

PUBLIC PROSECUTOR

v

XU FENGXI

Coram: *Chief Justice Vincent Lunabek*

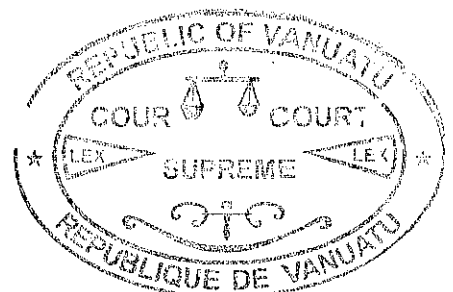
Counsel: *Mr Lenry Young for Public Prosecutor*
Mr Mark J. Hurley for Defendant

Date of Verdict: *14th January 2020*

JUDGMENT ON VERDICT

I. Nature of the Charge

1. This is the judgment on verdict of this case.
2. The accused, Xu Fengxi, is charged with uttering counterfeit currency, contrary to Section 142(c) of the Penal Code Act [CAP. 135]. The particulars of the offence are that on 26 November 2018 at Computer World store, Xu Fengxi knowingly uttered a counterfeit currency of VT10,000 note (Count 1).
3. The accused, Xu Fengxi, is also charged with knowingly attempted uttering counterfeit currency, contrary to Sections 28(1) (2) and 142(c) of the Penal Code Act [CAP. 135]. It is particularized that on 27 November 2018 at Computer World store, Xu Fengxi knowingly attempted to utter a counterfeit currency of VT5,000 note (Count 2).
4. He entered not guilty pleas on the two offences and was tried on 1 and 2 August 2019.
5. Before the trial started, the accused's rights of presumption of innocence were read and explained to him. He understood them (Section 81 of the Criminal Procedure Code Act [CAP. 136]).



II. Elements of the Offences

6. The prosecution has to prove each and all essential elements of the offences in Counts 1 and 2 on the criminal standard of proof beyond reasonable doubt. They are set as follows:-

Count 1

- (a) Identity of the accused as culprit who uttered or used VT10,000 counterfeit note at Computer World store (Vanuatu), in the first incident of November 2018; and
- (b) Date and time of the first incident in November 2018 at Computer World store; and
- (c) Accused uttered or used counterfeit VT10,000 note at that time as real money; and
- (d) Accused knew the money VT10,000 note uttered was counterfeit

Count 2

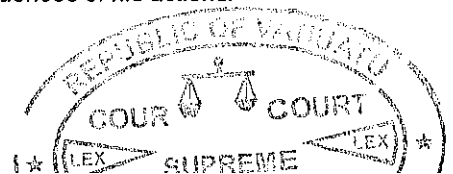
- (a) Identity of the accused as the culprit who attempted to utter or attempted to use VT5,000 counterfeit note at Computer World store (Vanuatu), in the second incident of November 2018; and
- (b) Date and time of the second incident of November 2018 at Computer World store; and
- (c) Accused attempted uttering counterfeit VT5,000 note at that time as real money; and
- (d) Accused knew the money VT5,000 attempted to be uttered or used was counterfeit.

III. Onus and standard of Proof

7. This is a criminal trial, The general rules of the burden of proof in a criminal trial are set out in section 8 of the Penal Code Act ("the Act") as follows:-

"(1) No person shall be convicted of any criminal offence unless the prosecution shall prove his guilt according to the law beyond reasonable doubt by means of evidence properly admitted; the determination of proof of guilt beyond reasonable doubt shall exclude consideration of any possibility which is merely fanciful or frivolous.

(2) In determining whether a person has committed a criminal offence, the court shall consider the particular circumstances of the case and shall not be legally bound to infer that he intended or foresaw the natural or probable consequences of his actions.



(3) If the prosecution has not so proved the guilt of the accused, he shall be deemed to be innocent of the charge and shall be acquitted forthwith."

8. Section 10 (2) and (3) of the Act provides:-

"(2) In all cases in which it is necessary for the accused to have knowledge of certain facts in order to form a criminal intention, the burden shall rest upon the prosecution to prove that the accused was aware of such facts.

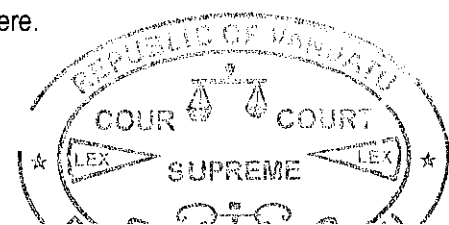
(3) In the absence of direct evidence thereof, such knowledge may be proved by inference from other facts or circumstances."

IV. Prosecution case

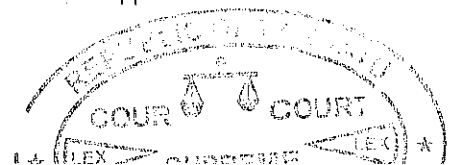
9. The prosecution alleges that the accused went to the Computer World store on two separation occasions with counterfeit currency to do his shopping.
10. The first incident occurred on 26 November 2018 at the Computer World store when the accused uttered or used a counterfeit currency note of VT10,000 for his shopping in that store. That note of VT10,000 was later on banked at BSP Bank. The cashier who served the Defendant at that time was Yvette Mera.
11. The second incident happened on 27 November 2018 when the accused again went to the Computer World store and attempted to use a counterfeit note of VT5,000 to do his shopping. The cashier at that time was Lindy Thomas. She noticed that the VT5,000 note attempted to be used by the accused was fake which she told the accused of it. In reply, the accused denied. She asked the accused where he got the note of VT5,000 from and he answered he got it from other stores as his change for the shopping he did on that day.
12. The prosecution will rely on circumstantial evidence to establish the mental element of the offence (means rea).
13. The prosecution called seven (7) witnesses in support of its case.

V. Evidence for Prosecution

14. The prosecution called seven (7) witnesses in support of the allegations contained in the Amended Information filed 23 July 2019.
15. Ms Yvette Mera is the first prosecution witness (PW1). Ms Mera gave evidence to this effect. She is from Malekula Island. She works as a shop assistant. She works at Computer World for 2 years and she started on 16 August 2017. In her work as shop assistant, she assisted the shop cashier when the cashier was not there.

