

PUBLIC PROSECUTOR
-vs-
BARAK TAME SOPE MAAUTAMATE

Prosecutor: Mr. Wiltens
Defendant: Mr. Malcolm

The defendant appears before the Court on two counts of forgery.

Count 1. Forgery – Contrary to sections 139 and 140 of the Penal Code, Cap 135.

PARTICULARS OF OFFENCE

BARAK TAME SOPE MAAUTAMATE at Port Vila Vanuatu did on or about 15th December 2000 forge a Government Guarantee Number VIC/12/0012000 in the sum of USD 5 million with a stated beneficiary Vanuatu Investment Corporation Limited (VICL) (document SFO 1260/1868)

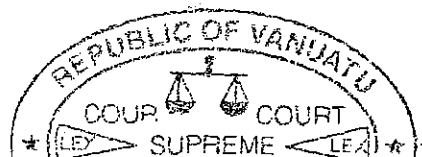
Count 2. Forgery – Contrary to sections 139 and 140 of the Penal Code, Cap 135.

PARTICULARS OF OFFENCE

BARAK TAME SOPE MAAUTAMATE at Port Vila Vanuatu did between 8 January 2001 and 12 March 2001 forge a Government Guarantee Number VIC 011/2000/07 in the sum of USD 18 million with a stated beneficiary Dynamic Growth Management Projects PTY Ltd (document SFO 1260/1866)

Section 139 (1) Penal Code states:-

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.*



Section 59 states:-

AUTHORITY FOR THE GIVING BY THE STATE OF GUARANTEES AND INDEMNITIES.

59. *Except as expressly authorised under this Act, it is not lawful for a person to give a guarantee or indemnity that imposes an actual or a contingent liability on the State.*

Section 60 states:-

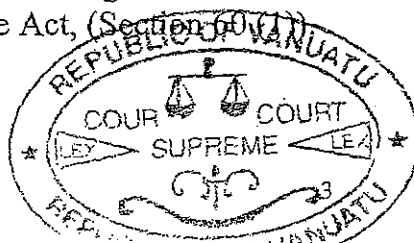
POWER TO GIVE GUARANTEES AND INDEMNITIES

60. (1) *Subject to subsection (3), the Minister on behalf of the State, may from time to time, if it appears to the Minister to be necessary in the public interest to do so, give in writing a guarantee or indemnity upon such terms and conditions as the Minister thinks fit, in respect of the performance of the person, organisation, or Government agency but may only do so:*

- (a) *with the prior approval of a simple majority of Parliament;*
- (b) *after consultation with the Director-General;*
- (c) *where such guarantee or indemnity is consistent with fiscal responsibility provisions of this Act.*

2. *The Minister must advise, and give reasons and provide documents where required, to Parliament as to why it is necessary in the public interest to grant the guarantee or indemnity, as the case may be, and must provide an assessment of the risks associated with the guarantee or indemnity.*
3. *Where a guarantee or indemnity is required as security for the raising of a loan under section 54 the Minister is not required to obtain the approval of Parliament but must in the report to Parliament under section 54 (2) (h) include the full details of the guarantee or indemnity and reasons why it was necessary in the public interest.*
4. *Any money paid by the State pursuant to a guarantee or indemnity given under this section will constitute a debt due to the State from the person, organisation, or Government agency in respect of whom the guarantee or indemnity was given, and may be recoverable as such in any Court of competent jurisdiction.*

The prosecution says the Minister (by section 2 that means the "Minister from time to time responsible for Finance") had not signed the two guarantees. Further, there was no prior approval of Parliament, no consultation with the Director- General and no assessment as to whether such guarantees were consistent with the fiscal responsibility provisions of the Act, (Section 60(1))



Parliamentary acceptance. Instructions had gone out that the guarantees were to be kept safe and not released until all the transactions were signed up and Parliamentary approval given.

That, in essence, is the prosecution and defence case.

This a criminal prosecution. It is for the prosecution to prove their case and to do so beyond reasonable doubt. Anything short of that will not suffice to found a conviction. It is not for this defendant to prove anything. He has raised a defence and it is for the prosecution to disprove it, not for the defendant to prove it.

There are two counts. I must necessarily consider each separately and not assume that a particular verdict upon one means the same verdict upon the other. I can look at the totality of the evidence when considering each count.

