

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

Criminal Appeal Case No 17/2479 SC/CRM

PETRUS JOHANNES ROMMERS
V
PUBLIC PROSECUTOR

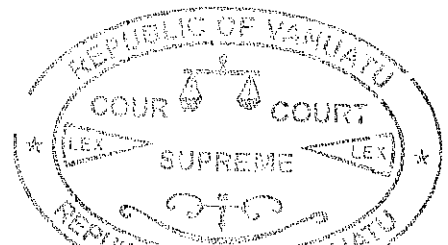
Before: Chetwynd J
Hearing: 12th June 2018
Counsel: Mr Sugden for the Appellant
Mr Blessing for the Respondent

JUDGMENT

1. This is an appeal against sentence and a petition to review convictions following guilty pleas. The convictions and sentence relate to a hearing before the Magistrates' Court at Luganville on 13 September, 2017. At that hearing the appellant entered pleas of guilty to four counts under the Customs Act No. 7 of 2013 ("the Act"). The appellant was fined a total of eight million vatu.

2. The facts behind the conviction and sentence are straightforward. The appellant was (maybe still is) the Master of the Dutch registered cargo vessel MV Momentum Scan. The vessel was carrying a cargo of trains bound for Brisbane in Australia. They had been loaded in Mumbai India. Whilst on route from Port Alma in Queensland to Brisbane the appellant was advised by the charterers that they would not be able to receive the cargo for some time due to logistical problems. The appellant was advised to leave Australian waters and seek safe shelter. He sailed to Matantas Bay in north east Santo arriving there and dropping anchor on the 15th of August, 2017.

3. The authorities in Luganville were alerted to the vessel's presence by a local land owner. They travelled to Matantas Village on the 18th of August and made contact with the appellant. They boarded the vessel and spoke directly with him. The appellant was told to move the vessel to Luganville port and he said he would depart for Luganville at first light the next day. Sometime between three and 4.00 PM on the 18th of August the MV Momentum Scan arrived in Luganville and anchored there. The appellant was later interviewed under caution and charged.



4. The Amended Information drawn up by the Public Prosecutor is dated the 24th of February 2016 which must be a mistake and I presume the Amended Information should in fact have been dated the 24th of August 2017 as was the original Information. In any event it contained seven counts. They were:

1. Failing to advise of impending arrival contrary to section 27 (1) (a) of the Customs Act;
2. Failing to proceed directly to a port contrary to section 27 (1) (b);
3. Failure to anchor at a declared port contrary to section 30 (1);
4. Failure, when required or compelled to land other than at a port, to report to customs 31 (2)(a);
5. Failure to provide an inward report contrary to section 32 (2);
6. Delivering an incorrect misleading or defective inward report contrary to section 33;
7. Making a false declaration contrary to section 170.

5. The record from the Magistrates' Court is a little ambiguous but it would seem that counts 3, 6 and 7 were withdrawn and the appellant pled guilty to the remaining four counts. He was fined two million vatu on each count, a total of eight million vatu. The ambiguity concerning what the appellant pled to and what he was convicted of will need to be examined later in this decision.

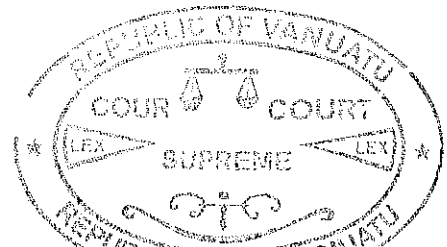
6. On the 27th September a notice of appeal against sentence was filed. On the 4th of October counsel for the appellant filed a memo of appeal and petition to review the convictions.

7. The offences charged under the Act are provided for in part 4 of the Act. That part of the Act deals with arrival and departure of goods persons and crafts. It is obviously designed to provide mechanisms and processes which allow for notifications to the Customs, meaning the Government Service that is responsible for administering Customs law. This is to ensure that the government service is aware of the arrival of goods persons and crafts and is in a position to levy the appropriate duties where necessary or appropriate. As will also be seen, the act has other purposes.

8. Section 26 of the Act provide that in certain circumstances all goods are subject to the control of Customs. There does not appear to be any dispute that what was on the MV Momentum Scan were goods on board a craft that had arrived in Vanuatu from a point outside Vanuatu (section 26 (1)(d)). They were therefore subject to customs control.

9. Section 27 (1) (a) deals with advice of arrival of a craft. A craft is defined in section 1 as:

craft includes any aircraft, ship, boat or other machine or vessel, used or capable of being used for the carriage or transportation of persons or goods, or both, by air or water or over or under water.



