

**PUBLIC PROSECUTOR -v- KAROLY HENRIK MAHINKO**

**Coram:** V. Lunabek CJ

**Counsel:** Ms Kayleen Tavoia, Public Prosecutor  
Mr Robin Tom Kapapa for the Defendant

**JUDGMENT ON THE VERDICT**

**I - INTRODUCTION: CHARGES AND PLEAS**

This is the judgment in this case. Mr Mahinko, you are a Hungarian citizen and you are residing in Port-Vila, Vanuatu. On 2<sup>nd</sup> day of August 2011, the Public Prosecutor charged you with five (5) offences, the particulars of which are set out as follows:

Count 1:

**Statement of offence**

THEFT - contrary to section 125(a) of the Penal Code Act [CAP.135].

**Particulars of offence**

Karoly Mahinko Henrik, on or about early April 2011, you did take from Mrs Kadiatou Ruru Diallo, property belonging to her, namely VT400,000 and you did so at the time with the intention of permanently depriving her of her money.

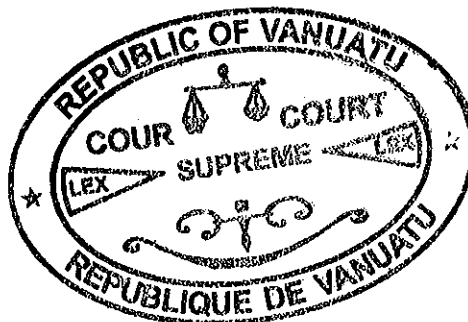
Count 2:

**Statement of offence**

MISAPPROPRIATION - contrary to section 125(b) of the Penal Code Act [CAP.135].

**Particulars of the offence**

Mahinko Karoly Henrik, on or about early April 2011, you did misappropriate namely you converted VT400,000 to your own use, which monies were the property of Mrs Kadiatou Ruru Diallo, who had entrusted such monies into your safekeeping and custody.



Count 3:

**Statement of offence**

FALSE PRETENCES - contrary to section 125(c) of the Penal Code Act [CAP.135]

**Particulars of the offence**

Mahinko Karoly Henrik, on or about early April 2011, you did obtain possession by false pretences VT75,000 from Mrs Kadiatou Ruru Diallo, namely you did so by making false pretenses, with intent at that time to defraud Mrs Kadiatou Ruru Diallo of VT75,000.

Count 4:

**Statement of offence**

FALSE PRETENCES - contrary to section 125(c) of the Penal Code Act [CAP.135]

**Particulars of offence**

Mahinko Karoly Henrik, on or about early April 2011, you did obtain possession by false pretences, VT400,000 from Mrs Kadiatou Ruru Dialo, namely you did so by making false representations by words and conducts, and which words and conduct you know to be false, with intent at that time to defraud Mrs Kadiatou Ruru Diallo of VT400,000.

**Alternative charge**

Count 5:

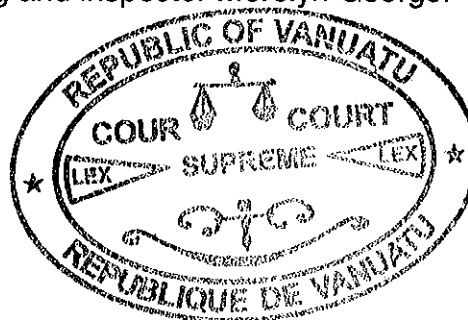
**Statement of offence**

FRAUD BY TRUSTEE - contrary to section 128 of the Penal Code Act [CAP.135]

**Particulars of offence**

Mahinko Karoly Henrik, on or about early April 2011, being a trustee of property namely VT400,000 belonging to Mrs Kadiatou Ruru Diallo, converted the property into your own personal use, without the authority of Mrs Kadiatou Ruru Diallo, the trust.”

On 16 August 2011, you pleaded not guilty to each and all five (5) counts. Your trial proceeded on that basis after your right under s.81 of the Criminal Procedure Code Act [CAP.136] were read and explained to you. The prosecution has called eight (8) witnesses, namely: Kadiatou Ruru Diallo, Serah Manuake, Klem Camille, Sandrine Hollerer, Ronnie Nganga, James Narwayeng and inspector Merelyn George.



You have given evidence yourself and you called two other witnesses, namely John Terry and Anna Dvorakov after your rights under s.88 of the Criminal Procedure Code Act [CAP.136] were read and explained to you at the end of the Prosecution case.

At the close of the prosecution case, your defence lawyer made submissions of a no case to answer. After consideration, the Court is satisfied that the prosecution failed to prove beyond doubt, the essential elements of the offences of: Theft, contrary to section 125(a) in count 1; False pretences, contrary to section 125(c) of the Penal Code Act in count 3; and Fraud by Trustee, contrary to section 128 of the Penal Code Act in count 5. You were therefore, found not guilty and acquitted of offences charged against you in counts 1, 3 and 5 accordingly.

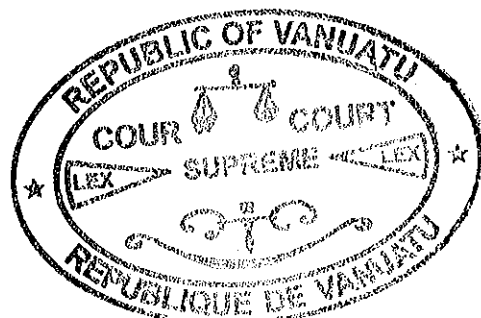
You were, however, required to put forward your defence in respect to the offences of misappropriation, contrary to section 125(b) and false pretences, contrary to section 125(c) both of Penal Code Act charged against you respectively in Counts 2 and 4.

## II - BURDEN OF PROOF

In a criminal trial such as the present, the law is for the prosecution to prove each and all essential elements of the offences of misappropriation and false pretences, contrary to sections 125(b) and 125(c) respectively beyond reasonable doubt against you.

You are not required to prove your innocence. If you have to give evidence yourself or call other person to give evidence on your behalf, I must consider your evidence and the evidence of your witnesses on equal basis as any evidence of the prosecution.

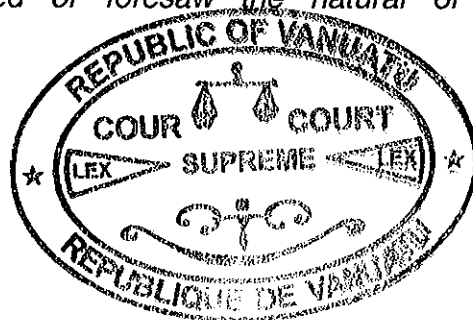
The onus or burden of proving your guilt beyond a reasonable doubt rests upon the prosecution and it never shifts. The prosecution must prove beyond doubt that you are guilty of the offence which you are charged before you can be convicted. If I have a doubt and the doubt is a reasonable doubt as to whether you committed the offence charged against you in each or one or both counts 2 and 4, it is my duty to



give you the benefit of the doubt and to find you not guilty on the charge of misappropriation and false pretences.

Proof beyond a reasonable doubt has been achieved when I as a judge of fact feel sure of your guilt. It is that degree of proof which convinces the mind and satisfies the conscience so that I as a conscientious judge of fact feel bound or impelled to act upon it. Conversely, when the evidence I have heard leave me as a responsible judge of fact with some lingering or nagging doubt with respect to the proof of some essential elements of the offence with which you are charged so that I am unable to say to myself that the prosecution has proven your guilt beyond a reasonable doubt as I have defined these words, then, it is my duty to acquit you. If I believe you and you did not commit the offence or what you did lacks some essential elements of the offence or if your evidence either standing alone or taking together with all of the other evidence leave me in a state of reasonable doubt I must acquit you. But if upon consideration of all of the evidence taken together at the end of the trial, the arguments of counsel and the charge I am satisfied that you have been proven guilty beyond a reasonable doubt as I have defined these words above, it is my duty to convict you. I must say that it is rarely possible to prove anything with absolute certainty. So the proof or the burden of proof on the prosecution is only to prove guilt beyond a reasonable doubt. When I speak of reasonable doubt I use the words in their ordinary natural meaning, not as a legal term having some special connotation. A reasonable doubt is an honest and fair doubt based on reason and common sense. It is a real doubt, not an imaginary or fanciful doubt which might be conceived by an irresponsible judge of fact to avoid his or her plain duty. This is emphasized by Section 8 of the Penal Code Act [CAP.135] in these terms:-

- "8.(1) No person shall be convicted of any criminal offence unless the prosecution shall prove his guilt according to the law beyond reasonable doubt by means of evidence properly admitted; the determination of proof of guilt beyond reasonable doubt shall exclude consideration of any possibility which is merely fanciful or frivolous.*
- (2) In determining whether a person has committed a criminal offence, the Court shall consider the particular circumstances of the case and shall not be legally bound to infer that he intended or foresaw the natural or probable consequences of his action.*



- (3) *If the prosecution has not proved the guilt of the accused, he shall be deemed to be innocent of the charge and shall be acquitted forthwith."*

## **II - THE CASE FOR THE PROSECUTION**

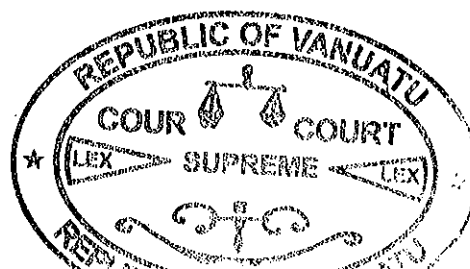
The thrust of the prosecution case is that on or about April 2011, the Defendant became friendly with the complainant. The Defendant soon befriended the complainant woman and their relationships grew as the affairs grew and it was no secret to the complainant's husband nor her friend Serah. Once the affair grew there was a level of trust and a personal history of marriage was given to the Defendant by the complainant woman and also from her friend Serah and Serah's adopted brother John. The Defendant showed love, care and trust and he also showed pity to the complainant woman. The woman no longer consulted her husband and she revealed to the Defendant her plan to travel back with her children to Mali, West Africa and that she had deposited into her bank account money to pay for the airfares tickets. The Defendant tested the woman asking her to pay for his rent of VT75,000 and that he will refund her in 3 days which he failed to do so. He then asked her to give him VT400,000 to keep in his Bank Account and he will assist her raising fund toward the airfares and the travel to Mali (Africa). The complainant woman gave the Defendant VT400,000 and the Defendant used the money for his own personal use or purposes.

