IN THE COURT OF APPEAL OF THE REPUBLIC OF VANUATU

(Criminal Appellate Jurisdiction)

CRIMINAL APPEAL CASE No. 17/2137 CoA/CRMA

BETWEEN:

NORMAN TORE Appellant

AND:

PUBLIC PROSECUTOR Respondent

<u>Coram:</u>

Hon. Chief Justice Vincent Lunabek Hon. Justice John von Doussa Hon. Justice Ron Young Hon Justice Daniel Fatiaki Hon. Justice Dudley Aru Hon. Justice David Chetwynd Hon. Justice James Geoghegan

Counsel:

Mr. L Napuati for the Appellant Mr. L Young for the Respondent

<u>Date of Hearing:</u> 8 November 2017 <u>Date of Decision</u>: 17 November 2017



JUDGMENT

1. On 13th April 2017 the appellant entered guilty pleas to 16 counts of misappropriation. The offences occurred when he was a principal accountant at the firm of Law Partners in Port Vila. The firm administered two insurance schemes, Family Holdings Ltd and Family Assurance Ltd. The appellant misappropriated funds from 10 policy holders over a period of 12 months. He did so by surrendering life policies either with or without the policy holder's authority and keeping the proceeds. The total value of funds involved in the 16 offences was VT 9,684,326.

2. In the view of the sentencing Judge the offences involved a degree of planning, an abuse of trust, deception and dishonesty. The culpability of offending

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 retails 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 the sentencing between the appellant.

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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 17 th day of I	November, 2017
BY THE COURT	TCOEVAN
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Hon. Vincent LUNAB	
Chief Justice.	QUQUE DE SPANA