

**PUBLIC PROSECUTOR**

- v -

**MICHAEL TABINOK**

**Coram:** V. LunabeK - CJ

**Counsel:** The Public Prosecutor and Mr Philip Toaliu for Public Prosecutor  
Mr Eric Molbaleh for the Defendant

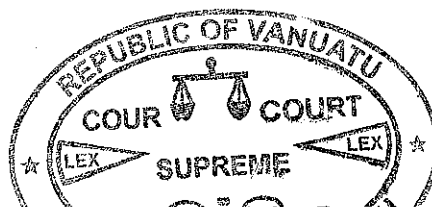
**DECISION ON VOIR DIRE**

1. The Accused was charged with two offences, theft and unlawful entry, contrary to ss125 and 143 of Penal Code Act respectively. He pleaded not guilty to the said offences on 19 May 2016. A trial was required. The Defence raised voluntariness of admissions made in cautioned statement made on 22 November 2015. Before the trial began, the Defence counsel sent an email to the prosecution as to the nature of an issue of the voir dire that on 22 November 2016, the arresting police officer assaulted the accused in the vehicle on the night after his arrest. The accused spat blood and he did not eat for several days. He bled.
2. It was also said that the accused was forced by PC Terry Lapinpel to admit he only stole 300,000 Vatu and he was threatened in loud voice. The Defendant wanted a voir dire to determine the admissibility of his statement under caution and the answers to questions 26 and 43 in the interview statement.
3. The sole object of a voir dire is to determine the voluntariness of admission by the Accused.
4. The Prosecution assisted me with the decision of Privy Council (English) in Ibrahim -v- The King [1914] Ac 599. In there, Lord Sumner who gave the judgment of the Court established the common law rule that no statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement. If an objection is made to the admission evidence as to a statement made by an accused it will be for the

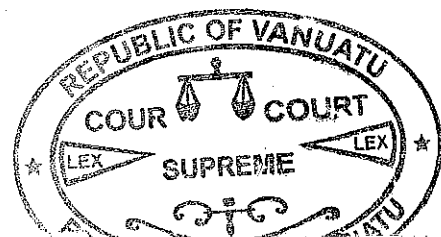


judge to decide as to its admissibility. He will generally, in the absence of the jury (although in Vanuatu a judge sits alone as judge of fact and a judge of law), have to hear the testimony of witnesses in regard to the impugned evidence and in regard to the relevant surrounding circumstances. He will then decide whether the prosecution have shown that the statement was a voluntary statement. Lord Sumner explained or illustrated what he meant by a voluntary statement. He meant a voluntary statement "in the sense" that it had not been obtained either by fear of prejudice or hope of advantage, the fear being as he put it "exercised" by or the hope being "held out" by someone whom he described as a person in authority. Police officers are clearly persons in authority.

5. I heard evidence from arresting and investigating officers and also from witnessing police officer at the interview of the accused. I also heard evidence from the Accused/Defendant.
6. Has the prosecution shown that the statement of admission were obtained voluntarily? The onus of proof resides with the prosecution and the standard of proof is that the statement was voluntarily obtained beyond reasonable doubt.
7. PC Orlando was the first witness. He testified to the following effect. He was the driver of the white double cabin # 7915. He was accompanied by Police Officer Jimmy Nimisa. He was instructed to drive to the Red Light Nakamal at No.2 Lagon to arrest the accused. He was given description of the accused as contained in the watch house register (Exh. P4). He was the arresting officer. The accused was lying about his name claiming his name was Joseph.
8. After the Defendant was informed of the nature of the charge against him, he lied to avoid the arrest. PC Orlando had descriptions of the Defendant wearing a yellow cap, a head phone and a black shirt, he arrested the Defendant and hand cuffed him. He took him in the Police vehicle Reg.# 7195. PC Jimmy Nimisa sat with the Defendant behind him in the vehicle. He drove them to the police station. It was 4-5 minutes drive.
9. The Defendant says when the police vehicle arrived at USP on that night of 22 November 2015, PC Jimmy Nimisa punched him on his mouth which affected

