IN THE SENIOR MAGISTRATE'S COURT OF
THE REPUBLIC OF VANUATU
HELD AT PORT-VILA

CRIMINAL CASE No. 109 of 1999

(*Criminal Jurisdiction*)

# PUBLIC PROSECUTOR -v- HANNINGTON ALATOA

**Coram:** Bruce Kalotiti Kalotrip
**Appearance:** Mr. Willie Daniel for Public Prosecutor
Mr. Sampson Ngwele for the Defendant

**Charge:**
The Defendant, Hannington Alatoa was charged with one (1) count of Misappropriation contrary to section 125 (b) of Penal Code Act [CAP. 135].

**Plea:**
The Defendant appeared before the court on the 19th August 1999. He pleaded Not Guilty to the charge against him and the matter was set for trial.

**Trial:**
The trial commenced on 07th September 1999 and at the conclusion of the Prosecution's case, the Defence made a Submission of "No Case" to answer. On 24th September 1999 the Court finds there is a *Prima facie* case made out against the Defendant to answer the charge of Misappropriation.

On the 13th September 1999, the Defence was called to present his case. However, this Court is to be reminded that it is the basic principle of our law that every person is deemed to be innocent unless and until his guilt has been established beyond reasonable doubt. He comes to this Court with the presumption of innocence in his favour. We must bear in mind that at all material times the onus of proof rests upon the Prosecution. However in this present case the Prosecution has the duty to satisfy this Court beyond reasonable doubt that the Defendant did misappropriate an amount of monies in the sum of 100 000 Vatu being the balance owing for the purchase of a vehicle on auction in Tanna on 02nd April 1998.

**Prosecution Case**
The Prosecution provides various definitions of Misappropriation as follows:
1- Section 123 of the Penal Code Act [CAP. 135] states:

"A person commits misappropriation of property who destroys, wastes, or converts any property capable of being taken which has been entrusted to him for custody, return, accounting or any particular manner of dealing [not being a loan of money or of monies for consumption]."

2- Black's Law Dictionary (6th Edn.)
"The unauthorised, improper or unlawful use of funds or other property for purpose other than that for which intended."

3- Oxford Dictionary (4th Edn)
"Take somebody' else's money wrongly, especially for one's own use."

The Prosecution argues that the above definition is sufficient on its face whilst it is proper to say that there is no mention of direct evidence where the Defendant was physically seen wasting, destroying, or converting certain sums of monies to his own private use. The Prosecution maintains that the Defendant failed to retire the original sum of 381 000 Vatu (see exhibit 7) at the end of day with the National Bank of Vanuatu. His conduct amounts to a short fall of 100 000 Vatu (see exhibit 2).
Mr. Willie Daniel submits that still at the closing of the trial their evidence outweighed the Defence case. He said the Prosecution has in fact proved its case beyond reasonable doubt and the Defendant must be convicted on the alleged charge of Misappropriation.
However the chronology of the event leading towards the lying of a criminal charge constitutes the basis of the Prosecution's evidence at the closing of its case on the 07th September 1999. The Prosecution called five (5) witnesses including the two main witnesses namely: Peter Kawas and Tom Noam. They both claimed that the Defendant personally received from them 381 000 Vatu being the purchased price of a certain Toyota Hi-Lux auctioned by the Development Bank of Vanuatu (DBV) on 02nd April 1998. A brief historical background shows that the above vehicle was the subject of a bank loan to the former Tanna MP, a certain Kissel Lop whose account was classified as doubtful debt. The Bank needed to recover the loss sustained from such bad account. The only possibility for recovery was the foreclosure of any security held against the loan. Until the Toyota Hi-Lux was fully repaid by the customer, the motor vehicle would still be the property of the DBV. Leading to the facts of the case the former MP of Tanna Island did not honour his full commitment with the DBV. The Bank was then forced to activate any security held against the loan. Thus the Bank proceeded with the sale of the motor vehicle and the proceeds of which should then be credited towards the current account of the above customer. The evidence throughout the trial shows that the Defendant went down to Tanna in his capacity as Manager Credit Services on 01st April 1998 and the auction was then conducted the following day being 02nd April 1998 at Isangel station. Peter Kawas was the highest bidder of the vehicle valued at 381 000 Vatu. Peter Kawas must then show to the satisfaction of the DBV that he had the required money to tender before he took possession of the vehicle.
The Prosecution still maintained that Peter Kawas and Tom Noam testimonies were consistent that the Defendant was tendered a full cash payment of 381 000 Vatu in the Court House of Tanna. The money was witnessed by a certain Peter Mawa when the Defendant proceeded with the counting of the aforesaid sum of 381 000 Vatu. Every witnesses of both parties confirmed the money was counted twice by the Defendant before a receipt was issued to Peter Kawas (see exhibit 7). The Prosecution still maintained from the evidence adduced that the Defendant

