

PUBLIC PROSECUTOR VS- JEFFREY MOCROW

Coram: Mr. Justice Oliver A. Saksak

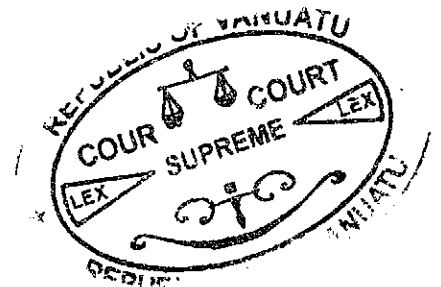
Counsel: Ken Massing for the Public Prosecutor (Appellant)
The Respondent in person unrepresented

Date of Hearing: 16th May 2018

Date of Judgment: 18th May 2018

JUDGMENT

1. This is an appeal against the Decision of the Magistrate Court dated 16th August 2017 whereby the Magistrate acquitted the defendant without conviction but ordered him to pay costs to the Prosecution at VT 1.500.
2. The respondent was charged with theft in Criminal Case No. 1029 of 2017. It was alleged the respondent had stolen a water pump contrary to section 125 (a) of the Penal Code Act. He initially pleaded not-guilty on 28th June 2017 but changed his plea on rearraignment on 16th August 2017 to guilty to one charge of theft of a water pump without permission. The police had recovered the item in good condition.
3. In his mitigation and caution statement the respondent gave the motive for his action as provocation towards the complainant. He contended that the complaint's son Terry Fare was instructed to ride his motor scooter back to his residence at Big Sea Area. In doing so Terry Fare picked up a friend Simon Natu and both had a fun ride all over town. The respondent had tried to locate his scooter without success. It was only in the afternoon upon returning home, he found the scooter parked opposite the block with keys in it. Upon inspection the respondent saw extensive damage to his scooter. As a result the respondent tried texting messages to Mr Fare and his father to repair his scooter but to no avail. That left him frustrated and emotionally hurt.



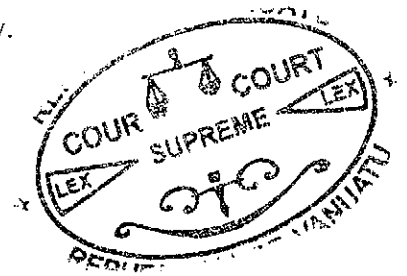
4. The respondent reported the matter to the police by attending the General Inquiries section and the CID section but got no positive attention. The Police were simply unhelpful.
5. The thrust of this appeal it is submitted by the State is that the Magistrate erred in law when he acquitted the respondent without conviction basing his decision entirely on the mitigating factor of provocation. It is contented also that the Magistrate did not specify which section of the Act he relied on to acquit the respondent without conviction.
6. The relevant passages in the Decision under challenge are-
Paragraph 8 which reads:

“In my observation, I have sense that the defendant is struggling to receive justice similarly as the complainant. However, it is clear to me that although he has pleaded guilty on the count of theft, on the other hand, he did also proven to the Court that chains of circumstance has led him to provoke. If during the time upon which the defendant raises his concern to the Police and was acted upon professionally, I believe the defendant will not be in Court for that offence. To my view, I see the professionalism of the Police officers who deal with this case is below the requirement of promoting justice that must be served equally and transparently without discrimination, culture, race and religion....”

Paragraph 9 reads:

“I have accepted that this is an act of provocation, and to that effect, I acquit the defendant without conviction but ordered that the defendant only pay Prosecution costs of VT 1.500.”

7. It is submitted by the State that the Magistrate was wrong in accepting that the defendant acted under provocation, instead he should have treated his action as an act of revenge and to enter conviction and sentence him accordingly.



8. Section 55 of the Penal Code Act provides the power of the Court to discharge an offender without conviction or sentence. It reads:

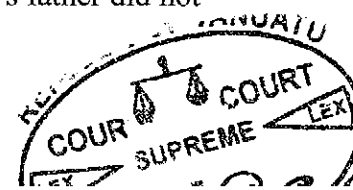
- (1) *If a person is accused of an offence, any court, after inquiry made into the circumstances of the case, may in its discretion discharge that person without convicting him or her, unless by any enactment applicable to the offence a minimum penalty is expressly provided for.*
- (2) *A discharge under this section shall be considered to be an acquittal.*
- (3) *The Court discharging any person under this section, may, if it is satisfied that the charge is proved against him or her, make any Order for:*
 - (a) *the payment of costs; or*
 - (b) *....., or*
 - (c) *.....; or*
 - (d) *.....*

that it could have made under any enactment applicable to the offence with which he or she is charged if it had convicted and sentenced him or her, and the provisions of every such enactment shall apply accordingly.

- (4) *Nothing in this section shall affect the power of any court to convict and discharge any person.*

9. Under the provision the Magistrate's discretion is twofold (a) he has discretion to discharge an offender without conviction (section 55 (1)) and (b) he has discretion also to convict an offender and acquit him or her (section 55(4)). Before exercising those discretions the Magistrate must make an inquiry into the circumstances of the case.

10. In the respondent's case he pleaded guilty to theft. It is apparent from the decision that the Magistrate had made inquiries into the reasons and the motives behind the respondents actions and concluded his actions were provoked. Had the complainant's son followed instructions and ridden the scooter straight to the respondent's house, there would not have been any damage done to it. And had Terry Fare responded to the test messages of the respondent and cooperated with the respondent to make good the damage all this would have been avoided. Furthermore Terry Fare's father did not




assist. They simply turned a blind eye to a hurting respondent. Could he not have been frustrated to the point of being provoked under those circumstances? To make matters worse, the Police did not assist him. It was under those circumstances that the Magistrate was of the view that the respondent was provoked into taking the action that he did. In my view the Magistrate was correct to hold that view. The Magistrate therefore accepted that under the circumstances, there should be an entitlement of diminished responsibility resulting in a discharge without conviction. In my considered view the Magistrate was entirely correct in exercising his discretion under section 55 (1) and was entirely correct in awarding costs under section 55 (3) (a).

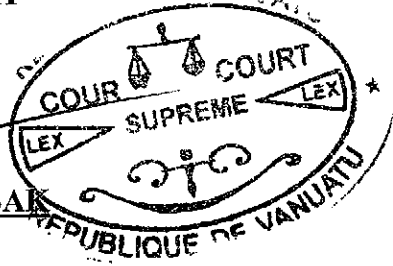
11. This appeal therefore has no merits.

12. For those reasons, leave to appeal out of time is refused, and the appeal is dismissed.

DATED at Luganville this 18th day of May 2018

BY THE COURT


OLIVER A. SAKSAK
Judge


The seal is circular and contains the text "COUR SUPREME" at the top, "REPUBLICQUE DE VANUATU" at the bottom, and "LEX" on the left and right sides. It also features a scale of justice in the center.