

**IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU**
(Criminal Jurisdiction)

Criminal Case No. 1345 of 2016

PUBLIC PROSECUTOR

-v-

MICHAEL TABINOK

Coram: V. Lunabek- CJ

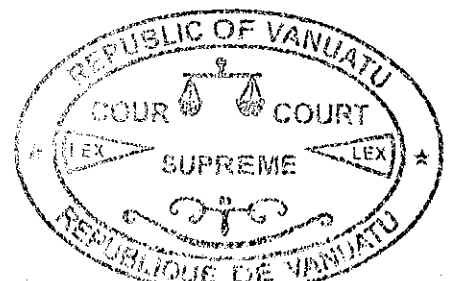
Counsels: Mr Philip Toaliu for Public Prosecutor
Mr Eric Molbaleh for the Defendant

Date of Delivery: 23rd August 2017

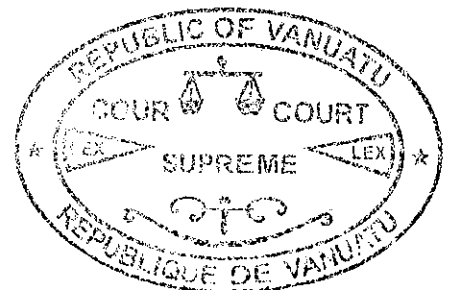
REASONS FOR VERDICT

I. Introduction: Nature and Particulars of Offences and Pleas

1. This is the judgment in this case. Defendant Michael Tabinok is charged with one count of unlawful entry into a shop with intent to commit an offence therein (count 1) and one count of theft (count 2) contrary to sections 143 and 125 of the Penal Code Act [Cap 135], respectfully.
2. The details of the allegations against Defendant Michael Tabinok are these:- on or sometime between 29th October and 30 October 2015 at Onlapapa Village, East Pentecost, Michael Tabinok unlawfully entered Sisbaleh Community Store with the intention to commit the crime of theft; and on or between 29th October and 30th October 2015 at Onlapapa Village, East Pentecost, Michael Tabinok stole an amount of cash VT1, 096, 000 with the knowledge that the money belonged to Sisbaleh Community Store.
3. On 19 May 2016, Michael Tabinok entered not guilty pleas on count 1 of unlawful entry and count 2 of theft as charged against him in the information dated 9 May 2016.



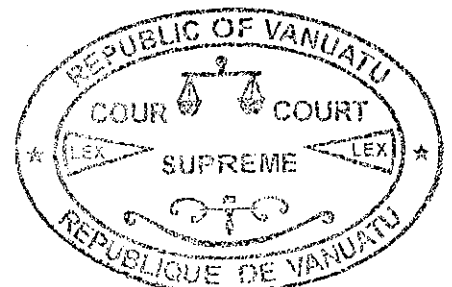
4. A trial was required. In this case a trial within a trial (Voir dire) was conducted from 27 May to 31 May 2016 as the Defence challenged the cautioned statement of Michael Tabinok and also his record of interview in which he admitted he stole an amount of 300,000 Vatu from Sisbaleh Community Store on the night between 29 October and 30 October 2015. The nature of the challenge was that Defendant Mr Tabinok did not voluntarily made those admissions. It was said he made these admissions on the basis of some force and one of the police officers who arrested him at Second Lagoon Red Light Nakamal, assaulted him in the police vehicle on the night of his arrest.
5. The Court gave its ruling on the Voir Dire on 25 April 2017. The Court found and was satisfied beyond reasonable doubt that there was no assault on Defendant Michael Tabinok as he alleged on 22 November 2015. But that he had made the admissions that he had entered into the store and had stolen 300,000 Vatu from Sisbaleh Community Store voluntarily to the police officers in his statements taken to the police officers dated 23 November 2015 and 24 November 2015. These two statements were tendered and marked as Exhibits P1 and P2.
6. The substantive trial took place at Enar Village, Central West Pentecost, on the week commencing 21 August 2017. Before the commencement of the trial, the prosecution applied to amend Count 2 in the information dated 21 August 2017 and in particular count 2. The amendment was in respect to the total amount of cash money in vatu that the prosecution has alleged Defendant Michael Tabinok had stolen at Sisbaleh Community Store on or between 29 October and 30 October 2015. The prosecution alleged that Defendant Michael Tabinok has stolen an amount of cash money of VT1, 096, 000 at the Sisbaleh Community Store on or between 29 October and 30 October 2015. On 21st August 2017, the Court asked the Defence Counsel if there is a dispute to the prosecution's application to amend Count 2 in respect to the offence of theft by amending the amount of Vatu 300,000 stolen on or between 29 October and 30 October 2015 to an amount of Vatu 1, 096, 000 as the total money of vatu cash stolen in the night in question.



