ACT 8/98

IN THE SUPREME COURT OF THE REPUBLIC OF VANUATU HELD AT PORT VILA
(Appellate Jurisdiction)

CRIMINAL CASE No.17 OF 1996

Between: JEAN YVES MAMELIN

Appellant

And : VANUATU NATIONAL PROVIDENT FUND

Respondent

Coram: Mr Justice Oliver Saksak J.

Counsel : Mr Garry Blake of Counsel for the Appellant
Ms Kayleen Tavoa and Mr Nasse for the Respondent

The Respondent was charged with and found guilty on a total of 196 Counts on 17th September 1996 which are divided up into two categories of offence as follows :-

(a)(i) Charges 1-98

These relate to consecutive months from August 1987 to September 1995 being for alleged failure to pay contributions due to the fund in respect of Mr Serge Mamelin.

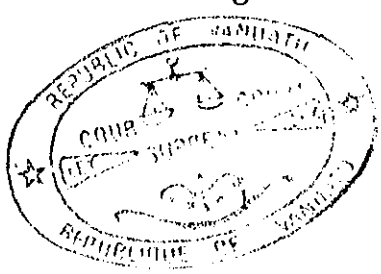
(ii) Charges 99-196

These relate to the same period for failure to pay surcharges on the contributions so due.

(b) Charges 1-98

These were each based upon a failure by the Appellant to pay contributions in breach of sections 26(1) and 50(2) of the Vanuatu National Provident Fund Act [CAP 189].

The Court below found the Appellant guilty and imposed the following fines:-



(i) In respect of charges 1 to 98, that the Defendant pays VT12.000 for each charge, a total of VT1.176.000 or the in default, serve 12 months imprisonment.

(ii) In respect of charges 98-196, that the Defendant pays VT10.000 for each charge, a total of 980.000 or in default, serve 10 months imprisonment. This was made concurrent to the above fine and sentence.

In addition, the Defendant was ordered to comply with the above Orders within 6 months. Further, the Defendant was ordered to pay to the Respondent by end of December, 1996 the sum of VT1.862.724. Lastly the Defendant was ordered to pay costs in the sum of VT14.000.

The Appellant has exercised his right of appeal by filing a Notice of Appeal on 30th September 1996. Subsequently the Defendant filed a Memorandum of Appeal on 14th October 1996. The grounds of the Appeal are contained in this document and I need not repeat them.

The facts of the case are contained in the judgment of the Learned Magistrate of 17th September 1996 and I need not repeat them.

The Issues

(1) Whether or not charges 1-44 and charges 99 to 142 were at the date of indictment statute bar ?

It seems to me from the Record and the Judgment of the Court below that this issue was not advanced by the Appellant. Counsel for the Appellant referred to section 15 of the Penal Code Act [CAP 135] which provides that :

> *"No prosecution may be commenced against any person for any Criminal offence upon the expiry of the following periods after the commission of such offence-*
>
> *(a) Not applicable*
> *(b) in the case of offences punishable by imprisonment for more than 3 months and not more than 10 years - 5 years,*
> *(c) Not applicable."*

The proceedings were instituted on 14th May 1991. The offences alleged to have been committed were committed earlier than 5 years prior to 14th May 1991. Charges 1 to 44 were allegations of failure to pay contributions beginning August 1987 to March 1991. Similarly charges 99-142 were allegations of failure to pay surcharges on those contributions for the same period from August 1987 to March 1991. Counsel for the Appellant submitted that these charges should have automatically been removed because section 15(b) of the Penal Code Act was applicable to them.

Counsel for the Respondent argued that limitation period is not normally used as a defence. She submitted that it has been common practice in Vanuatu that offences committed after the limitation period has lapsed have been reported and prosecuted at the discretion of the prosecutor.

Section 15 of the Penal Code Act is discretionary. A decision whether or not to prosecute an offence which is time-barred has to be made by the prosecutor having regard to, among other things, whether or not there is abundantly clear and sufficient evidence on which the prosecution can prove to the Court beyond reasonable doubt that an offence has been committed. Here the evidence was far from sufficient to warrant the exercise of that discretion to prosecute. The correct exercise of that discretion should have been not to prosecute the Appellant for the offences alleged against him in respect of charges 1 to 44 and 99 to 142.

It is not enough for the prosecutor to merely look at a case and say because it is a common practice that some offences in this category have been prosecuted, that he should adopt the practice and prosecute. Practice can be adopted and applied only when and where there is no expressed rule of law in order to attain substantial justice. Article 47(1) of the Constitution makes this point clear. Here, with section 15 of the Penal Code Act in place since 1981, this Court has a duty under Article 47(1) of the Constitution to uphold that provision and reject the submission that the Court should uphold the practice.

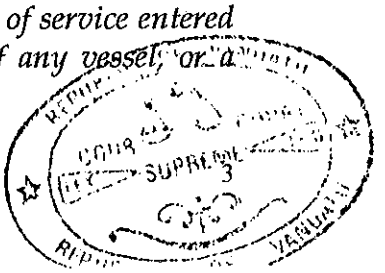
For these reasons the answer to this issue is in the affirmation and the Appellant is hereby accordingly discharged of charges 1 to 44 respectively and charges 99 to 142 respectively.

(2) Whether or not Serge Mamelin was an employee of the Appellant ?

Mr Blake for the Appellant argued that Serge Mamelin was not an employee within the meaning of the VNPF Act [CAP 189] and as such, there was no obligation on the Appellant to pay contributions.