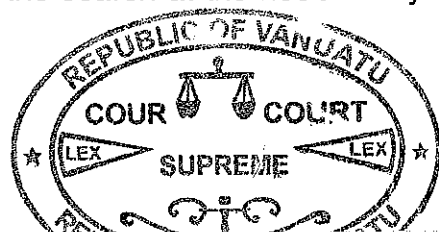


- one of his teeth. It was painful. He spat blood. He found hard to eat PC Orlando says he never saw anything of this sort. The defendant sat on his right side but at the back if something happened he would have reacted.
10. He observed the defendant from the light of police station. He said he did not see any assault or bleeding on the body of the defendant. PC Orlando confirmed this evidence in the Watch House Book. PC Orlando gave food to the Defendant.
  11. The accused ate the food before PC Orlando locked him up in Cell No.6. PC Orlando was cross examined and he maintained his evidence in chief.
  12. PC Jimmy Nimisa says he accompanied PC Orlando to Red Light Nakamal at 2<sup>nd</sup> lagoon on 22 November 2015. He confirmed how the Defendant have been asked his name. The Defendant says his name was Joseph. The Defendant was there. They arrested him and placed him at the back seat of the vehicle on his right hand side. He said he never assaulted the Defendant at any time from the Red Light Nakamal to police station in Port Vila.
  13. At the police station, he made entries to the Occurrence Book of the details of the Defendant and the food given to the Defendant. The Defendant did not object to the food given to him. The defendant did not complain of his mouth bleeding. PC Jimmy Nimisa was responsible for recording the Defendant's details and food given to him (Exhibit P4).
  14. PC Jimmy Nimisa testified that he also gave the Defendant breakfast the next morning on 23 November 2015. On that date, PC Jimmy Nimisa took the Defendant first cautioned statement. He says he alone was present. PC Terry Lapinpel was not present.
  15. On 24 November 2015, PC Jimmy Nimisa took the second cautioned statement of the Defendant by questions and answers. He was the only one asking questions to the Defendant (Exhibit P2). The Defendant was answering his questions. PC Terry Lapinpel was just witnessing. He says the Defendant made admissions to questions 21, 22, 26, 43, 51, 80 despite the limited scope of the complaints (Q.26 and Q.43). He says in one of the answers he gave the Defendant agreed to refund the money. There was no

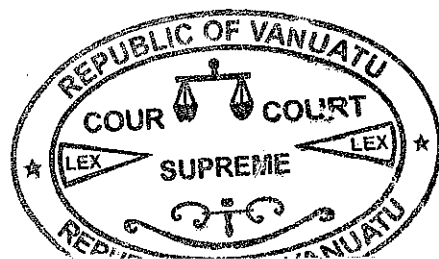


mention of the amount of 1,036,000 Vatu. He gave the reason that the police did not have the details of the amount stolen at that point in time.

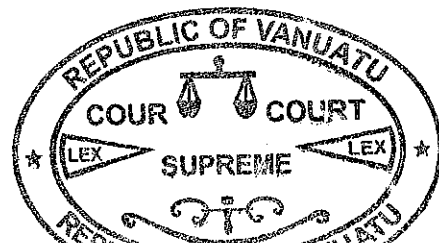
16. PC Nimisa says PC Terry Lapinpel never raised his voice or threatened the defendant. PC Nimisa says the records of interview was read back to the Defendant. The Defendant agreed and signed. He says the cautioned statements of 23 November and 24 November 2015 was read back to the Defendant. He agreed and signed. PC Nimisa says that at the end of the statements, his recording of interviews and the admissions by the defendant was given on his free will and so voluntarily.
17. PC Terry Lapinmal gave a brief evidence. His role at the interview of the Defendant was a witnessing officer. He was not present on 23 November 2015. He says he had never asked any questions. He was present on 24 November 2015. The interview was conducted by PC Nimisa. He denied ever raising his voice while accused was being interviewed. PC Terry Lapinpel confirmed the evidence of PC Nimisa that the records of interview was read back to the Defendant. The Defendant agreed and signed the record. PC Lapinpel also says he signed the records of interview. He says the defendant gave a statement voluntarily on his own free will.
18. Defendant Michael Tabinok gave evidence to the effect that on 22 November 2015, two (2) police officers arrested him at the Red Light Nakamal at 2<sup>nd</sup> Lagoon. He remembered Police officer Jimmy Nimisa and the other who drove the police vehicle. They arrested him and took him to Police station. He says they asked him about the theft of money at a store in the central part of Pentecost, he said it was not him. He says at USP round about, PC Jimmy Nimisa punched him on his mouth and there was a tear (cut) in his mouth. He says he was with Jimmy Nimisa at the back. The driver was alone in the front.
19. He says Jimmy Nimisa punched him only once. The Police Officers only asked him if he took the money and he said he respond no. The driver of the vehicle told him: "you lied". They took him inside the police station. They searched him and removed 2 fruits of cigarette and small amount of money. They put him in cell No.6. They released him on the other day. They went with him and searched his house. He lived at Ohlen Fresh Wind. Police took his Sola Panel and his money from kava. After the search at the house they



