

PUBLIC PROSECUTOR
-V-
PETER CLARENCE FOSTER

DECISION

Brief History of the case

On the 14th of January 2007, the Accused Peter Clarence Foster, an Australian national, first appeared before this Court on charges of *Prohibited Immigrant* contrary to section 15(2) of the Immigration Act CAP 66 and *International Offences* contrary to section 5(1) of the Penal Code Act CAP 135. The court, upon application from the Prosecution and from the accused, had adjourned the matter and remanded the accused in police custody pending police investigation and also to allow some time for the accused to consult a lawyer. On the 15th of January Mr Nigel Morrison appeared on behalf of the accused and requested a further adjournment. With the consent of the prosecution, the court further adjourned the matter to the 18th of January 2007. On the 18th of January 2007, having heard both parties, there



were intentions expressed by the prosecution that the charges would be amended and that the accused would take his plea on the offences under the Immigration Act only in the Magistrate's Court. The matter was then adjourned to the 19th of January 2007 for plea. However on the 19th of January 2007, by order of the Supreme Court, the matter was transferred from the Magistrate's Court onto the Supreme Court under Section 27 (1) & (2) of the Criminal Procedure Code Act CAP136. After having considered the matter, on the 22nd of January 2007, the Supreme Court, after having accepted the amendments of the charges made by the Public Prosecutor, had directed that the matter be re-transferred to the Magistrate's Court for a Preliminary Inquiry (PI) hearing on the 23rd of January 2007. On the 23rd of January 2007, the prosecution filed a formal complaint and a charge consisting of the offence of Unlawful Immigrant Contrary to section 22(1)(i) of the Immigration Act CAP 66 in Count 1, and the offence of Non Compliance with Possession of Passport Contrary to section 6(1) of the Passport's Act CAP 108 in Count 2. They have also filed and disclose to the defense, copies of the proposed PI information or materials.

The matter was then re-listed for Preliminary Inquiry on Thursday the 25th of January 2007 at 11 AM. However on the 24th of January 2007 and on the 25th January 2007, prior to the time of hearing, the Prosecution, with the consent of the defense, made an application to withdraw count 2 of the charge and elected to proceed only with count 1 summarily in the Magistrate's Court on



the grounds that the offence only carries a maximum penalty of Vatu 200.000 fine or 12 months imprisonment or both.

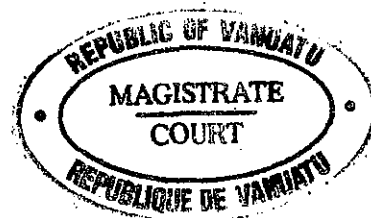
The court had accepted that, if that is the position of the prosecution, then under point 2 of the Supreme Court Order dated January 22nd 2007, it is no longer necessary to conduct a preliminary inquiry hearing in the matter. For the Magistrate's Court to conduct a preliminary inquiry hearing on count 1 only would make it unfair on the Defendant. Section 14(2) of the Judicial Services and Court's Act No.54 of 2000 empowers a Magistrate's Court *'to hear and determine in a summary way criminal proceedings for an offence for which the maximum punishment does not exceed imprisonment for 2 years'*. Because the offence is a summary one, the defendant must be given an opportunity to answer the charges within the summary jurisdiction of the Magistrate' Court.

PLEA

On the 29th of January 2007, the charge of Unlawful Immigrant contrary to section 22(1)(i) of the Immigration Act CAP 66 was put to the accused Peter Clarence Foster. And from the accused box, the accused pleaded GUILTY to the said charge.

VERDICT

The court had recorded a plea of guilty and having heard and considered the summary of the agreed facts presented by the prosecution, this Court hereby convicts the accused as charged under section 22(1)(i) of the Immigration Act of the Republic of Vanuatu, CAP 66.



