



Pacific Judicial
Integrity Program

Advanced Judicial Officers' Fraud and Corruption Online Courses



**FEDERAL COURT
OF AUSTRALIA**



Papua New Guinea
Centre for Judicial Excellence



Topic 4: Sentencing

Justice Teresa Berrigan

National and Supreme Courts of Papua New Guinea

Nature of the Offence



The nature of the offence will be relevant when determining sentence:

Fraud/dishonesty

- The deprivation/imperilment of another person's property

Official Corruption

- The abuse of public trust

Money Laundering

- The dealing with monies or assets that are already the proceeds of criminal conduct so as to conceal or disguise their criminal origin and convert them into property which appears legitimate

FRAUD/DISHONESTY

Fraud/Dishonesty



Wellington Belawa v The State [1988-89] PNGLR 496

Una v Regina [2007] SBHC 17; HCSI-CRC 402 of 2006

Public Prosecutor v Gama [2005] VUSC 60; Criminal Case No 011 of 2005 (11 April 2005)

Wellington Belawa v The State [1988-89] PNGLR 496



The following factors are among those which should be taken into account on sentencing an offender for an offence involving dishonesty where the offender is in a position of trust:

- the amount taken
- the quality and degree of trust reposed in the offender including his rank
- the period over which the fraud or the thefts have been perpetrated
- the use to which the money or property dishonestly taken was put
- the effect upon the victim
- the impact of the offences on the public and public confidence
- the effect on fellow-employees or partners
- the effect on the offender himself/herself
- the offender's own history
- restitution
- those matters of mitigation special to himself such as illness; being placed under great strain by excessive responsibility; a long delay; any help given to the police

Kaya v The State (2020) SC2026

The following scale of sentences may usefully be accepted as a base to be adjusted upwards or downwards according to the above factors, such that where the amount misappropriated is between:

- (a) K1 and K1000 a gaol term should rarely be imposed;
- (b) K1,000 and K10,000, a gaol term of up to two years is appropriate;
- (c) K10,000 and K40,000, two to three years of imprisonment is appropriate;
- (d) K40,000 and K100,000, three to five years of imprisonment is appropriate;
- (e) K100,000 and K500,000, five to seven years' imprisonment is appropriate; and
- (f) 500,000 and K1 million, seven to 10 years of imprisonment is appropriate, bearing in mind that the maximum under s. 383A(2) (10 years) should be reserved for the worst types of offending involving amounts less than K1 million.

Penalty: 10 years for amounts greater than K2000, 50 years for amounts greater than K1m but less than K10m, and life imprisonment for amounts greater than K10m

Wellington Belawa v The State

Amount:

- The principle is simple. The larger the amount, the greater should be the punishment.

The quality and degree of trust reposed in the offender including his rank:

- There is less supervision over a top and trusted man and consequently more opportunity to be dishonest and to avoid punishment. This is a factor calling for heavier punishment as a deterrent to such top people.

The period over which the fraud or thefts have been perpetrated

- A series of dishonest acts over a long period indicates a more confirmed state of guilty mind than one spur of the moment criminal act.

The use to which the money or property taken was put

- There are cases where money stolen is used to maintain the offender's desperately impoverished family or some other purpose which might be treated as a mitigating factor. In other cases, the money is used for purposes like gambling and drinking or to finance other criminal activities.

Wellington Belawa v The State



The effect upon the victim:

- There are cases where the victim is seriously disadvantaged or even ruined by the loss of the property stolen. This can occur if large sums are stolen from a small unprofitable business or if things like technical designs or business secrets are stolen.

The impact of the offences upon the public and upon public confidence

- The public can sometimes suffer from the loss of the actual property taken. But the public can also suffer from loss of confidence if the offender was a high and trusted public employee. This is an aggravating factor.

