

BETWEEN: JANDY GAMMA
Appellant

AND: PUBLIC PROSECUTOR
Respondent

Date of Hearing: 8 November 2021

Before: Chief Justice V. Lunabek
Justice J. von Doussa
Justice R. Asher
Justice O. Saksak
Justice G. Andree Wiltens

In Attendance: Mrs Karu Kylie for the Appellant
Mr Simcha Blessing for the Respondent

Date of decision: 19 November 2021

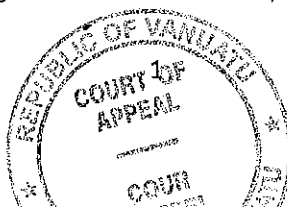
JUDGMENT

A. Introduction

1. This was an appeal against sentence.
2. The Appellant, Mr Gamma, pleaded guilty to four (4) Counts of misappropriation of a total of VT1,488,135, contrary to Section 125(b) of the Penal Code Act, and two (2) Counts of forgery, contrary to Sections 139 and 140 of the Penal Code Act. Mr Gamma was sentenced to 3 years and 3 months imprisonment.

B. Background

3. Mr Gamma was employed by Vanuatu Brewing Limited ("VBL") as a sales representative.
4. VBL produce and sell alcoholic and non-alcoholic beverages, including Tusker beer and Cascade Sparkling Water.
5. The majority of VBL customers are small retailers who purchase beverages upon delivery. Larger businesses have accounts with VBL sale representatives, and have 30 days to pay after delivery.
6. Mr Gamma, before going out on his daily runs, would obtain beverages from the officer in charge of VBL's warehouse and be given a tax invoice which, among other things, showed the type of



beverages obtained, the quantity, the price and the total amount involved. Early in 2020, he delivered goods on that basis.

7. Mr Gamma did not turn up to work for a week after that. Mr Gamma's colleagues checked with Emates Limited and Johnny's nakamal who confirmed that they had paid upon delivery. Wahoo Bar confirmed that they had never ordered the stock reflected on tax invoices PO 23000 and PO 2001, and that they had settled all their orders before the stock-take.
8. Mr Gamma returned to work on 20 January 2020. His manager confronted him again. Mr Gamma told him that he forgot the money at his house.
9. He later messaged his manager that he only had half of the money at his house. He had not offered any explanation in relation to the balance of the missing money.
10. On 21 January 2020, Mr Gamma messaged his manager that he would arrive at work a little late, and would bring the money with him. He did not turn up.
11. On 23 January 2020, Mr Gamma turned up to work. He was confronted again.
12. Mr Gamma told his manager and colleagues that he had lied to them about having the money. He said that he spent the money and goods on his girlfriend, on alcohol and had rented a number of vehicles, among other things. According to VBL officers, he was not at all contrite. He was arrogant, as opposed to remorseful in any way.
13. Mr Gamma finally messaged his manager asking to meet with him and the General Manager. They agreed. Mr Gamma did not turn up to the appointment.
14. Mr Gamma did not apologise for what he had done, but said that his sister would refund the money on his behalf. VBL approached his sister. She denied saying that and said that she wanted nothing to do with the matter.
15. When interviewed by the Police, Mr Gamma admitted misusing the money.

C. Grounds of appeal

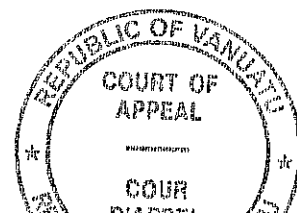
16. The grounds of appeal were that:
 - (i) The sentence starting point of 54 months imprisonment was manifestly excessive, which resulted in an excessive end sentence of 3 years and 3 months; and
 - (ii) The learned judge erred in law by placing insufficient weight on the personal circumstances of the offender resulting in an insufficient overall deduction of only 2 months.

D. Discussion

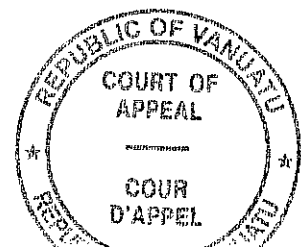
17. The sentencing judge adopted a sentence starting point of 54 months imprisonment (ie. 4 years and 6 months). The learned Judge did so adopting the starting point sentence submitted by the prosecution in the Court below, and taking into consideration the following aggravating factors:-



