

PUBLIC PROSECUTOR

-v-

JOHNNY TAKANA

Coram: Chief Justice, Vincent Lunabek
Counsel: Mr Ken Massing for Public Prosecutor
Mr Daniel Willie for the Defence

ORAL VERDICT

Mr Johnny Takana, this is your Verdict. You were charged with following counts:

- 2 counts of Theft, contrary to s.125(a) of Penal Code Act [Cap 135] (Counts 1 and 2); and
- 3 counts of Obtaining money by False pretences, contrary to s.125(c) of Penal Code Act (counts 3,4 and 5); and
- In the alternative, 3 Counts of Obtaining Money by False or misleading statement, contrary to s. 130C of Penal Code Act (Counts 6,7 and 8).

You entered not guilty pleas in respect to each of those counts. Before your Verdict (at different stages from No case submissions to submissions on verdicts), the Public Prosecutor applies for Nolle Prosequi in respect to 2 offences of theft (Counts 1 and 2); 2 offences of obtaining money by false pretences, contrary to s. 125(c) (counts 4 and 5) and 1 offence of obtaining money by false or misleading statements, contrary to s.130C of Penal Code Act (count 7).

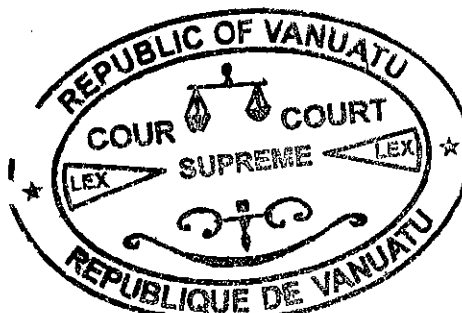
You are discharged for the offences charged against you in counts 1, 2, 4, 5 and 7 accordingly.

You appear in court today for Verdict in respect to offences laid against you in counts 3,6 and 8 the particulars of which are set out below:

• Count 3:

Statement of offence

-Obtaining money by False pretences, contrary to s.125(c) of Penal Code Act [Cap 135]



Particulars of offence.

Johnny Takana on or about November 2012, whilst in the employment of Worin Motors, you did commit the offence of obtaining money by false pretences in that, you made representations that were false in fact to Max Niptik which representations you knew were false in fact, hereby obtaining property from Max Niptik capable of being stolen, namely VT400,000.

- Count 6:

Statement of offence

-Obtaining money by false or misleading statement, contrary to s.130C of Penal Code Act.

Particulars of offences.

Johnny Takana, sometime in November 2012, whilst in the employment of Worin Motors, you did commit the offence of obtaining money by false or misleading statements in that with intent to obtain for yourself money VT400,000 you made a statement to Max Niptik, which was false or misleading and was made with reckless disregard as to whether it was true or misleading.

- Count 8:

Statement of offence

-Obtaining money by false or misleading statements, contrary to s.130C of Penal Code Act [Cap135].

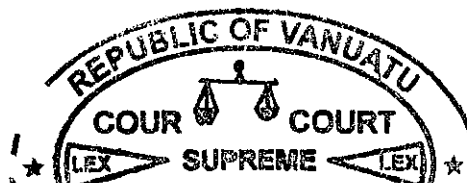
Particulars of Offence

Johnny Takana, on or about 31 December 2012, whilst in the employment of Worin Motors, you did commit the offence of obtaining money by false or misleading statements in that, with intent to obtain for yourself money VT600,000 you made a statement to Jack Iapa and was with reckless disregard as to whether it was true or false or misleading.

This is a criminal trial, the law is for the prosecution to prove each and all essential elements of the offence of obtaining property by false pretences, contrary to s.125(c) of Penal Code Act (in Count 3) and each and all essential elements of obtaining money by false or misleading statement contrary to s.130C of Penal Code respectively beyond reasonable doubt.

I have explained proof beyond reasonable doubt and my duty as a prior of facts in the case of Public Prosecutor -v- Mahinko [2011] VUSC 303; Criminal Case 80 of 2011 (21 November 2011).

You are not required to prove your innocence. If you have to give evidence yourself or call other person to give evidence on your behalf, I must consider your evidence and the evidence of your witnesses on equal basis as any evidence of the prosecution witness.

