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

Criminal Appeal
Case No. 19/3440 CoA/CRMA

BETWEEN: Li Jiang Jun
Appellant

AND: Public Prosecutor
Respondent

Date of Hearing: *10 February 2020*

Before: *Justice J. W. Hansen*
Justice R. C. White
Justice D. Aru
Justice G.A. Andrée Wiltens
Justice V.M. Trief

In Attendance: *Ms M. Nari for the Appellant*
Mr S. Blessing for the Respondent

Date of Decision: *20 February 2020*

JUDGMENT

A. Introduction

1. This is an appeal against a Supreme Court decision ruling at the end of the prosecution case that there was a case to answer.

B. Background

2. The appellant is charged with 12 criminal charges alleging misappropriation. The particulars of the charges allege that the appellant was entrusted with various amounts of money amounting to over VT 12 million for a particular purpose but that he "wasted and converted the money".

3. At the close of the prosecution case the primary Judge heard an application to dismiss the charges on the basis that there was insufficient evidence produced to establish a *prima facie* case. An oral ruling was given, which ruled that there was sufficient evidence and dismissed the application. Section 88 of the Criminal Procedure Code ("CPC") was then complied with. There followed an application by counsel for the appellant to adjourn the hearing in order to confirm instructions.

4. During the adjournment this appeal was filed as well as an application for stay pending the result of the appeal – the stay was granted. Also during the adjournment the primary judge produced a written decision.

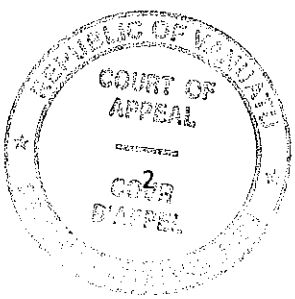
C. The Oral Ruling

5. The primary judge summarised evidence indicating that the appellant was one of a group of people who came together with a common goal, but that the appellant had been undertaking personal tasks rather than attending to matters within the group's common intentions. In particular, the judge referred to evidence indicating that group funds were used by the appellant to purchase a number of motor vehicles; and that instead of creating a corporate entity for the benefit of the group he had set up corporate entities for his own purposes.

6. The primary judge stated the test to be applied in assessing whether there was sufficient evidence to establish a case on which the appellant could be convicted was as follows:

> "The case is on the evidence so far presented by Prosecution – (i) is there a prima facie case established, the answer is yes and (ii) is the evidence enough to convict, no that is not the question, but is enough for the Court to say probably on that evidence the Court could convict him if we continue with the case and arrive at scale for the Court to decide on probability and the Court may take all the evidence in its totality, the Court may come to see whether all the evidence before it is sufficient, or fall short of the standard of proof. That is for another day."

7. As a result, the application was dismissed.



D. The Written Ruling

8. The primary judge recorded that the prosecution had called 17 witnesses. He referred to section 135 of the CPC, but correctly recorded that Ms Nari's application was based on the provisions of section 164(1) of the CPC.

9. The primary judge then recorded that there was evidence to the effect that funds were transferred into Vanuatu from China, converted into cash, and then given to the appellant. The purpose behind the funds being remitted was to purchase a particular property in Port Vila, and there was a signed agreement between the various shareholders and the appellant setting out that purpose.

10. It was further recorded that there was evidence that more than VT 12 million was so transmitted, converted and given to the appellant.

11. The primary judge recorded that steps were taken towards the purchase of the particular property, but the VT 10 million deposit paid by the appellant for the property had been forfeited. There was further evidence that the appellant had thereafter attempted to repay various of the shareholders.

12. There was evidence presented to the primary judge that the corporate vehicle the group had agreed would be created to achieve their intended purchase was not formed by the appellant. The purchase of the property had also not been completed. Instead the evidence led demonstrated that the appellant had set up his own corporate entities, had made arrangements to purchase other property and cattle, and that the funds given to the appellant were used for purposes other than those agreed upon by the group of shareholders, including the purchase of numerous cars. The primary judge said that the evidence indicated that the funds given to the appellant were not a loan.

E. Grounds of Appeal

13. Four grounds of appeal were advanced.

14. Firstly, it was submitted that the primary judge had considered the wrong legislative provision, namely section 135 of CPC rather than section 164, when

dealing with the application to dismiss the charges due to insufficient evidence having been presented to establish a *prima facie* case.

15. Secondly, it was submitted that an incorrect test, as set out in paragraph 6 above, had been used in considering the application.

16. Thirdly, it was submitted that the primary judge had erred in relying on inconsistent evidence as to the amounts advanced to the appellant, namely VT 44.8 million, VT 40 million, and VT 80 million, allegedly misappropriated to support a finding of sufficiency of evidence to establish a *prima facie* case.

