N2921

PAPUA NEW GUINEA

[IN THE NATIONAL COURT OF JUSTICE]

CR 389 of 2004

THE STATE

v

IORI VERAGA

WAIGANI : SAKORA J
2005 : 14, 15, 16, 17, 21, 22 & 24 March
1, 5, 6, 28 April, 2, 14, 16 & 17 June

Criminal Law – Purposes of – Sentencing – Role in and purposes of – Offences of conspiracy and misappropriation – Separate offences – Mitigation – Factors of – Aggravation – Factors of – Role of counsel in sentencing – Maximum sentences – custodial sentence – Cumulative and concurrent sentences – Constitution, ss 37 (4) (a) & (10); Criminal Code Act, ss 19, 383A (1) & (2), 407 (i), 593, 596, 600 & 601.

Criminal Law – Sentencing – Sentence discount – Degree of culpability – Remorse – Cooperation with the authorities – Guilty plea – First offender – Previous good character – Prevalance or otherwise – Interests of victims.

CASES CITED:
Taiba Maima v Sma [1971] PNGLR 49.
R v McGrath [1971] PNGLR 247.
Goli Golu v The State [1979] PNGLR 653.
Kondan Kale v The State (1983) SC250.
Wellington Belawa v The State [1988-89] PNGLR 496.
Churchill v Walton [1967] 2 AC 224
The Queen v Barber (1976) 14 SASR 388.
Bensegger v R [1979] WAR 65.
R v Tait and Bartley (1979) 24 ALR 473.
Neal (1982) 42 ALR 609.
R v Case and Wells (1985-86) 20 A Crim R 191.
R v Jamieson (1988) 50 SASR 130.
R v Cartwright (1989) 17 NSWLR 243.
R v Gallagher (1991) 23 NSWLR 220.

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Counsel:
A. Kupmain for the State.
L. Henao for the Accused.

SENTENCE

17 June 2005

Sakora J:

Introduction

For the information and edification of the uninitiated members of the general public, so that, hopefully, there is some appreciation of how and why this court arrives at what it considers to be an appropriate sentence for this particular offence, and this particular prisoner, a little time at this preliminary stage devoted to, firstly, the purpose of criminal law, and, secondly, the sentencing role of the courts, will, I would respectfully suggest, not go amiss.

Put simply, "a crime is an unlawful act or default which is an offence against the public, and renders the person guilty of the act or default liable to legal punishment": *Halsbury's Laws of England,* 3rd ed; Vol. X, p. 271. Inherent in this definition is the notion that it is an offence against the State. It is public law as opposed to private law, and, as such, is enforced at the instance of the State through its formal institutions such as the Royal Papua New Guinea Constabulary (RPNGC) and the Office of the Public Prosecutor, and, of course, the formal courts. Thus, the State, on behalf of its citizens, the law-abiding members of our communities, confronts the offender and "brings him to justice".

The apprehension, prosecution and punishment of an offender is, therefore, a public affair rather than a private personal matter, though most criminal offences have human victims. And this is another instance of the exercise of State power, specifically sanctioned by the *Constitution*, the *Police Act* and the *Criminal Code Act* (CCA) together with other enabling legislation such as the *Search Act, Arrest Act* and the *Bail Act.* The laws, principles and the accompanying processes and procedures have, in the main, been adopted from England and Australia, and some of these adapted over time.

In relation to the enforcement of the criminal laws of the country, principles of justice that we inherited have evolved over centuries in order to ensure that State power in this respect is exercised fairly, free from error or caprice. First and foremost of these principles is the presumption of innocence [s 37 (4) (a) *Constitution*] obliging the State to bear the burden of proving, beyond reasonable doubt, the guilt of an accused person.

Another fundamental principle is the right of an accused (or counsel for the accused) to cross-examine the witnesses for the State. And the third principle concerns the right of the accused to remain silent. Such a principle serves as a partial safeguard against coercion or intimidation [s 37 (10) *Constitution* - protection against self-incrimination]. Section 37 *Constitution* is directly concerned with *Protection of the Law*.

These basic principles for the determination of guilt or innocence in the courts by no means conflict with sensitive or dignified treatment of the victim(s) or witnesses. There exist, therefore, no fundamental incompatibility between the rights of the victims and those of the accused (who may end up as a prisoner of the State).

