N6049

PAPUA NEW GUINEA
[IN THE NATIONAL COURT OF JUSTICE]

CR (FC) 402 of 2004

BETWEEN:

THE STATE

AND

JIMMY MOSTATA MALADINA

Waigani: Salika, DCJ
2015: 04th, 05th & 21st May, 24th July and 13th August

PRACTICE AND PROCEDURE – Criminal Law – Dishonesty offence – Sentence – Conspiracy to defraud – misappropriation of superannuation funds - Chairman of a superannuation fund – a high position of trust – total amount restituted – a deterrent sentence to be imposed.

Cases Cited:

The State v Paroa Kaia Unreported, (1995) N1401
The State v Iori Veraga Unreported N2849
The State v Jimmy Kendi (No 2) N3131
The State v Stanley Haru (2014) N5660
*The State v Peter Tokunai(*2015) N6039
Avia Aihi v The State (1982) PNGLR 92
Goli Golu v The State (1979) PNGLR 653;
*The State v Niso (No2) [*2005] PGNC 26; N2930
The State v Paul Tiensten Unreported (2015) N5563
*Ure Hane v The State (*1984) PNGLR 105

Counsel:
Mr A Kupmain, with *Ms R Koralyo,* for the State.
Mr Ian Molloy, with Mr G Purvey and *Ms C Copland,* for the Defence

Sentence

13th August, 2015

1. SALIKA DCJ: Introduction On 21 May 2015, I convicted Jimmy Maladina on the following charges namely:

"First Count:

Jimmy Mostata Maladina of Mena'ala, Esa'ala, Milne Bay Province stands charged that he, between the 1st day of November 1998 and the 10th day of October 2000, at Port Moresby, National Capital District in Papua New Guinea, did conspire with Herman Joseph Leahy, Henry Fabila, Shuichi Taniguchi, Kazu Kobayashi and other persons to defraud the National Provident Fund Board of Trustees of the sum of K2,650,000.00 by fraudulently increasing the construction costs of the National Provident Fund Tower situated at Douglas Street, Port Moresby, National Capital District.

Second Count:

Between 26 February 1999 and 30 July 1999, at Port Moresby, National Capital District, he dishonestly applied to his own use and to the use of others the sum of K2,650,000.00, the property of the National Provident Fund Board of Trustees."

Facts:

2. Between the 1st of November 1998 and 10th October 2000, National Provident Fund engaged the services of Kumagai Gumi Limited (Kumagai) to build the NPF Tower. National Provident Fund Board of Trustees also engaged the services of Pacific Architects Consortium Limited as the administrators of the project. Their job was to provide monthly progress reports to NPF Board of Trustees and to negotiate other subcontracts, mainly the administration part of it. The Court found that between November 1998 and around June 1999, the accused conspired with Mr Herman Joseph Leahy, Mr Henry Fabila, Mr Shuichi Taniguchi and Kazu Kobayashi and other persons to defraud the National Provident Fund Board of Trustees of K2,650,000.00.

3. This court found that the conspiracy to defraud occurred between Mr Shuichi Taniguchi and Mr Kazu Kobayashi who both were employed by Kumagai as General Manager and Project Manager respectively and Jimmy Maladina, the Chairman of Nasfund Board, Mr Herman Joseph Leahy and Mr Henry Fabila both employees of NPF Board of Trustees and a host of others. Jimmy Maladina was at the relevant time a partner with Carter Newell Lawyers and was appointed the chairman of the NPF Board of Trustees in January 1999.

4. The court found that the conspiracy began from around November 1998 onwards. The conspirators agreed for Kumagai to falsely charge extra fees termed as "further accelerated fees" on top of the normal cost of building the tower which was contractually agreed at K50 million. The further accelerated fee of K2,650,000.00 was fraudulently paid to Kumagai by Nasfund bankers which was then paid to Ken Yapane who then distributed to each of the conspirators..

5. The Court further found that the conspiracy was accordingly executed as planned and Kumagai paid the moneys to Mr Ken Yapane who in turn paid it to the other beneficiaries. Those payments were made in accordance with the conspiracy that the accused would engage

or would use Ken Yapane and his company account to have this money transferred. The court found the way the money was being handled amounted to money laundering,

Issue

6. The issue before this Court is what penalty to impose on the prisoner.

The Law

7. The charge of conspiracy to defraud was brought under s.407(1) (b) of the *Criminal Code*. It also provides the penalty. It reads:

> *407. Conspiracy to defraud.*
> *(1) A person who conspires with another person—*
> *(a) by deceit or any fraudulent means to affect the market price of anything publicly sold; or*
> *(b) to defraud the public, or any person (whether or not a particular person); or*
> *(c) to extort property from any person,*
>
> *is guilty of crime*
>
> *Penalty: Imprisonment for a term not exceeding seven.*
> years.

