

PUBLIC PROSECUTOR
V.
MOISE BICE
AILUL KAVIN AKAR BEN
AITIP BICE

Coram: Justice D. V. Fatiaki

Counsels: Mr. G. Takau and Mrs. T. Harrison for the State
Defendants – in person

Date of Decision: 23 September 2011

VERDICT

1. On 5 July 2011 the defendants were arraigned on an information which jointly charged them with the following offences:

"Count 1 **STATEMENT BLONG WRONG**

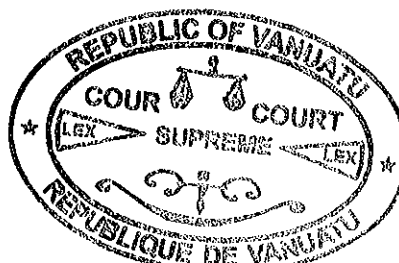
POSSESSION OF DRIED CANNABIS LEAVES CONTRARY TO SECTION 2 (62) OF THE DANGEROUS DRUGS ACT [CAP. 12]

PARTICULARS BLONG WRONG

MOISE BICE, AITIP BICE and AILUL KAVIN AKAR BEN yufala istap live long Port Vila. Samtaem long 11th May 2011 long Anamburu area long FSP yufala ie been gat long possession blong yufala ol dry cannabis leave mo long taem ia yufala ie save gud se hemi wan prohibited drug long Vanuatu.

Count 2 **STATEMENT BLONG WRONG**

SALE OF CANNABIS CONTRARY TO SECTION 2 (62) OF THE DANGEROUS DRUGS ACT [CAP. 12]



PARTICULARS BLONG WRONG

MOISE BICE, AITIP BICE and AILUL KAVIN AKAR BEN yufala istap live long Port Vila. Samtaem long 11th May 2011 long Anamburu area long FSP yufala ie been stap salem cannabis wei hemi illegal blong salem long Vanuatu mo yufala ie save gud se hemi wan prohibited drug long Vanuatu.

Count 3

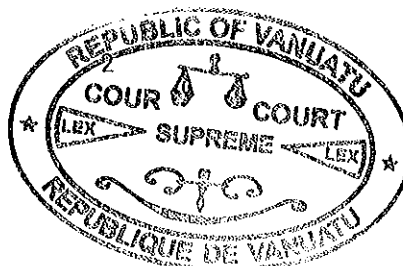
STATEMENT BLONG WRONG

POSSESSION OF PROPERTY SUSPECTED OF BEING PROCEEDS OF CRIME CONTRARY TO SECTION 12 OF THE PROCEEDS OF CRIME ACT [CAP. 284]

PARTICULARS BLONG WRONG

MOISE BICE, AITIP BICE and AILUL KAVIN AKAR BEN yufala istap live long Port Vila. Samtaem long 11th May 2011 long Anamburu area long FSP yufala ie been kat long possession blong yufala 108,754vt wei hemi money wei yufala been karem through long sales blong cannabis wei hemi prohibited long Vanuatu."

2. To each of the counts the defendants entered pleas which contained partial admissions and partial denials. In particular, the defendants uniformly denied that cannabis was a dangerous or prohibited drug. Accordingly the Court entered "not guilty" pleas consistent with **Section 160 (2)** of the Criminal Procedure Code ('CPC') and the matter was fixed for trial.
3. When the trial commenced on 30 August 2011 the defendants who were represented by the Public Solicitor's Office confirmed to the Court that they no longer wished to be represented by the Public Solicitor's Office and defence counsel was granted leave to withdraw. The trial then proceeded with the defendants representing themselves. Section 81 of the Criminal Procedure Code was complied with and prosecuting counsel briefly opened the case and called his witnesses.
4. It is convenient at this stage to discuss the charges and some important requirements or features of a criminal trial.
5. In this latter regard this being a criminal trial the prosecution along bears the burden of proving each defendants guilt beyond a reasonable doubt on the 3 charges brought against each of the defendants. In other words the prosecution must call and produce evidence which establishes each of the ingredients of the offences charged to the satisfaction of the Court beyond a reasonable doubt.