**confirmed in his own word the actual DBV receipt was issued after the money was counted twice.**
**Mr. Daniel says that although the Defendant claimed that his mind was fixed at the sum of 381 000 Vatu when counting the money that afternoon in the Court House and that it is possible the Defendant may have made a mistake. He argues that such assertion might have been hard to believe. The Defendant himself said he had a piece of paper with him to record all the monies he was counting. The Prosecution submits that even the Defendant own words as recorded in bislama in these terms:**

**".....Tufala igivim smol smol ikam mi stap countem.....mo mi stap raetem down long paper....."**

**The Prosecution submits that the Defendant's argument is unjustified and not tenuous. How would such huge amount of money escape his attention when he was the only person doing the counting. Mr. Daniel confirms three witnesses who were physically present during the counting at that time could have told him that there was a mistake then. Even if the Defendant believed there was a genuine error his friend Jack Mawa would have pointed the mistake straight away but no one made mention of the possible discrepancy in the counting of the monies. He still maintained that both Peter Kawas and Tom Noam saw him counting the money twice before issuing the DBV receipt. The first Prosecution's witness who was himself Acting Manager Credit and immediate supervisor of the Defendant at that time testified that a few Hundred Vatu are likely to be miscounted but not with such huge amount of 100 000 Vatu cash. It would not be possible that the Defendant made a material error on the 02nd April 1998 in the CourtHouse of Tanna.**
**The Prosecution also maintains that the Defendant received a total of 381 000 Vatu being the purchase price of the vehicle on auction and not something else. It was also from the corroborated answers of the parties witnesses that during the counting stage, Johnson Simil rang the Defendant and told him that should the money not enough he would be paying the balance in settlement of the agreed price of 381 000 Vatu in Port-Vila. Mr. Daniel submits that the Defendant may have seized the opportunity of his telephone conversation with Mr. Simil which resulted in the shortfall of the whereabouts of 100 000 Vatu. He said the Defendant would be the only person to clarify the unexplained mystery of such discrepancy and no one else. The Prosecution says there is no prove to discredit its case that the Defendant only received 281 000 Vatu being a clear difference of the original sum of 381 000 Vatu (see exhibit 7) with no reasonable explanation as a consequence of the aforesaid material error.**
**Again the Prosecution makes reference to similar cases decided previously in this jurisdiction. It was held that how one misuse certain sum of money is irrelevant. The only relevance in this case is to show that the person holding the money in question never retire the aforesaid money or if he did the balance at the end of day is incorrect (see *Public Prosecutor-v- Daniel Nato* [1988] SMC Unreported Case No.304/88). Mr. Daniel submits that as long as the balance due was not made up by the Defendant the offence of Misappropriation is committed (see *Tatamat Seth-v-Public Prosecutor* [1988] CA Unreported Case No.5/88; *Public Prosecutor- v- Keith***

*Mala*; *Public Prosecutor-v- Clerence Marae*). The Prosecution still argues that the intention is not an element (*Mens Rea*) required under section 123 of the Penal Code in response to Defence "No Case" submission. He submits that their evidence in this trial is consistent, corroborated and has more weight than the Defence case.

Defence Case

Mr. Sampson Ngwele in reply submits that although Peter Kawas won the bid he was unable to effect the payment straight away because he did not carry enough cash. He was bidding for his brother in law, Johnson Simil who was working in Vila. Peter Kawas was assisted by his wantok, Tom Noam to look for some more funds in order to satisfy the required amount of 381 000 Vatu won as the highest bid in the auction. It was reported that four people were present at the Court House in Tanna during the counting namely: the vendor by its employee, the Defendant, his friend Peter Mawa, the purchaser, Peter Kawas and his friend, Tom Noam.

