IN THE COURT OF APPEAL OF

THE REPUBLIC OF VANUATU

(APPELLATE JURISDICTION)

CRIMINAL APPEAL NO. 6 OF 1997

PETER HAROLD SWANSON

APPELLANT

AND:

THE PUBLIC PROSECUTOR

RESPONDENT

CRIMINAL APPEAL NO 11 OF 1997

MATTIE ROSE SWANSON

APPELLANT

AND

THE PUBLIC PROSECUTOR

RESPONDENT

CORAM: HON. JUSTICE JOHN von DOUSSA
HON. JUSTICE SIR IAN BARKER
HON. JUSTICE DANIEL FATIAKI
HON. JUSTICE REGGETT MARUM

COUNSEL: MR ROBERT SUGDEN for the Appellants
MR JON BAXTER WRIGHT for the Respondent

Hearing: 22, 23, 24, 25 June 1998.

Judgment: 26th June 1998.

JUDGMENT

This is an appeal by the first Appellant (to whom we shall refer simply as "the Appellant") against conviction and against an order for costs made at the time when he was sentenced. There is also an associated appeal by the second Appellant, who is the aunt of the Appellant, over the confiscation of the funds paid into Court by her for the Appellant's bail and the application of those funds to satisfy the costs orders made against the appellant

After a trial before the Acting Chief Justice, the Hon. Justice Vincent Lunabek, the Appellant was found guilty upon the following charges:

In Count 1:
Attempted Obtaining of Property by False Pretences, contrary to Sections 125(c) and 28 of the Penal Code Act [CAP 135].

The Particulars of the offence are that:

On or between 1st March 1996 and 23rd June 1996, Peter Harold Swanson did attempt to cause loss to the Government of the Republic of Vanuatu in that by one or more false pretences which he then knew to be false he obtained possession of ten (10) bank guarantees each in the sum of US$10 million drawn on the Reserve Bank of Vanuatu.

In Count 4:
Fraudulently attempting to induce a person to invest money, contrary to Section 11 of the Prevention of Fraud (Investments) Act [CAP 70].

The particulars of the offence are as follows:

That on or sometime between 1st March 1996 and 23rd June 1996, the Accused Peter Harold Swanson did recklessly make statements and forecasts which were misleading to attempt to induce Sampson Ngwele to enter into an agreement the pretended purpose of which was to secure a profit to the parties to the said agreement from the yield of securities or by reference to fluctuations in the value of securities.

In Count 5:
Dealing in securities without a Dealers licence, contrary to Section 2 of the Prevention of Fraud (Investment) Act [CAP 70].

The particulars of the offence are as follows:

That on or sometime between 1st March 1996 and 23rd June 1996 the Accused Peter Harold Swanson did purport to carry on the business of dealing in securities, namely Reserve Bank of Vanuatu Guarantees otherwise than under the authority of a licence under the prevention of Fraud (Investments) Act [CAP 70], and otherwise than as an exempted dealer for the purpose of the said Act.

In Count 6:
Forgery, contrary to Section 140 of the Penal Code Act [CAP 135].

The particulars of the offence are as follows:

That on or sometime between 1st March 1996 and 23rd June 1996, the Accused Peter Harold Swanson did make certain false documents, namely ten Reserve Bank of Vanuatu Guarantees each in the sum of US$10,000,000 knowing each of them to be false with the intent that each of them should be used or acted upon as genuine.

In Count 7:
Uttering Forged Documents, contrary to Section 141(a) of the Penal Code Act [CAP 135].

The particulars of the offence are as follows:

That on or sometime between 1st March 1996 and 23rd June 1996, the Defendant Peter Harold Swanson, knowing certain documents namely ten Reserve Bank of Vanuatu Guarantees each in the sum of US$10,000,000 to be forged, did deal with the said documents as if they were genuine.

In Count 9:
False statement by promoter, contrary to Section 129(c) of the Penal Code Act [CAP 135].

The particulars of the offence are as follows:

That on or about 29th March 1996, being a promoter of a company then intended to be formed, namely New Resources Group (Vanuatu) Limited, did publish to Sampson Ngwele a statement being a 17 page document entitled "On Prime World Bank Credit Instrument Trading" which he then knew to be false in one or more material particulars, with intent to induce the Reserve Bank of Vanuatu to become an investor.

In Count 10:
False statement by promoter, contrary to Section 129(c) of the Penal Code Act [CAP 135].

The offence is particularized as follows:

That on or about the 29 March 1996, the Defendant Peter Harold Swanson being a promoter of a company then intended to be formed, namely New Resources Group (Vanuatu) Limited, did publish to Sampson Ngwele a statement being a 3 page document entitled "Introduction to Bank Credit Instrument Trading" which he then knew to be false in one or more material particulars, with intent to induce the Reserve Bank of Vanuatu to become an investor.

The trial

The Appellant had been arraigned on 10 counts. Counts 2 and 3 were laid in the alternative to Counts 9 and 10. The Appellant pleaded not guilty to all Counts. In the course of the trial Counts 2, 3 and 8 were abandoned.

The trial was a lengthy one involving complex questions of fact. Evidence was

taken in December 1996 and January 1997. Judgment was reserved by the trial Judge on 7 February 1997. The verdict was delivered on 17 October 1997 with an oral statement of reasons. Some weeks later, the Judge issued a typed version of his reasons for verdict which added to those pronounced orally some 58 pages of further reasons, taken largely from the submissions made to him by the prosecution The 8 month interval between the conclusion of the trial and the delivery of the verdict assumes importance in one of the grounds of appeal.

On 5 December 1997, the Appellant was sentenced to 18 months' imprisonment on Count 1, 12 months' imprisonment on Count 4, and 6 months' imprisonment on each of the remaining Counts on which he was convicted. All sentences were to be served concurrently. In addition, the Appellant was ordered to make immediate payment of VT10 million for prosecution costs. It was further ordered and directed that VT10 million paid by the Appellant to the Supreme Court for his release on bail in 1996 be transferred and paid to the Prosecutor in satisfaction of the order for costs. The sentences, and the other orders have been stayed pending the determination of this appeal.

The evidence

As the trial Judge observed in his sentencing remarks, the Appellant's trial was the culmination of the largest criminal investigation conducted by the Vanuatu Police, and the most complex fraud prosecution in the history of the Republic of Vanuatu. Central to the charges were events which occurred on 29 March 1996 and in the weeks that followed. Over that time, the Appellant obtained in Vanuatu, and took to London, 10 Guarantees signed on behalf of the Reserve Bank of Vanuatu, which purported to commit the Reserve Bank to pay US$10 million in 2 years' time, i.e. on 1 April 1998. The aggregate face value of these Guarantees was US$100 million which far exceeded the reserves of the Republic of Vanuatu.

Each Guarantee was signed by the Hon. Barak T Sope, the then Treasurer and Minister of Finance, Mr. George Borugu, the First Secretary to the Minister of Finance, Mr. Sampson Ngwele, the Governor-General of the Reserve Bank of Vanuatu, and the Hon. Maxime Carlot Korman, the then Prime Minister of the Republic. The prosecution case, in substance, alleged that the Guarantees were prepared by or under the direction of the Appellant. Mr. Ngwele was then induced to sign the Guarantees, and to give them to the Appellant, by false representations and promises made by the Appellant in furtherance of a fraudulent scheme designed to cause a loss to the Government of the Republic. After Mr. Ngwele's signature had been obtained in this way, the documents were

placed before the Prime Minister. It was the prosecution case that the Prime Minister had earlier refused to sign the Guarantees until they had been signed by the Governor of the Reserve Bank, on whose signature the Prime Minister then relied as verification of the authenticity of the documents.

The evidence at trial was received from seven witnesses called by the Prosecutor, and one witness called by the Appellant. Numerous documentary exhibits were tendered.

The prosecution witnesses included Mr. Ngwele, Mr. Korman, Ms Kathy Simon who typed the Guarantees under the direction of the Appellant (and a number of other documents that became exhibits) and three witnesses with international banking experience who gave evidence as experts in that field. The defence witness was the Hon. William Edgell. The Appellant did not give evidence.

The evidence was reviewed extensively in the reasons for verdict of the trial Judge. A summary of some of the evidence is necessary to understand the basis of the convictions and the grounds of appeal advanced before this Court by counsel for the Appellant in his detailed written and oral submissions.

The Appellant is an Australian, aged 45 years. In his meetings with Mr. Ngwele and other Government officials, he described himself as a financial specialist with 22 years' banking experience.

Prime Minister Korman and his MPP Party came into office on 26 February 1996. Mr. Sope and Mr. Edgell were Ministers in the new Government. Mr. Sope, as Minister of Finance, had a responsibility, among many, of finding opportunities for the Government to raise loans for infrastructure development. Mr. Edgell was the Minister of Lands, Geology and Mines and Rural Water Supply. On 8 March 1996 he had signed a report (Exhibit D25) concerning a proposal for a geothermal power project at North Efate. The estimated cost of this project was some US$65 million.

Mr. Edgell gave evidence at the trial that in 1993 or 1994, he was in Sydney with Mr. Sope and met with the Appellant. Mr. Sope on that occasion had asked the Appellant if he could raise finance for Vanuatu if MPP achieved Government.

Documentary exhibits include a document dated 1 July 1995 described as a "non-circumvention" document (P42) in which the Appellant entered into an agreement with T.L.Dowdell and Associates. It appears to have been common ground at trial that Mr. Dowdell was a person connected with the traders in the

Financial Scheme which the Appellant was promoting in March 1996. Mr. Christopher Olsen was an associate of Mr. Dowdell, and was also apparently connected with those traders.

It is common ground that the Appellant arrived in Vanuatu on 20 March 1996. Mr. Ngwele gave evidence at the trial on behalf of the prosecution that, on 21 March 1996, he was requested by Mr. Sope to provide particulars of the bank reserves of Vanuatu, and where they were lodged. Mr. Ngwele personally delivered that memorandum to the Minister.

