

**IN THE COURT OF APPEAL OF
THE REPUBLIC OF VANUATU**
(Criminal Appellate Jurisdiction)

Criminal Appeal
Case No. 18/1721 CoA/CRMA

BETWEEN: MIKE UYOR
JACKY THOMAS
Appellants

AND: PUBLIC PROSECUTOR
Respondent

Coram: Hon. Justice Bruce Robertson
Hon. Justice John Mansfield
Hon. Justice Daniel Fatiaki
Hon. Justice David Chetwynd

Counsel: Mr. W. Kapalu for the Appellants
Mr. S. Blessings for the Respondent

Date of Hearing: 10th July 2018

Date of Decision: 20th July 2018

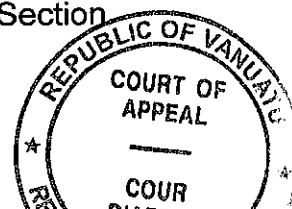
JUDGMENT

Introduction

1. Before the Court is an application for leave to appeal and if that is granted a substantive appeal against a decision delivered in the Supreme Court on the 8th June 2018 when the Court directed that the matter be returned to the Magistrate's Court for the preliminary investigation to be completed.

Background

2. This case began with a preliminary investigation before the then Chief Magistrate. On the 26th February 2018 he ruled that a prosecution commenced against the appellants had failed to disclose a prima facie case.
3. The Magistrate further held that the proceeding was an abuse of process because the facts relied on by the prosecution were the same facts as had been in contention in Supreme Court Civil Case No. 108 of 2013.
4. Underling the decision of the Magistrate was the premise that in terms of Section 130 of the Penal Code Act "a *valuable thing*" does not include land.



The Supreme Court Appeal

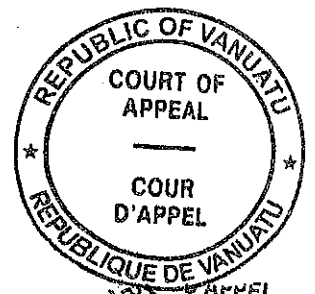
5. The Magistrate's decision was the subject of an appeal to the Supreme Court on two particular findings:
 - (1) that land was not a valuable thing and
 - (2) as the dispute had been the subject of a civil case, that meant it was an abuse of process for this matter to be progressed by way of a criminal prosecution.
6. The Supreme Court judge held that there was no question that the title to land was a valuable thing and therefore the section could be invoked.
7. He also held that there was no abuse of process because the merits of the case had not even been considered in the Supreme Court Civil Case which had been dismissed on the issue of time bars.

Leave to appeal

8. In respect of the application for leave, the question of the proper approach by Senior Magistrates in conducting preliminary inquiries had been thrown into stark relief. It is in the public interest for there to be a clarification of the proper operation of that jurisdiction of the Court. The respondent agrees.
9. We are satisfied that there are issues of sufficient import. Leave is accordingly granted. We turn to look at the substance of the appeal.

Preliminary Investigations

10. We accept the submissions of the Public Prosecutor that the purpose of a preliminary inquiry is to determine whether there is sufficient evidence to place an accused person on trial.
11. The principles are clearly enunciated by this court in Public Prosecutor v Moti [1998] VUSC 54 which contains a restatement of approaches which had been adopted both here and in other jurisdiction over a lengthy period of time.
12. It is no part of a Senior Magistrate's function to decide whether he or she would be satisfied that a conviction should be entered but only whether on the evidence which is available there is a prima facie case.

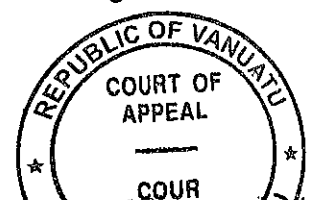


13. A committing Magistrate is not determining the guilt of an accused person or conducting a trial. She or he assesses the evidence and decides whether there is a prima facie case.
14. The term "*prima facie case*" is used in most common law countries and it simply means whether at first sight and on the face of the available evidence, without investigation, there is a case to be answered. The relevant legislation in Vanuatu provides in Section 145(2) of the Criminal Procedure Code:

"... the Senior Magistrate shall decide whether the material presented to him discloses, if the same be not discredited, a prima facie case".
15. The proceeding before the Senior Magistrate is administrative in nature and not judicial. It does not involve the exercise of a judicial power although it has a distinctive judicial character it does not result in a binding determination of rights or guilt.
16. We accept the respondent's submissions that the Chief Magistrate should not have been determining any question of law. If he considered it necessary to have a question of law adjudicated upon he should have used the power under Section 17 of the Judicial Services and Courts Act and obtained a determination from the Supreme Court.
17. In this case it is clear that the Magistrate sought to look at matters beyond the evidence and accordingly misconstrued his role and function.

Merits of the case

18. The primary judge stated as follows:
 6. *The learned Chief Magistrate ruled that the term "valuable thing" as it is used in section 130B of the Penal Code does not include land. I can only assume he was considering the analogous authorities that deal with the definition of what is capable of being stolen – and land is most probably outside that concept.*
 7. *However, the real question here did not involve land, it involved the title to land – a quite different matter altogether.*
 8. *There can be no dispute that a title to land is a valuable thing. Indeed, Mr Kapalu had to accept as much when I challenged him as to this.*
 9. *Mr Kapalu attempted to argue that my proposition was correct only if the holder of the title is the genuine owner; but of course a stolen title may still be transacted for value as if genuine."*
19. When the findings of the Senior Magistrate are reviewed and investigated, as they were before the Supreme Court Judge, we have no doubt that the Judge



was correct when he found that the prosecution was not about land but about a title to land which in law is a quite different concept and is, unquestionably, a valuable thing. The limitation on the meaning of the word "property" in respect of an offence of theft is not applicable to an allegation of obtaining money or a valuable thing by deception.

20. Equally the fact that there had already been a case relating to the land which is involved in this case does not constitute the present case an abuse of process. The onus and standard of proof are different and it is no legal impediment to the Court's consideration of the criminal allegation.

21. The primary judge again correctly summarized the position when he said:

"10. The civil challenge to ownership of the land was not a decision based on the merits of the case. The Chief Justice ruled the claim was out of time, and he dismissed the case on that basis. The learned Chief Magistrate has recorded that the claim was time barred, but also that "...there was no clear cause of action". As the merits of the claim were not examined at all, I find it hard to see where this statement derives from.

11. However, even if the Chief Justice had given a judgment based on the merits, that cannot possibly preclude a criminal prosecution being undertaken essentially dealing with the same issue, as the standards of proof are quite different, and the rules as to admissibility of evidence in the two types of proceedings are different.

12. There is no abuse of process discernible. The Public Prosecutor is well within his rights to commence a prosecution for alleged fraudulent conduct, if he is satisfied there is sufficient evidence to establish that and that it is in the public interest to proceed. The earlier civil case has no bearing on the Public Prosecutor's discretion, although some relevant evidence may flow from it. Whether the Public Prosecutor succeeds or not, will depend on the evidence produced."

22. We respectfully agree and have nothing useful to add.

Conclusion

23. Accordingly the appeal is dismissed and we are entirely in agreement with the Supreme Court Judge that there is no impediment to this matter being the subject of a completed preliminary inquiry.

DATED at Port Vila, this 20th day of July, 2018.

BY THE COURT



Hon. Justice Bruce ROBERTSON