The Defence submits that the purchaser looked on as his friend took out the cash in drips and drabs and handed them over to the vendor being the Defendant who proceeded with the counting. Mr. Ngwele said there was no clear evidence as to the identity of the individual notes counted for example: lots of 5 000 Vatu notes, 1 000 Vatu notes, 500 Vatu notes and the 200 Vatu notes and their serial numbers. He also says that Prosecution failed to substantiate the amount tendered but simply relied on the fact that the cash money was counted twice and the DBV receipt issued by the Defendant which indicated an amount of 381 000 Vatu. It was when the Defendant went to bank his cash money at the NBV branch in Tanna after 5 to 10 minutes walking distance from the Court House that the discrepancy was reported to him by the bank teller. The shortfall of 100 000 Vatu was reported to him during the second count by the teller. The defendant maintained throughout that the shortfall was a product of a material error. Mr. Ngwele said that whilst counting the Defendant was at all material times had his mind fixed on the winning bid of 381 000 Vatu whereas the purchaser, Peter Kawas made a statement to the Police on 05th May 1998 in these terms:

"….. Mi bin givim full cash amount ia 381 000 Vatu."

The Defence maintains that both accounts by the vendor and the purchaser were solely based on hearsay. Mr. Ngwele says that the Prosecution who had the onus of proving the matter failed to prove the existence and the non-existence of the money that circulated in the hands of the parties concerned at that time except to rely on the DBV receipts and the NBV receipts. He also pointed out the fact that the money was counted twice amidst from a disturbance from a phone call to which the Defendant had to leave everything and attend to, and the quantity of a shortfall were also strong factors relied throughout the trial by the Prosecution.

The Defence submits that such discrepancy letting to 3 months suspension of the Defendant from his official duty on 09th April 1998, reducing his salary and other staff benefits including VNPF contributions by 50% and terminating his employment on 08th July 1998 and forfeiting his terminal benefits including severance allowance and/or leave entitlements and/or appropriate notice payment

provided under relevant provisions of statutes for example: the DBV Act [CAP.169]; the Employment Act [CAP.160]; VNPF Act [CAP.186] and labour related policies.

Mr. Ngwele points out three issues raised from the charge namely:

1- the amount of 100 000 Vatu,
2- the name Peter Kawas hereinafter called the complainant, and
3- The charge itself of Misappropriation of property.

The Defence argues that from the framing of the charge itself both the DBV and Peter Kawas were implicated as owners of the cash tendered for the vehicle when the Prosecution has duty to ensure that the said charge must properly be drafted without ambiguity. He says the sale of the vehicle took place on 02nd April 1998 and Peter Kawas took possession of the aforesaid vehicle the same day. Because of the shortfall in cash of 100 000 Vatu from the Bank's auction sales on Tanna directly handled by the Defendant he was then suspended on 09th April 1998 before the termination letter was handed over to him on 08th July 1998. He again says the particulars of the charge fail to acknowledge that the same property (381 000 Vatu or 281 000 Vatu) has changed ownership before reaching the NBV when the discrepancy was discovered and recorded. It was only then that it became an issue. Thus, it is proper to say that the new owner of the property was the DBV when the DBV receipt was issued and keys of the vehicle handed over to the buyer, Peter Kawas. The real issued now as Mr. Ngwele stated is not Peter Kawas but the DBV and its employee, the Defendant.

The Defence identifies three issues for their submission as follows:

1-Whether the discrepancy in the Development Bank of Vanuatu is an issue.

