IN THE SUPREME COURT
REPUBLIC OF VANUATU
(Criminal Jurisdiction)

Criminal Case No. 183 of 2014

PUBLIC PROSECUTOR
-v-
EILON MASS

Before Chetwynd J
Mr Boe for Prosecution
Mr Mass in person
Hearing 23rd and 24th November 2016

Decision on no case to answer submission

1. The Defendant faces one charge of possession of cannabis contrary to the Dangerous Drugs Act [Cap 12]. The particulars allege possession on or about 20th November 2013 in Luganville Town and Velit Bay on Santo. The Prosecution has called 3 witnesses, Senior Sgt Leo, Mr Moise Kaloris Andrew and Ms Tanya Isom. On the close of the prosecution case the Defendant has made a submission that there is no case to answer.

2. It is generally accepted in this jurisdiction that at the conclusion of the prosecution case the presiding judge should consider whether, as a matter of law, there is a *prima facie* made out against the defendant. That is the plain meaning of section 164 of the Criminal Procedure Code [Cap 136]:

> ***164.*** *(1) If, when the case for the prosecution has been concluded, the judge rules, as a matter of law that there is no evidence on which the accused person could be convicted, he shall thereupon pronounce a verdict of not guilty.*
>
> *(2) In any other case, the court shall call upon the accused person for his defence and shall comply with the requirements of section 88.*

3. It is also generally accepted that it matters not whether the presiding judge embarks on that exercise of his own volition or as a result of a submission of no case to answer, the test to apply is that set out in the English case of *Galbraith* [1].

> *"'How then should the judge approach a submission of 'no case'?*
>
> *(1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case.*

[1] *Reg. v. Galbraith* (1981) 2 All ER 1060

REPUBLIC OF VANUATU COUR SUPREME COURT LEX LEX REPUBLIQUE DE VANUATU

(2) The difficulty arises where there is some evidence but it is of a tenuous character, for example, because of inherent weakness or vagueness or because it is inconsistent with other evidence.
(a) Where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case.
(b) Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness' reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury.

It follows that we think the second of the two schools of thought is to be preferred. There will of course, as always in this branch of the law, be borderline cases. They can safely be left to the discretion of the judge"

4. The evidence from the three prosecution witnesses can be dealt with quite shortly. Senior Sergeant Leo was the officer in the case. His involvement was quite limited. He received a plastic syringe containing a black viscous substance from Moise Kaloris Andrew on 3rd August 2014. He passed the syringe to the Head of Forensics at the time, Chief Inspector Edmanley. The Chief Inspector tested the substance in the syringe and it tested positive for THC, the active ingredient in marijuana or cannabis. Snr Sgt Leo was not involved in any interviewing of the Defendant because he was based in Port Vila and the Defendant was frequently travelling between Port Vila and Santo. It proved difficult to make arrangements for ma meeting and it was easier for officers in Luganville to conduct the interview. He did take a statement from Moise Kaloris Andrew. He confirmed that although the syringe had been tested for drugs it had not been examined for fingerprints.

5. In his statement and in his evidence Mr Andrew said he had taken the syringe directly from a bag belonging to the Defendant or alternatively he had picked it up when the defendant had dropped it. This was either in Uncle Bill's store in Luganville or the ANZ bank there or outside the bank or at some spot between Uncle Bill's and the bank. When he first picked up or stole the syringe from the Defendant it had a needle on it. He stuck himself with the needle and therefore broke the needle off and disposed of it. He gave no evidence on what he did with the syringe other than he put it in his pocket and then some 10 or so months later handed it to Senior Sergeant Leo. He also told of seeing the Defendant and another man trying to inject or actually injecting the third witness (Ms Isom) with a black oily substance. Mr Andrew also spoke of a box he saw the Defendant with which had syringes in it.

6. Ms Isom gave evidence that the Defendant had given her a plastic syringe containing a black oily substance which he said was cannabis oil. He said she could use it to treat a skin complaint. She did not rub the oil on her affected skin as he advised, and gave it back to the Defendant some short time later. When she had the syringe in

her possession it did not have a needle attached. She also told of a plastic box containing syringes which the Defendant put in the freezer. She denied that the Defendant had injected her or tried to inject her with anything.

7. That is the totality of the evidence against the Defendant. Dealing with Ms Isom's evidence first, all she says is that she was given a syringe by the Defendant which he said contained cannabis oil. She could neither confirm nor disagree that the syringe actually contained cannabis oil. Senior Sergeant Leo was also unable to give any evidence that the Defendant was in possession of any cannabis. He can only confirm that the substance in the syringe given to him by Mr Andrew tested positive for THC.

8. The only possible evidence that could be used to convict the Defendant comes from Mr Andrew. If it is accepted that the syringe he gave Senior Sergeant Leo was the same syringe he says that he either took from the Defendant's bag or picked up when the Defendant dropped it, then it could be said there was a *prima facie* evidence of possession by the Defendant. This possible evidence of possession is not corroborated by any other witness and certainly not by Ms Isom because she was adamant the syringe she was given did not have a needle attached. It could not be the same syringe Mr Andrews handed over to the police because he says that one had a needle attached which he broke off. There is no evidence to tie the syringe to the Defendant. There is no fingerprint evidence, no DNA evidence or indeed any other forensic evidence to say the syringe was ever in the possession of the Defendant. All there is to support the allegation that the syringe was in the Defendant's possession is what Mr Andrews says. However, there are flaws in that evidence. He does not explain what happened to the syringe he says came into his possession and which he says he gave to the police 10 months or so later. Evidentially that syringe disappears into a black hole immediately it is put into Mr Andrew's pocket. He offers no evidence how the syringe was stored or who else had access to it or might have had access to it. Mr Andrew's evidence "*is of a tenuous character*" it clearly is subject to, "*inherent weakness*" it is clearly vague and in addition, "*it is inconsistent with other evidence*". A jury would have to be directed as to the very real dangers of convicting a defendant on evidence of the chain of possession which was so flawed. That leads to the conclusion that, "*taken at its highest,*" the evidence, "*is such that a jury properly directed could not properly convict upon it*".

9. The charge must be dismissed; the Defendant is found not guilty and discharged.

Dated at Port Vila this 24th day of November 2016

Chetwynd J

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