

19/08/08

IN THE MAGISTRATE'S COURT
OF THE REPUBLIC OF VANUATU

(Criminal Jurisdiction)

Criminal Case No. 139 of 2004

PUBLIC PROSECUTOR -V- YVES CHEVALIER

Coram: K. KAWI-IU
Appearance: Kayleen for Prosecution
Morrison for Defence

JUDGMENT

Defendant is charged with one count of "communicating false information relevant to grant or holding of aviation document, contrary to Section 59(1) Civil Aviation Act No. 16 of 1999".

It is alleged that the Defendant, on or about 27 September 2001 at Port Vila, did provide information to the Director of Civil Aviation relevant to the exercise of a power under the Civil Aviation Act that was false, knowing that the information to be false.

On the 27 September, 2001, Defendant applied for a CEO post with Vanair Ltd, the application which was received by one Mr Foon, Assistant Director Flight Safety. Mr Foon signed it on the same date who certify or indicated on the form "Biographical Details of Senior Staff Norminated By an Organization Seeking Certification" (Exhibit P 1), that the Defendant/Applicant "Meets Fit and Proper Person Criteria". The application (Exhibit P 1) was accompanied with the Defendant's Curriculum Vitae (CV). On page 2 of the CV the 1026 hours appears. The total hours of 1026 given by the Defendant was discovered sometime after the Defendant had been accepted as the CEO of Vanair Ltd. It

appears the discovery of the mistake would have been made in 2003 and not on the date the Defendant's application was received by Mr Foon on 27/9/01. It was for this mistake that the Defendant was charge for giving information that is false and knowing the falsity of the statement.

Prosecution called three witnesses: Mr Joseph Casten, Director of Civil Aviation; Mr. Foon Assistant Director Flight Safety and Mr Kami Toa, Police Officer who conducted the Record of Interview.

Mr Casten says he was appointed Director of Civil Aviation in November 2002. Soon after, he appointed staff to look after specific sections. He further says one of the main emphasis of CAA is for the safety of the airline industry, in particular air operations, pilot licenses etc. Mr Casten says, Defendant's pilot licence was revoked on the basis that the documents he submits were improper, when he went about obtaining his licence. He clarified the revocation of the licence by saying that it was revoked not on the basis of Defendant's flying hours but his incorrect statement in his file discrepancies in his Log Book. This file is a reference to the Application Defendant submits to CAA when he applied for a position as Chief Executive Officer with Vanair Limited.

The second witness is Mr Foon, Assistant Director Flight Safety. He received Defendant's Application on the 27 September 2001 and certified that the Defendant "Meets Fit and Proper Person Criteria". He did not check the Log book when he received the Application from the Defendant. This was done in 2003, only after the defendant's Pilots Licence had been revoked. In the Defendant's CV and the Log book, "flying hours experienced" is shown as 1026 hours. This witness checked the Log book and calculated the number of hours and says only 816 hours was logged and not 1026 as indicated by the Defendant. He further says Defendant had also included some hours, which are not

actual flight hours but simulator time, which according to him, international aviation industry does not recognize; however, no specific rule or law was referred to in support. It was suggested in cross-examination, that the 1026 hours as recorded in the Log Book may have been the same mistake Defendant made in his application. Mr Foon agreed that this is a mistake. He further agrees that the two figures, 344.4 appearing on page 6, column 10 of the Log Book and 444.4 appearing on page 7 may also be a mistake. Furthermore, he agrees that figures 344.4 and 444.4 were original entries and not altered. Mr Foon agrees that to be a CEO of Vanair Limited it is not necessary to have 1026 flying hours experience in a B747. He further agrees that Defendant may have made a genuine mistake and not a deliberate one.

The last witness is Police Officer Kami Toa. After receiving information from Joseph Castan, Director CAA, of an alleged breach of Section 59(1) Civil Aviation Act No. 16 of 1999, applied for a search warrant to retrieve Defendant's Pilot Log Book. Perusal of the Log Book by Mr. Foon revealed that the 1026 hours indicated in Defendant's Log Book and Application was incorrect. Consequently a Record of Interview was conducted on or about 9 December 2003. The relevant questions for purpose of this proceeding are questions 1 to 14 and 35 to 44 (Exhibit P 3). At the conclusion of the Interview it is apparent that no admission was obtained.

