

**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**

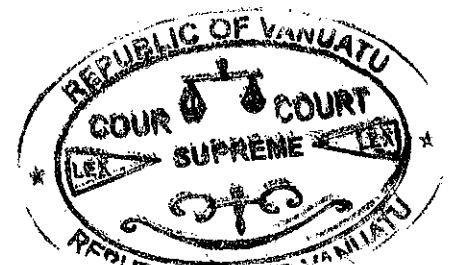
Coram: Mr. Justice Oliver A. Saksak

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

Date: 20th September 2017

RULING ON NO CASE SUBMISSION

1. At the end of prosecution case this morning Mr Leo made an oral application for the acquittal of the three defendants on grounds that there was no prima facie case made out against them. Mr Leo based his submission under Section 135 of the Criminal Procedure Code Act [CAP 136]. Mr Leo summarised the relevant evidence of the evidence of Quineth Andrew, Russel Sipity, Irene Laloyer, Harold Joe, Philip Ryan and Peter Solwie. Mr Leo then submitted the prosecution had not established any evidence to show the three defendants had committed the offences of theft, misappropriation, and money laundering as charged.
2. Mr Boe and Mr Massing responded in opposition. Mr Boe said the correct section was section 164 of the CPC Act. Counsel argued and submitted the prosecution had only to show there was some evidence to which the Court could convict. Both Counsel submitted it was not required of the prosecution to establish evidence on the high standard proof beyond reasonable doubt.
3. Mr Leo conceded section 164 of the CPC Act was the correct provision due to an oversight on his part. I disagreed. There is a distinction in the two sections. Either of them may be used depending on the circumstances. Where a no case submission is indicated or made as in this instance, the correct section is 135. Where no such submission is made, it is open to the judge on his own motion to so rule, it is done under section 164. Either way is the correct procedure.



4.1. Theft is defined in section 122 of the Penal Code Act CAP 135 as follows:

- a. *"A person commits theft who, without the consent of the owner, fraudulently and without a claim of right made in good faith, takes and carries away anything capable of being stolen with intent, at the time of such taking, permanently to deprive the owner thereof;*
- b. *(2) A person shall also be guilty of theft of any such thing notwithstanding that he has lawful physical control thereof, if, being a bailee or part owner thereof he fraudulently converts the same to his own use or the use of any person other than the owner.*
- c. *(3) For the purpose of subsection (1) –*
 - (a) *the word "takes" includes obtaining physical control –*
 - (i) *by any trick or by intimidation;*
 - d. *(ii) under a mistake on the part of the owner with knowledge on the part of the taker that physical control has been so obtained;*
 - e. *(iii) by finding, whether or not at the time of finding the finder believes that the owner can be discovered by taking reasonable steps;*
 - f. *(b) the words "carried away" include the removal of any thing from the place which it occupies but in the case of a thing attached, only if it has been completely detached;*
 - g. *(c) the word "owner" includes any part-owner or person having physical control of, or a special property or interest in, anything capable of being stolen."*

4.2. Misappropriation is defined in section 123 as follows:

"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)."

4.3. Section 125 prohibits theft and misappropriation as follows:

"No person shall cause loss to another –

- (a) by theft;*
- (b) by misappropriation; or"*

4.4. Section 11 of the Proceeds of Crime Act [CAP 284] provides for money laundering as follows:

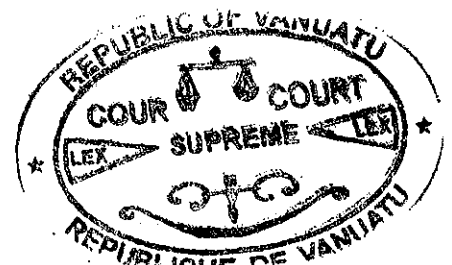
In this section:

"transaction" includes the receiving or making of a gift.

(2) N/A.

(3) *A person engages in money-laundering only if the person:*

- (a) acquires, possesses or uses property or engages directly or indirectly, in an arrangement that involves property that the person knows or ought reasonably to know to be proceeds of crime; or*



(b) converts or transfers property that the person knows or ought reasonably to know to be proceeds of crime; or

(c) conceals or disguises the true nature, source location, disposition, movement, ownership of or rights with respect to property that the person knows or ought reasonably to know to be proceeds of crime.

5. For the charge of theft the following elements had to be proven by evidence-

- a) The accuseds stole VT 10.828.000,
- b) They took the money without Niscol's authorisation,
- c) They did it fraudulently and without any claim of right,
- d) They did it maliciously (not in good faith),
- e) They did it with intent, and
- f) They permanently deprived Niscol of the money.

The evidence thus far produced by the prosecution does not show any of these elements done on the part of the three accuseds.

6. For misappropriation, the elements to be proven by evidence were-

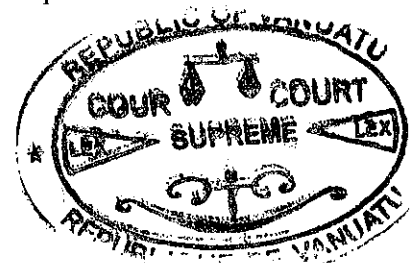
- a) The accuseds destroyed, wasted or converted VT 10.828.000 for their own use,
- b) The money was entrusted to them for custody, return and accounting, and
- c) They had no authority to so destroy, waste or convert the money for their own use.

The evidence thus far produced by the prosecution shows there is prima facie case against the three accuseds to answer or make a defence in relation to the misappropriation charge.

7. For money-laundering the elements to be proven by evidence were-

- a) Were the vehicles gifts?
- b) Were they proceeds of crime?
- c) Did the defendants know the vehicles were proceeds of crime?
- d) Did the defendants conceal or disguise the true nature source location, movement, ownership, ownership of vehicles?

The prosecution simply did not produce any evidence at all to show (a) the vehicles were gifts, (b) they were bought to commit crimes, (c) the vehicles were proceeds of crime



brought into Vanuatu by Asco Motors and (d) the defendants were concealing or disguising the nature of their dealings.

8. I therefore rule that the prosecution has no prima facie evidence against the three defendants in relation to the charges of theft and money laundering. Accordingly I dismiss those charges and acquit the three defendants of those two charges.
9. I find however there is some evidence showing the defendants converted vehicles by registering them in their own names instead of in the name of NISCOL. They are required to answer to that charge only in their defence.

DATED at Luganville this 20th day of September, 2017

BY THE COURT


OLIVER A. SAKSAK

Judge

