

**IN THE MAGISTRATES COURT
OF THE REPUBLIC OF VANUATU**
(Criminal Jurisdiction)

Cr. Case No. 116 of 2013

PUBLIC PROSECUTOR

-v-

LEVI TAROSA

Coram: *Moses Peter*

Court Clerk: *Florina Ephraim*

Appearances: *John Stephen for the State*

Daniel Yawha for Defendant

Defendant appear in Person

JUDGMENT

1. In the initial arraignment filed by the State on 14th May 2013, the defendant was jointly charged with a Chinese business man namely Zheng Yu Peng on offence of Willful Evasion of Duty contrary to section 47 of the Stamp Duties Act [CAP 68].
2. On 16th December 2013, Counsel for the State applied to have the charge withdrawn against the defendant Zheng Yu Peng but maintain the charge against the defendant Levi Tarosa.
3. The court granted the application and the charges was withdrawn against the defendant Zheng Yu Peng pursuant to section 129 of the Criminal Procedure Code.
4. The charge was read to defendant Levi Tarosa and to which he pleaded Not Guilty.
5. The trial was held on 29th of April 2014 and to which the normal course of hearing began with court reading section 81 of the Criminal Procedure Code to the Defendant before an opening statement was rendered by the counsel representing the State (Vanuatu Financial Service Commission).
6. The background of the case has it that the defendant facilitated a Sale and Purchase agreement for lease to be created on a surveyed land title 12/0633/1314 customarily owned by Ronald



Kalpuaso Sandy and his wife Hellen Sandy as Lessor and Zheng Yu Peng as Lessee. The consideration for the land is VT 17,000,000 (Seventeen Million Vatu).

7. The defendant is responsible for getting the appropriate lease approval from the Department or Ministry of Lands. Mr. Zheng Yu Peng paid defendant VT 1,190,000 for registration fees for the land at the Department of Lands and Stamp Duty at the Vanuatu Financial Service Commission (VFSC).
8. The Complainant alleged that the defendant upon receiving the money from Mr. Zheng Yu Peng created a lease under the name of the parties to the sale and purchase agreement with consideration of VT 500,000 in order to evade the appropriate amount payable to the government for the consideration of VT 17,000,000 in accordance with the Sale and Purchase Agreement. The Complainant alleges that the defendant acted in such manner because he had misappropriated the money entrusted on him by Mr. Zheng Yu Peng for the required fees.

9. **Count 1**

Willful Evasion of Duty contrary to section 47 of the Stamp Duties Act [CAP 68].

Particulars of Offence

"LEVI TAROSA, on or about 12 October 2011 in Port Vila, you acting as an agent, lodged for your benefit, a Transfer of Lease Title NO. 12/0633/1314 in the name of Ronald Kalpuaso Sandy and Helen Sandy, being Transferors and Zheng Yu Peng being the Transferee, willfully conspired to defraud the Government of Vanuatu of payable duty in breach of section 47 of the Stamp Duties Act [CAP 68], for the sale and purchase agreement in the transfer of Lease Title No.12/0633/1314 for the consideration of VT 17,000,000 [Seventeen Million Vatu]."

10. **STANDARD OF PROVE**

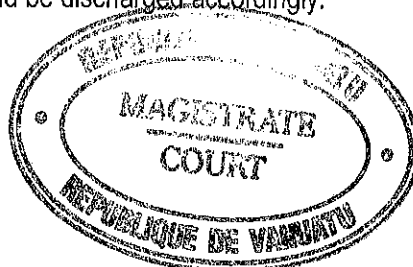
To validate the criminal conviction of the Defendant; the standard of evidence required of the State is prove beyond reasonable doubt.

Section 8 (1) of the Penal Code Act [CAP 135] reads:

"No person shall be convicted of any 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."

11. The State has the burden to prove the essential elements of the offences which the Defendant was charged there under and if at the end of the proceedings, that burden is not discharged, the Defendant will have the benefit of it and be discharged accordingly.

