

**PUBLIC PROSECUTOR**

**V**

**XU FENGXI**

**Coram:** *Chief Justice Vincent Lunabek*

**Counsel:** *Mr. Lenry Young for Public Prosecutor  
Mr. James Lindsay Glissan and Mr. Mark Hurley for the Defendant*

**Date of Sentence:** *23<sup>rd</sup> March 2020*

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**SENTENCE**

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**Introduction**

1. Mr. Xu Fengxi, you appear today for sentence after the Court found you guilty of one (1) count of Knowingly Uttering Counterfeit Currency contrary to Section 142(c) of the Penal Code [CAP. 135] and another count of Knowingly Attempted Uttering Counterfeit currency contrary to Sections 28(1), (2) and 142(c) of the Penal Code.
2. You entered not guilty pleas to the charges. You were tried on 1<sup>st</sup> and 2<sup>nd</sup> August 2019. You were found guilty by the Court on the two counts on 14 January 2020.

**Sentencing base**

3. This case was about two suspected genuine Vatu banknotes that were interfered or altered in a material particular which rendered each of them false or counterfeit notes pursuant to Section 139(2) and (3) of forgery in the Penal Code Act [CAP. 135]. Mr. Xu Fengxi, you knowingly used a 10,000 Vatu note as if it was genuine on 26 November and on the following next day, you attempted to use a 5,000 Vatu note as if it was genuine on 27 November 2018 but you were stopped. You were successful with the passing of



10,000 Vatu on 26 November 2018. But your success was just for a very short period of time as the next day, the bank discovered the counterfeit note and returned it back to the Computer World store.

4. Section 142(c) is the relevant prohibiting section of the Penal Code. It provides as follows:

*"Counterfeit currency*

*142. No person shall –*

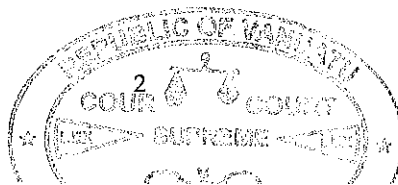
- (a) counterfeit or debase any current coin or bank note;*
- (b) import any such counterfeit or debased current coin or bank note;*
- (c) knowingly utter any such counterfeit or debased coin or bank note;*
- (d) without lawful authority manufacture or knowingly possess any instrument, apparatus or other material whatsoever designed or intended for counterfeiting any note or coin.*

*Penalty: Imprisonment for 15 years." [Emphasis Added].*

5. Section 139 of the Penal Code defines forgery incorporating counterfeit currency including use of counterfeit currency (the passing) and it provides as follows:

*"FORGERY DEFINED*

139. (1) *Forgery is making a false document, knowing it to be false, with the intent that it shall in any way be used or acted upon as genuine, whether within the Republic or not, or that some person shall be induced by the belief that it is genuine to do or refrain from doing anything, whether within the Republic or not.*
- (2) *For the purposes of this section, the expression "making a false document" includes making any material alteration in a genuine document, whether by addition, insertion, obliteration, erasure, removal or otherwise.*
- (3) *For the purposes of this section the expression "false document" means a document–*
- (a) of which the whole or any material part purports to be made by any person who did not make it or authorise its making;*
  - (b) of which the whole or any material part purports to be made on behalf of any person who did not authorise its making;*
  - (c) in which, though it purports to be made by the person who did in fact make it or authorise its making, or purports to be made on behalf of the person who did in fact authorise its making, the time or place of its making, whether either is material, or any number or distinguishing mark identifying the document, whether either is material, is falsely stated;*
  - (d) of which the whole or some material part purports to be made by a fictitious or deceased person, or purports to be made on behalf of any such person; or which is made in the name of an existing person, either by him or by his authority, with the intention that it should pass as being made by some person, real or fictitious, other than the person who makes or authorises it.*

