IN THE COURT OF APPEAL OF
THE REPUBLIC OF VANUATU
(Criminal Jurisdiction) APPEAL CASE NO. 1 OF 2001

BETWEEN : JOSEPH KALO

Appellant

AND : THE PUBLIC PROSECUTOR

Respondent

CORAM : Justice Bruce Robertson
Justice John von Doussa
Justice Daniel Fatiaki

HEARING : 27TH April, 2001

COUNSEL : Mr. S. Stephens for the Appellant
Mr. T. Gardiner for the Public Prosecutor

JUDGMENT

On the **27th April 2001** this Court having concluded the hearing of the appeal ordered that the appeal be dismissed for written reasons that would be made available to the parties in due course. This we now provide.

This is an appeal against the judgment of the **Chief Justice** on **13th March 2001** in which he convicted the appellant on an information containing 46 separate counts of **Failing to Pay Insurance Premiums** : **Contrary to Section 32** of the **Insurance Act Cap.82**.

On 27th March 2001 the **Chief Justice** sentenced the appellant on each count to one (1) month imprisonment making a total consecutive sentence of forty six (46) months imprisonment.

The appellant appeals against both his conviction and sentence and advances ten (10) separate grounds of appeal as follows :

Ground 1 **The Honourable Chief Justice erred in fact and law in failing to take into account and giving proper weight to the evidence adduced on the part of the appellant.**

Ground 2 **The Honourable Chief Justice erred in fact and law in failing to assess, weigh and find the evidence upon each and every of the 46 counts quite separately in order to return quite separate verdicts on each of them as against the appellant.**

Ground 3 **The Honourable Chief Justice erred in fact and law in failing to hold that Solomon Islands Family Assurance Limited (SIFAL) is required to have a business licence to carry on business in Vanuatu when he had earlier held in his verdict that SIFAL was at all material times a registered insurer in Vanuatu.**

Ground 4 **The Honourable Chief Justice erred in fact and law in taking into his consideration a consent Judgment in a civil action which Judgment was issued on an Agreement signed by the Appellant and SIFAL when the consent Judgment is now the subject of further proceeding for alleged duress.**

Ground 5 **The Honourable Chief Justice erred in fact and law in failing to consider the constitutional aspect of the fact that the Appellant was not given the opportunity to have access to his records are currently held in SIFAL's custody in order to defend himself adequately.**

Ground 6 **The Honourable Chief Justice erred in fact and law in failing to make mention anywhere in his verdict the exact amount of monies alleged to have not been remitted by the Appellant to SIFAL, which the Appellant says the Honourable Judge was unsure of the sum involved himself. The amount now indicated**

in the sentencing order was only submitted by the Prosecution during submissions for sentencing. This amount has in effect only been raised after trial.

Ground 7 **The Honourable Chief Justice erred in fact and law in failing to give his verdict immediately after the trial, an approach whereby room would be open for other matters to cloud his Lordship's mind when summing up the facts and evidence.**

Ground 8 **The Honourable Chief Justice erred in fact and law by continually sitting in and hearing three (3) different cases against the appellant before dealing with the recent criminal case, which the Appellant says was most probable to have prejudice the Appellant's case in the criminal matter.**

Ground 9 **The Honourable Chief Justice refused to release Appellant on bail following an application made by the Appellant on 26th March 2001 pursuant to section 209 of the Criminal Procedure Code CAP.136 which to some extent attempts to deny the Appellant's right of appeal.**

Ground 10 **The Honourable Chief Justice erred in fact and law in failing to impose a concurrent sentence (if any) on the Appellant when in fact he has seriously failed to find evidence upon each and every of the 46 counts as charged.**

Before dealing with the grounds of appeal it is convenient to briefly set out the factual background to the case.