Section 1 of the VNPF Act defines "employee" to mean-

> *"any person, not being a person of any of the descriptions specified in the schedule nor a person exempted by an Order made under section 60(a) nor under sections 34 or 35 who-*
>
> *(a) is employed in Vanuatu under a contract of service or apprenticeship, whether written or oral or whether expressed or implied ; or*
> *(b) being a citizen of Vanuatu, is employed in the manner specified in the last preceding paragraph outside Vanuatu by an employer having a place of business in Vanuatu ; or*
> *(c) being a citizen of Vanuatu is employed under a contract of service entered into in Vanuatu as a Master or member of the crew of any vessel; or a*



captain or member of the crew of any aircraft, the owners of which have a place of business in Vanuatu , or

(d) is declared by the Minister, in his discretion by Order published in the Gazette to be an employee for the purposes of this Act;"

Serge Mamelin did not fall within any of the above category of employment. The cross-references to sections 60(a0, 34 and 35 of the VNPF Act have no relevance and I need not refer further to them. Throughout the relevant period Serge Mamelin was a French Citizen. That being so, the prosecution contended that he fell within category (a) of section 1 of the VNPF Act. The Appellant was a registered employer in respect of his other employees but not Serge Mamelin. The two witnesses for the prosecution told the Court that they had seen Serge Mamelin driving bulldozers and heavy trucks loading or carrying logs. It was not open to the Learned Magistrate to infer from that that Serge Mamelin was in fact an employee. There was no evidence that a contract of service existed between and the Appellant and Serge Mamelin. To hold that there was an implied contract of service, the Court should not merely look at the conduct of the parties, but also to words spoken to determine whether or not the parties intended to create a legally binding relationship between them. There is nothing in evidence to show that the Appellant intended Serge Mamelin to perform work as an employee. Serge Mamelin told the Court in his examination-in-chief that he started work in 1980 and he drove bulldozers or heavy trucks. He never said anything about who told him to work or what was actually said by the Appellant to him regarding the work. He contradicted himself in his cross-examination when he said- "1967 - 1980 No work. My father gave me money..."

His witness, Iauko Kawial told the Court he started work in 1979. He told the Court :
"Yes, in 1979 - I saw Serge working with his brother Jean-Yves. He drove camions and bulldozers..."
This is inconsistent with the evidence of Serge Mamelin. None of their evidence is corroborated. The evidence of Henri Rodin is relevant only to the period from 1993 to 1995.

The Appellant told the Court in examination-in-chief in answer to the question whether it was true that from 1980 - 1995 Serge Mamelin had worked from him. He said this :-
"He never work anywhere and never work with me. Because he is French citizen. Because he is a driver, we must get ni-Vanuatu to drive."

By that, the Appellant categorically denied that Serge Mamelin was his employee. There can be no intention whatsoever on his part that Serge Mamelin, his brother should be his employee. The prosecution was required to show that intention by adducing evidence showing some facts or circumstances said and/or done by the parties which would imply their intentions. It was not so here. There was no evidence showing an offer and acceptance of the offer. It was therefore unsafe to convict the Appellant

merely on what was said from the evidence before the Court at trial without the prosecution adducing further evidence of facts or circumstances surrounding the parties' words and conduct which would imply an intent on their part.

If therefore Serge Mamelin did work at all, I am satisfied from the evidence before the Court that from 1980 to 1993 he was not an employee of the Appellant within the meaning of the VNPF Act so as to make the Appellant liable to pay contributions to the Fund in accordance with section 26 of the VNPF Act. From November 1993 to September 1995 there is evidence that Serge Mamelin did work for the Appellant but that engagement must be distinguished from the earlier. This engagement in my opinion on the evidence, was a contract for services. The VNPF Act does not apply to this category.

(3) Whether or not the Contract of Service was Illegal ?

Having found and held that Serge Mamelin was from evidence, not an employee of the Appellant, it is not necessary for the Court to consider this issue. I should mention though that the Respondent have alleged against the Appellant breaches of the Labour (Work Permit) Act [CAP 187] and have used that as the basis for submitting that the Appellant was an employer and Serge Mamelin his employee. It is of course common knowledge that our law (see section 81 of the Criminal Procedure Code [CAP 136]) requires that all accused persons are presumed to be innocent unless and until proved guilty by the prosecution. At no time has the prosecution instituted formal charges against the Appellant nor do they intend to do so. Unless that is done and the Appellant is convicted, it cannot be accepted as a basis for submissions in this case.

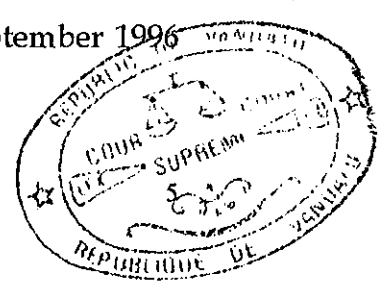
Standard And Burden of Proof

This is clearly defined in sections 8 and 81 of the Penal Code Act [CAP 135]. As a general rule section 8(1) requires that the prosecution shall prove guilt according to law beyond reasonable doubt by means of evidence properly admitted. Here it is clear from evidence that the prosecution did not discharge that burden at the trial in the Court below. Where this occurs the accused must be given the benefit of the doubt (see section 8(3) of the Penal Code Act).

For these reasons the balance of the charges against the Appellant, namely charges 45-98 respectively and charges 143 to 196 must also fail. And the Appellant is hereby dismissed of all those charges.

The Appeal is allowed and the following Orders are made :-

(1) The whole judgment of the Magistrates Court date 17th September 1996 is hereby set aside.



(2) All Orders therein made are hereby set aside.

(3) The Appellant is discharged of all charges from 1-196.

(4) There be no Order as to costs either below or on Appeal.

PUBLISHED AT PORT-VILA this 4th DAY of AUGUST, 1998

BY THE COURT

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OLIVER A. SAKSAK
Judge