“The appellant was the Secretary of the Department of West New Britain when he committed the offence and Secretary of the Department of Milne Bay when he endeavoured to cover up his offence and when it was uncovered. In those positions he was responsible for the administration of those provinces and he was in charge of, and a model for, all provincial public servants. It was his job to ensure that those public servants gave honest and efficient public service to the government and the public. At a time when scandal and corruption by public officers are being frequently exposed, the disclosure of this breach of trust by the top man, the Secretary himself, must have had a most serious effect upon public confidence in the whole system of government administration.”

Fraud is not a victimless crime

Fraud is not a victimless crime



It has very real and often enduring consequences for those who lose the benefit of the funds. Where State monies are involved it impacts the entire community, particularly those most vulnerable.

It must also be recognised that offences of such scale against public funds have the potential to tarnish [country]'s standing at the international level and deter foreign investors with potentially far-reaching consequences for the development of the country.

Wellington Belawa v The State



Restitution

- May be taken into consideration in mitigation as it will reduce the suffering of the victim and may demonstrate remorse and that the offender is unlikely to repeat the offence.
- Suspension
 - Restitution cannot be used to buy freedom: *The State v Alice Wilmot* (2005) N2857
 - BUT for offences at the lower end of the scale, it may be a condition of partial or whole suspension that the offender is required to make restitution within a reasonable period on the basis that consideration should be given to alternatives to custody: *Doreen Liprin v The State* (2001) SC673
 - This is not an exercise in leniency but an order made in the community interest: *The State v Tardrew* [1986] PNGLR 91; *The State v Frank Kagai* [1987] PNGLR 320.
 - ie, where the prisoner will feel the real weight of the money lost towards restitution, where it constitutes punishment and personal deterrence, and where it will promote the offender's rehabilitation

Wellington Belawa v The State

The offender's history

- Prior criminal history
- Exemplary life of dedicated employment and community service
- Sophistication, education
- Other personal circumstances

But must be considered in all the circumstances of the case

“The history of this offender which was put before the trial judge showed an impressive employment record and no evidence of previous convictions or acts of dishonesty. These factors must be taken into account but ... this is almost always the case with offenders charged with breach of trust in positions of high office. If they did not have such a good employment record they would not have obtained their high position. It is their action of abusing that position of high trust which has resulted in the charge against them and for this reason weight given to the previous good service as a mitigating factor is reduced.”

Wellington Belawa v The State



The effect on the offender

- People in high positions who commit crimes of this nature usually suffer loss of employment and public disgrace. It will usually be hard for them to obtain future employment in similar positions of trust and they and their families will suffer. These factors can be given some weight in sentencing as they constitute a heavy penalty in themselves.
- But except in very extreme circumstances, the impact of the offender's incarceration it is not ordinarily a relevant consideration on sentence: *Allan Peter Utieng v The State* (2000) SCR No 15 of 2000; *The Public Prosecutor v Vangu'u Ame* [1983] PNGLR 424

Matters of mitigation special to the offender

- Eg, ill health, young or old age, the effect of excessive nervous strain, co-operation with the police, serious family problems, delay etc.

Wellington Belawa v The State



Delay

- A lapse of time between the commission of an offence and the imposition of sentence is not a mitigating factor of itself
- Whether delay is a relevant consideration will depend on the circumstances. Where there has been a failure on the part of authorities or the judicial process to bring an offender to justice within a reasonable time that may constitute a factor in mitigation, particularly where an offender has cooperated with authorities from an early stage.
- Consideration should also be given to the conduct of the offender him or herself and their role in the delay.
- Delay may also be relevant where the offender has made demonstrable progress towards his or her rehabilitation during the period of delay.
- As in any case delay must be balanced against all the other factors for consideration, including the nature and seriousness of the offence.