The business relationship between the appellant and **Solomon Islands Family Assurance Limited (SIFAL)** began in **1993** when the appellant a registered insurance agent trading under the business name **Maureen Insurance Agency (MIA)** successfully proposed a group insurance scheme on behalf of the members of the **Vanuatu Teachers Union (VTU)**.

As agreed premium payments under the scheme were deducted at source from each members salary and paid in a single cheque into the **MIA** account maintained with the **ANZ** bank.

From this gross amount the appellant was required (1) to pay out to **VTU** the respective members union subscription ; (2) to deduct his commission and management fees ; and (3) to pay over the balance remaining into **SIFAL's** account at **ANZ** bank. For record purposes the appellant regularly sent reconciliation statements of bank deposits he had made into **SIFAL's** account to **SIFAL's** principals in **Australia**.

The undisputed evidence led during the course of the week long trial established that the scheme operated as expected for a year, until a teachers strike occurred in **1994** which lasted for a month. Thereafter although premium deductions continued to be made at source and continued to be paid into **MIA's** account **and** although payment of the subscriptions due to **VTU** continued to be made throughout the relevant period, **no** corresponding remittances (after deductions) were ever made into **SIFAL's** bank account nor were bank deposit reconciliation statements provided by the appellant to **SIFAL's Australian** principals as he had previously done.

The sample charges in the information relates to the period **January 1995** to **December 1996** when remittances from **MIA** into **SIFAL's** bank account ceased to be made.

It was common ground in the case that during the relevant period deductions for premium and union subscriptions were made from members salary and paid into the appellant's bank account. It is also undisputed that **VTU** subscriptions continued to be paid out by the appellant as required, and the only issue which was seriously contested in the case relates to the fourth and final ingredient identified in the **Chief Justice's** judgment, namely, '***... the failure*** (of the appellant) ***to pay the premium over to the insurer*** (SIFAL) ***within 30 days of the receipt by*** (him) ***of the premiums ... (less his commission and other deductions to which by written consent of the insurer he is entitled ...)'.***

In support of this ingredient the prosecution produced the relevant bank statements of the **MIA** account maintained at the **ANZ** bank and into which account the deductions at source had been deposited by the **Finance Ministry** during the relevant period. The prosecution also called

Ross David Porter the managing director of **SIFAL** who testified that no remittances were ever made from the appellant to **SIFAL** during the period **January 1995** to **December 1996**. This crucial evidence was not challenged in cross-examination as it should have been, if it were disputed, and the **Chief Justice** quite properly commented on the failure in his judgment.

In his defence the appellant elected to testify on oath at the trial. In essence the appellant maintained that he had paid over during the relevant period all monies due to **SIFAL**.

The **Chief Justice** was accordingly faced on the one hand, with the evidence of **Ross David Porter** the managing director of **SIFAL** that no payments were ever received from the appellant during the relevant period and on the other hand, the evidence of the appellant that all payments were duly made to **SIFAL**. Both versions could not be true. It was incumbent on the **Chief Justice** to decide which version he accepted and believed.

In this latter regard the **Chief Justice** in a full and careful judgment stated: ***'I find the accused version of the facts difficult to believe ... The evidence of Mr. Kalo on critical issues of facts, is not worthy of credit.'*** Earlier in his judgment the **Chief Justice** had noted that : ***'At no stage of the evidence of Ross Porter either originally nor at his recall the question of payment of money was put to witness Porter as to whether it was untrue, challenged nor wrong.'***

With that background we turn to consider the grounds of appeal.

Ground (1) - complains that no proper weight was given to the appellant's evidence.

We are satisfied having heard appellant's counsel that this ground cannot possibly succeed. It is clear from the judgment of the **Chief Justice** that he was fully aware of the nature of the appellant's defence which singularly raised a question of credibility between the evidence of **Ross David Porter** and the appellant. It was eminently a question for the trial

judge to determine and this court will not interfere with that determination which has not been shown to be either unsupported by the unchallenged evidence led at the trial nor one upon which the advantage of the trial court over that of an appellant court can be easily ignored.