## **IV - ESSENTIAL ELEMENTS OF OFFENCES**

In the present case, before the Defendant could be convicted on counts 2 and 4, the prosecution must prove beyond reasonable doubt each and all essential elements of the offences of misappropriation and false pretences. Misappropriation is defined under s.123 of the Penal Code Act. The prosecution must prove the following elements:

1. That the property (VT400,000) has been entrusted to him for custody, return, accounting or any particular manner of dealing (not being a loan of money or of monies for consumption).
2. That the Defendant Mahinko Henrik destroys, wastes, or converts any property capable of being taken (here VT400,000);

The offence of false pretences is defined under s.124 of the Penal Code Act. The prosecution must prove the following elements:

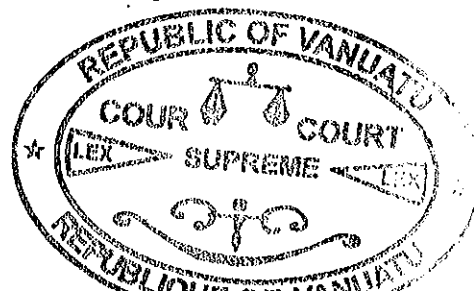


1. That the Defendant Mahinko obtains property (VT400,000) or possession of or title to anything capable of being stolen (here VT400,000) either directly or indirectly by a false pretence;
2. That by a false pretence, that is to say, any representation made by words, writing or conduct, of a matter of fact, either past or present;
3. That the representation is false in fact.
4. That the Defendant knew the representation to be false, or does not believe to be true;
5. That the Defendant intended to defraud the complainant woman.

#### **V - EVIDENCE OF THE PROSECUTION**

The details of the evidence are contained in the record of evidence kept in the court file. What follows are parts of the evidence which are relevant to the elements of the offences of Misappropriation and False pretences. In this case, the Prosecution has called eight (8) witnesses.

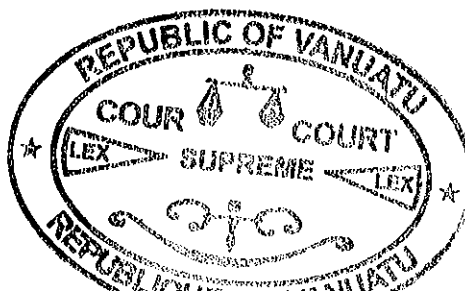
The first Prosecution witness is Mrs Kadiatou Ruru Diallo. Mrs Kadiatou gave evidence to the following effect – She is a mother of three children (two sons and a daughter). She is originally from Mali, West Africa. She is married to Gaetan Ruru who is from Malekula, Vanuatu. Mrs Kadiatou lived with her husband at Fresh Wota 4 for two and half years. She has obtained the Vanuatu Citizenship. She has found work and started to work at French Kiss Shop in Port Vila in July 2011. Before that time, she had no employment. She had problem in her relations with her husband. They had separated but they both live in the same house but in separate rooms. Her husband works in Vanuatu National Parliament as French Translator. Her husband paid for the rents of the house they live in with the children at Vt40.000 per month. She gave evidence of her intention to leave her husband and take her children back to Mali, Africa. She prepared and sold food at Fresh Wota market road with other women. One of these women doing market road like Mrs Kadiatou was Serah. She prepared and sold food at road market to pay for the airfares tickets for herself and her children to return back to Africa. She told Serah about her plan. She opened a Bank Account at Bred Bank in which she saved monies for the airfares to return to Mali (Africa) with the children. She provided the details of the account numbers and she would save about 500,000VT and her husband gave her 271,000VT for the



payment of the tickets as planned. Her husband gave her his MTA Credit Card and she would use her husband Bank Account at Bred Bank to pay for the Accommodation and daily needs with the children.

She gave evidence on how she met the Defendant Mahinko Henrick Karoly. Mr Mahinko used to purchase food from the road market. One evening sometimes in February or March 2011, Mahinko gave her his telephone number and got her mobile phone number after he purchased some food from her table at the road market at Fresh Wota 4. On the same night he sent her a text message saying: "I like you very much" or words to that effect. Mrs Kadiatou and the Defendant Henrik started a friendship that quickly turned into a love relationship that took them to several motels in Port Vila including the Defendant having his lunch at Mrs Kadiatou's house. The Friendship became so amicable that the Defendant Mahinko asked Mrs Kadiatou to give him money to pay for his rent of the month of May 2011 for his accommodation at Mele Devil's Point. She gave evidence that it was a Monday morning when the Defendant Mahinko asked her VT 75,000 to pay for his rent at Mele and that he will refund her on Wednesday. She gave evidence that the Defendant was keen about her and he had no work at the time and that he had no money. She said she lent him VT75,000 to pay for his rental of the month of May. She gave the details of how she gave the money of VT75,000 to the Defendant. In the morning of that Monday, the Defendant drove her in his car to Au Bon Marche No.2 and asked her for money to pay for his rent. She used her ATM Machine Card and withdrew VT80,000 she gave him VT75,000 and 5,000 Vatu was used to pay for the Hotel room at Pango where they spent a night together there. This was sometimes in April she said. The Defendant thanked her and told her that she was the only friend he has in Vanuatu. The Defendant further told her that he was supposed to repair a lady's car and she will pay him 75,000VT and he will pay her 75,000VT back by Wednesday.

Further the relationship was so good and trustworthy between them that Mrs Kadiatou admitted to the Defendant of her intention to leave her husband and take her children back to Africa. She had even informed the Defendant Mahinko of the Accounts she had at Bred Bank. She said the Defendant told her to give him her money so that he could complete the monies and they will travel together. Then the Defendant changed his mind and told her that if she kept her monies into her Bank

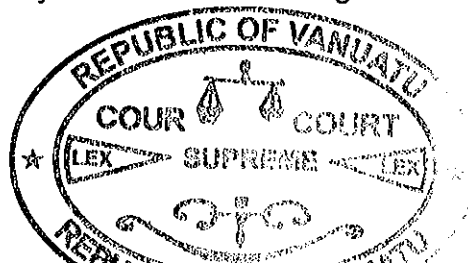


account her husband could block it if he knew that she befriended him (the Defendant) and her husband has relatives who worked in Bred Bank. The Defendant showed to her one of his International Westpac Bank Credit Cards and he suggested to her that they could use it.

On the 6<sup>th</sup> April 2011, Mrs Kadiatou closed and transferred her fixed term deposit account into her savings account at Bred Bank. She then went and withdrew the amount of VT 400.000 on the 18<sup>th</sup> of April 2011. She gave specific account in her evidence that to withdraw VT400,000, she had to open a Term Deposit Account of this money. She had to close it to withdraw this money of VT400,000. She further gave evidence that when she went to withdraw the money from her Bank account, Defendant Mahinko was at Fresh Wota 4 at the house of his friend John Terry and she stated further that Defendant Mahinko kept ringing her up if she had withdrawn the money. She stated further that she gave VT400,000 to Defendant Mahinko at her house at Fresh Wota 4 on the same date she withdrew the money and her son of 2 years of age was sleeping there. This was few days after she said she had given Defendant Mahinko VT75,000 for his rental at Devil's Point.

She said that after she gave him VT400.000, she saw him rarely. She rang him by phone and sometimes the Defendant insulted her in the telephone by saying "Bullshits" and "I should prostitute myself". During one of the conversations, the Defendant told her that he was expecting to receive a container. He had a car. He will sell the items and he will repay her by 2 months. On one occasion, the Defendant rang her and told her that they must change the plans. They had to go to Solomon Islands. He changed the date for their departure to the Solomon Islands to 26<sup>th</sup> April 2011. She was infuriated and demanded to know what he had done with her money. She told him that her money was supposed to be kept in the account and the Defendant used it to pay for residency permit in the Solomon Islands. She said, she did not agree. She wanted to return to Mali-Africa. She demanded that the Defendant gave her money back.

