

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

Criminal Case No.43 of 2014

PUBLIC PROSECUTOR

-V-

BEN TATHY

Coram: Justice D. V. Fatiaki

Counsel: Mrs. L. Matariki for the State
Mr. G. Takau for the Defendant

Date of Decision: 22 May 2015

VERDICT

1. This case has had a long gestation since the defendant's first appearance before the Magistrate's Court in late 2010. The case was not committed until 20 April 2014 because the prosecution required further enquiries to be conducted. At the time of his committal the defendant faced eight (8) counts, four (4) counts of Theft and 4 alternative counts of Misappropriation. At his arraignment on 3 June 2014 the information charged the defendant with two (2) counts only a Theft count and an alternative count of Misappropriation of VT12,476,060 from his employer Air Vanuatu Limited ("AVL").
2. Since then, the information has been amended a further three (3) times increasing it to ten (10) counts and then reducing it back to two (2) alternative counts in the latest information dated 3 March 2015 (*ie* some 5 years after the alleged incident occurred) which charged the defendant with misappropriating the sum of VT125,910 from AVL between August and September, 2010.
3. Throughout its several transformations the defendant has consistently maintained his "not guilty" plea and, eventually, after an unsuccessful attempt to adjourn by the prosecution, the trial commenced on 13 April 2015 almost a year after its committal.
4. The prosecution's case was opened on the basis that the defendant a long serving employee of AVL was dissatisfied with his work conditions and had

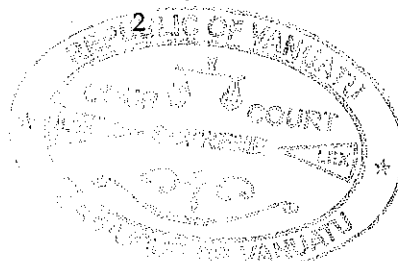


intentionally used his knowledge of AVL's ticketing system to commit the offence. Furthermore to conceal his fraud the defendant used the sign-in code of a fellow employee namely, Marie Willie to issue the fraudulent air tickets.

5. The offences charged in the alternative against the defendant are Misappropriation contrary to **Section 125(b)** of the **Penal Code ("PC")** and alternatively, Theft contrary to **Section 125(a)**. The ingredients which the prosecution must prove in respect of Misappropriation are:
 - (i) Ben Tathy had been entrusted with VT125,910 cash between the alleged dates for the purpose of accounting or paying it to his employer (AVL); and
 - (ii) Ben Tathy had converted the said money to his own use and benefit.

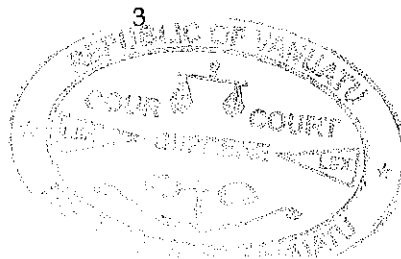
In respect of Theft the prosecution must establish:

- (i) Ben Tathy fraudulently and without the consent of AVL or any claim of right to do so, took money belonging to AVL; and
 - (ii) At the time of taking the money the defendant intended to keep the money.
6. To prove its case the prosecution called 10 witnesses and produced seven (7) documentary exhibits including a caution interview record of the defendant [**Exhibit P(8)**] and letters that the defendant had written to his employer after the fraud was discovered [**Exhibits P(2) and P(4)**]. The statements of 5 prosecution witnesses were also formally admitted in evidence under **section 84** of the **Criminal Procedure Code ('CPC')** after defence counsel accepted the contents of the statements and indicated he did not wish to cross-examine the witnesses.
7. At the close of the prosecution case, defence counsel made an unsuccessful "*no case*" submission. In dismissing the submissions the Court was satisfied that there was some evidence on which the defendant could be convicted at that stage. After the provisions of **Section 88** of the **CPC** were read to the defendant, counsel indicated that the defendant would give sworn evidence.
8. Although the "*no-case*" submission failed it was clear to the Court from the prosecution's evidence at that stage, that it had completely failed to establish beyond a reasonable doubt, the amount of VT125,910 which it



had charged the defendant with misappropriating or stealing from AVL or indeed any amount at all.