RELEVANT LAWS



Section 47 of the Stamp Duties Act [CAP 68].

"Every person who willfully and fraudulently evades or conspires to evade, or assists another person to evade, payment of duty to which any instrument is liable under this Act shall commit an offence punishable upon conviction by a fine not exceeding VT 300,000 or imprisonment for a term not exceeding 2 years, or by both such fine and imprisonment".

12. For offence of Willful Evasion of Duty, the prosecution must prove beyond reasonable doubt the following elements:

- I. At place, date and time
- II. Accused as a person
- III. Willfully and fraudulently conspires to evade payment of duty
- IV. To which any instrument is liable under.

13. Based on this wording there are several different offences covered by section 47.

1. Willfully and fraudulently evade payment of duty;
2. Willfully and fraudulently conspire to evade payment of duty; and
3. Willfully and Fraudulently assist another person to evade payment of duty.

14. In this case, whilst the Statement of Offence referred to the Section of the Stamp Duties Act, the Particulars of the Offence have described another completely different offence. The wording of the actual charge is "**willfully conspired to defraud the Government of Vanuatu of payable duty**". This is not one of the available charges under section 47.

15. Before looking at provisions of the criminal Procedure Code which deal with errors in drafting of charges, it is useful here to consider the nature of conspiracy.

16. Conspiracy

Conspiracy is covered in section 29(1) of the Penal Code.

29. Conspiracy

1) *Conspiracy is an agreement, express or implied, **between two or more persons** to do an act which, if done, even by one person, would constitute a criminal offence.*

(2) *There can be no conspiracy between husband and wife.*

(3) *The criminal responsibility of a conspirator who voluntarily withdraws from the conspiracy before the commission of the offence shall be diminished.*



- (4) *A conspiracy to commit a criminal offence shall be punishable only where expressly provided by any provision of law.*
- (5) *No person shall be prosecuted as a conspirator without the consent in writing of the Public Prosecutor.*
17. Quite apart from the issue of the requirement for written consent of the Public Prosecutor, conspiracy is defined as "an agreement" ... "between two or more persons".
18. In the charge before the court there is no reference to the person or persons with whom the defendant is alleged to have conspired.
19. In the evidence before the court the Prosecution led evidence of an actual evasion of the payment of duty, not a conspiracy to evade payment of duty. The prosecution case was one of the defendant acting alone.
20. In the defence case there was evidence of the defendant's wife lodging the forms and the conversations surrounds that. The prosecution did not rely on a conspiracy between the defendant and his wife as the basis of this prosecution.
21. There is therefore a real question as to how the prosecution can succeed on a conspiracy charge when they do not put evidence before the court about what was the agreement and who were the parties with whom the defendant conspired.
22. Willfully and fraudulently evade the payment of duty is not an alternative verdict to a charge of Willfully and fraudulently conspire to evade the payment of duty.
23. What is the effect of the erroneous wording in the Particulars of Offence?

Section 71 of the Criminal Procedure Code [CAP 136]

"Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged".

Section 74 reads

"The following provisions shall apply to all charges and information and, notwithstanding any rule of law or practice, a charge or an information shall, subject to the provisions of this Code not be open to objection in respect of its form or contents if it is framed in accordance with the provisions of this Code



(a) a count of a charge or an information shall commence with a statement of the offence charged, called the statement of offence;

(b) the statement of offence shall describe the offence shortly in ordinary language, avoiding as far as possible the use of technical terms, and if the offence charged is one created by enactment, shall contain a reference to the provision of the enactment creating the offence;

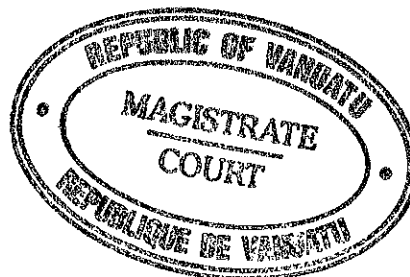
(c) after the statement of the offence, particulars of such offence shall be set out in ordinary language, in which the use of technical terms shall not be necessary;

Provided that where any rule of law limits the particulars of an offence which are required to be given in a charge or an information, nothing in this paragraph shall require more particulars to be given than those so required;

(d) forms approved by the Chief Justice or forms conforming thereto as closely as possible shall be used in cases to which they are applicable, and in other cases forms to the like effect or conforming thereto as closely as possible shall be used, the statement of offence and the particulars of offence being varied according to the circumstances in each case;

(e) where a charge or an information contains more than 1 count, the counts shall be numbered consecutively.