8. The charge of dishonestly applying property to his own use or to the use of others was brought under s.383A(i)(a) of the *Criminal Code* . It reads:-

> *"383A. Misappropriation of property.*
> *(1) A person who dishonestly applies to his own use or to the use of another person—*
> *(a) property belonging to another; or*
> *(b) property belonging to him which is in his possession or control (either solely or conjointly with another person) subject to a trust, direction or condition or on account of any other person,*
> *is guilty of the crime of misappropriation of property."*

9. The penalty provision for misappropriation of property is under subsection 2. It reads:-

> *"(2) An offender guilty of the crime of misappropriation of property is liable to imprisonment for a term not exceeding five years except in any of the following cases when he is liable to imprisonment for a term not exceeding 10 years.*
> *(a).....*
> *(b).....*
> (c) *where the property dishonestly applied was subject to a trust, direction or condition; or*
> *(d) where the property dishonestly applied is of a value of K2,000.00 or upwards."*

10. The law as demonstrated above provides for the maximum penalties of 7 years and 10 years respectively for counts 1 and 2 of the charges. The courts have however stated on many occasions that the maximum penalties should be reserved for the worst type of cases in each category of offence depending on the circumstances and the aggravating features of the case. See *Goli Golu v The State* (1979) PNGLR 653; *Ure Hane v The State* (1984) PNGLR 105 and *Avia Aihi v The State* (1982) PNGLR 92. Many National Court and Supreme Court decisions have subsequently approved the above Supreme Court decisions as the appropriate law on that point.

11. Moreover, this court is mindful of the provisions of s.19 of the Criminal Code. That provision empowers the court to impose lesser penalties other than the maximum prescribed.

12. Apart from the provision of statute, the court is also usually guided by similar case precedents in determining what penalty to impose. The following cases were cited by counsel as relevant in assisting the court in determining the appropriate sentence in this case.

Case	**Offence**	**Sentence**	**Particulars**

St v Niso (No2) [2005] PGNC26; N2930 Gavara-Nanu, J	1 x conspiracy 1 x forgery 1 x fraudulently uttering a false document and 1x misappropriation	3 Yrs 6 mths IHL for conspiracy 1 Yr 3 mths IHL for forgery 1 Yr 3Mths IHL for fraudulently uttering a false document. 7 Yrs 6 Mths IHL for misappropriation (sentences for first, second and third counts to be served concurrently with the sentence for the fourth count). (effective term of imprisonment 7 yrs 6 mths IHL minus period spent in custody which is 8mths. Balance of effective sentence at 6 yrs 10 mths IHL.	Not Guilty Plea The prisoner conspired with one Soni Harvies and other unknown persons to the Bank of PNG of K500,000.00 He then forged a Westpac Bank (PNG) Ltd cheque account application form in the name of Raymon Mell. Prisoner knowingly and fraudulently uttered a false document purporting to be a Westpac Bank (PNG) Ltd Cheque Account application form in the name of Raymond Mell. He then applied to his own use and to the use of others K500,000.00.

St v Paroa Kaia Unreported, 6 September 1995 CR340/1995 N1401 Sawong, J	Misappropriation x 1	4 Yrs IHL	Guilty Plea. Account Supervisor applied money to his own use and to the use of others K94,478.31 from ANZ Bank Corporation over 2 years period. No restitution made. An Account Supervisor, high degree of trust. Severe sentence required to act as deterrent and restore public confidence in banking institutions.
St v Iori Veraga Unreported 17 June 2005 CR 389/2004 N2849 Sakora, J	Conspiracy x 2 Misappropriation x 4	4 Yrs on each conspiracy count to be served concurrently; 2 yrs of each misappropriation count to be served concurrently. Misappropriation sentences cumulative on conspiracy sentences	Not Guilty Plea. Valuer conspired with others, including senior executives of NPF, to defraud NPF of K60,300.00 and K175,000.00,by charging valuation fees that were excessive. Valuer then applied K20,300 and K7155 of that money to his own use, and K30,000 and K87,500 to the use of Jimmy Maladina. Court found that the prisoner played secondary role to that of co-conspirators. Court noted that the prisoner had to that point been a productive member of the community. The crime was a well planned scheme designed to defraud a public institution specifically established to provide a "safety net" for the future of ordinary workers, who did not have a welfare system in PNG. The prisoner showed no remorse for the ordinary workers of the private sector, whose life savings were raided by him and his conspirators. No restitution was made.

St v Jimmy Kendi (No 2) (2007) N3131	1 x False Pretence 1x Misappropriation	4 Yrs for False Pretence; and 9 Yrs for misappropriation. (to be served concurrently thus total of 13 Yrs IHL)	Not Guilty Plea The prisoner fraudulently obtained K4,298,037.33 from the State, with assistance of corrupt officers, from the Department of Finance and Treasury and Department of Defence, in payment for a false claim that members of the Defence Force present in Bougainville during the crisis unlawfully used machinery and equipment belonging to his company between 1993 and 1997. Evidence proved that the prisoner's company never owned any machinery or equipment during the claim period.
St v Stanley Haru (2014)	Misappropriation	8Yrs IHL 4 Yrs to be suspended if all the money is restituted.	Prisoner unlawfully sold the Kone Tigers Rugby League Oval in Waigani and misappropriated the proceeds of the transaction on himself in the amount of K2,600,000.00 which was the property of Kone Tigers Rugby League Club, and was found guilty after a trial. Existing Trust and Significant amount of money.