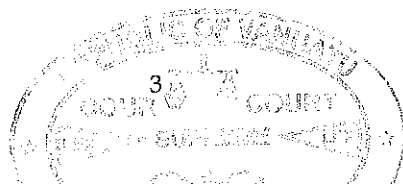


- (4) *It is immaterial in what language a document is expressed or in what country or place and whether within or beyond the Republic it is expressed to take effect.*
- (5) *The crossing of any cheque, banker's draft, post office money order, postal order or other document the crossing of which is authorised or recognized by law, is a material part of such document."*

6. It is useful to understand the correlation or connection between Section 139 of the Penal Code relating to defining forgery and the offence of uttering false or counterfeit currency note under Sections 142(c) of the Penal Code. In the common law, uttering is a crime similar to forgery. Uttering and forgery were originally common law offences, both misdemeanours. Forgery was the creation of a forged document, with the intent to defraud; whereas uttering was merely use – the passing – of a forged document that someone else had made with the intent to defraud. In law, uttering is synonymous with publication (circulation), and the distinction made between the common law offences was that forgery was the fabrication of a forged instrument (with the intent to defraud) and uttering was the publication (circulation) of that instrument (with the intent to defraud).
7. Statute law offences of forgery replace the common law offences nowadays, often subsuming the offence of the uttering, and, where the distinction exists, forgery is usually an indictable offence rather than a misdemeanour. However, in this Republic, Parliament intended otherwise. Forgery and knowingly utter any counterfeit or debased coin or bank note are both indictable offences and Parliament intended that the Court consider more seriously counterfeit currency including the use of the counterfeit currency by imposing a more severe maximum penalty than the offence of forgery in Section 140 of the Penal Code.
8. I have seen the definition at common law of counterfeit currency provided by Mr Glissan of counsel for the defence and I thank him for his assistance. However, I rely on the statutory provision of Section 139 of the Penal Code Act [CAP. 135].
9. The prosecution is seeking a custodial sentence for you, Mr Xu Fengxi, in the range of 3 to 4 years with a starting point of 5 years. The defence is seeking a non-custodial sentence placing emphasis on rehabilitation of the defendant as one of the cornerstones of sentencing discretion.

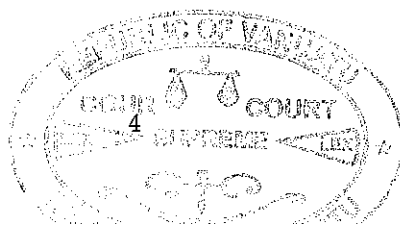
### **Facts**

10. The brief facts of this case as found by the Court is this – You are an accountant by profession, you work for China Civil Engineering Corporation Company (CCECC). You are from China. You are known by the



cashiers at Computer World store as Jeremy and as regular customer of that store. Also, they knew your profession as an accountant for CCECC.