The master of a craft "en route" to Vanuatu must give notice of his impending arrival to the Customs. The phrase en route must bear its usual or natural meaning, i.e. on the way to. Arrival has a technical meaning and is defined in section 1 as;

arrival means:

(a) in relation to a craft - the arrival of a craft in Vanuatu from a point outside of Vanuatu, whether or not the craft lands at, hovers above, berths, moors, anchors, or stops at, or otherwise arrives at any place within the territorial waters or the air space of Vanuatu; and

(b) in relation to a person - the entry of the person by any means, into Vanuatu from a point outside Vanuatu;

10. According to the Act therefore the appellant, as master of a craft, was obliged to notify Customs of his imminent arrival in Vanuatu territorial waters. In other words before his actual "*arrival*" a master of a craft must tell Customs he is going to arrive. In addition the master must provide Customs with information about certain other matters and all the information he has to provide is set out in subsection 1(a) (i) to (vi) namely:-

(i) the impending arrival of the craft;

(ii) its voyage;

(iii) its passengers;

(iv) its cargo for discharge within Vanuatu;

(v) its cargo not intended for discharge within Vanuatu (if any);

(vi) the appointed port or airport at which the craft will arrive

11. All the information required to be provided as set on above can be provided by the master of the vessel or its owner or operator, or an agent for the owner or operator.

12. Once a master has arrived in Vanuatu (see paragraph 8 above) with his craft section 27 (1) (b) requires him to proceed directly to a port. The Act does not say the master must proceed to the *appointed port* in accordance with Section 27(1)(a)(iv) but it seems logical to assume that is what should happen. It means the master (or other person entitled to under subsection 27(2)) elects which port the vessel is going to use. Ports are dealt with in Part 3 of the Act and as far as I have been able to ascertain there are only 4 declared ports in Vanuatu; Port Vila, Luganville, Sola and Lenakel. These ports were deemed to have been declared ports by section 14(2) (a) to (d) of the Act. So, having told customs before he arrives that he intends to berth or otherwise arrive at one of the declared ports the master must proceed to that port.

13. The requirement to proceed directly to a port is emphasised by section 30 of the Act. In accordance with that section the master of a craft carrying goods subject to Customs control must ensure the craft *anchors or otherwise arrives* at a declared port. There is a provision in section 31 to allow for crafts which are *required or compelled to*, to anchor at a place other than a declared port. The Act makes it clear that required



refers to a requirement of navigation imposed by some statutory authority or other requirement; and compelled refers to accidents, *stress of weather or other necessity*. If a vessel is required or compelled to anchor at some other place section 31 (2) sets out an obligation for a master to report that fact to the Customs.

14. Section 32 deals with inward reports. It says in part:

Inward report

- (1) *Unless otherwise approved by the Director, this section applies to a craft that arrives in Vanuatu from outside of Vanuatu, or that is carrying persons or goods subject to Customs control.*
- (2) *On the arrival at a port or airport, the master or the owner of the craft must:*
- (a) *deliver to Customs, the certificate of clearance granted to the master at the last port or airport of departure; and*
- (b) *deliver to Customs within 12 hours of the crafts arrival, an inward report containing particulars verified by a declaration as approved and accompanied by such supporting documents as approved by the Director;*

Section 1 defines a declaration this way:

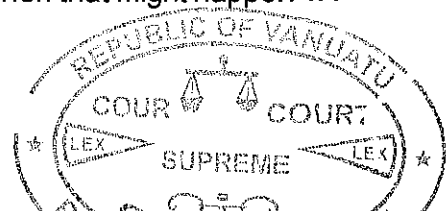
declaration means the provision of all information to Customs whether verbal or written in a document or in electronic form, by a person relating to:

- (a) *the import or export of goods; or*
- (b) *the arrival or departure of a craft; or*
- (c) *arrival or departure of a person;*

15. These comprehensive requirements under the Customs Act are there to carry into effect the purposes of the Act which are, in the words of the Act, *An Act to reform and modernise the law relating to Customs control and enforcement, and to provide for revenue administration, border management, trade and travel*. As far as I am aware there is no suggestion by the Public Prosecutor that there are revenue implications in this case. However, the Act not only deals with revenue, it has, as can be seen from the stated purposes, important border management provisions as well.

16. There can be no question that Vanuatu as a nation can and does assert sovereignty over land forming the islands of Vanuatu and the sea contiguous to those islands. The exact details are set out in the Maritime Zones Act No 6 of 2010. As such it has the right to supervise and/or police those areas. Vanuatu as a nation has the right to manage and protect its borders. It has the right, subject to its international obligations and treaties, to legislate for what can and does happen within its borders. The Act provides a means of obtaining information about who intends to cross borders or who has actually crossed borders into the national territory of Vanuatu.

