

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

Criminal
Case No. 18/2820 SC/CRML

PUBLIC PROSECUTOR

v

1. **SALAD TOSU**
2. **JOHN BOVIRA**
3. **ANDREW TOSU**
4. **GRAHAM BOVIRA**
5. **NICKSON AMOS**
6. **ELIJAH BEN**
7. **MORRISON TOSU**
8. **PIERO TOSU**
9. **KALTO SITANGTANG**
10. **REMY TAVUI**
11. **BOVIRA**
12. **WUS KAVEN**
13. **TALAI TOSU**

Before: *Justice Fatiaki*

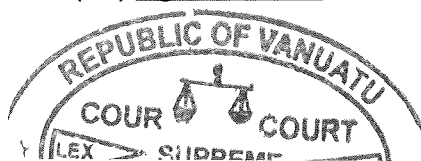
Appearance: *K. Massing for the State*
J. Garae for the Defendant

Date of Plea: *14 May 2019*

Date of Sentence: *17 May 2019*

SENTENCE

1. This case has a somewhat chequered history that bears retracing. Although the defendants had pleaded earlier to the Information, because the prosecution filed an amended Information on 8 May 2015 including a further count of Malicious Damage (Count 2) to which the defendants had not yet pleaded, the defendants had to be re-arraigned.
2. Defence counsel who had not seen the amended Information sought an adjournment to take instructions and, rather than delay matters further, prosecuting counsel nollied the Malicious Damage count leaving the original charges of Unlawful Assembly (Count 1) and Theft (Count 3) to which all 13 defendants again pleaded not guilty.
3. Defence counsel then advised the Court that he wished to make a legal submission on the basis of thirteen (13) Agreed Facts that he had earlier provided



to prosecuting counsel to consider. Prosecuting counsel confirmed receiving defence counsel's submission and list of Agreed Facts and after considering it, he agreed to facts 1 to 11 inclusive. By order of the Court Agreed Facts 1 to 11 were formally admitted pursuant to Section 84 of the Criminal Procedure Code Act [CAP. 136] as part of the Court record.

4. Briefly, a large number of the admitted Agreed Facts referred to the history of litigation surrounding "Putingin land" where the complainant had established his subsistence gardens and planted his kava. The land had been declared by the **Santo Island Land Tribunal** on 3 May 2010 in favour of the defendants' extended family as custom owner of one unsurveyed and undivided quarter share.
5. The most relevant for this case were Agreed Facts 4, 5, 8 and 9 which reads as follows:

"The complainant entered Putingin custom land to grow his food gardens and kava gardens in 2014 without the permission of the custom land owners.

The complainant grew some 3,000 kava plants on Putingin custom land.

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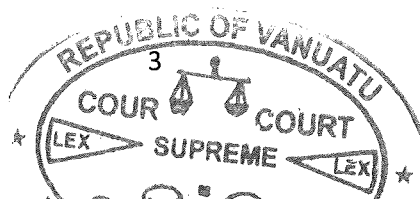
On 17 August 2016 the Magistrate Court (CC No.2753 of 2016) in Port Vila issued restraining orders against further entry and gardening on "Putingin" ... custom land by 27 named Fanafo people including "Jimmy" the complainant.

Between 6 and 8 March 2017 the accuseds entered the complainant's gardens on their land at "Putingin" and dug up and took around 3.000 kava plants grown by the complainant".

6. Thereafter extensive discussions were held with both counsels and it was agreed that despite the Agreed Facts, the evidence of the complainant needed to be called and heard orally in open court. Prosecuting counsel also sought the admission of the defendants' police caution statements as part of the prosecution's evidence and, with defence counsel's consent, they were formally marked: **Exhibits P(1) to P(13)**.
7. With slight immaterial variations each defendant is recorded to have said in his caution statement that he helped the other defendants in uprooting the green kava plants from the complainant's garden and storing the uprooted kava plants in the Hydro nakamal. The next day 8 March 2017 he helped pack the complainant's green kava into 4 bags which were then transported in a truck driven by **Remy (Tavui)** to "Clean and Green Factory" where the kava was sold and the proceeds were shared amongst the defendants.
8. After the luncheon adjournment, the complainant was called and he testified that he had entered the land in question in 2014 after receiving the permission of

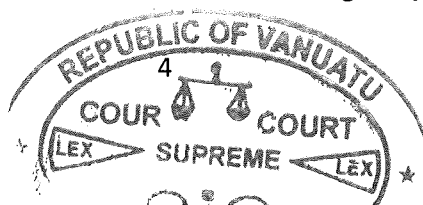
Rukon Perei who he understood was a competing claimant to the land which was then the subject matter of an Island Court case. He agreed that he stopped planting on the said land in November 2016 on the advice of his Chief Molimerica. The complainant frankly admitted he did not come from that area nor did he know the traditional name of the land he was planting on. He had not completed harvesting his crops on the said land despite starting in November 2016 because his garden "*i big tumas*".

