

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

Criminal Case No 17/2595 SC/CRML

PUBLIC PROSECUTOR

V

TUSAVAKA NISHAI

Before: Chetwynd J
Hearing: 15th and 16th March 2018
Counsel: Mr Young
Mr Takau for the Defendant

JUDGMENT

1. The defendant Tusavaka Nishai is charged with 16 offences of money laundering contrary to sections 11(3)(a) and (b) of the Proceeds of Crime Act as amended ("the Act"). Following submissions by counsel on 16th March I gave an oral decision and promised full written reasons would also be published. These are those written reasons.

2. The facts are straight forward. In a short period between 27th January and 3rd February 2016 she received payments into her ANZ bank account, withdrew that money and transferred it to one James Bony in Malaysia by Western Union money transfer. The money came from the ANZ bank account of a Mr and Mrs Churchill who had not given anybody any authority to withdraw any funds from their account. Mr & Mrs Churchill became aware of the withdrawals and reported the matter to the bank. The bank called in the defendant to investigate what had gone on. Rather alarmingly, it seems that despite the bank being aware of the unauthorised withdrawals they continued to allow unauthorised withdrawals to be made from the Churchill's accounts.

3. The defendant does not deny the payments into her account, the withdrawals from her account or the transfers to Mr Bony. It is not disputed that the money paid into her account was in fact the proceeds of crime. What she says is at the time the money was



being paid in she did not know it was the proceeds of crime. As Mr Takau said in his submissions, the only issue in this case is that relating to the defendant's knowledge.

4. Section 11 of the Act states:

(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.

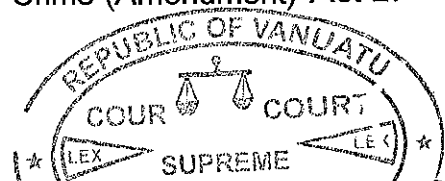
5. What the prosecution have to establish in this case, and in relation to each count, is that the defendant actually knew or ought to have known the money was the proceeds of crime at the time it was received, withdrawn or transferred.

6. The Proceeds of Crime (Amendment) Act 12 of 2012 adds two new subsections to section 11 of the Act :

(4) Nothing in this Act prevents a person that has committed an offence that generates proceeds of crime from being convicted of a money laundering offence in respect of those proceeds of crime under subsection (3).

(5) Nothing in this Act requires a person to be convicted of an offence that generates proceeds of crime before they can be convicted of a money laundering offence in respect of those proceeds of crime under subsection (3).

7. Section 11 was further amended by the Proceeds of Crime (Amendment) Act 27 of 2014:



(6) *Knowledge, intent or purpose required as an element of an offence in subsection (3) may be inferred by objective factual circumstances.*

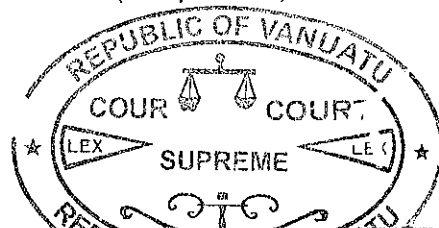
8. This new provision, in the case of money laundering, writes into the legislation the concept of inference, something long recognised in the criminal law¹. The distinction between an objective test and a subjective one is also well known. It is an easy distinction to understand in most circumstances. A comment that a flower is beautiful is easily recognised as subjective and one which states a flower has coloured petals and a scent as objective. Both of course can relate to the same flower.

9. The factual circumstances relating to the defendant's knowledge which have been admitted or proved in this case are that the defendant was contacted on social media (Facebook) by someone she did not know, a Mr Drake. She was offered employment by him on the basis she was reliable, efficient and dedicated. The initial work consisted of her allowing funds to be credited to her bank account and her then transferring 90 percent of those funds to someone else. The transfer was to be by Western Union money transfer. The remaining 10 % she could keep for herself for her, "*stress and time being spent on it*". She was also told that she would be on a three month trial and if the business relationship, "*worked out well*" she would be on a monthly salary of \$7,000 and also receive her 10%.

10. She did not provide any CV or references to Mr Drake. In fact she provided absolutely no personal information to him. She made no enquiries about Mr Drake's firm, Lina Interior Company of London. She accepted he was a Director of an unincorporated business. She did nothing to check Mr Drake's claim that Lina Interior Company was a well-respected international business.