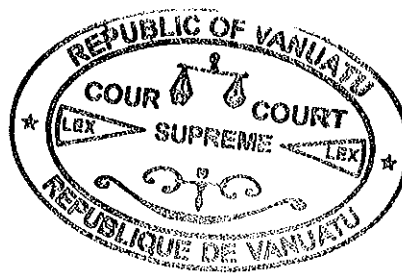


6. The corollary of that feature or requirement is that the defendants are not obliged to prove their innocence or even say anything during the trial but in this case, the first and second defendants elected to give sworn evidence in their defence and the Court is obliged to scrutinize their evidence as carefully as it does the prosecution's evidence.
7. If at the end of the trial, after considering all of the evidence including the defendants' sworn testimony, I am **not** satisfied that the prosecution has proved its case beyond reasonable doubt then it will be my duty to acquit the defendants. If however, after considering all of the evidence, I am satisfied beyond a reasonable doubt of the guilt of the defendants then equally it will be my duty to convict the defendants.
8. I remind and caution myself that although the defendants are jointly charged in the one information, it is my duty to consider and deal with the charges and the evidence against each defendant separately. By this I mean that the strength or weakness of the prosecution's case and evidence must be approached separately as it relates to each defendant.
9. In other words just because the Court may be satisfied beyond a reasonable doubt on one of the charges against a defendant that does not necessarily mean that it must be similarly satisfied in relation to the other charges that he faces.
10. In similar vein just because the Court may be satisfied of the guilt or innocence of one defendant does not automatically mean that it must be or is similarly satisfied about the guilt or innocence of a co-defendant.
11. The guilt or innocence of each defendant on each offence will depend on the strength of the prosecution's evidence called against that defendant on each count to the satisfaction of the Court beyond a reasonable doubt.
12. With those general directions I turn next to consider the offences against the 3 defendants of which there are 2 namely, **Possession of Dried Cannabis Leaves** and **Sale of Cannabis** and against the first and second defendants only, **Possession of Property Suspected of Being Proceeds of Crime**.
13. The Possession and Sale of Cannabis is an offence against **Section 2** of the **Dangerous Drugs Act** [CAP. 12] which provides (with an inapplicable exception):

"2. Prohibited substances and materials

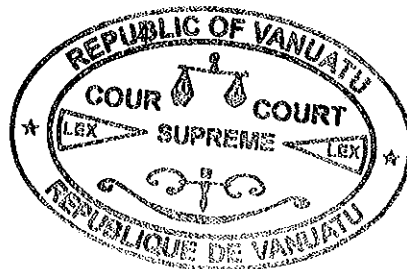
The, sale, supply or possession in Vanuatu of the following substances and materials is prohibited"

And one of the prohibited substances or materials listed in the section at **item 62** is "**Cannabis**" which is relevantly defined as:



“... any plant of the genus *Cannabis* or any part of such plant (by whatever name designated) or the seeds of such plant ...”

14. It should be pointed out that although the legislation is called the **Dangerous Drugs Act** and is intended to regulate the importation, sale, supply and possession of certain dangerous drugs in Vanuatu, **no where** in the contents of the Act is there any mention of the word “*dangerous*” nor is there to be found a definition of the term “*dangerous drug*” **or** even an offence which refers to dangerous drugs. Instead the offences under the Act refers to “**prohibited substances and materials**”.
15. This incongruity in the drafting of the Act may be considered unfortunate even confusing, but that is not the concern of this Court whose sole duty is to uphold and enforce the law as passed by the Parliament of Vanuatu.
16. As for the offence of **Possession of Dried Cannabis Leaves** the prosecution are required to prove the following 3 elements or ingredients against each defendant:
 - (a) That the defendant possessed dried leaves;
 - (b) That the dried leaves are “*cannabis*”; **and**
 - (c) That the defendant knew that he had the dried leaves in his possession.
17. In similar vein in regard to the offence of **Sale of Cannabis** the prosecution must establish beyond reasonable doubt 3 elements as follows:
 - (a) That the defendant sold plant material;
 - (b) That the plant material is cannabis; **and**
 - (c) That the defendant knew that the plant material he was selling was cannabis.
18. Finally, in respect of the third count of **Possession of Property Suspected of Being Proceeds of Crime** the prosecution must establish:
 - (a) The first and second defendants had money in their possession;
 - (b) The money was derived from the commission of a “*serious offence*”;
 - (c) The serious offence is one for which the maximum penalty is at least 12 months imprisonment; **and**
 - (d) The first and second defendants knew or reasonably suspected that the money was the proceeds of crime.
19. I note that the third ingredient or element of the offence i.e. (c) above, does **not** need to be proved by evidence as it is established by the penalty prescribed in the **Dangerous Drugs Act** for an offence of **Selling Cannabis** namely:

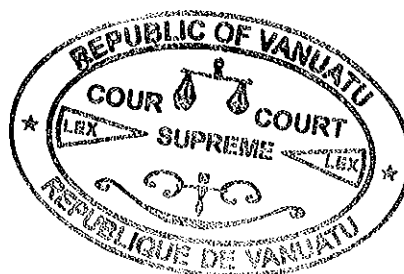


"17. Penalties for contravention of Act

Every contravention of this Act shall constitute an offence punishable by a fine not exceeding VT100 million or to a term of imprisonment not exceeding 20 years or to both such fine and imprisonment."