Mr. Ngwele said the discrepancy in the DBV/NBV receipts seems to be the real issue. The DBV receipt for 381 000Vatu given to Peter Kawas was issued by the Defendant certifying the completion of sale of the vehicle to Peter Kawas on 02nd April 1998 whereas the NBV receipt of 281 000 Vatu certifying the deposit amount made to the DBV account with the NBV on 02nd April 1998. He went on to say the act or omission surrounding that discrepancy is purely an internal matter for the DBV and its employee which has already been dealt with by operation of the law (see *Stevenson, Jordan & Harrison v MacDonald and Evans* 1T.L.R 101). He stated that the suspension letter of 09th April 1998 was due to the shortfall in cash of 100 000 Vatu from the Bank's auction sales on Tanna. He states that the Defendant has received double hit in this case. He was already punished administratively by operation of law from his employer on 09th April 1998 and thereafter 08th July 1998. His case was treated as serious misconduct under sections 50 and 55 (2) of the Employment Act [CAP. 160]. Mr. Ngwele said the Defendant was then dismissed from employment and had 178 605 Vatu deducted from his salaries plus other terminal benefits in excess of 100 000 Vatu and at that stage the Bank's books should have been rectified and the issue put to rest after all. The action now initiated on a criminal charge he argues was clearly in breach of Article 5 (2) (h) of the National Constitution with respect to individual rights and the protection of law.

**2-Whether Peter Kawas was the issue:**

**The Defence states whether Peter is the proper complainant in this case. He makes reference of Peter Kawas statement to the Police on 05th May 1998 reproduced in these terms:**

**"Mi Peter Kawas mi blong Tanna nomo, mi stap submitim statement ia blong 'clarifiem confusion'we istap long tender blong wan Hilux Registration T478 we mi nao mi bin winim tender....."**

**He makes it clear that on the face of the statement itself Peter Kawas was neither expressing dissatisfaction nor complaining of any discrepancy with the cash money tendered to the DBV. In fact he was requested by the DBV to produce a statement in support of a complaint initiated by Bank when a complaint was filed to the police to proceed with their formal investigation which then based on sufficient grounds proceeded to the laying of a criminal charge pursuant to sections 34 and 35 of the CPC [CAP. 136]. To substantiate the statement the Defence argues the fact that the statement by Peter Kawas was a clarification not a complaint as such and that he made it 12 days after Rex Yapen's statement on 24th April 1998. Peter Kawas' statement was prepared by Corporal Judah Silas, a police officer, whose handwriting and signature appears on the witness statement by Tom Noam on 18th May 1998. Mr. Ngwele submits that if Peter Kawas statement is treated as a complaint then it is invalid thus in contravention of section 35 (2) of the CPC in terms of procedural requirement that a complaint must be made under oath and if made orally must be reduced in writing and signed by both complainant and the prosecutor. The step taken by the prosecution is also in breach of Article 5 (2) (a) of the Constitution provides a person charged with an offence to have a fair hearing, which also means adherence to procedural requirements under law.**

**3-Whether Misappropriation is the issue:**

**The elements of misappropriation of property as defined by section 123 of the PC [CAP.135] must show where two parties are involved as A and B and one of the parties for example B causes loss to the A when a particular property is entrusted to that other person B for purpose of custody; return; accounting; or any other particular manner of dealing with the exceptions of money; monies of consumption, and if B destroys; wastes; or converts those properties so that A suffers loss as result of one of such conduct then this would amount to misappropriation of property.**

**The Defence submits that the Prosecutions are not capable of producing that evidence because misappropriation of property relates to a completely different activity to the facts pertaining to this present case. Mr. Ngwele argues there are two possible legal issues namely: misconduct under the Employment Act or breach of contract under the Sale of Goods Act and the Common Law. Whilst in the present case, misappropriation of property is covered under Penal Code being different to the facts under consideration. It is a criminal offence. A breach of contract is a civil matter and misconduct is an administrative problem. He argues that when all these activities are tied up together at the outset they then to distort the Defendant's outlook and understanding of the true nature of the offence he was charged with**

(see *Johnson v Miller* [1973] 59 CLR 467; *Remeyko v Samuels* [1972] SASR 529) thus, the Defendant was completely colour blind to the issue before him.

The Law

Section 125 (b) of the Penal Code states:

*No person shall cause loss to another*

*(a) .....*

*(b) by misappropriation*

*(c) .....*

Penalty: Imprisonment for 12 years

Issues:

Issues to be decided are as follows:

1- Whether the Defendant was properly charged.
2- If the answer to point one is in the affirmative then whether the Defendant received the money.
3- If the answer to point two is in the affirmative then whether he converted the money into private use.

Firstly, with issue one.