7. The Defence Counsel informed the Court that there was no objection on behalf of the Defendant.
8. On 21 August 2017 before the substantive trial began, the Defendant was re-arraigned on Count 2 on the offence of theft of the amount of Vatu 1, 096, 000 stolen inside Sisbaleh Community Store on or between 29 October and 30 October 2015. Defendant Michael Tabinok entered a not guilty plea on that Count 2 as contained in the Amended Information dated 21 August 2017. The substantive trial began after the rights of the Defendant were read and explained to him (see s.81 of the CPC [Cap 136]).

II. Burden and Standard of Proof

9. This is a criminal trial. It is for the prosecution to prove the charges brought against the Defendant. The law is that the prosecution must prove each and all essential elements of the offences against the Defendant. Each charge must be dealt with separately on the standard of beyond reasonable doubt. This means that, I, as a judge of fact, I must be sure of the guilt of the Defendant on the facts in respect to each offence charged against him in this case.
10. If there is a doubt in respect to any offence charged against the Defendant and that the doubt in question is a reasonable doubt, I must acquit the Defendant on that offence.
11. If at the end of the trial, I am not sure of the guilt of the Defendant or if I am left with a suspicion as to the guilt of the Defendant or if on the evidence I reach the conclusion that the offences probably occurred or are more likely than not to have occurred then I must find the Defendant not guilty of the offences and acquit him.
12. But if I am satisfied beyond reasonable doubt of the guilt of the Defendant on the evidence of the prosecution in respect to each element of any offence or of all offences charged against him, it is my duty to convict him on such offence or offences.



13. Section 8 of the Penal Code Act deals with the general rule as to burden of proof. It provides:

"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 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 for saw the natural or probable consequences of his actions.

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

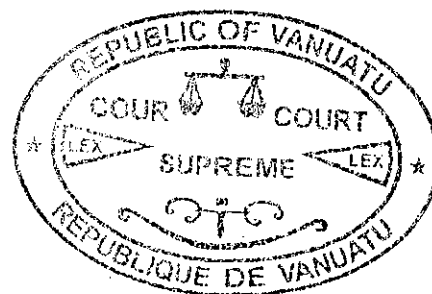
III. The Elements of Offences

14. The prosecution must prove each and all essential elements of the offences beyond reasonable doubt before the Court can convict the Defendant.

- Unlawful entry contrary to s.143 of Penal Code.

15. The prosecution must prove the following elements:

1. That on or sometime between 29 October and 30 October 2015, Defendant Michael Tabinok unlawfully entered into the Sisbaleh Community Store.
2. That on or sometime between 29 October and 30 October 2015, Defendant Tabinok unlawfully entered into Sisbaleh Community Store with intention to commit the criminal offence of theft therein.



- Theft, contrary to s. 125 of Penal Code

16. The prosecution must prove the following elements:

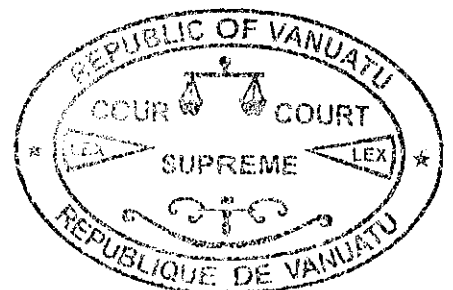
1. That on or sometime between 29 October and 30 October 2015, Defendant Michael Tabinok took away cash Vatu 1, 096, 000 from Sisbaleh Community Store.
2. That on that night on or between 29 October and 30 October 2015, Defendant Tabinok had the knowledge that the money Vatu 1, 096, 000 belonged to Sisbaleh Community Store.
3. That on that night on or between 29 October and 30 October 2015, there was no consent or no permission given to Defendant Michael Tabinok to take away VT1, 096, 000 by its owners (being the members of Sisbaleh Community Store).

IV. The Prosecution Case

17. It is the prosecution case that on or between 29 October and 30 October 2015, at Onlapapa Village, East Pentecost, Defendant Michael Tabinok entered Sisbaleh Community Store and took away Vatu 1, 096, 000 without the consent of the owners of the money.

V. The Prosecution evidence

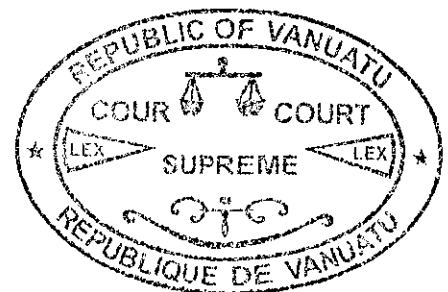
18. The first admitted evidence were the two statements of Defendant Michael Tabinok to the police dated 23 November 2015 (Defendant's cautioned statement) and the Defendant's record of interview dated 24 November 2015 referred to in the early part of the judgment. These two statements were the subject of the Court's ruling on Voir Dire dated 25 April 2017. They are now admitted as evidence and marked as exhibits P1 and P2 respectively.



