

**IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU**
(Criminal Jurisdiction)

Criminal Case No. 57 of 2011

MICHAEL JESSOP

-V-

**HARRY NATNAUR
LINO SANIEL**

Hearing: 26 - 29 September 2011

Before: Justice Robert Spear

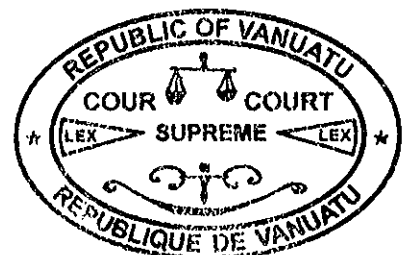
*Counsel: Robert Sugden for Private Prosecutor
Eric Csiba and James Tari for Accused*

VERDICTS and REASONS FOR VERDICTS

(Accused Harry Natnaur)

(Remand arrangements for Lino Saniel_

- **HARRY NATNAUR** – *Verdicts of Not Guilty on counts 1, 2 and 3*
- **LINO SANIEL** – *Pleads Guilty to counts 1, 2 and 3 at conclusion of prosecution case and convicted accordingly. Remanded on existing bail to appear for sentence at 10.00 am Thursday 10 November 2011. Pre-sentence report called for. for PSR and sentence*



1. The accused (Harry Natnaur) faced trial on three charges that eventually were as set out below. Extensive detail accompanied the charges but it is unnecessary to repeat that here.

“COUNT 1: ATTEMPTING TO OBTAIN MONEY BY DECEPTION CONTRARY TO SECTIONS 130B(i) AND 28 OF THE PENAL CODE – CAP 135

Between the dates of 20 May, 2010 and 28 May, 2010 and 28 May, 2010 at and near Port Vila HARRY NATNAUR and LINO SANIEL attempted to dishonestly obtain the sum of five million three hundred and eighty-nine thousand vatus (Vt5,389,000) from Eric Kerres by deception contrary to Sections 130B(1) and 28 of Cap 135.

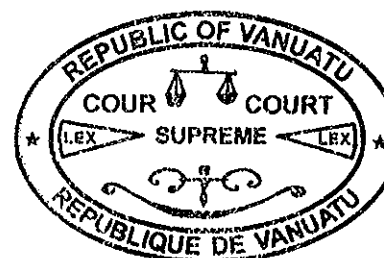
COUNT 2 OBTAINING MONEY BY DECEPTION CONTRARY TO SECTION 130B(1) OF THE PENAL CODE CAP 135

On a day unknown prior to 10 June, 2010 HARRY NATNAUR and LINO SANIEL obtained the sum of TEN MILLION VATU (VT10,000,000) from Magna Limited or the right for HARRY NATNAUR to be paid that sum, by falsely pretending to Magna Limited that HARRY NATNAUR had the legal right to sell to it the lease having registered title 12/0931/01.

COUNT 3: FRAUDULENTLY ISSUING OR PROCURING THE ISSUE OF A REGISTERED TRANSFER OF REGISTERED LEASEHOLD TITLE 12/0931/011 TO MAGNA LIMITED CONTRARY TO SECTION 109 (2) (a) OF CAP 163

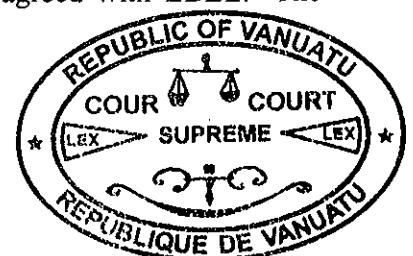
On or about 11 June 2,010 LINO SANIEL a senior Lands Registration Officer at the Department of Land Records, and HARRY NATNAUR, then the registered proprietor of 12/0931/011, with intent to fraudulently deprive ETMAT BAY ESTATE of the benefit of its transfer of the same registered title that HARRY NATNAUR had previously sold to it and that was lodged for registration in November 2,009, issued or procured the issue of a registered transfer by HARRY NATNAUR of the same title to MAGNA Limited that had been lodged for registration on 10 June 2,010.

2. The charges relate to an extensive land development intended for Etmat Bay just around the coast from Erekor. The development that was being pursued by Etmat Bay Estates Ltd (EBEL). In the middle of this intended development is a block of land which by about 2005 was declared to be the custom land of the accused and one other - effectively on behalf of their respective families.
3. The accused originally faced trial with one Lino Saniel and the charges were, as noted, proffered against them jointly. At the conclusion of the prosecution case the



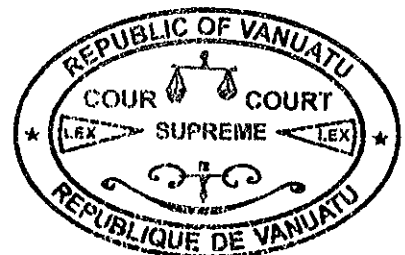
co-accused Lino Saniel pleaded guilty to all three charges. Convictions were entered and he was then remanded off for a sentencing hearing.