17. Turning now to the matters before me. There is the petition to review the convictions and there is an appeal against sentence. I accept that there are circumstances when the Supreme Court will review a conviction by a magistrate even though there has been a guilty plea. The circumstances when that might happen would



have to be exceptional. Not only that, if an appeal is to be pursued in the face of a guilty plea the appellant will have to establish that there is a defence. The appellant in this case says poor advice from his counsel and commercial pressures, namely the need to obtain the release of the vessel as quickly as possible, are the reasons why he entered guilty pleas.

18. There is no evidence from the former counsel or even from the appellant as to why the advice given to him was defective. It is to be noted that it would only be defective if the arguments now put forward, particularly on the right of innocent passage under the provisions of the Maritime Zones Act, are correct. As to commercial pressures, it is clear from the appellant's statements to Customs that he was told he would not be able to offload his cargo in Brisbane for some time. From the 15th August to 13th September is 5 weeks. There is no evidence from the appellant as to what time he thought, in the ordinary course of events, his offloading would take. He and the charterers made a purely commercial decision that he should wait out the logistical delay in some place where there would be minimal costs. He and the charterers took a commercial risk which did not pay off on this occasion.

19. That a purely calculated commercial decision was made is clear from the circumstances. The MV Momentum Scan travelled from Port Alma to Vanuatu. I can take judicial note that Brisbane is approximately 600 kilometres south of Port Alma. However, the vessel travelled some 2000kms north east to Santo (and logically would have been required to sail a further 2000kms to get back to Brisbane). According to the ship's log it departed Port Alma on the evening of the 10th August. It must therefore have been commercially more attractive to sail a distance of 4000kms over 10 days than anchor off either Port Alma or Brisbane. Given those facts the commercial pressure argument does not hold water.

20. There is no doubt in my mind that the master of the MV Momentum Scan could have enjoyed the right of innocent passage over the internal or archipelagic waters of Vanuatu. The Maritime Zones Act makes that perfectly clear. Such a concept is also in accordance with Vanuatu's international obligations. The question is, was he doing so? The Maritime Zones Act provides:

Innocent passage

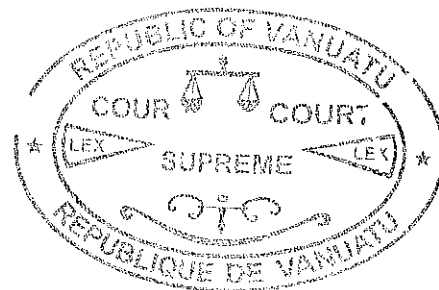
(1) In this section:

innocent passage means navigation through the territorial sea and archipelagic waters for the purpose of:

(a) traversing the territorial sea or archipelagic waters without entering the internal waters of Vanuatu or calling at a roadstead or port facility outside internal waters; or

(b) proceeding to or from internal waters or a call at such roadstead or port facility.

(2) Subject to this Act, a foreign vessel, warship or submarine may enjoy the right of innocent passage.



(3) *The right of innocent passage by a foreign vessel, submarine or warship must be:*

(a) *continuous, expeditious, and in conformity with the Convention and other rules of international law; and*

(b) *in a manner that is not prejudicial to the peace, good order or security of Vanuatu.*

(4) *A foreign vessel, submarine or warship that exercises the right of innocent passage may be allowed to stop and anchor if:*

(a) *such activities are incidental to the ordinary navigation of the foreign vessel, submarine or warship; or*

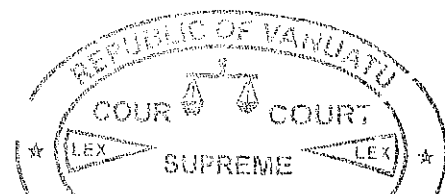
(b) *it is necessary because of natural disaster or distress; or*

(c) *it is necessary to provide assistance to a person, foreign vessel, submarine, warship or aircraft that is in danger or distress.*

