

JEAN BETTY MAENUA, BADDELEY AU, JACK AKAO, JOHN MEKE AND
PAT TOM V. REGINA

High Court of Solomon Islands
(Palmer CJ)

Criminal Appeal Case Numbers 121-03, 300-03, 305-03, 374-03, 375-03

Date of Hearing: 8th December 2004

Date of Judgment: 8th December 2004

K. Averre (Public Solicitor) for the Appellants

R. Barry (Chief Legal Officer) for the Respondents

JUDGMENT

Palmer CJ: Jean Betty Maenua, Baddeley Au, Jack Akao, John Meke and Pat Tom (hereinafter referred to as "the Appellants") were all convicted on offences of conspiracy to procure payment of money by false pretences under section 384 of the Penal Code as read with section 308(a) of the Penal Code and sentenced to imprisonment as follows:

Jean Betty Maenua:	5 years
Jack Akwao:	3 years
John Meke:	3 years
Pat Tom:	2.5 years
Baddeley Au:	5 years.

Baddeley Au was also convicted on other charges and sentenced as follows:

1. Intimidation contrary to section 231 of the Penal Code: *3 months consecutive.*
2. Wilful and unlawful damage to property contrary to section 326(1) of the Penal Code: *1 month concurrent.*
3. Using abusive language contrary to section 178(n) of the Penal Code: *2 weeks concurrent.*

He thus had a total of 5 years and 3 months imprisonment to serve.

The Appellants lodged appeals on various dates; the earliest being 18th November 2003. It has however taken almost a year, despite numerous reminders, for the appeal records to be made ready and listed for hearing. This is quite unsatisfactory especially when most of the Defendants in this case would have served their sentences by the time this appeal was heard on 8th December 2004. Court Staff and Judicial Officers are required to process appeals expeditiously. Court records of proceedings should be forwarded to this court as soon as possible after an appeal has been filed. Prolonged delays can work injustice and unfairness to Appellants, not only in this case but in others as well.

For convenience these appeals have been consolidated and heard together. A number of grounds have been lodged in support of the appeal. The most pertinent been that of excess of jurisdiction.

The offence in section 384 of the Penal Code refers to the offence of Conspiracy as a misdemeanour without defining particulars of sentence or penalty. Recourse accordingly must be made to section 41 of the Penal Code which sets out general punishment for misdemeanours as inter alia, not exceeding two years.

The presiding Magistrate unfortunately confused the penalties prescribed under the substantive offences stipulated under section 308 being five years, with that prescribed under section 384, which did not prescribe any particular penalty, only a misdemeanour. The sentences of more than two years imposed on all the Appellants accordingly were made in excess of jurisdiction and ought to be corrected.

In the circumstances, it is not necessary to consider the remaining grounds of appeal other than to determine the appropriate sentences to be imposed in each case. I have listened to submissions from learned Counsels regarding the appropriate sentences to be imposed. The learned Magistrate did make a difference between the originators or primer movers, Jean Betty Maenua and Baddeley Au, of this money scam, as opposed to the other co-conspirators. For the rest, various sentences ranging from 2.5 to 3 years were imposed.

In the circumstances I am satisfied sentences be reduced as follows taking into account all relevant mitigating factors raised in the lower court:

Jean Betty Maenua and Baddeley Au:	22 months.
Jack Akao and John Meke:	14 months.
Pat Tom:	12 months.

In the case of Baddeley Au, the sentence of 3 months imposed for intimidation not being appealed against is to be added onto the 22 months giving a total of 25 months to be served.

Compensation Order

The power of the Magistrates Court to order payment of money by an accused person for compensation is derived from sections 27 and 28(1) of the Penal Code. I quote:

"27. Any person convicted of an offence may be ordered to make compensation to any person injured by his offence and such compensation may be either in addition to or in substitution for any other punishment."

28. (1). When a court orders money to be paid by an accused person or by a prosecutor or complainant for fine, penalty, compensation, costs, expenses or otherwise, the money may be levied on the movable and immovable property under warrant. If he shows sufficient movable property to satisfy the order his immovable property shall not be sold."

The crucial words used in section 27 are *"any person injured by his offence"*. The Appellants submit compensation payments referred to in section 27 are to be confined only to personal injury claims and not claims for other types of loss.

