

(Criminal Appellant Jurisdiction)

BETWEEN: THE PUBLIC PROSECUTOR

Appellant

**AND: SYLVESTER JOHN and
MAVUN HOVUHOVU**

Respondents

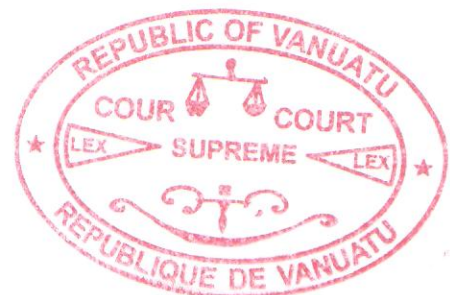
Mr Justice Oliver A. Saksak

Mr P. Wirrick for the Appellant
Miss J. Tari for the Respondents

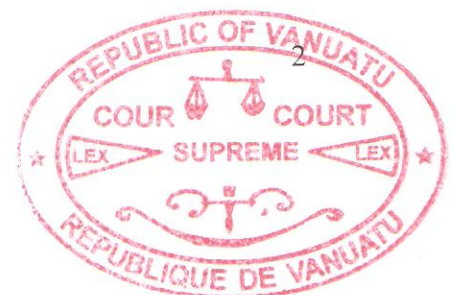
Date of Hearing: 4th July 2012
Date of Judgment: 3rd August 2012

JUDGMENT

1. This is a State appeal made pursuant to Section 200(3) of the Criminal Procedure Code Act Cap 136 (the CPC Act).
2. The two respondents were charged with a total of five counts. The first three counts involved both respondents charged jointly for two separate transactions of theft contrary to section 125(a) of the Penal Code Act Cap 135 (the Act), one of which involved a correlating charge of Unlawful Entry contrary to section 143 of the Act. Respondent Sylvester John was charged with a further count of Unlawful Entry and Theft (Counts 4 and 5) which were allegedly committed in one transaction on a further separate date. These two Counts were however discontinued by the State by way of a Nolle Prosequi application made pursuant to section 29 of the CPC Act after the respondent Sylvester John pleaded not-guilty to all five counts.



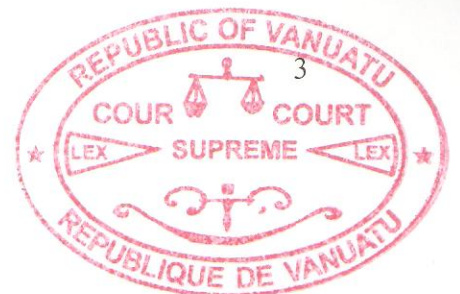
3. Respondent Mavun Hovuhovu pleaded guilty to all the charges against him (Counts 1, 2 and 3) on 7th March 2012. On 10th April 2012 he was Sentenced to a conviction and discharge and ordered to pay prosecution costs in the sum of VT3.000.
4. On 3rd May 2012, respondent Sylvester John appeared for trial. His co-offender, Mavun Hovuvu gave evidence on behalf of the Prosecution against him in respect to the three Counts (Counts 1, 2 and 3). The Court below found him guilty and sentenced him to a conviction and discharge with an order to pay prosecution costs in the sum of VT5.000.
5. The Sentencing Order simply states –
*“That the defendant (Sylvester John) is convicted and discharged.
That he pay VT5.000 Prosecution Costs on or before 3rd June 2012.”*
6. The State appeals against the whole of the Order both of 7th Mach 2012 and of 3rd May 2012 on the grounds that the learned Senior Magistrate erred:-
- (a) By failing to follow precedent.
- (b) By placing insufficient weight on the principles of denunciations and personal and general deterrence.
- (c) By placing insufficient weight on the nature and value of the properties stolen as an aggravating feature.



- (d) By imposing Sentences which did not reflect the seriousness of the offences committed.
- (e) In improperly exercising his discretion to convict and discharge the respondents without further considering other options available under the Act.
- (f) The Sentences imposed were manifestly inadequate.

