

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

**Criminal Appeal  
Case No. 22/2088 CoA/CRMA**

**BETWEEN: Public Prosecutor**  
Appellant

**AND: Chen You**  
**Yang Da Chao**  
**Huang Jian**  
**Huang Yiji**  
**Li Deqin**  
**Li Yang**  
**Li Yawang**  
**Yang Xing**  
**Yang Wenguo**  
**Zhang Jianxin**  
**Zou Ronghai**  
**Bu Heping**  
**Li Pinch**  
Respondents

*Date of Hearing:* 7 November 2022 and 14 November 2022

*Date of Judgment:* 18 November 2022

*Coram:* Hon. Justice O Saksak  
Hon. Justice R Young  
Hon. Justice R White  
Hon. Justice S Harrop

*Appearances:* S Blessing for the Appellant  
S Mahuk for the First named Respondent  
N Morrison for the Second named Respondent  
D Yawha for the Third to Thirteenth named Respondents

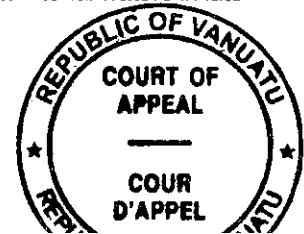
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**JUDGMENT OF THE COURT**

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**Introduction**

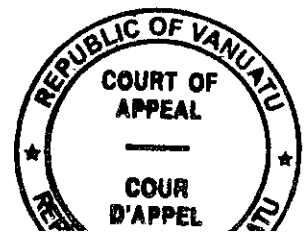
1. In late 2020 three fishing vessels from China sailed toward Vanuatu with the intention of engaging in commercial fishing (Dongangxing13, Dongangxing16, Dongangxing17) During the voyage vessel D17 was lost at sea. The vessels D13 and D16 arrived in Vanuatu territorial waters in late 2020.



2. On 21 January 2021 the vessels were apprehended by a Vanuatu naval ship, the Tukoro. Subsequently the masters of the two ships and their crew faced criminal prosecution alleging that as masters and crew of foreign fishing vessels they had fished in Vanuatu territorial waters without the requisite licenses ( Counts 1,2 and 3 Fisheries Act 2014, S 53(1) and S 53 (3)(c)) and that each of the vessels had been in Vanuatu waters, when they had failed to ensure their fishing gear was stowed so not available for use for fishing (Counts 4 and 5 S 53 (5)).
3. The matter came for trial before the Supreme Court in August 2022. The Supreme Court Judge acquitted the two masters and all of the crew, on all of the charges.
4. The Public Prosecutor now appeals against the convictions. The appeal against conviction is based on three simple points.
  - a) The Judge erred in concluding that commercial fishing was a requirement of an offence under section 53 of the Fisheries Act 2014;
  - b) The Judge erred in concluding the respondents did not engage in commercial fishing;
  - c) The Judge erred in concluding that the fishing gear on board the two boats were not readily available for use fishing.

#### **The facts**

5. Much of the factual material was in common between the Prosecution and Defence. The two fishing vessels D13 and D16 were registered as foreign fishing vessels. When they arrived in Vanuatu territorial waters from China they were not licensed to fish although apparently applications for licences had been made to the Vanuatu Government. At the time of the alleged offending licences had not been granted.
6. The ships are a similar size and weight, D13 at 45.33m with a tonnage capacity of 576 tonnes, and D16 at 46.79m with a tonnage capacity of 577 tons. Both vessels have two ice freezers. They are registered to fish as basket and pot/hook line vessels. The ships were apprehended by a Vanuatu naval ship within Vanuatu's Exclusive Economic Zone. There is evidence accepted by the Defence that members of the crew of both D13 and D16 were using individual fishing lines to fish off both ships prior to apprehension.
7. When the members of Vanuatu Fisheries boarded the two ships, they found frozen fish on white trays inside the freezer of D 13. Mr Sieber, the Senior monitoring control and surveillance officer at Fisheries said that the frozen fish he saw were on white trays inside the freezer. He said that is where fish are generally stored before processing, he was familiar with how baitfish was stored on fishing boats. He said that in his experience baitfish are not stored in trays (as he had found in D13) but are packaged with the weight, fish type and number identified on the package. Fish

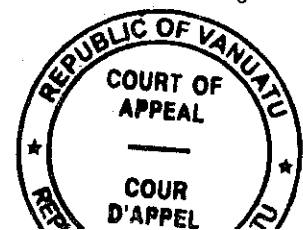


would be cleaned and wrapped in plastic before being packaged as baitfish. One package will contain only one species of fish.