The Position in English Criminal Law

In English Criminal Law payments of compensation as it applies prior to 1963 are covered under three different legislations. The first pertains to compensation to relatives of persons killed in attempting to effect under the *Criminal Law Act 1826*, section 30 as amended by the *Criminal Law Act 1967*, Sched. II. That does not apply to this case.

The second relates to compensation awarded after an order for probation or conditional or absolute discharge. Under section 11 of the *Criminal Justice Act 1948* the Court *may without prejudice to its power of awarding costs against him, order the offender to pay such damages for injury or compensation for loss as the court thinks reasonable; but in the case of an order made by a court of summary jurisdiction, the damages and compensation together shall not exceed one hundred pounds or such greater sum as may be allowed by an enactment other than this section.*" Again this does not apply to this case in that it relates to orders for probation or conditional or absolute discharge. Further, the legislation expressly makes a distinction between damages for (personal) injury and compensation for loss.

The third relates to compensation paid to persons injured by the commission of an indictable offence. The *Forfeiture Act 1870* section 4 (as amended by the *Criminal Law Act 1967*, section 10(1) and Schedule 2(9) provides in the case of treason or an indictable offence for an award of "*any sum of money not exceeding four hundred pounds, by way of satisfaction or compensation for any loss of property (which includes damage to property, but does not include loss or damage due to an accident arising out of the presence of a motor vehicle on a road) suffered by the applicant through or by means of the said (offence tried on indictment) and the amount awarded for such satisfaction or compensation shall be deemed a judgment debt due to the person entitled to receive the same from the person so convicted,...*".

The discretionary power to order compensation under this category is quite specific. It also expressly limits compensation for loss of property to four hundred pounds. It further refers to persons aggrieved. In *R. v Ali, R. v Cotterill*¹ the Court of Appeal approved a practice whereby losers of property would indicate to Police whether they wished Prosecution to apply for compensation in the event the offender was convicted.

The *Children and Young Persons Act 1933*, s. 55 also provides for the parent to pay a fine, damages or costs instead of the child or young person.

Also a scheme for compensating victims of crimes of violence was set up in August 1964 for victims who may have suffered personal injuries on or after that date as a direct consequence of a criminal offence, or of trying to arrest an offender or to prevent a crime. If the injuries were fatal, the victim's dependants may apply for compensation.

Ambit of section 27 of the Penal Code

The ambit of section 27 is to be derived from the words *any person injured by his offence*. In the absence of any express limitation to the use of the word "injured" it is to be liberally interpreted and not restrictively defined. Secondly it should be given its meaning as used in common parlance. The Australian Little Oxford Dictionary defines the word "injure" as "hurt, harm, impair, do wrong to" and "injury" as "wrong, damage, harm". The word "injured" accordingly should not be confined to personal injury claims but to include other losses. This must naturally include financial losses incurred by the victims arising from the offence of the Defendants. I am satisfied the learned Magistrate correctly extended the meaning to include financial injury in that the crucial issue in compensation is the loss to the victim(s).

Secondly before considering whether to impose a compensation order or not, it is important to establish by evidence the amount of the victim's loss, if not agreed by the Defendants (see

¹ (1972) 56 Cr. App. R. 301

the case of *R. v. Vivian*²). In *R. v. Swan*³ the Court of Appeal commented that a trial judge should not when considering compensation simply pluck a figure out of the air. In *Horsham Justices, ex parte Richards*⁴ Neill LJ said at p. 993:

"... in my judgment the court has no jurisdiction to make a compensation order without receiving any evidence where there are real issues raised as to whether the claimants have suffered any, and if so what, loss".

The learned Authors in Blackstone's Criminal Practice 1992⁵ however pointed out that the court should be hesitant to embark on a complex inquiry into the scale of loss, since compensation orders are designed to be used only in clear, straightforward cases.

Unfortunately that cannot be said to be the position in this case. Whilst the evidence disclosed by Jean Betty Maenua was that there were about 17,000 members and that each was required to pay a minimum of \$250.00 each for membership, it is not clear on the evidence if all those persons did pay the minimum amount or not, or more, or whatever. It is also not clear on the evidence if all of those 17,000 members each lost \$250.00 or whether this was less and the identity of those members. To make a compensation order of \$4,250,000.00 from that evidence alone without further inquiry in my respectful view is inadequate.