Discussions

7. The respondents raised the issue of jurisdiction of the Magistrate's Court submitting that pursuant to Section 14 of the Judicial Services and Courts Act Cap 270 the Court below did not have the jurisdiction to convict and sentence the respondents because the maximum sentences for unlawful entry and theft are 12 years and 20 years imprisonment.
8. It is my view that this is not an appealable issue as it appears it was not raised for consideration by the Senior Magistrate in the Court below. In future cases involving charges of unlawful entry and theft it would be of great assistance if Counsel for the defendants make objections on the basis of Section 14 of the Judicial Services and Courts Act.
9. The respondents were charged, pleaded, tried and convicted by the Court below. To set aside their convictions in the Court below and have them re-plead, and retried would be to try them twice for the same offences.



10. The appeal therefore must be considered and determined in light of the six grounds raised by the Sate which are reframed as follows:-

(i) Did the Senior Magistrate fail to follow precedent?

The State relied on the following cases –

- (a) Public Prosecutor v. Tabi [2009] VUSC, 122 Criminal Appeal Case 1/2009.
- (b) Bule v. Public Prosecutor [2005] VUSC, 167 Criminal Appeal Case 1/2005.
- (c) Enock v. Public Prosecutor [2000] VUSC 8, Criminal Appeal Case 1/2000.

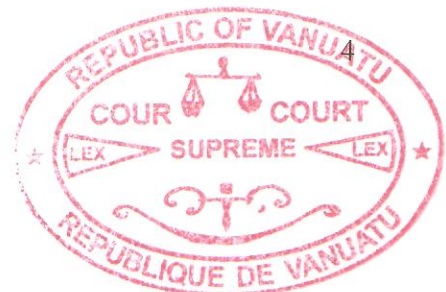
The defence counsel referred to –

- (a) Public Prosecutor v. Tabi [2009] VUSC 122; and
- (b) Public Prosecutor v. Jerry Farrai [2010] VUSC 42, Criminal Case 12/2010.

These cases provide persuasive guidelines only. Each case has to be considered in light of its own circumstances.

11. It appears from submissions by respondent's counsel that they are conceding that from Tabi and Jerry the usual sentencing trend for unlawful entry and theft are suspended sentences with or without conditions for first time offenders. However, Counsel urges the Court to make a distinction between those cases and this in that in those two cases, all properties stolen were not returned, whereas in the present case, all properties were returned.

In light of that concession, this Court concludes that the Senior Magistrate failed to follow precedent. The appeal succeeds on this ground.



12. (ii). Did the Senior Magistrate err by placing insufficient weight on the principles of denunciation and personal and general deterrence?

Respondents' Counsel conceded this issue. The Court agrees with State's submissions and accordingly the appeal succeeds on this ground.

13. (iii). Did the Senior Magistrate err by placing insufficient weight on the nature and values of the properties stolen by the respondents, and taking it into account as aggravating features?

The Court accepts and agrees with the submissions of the State in relation to this ground. It can never be a valid mitigating factor when items stolen are recovered and returned. That is done by the police as a result of quick action and probably sheer luck.

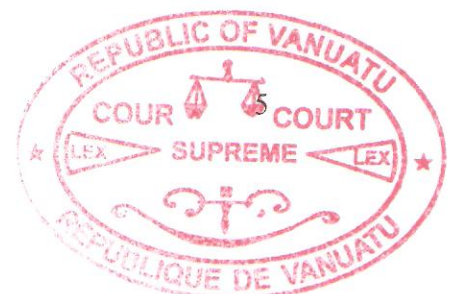
The items stolen by these respondents are listed as –

- One solar panel;
- One inverter (for solar panels);
- One car battery;
- One mobile phone;
- One roll electrical cable for solar wiring;
- One roll calico;
- Two bed sheets; and
- One torch.

With time, these would have been sold for cash and the money would have been spent, thus is the resulting emotional loss to the owner. Then there is resulting emotional stress. It is clear no thought or consideration was given to these.