8. In contrast the white trays of fish he saw in the freezer had not been cleaned, or wrapped, different species were frozen together and there was no reference to fish type and weight. There was blood seen on some of the trays. The species of fish in the trays were found in Vanuatu waters although it was accepted, they could also be found in the waters around China.
9. In addition, the fisheries officers found nets in fish wells in both D13 and D16. Their evidence was that these nets were available for fishing and were not stored properly. In D16 there were freezers with fish and food stored together.
10. In addition, with regard to D16 there was a small fibreglass blue boat attached to the main boat with a Yamaha engine which had fuel and a bamboo pole of the hook at one end. There were also squid hooks and squid and other fishing equipment.
11. On D13 there were four fibreglass boats on the deck with one bound by a rope connected to a winch. There was a trolling line and a fish net.
12. As to the stowage of fishing gear, the fisheries officers consider that there was gear on D13 and D16 which was not stowed properly including the nets they saw on both boats that they believed were used for net fishing. The fisheries officers believe that the blue boats are used during fishing operations to transfer fishing gear, crew and fish for storage between the boats.
13. The fish found in the freezers was dumped by the Fisheries Officers. In total on the D13, 640 kg of fish and later 311kgs were dumped consisting of 15 trays of fish.
14. In both D13 and D16 the Fisheries officers said there were nets stored inside fish wells which were said to be trawl nets. Some of the nets were fully constructed with float lines attached to small buoys.
15. The Vanuatu Government had as part of the arrangements with ships applying for or with fishing licenses required the installation of CCTV. Upon seizing the ships, the Fisheries Officers viewed the CCTV footage. On D16, there was a video showing crew members with fishing lines fishing off the boats and fish being put into a basket behind the men. On the 14th of January a fishing net was prepared and dropped into the sea.

### **The Defense Case**

16. A number of the defendants gave evidence including both masters of the boats. They denied any commercial fishing, but they accepted that some crew members may have fished off of the boat for recreational use. They said that the nets stored in the fishing wells were not nets that were used for fishing but spare nets that would be used to prevent the small boats causing damage when returning to either D13 or D 16.

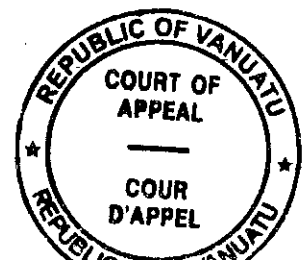


17. Their evidence was that they had purchased 1200kg of baitfish before leaving China. The baitfish they purchased was inexpensive baitfish which is not cleaned nor sorted into species but simply packaged on trays for sale. Their evidence was that all the fish that the fisheries officers found onboard the vessel was part of the 1200kg of baitfish they had originally purchased before leaving China. The defendants called evidence which they said showed such a purchase.
18. The master said that the evidence of the use of a small net and men fishing off his boat was fishing for their own personal use and not for commercial fishing or reward. He said that the fibreglass boat on D16 was stored in this way because it was used to move people between the two vessels as they had no other boats to travel between those vessels.
19. The defence case was that for an offense under S 53 to be committed it must be shown there was commercial fishing. The only evidence was of recreational fishing. As to the storage of fishing gear there was no evidence of any items being inappropriately stored in terms of S53. Any items that were seen were either not used for fishing or were used for recreational fishing.

#### **The Prosecution Case**

20. The prosecution case was that an offence under section 53 of the Fisheries Act did not require proof of commercial fishing. It was sufficient that any fishing took place as long as it was in Vanuatu's territorial waters. Here there was evidence that the crew had undertaken fishing. Indeed, the fact that the crew had been fishing was not denied and so given the other concessions by the defence the offences of fishing without a licence in Vanuatu territorial waters had been proved (S 53 (1)).
21. If commercial fishing was an element of a section 53 charge (and potentially relevant to penalty on conviction) this was a case of commercial fishing. The prosecution relied upon circumstantial evidence and the rebuttable presumption at Section 16(4) of the Fisheries Act. That presumption they said, meant that the fish found on the vessels was presumed to be caught in Vanuatu waters. Given the large amounts of frozen bait fish the only reasonable inference was that it had been caught to support commercial fishing of the two boats.
22. In addition to the presumption they said that the evidence from the fisheries officers that the fish seen on vessel D13 had blood on it and was packaged in a way that was not consistent with the pre-purchase of baitfish, established that the fish had been obtained in Vanuatu waters and had been stored in that way before any processing.
23. They said that the small blue boat stored on D16 was obviously available and used for fishing and that it was not stored appropriately and so that offence had also been established.

