

(Criminal Jurisdiction)

In the matter of a private prosecution  
brought pursuant to section 35 of the  
Criminal Procedure Code (Cap 136) (as  
amended)

BETWEEN: Dudley Aru  
Complainant

AND: Ariipaea Marc Salmon  
Defendant

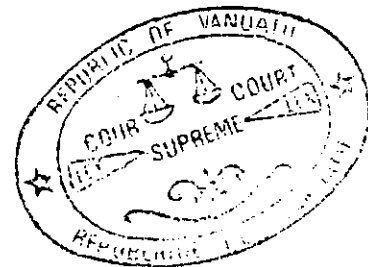
Counsel: *Julian Moti* for complainant  
*John Malcolm* for defendant

Hearing: 18 September 1998

Verdict: 18 September 1989

REASONS FOR VERDICT OF TOMPKINS J

In a private prosecution brought as a result of an information laid by the complainant, the defendant faces an indictment containing 9 counts. There is an element of duplication in the counts. In essence what is charged against him is that on 10 March 1998 he made threats against Mr Julian Moti that if three conditions were not fulfilled, Mr Moti would be accused of sexual offences in relation to the defendant's daughter.

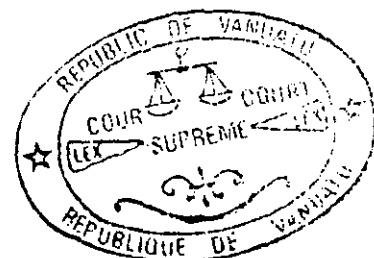


Following the laying of the complaint, the office of the Public Prosecutor, by a letter that is undated, addressed to Mr Moti, advised him that in exercise of the powers vested in the Public Prosecutor, she appointed Mr Aru and Mr Moti as private prosecutors for the case against the defendant. In my opinion, those appointments were entirely inappropriate. It is an elementary principle of the common law that where criminal proceedings are brought against a person, counsel who appears as prosecutor on behalf of the State or on behalf of a private prosecutor should be impartial and objective. The only exception to this rule is if the complainant in a private prosecution appears on his or her own behalf. At the commencement of these proceedings I pointed out to Mr Moti my view that it was quite wrong for him, the alleged victim of the extortion and otherwise involved in matters relating to the accused daughter, to appear as counsel for the complainant. Because of those personal involvements, an independent counsel should have been instructed. I was minded to dismiss the proceedings at that stage, because of the inappropriateness of Mr Moti appearing, but I did not do so for two reasons. First, any dismissal at that stage would be likely to be without prejudice, and I did not see any reason why the accused should have to face the series of charges the second time because counsel for the prosecution appeared inappropriately. Secondly, his trial has been before the Courts since March and it was high time that it was brought to finality.

#### Directions on law

The relevant parts of section 138 of the Penal Code [CAP 135] provide :

- "138 No person shall, with intent to extort or gain anything from any person-
- (a) threaten expressly or impliedly to make about any person, living or dead, any accusation or disclosure of any offence, or moral misconduct, whether the accusation or disclosure is true or not ;



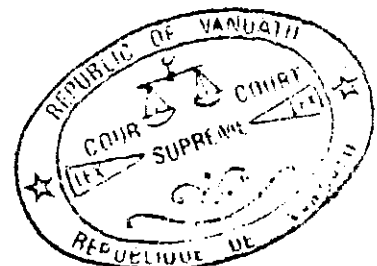
- (b) threaten expressly or impliedly that any person shall make any such accusation or disclosure about any person living or dead."

The first six counts are laid under s 138(a). The last three are laid under s 138(b). The onus rests on the prosecution to prove each element of the count. That onus rests on the prosecution from beginning to end. The defendant does not need to give evidence. In this case he has done so. But that does not affect the onus of proof. The law is that the prosecution must prove each element of the charge beyond reasonable doubt before the accused is found guilty of that charge. That test must be applied separately in respect of each count.

I need not analyse the elements of these offences in any detail because the issue in this case is a simple and straight forward one. If the evidence called by the prosecution is accepted as correct beyond all reasonable doubt, the elements of the charges have been proved. If the evidence given by the defendant is found to be correct, or if there is a reasonable doubt which of the two dramatically different accounts is correct, the prosecution has failed to discharge the onus of proof.

