

**PUBLIC PROSECUTOR - v - LEIMARA PAKOA  
ROGER ISHMAEL**

**Coram:** V. Lunabek CJ

**Counsel:** Mr Leon Malatungun for the Public Prosecutor  
Mrs Mary Grace Nari for the Defendant Leimara Pakoa  
Mr Andrew Bal for the Defendant Roger Ishmael

**ORAL JUDGMENT ON VERDICT**

Leimara Jimmy and Roger Ishmael were both charged with:

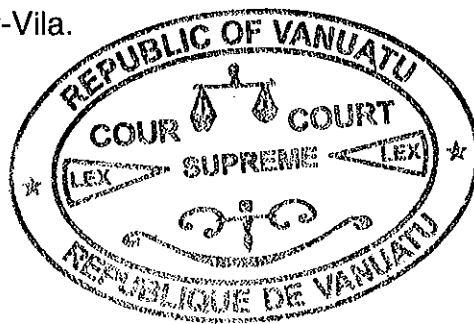
- 1 count of obtaining money by deception, contrary to section 130B(1)(a) of the Penal Code Act [CAP.135] (count 1); and
- 1 count of Theft, contrary to section 125(a) of the Penal Code Act [CAP.135] (count 2).

On 18 December 2009, accused Leimara Jimmy entered not guilty pleas on both counts 1 and 2 above.

Accused Roger Ishmael pleaded not guilty to count 1 and entered guilty plea to Theft in count 2.

A trial was conducted for both accused on counts 1 and for Leimara Jimmy on count 2. The sentence of the accused Roger Ishmael in respect to count 2 (Theft) is adjourned and directions were made for pre-sentence report and submissions to be filed.

In count 1 of the information dated 29 October 2009, it is particularised that on 9 October 2008 Leimara Jimmy and Roger Ishmael who live in Port-Vila dishonestly obtain VT680,000 from Jack Subi and Jimmy Kauna at Anchor Inn in Port-Vila when they both lied to Jack Subi and Jimmy Kauna by holding to them that they are working for Credit Corporation in Port-Vila.



In count 2 of the same information, apart from accused Roger Ishmael, it is particularised that Leimara Jimmy on 9 October 2008, she fraudulently obtain without a claim of right VT680,000 from Jack Subi and Jimmy Kauna and she used the money although she both knew that the property (money) belonged to another person.

From the outset, the basic course of events outlined in the evidence was not substantially in dispute.

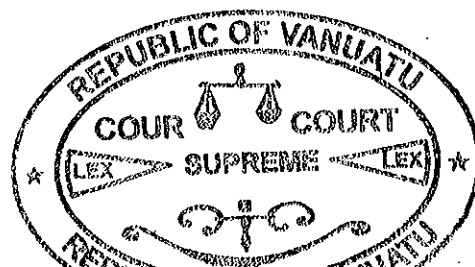
Roger operates a credit lending scheme in town called Nesa Lending Scheme. Leimara Jimmy is a long time Pre-School Teacher Trainer since 1974. Roger Ishmael asked Leimara Jimmy to help him with the Nesa Lending Scheme. Leimara Jimmy assisted Roger Ishmael as a consultant. I will come back to the details later on.

Jimmy Kauna and his father wanted to purchase a truck. They have a total amount of VT680,000. Jimmy Kauna went to the Bank (ANZ) with the intention to negotiate for a loan with a deposit of an amount of VT680,000. The Bank (ANZ) told him the deposit amount is too small. So Jimmy Kauna took the money back and leave it at his home in Port-Vila as he is a cuisine chef at Iririki Hotel.

At some stage, Jimmy Kauna's broth-in-law told him that he has a friend who told him that he knew somebody who could purchase a truck with the money of VT680,000 and he gave Jimmy Kauna Roger Ishmael's telephone number.

They arranged to meet with Roger Ishmael. They phoned Roger Ishmael and met with him in town on 8 October 2008 at Anchor Inn.

Jimmy Kauna said they meet more than one time with Roger Ishmael. On the first meeting with Roger Ishmael, Leimara Jimmy was not there. Jimmy Kauna said Roger Ishmael had a red bus. Roger did not work in the office. He said Roger told him some officer work in the office. Jimmy said on the first meeting, Roger Ishmael gave them the form to fill in. On the second meeting they filled in the form. The form was for Credit Corporation. At the second meeting at Anchor Inn, Roger Ishmael came in with Leimara Jimmy and left. Jimmy Kauna said Roger told him that Leimara Jimmy work in the office of Credit Corporation and anything



to do with the truck, Leimara will sort it out for them. Roger went back to his bus as he is a bus driver.

