



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

Criminal Case No.2803 of 2016

**PUBLIC PROSECUTOR VS- JOHN MORRISON WILLIE,**  
**SANDY KALVEN AND**  
**HENRY NIN**

**Coram:** *Mr. Justice Oliver A. Saksak*

**Counsel:** *Ken Massing and Damien Boe for Public Prosecutor*  
*Colin Leo for the Defendants*

**Date of Trial :** *19<sup>th</sup>, 20<sup>th</sup>, & 21<sup>st</sup> September 2017*

**Date of Verdict:** *21<sup>st</sup> September 2017*

---

**VERDICT**

---

1. The 3 defendants were initially charged with three representative charges as per the Information dated 5<sup>th</sup> September, 2016.
2. These three charges were-
  - a) Count 1- Misappropriation contrary to section 125 (b) of the Penal Code Act [ CAP.135] ( the Act).
  - b) Count 2- Theft contrary to section 125 (a) of the Penal Code Act, and
  - c) Count 3- Money Laundering contrary to section 11 (3) (a) of the Proceeds of Crime Act [ CAP. 284].
3. As of yesterday, after the prosecution had called 6 witnesses and closed their case Mr Leo made a no case submission pursuant to section 135 of the Penal Code Act. I accepted the submission after hearing arguments and ruled that the prosecution had not established any prima facie evidence against the 3 defendants in relation to the theft and money laundering charges in Counts 2 and 3. I therefore dismissed those two charges against them and acquitted the 3 defendants accordingly. That Ruling has been published and issued separately earlier today.



4. That leaves the Misappropriation charge in Count 1. The offence of misappropriation is defined in section 123 of the Penal Code Act which states-

*"A person commits misappropriation of property who destroys, wastes, or converts any property capable of being taken which 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)."*

5. The act of misappropriation is prohibited under section 125 (b) as follows-

*"No person shall cause loss to another –*

*(a) ..... ,*

*(b) by misappropriation; or*

*(c) .....,*

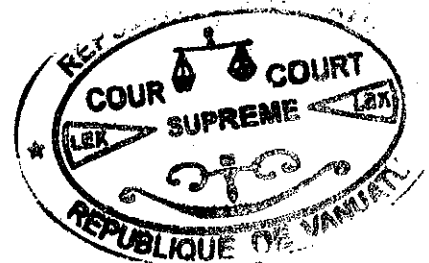
*Penalty: Imprisonment for 12 years."*

6. The particulars of wrong against the 3 defendants reads-

*" John Morrison Willie, Sandy Kalven mo Henry Nin, sometimes between manis blong July 2012 mo April 2013, long ol different taems mo dates, yufala I bin stap olsem ol board of Directors blong NISCOL Company mo yufala I bin stap authorisem mo receivem ol payments blong ol cheques weh hemi kasem wan amount blong VT 10.828.000 mo long ol taems ia yufala I bin stap usumap money ia long ol own use blong yufala nomo."*

7. The elements to be proven by the prosecution for the charge of misappropriation are-

- a) That the defendants destroyed, wasted or converted VT 10.828.000 for their own use.
- b) The said amount of money was entrusted to them for custody, return and accounting, and
- c) That they had no authority to so destroy, waste or convert the money for their own use.



The burden of proof rests on the prosecution on the high standard of proof beyond reasonable doubt. Section 8 of the Penal Code Act provides for the general rule as to burden of proof as follows-

*“(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) ..... N/A

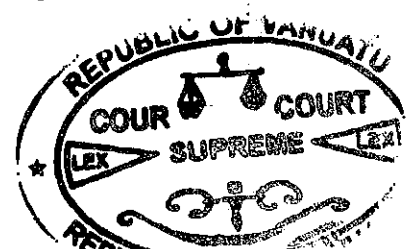
*(3) If the prosecution has not so proved the guilt of the accused, he shall be deemed to be innocent of the charge and shall be acquitted forthwith.”*

8. The presumption of innocence statement in section 81 of the Criminal Procedure Code Act [ CAP. 136] as read to the defendant on 19<sup>th</sup> September at the commencement of the trial also clearly places this burden of proof on the prosecution.
9. To discharge that duty the prosecution relied on the evidence of Quineth Andrew, Russel Sipity, Irene Laloyer, Harold Joe, Philip Ryan and Peter Solwie. Relevantly I summarise in brief their evidence as follows:-

- a) **Quineth Andrew**, Assistant Account of Niscol since 29<sup>th</sup> August 2012. She said Chairman Sandy Kalven, CEO John Morrison and Accountant Henry Nin were authorised to sign all cheques for all payments for overhead costs and wages and salaries.