SENTENCE

Having heard Mr Alfred Bice for the prosecution and having heard Mr Nigel Morrison for the accused, And having also read the written submissions tendered in by both parties, the Court considers the following as mitigating as well as aggravating factors:

1. Mitigating factors.

Mr. Nigel Morrison, Counsel for the accused submitted the following as mitigating factors:

- The accused was faced with a 'fear and flight' situation in Fiji that is why he had to leave Fiji. His life together with many more others were in danger. And the reason why he landed in Vanuatu was because it was the next neighboring island nation on the route the ship he was on was taking.
- The accused's mother is now a very old person of over 70 years of age. She is still in and restraint form leaving Fiji and has had two strokes because of the various issues affecting his son, the accused.
- The accused is a person who holds an Australian passport and is lawfully entitled to enter Vanuatu. He has in fact visited Vanuatu twice already in the past without any problem.
- The accused has pleaded guilty at the earliest opportunity.

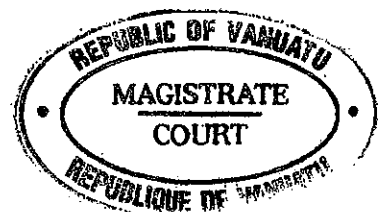


- The accused has been cooperative with the police since the day he was arrested and has accepted to be deported or return back to Australia as soon as possible.
- The accused has no previous convictions in Vanuatu. He may have criminal records in other jurisdictions but the defense counsel submitted, and this court also agrees, that this court should disregard such information and considers them as irrelevant in the jurisdiction of this court.

2. Aggravating factors.

Having heard both the Prosecution and the Defense Counsel, this Court considers the followings as aggravating factors:

- The fact that he was dropped off and accepted to enter the country through an area that was not declared by Customs as a port of entry into Vanuatu. Being a person who has traveled to many countries in the past including Vanuatu, there is no doubt that the accused knew that what he was doing was illegal and unlawful when he got off from the ship MV Retriever 1 and sailed ashore on a small boat without any inspection and control by immigration, customs and quarantine authorities of the Republic of Vanuatu.
- After having been picked up by Mr Wayne Furness, the accused, apart from the few telephone calls he made, has failed to present



himself voluntarily either to the Vanuatu authorities or the Australian High Commission in Port Vila.

- If the defendant was in a 'fear and flight' situation as he is claiming, this court does not understand why he has elected to enter the country through an unauthorized port of entry and then decided not to surrender himself and seek help from the Vanuatu authorities but for about 1 week he was hiding from the Vanuatu authorities at Wayne Furness's residence at Malapoa Estate in Port Vila like a person who does not need help from a 'fear and flight' situation. The Police had to search and arrest him upon information received from the witnesses who saw the accused landing near Tamanu Beach Resort and also upon complaints from the Principal Immigration Officer of Vanuatu.
- This court is not so interested in the situation of the accused in Fiji or any other country, prior to his arrival in Vanuatu. The information as to why and how the accused boarded the ship MV Retriever 1 to Vanuatu may be relevant in explaining whether it was a 'fear and flight' situation or not. However the fact that he has outstanding matters in foreign jurisdictions and has failed to comply with the bail orders of the Magistrate's Court in Suva, Fiji not to leave the jurisdiction of that Court without the Court's permission may



suggests that he was running away from all these pending court matters.

3. The penalty prescribed by Law

Section 22(1)(i) of the Immigration Act of Vanuatu CAP 66 states

'Any person who-.....

(i) unlawfully enters or is unlawfully present in Vanuatu;

.....shall be guilty of an offence against this Act.'

Section 5 of the Immigration (Amendment) Act No.22 of 2005 states

'After subsection 22(4) Insert

"(4A) Any person who is convicted of an offence under paragraph 22(1)(i) is liable to a fine not exceeding:

(a) VT100,000, if he or she was unlawfully present in Vanuatu for less than 3 months at the time he or she was charged with the offence; or

(b) VT250,000, if he or she was unlawfully present in Vanuatu for 3 months or more but less than 6 months at the time he or she was charged with the offence; or

(c) VT500,000, if he or she was unlawfully present in Vanuatu for 6 months or more at the time he or she was charged with the offence."

In this present case, the offence committed under section 22(1)(i) is the offence of Unlawfully entering Vanuatu as oppose to the offence of unlawfully present in Vanuatu also under section 22(1)(i). The penalties provided for the offence of unlawfully present in Vanuatu are found in section 22 (4) (A) (a), (b) and (c) as amended. The longer a person's unlawful presence is the higher the penalty. However, the offence in this present case is one of unlawful immigrant or unlawfully entering the country, which is only the first part of



section 22(1)(i). And there is no penalty provided in the Act for such offence. The relevant section therefore, as also submitted by both parties, is section 22(3) of the Immigration Act as amended. It provides a maximum penalty of VT 200.000 fine or 12 months imprisonment or both such fine and imprisonment.

