

**IN THE COURT OF APPEAL  
OF THE REPUBLIC OF VANUATU**  
*(Appellate Jurisdiction)*

**Criminal Appeal**  
**Case No. 15/8 CoA/CRMA**

**BETWEEN:** **EILON MASS**  
Appellant

**AND:** **PUBLIC PROSECUTOR**  
Respondent

**Date of Hearing:** *Thursday 7<sup>th</sup> April @ 10:00am*  
**Date of Judgment:** *Friday 15<sup>th</sup> April @ 4:00pm*

**Coram:** *Hon. Chief Justice Vincent Lunabek*  
*Hon Justice John von Doussa*  
*Hon Justice Ronald Young*  
*Hon. Justice Daniel Fatiaki*  
*Hon. Justice David Chetwynd*

**Counsel:** *Ken Massing for the Public Prosecutor*  
*Mr Eilon Mass in person*

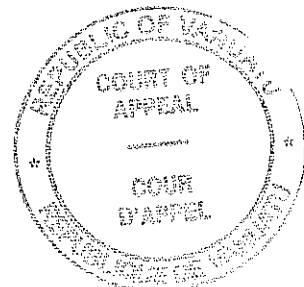
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**JUDGMENT**

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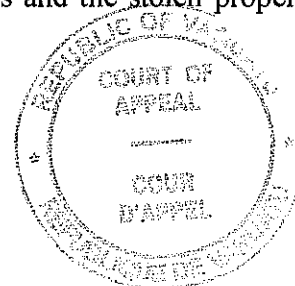
**Introduction**

1. Mr Mass was charged with inciting and soliciting an unlawful assembly and inciting and soliciting theft. He was convicted in the Supreme Court in August 2015 and sentenced to 12 months imprisonment. He is now released on parole. Mr Mass appeals his convictions and sentence. He filed extensive submissions in support of both challenges. Because we were concerned about some aspects of the Supreme Court reasons for verdict, we first asked the Public Prosecutor to respond to our concerns. After hearing the Prosecutor we concluded the appeal against conviction should be allowed. We therefore did not call upon Mr Mass. We advised the parties of our conclusions at the oral hearing. We now give our reasons for allowing the appeal against conviction.



## Background Facts

2. Mr Mass came to Vanuatu in 2010. He met Mr Ronan Harvey in Santo. In late 2012/early 2013 Mr Mass returned to Vanuatu to start a business however he initially worked for Mr Harvey at Velit Bay. A machine was purchased and imported from China to produce coconut oil. Mr Harvey and Mr Mass fell out. Mr Mass left Velit Bay and left the coconut oil machine there.
3. Mr Mass then made a number of complaints to the police about Mr Harvey's conduct. At about this time Mr Mass apparently heard rumours about 19 boys from Kole Village (near Velit Bay) being shot at by Mr Harvey.
4. By September 2014 Mr Mass had a number of meetings with the villagers at Kole and with the police. Mr Mass wanted to obtain the coconut oil machine from Mr Harvey's Velit Bay property because he claimed to own the machine. He discussed uplifting the machine with the villagers. He said the Kole villagers were also angry at Mr Harvey over the shootings. In the meantime Mr Mass had filed proceedings in the Supreme Court seeking the return of the coconut oil machine and other claims relating to the business.
5. Mr Peter Terry had transported the coconut oil machine, at Mr Mass' request, to Velit Bay after it arrived from China. A few days before 21 September Mr Terry had agreed, at Mr Mass' request, to bring his trucks to Velit Bay on 21 September to uplift the machine and its associated equipment. Mr Terry told Mr Mass that he would need a forklift to lift the machine onto the truck. Mr Mass said he didn't have a forklift but would arrange for some men from Kole village to help.
6. On 21 September Mr Terry picked up a number of men from the village and transported them to Velit Bay. Mr Mass was also at the gate to Mr Harvey's property at Velit Bay on that day. Mr Mass stayed at the gate and Mr Terry and the men from Kole village went in the trucks into the property. The coconut oil machine and associated machinery were loaded on the trucks. The men from the village then destroyed some other property and stole other property. When Mr Terry, the coconut oil machines and the stolen property



taken by the men from Kole village returned to the entrance gate at Velit Bay, the police, who had in the meantime been called, were present. There was something of a confrontation. Eventually all the property was taken to the police station at Luganville.

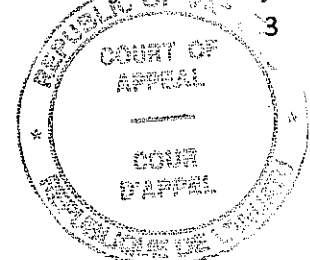
7. Twenty nine of the men from the Kole village who had gone to Velit Bay on 21 September and had taken and damaged property were charged with and pleaded guilty to unlawful assembly and theft arising from the events that day.