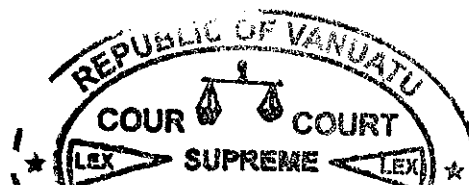


The onus or burden of proving your guilt beyond a reasonable doubt rests upon the prosecution and it never shifts. The prosecution must prove beyond doubt that you are guilty of the offence which you are charged before you can be convicted. If I have a doubt and the doubt is a reasonable doubt as to whether you committed the offence charged against you in any or all counts (3, 6 and 8), it is my duty to give you the benefit of the doubt and to find you not guilty on the charge of obtaining money by false pretences and obtaining money by false or misleading statements.

Proof beyond a reasonable doubt has been achieved when I as a judge of fact feel sure of your guilt. It is that degree of proof which convinces the mind and satisfies the conscience so that I as a conscientious judge of fact feel bound or impelled to act upon it. Conversely, when the evidence I have heard leave me as a responsible judge of fact with some lingering or nagging doubt with respect to the proof of some essential elements of the offence with which you are charged so that I am unable to say to myself that the prosecution has proven your guilt beyond a reasonable doubt as I have defined these words, then, it is my duty to acquit you. If I believe you and you did not commit the offence or what you did lacks some essential elements of the offence or if your evidence either standing alone or taking together with all of the other evidence leave me in a state of reasonable doubt I must acquit you. But if upon consideration of all of the evidence taken together at the end of the trial, the arguments of counsel and the charge I am satisfied that you have been proven guilty beyond a reasonable doubt as I have defined these words above, it is my duty to convict you. I must say that it is rarely possible to prove anything with absolute certainty. So the proof or the burden of proof on the prosecution is only to prove guilt beyond a reasonable doubt. When I speak of reasonable doubt I use the words in their ordinary natural meaning, not as a legal term having some special connotation.

A reasonable doubt is an honest and fair doubt based on reason and common sense. It is a real doubt, not an imaginary or fanciful doubt which might be conceived by an irresponsible judge of fact to avoid his or her plain duty. This is emphasized by Section 8 of the Penal Code Act [CAP.135] in these terms:-

- "8.(1) No person shall be convicted of any criminal offence unless the prosecution shall prove his guilt according to the law beyond reasonable doubt by means of evidence properly admitted; the determination of proof of guilt beyond reasonable doubt shall exclude consideration of any possibility which is merely fanciful or frivolous.*
- (2) *In determining whether a person has committed a criminal offence, the Court shall consider the particular circumstances of the case and shall not be legally bound to infer that he intended or foresaw the*



natural or probable consequences of his action.

- (3) *If the prosecution has not proved the guilt of the accused, he shall be deemed to be innocent of the charge and shall be acquitted forthwith."*

The thrust of the prosecution case is this. The Defendant Johnny Takana was employed by Worin Motors as a Sales Manager. He started his employment with the company in October 2011. Worin Motors deals with importation of vehicles and spare parts in Korea and sold them in Vanuatu.

During his employment, on Max Niptik came and see Defendant Johnny Takana and told Defendant that he wanted a bus. He did not have enough deposit, a negotiation took place between the Defendant and Mr Max Niptik. Mr Max Niptik then deposited an amount of VT400,000. The Defendant made a receipt for the deposit and gave it to him some days later.

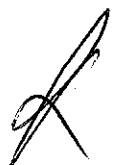
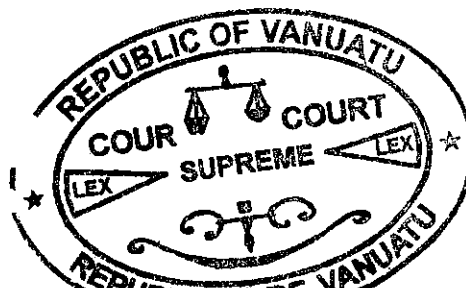
Defendant promised dates to Max Niptik to get the bus. Max Niptik found out that there was no order placed for his bus. Max Niptik found out that his deposit of VT400,000 did not reach the owner of the company.

It is also said that in December 2012, one Jack Iapa deposited an amount of VT600,000 to the Defendant for an order of a new bus to be placed by Worin Motors. Iapa found out that there was no order placed. The owner of the company was not aware of the deposit and did not see the amount of VT600,000 deposited by Jack Iapa.

