

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

Criminal Appeal Case No. 349 of 2016

BETWEEN: SIMON PIERRE RAPOUEL
Appellant

AND: PUBLIC PROSECUTOR
Respondent

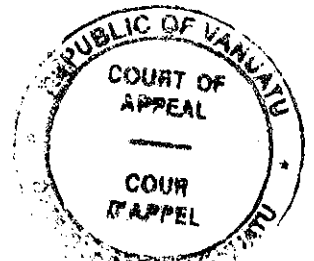
Coram: *Hon. Chief Justice Vincent Lunabek*
Hon. Justice John von Doussa
Hon. Justice Ronald Young
Hon. Justice Oliver Saksak
Hon. Justice Dudley Aru
Hon. Justice Paul Geoghegan
Hon. Justice Mary Sey
Hon. Justice David Chetwynd

Counsel: *Mr Saling Stephens for the Appellant*
Mr Ken Massing (PPO) for the Respondent

Date of Hearing: *Wednesday 6th April 2016 at 10:00 am*
Date of Judgment: *Friday 15th April 2016 at 4:00 pm*

JUDGMENT

1. This appeal is brought by leave pursuant to section 30 (4) of the Judicial Services and Court's Act [Cap. 270] on a question of law. The question concerns the interpretation of the



Maintenance of Family Act [Cap. 42] (the MFA) and the application of that Act in the circumstances of this case. The MFA comprises only three sections. In full the Act reads:

"1. Failure to maintain family

Any –

- a. man who for a period exceeding 1 month fails to make adequate provision for the maintenance of the woman to whom he is legally married or his legitimate children being under the age of 18 years; or*
- b. mother who for a period exceeding 1 month deserts her children being under the age of 18 years;*

shall be guilty of an offence and on conviction thereof shall be liable to a fine not exceeding VT 20,000 or to a period of imprisonment not exceeding 3 months or to both such fine and imprisonment:

Provided that no offence shall be committed under paragraph (a) by a person who is rendered financially incapable of making such provision by reason of:

- (i) illness or injury;*
- (ii) incarceration in prison; or*
- (iii) any other circumstances beyond his control.*

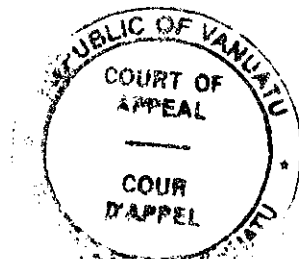
2. Order to maintain family

Where a man is convicted under the provisions of section 1 the court may in such manner as it may think fit order him to make adequate provision for his wife or children being under the age of 18 years.

3. Failure to comply with order

Any person who fails to comply with the provisions of an order made under section 2 shall be guilty of an offence and on conviction thereof shall be liable to a fine not exceeding VT 50,000 or to a term of imprisonment not exceeding 6 months or to both such fine and imprisonment."

2. The Appellant was charged in the Magistrate's Court and convicted under s. 1 with the failure to make adequate provision for the maintenance of his wife and three children under the age of 18 years. The Magistrate found that the Appellant had failed to make adequate provision for his wife and children for the period of four years and four months. A



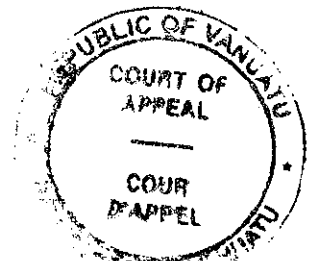
conviction was entered and a fine of Vt 5,000 was imposed. Under section 2 the Magistrate's Court made ancillary orders as follows:

- “2. *The Defendant shall be liable to outstanding payments of Vt 105,000 dating back from 2011 and 2012 family maintenance to the Complainant and children.*
3. *The Defendant shall be liable to payment of the sum of Vt 105,000 for 2013 and 2014 family maintenance to the Complainant and children.*
4. *The Defendant shall continue to pay an amount of Vt 15,000 fortnightly for the 3 children until they reached 18 years and Vt 2,000 fortnightly for the complainant.*
5. *Orders 2 & 3 must be paid in installment within 12 months starting as of today.*
6. *The orders are effective on the date it is issued.*
7. *The Cost of this proceeding is reserved.”*

3. An appeal to the Supreme Court against the ancillary orders made under section 2 was dismissed. The Appellant contends that the Supreme Court misconstrued the MFA, and misapplied it to the facts of his case.
4. In her evidence in the Magistrate's Court the Appellant's wife said that she had separated from the Appellant in 2010. She said that after the separation the Appellant walked away with the cash money of Vt 280,000 being reserves from their micro business and in consequence she had a difficulty sustaining her childrens' needs and in particular tuition fees.

The Magistrate's Court noted:

“In 2012, the Complainant brought proceeding against the Defendant for violence. The Court has issued orders for non-violence, non-molestation and exclusive occupation with orders to make payments for failure to maintain family. Simon Pierre Rapouel, the defendant has defaulted in payment of maintenance, so the applicant filed application for enforcement of Family Maintenance Order with outstanding payments of Vt 126,000 dating from September 2011 until March 2012 but with no success.”