### The Charges

8. Mr Mass was also charged with criminal acts arising from the same events. It is not certain exactly what he was initially charged with. The charges before the Supreme Court are dated 6 February 2015. There were two counts. The first alleged Mr Mass on or about 21 September 2014 incited and solicited a number of named people from Kole village to unlawfully assemble at Kole village and Velit Bay "*to commit the offence assault, the theft and damage to property.*" At some time the above quoted words had a line put through them so that no unlawfulness was identified in Count One.
9. The second count alleged Mr Mass had incited the same men on the same day to commit theft at Velit Bay.

### The Supreme Court Decision

10. The trial was held between the 10<sup>th</sup> and 14<sup>th</sup> August 2014. The Judge gave a verdict on 14 August 2015 and convicted Mr Mass of both counts. In the verdict the Judge said that he had "*considered the following*" in arriving at the verdict. There then followed a definition of "*incite*" and a series of questions which the Judge posed.
11. On 18 August the Judge gave his reasons for verdict. He rejected the evidence of Mr Mass. He concluded that arising from the meetings Mr Mass held with the men from Kole village between 17 to 21 September he had "*incited, instigated or encouraged and solicited by supporting assisting and helping the commission of an unlawful assembly*



*first at Kole, second at Velit Bay and third, down below at the workshop and machine shade.” The Judge said he was satisfied Mr Mass had incited the offence of theft of “the oil mill machine and related equipment and other properties belonging to the management staff of Velit Bay.....”*

12. The Judge said he reached these conclusions given the definition of incite and an analysis of the evidence from the prosecution and defence in answering the five questions he had originally posed in his “*verdict*” of 14 August.

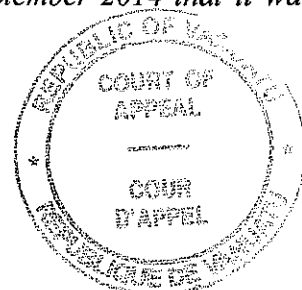
13. We now turn to our concerns about the verdict and reasons for verdict.

### **Claim of right**

14. Mr Mass’ fundamental defence was that he did not incite anyone to steal anything. He said he owned the coconut oil machine. He asked the men from Kole village and Mr Peter Terry to remove the machine from Velit Bay. He was therefore asserting, in terms of Section 122 of the Penal Code a “*claim of right made in good faith.*” The prosecution would have been aware of that claim given there was a discussion with Police at Velit Bay on 21 September about Mr Mass’ ownership of the machine. And so the prosecution would have been aware they needed to disprove Mr Mass’ claim of right made in good faith to that machinery.

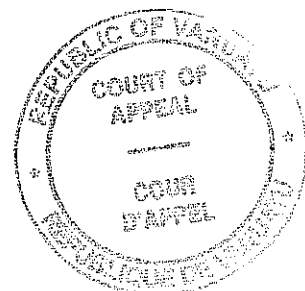
15. In the Judge’s identification of the elements to be proved for theft no mention is made of claim of right. However the Judge said:

*20.9 The real difficulty the defendant had and faced was that he was claiming ownership of the machine in fact only and he had not established a legal right to ownership and therefore his claim of ownership of the machine at the time was not made in good faith. The evidence of the defendant was that he had filed Civil Claim No.196 of 2014 against the WPCC for loss of business. That claim remains pending in this Court. The issue of ownership of the machine would have to be heard and decided in the course of that proceeding. The defendant however ran ahead of his case and used the Supreme Court Claim and deceived the people at the gate on 21<sup>st</sup> September 2014 that it was a*



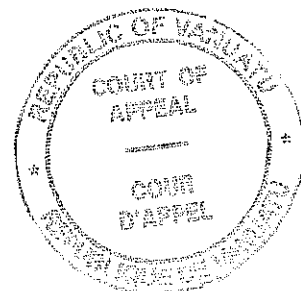
*Court Order authorizing him to have access to and to remove the machine. Clearly it was a “trick” and section 122(3) of the Act prohibits taking and obtaining physical control of the machine by trick or intimidation. The defendant had as it were, “put the card (sic) before the horse”.*

