's personal factors.
21. Taking all matters into account, the end sentence imposed is 8 months imprisonment.
22. That Mr Chen is not a first time offender and the planning involved are factors against the suspension of sentence. In favour of suspension is that all of the goods taken were returned and in fact the shop benefitted from the payment of goods paid for but not bought. Mr Chen has served 8 days in custody, an effective sentence of 2 weeks imprisonment. Finally, Mr Chen is stated to be remorseful and that he has accepted responsibility for the offending. On balance, I am prepared to suspend Mr Chen's sentence for 2 years.
23. Mr Chen is warned not to offend in the next 2 years or he will need to serve the sentence of imprisonment in addition to any other penalty imposed on him for the further offending.



E. Result

24. The appeal is allowed. The sentence in the Magistrates' Court dated 4 November 2021 is **set aside** and substituted by the sentence in this Court.
25. The end sentence imposed in this Court is 8 months imprisonment, wholly suspended for 2 years.
26. In addition, Mr Chen is to complete 120 hours of community work and pay a fine of VT10,000.

**DATED at Bwatnapni, Central Pentecost this 25<sup>th</sup> day of November 2021  
BY THE COURT**

*VM Trief*

Justice Viran Molisa Trief