9. He denied ever receiving a court order stopping him from entering into "*Putingin land*" nor had he attended any council of chiefs meeting that discussed the area where he was planting. He testified he was hiding about fifty (50) metres away when he saw the defendants enter his garden and uproot 3,000 kava plants that he had planted on the land.
10. He denied any knowledge of who the declared custom owner of the land on which he planted was, other than **Rukon Perei**. The defendants did not return his uprooted kava plants to him nor did they give him any of the money they received from selling his kava. During his examination in chief the complainant was shown seven (7) defence documents including the Santo Island Land Tribunal decision in the defendants' favour; the Supreme Court judgment in Civil Case No. 19/2010 upholding the Tribunal's decision; and the restraining order of the Magistrates' Court in Civil Case No. 2753/16 between Family Bensive Tosu as claimants and members of the Santo Bush Fanafo area including "**Rukon Perei and family**"; "(Chief **Molimerica**" and the complainant ("**Jimmy**") as defendants wherein, the defendants in the case, including the complainant, were restrained from "*further entry into and growing new gardens on Putingin customary land*". To all the defence documents the complainant denied ever seeing them or receiving a copy before being shown it in Court.
11. In cross-examination however, he admitted being informed by his un-named uncle about the Magistrates' Court injunction and how he was named as a defendant in the case. He denied the injunction prohibited "*entry into*" the land but only to stop planting, which he claims he strictly obeyed. He admitted knowing about "*Putingin land*" being under dispute and agreed that his plantation was in "*Putingin land*" and although he was aware of the defendants moving from Fanafo to behind the Hydro, he didn't know why nor had he thought to ask them if they owned the land he was planting on or to seek their permission to continue with his planting. He specifically denied knowing that the defendants were declared custom owners of "*Putingin land*".
12. On being shown Exhibit D(6) – the defendants' Kastom Public Notice by defence counsel, the complainant admitted receiving and seeing a copy of it. He also understood the Notice specifically prohibited access to his gardens from 06 March 2017 unless authorised by calling 2 mobile numbers included in the Notice. He said he obeyed the Notice and stopped going to his garden from 06 March 2017.



13. The complainant was then cross-examined about his police statement where he is recorded in the second paragraph to have said that he had gone to his garden on Monday 06 March 2017 at about 8am and had seen the defendants uprooting his kava plants that he had planted 3 years earlier at Hydro Bush. The glaring inconsistency in the complainant's answer under oath about obeying the KASTOM NOTICE and not going to his garden from 06 March 2017 and his recorded police statement about actually going to his garden on 06 March 2017 was pointed out to him and the complainant was reluctantly forced to admit that what he told the police was "a lie" ie. about going to his garden and seeing the defendants uprooting his kava plants on 06 March 2017.
14. The complainant then confirmed under cross-examination that he had not gone to his plantation on the morning of 06 March 2017 and that had not seen the defendants' uprooting his kava. In his own words:

"I was just guessing who damaged and uprooted my kava because I didn't see. I didn't see the defendants digging up my kava but I felt bad at what happened to my garden so I went and made a statement to the police".
15. In re-examination, the complainant confirmed making his report to the police on the morning of 08 March 2017 and to the Qn: "How do you know it was the defendants who uprooted your kava?" the complainant said Ans: "I saw them transporting kava to town".
16. If I may say so having seen and heard the complainant testify in Court, I found him a wholly unsatisfactory and unreliable witness. He struck me as a person who was willing to lie on oath to achieve his own ends without any concern for the truth or for the consequences.
17. He was discredited in his evidence and exposed as a witness with a selective memory who was willing to deny any evidence that might reveal that he knew more than he was willing to admit, especially, if it was evidence that he considered was contrary to his interests such as the Magistrate's Court's restraining order.
18. After the complainant's evidence prosecuting counsel on his own initiative before closing his case asked the Court to acquit the defendants **Wus Kaven** and **Talai Tosu** on the basis that there was no credible evidence against them on both charges. This was despite the complainant identifying them both in Court as persons he saw uprooting the kava plants in his garden on 06 March 2017. They were both accordingly acquitted and released from the dock.
19. The prosecutor then closed his case and defence counsel sought time to make a "no case" submission pursuant to Section 164 of the Criminal Procedure Code. The case was adjourned to 10am the following day for defence counsel's submission.