This court needs to refocus its attention to the chronology of the event from the point of investigation leading up to the formulation of a criminal charge. It is clear that the proper procedure with the institution of proceedings is initiated by the laying of a charge provided under section 34 of CPC Act [CAP. 136] and the aforesaid procedural steps are then applied by virtue of section 35 of the Act. Section 35 reads:

> (1) Any person who believes from reasonable and probable cause that an offence has been committed by any person may make a complaint thereof to a prosecutor.
> (2) A complaint shall be made under oath and may be made orally or in writing but if made orally shall be reduced to writing by the prosecutor and, in either case, shall be signed by the complainant and the prosecutor.
> (3) Upon receiving any such complaint, the prosecutor may, if the complaint discloses an offence draw up or cause to be drawn up and shall sign a charge containing a statement of the offence with which the accused is charged. The prosecutor shall the present the complaint and the charge to a judicial officer.

On cross-examination both Peter Kawas and the Defendant have admitted that the money was counted twice in the Court House before a DBV receipt was issued by the Defendant himself to Peter Kawas in front of other witnesses namely: Tom Noam and Jack Mawa. Hence, the Defendant's own report to the Managing Director of DBV on 06th April 1999 states in part as follows:

"On 02/04/98 the Bank sold a vehicle to Peter Kawas of Tanna. Despite counting the cash with witnesses around me several times and wrote out a receipt for 381 000 Vatu, the actual cash was only 281 000Vatu as verified by NBV receipt No. CT 2729 of 02/04/98."

Whilst Peter Kawas facsimile to the DBV on 03rd April and again 08th April 1998 confirmed that the amount of 381 000 was trusted with the Defendant on 02nd Aril 1998. On 06th April 1998 the immediate supervisor of the Defendant at that time Rex Yapen being the first Prosecution's witness expressed his concern over such discrepancy to Acting manager of Finance in these terms:

".... Though it may be an error as explained by Hannington, I find it difficult to understand that Hannington did not realise that cash was short of 100 000 Vatu even counted two times as stated by the report faxed by Peter...how such huge amount be miscounted of if arrangement was made for 100 000 Vatu to be paid in Vila, agreement would have been reached by both parties. Secondly by issuing receipt and later noticing shortage of cash could not be a mistake for such a huge amount and for a senior officer like Hannington...."

Again from Peter Kawas statement to the Police on 05th May 1998 he stated partly in the following terms:

"Mi Peter Kawas mi blong Tanna nomo, mi stap submitim statement ia blong clarifiem nomo confusion we istap long tender blong wan Hilux Registration T478 we mi nao mi bin winim tender...."

From Peter Kawas evidence it is become apparent that he was only brought into seen as a keen witness for the Development Bank and as to how his name was brought in as the complainant in this case left a lot to be desired. It is also not clear with the framing of the charge as to who is the real complainant. What appears interesting from the background was from the point where the counting was satisfied in the courthouse. It may be at least clear if the keys and the vehicles have not yet changed hands because the DBV receipt was not issued. The Defendant admitted that during the process of counting he had a piece of paper and a pen to write down the series of cash notes of different lots and their serial numbers written down. The telephone call from Vila cannot be used as a disturbing factor because no one out from these four persons ever touched the notes during the telephone conversation. The Defendant was the sole person who received the cash money from the purchaser, proceeded with the counting as he penned them down whilst others looked on. There was no indication that he was in a rush of counting the money. The court heard in evidence that he must be on the last flight that Thursday afternoon of 2nd April 1998 back to Vila. He also told the court that Johnson Simil has agreed on the phone to pay for the balance in Vila should the required money not complete between the parties. In any event it is common knowledge that mistakes may have been material only from the hit of the moment or from emergency cases when something is unusually performed which his not normally done. There might be