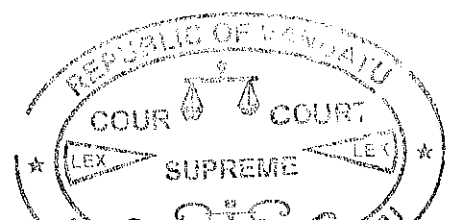


16. She worked on 26 November 2018. On that date, she replaced a cashier. She had some clients coming in. One of the clients she served that day was a client who was working at the China Civil Engineering Corporation Company (CCECC). This client took an item (external hard drive) the amount of which was VT8,995.
17. The accused gave her VT10,000 note. She took the note and gave him back the change. She put the VT10,000 note into the cash drawer. They cleared this item before the accused went out of the door.
18. She knew this client worked with CCECC because he told her so and she sent him to CCECC to get the proof that CCECC had a certificate of VAT free. She knew him as Jeremy a Chinese national. He was a regular customer of the Computer World store.
19. That note of VT10,000 was banked at BSP Bank the next day. She identified the accused in Court as Jeremy.
20. The next day, BSP Bank called the Computer World store and informed them that the note of VT10,000 they banked for the previous day was a fake note. That note of VT10,000 was shown to her and she recognized that note of VT10,000. She recognized the note as it was shine a little bit and there were scratches on it. When the BSP Bank called the Computer World store, Erin was with her at the time.
21. PW1 went through cross-examination. She confirmed she was there at the cashier when Jeremy bought the external hard drive with a VT10,000 note. When Jeremy gave her the VT10,000 note at that time, she did not recognize it as a counterfeit note. She did not put into her statement to the police that it was a fake note. She was not a full time cashier and she was busy at that time. She took the counterfeit 10,000 vatu note as genuine. After that the BSP Bank called and advised the Computer World Store that the note 10,000 vatu of the previous day taking was counterfeit, that note of 10,000 vatu was showed to her and she recognized as the note of 10,000 vatu the accused gave her the previous day and it was a fake money as there were scratches on it.
22. Lindy Thomas is the second prosecution witness (PW2). She gave evidence that she is from Nguna Island and works at the Computer World store from 2016 to June 2019. On 26 November 2018, she was at the Computer World and she worked as a cashier at Computer World. As a cashier, she collected payments of items in the shop and served customers. On 27 November 2018, the accused who was known by her as Jeremy as he was a regular customer of the Computer World store, came in the store in order to buy a sport watch. Jeremy was the accountant at CCECC. So Jeremy came at the Computer World store counter. She observed he took a Vatu 10,000 note quickly and he then looked at her and took time to give her the vatu 5,000 note instead.
23. She checked the vatu 5,000 note and told Jeremy that it was a fake money. Jeremy responded to her that it was not fake money. It was a true and genuine money. She asked Jeremy where he took the money from. Jeremy told her he shopped in various

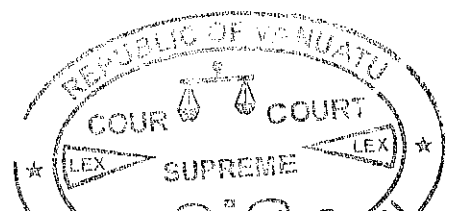


shops that day and they gave him that note of vatu 5,000 as his change. She told Jeremy to wait while she took the vatu 5,000 note to her supervisor.

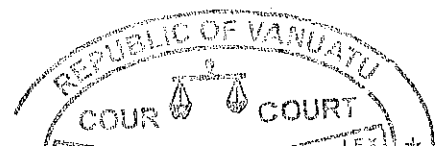
24. She said that she spotted scratches on that vatu 5,000 note. It was laminated and the side of the note was scratched. Jeremy insisted it was a genuine note. Jeremy told her to give that note of 5,000 vatu back to him so that he could give the exact amount of vatu for the sport watch.
25. She told him to wait. She took the vatu 5,000 note and went to show it to her supervisor and came back at the counter. The vatu 5,000 she said she spotted scratch on it. It was laminated but a little bit scratch. Jeremy told her it was a genuine note. Again Jeremy told her to give it back to him and he could pay the exact amount of money for the sport watch. She told him to check the money back to the bank whether it was a genuine note. She gave him back the vatu 5,000 note and he gave her the exact amount of vatu for the sport watch – Thirteen thousand vatu.
26. When she told him the money was fake, she said he was strange. When she told him to take the money to show to her superior, he was just standing. He told her he will give her the exact amount for the sport watch.
27. When she went to see her superior, her superior took a picture of that money Vatu note. She told Jeremy to go and cross-check with the bank.
28. She saw when Jeremy opened his wallet, there were vatu 10,000 notes and vatu 5,000 notes. Then she saw the difference which was that the vatu 10,000 notes are genuine the vatu 5,000 note was scratchy and hard but not soft as the real or genuine money note.
29. She said when Jeremy gave money (on the 27 November 2018), he gave a note of vatu 10,000 first quickly but then took time to give her that vatu 5,000 note.
30. She said if she was shown the vatu 5,000 note she recognized it. A note of vatu 5,000 was shown to her she recognized it as the 5,000 vatu note she was talking about and exhibit P1. There was spot and scratch on it. That money note was strong and Jeremy came and attempted to use that vatu 5,000.
31. She did not know the other name of Jeremy. She only knew Jeremy as the accountant of CCECC and Jeremy was in court and she identified the accused in the defence dock.
32. At that time (27 November 2018) the BSP Bank called the Computer World store to confirm the fake money note of vatu 10,000 used by the accused yesterday.
33. She called on Jeremy's boss to come to the Computer World store. Jeremy's boss came alone.