- The financial loss and damage to the relationships with the customers involved caused to his employer;
 - The offending was premeditated and planned using his knowledge of internal company processes;
 - Repeated dishonest offending over a period of 2-months;
 - Mr Gamma benefited substantially from the offending;
 - Mr Gamma used subterfuge to conceal his offending, and afterwards when confronted by his employer; and
 - no prospect of reparation.
18. Mrs Karu referred the Court to the guideline judgment for sentencing of the offences of fraud and theft in *Public Prosecutor -v- Mala* [1996] VUSC 22 adopted by the Court of Appeal in *Apia v- Public Prosecutor* [2015] VUCA 30 which stated that:
- "Where the amounts involved cannot be described as small but are less than 1 million or thereabout 18 months is appropriate. Cases involving sums of between VT1 Million and 5 Million will merit a term of about 2 to 3 years imprisonment. Where greater sums are involved, for example VT 10 million a term of 3 ½ years to 4 ½ years would be justified"* (Emphasis added).
19. We acknowledge that the statements of the Supreme Court in *Public Prosecutor v Mala* [1996] VUSC 22 remain valid in 2021 in terms of the guiding principles and the sentencing ranges set therein and is helpful in achieving consistency of sentencing for this type of offending (fraud and theft). The most recent judgments of this Court endorsing Mala's decision were those of 2017 and 2019 referred to by Counsel for the Appellant in her submissions before this Court, which we now refer to.
20. She cited three judgments of this Court respectively, *Public Prosecutor v Tavdey* [2017] VUCA 11, *Public Prosecutor v Garae* [2017] VUCA 21 and *Hinge v Public Prosecutor* [2019] VUCA 52 in support of her submissions that the starting point sentence of the appellant (of 4 years and 6 months imprisonment) in the present case was manifestly excessive.
21. *Tavdey's* case was about multiple fraud over a period of 4 years. *Tavdey* was a serial offender with a long list of convictions. The deceit was highly planned and the amount involved was VT 2,815,300. The Court of Appeal imposed an appropriate sentence starting point of 5 years imprisonment before any personal mitigation factors were considered.
22. *Garae's* case involved theft of a total of VT 15 million. A sum of VT 11 million was recovered, leaving an outstanding balance of more than VT 3 million unrecovered. The Court of Appeal accepted the aggravating factors present in the judgment at [39], and further accepted that the starting point of 4 years imprisonment was appropriate.



23. *Hinge's* case was a case involving 19 collective counts of unlawful entry, theft and forgery. Hinge stole over VT 8 6 million and caused a great loss to Youth Challenge Vanuatu (YCV) which he was working for, and which is a non-profit organisation established to assist disadvantaged youths in the community. The offending occurred in just over very short period of 16 days. There was a 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 onto other employees of YCV.
24. Mrs Karu pointed out that these factors are all apparent in this present case.
25. The Court of Appeal, after considering those aggravating features, then, adopted a sentence starting point of 6 years imprisonment.
26. In relation to Mr Hinge's mitigating factors, he had an unblemished past record and a generally good standing in the community. He cooperated with the authorities throughout; he accepted his wrongdoing; he pleaded guilty to the offending at the earliest opportunity; he was willing to apologise and reimburse the money stolen; and finally some items had already been recovered by YCV.
27. Mrs Karu also pointed out that the same factors are evident in this present case.
28. After the Court adopted a starting point sentence of 6 years imprisonment, 6 months was deducted for personal factors and 2 years for the early guilty plea. Mr Hinge was re-sentenced to 3 years 6 months. He was also ordered to repay VT 3,645,373 within 2 years from the date of his release.
29. Mrs Karu pointed out again that although the amount misappropriated in that case was more than the amount in this present case, the end sentence in both cases fell within the same range.
30. Mrs Karu submitted that the three cases of Tavdey, Garae and Hinge all depict similar or slightly higher starting points of 5 years despite the more serious nature of their offending. She emphasized that the comparison to the present case will certainly place the Appellant's offending on a much lower scale..
31. We agree with Mrs Karu's submissions that the sentence start point for the appellant in the present case demands a considerably lower starting point than 5 years imprisonment. We accept, therefore, that the learned Judge starting point sentence of 54 months (4 years and 6 months) is excessive.
32. Mrs Karu referred to a Supreme Court case of *Public Prosecutor v Temakon* [2020] VUSC 19, where the Court dealt with a very similar case in nature and where the Court adopted a sentence start point of 3 years imprisonment with an end sentence of 2 years imprisonment - which is ultimate gist of the appellant's submissions in this present case.
33. Mrs Karu accepted that the case of *Public Prosecutor v Temakon* was never provided to the learned primary Judge in the Supreme Court by Counsel.



34. Briefly, Temakon was charged with one (1) count of misappropriation involving an amount of VT 1,491,674 over a period of 20 months. The aggravating factors considered were the gross breach of trust towards her long-standing employer; degree of planning; duration of the offending – 20 months; and the extent of loss.
35. In her mitigation, Temakon did not perform any reconciliation ceremony. She offered reparation but the judge considered it a risk to entertain it. The sentencing judge adopted a starting point of 3 years imprisonment, which is consistent with the guideline in Mala's case and awarded a 25% deduction for the guilty plea, 4 months for the defendant's personal factors; and imposed an end sentence of 2 years imprisonment.
36. In the present case, based on the aggravated factors identified above at [17], we consider that 3 years is the appropriate sentence start point.
37. In mitigation, the appellant, Mr Gamma, is 28 years old. He is the youngest of 5 siblings. Both his parents passed away when he was attending primary school. He was a year 12 school leaver. He could not afford to pursue further studies but undertook short courses at Vanuatu Institute of Technology (VIT) and Computer Network Services (CNS) with the support of his siblings. With the minimum number of certificates obtained, he managed to find jobs to support himself and his family. But he does not live with any of them or their mothers. He did not find new employment since ceasing employment with VBL.
38. We consider that he should be entitled to an allowance of 3 months for his personal factors instead of 2 months given by the learned judge. But we agree with the learned judge that 25% (13 months) is appropriate to allow for his early guilty plea.

E. Result

39. The appeal against sentence is allowed. The sentence imposed in the Supreme Court is quashed and substituted by a sentence of 2 years imprisonment.

Dated at Port Vila this 19th day of November 2021

BY THE COURT

Hon. Chief Justice V. Lunabek