St v Peter Tokunai (2015)	Misappropriation	6 Yrs IHL	Prisoner was found guilty after a trial for misappropriating funds of K1,500,000.00 property belonging to the Department of National Planning & Monitoring. The prisoner obtained those monies upon a project proposal he submitted for the reconstruction of the Malaguna Catholic Church which did not eventuate. The Court found that only a little over K100,000 was used on the project but most of it was used by the prisoner on himself and a few of his friends.
St v Moko Essi Kom (2009) CR 114/2008 David J	Misappropriation	8 Yrs IHL	Guilty Plea – Prisoner was approached by others to use the name Simon Wapo so that he and others would embezzle funds from the Dept of Finance & Treasury. Claims were made and payments made to the prisoner totalling K3,780,000 which funds were used by the prisoner and others for their own use.

St v Daniel Mapiria (2004) Unreported CR 1118/2000 Mogish, J	Misappropriation	9 Years wholly suspended on condition including - restitution to State of K1 million within 18 mths - upon payment sentence suspended - 5 years community service - 5 year good behaviour bond - 6 monthly PS report	Not guilty plea Chairman of National Gaming Control Board misappropriated K3.188 million from the state by counter signing 41 cheques drawn payable to cash over 10 mths and applied to the benefit of another, namely the Registrar of the Board, Mr Aisa, rather than for the purpose of health, welfare, community etc as directed by the NEC. Aisa was acquitted by another trial judge. The prisoner in this matter did not personally benefit from this crime.
St v Zebedee Jabri Kalup	3 x False Pretence 4x Misappropriation	11 Yrs IHL	The court found there was a significant amount of money of K4,750,000 was misappropriated and a breach of trust had occurred as well. The prisoner was to serve a total of 11 years imprisonment in hard labour inclusive of the other charges he was convicted upon, however for the four (4) misappropriation charges alone, the accused was to serve 8 yrs imprisonment which is the sentence to be served concurrently.
St v Paul Tiensten N5563	Misappropriation	9 Yrs	The court found the prisoner guilty of misappropriation of K10,000,000.00 the property of the state.

13. The above listed cases are just some of the cases involving conspiracy to defraud and misappropriation. There are numerous more such cases, thus the above list of case precedents

is not exhaustive.

Personal Particulars.

14. The prisoner is 49 years old. He was about 33 years old at the time of the offences. His father is from the Milne Bay Province while his mother is from the Western Highlands Province. He is the 6th born of 7 siblings.

15. He is married to Janet who is from Chimbu Province and they have been married for 29 years now after having met while both studying at the University of Papua New Guinea. They have 4 children who are now living and studying in Australia.

16. The prisoner is a lawyer by profession. He started his education in Lae at St Mary's Primary School. He then went to Lae Provincial High School and then to Aiyura National High School.

17. After completing National High School he enrolled at the Law School at the University of PNG. After obtaining his law degree from UPNG he then completed a Masters Degree in Law at the University of Sydney. He is admitted to practice law in PNG and in Australia. He worked with Gadens Lawyers from 1990 to 1991. He then worked with Phillips Lawyers for a short time in Australia. He came back to PNG and worked for a short time with Young and Williams Lawyers. From 1992 to 2000 he worked with Carter Newell Lawyers from where these offences were committed.

18. In 2000 he and his family moved to Brisbane, Australia. While there he did some consultancy work for a fishing company which operated between Brisbane, Korea and New Zealand. He sold his business in Australia when declared bankrupt after he was taken to court relating to this matter.

19. He currently works for his family companies namely (PICC) Property & Investment Consultants Ltd) and Favalea Ltd.

20. The prisoner is of the Seventh Day Adventist Church but is not a regular church attendee since his arrest. It is not stated which congregation he is a member of. He still assists the church in the return of his tithes and offerings. He also assists the Lutheran Church at 5 Mile in Port Moresby. The prisoner says he does not attend church for the reason that after his arrest, the situation he was in was humiliating and brought shame on himself and his family and confined himself to his family home.

21. The prisoner suffers from high blood pressure or hypertension. He has been a patient of Dr Jack Amana, a senior cardiologist at the Port Moresby General Hospital. Dr Amana filed a report on 22 May 2015 on the health condition of the prisoner. He reports that the prisoner has had two episodes of "transient ischaemic attacks". He did not say when the 2 events occurred as he has been seeing the patient since 2007. He did not state when the last one occurred and when he last saw him. Furthermore did not explain what those medical terms meant and what was the cause of such conditions. The missing information is necessary if any weight is to be given to the report. I therefore, went to the medical dictionaries to help me find the meaning of the terms "transient ischemic attacks."