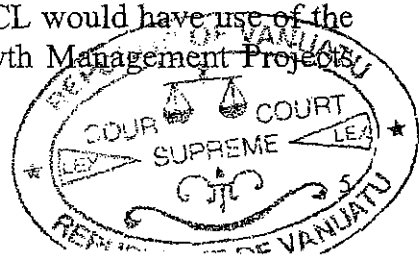
Apart from a few important points there was little challenge to the prosecution evidence. The evidence of Paul Westwood, a 'Handwriting and Questioned Document Examiner' was accepted. Where the defendant's signature appears on pertinent documents it was accepted as being his.

The collection and assembly of the documents was accepted. A chronology was placed before the Court. Objection was taken to certain paragraphs. As a result of these objections I ruled as follows.

Paragraphs 1- 8 were only admissible so far as going to shew the defendant was aware of Government Guarantees and how they are traded. The prosecution only relied on what was extracted. I have specifically not read the Ombudsman's reports. I only look at paragraph 1-8 in so far as the points raised above are concerned. I specifically disregard those parts of paragraphs 1- 8 that go beyond this. I have disregarded paragraph 16 and its attendant table and documents. Similarly I have disregarded paragraph 18. Paragraphs 31-39 were not disregarded, but accepted on the basis of the dealing with the US\$ 5 million dollar guarantee and its attendant US\$ 2.4 million loan. Paragraphs 92 to 96 are disregarded.

The fact a paragraph of the chronology has not been disregarded does not mean I have accepted its contents. The 'Chronology' is no more than an extraction of matters appearing on documents and prosecution comment thereon. In forming my conclusions in this judgment I have acted upon the documents themselves and accompanying evidence.

David Osborne is a senior forensic accountant and works for the Serious Fraud Office of New Zealand. He prepared the Chronology and described the guarantees as very valuable documents. He stated VICL would have use of the \$ 5 million guarantee for a year and Dynamic Growth Management Projects



Bulu said he was unaware of any such negotiations. He would expect to know of that.

In cross-examination he described the Development Committee of Officials (DCO). It consisted of Directors- General and at the time in question the Attorney-General or his representative. If a Government loan was proposed it would go first to the DCO and then to the Council of Ministers. He believed the Attorney- General was aware of the DCO decision of 7th June 2000 to work on the necessary legal framework for VICL (paragraph 2, document 1354). It was approved and the company incorporated.

He was not sure if the State Law Office advisor Mr. Downing had sent a letter to the defendant and Mr. Kaltongga stating how to go about issuing a bond or a guarantee. If the advice was sought it would have been given. It was put to Mr. Bulu there was a DCO document instructing the prime minister to look at ways of raising finance to assist the country. He was only aware of decision 444 (document 1123). It was suggested he was at the meeting and expressed concern. Mr. Bulu asked when the meeting was. He denied his office was involved in the destruction of any documents after the change of government. He denied knowledge of a similar document going to the Council of Ministers as went to the DCO. He could not recall a separate paper to document 1356.

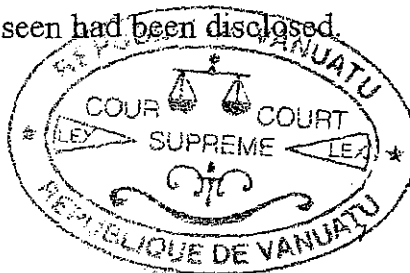
Mr. Bulu accepted there were general discussions about the pressure to raise money and the Belmol debt. He said he was unaware of any documents being destroyed or not disclosed. He said he had met Eddy Galea outside the Prime Minister office, never inside, or in the presence of Mr. Kaltongga. He understood Mr. Galea was in Vanuatu about VICL. He was not aware Mr. Galea had been appointed special envoy.

He agreed when loans are set up a package is put together and then taken to Parliament for approval.

Defence Documents 1 and 2 (DD1 and 2) were put to him. He believed they were done prior to the coming into effect of the PFEMA.

He believed there might have been a letter from Mr. Downing about loans. If there was there would be a copy. There may have been discussions about the Government issuing guarantees to raise money. He said the CoM keeps records, if there was discussion it would be recorded.

The defendant's counsel stated certain documents had not been provided to the defendant. No specific written demand had been made for them, a general request for all written statements and documents had been made on 20th November 2001. Mr. Wiltens replied that everything seen had been disclosed.