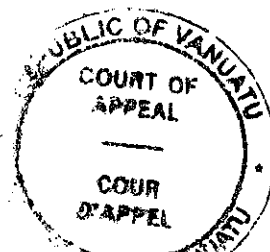
5. The papers before the Supreme Court on appeal, and before this Court, give no further details of the proceedings which occurred in 2012 or the orders then made. It is apparent from the reasons for judgment in the Supreme Court that it was assumed that the reference in the Magistrate's Court judgment to "*Family Maintenance Act*" meant that there had been a previous order made against the Appellant under s. 2 of the FMA. Thus, the Appellant argued that if he were to be charged with an offence under the FMA, he should have been charged under section 3 for failure to comply with an existing order made under section 2. He contended that he could not be charged under section 1 with failing to make adequate provision where there was an existing order under section 2. He further argued that "*.....the sentence was manifestly excessive*" and that the Magistrate "*..... has no jurisdiction to make an order for restitution of unpaid (maintenance) for 2011 to 2014 as he was already sentenced to a fine of Vt 5,000.*"

6. In dismissing the appeal the Supreme Court in its reasons for judgment said:

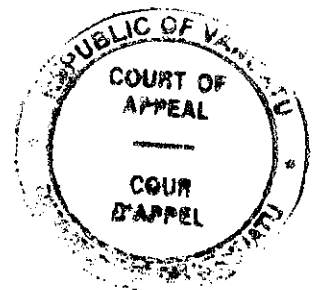
"7. *It is clear that Section 1 is the offence-creating provision and section 2 is triggered "where a man is convicted under the provisions of Section 1". Subject to that condition precedent Section 2 gives the court a wide discretion to order the convicted man "...to make adequate provision for his wife and children under the age of 18 years". Nowhere in the Act does it say that a pre-existing family maintenance order prevents an order being made under section 2 or for that matter, a prosecution under Section 1.*

8. *I accept that a prosecution under Section 3 would be the normal response where there has been proven non-compliance with the terms of an existing family maintenance order, but, where enforcement is a significant consideration then a prosecution under Section 1 is preferable.*

10. *The appellant's submission that an order under Section 2 cannot include an order for the payment of arrears of family maintenance already ordered but unpaid, ignores the very real possibility that the beneficiary(s) of the unpaid maintenance order may have incurred a liability or borrowed money in order to acquire "adequate provisions" as a direct result of the delinquent husband's breach of the family maintenance order."*



7. The questions of law initially proposed by the Appellant for the consideration of this Court were difficult to follow but as best we could understand them seem to ask as the principal question whether the Magistrate Court was empowered under the FMA to make the ancillary orders which it did when the Appellant had not been charged and convicted of an offence under section 3 (for failing to comply with an existing order under s. 2). In support of this question the Appellant contended that both the Magistrate's Court and the Supreme Court had misconstrued section 3 by allowing a prosecution under section 1 when there was a subsisting order for family maintenance under section 2.
8. As an ancillary question the Court of Appeal was asked whether the FMA permitted the Magistrate's Court, and the Supreme Court on appeal, to order costs against the Appellant.
9. The principal question of law as proposed by the Appellant, like the proceedings in the Supreme Court, assumes that there was a subsisting order for family maintenance previously made under section 2. However, nowhere in the material before the Supreme Court or before this Court is there anything to establish that the Appellant had earlier been charged or convicted of an offence under the FMA. In particular there is no evidence that an order had previously been made under s.2. The description in the Magistrate's Court judgment of the proceedings in 2012 is suggestive of proceedings against the Appellant under the Family Protection Act 2008. It is that Act, not the FMA, which makes provision for orders for non-violence, non-molestation and occupation. There is also a power under the Family Protection Act to order compensation. The so-called "*Family Maintenance Order*" apparently made in 2012 could well have been a compensation order for the money the wife says the Appellant took from their reserves in the micro business. If that is so, it would explain why the wife's endeavor to enforce the order for monetary payment failed as the Family Protection Act does



not provide a procedure for recovering a monetary order. Whether this is the correct explanation of the reference to “*Family Maintenance Order*” is not clear, but what is clear is the absence of evidence of any earlier order under s. 2 of the FMA.

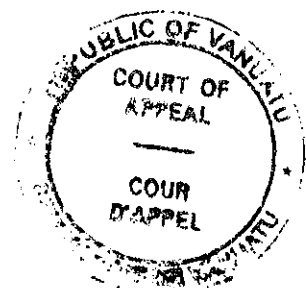
10. After discussion with counsel in this Court about the evidential material which had been before the lower Courts, it was accepted that there was no prior order for family maintenance under s. 2. The question of law to this Court was reformulated to pose the real question which is raised by the Appellant’s challenge to the ancillary orders for payment in respect of the years 2011-2014. The reformulated question of law is:

“Does section 2 of the FMA empower the Magistrate’s Court to order a monetary payment to compensate for a failure to make adequate provision for a wife or children prior to the date of conviction for an offence contrary to s.1?”

