

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)

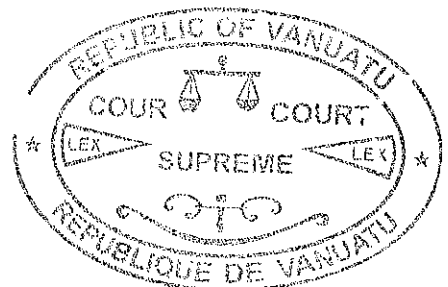
Before: Chetwynd J
Hearing: 31st May 2018
Counsel: Mr Blessing for the Prosecution
Mr Leo for the Defendant

JUDGMENT

1. The defendant James Tolak (otherwise known as James Tolak Bule) is charged with theft. He has entered a plea of not guilty. What he is alleged to have done is to steal 21 boxes of bush knives from a store known as Fung Kwan Chee which was owned by Stanley Fung. The charge in the information says that this occurred between June and July 2016.

2. What the prosecution have to prove, and prove beyond reasonable doubt, is the defendant took the bush knives from Mr Stanley Fung, the owner of the knives, without his consent with the intent of permanently depriving him of them and that the defendant did so fraudulently and without a claim of right made in good faith.

3. Oral testimony was given by Mr Fung, Miss Tania Kalmet (the defendant's former partner) and two men who were also charged with the theft. Sandy Kalo and Tommy Willie pled guilty to theft and were sentenced some months ago. There was



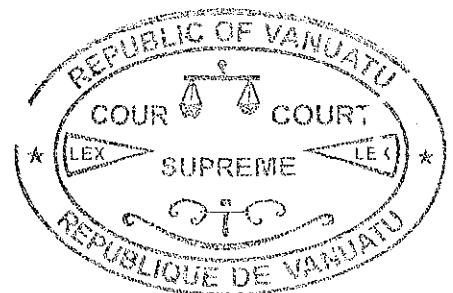
agreement between counsel that the evidence from one hundred or so witnesses could be tendered. Their evidence simply related to their purchases, from time to time, of bush knives from the defendant.

4. The alleged facts against the defendant are quite straightforward. It is said that he entered into an agreement with the shop staff that he would pay them VT 8000 for each box of knives they put in his bag. Whilst they were doing that he would select other items in the store and an invoice would be prepared for those other items. He would then take the invoice to Mr Fung and pay him for only those items on the invoice. He would then return to the front of the store and collect his bag with the knives in it. He would then leave the store. The undisputed true value of the knives was VT 27,000 per box.

5. The defendant admitted this arrangement and said that he had been visiting the shop for many years. He did so originally to purchase items for his own store. The defendant gave evidence he had been running his small store for a number of years. He confirmed the arrangement with the staff was long term, going back to probably 2003 and most certainly 2011.

6. Mr Fung was totally unaware of the arrangement between his staff and the defendant. He only became aware that something was wrong in 2016. He knew that he received regular deliveries of the knives and he was surprised when a customer asked him for a knife and there were none to be found in stock. He decided he would do a stock take when the next delivery of knives occurred. He received his next consignment of knives in June 2016. In July, and as a result of a new stock taking procedure, he realised he had many fewer knives in stock than he should have had. He then questioned his staff and reported the matter to the police.

7. As indicated above, the defendant admitted that he had an arrangement with the staff. He admitted that he would leave his bag with the staff and that they would fill it with knives. He admitted he would then take the knives away and sell them and that he had no intention of returning the knives to Mr Fung. He knew the staff members would not pay the money he paid them over to Mr Fung. Based on his own

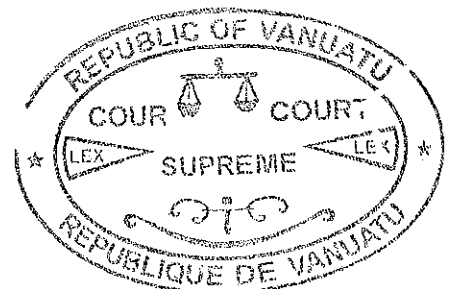


experience as a shopkeeper he accepted he knew this was wrong. As I understand the submissions from his counsel, despite this knowledge the defendant somehow suggests the arrangement he had made with the staff meant that he was not stealing the knives.