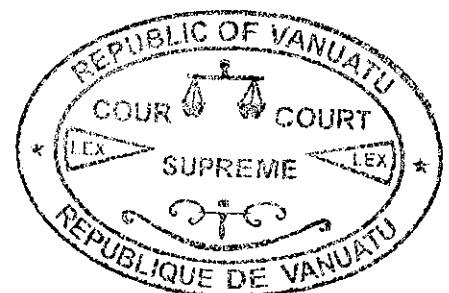
19. The second admitted evidence were the statements of the prosecution witnesses tendered by agreement between the Prosecution and the Defence Counsel in a memorandum dated 28 July 2017. The following statements were tendered:

- a) Statement of Kalo Ben marked Exh. P7;
- b) Statement of Dorethy David marked Exh. P8;
- c) Statement of Recliff Bule marked Exh. P9;
- d) Statement of Edward Bule marked Exh. P10;
- e) Statement of Thomas Willie marked Exh. P11;
- f) Statement of Ben Omry marked Exh. P12;
- g) Statement of Leo Mosovis marked Exh. P13;
- h) Statement of Melanie Matan marked Exh. P14;
- i) Statement of Keren Dick Naulin marked Exh. P15;
- j) Statement of Enoch Bule marked Exh. P16;
- k) Statement of Daniel Bule marked Exh. P17;
- l) Statement of Richard Molse marked Exh. P18;
- m) Statements of Nickson Bule (x3) marked:
 - Exh. P19 A;
 - Exh. P19 B;
 - Exh. P19 C;
- n) Statement of Dominique Tabi marked Exh. P20;
- o) Statement of Johnathan John marked Exh. P21;
- p) Statement of Barnabas Bule marked Exh. P22;
- q) Statement of Anfrida Bule marked Exh. 23, and
- r) Statement of Fr Frederick Bule marked Exh. P24

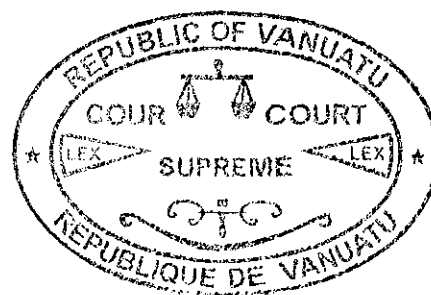
20. The prosecution called 4 witnesses to testify before the Court sitting at Enar Village, Central Pentecost. However, the fourth witness (Kenrick Tabi) had health problems with his heart. He was called but could not give evidence and he was taken to Health Clinic Centre at Enar Village on 21 August 2017. His statements and evidence were withdrawn by the prosecuting counsel accordingly. Only three prosecution witnesses testify.



21. Michael Tabimal is the first prosecution witness to testify. He is from Onlapapa Village, East Pentecost. He is the Chief of his village. He is a member of Sisbaleh Community Store. The store operates since 2000 but he could not remember the exact year. On the night of 29 October 2015, he was in the nakamal. He drunk kava with others until 11.00 pm o'clock in the night and he went home. In the morning of the next day (30 October 2015) they were told money was stolen from the store. He said they counted the money it was 1, 096, 000 Vatu before it was stolen. Before the money was stolen, he said the community celebrated that event in the village. They made a feast (la fête) to celebrate the money their store earned after so many years of hard work and patience.
22. After the money was stolen, they had a meeting at the nakamal. They put a plan or strategy in place to find out who purchased more or plenty kava at Leto pass when the ship arrived at Leto pass.
23. The theft occurred on 29 October 2015. On Sunday ship MV Cloud arrived at their pass. He went to the pass (Leto). There, he said he saw Defendant Michael Tabinok purchased kava from farmers and used 5,000VT notes to pay them. He saw Michael Tabinok used plenty of 5,000 Vatu notes. He testified the amount of VT1, 000, 000 was for the Sisbaleh Community Store and the amount of 96,000 Vatu was for the church house. They kept the two amounts in the shop. He said the amount of 1, 000, 000 Vatu for the store were all in 5,000 Vatu notes. The church money (96,000 vatu) were in 1000 - 2000- 500 notes and coins.
24. He said he is Defendant Michael Tabinok's custom chief. He saw Defendant spent 3 times 5,000 Vatu notes to purchase kava from the farmers at the Leto pass. He said he saw Defendant Tabinok took out half of the money and put it in his new bag. He saw Defendant put the money in a plastic bag. He confirmed he saw 5,000 vatu notes inside the Defendant's bag with that of the church. He said Defendant Tabinok had not purchased kava before. He purchased kava only after the money was stolen.