some other factors which were undisclosed for example that only few minutes left before the bank closed its door to customers before end of day or there is lack of focus when the mind is being misguided or influenced externally. Where the conduct is inevitable but is done out of character on the spur of the moment a material error is possible. Even with few Vatu is quiet possible that a mistake may have been made. On the other hand it would be hard for this court to accept the account of the Defendant that at all material times during the course of the counting his mind was well entrenched with the winning bid of 381 000 Vatu. However the discrepancy could have easily been avoided if his mind had not been fixed on the winning bid during the process of counting and the mistake be eluted from his own conduct. He was the only person as the Development Bank employee counting the money in front of the purchaser and other witnesses present in the CourtHouse looked on. Such mistake although irregular may give raise to certain inquisitive mind about the integrity of the suspect. Being in a position of trust and as a Banker it is it not always that easy and the court cannot please every body at the same time. The court is mindful that a person of a right mind takes enough precaution especially when it comes to be dealing with monetary values although each cash note is tangible it is in itself value worth. The court cannot accept such a conduct as material error in itself because intention cannot be proven for it is a subjective element which has its own bias contrary to *Actus Reus* where it must be proven as in this case four persons including the Defendant were present during the counting. No one denied upon two try that the figure arrived at was incorrect that there was a shortfall of cash money to satisfy the bid. It clear that not even anyone of them around disputed it before the DBV receipt was issued to Peter Kawas. Had the money shorten of 100 000 Vatu during the counting it is common sense that the Defendant would have notified Peter Kawas straight away and the arrangement be then concluded between them on the understanding that Johnson Simil has promised to attend for the difference of the aforesaid sum in Vila. Unfortunately, this arrangement did not eventuate because the required money was already satisfied. It is common understanding, for one thing that should not elute our mind was simply the way some people behave and it is a lesson to gain in understanding other people of the way they react with each other. The court takes into account the genuine deeds of the purchaser although he was not alone to complete the required sum from the auction because Tom Naum was there assisting him before they both ended up in the court house of Tanna with the money. They only needed a sum of 100 000 Vatu and nothing else to complete the bid. The only thing they failed to establish was the break down of different lots of cash notes and their serial numbers before they bundled them on their way to the CourtHouse. Should there be any deceptive conduct on Peter Kawas part, the Defendant should have spotted such discrepancy out from the outset. Having a piece of paper and a pen to record down the series of cash notes such a mistake is inescapable especially when four people were physically present witnessing and satisfying the conclusion of the sale of a vehicle, T 478.

On the same afternoon of 02nd April 1998 after 5 to 10 minutes walking distance to the NBV where the money was to be deposited in DBV account the Bank's teller discovered that the reception of the correct amount when counted twice was in fact

281 000 Vatu and not 381 000 Vatu as stated from the DBV receipt issued to Peter Kawas while others looked on.

But it was the following day of Friday 03rd April 1998 that a series of inquiries were made from the DBV head office in Vila for an explanation of the shortfall of 100 000 Vatu. Those inquiries brought about numerous discussions and exchange of memos between Heads of Departments within the Bank before the management eventually decided that the best way to handle this problem was to report it to the police for formal investigation. However the initiative to press charges emanated from the Development Bank of Vanuatu and that was how the Acting Manager Credit formally lodged a complaint on the 24th April 1998. Peter Kawas statement to the police did not reflect a formal complaint nor dissatisfy with the proceeds of sale. His case did not amount to any issue. In this matter the police prosecutor approached him before his statement was made on 05th May 1998. His statement was obviously prepared by Corporal Judah Silas, a police officer stationed in Tanna whose handwriting and signature appears on the witness statement by Tom Naom on 18th May 1998. On the other hand should Peter Kawas' statement be treated as a complaint then there is a clear breach with the procedural requirement provided under section 35 (2) of the CPC [CAP. 136]. In effect Peter's complaint must literally be made under oath and if made orally must be reduced in writing and signed by both the complainant and the prosecutor. It can be said in this case that section 35 (2) did not apply simply because Peter Kawas is not a complainant by the meaning of the aforesaid section. His position in the statement was to clarify certain confusion over the alleged crime when invited to do so by the prosecutor. He was in fact a useful accessory for the Prosecution by giving his testimony as a witness but cannot be classified as a complainant otherwise the statutory requirements are toothless couched under the miscarriage of the justice system. The integrity of the criminal justice system is also put into question. Thus there is a violation of individual rights to a fair hearing under Article 5 (2) of the Constitution where it is said that when the accused is charged his rights must strictly adhere to which also means procedures as required in accordance to law. In this system the procedure in the criminal courts reflect some important basic principles in criminal law: the intended accused is presume innocent until his guilt is proved beyond reasonable doubt; the interest of the state is that the right person must be convicted which also means the right to be lawfully dismissed from any wrongful charge. The Defendant was in essence wrongfully charged *ab initio*.