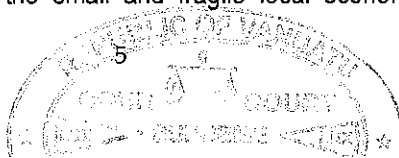
11. On 26<sup>th</sup> November 2018, you went to Computer World Store and uttered or used a counterfeit currency note of VT10,000 for your shopping in that store. That note of VT10,000 was later on banked at BSP Bank. Yvette Mera was the cashier at that time when you presented her with that counterfeit VT10,000 note as payment for a hard drive. Along with that VT10,000 note, you gave 1 x VT2,000 note and 1 x VT1,000 since the price of the hard drive is VT13,000. She gave you your change and the hard drive in return.
12. On the very next day, 27<sup>th</sup> November 2018, Rinnie Vevie was processing BSP customers' fast deposits. She received Computer World Store deposits and started sorting them out in face value then she noticed a piece of VT10,000 note. She advised her supervisor to check and they cancelled it because it was fake. The BSP notified the Computer World Store of the cancellation of the fake note and returned back to the Computer World Store that note.
13. On that same day, the 27<sup>th</sup> November 2018, you again went to the Computer World Store and attempted to use a counterfeit note of VT5,000 to purchase a storage card and a sport watch. You took that VT5,000 note from your wallet and gave it to the cashier. The cashier at the time noticed that the VT5,000 note is fake as it has scratch, different and peeled on the side. She decided not to accept it. She told you of it but you denied it. She asked you where you got it from and you answered you got it from other stores as your change for shopping you did on that day. You demanded the money VT5,000 note back. It was given back to you. You paid the value of the items storage card and sport watch with genuine money as you had that exact amount of money on you.
14. The said VT5,000 note and VT10,000 note were inspected, observed and compared with genuine banknotes for the Reserve Bank of Vanuatu by Dr Priya Sabramanian, a Senior Project Manager and Expert in the analysis and characterization of banknotes. The summary of his findings is this:-
  - (i) That the security features on the suspect banknotes were consistent with those on the reference genuine banknotes;
  - (ii) The note dimensions of the suspect banknotes received from Reserve Bank of Vanuatu were compared to the reference genuine notes. The suspect banknotes received from the Reserve Bank of Vanuatu have short edge dimensions lesser by 1mm and 0.5mm for VT5, 000 and VT10, 000 respectfully. The suspect banknotes have been cut for some reason and this is why the dimensions have changed.



- (iii) It was also observed that the suspect banknotes received from the Reserve Bank of Vanuatu are glossier than the reference genuine banknotes and they appear to have been laminated with a thin plastic layer on both sides. The laminate appears to have partially disintegrated or peeled off along the long and short edges of the notes. The reference genuine banknote does not have any laminate layer.
- (iv) The analysis of the suspected notes conducted with SEM and FTIR confirmed that for both suspect notes AA17342159 and AA10000190, an 8-micron thick polyethylene film has been laminated on both the top and bottom surface of a genuine banknote.

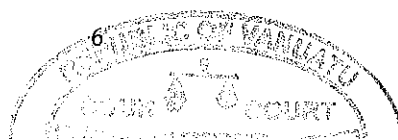
**Considerations: submissions and sentencing**

15. The two suspected banknotes appeared to be genuine notes, however, they have been interfered or altered firstly, by a cut on their respective edges which rendered their respective dimensions shorter than genuine notes and secondly, they were laminated with a thin plastic layer on the sides of both notes. They were, therefore, for the above reasons, false or counterfeit Vatu currency banknotes. They are not falsely created currency Vatu notes. There is no evidence against you, Mr. Xu Fenxi, that you are the maker of such forgeries on the said suspected currency notes. You were only using, publishing or passing or circulating them in the market economy. You will be sentenced for uttering (using or passing) one note of VT10,000 and attempting uttering (using or passing) a note of VT5,000 which each appeared to be genuine on their face but became false or counterfeit note because of the materiality of the interference or alteration with each of them.
16. This places you, Mr Xu Fengxi, not at the bottom range of offences of knowingly using counterfeit currency against Section 142(c) of the Penal Code but somewhere between the middle range of such kind of offending and the bottom range. Your role in this offending, based on the evidence before the Court, is the use and attempt use of the counterfeit currency in the market economy as if they were genuine.
17. There is no victim impact assessment. However, it is obvious that the Reserve Bank of Vanuatu in its responsibilities to promote the economic and financial welfare of this country, is responsible for issuing quality bank notes which are readily accepted and secured against counterfeiting. This type of counterfeiting on genuine currency can have devastating effect if it is done on a larger scale. And here, the material alterations of the bank notes (cuts and laminations) on the edges of the currency notes, reflect the situation that with the arrival of higher quality computers and printers and others, the number of counterfeit notes of this type passed in Vanuatu will necessarily be increased. Achieving consistently low levels of counterfeiting is critical to maintaining confidence in the currency. Widespread counterfeiting has the potential to significantly impact the small and fragile local economy. By way of example, the



implications for the currency if large-scale counterfeiting occurs in a particular area, and the resulting reluctance of business people to accept these bank notes in order to ensure that they are not left without proper payment. Small businesses operating on narrow margins, like local shop owners, stand to lose significantly when the counterfeit notes are passed and ultimately the consumer will pay higher costs as a result.