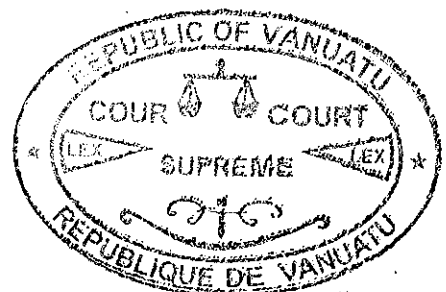


25. Chief Tabimal was cross-examined. He said his village is 5 kilometers distance away from the Defendant's. Michael Tabinok had no Nakamal in his village. He came and drunk kava at his nakamal. His house was near Sisbaleh Community Store. The store keepers also live near the store. There are two shop keepers. The community agreed for the 2 shop keepers to work at the same time. There was no one sleeping in the shop. The two shop keepers had each a key and they had brought the keys with them at their house every day. There was no solar panel lighting system in the store. He was aware of the loss of the money in the morning when the two shop keepers informed him and others about it. He was asked and he said Defendant Michael Tabinok did not know that they counted the money. He said he never told the Defendant they counted the money in the store. He was asked he said he never suspected the two shop keepers. They trusted both of them. He was asked as to why the money was not put into the bank. He replied that the bank (National Bank of Vanuatu) is far away from their village. He was asked and he said he did not see Defendant Michael Tabinok went into the store.
26. He confirmed his evidence that when they met at the nakamal on the day where the money was stolen, the strategy was when a ship arrived at Leto pass, they needed to find out who purchased plenty of kava there. He was asked and he denied that when the money was lost, they thought that Defendant Tabinok stole the money. He denied Michael Tabinok had plenty kava. He denied Defendant Michael Tabinok purchased kava before.
27. He confirmed Michael Tabinok went to Port Vila with 3 bags of kava and sold them in Vila and returned back to the island before this incident. He denied Michael Tabinok purchased kava before. He confirmed 96, 000 Vatu was the money for the church. He accepted the profits of the shop came from the sales. As to the church money, they made fundraising, they organised kava nights to raise 96, 000 Vatu for the church. He was asked and he said he knew all of the Defendant's gardens. The Defendant did not have any more garden currently. He repeated that the Defendant sold only 3 bags kava when he was last time in Port



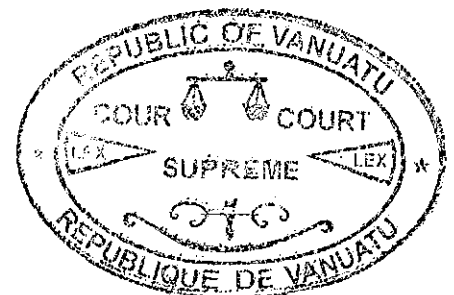
Vila and returned back in the island. He was asked he said he knew Defendant Michael Tabinok when he was a small boy until now.

28. He was asked on the night of 29 October 2015 when he drunk kava until 11.00 pm o'clock where was Defendant Michael Tabinok. He answered that Defendant Tabinok was at Naruha at the time. He was asked about the distance and he said Defendant Tabinok drunk kava in that village (Naruha) on the eastern side and it is 5km from his village (Onlapapa).
29. On cross-examination, Chief Michael Tabimal confirmed his evidence that they counted the money (Vatu 1,096,000) on a Sunday a week before the money was stolen. He said lots of people knew that they have that money in the store. He confirmed that the chiefs decided at the nakamal of the plan or strategy to take to find out who purchased more kava when the ship arrived at Leto pass. He said when MV Cloths arrived all of them went to the Leto pass. He maintained the Defendant did not purchase kava before. But he purchased kava only after the money was stolen. He confirmed his evidence that on 29 October 2015, Defendant Michael Tabinok drunk kava on the eastern part of the island. He mentioned again 5km from Onlapap Village. He was asked "how long"? He replied: 3 hours blo go kam. 1 hour ½ go mo 1 hour ½ come lo Wadungnalda Village.
30. Rex Tabi was the second prosecution witness. He is 31-32 years. He is from Naruha Village. He works in his garden. He has a business of a shop and a truck (transport). He started the store in 2006. He had plenty customers.
31. On 30 October 2015, he was in his village. There was a marriage celebration. Plenty people attended (from Enar Village, Tanbuk and others). On 30 October 2015, he said he met with Michael Tabinok. Defendant Tabinok came and purchased cigarettes in his shop. Then they both went to the nakamal to drink kava. They drunk kava until 12.00am o'clock and he said he went back home to sleep. He said he sold tusker beer in his shop. That night of 30 October 2015, his wakin (brother) Tabinok paid some "cale" for them. He said Defendant Tabinok

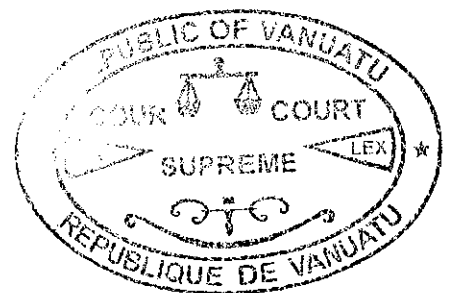


gave him 5,000 Vatu note for 10 bottles of Tusker beer. He brought the 10 bottles of tusker to the Defendant with the change and went back to sleep.