34. Her supervisor took a picture of that vatu 5,000 note and she return that note back to Jeremy as he requested and she told him to go to the bank and cross check that money note.
35. Lindy Thomas was cross-examined. She recognized Jeremy when he came to buy a sport watch at the Computer World store on 27 November 2018. She did not work at the Computer World anymore.
36. She said she saw Jeremy took a genuine vatu 10,000 note first and looked at her then the vatu 5,000 fake note. She was asked as to why she said Jeremy took vatu 10,000 note looked at her and took time to give her vatu 5,000 note. She responded that Jeremy made his decision of which money he gave her as he had the exact amount to pay. The CCTV camera footage showed she was too busy and she did not mention that Jeremy looked at her in her written statement to the police. She accepted by saying yes that she did not mention that Jeremy looked at her before he gave her vatu 5,000 note.
37. It was put to her she had just invented into the Court Jeremy looked at her before he gave her vatu 5,000 note. She answered yes.
38. It was put to her that when she said Jeremy took vatu 10,000 note quickly but took time to give vatu 5,000 note. She accepted she did not put that in her statement. It was put to her that she had just made up she said yes. She confirmed she gave back to Jeremy that note of vatu 5,000.
39. Lindy Thomas was re-examined. She was asked to clarify her answers to Mr. Bal's questions that she agreed she did not put into her statement that Jeremy looked at her and took time when he gave vatu 5,000 money note to her and to tell the Court why she did not mention in her statement.
40. She answered that when the police brought to her the statement form to fill in, she was busy at that time.
41. She was asked by Mr. Young to clarify her answer to the effect that when Mr. Bal put to her that she had just made up her answer in the court this morning, she said yes so what she meant.
42. She answered because Mr. Bal was sticking to her statement and she did not mention this is her statement that in why she answered to his questions she did not know what she will answer as she did not write it down in the statement.
43. She was also asked to clarify her answers to the questions asked by Mr. Bal that Jeremy said the vatu 5,000 note was the change of his shopping on the day and she said yes. She was asked and she answered she did not put in her statement she was asked to tell the Court why she did not put in her statement.



44. She said she was busy when the police brought to her the statement form. She said on a closer look of her statement, the handwritten in the front with the signatures were hers and then the Assistant Manager wrote what she told her in the statement.
45. She was asked to clarify her answer to the question that she made up her answer this morning in court, and she said yes. She clarified that because Mr. Bal insisted on the statement and she did not write these things in the statement.
46. She was asked of her answers to the questions of Mr. Bal about the conduct of Jeremy she said he was strange. She said he was not happy. She was asked she did not put that in her statement and she was asked she made up her mind she said yes. She was asked to clarify why she said she did not put in her statement.
47. She answered they were all busy in the store. It was busy time in the store. She had no time to write all those things. And Mr. Bal was sticking on her statement that was why she answered him in that way.
48. She was asked to clarify her answers given under cross-examination when it was put to her that Jeremy took out vatu 10,000 note quickly and took time to give vatu 5,000 note and that she did not say that in her statement and she said yes. She was asked to say why she did not put in her statement. She said these answers she gave them earlier already and that she was busy.
49. She was asked to clarify her answer that she made up her mind only this morning when she said yes. She answered she said that because she did not mention in her statement.
50. Erin Thorpe is the third prosecution witness (PW3). She was born in Vanuatu and she worked as Assistant Manager at Computer World store. She worked there since November 2017.
51. She worked on 27 November 2018. The Computer World store received a telephone call from BSP Bank advising that they received a fake note in the takings of the Computer World store from the day before. It was a vatu 10,000 note. They spoke to the cashier who worked that day, Yvette Mera, who found that the note was not right something wrong with it. Around the same time, the other cashier Lindy Thomas was processing sales, she called her over that she had a fake note. She took the note to her boss. Her boss said they are not going to accept that as they had the call from BSP saying they received a vatu 10,000 which was a fake note.
52. Her boss said they did not accept the fake note and they returned it to the customer. At this time, Yvette Mera (PW1) said the same customer who gave vatu 5,000 note was the same customer who gave vatu 10,000 note the day before.
53. She had discussions with her boss about the fake notes that they had to be brought back to them so that they can report to the police. They did not have a contact number for the

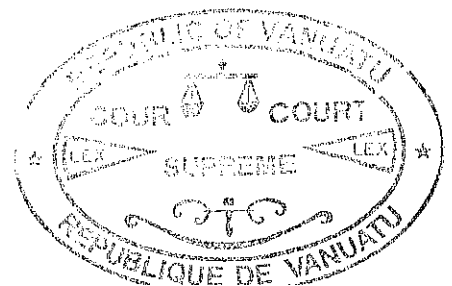


accused but they had contact for another colleague of his in the CCECC. So they called him, his name is Yan. She tried to explain to him that they requested the note of vatu 5,000 back to the Computer World store.

54. Shortly after the call, Yan came to the Computer World store. He tried to call Jeremy on his mobile. There was a discussion about where the money had come from and she overheard the conversation between Yan and Jeremy that Jeremy said he had recently returned from China and that he had changed his money into Vatu at Number One Currency and that was the money he was using.
55. She said another customer overheard the discussions and called the police by phone.
56. The police shortly after came to the Computer World store. The police told Yan to call Jeremy to come over to the Computer World store with the vatu 5,000 note. The police requested her to make a complaint. When Jeremy arrived, police took Jeremy in their vehicle to the police station for questioning. She and Yan also went to the police station to make statements.
57. Before going to the police station, she was able to access their security camera. She copied the recording of Jeremy of Monday 26 November 2018 of when he paid the items of vatu 10,000 note. She copied also the recording of that day Tuesday 27 November 2018 and she put them in a USB flash drive to get to the police.
58. She also took the vatu 10,000 fake note given to her by BSP to the police.
59. She did not know the other name of Jeremy up until that day of Tuesday. She identified the accused as Jeremy in court.
60. She was cross-examined. She confirmed Yan told her Jeremy returned from China.
61. Tammy Watas was the next prosecution witness (PW4). She is from Pentecost Island. She worked at Number One Currency at Pilioko House, Port Vila. She worked for four (4) years now. She is the chief cashier of Number One Currency. As chief cashier, she checked every cash in at Number One Currency.
62. They deal with foreign currencies such as Australian dollars, New Zealand dollars, US dollars, Euros and many others. They exchange foreign currencies into Vatu and Vatu to foreign currencies.
63. The records of Number One Currency showed that in 2018, they have lots of customers. The details of customers are entered into the system. The records of customers are also checked by their compliance officer. In 2018, they checked their records but they could not find a name by Xu Fengxi. The records of 2017, could not show a name by Xu Fengxi.



