

called for an immediate custodial sentence and after allowing for mitigation and the pleas of guilty, the appellant was sentenced to 4 years imprisonment. The judge added:

"In addition I make a restitution order that you repay the sum of VT 8,502,097 to FAL (Family Assurance Ltd) and VT 1,182,229 to FHL (Family Holdings Ltd). You will begin by making VT100,000 per month from the earnings of your retail shops. This will begin from the end of August 2017 and will continue until the whole sum of VT 9,684,326 is fully paid back."

3. The appeal is in respect of that order. It is advanced on the ground that the Judge erred, *"in improperly ordering excessive restitution without evidence of capacity to pay"*. It was said in submissions that it, *"...was crystal clear the learned Judge did not order a compensation report"*. It was argued the restitution order was excessive because the Judge was not adequately informed about the appellant's situation.

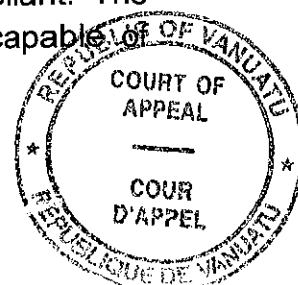
4. The Judge relied on information provided to him in a pre-sentence report and on submissions on sentence before making his order. In the pre-sentence report dated 26th July 2017 the appellant told the Probation Officer he:

"...regrets his offending and accepted the charges and conviction. However, he is willing to pay for the money he had used by way of instalment, as he is now still doing private consultancy work and operating two retail shops, one on East Ambae and one in Luganville Santo as his main source of income. He went on to say he is planning to make a repayment of 100,000 vatu per months for 110 months or nine years. However, in the event of making more money through his sources of income, he is willing to pay an amount of 220,000 vatu a month."

5. In the Defence Sentencing Submissions dated 9th August 2017 counsel then acting for the appellant submitted:

"The Defendant Mr Tore wanted and willing to repay back the money on instalment. He indicated in his PSR that he can repay 100,000 vatu on monthly instalment."

6. Whilst it may have been better for the Judge to have ordered a report specifically dealing with the details of the appellant's finances he was not obliged to. Based on the pre-sentence report and the sentencing submissions the Judge was entitled to conclude the appellant had the ability to pay the instalments being offered. He was entitled to assume the retail shops were operated by the appellant and that their operation was controlled in part or in whole by the appellant. The sentencing Judge was at liberty to presume the appellant would be capable of



making payments of the monthly amounts being offered and that the offer to repay what had been misappropriated was genuine.

7. The appeal is dismissed.

8. Lest the appellant feels aggrieved at this decision he should remember the Judge did not make any order pursuant to subsection 58ZD(2) of the Penal Code which states:

In addition to subsection (1), the court may direct that if the offender defaults in making the restitution within a period specified in an order, the offender is liable to be sentenced to imprisonment, for a period not exceeding a term calculated at the rate of 1 week imprisonment for every VT1,000 of the value of the property concerned.

9. As indicated, the Judge made no such default order.

DATED at Port Vila this 17th day of November, 2017

BY THE COURT

Hon. Vincent LUNABEK
Chief Justice.