On 22 March 1996 at Port Vila, a Power of Attorney was executed by Mr. Edgell as the Minister of Lands, Geology and Mines and Rural Supply, and by Mr. Korman and Mr. Sope on behalf of the Republic of Vanuatu, addressed to the Appellant. This document said that the Appellant was appointed to represent the Government of the Republic of Vanuatu.

In the days that followed, documents were prepared and signed for the proposed incorporation of a new company to be registered in the Republic of Vanuatu - New Resources Group (Vanuatu) Limited ("NRG Ltd."). On 29 March 1996, the Appellant signed a consent to act as a director. In fact the company was not registered until 17 May 1996. Documents then filed with the Vanuatu Financial Services Commission record that the Appellant owned 25 per cent of the issued shares, the Government of the Republic of Vanuatu 30 per cent, and a local government unit of Vanuatu a further 30 per cent. On 26 March 1996 a document was signed that purported to appoint the Appellant the Executive Chairman and Treasurer of NRG Ltd.

Evidence from a confidential report dated 20 June 1996 ("the Confidential Report") (Ex. P23) which the trial Judge found was prepared by the Appellant, shows that in March 1996 the Appellant proposed to Mr. Sope that a scheme which he was promoting could benefit the Republic of Vanuatu to the extent of around US$250 million, and that these moneys could be used, through NRG Ltd., on infrastructure development such as the geothermal power project.

On Friday 29 March 1996, at about 4.30 p.m., Mr. Ngwele arrived at Port Vila Airport from Ambae. He was met by an official from the Ministry of Finance who informed him that Mr. Sope was waiting to see him for an urgent meeting. Mr. Ngwele was taken to the Minister's office. On arrival he was told that he would require the seal of the Governor-General of the Reserve Bank of Vanuatu, and he made arrangements for the seal to be collected.

When he met with the Minister, the Minister's Secretary, Ms Kathy Simon, and the Appellant were present. Mr. Ngwele was ushered into a conference room where a meeting then took place. Present at the meeting were Mr. Sope, Mr. Borugu, Mr. Pakoa Kaltonga who was Second Secretary to the Minister of Finance and the Appellant. Mr. Sope chaired the meeting. The Appellant was introduced as a financial specialist who would be assisting Vanuatu in advising the Government, and would be the person who would stand between the Vanuatu Government and traders of a financial scheme ("the Financial Scheme") which the Appellant was going to explain.

The Appellant then gave information about himself and the Financial Scheme. The meeting lasted for one to one and a half-hours. Towards the end of the meeting Mr. Ngwele gave evidence that the Appellant produced 10 documents purporting to be Guarantees by the Reserve Bank of Vanuatu which had already been prepared on Reserve Bank letterhead. Mr. Ngwele signed each of the 10 Guarantees about five minutes before the meeting concluded. At the conclusion of the meeting Mr. Ngwele said that the Appellant gave him two documents entitled "On Prime World Bank Credit Trading" (Exhibit P40) and "Introduction to Bank Credit Instrument Trading" (Exhibit P41). These documents were said by the Appellant to give information on the Financial Scheme which he had described to the meeting. These two documents are those referred to in Counts 9 and 10. The following passages from the documents were some of those to which evidence from the three expert witnesses was specifically directed at the trial:

From "On Prime World Bank Credit Instrument Trading"

> "In most countries, trusts, insurance companies and pension plans are prohibited from purchasing the bank debenture instruments from the primary market; instead they are related (sic) to the secondary market.
>
> Prime Bank instruments are issued on an ongoing basis, usually by the top 100 World Prime banks. Most lower ranking banks will have top 25 or 50 ranking banks 'wrap' their paper in order to command a better price. The issuance of this type of credit instrument is done in Europe and in either US dollars or Deutschemarks.
>
> Basically, instruments [paper] are issued in USD 500 million lots. When a bank decides it wants to issue paper, it may be in lots of 500 million, 1 billion, 5B (not often), 10B (very rarely). Banks intent of issuing paper will work through one of a small group of major banks that deal in this area

administratively. These administrative banks distribute this paper by means of supply contracts that each has issued to private [non-banking] entities known variously to the broker community as collateral commitment holders, suppliers, providers etc. A bank wanting to issue paper will put out (almost like an offering circular for a stock offering) to one of the administrative banks (which has a lot of contract holders) notice of availability of instruments/notes/paper. The issuing bank very simply draws up a letter which it sends to each of those administrative banks that says 'this is what I have available', and then it goes on a 'menu'. When contract holders [collateral commitment holders, suppliers etc.] come to buy paper on behalf of their clients, they will find these notes on the 'menu'.

Once a buyer/investor with sufficient liquid funds finally finds a master wholesaler [commitment holder/supplier/provider] able to instruct [through his administrative bank] a bank to issue these instruments at a discount, an instrument can be created with the funds. Upon issue at a discount on the primary market, the instrument [which is now 'live' with CUSIP nos. etc. and available in hard-copy form] can be traded in the public [secondary] market at a profit. Therein is the market and therein is another reason for deep discounts. Discounts on the primary market have to be structured such that the trading activity on the secondary market can be maintained and discounts given to secondary market purchasers in an adequate amount to gain their interest."

References in the text to a primary market and a secondary market, and to "deep discounts" are to be noted.

Further, on page 15:

"Buyers in the secondary market are those who normally purchase lower yielding money market securities and comprise such groups as pension funds, commercial and investment banks, mutual funds, trusts, charities, money management firms etc. The secondary market is the highly liquid public market in which most players are either unfamiliar with or prohibited from participating in the private primary market where such instruments could be bought at more attractive yields.

There are many significant institutional players who are not permitted to deal in the primary market. For example, banks, pension plans, mutual funds and US-based insurance companies cannot buy in the primary market. Banks and insurance companies cannot purchase bank securities direct from the issuing banks by law. Pension plans and mutual funds are precluded by

law from purchasing a security that does not exist [in other words they cannot 'create' the instrument]."

At page 16:

"Where governments are concerned, it is possible to leverage the line of credit raised against the central bank guarantee from 1:1 to 2:1. The amount to which the bank may be prepared to leverage will depend largely upon the attitude of the bank at the time and will depend upon bank treasury matters such as how much idle cash the treasury has available, how much of this extra cash it may wish to tie up in this type of transaction for a 12 month contract etc. With a government guarantee, a 2:1 credit line is always said to be available."

Finally, at page 18:

"The following computations illustrate how the Trading Program can return a gross profit of 360% per annum."

Assumptions

Value of Government Guarantees:	USD 100 million
Line of credit [80%]:	0.80 x 100 = USD 80 million
Buy Notes at:	87.60% of Face Value
Face Value [value at maturity]:	80/0.876 = 91.32 USD million
Sell Notes to Wholesale Market at:	92.6% of Face Value
Profit per trade:	[92.6-87.6] = 5.0% of Face Value
	0.05 x 91.32 = USD 4.566 million
	4.566/80 = 5.71% of line of credit
Line of Credit leveraging:	2.1
No. of trading weeks/annum:	40
No. trades/week/line of credit:	1
Gross Profit per annum:	1 x 2 x 40 x 7.71% = 456%
	1 x 2 x 40 x 4,566=USD 365 million

From "Introduction to Bank Credit Instrument Trading" -

At page 1:

"However, these instruments are sold only in private transactions in what is

sometimes called the primary market. Top world banks are continually issuing these credit instruments which are purchased mostly by very wealthy people or large investment groups (sic) who hold them until they mature. The risk is low and the return is good. This marketplace is a private market place because it is accessed through non-banking corporations that specialize in that market. This private market place is also very difficult to access."

and at page 2:

"The restricted access to the private, primary market creates opportunities for investors who wish to buy instruments from the primary market and on-sell to the secondary market. Pension plans, mutual funds etc. cannot buy direct from the primary market because they are precluded by law from purchasing a security that does not exist (in other words they cannot 'create' the instrument). Similarly, insurance companies and banks cannot by law purchase bank securities direct from issuing banks. Thus both types of investors are restricted to buying in the secondary market.

When the above institutions wish to invest in a prime-bank instrument, a third party must first purchase from the private primary market and then on-sell this new instrument (now called a 'live' instrument) in the public secondary market to the pension plan or mutual fund.

...

Deep discounting of the freshly issued notes results in large spreads between the buying price at the point of issue and the retail price to the holding investor [who is almost invariably an institutional investor]. Managers of such approved Trading Programs bridge all the usual intermediatories capturing the full spread for themselves and their investing clients. Furthermore, electronic transfer of the instruments coupled with the fact that the buying and selling is handled completely by dedicated personnel within the Trading Bank, enables investment moneys to be turned around at least 40 times per annum. The Investor's moneys are completely protected by the Trading Bank which usually effects this protection through the supply of a one-year, top 25 world prime bank, guarantee for 110% of the investment principal with the Investor as beneficiary."

At the meeting attended by Mr. Ngwele on 29 March 1996, the appellant said that he was an expert financial specialist with 22 years in the banking area. He had retired from banking because he thought he had a better mission, to assist

countries that required special assistance. He was in Vanuatu to help the Government get finance from outside. Although he lived in Australia, he came from a Swiss family connected with a bank. He said that he knew traders who worked in relation to a special funding scheme trading with bank instruments. They made huge profits. The Funding Scheme was a special secret one, known to only a few countries. The Appellant said he was trying his best to have Vanuatu participate so that Vanuatu could gain some US$250 million to build projects in the Republic. Vanuatu qualified to enter the scheme because it was a democratic country which did not have a record of human rights' violations.

The Appellant said that it was necessary for an eligible country wishing to show interest in the scheme to give to the traders bank guarantees or instruments which would be lodged with custodial banks; once this was done the traders would commence trading. The Appellant said all the traders were recommended by the United States Government.

The proposed trading programme would run initially for two years, and then if the traders were happy with the country, they would consider a further term. The projected revenue that would be coming from the arrangement over two years would be US$250 million.

The Appellant said that because there was a high demand for the scheme, Vanuatu needed to act very quickly, and bank guarantees must be signed and sent to the traders quickly. The Appellant said that most documents that were necessary were in place, and the only outstanding documents were bank guarantees to be issued by the Vanuatu Government. The matter was urgent as he (the Appellant) was leaving Vanuatu the next day and needed to take the guarantees with him. He said Vanuatu had already been slotted into a certain trading time framework. If this were missed, Vanuatu might lose the opportunity.