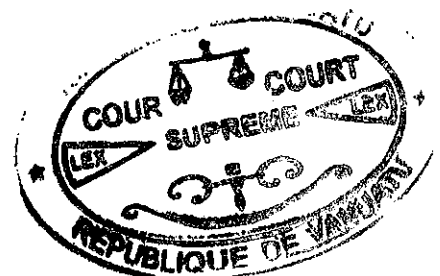
She recognised and identified copies of cheques signed by all three defendants which were presented to Asco Motors on 13<sup>th</sup> and 31<sup>st</sup> July 2012 for the payments of VT 1.651.250 and VT 2.000.000 as instalments for the vehicles. Those documents were tendered as Exhibits P1 and P2 for the prosecution. She confirmed the cheques were Niscol Cheques drawn from ANZ Bank Account.

- b) **Russel Sipity**, a customs officer dealing with registration of vehicles. He described the procedures for completing Registration forms and registration which normally concludes at the issuance of a Registration Book. He



recognised the Asco Motors documents attached with the Registration Forms. He identified an extract of the Registration Book issued to Henry Nin in relation to Vehicle No. S/ 7273. He did not show any extract of the Registration Books issued to Sandy Kalven and John Morrison Willie. His documents were tendered into evidence as Exhibits P3, P4, and P5.

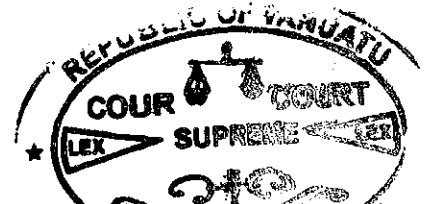
- c) **Irene Laloyer**- Asco Motors Manager, Luganville Branch. She was shown documents which she recognised as copies of cheques issued in Niscol's name for payments in instalments made in relation to the three vehicles. The documents were tendered as Exhibits P6, P7, and P8.
- d) **Harold Joe**- Sales Officer of Asco Motors. He saw registration forms in favour of Sandy Kalven, John Morrison Willie and Henry Nin. He completed forms with amount of road tax and presented to the Accounts Department to present to Customs. He identified and confirmed the documents tendered as Exhibit P3, P4 and P5 by the customs officer, Russel Sipity.
- e) **Philip Ryan**, current Chief Executive Officer of Niscol. He only took employment with the Company from 22<sup>nd</sup> April 2016. He referred to Articles of Association of NISCOL, sections 57 and 72 which he said place responsibilities of directors to remove themselves from any material advantage and the responsibility of the CEO to see that company funds are properly managed and accounted for. He said cheques paid to Asco Motors were equitable assets of Niscol and the vehicles purchased from those moneys were assets of NISCOL. In cross he said he was not aware of any resolutions made by the Board in 2012 since he had not yet arrived. Asked whether a CEO revoke a resolution of the Board of Directors, the witness said "NO". Asked whether he was aware of any Audit Report by the Company, he said there was none until 31<sup>st</sup> January 2017.
- f) **Corporal Peter Solwie** He confirmed he attended scene, collected exhibits and took photographs and created an album. He tendered his document as Exhibit P9.



## Defence Evidence

10. Relevantly I summarise the defendant's evidence as follows-

- a. **John Morrison Willie**- He was the Chief Executive Officer in 2012. He confirmed his Contract of Employment dated 19<sup>th</sup> July 2012 as Exhibit D1 and his appointment ( Exhibit D2). He described the circumstances in which NISCOL was in at the time and what was expected of him and the Board to do to get NISCOL back into operation as a viable company. He referred to the Contract and the entitlement provision as to the use of a vehicle for official purposes as a priority and also for private use. Due to that provision the Board agreed that they purchase the vehicles and register them in their names for safekeeping. He said they were 2 resolutions made by the Board, one in 2012 when he was CEO and the other in 2015 by a new Board. He agreed the three of them signed cheques and that it was his decision that Sandy Kalven should be a signatory to safeguard their actions. He said the three of them signed cheques as executive directors to ensure smooth running of the company as expected by the government. He agreed the cheques they signed were issued to Asco Motors for 3 Vehicles. And he agreed the vehicle was registered in his name.
  
- b. **Sandy Kalven**- He was appointed as Chairman and Director by Contract dated 19<sup>th</sup> July 2012. He agreed and tendered his contract as Exhibit D5. He said there is a provision providing for a entitlement to a vehicle and for its use and maintenance. As to why he signed cheques along with the other 2 defendants he said the Board he chaired had made a resolution in 2012 authorising them to purchase the vehicles and have them registered in their own names. This was necessary to safeguard the vehicles from others. He referred to another resolution made in 2015 which is referred to as resolution 14 which records the new Board resolution that they could keep " their vehicles' if they discontinued their claims for VT 50 million against Niscol. As to what grounds they bought the vehicles and registered them in their own names, he said it was to safeguard their positions. Asked if he had a copy of the resolution, he said they were burned when the NISCOL office was burnt in



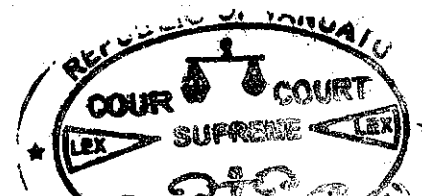
2015. The Court asked the witness if there were other Board members who were in the Meeting and he said Livo Langi, Karl David and Tiro Vanua were at the meeting.