After this, she tried to see him again. She phoned him and he told her that he was at No.1 Café. He told her that he was having problems with immigration. She caught a bus. The Defendant was with his friend John who told her at No.1 Café that the Defendant has a problem with his Residency Permit. The Immigration wanted to





send him out of Vanuatu. Mrs Kadiatou said she thought she might do something as she had a little bit of money on her. She went to the immigration office and she spoke to one James and one François Batik at Immigration office in order to sort out the Defendant's residency permit. From the conversations she had with the immigration officers, she realized that the Defendant was not stable and there were lots of complaints against him. She began to sense that something went wrong, this was a Friday. After Immigration, she spent several hours giving advice and trying to find out more. She went back to No.1 Café to see the Defendant and they both left. On their way toward VNPF building the Defendant went to see someone there. She said she could see that the Defendant had problems and she was trying to help him. On the same Friday, in the evening, she began to realize that if the Defendant was going to be deported he is not going to give her money back. She knew that by now the Defendant was residing at Le Rendez-vous Restaurant. She tried to contact him several times by phone, there was no answer but on one occasion, he would tell her by phone that she should not go there. She went to Le Rendez-vous Restaurant, but the Defendant was not there. This was the next day which was Saturday afternoon after lunch. She decided to wait for him as she knew where the Defendant was sleeping. She wanted to ask him to give her money back so she said she waited and the Defendant arrived with Anna who is the owner of Le Rendez-vous Restaurant. She really wanted to speak to the Defendant. The Defendant was aggressive, she spoke to Anna. She told Anna that the Defendant had her money and she asked Anna to tell the Defendant to give her money back. She said, she told Anna that the Defendant owed her VT475.000. The Defendant had problem with Immigration and she had just wanted the Defendant to refund her money. Anna called on the Defendant so that Mrs Kadiatou could speak directly to him. The Defendant spoke Hungarian with Anna and he agreed to meet her at the Restaurant. She said when they went to the room she asked the Defendant to get her money back and also her police clearance, passport with the children papers. She could see that the Defendant was upset. She asked him to sign a letter acknowledging his debts. The Defendant threw her out of the room. She said she grabbed a screw driver to retaliate to defend herself. She said if there was anything to solve, she wanted her money and she wanted to return to her home country with her children. After, the incident, she called the Police and the Police arrived at Le Rendez-vous Restaurant and got both of them into the police truck to the police station and she made her



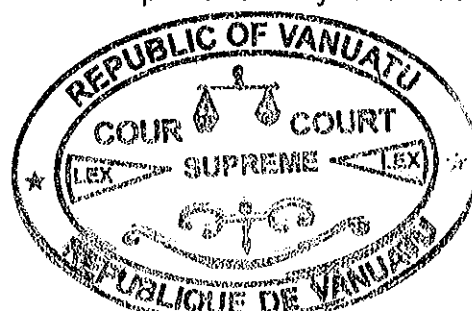
statement to the police. The last time she saw the Defendant again was on 30<sup>th</sup> July 2011 when the Defendant went to see her at her place of work. The Defendant wanted to talk to her. She said she could not talk to him unless he deposited her money. The Defendant told her to withdraw her complaints and he further told her that because of her, he was risking 30 years of imprisonment. She specified that it was a Saturday morning on 30<sup>th</sup> July 2011 and she was working.

Mrs Kadiatou was cross-examined for a lengthy period. She did not detract from her evidence in chief. She confirmed and maintained her evidence that she had problems with her husband. They had separated but they lived in the same house but different rooms at Fresh Wota 4. Her husband did not treat her properly but he now started to look after her since her complaint to the police against the Defendant. She said her husband did not support her for the months of February – March, April and May 2011. However, she clarified that since then, her husband looked after her and the children with the accommodation and food but they did no longer have sexual relationship as husband and wife.

She withdrew VT20,000 every 2 weeks from her husband's Bank account to pay for accommodation. She clarified she had one Bank account at Bred Bank in her own name. She withdrew money in her account and gave the money to the Defendant Mahinko. The other account was in the name of her husband. She used that account for accommodation and food.

When she sold food at the road market, she earned between 13,000VT to 15,000VT in any one evening as she prepared different and varieties of dishes. She would then take out money to buy things for her market and the food for Defendant Mahinko and she would deposit the balance into her Bank account. She stopped selling food at the road market when she started working at the French Kiss shop in July 2011. She gave the detailed account as to how she met the Defendant with the assistance of her friend Serah.

She said Defendant Mahinko told her he loved her. She said she needed a new husband. She had no objections to have a relationship with the Defendant. It was put to her and she confirmed that during March – April and May she had a good relationship with Defendant Mahinko.



She confirmed her evidence that sometime in April 2011, Defendant Mahinko asked her to give him money to pay for his rent at Mele Devil's Point. She confirmed she withdrew VT80,000 at ATM Au Bon Marché No.2 and she gave him 75,000VT and 5,000VT was for the hotel they spent a night in at Blue Pango Motel. She added that Defendant Mahinko did not steal VT75,000 from her but she gave that money to him to pay for his rent accommodation at Mele Devil's Point otherwise he would be thrown out by his land lady.

She confirmed also that during her good relationship with the Defendant, she had told the Defendant Mahinko of her intention to go back to Africa with her children. She said the Defendant asked her about the number of the children she has and the costs of the airfares tickets to Africa. She said she told him the costs is about VT860,000. She confirmed that Defendant Mahinko offered to help her with the purchase of the tickets to Africa. She was challenged that she had asked money to Defendant Mahinko but she maintained that she had never asked Defendant Mahinko to give her money or anything as Defendant Mahinko made her think that he has nothing. She was challenged about her giving Defendant Mahinko VT400,000 but she maintained and confirmed her evidence that Defendant Mahinko told her to give her money to him so that he could deposit the money to his Bank account at Westpac Bank and this was because Defendant Mahinko told her that her husband could block her account. She said she believed Defendant Mahinko. However, she realized that Defendant Mahinko lied to her and he is not an honest man. She was asked if she had a strong relationship with the Defendant. She answered that she did open her heart to him. They had a strong relationship. She said the Defendant knew about her weak points and he used them against her.

She further said that subsequently after she had given her money to Defendant Mahinko, she found out that the Defendant made enquiries and obtained information about her. She also said that as soon as she gave her money to Defendant Mahinko, he left her and lived with another woman.

She said it was Defendant Mahinko plan to go to Solomon Islands. She wanted to return back to Africa with her children. She wanted Defendant Mahinko to give her money of VT475,000 back. She confirmed that Defendant Mahinko did not steal



VT400,000 from her. She said she gave that money of VT400,000 to Defendant Mahinko at her house during lunch time and at that time her son of 2 years of age was sleeping there.

She confirmed she gave him the money. She said she thought Defendant Mahinko used her money to pay for the airfares for Solomon Islands but she maintained that she gave him VT400,000 to keep it safely in his bank account because she believed him when he told her that her husband could block her account.

She confirmed that she went to see Defendant Mahinko at Le Rendez-vous Restaurant where he resided after he left Mele Devil's Point accommodation. She confirmed her evidence of an incident happening at Le Rendez-vous Restaurant between her and Defendant Mahinko. She said she asked Defendant Mahinko to sign a letter acknowledging the debts of money he owed to her as proof (evidence). She added that if Defendant Mahinko had signed the acknowledgement letter she would not be in court. At that time, she said Defendant Mahinko assaulted her. She also said that when Defendant Mahinko started to be nasty to her, she spoke to Serah about her problems. She further said her bank records showed the withdrawal of VT75,000 and VT400,000 she withdrew from her bank account and gave the monies to Defendant Mahinko. When questioned, she denied she made the complaint against the Defendant in order to have him back. She insisted she wanted her money back as she wanted to go back to Africa with her children as she had problems with her husband. She was asked and she confirmed she has 3 houses in Africa. She denied she sent money in Africa to build the houses. She said except once, she sent money to Africa when Defendant Mahinko advised her to get a passport for him in Africa. She also denied she used the money for school fees and accommodation because she used her husband account to pay for accommodation and food. She did not pay for school fees. They are free. She maintained she withdrew money in her bank account and gave them to Defendant Mahinko and she denied she used the money for other purposes.

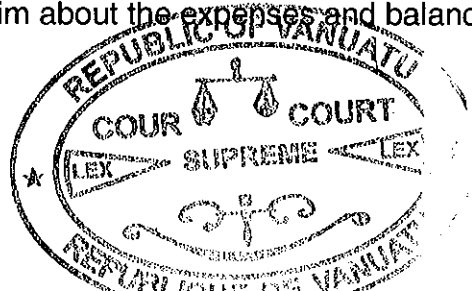
Mrs Kadiatou was re-examined. She confirmed the following: She had only one bank account. It was at Bred Bank. She opened that Bank Account to save money with a view to pay airfares for herself and her children to return to Africa. She started to



withdraw from her bank account when she met Defendant Mahinko. At the first time, Defendant Mahinko told her that he did not have the money to pay for his rent otherwise his land lady will throw him out. She withdrew money and gave him VT75,000. She said it was the understanding that Defendant Mahinko will repay her money of VT75,000 back. On the second occasion, she withdrew VT400,000 and gave it to Defendant Mahinko and it was for him to deposit safely in his bank account and it was the agreement that once they would left Vanuatu for Africa, Defendant Mahinko would give her money back. She said she did not give him the money to move to the Solomon Islands. She said she gave the money VT400,000 for Defendant Mahinko to keep it safely in his bank account. She gave the Defendant VT400,000 in her lounge at Fresh Wota 4. She denied there were gifts exchanged between her and Defendant Mahinko. She confirmed he never gave her anything on the contrary, she gave him Vatu 475,000. She said her relationship with her husband was the same as ever. She did not trust him. They lived in the same house but separate rooms. She did not have sexual relationships with her husband but her husband assisted her financially with the children. She finally said Defendant Mahinko is not an honest man. Her intention to bring the matter to the police was to recover her VT475,000 but not to take back Defendant Mahinko.

The next prosecution witness is Gaetan Ruru. His evidence is to this effect.

