

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

Criminal Appeal
Case No. 20/100 CoA/CRMA

BETWEEN: Xu Fengxi
Appellant

AND: Public Prosecutor
Respondent

Date of Hearing: 4 May 2020

Before: Justice J. von Doussa
Justice R. Asher
Justice O. Saksak
Justice D. Aru
Justice G.A. Andrée Wiltens
Justice V.M. Trief

Counsel: Mr J. Glissan QC with Mr M. Hurley for the Appellant
Mr T. Karae for the Respondent

Decision: 15 May 2020

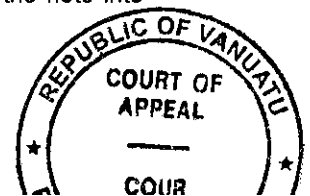
JUDGMENT

A. Introduction

1. Mr Xu was convicted, after trial, of one charge of knowingly uttering counterfeit currency (a VT10,000 bank note), and one charge of knowingly attempting to utter counterfeit currency (a VT5,000 bank note). The bank notes were handed by Mr Xu to a sales assistant in order to purchase items at a local retail outlet.
2. Mr Xu appeals both convictions.

B. Background Facts

3. The first alleged offence occurred on 26 November 2018; the second alleged offence occurred on the following day. Both instances occurred at the Computer World store, where Mr Xu was purchasing personal items. He was apparently a frequent shopper at that establishment and known to the staff.
4. On 26 November 2018, Mr Xu was purchasing an external hard drive. Mr Xu gave the shop assistant a VT10,000 banknote as payment for the item. She put the note into



her cash drawer and gave Mr Xu the appropriate change. He then left with his purchase.

5. As part of the usual Computer World banking procedure, the VT10,000 note was banked with the Bank of South Pacific ("BSP") the next day. BSP subsequently informed Computer World that the bank note was a fake. It was returned to Computer World, and later seized by the police as an exhibit.
6. On 27 November 2018, Mr Xu was purchasing, among other items, a Sports watch. As part of his payment, Mr Xu handed over a VT 5,000 note to the sales assistant. She rejected the bank note, and after checking with other members of staff returned it to Mr Xu. Mr Xu protested there was nothing wrong with the note, but in any event paid for his purchases using other cash from his wallet before leaving the store with his purchases and the challenged VT5,000 bank note. The questioned note was later recovered from Mr Xu by the police – it was voluntarily produced.
7. The two challenged bank notes were sent for examination and comparison with similar value genuine Vanuatu bank notes.
8. Mr Seri, of the Vanuatu Reserve Bank, stated that the two challenged notes had passed all the security tests as genuine Vanuatu bank notes, but stated they had been tampered with.
9. Dr Subramanian, an expert witness, presented evidence to the Court in the form of a 3-page report. Significantly, Dr Subramanian reported both similarities and differences with the comparison genuine currency used. Firstly, the questioned bank notes resembled genuine bank notes, having all the security features consistent with genuine Vanuatu bank notes. Secondly, the questioned notes were marginally smaller than the comparison genuine notes, and each had been laminated with an 8-micron thick polyethylene film on both sides, giving them a glossier appearance.
10. Dr Subramanian also produced a far more extensive report, which this Court had the opportunity to consider, albeit that it is unclear whether the primary Judge was similarly so advantaged. There is no mention in the judgment of the more detailed report, and the main conclusions are taken from the shorter document. Given that the conclusions do not differ, we are content to deal only with the 3-page report.
11. The prosecution allegation was that Mr Xu had knowingly uttered the VT10,000 bank note and attempted to utter the VT5,000 bank note to two sales assistants at Computer World, contrary to section 142(c) of the Penal Code.
12. The physical state of the two bank notes was submitted to support the prosecution case in terms of the obvious nature of the differences between the challenged notes and genuine currency. It was further contended that the circumstantial evidence



surrounding Mr Xu's conduct in the shop, on the successive days, and his allegedly inconsistent explanations regarding how he came by those challenged bank notes were all factors from which it could be inferred that Mr Xu had the necessary *mens rea*. His position as an accounting officer for his employers and his regular dealings with cash were said to be other factors the Court could use to draw such inference.

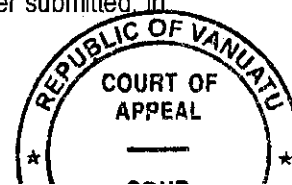
13. Mr Xu was interviewed by the police and maintained the bank notes were genuine. He stated the notes had been obtained innocently, and that he had no reason to suspect their provenance in any way.

