

PUBLIC PROSECUTOR-v- SUSAN FAY PATTERSON

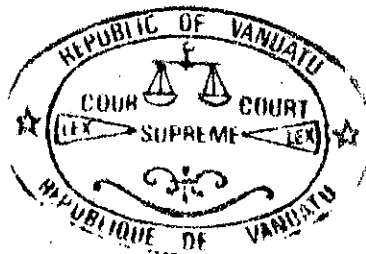
Terry Gardner for the Prosecution
Mr. Mark Hurley Counsel for the Defendant

ORAL JUDGMENT

This was an appeal that came before me for hearing of which the ground of the appeal are contained in the memorandum of appeal itself. This was a criminal matter that came before the Magistrate's Court for the offence of Importing unlawful obscene material, an offence against section 147 (1) (a) of the Penal Code. The appellant was found guilty and was convicted and ordered to pay a court fine of 20,00vatu.

The appellant relied on seven (7) grounds all together in support of the appeal. However, the appellant counsel advances mostly on ground one, as the whole bases on which the appeal lies which states; the magistrate misdirected himself in finding at the prima facie level that no defence or dispute was raised as to the obscene contain of the video. The counsel advances in support of this ground was that, the actual video tape was not tendered to the court and remains for the Prosecution to prove beyond reasonable doubt to the court that the tape was obscene in its nature. Because the tape was not tendered the defendant could not raise any defence as to the obscene nature of the print.

There were no objections by Terry Gardner for the prosecution and agreed to what has happened. Counsel for the appellant also advances in ground two (2); that the Magistrate misdirected himself on the requisite burden of proof at the prima facie level by drawing

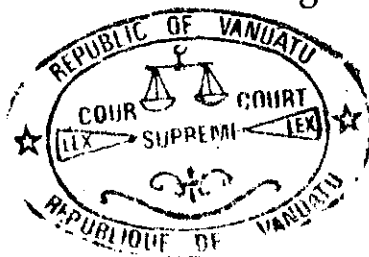


inferences that were not available on the evidence before the court at the prima facie level. Further, advances on ground 3 that; the Magistrate misdirected himself by not finding that section 147 should be red in whole. Further, that; the Magistrate hold that the offence is one of strict liability, which is not, and also advances on the two last grounds.

In this case argument advance by the appellant's counsel being that the tape was not tendered. No reasons advance by both counsels as to why the said video tape in question was not tendered. Under section 147 in such case the tape cover or the cover of the tape is not that important but the contain therein that's when viewed on the video screen will show the nature of the print. And this is the nut shell of the required evidence of fact to be proven beyond reasonable doubt by the prosecution, to show that the prints as seen are obscene in nature. Not only that, but will also allow the defendant to show to the court the nature of the prints to be not obscene in their nature before the magistrate makes his decision. The defendant was not given that opportunity. That opportunity could only arise when the tape in question was tendered . For the evidence of the informant to be admitted as evidence of fact, the tape and the content of the prints must first be tendered to court as evidence of fact, which was still a missing evidence. Any evidence by the informant can only confirm that the tape in question was the tape that contain the obscene prints. However, the court still retain the power to decide in law whether the prints were obscene or not at close of evidence. Under s.147 of the Penal Code for this type of offence, when the evidence is not supported by producing the actual tape with the print in it, then the case should be thrown out as it lacks material evidence of fact of the real nature of the prints it contain.

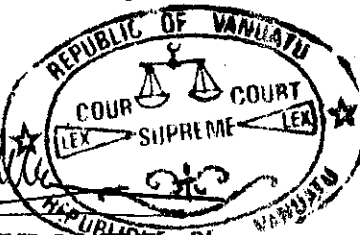
Under s.147 (1) (a) the court can draw inference as to the importation of the obscene material, but not the actual obscene prints, as that is the required material evidence the whole case is based upon, which must be tendered as a group of evidence of it's own in proving the prints therein for the court to decide it's nature.

On the whole, if the video tape was tendered as evidence, this court , from reading the judgment of the magistrate, will not readily



interfere with that finding. For these reasons the appeal is allowed, decision of the magistrate quashed and referred back to the magistrate court for hearing before another magistrate. In allowing the appeal on the first two grounds, I need not go further to the other grounds.

Dated at Port Vila this, 17th day of March 2000



The seal of the Supreme Court of the Republic of Vanuatu is circular. It features a central scale of justice. The words "REPUBLIC OF VANUATU" are written along the top inner edge, and "SUPREME COURT" is written along the bottom inner edge. The word "COURT" appears on both the left and right sides of the scale. The word "LEX" is written on the left and right sides of the scale's base. A star is positioned on the right side of the seal. A signature is written across the seal.

R. MARUM MBE
JUDGE