64. Tammy Watas was cross-examined. She confirmed her evidence in chief that police told them to search in their system if the name Xi Fengxi appeared in their system. They searched and they could not find the name Xu Fengxi.
65. Mangi Timbacci is the next prosecution witness (PW5). Mangi Timbacci is from Malo Island. He is the Manager of Number One Currency and his office is situated at Pilioko Building. He worked there for 4 years now. He looked after the operation and whole business of the Number One Currency across Vanuatu. The business of Number One Currency is to offer foreign currencies. They exchange foreign currencies into Vatu and Vatu to foreign currencies. There are in total 12 currencies.
66. They do not exchange fake currency and if they find one, they report directly to the police. They train their staff so that they detect the security features of the foreign currencies or vatu (coins or notes). They do also have to detect their security features of the foreign currencies.
67. In his cross-examination, he said if they have issue of fake moneys they reported immediately to the Fraud Investigation Unit (FIU) and the police. Until now they do not have any. He was not aware that Number One Currency gave fake money notes.
68. He confirmed the records system of the Number One Currency did not find a name of Xu Fengxi.
69. Sergeant Janette Boedovo (PW6) is the second last prosecution witness. She is a police sergeant working as a police officer for 33 years.
70. She is an investigating officer under the Fraud Unit of the Criminal Investigation Branch. On 28 November 2018, she was in the office of the Fraud at the time when another sergeant police officer Hesley came in the office with a male Chinese national by the name of Xu Fengxi.
71. Because Xu Fengxi does not speak bislamar, but speaks English, he gave the statement, she read through and started to interview him. She asked him of his rights and cautioned him and the accused understood. She signed and he signed the statement they started the interview.
72. He told of his versions of the story in English and she wrote it down in English language. The accused understood and spoke very fluent English. At the end she read his statement back to him. Sergeant Esly was present at the time. She confirmed the statement she took from the accused on 28 November 2018. There was no pressure on the accused when he gave his cautioned statement (Exhibit P7).
73. She confirmed her evidence when she was cross-examined.



74. Sergeant Esly Marango was the last prosecution witness (PW7). This police officer is from Tongoa Island and is an investigating officer under the Fraud Section of the Criminal Investigation Department. This officer knew of the incident involving the accused when he purchased items on 26 and 27 November 2018. Two fake notes of vatu 10,000 and vatu 5,000 were reported by the Computer World store. This officer was present when Sergeant Janet Boedovo cautioned the accused. The accused said he did not believe he used a counterfeit currency note money. The statement was read back to the accused and he signed it. There was no force applied on the accused.
75. In his cross-examination, he said when he conducted searches, he did not find any fake money at the accused's house or his place of work.
76. It was suggested to him that the accused will say that the money he exchanged he took from Number One Currency. Whether or not he got any record from Number One Currency. He answered no as he said the date the accused exchanged money at Number One Currency, he went to obtain records of them. However, there was no client of Number One Currency of that name Xu Fengxi and there was no records of such transactions made by a client of Number One Currency in the name of Xu Fengxi. The Number One Currency records were given in their own statements.
77. The following statements and their respective attachments were tendered as evidence of the prosecution by agreement of the prosecution and defence counsel:-
- (1) Sworn statement of Dr. Priya Subramanian dated 22 July 2019 (Exhibit P1) including physical notes the subject of this case;
 - (2) Sworn statement of John Hilliman dated 11 July 2019 (Exhibit P2);
 - (3) Sworn statement of Moana Korikalo dated 15 July 2019(Exhibit P3);
 - (4) Sworn statement of Rinnie Vevie (Exhibit P4);
 - (5) Attachments to statement of Campbell Beeson (Exhibit P5); and
 - (6) Sworn of Kensen Seri (Exhibit P6).
78. That is the end of the prosecution case and evidence.

VI. Process after the close of the prosecution case

79. A ruling was made pursuant to Section 164 of the Criminal Procedure Code (CPC) [CAP. 136] that a case is made out against the accused Xu Fengxi and that he was required to put forward his defence.
80. The rights of an accused person contained in Section 88 of the CPC [CAP. 136] was read and explained to the accused Xu Fengxi. He understood them.

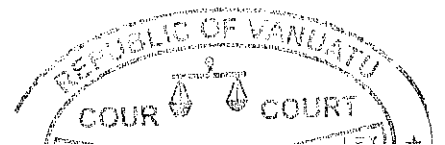


VII. Defence case and/or position

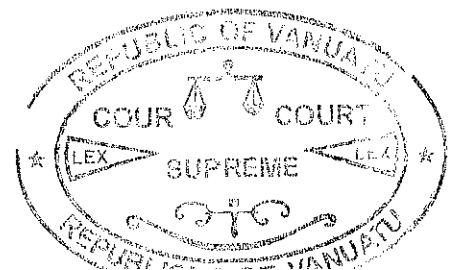
81. The accused Xu Fengxi exercises his right to remain silent. That is the end of the defence's case.

VIII. Facts – Findings and Assessment of Evidence

82. The evidence established the following facts:-
83. On Monday 26th of November 2018 around 3pm in the afternoon Accused Xu Fengxi went to Computer World store to purchase an external hard drive roughly of vatu 13,000. The accused gave to the cashier (evidence of Yvette Mera) vatu 13,000 and the cashier gave him vatu 90 change. The details of the money he gave were 1 x vatu 10,000 note, 1 x vatu 2,000 note and 1 x vatu 1,000 note and 1 x vatu 100 coin. The cashier gave him the hard drive and he left the Computer World store.
84. The Computer World store taking of the day is banked the next day. So the taking of the Computer World store of Monday 26 November 2018 was banked at BSP on 27 November 2018 (evidence of driver John Hilliman).
85. On 27th November 2018 around 10am – 11am, as a teller of BSP, Rinnie Vevi was processing BSP customers fast deposits, received Computer World store deposits started sorted in face value and counted them then she noticed a piece of vatu 10,000 note was totally different from the other normal vatu 10,000 note. She advised her supervisor to check. She cancelled that note because it was a fake one. The BSP notified the Computer World of the cancellation of the fake note and returned back to the Computer World that vatu 10,000 note (evidence of Rinnie Vevi and Moana Korikalo).
86. The next day, Tuesday 27th November 2018 at about 11am, accused Xu Fengxi went back at the Computer World store to purchase a storage card and sport watch. Accused Xu Fengxi was known by the cashiers of the Computer World store as Jeremy as he was a regular customer of the Computer World store and the cashiers of the Computer World store knew the accused is the accountant of the CCECC.
87. On 27 November 2018, at the cashier counter of the Computer World store, accused took his wallet, there were vatu 10,000 notes and vatu 5,000 notes in the wallet. He took out from his wallet a vatu 10,000 note quickly and before he took out a vatu 5,000 note, he looked at the cashier and took time before he gave her the vatu 5,000 note.
88. The cashier spotted that the vatu 5,000 note was laminated, there was a scratch on it, and it was different and not soft. It was peeled at the edge. The cashier decided not to accept it. The cashier showed the vatu 5,000 note to her supervisor (evidence Lindy Thomas).