20. The next day when the trial was called for continuation, defence counsel advised the Court that in considering the matter overnight and after consulting with his clients, he had instructions to ask the Court for his clients to be re-arraigned as they wished to "*come clean*". The remaining eleven defendants were re-arraigned and this time each defendant pleaded guilty ("*yes my lord, mi guilty*") to Unlawful Assembly and Theft. Prosecuting counsel then outlined brief facts referring to the particulars charged and to each defendant's police caution admissions about packing the complainant's kava into 4 bags which they transported and sold to a factory and shared the proceeds. Upon each defendant admitting the facts outlined ("*mi harem storian i tru*") each was convicted of the two offences as charged.
21. Defence Counsel then informed the Court that counsels had agreed if the defendants were convicted, to ask the Court to sentence the defendants to return what they had taken from the complainant's garden, by way of restitution in kind namely, 4 bags of green kava plants which was to be contributed to by each of the defendants from his own kava plantation.
22. After considering the defendants change of pleas and noting their sincere and commendable desire to tell the truth and "*make a clean breast of it*", and mindful of the provisions of Section 37 about keeping offenders in their communities as far as practicable and also of the genuine albeit misguided and naively held belief of the defendants that they were entitled to uproot the complainant's unauthorised kava plantation growing on their customary land, the Court agreed with counsels request that a community-based sentence which restored the complainant's lost kava and at the same time, allowed the defendants to remain with their families and community was the most appropriate and just manner of dealing with the case given the criminal convictions that had already been recorded against each defendant.
23. Accordingly and pursuant to the mandatory terms of Section 40 of the Penal Code, the defendants were individually and jointly sentenced to make Compensation to the complainant, comprised of 4 fully packed bags of green kava stems and cuttings to be contributed to by each defendant harvesting green kava plants from his own kava plantation.
24. The 4 bags of green kava were ordered to be brought to the Court to be formally handed over to the complainant and at the defendants' request, such handing-over was to occur during a reconciliation ceremony they intended to perform to the complainant in the presence of his chief and the probation officer. The matter was then adjourned to 4pm the next day.
25. The next day when the Court resumed at 4.30pm prosecuting counsel much to the dismay of the defendants, advised the Court that the complainant could not be located and was not available to receive the 4 bags of green kava plants that




had been carefully harvested and prepared by the defendants that were present in the Court ready to be handed over. The matter was adjourned for a final time to allow the prosecution further time to locate and bring the complainant to Court.

26. At 7.30pm later in the evening the Court re-assembled and the prosecutor again advised that the complainant could not be located but in his place he had brought the complainant's chief and his younger brother. Unfortunately, neither was willing to accept the 4 bags of green kava on the complainant's behalf and the handing over ceremony had to be postponed yet again.
27. Defence counsel and prosecuting counsel were then directed by the Court to confirm a suitable date and time as soon as possible within the next 7 days to hand-over the 4 bags of green kava and perform a custom reconciliation ceremony to be witnessed by the probation officer who was directed to file a written report for the Court's record purposes.
28. On the late afternoon of Thursday 23 May 2019 prosecuting counsel advised the Court that he was able to bring the complainant and six defendants, namely, Salad Tosu, Nickson Amos, Piero Tosu, Morrison Tosu, Kalto Sitangtang and Remy Tavui with their chief to Court for the handing-over of the 4 bags of green kava and reconciliation to occur.
29. All parties assembled in Court and after the Court addressed the parties thanking them for their presence the defendants' Chief Amos Tosu presented the complainant with 4 bags of green kava; a large highly-prized traditional red mat; a wild fowl and yams. The six defendants then individually shook hands with the complainant after their spokesman Remy Tavui expressed their acceptance of wrong-doing and their sorrow and apologies. The complainant then spoke accepting the presentations and the defendants' personal apologies. The parties were reconciled and the Court was privileged to bear witness to the short but meaningful traditional ceremony of "*Klenem fes*".
30. The Court delivered a final word of thanks and its hope that the parties would continue to live together peacefully in the future.

DATED at Luganville, Santo, this 24th day of May, 2019.

BY THE COURT


D. V. FATIAKI
Judge.