11. If the answer to that question is “*yes*” then the amount ordered to be paid by the Magistrate’s Court involves the evaluation of matters of fact established by the evidence before that Court. The outcome of that evaluation is a conclusion of fact that cannot be reviewed on appeal to this Court. The decision of the Supreme Court on appeal from the Magistrate’s Court is final on questions of fact: s. 30 (4) of the Judicial Services and Court’s Act.

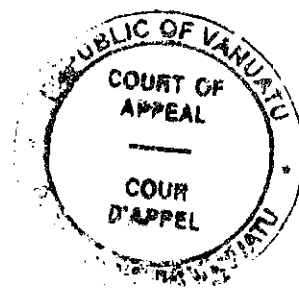
12. In our opinion, the answer to the question of law is plainly “*yes*”. An order made under s. 2 after conviction after s. 1 may include provision that is to compensate for inadequate provision in the past.

13. The prosecution for an offence under s. 1 will be based on, and established by, evidence of inadequate provision for the wife or children at and before the time when the complaint is



laid. The purpose of the Act is to rectify that situation. If the Court was not permitted under s. 2 to order payment to make good that inadequate provision the purpose of the Act would to that extent be frustrated.

14. Section 2, in empowering the Court "*in such manner as it thinks fit*" to order the convicted person to make adequate provision for his wife or children gives the Court a very wide discretion. The language of this section gives no indication that in exercising its discretionary power, past deprivations suffered by the wife or children are to be disregarded.
15. The Appellant's contention that an order under s. 2 can only provide for future needs after the date of conviction would be an invitation to a defendant charged under section 1 to delay the trial of the charge for as long as possible, perhaps for example by absconding after being served with the complaint. Moreover, as the Supreme Court noted, the Appellants construction of s.2 would defeat the very real probability that the wife or children may have incurred a liability or borrowed money in order to acquire "*adequate provision*" in the period before conviction. For example, arrears of school fees may have occurred. Unless s. 2 empowers the making of an order that includes compensation for the past, this and similar liabilities incurred by the wife or children could not be addressed.
16. This Court's affirmative answer to the question of law posed upholds the construction of section 2 of the FMA applied by the Supreme Court. As we have pointed out, it is not within the power of this Court on appeal from the Supreme Court to review the quantum of the ancillary orders made in the Magistrate's Court, and upheld by the Supreme Court.



17. The ancillary question posed concerning the power of the Court to order costs against a person convicted under s. 1 is answered by s. 98 of the Criminal Procedure Code [Cap. 136] which provides:

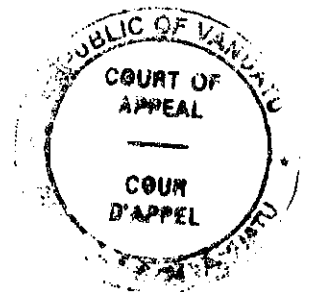
"COSTS AGAINST ACCUSED

98. (1) It shall be lawful for the judicial officer to order any person convicted by him of an offence to pay to the public or private prosecutor, as the case may be, such costs as the judicial officer shall consider reasonable in addition to any other penalty imposed.

(2) The costs awarded under subsection (1) by a magistrate shall not exceed VT 100,000."

18. Counsel for the Appellant argues that costs should not be awarded against a convicted person. Usually that is the situation, and reflects a rule of practice, not a rule of law.

19. In the present case costs have not yet been awarded against the Appellant in the Magistrate's Court, so to that extent the question posed to the Court is theoretical. Costs were awarded against the Appellant in the Supreme Court. Before the Supreme Court the appeal was not against conviction and sentence. It was an appeal against the ancillary orders which are orders in the nature of a civil remedy requiring payment of money to discharge a past and future liability. The practice which the Appellant seeks to invoke is not appropriate to proceedings concerning a monetary order of that kind. In our opinion the Supreme Court plainly had jurisdiction to order costs against the Appellant on the dismissal of his appeal. Similarly the Court of Appeal has jurisdiction to award costs against him in respect of the present appeal.

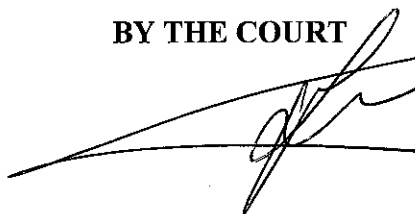


20. To the question, "*Does s. 2 of the FMA empower the Magistrate's Court to order a monetary payment to compensate for a failure to make adequate provision for a wife or child prior to the date of conviction for an offence contrary to s. 1?*" The Court answers "yes".

21. As the Appellant has failed to make good the construction of s. 2 for which he contended, the Appellant must pay the Respondent the costs of this appeal on the standard basis. The order against him for the payment of costs in the Supreme Court remains undisturbed by the Order of this Court.

DATED at Port Vila this Friday 15th day of April, 2016

BY THE COURT



Vincent LUNABEK
Chief Justice