11. She did not question how Mr Drake knew she was reliable, efficient and dedicated without having taken references or being provided with more personal information.

¹ See *Swanson v Public Prosecutor* [1998] VUCA 9; Criminal Appeal Case 06 & 11 of 1997 (26 June 1998); *Public Prosecutor v Weties* [2008] VUSC 6; Criminal Case 70 of 2007 (11 March 2008); *Sokomanu v Public Prosecutor* [1989] VUCA 3; [1980-1994] Van LR 440 (14 April 1989)



12. She did not question the poor linguistic skills of Mr Drake. Drake is a well known English name and presumably the name of someone who should have been reasonably proficient in the English language. Mr Drake was not very proficient in the English language.
13. He wrote, "This is why added you up on Facebook". He also told her, "which you will never regret working with us". He said the defendant would be given the, "opportunity to be our full time staff". Mr Drake's proficiency in English was worse than that of the defendant but she never queried it.
14. She never asked why a well-respected business based in London would want her to send its money to a person in Malaysia. She never asked why the money should be sent to James Bony rather than Lina Interiors. She did not ask why she had to use Western Union to transfer cash.
15. Most importantly she did not ask where the money was coming from. She did ask a cursory question about clients or customers and was told there were clients in Vanuatu. She made no effort to pursue those enquiries. She did not ask, why then do you need to use my bank account not theirs. When she received the first payments, she could have asked ANZ bank where the money was coming from. The bank may not, for reasons of confidentiality, been able to say who was sending the money but they would probably have told her whether the payments were legitimate.
16. These are the objective factual circumstances which would have alerted a reasonable person to the possibility that all was not well. The defendant had before her a number of facts which any reasonable person would have considered suspicious and worthy of further inquiry. The defendant did not make any further inquiries and instead deliberately turned a blind eye to all the evidence before her of possible unlawful activity.
17. The defendant is neither uneducated nor unsophisticated. Whilst the idea of the man on the Clapham omnibus is probably unhelpful in the context of the criminal law of Vanuatu, there is nothing to suggest that the defendant is anything other than the Ni-Van equivalent. The Act refers to what a person *knows or ought reasonably to know*. Given the information that was in plain sight before her the defendant ought reasonably to have known that Mr Drake was not who he purported to be, that the business he purported to be part of was bogus, that the transaction she was being asked to participate in was not

legitimate, and that the source of the funds she was required to transfer was questionable and that meant they were the proceeds of some unlawful activity.

18. Kosher is an expression commonly used in the English language which is derived from the Hebrew word kasher. In the Jewish religion kosher foods are those which conform to the strict dietary laws found in the kashrut which in turn is derived from the books of the Old Testament, in particular Leviticus and Deuteronomy. Kasher means fit (as in fit to eat) and kosher now has a secondary meaning in English of something which is genuine or legitimate. In short, the defendant should have known the whole transaction she was being asked to participate in was not kosher. She deliberately ignored all the alarms that must have been sounding in her mind and proceeded to deal with the funds that were placed in her ANZ bank account.

19. There is no doubt in my mind that the prosecution have established the defendant knew or ought to have reasonably known the funds transferred into her account were the proceeds of crime when, or even before, they were paid into her account and when she withdrew them and transferred them.

20. The only query I have is whether the dealings she had with those funds resulted in separate offences when she received the money, when she withdrew it and when she transferred it to Mr Bony. Section 11 refers to an offence of money laundering being committed if a person "*acquires, possesses or uses property or engages directly or indirectly, in an arrangement*" involving proceeds of crime (section 11(3) (a)) or "*converts or transfers property*" which represents the proceeds of crime (section 11(3)(b)). On balance, the Act by the use of "or" throughout the section, envisages the possibility of multiple offences being committed. If I am wrong in that then practically the effect of conviction of a number of offences will be minimal. Subject to sentencing submissions, my view is that section 39 of the Penal Code will require concurrent sentences.

21. The defendant is guilty of the 16 counts of money laundering set out in the information. I will adjourn for sentence to 5th April 2018.


D. CHETWYND

Judge