17. Lastly, it was submitted that there was no evidence presented in respect of all the legal elements required to prove the charges. It was not clarified in the grounds, nor in counsel's submissions, which particular element(s) had not been addressed in the evidence. Included under this head was a submission relating to delay, and the lack of public interest in prosecuting alleged offending of this type.

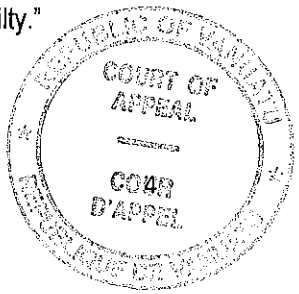
F. Discussion

18. The primary judge has decided the application according to the provisions of section 164 of CPC. Although section 135 was mentioned in the written decision, that was not the basis of the application as is recorded in the written decision, nor was it the legislative provision considered in arriving at the decision. There is nothing in this ground.

19. The test stated orally by the primary judge, as set out in paragraph 6 is unwieldly and legally incorrect. It was not repeated in the written ruling. The test as stated set the bar too high. The prosecution does not need to establish sufficient evidence to probably achieve conviction.

20. Section 164 reads as follows:

"If, when the case for the prosecution has been concluded, the judge rules, as a matter of law that there is no evidence on which the accused person could be convicted, he shall thereupon pronounce a verdict of not guilty."



21. What is required in relation to section 164 of CPC was summarised by this Court in *PP v Suaki* [2018] VUCA 23:

> "16. Section 164(1) of the CPC refers to the judge reaching a conclusion that there is "**no evidence on which the accused person could be convicted**". This leaves it open to a judge to consider not only whether there is such evidence, and in certain very limited circumstances, whether the quality of evidence is so manifestly discounted or unreliable that the judge can conclude that there is no evidence on which the accused person could be convicted.
>
> 18. Therefore, where the evidence in a criminal trial is on its face sufficient to prove the case, a judge will only take the step of dismissing a charge where the evidence is "so manifestly discredited or unreliable that it would be unjust for a trial to continue.""

22. In the primary judge's analysis of the evidence presented, he may have used the incorrect test, but as that test involved a higher threshold than actually required, we cannot see any merit in this point. Had the test used involved a lesser threshold than actually required by law, this submission would have gained traction, but that is not the case here.

23. The third ground of appeal centred on the fact that there was inconsistent evidence from witnesses. This is not a valid ground of appeal. The primary judge is only required to analyse the evidence into what he accepts and what he does not at the conclusion of the entire case prior to giving a verdict. There is but a very limited exception to this as articulated in *Suaki*. The actual inconsistencies pointed to in counsel's submissions relate to the amount of funds given to the appellant. As each of the witnesses have testified that more than the total amount involved in the charges was given to the appellant, it cannot be submitted that there is no evidence of his having received VT 12 million on certain conditions.

24. As mentioned, there was no clear submission, despite invitations by this Court, as to which element(s) of the offence of misappropriation has/have not been addressed by evidence as part of the prosecution case. We do not consider the submission as to undue delay and lack of public interest in prosecutions of this type to have any relevance.

25. On the face of the material to which the primary judge referred, there was evidence that the appellant had received funds from others on certain conditions, which conditions he did not comply with. Instead the evidence, if accepted, could

support a finding that he had used a portion of the funds for his own purposes, or, to put it as in the charges, wasted or converted the same. We are satisfied that this material was capable of supporting the establishment of all the elements of the charges. There is accordingly nothing in this ground of appeal.

26. The question of whether the charges are made out to the criminal standard of proof is of course a matter for the judge at the end of the trial.

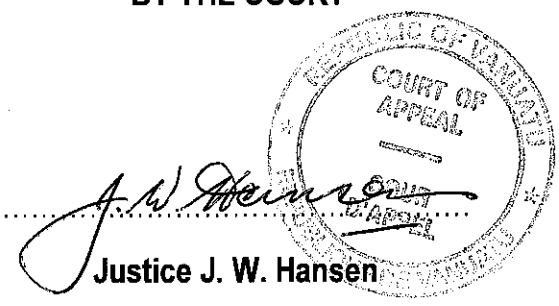
G. Result

27. This appeal is dismissed.

28. We add the following: we are strongly of the view that it is inappropriate in situations such as this to accede to a stay of the case pending the hearing of the appeal. The case should have proceeded to completion and any appeal brought on at its conclusion. Interlocutory appeals of the present kind fragment the trial process and impair proper administration of justice. Further, experience shows that it is rare for appeals of this kind to succeed. For these reasons, it would have been much better, in our view, had the trial simply continued on to completion.

Dated at Port Vila this 20th day of February 2020

BY THE COURT



Justice J. W. Hansen