The Prosecution submitted that, in this case, a custodial sentence is an appropriate one. To support their submission, and in addition to the aggravating factors presented, they made reference to the Supreme Court case of *PP v Ali August*¹ outlining the general sentencing guideline and also referred to the Magistrate's Court case of *PP v Joshua Panketo*².

The Defense however submitted that these two cases are irrelevant because the circumstances differ considerably from the present case.

They submitted that the decision of the Magistrate's Court in the case of *PP v Joshua Panketo* is not a binding authority. The circumstances also of that case are not similar to this present case because the accused was a man from Cameroon who entered the country and wanted to seek asylum in Vanuatu. He has not complied with the police custodial measures and has even escaped from custody. The Court, in that case, also considers that a custodial sentence would be beneficial to him.

They finally submitted that the accused might be considered as an unattractive person in our society however, as Justice Kerby of the Australian

¹ CR 14 OF 2000, Supreme Court of Vanuatu

² CR 315 of 2001, Magistrate's Court, Port Vila

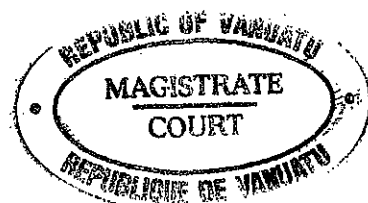


High Court stated, he must be treated with the same sense of decency and fairplay as the court would do to an attractive person.

They pointed out that the amendment of section 22(3) of the Immigration Act only affects the monetary penalty but not the custodial penalty. They further stated that the accused should be given a special treatment because he entered the country from a 'fear and flight' situation in Fiji. His life was in danger in Fiji, the defense said, that is why he had to get away despite the lack of appropriate traveling documents and the restriction on his movement imposed by the Suva Court. They submitted that a payment of fine and the time already spent in custody here in Port Vila would be an appropriate penalty.

4. ORDERS.

Having heard both the Prosecution and the Defense and having also read the documents tendered in by both parties, and before passing sentence, this Court wishes to remind itself that this is just another case involving breaches of Immigration laws of the Republic of Vanuatu. The fact that the accused is Mr Peter Clarence Foster should not make the case more or less serious than the case of any other unpopular foreigner who enters Vanuatu Unlawfully. The political issues, the financial issues or any other issues that may be involved or connected with this case are matters outside of this Court's business. The Court must only concern about the offence committed and must discharge its duties in upholding the rule of law in this country.



The Immigration law of this sovereign state does not provide for any exceptions or special treatment for foreign persons such as the accused. All foreigners wishing to enter or immigrate into Vanuatu, whatever their reasons and circumstances, they all must comply with certain requirements as prescribed by the laws enacted by the parliament of this sovereign state.

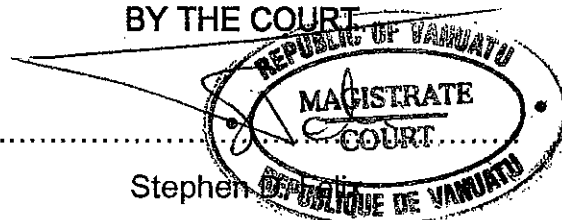
On these notes, **THIS COURT THEREFORE MAKES THE FOLLOWING ORDERS:**

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1. That the Accused Peter Clarence Foster be imprisoned for a term of 6 weeks effective as of January 14th 2007.
 2. That the Accused Peter Clarence Foster pays a fine of VT 120.000 and a prosecution cost of VT 50.000 within 6 weeks from the 14th of January 2007.
 3. That in default of such payments of fine and cost as ordered in point 2 above, the Accused Peter Clarence Foster shall be imprisoned for an additional term of 2 months.

The parties wishing to appeal, are given 14 days, from the date of this decision to do so.

Dated at Port Vila this 2nd day of February 2007

BY THE COURT



Stephen

MAGISTRATE