IN THE SUPREME COURT
OF THE REPUBLIC OF VANUATU

Criminal Appeal Case No. 22 of 1999

PUBLIC PROSECUTOR
Appellant

-v-

HANNINGTON ALATOA
Respondent

JUDGMENT

This is an appeal by the Public Prosecutor against the written Judgment of the Magistrate Bruce Kalotiti Kalotrip dated 18 November 1999.

The Respondent had pleaded not guilty to one count of misappropriation contrary to Section 125 (b) of the Penal Code. The exact details of the allegation and the defence do not need to concern this Court. The Respondent was acquitted and the Public Prosecutor appealed. The notice of appeal was lodged a few days out of time. No issue is raised on that and I exercise my discretion to extend the time allowed.

The grounds of appeal are set out in the Memorandum of Appeal which was lodged on 8th December 1999. I have read the written closing submissions of the prosecution, the "*Final Submission by Defence Counsel*" submitted by "*Counsel for the Defendant*", the judgment of the learned magistrate dated 18 November 1999 and the other documents in this case.

REPUBLIC OF VANUATU COUR SUPREME COURT REPUBLIQUE DE VANUATU

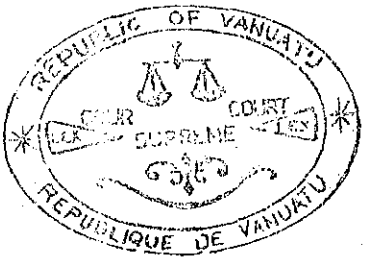
By agreement of the parties and consent of the Court Mr. Malcolm addressed the Court first. He accepted that the appeal must succeed and raised an issue which appears to be at the heart of this case. I will deal in turn with the grounds of appeal.

Ground 1, 2, 3 and 5 can be dealt with together. The learned Magistrate found the prosecution had not proved this case on what he described as "*Issue one*". I need not go into any detail. The arguments revolved around the interpretation of Section 34 and Section 35 of the Criminal Procedure Code as unamended by the Criminal Procedure Code (Amendment) Act No. 13 of 1984. The second schedule of that Act by reference to Section 35 of the principal code states

> "*Provided that when proceedings are instituted by a prosecutor ... a formal charge duly signed by any such person may be presented to a judicial officer and shall be deemed to be a complaint for the purposes of this Code.*"

On 7th May 1999 such a document was signed and subsequently presented to the judicial officer, the Magistrate in this case. It is clear his attention was not drawn to that provision. Had it so been then the arguments which give rise to these grounds of appeal would not have been entertained.

Ground 4. It is not clear to what extent the learned Magistrate's findings concerning Article 5 (2) of the Constitution formed part of his final decision. Consideration of this point, which was raised in the defence submissions, was considered as part of "*issue 1*". In fact there are two points. He found a

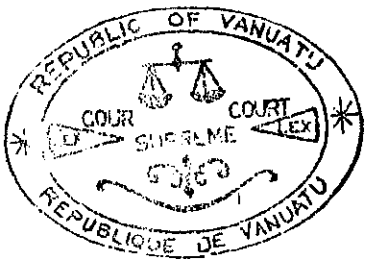


breach of Article 5 (2) presumably paragraph (a) as a result of his findings concerning sections 34 and 35 of the Code. For the reasons stated above this point has no validity.

The learned magistrate also, it appears, found a breach of Article 5 (2) (h). It is not clear to what extent that finding under pinned the parts of his judgment labelled "*Conviction*" and "*Court Order*". In any event, the point I have to resolve is straight forward. In effect, a plea of autrefois convict was being raised. It was not taken at the commencement of the proceedings. Such a plea was never available. Action may have been taken against the defendant under the Employment Act, and in other ways of a civil nature, as a result of this incident. However, nowhere is it suggested any criminal proceedings were ever previously brought concerning these matters. Thus autrefois convict is not available, nor does Article 5 (3) (h) of the Constitution come into play.

Ground 6. Both the Respondent and Appellant agree that material concerning the actions taken against the defendant by his employers, newspaper articles and other matters were placed by his "*advocate*" before the Court from the bar table. That is not evidence and should not have been permitted. It is also of concern that it was this material that founded the basis of the erroneous autrefois convict argument.

Ground 7. The learned magistrate awarded the defendant his costs. This was requested in the defendant's final submissions, under Section 103, where his "*counsel*" also talked about "*plaintiff*" and defendant. Section 103, as amended, only refers to a private prosecutor, and if the charge was '*frivolous*' or '*vexatious*'.



The only power the Magistrate could have used to award costs against the Public Prosecutor was under Section 101. To found such an order the Magistrate would have to find the prosecution was "*unjustified or oppressive*". The circumstances of this case, on their face, do not fall into that category.

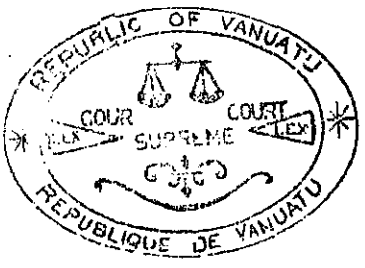
Ground 9. It is argued by the Respondents and Appellants that the learned Magistrate took time to consider his judgment and then sent it out in writing without further convening the Court. Section 93 (1) of the Criminal Procedure Code states: "... *the judgment in every trial in any criminal Court ... shall be pronounced or the substance of such judgment shall be explained in open Court either immediately after the termination of the trial or at some subsequent time of which notice shall be given to the parties and their advocates, if any.*"

This did not happen. This ground of appeal must succeed.

In view of my findings on the other grounds, neither party to the proceedings required ground 8 to be considered.

My powers at this juncture are set out at Section 207 (2) (a) of the Code. Accordingly I quash the judgment appealed from and order the accused to be retried by another Magistrate. By consent I make no order for costs.

The learned Magistrate was presented with a document entitled '*Final Submission by Defense Counsel*'. That document gave rise to many of the findings which formed his judgment. All the points which have been appealed successfully in theses proceedings either originate from or are strongly promoted by that document. It would have helped the learned Magistrate if the issues had been more clearly defined and the correct law had been cited at least on the basic matters of procedure.



I am told by both counsel that the '*counsel*' defending is not admitted and only holds a law degree. That raises a number of concerns, not least the question of liability insurance. The greatest concern however is that a man has been acquitted only to find the judgment is quashed and a retrial ordered. That acquittal came about in large part as a result of the erroneous points of law put forward by an unadmitted and possibly unqualified advocate.

It is a matter for the Public Prosecutor to decide whether or not there should be a retrial.

Dated at Port Vila, this 7th day of April 2000.

R. J. COVENTRY

JUDGE.

C.F.

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ORDER

UPON HEARING Mr. Willie Daniel for the Appellant and Mr. Malcolm for the Respondent it is hereby Ordered : -

1. That the judgment of Magistrate Bruce Kalotiti Kalotrip dated 18 November 1999 be quashed.

2. That the Respondent be retried before another Magistrate.

3. There be no order for costs.

Dated at Port Vila, this 7th day of April 2000.

R. J. COVENTRY
JUDGE.

REPUBLIC OF VANUATU COUR SUPREME COURT REPUBLIQUE DE VANUATU