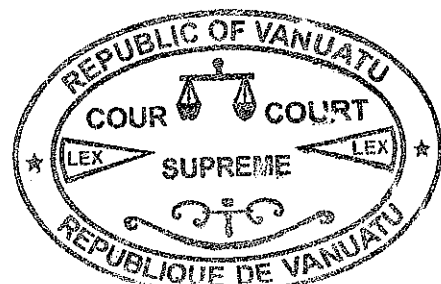
- returned back to the police station. He said police asked him if he took the money. He said he told them that he did not know what they are talking about. He said on 23 November 2015 police officer Jimmy Nimisa was with him in the room of interview. He said Jimmy Nimisa asked him about the money whether he took the money. The police officer gave him food at lunch time (take away from chinese restaurant).
20. He said he could not eat well because of the pain from one of his teeth. He said that was around 2.30pm when they had lunch. He said after lunch Terry Lapinpel came in and told him that if he did not admit to 1 Million he can admit of taking only 500,000 to 300,000 Vatu.
  21. He said police told him to say something as there was a Court at 3.00PM.
  22. He said in his statement of 23 November 2015, he said yes it was true he took 300,000 Vatu at a store at Central Pentecost. He gave the reason that when they told him so he said yes. But he said he did not take any money.
  23. Then he said the interview took about 2 hours and 30 minutes. The interview started at 12.00PM o'clock until 2.00PM. It was the date after the arrest.
  24. He was asked by his lawyer that Police said they took a statement from him on 24 November 2015.
  25. He said the police interviewed him on 23 November 2015 after the arrest.
  26. He was asked by his lawyer that the police document showed that there was an interview with the police on 24 November 2015. The interview record, showed he also admitted taking 300,000 Vatu at the store at Central Pentecost.
  27. He said he said that from what Terry Lapinpel told him to say that he stole 300,000 Vatu. But he said he did not stole any money. He said PC Lapinpel came in the interview room twice. He said police officer Lapinpel told him in loud and strong voice.
  28. In cross-examination, the Defendant said his name was not Joseph but Michael Tabinok. He admitted he lied to police officer Orlando when he said his name was Joseph.