Mr. Ngwele gave evidence that he expressed his concern saying that the Reserve Bank usually did not give guarantees. The Appellant told the meeting that the guarantees would be returned back to Vanuatu unencumbered at the end of the two-year period.

The Appellant, according to Mr. Ngwele, produced 10 bank guarantees from his brief case. He said that he had 'taken the liberty' of obtaining blank letterheads from the Reserve Bank, and had arranged for the Guarantees to be typed. (There was evidence from Ms Simon that she had typed the Guarantees on instructions from the Appellant, using the text of a fax addressed to the Appellant from a Mr. Christopher Olsen). There was also evidence from Mr. Edgell which suggested that Mr. Sope may have facilitated the obtaining of the letterheads by the

Appellant.

Mr. Ngwele recognized Mr. Sope's signature already on each of the Guarantees. There was a space below for Mr. Ngwele's signature but no provision was made for any other signatures (although later the signatures of Messrs. Korman and Borugu were added).

Mr. Ngwele was reluctant to sign. He asked whether the "whole thing was approved by the Council of Ministers". The Appellant and Mr. Sope produced the Power of Attorney executed on 22 March 1996 and other documents signed by Ministers including the Prime Minister. The Appellant also produced a diplomatic Vanuatu passport in his name. The Appellant and Mr. Sope said approval had been obtained from the Council of Ministers (which was not the case). Again Mr. Ngwele said that the Central Bank does not normally give out bank Guarantees. The Appellant said that the document was not a bank Guarantee as such, but merely a document which was to be given to the traders so that they knew Vanuatu was interested in the scheme. The Appellant said the traders would be trading in their own name, that after 2 years the documents would be returned unencumbered and that a cross-guarantee was going to be given in any event to cover Vanuatu's position. The Appellant assured Mr. Ngwele that the Guarantees would never be called, that they were risk free. Mr. Ngwele pointed out that the face value of the Guarantees in total exceeded the reserves of Vanuatu. The Appellant assured him that to go around that problem, the bank Guarantees had been broken down into pieces of US$10 million so that at, any one time, a US$10 million guarantee would be less than the actual reserves.

Mr. Ngwele then signed the Guarantees. In evidence he said that he signed them in the belief and understanding that the scheme was to benefit Vanuatu. Mr. Sope at one point in the meeting had said that one of the projects to be funded from the returns of the scheme was a thermal project at North Efate and that another project would be a cement factory at Forari.

Mr. Ngwele asked for copies of the Guarantees, but was informed that this was not allowed as the whole thing was secret, and in any event the Minister of Finance had copies.

It appears to have been common ground at trial that the Appellant left Vanuatu on Sunday 31 March 1996, and that when he did so, he took the Guarantees with him signed both by Mr. Ngwele and by Mr. Korman.

It was submitted by counsel for the Appellant that Mr. Ngwele signed at the

direction of Mr. Sope, the relevant Minister with responsibility for the Reserve Bank. The Judge however held that Mr. Ngwele had been induced to sign them by the statements of Mr. Swanson. In our opinion this finding is in accordance with evidence of Mr. Ngwele who in his cross-examination did not agree that he had signed only because Mr. Sope wanted him to do so.

Mr. Korman in his evidence was uncertain about dates, but expressed confidence in his recollection about the sequence of a number of events. In about early March 1996 he had discussions with Mr. Sope about various projects for Vanuatu. Towards the end of March 1996 he met with Mr. Sope, and Mr. Edgell and the Appellant. He signed the Power of Attorney and a document appointing the Appellant to act for the Government of Vanuatu. As to the Guarantees, Mr. Korman said there was a first meeting at which Mr. Sope and the Appellant requested him to sign bank guarantees. He informed them that as the Governor-General of the Reserve Bank had not signed the documents, he would not sign them. There was then a second meeting, he thought it was on a Monday, when the Appellant showed him the Guarantees bearing the signature of Mr. Ngwele as Governor-General of the Reserve Bank. Because Mr. Ngwele had signed, Mr. Korman affixed his signature.

The Appellant returned to Vanuatu on 14 April 1996. On 16 April 1996, Mr. Ngwele was summonsed to another meeting to see Mr. Sope, and at that meeting the Appellant and Mr. Borugu were present. The Guarantees were again produced. Mr. Ngwele noted that there were two additional signatures now appearing on the Guarantees, those of Mr. Korman and Mr. Borugu below those of Mr. Sope and himself which had been there on 29 March 1996. The Appellant gave an explanation that when he took the documents to the traders, the documents did not meet their requirements so he had to come back for additional signatures. Mr. Ngwele was asked to sign two additional documents (P42 and P43) which related to Vanuatu's purported participation in the Financial Scheme. Mr. Sope asked Mr. Ngwele to prepare another letter specifying the amount of the reserves of Vanuatu, the names of the institutions which held them, and contacts within those institutions.

The following day, 17 April 1996, the Appellant attended the Reserve Bank to collect the letter relating to the reserves. Mr. Ngwele invited the Appellant to specify the information required in the letter. The Appellant said that he wanted the letter addressed to him, but Mr. Ngwele addressed it to the Minister as the authorized person. The Appellant also dictated the last two paragraphs of the letter which said:

"This information is supplied in line with instructions received from yourself for the use of the Trading Manager for the funding programme and on specialist representative - Diplomatic Peter H. Swanson, Esquires.

If we can be of further assistance, please do not hesitate in contacting me at the Reserve Bank of Vanuatu on Telephone number (678) 23333." (Ex. 44)

On this occasion the Appellant also asked if he could see the bank's vaults, and said he wanted the Reserve Bank's "test keys" - that is the confidential access codes that would permit access to the reserves held by other institutions. Mr. Ngwele refused both requests.

On 17 April 1996 the Appellant left Vanuatu, with Mr. Sope. The Confidential Report records that the Appellant and Mr. Sope met Mr. Olsen in Sydney later that day.

Information in the Confidential Report and from other documentary exhibits indicate that at the end of April and in early May 1996 the Appellant was in the United States. At that time a change in the identity of people who were said to be working with the Appellant in connection with the Financial Scheme occurred. The names of Messrs. Dowdell and Olsen disappeared, and the name Ron Forrester was substituted. Mr. Forrester is described in one document as General Agent for Barton Jameson and Macmillan Incorporated. ("BJM Inc") The Confidential Report states that the Appellant met with Mr. Forrester and a Ms Hocker in New York on 3 May 1996. On 7 May 1996 the Appellant sent a facsimile to Mr. Forrester headed "Trade Credit Program" and enclosed documents including "letter from Mr. B T Sope to me". On 9 May 1996 Mr. Sope wrote a letter to the Appellant purporting to confirm the assignment of the Guarantees to NRG Ltd. Such a letter had been requested by Mr. Forrester in a letter to Mr. Swanson on 9 May 1996.

On 15 May 1996 the Appellant arrived once more in Vanuatu.

There was a third meeting attended by Mr. Ngwele on about 17 May 1996, which was a meeting requested by the Prime Minister. Present at the meeting were the Deputy Prime Minister, the Hon. Donald Kalpokas who chaired it, Mr. Sope, Mr. Borugu, Mr. Edgell, the Appellant, Mr. Ngwele and two other officers of the Reserve Bank, namely the General Adviser, Mr. Joggiar and the Research Director, Mr. Tickeher (both of whom gave evidence for the prosecution) and the Attorney-General. Again the Appellant outlined the Financial Scheme and the proposed benefits to the Republic of Vanuatu, including expected profits in

excess of US$250 million.

Mr. Ngwele says that on this occasion Dowdell Dutcher was described by the Appellant as consultants to the programme. However, the Appellant said that Mr. Dowdell was on a "watch list" (which was not explained) and that BJM Inc was now involved.

In his cross-examination, Mr. Ngwele confirmed that the meeting had been called for the Appellant to explain the scheme to those present. The Appellant did most of the talking and urged that the scheme go on. Mr. Ngwele agreed in cross-examination that the Attorney General on a number of occasions expressed doubt and concern about the Financial Scheme.

The evidence of Messrs. Joggiar and Tickeher confirm that the Appellant again outlined the Financial Scheme and urged that Vanuatu participate. Mr. Joggiar remembers the Appellant saying that the scheme had no risk whatsoever to Vanuatu.

Notwithstanding the doubts about the Financial Scheme expressed by the Attorney-General at the meeting, and reservations held by Mr. Ngwele and the other Bank officers, the Appellant left Vanuatu with the Guarantees and Mr. Sope on 19 May 1996. They traveled to London. The Guarantees were lodged at Lloyd's Bank on about 23 May 1996.

The Confidential Report says that it was proposed to hold a function in Vila on 27 June 1996 at which US$7 million would be handed over to the Government as a first payment from the profits of the Financial Scheme. The function did not occur. As events turned out the Appellant was arrested that day by the police in Port Vila, and charged. Documents tendered in the prosecution case show that on 11 June 1996 the Appellant sent a fax to Mr. Forrester saying that he would nominate an ANZ Bank account in Adelaide, Australia, to which $10 million could be sent on 24 June 1996. There is no evidence to suggest that any money was ever forwarded to the Appellant by anyone in connection with the Financial Scheme.

The bank guarantees were recovered by Scotland Yard from Lloyd's Bank after the Appellant's arrest.

Discussion of the evidence

The evidence of the three banking experts was unequivocally to the effect that

the statements earlier recited from the documents "On Prime World Bank Credit Trading" and "Introduction to Bank Credit Instrument Trading" were sheer nonsense and did not reflect reality. They said primary and secondary markets of the kind described in the documents did not exist. They said that profits earned in the manner suggested by the example given in the documents, and the level of profits, were fictitious. In short, they provided evidence that the Financial Scheme, as described in those documents and as outlined by the Appellant was impossible, and had the hallmarks of a fraudulent scheme intended to lure gullible investors who would be attracted by the promise of huge profits at minimal risk.