Ground (2) - this ground can be shortly disposed of. In his judgment the **Chief Justice** said : `***in this trial, I have the duty to look at the evidence upon each of the count quite separately in order to return separate verdicts on each of them as against the accused'***.

Plainly the **Chief Justice** was aware of his duty in that regard and although there is no actual reference or mention in the judgment of the evidence on each count we are satisfied that sufficient documentary evidence in support of each count was placed before the trial judge who recorded his verdict : `***I find the accused guilty on each of all 46 counts as charged in the information.'***

Even if there was any substance in this ground, having regard to the totality of the evidence in the case, both oral and documentary, we are satisfied that no miscarriage of justice was occasioned thereby and we would be content to apply the proviso and uphold the conviction.

Needless to say the appellant's defence which was a blanket denial obviated any need for the **Chief Justice** to minutely examine the evidence on each count beyond the general unchallenged findings of fact that were enumerated in the judgment.

Ground (3) - **SIFAL** is a registered overseas insurance company which transacted its business in **Vanuatu** through its agent **MIA** which had an appropriate business and insurance licence.

Ground (4) - complains that the **Chief Justice** had improperly taken into consideration a consent judgment in a civil action between the parties. This ground is misconceived. The appellant was cross-examined about the judgment on a matter of credibility and was relevant in assessing his assertion that payments of premia had in fact been made to **SIFAL**.

Ground 5 - this was a central plank of the appellant's appeal. **Mr. Stephens** was at pains to suggest various possibilities that might have arisen had the appellant been given access to his business records but such suggestions are merely fanciful. No application was ever made for the release of such records nor was the trial judge requested to issue a sub-poena for the production of the appellant's records over and above the banking records of **MIA** which were tendered by the prosecution at the trial.

Ground 6 - complains that the **Chief Justice** failed in his judgment to mention the exact amount of monies alleged to have been withheld from **SIFAL**. In the first place the exact amounts are clearly set out in each of the counts with which the appellant was charged but, more importantly, the exact amounts were never challenged before the trial judge and in any event could not have affected his lordship's verdict.

Grounds (7) & (8) - may be conveniently dealt with together. They raise the delay in the delivery of his lordship's judgment and the possible prejudice that might have clouded his mind in the interim. Whilst we accept that it might have been better if his lordship had been able to deliver a judgment sooner than occurred, there is no basis whatever for the suggestion that his lordship was prejudiced by the mere lapse of time.

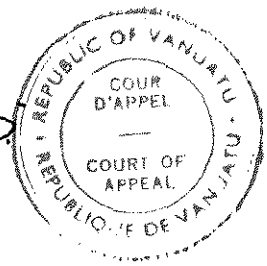
All relevant issues were canvassed in the written submissions of each counsel and fully and carefully considered in the judgment. The subsidiary issue that the **Chief Justice** had heard previous cases involving the appellant was never raised in the **Supreme Court** trial and there is nothing in the judgment nor in counsel's submissions which suggests that he might have been prejudicially influenced thereby.

Ground (10) - raises the question of whether or not concurrent sentences ought to have been imposed by the trial judge. We are satisfied from having perused the **Chief Justice's** sentencing remarks that the cumulative nature and length of the sentence was entirely appropriate in all the circumstances having regard to the nature and duration of the offending and the total amount involved.

It is also consistent with a sentencing guideline in this jurisdiction from which we would be unwilling to depart. The appellant's total culpability is well encapsulated by the **Chief Justice** when he said `***the defendant as an Insurance Agent, is in a position of privilege and trust and has used that trusted position to defraud the insurer of a considerable sum of 22,467,040 Vatu during a period of 2 years (January 1995 to December 1996)***'.

The appellant having failed on all grounds the appeal was dismissed.

ON BEHALF OF THE COURT



(D.V. Fatiaki)

JUDGE

At Port Vila,

6th September, 2001.