

PUBLIC PROSECUTOR

-V-

DIANA MISIPI

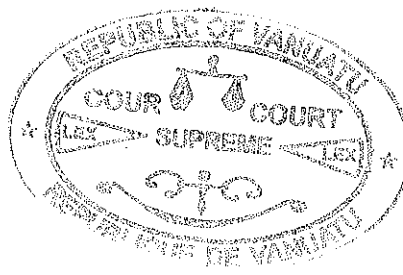
Coram: *Mr. Justice Daniel Fatiaki*

Counsel: *Mr. D. Boe for the State*
Mr. John L. Napuati the for defendant

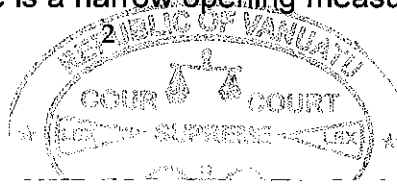
Date of Decision: 22 May 2015

VERDICT

1. The defendant Diana Misipi is charged with two offences. Theft contrary to Section 125 (a) of the Penal Code and an alternative count of Misappropriation contrary to Section 125(b). She pleaded not guilty at her arraignment in October 2013 and after three separate unsuccessful trial fixtures were set in 2014 the trial eventually took place in April 2015.
2. The allegation against the defendant is that during the course of her employment as a teller/cashier of Goodies Limited she stole a sum of VT1,145,000 on 1st February 2013.
3. This being a criminal trial I remind myself that the prosecution bears the burden of establishing the defendant's guilt on the charge(s) beyond all reasonable doubt. The defendant does not have to prove her innocence or say anything in her defence. She is entitled to rely on the presumption of innocence which was read out to her at the beginning of the trial in accordance with **Section 81** of the **Criminal Procedure Code [CAP. 136]**.
4. In order to establish the offence of Theft by the defendant the prosecution must produce evidence that proves the following elements:
 - (a) The defendant took cash money in the amount of VT1,145,000 belonging to her employer Goodies Limited;
 - (b) The defendant did not have the consent or agreement of Goodies Ltd. to take the money;

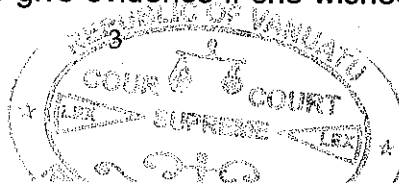


- (c) That at the time of taking the money the defendant did not have any claim or right to take the money; and
- (d) The defendant intended to keep the money at the time of taking it.
5. To establish its case the prosecution called eight (8) witnesses and produced three (3) documentary exhibits. The witnesses were:
- Ory and Noam Covo – the owners and managers of Goodies Ltd.;
 - Nelly Frank; Lotty Raptigh; and Dorian Tari – work colleagues of the defendant and her supervisors employed by Goodies Ltd.;
 - Rebecca Johnas – manager of Marine Consultancy Services which operates a shipping service transporting cargo between Port Vila and the northern islands including Pentecost Island;
 - Bouledam Banmasen Didier – a relative of the defendant from Namaram village in Central Pentecost island; and
 - Sgt. Risa Fred – the investigating officer in the case who produced an ONG store Invoice No. 0035 dated 4 February 2013 [**Exhibit P(3)**].
6. Without detailing the evidence of each of the prosecution's witnesses (most of which was undisputed) I am satisfied the prosecution evidence establishes the following facts beyond a reasonable doubt:
- (a) Goodies Limited operates a foreign exchange business in Port Vila buying foreign currency and selling Vatu currency in exchange. It has 3 outlets or shops – a main branch at Olympic court opposite Healthwise pharmacy; a branch opposite Westpac Bank; and a smaller shop beside ANZ bank;
- (b) Goodies operates 5 cash tills during the week, 3 tills on Saturday, and 1 till on Sundays at the main branch. Each till is opened daily with a constant float of VT1,270,000 and is checked by a supervisor twice a day at lunchtime and at the end of a day's trading. The cash once counted and reconciled is then locked in a safe at the main branch;
- (c) The Goodies shop beside ANZ bank is located on the main street and has a small area within the entrance door for customers. There is a wooden counter with a glass screen above it which has a vertical slot where the customer can talk to the cashier and beneath it where the glass screen meets the counter, there is a narrow opening measuring about 2 feet wide



by 8 inches high through which money exchanges are transacted. The shop has a metal shutter screen at the entrance door which can be pulled down to prevent customers from entering or seeing into the shop. When the shop is open the counter is clearly visible to passerbys on the footpath outside;