The Court must reject the submissions of the respondents in respect to this ground.

Accordingly, the appeal succeeds on this ground.



- 14.(iv). Did the Senior Magistrate err by not imposing Sentences which did not reflect the seriousness of the offences?

The Court accepts the submissions by the State in relation to this ground. Respondents' Counsel appears to concede to this ground. Accordingly, this ground is answered in the affirmative and the appeal succeeds on this ground.

15. (v). Did the Senior Magistrate err by improperly exercising his discretion to convict and discharge the respondents without further penalties?

Both Counsel rely on Section 55 of the Penal Code Act Cap 135 as the basis for the Senior Magistrate making the sentencing order. But that is only a presumption. The Sentencing Order is so short, it does not indicate the source of the power under which it is made. In the absence of such, this Court can only conclude it was an improper exercise of discretion.

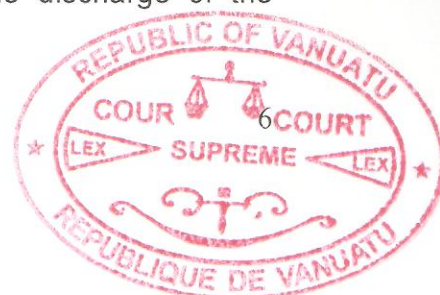
Accordingly, the appeal succeeds on this ground.

16. (vi). Was the Sentence imposed by the Senior Magistrate manifestly inadequate?

The respondents' counsel concede this ground. The Court accepts the submissions by the State on this ground and answers this issue in the affirmative. Accordingly, the appeal succeeds on this ground.

17. The overall conclusion reached is that this appeal is allowed.

18. The convictions of the respondents are upheld together with the Orders for payment of prosecution costs. The discharge of the



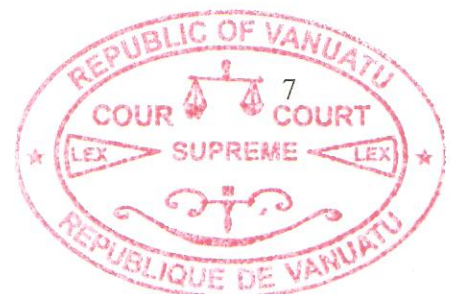
respondents are however vacated. This Court imposes the following Sentences in substitution pursuant to its jurisdiction under Section 30(1) and (2) of the Judicial Services and Courts Act.

- (a) Sylvester John – For Theft – Under Count 1 – 4 months imprisonment consecutive to Sentences for Counts 2 and 3.
- For Unlawful Entry – Count 2 – 5 months imprisonment.
 - For Theft – Count 3 – 5 months imprisonment to be served concurrent with Count 2.

You will serve a total of 9 months imprisonment however, these are suspended for a period of 2 years on conditions you do not re-offend or commit other criminal offences for which you are charged and convicted. If you do, you will go straight to prison for 9 months.

This Sentence serves as a deterrence for you and other people, it marks the seriousness of your offendings, it acts as a public disapproval for your unlawful actions and finally it is to punish you adequately for these offences.

- (b) For Mavun Hovuhovu - You are sentenced as follows –
- (a) For Theft – Count 1 – 4 months imprisonment consecutive to the Sentences for Counts 2 and 3.
 - (b) For Unlawful Entry – Count 2 – 5 months imprisonment concurrent with the Sentence for Count 3.



(c) For Theft – Count 3 – 5 months imprisonment concurrent with the Sentence for Count 2.

Altogether, you will serve a total of 9 months imprisonment but these are suspended for 2 years on the conditions that you do not re-offend or commit other criminal offences for which you would be charged and convicted. If you would do, you will go straight to prison for 9 months.

This Sentence serves as a deterrence for you and for others. It also marks the seriousness of your offendings and acts as a public disapproval for you unlawful actions. Finally, it acts as an adequate punishment for you for these offendings.

DATED at Luganville this 3rd day of August 2012.

BY THE COURT


OLIVER A. SAKSAK

Judge