20. The prosecution's evidence in the case was entirely comprised of the sworn testimony of police officers drawn from the Tactical Response Group, the Drug Squad, CID, Crime Scene Officers and the Head of Forensics. In all there were 14 police officers most holding the rank of Constable except for **Senior Sergeant Uriel Leo** in charge of the Drug Squad and **Chief Inspector John Edmanley** the Head of Forensic.
21. The prosecution's case is that on **11 May 2011** a search warrant was executed by a team of police officers at the Ex-FSP premises at Anamburu where the first defendant occupied a small natangura house in the compound.
22. On arrival at the scene a group of youths were rounded up inside the compound. Amongst them was the third defendant **Aitip Bice**. The group of youths was searched and **Constable David Bong** testified that he searched the third defendant and "*found dried leaves in his pocket*" which he suspected was cannabis. The third defendant was arrested and escorted to the Vila Police Station where the dried leaves were tested by CRO and "*confirmed they were cannabis*". Unfortunately, Constable Bong did not produce the third defendant's trousers nor did he identify and produce in court, the dried leaves recovered from the third defendant's trousers pocket.
23. The search then moved to the first defendant's house and when it began the first and second defendants were still inside. They too were arrested and escorted outside and then to the police station whilst the search of the house was continued by several police officers.
24. The evidence of **Senior Sergeant Uriel Leo** who was the leader of the search operation is typical of what was done, seen and recovered from the first defendant's house by the police officers who assisted in the search. He testified:

"I showed the first defendant a copy of the search warrant. Moise Bice and then started searching inside. Yes I kept an eye on the search being conducted by the police boys. I went in and out of the house. It had lots of marijuana packets and bags. There was a book and paper with lots of names on the list. Names of people from Malekula and it has also quantity of packets each had and the amount of money due to each. I recall we recovered over VT100,000."



25. In this latter regard the evidence of **Constable Fred Pakoa** who assisted in searching the first defendant's house was:

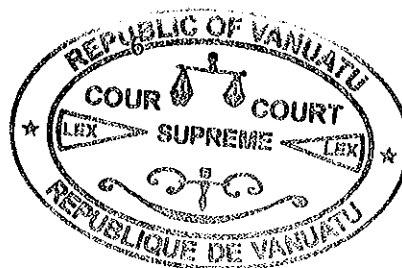
"The first defendant came out and search began inside. The house was full of marijuana and money. There was also a list with names. I saw a handbag. The bag had a solar light and rolled marijuana".

26. The witness next identified and produced a large amount of local currency in notes and coins which he had found in the first defendant's house stored in plastic bags, a brown paper bag, a red purse, and a black man's wallet. Some of the cash were contained within larger hand bags also found in the first defendant's house. In total the cash seized amounted to **VT108,554**.
27. During the course of the trial the prosecution sought and was permitted under **Section 82** of the **Criminal Procedure Code** to recall several police officers who had earlier testified to assisting in the execution of the search warrant at the first defendant's house but who had not identified or produced any of the items they had individually found and seized during the search of the first defendant's house.
28. The recalled officers were Sergeant Uriel Leo, and Constables Edward Are, James Cedrick, Kalpat Steedman and Joe Toto. Each recalled witness identified numerous items that he had recovered from the first defendant's house including, a large amount of local currency notes and coins contained in plastic bags found in a carton, and in a black zip bag "Bobo" brand and a large quantity of rolls of dried leaves.
29. Of particular interest was the evidence of **Constable Kalpat Steedman** who produced a plastic bag containing "filters" which were the unsmoked butt ends of a marijuana joint. In his words:

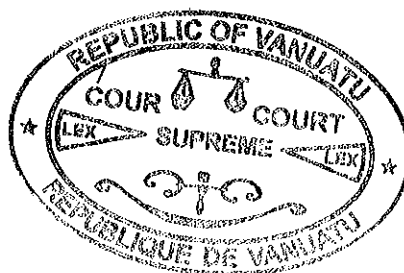
"This is part of a joint. Marijuana rolled together forms a joint which is smoked. The joint is rolled in Talio paper used to roll tobacco. When I found the filters they were spread on top of a table. Yes all these filters have been used. They have all been smoked. They all show signs of burning on their edges."