Taken together, the evidence of the experts, the degree of improbability that profits in the order represented could be earned without risk, and the documentary exhibits made out a very strong case that the Financial Scheme was fraudulent.

In not giving evidence, the Appellant exercised his legal right to remain silent, as he had done during the investigation process after his arrest. The trial judge correctly said that the Appellant was not to be criticized for having not done so. His right to remain silent was clearly recognized by the trial Judge. The only evidence advanced in his defence came from Mr. Edgell who suggested that it was not the Appellant who was proposing the Financial Scheme for the Government, but Mr. Sope who had approached the Appellant to pursue on the Government's behalf avenues of funding that had been identified as long ago as 1992. To this end he identified a number of documents concerning attempts which had been made in 1992 and 1993 to raise loan funds for Vanuatu. Mr. Edgell had no personal knowledge of the Financial Scheme or how it was proposed that the bank guarantees would be used. On those critical issues his evidence contributed nothing to the trial.

Absent evidence from the Appellant about the Financial Scheme, there was, at the end of the evidence, no explanation as to how the Guarantees could be used in or form part of a legitimate scheme that could generate profits in the order suggested, or at all, whilst at the same time not exposing the Republic of Vanuatu to a risk that a call for payment would be made under the Guarantees.

The defence case challenged in many respects aspects of the prosecution case and the credibility of principal prosecution witnesses. A strong attack in particular was mounted on the evidence of Mr. Korman that he signed the Guarantees shortly after Mr. Ngwele on 29 March 1996, and that he did so in reliance upon the presence of Mr. Ngwele's signature.

Apart from these challenges to particular aspects of the case, counsel for the

Appellant contended that the prosecution had not proved beyond reasonable doubt that the Appellant knew that the representations that he had made about the Financial Scheme were false or misleading, and that it was not proved beyond reasonable doubt that he intended to cause loss or damage to the Government of the Republic of Vanuatu, or to anyone else. It was submitted, to the contrary, that the evidence was consistent with the Appellant's innocence in that he genuinely believed the Financial Scheme would benefit Vanuatu in the way proposed, and without risk. The same contentions have been pressed before this Court.

In the manner in which the defence was presented, the trial Judge was faced with a stark choice - either the Appellant was himself knowingly or recklessly involved in promoting a fraudulent scheme, or he was an innocent dupe who was being unwittingly manipulated by others behind the Financial Scheme. At the end of the case, to convict the Appellant, the trial Judge had to be satisfied beyond reasonable doubt that the latter situation was not a reasonable possibility.

The trial Judge correctly noted that the prosecution case rested on circumstantial evidence, and that therefore, the onus rested on the prosecution to prove beyond reasonable doubt that there was no reasonable explanation for the Appellant's conduct, as established by the evidence, that was consistent with his innocence.

The trial Judge rejected the attacks on the credibility of the prosecution witnesses. He accepted the evidence of Mr. Korman and Mr. Ngwele. He saw and heard these witnesses and was quite entitled to accept their evidence. He identified a number of matters that he considered indicated dishonesty on the part of the Appellant. After reviewing these matters, the Judge held it proved beyond reasonable doubt that the Appellant's conduct was not that of a victim, but that of a fraudster intent on putting his scheme into effect. He rejected the submission that the Appellant honestly believed in the Financial Scheme.

The general conclusion that the Appellant's involvement was dishonest led the trial Judge, in his consideration of the specific charges, to conclude that the Appellant acted with the requisite criminal intent or knowledge where an ingredient of the offences charged included fraudulent intent or knowledge.

The submissions advanced on the Appellant's behalf in support of the appeal have been made under three broad headings:

A. An appeal on the merits.

B. An appeal on the basis of apprehended or actual bias on the part of the trial Judge.

C. An appeal against the costs order and the order sequestrating the bail

money.

Before turning to the merits it is desirable that we consider an argument raised by counsel for the appellant as to admissibility of documents and also discuss the role of the Judge at the trial of a criminal case in this jurisdiction.

Admissibility of Documents

We have set out the evidence relied on by the trial judge. However, counsel for the appellant submitted that several documents produced in prosecution evidence were inadmissible. Particularly, the complaint was that copies of documents allegedly bearing the accused's signature were tendered in evidence by Mrs. Simon, the secretary to the Minister of Finance, Mr. Sope. No evidence was called from a handwriting expert.

Mr. Ngwele said in evidence that the accused told him that whenever he signed important documents, he always impressed the distinctive seal from his signet ring onto wax, which sealing accompanied his signature. He showed Mr. Ngwele the ring with its distinctive motif.

Mr. Gee, the NRG solicitor, confirmed that the memorandum and articles of NRG had been signed by the accused in his presence. He identified copies of these documents and the Appellant's signature, which is a fairly distinctive one which from casual observation, it is hard to discern as 'P H Swanson'.

The Judge ruled the other documents produced by Mrs. Simon as admissible in a special ruling after a voir dire. Mrs. Simon had said in evidence that the handwriting on the disputed documents except P34, looked like the Appellant's but she could not be sure.

The Judge, in his reasons for verdict, decided that the handwriting and signature on various photocopied documents produced by Mrs. Simon was that of the accused.

The Judge followed *R. v. Leroy* [1984] 2 NSWLR 441 as authority for the proposition that he could use connecting features between the handwriting in question and other evidence in order to conclude that the handwriting was that of the accused.

In *Leroy's* case, as here, there was an admitted example of the accused's

handwriting which the jury was asked to compare with the handwriting in the other disputed documents in order to infer that it was the accused's writing in those other documents. A handwriting expert was unable to say one way or the other whether the writing in the admitted sample was in the same hand as the writing in the disputed documents. The jury there, like the Judge here, had evidence of a context in which apparent similarities might well have been regarded by the jury as sufficient to support a conclusion that the accused had been the author of the document known to have been in her handwriting.

Whilst advocating a cautionary approach, the New South Wales Court of Criminal Appeal considered that the jury was entitled to draw a conclusion about the disputed handwriting. Here the Judge expressly indicated the need for caution.

Whatever the situation in England, we consider that the *Leroy* approach is appropriate for Vanuatu where there is only trial by Judge-alone and handwriting experts are generally not available.

We reject any suggestion that because of the reference in section 95(2) of the Constitution to the Court is bound to follow English law existing at the date of independence.

Vanuatu as a common law country which has the benefit of drawing on the wisdom and jurisprudence from a whole range of common law countries in the search for precedent appropriate to Vanuatu conditions. The common law is constantly developing and any suggestion that it ossified as at the date of independence must be rejected.

The English practice, identified by such cases as *R. v. Tilley* [1961] 1 WLR 1309 clearly is inappropriate to Vanuatu conditions. We think the Australian approach preferable.

In any event, the documents produced by Mrs. Simon do little but bolster an already strong case on the principal charge which depended mainly on the evidence of Mr. Ngwele. It is also straining credibility that the repeated references in the disputed documents do other than interconnect them with both oral evidence and the undisputed documents. The similarity between the accused's rather idiosyncratic signature as shown in the memorandum and articles and that in the disputed documents is very easy to discern. Besides, some of the disputed documents show the use of a seal beside the signature.

We have no hesitation in holding that the Judge was right to admit these

documents.

Counsel for the appellant submitted also that the Curriculum Vitae (CV) of the appellant should not have been received into evidence. The evidence of Mr. Edgell identified the CV as a document which came from the possession of Mr. Sope, but counsel submitted that this did not prove it was a document acknowledged by the appellant as his document. A CV relating to the appellant was produced at one of the meetings with Mr. Ngwele, although he was not shown the contents of the document.
That document was described as the appellant's CV in his presence and he did not deny it. There is other evidence as to the circumstances surrounding the appointment of the appellant on CEO of NRG Ltd which also suggest that the appellant had provided his CV to the other directors of the Company. Mr. Sope was one of the directors. The plain inference from the evidence is that the CV which Mr. Edgell identified as coming from the possession of Mr. Sope was one and the same document that had been produced and referred to in discussion in the presence of the appellant. Moreover the contents of the CV that it was unlikely to have been compiled by someone other than the appellant in Vanuatu.

In our opinion the CV was rightly received into evidence.

The role of the Judge

Vanuatu has opted for a system of trial by Judge-alone in the Supreme Court for all criminal charges heard there. Other Commonwealth countries such as Singapore have a similar system. In other common law countries, such as New Zealand and some Australian jurisdictions, an accused may elect trial by judge-alone instead of trial by jury.

Trial by jury or trial by Judge sitting with assessors (as is the case, for example, in Fiji) has the advantage of delivering an answer on guilt or innocence promptly. After the Judge has summed-up on the law to the jury or assessors and after the jury and assessors have deliberated for an appropriate time - usually measured in hours, but sometimes in days, depending on the complexity of the trial, a verdict is announced.

Such a process has the disadvantage that the prosecution and the defence never know what factors have weighed with the jury or the assessors in reaching a verdict.

Trial by Judge-alone has the advantage of reasons for the verdict having to be provided. Armed with these reasons, it can be easier for counsel to advise on an appeal. But given the need to supply reasons, the verdict must still be delivered within a reasonable time after the conclusion of the hearing. Any accused is entitled to speedy justice and should not have to wait any longer that is absolutely necessary to learn of his/her fate.

In some jurisdictions, the convention is that a judge who has concluded the hearing of a judge-alone criminal trial undertakes no more judicial work until the verdict and the reasons are ready to be delivered. The time needed for preparation of the reasons varies according to the length and complexity of the trial. In this prosecution, given the helpful submissions made to the Judge by both counsel, we should have thought that an interval of 2 months between conclusion of hearing and verdict was the most that could have been reasonably justified, all other circumstances being equal.

One must refrain from laying down a tariff, but a delay of 8 months was plainly excessive by any standard. No reason for the delay appears in the Acting Chief Justice's reasons.