Criminal Law: Purpose

The purposes of criminal law are several. And these can be summarized as, firstly, to impose *deserved punishment* in retribution of the crime committed, the notion not just of vengeance, but of *just desserts.* Colloquially put: *Do the crime, do the time.* This purpose explains why there are varying punishments that are prescribed for crimes, depending on the seriousness or heinousness of the crime. The second purpose is *prevention,* by threatening punishment on conviction. The third is to provide for punishment of those who have not been deterred and who commit crimes, so as to *frighten* them especially so that they will not engage in further criminal conduct. This is intended also to reinforce the threat of punishment at large.

The last purpose has to do with *education* of the community continually in the proper standards of conduct which have to be observed if a decent life is to be possible for all of us.

And these purposes are intended to be achieved in the end through the sentencing process of our courts. That is precisely where we are in this case now.

Sentencing: The Role and Purpose of

The task of sentencing, though coming at the end of the trial process in the criminal justice system, is no less important than the other earlier stages of the process. This stage is the sanctioning stage, the ultimate enforcement stage, the vindication of the law stage. The Court's function at this stage is no less onerous and crucial. It is as serious as the earlier stages that are put into operation by the police embarking upon their initial investigations. Sentencing has been described as the sharp edge of the criminal justice system, that moment when courts determine what degree of punishment or rehabilitation constitutes justice in a particular case, and how consistent that justice will be. This is the stage or process where a combination of factors such as: the entire and special circumstances of this case; the law relevant to the offences in question here; the public interest; and interests of individuals (or groups of) concerned (the victim(s), if any, and the offender or perpetrator) are all to be considered, weighed up and contrasted against each other. All of these factors or circumstances need to be taken due account of, where relevant and pertinent, in the proper exercise of the sentencing discretion.

Needless to say, sentencing is not an exact science. It cannot be because this is a

function performed by fallible humans such as myself, trying as much as possible to weigh up against each other, factors and considerations seemingly opposing but no less important to the interests of the public at large and the prisoner respectively. The Court has to strike, hopefully, some balance here. Therefore, the proper exercise of the sentencing discretion involves, as well as taking into account factors relevant and pertinent to the foregoing interests, the court needs to acknowledge the universally accepted principles and purposes of sentencing or punishing offenders, and be guided by these.

There is, therefore, a range of sentencing options available in order to assist a sentencing court such as this to endeavour to balance protection of the community with an appropriate punishment for and rehabilitation of offenders. Purposes for which a sentence may be imposed can be summarized as follows:

- To punish the offender to an extent or in a way that is just in all the circumstances, the *retributive* purpose, justified by the fact that he has done wrong and deserves to be punished for it; or
- Because punishment will ensure that he and others do not commit like offences in the future (individual and general *deterrence)*; or
- Because he will learn from his punishment the folly of his way (*reformation)*; or
- Simply to keep him out of harm's way, in confinement, out of circulation, as it were (for the *protection* of the public).

It will be noted that these purposes or sanctions correspond to the purposes of the criminal law mentioned above. And, in the exercise of the sentencing discretion, any combination of the foregoing measures may be opted for in appropriate circumstances. The foregoing purposes or principles of sentencing have to, then, be applied to the particular facts of a case in the light of what the law (CCA) prescribes as the proper sanction or penalty for that offence. The individual criminalization of an act or omission (in the Code provisions) is accompanied by the prescription of a sanction. In a large majority of offences, maximum sentences are prescribed, thus inviting the exercise of discretion. Very few offences attract minimum penalties. Section 18 lists the kinds of punishments that may be inflicted under the Code. These are: (a) death; or (b) imprisonment with hard labour; or (c) imprisonment without hard labour; or (d) detention in an industrial or reformatory school; or (e) fine; or (f) finding security to keep the peace and be of good behaviour.

Further assistance to the sentencing court is available under s 19 CCA (*Construction of provisions of Code as to punishments*), vesting further sentencing discretion, so that, in appropriate circumstances, the court can utilize measures other than those specifically sanctioned by the Code provision. The learned authors of the standard text, *Criminal Law and Practice of Papua New Guinea,* 3rd ed; LBC (2001) provide useful discussion on sentencing under ss 596, 600 – 601. Then there is the glut of case law, judicial pronouncements, on the various factors in sentencing, and the principles applicable to *concurrent* and *cumulative* sentences (thus, the *totality* principle), and any relevant considerations of custom.