He is the husband of the complainant. He states that his wife is from Mali and that they have three children. They live at Fresh Wota 4 and that he is employed as the French Translator at the Parliament House. He confirms that he gave to his wife 271,000VT for his wife to deposit so that it will help with their travel arrangement back to Mali. He confirms that he and his wife had agreed to her return with the children to Mali and that they had property in Mali. He states that the Defendant had lunch with them and that he was aware of the affair that his wife was having with the Defendant. He became aware of the money issue when he arrived from an overseas trip to find the Police with his wife at their home. He found out that even the 271,000VT which he had given to his wife was also withdrawn and that his relationship with his wife since the money being taken is better than previously. Under his cross-examination, he confirmed his evidence in chief and he added that he made agreement with his wife that she hold his ATM card to take care of the households and sometimes she informed him about the expenses and balance.



Serah Manuake is the next witness. She gave evidence to this effect. She is a good friend of the complainant. She states that they have been food vendors for two years or more. She states that she is aware of the problems that Mrs Kadiatou and her husband face and that she has on several occasions been sorry for her. Additionally she was the person who translated the text message that the defendant had sent to Mrs Kadiatou. She had encouraged Mrs Kadiatou and could see that as they slowly got to know each other Mrs Kadiatou became fond of the defendant. She states that the defendant use to drop the complainant off at the house with her market food. She further states that he always came and had lunch at Kadiatou's house. She recognized his vehicle and on one or two occasions she saw the defendant with the complainant in the house when she went to visit. She also states that she knew that the complainant was selling food at the road market because she wanted to leave her husband and return to Mali. She stated that it was towards the end of April and May that she realized that Mrs Kadiatou was no longer making contact with the Defendant but instead she was looking sad and even the complainant suggested she may be pregnant. She said the complainant later told her the truth in relation to her frustration at the defendant. She said words to the effect that she was angry because the defendant did not give back the money that she had given him. She was cross-examined but she maintained her evidence in chief.

Klem Camille is another prosecution witness. He is a bank Officer who is in charge of fixed deposits at the Bred Bank. He gave evidence that he is related to the complainant's husband. He went further to say that as an Officer of the banks he opens term deposits and closes them at the request of customers. He states that he closed the term deposit of the complainant and transferred 400,000VT to her Savings account on the 6<sup>th</sup> of April 2011. He further states that Mrs Kadiatou gave no reason for the transfer and he did not ask but normally a person would close a term deposit to either start his or her own business or because of personal reasons but as an Officer he did what the client requested.

Sandrine Hollerer is the next prosecution witness. She is the former land lady of the Defendant. She testified that Defendant Mahinko moved from an apartment he rented at 65,000VT per month to another at 75,000VT per month. She said monthly rental are paid by advanced payments. She said Defendant Mahinko defaulted for



his rentals of March and April.

She gave evidence in relation to the last month that the Defendant spent at Devil's Point road. He left her premises on the 6<sup>th</sup> of May 2011 and moved elsewhere after he had paid his two months rent of VT150,000 for the month of March and April.

Ronnie Nganga is another prosecution witness.

He is the Bank Officer whom the complainant made the withdrawal of 400,000VT from, her account in Bred Bank on the 18<sup>th</sup> of April 2011. As a Bank Officer, he was required to give details of the account of the complainant. He gave her name Kadiatou Ruru Diallo, he gave her account number her balance on the date 22/03/11. He gave the deposits the complainant had made on 25<sup>th</sup> March, 28<sup>th</sup> March 29<sup>th</sup> March 30<sup>th</sup> of March and the 1<sup>st</sup> of April, He then gave information to a withdrawal on the 4<sup>th</sup> of March, and then further deposits made on the 4<sup>th</sup> of March 2011. On the 6<sup>th</sup> of March 2011 a transfer of 400,000VT was transferred from her fixed deposit to her Savings account. A withdrawal made on the 12<sup>th</sup> of April and the withdrawal of 400,000VT on the 18<sup>th</sup> of April, another withdrawal on the 21<sup>st</sup> of April 2011. He told the court that what she has left in the account is the amount of 583VT the interest which the bank auto generated by the bank.

James Narwayeng is the second last prosecution witness.

This witness is the Deputy Immigration Officer; he gave evidence in relation to the status of the defendant, Mr. Mahinko. He gave evidence in relation to his arrival in Vanuatu. He also gave evidence as to how he moved from one job to another and that from the point of view of the Immigration his employees were frustrated with the Defendant resulting in Pacific Autronic refusing to extend his work permit, then he went to Bodiam who did all they could to ensure that he has a work permit and his residency were update then he left this employment. This resulted in Immigration opening a file on him. Immigration has sent him warnings but on one occasion he appealed to the Minister and it is still pending.

Inspector Merelyn George is the last prosecution witness. The Inspector gave evidence in relation to the complaint and the different statements that were obtained from witnesses and the Defendant. At no time during the record of interview did the defendant admit or deny any thing. He refused to say anything and as such this



matter is now before the Court.

That is the end of the prosecution evidence.

## **VI - THE CASE FOR THE DEFENCE**

Defendant Mahinko is a Hungarian citizen. It is the Defence case that he had a love relationship with the complainant woman. The complainant was jealous of the Defendant because he is leaving her to live with another woman. She made false allegations against him. It is the defence case that Defendant Mahinko had never taken any money from the complainant. It is also the Defence case that the Defendant had never gone to the complainant's house on April 2011 as alleged.

Defendant Mahinko gave evidence himself and called two other witnesses after his rights under s.88 of the Criminal Procedure Code Act [CAP.136] were read and explained to him.

## **VII - EVIDENCE OF THE DEFENCE**

The Defendant Henrik Karoly Mahinko gave evidence on his own behalf. His evidence is to the following effect. He is from Hungary, Eastern Europe. He is 35 years of age. He arrived in Vanuatu some 2 and ½ years ago to visit his ex-wife. On his arrival he started to visit mechanic workshop and Pacific Autronic offered good salaries for him to work at their workshop. He decided to stay in Vanuatu. Pacific Autronic applied for his work permit, paid him a salary of VT56,700 per month including one free vehicle, free mobile phone and one free apartment. He worked for Pacific Autronic for 4 months. On the 3<sup>rd</sup> month of his employment with Pacific Autronic, he found out that the company did not extend his work permit. They told him he did not need a work permit. He said they did not give his passport back so he went to the police.

He changed from Pacific Autronic and worked for Rental Cars for a period of one (1) month and he then worked for Bodiam. Then, he stopped working for a company as he has medical sick leave for his broken leg. He was asked and he said he arrived in Vanuatu with his Hungarian wife. She was not happy and she returned back to Europe. He then met a woman from Malekula (Maskelynes) and he married her on 11 January 2011. Her name is Shirley Obediah. He said he did not stay with his wife. He had opened a business in the Solomon Islands. His wife Shirley Obediah refused to follow

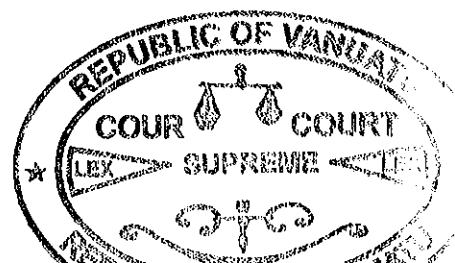




him to Solomon Islands. He said he separated from his wife on 5 April 2011.

He said he further met the African lady – the complainant in this case. He met her at Fresh Wota 4 at the market road where she sold food at the market road there. He was interested to know more about her because she is different, beautiful and she is from Africa. He asked her for her mobile phone number. He sent her a text message to tell her that he likes her. He met the complainant at No.1 Café while he was with his friend John Terry. When the complainant arrived, John left No.1 Café. The complainant and the Defendant then talked about how she came to Vanuatu. He said she told him that she had divorced her husband from Africa and she told him about her current husband. He said she asked him money of VT960,000 to go back to Africa with her three children. He mentioned that they did not have relationship but they were only friends. He said she asked him that money straight away. He said she told him she could do anything for him. He said he told her that he invested in the Solomon Islands. He could not give her that money. He said he told her that she could come with him in the Solomon Islands and worked for him there and invest money to go back to Africa. He said the complainant told him that she did not have enough money and her husband did not give her any money and she did not have enough money with her road market food sales.

He said he had tried to help her because the stories she told him about were very sad. He said she cried and told him that she will do anything for him if he helped her returning back to Africa. He smiled to her and told her she did not need to do anything but he would see what would happen later. He said after this meeting, he and the complainant met again and every time they met, they talked about her husband. He said he told her that to apply for work permit in the Solomon Islands is not easy as the complainant did not have the certified skills to work there. He said he had a relationship with the complainant. The first time, they spent a night at Blue Pango Motel. Everything was nice, perfect but later on, he said, she was more aggressive. He said they had spent more than one night at Pango Motel and he paid for the Motel. He said they had also spent some nights at Kaiviti Motel and Sky Garden. He provided the receipt that he paid VT9,000 the night bearing dates 10, 19, 22 and 27 April 2011. During these nights he said they have sexual relations and every time the complainant forced him to have sex and he paid for food, drinks and the motel rooms. He described his relationships with the complainant that they started very strongly but after the complainant started to



be jealous. She will call him more than 100 times a day. He said she complained to him as to why he went to his ex-wife.

He said he visited the complainant once at her house at Fresh Wota when her husband invited him for lunch. He said sometimes he visited her after lunch and she would force him to have sex and he would say no. On that Sunday, he said they had lunch, the complainant asked her about the Solomon Islands. She asked him for sex, he would say no because the house is hers and her husband was there.