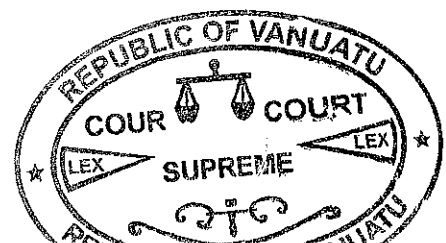
29. He said Jimmy Nimisa punched him in the Police Vehicle. He had a cut inside his mouth. There was no cut on his lips but on his teeth. There was no blood on his lips but on his teeth. There was no blood on his shirt. He said if any saw him he would see the blood. He agreed it was painful and he could not eat for several days. He did not make any noise when Jimmy Nimisa punched him. At the police station, he said PC Orlando saw that he spet blood he asked him what happened to him. He said he told him that PC Jimmy Nimisa punched him.
30. It was pointed to him that Orlando said that he never complained to him. He said PC Orlando drove the vehicle.
31. It was put to him again that he never complained to PC Orlando and he admitted. He said he complain to Jimmy Nimisa in the loud voice because he was in pain. It was put to him he never complained to Jimmy Nimisa because he never assaulted. He said he said what happened.
32. He accepted that at the police station, he was searched before his details were put on the watch house book. He confirmed he had a yellow cap, a head phone and two cigarettes. He confirmed he saw PC Jimmy was writing something about what PC Orlando asked him. He was shown Exh P4 with the mentioned "inventory of properties" and was asked the signature on the document was his. He said No.
33. He confirmed that on 24 November 2015, he was taken to correctional services. He accepted he was asked questions about his conditions.
34. He accepted he never complained to correctional officers. He accepted they asked him if he had specific problem of health. He accepted he told them no he had not.
35. He accepted they asked if he needed any medication and he admitted he said no. He accepted he was asked to sign the record. He said he remembered he signed the record. He accepted he went to the hospital much later on. He was seen by a doctor but he accepted he did not make any complaint to the doctor. He accepted the doctor assessed him to be normal (Exhibit P5).



36. He was shown the record of correctional services and was asked of the signature on the document he said it was not his. It was suggested if someone forged his signature at correctional services centre he said no. He did not know but then said someone forged his signature at the correctional services centre. He did not have any reason. He was taken to Court on 24 November 2015.
37. He was questioned he admitted he did not complain to the Magistrate Court. He said after he was arrested, they gave him something to eat before they put him in jail. He accepted that the next day Jimmy Nimisa came back and gave him some food for breakfast. He accepted he did not complain.
38. He was asked about the cautioned statement of 23 November 2015, the records showed only PC Jimmy Nimisa was there. There was nobody else. He accepted by saying yes.
39. He accepted there were no other police officer around. It was put to him and he admitted that PC Terry Lapinpel was never there when PC Jimmy Nimisa took a cautioned station from him for the first time on 23 November 2015.
40. He was asked whether he agreed and signed. He said he did not sign. He was shown Exhibit P1 (the cautioned statement of 23 November) he said for the First time he never signed it (although his lawyer never cross-examination Police officers on this). He denied signing the document. But he accepted and agreed that the records were read back to him.
41. He was taken to the next document Exh. P2 (cautioned interview statement). He was asked and he accepted that on 24 November 2015, he was with Jimmy Nimisa. PC Jimmy Nimisa wrote questions and he answered them.
42. He was asked that this time PC Jimmy Nimisa was there and for the first time PC Terry Lapinpal also was present. He admitted by saying yes. It was put to him and he accepted that Jimmy Nimisa asked him questions and he answered them.
43. It was put to him and he denied that PC Lapinpel was just a witness officer and never said anything to him.



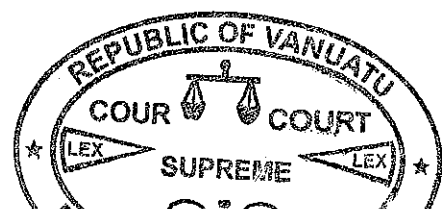
44. It was put to him that there were a total of 85 questions in the statement of interview and none was asked by PC Terry Lapinpel but they were all asked by PC Jimmy Nimisa. He admitted by saying yes.
45. He also accepted that after interview questions and answers they were read back to him. He confirmed that they were taken by PC Jimmy Nimisa. He accepted that none of questions he said PC Lapinpel told him to say were in the records of interview.
46. It was suggested to him that what Terry Lapinpel told him that if he did not admit 1 Million Vatu, he could just admit 500,000 or 300,000 Vatu and this was at the time they questioned him but it was pointed out to him that the police officers at that time, did not know the amount of money stolen. He accepted the suggestion by saying yes. He was asked how they would know about this amount was over 1 Million Vatu.
47. He was asked how they would know, he did not answer. He was just saying that they knew about 1 Million Vatu they arrested him for. He said what he told the Court was true.
48. It was put to him the allegations that Jimmy Nimisa assaulted him were untrue. He denied and said it was true. It was put to him that the allegations that Terry Lapinpel interfering with the cautioned statement and the interview statement on 23 November 2015 and 24 November 2015 were untrue. He denied and said they were true.
49. He was re-examined he said Jimmy Nimisa punched him. He was in pain. He had just told him why he assaulted him. He said when he was at the correctional services centre, they sent them to the hospital to check. In the interview room he said he was with Jimmy Nimisa. When they came out he told him to see Jimmy Nimisa inside the police station.
50. In this case, the difficulty I have with the defence is that the accused was sitting to the right side of the driver (PC Orlando). PC Orlando would have reacted to something unusual occurring in the back of this vehicle. PC Orlando said he never saw anything of this sort. PC Orlando observed the accused from the light of the police station. He did not see any assault or bleeding on





