

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

Criminal Case No. 71 of 2011

PUBLIC PROSECUTOR
V.
JONATHAN MARK
CHARLIE WILLIE
JOHN JERRY
SELWIN BICE

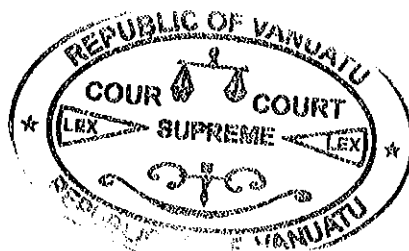
Coram: *Justice D. V. Fatiaki*

Counsels: *Mrs. T. Harrison for the State*
Defendants in person

Date of Decision: *22 June 2012.*

RULING

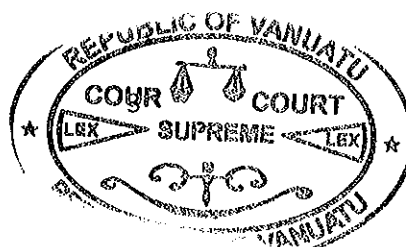
1. At the close of the prosecution case, the prosecutor was asked to address the Court on the question why the case should be allowed to continue against the defendants. I took the unusual course as the defendants were unrepresented and the case as presented, needed to be clarified for the benefit of the defendants and the Court.
2. From the very beginning this case has been marked by confusion and a lack of analysis and discipline. Although the case involves 5 defendants, it has a small factual context and ambit.
3. In summary, on 9 May 2011 acting on a "tip off", the defendants were approached by a team of police officers when an inter-island vessel "M.V. Malkos" sailing from Malekula, arrived at the Star Wharf in Port Vila. The defendants were invited to identify and open their cartons at the wharf in the presence of the police officers. Underneath some fruit including oranges, pawpaw, pomplemous, cucumber and naus, each carton contained rolls of dried leaves. The defendants were arrested and taken to the police station for further questioning and processing.



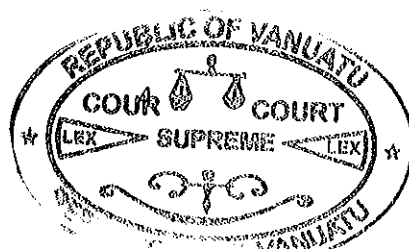
4. The police information and suspicion was that the rolls of dried leaves was cannabis. It was therefore crucial to maintain a record of the seizures and an unbroken chain of custody of the exhibits in order to ensure that the connection between each defendant and his/her carton was strictly and carefully documented and maintained. It was undoubtedly the prosecution's duty to ensure that the case was presented with that unbroken chain at the forefront of the case.
5. Given the factual context, one would have expected that the case would be treated as one joint criminal transaction with all 5 defendants being joined together in a single charge [*see*: **Section 73 (a)** of the **Criminal Procedure Code (CPC)**]. Unfortunately that did not occur. Instead, a police file was opened on each defendant and 5 separate charges were filed. This led to 5 separate committals and 5 separate informations. This should not have occurred and the prosecution was ordered to consolidate the charges into a single information to more accurately reflect the factual realities of the case.
6. It is noteworthy that each of the defendants was charged with a single offence of **Possession of Dry Cannabis Leaves** on the same day and place. No quantity of cannabis was mentioned in any of the 5 charges as it should have been, and is indicative of how the exhibits had been treated and dealt with in the police investigations on that aspect of the case.
7. The Public Prosecutor's consolidated information fared no better. It merely joined all defendants in a single count with no mention of any quantity of cannabis. Consistent with the way that the police had initially investigated and charged the defendants, the consolidated information should have had 5 separate counts joined together, each charging a named defendant with **Possession of Cannabis Leaves** of a certain weight [*see*: **Sections 72 (1), 73 (a) & 74 (e)** of the **CPC**]. This did not occur.
8. I accept that for the purposes of an offence of **Possessing Cannabis Leaves**, the weight of leaves might be considered of secondary importance, but, as a matter of sentencing, it is of vital importance. Needless to say it was not the prosecution's case that the activity was a single criminal or commercial enterprise of importing or exporting cannabis where a global combined weight might be acceptable nor was it ever suggested that the contents of each defendant's carton was part of the same single shipment.
9. Be that as it may, I turn next to consider the prosecution's evidence. The prosecutor correctly identifies the essential ingredients of the offence charged as being:
 - (a) possession of plant material by each defendant; and
 - (b) proof that the plant material when forensically tested returned a positive result for "*cannabis*".