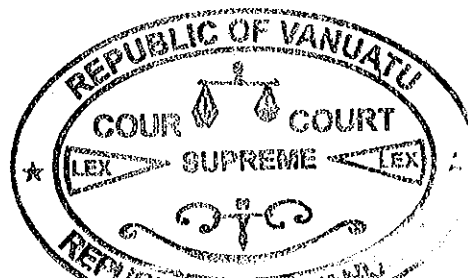
He also said the complainant told her she had small amount of money from her food sales at road market. She has asked him to go with her in Africa. He said the complainant told him that she had 3 houses in Africa and she sent money to Africa as one of her 3 houses is not finished yet. He said he did not recall and he denied going to the complainant's house in April 2011.

As to his daily needs, he said he had sold his Nissan truck of VT600,000 in December 2010. He sold 3 cars belonging to him. Every month, his ex-wife sent him his share of business from England of VT100,000 through Western Union.

He denied he had received VT400,000 from the complainant, Mrs Kadiatou. He said he did not have that money in his bank account or in cash. He said the maximum amount of money he has in his bank account is VT200,000.

He said he did not give money to Mrs Kadiatou but he paid for food, drinks and hotel accommodation when they met apart from the fact that she asked him to give money for her airfares to Africa. He remembered he saw the complainant's friend, Serah. He did not recall visiting the complainant at her house on 18 April 2011 as on that date they went to Beach Comber then to Emua road market and then they came back to Port-Vila. He said he is an auto-electrician and master examiner. He is the only one in Vanuatu. He said he taught boys for auto electrician free.

Under cross-examination, Defendant Mahinko said he worked for Pacific Autronic for 4 months but not 3 months. His ex-wife Mariana Sodak Zuzuanna returned to United Kingdom. He denied that he had overstayed his visit permit in New-Zealand in 2008.



He was asked and he accepted that when he arrived in Vanuatu he came on visitor's permit for 3 months. He was asked and he denied that to extend his stay in Vanuatu, he would need to look for a job. He stated that one Arvin Lal from Autotronic forced him to work because of his qualification. When he left Autotronic, he worked for World Car Rentals in 2010. He was asked and he denied that he operated a business in the Solomon Islands but he said he had just registered a company in the Solomon Islands because the Court or the police had his passport.

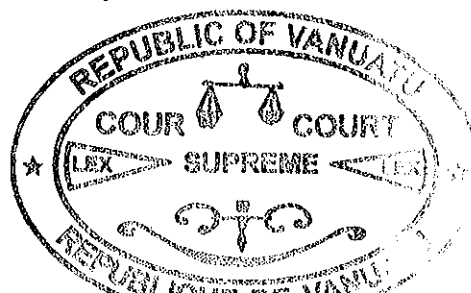
He confirmed he went to the road market at Fresh Wota every night and everybody at the road market there knew him. He confirmed that when he started to buy food from Mrs Kadiatou, he met with Serah for the first time. He was asked and he denied that Mrs Kadiatou has feelings for him and he denied she had trusted him during their relationships. He said he thought she saw him as the man who will take her out of Vanuatu.

He was then challenged about his evidence when he said that when he had just met with Mrs Kadiatou she asked him VT960,000 straight away. It was put to him how would it be so when he has just told the Court that Mrs Kadiatou did not trust him? He did not answer the question but he gave a response to the effect that he has to trust her in order to give her the money she asked. He was further asked this question: "Was it the first time you met her at No.1 Café? Have you ever met her before?" Defendant Mahinko did not respond to that question. He gave the following answer: "I do not know from the start but I heard from others – white people that she asked monies to go back to Africa."

He said his ex-wife sent him VT100,000 every month. It was put to him that his ex-wife tried to leave through Australia and he responded that his ex-wife could not go through Australia but New Zealand. She was given 18 days to leave and she left. He said he could stay.

He confirmed that by 20 May 2011, his relationship with Mrs Kadiatou had stopped. But she continued to call him. It was put to him and he denied that the reason for her calling him in May 2011 was for her VT400,000 she gave him.

He was asked and he confirmed that sometime in May 2011 before the incident at



Le Rendez-vous, Mrs Kadiatou came and met him at No.1 Café when he was with John Terry.

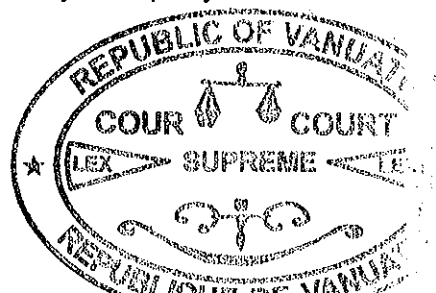
He confirmed that he told her he had problems with his stay in Vanuatu. It was put to him that Mrs Kadiatou told him that she could help him. He confirmed that he had talked to her in the phone. He confirmed she said she could help him because she had very good friend from immigration and that she said she has small money and that she can help him with immigration. He also said that when she arrived he told her that he did not need her money. He finally confirmed that Mrs Kadiatou did not know about his immigration status in Vanuatu until when she went to the immigration.

It was put to him and he denied that Serah saw him on several occasions at lunch time at the complainant's house at Fresh Wota 4.

He denied receiving VT400,000 from the complainant. He said when he had stopped working for the World Car Rentals he did not have a new employment contract with Bodiam. He denied working for Bodiam but said that at the beginning he worked for one George Lapi and sometimes he worked for Bodiam when they called on him for help. It was put to him that while he was still working for Bodiam, he started work for Bill Cheng but he replied he did not work for Bill Cheng. Bill Cheng did not pay him a salary, he said he helped him because they are friends.

It was then put to him that was the reason why Immigration asked him to leave the country. He denied and said only James Narwayeng asked him to leave Vanuatu. He has a problem with James Narwayeng. He confirmed that he is currently unemployed. He denied the complainant gave him money to pay for Blue Pango Motel.

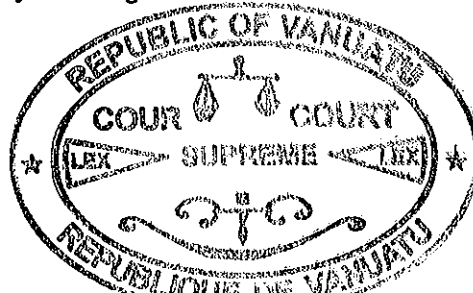
It was put to him and he denied that he had false information about his identity papers. He denied he wanted to entice Mrs Kadiatou. He said he like her and wanted to go with her in the Solomon Islands. He denied Mrs Kadiatou gave him VT400,000 at her house at Fresh Wota 4 on 18 April 2011 but he said she asked him for money. He said in April 2011, he was not employed but he said he sold 4 cars and his wife sent him his share from the family Company.



He also said that in April 2011, he stayed at Le Rendez-vous Restaurant free of charge. He ate free. The couple who own the Restaurant gave him money to eat and his ex-wife sent him money every month from January 2011. He was asked again and he denied that he had received VT400,000 from the complainant. It was put to him that he told the complainant to give him her money and for him to put it in his Bank account safely. He replied he said to her that she can work for him in the Solomon Islands. She can save money and go back to Africa. He confirmed that on 30 July 2011, he went to the work place of the complainant to buy a dress for his woman. He said the complainant saw him and talked to him about the baby she has as he said she was pregnant to him. He finally maintained that he never took any money from the complainant.

John Terry is the first witness of the Defendant. He is 44 years of age. He is from Malekula. He is the General Manager of National Housing Corporation. He knows the Defendant Henrik Karoly Mahinko since 2009. He knows about the relationship between the complainant and the Defendant. He had coffee with the Defendant from time to time at No.1 Café. He gave account of occasion the complainant came at No.1 Café to meet the Defendant. He lives at Fresh Wota 4 close to the area where Mrs Kadiatou lives. He was asked by the defence counsel if he saw Defendant Mahinko at the house of the complainant and he confirmed that Mrs Kadiatou called Defendant Mahinko to have lunch in her house. Sometimes she called Defendant Mahinko and they had lunch before lunch time i.e. 9.00am o'clock. John Terry was cross-examined. He confirmed he knew both the complainant and the Defendant. He acts as Defendant bigger brother when he has problem he would help him with finances and Defendant Mahinko would refund him when he had money. He was asked and he confirmed his evidence that Defendant Mahinko went and had lunch at the complainant's house. The complainant called him and he went to have lunch sometimes before lunch time.

Anna Dvorakov is the last defence witness. She lives at Elluk, Port-Vila. She is married. She is 46 years of age. She gets a business at Le Rendez-vous Restaurant. She is the owner of Le Rendez-vous Restaurant. She is originally from Hungary. She arrived in Vanuatu 5 and ½ years ago. She knows the Defendant



about 3½ years ago when the Defendant and his ex-wife came to Vanuatu after their visa expired and they introduced themselves. She said Defendant Mahinko came and stayed in an apartment at Le Rendez-vous in May 2011. She said she provided residence free, the food free after Defendant Mahinko left his former apartment at Devil's Point on 6 May 2011.

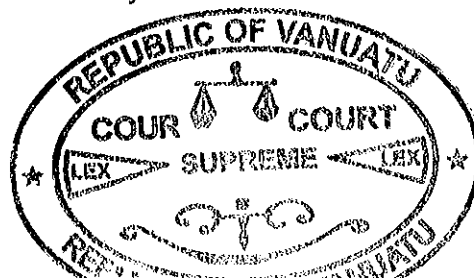
That is the end of the Defence evidence.

### **VIII - FINDINGS: DISCUSSION ON EVIDENCE**

There are two versions to the side of the evidence in this case. The prosecution evidence is that the Defendant had obtained money of VT400,000 from the complainant, Mrs Kadiatou by false pretences; and that the Defendant misappropriated the money of VT400,000. The Defendant's evidence is that he did not receive or obtained any money of VT400,000 from the complainant.