4. The accused then gave evidence essentially saying that he was not involved, in a criminal sense, with Saniel.
5. The prosecution case is reflected in the three charges. It relies on three separate dealings which can be summarized in this way:-
 - 1) First, an agreement for the sale of the leasee's interest in the land to EBEL.
 - 2) Second, an attempt to sell that same leasehold interest to Eric Kerres.
 - 3) Third, a concluded agreement which saw the same leasehold interest sold to Magna Ltd.
6. The prosecution case is essentially that the accused, as lessee, had a binding and enforceable agreement to sell the land to EBEL. Indeed, in November 2009 the transfer was both stamped and then lodged with the Lands Department for registration. However, for reasons that have not been exactly explained, particularly as no one from the Lands Office has been called to explain the dealings on that file, the transfer to EBEL was never registered despite numerous approaches to the Lands Department by Mr Jessop on behalf of EBEL. The evidence is clear, however, that from November 2009 both Mr Jessop for EBEL and also the accused were pressing the Lands Department to progress the registration of the transfer. The accused had pressing financial demands and wanted the next tranche of payments to be made which depended on registration. Mr Jessop, of course, had this transaction as part of a wider project and needed to have this land secured so that further project plans could be advanced.
7. In May 2010, the accused was approached by a man called Bernard who was accompanied by a Mr Eric Kerres. Somehow, for reasons not completely covered in the evidence, Bernard had come to hear that the accused's land at Etmat might be for sale and that is how that approach appears to have come about. The accused orally agreed to sell his leasehold interest to Mr Kerres for Vt5 million which, indeed, was less than the Vt8 m purchase price that had already been agreed with EBEL. The

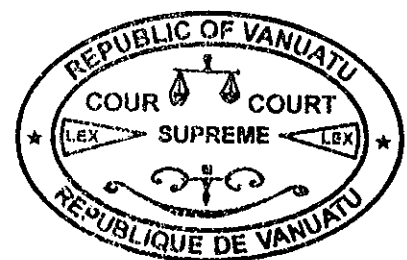


Kerres sale price of Vt5m was to reflect an annual rental of Vt40,000. That approach was on 20 May 2010. Mr Kerres was hesitant at entering into an agreement for the purchase of the land (when I referred to purchase I am of course at all times referring to the purchase of the lessee's interest in the land) and he stated in evidence that that was because of previous unhappy experience with land purchases in Vanuatu.

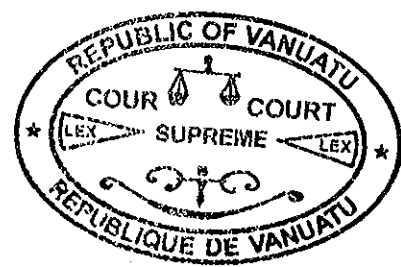
8. On that first day they met, and after a sale price was agree to, Mr Kerres and the accused went to see the other lessor (Mr Ngui) to obtain confirmation that consent to the transfer would be forthcoming. They then went on to the Lands Department where Mr Kerres went in alone and met with the co-accused Lino Saniel who was a Lands officer. Mr Saniel indicated that he was dealing with this particular file and that he knew both the accused and the land well. It would appear that Mr Saniel did have reasonable knowledge about this property. He was also the person to whom Mr Jessop had been referred in respect of the registration of the EBEL transfer. For various reasons which relate to Mr Kerres, that purchase did not go ahead.
9. Shortly afterwards, however, the accused was approached by a representative from Magna Ltd and an agreement was entered into for the sale of the land from the accused to Magna Ltd for Vt 10m which was the asking price by the accused..
10. At no stage does it appear that the accused informed Mr Kerres or the people from Magna Ltd that there was a contract with EBEL much less a transfer already lodged for registration. Furthermore, that there was a caution registered against the title which appears to have been removed without notice to Ebel.
11. The case for the prosecution in respect of count 1 is that the accused attempted to obtain money, namely Vt5 m approximately from Eric Kerres by deception with that deception being particularized as a failure to explain that the land was already subject to an agreement to EBEL and indeed the transfer had been lodged for registration.
12. Count 2 is a charge of obtaining money by deception and that relates to the 10 m vatu that the accused received from Magna Ltd in the same circumstances as for count 1.



