

**BETWEEN:** Kenneth Atuary  
Appellant

**AND:** Public Prosecutor  
Respondent

*Date:* 20 September 2019  
*Before:* Justice G.A. Andrée Wiltens  
*In Attendance:* Ms K. Karu for the Appellant  
Ms L. Lunabek for the Respondent  
*Date of Decision:* 23 September 2019

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**JUDGMENT**

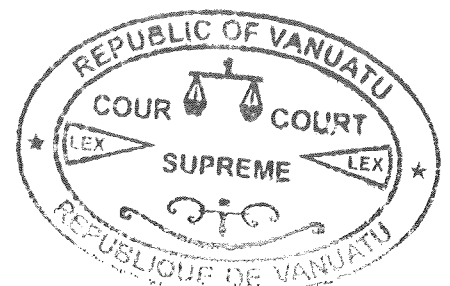
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A. Introduction

1. This matter came before me as an urgent application for bail pending appeal.
2. Mr Atuary was sentenced on 26 July 2019 in the Magistrate's Court to an end sentence of 9 months imprisonment. His Notice and Memorandum of Appeal were filed on 9 August 2019, but the matter escaped attention until the urgent bail application was filed on 16 September 2019.

B. The Decision

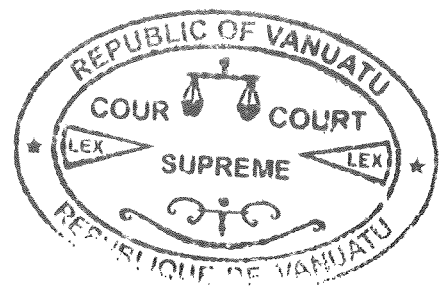
3. Mr Atuary had pleaded to 4 charges of obtaining by false pretences. There are 4 complainants who have been duped over a 2 year period, with a total loss of VT 30,000. There is no hope of reparation being made.



4. The learned Magistrate considered the appropriate start point for the offending was a term of 4 months imprisonment on each of the charges, with the terms being served concurrently.
5. The aggravating factors identified included that Mr Atuary had lied to the 4 complainants on 4 separate occasions, had deprived them of their money, and had breached their trust. These factors were said to merit a 3-month uplift.
6. The only mitigation considered available was Mr Atuary's prompt pleas, and a one-third discount was allowed for that. As well, as an allowance was made due to Mr Atuary's prior 14-day remand in custody.
7. The Magistrate then went on to discuss Section 58ZH of the Penal Code – which deals with the expunging of spent criminal convictions in certain circumstances. The Magistrate considered that Section 58ZH had no application, and then imposed an end sentence on Mr Atuary of **9 months imprisonment**.
8. Suspension of the sentence was considered inappropriate, but no reasons were provided as to why.

C. Discussion

9. One of the considerations to take into account when asked to grant bail pending appeal is the prospects of success of the appeal.
10. In this instance, as the learned Magistrate's reasoning was with respect quite illogical, I determined that the appeal had to succeed. Ms Lunabek did not argue to the contrary.
11. Accordingly, I converted the hearing into a hearing of the appeal itself.
12. Mr Atuary should have been sentenced, if I understand the logic of the sentencing notes correctly, to an end term of **3 months plus a few days imprisonment** – a start point of 4 months imprisonment, with a 3 month uplift, less one-third for his pleas and with some time already served being taken into account. There is no explanation as to how that was enlarged to an end sentence of 9 months imprisonment. There appears to be no justification for that to have occurred.
13. That sentencing logic permits the present uplift of 3 months imprisonment to stand. In reality, the only aggravating factor was the fact that Mr Atuary had offended in a repeated dishonest manner – on 4 occasions over a 2-year span. As well, in my view, the inability to make restitution is aggravating. The other matters referred to by the learned Magistrate are not truly aggravating - they are ingredients of the actual offending charged. In my view, an uplift of 2 months imprisonment was appropriate to reflect aggravating factors.




14. On appeal, the sentence imposed on Mr Atuary should be a sentence of 4 months imprisonment for the current charges, with a 2 month uplift for the repeated nature of the offending and lack of reparation. There should then be a reduction of one-third to reflect Mr Atuary's pleas, and the start point of the sentence back-dated by 2 weeks to reflect time already served.
15. Ms Karu was able to provide a history of Mr Atuary's previous convictions. It appears that Mr Atuary had 4 previous similar convictions in 2005 for which he was sentenced to terms of imprisonment. For 2 of those charges, the sentence imposed was 1 month imprisonment; for the other 2 charges, the terms imposed were 2 months imprisonment. It is unclear from the record provided whether the sentences were ordered to run cumulatively or concurrently.
16. However, what is clear, is that Section 58ZH did have application, and those convictions should have been ignored.

D. Result

17. Mr Atuary's appeal is allowed. The sentence of 9 months imprisonment is set aside.
18. The sentence that is now imposed, on all 4 charges concurrently, is one of an end term of 4 months imprisonment, back-dated to commence on 12 July 2019.
19. Mr Atuary has already served that sentence as he is entitled to automatic parole after serving half of the short sentence. He should accordingly now be released.

Dated at Port Vila this 23rd day of September 2019  
BY THE COURT

  
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G.A. Andrée Wiltens