The first question posed is: Did the Defendant obtain money (VT400,000) from the complainant?

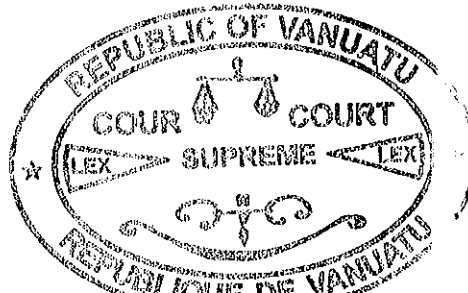
It is common ground the Defendant and the complainant had a love relationship which was developed and growing as their relationship grew from March, April and May 2011 "the relevant period". It is common ground that the complainant prepared and sold food at the road market at Fresh Wota 4 with other women including Serah Manuake. It is common ground that the complainant lives in a house at Fresh Wota 4 with her children. Serah Manuake's house is at Fresh Wota 4 on the other side of the road where the complainant's house is situated. The complainant and Serah knew each other and they are friends. The complainant talked to Serah about her problems with her husband. It is common ground that the complainant had problems with her husband. The complainant and her husband were separated but lived in different rooms in the same house with their children at Fresh 4. It is also common ground that because of the problem she had with her husband, she sold food at the road market to earn enough money to pay for the costs of airfares tickets for herself and her children to return to Mali – West Africa. The complainant told Serah about her plan to go back to Africa with her children. Serah confirmed this in her evidence that she knew Mrs Kadiatou did road market for her travel with her children back to Africa. It is also common ground that John Terry's house is situated also at Fresh



Wota 4 and it is near the complainant's house. Mr John Terry knows about the complainant and the Defendant. It is common ground that at the relevant period, the complainant loved the Defendant and trusted him. They both spent nights in several motels around Port-Vila. It is common ground that the Defendant rented an apartment at Mele Devil's Point until 7 May 2011 when he moved to Le Rendez-vous Restaurant and from 7 May 2011, the Defendant resides and eats free of charge at Le Rendez-vous Restaurant at the expenses of the owner of the Restaurant. This is confirmed by the evidence of Anna Dvorakov who is the owner of Le Rendez-vous Restaurant and second witness of the Defendant.

I accept Mrs Kadiatou's evidence that because of her love and trustworthy relationships with the Defendant, she admitted to him of her intention to leave her husband and take her children back to Africa. Her husband did not treat her properly so she was separated from him and she sold food on road market to purchase tickets for her and her children to return to Africa. It is accepted that the complainant and her husband discussed and agreed for the complainant to return to Africa with the children. It is also accepted that her husband gave her VT271,000 toward the payment of the air tickets to Africa. She had also informed Defendant Mahinko of the accounts she had at Bred Bank. I accept her evidence that the Defendant told her to give him her money so that he could complete the monies toward the travel and could travel together with the complainant and her children to Africa.

I accepted the complainant's evidence that she care, loved and trusted the Defendant. That is the reason why in April, Mr Mahinko asked Mrs Kadiatou to pay for his rental of the month of May of Vatu 75,000 otherwise he will be thrown out by his land lady. Mrs Kadiatou withdrew VT80,000 from her ATM Machine at Au Bon Marché No.2. She gave him VT75,0000 in his car and gave him VT5,000 for the Pango Motel where they spent the night there and this was on the second occasion they spent the night there. I accept her evidence that she gave the money to the Defendant to pay for the Motel on that occasion at Pango. There is evidence in support of the withdrawal of VT80,000 on 4 April 2011 at Bred Bank ATM Machine in the account name of the complainant (evidence of the two Bank Officers, namely Klem Camille and Ronnie Nganga). Sandrine Hollerer's evidence shows that the Defendant defaulted in his advance payments of his rentals at the Mele Devil's point

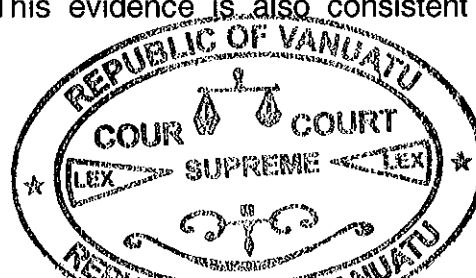


accommodation for the months of March and April 2011. However she said, the Defendant paid for the rentals on 5 April 2011 which was a day after the complainant gave him VT75,000.

I also accept her evidence that it was a Monday morning when the Defendant asked her to give him VT75,000 to pay for his rental of the month of March 2011 at Devil's Point. The Defendant told her to refund her by Wednesday. But he failed to do. It is accepted on the parts that the Defendant had loan of VT75,000 to the complainant.

I also accept her evidence that few days after she had given him VT75,000, the complainant withdrew VT400,000 from her Bank Account and gave it to the Defendant because she believed the Defendant when he told her to give him her money to put it safely in his Bank account in order to ensure that the complainant's husband would not block the money in her account if he knew about their relationships. The evidence of the Bank Officers confirmed the details of how she withdrew VT400,000 in her account at Bred Bank on 18 April 2011 with the bank statements in support. I also accept the complainant's evidence that when she was at the bank to withdraw VT400,000 the Defendant was at the house of John Terry and rang the complainant up and asked her if she had withdrawn the money.

I also accept the complainant's evidence that she had given money VT400,000 to the Defendant at her house at Fresh Wota 4 on the same date she withdrew it from her account while her son of 2 years of age was sleeping in the house. I did not accept the evidence of the Defendant that he went to the house of the complainant once during lunch time at the invitation of the complainant's husband. Serah's evidence which I accept, saw the Defendant on many occasions at lunch time at the complainant's house at Fresh Wota 4. Serah saw the Defendant transporting the complainant with her market goods from the market to the complainant's house on many times during the relevant period. Serah recognized the Defendant's car and saw the Defendant's car at the complainant's house during lunch times. Serah also went to the complainant's house and saw the Defendant was with the complainant in her house. John Terry who was the Defendant's first witness confirmed Serah's evidence that the Defendant, on many occasions, had his lunch at the complainant's house and sometimes before lunch time at 9.00am when the complainant called the Defendant to have lunch at her house. This evidence is also consistent to the

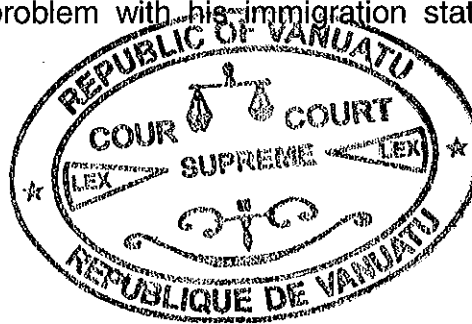




evidence of the complainant that on her earnings from her road markets, she deducted the money she would use for her markets for the next day including money for lunch for the Defendant and she placed the balance of her earnings at her Bank Account. The Defendant himself admitted that some times, he went to the complainant house but after lunch and on some instances the complainant asked him for sex and he said he refused.

I did accept the evidence of the complainant that she gave the money of VT400,000 to the Defendant on the same date she had withdrawn the money and that she had given that money to him in her house when her son was sleeping. This is consistent with other part of her evidence that when she was at the Bank withdrawing the money of VT400,000 on 18 April 2011, the Defendant was at the house of his friend, John Terry and rang her up asking whether or not she had withdrawn the money. John Terry's house on John Terry's own evidence is at the Fresh Wota 4 near the house of the complainant. It is highly likely that the Defendant, on 18 April 2011, knew that the complainant went to the Bank to withdraw the money from her Bank Account. That was the reason why while at his friend's house on 18 April 2011, he phoned the complainant asking whether she had withdrawn the money. As Mr John Terry's house is just near the complainant's house, it is highly likely that he went to the complainant's house on the same date and the complainant gave the money of VT400,000 to him to put it safely in his Bank Account as he had shown and suggested to her to put her money in his Westpac Bank International Credit Card Account safely from her husband.

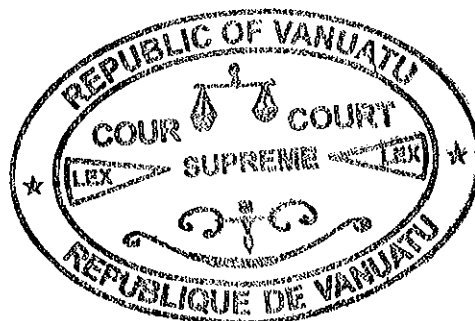
I reject the Defendant's suggestion that the complainant had lost her Bank Credit card. The Evidence which is accepted is that the complainant told the Defendant that she had lost her Wallet but she did not lose her bank credit card. I also reject the Defendant's suggestion that the complainant sent monies to Africa towards the building of one of her three houses. I accept the complainant's evidence that she did not send monies to Africa except once when the Defendant advised her to get a Passport for him to Travel with her and her children to Africa. It is common ground that the Defendant had problems with his immigration status in Vanuatu. This is confirmed by the evidence of James Narwayeng. This is also admitted by the Defendant when he told the complainant at No.1 Café that he had a problem with his immigration status. It is



common ground that the complainant intended to help the Defendant. She had some money. She thought she could pay the Defendant's fees for residency permit. She went to Immigration Department and that was when she discovered the problem that the Defendant has with immigration in Vanuatu. The Defendant did not tell her about his immigration status until she discovered by herself after she met the Defendant at No.1 Café on the second occasion. This was after she had given money of VT400,000 to the Defendant. It is common ground that it was after her meeting with Immigration Department that she had realized that the Defendant had a problem with his immigration status and if he would be deported from Vanuatu, she would lose her money. That was a Friday I accept that the prospect of the complainant to lose her money of VT400,000 was so real that she decided to ask the Defendant to pay her money of VT400,000 back. On the next day, she went to Le Rendez-vous Restaurant where the Defendant was residing. The Defendant was aggressive to her. He refused to talk to her. The complainant told the owner of the Restaurant Anna Dvonakov that the Defendant owed her money and she needed to talk to him. Anna asked the Defendant to talk to the complainant. The Defendant accepted. The complainant asked him to give her money VT400,000 back. The complainant asked him to sign a letter acknowledging his debts. The Defendant refused; he assaulted the complainant and threw her out of the room where they have their discussions. A fight between both started she called the police and the police took both into the police station and that was how the case started.

