IN THE COURT OF APPEAL OF
THE REPUBLIC OF VANUATU
(Criminal Appellate Jurisdiction)

Criminal Appeal
Case No. 18/1652 CoA/CRMA
Case No. 18/2222 CoA/CRMA

BETWEEN: **MARCELLINO PIPITE**
SILAS YATAN
THOMAS LAKEN
TONY NARI
JOHN AMOS
JONAS JAMES
Appellants in 18/1652

AND: **PAUL TELUKLUK**
ARNOLD PRASAD
SEBASTIEN HARRY
JEAN YVES CHABOD
Appellants in 18/2222

AND: **PUBLIC PROSECUTOR**
Respondent

Coram: ***Hon. Chief Justice Vincent Lunabek***
Hon. Justice John von Doussa
Hon. Justice Ronald Young
Hon. Justice Oliver Saksak
Hon. Justice Daniel Fatiaki
Hon. Justice Dudley Aru

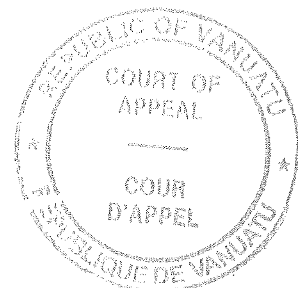
Counsel for the Appellants: *Mr. F. Laumae for Marcellino Pipite*
Mrs. M. Nari for Silas Yatan
Mrs. M. Nari for Thomas Laken and Tony Nari
Mr. E. Nalyal for John Amos
Mr. A. Bal for Jonas James
Mr N. Morrison for Silas Yatan on sentence appeal
Mr J. Kausiama for Tony Nari on sentence appeal
Mr G. Nari for Tony Laken on sentence appeal

Counsel for the Respondent: *Mr. J. Naigulevu – Public Prosecutor*

Dates of Hearing: *12th, 13th and 14th November 2018*

Date of Judgment: *16th November 2018*

JUDGMENT



1. On 5 April 2018 six of the appellants (Pipite, Yatan, Nari, Amos, Laken and James) pleaded guilty to a charge of conspiracy to defeat the course of justice. Four appellants (Telukluk, Prasad, Chabod and Harry) pleaded not guilty but were convicted after trial. With respect to two defendants originally charged with the conspiracy the prosecution entered a *nolle prosequi* and the charge against them was dismissed. We grant leave in the circumstances.

2. In this appeal all 10 appellants appeal against their sentence. The four appellants convicted after trial also appeal against their conviction. Two of the six other appellants (Pipite and Yatan) appeal their convictions raising issues with respect to the circumstances of their guilty pleas. These appeals are out of time and leave is required. We grant leave in the circumstances.

Background Facts

3. On 9 October 2015 fifteen members of parliament were convicted of corruption and bribery. After conviction but before sentencing one of the appellants, Mr Pipite, then Acting President, purported to pardon himself and the current appellants. Shortly after the President returned from overseas he rescinded the pardons. Subsequently the appellants were charged with conspiracy to defeat the course of justice arising from Mr Pipite granting them a pardon.

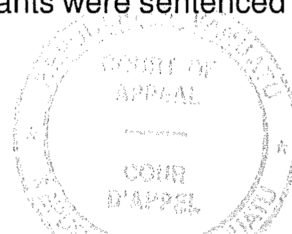
4. At trial in August 2016 all the appellants were convicted. They appealed. This Court set aside the convictions. In May 2017 the appellants were further charged with conspiracy to defeat the course of justice with the pleas and verdicts as identified.

5. The prosecution's case at trial was that the day after their conviction for bribery some of those convicted met at Mangoes Restaurant. The possibility of a pardon was then raised. The President was overseas and Mr Pipite as Speaker of Parliamant was the Acting President. Later the appellants went to the MIPU Building. At various times during the late morning and early afternoon they signed a request for pardon. Despite some legal and other advice against such a course Mr Pipite as the Acting President signed the pardons.

6. The trial judge convicted the four appellants who had pleaded not guilty.

7. At the sentencing of the six appellants who pleaded guilty the Judge adopted a start point for all of 5 years imprisonment, deducted 4 months for personal factors for all appellants and 15% for their guilty pleas resulting in a final sentence of 3 years 10 months imprisonment for all six appellants.