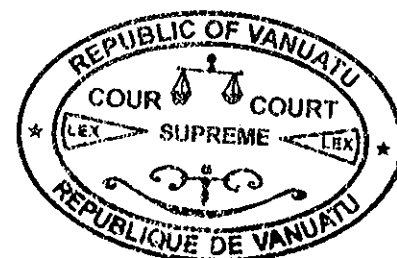
13. Count 3 is a charge of fraudulently procuring a transfer of the registered lease to Magna Ltd which to a large extent is a reshaping of the charge in relation to count 2 but with slightly different considerations.
14. In respect of all 3 counts, all the essential elements of each offence charged must be proven beyond reasonable doubt. The real and central issue here is whether the actions were conducted. In this case, what distinction there can be between *dishonestly*, *fraudulently* or *deceitfully* is not significant. Clearly, if the accused fully appreciated that he had an agreement with EBEL that he knew was lawfully binding on him and then deliberately took steps to obstruct the registration of the EBEL transfer and effectively dispossess EBEL of its equitable interest in the land then that would be dishonest, fraudulent or deceitful as the case may be.
15. The part played by the co-accused Lino Saniei is of significance. I find that it is abundantly clear, and beyond doubt, that he consistently fobbed Jessop off when Mr Jessop made his repeated inquiries as to the progress of registration of the EBEL transfer. I suspect, although there is no evidence on this, that he was responsible for the removal of the EBEL caution that I also find occurred without notice being received by EBEL. This, of course, enabled the Magna Ltd transfer to be registered. Mr Saniei was acting for personal gain in respect of his dealings with the Lands' Department file.
16. Mr Saniei was also involved at an early stage with the Keres negotiations. In that respect, Mr Saniei first became involved when Mr Kerres went into the Lands Department by himself to ask about this particular block of land. That was on 20 May 2010. I have been brought to the point of being firmly convinced that Mr Saniei then saw an opportunity for personal gain and that is why he was so accommodating to Mr Kerres. Shortly after that first meeting, when other documents were provided to Mr Kerres towards convincing him that the sale would go through without difficulty, this Senior Lands Officer (Mr Saniei) provided an invoice to Mr Kerres in the name of *Saniei Real Estate* for a fee of Vt 25,000 plus disbursements. That was, without question, highly improper and it amounts to graft and corruption on the part of a public official. That is clearly behind the change of plea on the part of that co-accused.



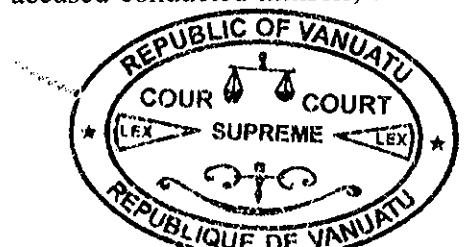
17. Harry Natnaur stated his understanding that Mr Saniei received something less than Vt35,000 as his "commission on the sale to Magna Ltd. Without question there was corruption and there was dishonest activity on the part of Mr Saniei who clearly saw an opportunity for personal gain, probably when Mr Kerres became interested in the property, and attempted to take dishonest advantage of it.
18. The issue then is whether it has been proven beyond reasonable doubt that the accused Harry Natnaur was complicit in the criminal activity of Saniei or acted dishonestly in his own right.
19. The accused gave evidence that he had, by the time Mr Kerres approached him on 20 May 2010, became frustrated at the lack of progress in respect of the registration of the EBEL transfer. He was also desperate for money. There seems to be no doubt that both circumstances are correct. Of course, Mr Jessop for Ebel was similarly frustrated. Both the accused and EBEL had become frustrated at the seeming deleteriousness on the part of the Lands Department to complete registration of the EBEL transfer. The accused also said that he was informed eventually by a person at the Lands Department that the EBEL transfer was incomplete and would need to be redone.
20. The accused gave evidence that he was approached by this man Bernard with Mr Kerres and he saw the opportunity to realize his interest in the land at a time when he was desperate for money. He was asked why he did not mention the contact with EBEL and his reply was far from convincing. He said that he thought that that contract had come to an end because he was waiting for Mr Jessop to get back to him about the problem with the transfer which the accused had taken to Mr Jessop. I do not accept that evidence. I also do not accept the accused's evidence that the accused took just the transfer and a further draft copy of the transfer from the Lands Department to Mr Jessop and handed it to him explaining that Ebel would have to redraft and re-execute the transfer, have it stamped again and then lodged again for registration. Mr Jessop confirmed, to a material concern, that this is what the accused told him.