R v Law; Ex parte A-G [1996] 2 Qd R 63; *The State v James Paru (No 3)* (2021) N9248

Fraud/Dishonesty



Guilty Plea

- A guilty plea is ordinarily a matter to be taken into account in mitigation on sentence.
- It may be indicative of remorse and a willingness to facilitate the course of justice on the part of the offender.
- It may also be taken into account on the separate utilitarian or objective ground that it has saved authorities and the court the time and expense of a trial and spared witnesses the inconvenience, and in some cases the distress, of testifying.
- In general terms, the earlier the plea the greater its weight and the more favourable it will be for the offender.
- In some cases a guilty plea when taken in combination with other relevant factors will be of little to no weight: *Kalabus v The State* [\[1988\] PNLGR 193](#) .
- Whilst a plea of guilty may be taken into account in mitigation, a sentence must never be made more severe because a convicted person has insisted on his or her right to have the charge proved according to law. *SCR No 1A of 1981; Re Motor Traffic Act* [\[1982\] PNGLR 122](#) .

Fraud/Dishonesty



Cooperation

Cooperation with authorities, like an early guilty plea, will only be a significant factor in mitigation when it constitutes genuine contrition and remorse, or reflects a willingness to assist authorities in their investigations and facilitate the course of justice. The nature and extent of the cooperation and its value to authorities are relevant factors in this regard.

R v Cartwright (1989)17 NSWLR 243

CORRUPTION/ABUSE OF OFFICE

Public Trust



The offences recognise that those who are entrusted to exercise the power and authority of public office must be accountable to the public.

Official corruption or abuse may occur at any level of public service or public office, albeit in general terms, the more senior the official the more serious the offending.

Attorney-General's Reference (No 3 of 2003) [2005] 1 QB 73; The State v Yawijah (2019) N7767; The State v Joel Luma (2020) N8798

“Corruption is like cancer”

“It is deadly because it can kill a nation if it is not dealt with swiftly and sternly. It is like a cancer that grows in the human body and if not treated quickly, can grow big and cause death. Its impact on the society must never be under estimated. It has far reaching consequences. A nation's progress and development is dependent on its work force and if public officials who make up the bulk of the work force in this country indulge in corrupt activities, their actions can bring down the entire nation.”: *S v Robert Konny* (2012) N4691

“The corruption in this case is particularly insidious and difficult to detect. Officials demand monies for simply doing their job. This case is the perfect example of the type of cancer that grows until, like the situation in some countries, it becomes so entrenched that it simply becomes accepted as a necessary part of dealing with the public service.”: *S v Doreen Tatut* (2021) N9023

MONEY LAUNDERING

Money Laundering

Maximum Penalty

The offence of money laundering is deliberately broad and designed to capture a wide range of conduct relating to money or other property arising from crime. Given its breadth the maximum penalty has been designed to accommodate a very broad range of offending behaviours.

In the circumstances sentencing will require a careful assessment of the objective seriousness of the offending under consideration.

State v Edward Bae (2019) N8029 adopting *Thorn v R* [2009] NSWCCA 294

Money Laundering

Considerations

- the amount or value of the criminal property involved
- the source of the criminal property dealt with or the seriousness of the criminal conduct from which the property derived
- the period over which the offence was perpetrated and the number of transactions involved
- the sophisticated nature of the offence and the extent of planning involved
- the role of the offender, or the authority with which he acted
- the nature of the dealing or the use to which the money was put, including the extent to which the offender personally benefited
- the state of mind of the offender, or the extent to which he knew the property was criminal property
- the extent to which the offender abused a position of power or trust
- the impact of the offence on the public and public confidence.

State v Edward Bae (2019) N8029; adopting *Wellington Belawa*; *R v Ansari* (2007) 70 NSWLR 89; *R v Huang* (2007) 174 A Crim R 370; *R v Li* (2010) 202 A Crim R 195; *R v Guo* (2010) 201 A Crim R 403

Money Laundering

General Deterrence

A sentence for money laundering should normally reflect the need for general deterrence to a very significant degree because of the serious nature of the offence and the potential risks posed to the economy and society and the difficulty for detection.

