

(Criminal Jurisdiction)

PUBLIC PROSECUTOR

V.

**NOEL FAENOLAVE
ALFRED MASENG
ALFRED MALIU**

Coram: Mr Justice Oliver A. Saksak
Ms Cynthia Thomas – Clerk

Counsel: Ms Linnes Moli for the Public Prosecutor
Mr Daniel Yawha for the Defendants

JUDGMENT

The Defendants were convicted and sentenced accordingly on 3rd April, 2003.

Noel Faenolave was charged with 5 counts of –

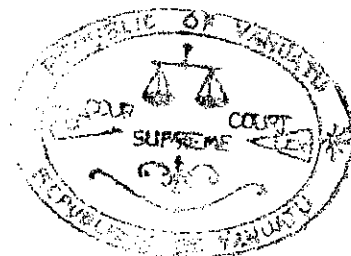
- (a) False Pretence under section 125(c);
- (b) Theft under section 125(a) x 2 counts; and
- (c) Misappropriation under section 125(b) x 2 counts.

Alfred Maseng was charged with 3 counts of –

- (a) Aiding and abetting misappropriation under sections 30 and 125(b) x 2 counts; and
- (b) Receiving property dishonestly under section 131.

Alfred Maliu was charged with 1 count of aiding and abetting misappropriation under sections 30 and 125(b). All charges were laid under the provisions of the Penal Code Act [CAP.135] (the PC Act).

The prosecutions had the burden of proof beyond reasonable doubt by producing evidence to show that all the elements of the

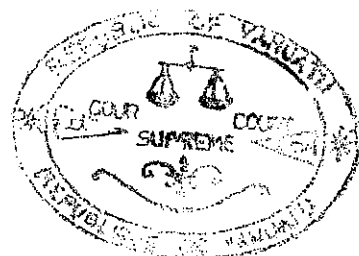


offences committed by the defendants existed. The prosecutions called 11 witnesses to give evidence to prove their case.

The defendants themselves gave evidence on oath and produced evidence from two other witnesses namely, Christian Ben and Evelyn Vira.

I do not propose to summarise the evidence of each witness in this judgment but references will be made to relevant parts later.

The facts of the case were that Noel Takau, complainant purchased 65½ bags of cocoa beans from vendors at West Coast Santo and had them shipped to Luganville on the MV Kawale on 31st December, 2001. The cocoa bags were then kept at a Dock at Sarakata waiting for export. In the meantime Noel Takau had applied to the Vanuatu Commodities Marketing Board (the VCMB) for an Export Permit. It was in and during the process of the export permit application that Noel Faenolave, as the previous Chairman of the VCMB began to get involved in the transaction. Conflicting advices were given by the VCMB to Noel Takau concerning his application. At one time he was advised by letter that his application was refused for reasons provided. But orally over the telephone Noel Faenolave had made representations to Noel Takau that his permit was ready for collection. At this, Noel Takau made his way to Luganville to have physical custody of his permit so that he could export his cocoa beans. He spent four days in Santo and returned to Vila without the Permit he was promised. Whilst in Santo he met Noel Faenolave and together with Alfred Maliu they went to visit the cocoa bags at the Dock at Sarakata. Thereafter Noel Faenolave made representations to the person in charge of the Dock that he was acting for and on behalf of Noel Takau. On 14th January 2002 Noel Faenolave removed 12 bags of cocoa beans from the Dock. After having the beans graded by the Cocoa Inspector, Noel Faenolave sold the 12 bags of cocoa beans. He got Alfred Maseng to attend to the cashier's office to sign out and collect the money for the 12 bags. Alfred Maseng did so and met Noel Faenolave shortly thereafter to hand over the money. In doing so, Noel Faenolave gave Alfred Maseng the sum of VT5.000. The balance of the money was never received by Noel Takau.



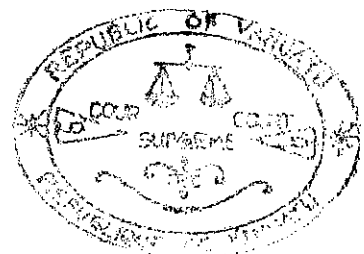
On 15th January, 2002 Noel Faenolave again in a VCMB truck went to the Dock at Sarakata and removed 7 bags which he took to the

Cocoa Inspector for grading. After grading, the cocoa was placed in the name of Alfred Maseng who again went to the cashier's office and signed for and collected the money as payment for 7 bags of cocoa beans. Alfred Maseng again handed the money over to Noel Faenolave a short time later. Together, Noel Faenolave, Alfred Maseng and Alfred Maliu went around to various places in Luganville consuming the money either on kava, drinks or food. None of the money was received by Noel Takau. Altogether the sum involved was VT81,367.