21. As I understand the argument advanced on behalf of the appellant it is said that the voyage from Port Alma **and** the anchoring off Matantas were all part of the appellant exercising his the right of innocent passage. However, what has not been suggested is how such, and in particular the anchoring off Matantas, was *incidental to the ordinary navigation of the foreign vessel*. A voyage from Port Alma to Brisbane would not ordinarily involve travelling through Vanuatu waters and anchoring of Espiritu Santo. The ship's log records the weather for the period 10th to 15th August and nowhere in the log is there any mention of actual or threatened inclement weather. Quite the contrary, with notes referring to "easy rolling vessel", "sunny" and "good visibility". The barometric pressure never seems to have dropped below 1005 hpa during the voyage and was mostly above 1010 hpa. There was not the slightest indication of an approaching cyclone or indeed any tropical depression. All of the log entries which refer to cargo simply report, "*checked cargo and lashings. All okay*". There is no record in the log of the MV Momentum Scan referring to the interception of any distress call from any nearby vessel or aircraft. With none of these matters in evidence the navigation by the appellant should have been continuous and expeditious. It clearly was not as the appellant dropped anchor in Matantas Bay.

22. Having said all that, even if it could be said that the appellant by doing what he did was legitimately exercising a right of innocent passage he would still be liable to comply with the Act. The appellant would not be entitled to disregard the Act merely because he was exercising a right of innocent passage. He could still have exercised that right if he had reported to the Customs as required by the Act. As it was there was simply no attempt by the appellant or anyone on his behalf to comply with the Act. If the appellant did not have the wherewithal to check the legal requirements for entering Vanuatu territorial waters he should have required the charterers to make the necessary enquiries. Any defence seeking to rely on the right of innocent passage is bound to fail.

23. That however, is not the end to the review process. I must now return to the ambiguous nature of the record from the Magistrates' Court. Brief details of the



charges the appellant faced are set out in paragraph 4 above. I have seen two copies of an Information setting out that detail of those charges. One was part of the appeal book at Tab A. It is labelled Information and is dated 24th August 2017. The other seems to have been together with papers arriving from the Magistrates' Court and it is the one dated 24th February 2016 and is labelled Amended Information. They are different. The former seems to indicate counts 3 and 4 were combined in some way. The latter has the word "withdrawn" written in the margin against count 3.

24. If we then look at the typed copy of the oral sentence it is apparent that the Magistrate was sentencing in respect of an offence under section 27(1)(a) (Count 1); an offence under section 27 (1)(b) (Count 2); an offence under section 31(2)(a), (Count 4) and an offence under section 32(2)(b) (Count 5).

25. There is no doubt the appellant failed to report his impending arrival in Vanuatu and provide the information required by section 27(1) (a). His conviction of an offence pursuant to section 27(1)(a) is sound. There is no doubt the appellant failed to proceed directly to a port. His conviction for the offence under section 27(1)(b) is sound.

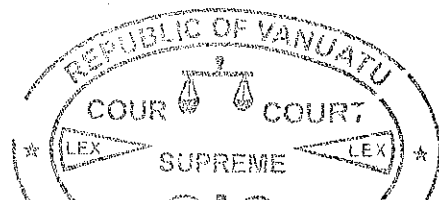
26. However, when we come to the conviction under section 31(2)(a) there are problems. That section is only applicable if the appellant had been required by Customs or for navigational reasons; or compelled by distress, accident or weather to anchor or arrive elsewhere. There is no evidence of that occurring on or before 15th August. The appellant was told to proceed to Luganville after the 15th August and did so. It might be argued that the appellant should have reported his arrival in Luganville but as I understand the agreed facts, Customs told him where to anchor and knew of his arrival. He was also interviewed so the fact of his arrival in Luganville were well known to Customs.

27. The conviction for an offence pursuant to section 31(2)(a) is not sound. The irony is that had count 3 been left on the Amended Information the appellant could have been convicted of failing to anchor or arrive at a declared port. Indeed, that seems to be what the Magistrate thought the appellant was being convicted of. The written sentence says that "*The Court convicts the Defendantone count of craft arriving at a place other than a declared port...*" but then unfortunately the Magistrate refers to section 31(2)(a) and (5). Because the record available to me is ambiguous I cannot say that this was merely a typographical error and allow the conviction to stand. I will quash to conviction and sentence for an offence under section 31(2)(a) of the Customs Act.

28. The conviction for failing to provide an inward report contrary to section 32(2)(b) appears sound to me and should stand.

29. Turning to the appeals against sentence, the offences under section 27 carry a maximum penalty of 2 years imprisonment or a fine of VT 5,000,000. The offence under section 32 carries a fine of VT 5,000,000. The Magistrate started at VT3,000,000 and after allowing a reduction of 1/3rd ended up with fines VT 2,000,000. It is submitted that the Magistrate took into account irrelevant matters.