Some of those factors will be adverted to shortly in this case, but in the light of some aspects of both counsel's submissions on sentence, it is instructive to list these at this juncture, and I do so hereunder as follows:

- The degree of participation;
- The degree of ignorance of the law;
- The age of the offender;
- That the offender is a first offender;
- The offender's previous good record;
- Restitution;
- The offender's physical and mental condition;
- Remorse;
- The assistance given to police;
- The plea of guilty by the offender;
- Aggravation offered by the victim or provocation not amounting to an offence;
- The effect of the jail term on the offender's family;
- The effect of a jail term on the offender's job, education or income;
- The technical nature of the offence;
- The customary punishment received or compensation paid to the victim; and
- The prevalence of the offence.

The Offences

The prisoner was charged with two counts of conspiracy to defraud the National Provident Fund (NPF) and four counts of misappropriation of funds the property of the NPF. The total amount misappropriated was alleged by the State in those four counts to be K144,955.00. The total amount of the funds of the NPF alleged to have been the subject of the two counts of conspiracy to defraud was K235,300.00.

After a trial lasting some eleven (11) days, I found the prisoner guilty on all six (6) counts. By that verdict I found that the total sum of K235,300.00 were obtained from the NPF by the prisoner pursuant to a conspiracy between him and three others, Messrs Jimmy Maladina, Herman Leahy and Henry Fabila. The finding of misappropriation of K144,955.00 pursuant to allegations in the four counts leaves, therefore, a sum of K90,345.00 the property of the NPF unexplained, unaccounted for. Of the K144,955.00, the prisoner's co-conspirator, Jimmy Maladina, received K117,500.00. It would appear from this simple arithmetic that the prisoner only benefited from the remaining K27,455.00.

The entire circumstances surrounding and giving rise to the bringing of the six (6) charges are, and have been, adequately canvassed in my detailed judgment on verdict. I, therefore, do not need to repeat these here save where necessary to emphasize certain aspects of those six (6) counts.

Sentence: Submissions on Mitigation

I have had the opportunity of detailed submissions on mitigation from Mr Henao making elaborate pleas for leniency on behalf of his client. After rectifying the grievous omission on the administering of the *Allocatus,* I have also had the benefit of hearing the prisoner himself, if only briefly, pursuant to s 593 CCA (*Convicted person to be called to show cause*), when he said he accepted the decision of the Count (on verdict) and that he was "sorry to this Court for what I have done, and once again I am sorry". The term "mitigate" from which "mitigation" is derived means to lessen the seriousness of evil, harm, pain etc. Thus, circumstances or factors of mitigation are intended to make a crime less serious, and thereby lessen the severity or rigours of the prescribed sanction.

Mr Henao's submissions dwelt at some length on the extent of the prisoner's culpability, inviting the Court to take into account the minimal role he played. That is to say, it was not the prisoner who initiated the conspiracy leading to the misappropriation, and he "got stuck", as Mr Henao describes it, when Jimmy Maladina offered him the two jobs. Thus, for this minimal role, the Court was invited to refer to the facts that had not been disputed at the trial, and those that had been found as being established by the evidence to find confirmation.

In this respect, learned counsel submitted that unlike his co-conspirators Henry Fabila and Herman Leahy, the prisoner had no role to play in the non-compliance with the requirements for tendering, and the acceptance of the invoices for fees and approval for their eventual payments. Nor was it his responsibility to ensure that what Messrs Fabila and Leahy were doing was proper and regular. Thus, it was submitted, the *pattern of eagerness to cut corners* that this Court had found could not be attributed to the prisoner. Similarly, any other acts or omissions found to have been committed by either the two NPF executives or Jimmy Maladina, or indeed Carter Newell Lawyers.

Mr Henao then urged upon the court the antecedents of the prisoner, his personal particulars, family situation, education, employment history, and his Church and community involvement. Finally, learned counsel invited the Court to avail of the provisions of s 19 CCA. Whilst mention was made of restitution, if the Court were so minded, there was no concrete suggestions as to how this could be undertaken and achieved.

