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

Criminal Appeal
Case No. 18/2112 CoA/CRMA

BETWEEN: CHARLES SUMBE
Appellant

AND: PUBLIC PROSECUTOR
Respondent

Coram:	***Hon Chief Justice Vincent Lunabek*** ***Hon. Justice John von Doussa*** ***Hon. Justice Ronald Young*** ***Hon. Justice Daniel Fatiaki*** ***Hon. Justice Dudley Aru*** ***Hon. Justice Gustaf Andrée Wiltens***
Counsel:	*Mrs Jane Tari Aru for the Appellant* *Mr Josaia Naigulevu for the Respondent*
Date of Hearing:	*7th November 2018*
Date of Decision:	*16th November 2018*

JUDGMENT

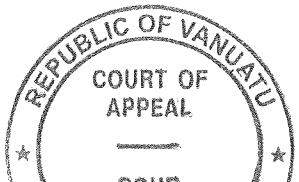
Introduction

1. On 26 March 2018 Charles Sumbe pleaded guilty to 15 counts of money laundering. He was sentenced to a sentence of 2 years imprisonment. A week later on 9 August 2018 the appellant was released on bail pending appeal. The appellant appeals against his sentence on the ground that it is *"manifestly excessive".*

The Facts

2. In January 2016 the appellant befriended a John Garrick Ross (Ross) on Facebook. Ross claimed to be a businessman and offered the appellant the opportunity to be his company representative in Vanuatu to receive and remit company funds as directed for a 7% commission. The appellant agreed and provided details of his personal vatu bank account which he maintained at the ANZ Bank at Luganville, Santo.

3. Over a period of 4 days in early February 2016 various amounts totalling VT397,500 were credited to the appellant's account. Unbeknown to the appellant these amounts were all sourced from the savings account of another



ANZ customer. On 4 February 2016 the appellant opened a new US Dollar account with ANZ at the direction of Ross and almost immediately received three (3) equal deposits of USD 3,000 into the account. These USD deposits were also sourced from a fellow USD account holder at ANZ.

4. On 4 separate occasions, on the instructions of Ross, the appellant withdrew a total of VT370,000 from his Vatu account. He also made one withdrawal of $4,500 from his USD account. On 4 February 2016 the appellant twice unsuccessfully attempted to remit the sum of VT218,184.74 through Western Union to a Diallo Amadou in Malaysia. On 9 February 2016 the appellant transferred VT500,000 to a local Bred Bank account as nominated and instructed by Ross.

5. Complaints were lodged with the police in mid-February 2016. The appellant was eventually interviewed under caution, in January 2017. The appellant frankly admitted his involvement in receiving, withdrawing and transferring various sums of money that he ought reasonably to have known were the proceeds of crime.

The Judge's Sentencing

6. The primary Judge noted the speed and urgency of the offending transactions which occurred over a period of just 9 days and caused a loss of VT240,000 and USD 9,000 respectively to two innocent ANZ Bank customers.

7. The primary Judge also identified the following aggravating features when he said:

> *"From the reports it appears both defendants received some commissions for their engagements in these transactions for their own benefit. From the statements it appears both defendants willingly accepted to be involved in this financial exercise which was a joint enterprise with overseas persons. It was a dishonest exercise and it was a criminal exercise. It appears they knew exactly what they were doing although they both knew what they were doing or engaging in was wrong, they continued to do it anyway. There was a degree of planning on their part."*

8. After considering several overseas and local authorities, the primary Judge adopted "*... a starting sentence of 5 years imprisonment on each count to be served concurrently.*" He then reduced that by 2 years for mitigating factors, and by a further year for the appellant's early guilty plea, leaving an end sentence of 2 years imprisonment.

Appellant's submissions

9. Mrs Aru advanced three submissions in support of the appeal. First, she submitted that in fixing the starting point the primary Judge erred in his assessment of the appellant's true culpability. Secondly, the primary Judge failed to give sufficient consideration and adjustment for the special mitigating circumstances in the case; and thirdly, there was an improper refusal to suspend the appellant's sentence.

10. The appellant is alleged to have engaged indirectly in an arrangement involving property that he ought reasonably to have known to be proceeds of crime. It is not alleged that he personally and directly obtained the funds that were credited to his bank accounts or that he knew that the funds had been illegally derived. Nor is it alleged that he was in any way involved in concealing or disguising the source, disposition, or ownership of the funds. His culpability, the appellant submitted, was that he ought to have known the money had been illegally obtained.

11. Counsel submits that the offending in the present case bears a close similarity to that in the recent cases of: Public Prosecutor v. Nishai [2018] VUSC 36 and Public Prosecutor v. Bani [2018] VUSC 90 where amounts of VT575,999 and VT160,000 were lost by innocent ANZ account holders who were defrauded in almost identical circumstances as occurred in the present case. In both cases a starting point of 3 years imprisonment was considered appropriate where the offenders were convicted of 16 counts and 9 counts of money laundering respectively.

12. The Nishai case was specifically singled out by the primary judge as: "*...directly relevant and applicable to the present case*". Unfortunately, that observation was not reflected in the starting point adopted in the present case as it should have, in the interest of consistency.

13. Even accepting that the appellant received and withdrew various sums from his bank accounts nevertheless, it was the independent actions of the appellant's overseas counterpart (not before the Court) that directly and unlawfully accessed the victim's bank accounts and transferred the various sums into the appellant's bank accounts.