21. The cost of stamping and registration the transfer first tendered amounted to Vt650,000 so it is not surprising that Mr Jessop was left unimpressed by this advise that he had to repeat the exercise.
22. I am also less than impressed by this evidence. The copy of the transfer produced in Court today is not obviously defective. It had the notation for the Director's signature to confirm registration and that was apparently the complaint conveyed to Mr Jessop as to how the transfer was defective. However, I am unable to dismiss the possibility that the accused was simply passing on what he had been told by a Land's officer.
23. Mr Jessop stated that the accused did not arrive just with the (so called) defective transfer but with a quite substantial part of the Land's Department's file if not the complete file. It is necessary to consider whether this evidence can be tied back to the issue as to whether was complicit, in a criminal sense, with Lino Saniei. There are a number of unhappy coincidences that certainly raised my suspicions in that respect. There is also the evidence of Mr Kerres that, when he first spoke to Mr Saniei, Mr Saniei told him that he knew the accused Harry Natnaur well and also knew that he was in financial difficulties; all of which off course was correct. That is admissible against the accused, Harry Natnaur given, as it was, as evidence in the case by Mr Kerres when Mr Saniei was still in the case.
24. Taking all the unhappy coincidences in to account, I am not brought to the point where I consider that the only inference to be drawn is that the accused and Mr Saniei were working together or with the full knowledge of what the other was doing. It is conceivable that Mr Saniei simply saw an opportunity for financial advantage and took it independently of Mr Natnaur. That is a possibility on the evidence that cannot be ignored and accordingly there has to be a reasonable doubt in that respect..
25. The second and separate consideration is whether the accused acted dishonestly or fraudulently in respect of each of the transactions captured by each of the charges. The accused says that he was not acting dishonestly. He stated that he believed that the EBEL agreement had come to a frustrated end as he had heard nothing back from Mr Jessop after delivering the "defective" transfer to him.



26. Where an accused gives evidence and effectively says I am not guilty of these offences, one of three findings are possible as to his credibility,
27. First, the accused's evidence is accepted by the Court in which case the related charge will obviously be dismissed.
28. Second, the Court might consider that accused **might** be telling the truth in that material respect although it is not convinced in that respect. Almost invariably, that will mean that the accused has raised a reasonable doubt as to his guilt and so he would have to be found, not guilty.
29. Third, the Court does not accept the accused's evidence in that material respect and rejects it as incredible or unreliable. In that event, the accused's evidence is simply put to one side. Just because an accused gives evidence that the Court does not accept as credible does not mean that the accused is guilty of that charge. It is also well understood that even if the Court considers that an accused has lied, that does not necessarily mean that he is guilty. Where the Court rejects the accused's evidence which proclaims his innocence, the Court then needs to examine all the other evidence tendered in the case and determine whether that evidence brings the Court to the point where it is left sure of guilt – that is, whether the guilty of the accused is proven beyond reasonable doubt.
30. In this case, I am not prepared to accept the accused's evidence in those material respects as to the issue of dishonest intent. As mentioned, that still leaves the onus on the prosecution to prove dishonest intent beyond reasonable doubt in each of the three charges. It requires the prosecution to be able to prove each of the essential elements of a charge to the high standard beyond reasonable doubt before a conviction can be entered. As I have earlier indicated the key point here is whether there was dishonesty, deception, or fraudulent activity (however you wish to call it) in respect of the accused's actions. There is no doubt that the acts reus, the acts involved in each of the charges has been proven. It is the dishonest or criminal intent that remains in issue. I have a strong suspicion that the accused's involvement with Saniel is closer and much deeper than he has been prepared to admit but I am unable to draw an inference of guilt in that respect just from the prosecution's evidence alone. Similarly, while I am concerned at how that accused conducted himself, the



fact (as I find) that he attempted to sell the land to others while he had a contract on board with EBEL raises clear civil consequences but does not point conclusively to criminal conduct.

31. It is conceivable and thus possible that the accused, a relatively unsophisticated man, simply did not appreciate that he was acting dishonestly in relation to EBEL. It is possible that his financial difficulties couple with his frustration at the sale to EBEL not being concluded with registration of the title, left him totally focused on what he thought was his only option and that was to sell his only asset. That possibility has some support from the attempted sale to Mr Kerres for Vt 5m where the EBEL sale would generate Vt8m.
32. For those reasons I do not consider that the case in respect of either counts 1, 2 or 3 had been proven on the prosecution evidence to the required high criminal standard of beyond reasonable doubt. A verdict of not guilty is returned in respect of each count.

HARRY NATNAUR, you are discharged.

BY THE COURT