9. There was some general evidence however, that AVL had suffered a loss of revenue from the sale of air tickets and that the shortages occurred on the days that the defendant alone was on duty as the ticketing officer at the domestic airport sales office. Although there was some evidence of air ticket purchases being made from the defendant for cash payments, no real effort was made by the prosecution to relate such evidence to the minimal documentary evidence produced of the ticket sales. Even the passengers who were called, namely, **Nadia Kanegai** and **Kathy Situ**, were not shown the air tickets they purchased from the defendant.
10. Although this was a case involving air tickets and daily ticket sales summary reports, the prosecution appeared to rely almost entirely on the oral testimony of witnesses to establish its case. Indeed there was a marked reluctance to deal with and/or marshal any documentary evidence to support the prosecution's case. In this regard it is neither acceptable or sufficient for the prosecution to merely produce computer printouts of passenger lists for the years 2007, 2008, 2009 and 2010 [**Exhibits P6(A), (B), (C) & (D)**] without any attempt whatsoever to link it to the charges or to the accused who is nowhere identified in the printouts as the ticketing officer concerned.
11. Be that as it may, at the close of the evidence for the defence both counsels orally addressed the court in accordance with **Section 170** of the **CPC**.
12. This is a criminal trial and in accordance with **Section 8** of the **Penal Code** ("PC") the prosecution bears the burden of proving the defendant's guilt beyond a reasonable doubt by means of admissible evidence. If the prosecution fails to establish the defendant's guilt to the required standard he shall be deemed to be innocent and shall be acquitted.
13. Furthermore in accordance with **Section 81** of the **CPC**, the defendant is presumed innocent of the charges unless and until his guilt is established beyond a reasonable doubt by the prosecution. The defendant has no duty to prove his innocence nor is he obliged to call any evidence, but, in this case, the defendant elected under **Section 14** of the **PC** to give evidence on oath and in accordance with **Section 88** of the **CPC** he was cross-examined by the prosecution.
14. The prosecution's evidence in broad outline was that the fraud was first uncovered after there was an upgrade to AVL's computer accounting



system in about August/September 2010. An internal investigation then revealed that the fraud had occurred when the defendant was rostered as the sole ticketing officer on duty at the domestic airport sales outlet. Furthermore, during the course of the investigations the defendant had admitted, in writing, to improperly selling air tickets to Ni-Vanuatu using the sign-in code of a fellow employee, Marie Willie without her knowledge or approval and who was untrained and therefore incapable of issuing the air tickets that were issued using her sign-in code – **0236AW**.

15. To establish its case the prosecution relied on the evidence of **Reynold Boeson** the Human Resources Manager; **Rene Bebe** the Financial Controller; **Melanie Fanai** of the Accounts Section; **Marie Willie** whose sign-in code had been used to fraudulently issue the tickets; and five (5) passengers who personally bought air tickets from the defendant and who paid him cash. The prosecution also relied on admissions made by the defendant in two (2) letters he wrote to Reynold Boeson as well as recorded admissions made by the defendant in his caution interview with the police.
16. In this regard the defendant confirms the contents of his letter of 24 September 2010 to Reynold Boeson in which he wrote:

"Dear Sir,

Reasons following the investigation of Financial Records

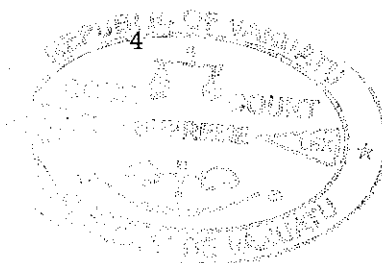
Following the letter which I received dated on 22nd September 2010, concerning the financial records from August 2007 and July this year. I hereby write you this letter to state my concern and reasons why this matter had happened.

I've been honest enough to admit the truth that I've been issuing tickets to Ni-Vanuatu people due to the following reasons:

Firstly, I've been working for the airline for the last eight years and there was no increment in my salary even though this was raise to the Airport [Domestic] managers;

Secondly, all employee should be treated fairely. Due to my understanding, my colleagues who have just in the company have received an increment in their salary and why not me.

Thirdly, concerning the sign in code. Why more than three person using the same sign in code [AW]?



Fourthly, why that is the foreigners or whites have a privilege to receive a 20% discount or as far as travelling on FOC while the Ni-Vans purchase a full air fare ticket as this is our Ni-Vanuatu airline.