89. Accused looked strange when the cashier told him that she is not going to take the vatu 5,000 note because it was a fake money note. She took it to her supervisor to check. The vatu 5,000 note was different. There was scratch on it and it was peeled on the side.
90. The accused demanded the money vatu 5,000 note to be returned to him. He was asked to take that vatu 5,000 note to the bank and to have it cross-checked. The vatu 5,000 note was given back to him. The accused paid the value of the items storage card and sport watch with genuine money as he had that exact amount on him also in any event. They gave the purchased items to him (evidence of Lindy Thomas).
91. The vatu 5,000 note spotted with scratches and peeled on side was photographed by the Computer World store management before they gave it back to the accused (evidence of Erin Thorpe).
92. The Computer World Store called a colleague of the accused, Mr. Yan, as they did not have the contact of the accused. Mr. Yan came directly to the Computer World when they informed him of the counterfeit currencies used by Xu Fengxi. Yan attempted several called to contact the accused. He was not successful but then after several attempts succeeded to contact the accused by phone and talked to him. There were conversations between Yan and accused (Jeremy) over the counterfeit money note and the conversations were overheard by the staff and clients of the Computer World store. The accused seemed to say after his return from China, he came to Vanuatu with US Dollars currencies and exchanged them into Vatu currencies at the Number One Currency. A client of the Computer World store phoned and reported the matter to the police. The police came at the Computer World store, Yan called on the accused to come and the police arrested the accused and took him to the police station for questioning (evidence of Erin Thorpe).
93. On 26 November 2018, cashier Yvette Mera had a busy time. She did not check properly the vatu 10,000 note used by the accused when he purchased an external hard drive. On the next day Tuesday 27 November 2018, after the BSP called and notified the Computer World store that a vatu 10,000 note from the previous taking was a counterfeit money note, she recognized that vatu 10,000 note which was given to her by the accused the previous day. She recognized the note as it was shine a little bit and scratches on it. Erin Thorpe was with Yvette Mera at the time. As it was a busy time, she made a short statement to the police. She accepted that she did not mention all what she said in her evidence in chief because it was a very busy time for her and when Mr. Bal cross-examined her, he was sticking at her statement and her statement did not contained all what she said in her evidence in chief. However, witness Mera said the vatu 10,000 note given to her by the accused the previous day, she recognized it as it was shine a little bit and was laminated and with scratches on it. She said it was a fake vatu 10,000 note. Mera's evidence is accepted as truthful version of the fact.



94. It is also accepted as a fact that when Lindy Thomas told the accused that she is not going to accept the vatu 5,000 note as it was a fake note and where she got it from, the accused told her it was not a fake money; it was a true and genuine money. She asked the accused where he got it from, the accused told her that he was shopping from various shops that day in particular at Prouds Duty Free and Paris Fashion Duty Free Shopping and they gave him that note of vatu 5,000 as his change.
95. The receipts from these two duty free shops were attached and exhibited. They showed that the accused did not do any shopping at any of these two Duty Free shops on 27th November 2018. The respective receipts from the two duty free shops indicate that the accused did do shopping at the Prouds Duty Free on the 04th October 2018 and he also did shopping at the Paris Fashion Duty Free Shopping on 08th October 2018. There were no evidence of any counterfeit currency notes exchanged or occurring at these two Duty Free Shops' takings when banked (evidence of Campbell Beeson and Winsbie Nigel Sablan and Johnson Sandrine).
96. It is also a fact that after the interview or the statement of the accused was obtained, the business records of the Number One Currency were provided. There were no evidence that Xu Fengxi exchanged United States Dollars currencies at the Number One Currency in October or November 2018 (evidence of Tammy Watas chief cashier of Number One Currency and Mangi Timbacci, the Manager of Number One Currency).
97. The suspected Vatu 5,000 (AA17342159) and the suspected vatu 10,000 (AA10000190) were inspected, observed and compared with following genuine bank notes from the Reserve Bank of Vanuatu - Reference VT5,000 (AA17252722) and reference VT10,000 (AA10731290). Dr. Priya Sabramanian, a Senior Project Manager and expert in the analysis and characterisation of bank notes and their construction made his findings of this study in the following way:-
1. *Upon initial inspection by eye, microscopy and using the visual spectral comparator determined that the security features on the suspect banknotes were consistent with those on the reference genuine banknotes.*
 2. *The note dimensions of the suspect banknotes received from Reserve Bank of Vanuatu were compared to the reference genuine notes. The results of these measurements are given in table 1 below. The suspect banknotes received from the Reserve Bank of Vanuatu have short edge dimensions lesser by 1 mm and 0.5 mm for 5000 and 10000 vatu respectfully. From closer inspection of the banknotes, it is his opinion that the suspect banknotes have been cut for some reason and this is why the dimensions have changed.*

Table 1: Dimensions of the suspicious and genuine notes

Notes	Dimension
Suspect 5000 Vatu (AA17342159)	150 x 64 mm



<i>Suspect 10000 Vatu (AA10000190)</i>	<i>150 x 64.5 mm</i>
<i>Reference 5000 Vatu (AA17252722)</i>	<i>150 x 65 mm</i>
<i>Reference 10000 Vatu (AA10731290)</i>	<i>155 x 65 mm</i>

3. *It was also observed on initial visual inspection that the suspect banknotes received from the Reserve Bank of Vanuatu are glossier than the reference genuine banknotes and they appear to have been laminated with a thin plastic layer on both sides. Upon closer inspection of the suspected notes, the laminate appears to have partially disintegrated or peeled off along the long and short edges of the notes. The reference genuine banknote does not have any laminate layer.*
4. *In order to confirm for the presence of a laminate layer and identify the material used, SEM and FTIR analysis was completed on both suspect and reference genuine banknotes. The analysis of the suspected notes conducted with SEM and FTIR confirmed that for both suspect notes AA17342159 and AA10000190, an 8-micron thick polyethylene film has been laminated on both the top and bottom surface of a genuine banknote.*

98. The two suspected notes of vatu 5,000 and vatu 10,000 with serial numbers AA17342159 and AA10000190 respectively were used (for vatu 10,000 note) on 26 November 2018 and attempted to be used (for vatu 5,000 note) on 27 November 2018 at the Computer World store by the accused Xu Fengxi (Jeremy) as if they were genuine notes. They are both counterfeit currency vatu notes.
99. The police came at the Computer World Store and arrested the accused on the same date of 27th November 2018.
100. The police search into the home and the place of work of the accused (office) did not find any or other fake or counterfeit vatu currency notes or any other counterfeit currency or currencies.