Jimmy Kauna said Leimara explained to them about the Lending process. Jack Subi stayed with Leimara at Anchor Inn and Jimmy Kauna went home and took VT680,000 and brought it to Anchor Inn.

There were too many people at Anchor Inn, so they moved to Café de Village, Jimmy Kauna and Jack Subi counted the money and gave VT680,000 to Leimara Jimmy. Leimara issued a receipt which was countersigned by Jimmy Kauna and Jack Subi.

Leimara Jimmy gave Jimmy Kauna and Subi a copy of the form of Credit Corporation which was already filed by them (Jimmy Kauna and Jack Subi). Jimmy Kauna said he filled in the form (Credit Corporation Form) for the purchase of a truck. The form was given to them by Roger Ishmael.

However, when Jimmy Kauna was cross-examined, he said the Credit Corporation Form was not given to him but it was given to his brother-in-law, Jack Subi and he did not know who gave the form to Jack Subi. He did not see that Roger Ishmael gave the form to Jack Subi.

Eddie Tari works for Credit Corporation since October 2008. He is employed as Credit Officer for the Credit Corporation. He explained the process of filling the form. He says that normally customers of Credit Corporation took the forms and filled them in and attached with their application and if customers have any queries, they should ring the telephone 23822 appearing on the form.

Any person can obtain the form and filled in it. Employees of Credit Corporation wear uniforms. They are easily identifiable. The Credit Corporation has never carried its business outside the office of Credit Corporation. The Credit Corporation Forms were given to customers by the Corporation secretary and sometimes by Eddie Tari. He said he saw Roger Ishmael for the first time in Court.

Roger Ishmael drove Leimara Jimmy, Kauna Jimmy and Jack Subi in his bus to Traverso Company and asked Jimmy Kauna and Subi to choose which type of

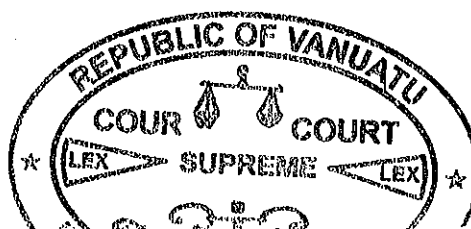
truck they would like to purchase. Roger Ishmael and Leimara Jimmy promised to get a truck for them within 2 weeks after they gave the money of VT680,000 on 9 October 2008. Leimara Jimmy on the same date gave VT680,000 to Roger Ishmael. She also got paid a fee of VT5,000 and issued a receipt for it in her own name. After 2 weeks, no truck was purchased. Kauna Jimmy made repeated phone calls to Roger Ishmael. Roger told them not to worry but wait for another 2 weeks. After another 2 weeks Kauna Jimmy phoned again. Leimara was not part of the discussions this time. Roger Ishmael met Jimmy Kauna and Subi at Ancho Inn. Roger told them that the truck was no longer at Toyota Motors but the truck was now at the Public Works and the Public Works will fix the truck before he can purchase it for them. Kauna Jimmy said he repeated the phone calls to Roger Ishmael but Roger told them the same stories.

They then phone Leimara Jimmy and she told them not to listen to Roger Ishmael anymore. On Christmas 2009, Roger Ishmael and Leimara Jimmy told them to change the Form. The Form is no longer that of Credit Corporation but a new form they created in the name of Nesa Lending Scheme. They had the discussions over the new form at the Chinese Restaurant next to police station. Jimmy Kauna questioned Roger and Leimara as to why they will fill in another form, they have already filled in a form before. At that stage, Kauna said they realised that Roger and Leimara are not working for Credit Corporation. At that meeting, Roger Ishmael went to Malekula for a custom circumcision ceremony. He did not inform Jimmy Kauna and Subi of this. Jimmy Kauna said Jack Subi and himself did not fill in another form.

They called Leimara Jimmy. They met with Leimara at Anchor Inn. Leimara told them to watch out as Roger Ishmael will steal their money.

They finally got hold of Roger Ishmael at Fresh Wota as he was hiding and change his phone simcards.

They met Roger Ishmael again at the Sea front. They asked him if he had used their money of VT680,000. Roger Ishmael admitted to them that he had used their money of VT680,000 and that he will refund them. Jimmy Kauna and Jack Subi told Roger Ishmael that they will help him to repay the money. Kauna said Roger did not respond so they lodged their complaint to the police.



