

THE COURT OF APPEAL
OF THE REPUBLIC OF VANUATU
(Criminal Appellate Jurisdiction)

Criminal Appeal Case No. 01 of 2004

BETWEEN: PUBLIC PROSECUTOR
Appellant

AND: THEODORE SOLONG
Respondent

Coram: Hon. Chief Justice Vincent Lunabek
Hon. Justice Bruce Robertson
Hon. Justice Daniel Fatiaki
Hon. Justice Patrick I. Treston
Hon. Justice Hamlison Bulu

Counsel: Mr. Nicholas Mirou for the Appellants
Mr. Ronald Warsal as counsel assisting

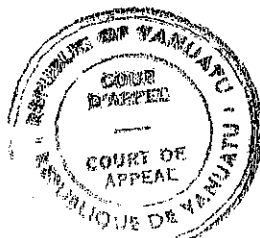
Date of Hearing: 4th June 2004.

Date of Judgment: 9th June 2004.

JUDGMENT

This is an appeal from a sentence imposed in the Supreme Court at Port Vila on the 4th of December 2001 when Mr. Solong was dealt with after pleading guilty to 36 charges of misappropriation contrary to Section 125 (a) of the Penal Code Act [CAP. 135]. He had apparently initially pleaded not guilty although it is difficult to understand on what basis he thought he could ever have had a defence as it appears that he clearly misused money which was entrusted to him for use and benefit of the Gaua Development Community in respect of which he could never have had any right at all.

The offending had occurred during 1995. For reasons which are not explained to us he was not placed before the Court until 1997 and



then it appears that because of his ill health the sentencing did not take place until four years later.

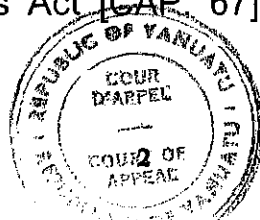
We are left with some concern that the criminal law was being used in part to ensure the collection of the debt. Owing a civil debt is one thing and breaking the criminal law another. Although the line between them is not always easy to draw it must always be ensured that the processes of the criminal law are not used for extraneous purposes. Equally importantly people cannot be permitted to escape the consequences of criminal activity simply by paying reparation.

The matter was in the call over on the 31st May and Mr. Solong was present. Thereafter we lost him. It appears now that was because of his ill health. There were some difficulties about his representation and eventually we asked Ronald Warsal to act as counsel assisting and to make contact with Mr. Solong who by the end of last week was a patient in hospital. We are now advised by Mr. Warsal that Mr. Solong has no objection to the matter being considered in his absence.

Cases of this sort are always difficult. On the one side you have a community which is out of pocket to the extent of VT1 million. On the information provided to us no part of that money has ever been repaid.

On the other hand we have the reality of a sickly man who we are told has a wife and children at school who has no money and who has already had to sell his house simply to keep his family going.

Those two facets create enormous tension which the Court in dealing with a criminal case has to try and resolve. The learned judge in the Supreme Court came up with a formula which he believed would deal with that but it is a formula which can be described as double suspension. It is a matter which the Court had occasion to consider at our last session. In *Public Prosecutor -v- Hollingson Issachar (Criminal Appeal Case No. 05 of 2003)* we held that the process which had been adopted by the sentencing judge was not available in terms of the provisions of the Penal Code Act [CAP. 135] or the Suspension of Sentences Act [CAP. 67] and therefore was invalid



and unsustainable. Both lawyers before us agree that exactly the same issue has arisen in this case.

The Public Prosecutor's appeal is long out of time but the application for leave to hear it now is not opposed because it is to Mr. Solong's advantage and benefit that the matter should be re-looked at and a lawful sentence imposed. Accordingly leave is granted under Section 200 for this appeal now to be considered. In terms of the reasoning in *Hollingson Issachar* it is necessary for this Court to allow the appeal and to consider issues of sentence afresh.

What we are faced with is a man who without any justification took VT1 Million which belonged to others. He has not paid any of it back. He has no means to pay it back. A medical report provided from the hospital as recently as Monday makes it clear that his ongoing situation is unlikely realistically to ever improve to the position when we could sensibly make it a condition of any sentence that he make meaningful payments.

The concern which the Court has about that is that it might lead anyone into the mistaken belief that simply because they are sick they will not face the full consequences of their wrongful action. That would be a foolish assumption for anyone to take.

But the circumstances of this case and particularly bearing in mind that we are now in 2004 dealing with acts and omissions of this man almost nine years ago we have to maintain a degree of reality.

We have concluded that it is not possible to order compensation or reparation as part of the sentence. That does not extinguish the debt. Those to whom the money is owing are entitled to exercise civil remedies if they wish to do so. They of course will need to be cautious to ensure that they do not spend more good money in pursuing something which is unlikely to be fruitful. But if for any reason Mr. Solong's position changes and he has capital or a steady income stream, then their ability to recover their entitlements will not be removed.

It appears to the Court that the only realistic possibility is to exercise the powers under Section 42 of the Penal Code. There is nothing to



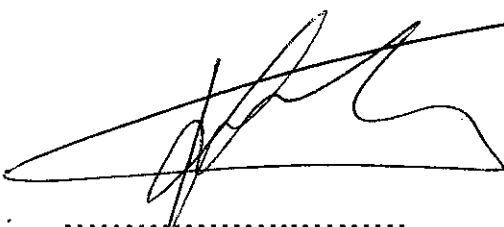
suggest that in the intervening nine years this man has infringed the criminal law but he should be subject for a further two years to the fact that if he offends in anyway he can be brought back before the Court to be sentenced in respect of the new offending together with this offending from the past. His health will not save him from the proper consequences of his criminality if that occurs.

We understand that for those who have lost VT1 Million this will be a frustrating outcome but we are satisfied that in all the circumstances there is no reasonable alternative.

Leave to appeal is granted. The appeal of the Public Prosecutor is allowed on each of the counts Mr. Solong is now sentenced to come up for sentence if called upon within 2 years of today's date in terms of Section 42 (1) of the Penal Code.

DATED at Port Vila, this 9th day of June 2004.

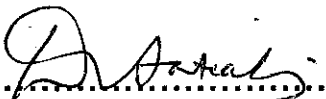
BY THE COURT



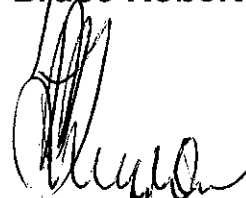
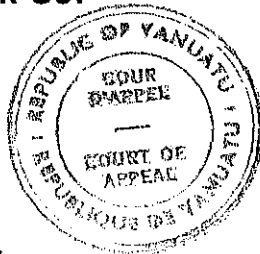
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Hon. Vincent Lunabek CJ.



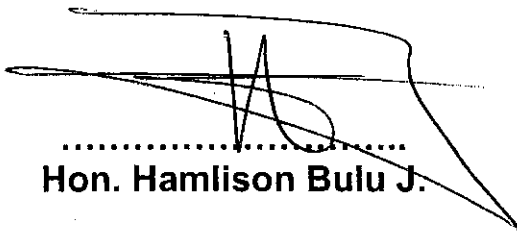
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