#### **Defence Response to Presumption, S 16(4)**



24. As to the presumption relating to the baitfish found onboard and the defence said that the evidence of the crew and captain should be accepted that the baitfish onboard had all been purchased in China. They explained the condition of the baitfish. It was cheap baitfish which would not be cleaned nor sorted into species before purchase. This type of baitfish was purchased on trays and didn't have the information relating to species or weight. This evidence established on the balance of probabilities that they had established the only "commercial" fish on the ships, the bait fish, was not caught in Vanuatu waters but purchased in China before the voyage.

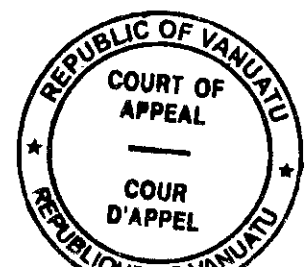
### **The Supreme Court Judgment**

25. The Judge concluded that section 53 did relate to commercial fishing activity. The Judge said

*14: "Any fishing done for leisure and not for sale or profit is recreational fishing. On the other hand any fishing intended for the sale or trade of fish for profit would be termed commercial fishing which requires a license. Section 53 in my view relates to commercial fishing activity as it obliges foreign fishing vessels to have a licence issued pursuant to section 59 to conduct such fishing activity. The penalties for any breach are extremely high which is again reflective of commercial operations."*

26. After identifying the agreed facts and the evidence for the prosecution and defence the Judge then noted that the evidence relating to commercial fishing relied upon circumstantial evidence. The Judge considered that the only explanation as to how the baitfish came to be in the ship was the explanation offered by the defendants. He accepted their evidence. They said they had purchased that fish prior to leaving China. The only direct evidence of fishing had been by individual members and was recreational fishing the Judge said. And so, the effect of these findings was the Judge was satisfied that the respondents had overcome the S16(4) presumption, and they were not guilty of Counts 1 and 2.
27. As to the second set of charges (Counts 4 and 5) relating to failing to ensure all fishing gear was stowed in a manner that would not readily be available for fishing, the Judge concluded that the fishing nets found by the Fisheries Officers were not for fishing but were as the defendants had said "to protect the fibreglass boats on arrival at the fishing boats." As to the small boat on D16 the Judge accepted that the boat had been "prepped" in this way before departing China and was used for moving people between the boats and therefore he considered it was prudent to prep the boats in this way is preparation for any emergency. Again, he accepted the evidence of the defendants as truthful and so dismissed these charges.
28. The Judge therefore accepted that neither of the two categories of charges have been established and acquitted all defendants.

### **This Appeal**



29. Before we consider the appeal grounds we consider two points raised by Mr Morrison on behalf of all appellants which Mr Morrison described as "knockout points". The first point alleges that the prosecution failed to prove as they were required to by section 53(2) (a) and (b) that D13 and D16 had been operating the vessels:

"(2)(a) *for a purpose recognised by the provisions of the United Nations convention on the law of the sea, 1982*;

or (2)(b) *in accordance with an access agreement issued under this Part.*"

30. Essentially Counsel for the respondents' claimed that because the prosecution failed to prove the United Nations Convention on the Law of the Sea or that D13 or D16 did not have an access agreement an essential element of the charge had not been established.

31. We are satisfied that the respondents at trial accepted that the only issue that was live in the prosecution under section 53(1) was whether or not section 53(1) required proof of commercial fishing activities rather than any type of fishing. Given that concession it is not now open to counsel to raise to complain about inadequacy of proof of other trial issues that were effectively conceded by them at trial.

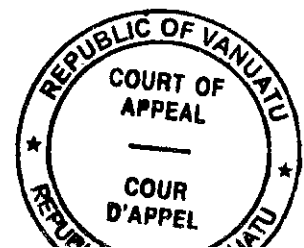
32. The second issue raised by Mr Morrison related to where the individual fishing occurred. He said there was no evidence which proved that the fishing by individual crew members was within Vanuatu's territorial waters.