However this Court is aware of difficulties that occurred in the Supreme Court in Vanuatu in 1997 which difficulties understandably took up much of the time of the Acting Chief Justice. For a period, he was the only resident Judge of the Supreme Court. Another factor is that preparation of any judgment in any complicated case usually requires dedication of a block of time to enable thoughtful preparation. We suspect that the many demands on the Acting Chief Justice over the relevant period made the finding of the necessary block of time fairly difficult. The delay in delivering verdict is regrettable but is explicable given the intense pressures on the Acting Chief Justice and the keen demand for judicial resources in this jurisdiction.

In the present case, a motion to quash the indictment was filed by the appellant based in section 5(2)(a) of the Constitution. It alleged a failure to afford to the appellant a trial within a reasonable time. The real grounds were based on the failure of the Acting Chief Justice to have delivered his verdict by the 12th August 1997, the date of filing of the Petition. S. 218(5) of the Criminal Procedure Code requires such a petition to be listed for hearing by the Court. The petition should not have named the Judge as a defendant. However, whether it did so name him or not, the Acting Chief Justice would have had some difficulty in hearing the Petition himself. There was no other judge available to hear it.

Absent these very unusual circumstances, there could have been an argument

whether a delay of this dimension between hearing and verdict accorded with the constitutional right to a trial "within a reasonable time". Cases which show that systemic delays can result in the quashing of an indictment are *Martin v. Tauranga District Court* [1995] NZLR 419 (New Zealand Court of Appeal) and *R. -v- Morin* (1992), 12 C.R. (4th) 1 (Supreme Court of Canada). The Canadian Charter under consideration in *Morin* spoke of trial 'within a reasonable time': The New Zealand Bill of Rights Act in *Martin* spoke of trial "without undue delay". The constitutional point was not discussed at the hearing of this appeal, so we do not need to consider it further. However, we signal these authorities as relevant in Vanuatu in future cases.

We adopt a summary of what is required of a judge giving reasons for verdict in a judge-alone criminal trial provided by Cooke J. (as he then was) in the NZ Court of Appeal *in R. v. Connell* [1985] NZLR 233 237 - a fraud case.

> *"Further, what the Judge sitting alone delivers is intended to be a verdict. It need not be supported by elaborate reasons. To require the Judge to set out in writing all the matters that he has taken into account and to deal with every factual argument would be to prolong and complicate the criminal process to a degree which Parliament cannot have contemplated. There are cases where a point or argument is of such importance that a Judge's failure to deal expressly with it is his reasons will lead this Court to hold that there has been a miscarriage of justice. A demonstrably faulty chain of reasoning may be put in the same category. But it is important that the decision to convict or acquit should be made without much delay. Careful consideration is an elementary need, but not long exposition. (Emphasis added)*
>
> *In practice, if the reasons are of some length it has sometimes been found fairest to announce the verdict at the outset. There can be no invariable rule; the Judge will wish to take into account the implications case by case. If necessary the reasons can be delivered later in writing, although preferably they should be given with the verdict.*
>
> *Only in most exceptional cases, if ever, is it likely to be consistent with the judicial role in truing an indictment to give no reasons for the verdict. If the verdict is not guilty, however, occasionally a very brief statement of reasons is best. In other cases, whether the verdict is guilty or not guilty, it is obviously impossible to work out a formula covering all circumstances. But in general no more can be required than a statement of the ingredients of each charge and any other particularly relevant rules of law or practice; a concise account of the facts; and a plain statement of the Judge's*

essential reasons for finding as he does. There should be enough to show that he has considered the main issues raised at the trial and to make clear in simple terms why he finds that the prosecution has proved or failed to prove the necessary ingredients beyond reasonable doubt. When the credibility of witnesses is involved and key evidence is definitely accepted or definitely rejected, it will almost always be advisable to say so explicitly.

At this stage in the history of Judge-alone jurisdiction in trials on indictment in New Zealand we will not add to these general observations. They are of course not meant to be exhaustive or the last word on the subject. What we stress now most is that a long and careful trial, as this one was, need not mean an extensive judgment.

In this case we think Thorp J's judgment met admirably the requirement that we have outlined. It was unnecessary for him to say any more either on the credibility of Mr. Gardiner as a witness and the criticisms directed against the latter by the defence or on any of the other arguments urged by counsel for the defence. We see no reason to infer that he failed to take into account anything of real significance, and we have no misgivings about his findings. They were neither unreasonable nor unsupported by the evidence.

On the Crown case counts 1 and 2 were closely related, representing different stages of the same fraud. There was ample evidence that, in the sense referred to in R. v. Scale [1977] 1 NZLR 178, the money was earmarked by Broadbank, to the knowledge of the accused, to be used solely for the purpose of buying Juliet Lima and reselling the plane to Air Central to fulfil what the accused represented to be a firm order. If, as the Judge was entitled to find, the accused obtained control of the money knowing that it had been extracted from Broadbank by a false pretence that such an order existed, it was certainly his duty to account for it to Broadbank. Despite his unique knowledge of the complicated dealings to which the charges relate, the accused did not go into the witness box. In substance there was nothing to rebut the inferences open beyond reasonable doubt against him."

It can be noted from the judgment that not only should a decision be given "without much delay" but that even in a complicated fraud case, a lengthy statement of reasons is unnecessary. In the present case, the Judge's reasons ran to some 174 pages. The last 60 odd pages were not included in the orally-pronounced judgment. They were included in the published version and were mainly a replication of the prosecution's closing submissions. The reasons could have been reduced considerably in the light of the *Connell* comments. It is not

good practice to enlarge on an oral judgment to such an extent as was done by the Chief Justice.

Indeed the *Connell* principles accord with Section 95 (1) of the Criminal Procedure Code (CAP 136). By that enactment, the decision in a criminal case is required to contain the points for determination and the reasons for the decision.

We hope that the above comments may be of some use to Judges in Vanuatu in discharging the different and demanding function of deciding guilt or innocence without the assistance or a jury or assessors.

It follows that we cannot accept the many and diffuse criticisms made by counsel for the appellant concerning alleged failures by the Judge fully to consider the arguments. Although it may not have been good judicial craftsmanship to have repeated the prosecutor's submissions holus bolus in his reasons for verdict, we think that the Judge by so doing clearly signalled his acceptance of the prosecution's submissions. He also considered the defence submissions, although his treatment of them is far less comprehensive.

Nor do we gain much assistance from the cases cited by the counsel for the appellant concerning the need to give reasons - mainly in civil cases. We consider that the *Connell* dictum appropriate for a judge alone criminal trial.

Appeal on the merits

It is convenient now to deal with each of these topics separately, and to commence with the appeal on the merits. We turn to consider the convictions on each count.

Count 1.

The conviction in Count 1 was based on findings beyond reasonable doubt (1) that the Appellant attempted to bring about a situation where he and his associates would have possession of the 10 Guarantees, and would pledge, sell or secure them to their own advantage, leaving the Government of the Republic of Vanuatu to face claims by third parties; (2) that the attempt was made by the Appellant making a number of false pretences, which had been identified by the

prosecution in particulars to Count 1; (3) that the Appellant knew the pretences to be false; and (4) in consequence he obtained the possession of the Guarantees from Mr. Ngwele on 29 March 1996. The false pretences found proved beyond reasonable doubt by the trial Judge consisted of representations made to Mr. Ngwele at the meeting on 29 March 1996, in particular;

- that Mr. Swanson did not have banking expertise because such expertise was inconsistent with admitted evidence that the Appellant had been bankrupt in Australia from 1990 to 1993.
- that the Financial Scheme was a non-existent fiction, not a well kept secret which was backed by the US Government as part of its assistance to countries redeveloping their economies.

The finding recorded by the trial Judge is that the Appellant actually obtained possession of the guarantees. The substantive offence of obtaining by false pretences was proved. The "attempt" pleaded in the particulars was to cause loss to the Government. This attempt constituted the requisite intention for the offence. However, if the actual offence is proved, the Appellant can be convicted only of the attempt: See s116 Criminal Procedure Code [CAP 136]. The conviction is therefore not invalidated by this technicality in the charge.

Counsel for the Appellant contends that the Guarantees were never in the possession of Mr. Ngwele, and on this ground that the conviction cannot be sustained. There is no substance in this argument. The guarantees were given into the possession of Mr. Ngwele for him to sign them. He had possession of them for that short time. He then handed them ove with his signature endorsed on them, in consequence of the statements of the Appellant.

The main challenge advanced by counsel for the Appellant against his conviction on this count alleges that the evidence does not support the finding of the trial Judge that beyond reasonable doubt the Appellant knew the pretences were false, or did not believe them to be true. In particular, it is submitted that the trial Judge erred in reasoning that the Appellant must have known of his bankruptcy and therefore must have known that his pretences about banking expertise was false. As to the trading programme, counsel argues that the trial Judge erred in finding that the facts established positive and knowing dishonesty on the part of the Appellant. That conclusion constitutes a finding that the Appellant actually knew that the Financial Scheme was not a legitimate one.

The arguments addressed to the Court on these issues are also critical to challenges made to the convictions on each of the counts where it was incumbent on the prosecution to prove specific intent or knowledge.

Counsel for the Appellant argues that it was fundamentally wrong for the trial judge to reason to the findings of specific intent or knowledge by first deciding that the Appellant's involvement was dishonest. We do not agree. As we have already pointed out the trial Judge was faced with a stark choice on the evidence - either the Appellant's involvement was dishonest, or alternatively he was an innocent dupe. It was an entirely sensible approach to consider the evidence suggestive of a dishonest involvement, and to decide if it established dishonest involvement beyond reasonable doubt

Counsel for the Appellant further submits that the matters identified by the Trial Judge as suggestive of dishonesty do not justify the finding of dishonesty that was made. First, counsel submitted that each of the matters identified was not, standing alone, proved beyond reasonable doubt. However that is not the test. Each item of circumstantial evidence does not have to be independently proved beyond reasonable doubt: see *R v Thomas* [1972] NZLR 34, and *Shepherd v The Queen* (1990), 170 CLR 573. A number of facts, each of which alone are not proved beyond reasonable doubt, may, when taken together operate so as to justify an inference beyond reasonable of dishonest involvement. As Thorp J said in the New Zealand Court of Appeal in *R v Puttick* (1985), 1 CRNZ 644, 647 "where the charge has several essential elements, proof of guilt necessarily involves proof of each of those elements to the same standard. It does not however, require proof beyond reasonable doubt of every fact which may be relevant to proof of each essential element".