Finally, why this matter was raised this year and not in August 2007 as stated. Why this matter was held up for the three years?

Therefore, I kindly asked all the managers in different sectors in the airline to work more closely with all the staff in order to upgrade the airline which will be efficient to all Ni-Vanuatu citizens.

Thank you very much for your understanding.

Yours faithfully,

Tathy Ben."

(my emphasis and underlining)

17. The second letter which the defendant write to Reynold Boesen on 30th September 2010 in answer to identified cash shortages totaling **VT12,476,060** and 5 specific allegations, was in the following terms:

"Dear Sir,

Response to allegation

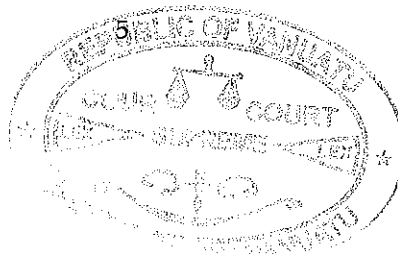
Following the second letter of allegation and stand down which I received dated on the 27th September 2010 concerning all the events that took place between 23rd March 2007 and 12 September 2010 and all the allegations against me, I hereby write you this letter that I was once again honest to tell you the truth in my first letter and even verbally when we met.

I've been dishonest to the company with my actions like issuing tickets and I meant to do so due to the reasons that stated in my first letter.

Therefore, with the amount of VT12,476,060 that was missing, I understand that it was under my responsibility but am not part of it even I don't have the cash in hand or even in my bank account.

With all the respect I apologies for what had happened and believe that you will consider my hard work since I've been into the company and also mostly willing to work very closely with your for more investigations.

Thank you very much for your understanding and hopefully to hear a positive respond from you as soon as possible.



Yours faithfully,

Tathy Ben."

(my emphasis and underlining)

18. From the letters, the following admissions may be extracted:
- (a) The defendant had been intentionally "*issuing tickets to Ni-Vanuatu people*" (whether free or for payment? is unclear);
 - (b) The defendant proffered 5 reasons for issuing the tickets including "... *three persons using the same sign in code [AW]*" and junior colleagues "*received an increment in their salary and why not me*";
 - (c) The defendant has "*been dishonest to the company with my actions like issuing tickets and I meant to do so ...*"; and
 - (d) "... *with the amount of VT12,476,060 that was missing I understand that it was under my responsibility but am not part of it ...*";

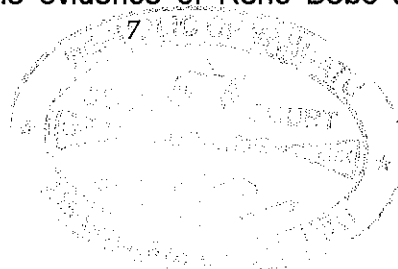
In short, the defendant admits "*dishonesty*" (how? is unclear) in issuing tickets to Ni-Vanuatu people intentionally, but, denies personally benefiting from it. Significantly he does not admit receiving any payment for the tickets he issued or being one of the persons who used the "AW" sign-in code. I do not accept that the defendant's letters are sufficient proof of the offences charged.

19. Under cross-examination Reynold Boeson accepted that the defendant's supervisor should cross-check the defendant's daily ticket sale summaries before it is sent with any cash to the Accounts Section. He was unsure who the defendant's supervisor was at the relevant time or who was responsible to take the daily cash takings and sales reports to the Accounts Section. He could not recall the defendant's personal sign-in code and frankly admitted, that the company's annual audits did not pick up any cash short falls during the relevant period.
20. It may be noted that it was never suggested to Reynold Boeson during his cross-examination that he had threatened, induced, or coerced the defendant into writing the letters or that he had anything to do directly with the contents of the defendant's letters or the admissions he made in them. Neither was it suggested that he and the defendant were not on good terms



("bad friends") or that he had a grudge against the defendant for charging his (Reynold Boeson's) relatives for excess luggage.