the body of the accused. PC Orlando confirmed this in the light of the police station before locking him up in the cell No.6.

51. It is observed that the range of questions asked and recorded in the Exhibit P4 provide significant evidence that rebut the complaint of the accused.
52. The accused name is Michael Tabinok not Joseph. He did not suffer any injury nor any medication is required. It is accepted that the evidence is inconsistent with a claim that the accused was assaulted and bled on the mouth. PC Orlando gave food to the accused. The Accused had the food before he was locked up. This is inconsistent with the claim that the accused was bled from the mouth and could not eat for several days.
53. The evidence of food given was recorded in the occurrence book (Exh. P4). Accused did not object to food given to him nor did he complain of his mouth bleeding. Accused was given food during breakfast on the next morning of his arrest on 23 November 2015.
54. On 23 November 2015, PC Nimisa took the first cautioned statement to the accused. He alone was present. PC Terry Lapinpel was not there. This was confirmed by the Accused despite some confusion earlier on in his evidence.
55. On 24 November 2015, PC Nimisa took the second cautioned statement (the interview statement) (Exh. P2). PC Jimmy Nimisa was the only one he asked questions. PC Terry Lapinpel was just witnessing the interview statement. The accused made admissions to Q21, Q22, Q26, 43, Q51, Q80 despite limited scope of the complaints.
56. In one of the answers the accused gave, he agreed to refund the money. There was no mention of the amount of 1,096,000 Vatu. The reason was given by PC Jimmy Nimisa and PC Terry Lapinpel that the police did not have the detail of the amount taken at that point in time.
57. The record of interview was read back to the accused. Accused agreed and signed. The cautioned statement of 23 November and 24 November 2015 were read back to the Accused. He agreed and signed. The Accused now denies the signatures on the said documents are his. That is not a matter of admissibility but weight.



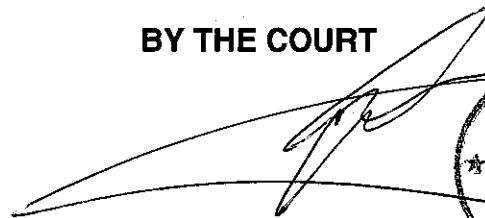
58. It is noted that how the accused admitted to the Court how he lied to the police about his name does indicate the manner as to how he made the complaints of assaults PC Nimisa and how he said PC Terry Lapinpel forced him to make admission.
59. Again the accused had never complained to the police, to the correctional officers, to the medical and to the Magistrate.
60. The signatures on the documents cannot be forgery by someone else. There were no reason.

There were finally some difficulties with the defence as the accused raised matters that were not traversed the prosecution witnesses how he objected the food given to him.

61. The prosecution has been able to show that the statements given by the accused on 23 November 2015 and 24 November 2015 (Exh. P1 and P2) are statements given voluntarily in the sense of not given by him in fear of prejudice.
62. In this case, the objections all go to the weight not to admissibility of the evidence.
63. What a person having knowledge about the matter in issue says of it is itself relevant to the issue as evidence against him. That he made this statement under circumstances of hope, fear, interest or otherwise goes only to its weight.

**DATED at Port Vila, this 25<sup>th</sup> day of April 2017**

**BY THE COURT**



**Vincent LUNABEK  
Chief Justice**