33. Mr Blessing in response identified evidence which he said established that the fishing undertaken by individual crew members did occur within Vanuatu waters.

34. We are satisfied that there was evidence which the Judge could have accepted which established that the recreational fishing was within Vanuatu waters. This was not an issue raised by the respondents at trial and so no finding was made by the Judge in the course of his decision as to whether any recreational fishing was within Vanuatu waters. Further given the judge's focus was on commercial fishing rather than recreational fishing there would have been no need to consider where the recreational fishing took place.

35. For the reasons identified below in this judgement we propose to send the prosecution for Counts 1, 2, 4 and 5 back to the Supreme Court for retrial. This issue left unresolved by the judge at trial can be raised by Counsel for the respondents at any subsequent trial. We do not see this issue as determinative of this appeal.

36. Returning therefore to the Appeal grounds by the appellant. The first ground relates to proper interpretation of section 53 and whether the obligations of masters and crew on foreign fishing vessels are intended to apply to all fishing activities, or whether the obligations in the section are limited to commercial fishing activities.



37. In his conclusion that section 53 related to commercial fishing the Judge said:

*14 – “section 53 in my view relates to commercial fishing activity as it obliges foreign fishing vessels to have a licence issued pursuant to section 59 to conduct such fishing activity. The penalties for any breach are extremely high which is again is reflective of commercial operations. We accept that the maximum penalty that can be imposed for breach is significant. However we do not think that is determinative of a proper interpretation of section 53. It will be at the discretion of a sentencing judge to decide the range in penalty from none to the maximum. Obviously where a penalty falls will need to take into account whether the fishing is recreational or commercial. We are therefore satisfied that the judge was wrong to limit the Section 53(1) prosecutions being count one and count two to considering commercial fishing activity alone.”*

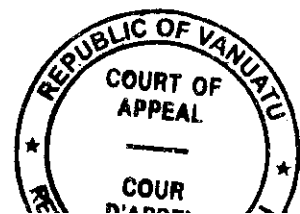
38. We are satisfied that section 53 is intended to cover all fishing activities. We say this for a number of reasons.

39. First the text of Section 53. The text refers only to “fishing or related activities”. It could but it does not specify any particular type of fishing. Fishing is defined in Section 1 as including such activities as catching fish and engaging in activities expected to catch fish. The Act specifies several types of fishing including recreational, commercial, game, and artisanal. The legislature could have specified one or more of the activities as those that give rise to the obligations in S 53. It is significant that it did not do so but chose the wide phrase “fishing or related activities”.

40. As to context, we see nothing in the context of Section 53 within the Fisheries Act which would require a different interpretation. On the contrary sections 35 and 36 of the Act, deal with the obligations of Vanuatu citizens who own fishing vessels and obligations of jointly owned Vanuatu and foreign owned fishing vessels. It is clear from Sections 35 and 36 that Parliament decided that the obligations on those fishing from Vanuatu or jointly owned ships would be limited to commercial and game fishing but would not include limitations of recreational fishing. There are obvious reasons why that would be the case. Parliament would likely wish to protect recreational fishing by Vanuatu citizens but the same obligations to protect recreational fishing by the crew of foreign fishing vessels would not arise.

41. The Fisheries Act is designed to manage, conserve and develop a valuable resource for Vanuatu. Strict controls on foreign involvement in fishing is consistent with the management and conservation of that resource. Given what will be a very large area of water that Vanuatu has declared to be its exclusive fishing zone (See Section 1 Fisheries Act 2014) it will wish to ensure that foreign vessels do not unlawfully use that resource. It is therefore consistent with that proposition that Parliament would wish to ensure that no fishing was undertaken without licence. This will be especially important given the difficulties of investigation enforcement of unlawful foreign fishing in such extensive territorial waters. Parliament has therefore decided that a simple easily enforceable ban on all fishing by foreign vessels unless licensed was appropriate in S 53.

42. We are therefore satisfied that the obligations and offences in S 53 relate to any type of fishing or related activity and are not limited to commercial fishing.



43. Ground 3 of the appeal raises the question as to whether or not the two fishing boats fished commercially. The appellant submitted there was evidence of commercial fishing but the Judge did not take that evidence into account and wrongly accepted the evidence of the respondents.

