

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

Criminal Appeal
Case No. 21/3880 SC/CRMA

BETWEEN: Ipak Investment Limited
Appellant

AND: Public Prosecutor
Respondent

Dates of Hearing: 25 & 26 May 2023
Before: Justice V.M. Trief
In Attendance: Appellant – Mr J. Boe
Respondent – Mr K. Nathan
Date of Decision: 19 June 2023

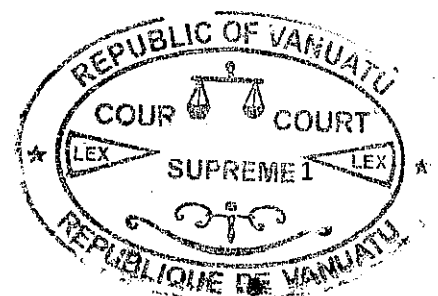
JUDGMENT

A. Introduction

1. This is an appeal against the verdict delivered by the Magistrates' Court dated 9 November 2021 in which the Appellant Ipak Investment Limited ('Ipak') was found guilty and convicted of five charges alleging failure to pay VNPF monthly employees' contributions.

B. Background

2. On 8 April 2021, Ipak was charged with failure to pay VNPF monthly employee contributions contrary to subs. 26(1) and para. 50(1)(c) of the *Vanuatu National Provident Fund Act* [CAP. 189] for periods commencing at the earliest in October 2015 to March 2018 in respect of five persons alleged to be Ipak's employees (Charges 1-5).



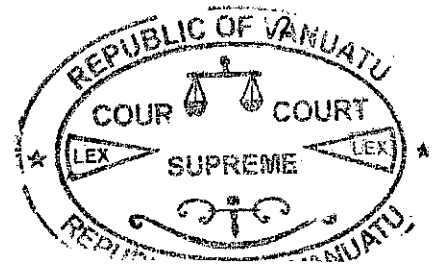
3. On 5 May 2021, Amended Charges were filed in which Rex Kas lapen was named as Defendant along with Ipak. It was alleged that the five persons the subject of the charges were employees of both Ipak and Mr lapen.
4. On 31 May 2021, Further Amended Charges were filed (Charges 1-5).
5. On 31 May 2021, Ipak pleaded not guilty.
6. On 2 August 2021, there was a trial in the Magistrates' Court. The Prosecution called five witnesses and the Defence 2 witnesses Sylvana Nicholls and Mr lapen.
7. By Verdict dated 9 November 2021, the learned Magistrate found Ipak guilty of and convicted on all five charges. Mr lapen was found not guilty and acquitted.
8. On 23 November 2021, Ipak filed Notice of Appeal.
9. On 20 July 2022, the Prosecution filed submissions in response.
10. On 17 February 2023, Ipak filed Appeal Book including Amended New Grounds of Appeal.
11. On 24 April 2023, the Prosecution filed submissions in response to the Amended New Grounds of Appeal.

C. Additional Grounds of Appeal

12. Amended New Grounds of Appeal were included in the Appeal Book filed on 17 February 2023 setting out additional grounds of appeal.
13. Mr Nathan correctly pointed out that no application for leave to file additional grounds of appeal has been filed. Even after he pointed this out in the response submissions filed on 24 April 2023, no application for leave was filed.
14. In the circumstances where Ipak does not have leave and did not even seek leave to file additional grounds of appeal, I confirm that it does not have such leave. I give no further consideration to the purported additional grounds of appeal.

D. Grounds of Appeal and Submissions

15. By Notice of Appeal filed on 23 November 2021, Ipak is appealing the verdict in relation to all charges. The grounds of appeal included that the learned Magistrate erred in fact by misunderstanding the evidence that Ipak and the Custom Land Owners Steering Committee ('CLOSC') as owners of the area were business partners hence their agreement for Ipak to provide funds and CLOSC to hire and pay workers. The alleged employees were actually employed by CLOSC, not Ipak. Secondly, that Ipak was wrongly seen as the employer because at times it stepped into CLOSC's role when using computers to process payments because CLOSC members were not able to use computers to process payments or type letters.