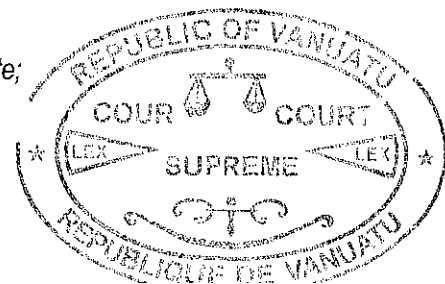
IX. Application of law to facts

101. Section 142 (c) of the Penal Code is the relevant provision. It provides as follows:-

"142. Counterfeit currency

No person shall –

- (a)...*
- (b)...*
- (c) Knowingly utter any such counterfeit or debased coin or bank note;*
- (d)..."*



102. The object of enacting this subsection (c) of section 142 of the Penal Code is to stop the circulation of counterfeit currency notes (counterfeit vatu currency notes or currency notes of another country) by punishing all persons who knowingly or having reason to believe the same be counterfeit do any act which could lead to their circulation.
103. In order to convict an accused of this crime, the prosecution must prove that the accused acted with criminal intent. In the context of charges stemming from the alleged use of counterfeit currency, the prosecution must prove that the accused acted with the intent to defraud.
104. Criminal intent can be proved by direct evidence, such as an accused's confession that he meant to defraud the victim. But more often, it is proved using circumstantial evidence. The law allows a judge to make reasonable inferences from circumstantial evidence presented at trial. Circumstantial evidence is evidence that allows the judge to make an inference in order to determine the existence of a fact (see **Swanson v Public Prosecutor [1998] VUCA 9; Criminal Appeal Case 06 & 11 of 1997(26 June 1998)**). The relevant part of this Swanson judgment on drawing inferences and adverse inferences against the accused is set out hereunder:-

"Inferences may be drawn from proved facts if they follow logically from them. If they do not, then the drawing of any conclusion is speculation not proof. Speculation in aid of an accused is no more permissible than speculation in aid of the prosecution. (R. v. Harbour, [1995]1 NZLR 440.

Inferences need not to be irresistible. The prosecution is not required to disprove any inference that the ingenuity of counsel might devise. It must exclude any reasonable hypothesis based on the evidence which is consistent with innocence, but no more. R. v. Laugalis (1993) 10 CRNZ 350, 359. To similar effect is Section 8 (1) of the Penal Code Act [CAP 135] which mandates proof beyond reasonable doubt but states that "the determination of proof beyond reasonable doubt shall exclude consideration of any possibility which is merely fanciful or frivolous".

In a circumstantial evidence case, where the accused makes no statement out of Court and/or elects not to give evidence, inferences can be drawn from the absence of any explanation from the person "with unique knowledge of the complicated dealings to which the charges relate" (a quote from Connell (supra), also a complicated fraud case.

The limits of the right to draw inferences from an accused's silence are discussed in such cases as Trompert v. Police [1985] 1 NZLR 357 and Weissersteiner v. R. [1993] HCA 65; [1993] 117 ALR 545. It is basically a matter of common sense to be used in the circumstances of the case. See Haw Tua Tau v. Public Prosecutor [1982] AC 136, 151, 153. (a Judge-alone criminal trial).

The Judge did not rely on the accused's silence as a basis for drawing adverse inferences against the accused. In our view, he did not need to do so because the



other inferences discussed already amply justified the convictions. However, since the inferences are available to be drawn from unchallenged evidence, we should have thought that this case provided a suitable occasion for the drawing of inferences adverse to the accused, stemming as a matter of common sense from his lack of any explanation."

105. The judge may, for example, infer that the accused intended to defraud a retailer (here, Computer World Store) if the prosecution presents evidence that the accused acted or behaved in specific or certain way when paying for the item. The prosecution would argue that the judge should infer from the circumstantial evidence (the accused's action or behaviour) that the accused was attempting to defraud the retailer by passing counterfeit cash. These are the submissions of Mr. Young, the prosecution counsel, in relation to count 2.
106. A judge may, on the other hand, determine that the circumstantial evidence does not support an inference of intent. For example, although the prosecution may introduce evidence of the accused's specific or certain action or behaviour at the time of paying the item, the defence counsel may introduce evidence that the accused's specific or certain action or behaviour at the time of paying the item meant something else.
107. During closing argument, the defence counsel would urge the judge to make the reasonable inference that supports the theory that the accused was unaware that the cash was counterfeit and therefore should be acquitted. That is the essence of the submissions of Mr. Bal, the defence counsel, on behalf of the accused in this case on both counts 1 & 2.
108. A person charged with using counterfeit currency may have one or more defences available. As with all criminal charges, the prosecution must prove every element of a crime beyond a reasonable doubt in order to obtain a conviction. In counterfeit currency cases, however, lack of knowledge and intent is perhaps the most commonly raised defence.
109. As in the above hypothetical scenario, an accused may argue a lack of knowledge that the currency was counterfeit. With such a defence, the accused's counsel attempts to persuade the judge that the accused did not know that the cash used was counterfeit and therefore could not have been intended to defraud the recipient. These are the submissions of Mr. Bal on behalf of the accused on both counts 1 & 2.
110. If the counterfeit notes are poor quality forgeries, the prosecution may counter the defence by asserting that the accused could not have reasonably believed that the forgeries were legitimate currency notes. In essence, Mr. Young, on behalf of the prosecution, submitted to this effect in respect to both counts 1 & 2.
111. The prosecution may also counter the accused's lack of knowledge defence by arguing that the accused's behaviour indicates knowledge that the cash was counterfeit. For



example, the prosecution may introduce evidence that the accused acted unusually when making the purchase item with the fake cash. Such evidence may include witness testimony that the accused acted nervously or strangely when making the transaction. In essence, Mr. Young submitted to this effect based on the evidence in chief of witness Lindy Thomas, although weakened in her cross examination but comforted her evidence in chief in her re-examination and accepted by the court as truthful fact on count 2.

