

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

Criminal Appeal
Case No. 18/2842 CoA/CRMA

BETWEEN: DANKEN HINGE

Appellant

AND: PUBLIC PROSECUTOR

Respondent

Coram: *Hon. Chief Justice Vincent Lunabek
Hon. Justice John Hansen
Hon. Justice Dudley Aru
Hon. GA Andree Wiltens
Hon. Justice Stephen Felix*

Counsel: *F. Tasso for the Appellant
S. Blessing for the Respondent*

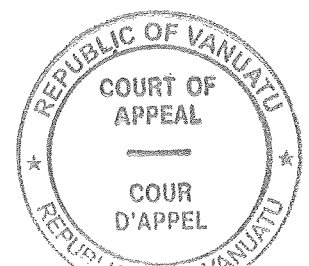
Date of Hearing: *9th July 2019*

Date of Judgment: *19th July 2019*

JUDGMENT

Introduction

1. The appellant was sentenced to an end sentence of 12 years imprisonment on one count of the offence of Unlawful Entry which carries a maximum penalty of 10 years imprisonment, 10 counts of the offence of Theft which carries a maximum penalty of 12 years; and 8 counts of the offence of Forgery which carries a maximum penalty of 10 years imprisonment.
2. The offences were committed between the 14th and 30th of March 2016 or over a period of 16 days.
3. After considering the submissions from the prosecution and the defence, the trial judge adopted a starting point of 6 years imprisonment for each count but then made Counts 1 and 2 cumulative with Counts 3 and 4; Counts 1 to 4 cumulative with Counts 5 to 7, Counts 1 to 7 cumulative to Counts 8 to 19 and therefore ended up with a sentence starting point of 24 years imprisonment.
4. The appeal is based on 2 grounds. Firstly that the starting point of 24 years imprisonment was manifestly excessive in the circumstances of this case; and secondly, that the orders for restitution of the funds equivalent to the value of the moneys stolen was inappropriate taking into account the personal circumstances and the financial position of the appellant.

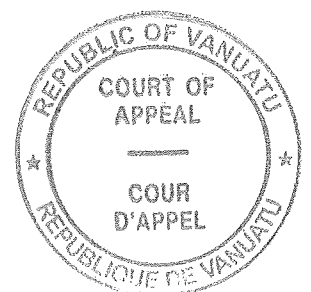


Facts

5. Mr Hinge was employed by an organisation called Youth Challenge Vanuatu (YCV) as the Head of Finance and Administration Department in Port Vila between April 2015 to March 2016.
6. On the 14th of March 2016, the manager of YCV lodged a complaint against an unknown person for breaking and entering the YCV office and stealing several pieces of electronic office equipment including an ANZ Bank YCV cheque book.
7. On the 20th of April 2016, another complaint was lodged against an unknown person for forging signatures in the YCV ANZ cheques from the missing cheque book and drawing a total amount of VT7,802,185.
8. Upon investigation, Mr Hinge was arrested and interviewed by the police. He admitted forging the signature of Shirley Abraham on eight (8) different cheques and on different dates between the 21st of March and the 30th of March 2016.
9. Mr Hinge also admitted stealing a total of VT 7,802,185 by cashing six of the eight forged cheques, depositing one forged cheque into Elison Tabisal's bank account and another into the bank account of Hilton George. The total loss suffered by YCV was VT 8,639,373.
10. Mr Hinge pleaded guilty to all of the 19 counts on the 3rd of April 2018, and was sentenced on the 3rd of October 2018.

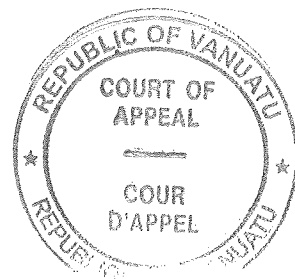
Supreme Court Judgment

11. The primary Judge adopted a starting point of 6 years imprisonment for each of the offences. He then divided the 19 counts into four groups based on the dates of the offending and then ordered they run consecutive to each other to end up with a starting point of 24 years imprisonment.
12. The primary Judge made an allowance for 6 years for Mr Hinge's unblemished past record, his good standing in his family and in the community, his cooperation with the police throughout the criminal investigation and his willingness and readiness to apologise and to repay the YCV for the moneys stolen.
13. The primary Judge then deducted a 6 years imprisonment for the early guilty pleas and ended up with an end sentence of 12 years imprisonment.
14. The primary Judge further ordered that VT 4,994,000 frozen at the National Bank of Vanuatu be released to YCV; and that the outstanding loss of VT 3,592,035 be repaid by Mr Hinge to YCV over the period from the date of sentence until after 2 years after his release.