16. Mr Boe submitted that there is insufficient reasoning set out in the Verdict to support the conclusions reached by the learned Magistrate.
17. Mr Nathan submitted with reference to the Prosecution's evidence and cross-examination of Mrs Nicholls that the learned Magistrate was correct to conclude that Ipak was the employer of the five alleged employees. He submitted with reference to the Prosecution's closing submissions at trial summarising the Prosecution and Defence evidence that the learned Magistrate was correct in stating that CLOSC and Mr Iapan are Ipak employees. Further, that the Magistrate did not consider only Ipak's processing of payments but also other factors to correctly conclude that Ipak was the employer of the persons concerned.

E. Limitation Period

18. Paragraph 15(b) of the *Penal Code* [CAP. 135] provides as follows:

15. *No prosecution may be commenced against any person for any criminal offence upon the expiry of the following periods after the commission of such offence –*

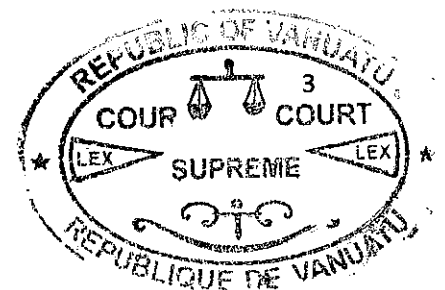
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(b) *in the case of offences punishable by imprisonment for more than 3 months and not more than 10 years – 5 years;*

19. Mr Nathan accepted that given that the charges were first filed on 8 April 2021, all months in 2015 and the months January-March 2016 fell outside the 5-year limitation period prescribed in para. 15(b) of the *Penal Code*. This applies to Charges 1, 2 and 5.
20. Mr Nathan submitted that the Court sever those months from Charges 1, 2 and 5 and the Verdict stand otherwise.
21. I will order therefore that the months of 2015 and January-March 2016 are severed from Charges 1, 2 and 5.

F. Discussion

22. The Verdict recorded that the employment of the five persons alleged to be employees and the period of their employment was not disputed. The only issue as Mr Nathan submitted was "who is responsible to pay for the contributions under section 26(1) of the VNPF Act and so liable for an offence under section 50(1)(c) of the Act": Verdict at [6].
23. The learned Magistrate then summarised the Prosecution and Defence cases: Verdict at [10]-[11].
24. She then went on at [13] of the Verdict to set out her findings of fact. In doing so, she discussed admissions by Mr Iapan and the evidence of Defence witness Mrs Nicholls.



25. The grounds advanced on appeal were essentially that the learned Magistrate erred in fact by misunderstanding the evidence that it was not Ipak who was the employer but CLOSC. However, as set out in the learned Magistrate's findings in the Verdict at [13], she set out the basis on which she held that Ipak was the employer of the five persons alleged to be its employees. That included Ipak and CLOSC's agreement that it was the latter's role of getting people from their community to build the resort and they would be paid with money given by Ipak. Further, Mr Iapan admitted that he received money from Ipak to pay the employees. In addition, Mrs Nicholls admitted that CLOSC was a "facilitator" to whom money was sent, to Mr Iapan, to pay the workers for the works done. Finally, that it was Mrs Nicholls and her husband Simon Turner who gave instructions for and on behalf of Ipak to CLOSC and Mr Iapan in relation to works on the resort construction and payments.
26. The learned Magistrate also referred to a 2019 memorandum signed by Ipak and CLOSC and stated that this could not be used retrospectively to explain what the business arrangement was between Ipak and CLOSC in the preceding years. With respect, she was correct.
27. In the circumstances, I cannot agree with Mr Boe that there was insufficient reasoning set out in the Verdict to support the conclusions reached.
28. I had raised with counsel concern that it is not set out anywhere in the Verdict how many witnesses the Prosecution had, who they were and what their evidence was. However, on review of the Prosecution's closing submissions in which that evidence was summarised, I consider that the failure to summarise their evidence in the Verdict is immaterial to the factual findings made and the basis on which they were made. I consider that on the basis set out in the Verdict at [13], it was open to the learned Magistrate to make the factual findings that she made.
29. For the reasons given, the Verdict must stand.

G. Result and Decision

30. The months of 2015 and the months of January-March 2016 are severed from Charges 1, 2 and 5 in accordance with para. 15(b) of the *Penal Code*.
31. The appeal is **dismissed**. Accordingly, the Verdict dated 9 November 2021 stands with the change that all months of 2015 and the months of January-March 2016 are severed from Charges 1, 2 and 5.

DATED at Port Vila this 19th day of June 2023
BY THE COURT


Justice Viran Molisa Trief