32. Rex Tabi confirmed in his cross-examination that the date of the marriage in his village was 29 October 2015. On 30 October 2015 he was with Defendant Michael Tabinok until 12.00am o'clock in the morning.
33. Hardison Tabi was the third and last prosecution witness. He testified to the following effect. He is from Onlapapa Village, East Pentecost. He works as one of the Sisbaleh Community shop keeper since 2002 to the present. The second shop keeper is Ken Rick Tabi. They have 1 key each. They opened the store ½ day and they closed the shop in the afternoon to go to the gardens.
34. On 2 November 2015, he recalled he went to Leto pass with his brother in law (Defendant Tabinok) after his brother in law went on board the ship. He went to Leto pass after the meeting they had at the nakamal. He testified that after the money was stolen, they had a meeting at the nakamal. They decided to find out the suspected person as being the one who would purchase a great quantity of Kava at the Leto pass at a time a ship will be at the pass and spent plenty of 5,000 Vatu (old) notes.
35. On 2 November 2015, MV Island Claus arrived. He went to Leto Pass with his brother in law. He saw Defendant Michael Tabinok took money and put the money into 2 plastic bags and put the money inside his (Michael's) Island basket. He went to Leto pass at 10.00am in the morning. Defendant Tabinok gave him an amount of 100,000 Vatu.
36. Defendant Tabinok told him to purchase Kava from the farmers of the bush with that amount of VT100, 000. He took the amount of 100,000 Vatu and went to Nokonpok village (Central Pentecost). There, he took out the plastic where the money was. He took out the money from a different plastic bag. He saw the amount of 100,000 Vatu were all made up of 5,000 Vatu notes. He purchased a 25Kg rice for the Defendant's Family and took the rice to the Defendant's family.



37. On 2 November 2015, at Leto pass, he saw Defendant Tabinok only purchased Kava from the farmers (20,000 Vatu per bag). He said the Defendant had purchased Kava from the farmers. The Defendant had no more Kava to sale. On 2 November 2015, the Defendant purchased kava from others. He took the bags of Kava on the ship and sold them in Port-Vila. On that day, the Defendant purchased 3 bags of Kava at Leto pass.
38. In the month of October 2015, there were no cash money in the store. The money was stolen. An amount of 1,000,000 Vatu constituted the profits made by the store. That amount was made up only of 5,000 Vatu notes. Another amount of 96,000 Vatu was for the church. It was made up of 1000VT, 2000VT and 500VT notes and coins.
39. The money was not put in the bank because the National Bank of Vanuatu was located on the Western part of the island. The transport cost is expensive – 4,000VT from his village to the Bank at Enar village. The Boat is about 30,000 Vatu.
40. Hardison Tabi testified that when he took the money Vatu 100,000 given to him by the Defendant, he saw and recognised a 5,000 Vatu note that he said he had cello taped before the incident of 29 October 2015. He explained that he had cello taped that 5,000 Vatu note on the side where Nangol design was on the note. He gave details of what he did on that note of 5,000 Vatu. He put the pieces of the note together on the nangol side of the note. He said he thought to himself that was the note he had cello taped in the store.
41. He then went and purchased the kava for the Defendant and took the Kava to .Bwatnapni. The Defendant paid Kava before but then he had stopped. He then only sold kava from his gardens. When he saw the money he rang the old people in the community. They told him to continue to pay Kava for the Defendant. After the loss of the money he said the store still operates.
42. Hardison Tabi was cross-examined. He worked in the store as the store keeper with the other store keeper until today. He confirmed his evidence in chief that



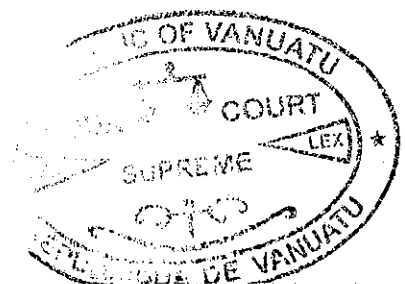
they have each a key. There is a bell near the store that customers used when they needed to buy something in the shop. If one of the shop keepers is out, he communicates with the other. The cash earning per day will be 2,000 Vatu to 5,000 Vatu depending on the customers and the numbers per day.

