

PUBLIC PROSECUTOR - v - SAM NIKAHI

Coram: *V. Lunabek CJ*

Counsel: *Mr Gregory Takau for the Public Prosecutor
Ms Eric Molbaleh for the Defendant*

JUDGMENT ON VERDICT

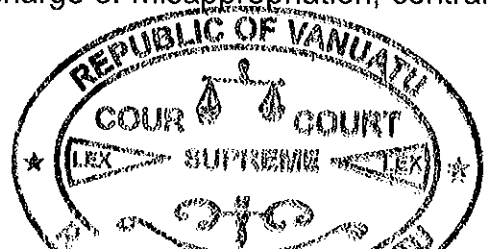
The Accused Sam Nikahi is charged with one count of theft, contrary to Section 125(a) of the Penal Code Act and one count of Misappropriation, contrary to section 125(b) of the Penal Code Act [CAP.135]. The Accused pleaded not guilty to both counts. He was then tried for both counts. Before his trial, he understood his rights under s.81 of the Criminal Procedure Code Act [CAP.136] which were read and explained to him. Equally, at the end of the prosecution case, he understood his rights under s.88 of the Criminal Procedure Code Act [CAP.136] which were read and explained to him.

This is a criminal trial, the law is for the prosecution to prove each and all the essential elements of the offence beyond reasonable doubt. The Accused is not required to prove his innocence. If at the end of the prosecution evidence there is a doubt as to the culpability of the accused, he must be acquitted. If the accused elected to give evidence himself, he will be subject to cross-examination by the other side and the burden of the proof is still on the prosecution on beyond reasonable doubt.

In this case, the prosecution accepted that they failed to prove the elements of the offence of theft, contrary to Section 125(a) of the Penal Code Act beyond reasonable doubt against the Accused. The prosecution asked the Court to acquit the accused Sam Nikahi on the offence of theft (in count 1).

The Court acquitted the accused Sam Nikahi in respect to count 1 of theft, contrary to Section 125(a) of the Penal Code Act [CAP.135] accordingly.

The accused Sam Nikahi is now only facing the charge of misappropriation, contrary to s.125(b) of the Penal Code Act.



The prosecution must prove beyond reasonable doubt that:

1. That the money (VT764,281) was entrusted to him to deposit in the account of the Riverside Cooperative Savings and Loans; and
2. The accused Sam Nikahi converted or dealt with the money of Vatu 764,281 entrusted to him for return or accounting or any particular manner of dealing.

Before the trial begins, it was agreed by the prosecution and the defence that-

1. The accused Sam Nikahi was the treasurer of the Cooperative association. He received the amounts of VT764,281 from the members of the Cooperative.
2. The accused denied that he had used VT764,281 for his own personal use.
3. The accused said he had given all the money to Jack Nafeali to deposit into the Bank account of the Cooperative.

The prosecution called Mr Jack Nafeali as the prosecution witness. Mr Jack Nafeali is the only prosecution witness. He gave evidence to this effect.

1. He used to work for the Cooperative Department for 33 years;
2. His role was to develop business plan, provide training, do auditing, provide business advice and run awareness to people wanting to set up and run a cooperative society;
3. He helped setting up cooperative societies including River Side Saving and Loans Cooperative Society at Etas are in Efate;
4. The purpose was to help people like mothers who cannot read and write to do saving and lending;
5. There are 35 members of that River Side Cooperative Savings and Loans and so the members put their money together since 4 April 2010 the day they set up the association;
6. He is the assistant treasurer of that association and the defendant is the treasurer;
7. He has never met with the defendant to discuss the financial issues and development of the association;
8. He says defendant was always avoiding the meetings;
9. He says defendant never gave him the money collected from the members;
10. He says the members contributed to an amount of 234,596 Vatu on the 4th of April 2010;
11. Because there was no bank account for their had to put the money into his wife's term deposit account;
12. He says that on the 11 March 2011, his wife Mrs Nafeali transferred that amount of 234,596 Vatu to the account of the River Side Saving and Loans Cooperative association;
13. He says he never received the amount of VT764,281 from the defendant;
14. He said he did auditing and found out that the amount of VT764,281 was missing;



15. He also asked the Department of Cooperative to do auditing;
16. He says it is only the defendant who does the deposit; however, he and the defendant sign the withdrawal form for any withdrawal of cash from the bank;
17. He said defendant said in the meeting that he (defendant) will refund 10,000 Vatu and another time he said he (defendant) will pay back an amount of 25,000 Vatu and he (defendant) will have a stall in July to pay back the money but he never pay back any money.

The accused Sam Nikahi elected to give evidence. His evidence is that he received the amount of VT764,281 from the members of the Riverside Cooperative Savings and Loans. He says every time he received money, he gave the money to Jack Nafeali to deposit into the deposit account of Mrs Nafeali for the money to grow.

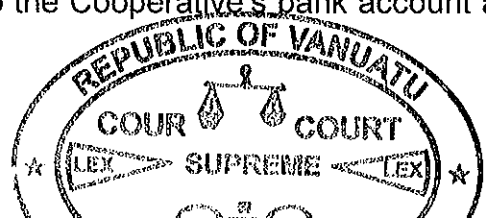
He said at a meeting of the association, on 9 July 2011 after it was discovered that money of VT.764,281 was missing, the members of the committees decided to pay back each VT10,000. He decided to fundraise VT10,000 but the agreed he never did so.

The accused gave evidence that he received VT764,281 and gave the money to Jack Nafeali to deposit into the account of the Association at the Bred Bank.

The accused was confronted in his evidence under cross-examination when he was asked to explain why he admitted to the members of the association during a meeting of the committee in July 2011 that he had used the money and he also told the police during his interview that he had used the money but in Court he pleaded not guilty to the offence and in his evidence in chief, he said he did not use the money because he only covered Jack Nafeali because he respects him as his cousin and Jack Nafeali has a lot of experience in setting up the cooperative savings and Jack Nafeali was the one who set up River Side Cooperative Savings and Loans and as every time he received money, he gave the money to Jack Nafeali to deposit into the Cooperative Bank Account. He said Mr Jack Nafeali knew where the money are. But he did not use the money for his personal use.

There is no evidence of what amount was exactly missing. There is no evidence from the Bred Bank as to the statement of Accounts of the Cooperative held by the Bank apart from the figure of VT764,281 which Mr Jack Nafeali said were missing.

There is evidence that Mr Jack Nafeali deposited money into the Bank Account of the Riverside Cooperative. On the evidence, although the accused is appointed as the treasurer of the Cooperative association, and Mr Jack Nafealy the Assistant Treasurer, in practice, it is Mr Jack Nafeali who ran and managed the Cooperative Savings funds and Accounts. That is what transpired from the evidence and accepted by the Court. This confirmed the evidence of the accused that he had given money he received to Jack Nafeali to deposit into the Cooperative's bank account at




Bred Bank. This creates a doubt which is a reasonable one. It must be interpreted in favour of the accused.

The Court cannot convict the accused Sam Nikahi on the evidence so far provided by the prosecution. I found him not guilty. The accused Sam Nikahi is acquitted of the offence of misappropriation contrary to s.125(b) of the Penal Code Act.

DATED at Port-Vila this 18th day of June 2012

BY THE COURT



Vincent LUNABEK
Chief Justice