For Defendant, Johnny Takana to be convicted on count 3 of obtaining money by false pretence, contrary to s.125(c) of Penal Code Act, the prosecution must prove each and all essential elements of this offence beyond reasonable doubt. The offence of the false pretences is defined under section 124 of Penal Code Act. It says:

OBTAINING PROPERTY BY FALSE PRETENCES DEFINED

124. 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 possessions of or title to anything capable of being stolen or procures anything capable of being to be delivered to any person other than himself.



PROHIBITION OF THEFT, MISAPPROPRIATION AND FALSED PRETENCES

125. No person shall cause loss to another-

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

The prosecution must prove the following elements:

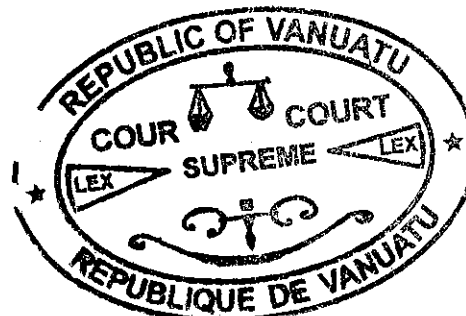
1. That the Defendant Johnny Takana by a false pretence, obtained money of VT400,000 or possession of or title to anything capable of being stolen either directly or indirectly;
2. That by a false pretence, that is to say, any representation made by words, writing or conduct, of a matter of fact, either past or present and that representation is false in fact.
3. That Defendant Johnny Takana knew the representation to be false, or does not believe to be true;
4. That the Defendant intended to defraud Max Niptik.

Also the offence of obtaining money by false or misleading statement is defined under section 130 C of Penal Code Act which says:

OBTAINING MONEY ETC BY FALSE OR MISLEADING STATEMENTS

130C. A person must not, with intent to obtain for himself or herself or another person any money or valuable thing or any financial advantage of any kind whatsoever, make or publish, or concur in making or publishing, any statement (whether or not in writing):

- (a) which he or she knows to be false or misleading in a material particular; or
- (b) which is false or misleading in a material particular and is made with reckless disregard as to whether it is true or is false or misleading in a material particular.



A

For the Defendant to be convicted of the offence of obtaining money by false or misleading statement, the prosecution must prove beyond reasonable doubt following elements of that offence:

1. That Defendant Johnny Takana intended to obtain for himself or another person any money or valuable thing or financial advantage of any kind;
2. That Defendant Johnny Takana makes or publishes, or concurs in making or publishing, any statement (whether or not in writing).
3. That Defendant Johnny Takana knows the statement to be false or misleading in a material particular; or
4. That the statement is false or misleading in a material particular and is made with reckless disregard as to whether it is true or is false or misleading in a material particular.

EVIDENCE

The evidence are recorded in the court file. What follows is the summary of the facts relevant to the case.

Summary of Prosecution evidence

The Prosecution has called four (4) witnesses.

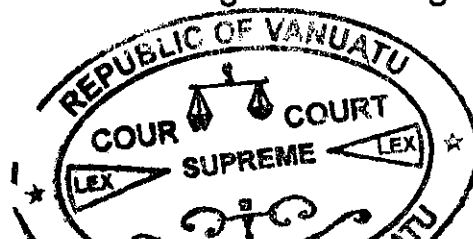
Mr Harry Shine is the first prosecution witness. He gives evidence to the effect that he is the owner of Worin Motors.

He stated he alone orders bus in Korea and the orders are made in Korean through email.

The contract paper contains the price of the vehicle, how much to deposit, the outstanding balance of the price, details of the vehicle, payment plan of the outstanding and how customer can make repayment of the balance. It also contains personal information of the customer and the document bears the signature of the customer and the owner of the company (Harry Shine).

He stated that bus deposits are reduced if an employee of the company gets more customers to deposits.

Also he mentions that the deposits of bus at the start of the company's operation are 1 to 1.2 million vatu. Later 500 to 800,000 vatu. Special deposits rate for an employee if more customers get in through the employee.



A handwritten signature or scribble, possibly in ink, located to the right of the official seal.

He did not receive the money for Max deposit.

He and Johnny usually deal with clients who came for deposits.

He keeps the deposits money and he placed orders for new buses.

He stated for an order to be made for a bus a customer has to deposit before he placed an order.

He knew the dates of the arrival of the bus.

Sonia is responsible for looking after monies in relation to garage and spare parts.

Harry Shine was cross-examined. Part of his evidence was challenged in respect to what he stated into his statement and what he told the court in the witness box. Part of his evidence cannot be relied upon.

