

BETWEEN: Public Prosecutor

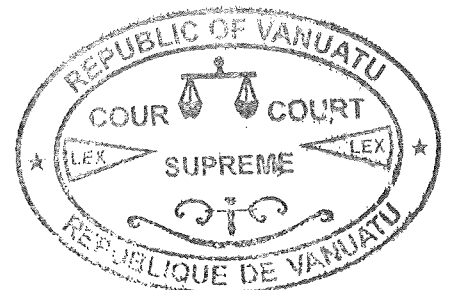
AND: Ryan Foots
Defendant

Date: 10 December 2018
Before: Justice G.A. Andrée Wiltens
Counsel: Mr S Blessing for the Public Prosecutor
Mr N Morrison for the Defendant

JUDGMENT

A. Introduction

1. Mr Foots was acquitted of 4 criminal charges after a trial that ran from 20 to 23 August 2018. On the morning of day 3 of the trial, the prosecution offered no evidence in relation to charge 3, obtaining by deception, and that charge was dismissed. At the conclusion of the prosecution evidence there was insufficient evidence to establish a prima facie case on 2 further charges of obtaining by deception; and those charges were also dismissed. On 23 August 2018, orally at the conclusion of all the evidence, I found Mr Foots not guilty of theft.
2. I produced written reasons for my verdicts on 24 August 2018.
3. I commented that the prosecution appeared to me to be unjustified, and I invited counsel to make written submissions within 14 days regarding whether or not costs should be imposed against the prosecution.
4. Mr Morrison filed written submissions on 13 September 2018.



5. Mr Blessing has not filed any submissions, despite on numerous occasions expressing his intention to do so. I am aware he has had significant personal issues to deal with, but he has appeared in other cases before me in the interim; and now, some 3 and a half months later, it is time to finalise this matter.
6. Accordingly, I make this decision in the absence of any submissions by the prosecution.

B. Costs

7. Provision for costs in criminal cases is made in Section 101 of Criminal Procedure Code [Cap 135] ("the Act"). That reads as follows:

"101. State not to pay costs

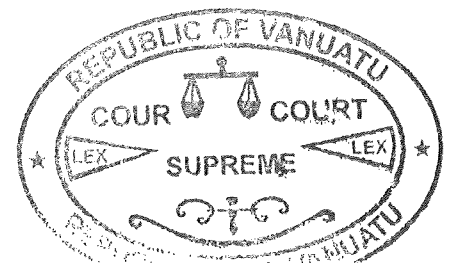
Except where the Court is of opinion that a prosecution is unjustified or oppressive, the State shall not be ordered to pay costs in case of dismissal of any charge;...."

8. Mr Morrison has submitted that costs to Mr Foots in the amount of VT 4million is appropriate – that being the total legal fees expended by Mr Foots to defend himself. That analysis sits well with the awards of damages in the cases of *Warte and Others v Republic of Vanuatu and Others* Civil Appeal Case No. 52 of 2012 and *Southwick v State* [2002] FJCA 51, which Mr Morrison referred to in support of his submission.
9. However, I am considering the issue of costs in criminal cases, not general damages.
10. The *Southwick* case is of some assistance as it confirms that where a statutory provision exists the common law has little application.

C. Principles

11. Costs in a criminal case has been considered by the Court of Appeal of Vanuatu in *PP v Emelee* [2008] VUCA 18, and the Court closely considered the meaning of section 101(1). I take from that authority the following relevant propositions, which have application to Mr Foot's case:

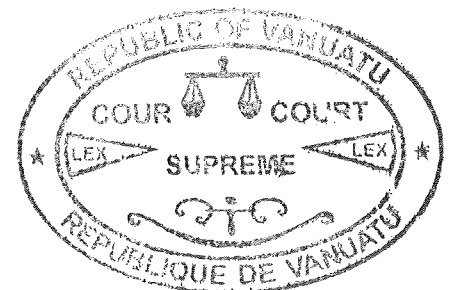
- It is only in the exceptional circumstance of a prosecution being unjustified or oppressive that costs may be ordered;
- The section must be read as though it were written in the past tense;
- The provision is aimed at a specific defined point in the criminal process; and
- The ability to award costs is justifiable as a constraint on the power to instigate a prosecution and a protection against misuse.



12. The Court of Appeal held that the question whether or not a prosecution was unjustified or oppressive must be considered at the point in time that the Public Prosecutor filed the information in the Supreme Court Registry.

D. Discussion

13. As referred to in my decision, Mr Foots was committed for trial on 29 September 2017 and bailed to appear for plea on 20 November 2017 in relation to an information filed by the Public Prosecutor. The nature of the charges had already been altered in that short interval. On the morning of trial there was a further amendment to the information.
14. On any view, this was not a case where the evidence might be termed weak and it was proper to allow the Court to decide. This was a case where the prospects of success were bleak, no matter how the charges were framed. Accordingly, in my view, it was a prosecution that was unjustified – it should not have been brought.
15. The various changes to the allegations demonstrate that several times, the available evidence must have been carefully assessed – yet the fundamental obligation of assessing of the realistic prospects of success was over-looked. The end result of this case was always obvious, and in those circumstances, the persistence of the prosecution was inappropriate. That well have been as a result of pressure imposed by a persistent and/or forceful complainant – but the prosecutor’s role is not to simply be an advocate for the complainant.
16. The principled decision here by the Public Prosecutor ought to have been to end the case after the initial review of the available evidence, or when the evidence was later reviewed prior to trial. At both those stages, it was obvious that there was no realistic prospect of convictions being achieved, and Mr Foots should have been spared the ordeal rather than face an information.
17. Mr Foots was arrested and detained in the infamous Cell 6 prior to being granted bail. His name was published in the press in association with the allegation of gross dishonesty. He has faced trial for something in the order of 12 months. The impact of the stress created by these matters on him and his family should not be minimised or overlooked. It is exactly these types of considerations that compel the Public Prosecutor to make the decisions he is obligated to determine in a responsible and fair manner, taking into account the interests of the community and the individual concerned.
18. Great care needs to be taken, prior to an information being laid in Court, that there is sufficient evidence available to warrant the commencement of a criminal prosecution; and/or that there are sound policy reasons for the matter to go ahead. Absent either or both those considerations, any prosecution is unjustified and/or oppressive.



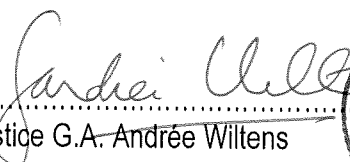
E. Quantum

19. I have very little guidance as to quantum. The authorities dealing with damages for wrongful arrest and procedural inadequacies are of no relevance. They rightly deal with the issue of the legal costs incurred in defending the case. Section 101 does not countenance that – it is dealing with constraints against the commencement of prosecutions and protection against misuse.
20. In the case of a private prosecution, the legislature has seen fit to set a maximum amount for an award of costs at VT 50,000.
21. Given the fact that the Public Prosecutor is a professional legal officer specialising in this field, and with considerable practical experience, it seems to me that a significantly greater maximum is in order in this instance.
22. While what I have in mind goes nowhere near to meeting Mr Foots actual legal expenses, I am satisfied that the award meets constraints and protections envisaged by Parliament when it passed section 101 of the Act into law.

F. Decision

23. The Public prosecutor is to pay costs in the sum of VT 250,000 to Mr Foots within 14 days.

**Dated at Port Vila this 10th day of December 2018
BY THE COURT**


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Justice G.A. Andrée Wiltens