21. The prosecution's second witness was **Rene Bebe** the Financial Controller of AVL. He described the process involved in the sale of air tickets and the system for accounting for daily takings from ticket sales including the submission of an overall report and individual ticketing officer reports recording the daily sales and reconciling daily receipts. He was part of the internal investigations into the shortages that were detected in the domestic airport sales office where the defendant was based. He confirmed that the defendant's sign-in code was "**0194AT**" and Marie Willie's sign-in code was "**0236AW**". He explained Marie Willie's duties as a Document Officer was to meet incoming flights from the outer islands, collect the tickets for the arriving passengers and change the ticket status on the computer system from "*open*" to "*flown*" to show the ticket had been used on the flight.
22. Under cross-examination Rene Bebe confirmed that the AVL accounting system was upgraded from "*ARIS*" to "*EDGAR*" in 2008. He was not working with AVL however between 2007 and 2010 when the shortages occurred. He confirmed that the defendant worked under a supervisor **Saul Pati** who is supposed to cross-check the defendant's daily ticket sales reports. He agreed that the defendant did not take the daily cash takings to the cashier and although their internal investigations revealed that two (2) sign-in codes were regularly used on the days that the defendant was rostered to work namely, "**0194AT**" (the defendant's) and "**0236AW**" (Marie Willie's), he admitted he did not see the defendant using Marie Willie's sign-in code.
23. Although he said that employees should not share their sign-in codes, he frankly admitted that the internal investigations revealed that code-sharing "*... happened plenty times*" when an employee was shut-out of the computer system.
24. He accepted that there was more than 2 persons working with the defendant at the domestic airport area and he described the general layout of the offices and identified other AVL employees who worked in the same area. To a question from the Court the witness identified the AVL computer system for issuing tickets was called "*AMADEUS*" and he agreed that the defendant's supervisor and Marie Willie (both of whom are still working with AVL) were questioned during the internal investigations.
25. **Melanie Fanai** the Passenger Controller in the Accounts Section of AVL generally corroborated the evidence of Rene Bebe about the accounting



system and the ticketing system in AVL which uses both electronic tickets as well as manual coupons. She confirmed that daily ticket sales and cash receipts should be balanced at the end of each day and should be recorded daily, in an overall sales report as well as in the individual sale sheet of the officer concerned. The witness was shown and identified one (1) only overall sales summary sheet and the defendant's sale sheet for 1 September 2010 [Exhibits P5(a) and 5(b)]. When asked:

Q: "Why doesn't a discrepancy show up to the supervisor at checking time?"

the witness answered:

A: "The sales agent may have only submitted his individual sales sheet and cash without producing with it the overall summary report for the days ticket sales".

26. She confirmed that internal investigations of the cash shortages revealed that no individual sales sheets had been submitted for sales using sign-in code "**0236AW**" on the days that the defendant alone was on duty. She explained that the only other ticketing officer at the domestic airport sales office was **John Obed**, but he worked different days from the defendant.

27. When asked finally in-chief:

Q: "How do you know it was the defendant who used Marie Willie's sign in code and not someone else?"

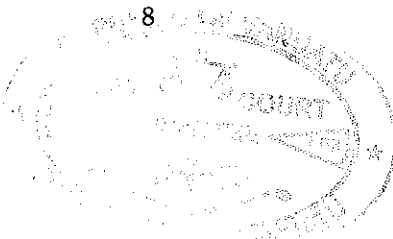
She replied:

A: "Hem nomo hemi issued the tickets".

28. In cross-examination she confirmed that despite daily reconciliations of ticket sales and cash receipts no cash shortfalls were detected at the time. Ticket sale shortages only came to light after the computerized accounting system was upgraded in 2010.

29. She confirmed that **Saul Pati** was the defendant's supervisor at the relevant time and should have detected any daily shortages if he received all the daily documents. She received no reports or allegations against the defendant from his supervisor at the relevant time nor did she question the supervisor.

30. She accepted that before the cash proceeds of daily ticket sales reaches the Accounts Section, no less than 3 people handle it, (1) the ticketing officer who collects it; (2) his supervisor who checks the paper work and



money; and (3) the cashier who comes and picks the money from the airport. She said that the sign-in code was officer-specific but not computer-specific. It is "*confidential*" and should not be given out or shared with others.