112. In the present case, the accused exercises his right to remain silent and elects not to give evidence. That is his right. He should not be criticised for doing so.
113. There is no need for the court to rely on the accused's silence as a basis for drawing adverse inferences against him because there are other inferences which exist and are available to be drawn from unchallenged evidence. However, since the inferences exist and are available to be drawn from unchallenged evidence, this case provided a suitable occasion for the drawing of inferences adverse to the accused, stemming as a matter of common sense from his lack of any explanation.
114. Inferences can be drawn from the absence of any explanation from him "*with unique knowledge of the (complicated) dealings to which the charges relate*".
115. The following elements of the offences in Counts 1 and 2 are established:-

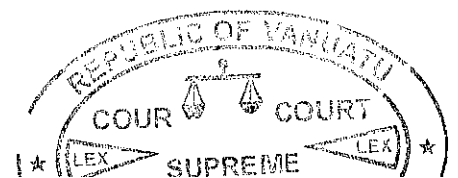
A. Count 1

1. Identity of the accused as culprit of the first incident offence in count1

116. Yvette Mera identified the accused in the defence dock as Jeremy known to her and others in the Computer World store as a regular customer and the accountant of CCECC. Jeremy's other name is Xu Fengxi, the accused. He came into the Computer World store and purchased an external hard drive from the store on 26 November 2018. The accused had used a bank note of vatu 10,000. Mera did not recognize the vatu 10,000 was fake as she was busy at the Computer World Sales counter at that time. The accused Xu Fengxi (Jeremy) gave vatu 10,000 note to Yvette Mera to purchase the item of the external hard drive. In his cautioned statement, the accused admitted he came to the Computer World store and purchased an external hard drive with a note of vatu 10,000 to the cashier at the Computer World store on Monday 26th November 2018. The CCTV Camera footage showed the accused giving the cashier, Yvette Mera, vatu 10,000 note. Yvette Mera recognized the vatu 10,000 note given to her by the accused on 26 November 2018 and on a closure inspection, it has scratches and peeled on the side.

2. Date and time of the first incident

117. The first incident occurred on 26 November 2018 at about 3.00pm in the afternoon as testified by Yvette Mera and confirmed by the cautioned statement of the accused, Xu Fengxi, himself.



3. Uses counterfeit 10000 vatu note as if it is real money

118. The accused, Xu Fengxi (Jeremy) uttered or used the vatu 10,000 counterfeit note as real money to purchase the external hard drive item and the property item was given to him and the VT10,000 counterfeit note was put into the cash drawer as genuine with his change given to him on 26 November 2018. The counterfeit note of 10,000 vatu was deposited into the bank when it was found out it was a counterfeit currency of 10,000 vatu note on 27 November 2018.
119. The suspect money of VT10,000 note (AA17342159) uttered or used by the accused was seized and analyzed. It was a counterfeit 10,000 note as the evidence amply justified (evidence of Lindy Thomas, Erin Thorpe, Reserve Bank of Vanuatu officers and Dr. Priya Subramanian).

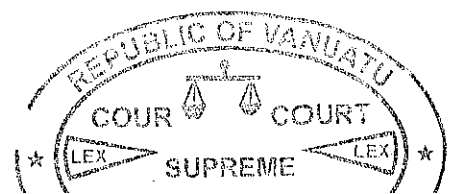
4. The Accused knew the money VT10,000 note uttered was counterfeit

120. His knowledge the money vatu 10,000 note was counterfeit could have been reasonably inferred also from the following established facts:
1. . He is a regular customer of the Computer World store and there were no complaint of counterfeit currency made against him. However, after his return from China, the accused in his cautioned statement said he come back with few American US dollars (US \$ 450) and he exchanged them into Vatu currencies at Number One Currency. There was no evidence of a person named Xu FengXi exchanging US Dollar currencies into Vatu currencies in the Number One Currency Business records nor evidence of a person or agent exchanging money US Dollars currencies into Vatu currencies on behalf of the accused Xu Fengxi.
 2. On 26 November 2018, the accused came at the Computer World store and purchased an extension hard drive with a counterfeit currency of vatu 10,000 note as if it was a genuine note to defraud the Computer World store. Yvette Mera, a shop assistant, was replacing the cashier at the time. Mera was busy and so she did not notice that forged currency note of 10,000 vatu she received from the accused and she accepted it at that time. The purchased property was given to him with his change (90 vatu).
 3. The very next day, 27th November 2018, the accused came back at the Computer World store to purchase a storage card and a sport watch. He attempted to utter a counterfeit currency of VT5,000 note in his purchase of the items as if the counterfeit money note was genuine to defraud the Computer World store.
 4. On 26 November 2018, Yvette Mera took the counterfeit 10,000 vatu note as genuine. She was busy, she was not the cashier but as an assistant shop she received the customers including the accused when the cashier was not there. It



was a busy day in the shop. However, on 27 November 2018, after that the BSP Bank called and advised the Computer World Store that the note 10,000 vatu of the previous day taking was counterfeit, that note of 10,000 vatu was showed to Mera and she recognized it as the note of 10,000 vatu the accused gave her the previous day and there were scratches on it and it was peeled on the side. It was a fake money.

5. The accused's uttering of counterfeit currency note of vatu 10,000 was successful on 26 November 2018. So the next day he came back with another counterfeit currency of vatu 5,000. But this time, another and real cashier was there at the counter (not the same one (Mera), the assistant shop), so the accused took some extra precautions. He first quickly gave an amount of vatu 10, 000 (a genuine note), and before he gave the counterfeit 5,000 vatu note to the cashier he looked at her and took time to give her that counterfeit money of 5,000 vatu note.
 6. The counterfeit currency of 5,000 vatu note was spotted out as counterfeit money note and it was not accepted by the cashier of the Computer World store.
 7. The accused insisted that the counterfeit money of VT5,000 note will be given back to him. It was not a fake money. It was a genuine one. He got that VT5,000 note as his change from his shopping on the day.
 8. The accused had the exact value amount of the two items (storage card and sport watch) at that time. He paid the exact value amount of the items after the counterfeit money note was spotted out and not accepted by the Computer World.
 9. The actions of the accused on 26 November 2018 leading to his knowledge of the money vatu 10,000 note was counterfeit and his actions on 27 November 2018 were so closely linked and interrelated on the material time sequences of facts connected to his knowledge of the situations and succeeding events. It is rational as a matter of sense and logic to draw inferences on these established facts that the accused knew on 26 November 2018 that the money VT 10,000 note was counterfeit.
-
121. Further, the evidence established that upon inspection by naked eyes the suspected counterfeit note of 10,000 vatu has been cut for some reason and so its dimensions have been changed. Its texture was glossier and appeared to have been laminated with a thin plastic layer on both sides. The laminate appears to have partially disintegrated or peeled off along the long and short edge of that note.
 122. On evidence, that counterfeit note of suspect 10,000 vatu (AA1734159) is poor quality forgeries. It is rational to infer that the accused could not have reasonably believed that the counterfeit note was a legitimate currency note taking his profession at the place of



his work at the CCECC as the accountant of the Company. The submissions to the contrary effect are rejected.