- (d) On Friday 1st February 2013 the defendant was allocated cash till No. 5 and worked alone at the small shop beside ANZ bank. On that day the defendant's till was checked at lunchtime by Dorian Tari a supervisor who worked at the branch opposite Westpac. However Dorian did not check the defendant's till in the afternoon as it was a Friday and all checking is done at the main branch opposite Healthwise where the safe is kept;
 - (e) Checking of a till involves counting all foreign and vatu currency and ticking off a cashier's book or work sheet and reconciling it with the computer system which maintains a running record of all transactions processed by a cashier;
 - (f) At the close of business on Friday 1st February 2013 the defendant did not hand in any of the Vatu currency notes recorded in her cashier book or work sheets [**Exhibits P(1)(a) and (b)**] at the main branch for safe-keeping nor had any supervisor actually checked her work sheet or reconciled her till cash in the afternoon;
 - (g) On Friday 1st February 2013 when the defendant brought her till to the main branch she was asked about the Vatu notes and she said that her till had been checked by Dorian at the branch opposite Westpac and she had given Dorian her Vatu currency notes;
 - (h) The next day Saturday 2nd February 2013 a shortfall of 1,145,500 Vatu currency was detected in cash till No. 5 which was the defendant's till the day before;
 - (i) On Monday 4th February 2013 the defendant sent a text message to Dorian that she had lost the money because she was busy and she had left her cash on the counter and bent down to count her coins and when she came back up there was no money on the counter;
 - (j) The defendant is a very good customer of Marine Consultancy Services and has shipped cargo to her family's business Buleguru Store in Pentecost Island since 2010 until 2013 [**Exhibit P(2)**];
7. At the end of the prosecution's case, the defendant was advised of her right to call witnesses and to elect to give evidence if she wished or to remain silent in



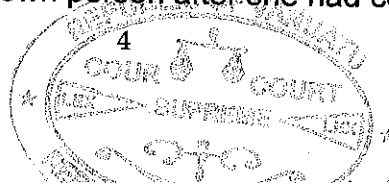
accordance with **Section 88** of the **Criminal Procedure Code [CAP. 136]**. The defendant elected to give evidence and was cross-examined.

8. In her evidence the defendant confirmed that on Friday 1st February 2013 she had cash till No. 5 and worked alone at the small Goodies shop near ANZ bank. She described the layout of the shop and the teller's counter and how she was 6 months pregnant at the time and had difficulty bending down to go through a space under the counter to get to her work area behind the counter. Although there was a ship in port she did not have a busy afternoon.
9. At about twenty to 5pm nearing closing time she had taken out her Vatu currency notes and had counted them and tied them up in a single rolled bundle bound by a rubber band which she left on the counter whilst she bent down to count her Vatu coins that were inside plastic packets. When she got up to enter the amount of coins in her work sheet she noticed the roll of Vatu currency notes was missing from the counter.
10. When asked in chief:

Q: *"After money was lost what did you do?"*

The defendant answered:

A: *"After the money went missing I took my note book and I ticked all the boxes because I was too afraid ('mi fraet tumas') because I lost such a large amount".*
11. She then took her till to the main branch to be checked and when Lotty Raptigh asked her if her money had been checked she told her: *"Yes mi givem lo Dorian"*. She gave the manager Noam Covo her foreign currency and went home. She didn't tell her colleagues about the missing money because: *"From se mi bin fraet tumas be hemi wan big amaon ilusum"*.
12. She was shown her work sheet for Friday 1st February 2013 [**Exhibits P(1)(a) & (b)**] and she purported to identify three (3) minute variations in her handwritten numbers which she said was caused by her shaking hand (*"hand blo mi seksek"*). She never returned to work after the money had gone missing. Several weeks later she next met her boss Ory Covo at the Police station and again at Chantilly's where she offered to pay him back VT126,000 but he refused.
13. In cross-examination she admitted that the normal procedure before counting money was to close the entrance metal shutter but she had not done so on the 1st February 2013 because she was 6 months pregnant and found it difficult to bend under the counter. She was adamant that the missing money was taken from her counter by an unknown person after she had counted it and bent down



to count the coins. She denied stealing it and explained that cargo purchases she sent to their family store in Pentecost Island was paid for from income derived from her dried kava and copra businesses as well as earnings from a minibus taxi and 2 buses which she bought in 2007 and 2008 from personal funds.

