

PUBLIC PROSECUTOR

v

JAMES BARRY TOUGEN

Before: *Justice Oliver A. Saksak*
Counsel: *Mr Lenry Young for Public Prosecutor*
Mr Daniel Yawha for Defendant
Date of Plea: *6 June 2023*
17 November 2023

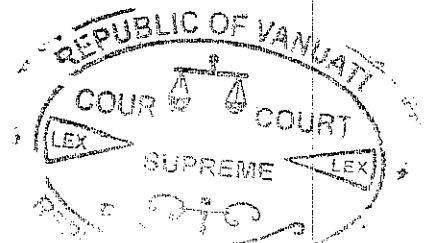
SENTENCE

Introduction

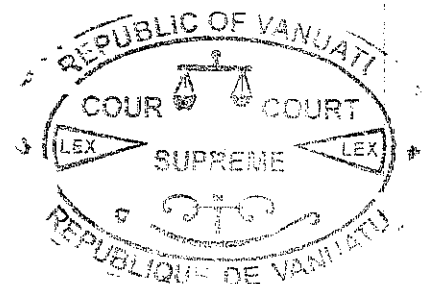
1. On 6 June 2023 the defendant pleaded guilty to all 16 Counts of Misappropriation contrary to section 125 (a) of the Penal Code Act [CAP. 135]. And he is here for sentence today.
2. He is accordingly convicted and sentenced on his own guilty pleas and the facts presented.
3. Misappropriation is a serious offence carrying a maximum penalty of 12 years imprisonment.

Facts

4. The defendant was employed by Asco Motors in Port Vila as a Sales and Marketing Manager. In the course of his employment the defendant on different dates received cash payments for vehicles and converted them for his own benefit and personal use. These were as follows:-
 - (a) Between June 2020 and April 2021, VT15,000,000 received from Weng Jian Fan for a Toyota Prado – Count 1.

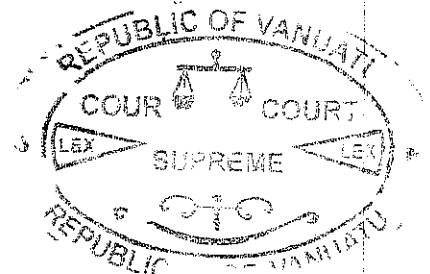


- (b) Between 1st and 30 September 2020, VVT1,212,000 received from Amos Renty Tom for a Toyota Bus – Count 2.
- (c) Between 1st and 31 December 2020, VT800,000 received from Benoit Butal for a Toyota Bus – Count 3.
- (d) 8 January 2021, VT4,200,000 received from Dr Jinping Li for a Toyota Hiace Bus – Count 4.
- (e) Between 1st and 31 October 2020, VT1,200,000 received from Job James for a Toyota Bus – Count 5.
- (f) 20 August 2020, VT4,000,000 received from Johnny Lam for a Toyota Land Cruiser – Count 6.
- (g) Between 1st and 31 December 2018, VT2,800,000 received from Liang Huaxin for a Toyota vehicle – Count 7.
- (h) 22 December 2020, VT600,000 received from Madelaine Natonga for a Toyota Bus – Count 8.
- (i) Between 1 April 2018 and 30 June 2018, VT1, 000,000 received from Peter Albert for a Toyota Hiace – Count 9.
- (j) Between 1st December 2020 and 31 January 2021, VT1, 500,000 received from Raul Tavday for a Toyota single cabin – Count 10.
- (k) 19 March 2019, VT4, 600,000 received from Sino Van Fisheries Ltd for a Toyota Land Cruiser – Count 11.
- (l) Between 1 and 30 November 2020, VT2, 800,000 received from De Xing Hugo for a Toyota Double Cab – Count 12.
- (m) Between 1 March 2019 and 30 November 2019, VT4, 600,000 received from South Pacific Refrigeration for a Toyota Vehicle – Count 13.
- (n) Between 1 and 30 November 2020, VT2, 000,000 received from Tamath Marc for a Toyota Hiace Bus – Count 14.
- (o) Between 1 March 2021 and 31 May 2021, VT1, 500,000 received from Johnny Nguyen Van Hai for a Toyota Prado – Count 15.
- (p) Between 18 November 2020 and 31 March 2021, VT1, 800,000 received from Taura Sisi for a Toyota Hiace – Count 16.