Defendant was the sole witness for the defence. He was CEO of Vanair Limited until end of 2003. Defendant says he prepared his CV in Mauritius about 1991 long before he came to Vanuatu. His Pilot Log Book last entry of any records of his flying would have been made in 1992 in Mauritius before leaving that country for Vanuatu. Since then he had not updated his Log Book or his CV as the records of his flying hours are in his computer when he first prepared his record in

Mauritius. When he applied for a CEO with Vanair Limited in 2001 he says that he was not aware of any mistake. The Log Book was not examined when he lodged his application in 2001. It was only examined between November and December 2003 when the alleged mistakes were revealed.

Defendant says that at no time was he aware of the errors. The errors in the Log Book of 344.4 and 444.4 were only discovered on the 9 August 2004 during hearing in court. This includes the mistake of the flying hours of 1026. The mistakes were made in about 1991 and discovered only yesterday (9/8/04). Prosecution suggested in cross-examination, the figures 344.4 and 444.4 were purposely made to increase the flying time experience, which was denied by the Defendant. Defendant was asked whether he has updated his B 747 Log Book in respect to flying hours, which he stated that he had not as no work was carried out B 747 since 1992. Defendant says he is aware of international rule with regard to simulator time. Accordingly says that simulator time is taken into consideration when calculating flying hours as they form part of the training for qualification in say a B 747 aircraft. Defendant has not detracted from his statements made, during the Record of Interview, despite prosecutions suggestion that he has deliberately made the errors/mistakes for some purpose.

Defendant is charged under Section 59(1) of the Civil Aviation Act No. 16 of 1999. Technically the Charge/Information may be a nullity since S. 59(1) contains three paragraphs and the offence charge may be ambiguous, for Defendant to plea or defend. However, this issue was not raised during the proceeding and since the form of the charge was understood it must have meant S. 59(1) (a). This section reads:

“(1) A person commits an offence if the person:

(a) by any means provides to the Director information relevant to the Director's exercise of powers under this Act knowing the information to be false;"

Elements of the charge –

- i) Defendant*
- ii) by means provide to the Director information*
- iii) relevant to the Directors exercise of power under the Act*
- iv) knowing the information to be false.*

The first two elements are not contested. It is clear Defendant submitted application for the position of Chief Executive of Vanair Limited to the Director of CAA. This application was submitted on or about 27 September 2001. The Defendant's application was accepted and he began employment with Vanair Limited. In 2003, Defendant lost his job, because, according to MR Casten, Director of CAA, Defendant's application was found to contain false or misleading statement. There are two important considerations to be made in respect to the elements (iii) and (iv) above. I will deal first with element (iv) which is the issue of "knowledge".

It is the task of the prosecution to prove first, that the Defendant supplied or provided information that is false and further that he knew that such information was false. Prosecution witnesses asserted that the information supplied was false. The hours Defendant had in flying B 747 of 1026 was infact less (816.1 hours). This is further compounded by his

misrepresentation of certain hours 344.4 (on page 6 Log Book Column 10 and the same was reported (on page 7 Log Book Column 10 as 444.4. This the prosecution suggested, that it was a deliberate attempt to increase the hours. These mistakes or errors were made in respect to a particular type of aircraft, the B 747 and it is submitted for the prosecution that Defendant has a motive in manipulating the figures to his advantage.

It is the duty of the prosecution to prove each and every element of a charge. It is for the prosecution to prove that Defendant had the necessary intention in carrying out the acts complained of. There is no direct evidence to show nor was there any other, say, circumstantial evidence from which to draw the necessary conclusion that Defendant has had the intention to carry out the prohibited act, that is of falsifying the documents (i.e. application CV and Log Book).

Defendant has throughout the proceeding maintained that if there had been errors they are genuine mistakes. He states that the mistakes were made in 1991, and since then has not realize those mistakes. The mistakes were discovered only on the 9 September 2004. The question that may linger in the prosecution's mind is why such an important information not detected, given the length of time the error or mistakes had existed. Defendant's explanation is that in 1991 he had his CV written, (may have been for other purpose). In 1992 he left employment with Air Mauritius and has not had any engagement with airline companies, thus there was no need or unnecessary to check his Log Book or have it updated. The mistakes were made in 1991, and had been in existence since that date. There is no evidence to show that there is opportunity for Defendant to realize the mistakes. Mr. Foon, prosecution witness whom I regard as the principal witness indicated that the Defendant's mistake were genuine, and not deliberate. He further says

the mistake was original and not altered, a suggestion that no attempts was made to falsify the number of hours made.