22. "Transient ischaemic attacks" is defined by Blacks Medical Dictionary 35th Edition as:

> *"Transient ischaemic attacks are episodes of transient ischaemic of parts of the cerebral hemispheres of the brain stem lasting anything from a few minutes to several hours and followed by complete recovery. By definition the ischemic episode must be less than 24 hours. These episodes maybe isolated or they may occur several times in a day. The cause is atheroma of the carotid or vertebral arteries and the embolisation of platelets or cholesterol. These attacks present with strokes that rapidly recover."*

23. The Oxford Concise Colour Medical Dictionary defines atheroma as:

> "*degeneration of the walls of the arteries due to formation in them of fatty plagues and scar tissue. This limits blood circulation and predisposes to thrombosis*."

The same dictionary defines thrombosis as:

> "*a condition in which the blood changes from a liquid to a solid state within the cardiovascular system....."*

The Oxford Concise Color Medical Dictionary defines transient ischaemic attacks (TIA) as:-

> *"The result of temporary disruption of the circulation of part of the brain due to "embolism, thrombosis to brain arteries, or spasm of the vessel walls. The most common symptoms are transient loss of vision in one eye and weakness or numbness in one limb or part of a limb. Patients recover within 24 hours."*

The Oxford Concise Color Medical Dictionary defines "stroke" as:

> *"A sudden attack of weakness usually affecting one side of the body. It is the consequence of an interruption to the flow of blood to the brain. An ischemic stroke occurs when the flow of blood is prevented by clotting or by a detached clot, either from the heart or a large vessel (such as the carotid artery) that lodges in an artery."*

The Oxford Advanced Learners Dictionary defines "transient" as:-

> *"Continuing for a short time – fleeting, temporary".*

The same dictionary defines ischemic as:

> *"the situation when the supply of blood to an organ or part of the body, especially the heart muscles, is less than is needed".*

24. To put it in layman's terms and in the absence of a doctor's explanation of what the condition is, the prisoner has had on two occasions a situation where blood supply to his heart or body was not enough for short periods. Such attacks could prove fatal. Dr Amana did not state what caused the attacks and what caused the hypertension. Was the condition as a result

of this case or from some other source or whether this was a pre existing condition before this case. For that reason his report is unhelpful to the court.

25. Another medical practitioner Dr Julius Ngason, Senior Psychiatric registrar also at the Port Moresby General Hospital filed another report which says that the prisoner to him is a known hypertensive patient since 2007 and has been seeing him for a number of months for treatment of depression. Again this doctor does not say when he first saw him with the condition and when he last saw him with this condition. He recommends that the prisoner's condition be regularly monitored on his medications and mental state. He says that due to the circumstances he went through and is going through now, the severity of the symptoms of his depression have increased. He says this consists of insomnia, headaches, loss of appetite, difficulty in concentration, loss of interest and suicidal inclinations. The difficulty with this report is the same as the other medical report. It does not say when was the last hypertension attack or when was the last transient ischaemic attack. It does not state when the doctor last saw him. Again this report is of very little help to the court.

SENTENCING CONSIDERATIONS

26. The sentencing trend in misappropriation and conspiracy to defraud cases have been to a large extent been dictated by sentences meted out in earlier cases by the National Court and the Supreme Court, in other words by case precedents. The often cited case of Wellington Belawa v The State (1988-89) PNGLR 496 again comes to the fore in assisting this court to consider certain relevant factors when deciding a sentence. The Supreme Court in the Belawa case adopted the sentencing considerations set in the English case of R v Barrick (1985) 81 Cr App R 78. Those considerations are:

a) The quality and degree of trust reposed in the offender.
b) The period over which the fraud was perpetrated
c) The use to which the money was put to
d) The effect on the victim
e) The impact of the offence on the public and public confidence.
f) The effect on fellow employees or partners.
g) The effect on the offender himself
h) His own history
i)Matters of mitigation spared to himself such as illness, being placed under great strain by excessive responsibility or the like, where as sometimes happens, there has been a long delay, say over two years, between him being confronted with his dishonesty by his professional body or the police and the start of his trial, and finally any help given by him to the police.

27. The Supreme Court in Belawa added two other factors namely:

(a) Amount taken; and
(b) Restitution

With respect I agree that the above factors adopted from the English case and the additional factors from the Belawa case are relevant factors in my respectful opinion in determining an appropriate sentence. This is because there is "no mathematical or scientific formula" to work

from to arrive at a sentence.

28. I now go on to discuss the above mentioned factors in this case.

(a) Amount taken.

29. The total amount taken was K2,650,000 for which the prisoner was convicted of but evidence shows the prisoner directly benefited personally in the amount of K400,000.00

(b) The quality and degree of trust reposed in the offender including his rank.

30. The prisoner was the Managing Partner of a major legal firm and the Chairman of the National Provident Fund Board. The Board members were trustees of the savings belonging to employees or workers of private companies. Their job was to look after the workers savings for the benefit of workers who do not have the benefit of a social welfare system when they retire or finish from employment. They had the powers to invest the funds for the benefit of the Fund contributors. As the chairman of the Fund Board the prisoner was entrusted with a lot of power, trust and confidence to make good sound economic decisions for the management of the Trust Funds. He obviously abused that trust and confidence and instead stole from it.