It should be mentioned also that Mr Henao did suggest in his submissions that there have been, and will undoubtedly be, adverse effects on the prisoner personally and professionally, and his standing in his village community. It is noted that learned counsel did not go down the road of the "plight of the family" as a result of these offences. The seriousness of this offence was duly acknowledged, but sought merciful considerations in sentencing.

Finally, in support of mitigation, Mr Henao referred the Court to and relied on the the affidavit of Mr Gabi Dori, the Village Court magistrate at Gomore village. In a lengthy deposition Mr Dori adverts to the previous good character of the prisoner and his history of Church and community involvement and assistance, all of which were intended to speak well and highly of his character and leadership qualities.

Sentence: The State submissions

Mr Kupmain of counsel for the State helpfully took the Court through the relevant sentencing principles in relation to dishonesty and misappropriation cases. This was greatly enhanced by the brief discussions on the applicable case law. Emphasising on the dishonesty aspects of the entire case, and based on the factors listed in the oft-cited case of *Wellington Belawa v The State* [1988-89] PNGLR 496, it was the State's submission that, firstly, large amounts of monies were involved here that had or would have had an adverse effect on the Fund, detrimental effect on the contributors.

Secondly, Mr Kupmain also invited the Court to consider that, though the prisoner was in no direct relationship with the NPF there was some degree of trust relationship in him, and, that he had used his special knowledge as a professional valuer to benefit from the fraudulent scheme. Finally, learned counsel noted that this had been a trial, with the prisoner putting the Staet to its proof, entailing expenditure of time, effort and expense to sustain the allegations. Furthermore, whilst restitution had been mentioned by Mr Henao, there was nothing put before the Court for its assistance in considering this. Monies had not been repaid nor recovered.

General Comments

Without doubt, the conspiracy and the resultant misappropriations were motivated by and dedicated to "good old-fashioned greed", avarice. The undeserved benefits reaped from this entire criminal enterprise by the prisoner and one of his co-conspirators, Jimmy Maladina, can be properly characterized as *unjust enrichment,* in my respectful opinion.

The prisoner was either naïve despite his upbringing, education, and years of professional experience, or was very foolish and greedy, embarking upon a criminal enterprise that would eventually adversely affect him and his family in more ways than one. I do not believe that he was naïve or gullible. And the facts as I found in order to convict demonstrate this sufficiently.

As I have found already, the co-conspirators needed the prisoner to provide the over-exaggerated and over-priced values of the two properties so that, more particularly the Waigani land that Jimmy Maladina was the beneficial owner through his company *Waim No 92 Ltd,* could be sold quickly to the NPF at an exorbitant sale price, and, in the process, Maladina share the excessive fees that came with the valuations. In this respect, the co-conspirators could very well have chosen some other valuer who was either gullible or completely corrupt enough to achieve the same ends. Perhaps they were unable to come up with such a valuer.

By the same token, Messrs Fabila and Leahy were crucial to the success, both of the proposed sale of the Waigani land, and the unjust, unearned professional fees. But in the end, I am confident and satisfied from the entire circumstances of the case that the prisoner played a secondary role to his *co-conspirators*. Jimmy Maladina would appear to have been the manipulative member of the conspiratorial criminal cabal, the one person, in a classic *'chain conspiracy*' who "called the shots", as it were. The one person who "pulled the strings" as if a puppeteer. These are conclusions properly drawn from the evidence at the trial: prisoner's sworn oral evidence and the record of

interview (Ex."F"); sworn oral evidence of both Brown Bai and Rod Mitchell and their respective affidavits (Exhibits "N" & "E1" and the Statutory Declaration John Jeffrey (Ex. "R"). I believe, therefore, that there were other people who had higher stakes to play. The prisoner just happened to be a convenient conduit.

The prisoner knew perfectly well that what he was doing, what he was embarking upon, was unlawful, was fraudulent, was dishonest. But the allure of quick easy money, for expending little or no physical and mental efforts was too much of a temptation to pass up. The prospect of getting away with it, confident in the belief that there was little or no chance of detection, because of the direct involvement of two highly placed executives in the organization, providing what can colloquially be termed "inside job" assistance was encouraging. Moreover, the direct involvement of someone such as Jimmy Maladina, who appeared to have had the ears of what may also be colloquially termed "the movers and shakers" in the highest echelons of government. This is deduced from, once again, the evidence of Messrs Mitchell, Bai and Jeffrey (supra).