18. It must also be recognised that the Reserve Bank of Vanuatu and policing agencies will devote significant resources to respond to the growth in counterfeiting. It is evident, as a matter of logic and sense, that maintaining the integrity of the Vatu banknotes against rampant degradations and its acceptance must be a significant concern for the Reserve Bank of Vanuatu.
19. Although your involvement, Mr Xu Fengxi, remained as a user of the counterfeit Vatu currency but not a maker, it is essential that the courts in appropriate cases recognise the importance of deterrence, both general and specific, and denunciation, as significant sentencing principles in addressing counterfeiting offences. Counterfeiting is an offence for which, deterrence is a far more important factor than it is for any other offence. It requires a degree of premeditation and planning, and is driven entirely by greed.
20. It may be that printers and others in lead roles in these operations generally will be sentenced more severely than those who merely distribute the items involved such as you, Mr Xu Fengxi, in this case.
21. In determining a fit sentence in respect to you, Mr Xu Fengxi, I bear in mind the objectives and principles of sentencing which are set out in some of the local cases (see *Boesaleana v Public Prosecutor* VUCA 33 and others). Those objectives, in addition to denunciation and deterrence, include consideration of rehabilitation principles. I must impose a sentence which is proportionate to the gravity of the offence and the degree of responsibility of you, Mr Xu Fengxi (see Australian case *Veen (2)* (1988) 164 CLR 465 at 472; 33 A Crim R 230 which is also applied here). I must consider the aggravating and mitigating factors. This is the type of approach adopted in the case of *Public Prosecutor v Andy* [2011] VUCA 14. All available sanctions other than imprisonment that are reasonable must be considered. An offender should not be deprived of liberty if less restrictive sanctions are available.
22. These considerations emphasise that sentencing is an individual process which acknowledges the significant need to deter people from committing counterfeiting offences while balancing the particular circumstances of the offence and the offender. This is what I do now in your sentencing considerations.
23. I have reviewed the pre-sentence report in respect of you, Mr Xu Fengxi. You work for the China Civil Engineering Corporation Company (CCECC) as an accountant; you are 24 years old; you are a single

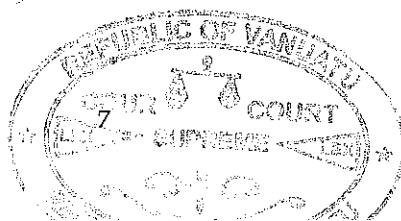


man; you are a first time offender. I take it that you have not shown any remorse as you maintain your innocence through your early notice of appeal I am told. That is a right for you, Mr Xu Fengxi, but for the purpose of sentence, I note that you have applied your mind to the contrition factor.

24. Mr Glissan places emphasis on the rehabilitation as a purpose for sentencing which aimed at the renunciation by the offender of his or her wrongdoing and the offender's establishment or re-establishment as an honourable citizen: *Vartzokas v Zanker* (1989) 51 (SAS R277 at 279). The rehabilitation is one of the cornerstones of sentencing discretion.
25. He submitted that the Court will be assisted in the exercise of its discretion in this matter by reference to some general principles of application to sentencing for "white collar" crime, of which the present matter forms a variety.
26. He also submitted that care must be taken when applying general principles in relation to "white collar crime" offences. He referred to *R v Brown* (unreported, 1/8/97, NSW CCA) Simpson J said:

*"White collar crime itself is so various in its manifestations and nature that it is scarcely susceptible of precise definition or of defined sentencing principles. I do not read the cases cited as laying down any proposition of the inevitability of a full-time prison sentence in any case which could be brought within the description of "white collar crime."*