OTHER GENERAL PRINCIPLES

Generally



The Court has a broad discretion on sentence.

Consideration must be given to protection of the community, punishment, rehabilitation and deterrence: *Acting Public Prosecutor v Aumane & Ors* [1980] PNGLR 510.

And denunciation.

Guidelines and comparative cases are important considerations but every sentence must be determined according to its own facts and circumstances: *Lawrence Simbe v The State* [1994] PNGLR 38.

Broad Discretion

An appellate court will not readily disturb the discretionary power of a sentencing judge. For it to do so it must be satisfied that the judge made an error that has the effect of vitiating the sentence.

Such an error may be identifiable: a mistake as to the facts; an error of law; the taking into account of matters which should not be taken into account; or the failure to give appropriate weight to matters to be taken into account.

Even where no identifiable error can be shown, a sentence may be set aside where it is obviously – but not merely arguably - out of all reasonable proportion to the circumstances of the case: *William Norris v The State* [\[1979\] PNGLR 605](#)

Maximum Penalty

The maximum penalty is reserved for the most serious instances of the offence:
Goli Golu v The State [1979] PNGLR 653.

That is, whether the offence is so grave as to warrant the imposition of the maximum penalty.

Whilst the maximum penalty should be reserved only for the worst sort of cases, that is not to say that the case must be “the very worst in the book” (*Goli Golu v The State* [1979] PNGLR 653) or the worst imaginable example of the offence (*The Queen v Kilic* (2016) 259 CLR 256)

Circumstances of Aggravation

- A circumstances of aggravation is not an essential element of an offence
- **But** if the prosecution wishes to rely on a prescribed circumstance of aggravation to attract a higher maximum penalty then in PNG it must be pleaded in the indictment: s 528(2), *Criminal Code*
- It must also be established beyond reasonable doubt
- If necessary, analyse the circumstance of aggravation in the same way as for the essential elements by reference to statutory definitions and related case law
- A failure to prove an alleged circumstance of aggravation is not fatal to establishing the offence charged without that circumstance: s 538

Cumulative v Concurrent

There is no “all-embracing” rule as to when sentences for two or more convictions should be made concurrent. Sentences should generally speaking be made concurrent where a series of offences is committed in the prosecution of a single purpose or the offences arise out of the same or closely related facts: *Tremellan v The Queen* [\[1973\] PNGLR 116](#). Where the offences are different in character, or concern different victims, the sentences should normally be cumulative: *Public Prosecutor v Kerua* [\[1985\] PNGLR 85](#).

Consider: nature, purpose, date, location, victim(s), gravity

Three stages in coming to a total sentence:

- The first step is to consider the appropriate sentence for each offence charged
- The second step is to consider whether they should be concurrent sentences or cumulative sentences.
- Where the decision is made to make two or more sentences cumulative, the sentencer is then required to look at the total sentence and see if it is just and appropriate.
- If it is not, they must vary one or more of the sentences to get a just total. This principle must be observed because a straightforward addition of sentences usually leads to a total sentence that is excessive in the whole of the circumstances: *Mase v The State* [\[1991\] PNGLR 88](#)

Parity



Parity is a matter to be determined having regard to the circumstances of the co-offenders and their respective degrees of culpability.

- Equal justice requires that like should be alike but that if there are relevant differences due allowances must be made for them.
- In the case of co-offenders, different sentences may reflect different degrees of culpability or their different circumstances.
- However the parity principle recognises that equal justice requires that, as between co-offenders, there should not be a marked disparity which gives rise to 'a justifiable sense of grievance'

Sanawi v The State (2010) SC1076 adopting *Mario Postiglione v The Queen* [1997] HCA 26; *Lowe v The Queen* (1984) 154 CLR 606; affirmed *Kaya v The State*

“It is obviously desirable that persons who have been parties to the commission of the same offence should, if other things are equal, receive the same sentence, but other things are not always equal, and such matters as the **age, background, previous criminal history and general character of the offender, and the part which he or she played in the commission of the offence**, have to be taken into account”: Gibbs CJ in *Lowe v The Queen* (1984) 154 CLR 606.