He agreed the Bill in DD2 was put through Parliament. He agreed the Bill in DD 2 was passed in September 1998 and that it purported to avoid PFEMA. He agreed DD2 was the normal format over the last few years for passing loan agreements. He could not remember debate in Parliament with questions being asked of Mr. Sope. He said it was possible.

In re-examination, he said there was no debate about documents 1 and 2. To the Court he said that he had checked the records. When he agreed 'normal format' to defence counsel's question he meant "Only a two section Bill and then annexures, concerning the activities". He could not say how common it was to exclude PFEMA.

I accept his evidence. It was honest and reliable .

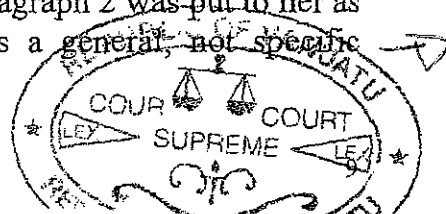
Nadine Alatoa was Secretary-General to the Council of Ministers from August 1998 until January 2001, and again to the present from May 2001. She is responsible for the agenda and records of the Council of Ministers. She said a record is kept of all resolutions and agendas.

She said document 1123 is a record of decision 444. Document 1117 is an example of a paper tabled by a Minister. Last year she was told about documents 1 and 2. She searched through the records for documents concerning these guarantees. She found none. She searched for the period January to May 2001, many times.

In cross-examination she stated for a time Jimmy Andeng was Secretary-General to the Council of Ministers. He took her place in her absence. Between January and May 2001 she didn't attend meetings of the DCO. " I guess Jimmy Andeng did". She said before January there were weekly DCO meetings on a Wednesday afternoon. She had attended about 12, and if she couldn't attend a deputy would go. She would know of the agendas because she sent them to members. Any resolution papers to go to the Council of Ministers she would see. There were also minutes she would see. She could not recall if she was present at DCO when it discussed the incorporation of VICL.

There was much discussion about the financial problems the country was facing. She remembered discussions over Belmol.

She did recall the Prime Minister and Minister of Finance were asked to find ways to raise funds to help with the finances of the country. There were discussions in the DCO about giving the Prime Minister and Minister of Finance a mandate to do that. There was concern in the Council of Ministers that money was needed. It was put to her that the CoM asked the Prime Minister and Minister of Finance to investigate ways to raise money. She started to answer. "I think", when document 1179 paragraph 2 was put to her as an example of what was done. She replied it was a general, not specific



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Morkin Stevens is an M.P and was Minister of Finance during the premiership of the defendant. He stated he had *"some knowledge of the PFEMA, not too much, basic background."*

He said he was called by the Prime Minister about signing document 1 on behalf of the government. He said the defendant told him it was drafted by the State Law Office. He continued *"if that is so, I'd let him sign on behalf of the Government . I would authorise the Prime Minister to sign it"*. He said concerning document 2 *"I did this the same way as the first. I'm not quite sure if I issued a letter, if I signed a letter authorising. I did say yes if passed by the State Law Office."*

He said prior to 15 December 2000 as Minister of Finance I was required to attend at Council of Ministers. When asked if he had any recollection of a Council of Ministers meeting authorising guarantees or securities to be investigated he replied *"I have really forgotten"*. He did not recall a meeting chaired by Mr. Sope.

In cross-examination he set out his educational and work background. He was in Parliament when PFEMA was debated and took part in the debate. He had to pay particular regard to that act after he became Minister of Finance. He said on 15 December he was called by the Prime Minister's first political advisor, Mr. Kaltongga, concerning the signing of the guarantee. It was the first time he'd heard of it. He thought the Director General of the Prime Minister's office was also present.

He believed Rowan Downing, the State Law Office advisor was also there. The Prime Minister *"asked me whether he can sign the document on behalf of the Government. I had not seen it before"*. He asked if it had been *"prepared by the State Law Office and the Prime Minister replied yes. Then I was no longer there. I think the document was signed the next day. There was a second meeting Kaltongga was present. That's all I can remember"*. He thought his authorisation was oral. When asked why he didn't sign he replied *"Because it was requested by the Prime Minister's Office."* He said the *"instrument was new to me"*. When asked if it was in the public interest to have the 5 million guarantee, he agreed and he gave no consideration to section 60 (1) a of PFEMA. He didn't know if the Director General of Finance had been consulted.