27. The prosecutor referred the Court, amongst other matters, to two cases. The first case is *Public Prosecutor v Stefanson Stefan Atanasov* [2010] VUSC 91. In this case, the defendant presented to the Bred Bank Teller US\$2,300.00 in 23 x 100US Dollar notes. The teller found that the US Dollars given to her by the defendant were all false US currency when she used a counterfeit detector pen. She asked the defendant to wait while she consulted her supervisor. The defendant left without any explanation. On his guilty plea, he was sentenced to 3 years imprisonment starting point. After considering the aggravating and mitigating factors, he received an end sentence of 2 years imprisonment which was partly suspended due to the personal circumstances of the defendant.
28. The Samoan case of *Police v Collins* [2011] WSSC158, was the second case, the prosecutor referred to this Court. There, the defendant was charged of five (5) charges of making counterfeit currency and one charge of uttering counterfeit coin. He pleaded guilty to those charges and was convicted accordingly. He was sentenced to 3 years imprisonment for the charges of making counterfeit currency and 3 months for uttering currency. The sentences run concurrently.



29. The prosecution submitted that in assessing the seriousness of the offence and the culpability of the actual offending in this case, the following aggravating features of the offence stands out:-
- The total amount of counterfeit notes is of VT15,000 (ie. 1 x 10,000 notes and 1 x 5,000 notes). This amount cannot be described as small;
  - The Computer World Store was the victim of the defendant's offending. He used counterfeit VT10,000 to purchase a hard drive on the first occasion. The item was given to him;
  - Breach of trust – there is a breach of trust between the defendant and Computer World Store since he was the regular customer and the cashiers knew him;
  - The offending was repetitive for over two separate occasions on 26 and 27 November 2018;
  - Planning – the offending involved some degree of planning. The defendant went twice to Computer World Store using counterfeit notes to do his shopping. On 27 November, he used a counterfeit note of VT5,000 when he had the exact amount of money on him that is equivalent to the value of the item he wanted to purchase.
30. The prosecutor suggested a starting point of 5 years imprisonment given the seriousness of this offence and an end sentence of between 3 to 4 years imprisonment. That end custodial sentence should not be suspended.
31. Mr Glissan argued that the prosecutor has referred the Court to a relatively small number of earlier decisions. There is a danger in endeavouring to extract a "range" from a limited group of decisions on appeal, or from sentencing statistics. Some of the cases here selected by the prosecutor were cases involving quite different objective and subjective considerations, as well as differing sums of money. Some involved offenders such as employees or other holding fiduciary office or positions of trust, and others of which involved employees of no great seniority. In some instances, the offences were relatively simple and of short duration, and other cases they were complex and prolonged.
32. Your lawyer referred to the case of Slater [2001] NSW CCA 65 at paras. 50 – 52 when CJ Spigelman expressed the need for care in attempting any such comparison as that suggested here in this way:-





*"... In my view, greater assistance is to be derived by reference to general sentencing policy which has seen something of a hardening attitude to white collar crime in view of its difficulty of detection, and in view of the fact that its impact may fall upon a wider group of investors or creditors" Pont [2000] NSW CCA 419.*

33. I consider the prosecutor's submissions and your lawyer's submissions. The following features have been identified as influencing the assessment of the gravity of the crime:

- (1) The amount of the money involved;
- (2) The length of time over which the offences are committed;
- (3) The motive for the crime;
- (4) The degree of planning and sophistication;
- (5) An accompanying breach of trust;
- (6) Also the court have regarded the impact on public confidence and the impact on the victim as relevant matters.

34. I accept your lawyer's submissions that in the present case no loss of public confidence in the currency of the Republic was possible – the two notes were apparently genuine, although materially altered, and thus false or counterfeit, but, they are not falsely created currency. That aspect of aggravating factor is absent. Also, here, the sum (of VT15,000) is not insignificant but it is not great; nor the offences committed over a lengthy period of time. There is no evidence for the motive of the crime nor the degree of planning and sophistication.