43. He confirmed his evidence that 1,000,000 Vatu was for the profits made by the store. That amount was made up of 5,000 Vatu notes. These 5,000 Vatu notes were old cash notes of 5,000 Vatu. The 96,000 Vatu cash money was for the church.
44. He said the profits of VT1, 000,000 were the profits made by the store since the store started in 2002 until the money was taken away from the store. They placed 1,000,000 Vatu and 96,000 Vatu together in the same bucket in the shop. He confirmed the money for the church were made from fund raisings and collections from members. He confirmed that Ken Rick Tabi also knew that 1,000, 000 VT was for the store and 96,000 VT was for the church. He confirmed they celebrated the amount of 1,000, 000 VT with a big feast (Kaikai). He confirmed lots of people in the village knew. He was asked and he said Defendant Michael Tabinok was not in the village at the time of the big kakai. He was asked he agreed that he did not see Defendant Michael Tabinok entering the store and took away the money.
45. He was specifically asked about the 5,000 VT note he said he had celloctaped, he replied:

“Money we mi scotchem, mi scotchem mo putum lo bucket inside lo store. Taem we 5,000 VT note icome lo store mifala ino spendem. Mifala ilego nomo istap.”

46. He was asked again any 5,000VT notes that come in by way of sale, you put it into the bucket. He answered:

“No taem 5,000VT note nomo icome bae mi breakem blo work lo hem.” He added:

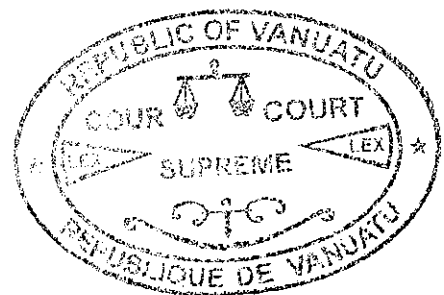


“Be mi remember mi scotchem money ia lo brown scotch before steal itakem place.” “Mo money we mi scotchem mi putum lo bucket blo Sisbaleh Community Store nomo. I never go out.”

47. He confirmed when he cellowtaped that 5,000VT note, Ken Rick Tabi was there with him. He said they sold pigs from time to time. They also purchased Kava and sold Kava on two or four trips and then they stopped. He was asked and he accepted the only place that money was safe was in the bank. He confirmed Defendant Tabinok is his brother in law. He married the Defendant's sister. He was asked he said Michael Tabinok sold Kava in Port-Vila and could earn 20,000 VT per bag with a total of VT 60,000.
48. He confirmed that Defendant Tabinok had plantations of Kava before the theft incident. But the Defendant is now replanting his Kava. The Defendant's kava were not ready for sale. He was asked again and he insisted that yes Defendant Tabinok had plantation of Kava before the incident. Now he is replanting again with 1000 head. Hardison Tabi was re-examined. He reconfirmed his evidence in chief and cross-examination. That is the end of the Prosecution evidence.
49. At the end of the prosecution case, the Court ruled that there is a Prima Facie case made out against Defendant Michael Tabinok. He is therefore required to put forward his defence [s. 164 (1) Criminal Procedure Code Act (C.P.C.) (Cap 136)]. The Court also read and explained the rights of the Defendant contained in section 88 of CPC (Cap 136) to him. He has understood his rights.

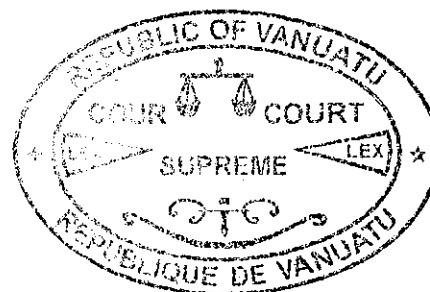
VI. The Defence Case

50. Defendant Michael Tabinok elected to exercise his rights to remain silent and not to give evidence himself. He is also decided not to call in any witness for his defence. That was the defence position and the defence case.

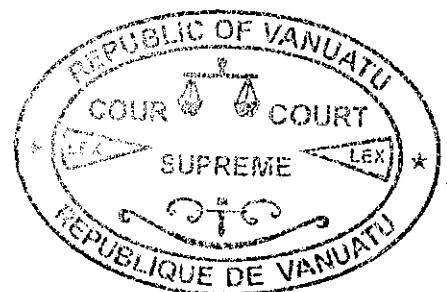


VII. Discussion on evidence

51. I have listened observed and considered the evidence in this case. The following finding of facts and credibility are made:
52. Witness Michael Tabimal knew what he said in most of his evidence testimony before the court although some minor aspect of his evidence he may not appreciate the difference in size and distance dimensions in great details, he is a credit worthy witness.
53. He was also very precise on some significant details of his evidence of the location of the Defendant on the night between 29 October 2015 and 30 October 2015. His testimony must be believed.
54. Rex Tabi is a simple member of the Community. There is nothing to challenge his evidence. To the extend that it was relevant his evidence is also to be believed.
55. Hardison Tabi is a powerful witness. He gave evidence of the history of the store, how the profits were made with detailed precision. He gave relevant detailed evidence that connected directly Defendant Michael Tabinok to the incident occurring on or between 29 October 2015 and 30 October 2015 with the 5,000VT note he cellowtaped before the incident between 29 October and 30 October 2015.
56. Further the 5000VT notes contained in the 1, 000,000 Vatu for the profits of the store were all old 5,000 VT notes.
57. There are overwhelming evidence on the use of 5000VT notes by Defendant Michael Tabinok at Leto pass to purchase the Kava (evidence of Michael Tabimal and Hardison Tabi) and also in Port Vila.