### Factual findings

I do not propose to review all the evidence in detail. In giving reasons for a verdict that is neither necessary nor desirable. The background to the relationship between the parties is of some relevance. The evidence establishes that there has been at least a commercial relationship between the defendant and Mr Moti for some considerable period preceding these events. It appears that a company in which Mr Moti has at least a legal interest IMT (Vanuatu) Limited provided support for a work permit application by the defendant. It also appears that the defendant and Mr Moti had a common

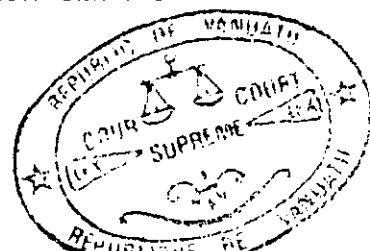


interest in a company. During the course of this relationship Mr Moti provided the appellant with certain financial support.

A further background relevant fact is that at sometime earlier this year, before the events to which these counts relate, an allegation of sexual impropriety was made by the defendant's daughter Puaita against Mr Moti. At the relevant time no formal charges had been laid. They have since, as a result of which Mr Moti was arrested and is currently on bail awaiting a hearing of these charges. This is another convincing reason why it was so inappropriate on Mr Moti to appear as counsel in this case.

Sometime before 9 March 1998, there were suggestions made that the defendant would persuade his daughter to drop the allegations. A letter has been produced, undated, in which the daughter withdraws and unconditionally retracts the allegations that she had made. Apparently believing that it was possible to negotiate a settlement, Mr Moti prepared a draft of what is entitled a Deed of Mutual Release and Settlement. I am not going to review it in detail. The essential features of the deed, which was to be signed by the defendant's daughter, the defendant and his de facto wife and by Mr Moti, was that the daughter would withdraw her complaints and Mr Moti would use his best endeavours to procure an investor residence visa for the defendant. The agreement recites that the daughter fell in love and had a relationship with Mr Moti during 1997 (when she was aged 13). That relationship terminated in October 1997, according to the recitals.

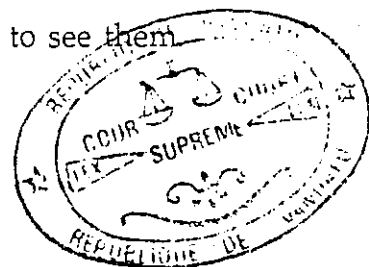
The evidence for the prosecution given by the one witness called, Mr Aru, Mr Moti's partner in his legal firm, was to the effect that on 9 March 1998 Mr Moti and Mr Aru visited the defendant's house and discussed with him and his de facto wife the possibility of a peaceful resolution of their differences relating to the daughter. Mr Aru said that they urged the defendant and his wife to obtain legal advice. The matter was left that the



defendant would call at their offices the next morning to advise who the lawyer would be.

He did call but later that the expected appointment. Mr Aru was not available. The result was that Mr Aru went to the defendant's house that evening. The exchange that took place was between Mr Aru and the defendant. Nobody else was present. Mr Aru said that the defendant refused to look at the draft and said that he did not want anything to do with it. Mr Aru said that the defendant told him that there were three conditions that Mr Moti must fulfil otherwise he, the defendant, would push the police to prosecute Mr Moti for the offences alleged by his daughter. The three conditions were first that Mr Moti pay US\$35,000 into the defendant's bank account, secondly that he should capitalise and issue shares in a company in which Mr Moti and the defendant had a joint interest Botanica Pacific Limited and transfer those shares to the defendant, and that was to discharge any money lent or spent by Mr Moti on the defendant. Thirdly that Mr Moti should give a written undertaking that neither he nor his firm, companies, partners or associates should be involved in the business of noni fruit in Vanuatu. There were further comments allegedly passed by the defendant to the effect that Mr Moti is a very wealthy man and should pay this money to protect his reputation. Mr Aru said that he told the defendant that he would discuss the conditions with Mr Moti, he then left.

The defendant gave evidence. He accepted that there had been a meeting on 9 March between him, his wife, Mr Moti and Mr Aru. He said that he told them that they (he & his wife) wanted nothing further to do with them. There was no discussion about their seeing a lawyer. He also accepted that there was a meeting between him and Mr Aru on 10 March. The defendant said that Mr Aru told him that he had some documents called a deed for him (the defendant) to look at. The defendant said he did not want to see any documents. Mr Aru again asked why he did not want to see them



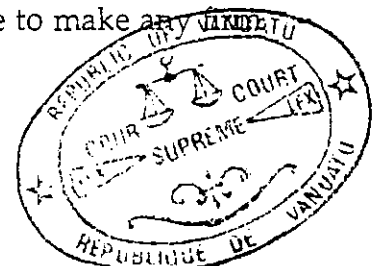
The defendant replied that he (Mr Aru) was to leave his family alone. He did not want to him or anyone from his firm especially Mr Moti come into his yard ever again. Mr Aru insisted that he should show the defendant the document. The defendant said no that was all. Mr Aru then left.

