

(APPELLATE JURISDICTION)

IN THE MATTER of an Appeal from  
the Senior Magistrate's Court for  
C.D.1 and South.

Selwyn LEODORO

Appellant

AND

PUBLIC PROSECUTOR

Respondent

JUDGEMENT

This is an appeal against a decision of the Senior Magistrate for Central District I and South given on 9 July 1990 wherein the appellant was convicted of misappropriation of 10480VT the property of the Government of the Republic of Vanuatu. Following his conviction he was ordered to pay a fine of 20000VT. His appeal is against conviction.

The facts of the case briefly are these. The appellant at the time this allegation arose was employed as the Principal Private Secretary to the President of the Republic. Airline tickets were purchased with government funds by the appellant to convey two people who were members of a musical group from Santo to Vila. This group were to perform at a fund raising function organised by the State Office. The appellant was responsible for the organisation of this function. He was also the manager of this same musical group for two members of which the airline tickets were bought.

The prosecution contended at the trial that the purchase of these airline tickets for these two musicians represented a misuse of government funds, and that the appellant knew this to be the case.

The defence contended that as the guidelines as to the classification of official expenditure were broad, this expenditure could have been so classified. More importantly they contended that even if it in fact was not a proper use of government funds, the appellant nevertheless had a genuine and reasonable belief that it was a proper use.

Section 12 of the Penal Code Cap. 135 as amended by the Penal Code (Amendment) Act No.27 of 1989 provides that "a mistake of fact shall be a defence to a criminal charge if it consists of a genuine and reasonable belief in any fact or circumstance which, had it existed, would have rendered the conduct of the accused innocent."

The amendment of this section of the Penal Code came into force on 29 December 1990, after this allegation arose. Prior to the amendment the "belief" had only to be genuine. It did not then have to be reasonable.

Applying this section to the facts of this case the accused would have a good defence to this charge if he could persuade the court that he genuinely believed this particular use of government funds to be a legitimate use.

Herein lies the foundation to this appeal. It is contended by the appellant that the question of a defence under section 12 was raised by counsel at the trial but was not considered by the learned magistrate. Counsel points to the fact that nowhere in the judgement is section 12 referred to, an omission which he suggest confirms the contention that it was not considered.

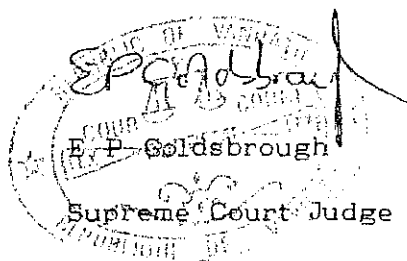
It is indeed a fact that no reference is to be seen in the judgement to the terms of section 12. I do not consider that of itself however an omission which affects the validity of the judgement. In my view it is more important to ascertain from the judgement whether the learned magistrate considered the questions posed by section 12 rather than recite its terms.

Reading the judgement in its entirety it is clear that she has. In particular I refer to the last page of the judgement where the defence case is set out. The second paragraph of that page begins "I do not find this explanation convincing" Later the appellant's answers to questions are described as "unsatisfactory"

From that it is apparent that the learned magistrate did consider a defence under section 12, in that she considered and rejected the defence case of a genuine belief in mistaken facts. She concluded that the appellant did not have the genuine belief that would have resulted in his acquittal.

Whether this court would have reached the same conclusion if it had had the benefit of hearing the trial is not the proper question. On the basis of the evidence in the court below the conclusion reached was a conclusion which was open to it and in those circumstances this court should not interfere with it.

For these reasons the appeal against conviction is dismissed.



*E. P. Goldsbrough*  
E. P. Goldsbrough  
Supreme Court Judge