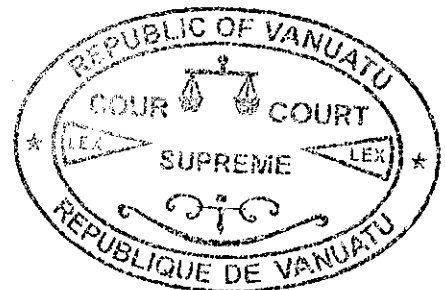


58. The evidence that is not challenged is that Defendant Tabinok did not have Kava to sale any more. He had sold all his Kava from his plantation. Defendant is now replanting his Kava. There is no kava for him to sale. Defendant Michael Tabinok is now purchasing Kava and he has no Kava to sell. On 2 November 2015, he took ship MV Claus to Port Vila, he arrived in Port-Vila on 3rd November 2015 with 3 bags of Kava he had purchased from Pentecost to sell in Port-Vila.
59. On 7 November 2015, just 4 days of his arrival in Port-Vila, Defendant transferred (cash money) of Vatu 96,000 to Pentecost – (Evidence of Bule). The amount of money was made up of 5,000 VT notes and also 1000 VT notes. They are all old money vatu notes.
60. On 10 November 2015, Defendant Tabinok transfered (cash money) of VT75,000 to Pentecost (Evidence of Enock Bule). On 11 November 2015, Defendant Tabinok transferred (cash transfer money) Vatu 52,800 Vatu to Pentencost. The total cash transferred from 7 November 2015 to 11 November 2015 was of 223,800 Vatu. This amount was sent to Pentecost before the defendant started to sell his Kava in Port-Vila that he purchased them from Pentecost) (Evidence of Thomas Willie).
61. Thomas Willie, on 17 November 2015, paid the Defendant's 6 bags of Kava for a total amount of 154,200 Vatu at 300VT/kg. (Thomas Willie – Exh. P11). Evidence of Enock Bule is confirmed by evidence of David Bule back on Pentecost (Exh. P17).
62. There were evidence of his spending in Pentecost (Hardison Tabi), evidence on his spending in Port Vila on taxis, kava, alcohol and guest house. The totality of evidence confirmed Defendant Tabinok used 5,000VT notes for his spending. On assessment of evidence the total spending was approximately VT178,000 compared with his sale of Kava of VT154,000 VT. This is just an approximation on his spending.



63. Defendant Michael Tabinok's own admissions in his interview by police officers on 24 November 2015 to the following effect:

- He understood a complaint of unlawful entry and theft was made against him.
- It was night time he went inside the Sisbaleh Community Store at the Central Pentecost and took Vatu 300,000.
- He forgot the date but he said it was night time going toward the end of the month of October 2015 sometime between 2.00am and 3.00am in the morning.
- He went from his village to the other village, Onlapapa Village at the time of break-in in the store. The door of the store was wooden store and the lock of the door was hanging on a pin.
- He forced to open the pin of the lock. He opened the door and went inside the store.
- He had used a torch inside the store and found money underneath the counter. He pulled it and it was not locked.
- He took the money with him.
- The cash money he took were of 5,000 Vatu notes and 1,000 Vatu notes.
- He counted the money on the road he said it was a total of 300,000VT.
- He used the money to pay kava on Pentecost and took the purchased kava to sell them in Port Vila.
- He used an amount of 100,000 Vatu to purchase kava with. The half of the money was recovered by the police officers (CID) at his house at holen.
- He used the money to purchased his expenses of guest houses, taxis, tuskers and given to friends.
- On the strength of the totality of the evidence, it is a fact that the money that was in the store was of Vatu 1, 096, 000 not just 300, 000 Vatu. Evidence of Chief Michael Tabimal, Hardison Tabi and they were contradicted nor put into question or any shadow of any doubt.
- The money 1, 000, 000 Vatu profits of the store and 96,000vatu for the church were counted before the Defendant broke in the store.