C. The Decision

14. The focus at trial centred on whether it could be established that Mr Xu had knowledge of the true nature of the bank notes as counterfeit on the two occasions he exchanged the notes for his purchases at Computer World.
15. The primary Judge accepted that both bank notes used by Mr Xu were counterfeits. He did so, relying on the accepted evidence of Dr Subramanian and Mr Seri. The evidence of the sales assistants, and their descriptions of the bank notes, was also taken into account. The primary Judge also reverted to the provisions of section 139 of the Penal Code, which defines forgery, to assist in making that determination.
16. The primary Judge found that the two bank notes were poor quality forgeries, relying on the glossiness of the notes as observed by the second sales assistant, the difference in size, and the poor quality of the film coatings around the edges of the notes. He accepted the evidence of Mr Xu's alleged furtive conduct at the time of his handing over the second bank note as being indicative of his guilty knowledge. He accepted that Mr Xu had at first taken out a VT 10,000 bank note from his wallet, before putting it back, and looking at the sales assistant before selecting the VT 5,000 note that was used as part-payment for the second purchase.
17. The primary Judge set out an extensive list of factors, including the matters referred to above, which he relied upon to draw the adverse inference that Mr Xu knew, at the relevant times, that both bank notes were counterfeit. Accordingly, the primary Judge convicted Mr Xu on both charges.

D. The Appeal

18. The appeal was advanced on two main grounds, and other lesser contentions. Firstly, it was submitted that the bank notes had not been proved to be counterfeit. Secondly, the findings that Mr Xu had knowingly uttered and knowingly attempted to utter were challenged as being unsupported by the evidence. Thirdly it was further submitted, in



all the circumstances of this case and after traversing all the evidence, that the convictions were unsafe and unsatisfactory.

19. Mr Glissan did not place emphasis on the allegation of counsel incompetence save that it was one of the matters which he submitted supported the overall contention that the trial had miscarried. A secondary aspect of that submission was the additional evidence that could/should have been led on the part of the defence.
20. Mr Karae resisted all those propositions and submitted that there was compelling evidence of the notes being counterfeit and Mr Xu's knowledge. He sought to uphold both convictions.

E. Discussion

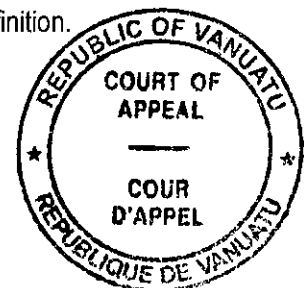
21. Section 142 of the Penal Code, so far as it is pertinent to this discussion, reads as follows:

"142. Counterfeit currency

No person shall –

- (a) counterfeit or debase any current coin or bank note;
- (b)
- (c) knowingly utter any such counterfeit or debased coin or bank note;..."

22. It is trite that the Penal Code does not define "counterfeit". The prosecution case dealt solely with the alleged counterfeit nature of the currency; there was no allegation of debased currency.
23. Both Mr Glissan and Mr Karae submitted that the common law position was reflected by the definition of counterfeit currency set out in section 3 of the Crimes (Currency) Act (1981) (Commonwealth of Australia) as being:
 - (a) any article, not being a genuine coin or genuine paper money, that resembles, or is apparently intended to resemble, or pass for, a genuine coin or genuine paper money; or
 - (b) any article, being a genuine coin or genuine paper money, that has been altered in a material respect and in such manner as to conceal, or to be apparently intended to conceal, the alteration;and includes any such article whether it is or is not in a fit state to be uttered and whether the process of manufacture or alteration is or is not complete.
24. We accept that definition as applicable to the position in Vanuatu.
25. In our view, the two bank notes do not fit within either limb of that definition.



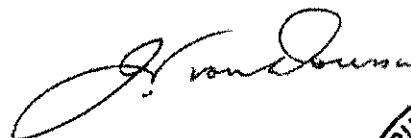
26. Firstly, we consider the evidence to be strongly indicative of the genuineness of both the notes, especially taking into account that all the security features inherent in a genuine note are present in the two notes used by Mr Xu.
27. Secondly, adhering an 8-micron thick polyethylene film to both sides of each note cannot be considered to alter either note in a material respect.
28. Similarly, the reducing in size of the VT5,000 bank note by 1mm and the VT 10,000 bank note by 0.5 mm respectively also cannot be considered as having altered either note in a material respect.
29. Further, the alterations identified do not appear to have been carried out in such a manner as to conceal or apparently be intended to conceal the alteration.
30. The over-arching criminality of the offending charged involves deliberate dishonesty. What was done to the two notes used by Mr Xu, and we do not speculate as to why those steps were taken or by whom, does not in our view indicate any obvious dishonest intent.
31. Given these conclusions, which are determinative of this appeal, we do not need to go on to consider and evaluate the circumstantial evidence relied on by the primary Judge to see if the inferences drawn were in fact available and logical. Nor do we need to address the other grounds of appeal advanced.

F. Result

32. The appeal is allowed.
33. Mr Xu's convictions for knowingly uttering counterfeit currency and knowingly attempting to utter counterfeit currency are quashed and set aside.

Dated at Port Vila this 15th day of May 2020

BY THE COURT



Justice J. von Doussa