This was a case where the prosecution was based wholly in circumstantial evidence. The Judge correctly acknowledged that the accused could be convicted only if guilt is the only reasonable inference open on the facts. In argument, counsel suggested many suggestions of inferences which, in his submission could have been drawn by the Judge - inferences consistent with innocence. One example of his suggestions will suffice. Counsel suggested that when the appellant asked Mr. Ngwele for the 'Bank Keys' the appellant was only ' big noting'. We regard that as an unlikely inference, far outweighed by the inference of dishonesty.

Inferences may be drawn from proved facts if they follow logically from them. If they do not, then the drawing of any conclusion is speculation not proof. Speculation in aid of an accused is no more permissible than speculation in aid of the prosecution. (*R. v. Harbour*, [1995]1 NZLR 440.

Inferences need not to be irresistible. The prosecution is not required to disprove any inference that the ingenuity of counsel might devise. It must exclude any reasonable hypothesis based on the evidence which is consistent with innocence,

but no more. *R. v. Laugalis* (1993) 10 CRNZ 350, 359. To similar effect is Section 8 (1) of the Penal Code Act [CAP 135] which mandates proof beyond reasonable doubt but states that "the determination of proof beyond reasonable doubt shall exclude consideration of any possibility which is merely fanciful or frivolous".

In a circumstantial evidence case, where the accused makes no statement out of Court and/or elects not to give evidence, inferences can be drawn from the absence of any explanation from the person "with unique knowledge of the complicated dealings to which the charges relate" (a quote from *Connell* (supra), also a complicated fraud case.

The limits of the right to draw inferences from an accused's silence are discussed in such cases as *Trompert v. Police* [1985] 1 NZLR 357 and *Weissersteiner v. R.* [1993] 117 ALR 545. It is basically a matter of commonsense to be used in the circumstances of the case. See *Haw Tua Tau v. Public Prosecutor* [1982] AC 136, 151, 153. (a Judge-alone criminal trial).

The Judge did not rely on the accused's silence as a basis for drawing adverse inferences against the accused. In our view, he did not need to do so because the other inferences discussed already amply justified the convictions. However, since the inferences are available to be drawn from unchallenged evidence, we should have thought that this case provided a suitable occasion for the drawing of inferences adverse to the accused, stemming as a matter of commonsense from his lack of any explanation.

Counsel for the appellant used most of the time available to him for his address in reply in painting a gloomy picture of the erosion of an accused's rights created by the authorities to which we have just referred. He urged that these authorities not be part to the law of Vanuatu. The decisions discuss the tension between the right of silence and the drawing of adverse inferences from a silent accused. The situation is not a modern phenomenon, see *Purdie -v- Marxwell* [1959] NZLR 594 which quoted *R-v- Burdett* (1820), 4 B & Ald. 95, 140, 161 - 2.

We see no reason for holding that the principles found in the above cases are not part of the law of Vanuatu, as they seem to be in most of the common law world, provided the limits set out in the authorities are carefully observed.

We return to finding of dishonest involvement by the Appellant. The finding was made after a review of the whole of the evidence, and was a conclusion based on many aspects of the evidence which pointed to that conclusion. The finding that the involvement of the Appellant in the Financial Scheme was dishonest, not

innocent, was not solely dependent on the finding of the trial Judge that the failure to disclose his bankruptcy indicated that his claim to be a financial specialist with banking expertise was false. The trial Judge listed and discussed a number of these indications when dealing with the topic of the Appellant's subjective dishonesty. His Lordship made it clear that the list was not intended to be exhaustive. The matters listed by him were:

(a) The non-existence of any legitimate Financial Scheme.
(b) The failure of the Appellant to tell Mr. Ngwele that he had been bankrupt fairly recently. The trial Judge considered this was an important failure as the Appellant was asking to be entrusted with a huge sum of money. A person acting honestly would have revealed this part of his history.
(c) The degree of haste and pressure with which the Appellant conducted his presentation to Mr. Ngwele on 29 March 1996.
(d) The Appellant's reluctance to show documents to Mr. Ngwele for perusal and analysis by Reserve Bank offices.
(e) The Appellant's apparently keen interest on 17 April 1996 to gain access to the "test keys" of the Reserve Bank. The trial Judge considered access to the keys would have been an important step towards being able directly to access or transfer the Bank's entire reserves. This request gave color to the earlier requests by the Appellant for production of lists identifying the names of banks where reserves were held.
(f) The fact that solicitors in Port Vila who had been appointed as the solicitors for NRG Ltd., had been paid a retainer and who had been instructed by the Appellant to prepare documents for the incorporation of NRG Ltd, were not instructed in respect of other documents such as the Purchase Option Agreement and the Assignment Agreement (Exhibits P26 and P27). In fact there was no evidence of the involvement of lawyers in the actual preparation and execution of the guarantees. One would have expected in a transaction of this importance and dimension, an array of experienced commercial lawyers on both sides.
(g) The fact that the wording of the Guarantees makes reference to their being governed by the "Uniform Custom and Practices" of the International Chamber of Commerce, whereas in truth the Guarantees were inconsistent with the Uniform Custom and Practices.
(h) The Financial Scheme promised ridiculous and impossibly high profits.
(i), (j) & (k) These three matters identified by the trial Judge are related. They concern the fact that the Appellant knew, at least by 15 May 1996, that Mr. Dowdell was on a "watch list" and thereafter pressed on with the promotion of the same scheme disregarding the significance of the fact that Mr. Dowdell may be crooked. His Lordship thought it significant that BJM Inc (Mr. Forrester) was substituted for Messrs. Olsen and Dowdell in

about early May 1996. The determination of the Appellant to press on notwithstanding the possible problem about the integrity of people connected with the origin of the funding scheme suggested dishonesty. His Honor observed "If the people associated with the scheme in the first instance were apparently dishonest, it was unlikely ever to get any better, and (the Appellant) must have known this". As CEO of NRG Ltd, one would have expected the Appellant to have formally assuaged any doubts raised by the change from Dowdell to Forrester.

(l) The Appellant continued to promote the scheme to the Government even after the Attorney General had questioned the legality of the funding scheme. Rather than take heed of the warning, the Appellant defended the funding scheme Counsel for the Appellant submitted that the evidence of Mr. Edgell showed merely that the Attorney-General questioned the legality of the guarantees only as being beyond the limits authorized by statute. We do not think it matters even if counsel be correct. The guarantees were an integral part of the scheme. A warning, from the principal Law Officer of the country about their legality should have called a halt to the scheme unless and until appropriate legislation had been passed.

Additional indicators of dishonesty are mentioned elsewhere in the reasons for judgment. These included:

(m) An assertion in the Confidential Report that a letter received from Mr. Forrester dated 13 May 1997 provided a "guarantee without equivocation (sic) or reservation from Mr. Ron Forrester as General Agent for Barton Jameson and MacMillan Incorporated". The trial Judge considered that the so-called guarantee from Mr. Forrester provided no protection at all to the Reserve Bank of Vanuatu.

(n) The fact that the Appellant failed to inform other members of NRG Ltd., when he chaired a meeting of the company on 17 May 1996, that the Attorney-General questioned the legality of the guarantees, and therefore, the scheme.

We agree with counsel for the Appellant that the trial Judge's finding that the Appellant's claim to financial expertise was proved to be false by his bankruptcy cannot be supported. At least as a matter of logic, a bankrupt person could at the same time have a high level of skill and expertise as a banker. However, the failure to disclose the bankruptcy was, in the circumstances described by Mr. Ngwele, a serious omission. The Appellant held himself out as a person who

had retired after 22 years of banking experience because he thought he had a better mission, and he was inviting the Government to entrust more than the complete financial reserves of the Republic to him. In these circumstances the failure to disclose his bankruptcy was, in our view, likely to mislead Mr. Ngwele as to his competence and trustworthiness.

Moreover, in all the circumstances, it is very difficult to avoid the conclusion that the omission was intentional because to disclose it would have destroyed the Appellant's credibility. The Appellant's curriculum vitae which reveals a varied career in many occupations indicates that the 22 years in banking claim is erroneous. The Appellant refused to show all but the cover page of this document to Mr. Ngwele, claiming confidentiality. Looking at the document, it is hard to believe that it could refer to anyone other than the Appellant. It contains just too many personal details. Had Mr. Ngwele read it, he would soon have realized that he was not talking to a financial expert of 22 years' standing.

The weight which can be given to the matters identified in paragraphs (a) and (g) above may not be great. Both matters are strong proof that the Financial Scheme itself was dishonest, but they are not matters that necessarily implicate the Appellant in the dishonesty. Nevertheless they were matters to taken into account. The other matters referred to by the trial Judge are, in our view, strong indicators of dishonesty. Upon a review of the evidence, we see no reason to doubt the ultimate conclusion of the trial Judge that the Appellant's conduct was dishonest and in furtherance of a fraudulent scheme.

The trial Judge accepted Mr. Ngwele's evidence, and rejected the attack upon his credibility. The trial Judge was satisfied beyond reasonable doubt that if Mr. Ngwele had not believed what the Appellant was telling him on 29 March 1996, he would not have signed and handed over the Guarantees. The finding of the trial Judge is not dependent only on a statement by Mr. Ngwele in re-examination that he would not have signed the Guarantees if he had not relied on Mr. Swanson's representation that he was a banking expert. His evidence makes it plain that he relied upon the virtues of the Scheme as propounded by the Appellant, which Scheme the Appellant said exposed the Republic (and the Guarantees) to no risk.

In our opinion the challenge to the verdict of guilty on Count 1 fails

Count 4.