123. The Court is satisfied that the prosecution has proved each and all essential elements of the offence in count 1 beyond a reasonable doubt against accused Xu Fengxi.

B. Count 2

1. Identity of the accused as culprit of the second incident offence in count 2

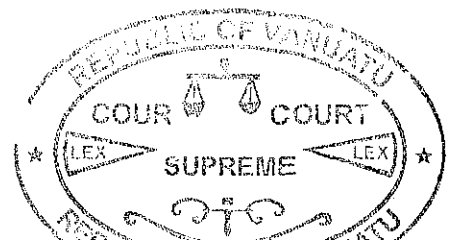
124. This was the second occasion that accused Xu Fengxi attempted to utter counterfeit currency note in the Computer World Store. The second time was through the cashier Lindy Thomas on 27th November 2018. He wanted to purchase a storage card and sport watch. Lindy Thomas spotted scratches, laminate and the side peeled off on a 5,000 vatu note given to her by the accused at that time. She suspected it was a fake currency note. She decided not to accept it. She took it to her supervisor. The evidence showed that the accused was there at the store at around 11.00am in the morning. The accused appeared to say it was not a fake currency note and it was genuine as his change from his shopping. The evidence established that he was at the store on that date. In his cautioned statement also, he accepted he went to the Computer World store on the 27th November 2018 to purchase a storage card and a sport watch.

2. Date and time of the second incident

125. The evidence established that the second incident happened on 27th November 2018 at around 11.00am o'clock in the morning at the Computer World Store. The accused attempted to utter 5,000 vatu counterfeit currency note on that date.
126. At that time also, the BSP Bank called the Computer World Store to advise them that a 10,000 vatu note of the taking of the Computer World Store of the previous day (26th November 2018) which is being banked on the 27th November 2018, was a counterfeit currency note.

3. Attempts uttering or using counterfeit currency 5,000 vatu note as if it is real money

127. Based on evidence, on 27th November 2018 at around 11.00 am, the accused Xu Fengxi (Jeremy) was purchasing a storage card and a sport watch using a genuine 10,000 vatu note and attempted to utter or use a counterfeit 5,000 vatu note as if it was real money note. The cashier Lindy Thomas prevented the accused from doing so by stopping him and not accepting that 5,000 vatu note as it was a fake note. She asked him to take it to the bank for cross-check. It was given back to him. The accused purchased the storage card and the sport watch as he had with him at that time the exact value amount of these two items.



128. The suspect money of vatu 5000 note (AA17342159) attempted to be used by the accused was seized and analysed. It was a counterfeit 5000 vatu note as the evidence amply justified (evidence of Lindy Thomas, Erin Thorpe, Reserve Bank of Vanuatu officers and Dr. Priya Subramanian).

4. The accused knew the money 5000 vatu note attempted to be uttered or used was counterfeit

129. Based on the evidence, the knowledge of the accused stemmed from his own conduct. First, he seemed to suggest in his cautioned statement that the 5,000 vatu counterfeit note was coming from the change of the money he spent in the shopping he did at the Prouds Duty Free and Paris Duty Free shopping on the day. The evidence was that on the day (27th November 2018), the accused did not shop at any of these two Duty Free shops. He did shop at the Prouds Duty Free on 04 October 2018 and at the Paris Duty Free Shopping on 08 October 2018.
130. Second, Lindy Thomas's observations of him at the cashier of the Computer World Store before he paid the storage card and the sport watch on 27th November 2018, was that he pulled out quickly the note of 10,000 vatu (the genuine one) but looked at her and took time before he gave her the suspect counterfeit 5000 note vatu (AA17342159).
131. Third, the accused's uttering of counterfeit currency note of vatu 10,000 was successful on 26 November 2018. So the next day on 27 November 2018, he came back with another counterfeit currency of vatu 5,000. It is rational to draw such a fact. But the counterfeit currency of 5,000 vatu note was spotted out as counterfeit money note and was not accepted by the cashier of the Computer World store.
132. Fourth, the accused insisted that the counterfeit money of VT5,000 note be given back to him. It was not a fake money. It was a genuine one. He got that 5,000 vat note as his change from his shopping on the day. The evidence established to the contrary that he did not do any shopping in the shops he referred to on the day (27 November 2018).
133. In addition, on 27 November 2018, the accused had the exact amount value of the two items (storage card and sport watch) and he paid the exact value of the items after the counterfeit money note was not accepted by the store. It is rational to draw the following inferences that as regular customer of the Computer World store he must have known of the prices of these items and instead of paying the exact value amount of these items that he had at that time, he attempted to utter a counterfeit VT 5,000 note to defraud the retailer shop (Computer World).
134. The actions of the accused on 26 November 2018 leading to his knowledge of the money vatu 10,000 note was counterfeit and his actions on 27 November 2018 were so closely linked and interrelated that it is rational, as a matter of sense and logic, to draw inferences on these established facts that the accused knew on 27 November 2018 that the money VT 5,000 note was counterfeit.



135. Further, on the evidence, that counterfeit note of suspect 5000 vatu (AA1734159) is poor quality forgeries, it is rational to infer that the accused could not have reasonably believed that the counterfeit note was a legitimate currency note.
136. The defence submissions to the contrary effect are rejected.
137. The Court is satisfied that the prosecution has proved each and all essential elements of the offence in count 2 beyond a reasonable doubt against accused Xu Fengxi.

X. Verdict

138. The verdict of the Court on both count 1 and count 2 are as follows:-

1. Accused Xu Fengxi is found guilty of offence of uttering counterfeit currency, contrary to section 142 (c) of Penal Code Act, charged against him in count 1; and
2. Accused Xu Fengxi is found guilty of offence of attempting uttering counterfeit currency, contrary to sections 28 & 142 (c) of Penal Code Act, charged against him in count 2.

DATED at Port Vila this 14th day of January, 2020.

BY THE COURT

**Hon. Vincent Lunabek
Chief Justice.**