He also identified a dry coconut shell which he describes "as being used as an ashtray" with used match sticks, burnt butt ends, and ash inside it. He also produced several unused match boxes and cigarette lighters he found in the first defendant's house.

30. Given the Court's limited storage capacity only the currency exhibits were retained by the Court. The other exhibits including a large quantity of dried leaves, and other non-currency exhibits were returned to the police for safe-keeping after they were marked as exhibits.



31. The quantities of dried leaves and local currency and other items recovered from the first defendant's house were carefully recorded on a **Property Seizure Record** comprised of seven (7) pages and marked as Exhibit – P21(B) by **Constable Terry Sandy**. He also photographed the search scene at the ex-FSP compound and the items recovered from the first defendant's house. The witness also produced five (5) sheets of **Crime Scene Examination Notes** (Exhibit – P21(C)) he had prepared when weighing the dried leaves recovered from the first defendant's house. The total net weight of the dried leaves recovered was **2145.90g**. Significantly, each page of the **Seizure Record** is signed by the first defendant certifying that he is "... *the owner/person in possession ...*" of the property seized under the search warrant.
32. Before leaving this witness' evidence I observe with some concern the process and procedure adopted in the collection and weighing of the dried leaves. The witness described the process as follows:
- "To weigh cannabis we weigh pieces together to get a net weight to assist the court in its decision. The cannabis if wrapped is removed from its wrapper and then weighed ... I collected the cannabis from the scene took it to the station where I placed them in workable groupings and labelled each group – "Exhibit 1 Etc..."*
33. If I may say so whilst the procedure adopted makes it easier and quicker to weigh the dried leaves seized, the process necessarily entails the mixing together of the separate bundles of dried leaves found and seized under the search warrant, such that, individual bundles are irreversibly transformed as to become incapable of being later identified in court by the officer(s) who found and seized the particular bundle or roll of dried leaves. There are dangers in adopting such a process when dealing with discrete recoveries especially from individuals as occurred with the third defendant in this case.
34. Be that as it may the dried leaves were later tested using test-kits specially prepared for use in testing for the existence of cannabis. The tests were carried out by **Chief Inspector Edmanley** the Head of the Forensic Unit. He concluded that "*the result of out tests was they were positive for cannabis material*". Chief Inspector Edmanley also described a second level of tests carried out on the dried leaves called the "*biological examination*" and again it confirmed that the dried leaves "*are cannabis material*".
35. With **Chief Inspector Edmanley's** evidence the prosecution closed its case.
36. As a good deal of the defendant's cross-examination of the police officers dwelt on the possible absence of a proper search warrant as well as the lawfulness of the arrest and search of individuals, I set out the relevant provisions of the Dangerous Drugs Act which relates to Seizures, Searches of the person and Search warrants:



"10. Seizures

It shall be lawful for any police or customs officer to seize and confiscate any prohibited substance or material or preparation containing any prohibited substance, found under conditions contravening the provisions of this Act.

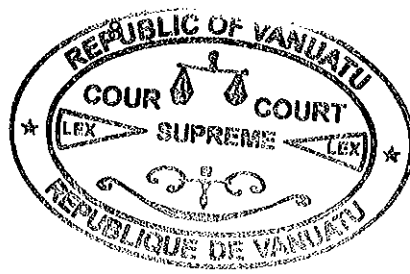
11. Searches of the person

It shall be lawful for any police or customs officer to take cognizance of any offence under this Act and to search the person of anyone suspected of concealing thereon any prohibited substance or material or any document of thing connected therewith.

12. Search warrants

The court, on application, may issue to any police or customs officer a warrant to search any premises or place in which any prohibited substance or material or any correspondence or thing connected therewith is reasonably suspected to be."