The truth of the matter is that the prisoner had every opportunity to walk away from this from the very outset when he met Jimmy Maladina in his office on that fateful day in early October 1998. He chose not to. It would appear that he took no heed of the alarm bells that undoubtedly would have been ringing in the ears of an honest self-respecting professional confronted with somebody corruptly suggesting an illegal commission.

All that Mr Henao urged upon me on behalf of the prisoner I have considered in my determination. I accept the prisoner’s secondary role, though I acknowledge that this role is no less important than the role of the others, more particularly those of the two NPF executives. I have taken due account of the antecedents, the personal particulars, of family, education, professional work and Church and community service. I accept that the prisoner has had a blameless life until this temptation came along. I also accept that he is a community-minded person, concerned with the needs of his people, and has been a faithful adherent of his Church. I do not believe that his commitment and services to his community and the Church have been in any way motivated by self-interest, any ulterior motives such as insuring for future political life.

Until now, the prisoner has been a productive member of his community and country, and a useful citizen by virtue of his long professional life. But all of these have to be necessarily compared and contrasted with or balanced against the seriousness and associated factors of the offences that he has committed. In this respect, I cannot say that this was a victim-less crime. The funds he defrauded belonged to a statutory organization specifically set up to provide what may be called "a safety net" for ordinary workers, for themselves and their families and their future. Thus, depletion of the funds in the way you did would undoubtedly have had an adverse and detrimental effect on the contributors.

Ordinary workers do not get paid huge wages accompanied by all manner of extra benefits and allowances. Unlike in the more developed democracies and economies, we have not here a system of welfare benefits to cushion against the harsh realities of this often "dog eat dog" world. Our country is not "the land of the silk safety net", a very apt description of Denmark, a country where a very large percentage of the national

budget goes towards "smoothing out life's inequalities".

Understandably, therefore, the contributors to the Fund particularly, and the general public would have had and have a right to feel outraged by professional elites using their positions, connections, influence and guile to manipulate the system for their own selfish ends.

This was a well planned scheme, as demonstrated by the evidence, specifically initiated to defraud a public institution as I have described. In this respect, I have taken note of what the learned counsel for the State put before, and urged upon, me. Contrary to what Mr Henao said in criticizing some of those matters that were put before the Court by Mr Kupmain, it was proper for counsel to do so in respect of some as I will comment on in due course. So long as counsel does not forget his place and let his submissions degenerate into emotional hysterics and/or histrionics, the Court is entitled to be assisted by the prosecuting counsel. I saw no problems with the way Mr Kupmain discharged his twin duties to his client and to the Court in respect of some matters or factors.

In the light of the exception taken by Mr Henao to some aspects of Mr Kupmain's submissions, a few quick observations on the role of State counsel in sentencing would be, in my respectful opinion, in order here. Whilst I have been unable to find any cases on point here, I have had the benefit of well developed case law in the Australian jurisdictions. I respectfully refer to a few of these and adopt and apply the principles enunciated there. Whilst it would not be appropriate for either the prosecuting or defence counsel to suggest precise periods as being appropriate terms of imprisonment, if the State seeks a higher penalty then it must assist the court towards this end by putting before it the true nature and extent of the heinousness involved in the offence. Without an accurate appreciation of this, the court falls into error which cannot be cured on appeal by the State: *R v Case and Wells* (1985-86) 20 A Crim R 191.

It is proper also for State counsel to assist the court by submissions as to the range of sentences that could be said to be appropriately open. In the South Australian case of *R v Jamieson* (1988) 50 SASR 130 (CCA), it was held, *inter alia,* that although prosecuting counsel may properly make submissions to a sentencing judge by referring to relevant sentencing principles and may address as to the appropriate sentencing approach, including whether a suspended sentence should or should not be imposed, or in a serious case as to the degree to which general deterrence should take precedence over rehabilitation, prosecuting counsel should generally refrain from making submissions as to the specific sentence or specific term of imprisonment which might be imposed.