(c) The period over which the fraud or thefts have been perpetrated.

31. The conspiracy to defraud was hatched in around November 1998 and went on to about October 2000 a period of over two years while the misappropriation took place from February 1999 up to July 1999 a period of 5 months.

(d) The use to which the money was put to use.

32. There is no evidence as to what he money was used for.

(e) The effect on the victim.

33. The Corporate victim in the matter was NASFUND but there were also individual victims who contributed to the fund through salary deductions.

34. There is no evidence from the NASFUND contributors how they felt when they found out that their savings were misappropriated by the prisoner and others. All the members of the Nasfund Board were also trustees and had a duty to protect the funds of the contributors. The other Board members were also negligent in their role as trustees, more so the Board Members who represented the contributors on the Board.

NASFUND took Kumagai to court and the proceedings in that matter were settled out of court for K3,000,000.00 which Kumagai paid.

35. The Pre-Sentence report says:

"Mr Ian Tarutia further stated that when this NPF saga came about, the reaction of the

contributors at that time was hostile and negative towards the government institutions who were custodians of their contributions and life savings. He was then a junior officer within NPF and he had no knowledge and access to this information but there was a public outcry in regards to these issues.

This public outcry prompted the Prime Minister that time, Sir Mekere Morauta to call for a commission of inquiry into the NPF saga and resulted in two proceedings to take place Civil Jurisdiction and criminal proceeding which saw Jimmy Maladina and others arrested and charged.

The interest of the contributors now is that, they want their money back and they are not concerned about what the court imposes on Jimmy Maladina. *This has also being circulated on their Social Network Nasfund Website as people are just interested in the offender paying restitution back to the state as it has taken almost 17 years and finally coming to an end of the saga.*

Mr Ian Tarutia stated that Jimmy Maladina, was placed in a position of trust and when this saga took place, it was a loss to our contributors as members lost their trust and confidence in the institution.

On the other hand he expressed that he had known Jimmy Maladina and had found him to be a mature, professional, open minded and well respected person. He is a very good person who has always assisted and encourages other young Papua New Guineans to work hard and excel in the different field they work in whether it was in the government or private sectors.

He also acknowledged that this case has taken a long time and he is sorry about the humiliation and what he had to endure all this years, however the interest of the contributors as stated earlier is for their money to be repaid.

Mr Ian Tarutia went on to say confidently that NPF saga had not only had negative, chaos or adversity effects on the Institution but has instituted very positive structural reforms within the Institution. The Institution has changed in a positive angle, legislations, procedures and processes were put in place to regulate tighter measures, and control to foster change and the institution is now reaping the benefits of this saga.

The Institution is now flourishing from 1.24 million Kina to 3.8 billion Kina. To conclude he believes Jimmy Maladina has suffered enough and all this should be taken into account when sentencing him, the bottom line is that he has to pay restitution to the state.

He also acknowledged that this case has taken a long time and he is sorry about the humiliation."

In that regard the full K2,650,000.00 has now been restored to the contributors.

(f) Public confidence.

36. The actions of the prisoner as reported by Mr Ian Tarutia was such that public confidence in NASFUND was diminished at the material time. The then government established a Commission of Inquiry which led to these charges and for civil action to be taken by Nasfund against Kumagai and the prisoner. However, Mr Tarutia said public confidence has been restored in that there has been positive structural reforms at Nasfund as a result of this incident. He reports that Nasfund is now flourishing from then K1.24 million to K3.8 billion. That is tremendous growth. Public confidence has therefore been restored in that regard. Lessons have been learned both from Nasfunds point of view and from the prisoners point of view. Time has moved on and events at Nasfund appears to have progressed for the better thus making the case look stale and of little consequence.

(g) Effect on the offender.

37. On allocatus the prisoner opted for his lawyers to speak which the lawyers did. The pre-sentence report says this:

Attitude towards Offence:

> ***"The accused admitted freely that he had committed the offence. He stated that he is sorry for what he did. He further apologises and is remorseful especially to the contributors of NPF for what he had done that deprived them of their benefits which was to be enjoyed with their families and to his family for the sufferings, shame that he has brought on them for the last 17 years. He is making arrangements and is willing to repay the money owed back to the state.***
>
> *Jimmy Maladina went on to say that since 2003 when he returned to Papua New Guinea and got charged by the Police. He has appeared in court 95 times and had been on bail since 2003 in the district court and subsequently in the National Court in 2004. He has been on bail for over 12 years.*
>
> *He believes that he has been under tremendous public scrutiny since 2000 when the NPF Inquiry began and his reputation and his family name ridiculed and badly tarnished. He has suffered with this bad image for over 15 years where people have labelled him a thief as a result. He has never gone out to public places and enjoyed himself but have restricted himself to his home for the last 15 years, virtually as a prisoner."*

What the prisoner and his family had gone through was brought about by himself and cannot blame anyone for this.

38. The State submitted that the prisoner was not remorseful. The pre-sentence report reports the prisoner to be remorseful for his wrongdoings and his willingness to pay restitution. It would have been better for the prisoner to make that statement as a public statement in Court for the benefit of victims.