It was put to him *"Did you approve just because he (Prime Minister) asked you ? He replied "why do you ask this question. I am not afraid of the question. He (PM) was senior than me and I said yes. He didn't bully me."* He said if the document had come from solicitors in Australia, and not through State Law Office he wouldn't let Mr. Sope sign it. (Mr. Sope in evidence had said that was where the document had come from).



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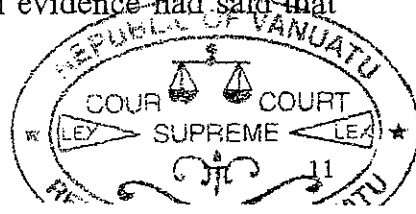
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Mr. Kaltongga was involved in the incorporation of VICL. Document 1354 was based on his paper and decision 444, document 1355, made by the Council of Ministers.

He had seen document 1 before it was signed. The dotted line and typed name were already on it. He said Eddy Galea drafted it. After it was signed it was given to Galea. Oral and written instructions were given by the Prime Minister. He could recall one specific point was the document could not be activated until it went through the Council of Ministers and Parliament.

He was present when document 196 and document 2 were signed. He could not recall who was present.

In cross-examination he agreed he was a friend of the defendant. He was appointed by the defendant to his position. It was suggested he had a selective memory. He could not remember other recommendations in his DCO paper. He had tried unsuccessfully to recover the documents.

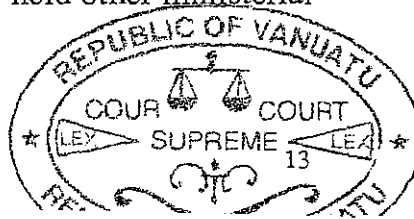
The defendant introduced him to Mr. Galea. He denied running VICL, or being a director, only being involved in it. The defendant had said he was a director. He had not seen documents 1321, 1335 and 1336 before. He said most or all of the VICL meetings were in the Prime Minister's office.

Mr. Kaltongga saw the Prime Minister sign document 1 and give it to Mr. Galea. He said he saw the letter addressed to Galea that went with it. The instructions did not apparently forbid the release of the guarantee until Parliament or any other approval. He said the Prime Minister told him document 196 was given to Eddy Galea. He was asked in detail about compliance with section 60. His answers became vague and evasive. His demeanour changed from one of calm self-assurance to agitated, and slightly aggressive responding. On two or three occasions questions left him stuttering to produce an answer.

I do not accept the evidence of Mr. Kaltongga. He could not remember details which should have been simple, his whole demeanour changed when pertinent questions were posed. I find he was a knowing assistant of the defendant in these activities even if he did not know their full import. I specifically did not believe him concerning his paper to the DCO.

I turn now to the evidence of the defendant. I assess his evidence in the same way as the other witnesses, and not in any different way because he is the defendant.

He gave a brief history of his career. He has been an M.P. since 1983. He was Minister of Finance in 1996 prior to the PFEMA. He has held other ministerial



He stated he told McCullough-Robertson that the originals of the guarantees must not be given away without *"the Government of Vanuatu saying it was OK to use them. Document 171, paragraph 2 last line that is the position"*.

He agreed his signature was on document 1074 and that Morkin Stevens signed. The figure should be 18 not 80 and 'finalised' should read 'finalising' They are typing errors.

Since May 2001 there had not been other papers or bills for approval of loans, securities or guarantees.

Mr. Sope was then cross-examined. He agreed he wrote in 1996 for the return of ten US\$10 million guarantees from England to trade them. He said the then Prime Minister asked him to do this. He said he didn't know how guarantees are traded. He was trying to get the guarantees back to Vanuatu.

Counsel for the defendant objected to cross-examination upon the Ombudsman's reports. The Court upheld the objection. Document 1376 paragraph 1 was put to the defendant, it was suggested this was so the guarantees could be traded. The defendant said there was an other letter, *"not this one", "It does exist"*.