24. In this case the "Statement of Offence Charged" is as set out above. The words "Willful evasion of Duty" is the heading to section 47 of the Stamp Duties Act. Does this form of words "describe the offence shortly in ordinary language"?
25. Given the requirement is to use ordinary words and avoid technical terms, it seems that this use of words would be sufficient.
26. Given that section 47 creates a number of different discreet offences, it is then very important that the 'Particulars of the Offence' are adequate for a defendant to know the exact nature of the charge he has to meet.
27. The Particulars provided refer to willfully conspiring to **defraud the government** and yet the section under which the defendant is charged is not a charge about defrauding the government. It is but about willfully and fraudulently evading, conspiring to evade or assisting to evade, the payment of stamp duty. These particulars are not particulars of an offence under section 47.
28. Unless there is some provision for the court to ignore these deficiencies, the court would have to conclude that the information is not a valid information.
29. Section 221 of the Criminal Procedure Code refers to a time after a finding, sentence or order has been made. This is not that time and thus this provision is of no assistance with whether the deficiencies mentioned above can be ignored.



30. Section 139 of the Criminal Code deals with the court's power to amend charges.

AMENDMENT OF CHARGE

139. (1) *Where it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case:*

Provided that

(a) where a charge is altered as aforesaid, the court shall thereupon call upon the accused person to plead to the altered charge;

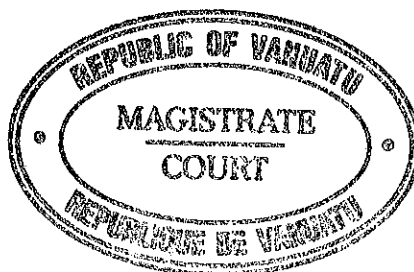
(b) where a charge is so altered the accused person may demand that the witnesses or any of them be recalled and be further cross-examined by the accused person or his advocate and, in such last-mentioned event, the prosecution shall have the right to re-examine any such witness on matters arising out of such further cross-examination.

(2) An amendment may be made before a trial or at any stage of a trial before the close of the case for the prosecution.

Variance between the charge and the evidence adduced in support of it with respect to the day upon which the alleged offence was committed is not material and the charge need not be amended for such variance if it is proved that the proceedings were in fact instituted within time (if any) limited by law for the institution thereof.

Where an alteration of a charge is made under subsection (1) or there is a variance between the charge and the evidence as described in subsection (3), the court shall, if it is of the opinion that the accused person has been thereby misled, adjourn the trial for such period as may be reasonably necessary.

31. Whilst this provision could have been used prior to the close of the prosecution case, it is clear that section 139(2) prevents it from being used at the current stage, that is, after both parties have completed their address. Neither party drew the court's attention to these issues and it is only in preparing the decision that they have arisen for resolution.
32. The prosecution bears the responsibility of bringing valid charges to the court and drawing to the court's attention any matters of which they ought to be aware that would affect their prosecution. It is unfortunate when such issues arise after the case for each side has been closed.
33. In addition, there is the issue of the deficiencies in the conspiracy aspect of the case. On the evidence before me the prosecution had strong evidence of the actions by the defendant in evading the duty owed. The defendant's own letter and evidence supported this. However, the court must apply the evidence to a valid charge.



Finding

I am not satisfied beyond Reasonable doubt that the prosecution has proved the charge before the court. The charge is dismissed. The defendant is thereby acquitted of the charge.

DATED at Port Vila this 16th day of August 2017

BY THE COURT



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MOSES PETER
Senior Magistrate