(h) His own history:

39. The prisoner is a lawyer. He was a principal of a leading law firm in Papua New Guinea. He was placed by the then government on boards of companies and government institutions because of his standing. He had impressive academic qualifications and work history. However with respect I agree with Barnett J in the Belawa case where his honour said:-

> *"As pointed out by the Lord Chief Justice of England in R v Barrick (1985) 81 Cr App R 78, in cases where senior employees are guilty of breach of trust or dishonesty, they will normally be people with an impressive employment record and previous good character – otherwise they would not be holding the job in the first place. For such people, the mere fact of conviction will bring about disgrace, dismissal, shame and the loss of future employment opportunities. The crime involved taking advantage of the position obtained as a result of the record of previous good character and faithful service fraudulently to steal from the employer. Such factors standing alone should carry little weight in determining the appropriate sentence in cases such as this."*

40. The prisoner served the country well, but now for this incident has blemished his once good record and will remain with him for the rest of his life.

(i) Whether restitution has been made to the victim.

41. Restitution was made in full on 24 July 2015, the very day I heard submissions on sentence.

42. However some earlier restitution (if I can call it that) was done when Nasfund took out a civil claim against Kumagai and the prisoner and others. That civil action was settled out of court with a payment of K3,000,000.00 by Kumagai but not with the prisoner. On the part of prisoner the pre-sentence report records Mrs Janet Maladina saying:

> *"Everything fell apart for the family, her husband had to appear in court in Australia and here in Port Moresby, they were declared bankrupt and their property in Queensland which they were living in was repossessed under the Trusties of Blake Dawson Lawyers who acted for NPF and sold it to recoup their money back to the total $500,000.00 Australian Dollars including monies from his personal account. It was a very difficult time for them and their children, which saw them move and live in a rental apartment and were then put on Welfare Services provided by the Australian Government.*
>
> *Janet Maladina stated that because of the charges laid against her husband Jimmy Maladina, the Australian Government revoked his Permanent Residence in Australia. He has to apply for a Visa to travel back and forth to visit her and their child which has been difficult at times for him. He had to go back to the court to seek the court's permission for him to travel to Queensland to visit his family.*
>
> *Janet further stated that what her husband had gone through for the last 17 years had affected him so much and it was like him already serving a sentence. From the stress and pressure on him he had suffered a stroke which is life threatening and still today he is under strict medication and has to continuously go for medical checkup.*

Not only that but it has also tarnished his reputation which has a lot of negative effects on the family and their business. The children had to bear the shame and undergo the suffering due to the father's case.

Janet stated that she accepts the decision of the court in finding her husband guilty and stands by her husband in this time. She has committed her support for her husband and has gone back to Australia to organise the sale of their properties and assets to assist her husband pay restitution back to the State of Papua New Guinea.

Finally, Janet Maladina stated that what her husband has gone through for the last 17 years the suffering, humiliation and shame is seen to, as being penalized enough. Their family accepts the guilty verdict and are now doing everything possible to assist pay restitution to the amount of K2,650,000.00 back to the State."

What Mrs Maladina has described above is the result of rather unfortunate consequences of the actions of Mr Jimmy Maladina her husband. Blame should not be shifted to anyone else but her husband. He was placed in a position of trust because the then government had trust and confidence in him.

43. However from this report it appears that Australian $500.000.00 was recovered from the Maladina Family by way of sale of assets they bought in Australia. Also from the Pre-sentence Report and submissions on sentence the Court was informed that Mr Maladina was also declared bankrupt for a while. In that regard it can be said that Mr Maladina has repaid AUD$500,000.00 to the victim. Today in PNG Kina, that amount would be in excess of K1,000,000.00. The additional amount repaid in the amount recently of K2,650,000.00 in restitution is taken into account, as well. In reality some restitution was paid right at the outset and quite a lot of restitution was paid at that time. It could be that the prisoner has overpaid the total amount of K2,650,000.00 by AUD$500,000.00.

44. While I know that the full restitution is done at this late stage an earlier restitution of AUD$500,000.00 was made. The prisoner was also declared bankrupt. I take those into account. The only down side to the last minute full restitution is the perception that the "have or the rich" can pay their way out of jail terms.

(j) **long delay in being confronted with his dishonesty**

45. This case has a long history. It has its beginning in around 1998. The case of the *State v Iori Veraga (*2005) PGNC 43: N2921 bears testimony to that. The State in their submissions do acknowledge the delay but say that due to various other court proceedings this matter has been delayed. The State also submitted that part of the delay be attributed to the prisoner's lack of co-operation and appreciation of the Criminal Law processes.

46. Counsel for the prisoner devoted 7 pages of his 10 page submission on sentence on the issue of delay. The issue for delay therefore needs to be addressed by the Court. Delay in bringing a matter to court is one consideration in considering a sentence as was adopted by the Supreme Court in the Belawa case. The English case of Barrick (supra) which Belawa approved and applied says any delay of say 2 years from the date of the offence to the date of

trial would be taken into account in mitigating a sentence. The prisoner was formally arrested and charged in July 2003 for events which took place in 1998 and 1999.