Suspension

Three broad, but not exhaustive, categories in which it may be appropriate to suspend a sentence:

- where it will promote the general deterrence or rehabilitation of the offender
- where it will promote the repayment or restitution of stolen money or goods
- where imprisonment would cause an excessive degree of suffering to the particular offender, for example because of bad physical or mental health

The State v Tardrew [\[1986\] PNGLR 91](#)

Considerations

- Offence
- Maximum penalty
- Facts established at trial or on plea
- Prosecution submissions
- Defence submissions
- Sentencing guidelines
- Comparative cases
- Personal circumstances
- Aggravating circumstances
- Mitigating circumstances
- Sentence for each offence
- Cumulation or concurrency, if applicable
- Deduction of pre-trial custody, if applicable
- Suspension, if applicable



S v Hetinu (2022) N9590

The offender was convicted after trial of one count of official corruption contrary to s. 87(1)(a)(i)(ii) of the *Criminal Code*.

Max penalty: 7 years of imprisonment

The Election Manager for the National Capital District, with overall responsibility to organise and conduct free and fair elections in the NCD received K184,300 cash on account of attempting to secure the election of one particular candidate to the NCD Regional Seat in the discharge of his duties of office. The monies were received pursuant to a memorandum of agreement between the intending candidate and the offender and another election official.

Prior conviction: Obtaining by false pretence in 2007: 2 years, wholly suspended

S v Hetinu

State submissions: 3 to 4 years, no objection to suspension

In aggravation:

- Serious breach of trust
- Serious effect on public trust in the electoral system
- Significant value of monies but did not personally benefit from them before they were seized
- Official corruption is prevalent
- Not a first time offender

In mitigation:

- Shown genuine remorse

Defence submissions: 2 to 4 years, wholly suspended, or fine in substitution

In aggravation:

- Serious breach of trust
- Monies large but did not benefit

In mitigation:

- Apprehended before he could do any act that would interfere with the electoral process and before he could use the monies found in his possession.
- Of prior good character, except for prior conviction
- According to the pre-sentence report he is a very committed and hard-working employee. He is a quiet and humble member of the community.
- Offender and family, especially his children, have already suffered as a result of the offending. He has been suspended and is likely to be terminated. He is the only breadwinner for his children and his extended family. The property they currently live in is rented and he has no property to send them to if he is imprisoned.
- He has expressed remorse.
- The offender is willing to pay a fine in substitution for imprisonment and has demonstrated that he will faithfully comply with the conditions of probation as he did on the last occasion.

S v Hetinu



- 51 years of age
- Educated to Grade 10
- Diploma in Theology
- Expressed remorse
- Maintains innocence
- Prior good character
- Long and impressive employment record with the Electoral Commission, rising from a casual driver in 2007 to Election Manager for Port Moresby in 2009
- Conducted elections as Election Manager across the country in challenging locations
- In 2005 he and his wife were seriously injured in a house fire, soon after which his wife died.
- He became a single parent to five children, aged then between 11 months and ten years of age, for whom he remains financially responsible. He remarried and, whilst he and his wife have since separated, he is financially responsible for their ten year old daughter. In addition, he is financially responsible for nine people who live with him in Port Moresby, including his 80 year old mother, his 14 year old son, and three grandchildren aged between 3 months and three years.
- Continues to suffer pain and reduced mobility from scarring suffered in fire
- Impact of the offence on the offender – age, employment, standing
- Impact on family
- Attempts to influence result thwarted
- Breach of trust
- Nature of offence – “rigging the elections”
- Value of monies received
- Effect on public confidence
- Level of planning
- Prior dishonesty conviction
- Prevalence of offence
- Deterrence