37. In the present case the police search party was armed with a search warrant (**Exhibit - P22**) issued by the Magistrate's Court which authorised the search of the houses and compound belonging to **Lopez Adam** at ex-FSP building at Anamburu which included the small house of the first defendant within the compound. Furthermore the warrant authorised the seizure of cannabis or marijuana including other items that related to its possession, sale and use.
38. I was satisfied that there was a case to answer against each of the defendants and **Section 88** of the **Criminal Procedure Code** was read to each defendant in turn in bislama. The first and second defendants elected to give sworn evidence and the third defendant **Aitip Bice** opted to remain mute. None of the defendants had any witness to call.
39. The first defendant, **Moise Bice**, testified that "*the product*" he sold from his house at the ex-FSP compound is called "**VORTAMAT**" which is a word from his language and traditions. "*Cannabis*" and "*marijuana*" are introduced names and foreign to Vanuatu. Vortamat was the name he gave the plant on 14 July 2006. The plant is related to the 10 commandments which says it is "*holy*" the vortamat tree. He criticised the forensic test carried out on the dried leaves as failing to show that cannabis is dangerous. All it did was show a colour pink which cannot be dangerous. He further said: "*All people who use cannabis that I know are not dead, so where is the danger in the dried leaves? The test is for chemical inside the plant material but not for bacteria. No one can tell me the poison inside.*" Finally he said "*Vortamat is cultivated by a cooperative called the South West Malekula Cooperative*".
40. In cross-examination he confirmed the second defendant (Kavin) was living with him in his house at ex-FSP compound and he steadfastly refused to admit that

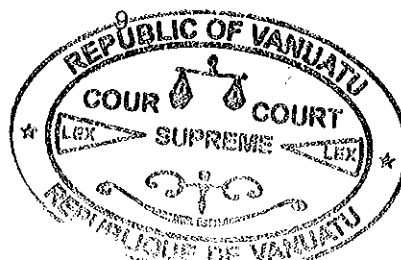


Vortamat is also known by the names "*cannabis*" and "*marijuana*". He admitted however that the money recovered from his house were the proceeds of selling Vortamat which came from Melip Village in Malekula.

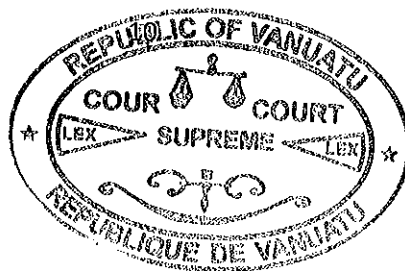
41. For his part the second defendant **KEYVEN AILUL AKAR** also claimed that the dried plant material is called "**VORTAMAT**" in his language which was launched on 14 July 2006. He said there are 3 "*solutions*" to the use of Vortamat:
- (a) land to be returned to custom owners;
 - (b) respect the 10 commandments; and
 - (c) respect boundary blong plant lo Jesus – Jesus grass;

He claimed that following and using VORTAMAT gave him wisdom and understanding.

42. In cross-examination he confirmed being in the first defendant's house at the ex-FSP compound when the police entered to search the house. He agreed that there was **VORTAMAT** stuff in the house as well as money collected from the sale of Vortamat. He denied being shown by the police or seeing any search warrant. The second defendant was particularly evasive in his answers ("*mi no save*") to counsel's questions which sought to identify Vortamat as being one and the same as "*cannabis*" and "*marijuana*". He admitted however selling Vortamat and he denied any real knowledge of the Dangerous Drugs Act which he disagreed with anyway.
43. In answer to the Court's questions the second defendant said Vortamat means "*World Peace*". He agreed that the word **VORTAMAT** also refers to a plant which can be smoked like tobacco and when used, gave "*wisdom to understand right from wrong*". He confirmed that he sold VORTAMAT as "*a product because it's God's creation*" to get *vatu*. He agreed that "*VORTAMAT is easy money*" whereas growing tomatoes was "*too hard work*". He reluctantly accepted that he came to know about the Dangerous Drugs Act when he was arrested by the police, but, because he didn't agree with it, he refused to follow or obey it.
44. As for the third defendant, **AITIP BICE**, although he elected to remain mute during the trial, his police caution interview record (**Exhibit P18**) was produced by **Constable Ruth Christopher**. In it the third defendant is recorded to have admitted that marijuana was found in a pocket of the trousers he was wearing but that the trousers belonged to his uncle.
45. I propose to deal firstly with the case against the third defendant **AITIP BICE**. In this regard I am satisfied that dried leaves were recovered from the pocket of the trousers he was wearing on 11 May 2011. This would have raised a reasonable inference that he knew of and was in possession of the dried leaves, **BUT**, that inference was seriously undermined, in my view, when the third defendant claimed in his police interview that the trousers belonged to his uncle, **Markiesurman**.