47. The committal process took 15 months and in October 2004 the prisoner was committed to stand trial in the National Court. From November 2004 to May 2015, a period of 11 years the prisoner's matter has been in and out of the National Court. The prisoner was committed to stand trial. Somehow his co-accused Herman Leahy was not committed to trial. The Public Prosecutor however indicted him under s.526 (indictment without committal) of the Criminal Code. Since then, the matter of Herman Leahy has been permanently stayed by the National Court.

48. The trial of the matter was initially set to run from 6 to 24 June 2005. The trial date was set in March 2005. In April 2005 the trial date was confirmed to start on 6 June 2005.

49. In May 2005 the trial date was vacated upon a request by the State before the National Court. The Court upon that request vacated the trial date. From May 2005 nothing was done to prosecute the prisoner until the middle of 2007. Two full years was wasted there. The State must be held responsible for that part of the delay with the Courts.

50. In 2008 the matter came before Mogish, J to fix a date for trial of the matter and was fixed on 11 August 2008 for Public Prosecutor to formally apply for a joint trial of the prisoner and Herman Leahy. On 11 August 2008, the matter was before Kirriwom J. His Honour adjourned the application for joint trial generally to a date to be fixed. That part of the delay appears to be occasioned by all parties.

51. In the meantime there were various applications before the Supreme Court by Herman Leahy objecting to an ex-officio indictment presented by the Public Prosecutor which the Supreme Court in March of 2010 ruled the ex-officio indictment to be in order and allowed amendment to the ex-officio indictment.

52. The Public Prosecutor on 6 July 2010 moved an application for a joint trial of the prisoner and Herman Leahy. This application was opposed by the prisoner and Herman Leahy.

53. On 12 July 2010 the National Court ruled in favour of the application for a joint trial of the prisoner and Herman Leahy. On 18 August 2010 the prisoner and Herman Leahy filed for review of the National Court decision to have a joint trial.

54. The review applications were never heard but were dismissed for Want of Prosecution in December of 2012. Since December 2012 both the State and the prisoner have done nothing to prosecute the matter until this Court called the matter early this year and listed the mater for trial with reluctance from both State and the lawyers for the prisoner. This part of the delay was caused by the prisoner and Herman Leahy.

55. After going over the history of the matter all the players involved in the process of bringing the matter to trial within a reasonable time have all failed to perform their respective duties in bringing the matter to trial. The Public Prosecutor failed, the Courts failed and the prisoner himself and his lawyers failed. In my respectful opinion after going through the

history of the case from committal to trial all parties including the prisoner and his lawyers are guilty of this rather lengthy delay.

56. The Public Prosecutor has the primary responsibility to bring a matter to trial under s. 177 (1) (a) of the Constitution. He must have the matter tried within a reasonable time pursuant to s.37 (3) of the Constitution. In recent years the courts have taken on the responsibility to move cases for trial. The Court Rules relating to listings of cases was meant for the speedy disposition of a case. T his is usually done in open court where Judges and Lawyers play a major part in listing of cases for trial within a reasonable time. The systems and the process provided under the listing rules failed to have this matter brought to a speedy trial. In that regard this court takes this failure into account in sentencing.

57. On the part of the prisoner and his lawyers the provision of s.552 of the Criminal Code were always available to be invoked if they wanted the trial to be expedited. See *The State v Yamai* (1987) PNGLR 314, *Lindsay Kivia & Ors v The State* (1988) PNGLR 107 and *The State v Alphonse Wohuinangu* (1991) N966, but were never invoked.

58. For the beneficiary of lawyers who do not practice criminal litigation and law very much s.552(2) and (4) of the *Criminal Code* provides:-

> *552. Right to be tried.*
> *(1) .....*
> *(2) A person who has been committed for trial or sentence or against whom the Public Prosecutor has laid a charge under Section 526 may make application at any sittings of the National Court to be brought to his trial.*
> *(3) .....*
> *(4) If—*
> *(a) a person has made an application under Subsection (2);*
> *and*
> *(b) at the end of the sittings of the National Court at his place of trial next following the application*
> *(i) no indictment has been presented against him; or*
> *(ii) the court is satisfied that the prosecution has not in the circumstances of the case made a genuine attempt to complete its case,he is entitled to be discharged.*

Invoking these provisions in my respectful opinion might have ensured an earlier trial or a possible discharge.

59. The delay from time of committal to time of trial is 11 years. The offences were committed in 1998 some 17 years ago. The delay for 11 years reasonable or unreasonable and regardless of who is at fault to me with respect is a breach of s.37(3) of the Constitution and as such is a serious breach of an accused persons fundamental right to a fair trial within a reasonable time. The breach was caused and occasioned by all parties involved in the matter including the prisoner himself and his lawyers. I am not sure whether as a result of the delay the offence can be considered stale in that the crime perpetrated by the prisoner and others has strengthened Nasfund, the institution they stole from. Nasfund is now in a sound financial and management position. Moreover, the contributors money has now been restored.