The defence case was that Noel Takau and Noel Faenolave had an agreement that if Noel Faenolave assisted Noel Takau to grant him an export permit, Noel Takau would give him 19 bags of cocoa beans. Noel Takau did not accept that contention to be correct. His evidence was that he had made an application for an export permit to export cocoa beans. In the hope and belief that such permit would be granted he entrusted the responsibility of grading the beans only to Noel Faenolave as the Chairman of the VCMB at the time. His evidence shows that Noel Faenolave went beyond what he was entrusted to do. His evidence shows that he purchased the cocoa beans and as such he was the owner. There was nothing in his evidence to show that he had given up 19 bags of cocoa beans to Noel Faenolave. There was also nothing in his evidence to show that he had given expressed authority to Noel Faenolave to sell his cocoa beans. I observed Noel Takau give his evidence and had no reservation that he was a credible witness.

Alfred Maseng had a hand in all these. Prosecution witness Senly Buleval, the VCMB Cashier in her evidence told the Court that it was this man who signed for payment and collected the money for 12 bags of cocoa on 14th January and again for 7 bags on 15th January 2002. The money was paid to Alfred Maseng because his name appeared on the two invoices for payment.

Dumont Boe, the Cocoa Inspector told of how he graded the cocoa beans at Noel Faenolave's request. He told the Court in his evidence that he was told by Noel Faenolave that the cocoa beans were shipped from Lingarak on Malekula and that they belonged to



Alfred Maseng. This officer saw all three of the defendants in his office at one time prior to the grading of the cocoa beans.

Prosecution witness Sammy Henry, cargo supervisor on the MV Kawale confirmed that the 65½ bags were shipped from West Coast Santo on 31st December 2001 and that they were shipped in Noel Takau's name.

Prosecution witness Bernard Natnaut, cargo supervisor on the MV Combito told the Court that during 2001 they never took on board any cocoa from Lingarak in the name of Alfred Maseng.

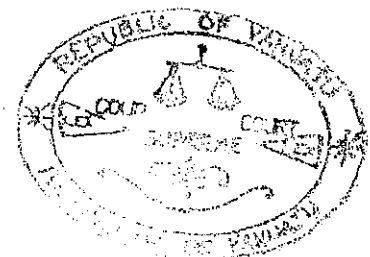
Prosecution witness Allan Varu who is a shop-keeper at the Coop shop at Sarakata who confirmed that the cocoa bags at the Dock were Noel Takau's. He confirmed that Noel Faenolave and some VCMB workers approached him on 14th January and that he was told the 12 bags were to be graded. He asked Noel Faenolave as to what would happen to the cocoa after grading and was told by him that the cocoa bags would be kept at the VCMB dock.

Prosecution witnesses Henry Atel and Daniel Jonas were VCMB workers who told the Court they were with Noel Faenolave on the VCMB truck that removed the 12 bags of cocoa and the 7 bags from the Sarakata Dock and taking them for grading. They each told the Court they knew the cocoa was Noel Takau's but found out upon grading that the owner's names were Alfred Maseng.

Alfred Maliu was with Noel Takau and Noel Faenolave on 4th January 2002 when they went to see the cocoa at the Sarakata Dock.

The evidence from each of the defendants were inconsistent with what the prosecution witnesses told the Court, and they each lacked credibility. Their witnesses evidence also lacked credibility. The Court did not place any weight on the evidence of the defendants and their witnesses.

The relevant sections of the Penal Code Act are –



A. Section 30 which provides for complicity –

“Any person who aids counsels or procures the commission of a criminal offence shall be guilty as an accomplice and may be charged and convicted as a principal offender.”