### Submissions

It was Mr Moti's submissions that I should accept the evidence of Mr Aru and reject the evidence of the defendant. He pointed to the fact that Mr Aru was an officer of the Court, that there was a good reason for Mr Aru to visit the house of the defendant when he did, that the defendant's financial position was precarious so that he had a motive for making the threats Mr Aru related, and when all the background evidence is considered, Mr Aru's account should be accepted as correct. It was Mr Malcolm's submissions that Mr Moti's conduct in prosecuting this case in the light of his personal involvement was a serious breach of legal ethics, and that in any event the evidence of the defendant should be accepted or at least there was a reasonable doubt.

### Verdict

I find the defendant not guilty on all counts. The essential reasons for this conclusion are that there was a direct conflict of evidence. There is no evidence that corroborates one version or the other. It is not a question of which version is to be preferred. As I have already stated, before a conviction of the defendant is justified, the Court must be sure beyond all reasonable doubt that Mr Aru's version of the vital discussion that occurred on 10 March is correct in the essential details. I am not prepared to make that finding in the light of the direct factual conflict, and in the absence of any corroborating evidence one way or the other. I am influenced in this conclusion also by the actions of Mr Moti in preparing the deed. I do not propose to make any

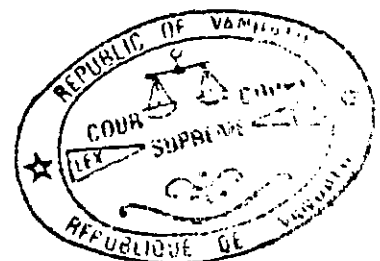


findings in connection with it, save to observe that I find it remarkable that Mr Moti, knowing that he was facing complaints from the defendant's daughter, should endeavour to influence the course of those complaints in the manner indicated in the deed. However, the essential reason for the verdict is that the prosecution has failed to prove the essential elements of each count beyond reasonable doubt. It is for those reasons that I have found the accused not guilty on all charges.


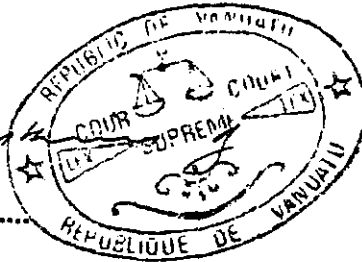
### Costs

Mr Malcolm has made an application for cost under s 99(1) of the Criminal Procedure Code. That provides that where a prosecution is instituted on a summons issued by the Court on the application of a private prosecutor, if the person accused is acquitted, the Court has power to order the private prosecutor to pay the accused such costs as, subject to subs (2), the judicial officer shall consider reasonable. Subsection (2) provides that in the case of an acquittal or discharge by the Supreme Court the costs awarded shall not exceed 50.000VT . Mr Malcolm has produced a schedule showing costs incurred by the defendant on a solicitor and client basis of 760.090VT prior to today's hearing. It is obvious that the maximum amount in s 99(2) is significantly out of date. However that is the maximum and accordingly I will award the cost of 50.000VT against Mr Aru as the private prosecutor.

Mr Malcolm also seeks compensation under s 103 of that Act. It provides that if on the dismissal of any case any Court shall be of opinion that the charge was frivolous or vexatious, the Court may order the private prosecutor to pay to the accused person a reasonable sum as compensation for trouble, expense, and any special loss to which such person may have been put by reason of such charge, in addition to his costs.



The issue is whether the charges were frivolous or vexatious. Mr Malcolm submits that they were, particularly having regard to Mr Moti's conduct, to the deed, and to the history of the relationship between the defendant and Mr Moti, particularly Mr Moti's attempt to have the defendant expelled from Vanuatu in November last year. Despite my disapproval of the actions of Mr Moti for the reasons I have already expressed, I am not prepared to hold that the charges themselves were frivolous or vexatious. At the conclusion of the prosecution case I held that there was a case to answer. As the reasons for verdict make clear, had I been satisfied beyond reasonable doubt that Mr Aru's evidence was correct, the defendant would have been convicted of at least some of the counts. It became a matter of credibility. The application for compensation under section 103 is dismissed.

TOMPKINS J.