Sonia Leingkone is the second prosecution witness.

She is responsible for monies for garage and spare parts

She is responsible to fill up the forms of deposits but he did not keep the money

She did not receive any money from or see any money from Max

She filled up the deposits form for Max

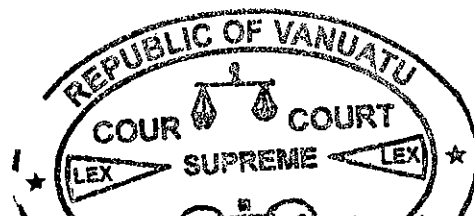
She confirmed through exhibit P8 tender in court that she filled up the form of deposits.

She said Johnny's name was on the form and he signs on behalf of Max as well as Harry Shine owner of the company.

She stated that she was send out of the office when Max and Johnny was inside the office having conversation.

She confirm that she did not receive the money (400,000 vatu) even when the defence counsel asked her in cross-examination that Tari B saw Johnny gave her the money. She denied Johnny giving the money to her.

She saw the defendant took enveloped containing money into the office and kept it in the office. That was between the months where Max and Jack had deposits for new bus.



She saw the defendant took the money little by little until the money was finished.

She stated that when Johnny went to her home and picked her up on his (Defendant's bus) the defendant told him that if the police asked them about the money they are going to say they gave it to Harry Shine.

She confirms that Harry Shine usually went to Sky Garden because he is part of the business in Sky Garden. She was cross-examined. She accepted she was previously charged and convicted for dishonest offences. She can reliable after warning by the court.

Max Niptik gave evidence that he gave the money to the defendant sometimes on the month of November 2012 at Woorin Motors.

He agrees that after a discussion with the defendant he came later to deposit that amount 400,000 vatu.

During their discussions the defendant and Max sends Sonia Leingkone the secretary outside of the office.

His evidence is that there is enough space for more than two people inside the office despite few tables and chair.

He gave the money directly to the defendant.

Max stated that the receipt was given to him the Friday of the same week.

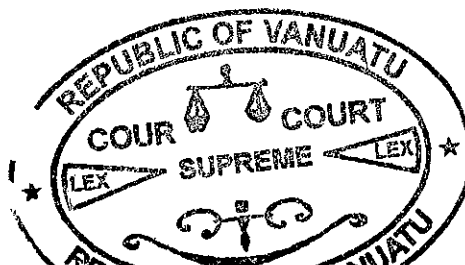
The defendant did not say any reasons as to why the deposit form or receipt was to be given to him on Friday of the same week.

He also stated that there was no verbal or written agreement between him and the defendant in relation to the deposit of bus but they have an arrangement.

He came a number of times to ask the defendant about the dates of the arrival of the bus but the defendant always have reasons to lie to him.

The defendant always gives dates which are false for the arrival of the new bus.

He also made conducts through phone but he cannot go through so he has to look for the defendant and asked about his conduct.



He stated he manage to have a phone conduct of the defendant's wife. He called a number of times but could not reach the defendant. He late found out from the defendant, that Harry Shine has reported the defendant to the police.

Max also stated that he asked the defendant to refund the money and in respond the defendant said the matter will be deal with by the Court.

He was show exhibit P8 and deposit from and he confirmed it. He indentify the receipt is the one given to him on Friday.

He stated that he did not sign and Johnny's name was on the deposit receipt.

He identified the date of the receipt or deposit document.

He was cross-examined. He accepted he had an arrangement with Johnny Takana that he did not have enough money for a deposit of a bus. But he needs one for his tourist business.

He said he has an arrangement with Johnny Takana for Johnny to get a bus for him in the Wooring company. He met Johnny and discussed with Johnny Takana. Johnny Takana told him that he could help him to get a bus by Johnny using his name in the deposit and order arrangements. He did not get a bus. There was no order of bus placed in the name of Johnny in November 2012 when he gave the amount of VT400,000 to Johnny Takana.

Mr Max Niptik's evidence is only partly reliable.

Jack Iapa in his evidence stated he and his wife and a friend of theirs went to deposit that amount of 600 thousand vatu.

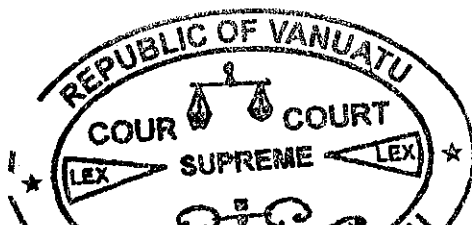
The defendant was present that time but did not sign.