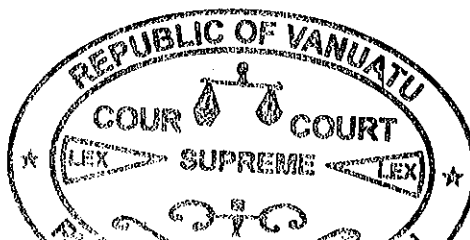
I will discuss in more detail the relevant details in relation to the elements which have to be proven in respect to each charge.

I remind myself that this is a criminal trial. In a criminal trial, the onus of proof in each charge and each element of the charge is on the prosecution in every case. It remains on the prosecution from beginning to end of the trial, the accused are not required to prove anything. They are entitled to give evidence but not required to do so. Both of them gave evidence. By doing so that did not alter the onus of proof. That remains on the prosecution through out. I record also that the standard of proof in relation to each charge is beyond reasonable doubt. I also have reminded myself that each charge must be looked at separately and each accused must be looked at separately, and it would be wrong to reason that if the person accused might be guilty of one charge he or she is automatically guilty of the other. It is also wrong to reason, of course, because one accused might be guilty so might the other. So the accused and the charges have to be looked at separately. This applies particularly in relation to their statements made out of Court to the police. Those statements are evidence only in relation to the person who made them and not in relation to the other person.

I turn to look at the charges individually, the first count 1 is the charge of obtaining money by deception.

The first element that has to be proven is that Leimara Jimmy and Roger Ishmael obtained money from the complainants Jimmy Kauna and Jack Subi. There is evidence that Jack Subi gave VT680,000 to Leimara Jimmy on 9 October 2008. There is also evidence which is not disputed that on that same date, Leimara Jimmy gave VT680,000 to Roger Ishmael and he deposited to his business account at Bred Bank. The first element is proven against both on beyond reasonable doubt.

The second element that has to be proved is that Leimara Jimmy and Roger Ishmael obtained money by dishonest deception. The prosecution alleges that Roger Ishmael and Leimara Jimmy hold themselves out and behave as they are employees of the Credit Corporation. Jimmy Kauna said Roger Ishmael gave a Credit Corporation Form to them. While under cross-examination, Jimmy Kauna

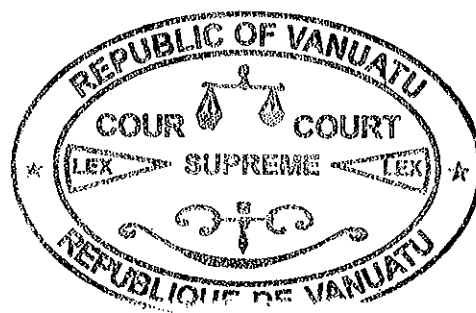


said he did not know who gave the form to Jack Subi and he did not see that Roger Ishmael gave the Credit Corporation Form to Jack Subi or himself to fill in.

Roger Ishmael evidence is that he never gave a Credit Corporation Form to Jimmy Kauna and Jack Subi. His evidence indicates that he has a Credit Lending Scheme called Nesa Lending Scheme. Subi asked him to purchase a truck for him through his lending scheme. Roger said he is not qualified enough. He asked Leimara Jimmy to assist him to prepare for the papers. According to Leimara Jimmy's evidence, which I accept in this respect, she met the complainants (Jimmy Kauna and Jack Subi) on 9 October 2008 at Anchor Inn. Leimara said the two (2) complainants have already filled in the form. She saw the form and pointed out to them that the Form belonged to the Credit Corporation but not Roger Ishmael's Nesa Lending Scheme. She told them that they cannot use it. Roger Ishmael's Application Form is not yet ready and at that time Roger Ishmael has no application form to give them.

She said she discussed the point with the two (2) complainants and they decided to give the money of the truck of VT680,000 and that they agree to use the application form of the Credit Corporation first and that later on, they will use the form of Roger's Lending Scheme when it would be ready. The two (2) complainants understood what she told them. At that time, Leimara did not wear any uniform. She never told them that Roger Ishmael is the boss of Credit Corporation or that she was working for Credit Corporation. The two (2) complainants knew that they dealt with Roger Ishmael who has a lending scheme business. The two (2) complainants told Leimara that they have already filled in a form if it is alright for them to use it. Leimara proposed to them that if they want to use the form, maybe in 2-3 days time the Nesa Lending Scheme will be ready. The complainants agree. This is where she sat with them and explained the process and prepared receipt for the money and a receipt for her fees as a consultant. The two (2) complainants gave her the money of VT680,000 and she gave the money to Roger Ishmael at 3.30pm on 9 October 2008.

Few days later, she called Jack Subi as the spokesperson of the two (2) complainants to come and fill in the form of Nesa Lending Scheme. That is the new form.