31. **Marie Willie** has been the Documents Officer with AVL since 2007. She is based at the domestic airport area and her duty is to collect inbound passenger coupons flying in from outer islands based on the passenger manifest, and she endorses them as "*flown*" on the coupon or if an eticket was used, by entering in the computer system. She confirmed that she works alone in her office. She agreed that her computer sign-in code is "**0236AW**" and she alone is supposed to use it. Despite that, she frankly admitted assisting a work colleague Keith David (whenever he was locked out of AVL's computer system) by opening his computer using her sign-in code. Keith David does not sell or issue air tickets, his duty was to make bookings for outer island passengers. She was adamant that she never authorized or permitted the defendant to use her sign-in code nor does she have access to or the necessary knowledge or training to issue air tickets.

32. In cross-examination the witness admitted knowing **Amanda Wass** who was an agent assisting with ticketing who shared the same office and computer with Keith David. She also confirmed her supervisor was **Saul Pati** and she remained firm that she only knew and authorized Keith David to use her sign-in code. To the question:

"Have you seen the defendant use your sign in code?"

She replied:

A: *"No mi no luk hem but sometimes he comes and asks to use my computer when it is on".*

She never asked the defendant why he wanted to use her computer nor did she tell her supervisor that the defendant had occasionally used her computer.

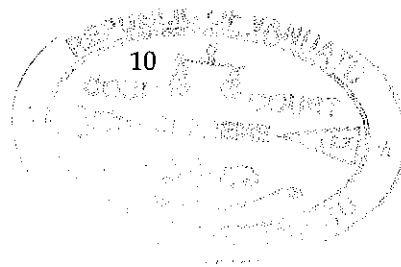
33. It is unfortunate that despite the general tenor of the defendant's defence and defence counsel's pointed questioning, the defendant's supervisor **Saul Pati**, **Keith David** and **Amanda Wass** were not called to deny or refute any suggestion or possibility that they themselves might have committed the fraud or been complicit in it. Similarly, the defendant's co-worker **John Obed** in the domestic airport sales office was not called to deny that any of the tickets issued using Marie Willie's "AW" sign-in code was done by him.

34. Instead and in order to overcome this glaring omission, the prosecution relies on oral hearsay evidence in place of documentary records of work



rosters during the months of August/September 2010 which would surely have been available and could have been produced by the defendant's supervisor Saul Pati whose duty it was to prepare them. So much then for the prosecution's evidence.


35. The defendant though not obliged to, elected to give sworn evidence on which he was cross-examined. The defendant admitted working for AVL for almost 9 years and finished in 2010. He was a sales and ticketing officer and sold air tickets to customers. He said after a day trading he would balance his sales and receipts and give it to his boss to check. His supervisor was Pati Saul. He testified that there were a lot of people working with him at the domestic airport.
36. He explained in-chief that he had written both letters to Reynold Boesen as agreed between them ("*tingting blong mi wetem hem*") that he should admit the allegations made against him about issuing air tickets. He didn't have a good working relationship with Reynold Boesen ("*bad friends*") and he had used the word "*dishonest*" in his second letter because that was how Boesen had described his actions and he had merely adopted it ("*mi usum bak*").
37. In cross-examination the defendant agreed that only he and John Obed were authorized to issue tickets at the domestic airport sales office. He confirmed they worked on different days. He also agreed that he had issued tickets to Ni-Vans "*but never free tickets*". All cash he received was entered in his individual daily sales report and he denied using the sign-in code of Marie Willie. He admitted writing the two letters to Reynold Boesen but he didn't realize that they would be used against him.
38. During the defendant's evidence I listened and watched his demeanour closely and I was left with a distinctly unfavourable impression. In particular, I found his explanations for the contents of the two (2) letters he wrote to Reynold Boeson untruthful and contrived.
39. Having said that I remind myself that the burden of proving the charges rests fairly and squarely on the prosecution to establish beyond a reasonable doubt. In order to do so it was necessary for the prosecution to produce evidence that directly implicated the defendant in the alleged Misappropriation and that includes excluding any other person who might reasonably be involved in using Marie Willie's sign-in code or in handling the defendant's daily cash takings.



40. After considering all the evidence including the defendant's sworn explanations and denials I entertain a reasonable doubt and am therefore not satisfied that the prosecution has proven its case to the requisite standard beyond all reasonable doubt.
41. Accordingly I find the defendant not guilty and acquit him of both charges. He is free to leave this court.

DATED at Port Vila, this 22nd day of May, 2015.

BY THE COURT


D. V. FATIAKI
Judge.