B. Section 122 defines theft as follows -

1. *“A person commits theft who, without the consent of the owner, fraudulently and without a claim of right made in good faith, takes and carries away anything capable of being stolen with intent, at the time of such taking, permanently to deprive the owner thereof;*

2. *A person shall also be guilty of theft of any such thing notwithstanding that he has lawful control thereof, if, being a bailee or part owner thereof he fraudulently converts the same to his own use or the use of any person other than the owner.*

3. *For the purpose of subsection (1) -*

(a) *the word “takes” includes obtaining physical control –*

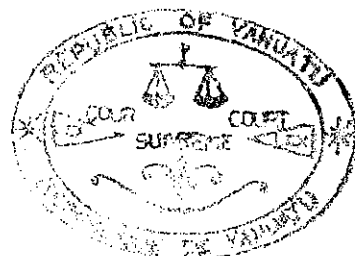
- (i) *by any trick or by intimidation;*
- (ii) *(not relevant);*
- (iii) *(not relevant);*

(b) *The words “carried away” include the removal of any thing from the place which it occupies but in the case of a thing attached, only if it has been completely detached;*

(c) *The word “owner” includes any part-owner or person having physical control of, or a special property or interests in, anything capable of being stolen”.*

C. Section 123 defines Misappropriation as follows –

“A person commits Misappropriation of property who destroys, wastes or converts any property capable of being taken which has been entrusted to him for custody, return, accounting or any particular manner of dealing (not being a loan of money or of monies for consumption)”.



- D. Section 124 defines what obtaining property by false pretences means as follows –

“Every person obtains property by false pretences who, by a false pretence, that is to say, any representation made by words, writing or conduct, of a

matter of fact, either past or present, which representation is false in fact, and which the person making it knows to be false, or does not believe to be true with intent to defraud, either directly or indirectly, obtains possession of or title to anything capable of being stolen or procures anything capable of being stolen to be delivered to any person other than himself”.

- E. Section 125 prohibits theft, misappropriation and false pretences as follows –

“No person shall cause loss to another –

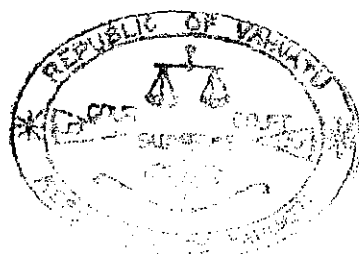
- (a) by theft;
(b) by misappropriation; or
(c) by false pretences.*

Penalty: Imprisonment for 12 years.

- F. Section 131 provides for receiving property dishonestly obtained as follows –

“No person shall receive anything obtained by any offence, or by any act wherever committed which, if committed within the Republic would constitute an offence, knowing that thing to have been dishonestly obtained”.

Applying these provisions to the facts as proved by admissible evidence, I was satisfied beyond reasonable doubt that Noel Faenolave had committed the offences of false pretences, theft and misappropriation of cocoa beans and misappropriating the monies obtained from the unauthorised sale of those cocoa beans. Noel Faenolave knew perfectly well that the cocoa beans were neither his nor Alfred Maseng's. He misrepresented that fact to the Cocoa Inspector knowing the same to be false. I am satisfied that the prosecution had discharged the onus of proof that was on them by proving all the elements of these offences against Noel Faenolave to the required standard. Accordingly I convicted him as



charged and sentenced him after considering the mitigation factors put forward on his behalf by his counsel.

As regards Alfred Maseng, I am satisfied beyond reasonable doubt that he committed the offences of aiding and abetting misappropriation and of receiving property dishonestly. He had his


name on two invoices which required him to attend to the Cashier on 14th and 15th January 2002 consecutively to sign for payment and to collect the money for the cocoa beans. He knew very well the cocoa beans were not his. And he knew also that they were not Noel Faenolave's. He facilitated the commission of these offences. He received VT5,000 in cash as a reward, which money he well knew was neither Noel Faenolave's, nor his own. The prosecution had discharged the onus of proof that was on them to the required standard. Accordingly I convicted him as charged and sentenced him after considering the mitigating factors put forward on his behalf by his counsel.

Finally for Alfred Maliu, I had no doubt that the prosecution had proved the elements of the charge of aiding and abetting misappropriation against him. He was seen visiting the cocoa bean on 4th January. He was seen at the grading shade by the Cocoa Inspector. His close Company with Noel Faenolave at this time left me in no doubt that Alfred Maliu was an accomplice to the offences committed by Noel Faenolave. Accordingly I convicted him as charged and imposed a fine on him.

In sentencing them, the defendants were informed of their rights of appeal.

Published at Luganville this 19th day of May, 2003.

BY THE COURT


OLIVER A. SAKSAK
Judge