The deposit form was not sign by the Harry Shine or Johnny Takana

He was shown exhibit 10 and he identify his signature and he stated there was no signature on behalf of the company. Date on the document dated the 31st of December 2012.

The defendant promised them to return on the 2nd week of January 2013.

He returned and he was told to return on the 26th of February 2013.



They was no reasons given to him for to returned on the 28th of January 2013.

That time Sonia was in the office and the defendant Johnny was not in office.

On that date when he returned he found out from Harry Shine that he never received his deposit money.

He called the defendant by phone and met the defendant at Korman round about. In Korman the defendant told him (Jack) that he has nothing to worried about he (defendant) was the one who placed orders for bus.

His bus is on the way on ship. The defendant told him to return on Thursday.

He (jack) did not come over to the company on that Thursday but instead he called the defendant on the phone. In respond the defendant told him that the ship was here in Vanuatu but was not in the wharf because tourist boat was at the wharf.

So on Friday the ship will be on the wharf and Saturday he should come over to get the bus.

Jack stated that when he came on Saturday the defendant met the defendant at the gate of worrin motors.

The defendant and him (jack) met at the place of celebration and had conversation.

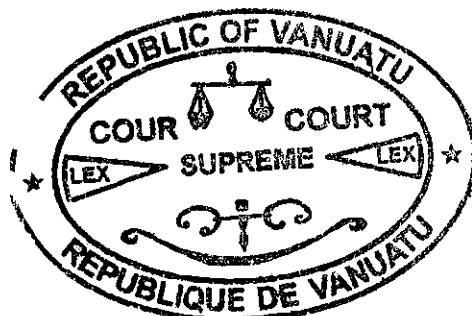
During their conversation, the defendant told him that his bus did not come. The defendant also offered him his bus for him (jack) to have his bus and do services while waiting his (jack's) bus to arrive.

The defendant also further stated that he came over and look for the defendant following the offer he (defendant) made to him but he could not reached him (defendant).

As a result he went to lodge a complaint at the police station.

Jack lapa is creditworthy witness.

Summary of defence evidence



Defendant Johnny Takana gave evidence himself after his rights under s.88 of Criminal Procedure Code Act was explained to him. The defence also called two other witnesses.

Johnny Takana gave evidence to the following effect.
He works as sales manager of Woorin Motors then

He is a Pastor of the Apostolic church in Vanuatu being appointed in 2012 and is still serving in the church to this day.

He negotiates of price of vehicles with customers

He denies ever taking deposit monies up to sky garden to give it to their boss when he is not at Woorin at the end of the day as alleged by Sonia Lengone.

He stated that all the monies received at the end of the day is kept in the cashier and this is what has been happening over the past years he has worked in the company with over 5 to 6 secretaries.

He started work with Woorin Motors in year 2011 and he had been doing his job as sales manager of the company to 2012 with no problem.

The owner of Woorin Motors trusted him and he in fact at the time of his employment was residing with the owner at the premises of Woorin Motors.

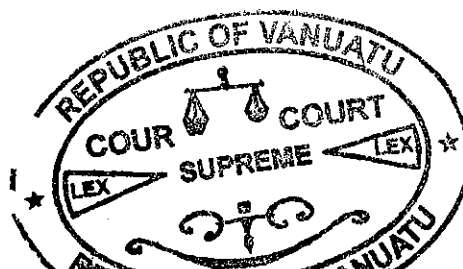
His boss trusted him and even when he travels overseas, he left him to look after his business until he gets back.

When the boss (Harry Shine) is not in the office he signs documents on his behalf and the boss allows him to do this and this has been the practice to date.

There was no problem with deposit monies paid n by customers to Woorin Motors until Sonia Leingkone came to work with them.

He testified that when he made negotiation with Max Niptik and Jack Iapa, he did it in his capacity as the sales manager of Woorin Motors and he did it in good faith and had no intention of stealing from them. He served them like he usually does to his customers. It was his usual kind of job.

The payments made by Max Niptik and Jack Iapa were all given to Sonia Lenkone and she kept them in the cash box which only he had the keys to it.



The payment by Max Niptik was handed over to Sonia Lengkone and this was witnessed by Tari Bresley.