35. I also accept that the criminal conduct complained of against you in this case (uttering counterfeit currency) cannot be described as a breach of trust when you used and attempted to use counterfeit vat currency notes at the Computer World Store. It is accepted that the settled common law established that a breach must be in direct contravention of what the offender was engaged to do. At the very least it recognises a relationship of confidence between offender and victim, which is not here present. I agree with your lawyer's submissions on this point.

36. Your role in the counterfeit currency notes operation is minor. There is no evidence that you are the author (maker) of the alterations (cuts and laminations) on these notes. However, the forgeries were so poor that the laminate appeared to have partially disintegrated or peeled off along their edges at the time of your passing or attempted passing. You passed one note and attempted to pass another despite these poor forgeries on these notes. You did so deliberately or recklessly, despite the fact that you are an accountant

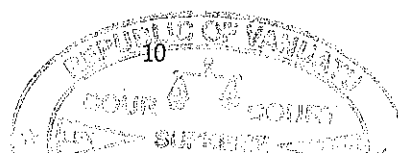


by profession. There was then an element of repetition with some degree of premeditation on your offending as reflected in the evidence before me.

37. At age 24 at the time of offending, at 26 now, you are still relatively young. You have no other court history. Your role in this counterfeiting operation was minor on the evidence before me. You passed a note (VT10,000) and attempted to pass another (VT5,000) on the next day. The forgeries involved in the alteration of the two notes were of amateur quality as the laminate appeared to have partially disintegrated or peeled off along the short and long edges of the notes.
38. In the circumstances of this case, your specific deterrence is not a significant sentencing. Your rehabilitation can be achieved in the community. General deterrence and denunciation in your case can be addressed through a community-based sentence or a short suspended term of imprisonment. I have considered whether a discharge is appropriate. I have determined that to do so would be contrary to the community interest because it does not provide in these circumstances an adequate statement of deterrence and denunciation to reflecting the seriousness of such offending and the intention of Parliament for the courts to consider and deal seriously with such offences.
39. The case of Public Prosecutor v Atanasov [2010] cannot be used on parity assessment with this case. The Atanasov case is factually a different and more serious category of cases involving uttering false foreign currencies (US Dollars) and with substantial amount involved. It is so distinguished. The present case is a separate type of counterfeiting on apparently genuine notes with material particularity and must be considered on its own circumstances. The prosecutor did not assist me with a relevant case law on the point.
40. In my view, a short suspended imprisonment sentence followed by probation will reflect the concerns of the courts for offences like this, while at the same time balancing Mr Xu Fengxi's particular circumstances and the steps toward rehabilitation. A starting point sentence of 5 months imprisonment will be appropriate and 1 month deduction for the delay in the prosecution and sentencing in your case. This will leave you with an end sentence of 4 months imprisonment to be suspended and a short probation period to allow for rehabilitation.

### **Sentence**

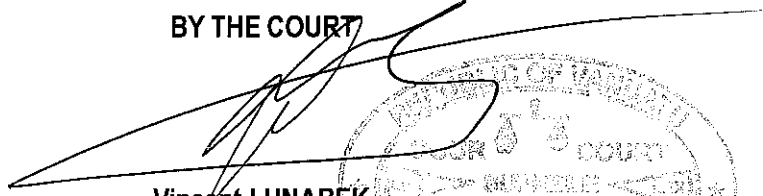
41. Mr Xu Fengxi, would you stand up please. On these two charges (count 1) and (count2) concurrent, I impose an imprisonment sentence of 4 months imprisonment suspended for a period of 12 months. In addition, I order that you undertake a sentence of probation for a period of 6 months on general standard.



42. You have 14 days to appeal against this sentence if you are unsatisfied with it.

**DATED at Port Vila, this 23<sup>rd</sup> day of March, 2020.**

**BY THE COURT**

A handwritten signature in black ink, appearing to be 'Vincent Lunabek', written over a circular official seal.

**Vincent LUNABEK  
Chief Justice.**