44. Section 54(3) of the Fisheries act 2014 provides as follows:

*"if the operator of a foreign fishing vessel navigating through Vanuatu waters refuses or fails to report the information described in subsection 1 there is rebuttable presumption that all fish found on such vessel have been caught within Vanuatu waters in contravention of this Act".*

45. It was common ground that the information required to be reported in section 54(1) was not reported. And so, the presumption in section 54(3) was triggered. The respondents therefore had to prove on the balance of probability that the fish found onboard D13 and D16 had not been caught in Vanuatu territorial waters.

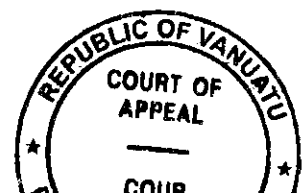
46. The respondent's evidence was that the bait fish found on D13 and D16 was purchased in China and stored on the ships' freezers. Evidence of an employee accountant of the owner of the ships was said to show the purchase of the bait fish in China. The masters and crew of the ships gave evidence of the purchase of the bait fish in China. The respondents said that the type of fish found stored on the ships was fish that could be found in both China and Vanuatu but with two species only likely found in China.

47. The Appellant challenged this evidence on several grounds. First, there was the evidence from the Vanuatu Fisheries Officers who described frozen fish on the vessels which they said were not stored consistently with overseas purchase of bait fish. This included the type of trays that the frozen fish were stored on, and the mix of fish species in each tray and the fact that the fish had not been cleaned, all suggest they said that the fish had been caught in Vanuatu waters. Some of the fish appeared to be recently caught.

48. The appellant submitted at trial and before us that the evidence of the masters and crew should be rejected as unreliable and untruthful. A significant portion of the appellant's submissions at trial detailed what they said were inconsistencies and untruths in the evidence of each of the witness defendants. The appellant claimed the evidence of the master and crew were "*ridden with lies and inconsistencies.*" The Appellant detailed in over twenty-eight pages of submissions, what they said were these inconsistencies and untruths.

49. On appeal, the Respondents maintained that the evidence given by their witnesses was consistent and truthful for reasons they identified.

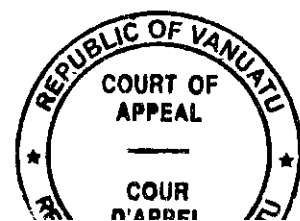
50. The Judge in his reasons detailed in summary form the evidence of the witnesses for the prosecution and defence. During the course of those summaries, there was no analysis of the evidence given or its likely accuracy. The Judge noted the submissions of the Prosecution as to



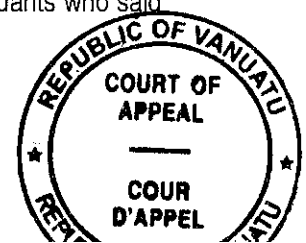


why they should accept the evidence of the fisheries witnesses and the inferences available from the evidence. The Judge did not mention the extensive submissions made by the prosecution challenging the defendant's evidence.

51. The Judge then identified the defence submissions. Under the heading of "*Discussion*", the Judge noted what was agreed between the parties and what was in dispute. The Judge then said "*Issue One*" was whether the defendants conducted any commercial activity. The consideration of these issues was under the subheadings of "*bait fish*", "*nets and well fish*", and "*video footage*". The Judge under these specified headings essentially recorded the evidence of the defendants and appeared without analysis to accept their evidence.
52. At the end of the Judgment, the Judge said that he found that the presumption in section 54(4) of the Act was discharged by the operators of D13 and D16. He was satisfied that the defendants did not engage in any commercial fishing.
53. We are satisfied that in the circumstances of this case the Judge was required to undertake an analysis of the evidence relating to whether the respondents had proved on balance of probabilities that they had not undertaken commercial fishing in Vanuatu waters. That required the Judge to consider the evidence of the prosecution witnesses, from which they invited inferences as to fishing in Vanuatu waters and it also required the Judge to consider the credibility and reliability of the defence witnesses. The trial Judge was obliged as part of his reasoning to verdict to consider the question of the credibility and reliability of the defendant's evidence. Their evidence went to the core proposition in the S 53(1) prosecution: whether they established on the balance of probabilities that the fish found in the vessels had been caught outside Vanuatu waters.
54. Fundamental to the judicial function is to expose the reasoning to reach a conclusion as to whether those charged with crimes are guilty or not guilty. In this case given the reverse onus and the challenge by the prosecution to the credibility and reliability of the defence witnesses the Judge was required to assess the reliability and credibility (if in issue) of the prosecution witnesses and assess the reliability and credibility of those defence witnesses and exposing his reasoning as to whether and why he accepted or rejected the evidence of each witness. The Judge did not do that and in failing to do that he failed to undertake a core function necessary in this case for a proper verdict.
55. For the reasons given therefore we are satisfied the verdicts given in Counts 1 and 2 are unsafe. We allow the appeal and set aside the acquittals and return those counts to the Supreme Court for further consideration.
56. With regard to Count 3, we confirm the Judge's decision to acquit the crew members of fishing in Vanuatu waters. The reasons which are different from the Judges' can be easily described.
57. To establish Count 3 amongst other matters the prosecution had to prove that each individual defendant engaged in fishing while in Vanuatu waters while a member of a crew of a foreign fishing vessel which did not have the appropriate licence.