I reject the Defendant's evidence that the complainant lodged this complaint against him because she was jealous. It may be that she had difficulty because of her love relationship with the Defendant but, however, on my assessment of the complainant's evidence, she is truthful about her giving money to the Defendant. The evidence of Bank Officers and the Bank statements supported her evidence of the withdrawal of the money.

I finally accept the evidence of Serah that after April she saw the complainant was upset and unhappy. Serah thought the complainant was pregnant. But the complainant told her that she was not pregnant but she was upset because of the money she had given to the Defendant.



A handwritten signature in black ink, consisting of a stylized, cursive script.

On the evidence which is accepted, April 2011 was the month the complainant withdrew the monies VT75,000 and VT400,000 and gave Them to the Defendant. The month of April 2011 was part of the relevant period. I find that the Defendant's explanation that for his daily needs he had sold his truck VT600,000 in December 2010 and 3 other cars and his ex-wife send him every month from January 2011 VT100,000 his share from the family business, was untenable for the following:

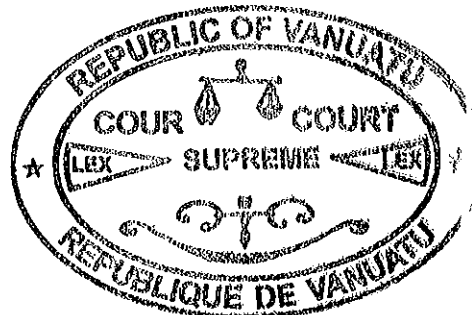
Mrs Mollerer's evidence which is not contradicted is that the Defendant failed to pay his advance rent payments for the months of March and April 2011. It is accepted that during the relevant period, the Defendant had his lunch at the complainant's house. Even after he left the Devil's Point Apartment, he was accommodated and fed free of charge since 7 May 2011 for a period of 3 months.

Anna Dvorakov's evidence that she and her husband paid for the accommodation and the food of the Defendant for a period of 3 months since 7 May 2011 confirms this.

On the balance of evidence, I find that the complainant gave a consistent and detailed version of facts. She is consistent through out. Most of her evidence is corroborated by the evidence of Serah, the two Bank Officers and John Terry. I accept her evidence as a trust and creditworthy witness.

The Defendant on the contrary, is not a creditworthy witness. The Defendant contradicted himself on several part of his evidence. An example of this could be found in his evidence in chief when he said the complainant asked him money of VT960,000 straight away to go back to Africa with her children. He gave evidence that he told her that he invested in the Solomon Islands. He would not give her that money. He said he told her that she could come with him in the Solomon Islands and worked for him there and invest money to go back to Africa. He set their departure time for Solomon Islands is set to 26 April 2011.

While he was cross-examined on this question, the Defendant denied that he operated a business in the Solomon Islands but that he had just registered a company in the Solomon Islands because the court or the police had his passport. At some stage during his evidence, the Defendant said he told the complainant that to apply for work permit in the Solomon Islands is not easy as the complainant did not have the required skills to work in the Solomon Islands.

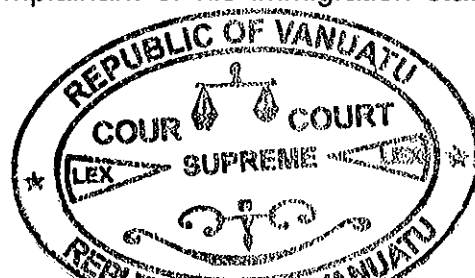


Another example of contradiction is the Defendant's evidence that when he said he arrived in Vanuatu some 2 and ½ years ago to visit his ex-wife while he said later on that he arrived in Vanuatu with his Hungarian wife.

A final example of contradiction in the Defendant's evidence is when he said he liked her very much. They had developed a love relationship and later on he denied the complainant had feelings for him and had trusted him. At some part of his evidence, the Defendant avoided to answer to the specific questions. I find that the Defendant is not a credible and trustworthy witness. I reject his version of fact of this case.

The next question posed is: Did the Defendant obtain money of VT400,000 from the complainant by false pretences?

The complainant's evidence is that on 18 April 2011, she had withdrawn money of VT400,000 and gave that money to the Defendant. The complainant gave this money to the Defendant because the Defendant offered to assist her with the costs of the airfares to Africa. Further the complainant's evidence is that the Defendant suggested to her to put her money safely in his Bank Account (Westpac Banking International Credit Card) to ensure that her husband would not block her account if he would know about the complainant's relationships with the Defendant. The complainant's evidence is that she believed the Defendant and trusted him. The complainant's evidence is also that she gave her money of VT400,000 to the Defendant not only because she believed him but she said it was an agreement that once they would leave Vanuatu for Africa, the Defendant would give her money back to pay for the tickets. She said she did not give him her money to move to Solomon Islands. She gave her money of VT400,000 to the Defendant for him to keep it in his Bank Account safely, from her husband. She realized later on that the Defendant was not an honest man. Sooner after she had given him VT400,000 the Defendant very rarely contacted her. He stopped contacted her and moved and stayed with another woman. It is common ground, the Defendant arrived in Vanuatu with his Hungarian ex-wife. She was forced to leave the country. In January 2011, the Defendant married with a Ni-Vanuatu woman. On his own evidence he did not live with her. He met the complainant. He made representations to the complainant. The complainant believed him and gave him money of VT400,000. The Defendant had not disclosed to the complainant of his immigration status until their



second meeting at No.1 Café which led the complainant to attempt to resolve the Defendant's immigration problem. It was a secret for her until she was told by the immigration officers of the immigration problem of the Defendant. The complainant then realized that the Defendant might not be in a position to give her money back. She thought the Defendant had used her money to pay for the work permit in the Solomon Islands. The Defendant's actual intention is to deceive the complainant by asking her to give him her money of VT400,000 on the basis that her husband could have blocked her account if he found out of her love relationships with him (the Defendant). The next stage of the deceit was the fact that although on his own evidence, the Defendant did not invest in the Solomon Islands but that he has registered a business there, he gave evidence that he told the complainant that he had invested in the Solomon Islands and that he had told the complainant to come with him in the Solomon Islands and worked for him there in order to invest money and pay for her return tickets to Africa. The Defendant knew that what he told the complainant about was not true or that he did not believe what he told the complainant to be true. This was confirmed in the Defendant's own evidence. When he attempted to explain to the complainant that to apply for work permit to the Solomon Islands is not easy as the complainant has not met the skilled requirements to work in the Solomon Islands. This is the evidence of the Defendant's intention to expose the complainant there to by means of that deceit or secret.

I find that the Defendant caused the complainant to give money to him to which he was not entitled and therefore the element of fraud is made out.

The last question is: Did the Defendant misappropriate the money of VT400,000?

There is evidence that the complainant had withdraw VT400,000 on 18 April 2011. It is accepted that money of VT400,000 was given to the Defendant by the complainant. It is accepted evidence that on the representations of the Defendant that the complainant's husband could block the complainant's Bank Account if she kept her money in her Bank Account, she believe the Defendant of that representation. She then withdrew VT400,000 and gave it to him to deposit safely in his Bank Account. It is accepted evidence that the Defendant will give back the money VT400,000 toward the payment of airfares ticket to Africa. It is accepted evidence that the complainant asked the Defendant to pay back her money of VT400,000. The Defendant refused. This led the complainant to confront the Defendant at Le Rendez-vous Restaurant with a letter



of acknowledgement of his debts. The Defendant refused to sign the said letter. He assaulted the complainant and threw her out of the room. That was when she called the police. The police brought both of them at the police station and she lodged her complaint against the Defendant as the Defendant refused to give her money back. It is accepted evidence that the money of VT400,000 was entrusted to the Defendant to keep it safely in his Bank Account towards the payment of the airfares tickets to Africa. The Defendant has not given back the money to the complainant when asked. On the contrary, he has come to this court denying receiving the money VT400,000 on the basis of his contradictory evidence.

## IX - THE LAW AND ITS APPLICATION

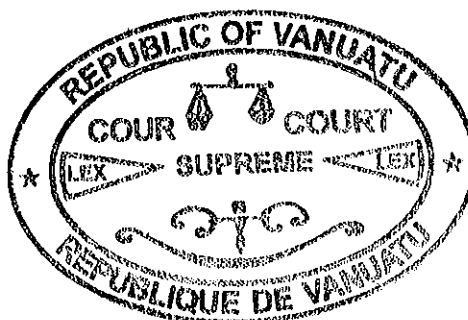
1. **Direction of the law** based on **Swanson -v- Public Prosecutor** (1997) VUCA, Criminal Appeal Case No. 06 of 1997.