14. In cross-examination she initially denied giving 2 "versions" of the missing money but when clarified for her, she eventually accepted that the second version namely, that the missing money was stolen from her counter by an unidentified person, was the truth. She frankly admitted that her first version i.e. giving the money to Dorian, was a lie she told because she was afraid at the time and because she had never lost such a large sum before. She also feared her boss Ory Covo would be angry with her as had occurred once before in an earlier incident in 2012 when her till was short of VT5,000 and she was held back in the office till late by her boss Ory.
15. In this latter regard I note that although her bosses Noam and Ory Covo gave evidence it was never put to either of them (in fairness) that such an incident occurred in 2012, and, although it was vaguely suggested to Nelly Frank, it was not pursued when she said: "*mi no save*". I also note and it is undisputed, that on 1st February 2013 Ory Covo the boss who was involved in the VT5,000 incident in 2012, was in Sydney, Australia and only returned to the office on Monday 3 February 2013. Similarly, Dorian Tari her supervisor who detected and reported about the VT5,000 shortfall was never asked about it in cross-examination as she should have been.
16. During the course of the defendant's evidence I observed her demeanour carefully and I was left with the distinctly unfavourable impression that she was a less than truthful witness. I disbelieve her in her grossly exaggerated claims of being "*afraid*" and in her description of how the roll of Vatu notes were stolen from off the counter while she was counting coins.
17. Perhaps the clearest example of that exaggeration was the vain and desperate efforts of defence counsel when examining the defendant in chief, in trying to spot so-called differences or variations between some numbers on the defendant's afternoon work sheet [Exhibit P(1)(b)] when compared with her morning work sheet [Exhibit P(1)(a)] apparently caused by her shaking hands, and being visible evidence of the defendant's fear at losing such a large sum of money in the afternoon. I reject this evidence as contrived.
18. I note that the defendant's first reaction to having lost such a large sum of money was not to close the shop and immediately report the loss to the police or to her supervisor as might be expected of an honest employee who had not herself stolen the money, instead, the defendant continued to count her foreign currency notes and quite dishonestly ticked her afternoon work sheet [Exhibit



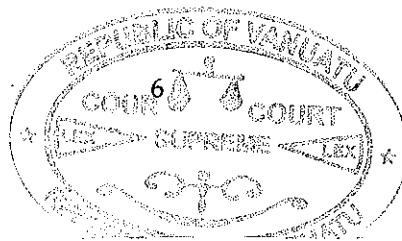
P(1)(b)] so as to show that her money had been checked when it hadn't been and in a conscious and deliberate lie when she was asked at the main branch, she named Dorian as the supervisor who had checked her work sheet and to whom she had given her Vatu currency notes when she well knew that that was not at all true and could get Dorian into trouble. If I may say so that is not the behavior of a fearful person and I reject the defendant's evidence that the Vatu notes were stolen by an unknown person.

19. Additionally even after the defendant had left and gone home that Friday evening she still did not report the matter to the police nor did she voluntarily make contact with her work colleagues or bosses the following day to inform them of the missing money from the relative safety of her own home (away from her bosses) and although she had not been dismissed she never returned to work again.
20. Defence counsel in his opening address raised the provisions of **Section 6(4)** of the **Penal Code** which provides:

"A person shall not be guilty of a criminal offence if he is merely negligent, unless the crime consists of an omission. A person is negligent if he fails to exercise such care, skill and foresight as a reasonable man in his situation should exercise".

and counsel suggests that the money was lost as a result of the defendant's negligence in leaving the roll of Vatu currency notes on the counter whilst bending down to count the coins. Counsel also mentioned that being six months pregnant at the time may have been a contributing factor to the defendant's negligence. In summary, defence counsel writes: *"It will be the defendant's defence that she failed to exercise due care as any reasonable teller would have exercised on 1 February 2013 which resulted in the lost (sic) of the money she is currently being charge with."*

21. I reject counsel's submissions for two reasons. Firstly, the defendant's negligence was not so much in leaving the roll of counted Vatu notes on her counter but rather, in her failure to shut the entrance door metal shutter before commencing the counting thereby enabling unrestricted public access and visibility into the shop while the counting was in progress. Secondly and more importantly, the provision is only relevant where an offender commits an offence of commission but lacks the necessary criminal intent. In the present case the defendant's defence is a complete denial of the offence including the physical element of taking and carrying away the missing money.
22. After carefully considering all of the evidence and reminding myself that the defendant need not prove her innocence, I am satisfied that the prosecution has established its case beyond a reasonable doubt and I find the defendant



guilty of the offence of Theft as charged and I remand the defendant on bail for sentencing on 12th June 2015 at 3pm.

23. In the meantime I order a pre-sentence report be prepared, filed and served on counsels by the Probation Services Department by 29th May 2015 with the assistance of the defendant. Thereafter both counsels are to file sentencing submissions on or before 5 June 2015.

DATED at Port Vila, this 22nd day of May, 2015.

BY THE COURT



D. V. FATIAKI

Judge.