58. There was evidence which established that a number of crew members were fishing from D13 and D16 catching small numbers of fish apparently for personal consumption. As we found any fishing from a foreign vessel in Vanuatu waters which does not have a licence is unlawful. And so the actions of the crew members was unlawful.
59. The difficulty for the prosecution, only now identified at the hearing in this Court, is that the prosecution did not and cannot prove the name and identification of the five crew members who were seen fishing from D13 and D16. The prosecution charged all crew members but there was no evidence to establish that every member of the crews of the two ships were fishing. Individual crew members were not able to be identified by the prosecution.
60. An essential element of the charge therefore has not been made out. The appellant accepts that they do not have evidence to identify individual crew members who fished. The appellant in this appeal accepts therefore that an essential element of proof is lacking.
61. For rather different reasons therefore we confirm that the respondents were correctly acquitted on Count 3.
62. Counts 4 and 5 relate to a prosecution for failing to stow fishing equipment or gear associated with fishing appropriately on the ship. The prosecution case was that a number of items including a small boat, fishing nets, fishing hooks, and bunkering all had elements of either direct fishing gear or gear associated with fishing. The prosecution said that these items were not stowed appropriately and therefore the prosecution had made out both charges.
63. The defence reply was that that either the items mentioned were stowed appropriately, or that the items identified as the subject of the charges were not associated with fishing at all or that while they may have had some relevance to fishing but at the time they were being used for purpose other than fishing.
64. The Judge in his decision did not deal with these different assertions as to the items that were the subject of Counts 4 and 5.
65. The Judge noted the evidence for the prosecution which detailed how particular items were found on the two vessels. The Judge noted that a surveillance aircraft had flown by the two boats and said *"they saw no reported activity onboard."* The Judge then said *"this confirmed that all gear onboard the two vessels was stowed in a manner which (at 82,83)*
66. We do not consider that the fact that a surveillance aircraft flying over the two boats and saying there was no reported activity onboard established that gear had been stowed in a manner that they were not readily available for fishing.
67. In his reasons the Judge did not consider the wide variety of items suggested by the prosecution to be improperly stowed. The Judge noted only evidence from one of the defendants who said the boat with the outboard motor had been prepped in an appropriate way.



68. We are satisfied that the Judge did not adequately address this issue in his decision. Again, there was conflicting evidence between the prosecution and defence witnesses. While there was no presumption with regard to a prosecution under this subsection of section 53 there was clear evidence from the prosecution witnesses that a number of items that were associated with fishing or directly relating to fishing had not been stored appropriately. It may be that the Judge discounted some of the evidence relating to appropriate storage because he may have thought that it related to recreational fishing rather than commercial fishing. For the reasons we have given we are satisfied that the obligations to store fishing gear appropriately related to fishing gear for both recreational and commercial reasons.
69. We are satisfied that the Judge did not appropriately consider the prosecution and defence positions and provide reasoning as to why he accepted the defence evidence and rejected the prosecution evidence. And so, for similar reasons as to our conclusion relating to Counts 1 and 2 we allow the appeal with respect to Counts 4 and 5, set aside the acquittals and send those counts back to the Supreme Court for further consideration.

### Summary

70. The acquittals are set aside and the counts returned to the Supreme Court.
71. The appeal with respect to Count 3 is dismissed.

DATED at Port Vila this 18<sup>th</sup> day of November, 2022

BY THE COURT

  
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Hon. Justice Oliver Saksak