16. This passage is not a correct analysis of the law. Mr Mass did not have to prove absolute ownership. The prosecution had to prove Mr Mass did not have a good faith claim to ownership. The Judge’s approach reverses the onus of proof. In any event to establish a claim of right proof of ownership is not required, merely an assertion of ownership in good faith. The assertion of ownership may ultimately turn out to be wrong but the claim of right is still available as long as it is a good faith assertion.
17. The only objective documentary evidence produced at trial supported Mr Mass’ claim to ownership of the machinery. Mr Mass produced five documents. The first was the registration of the business “Raw for Beauty” in his name. The second permission for Raw for Beauty to carry on business as a foreign investor in Vanuatu including an “oil mill” and the approval by the Government to operate an oil mill. Exhibit D3 was a bill of lading from a Japanese Shipping Company addressed to “Raw for Beauty” for the importation to Vanuatu of an oil press (or mill) and associated equipment. Next is a receipt from a stevedoring company acknowledging receipt of a payment of VT194,839, which Mr Mass said was related to the importation of the oil press machine. Finally there is an application by Mr Mass and Raw for Beauty for a VAT exemption for the oil press machine dated December 2013. This was sufficient evidence, if accepted, to establish a good faith claim of right. There was no reason for the Court not to accept this evidence.
18. The prosecution tried to establish at trial that Mr Harvey at Velit Bay owned the machine. Mr Sean Griffin who worked for Mr Harvey gave evidence. At trial he tried to produce documentary evidence relating to the machine but the Judge ruled it inadmissible. And so there was no evidence to contradict Mr Mass’ documentary evidence.



19. Without proof that Mr Mass had no claim right in respect to the machine the prosecution on counts 1 and 2 could not succeed where they alleged theft of the machine. It is possible that both counts were intended by the prosecution to also allege inciting theft of items taken by the Kole men other than the machinery and associated items.
20. However there was no evidence that Mr Mass incited the Kole village men to take these other items. There is no evidence to establish that the theft and damage to the other items at Velit Bay was anything other than a spontaneous reaction. The only witness called by the prosecution who was definitely present at the meetings between Mr Mass and the Kole village men was Mr Solomon David. He said Mr Mass spoke about retrieving his machinery and trying to get the police to obtain a search warrant at Velit Bay. The other witness who were present at Velit Bay thought they were there to remove the oil machinery and related property.
21. The Judge relied upon inferences when he concluded that Mr Mass had incited the Kole men to steal items other than the machinery.
22. At paragraph 20.10 the Judge said:

*20.10 Further in his evidence the defendant said he feared for the security of the machine and said he knew a couple of the boys in the group of 29 men who had assembled and instructed them that if they went down to Velit Bay that they should make sure the machine was safe. That instruction amounted to an advice or counseling or soliciting using the alternate language of section 35 of the Act. By necessary inference from that instruction the defendant knew the 29 convicted defendants were taking a move and that move would extend to doing other things including the taking and carrying away properties other than just the machine and its related equipment. The evidence of Peter Terry is clear on this point when he said that as soon as the trucks stopped, the men did not just go for the machine but they became disorderly and they rampaged and ransacked the place and properties. Their actions caused the workers and security officers' reasonable fear that a breach of peace was being committed.*



23. The inference the Judge refers to was not open on the facts the Judge found. There was no proper basis on which he could have concluded from this evidence Mr Mass had incited theft of the other items.

24. The prosecution therefore did not prove beyond reasonable doubt Mr Mass incited theft in either Count 1 or 2. We also set aside the convictions on this basis.

### **Onus and Standard of Proof**

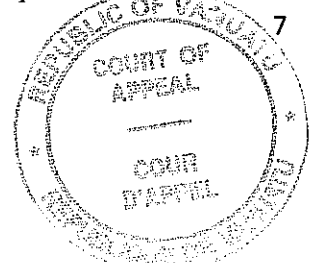
25. We consider the Judge wrongly drew inferences contrary to Mr Mass from evidence he had ruled inadmissible.

26. The Judge said:

Paragraph 21. 3 *“Further the defence objected strongly to the prosecution adducing evidence from co-accuseds Peter Servet, Skip Steven Ser, and Renny Samson and Thele Toto. And the Court upheld those objections. But had the Court allowed the prosecutions applications and heard evidence from these other persons, could it have been possible to discredit the defendant’s evidence as to the dates and timed of his going to Kole Village from 17-20<sup>th</sup> September 2014, and further that the purposes of his going there were more extensive than what the defendant maintained it to be? I am of the firm view that it would. That is the only reason why the defence objected strongly to calling those other persons as witness.”*

27. The Judge was not entitled to infer as he did that the evidence of witness whom he had ruled inadmissible would have discredited Mr Mass’ evidence or added to the prosecution case. Whatever the reasons for defence counsel objecting to the evidence of those witnesses the Judge had concluded their evidence was inadmissible.

28. No inference from the reasons for counsel’s objection or from the proposed evidence could properly be taken by the Judge. The Judge rejected Mr Mass’ evidence. His assessment and rejection of Mr Mass’ evidence was clearly influenced by the improper inference. If Mr



Mass' evidence had been accepted or if the Judge thought it might be true Mr Mass should have been acquitted. Mr Mass lost the opportunity by the Judge's approach. For this reason alone his convictions cannot be safe and the convictions on both charges must be quashed.