8. As best as I can understand the submission it is he had come to an arrangement in good faith with the staff and that meant that he was not stealing the knives. In coming to that strange conclusion the defendant has either overlooked the plain fact that it was the storekeeper and not the staff who owned the knives or alternatively he has simply ignored that inconvenient truth. It also has to be said the defendant apparently saying he believed the arrangement was perfectly all right even though he was paying less than one 3rd of the value of the knives strains credibility beyond reason.

9. It was said on the defendant's behalf the evidence of Mr Willie and Mr Kalo should not be accepted because they were trying to put all the blame on him. It is also suggested that it is wrong to take evidence from co-accused. As to the former point, Mr Willie and Mr Kalo have already pleaded guilty, been convicted and sentenced so it is difficult to understand why they would "put all the blame" on the defendant. They would have nothing to gain from doing so. As to the latter point, no discernible reason was put forward why it would be wrong other than they were co-accused.

10. There is no doubt in my mind that at the very least the defendant has admitted receiving stolen goods. He could therefore be convicted of an offence under section 131 of the Penal Code. I was always taught that in the eyes of the law, a receiver of stolen goods was as culpable as the thief who stole them. Apparently that is not the case in Vanuatu because there is no punishment attached to an offence under section 131. The punishment is to be found in the catch all provision of the Interpretation Act section 36(3), namely VT 5,000 or one years imprisonment or both. One has to think that this is an omission and one which should be remedied by Parliament. An offence of theft carries a maximum sentence of 12 years imprisonment.



11. In any event, as the defendant carried the knives out of the store in his bag and disposed of them by sale; this together with the agreement he admits he made with the staff, means he is guilty of theft. The provisions in the Penal Code are conclusive. Section 30 of the Penal Code provides;

Any person who aids, counsels or procures the commission of a criminal offence shall be guilty as an accomplice and may be charged and convicted as a principal offender

And section 31 says;

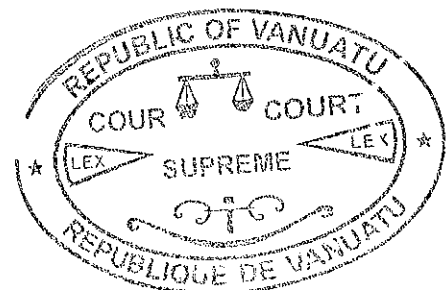
A co-offender shall mean a person who, in agreement with another, takes part with him in the commission of a criminal offence

And if further authority were needed section 34 states:

An accessory after the fact shall mean a person who, knowing or having reasonable cause to suspect that another person has committed a criminal offence, shelters such person or his accomplice from arrest or investigation, or has possession of or disposes of anything taken, misappropriated or otherwise obtained by means of the offence or used for the purpose of committing the offence.

12. If those sections are applied to the facts admitted by the defendant in this case a conviction is inevitable. All the elements required for a conviction for theft have been established beyond reasonable doubt through those admissions.

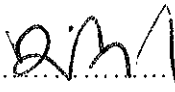
13. Before I conclude I must mention there was a problem with the date of the offending. The problem could have been avoided if the prosecution had thought about the wording of the charge prior to the trial. There was ample evidence to establish the defendant had been stealing knives for some time, including an admission by the defendant. The store owner only became aware of the theft in 2016. I presume that the dates in the charge were set on the basis of the storekeeper's



knowledge even though there was ample evidence that the thefts had been going on some time. I refused an application to amend the dates simply because it was made far too late. It could have resulted in a request for an adjournment and further delay in an already delayed case. The end result was that all of Miss Kalmet's evidence was rendered useless because she gave evidence of events in 2003. In addition she had left the defendant in 2012 prior to the offending as charged.

14. Despite the problems with the dates I am perfectly satisfied that there is ample, one might say overwhelming, evidence to support the charge of theft. I am satisfied that the prosecution have established beyond reasonable doubt that the defendant is guilty of theft as charged.

Dated at Port Vila this 4th June 2018


D. CHETWYND
Judge