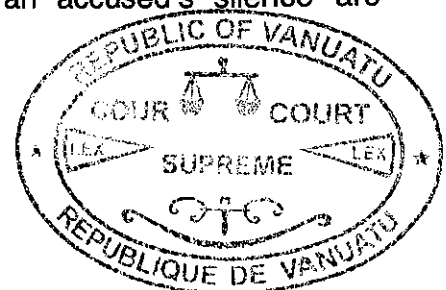


- A feast was organised by the village to celebrate the achievement before proper sharing of shares between the members of the community Sisbaleh Store.
- The witnessess confirmed the counting of VT1, 000, 000 for profits of the store and 96,000 Vatu for the church that they put the money in the same container but seperated in envelopes.
- I accept that the total money stolen was 1, 096, 000 Vatu between 29 October 30 October 2015 but not just 300,000 vatu.

VIII. Application of Law to the Facts

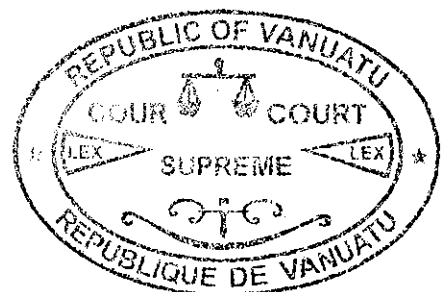
64. Swanson –v- Public Prosecutor [1998] VUCA 9 is the case authority to be applied in this case. The essence from Swanson case is this:

- (1) Inferences may be drawn from proved facts if they follow logically from them. If they do not, then the drawing of any conclusion is speculation not proof. Speculation in aid of an accused is no more permissible than speculation in aid of the prosecution. (R. v. Harbour, [1995]1 NZLR 440.
- (2) Inferences need not to be irresistible. The prosecution is not required to disprove any inference that the ingenuity of counsel might devise. It must exclude any reasonable hypothesis based on the evidence which is consistent with innocence, but no more. R. v. Laugalis (1993) 10 CRNZ 350, 359. To similar effect is Section 8 (1) of the Penal Code Act [CAP 135] which mandates 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"*.
- (3) In a circumstantial evidence case, where the accused makes no statement out of Court and/or elects not to give evidence, inferences can be drawn from the absence of any explanation from the person *"with unique knowledge of the complicated dealings to which the charges relate..."* The limits of the right to draw inferences from an accused's silence are



discussed in such cases as *Trompert v. Police* [1985] 1 NZLR 357 and *Weissersteiner v. R.* [1993] HCA 65; [1993] 117 ALR 545. It is basically a matter of common sense to be used in the circumstances of the case. See *Haw Tua Tau v. Public Prosecutor* [1982] AC 136, 151, 153. (a Judge-alone criminal trial).

65. In the present case, I do not rely on the Defendant's silence as a basis for drawing adverse inferences against the accused. I did not need to do that because the other inferences link directly the defendant to the offences of:-
Unlawful entry and theft at Sisbaleh Community Store on or between 29 October and 30 October 2015.
66. It is rational to infer and coupled with the defendant's own admissions, on the night between 29 October 2015 and and 30 October 2015, he did unlawfully entered into Sisbaleh Community Store with the intention to commit the offence of theft.
67. It is a fact as established by evidence that, the money kept in the store (Sisbaleh Community Store) was: 1,000,000 Vatu cash and all made up of 5,000VT old notes (including the 5,000VT old note celloctaped by the shop keeper) and 96,000 Vatu cash money in 1000VT notes, 2000 Vatu notes, 500 notes and coins belonging to the church.
68. It is rational to infer and coupled with the defendant's own admissions that on the night between 29 October 2015 and 30 October 2015, Defendant Michael Tabinok by unlawfully entering into the store took away the amount of VT 1,096,000 without the consent of the owners of the money.
69. I am satisfied beyond reasonable doubt that each and all essential elements of the offence of unlawful entry as charged in Count 1 are proved. I am also satisfied beyond reasonable doubt that Defendant Michael Tabinok took away Vatu 1,096,000 in the night between 29 October and 30 October 2015 and as



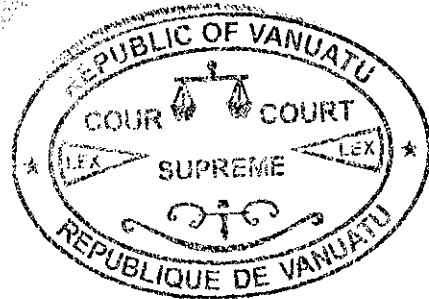
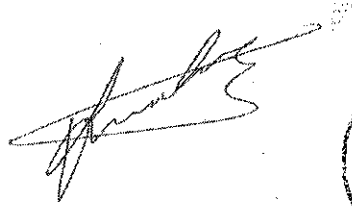
such each and all essential elements of the offence of theft in Count 2 are proved against the Defendant Michael Tabinok.

VERDICT

- 70. Guilty on unlawful entry (Count 1)
- 71. Guilty on Theft (Count 2)

DATED AT ENAR VILLAGE, CENTRAL PENTECOST

23rd August 2017



Vincent Lunabek

Chief Justice