

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

Criminal Case No 17/2275 SC/CRM

**PUBLIC PROSECUTOR**

**V**

**JAMES TOLAK**

**(Aka James Tolak Bule)**

**Before: Chetwynd J**  
**Hearing: 15<sup>th</sup> June 2018**  
**Counsel: Mr Blessing for the Prosecution**  
**Mr Leo for the Defendant**

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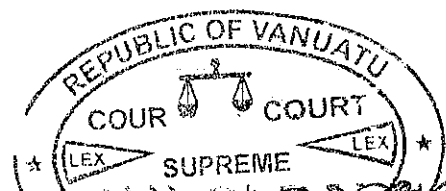
**SENTENCE**

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1. Mr James Tolak has been convicted, after trial, of the theft of a number of bush knives said to be worth VT1,714,800. I have carefully considered the defence submissions on sentence together with the pre-sentence report. I have also heard submissions from the prosecution.

2. Three other men were convicted of theft of the same bush knives on their own pleas and have been sentenced already. They ended up with the sentences of 16 months imprisonment which sentence was suspended for three years. They also ordered to carry out 100 hours of unpaid work for the community. They were also ordered to be supervised by a probation officer for 12 months. There is very little I can say about this defendant which is different from what was said of the others in the sentencing judgment dated the 12<sup>th</sup> of December, 2017. The major difference between Mr Tolak and the other three defendants is of course he entered a plea of not guilty and has been convicted only following trial.

3. In the circumstances his sentence will be little different from that of the other three defendants. Their sentence of 16 months reflects a full 1/3<sup>rd</sup> discount from 2 years imprisonment and of course Mr Tolak is not entitled to such discount. His



sentence is therefore one of two years. Like the others he poses no real risk to the community and his sentence can be suspended for a period of three years. However he will also have to carry out 150 hours of unpaid community work. He too will be supervised by a probation officer for a period of 12 months.

4. Whilst Mr Tolak was not an employee of the victim and therefore there is no breach of trust it is only equitable that he faces the same consequences as the other co-defendants.

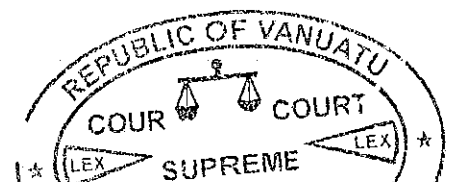
5. The other major difference between Mr Tolak and the other defendants is that his bank accounts had been frozen following his arrest and the issue of search warrants. No evidence was ever lodged as to which legislative provisions permitted the accounts to be frozen. I made an order un-freezing one of his bank accounts on the 21<sup>st</sup> of November, 2017. He was said to have at least two accounts. The prosecution have made an application for forfeiture of any accounts which remain frozen. This is on the basis that those accounts can only be made up of the proceeds of crime, namely the theft of the bush knives.

6. The difficulty with the prosecution argument is that there is absolutely no evidence as to the origins of the money in any of Mr Tolak's accounts. There is undisputed evidence that he ran his own business, a small store, and obviously he could have paid money from just that business into those accounts. It cannot just be assumed that the proceeds of the thefts have been paid into the bank account(s). The phrase Proceeds of Crime has a specific meaning (see section 5 of the Proceeds of Crime Act) namely *property derived or realised directly or indirectly from a serious offence*. The sums in the accounts in November 2017 were modest sums of just over a million vatu. The sorts of sums a small business might have. The prosecution offered no evidence or explanation why everything in the account(s) should be forfeit. The definition in section 5 does allow for the intermingling of funds but the prosecution cannot simply say what percentage of the funds they think might be involved, they have to establish that by evidence.

7. In the circumstances I am unable to accept the submissions of the prosecution on this issue and I decline to order any of Mr Tolak's bank accounts to be forfeit.

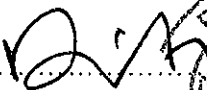
8. In addition there was evidence that the business from which Mr Tolak stole the bush knives is no longer in existence. That business was run by Mr Fung and his brother, or so I understand. Whilst only Mr Stanley Fung appeared to give evidence at the trial I can't order payment to him alone. I would have to order a payment to the business. What I did suggest to Mr Tolak and I repeat that suggestion here, is that he contacts Mr Fung and makes some offer as to repayment.

9. I doubt if that will happen but unfortunately I do not think the court is in any position to make it happen by forfeiting money in the bank accounts. I will order that my order of the 21<sup>st</sup> of November, 2017 will be discharged on the 31<sup>st</sup> of July this year



and the practical effect of this latest order is that none of the bank accounts held by Mr Tolak will be frozen. In the meantime of course there is no reason why Mr Fung cannot institute civil proceedings against Mr Tolak. He would probably be able to recover far more that way than relying of the Proceeds of Crime Act. Mr Tolak may end up losing everything rather than just the contents of his bank accounts.

Dated at Port Vila this 25<sup>th</sup> June 2018

  
D. CHETWYND  
Judge