The conviction on this Count was recorded on the basis that the Appellant made

statements to Mr. Ngwele on 29 March 1996 about the Financial Scheme which were recklessly misleading in an attempt to induce Mr. Ngwele to enter into "an agreement" the intended purpose of which was to secure a profit from pretended trading programmes that took advantage of fluctuations, that is of "deep discounts", in the trading of securities. The trial Judge identified the relevant agreement as constituted by a broad agreement between the Government of the Republic of Vanuatu, the Reserve Bank through its Governor-General, NRG Ltd., BJM Inc and the Appellant the objects of which were not only the participation in the Financial Scheme, but also the subsequent receipt and use of the profits in infrastructure ventures in Vanuatu. That was the "agreement" pleaded in the particulars to Count 4.

Counsel for the Appellant argued that the agreement identified by the trial Judge was not an agreement which had the purpose or pretended purpose of securing a profit from the yield of securities or by reference to fluctuations in the value of securities so as to come within s11 (a)(ii) of the Prevention of Frauds (Investments) Act. In our opinion the overall scheme for the raising of funds for infrastructure developments in Vanuatu which was described by the Appellant to Mr. Ngwele plainly had as its purpose the securing of profit for NRG Ltd. and the Government. That was to be the source of the funds. The profit was said to come from trading on the deep discounts in securities. The evidence supported the finding that there was an agreement of the kind described in s11 (a)(ii) of the Act.

One of the parties to the agreement identified in the particulars to Count 4 was BJM Inc. On 29 March 1996 the agreement included Dowdell, not BJM Inc. that was substituted for Dowdell in early May 1996. This departure from the evidence is, in our view, of no consequence as the other parties to the agreement as at March 1996 included the Appellant, NRG Ltd., the Reserve Bank, and the Republic of Vanuatu. The purpose of the agreement as at 29 March 1996 was to secure a profit at least for the Appellant, NRG Ltd. and the Republic of Vanuatu. The offence was made out notwithstanding that one of the parties named in the particulars did not become a party to the agreement until later.

Count 5.

Count 5 charged an offence contrary to s2 of the Prevention of Fraud (Investment) Act [CAP 70]. That section makes it an offence for a person to carry on or purport to carry on the business of dealing in securities except with the authority of a licence under the Act, or with authority of a representative of a licence-holder or under the authority of a Ministerial direction that a person is an

exempted dealer. The evidence established that the Appellant had none of these authorities: The trial Judge held it proved beyond reasonable doubt that the Appellant was carrying on a business of dealing in the Guarantees, which constituted securities. That he was carrying on such a business was evidenced by his obtaining possession of the Guarantees, followed by his arranging for their assignment to NRG Ltd., followed by his participation in the execution of agreements on 23 May 1996 between NRG Ltd. and BJM Inc referred to as the Purchase Option Agreement (P26) and the Assignment Agreement (P27). It was held that these agreements constituted "an agreement for ... disposing of securities", being one of the transactions included within the definition of 'dealing in securities' in the Act. We do not accept the submission of counsel for the Appellant that this transaction did not constitute the business of dealing because it was a 'one off' transaction. To so find would ignore the whole tapestry against which the transaction has to be viewed.

In our opinion the conviction on this count was amply supported by the evidence.

Count 6 and Count 7.

The offence of forgery, for which the Appellant was convicted on Count 6, is defined in s139 of the Penal Code Act [CAP 135] as follows:

> "(1) Forgery is making a false document, knowing it to be false, with the intent that it shall in any way be used or acted upon as genuine, whether within the Republic or not, or that some person shall be induced by the belief that it is genuine to do or refrain from doing anything, whether within the Republic or not.
>
> (2) For the purposes of this Section, the expression 'false document' means a document...
>
> (a) of which the whole or any material part purports to be made by any person who did not make it or authorize its making;
>
> (b) of which the whole or any material part purports to be made on behalf of any person who did not authorize its making..."

The conviction was based on findings that the Appellant made the Guarantees by directing Ms Simon to type them on Reserve Bank letterhead. It was held that they were false in the sense that each Guarantee "tells a lie about itself" (see *R v Dodge and Harris* [1971] 2 All ER 1523) because they purported to represent that they were the work of the Reserve Bank of Vanuatu, brought into existence in accordance with the usual and proper work process of the Reserve Bank. Based on the trial Judge's conclusion that the promotion of the Financial Scheme by the Appellant was knowingly dishonest, and not innocent, he held that the Appellant knew they were false. Further, it was held that the Appellant intended that each of the 10 Guarantees made by him would be acted upon by Mr. Korman by signing the Guarantees before Mr. Ngwele signed them as if they were genuine. The trial Judge based this finding of intent upon the evidence of Mr. Korman that at the first of the meetings deposed to by Mr. Korman, the Appellant had told him he should sign the Guarantees, and it was to be inferred from all the facts that the Appellant had the intent that Mr. Korman should act on the basis that the documents had been prepared and worded in the Reserve Bank, and brought into existence in accordance with the usual and proper work processes of the Bank.

The conviction for uttering forged documents on Count 7, is based on a finding that the Appellant, knowing that the bank Guarantees had been forged (as found in Count 6), dealt with the Guarantees as if they were genuine when he took the documents to the first meeting with Mr. Korman and requested that he sign them as if they were genuine.

We indicated to the parties in the course of argument that we are unable to agree that the guarantees told a lie about themselves. In our opinion the mere fact that the text of the documents that would become guarantees when appropriately signed were typed on Reserve Bank letterhead did not mean that the documents themselves represented that they were made by or with the authority of the Reserve Bank. The documents, at the time that they were allegedly presented to Mr. Korman did not purport to be anything more than pieces of paper that required several signatures including that of the Governor of the Reserve Bank to become guarantees. Moreover, there was a reasonable possibility that the appellant had the letterhead with some color of right because there is a suggestion that Mr. Sope facilitated his possession of it. We consider that the convictions cannot be sustained on the counts charging forgery and uttering. Verdicts of acquittal should be entered on Counts 6 and 7.

Counts 9 and 10.

The convictions on Counts 9 and 10 are based on the giving by the Appellant on 29 March 1996 of the documents "On Prime World Bank Credit Instrument Trading" and "Introduction to Bank and Credit Instrument Trading" to Mr. Ngwele. The trial Judge was satisfied beyond reasonable doubt that:

1. The accused was acting as a promoter of a new company then intended to be formed, namely NRG Ltd.
2. The two documents were published to Mr. Ngwele on 29 March 1996.
3. The accused knew the documents were false in one or more material particulars. The finding of knowledge was based on the conclusion that the Appellant's role in the Financial Scheme was dishonest; and
4. The accused gave the documents to Mr. Ngwele with the intent to induce the Reserve Bank of the Republic of Vanuatu to become an investor.

The evidence gives no reason to doubt that the Appellant was on 29 March 1996, a promoter of NRG Ltd., a company he was arranging to have incorporated. Nor is there any reason to doubt the findings that the Appellant gave the two documents in question to Mr. Ngwele with intent to induce the Reserve Bank to issue the Guarantees. The documents were given to Mr. Ngwele after he had affixed his signature to the Guarantees, but at that stage it is clear, accepting Mr. Ngwele's evidence, that there was a continuing need to satisfy Mr. Ngwele, and members of the Government generally, that the Financial Scheme was authentic. Moreover, the company was not then registered, and it was plainly the Appellant's intention that the guarantees not be withdrawn before that occurred.

It is a necessary ingredient of the offence that the prosecution establish that the intent was to induce the Reserve Bank of the Republic of Vanuatu "to become an investor" as alleged in the particulars. The trial Judge (at 167) said:

> "An investment can take any of numerous forms. It is not necessarily just taking up shares in a company.
>
> The intent to induce the Reserve Bank of Vanuatu to become an investor can be deducted from the effort put in to get the guarantees signed by the Governor. And the Bank did in fact become an investor, even though it later pulled out.
>
> Exhibit P61 is relevant on this point: this is a paper presented to the Council of Ministers by Mr. Sope. Its subject is 'Bank Trading Program Using Reserve Bank Guarantees as Investments to raise funds in the form of profits to finance specific development projects.'

> The guarantees were thus an input into the proposed scheme having a value as the equivalent of cash, and were thus an 'investment'. (see Halsbury, vol.7, paragraph 166). Stroud's Judicial Dictionary (Vol.3, 4th edition) says at p.1420 that 'investment' ... 'is not a word of art. It has to be interpreted in a popular sense'." [See *Melville v. M.L.C.* (31 A.E.R. 649].

The investment must however be in the company being promoted. This is clear from the terms of s129 (e) of the Penal Code under which the counts 9 and 10 were laid which requires an intent to induce a person "to entrust or advance any property *to the company*". Whilst the trial Judge has held that the Guarantees were an "input into the proposed scheme" it is clear, in the context of the evidence about the proposed role of NRG Ltd. that the Guarantees were to be first assigned to NRG Ltd., and then used by NRG Ltd. to enable the company to participate in the proposed Financial Scheme. The delivery of the Guarantees to NRG Ltd., coupled with the assignment, constituted an entrustment or advancement of property to NRG Ltd.

In our opinion the convictions on counts 9 and 10 were rightly entered on the findings of the trial Judge, and the findings were amply supported by evidence.

Bias.

The appellant submitted that the convictions should be quashed on the grounds of bias against the accused on the part of the Acting Chief Justice. Counsel for the appellant submitted that the Judge's bias was demonstrated by the cumulative effect of several matters.

(a) The extensive pre-trial publicity surrounding the arrest and trial of the appellant.

(b) The Judge's failure to refer to and assess all the evidence in his reasons for verdict.

(c) The Judge's adoption of a major part of the prosecution's submissions in his reasons, with limited and in some instances no reference to defence submissions.

(d) The pressure on the Judge caused by the Constitutional Petition to

dismiss the case which wrongly named the Judge as a Respondent.

(e) The pressure on the Judge caused by the Petition to the Judicial Service Commission to dismiss him for incompetence.

(f) The mounting pressure on the Judge caused by the delay in pronouncing his verdict and in preparing reasons.

(g) Alleged unreasonable hostility by the Judge to the counsel at the sentencing process.

We consider these allegations in turn.

As to (a), counsel for the appellant presented a dossier of media publications published pre-trial. In none of these is there any indication by the Acting Chief Justice of any view of the case. There is just no evidence of his having being affected by any of this material.