With respect the most succinct judicial pronouncement I have been able to find on the proper role of prosecuting counsel in sentencing comes from the joint judgment of the Federal Court of Australia (Brennan, Deane and Gallop JJ) in *R v Tait and Bartley* (1979) 24 ALR 473:

> The Crown has been said not to be concerned with sentence (see Lawrence J in *Paprika Ltd v Board of Trade* [1944] 1 KB 327 at 332, but when a state right of appeal is conferred upon the Crown, that proposition must be more precisely

> defined. It remains true that the Crown is required to make its submissions as to sentence fairly and in an even-handed manner, and that the Crown does not, as an adversary, press the sentencing court for a heavy sentence. The Crown has a duty to the court to assist it in the task of passing sentence by an appropriate reference to any special principles of sentencing which might reasonably be thought to be relevant to the case in hand, and by a fair testing of the defendant's case so far as it appears to require it. If the proposition that the Crown is not concerned with sentence was ever construed as absolving the Crown from this duty, it cannot be so construed when a Crown right of appeal against sentence is conferred. The Crown is under a duty to assist the court to avoid appealable error. The performance of that duty to the court ensures that the defendant knows the nature and extent of the case against him, and thus has a fair opportunity of meeting it. . .

State counsel represents the interests of the law-abiding members of our communities. Matters or factors pertinent and relevant to appreciating the concerns and frustrations of members of the public as to their safety and security are to be properly put before our courts. Public interest is relevant, and this, I would suggest, translates into *interest of justice*. And this interest demands that our Courts accord due consideration to the concerns and frustrations of the law-abiding members of our communities in these days of increasing criminality, both in violent and "white collar" crimes.

Conclusion

Mr Henao of counsel for the prisoner mentioned that his client is willing to assist the authorities, the State, to prosecute others implicated in the NPF saga. If this is an expression of a genuine intention and it does in fact happen in the near future then the prisoner will at least have salvaged something, such as self-respect, out of this unfortunate situation. But this is intended to be *ex post facto* good deed on his part that this Court cannot properly take cognizance of in the sentencing process, such as where informers and accomplices assisting the authorities whereby their co-operation in this respect would be considered as constituting genuine remorse as a mitigating factor, as envisaged in the South Australian case of *The Queen v Barber* (1976) 14 SASR 388.

There was no co-operation with the authorities here as well demonstrated by the prisoner's often evasive answers (and refusal to answer) to questions put to him by the police during an interview conducted with him.

It is noted that the prisoner apologized to the court for what he did, in his *Allocatus* (supra). The striking thing about this is that he expressed no regret, no remorse, for the possible adverse effects on the contributors to the Fund, the ordinary workers in the private sector, whose life savings were raided by him and his co-conspirators. Contrition on the offender's part can be used to mitigate a sentence. I respectfully borrow from and adopt as applicable here, the words of Murphy J in the Australian High Court case of *Neal* (1982) 42 ALR 609 (at 617):

> Contrition, repentance and remorse after the offence are mitigating factors, leading in a proper case to some, perhaps considerable reduction of the normal sentence.

It should be noted that the offender will be required to do more than claim to have suffered remorse or declare an intention to reform. Concrete evidence of contrition is required, such as restitution, co-operation with the police and the prosecution, and admission of other offences. The court necessarily assumes the role or attitude of "doubting Thomas".

There was no restitution here, nor any co-operation with the police and the prosecuting authorities. There are very helpful discussions on these in two New South Wales cases: *R V Cartwright* (1989) 17 NSWLR 23, and *R v Gallagher* [1991] 23 NSWLR 220. The case of *R v McGrath* [1971] PNGLR 247 considered and applied (per Raine J at 253) the discounting effect of co-operation with the police and pleading guilty where the majority reduced a four year sentence for stealing to the lesser one of three years.

Learned counsel for the State referred the Court to and relied on the factors listed in the *Wellington Belawa* case (supra). One of these was factor (4): the use to which the money or property dishonestly taken was put. With respect, this is a factor I often find difficulty with, because this allows State counsel to submit, as Mr Kupmain did here, that the monies were not put to any worthwhile purpose. Even if monies were, for instance given to charitable causes, why should this have an effect on sentence? Does this mean that the original gravity of a dishonesty offence can be somehow reduced if the proceeds of the offence were put to "worthwhile" causes? The sense and logic of such interpretation and application completely escape me.