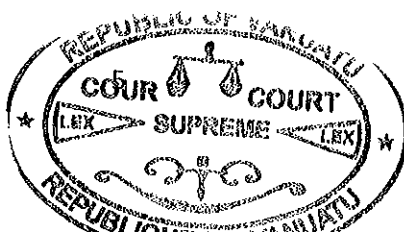
10. These ingredients are necessarily conjunctive. By this is meant that before the charge of **Possession of Cannabis Leaves** can be said to be proved, the prosecution must establish that the plant material that was found in the possession of each defendant, when subsequently tested, returned a positive result for cannabis.
11. To establish the offence, the link between the tested plant material and each defendant should be strictly and carefully recorded and maintained separately and apart, from the plant material in the possession of any other defendant. There should be no mixing or combining of the plant material and a record of an unbroken "*chain of custody*" must be kept and maintained and established at the trial, beyond a reasonable doubt.
12. Did the prosecution establish a "*prima facie*" case sufficient to put each defendant to his/her defence?
13. As for the element of "*possession*", the prosecution's evidence from the 3 police officers who went to Star Wharf is that the defendants were each requested to identify and open their respective cartons, and, when they did, rolls of plant material were found at the bottom of each carton concealed under fruit. No one testified to marking any of the cartons at the wharf with its owner/defendant's name nor were the defendants later individually photographed carrying his or her carton.
14. In the absence of the defendant's names on their respective cartons or other recorded distinguishing markings there is a real risk, even a probability, that the cartons and their contents would become mixed up at the police station and the ownership of the cartons and the vital unbroken "*chain of custody*" would become confused and compromised.
15. If I may say so, each carton should have been clearly marked with the defendant's name at the wharf before being loaded onto the police transport and a written record kept of its contents when it was opened up and emptied. Unfortunately this was not done by the arresting officers at the wharf. As a result of this critical omission, once the cartons were loaded into the police vehicle at the wharf, the crucial linkage of each of the carton's and its individual owner/defendant was broken and began to unravel.
16. I accept that each carton appears to have had a "*slip of paper*" in each with a defendant's name written on it, at the time of the cartons being photographed and processed by the forensic unit who I am satisfied, tried their best to maintain some separation between the cartons and their contents.



17. No documentary record was produced however, to verify this separation or to identify the origin and authorship of the "*slips of paper*" (as there should have been). Neither was any photo taken clearly showing each defendant carrying his/her carton, before the contents of each carton was emptied and processed. Such a photograph would have obviated the need to maintain an unbroken documentary record of the ownership of each carton.
18. With all due regard, the prosecution's treatment of the "*chain of custody*" and the production of the exhibits in Court, left much to be desired. There was an unseemly haste to get the exhibit marked without establishing a proper "*chain of custody*" or a clear linkage between the exhibits being produced and a particular defendant.
19. Indeed, what happened to the cartons after they arrived at the police station and after they had been processed by the forensic unit remains a complete mystery. At the close of the prosecution case, the original cartons had not been produced and their absence remained unexplained. Even the rolls of plant material that were produced in Court came out of 3 (not 4 as might be expected) large brown paper bags, if the 4 cartons that had been seized at the wharf, had been processed individually and separately.
20. All of the above may seem pedantic and unnecessarily time-consuming, but, where the liberty of the subject is concerned, there can be no short-cuts or compromises made or accepted to the onerous burden cast on the prosecution to establish its case against each defendant beyond a reasonable doubt.
21. Photographs are useful items of evidence if properly taken, identified and produced, but, they are of limited use in explaining or clarifying the "*chain of custody*" of an exhibit, especially, where the original receptacles which contained the exhibit (ie: the cartons) are later destroyed or discarded and the plant material (ie: the actual exhibit) is removed and mixed up in the forensic process.
22. In this latter regard it is unfortunate that the careful record-keeping of **Constable Cooks Thompson** of the Forensic Unit, was not fully investigated or produced at the trial nor was **Chief Inspector John Edmanley** requested to outline and explain the **Vanuatu Police Force** established processes and procedures for the collection, collation, examination and presumptive testing of cannabis.
23. As a result of this further prosecution lapse, no Crime Scene Examination Notes, Drug Weight Sheets, or Cannabis Test Result Worksheets were produced nor was any real attempt made to relate the results of the forensic tests to the multitude of photos produced. As a consequence, at the close of the prosecution case, other than some incompletely explained photos of dried leaves on measuring scales, the weight of cannabis recovered from each carton (and allegedly in the possession of each defendant) is unknown.