Considerations

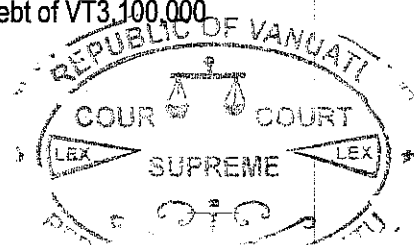
5. The total sum received, converted and misappropriated by the defendant was VT39,212,000, a very substantial and significant sum.
6. The aggravating features of these offendings are:
 - Massive losses to 16 customers of Asco Motors Vanuatu.
 - Great degree of planning involved.
 - Repetitive nature of offendings extending over a period of 4 years.
 - Huge amount of money involved and lost with no possibility of recovery or restitution.
 - Serious breach of trust.
7. There were no mitigating circumstances warranting the defendant's actions.
8. A sentence of imprisonment is appropriate in order to deter the defendant and other like-minded persons, to mark the seriousness of the offendings, to mark public disapproval and condemnation of the defendant's actions, to protect the public generally and to punish the defendant appropriately.
9. The Case of PP v Mala [1996] VUSC 22 as endorsed by the Court of Appeal in Apia v PP [2015] VUCA 30 lay down the established principles of sentencing for sums of money from less than 1 million vatu to over 10 million vatu.
10. Two later cases in 2021 first the Case of PP v John, [2021] VUSC 170 where VT10,375,600 was misappropriated, the Judge in the Supreme Court adopted a start sentence of 7 years imprisonment and reducing it to 5 years imprisonment without suspension.
11. The second case was the Court of Appeal Case of Li Jianjun v PP [2021] VUCA where for the sum of VT11,415,245 the primary Judge imposed a start sentence of 7 years reducing it to an end sentence of 4 years 6 months without suspension, the appeal against that sentence together with conviction was dismissed.



12. The sum of money involved in this case is VT39,212,000 which is 39 times more than the amount in Mala's, 3 times more than the amount in John's and 4 times more than the amount in Lijianjun's.
13. In John's case there were 34 charges and 34 victims but with a lesser amount of VT10,375,600. In Lijianjun's case there were 11 charges and 11 victims with a higher amount of VT11,415,245. The starting sentences in those cases were 7 years imprisonment.
14. In this case, it is submitted by Prosecution that the start sentence be 9 years imprisonment as a global figure.
15. For consistency, the starting sentence considering the seriousness of the offendings as the first step, will be 7 years imprisonment on each 16 counts. These will run concurrently.
16. For the second step, taking into account the several aggravating features of the offendings, there is warranted an uplift of 3 years, making a total of 10 years imprisonment as a concurrent sentence in respect of all the 16 charges.

Mitigation

17. In mitigation I first bear in mind his guilty plea. Despite his guilty pleas on the plea date, initially when interviewed, his record of interview shows that he shifted responsibility to his employers. For that factor it is my view he is not entitled to the full one-third reduction of sentence. He is only entitled to a 20% reduction which will be 2 years deducted from his 10 year sentence.
18. Next I have noted his pre-sentence report submitted by Probation Service indicating the defendant has no adverse criminal record of past convictions. He has good standing and contribution to the community as a member of the Church of Latter Day Saints. He is a young man of 44 years with a wife and 3 children ranging from 8 to 18 years old, the eldest son is currently serving in South Africa as a missionary. He holds a position in his church as communication director. His chief and wife speak well and in support of him. He is currently unemployed but he has to make monthly payments pursuant to a consent order relating to a Civil Case 21/3723 against him for a debt of VT3,100,000



as well as paying for school fees and maintaining his family. For all these factors I allow a further and final deduction of 2 years.

19. That leaves the defendant's end sentence to be 6 years imprisonment.
20. There will be no suspension of sentence as there are no exceptional circumstances warranting suspension.
21. The defendant is therefore convicted and sentenced to an end sentence of 6 years imprisonment as a concurrent sentence, without suspension.
22. This sentence will be effective after 14 days from the date of this sentence, unless the defendant chooses to go to prison earlier before the expiration of the appeal period.
23. Finally, this sentence was considered without the submissions of defence counsel. On 6 June 2023 the Court directed that defence counsel file submissions by 30 June. It did not happen and the Court reissued the orders on 4 July 2023 to file by 17 July 2023. It did not happen. The Court reminded Mr Yawha by email on 30 June 2023 and again on 2 November 2023 to file submissions. There has been none. Therefore, the Court has proceeded without them.

DATED at Port Vila this 17th day of November, 2023.

BY THE COURT

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Hon. Oliver A. Saksak
Acting Chief Justice