46. Unfortunately and despite the uncle being named, no attempt was made, as it should have been, to clarify or negate the third defendant's claim about the ownership of the trousers he was wearing. This raises in my view, a reasonable doubt as to whether or not the third defendant knew of the presence of the dried leaves inside the pocket of the trousers he was wearing. In addition, and even more serious, the dried leaves which were recovered from the pocket of the trousers worn by the third defendant was **not** preserved in tact or tested and weighed separately **nor** were they produced in Court, as a separate identifiable exhibit as they should have been. In the result, the prosecution were unable to positively identify and produce the dried leaves seized from the third defendant **nor** was it able to establish that the dried leaves recovered from the pocket of the trousers that the third defendant was wearing which was "mixed-up" with the dried leaves seized from the first defendant's house, was indeed, cannabis.
47. In this regard the manner in which **Constable Calvin Isaac** handled the dried leaves found in **Eddy Worwor's** trousers pocket when he searched him during the same police operation is commendable and should have been followed in respect of the third defendant. Unfortunately it was not (See: PP v. Eddie Worwor Criminal Case No. 100 of 2011).
48. For completeness, I record my view that the opinion of the police officer who found and seized the dried leaves when he searched the third defendant is inadmissible unconfirmed opinion evidence which carries little (if any) weight. Likewise, the recorded admission of the third defendant in answer to a leading question in his police interview, that he had "... of pieces blong ortamat (*Marijuana*)" in his trouser pocket is insufficient, in my view, to discharge the prosecution's heavy burden to establish the ingredients of the offence charged against the third defendant.
49. That being the only charge which the third defendant is facing I find that the prosecution has failed to prove the charge against him beyond a reasonable doubt. I therefore find the third defendant **AITIP BICE** not guilty and acquit him of the charge of **Possession of Cannabis** in Count 1.
50. I turn next to consider the case against the second defendant who is charged on all 3 counts namely, Possession and Selling of Cannabis and Possession of the Proceeds of Crime.
51. After considering all the evidence produced by the prosecution including the second defendant's police caution statement (**Exhibit – P19**) and his sworn testimony in court, I am satisfied beyond a reasonable doubt that the prosecution has proved **all** three (3) offences charged against the second defendant.
52. Accordingly I find the second defendant **KAVIN AILUL AKAR** guilty of an offence of **Possession of Cannabis** and an offence of **Selling Cannabis** both offences being contrary to Section 2(62) of the Dangerous Drugs Act [CAP. 12] respectively and also of an offence of **Being in Possession of property**




(money) which was the Proceeds of Selling Cannabis contrary to section 12 of the Proceeds of Crime Act [CAP. 284].

53. Lastly I turn to the case against the first defendant **MOISE BICE** and after considering all of the evidence in the case including the first defendant's police caution statement (**Exhibit – P20**) and his sworn testimony in court, I find that the evidence against the first defendant is overwhelming. I am satisfied that the prosecution have proved the 3 charges against the first defendant beyond a reasonable doubt.
54. Accordingly, I convict the first defendant for **Possession of Cannabis** and **Selling Cannabis** both offences being contrary to Section 2(62) of the Dangerous Drugs Act [CAP. 12], and, for the offence of **Being in Possession of property (money) which was the Proceeds of Selling Cannabis** contrary to Section 12 of the Proceeds of Crime Act [CAP. 284].
55. For completeness, I direct that all the dried cannabis leaves and cannabis "*filters*" seized from the first defendant's house at ex-FSP compound, Anamburu on 11 May 2011 and weighing approximately **2145.90gms** together with the containers in which they were found, be condemned and destroyed within 7 days.
56. Similarly and in the exercise of the Court's powers under **Section 58ZC** of the **Penal Code** [CAP. 135] I order the confiscation of the money seized from the first defendant's house at ex-FSP compound, Anamburu, and produced in court, totalling approximately **VT100,704** as representing the illegal "... *proceeds of the offence (of selling cannabis)*" and I direct that after the expiration of 14 days, the said money shall be forfeited to the State and be paid into the General Revenue by the Chief Registrar.
57. If you do not agree with the Court's Verdict you may appeal against it to the Court of Appeal within 14 days.

DATED at Port Vila, this 23rd day of September, 2011.

BY THE COURT


D. V. FATIAKI
Judge.