As regards knowledge of the falsity of the information, again it is the duty of the prosecution to prove that Defendant had knowledge of the false statement. Prosecution has not produced evidence to show that Defendant knew of the false information given in his application and Log Book. The 1021 hours contained in the application (CV) and Log Book had been existed since about 1991. This mistakes had not been discovered until 9 September 2004. Thus the element of knowledge was absent until 9 September 2004. When Defendant was charged for committing the offence on 27 September 2001 legally there is no offence committed because on this date Defendant lacked knowledge of the falsity of the information. Had there been anytime between 1991 and 27 September 2001 Defendant realizing the mistake or falseness of the information (having knowledge) consequently submits his Application, who was then charged, he may be convicted of the present offence. There may be a difference between supplying information that are false and supplying information that are false knowingly. It is the latter that the present charge is founded, and it is the prosecution who bears the burden to prove knowledge on the part of the Defendant. There is simply no evidence to the contrary.

There is one last aspect of this charge (S.59 (1) (a)) the court wants to consider - what is the subject of this provision in so far as it refers to the phrase "information relevant to the Director's exercise of powers under this Act". Does it relate to application for employment as a driver with CAA, Vanair Limited or Air Vanuatu? Does it apply to application as a CEO with Vanair as in the present case? When one reads paragraph (a) of S.59 (1) it would appear that the provision is inclusive, that is it

encompasses all information be it for employment application as a cleaner, truck driver, carpenter, CEO, aircraft engineer or pilot.

However, when attention is drawn to the heading, S.59 (1) (a) becomes more focused. That is the reference to "information relevant" must mean relevant to granting or holding of aviation document. And aviation document (without assistance of the Act) may refer to say pilot's license or aircraft engineer's license. Thus, application to work as a driver, carpenter, cleaner or even CEO doest not come within the definition of aviation document. The application of Mr. Yves Chevalier is not for the consideration of the Director to grant or the holding of aviation document. The principal aim of the Act is "safety" of aircraft and users of such aircraft. For pilots and engineers to obtain licenses it requires the applicants utmost good faith when submitting information. For the sake of safety in the aviation industry, these rules are applied. This provision would not be interpreted strictly in the case of truck driver, cleaner, carpenter or even a CEO. Mr. Foon Assistant Flight Director Safety confirmed in cross-examination that the 1026 hours on a B 747 is not a requirement for a CEO employment with Vanair Limited. If this interpretation is correct, the charge against the defendant may not be proper as the information supplied does not concern the grant or holding of aviation document. Had he applied for a pilot's license this charge would have been appropriate.

The issue for determination would be this: whether the defendant may properly be convicted of the offence under Section 59(1) (a) Civil Aviation Act No. 16 of 1999 when he has made a false statement, which he did not know when he first made it, but came to know of the falsity at a time after the charge had been laid.

Prosecution submits that Defendant knew of the error or mistake and had purposely omitted to correct the mistake. Thus it is opined that the mistakes if not detected may assist the Defendant in any further application for job advancement.

Defendant admits that errors or mistakes may have been made. However, the mistakes were not made deliberately. The mistakes were made in about 1991 and since then it was not shown that Defendant has had the opportunity to know of the error or mistakes. This was because he had not worked as pilot since about (1991/92) and therefore not in a position to use his Log Book.

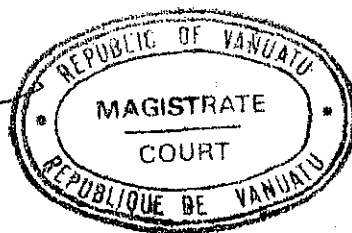
The offence in which defendant was charged, not only has element of false statement, it has the further element of "knowledge". It is fundamental principal of criminal law that the prosecution has to prove each and every element of the charge on the requisite standard that is beyond reasonable doubt.

The prosecution fails to show that Defendant has knowledge of the errors or mistakes at any time between 1991 and 27 September 2001. Defendant states in his evidence that he became aware of the errors or mistakes only on the 9 August 2004, when the hearing of this case was being heard. For the prosecution to succeed it must prove that Defendant has had knowledge of the mistake at any time between the date of making the statement and the date of dissemination of such statement, which would in this case, the time between 1991 (date Defendant made appropriate entries in the Log Book, and his CV) and 27/9/01 (date when such information was given to Vanair Limited) when he applied for employment. Defendant gave information or statement, which may have been false, but not aware of, thus the element of knowledge, was absence. It is for the prosecution to negated the

Defendant's contention that he does not know of the falsity of such statements. There is simply no evidence to prove the element of knowledge on the part of the Defendant, and accordingly find the Defendant not guilty and discharge him of the charge laid against him.

Dated at PORT VILA, this 28th day of September 2004.

BY THE COURT



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KEWEI KAWI-IU
Senior Magistrate