The other factor Mr Kupmain relied on is factor (2): the quality and degree of trust reposed in the offender including his rank. The prisoner had no fiduciary relationship to the NPF and the contributors as Messrs Fabila and Leahy undoubtedly had. Therefore, there was no breach of trust here, such as that envisaged by s 383 A (2) (c) CCA, attracting the higher maximum sentence of ten (10) years imprisonment.

Factor (2): the amount taken, is relevant here. A total sum of K235,300.00 was misappropriated. That is a large amount of money for the country's cash-strapped public institutions. In relation to factor (3): the period over which the fraud or the thefts have been perpetrated, I agree with Mr Henao, these were "one-off" offences. These were "one-off" conspiracy, that was not continued, and two instances of misappropriation over two amounts received. These were strictly, therefore, not a series of conspiracies and misappropriations over time.

Of course any effect on the prisoner himself (factor 8) are self-inflicted, knowingly bought upon himself. These are, like the plight of one's family, the natural consequences of one's decision to offend against the laws of the country. They cannot, therefore, operate as mitigating factors.

Finally, on these factors, there is factor (6) to comment on: the impact of the offences on the public and public confidence. The prevalence of dishonesty offences such as these undoubtedly diminish public trust and confidence in public officials and professional people. It will engender and strengthen the belief in the greed and untrustworthiness of the so-called "elites" of the country who have no hesitation in and qualms about putting self-interest and avarice before interests of one's own people and

country.

It is part of our law that maximum sentences are reserved for the worst type of cases. A maximum penalty prescribes what the penalty should be in the worst type of case. This is not to say that the case must be the worst imaginable. Both the nature of the crime and the circumstances of the crime must be considered: see, for example, *Taiba Maima v Sma* [1971] PNGLR 49; *Goli Golu v The State* [1979] PNGLR 653 (per Kearney J); *Bensegger v R* [1979] WAR 65.

The prisoner has no prior convictions, has, therefore, being of good character until these offences. Thus, his previous good record have been taken into account: *Kondan Kale v The State* [1983] SC20.

In the end result, it is the judgment of this Court that a custodial sentence would properly vindicate the law, vindicate the seriousness of the offences. A non-custodial measure would, in my respectful opinion, trivialize what is a serious matter. The offence of conspiracy attracts a term of imprisonment for seven (7) years. The prisoner was found guilty of two counts of this offence. The offence of misappropriation attracts the term of five (5) years imprisonment. His case does not come within the serious circumstances envisaged by s 383 A (2) CCA which would attract the higher term of ten (10) years. He was found guilty of four (4) counts of misappropriation.

The offences of conspiracy and misappropriation though closely associated, were separate offences. By definition *conspiracy* began and finished with the agreement. It was not a continuing conspiracy as in the case of *Churchill v Walton* [1967] 2 AC 224 (cited in the judgment on verdict), a continuing conspiracy. Misappropriation took place subsequently, and the prisoner was in a position to walk away from that agreement. And he did not.

The judgment of this Court is that you be imprisoned for a term of four (4) years on each count of the conspiracy charges. For the four (4) misappropriation counts, you be imprisoned for a term of two (2) years on each of the counts. It is part of our law that *maximum* sentences of imprisonment should be reserved for the worst examples likely to be encountered in practice. These were not the worst examples. There is a well established sentencing practice that *discount* on the sentence is applied where there is a plea of guilty. This was a trial. By simple arithmetic, the cumulative effect of the tariffs comes to a total of sixteen (16) years.

In the further exercise of my sentencing discretion, I order that the four (4) years term for Counts 1 and 2 be served concurrently. And for the two (2) year terms for Counts 3, 4, 5 and 6, I order that these terms be served concurrently.

Finally, I order that the terms for misappropriation be made cumulative upon the terms for conspiracy.

Thus, the prisoner is to serve the effective term of six (6) years in hard labour out of the total sixteen (16) years.

Lawyers for the State : *Public Prosecutor*
Lawyers for the Prisoner: *Henaos Lawyers*