Judges frequently, in all jurisdictions, have to adjudicate in high-profile, maximum-publicity cases against a background of media hype, even frenzy. We see no justification for holding other than the Acting Chief Justice was not affected by this publicity.

The appellant had sought at an early stage to ask the Acting Chief Justice to arrange for the trial to be heard before a judge from overseas. We consider that the Acting Chief Justice was right to rule against this request. He obviously considered that presiding over this high-profile trial was part of his responsibility as senior judicial officer in the land. We applaud him for that view.

(b) & (c) Elsewhere in this judgement, we have dealt with the appellant's criticisms of the reasons for verdict. We have set out criteria for a judicial exercise of this sort. We consider that the Acting Chief Justice did adequately fulfil the minimum requirements for a statement of reasons for verdict in a judge-alone criminal trial. Clearly, the Judge accepted the prosecution's submissions. Just because he did this, it does not follow that his action indicates bias. Whether he was right to have adopted those submissions is the principal matter addressed in this judgment. However, there is just no basis of bias provided by this phenomenon.

(d) & (e) & (f) No doubt the actions of the appellant in filing a constitutional

petition naming the Judge as a party and in joining in the petition to the Judicial Service Commission seeking the Judge's dismissal would have been hurtful and irritating to the Judge. Particularly when there was no other Judge readily available to hear the constitutional petition. We agree with counsel for the respondent, that one possible reaction by the Judge could have been to give a verdict of acquittal, had he felt overwhelmed by the complexity of the task of preparing the judgment. We cannot see how bias can he inferred, particularly when the appellant himself was one of those who sought to have the Judge removed from office at a time when the appellant himself was awaiting the verdict. No accused should be able to abort proceedings against him or her by stratagems such as this.

(g) There is nothing in the sentencing process to indicate bias on the part of the judge. There may have been acerbic exchanges with counsel, but whilst regrettable, such exchanges are not normally indications of bias.

In fact, the appellant received a lenient sentence of imprisonment. Had the judge be biased against him, one might have expected a much heavier sentence.

We consider that the test for the presumption of bias on the part of persons engaged in a judicial capacity is well set out in the New Zealand Court of Appeal decision *in* *Auckland Casino Ltd. -v- Casino Control Authority*, [1995] 1 NZ LR 142, 149. The Court endeavored to reconcile the various formulations of the test for presumptive judicial bias such as found in *R-v-Gough* [1993]AC 646 and *Webb-v-R* [1994] 122 ALR 41 and other authorities. The Court, while opting for the 'real danger' of bias test, considered that there was little practical difference between that and a test based on 'a reasonable apprehension or suspicion on the part of a fair-minded and informed member of the public that the juror (or judge) has not discharged his or her duty impartially'.
As Cooke P. (as Lord Cooke of Thorndon then was) noted at 149 of the *Auckland Casino* case; " If a reasonable person, knowing all the material facts would not consider that there was a real danger of bias, it would seem strained to say that nevertheless he or she would reasonable suspect bias. One must query whether the law should countenance such refinements".

We find nothing in the Australian Law Journal article by G. Pesce, 'Disqualification for Judges-the 'Reasonable man 'test renamed' which alters the above view. We are grateful to Mr. Sugden for referring the article to the Court.

Costs.

In making submissions as to sentence, the prosecutor sought an order for VT20 million for costs. The trial Judge thought that VT10 million was an appropriate figure and awarded costs against the Appellant in favor of the prosecution for that amount pursuant to s98 (1)(i) of the Criminal Procedure Code Act [CAP 136] which relevantly provides:

> "(i) It shall be lawful for the judicial officer to order any person convicted by him of an offence to pay to the public or private prosecutor, as the case may be, such costs as the judicial officer shall consider reasonable in addition to any other penalty imposed.

In the case of trial before a Supreme Court Judge, there is no limit on the about that may be awarded by way of costs.

After the Appellant was arrested, he was granted bail on condition that he paid into Court the sum of VT10 million. That amount was paid into Court on 26 July 1996.

After the conviction, when the question of costs was under consideration, the trial Judge was informed by counsel for the Appellant that the bail money belonged to the Appellant's Aunt Miss M R Swanson. Counsel for Miss Swanson appeared and sought to tender two affidavits. The first was sworn by Miss Swanson on 21 October 1997. She deposed that on 26 July 1996 she had arranged for the equivalent of VT10 million to be transferred to the trust account of the Appellant's solicitors with a specific direction that it be used to secure the Appellant's release on bail. Miss Swanson claimed that the moneys remained hers and should be repaid to her in full. The second affidavit was from Mr. M B Fox which purported to be sworn on 24 October 1997. Mr. Fox was a bank officer in New South Wales. He deposed to arranging the transmission of the bail moneys on behalf of Miss Swanson from New South Wales to the trust account in the Appellant's solicitors on 26 July 1996.

The trial Judge was critical of the procedural steps that had been taken to bring the above information to the attention of the Court. He noted that Miss Swanson's affidavit was not filed in the Supreme Court, but was put directly before the Court by Miss Swanson's counsel. The affidavit of Mr. Fox, whilst it contained a jurat clause and the signature of a witness, did not display a seal of a Justice of the Peace. The affidavit of Mr. Fox was rejected entirely, and it seems that the weight to be accorded to Miss Swanson's affidavit was treated as

diminished by reason of the way in which it was brought before the Court. We take judicial notice that Justices of the Peace frequently take affidavits in NSW and the experience of at least 2 members of the Court is that they rarely use a 'seal'.

The trial Judge noted a submission of the prosecutor "that any loan agreement that may or may not exist between the defendant and his relatives is of no concern to the Court. The money was paid by the defendant into Court. At no stage during any of the applications for bail, or subsequently (until Miss Swanson swore her affidavit) has it been suggested that this money was other than the defendant's..." This submission seems to have been accepted as the trial Judge found that on the balance of probabilities the sum of VT10 million paid into Court did not belong to Miss Swanson, and ordered that it be forfeited to the prosecutor.

We consider the approach of the Judge quite wrong. First, a costs order of this dimension must be regarded as part of the penalty. If a monetary punishment is considered appropriate, it should be imposed by way of fine. It is very rare in our experience for a fine to be coupled with a substantial term of imprisonment, even in a fraud case. The heavy costs associated with prosecuting fraud cases just have to be borne by the State, given the constitutional right of an accused fully to defend him or herself. Nor should a substantial fine be imposed without full judicial scrutiny of the convicted person's means. In the present case, there was nothing to suggest that the Appellant had the means to meet a substantial fine, or any other payment, apart from the bail money. There was available evidence that the bail money was lent to him on the basis that it would be returned when the bail process had concluded. We therefore quash the costs order.

Both the United Kingdom and New Zealand have statutes which allow the Judge, on sentencing a convicted person to order that person to pay contribution towards costs to the prosecution in addition to or in substitution for every any other form of sentence.

A costs order on top of lengthy imprisonment and/or a fine is rare indeed. It happened in *R –v- Maher & others* [1983] 1QB 784. Several accused had pleaded guilty to serious drug charges and two to murder. A costs order was made in the circumstances of the appellants' membership of a drug syndicate with huge assets. The amounts of heroin involved were considerable.
Obviously this was a truly exceptional case. The Court of Appeal ordered an amount to be paid towards prosecution legal costs but not for other items claimed by the Crown involving costly security arrangements.

The members of the Court are not aware of a costs order being imposed on top of imprisonment even in a costly fraud case. In some cases, a fine has been imposed as well as imprisonment as part of the total overall sentencing package.

In New Zealand, the Court of Appeal declined to make a costs order in favour of the prosecution even when there had been no imprisonment, but a community based sentence. The Court considered that defendants should be sentenced for their offending and not for subsequent conduct. Accused persons should not be penalized for exercising their constitutional right to plead not guilty. See *R –v- Minto,* [1982] 1NZLR 606 and the commentary in *Adams* on Criminal Law, (ed. Robertson) Volume 2 Chapter 3.03.

Nor can the use of costs orders in regulatory cases such as serious breaches of fishing legislation be a guide in a case such as the present. In those situations, there is usually no imprisonment and the State is looking to recoup its costs from those who flout international conventions and ravage the marine assets of the Republic.

It follows that the order sequestrating the bail money is also cancelled. We see no justification for the action of the Judge in rejecting the affidavits from Miss Swanson and Mr. West. Maybe they should have been filed in the Registry first, rather presented to the Judge in open Court. Again our experience indicates a broad flexibility about procedural rules in criminal matters, particularly at sentencing. Even if there were an irregularity in the form of the affidavits that the Court felt unable to accept them, then an adjournment should have been allowed for the irregularity to be cured. We see no reason to disbelieve Miss Swanson or the bank official in Australia who arranged to send her funds to Vanuatu. It is clear from their account that the money was not lent to the Appellant to do as wished with it. The money was advanced for the express purpose of meeting the bail, and was to be repaid to Miss Swanson if and when it was no longer required as bail money.

For these reasons we consider that the appeal against conviction on counts 1, 4, 5, 9 and 10 should be dismissed. The appeal against conviction on counts 6 and 7 should be allowed, the convictions should be quashed, and verdicts of acquittal entered.

There is no appeal against sentence. However as the Court has quashed the convictions on Counts 6 and 7, it is necessary for the Court to reconsider the overall sentencing package. In our opinion the sentence, taken as a whole, was a light one for the seriousness of the offending established by the evidence. We do

not think that the sentences for the convictions on the other counts should be varied. The sentences on Counts 1, 4, 5, 9 and 10 should be served concurrently in accordance with the original sentencing order.

The order for costs is be set aside. The bail money presently in Court should be repaid by the Registry to Messrs. Hudson & Co, the solicitors for Miss Swanson, once the Appellant surrenders himself into custody in accordance with the terms of his bail.

Dated at Port Vila, this 26th day of June 1998.

BY THE COURT

.....	.....
J. W. von Doussa J.	Sir Ian Barker J.
.....	.....
Daniel Fatiaki J.	Reggett Marum J.