- c. **Henry Nin**- He was the Accountant and Board Member since his appointment by Contract in July 2012. He confirmed the Board in 2012 met and resolved that the purchases of the vehicles be made and registered in their own names. He confirmed his contract tendered as Exhibit D6. He described the circumstances of NISCOL at the time that warranted the Board making the decision for safety reasons. He agreed he signed cheques with the other 2 defendants which cheques were presented to ASCO Motors. He confirmed he signed cheques to secure moneys of NISCOL. In cross he was asked why he could not produce a copy of the 2012 Resolution, he answered he did not have a copy as it was company document and for confidentiality he could not have a copy. For his contract, it was his personal copy.

11. Two independent witnesses, Livo Langi and Karl David were not allowed to give evidence in support of the defence case. Mr Massing had objected because they had both been present when the prosecution witnesses were giving their evidence. I accepted the objections and disallowed these two additional defence witnesses.

### **Discussions**

12. At the very outset the Court notes the three defendants have been totally frank and open about the purchases of the three vehicles. They accepted they signed the cheques for the purchases. They presented the cheque to Asco Motors. Asco Motors acted accordingly and presented documents for registrations of the vehicles to the Customs Department. They accepted the registrations were done in their own names. At no time had Asco Motors or Customs officer raised any questions, concerns or suspicions about the lawfulness or unlawfulness of those transactions. The only explanation and reason given by all the defendants is that they acted in accordance with a resolution of the Board of Directors made in 2012. And they gave valid reasons why they could not produce the Minute of the relevant Board Meeting because they were confidential documents only kept in the NISCOL office and those documents were burned in 2015



when the NISCOL office was burnt down. They gave consistent evidence that confirmed and corroborated each other's evidence. There is absolutely no reason why the Court should not believe their evidence as credible. After all these were men on whom their respected provinces and the Government placed their hopes and confidence to revive NISCOL into a viable company. Surely they could not go their way to spend Company's money without the Directors approval of their actions.

13. Next the registrations of the vehicles in their own individual names. The Customs officer Russel Sipity produced only an extract of the Registration Book issued in favour of Henry Nin but not Sandy Kalven and John Morrison Willie.

14. Section 33 of the Road Traffic ( Control) Act CAP.29 provides for registration of Motor vehicles as follows-

*"(1) Every motor vehicle shall be registered in accordance with the provisions of this Act.*

*(2) .....N/A*

*(3) The licensing authority shall, upon receipt of an application for registration of a motor vehicle, and on payment of the registration fee at the rate specified in subsection (4), cause such motor vehicle to be registered under serial number and shall issue to the owner a registration book in the forms prescribed in Schedule 2."*

By subsection (3) the issuance of a registration book to a person completes the process of registration and the Book becomes conclusive evidence that the name of the person appearing in the Book is the owner of the vehicle concerned.

15. Here the evidence fell far short of showing the registration was complete in respect of the vehicles claimed to be registered in Sandy Kalven's name and John Morrison Willie's name. Therefore these two defendants are entitled to be given the benefit of that doubt.

16. Even if the above conclusion is not correct, the 2012 Board resolution validated all the actions of the three defendants for the signing of the cheques, their presentations for purchases and the registrations and use of the vehicles.



17. The prosecution did not produce any evidence showing he defendants destroyed or wasted VT 10.828.000. Their evidence however showed the defendants were entrusted with the money for custody, return and accounting. The first and second element as far as conversion goes were proven, however the third element of there being no authority to so act, was not proven by the prosecution. Clearly the defendants had the Boards' approval. They bought the vehicles to use both for Official duties and also for private use as their privileges and entitlements under their respective contracts dated 19<sup>th</sup> July 2012. The VT 10.828.000 was therefore converted or invested on vehicles. The defendants therefore hold them on trust to be returned to NISCOL as company assets. In that sense, the defendant's actions did not amount to misappropriation.
18. For the foregoing reasons the prosecution has not discharged its duty of proof beyond reasonable doubt that these 3 defendants committed an offence of misappropriation. I therefore return the verdict of not-guilty against Sandy Kalven, John Morison Willie and Henry Nin. I dismiss the charge against them and acquit them accordingly.
19. As for the vehicles, having heard Counsel's submissions, I accept the prosecution's submissions that they are properties and assets of NISCOL and they must be released and returned to NISCOL forthwith, and I order so.
20. Resolution No. 14 of 2015 concerns the defendant's Civil Case No. 21 of 2013 which is awaiting judgment and which must be kept separate from this criminal case.

**DATED at Luganville this 21<sup>st</sup> day of September, 2017**

**BY THE COURT**

  
**OLIVER.A.SAKSAK**

**Judge**