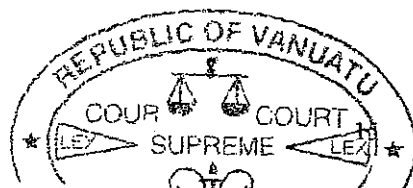
Mr. Sope said VICL was set up with the advice and drafting of the Attorney General. Mr. Galea was appointed special envoy(not roving ambassador). He agreed he tabled document 1117 in the Council of Ministers but it was prepared by the Director General.

There was no reference to the Government providing financial assistance to VICL. Mr. Sope said it wasn't needed at the time. Mr. Galea was managing director and Mr. Kaltongga a director. He did not agree Mr. Galea could be do almost anything without reference to the Government.

Mr. Sope agreed he signed document 1 so VICL could get the loan for Belmol. Lawyers McCullough Robertson had been appointed to represent the Government. Mr. Sope agreed he wrote the letter of 22 March 2001 to them. He agreed paragraph 4 document 35 was untrue. He said a letter had been sent correcting it. The correction letter has not been found. Mr. Sope said he didn't know till later there was only 9,000 not 12,000 cattle on the ranch.

Paragraph 5 talked of the government having issued a sovereign guarantee for 5 million to be used at the discretion of Mr. Galea. He agreed it was correct that is what is said. Mr. Sope accepted that by law a letter of guarantee can only be given by the government.

Q. How can you say what is in paragraph 5, that the government issued a Sovereign guarantee?



transactions been genuine or intended for nothing other than the best arrangements possible to meet Vanuatu's financial circumstances.

The evidence shews that as soon as the guarantees were sent off Mr. Sope set about getting them accepted as genuine and into a position to be traded. First of all he tried the Banque of Hawaii. When that failed he tried elsewhere. It is clear he was in close and frequent contact with Mr. Galea. In the attempts to get them accepted and traded he issued letters containing lies and he knew they were lies. I accept a Prime Minister has documents prepared for him and might sign them with little more than a cursory check. These documents did not fall in that category. They related to the very arrangements which would help alleviate the severe financial problems facing the country.

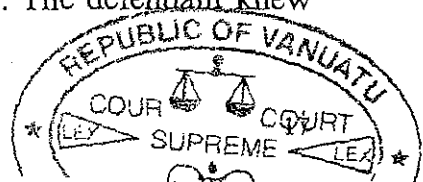
The defence primarily was that there was no mens rea. The prosecution asserted there was sufficient for a conviction if it could be shewn the defendant knew the documents to be false and he signed them intending others to accept them as genuine and act upon them. Others did treat them as genuine and act on them. The defence asserted there was no wrongful intent as all along he was wanting to relieve the financial problems of the country, he ensured as far as possible no release until Parliament approved and when the packages were ready he would go to Parliament. He said he was prevented from doing this by the fact negotiations were not completed, other factors and then the fall of his government.

On the evidence I reject this defence. It has been rebutted beyond reasonable doubt. These were not well intentioned but misguided and unlawful acts. There is no evidence of any intent to seek Parliamentary or other statutorily required approval or follow proper procedures at any time. There is no evidence of any intent to seek Parliamentary approval before or after any package was completed. There is nothing emanating from the defendant directing others to keep the guarantees in the strictest safety until formal approvals were given. Paragraph 2 of document 1179 is not a general mandate. It relates only to Decision 556.

Section 109 (2) Criminal Procedure Code states "when a person is charged with an offence and facts are proved which reduce it to a lesser offence, he may be convicted of the lesser offence although he was not charged with it". This section was mentioned by defence counsel in closing.

There are offences set out under section 64 PFEMA. In view of my findings I do not need to address this issue.

I am satisfied beyond reasonable doubt that Mr. Sope did sign documents 1 and 2, and indeed document 196. Those documents were false. The numbers on them were wholly fictitious. They were not guarantees of the Government as they purported to be since no authority existed for them. The defendant knew



However, at the heart of this is an enormous breach of the trust placed in you by the people of Vanuatu. When I first started to examine sentence I considered a term of 5-6 years. I take into account your age, your state of health, the mitigation generally and the fact it will not be easy for you to serve a sentence.

In my judgement the correct sentence is one of three years imprisonment concurrent upon each count. I have considered whether it should be suspended. In all the circumstances it cannot. There will be no order for costs.

Informed of right of appeal.

Dated at Port Vila this 19th day of July 2002.

R.J.
R.J.COVENTRY
Judge