Mitigating Factors

60. Having now gone through the *Belawa* factors. I will now go on to deal with the mitigating factors, if any, which has the effect of making any offence less serious:

(a) The prisoner is a first offender, that is that he has no prior convictions.
(b) The prisoner has a good personal and family background.
(c) The prisoner is suffering from a serious health condition in that he suffers from hypertension. This condition needs to be monitored closely.
(d) The prisoner has now made full restitution and in doing so has restored the victim's position financially.
(e) There was a long delay of getting the prisoners matter to trial. He was committed by the District Court to stand trial in the National Court 11 years ago. Had the matter been prosecuted with due diligence the prisoner might have served his time by now.
(f) I think the prisoner has a learnt valuable lesson from this case, is not likely to reoffend and is not a danger to society. There were others in the conspiracy and the theft but were not been charged. Co-accused has his case permanently stayed by the National Court.

Aggravating Factors

61. Against the prisoner are the following aggravating factors:-
(1) He is a lawyer and the Chairman of the Board and as such was in a high position of trust. He abused the trust.
(2) The amount he stole was a large amount of money.
(3) The conspiracy and the elaborate plans between Kumagai officials, Ken Yapane and others and execution of the conspiracy and plans.

Sentence

62. This was a case where a number of players were involved namely Jimmy Maladina, the late Henry Fabila, Herman Leahy, Shuichi Taniguchi, Kazu Kobayashi, Ken Yapane and others. This court concluded from circumstantial evidence that all the above named persons were involved in the conspiracy to defraud NASFUND.

63. The Court has now dealt with the matter of Jimmy Maladina. Herman Leahy's matter the co-accused has been permanently stayed by the National Court for reasons that he had been denied the right to be tried expeditiously. Evidence before the Court from Robin Flemming was that the late Henry Fabila and Herman Leahy dealt with the Bank and that some of the money from Kumagai went to Ulya Real Estate of which Herman Leahy was a director. The point of all these is that only Jimmy Maladina is being punished for this crime while others involved might or could get off scott free.

64. While this matter was a trial, the prisoner admitted his wrong doing to the Probation Officer who reported that:

"*The accused admitted freely that he committed the offence. He stated that he is sorry*

for what he did."

Firstly this is a late admission of the offences he was convicted of after the trial. Secondly, I consider his admission and his apology to the contributors to the Fund to be an expression of some remorse.

65. I take into account the delay factor seriously more so the fact that his Constitutional right to a speedy trial was denied him. That is however a factor he contributed to. I take into account the submissions of his Counsel on the aspect of the delay.

66. However, I do not forget the fact that the prisoner was in a very high position of trust. He was the principal trustee of a Superannuation Fund. He abused the trust. He was also in a position of power. Again he abused that power. The interest of the contributors to the Superannuation Fund in my view is a matter of paramount concern, but they are happy now according to Mr Ian Tarutia. The Court must continue to send out a stern message to deter those in positions of trust from abusing and manipulating the systems to benefit themselves and their cronies. This case calls for a stern punitive and deterrent sentence to serve as a clear warning to the trustees and chairman of boards looking after superannuation funds that high standards of integrity and honesty are expected from and of them.

67. Sentencing patterns from case precedents *Wellington Belawa v The State* (1988-89) PNGLR 496, *The State v Paul Tiensten(*2014) N5563, *The State v Stanley Haru* (2014) N5660, *The State v Zebedee Kalup* (2015) N6038 and others cited earlier in this judgment set the pace. I am guided by sentences imposed in those case precedents.

68. Accordingly, considering all the factors in this matter and the sentencing patterns I impose a sentence of 6 years on the first count and a sentence of 8 years on the second count. Both these sentences are to be served concurrently meaning that the head sentence is 8 years imprisonment for the two offences.

69. I take into account these following factors that will enable me to exercise the Courts discretion in the way I will. They are:

(1) Full restitution over and above what the prisoner dishonestly obtained has been made by the prisoner.

(2) A civil action was taken against him by Nasfund wherein he was declared bankrupt and his properties in Australia sold for over AUD$500,000.00 which was given back to Nasfund.

(3) Nasfund is now in a better position than it was those 17 years ago. It and the contributors are now happy that they have got back what was stolen from them by Kumagai and the prisoner.

(4) The prisoner will no longer be able to practice law ever again and I think he is aware of that fact.

(5) His co-accused's case has been permanently stayed by the National Court.

Others involved in the case have never been charged, thus issue of where is fairness is asked.

(6) I am aware that he brought all these on himself and he has no one to blame; but he was now put right in full and over what he did wrong. He will still suffer in that he will have to find other ways to survive in this world as he will no longer practice law.

(7) There has been a long undue delay to have this matter tried, thus his constitutional right to a trial within a reasonable time denied. The State had the primary role to expedite his trial.

70. In the circumstances as pointed above I will exercise the courts discretion and suspend all the 8 years and place him on good behaviour bond for 2 years.

Public Prosecutor: *Lawyer for the State*
Young & Williams Lawyers: *Lawyer for the Defense*