30-. The Magistrate did adopt a slightly unusual approach in calculating the amount of the fine. The Magistrate treated the fine as if it were a sentence of imprisonment



and reduced his "starting point" by one third in recognition of the guilty pleas by the appellant. It is not usual to treat financial penalties this way. The three step process set out by the Court of Appeal in *Andy*¹ may not be appropriate when dealing with purely financial penalties the usual approach is to look at the overall culpability of a defendant taking into account all mitigating and aggravating factors including a plea of guilty. However, I accept that when dealing with substantial financial penalties as in this case a useful guide may well be the 1/3rd rule for guilty pleas.

31. I would have approached the calculation of the amount of the fine by looking at the maximum penalty available. This was not an offence committed through inadvertence. This was an offence committed by a master of a vessel who couldn't be bothered to check what his obligations were upon entering Vanuatu waters. His decision to do so was based on purely commercial considerations. I accept the decision was not made for other nefarious reasons. I would have put this in the mid-range of offending and after taking everything into account (such as the guilty pleas) I would have imposed a fine in the mid-range of the maximum sentence available. The Magistrate reached the same conclusion by a slightly different route.

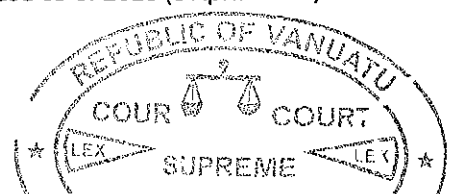
32. As to irrelevant matters, the appellant says that in particular the Magistrate should not have required supporting evidence of any fact asserted in mitigation if the fact was not challenged by the prosecution. I do not accept that as a valid argument. Mitigation is not the same as argument about guilt. If a defendant wishes to emphasise a fact in mitigation then some attempt should be made at providing supporting evidence. A Magistrate is not required to blindly accept what a defendant says and can use the lack of supporting evidence to comment on the strength or otherwise of something put forward in mitigation.

33. The appellant also suggests that the comments by the Magistrate relating to the security of the nation being threatened were prejudicial. As indicated earlier, the Customs Act has revenue implications and security implications. If a defendant ignores the requirements to inform the proper authorities of his presence etc. then the security of the nation is threatened. It was perfectly proper for the Magistrate to consider that element when considering sentence. It is an element touching on of the culpability of the defendant.

34. The submission that if the ship (the MV Momentum Scan) travelled to Matantas bay to seek refuge the entry (into Vanuatu) was not illegal because of the right of innocent passage completely misunderstands the mischief the Act is aimed at preventing. It is not the entry in itself which is illegal it is the entry without complying with the reporting requirements which is illegal. Even whilst exercising a right of innocent passage a master is obliged to comply with local laws. The appellant did not do so.

35. The appellant submits his was an unintentional breach of the "entrance laws" of Vanuatu. As I have indicated, I do not accept that. The appellant, in conjunction presumably with the charterers, decided to take a course of action for purely commercial reasons. There can be no other explanation why a master would sail some

¹ *Public Prosecutor v Andy* [2011] VUCA 14; Criminal Appeal Case 09 of 2010 (8 April 2011)

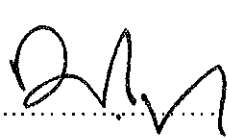


2,000kms in the "wrong" direction and anchor off a relatively secluded part of the coastline of Vanuatu. The appellant did very little to ascertain what was required of him by the authorities in Vanuatu in order that he could "seek shelter". He says in his interview under caution that he checked in some official British Admiralty publication on board the vessel but neither he nor the charterers apparently did anything more to check what might be required in order to anchor off the coast of Santo. It seems to me they took the cynical view that after all Vanuatu was only a small third world Pacific country. I repeat again this case involves a commercial decision taken for purely commercial reasons and there is nothing in the appellant's submissions which persuades me that the approach to sentencing taken by the Magistrate was wrong or resulted in sentences which are inappropriate. The appeal against sentence is dismissed.

36. In summary, the petition for review based on the appellant's right of innocent passage through Vanuatu waters is refused. The conviction on count 3 of the amended Information (charging an offence contrary to section 31(2)(a)) is quashed and sentence set aside on the basis that because of ambiguities in record available to me I cannot be sure the conviction can be maintained for the offence charged. The appeal against sentence is refused.

37. There is a sum of VT 8 million deposited in the Chief Registrar's Trust Account. Of that sum VT 6 million shall be withdrawn and paid to the Magistrates' Court in settlement of the fine. The balance of VT 2 million will be withdrawn and paid to Sugden Lawyers.

Dated at Port Vila this 4th day of July 2018



D. CHETWYND

Judge