The prosecution fails to prove any dishonest deception for obtaining money on the second element against Roger Ishmael and Leimara Jimmy.

That is sufficient to dispose of this charge against the accused Roger Ishmael and Leimara Jimmy.

The third element that has to be proven is that at that time Leimara Jimmy and Roger Ishmael have each guilty mind.

There was no evidence of any guilty mind given by the prosecution against Leimara Jimmy. I find that she was genuine in what she did on behalf of Roger Ishmael to purchase a truck for the complainants. She obtained the money and gave it to Roger Ishmael. At that stage, there was no evidence of a guilty mind on the part of Roger Ishmael either.

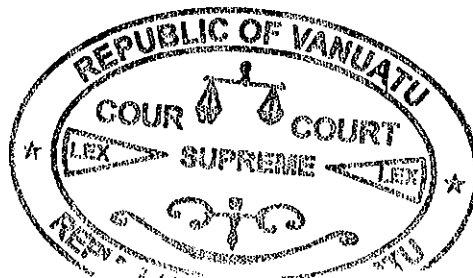
The prosecution fails to prove on beyond reasonable doubt the charge of obtaining money by deception against Leimara Jimmy and Roger Ishmael.

As to the charge of Theft, contrary to section 125(a) of the Penal Code Act , the prosecution has to prove the following elements against the Accused Leimara Jimmy:-

First, that she obtained money of VT680,000 from the complainants without their consent. There is evidence to the contrary. The complainant willingly gave the money to Leimara as Roger Ishmael's consultant. The prosecution failed to prove this element on the required criminal standard.

The second element that has to be proven is that Leimara Jimmy obtained money fraudulently and without claim of right made in good faith. Again there is evidence that the complainants wanted to purchase a truck. They do not have enough money. They seek assistance through Roger Ishmael's Lending Scheme. They agree to give Roger Ishmael's consultant VT680,000 for that purpose. It was obtained in good faith by Leimara Jimmy for that purpose. The prosecution fails to prove that element on the criminal standard required.

The third element that is to be proven is that Leimara Jimmy takes the money of the complainants (VT680,000) and carry it away with the intention to permanently deprive the complainants of it.



There is evidence that Leimara obtained money of VT680,000 and gave it to Roger Ishmael. Roger deposited to his business account at Bred Bank.

There is no evidence of the third element made out against Leimara Jimmy on the criminal standard required.

I am satisfied that the prosecution failed to prove all the elements of the charge of obtaining money by deception, contrary to section 130B of the Penal Code Act against both accused Leimara Jimmy and Roger Ishmael beyond reasonable doubt (in count 1).

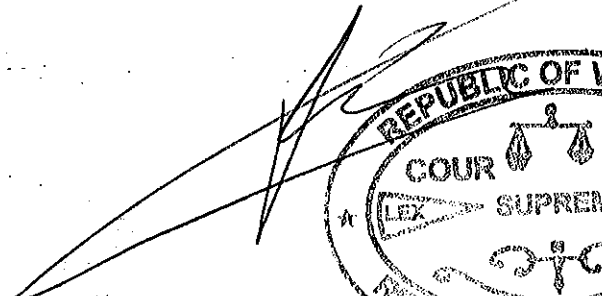
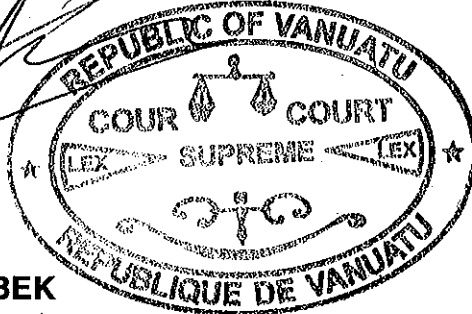
Equally, I am satisfied that the prosecution failed to prove all the elements of the charge of Theft laid against Leimara Jimmy on beyond reasonable doubt (in count 2).

### **VERDICT**

- Accused Leimara Jimmy is found NOT guilty to offences in counts 1 and 2. She is discharged of the two offences accordingly.
- Accused Roger Ishmael is found NOT guilty to offence in count 1. He is discharged to that offence accordingly.

**DATED at Port-Vila this 19<sup>th</sup> day of March 2012**

**BY THE COURT**

  
  
The seal is circular with the text 'REPUBLIC OF VANUATU' at the top and 'REPUBLIQUE DE VANUATU' at the bottom. In the center, it says 'COUR SUPREME' with 'COUR' on either side and 'LEX' in boxes on either side. A scale of justice is depicted above the text.

**Vincent LUNABEK  
Chief Justice**