It is Sonia Lengkone who fill out contract forms for Max Niptik and Jack Iapa and receipted them.

He confirms that he negotiated and had an arrangement with Max Niptik to buy a bus in his own name to help Max Niptik when Max Niptik approached him with only VT400,000.

He confirms that his name appears and he signed Max Niptik's contract form because of their arrangements.

He denied ever meeting Jack Iapa at Korman to assure him of his bus and that he is responsible for placing order for his bus.

In fact he confirms that when customers want to place an order for a bus with their company, they came and met with him and negotiate everything and then the boss place the order

He denied that he met Jack Iapa opposite Woorin Motors to discuss and agree to lend his bus to Jack Iapa and that he never met Jack Iapa again after he was suspended from work by his boss.

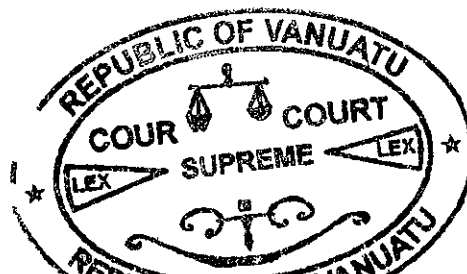
He confirms that he did won an amount of VT450,000 at the casino and that he took the money and put it under his table in a safe place for only one night then he came and took it the next day to bank it contrary to what Sonia said.

He said that he did not signed Jack Iapa's contract form on behalf of the company because he left the office to go to Wilco to buy building materials while Jack Iapa and his wife were still with Sonia Lengkone at that time.

He testified that the dates he usually gives to the customers are those given to him by the boss and secretary. The dates are shipping dates are kept in the office.

The dates given to Max Niptik and Jack Iapa are dates given by the office and not by himself. He denied claims that he gave false dats to Max Niptik and Jack Iapa.

He stated that after his suspension he went back to work but the boss took a restraining order against him not to go back to Woorin Motors so that is why he never went back to work till today.



He stated that it is Sonia Lengkone's job to close the office at the end of the day.

He finished work with Woorin Motors on 28 January 2013.

Tari Bresley is the second witness for the defendant. He is the former chief mechanic of Worrin Motors.

He confirms that he went to get a spare part from Sonia Lengkone when he witnessed the Defendant handing over an amount of VT400,000 to Sonia Lengkone at that time.

He denied that he never agreed to assist the Defendant in his case against Woorin and that what he testified in court is true and not lies.

Under cross examination, he maintains that he witnessed the money being given by the Defendant to Sonia Lengkone.

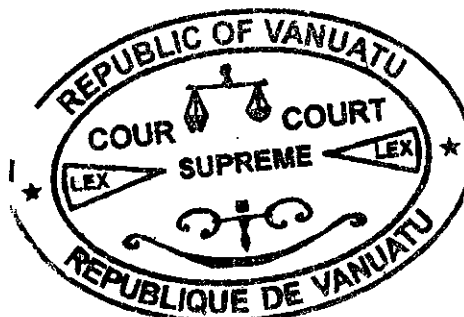
Tom Nipio is the last Defence witness. He stated that he made a payment of VT300,000 to Mr. Harry Shine directly for a second hand bus but when he went back, Mr. Shine said he never knew him and that he never received any money from him for a bus.

DISCUSSION ON EVIDENCE

I have assessed the evidence of the prosecution and that of the Defence. I have also considered the charge and the submissions made by the Prosecuting counsel on behalf of the Public Prosecutor and the submissions made by the Defence counsel.

On the totality of the evidence, there are other co-existing circumstances in this case which raise doubt as to the conviction of the Defendant the counts of obtaining money by false pretences, contrary to s.125(c) and obtaining money by false or misleading statements, contrary to s.130C of Penal Code Act.

There is to my assessment of evidence, a reasonable doubt existing in respect to essential elements of each of counts 3, 6 and 8 charged against the Defendant in the information dated 28 June 2013.



A handwritten signature or mark, possibly a stylized 'A' or 'F', is located to the right of the seal.

VERDICT

Defendant Johnny Takana is found not guilty to :

- (1) One count of obtaining money by false pretences, contrary to s.125(c) of Penal Code Act. (count 3).
- (2) Two counts of obtaining money by false or misleading statements, contrary to s.130C of Penal Code Act. (count 6 and 8).

Dated at Port Vila, this 15th day of October 2013

BY THE COURT


Vincent LUNABEK
Chief Justice