Discussion

15. Before addressing the two points of appeal raised by Mr Hinge, we asked Mr Blessing to clarify two things: Firstly, whether the period of offending was 16 days as stated in the statement of facts or 1 year as mentioned in the prosecution's sentencing and appeal submissions. Secondly, should this Court allow the prosecution to submit a 12 years imprisonment as the appropriate starting point when in the Court below, a start point of 6 years imprisonment had been advanced.
16. Mr Blessing confirmed the offending occurred over 16 days. We consider it very unusual and inappropriate for a prosecuting counsel, acting neither for an appellant nor a respondent/cross-appellant to be making submissions requesting a re-sentence at a higher starting point than had been submitted in the Court below. Ultimately, Mr Blessing conceded that the appeal should proceed on the basis of the 6 years starting point he had advanced in the Supreme Court.
17. Mr Tasso submitted that the appropriate starting point should only be 6 years imprisonment and that 12 months should be deducted for Mr Hinge's unblemished past and his expression of remorse; and a further 3 months deducted for the return of stolen properties; and finally, a further 1/3 deduction for the early guilty pleas.
18. We say again that eligibility for parole is irrelevant to sentencing and should not be raised in submissions or considered by the Court. That is a matter for the authority responsible for the management and enforcement of imprisonment sentences namely the Correctional and Probation Services.
19. We also re-iterate that reference to authorities from the Supreme Court are not binding on this Court and wherever possible, Counsel should refer to helpful decisions of this Court.
20. The two relevant Court of Appeal cases of Public Prosecutor v Garae (2017) VUCA 21 and Public Prosecutor v Sewere (2018) VUCA 57 referred to by Mr Tasso in his submissions differ from the present case in their circumstances. In the Garae case where there was VT 11 million involved but only 4 counts, a starting point of 4 years imprisonment was adopted; in the Sewere case, there was 1 count of misappropriation and the amount of money involved was VT 6.5 million. This Court again adopted a starting point of 4 years imprisonment.
21. The general principle of proportionality in sentencing conveys the idea that the severity of the punishment should fit the seriousness of the crime: Veen v The Queen (No.2) [1988] HCA 14; (1988) 164 CLR 465; R v Dodd (1991) 57 A Crim R 349 at 354; and R v Whyte (2002) 55 NSW LR252
22. We also point to the decision of Gigina v Public Prosecutor [2017] VUCA in which we stated: "Overall it will be rare for mitigation deductions including guilty pleas to total 50% and even rarer for them to exceed 50%." Counsels should take that into account when formulating their sentencing submissions.



23. In this present case, the aggravating factors to the offending to be taken into account are: Mr Hinge stole over VT 8.6 million and caused a great loss to YCV which is a non-profit organisation established to assist disadvantaged youths in the community. The offending occurred very quickly in just over very short period of 16 days. There was a certain degree of planning on Mr Hinge's part, he breached the trust that his former employer had in him and also threw suspicion for the offending on to other employees of YCV.
24. The mitigating factors to the offender are: Mr Hinge has an unblemished past records and a generally good standing in the community. He cooperated with the authorities throughout; he accepted his wrong doing; he has pleaded guilty to the offending at the earliest opportunity; he is willing to apologise and reimburse the money stolen; and finally, some stolen items have already been recovered by YCV.
25. Compared to the cases of Garae and Sewere, we say that because of the large number of offences involved, together with the aggravating factors mentioned above, the starting point of 6 years imprisonment agreed between the appellant and the respondent is appropriate and so we confirm and allow the appeal on that first ground.
26. We then consider the mitigating factors submitted and accept a reduction of 6 months and a further 2 years for the early guilty pleas.
27. We also allow the appeal in relation to restitution. There is little chance Mr Hinge can pay anything while in prison.

Conclusion

28. We therefore allow the appeal.
29. We adopt a starting point of 6 years imprisonment for the 19 offending that occurred within 16 days period. We then consider the mitigating factors submitted and accept a reduction of 6 months and a further 2 years for the early guilty pleas.
30. Mr Hinge, you are therefore re-sentenced to an end sentence of 3 years and 6 months imprisonment back-dated to the 6th of March 2018 which is the date you were first incarcerated.
31. You are to repay the remaining VT 3,645,373 to YCV within a period of 2 years commencing from the date of your release.

DATED at Port Vila, this 19th day of July, 2019.

BY THE COURT

Hon. Vincent Lunabek
Chief Justice.