In the present case, part of the prosecution evidence was based on circumstantial evidence. The prosecution has the legal burden to prove the elements of the charge against the accused person beyond reasonable doubt. In situations similar to the present case and based on circumstantial evidence, each item of circumstantial evidence does not have to be independently proved beyond reasonable doubt. A number of facts, each of which alone, is not proved beyond reasonable doubt, but, may, when taken together operate so as to justify an inference beyond reasonable doubt of an unlawful act of misappropriation and false pretences.

This was best illustrated in **R v. Exall** (1866) 4 F & F 922 Pollock CB, employing the analogy of a rope, said, at page 929:

*"One strand of the cord might be insufficient to sustain the weight, but three stranded together may be quite of sufficient strength. Thus, it may be in circumstantial evidence- there may be a combination of circumstances, no one of which would raise a reasonable conviction, or more than a mere suspicion; but the whole, taken together may create a strong conclusion of guilt, that is, with as much certainty as human affairs can require or admit of."*

In **Teper- v- R** (1952) AC 480 (at p489) Lord Norman provided useful explanation of circumstantial cases in this way:



*"Circumstantial evidence is receivable in criminal cases as well as civil cases; and indeed the necessity of admitting such evidence is more obvious in the former than in the latter; for in criminal cases, the possibility of proving the matter charged by direct and positive testimony of eye witnesses or by conclusive documents are more rare than in civil cases; and where testimony is not available, then, the jury are permitted to infer from the facts proved other facts necessary to complete the elements of guilt or establish innocence. It must always be narrowly examined, if only because evidence of this nature may be fabricated to cast suspicion on another. It is also necessary before drawing the inference of the accused guilt from the circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference..."*

*It has been said that circumstantial evidence is often the best evidence. It is evidence of surrounding circumstances which by undersigned coincidence is capable of proving a proposition with the accuracy of mathematics. It is not derogation to say that it is circumstantial".*

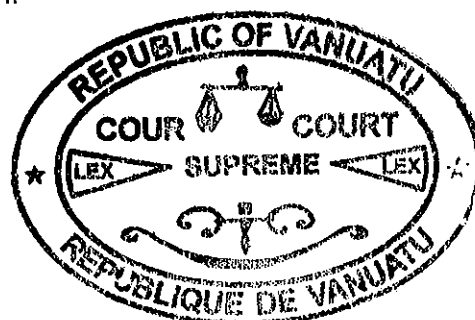
The prosecution is not required to disprove any inference that the ingenuity of the defence counsel might devise. It must exclude any reasonable hypothesis based on the evidence which is consistent with innocence but no more. [R v. Longalis (1993) 10 LRNZ 350 at p.359].

Section 8 of the Penal Code Act [CAP.135] indicates 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."

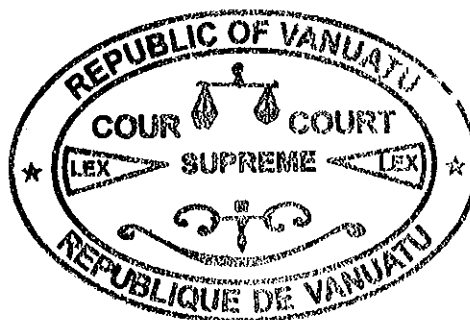
Inferences may be drawn from proven facts if they follow logically from them. If they do not, then the showing of any conclusion is speculation and not proof.

## **2. Application of the law**

The Prosecution and the Defence agree that in the case, there were no eye witnesses when the complainants gave money of VT400,000 to the Defendant. However, on the basis of proven facts, inferences could be drawn. The Court accepts the following submissions of the Prosecution:



- The Defendant became friendly with the complainant woman
- The Defendant soon befriended the complainant and their relationship grew as the affairs grew
- Their love relationship is not kept secret as it was known to the complainant's husband, Serah and the Defendant's adopted brother John Terry.
- It is common ground that once the affair grew, there was a level of trust and a personal history of marriage life of the couple given to the Defendant and Serah by the Complainant.
- The Defendant showed love, care and trust and pity's to the complainant.
- The complainant has no longer consulted her husband in relation to her travel as she then informed the Defendant and she earned his trust.
- The Defendant took the complainant to Pango Blue Motel on the 4<sup>th</sup> April 2011. The Complainant gave him VT5,000 to pay for the Pango Motel. This was the second occasion the Defendant and the complainant spent time together at Pango Blue Motel.
- The complainant closed her term deposit on 6 April 2011.
- 12 days after she had closed her term deposit, the complainant withdrew VT400,000 on 18 April 2011.
- She said she gave money of VT400,000 to the Defendant at her home. It is accepted that this was what happened on the evidence and proven facts and inferences shown from those facts.
- The Defendant and the complainant spent a night on the 19<sup>th</sup> April 2011 at Kaiviti Motel.
- The Defendant failed to contact her for several days.
- The complainant contacted him and he abused her on the phone.
- He then called her at one stage to tell her that the complainant and herself will be leaving for Solomon Islands on 26 April 2011.
- She was infuriated and angry believing that the Defendant had spent her money to purchase the work permit in the Solomon Islands and she demanded that he refunded her money.
- The Defendant continued not talking nicely to the complainant or abused her until she had enough that she went to the Defendant's place of residence at Le Rendez-vous Restaurant.



*[Handwritten signature]*



- The complainant demanded that the Defendant refunded her VT400,000. He refused to refund her. She asked him to sign an acknowledgement letter of debts. He refused, assaulted her and threw her outside the room.
- She called the police. Police took both of them to the police station. She lodged her complaint against the Defendant and the whole money issue became known not only for the police to investigate but also her husband was also informed when he saw police officers at his home after an overseas trip.

On the basis of the evidence as found by the Court, I am satisfied that the prosecution has proved beyond reasonable doubt that the complainant has given money of VT400,000 to the Defendant on 18 April 2011.

On the evidence as found by the Court, I am satisfied that the Defendant intended to expose the complainant by means of a deceit. I am satisfied that the prosecution has proved beyond reasonable doubt that the Defendant has caused the complainant to give money to him to which he was not entitled and therefore to defraud the complaint of her money of VT400,000.

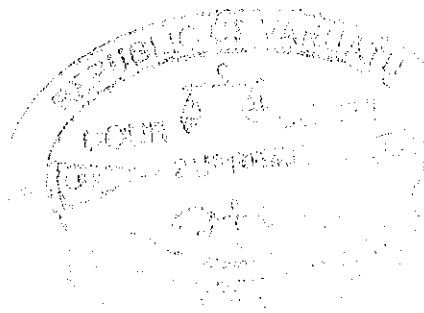
The prosecution has proved beyond reasonable doubt the required elements of the offence of obtaining property by false pretences, contrary to section 125(c) of the Penal Code Act [CAP.135].

As to the offence of Misappropriation, on the basis of proven facts, I am satisfied that the complainant gave her money of VT400,000 to the Defendant to keep it safely in his Bank account.

The Defendant was asked to refund the money. He failed to do so when asked. I am satisfied that the prosecution has proved beyond reasonable doubt the required elements of the offence of misappropriation, contrary to section to section 125(b) of the Penal Code Act [CAP.135].

## **X - VERDICTS**

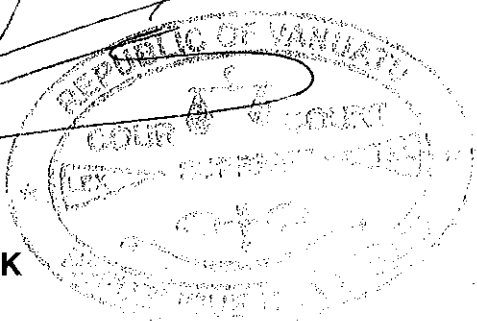
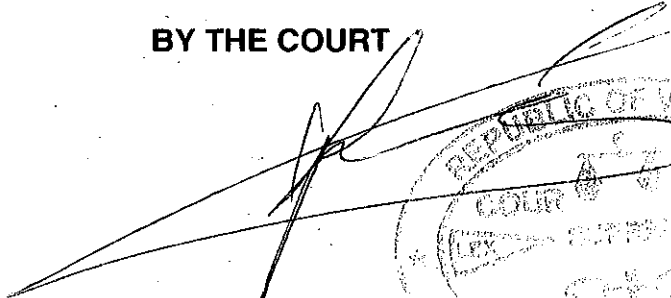
1. I find Defendant, Karoly Henrik Mahinko guilty for:



- Obtaining property by false pretences, contrary to section 125(c) of the Penal Code Act [CAP.135] as charged in count 4; and
  - Misappropriation, contrary to section 125(b) of the Penal Code Act [CAP.135] as charged in count 2.
2. I find Defendant, Karoly Henrik Mahinko not guilty for the following offences:
- Theft, contrary to section 125(a) of the Penal Code Act [CAP.135] in count 1. He is acquitted accordingly.
  - Obtaining property by false pretences, contrary to section 125(c) charged against him in count 3. He is acquitted accordingly.
  - Fraud by Trustee, contrary to section 128 of the Penal Code Act [CAP.135] charged against him in count 5. He is acquitted of that charge accordingly.
3. Prosecution and Defendant counsel shall prepare submissions for the sentence of the Defendant, Mahinko Karoly Henrik in respect to the Defendant's guilty verdict on counts 2 and 4 which is scheduled on 9 December 2011 at 9.00am.

**DATED at Port-Vila this 21<sup>st</sup> day of November 2011**

**BY THE COURT**



**Vincent LUNABEK**  
**Chief Justice**