14. Mr Naigulevu supported the sentence imposed on the appellant by the primary Judge. Counsel submitted the end sentence is neither excessive nor outside the boundaries of the law and properly reflects the seriousness of the offence, and the need for deterrence.

15. The Chief Justice recently observed in PP v. Steve Bani [2018] VUSC 90 of the offence of money-laundering:

"Offences of this type involve receiving money from an unknown individual, company or agencies of any type in one's local bank account and with the mission to transfer the money into another client of that same bank overseas. With the promise of a good percentage commission in return as compensation. That is the simplest version. Those type of offending may be simple or complex and on occasion intricate. The sentences of the Court must reflect those considerations. It is wrong in principle to approach the law of sentencing as though automatic consequences follow from the presence or absence of particular factual circumstances. In every case, the Court must make a discretionary decision in the light of the circumstances of the individual case and in the light of the purposes to be served by the sentencing exercise..."

16. We are satisfied that the appellant's offending falls squarely within *"the simplest version"* of the offence with the lowest degree of culpability not only in the respect of the amounts involved, but also, in the duration of the offending and the appellant's lack of success in remitting the funds overseas.

17. In setting the starting point in the present case, the primary Judge recorded *"...the seriousness of the offence together with its aggravating features and standing back and looking at the totality of the case."* No reference is made however to the specific actions of the appellant and their effect in the context of the charge(s) and the maximum sentence for the offence (***see***: Public Prosecutor v Andy [2011] VUCA 14).

The Appellant's Culpability and the Starting Point

18. The maximum penalty for an offence of money-laundering is: *"....a fine of 10 million vatu or imprisonment for 10 years, or both"*. The legislature clearly envisages the possibility of a *"fine"* only, being imposed for a conviction of money-laundering.

19. We accept that the appellant's specific actions in voluntarily providing a local bank account for the transfer of the illegally-sourced local funds and then by in his attempted remittance of the said funds, are less culpable than that of the person(s) who actually hacked into the ANZ Banks customer database and illegally accessed the victim's bank accounts. However we are equally satisfied, that the appellant's role was pivotal to the fraudulent scheme.

20. We are satisfied that the primary Judge incorrectly assessed the appellant's culpability. However we cannot say the end sentence of two years imprisonment is manifestly excessive. The appellant was given a very generous deduction of 2 years, or 40% of his start sentence for his personal circumstances before his plea of guilty was taken into account. This was more than could be justified. We are satisfied that a final sentence of 2 years imprisonment was within the range available to the judge.

Suspension

21. We now consider whether the judge made an error in the exercise of his discretion not to suspend the two year prison sentence.

22. Mr Tari submitted that the primary Judge erred in failing to suspend the appellant's prison sentence given the appellant's conduct since his offending as highlighted in his pre-sentence report, the fact that this offending was at the less serious end of the scale and due to his personal circumstances.

23. We have already observed that the appellant's offending is the "*simplest version*" with the lowest level of culpability where the appellant himself was duped and succumbed to the temptation of making some easy money. The appellant is also a first offender and when first taxed about his activities, he made a full and complete admission. He provided every possible assistance he could to the ensuing bank and police investigations. He also approached the USD account victim to apologise and agree restitution terms without being ordered or directed to do so.

24. We accept the appellant is unlikely to reoffend in a similar way. The fact that he continues to be employed even after his conviction speaks of how highly the appellant is regarded by his employer. We are satisfied therefore that the Judge erred in his assessment of the seriousness of the appellant's offending and failed to adequately acknowledge his personal mitigation factors.

25. In light of the above considerations and the lengthy delay between the commission of the offence and eventual sentencing of the appellant coupled with the fact that he has not reoffended since his conviction in March 2018, we are satisfied that the appellant's sentence should be suspended for a period of 2 years.

26. The appellant is warned that although he will not be returned to prison today this suspended prison sentence remains effective for 2 years. This means that if the appellant is convicted of any offence in the next 2 years then he will be returned to prison to immediately serve this sentence of 2 years imprisonment in addition to any other sentence he receives for his reoffending. Whether that happens or not is entirely in the appellant's hands but, if he reoffends, then he cannot expect the same leniency from the court.

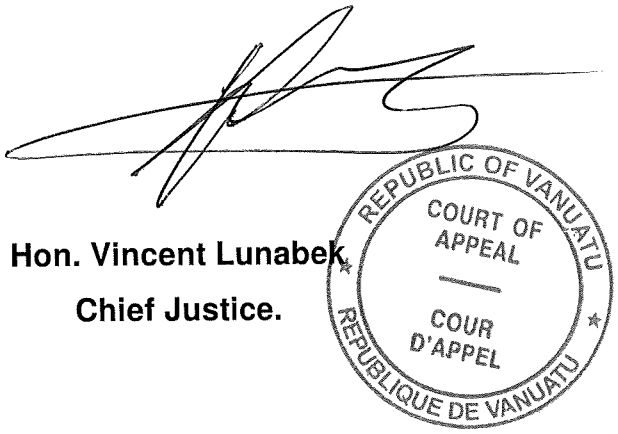
27. In addition, the appellant is sentenced to pay compensation in the sum of VT96,000 to Mr Mark Erceg at the agreed fortnightly rate of VT7,000 until the said sum is fully repaid.

28. Finally the appellant is ordered to serve a sentence of supervision for a period of 12 months and undertake and complete any rehabilitation program that the

probation officer requires him to undergo for the duration of the supervision period.

DATED at Port Vila this 16th day of November, 2018.

BY THE COURT



Hon. Vincent Lunabek
Chief Justice.