The Defendant was in fact charged twice and the law is clear in such circumstances pursuant to article 5 (2) (h) of the Constitution. He has already been punished administratively for his wrongful deed by virtue of the suspension letter of 9th April 1998 from the post of Credit Services Manager with 50% less from his monthly salary together with other staff benefits for a period of three (3) months. The Defendant then received his termination letter dated 08th July 1998 from the Managing Director of the Development Bank of Vanuatu. Such retribution adopted by his employer towards its employee (the Defendant) was treated as a serious misconduct pursuant to sections 50 and 55 (2) of the Employment Act [CAP. 160]. The Defendant has in fact suffered double hit in this action: firstly, it was by his employer who took the initiative to suspend him on a half pay monthly salary, the

**termination of official duties and secondly, their formal complaint towards the pressing of a criminal charge which then became inevitable. In the words of Dean J it is said that:**

**" [T]he duty of the Prosecuting counsel in the criminal trial is to act with fairness and detachment and always with objectives of establishing the whole truth and of helping to ensure that the accused's trial is a fair one." (see *Whitehorn v The Queen* (1983) 152 CLR 657 at 663, 664).**

**The court is satisfied that Peter Kawas status as a complainant is without legal basis. The way he went about making his complaint was not in compliance with section 35 of CPC, and thereby in violation to the Defendant's right to a fair hearing under Article 5 (2) of the Constitution, which also means the right to a fair charge. Likewise it is the duty of this court to administer justice and to ensure that justice as a matter of public policy must be seen to be done and also in accordance with Article 47 (1) which provides among other things that:**

**"The administration of justice, is vested with the judiciary, who are subject only to the Constitution and the law. The function of the judiciary is to resolve proceedings according to law...and substantial justice....."**

**It is proper to say that Peter Kawas is not an issue in this case because the sale has already been concluded *bona fides* between the parties. And not even once the DBV the Bank was told that Peter Kawas or his agent must be held liable to settle the balance of 100 000 Vatu being the subject of the alleged offence.**
**This court will not be commenting any further for reasons enunciated above.**

**<u>Conviction:</u>**
**For those reasons the court is satisfied that the Prosecution had not proved their case to the required standard. The court is satisfied that there was no full reference of the authorities provided by the Prosecution in support of their case. It was pointed out earlier that there are three issues for discussion in this matter. With the first issue, the answer is in the negative. Thus, the Defendant was given the benefit of the doubt. This court will not be able to accommodate the last two anticipated issues. In order to properly convict the Defendant the information and the summons should accurately state from the outset the acts necessary to constitute all the ingredients of the offence. The charge in itself is defective *ab initio*.**
**Should the Prosecution notice any discrepancy with the framing of the charge at the beginning the only recourse they could at least take was to apply before the court for an amendment pursuant to section 139 of the CPC. Section 139 states:**

**"139 (1) Where it appears to the court that the charge is defective, the court may make such order for the amendment of the charge as the court considers necessary to meet the circumstances of the case, the required amendments cannot be made without injustice.**
**139 (2) An amendment may be made before a trial or at any stage of a trial before the close of the case for the prosecution."**

**Therefore the power of the court is a discretionary one and consideration can be made if the Prosecution had made an application to amend the charge stated. Unfortunately such opportunity was not seized as required under sub-section 2. The Magistrate cannot be substituted for a Prosecutor whilst his duty is limited to dealing with any application to amend which is the sole function of the Prosecutor in this jurisdiction.**

**Sentence:**

**Having considered that in view of the circumstances and in particular the nature of the crime and the character of the Defendant, it is therefore ordered that:**

**Court Order**

**1-The case is not made out against the Defendant.**
**2-The charge made against the Defendant is defective *ab initio*.**
**3-The Defendant has no case to answer.**
**4-The State is ordered to pay for the Defendant's costs in this action.**
**5-The alleged compensation by the Defendant must be specifically pleaded through a separate cause of action by way of a civil claim.**

**Dated At Port-Vila this ....18th.... Day of November 1999.**

**BRUCE KALOTITI KALOTIP**
**Magistrate**

REPUBLIC OF VANUATU
TRIBUNAL DE PREMIERE INSTANCE
MAGISTRATES' COURT
REPUBLIQUE DE VANUATU