There is a practical problem in respect of this case in that there are unidentified members of the Family Charity Fund ("FCF") who may have lost money but are not prepared for any reason to make a claim for compensation. A compensation order is only useful where the victims are identifiable and the amount of the loss clear. In this case the evidence is quite clear that the total amount of loss proven on the evidence and admitted by Defence at the trial was \$20,250.00 in respect of 15 members for varying amounts.

In the circumstances, it is only proper that an order for compensation be made in favour of those 15 victims as follows:

1. Joe Didio Kwate	5 cards	\$1,250.00
2. Zita Pianga	1 card	\$ 250.00
3. Issac Rifua	1 card	\$ 250.00
4. Michael Olo	4 cards	\$1,000.00
5. Nelson Oto	3 cards	\$ 750.00
6. Moses Sasago	2 cards	\$ 500.00
7. Brian Spencer	1 card	\$ 250.00
8. Joan Mary	2 cards	\$ 500.00
9. Susan Bako	1 card	\$ 250.00
10. Charles Manata	1 card	\$ 250.00
11. Mary Donia	28 cards	\$7,000.00
12. Veronica Manesonia	20 cards	\$5,000.00
13. Gabriel Tua	1 card	\$ 250.00
14. Anna Hirogeu	4 cards	\$1,000.00
15. Emily Kuper	7 cards	<u>\$1,750.00</u>
		<u>\$20,250.00</u>

² [1979] 1 WLR 291

³ (1984) 6 Cr App R (S) 22

⁴ [1985] 1 WLR 986

⁵ p. 1712

In terms of culpability, it is clear as well that the court had determined that the main instigators of the FCF were Jean Betty Maenua and Baddeley Au. Next in line were Jack Akao and John Meke. Pat Tom was the least culpable of all five. The percentages of culpability in my respectful view should reflect the amount each defendant should be liable. In my respectful view this should be as follows:

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| 1. Jean Betty Maenua and Baddeley Au: | 30% each. |
| 2. Jack Akao and John Meke: | 15% each. |
| 3. Pat Tom: | 10%. |

The amount each is liable to pay accordingly is as follows:

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|---------------------------------------|------------------|
| 1. Jean Betty Maenua and Baddeley Au: | \$6,075.00 each. |
| 2. Jack Akao and John Meke: | \$3,037.50 each. |
| 3. Pat Tom: | \$2,025.00 |

There was submission that the learned Magistrate had no power to impose any compensation order beyond the maximum fine which a principal magistrate had jurisdiction to impose being \$1,000.00. The relevant sections however do not impose any limits as to the amount of compensation which the court could order. In the circumstances it would not be appropriate to impose any limits. A compensation order is different from a fine.

On the submission that there is no power to impose an order for compensation where the charge is one of conspiracy to obtain by false pretence that must also be dismissed. There is no limit as to the power of a court to impose such orders. The only limit lies in the identification of *any person injured by his offence*. Where there is evidence of injury having been sustained, from any offence, compensation may be considered. The evidence adduced in this case is quite clear that the 15 persons identified above had incurred financial losses as a direct result of the offences committed by these five Appellants. I note no submission has been made to suggest that any of the Appellants was not able to pay up or that they do not have sufficient movable or immovable property which could be levied against to recover the said amount. I am also satisfied a reasonable time of thirty days should be granted to the Appellants to have the compensation paid.

ORDERS OF THE COURT:

1. Uphold Appeal of the Appellants.
2. Quash sentences imposed in respect of the offence of Conspiracy contrary to section 384 of the Penal Code.
3. Substitute sentence as follows:
 - (i) For Jean Betty Maenua and Baddeley Au, impose sentence of 22 months each. (Note Baddeley Au will serve a total of 25 months).
 - (ii) For Jack Akao and John Meke, impose sentence of 14 months each.
 - (iii) For Pat Tom, impose sentence of 12 months.
 - (iv) Period spent in custody to be taken into account.
4. Uphold appeal against order of compensation imposed.
5. Quash order of compensation for \$4,250,000.00.
6. Substitute order of compensation for \$20,250.00 against all Appellants to be paid within 30 days (of date notice of this order is received) in the following shares:

- (i) Jean Betty Maenua and Baddeley Au to pay \$6,075.00 each;
- (ii) Jack Akao and John Meke to pay \$3,037.50 each; and
- (iii) Pat Tom to pay \$2,025.00.

THE COURT.