29. As we have noted in his 14 August verdict the Judge posed 5 question which he said he had considered in reaching his verdict. In his reasons of 18 August the Judge said he had considered the prosecution and defence evidence in answering these questions. The five questions all involve queries about Mr Mass' conduct about the time of the alleged offending.

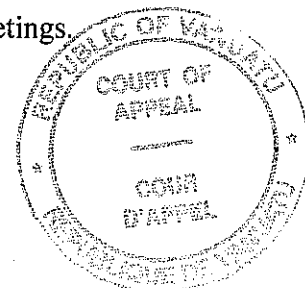
30. The overriding impression from the questions is that they required Mr Mass to prove why he had done certain things. For example question (C) asks: "*Why was the defendant (EM) present at the gate at Velit Bay (VB) on 21<sup>st</sup> September 2014? If the sole purpose of him being there was to oversee the removal of machinery, why did he ask Peter Terry to send one of his trucks to pick up the boys from Kole village prior to coming to VB?*"

31. Two points can be made. Mr Mass did not have to prove why he was present at the Velit Bay gate. The prosecution had to prove he was present either to incite an unlawful assembly or a theft or both. In any event evidence was given as to why Peter Terry sent one of the trucks to pick the Kole village boys. They were needed to lift the machinery on to the trucks given there was no forklift. There was no challenge to his evidence.

32. The Judge's further question at (c) was "*Alternatively why could EM not pursue his claim and obtain judgment before taking the actions he took on 21 September 2014?*"

This question puts the onus on Mr Mass to establish ownership of the machine. It was for the prosecution to establish Mr Mass did not own the machinery or have a good faith claim of right to the machine.

33. Other questions posed asked why Mr Mass went to the Kole village at certain times before the 21<sup>st</sup> September. Other than discussions about the machine there was no other evidence of what was discussed. The known facts could not have supported an inference (beyond reasonable doubt) that Mr Mass was inciting theft at the village meetings.





34. We are concerned therefore that some of the questions the Judge relied upon, reverses the onus of proof and in others inferences are drawn? against Mr Mass which are speculation rather than proof.

35. We acknowledge that in his reasons for verdict the Judge did say that the onus of proving the charges was on the prosecution. However we consider there is doubt that he has applied this fundamental rule to the evidence. We consider on these grounds the appeal should be allowed and the convictions quashed.

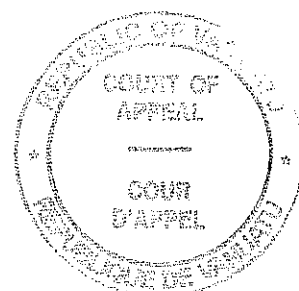
### **Result**

36. For the reasons given the convictions on charges 1 and 2 are quashed. This is not a case for the application of the proviso in rule 36(1) of the Western Pacific Court of Appeal Rules 1973. We have concluded that the errors by the Judge go to fundamental trial issues and that there was insufficient evidence to convict Mr Mass of both counts.

Further Mr Mass has already served the sentence of imprisonment imposed. No re-trial is ordered.

37. Mr Mass filed a number of documents using the same Criminal Appeal number as this appeal which related to another criminal case involving Mr Mass before the Supreme Court. We advised Mr Mass these matters should be raised before the Supreme Judge who is responsible for the conduct of this case.

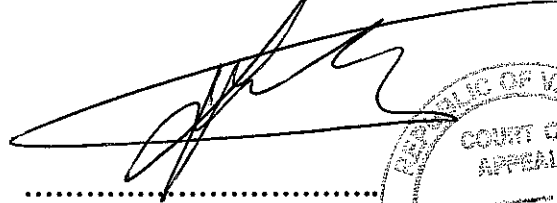
38. We mention one particular matter, bail. Mr Mass was tried and convicted of a serious crime. He successfully appealed. His conviction was quashed and a retrial ordered. Mr Mass was then released from prison. He should not have been. He was only able to be released from custody while awaiting trial for this serious charge if he successfully applied to the Supreme Court for an order for bail. When it was realized Mr Mass had been wrongly released from



prison a Supreme Court Judge issued a warrant for his imprisonment as Section 60 of the Criminal Procedure Act required. If Mr Mass now seeks bail he should apply to the Court, serve the Public Prosecutor and obtain a hearing date from the Supreme Court.

**DATED at Port Vila this 15<sup>th</sup> day of April, 2016.**

**BY THE COURT**



.....  
**HON. CHIEF JUSTICE**

**Vincent Lunabek**