24. Having said that, the prosecution also relied on the admissions that were recorded from some of the defendants and which formed part of the preliminary inquiry statements placed before the Magistrate's Court at the committal hearings.
25. Unfortunately, due to an oversight on the prosecutor's part, no interview records were produced during the interviewing officers' examination in chief (as they should have been). The court reluctantly allowed the witnesses evidence to be re-opened and the caution interview records were produced as exhibits.
26. In this regard **Constable Zedrick** testified that he had interviewed Jonathan Mark and Selwin Bice under caution at the Police Station and both voluntarily admitted the offence and signed their interview records. Both interview records are in narrative form as opposed to the usual question and answer format but nothing turns on that.
27. In his statement, Jonathan Mark, admits to receiving two cartons of marijuana from his sister Lyn from Melip, firstly, in December 2010 and the second was the carton he identified to the police team at the Star wharf. He also admits to smoking marijuana even though "*i nogud*" and he knows that it is illegal to smoke marijuana but he has not been arrested by the police. Finally, he admits that the marijuana that was shown to him by the police belonged to him. Selwin Bice, for his part, admitted that he had an (unidentified) bundle of marijuana hidden under some bush at his residence. He too used to smoke marijuana before sleeping. He admitted "*se 'yes' i tru hemi naio mi karem se mbae mi stap smokem*".
28. **Senior Sergeant Uriel Leo** the officer in charge of the Drugs squad produced the interview record of Charlie Willie which he had recorded at about midday at the Port Vila Police Station on 9 May 2011. In it, Charlie Willie admitted that he had arrived on the "*M.V. Malkos*" from Melip, Malekula and the carton that he had brought with him "... *igat marijuana, orange mo cucumber long hem*".
29. I accept that the defendants signed admissions are admissible evidence of "*possession*" but their other admissions namely, that the dried plant material was "*marijuana*", is inadmissible opinion evidence that cannot replace the duty of the prosecution to establish by admissible forensic expert evidence, that the plant material seized from each defendant's carton is "*cannabis*" beyond a reasonable doubt.
30. Needless to say the recorded admissions are incapable of identifying the particular cannabis in the possession of the particular defendant concerned nor does it establish an unbroken "*chain of custody*" from the time of seizure of the cannabis to its eventual production in court as an exhibit.
31. In light of the foregoing I am not satisfied that the prosecution have established an unbroken "*chain of custody*" of the cannabis produced in court and its linkage

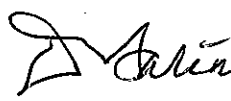


to each defendant from whom it was seized. In other words, although the prosecution has produced some evidence to establish each ingredient of the charge the necessary and vital linkage between the two elements of the charge is sadly lacking.

32. Accordingly, and consistent with the Court's duty under **Section 164** of the **Criminal Procedure Code** I enter a verdict of "*not guilty*" in respect of all, Selwin Bice, Jonathan Mark, Charlie Willie and John Jerry.
33. You have 14 days to appeal against this ruling if you do not agree with it.

DATED at Port Vila, this 22nd day of June, 2012.

BY THE COURT


D. V. FATIAKE
Judge.