8. As to those four appellants who pleaded not guilty but were convicted the Judge also started with 5 years imprisonment. The appellants were sentenced variously



to 4 years 3 months, 4 years 4 months, 4 years 6 months and 4 years 8 months, after varying deductions for personal mitigation was made.

9. This appeal considers the appeals to set aside Mr Pipite and Mr Yatan's guilty pleas, then the four appeals against conviction, then the sentencing appeals.

Appeals by Mr Pipite and Mr Yatan against conviction after guilty plea

10. The appellants say this Court should set aside their convictions based on their pleas of guilty primarily because the pleas were entered as a result of a plea bargain which the Prosecutor did not adhere to; there was *"new"* evidence given at the trial of these appellants' co-offenders after their guilty pleas which would likely have resulted in their acquittal.

11. We accept that Courts may set aside convictions after guilty pleas where there has been some miscarriage of justice.We do not consider any miscarriage has occurred in this case.

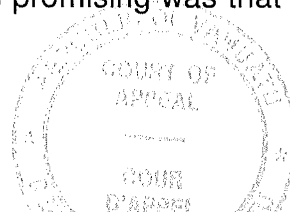
12. First, as to the circumstances of the plea and the suggestion of a plea bargain. We note our discussion of this point in our consideration of the sentencing appeal. All counsel accepted that there is no such thing as a plea bargain in Vanuatu. Whatever is discussed and agreed between the prosecutor and defence counsel cannot bind a Judge. We are confident that counsel for Mr Pipite and Mr Yatan would have told their clients this basic fact.

13. Mr Pipite and Mr Yatan have both filed sworn statements as to the circumstances of their guilty pleas. As to Mr Pipite he claims that his lawyer told him that he would get a suspended prison sentence. This claim is not supported by Mr Pipite's lawyer. Ms Thyna in her sworn statement said that she had tried to convince the prosecution to amend the charge to an attempt to conspire (we doubt such a charge exists).

14. Ms Thyna then said:

> *" The Prosecution has refused but has promised that if Mr Pipite were to plead guilty to the charges laid by him, he would be likely to get a suspended sentence to which he will not be opposed."*

15. We advised all counsel at the call-over of this case that where sworn statements were proposed to be filed in support of this appeal relating to discussions between counsel and the prosecutor they should contain all known detail and include as far as possible the direct speech of the participants. Ms Thyna's sworn statement falls well below that requirement. However the thrust of the above quoted paragraph was that all the prosecutor was promising was that he would



not oppose a suspended sentence. Ms Thyna does not claim there was a promise of a suspended sentence.

16. Mr Napuati on behalf of Mr Yatan filed a far more comprehensive sworn statement. Mr Napuati confirmed that the Prosecutor said that he would not oppose a suspended sentence. There was no suggestion the prosecutor promised a suspended sentence.

17. The Prosecutor, Mr Naigulevu, also filed a sworn statement. He confirmed he told counsel for the appellants before their decision to plead guilty that he would not oppose a suspended sentence for these appellants should they plead guilty. In his submissions before the Court at sentencing the Prosecutor did not oppose a suspended sentence. He took a neutral view.

18. In these circumstances it is clear the appellants knew before plea there was no promise they would have any prison sentence suspended and they knew the prosecutor would not oppose such a sentence. They would have entered their plea therefore knowing there was no promise of a suspended prison sentence. We reject this ground of appeal.

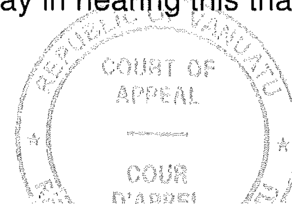
19. The second ground on which the appellants say their conviction should be set aside relates to the claim of the existence of *"new"* evidence.

20. We consider this alleged new evidence at paragraphs 32 to 38. We are satisfied that this evidence has no relevance to the Judge's conclusion as to guilt or otherwise. Given that conclusion this further evidence is not a ground on which a conviction after a guilty plea could be set aside.

21. Mr Pipite raises other grounds on which he says would allow his appeal against conviction.

22. First Mr Pipite says he would suffer a grave injustice if his lawyer, who at the bribery trial was a co-offender on the conspiracy, was allowed to give evidence against him. Mr Pipite's previous lawyer was given immunity from prosecution and gave evidence at trial. There was nothing objectionable about this process. Counsel for Mr Pipite challenged the credibility of this witness given the immunity. The Judge at trial took the fact of immunity into account in assessing the credibility of that witness. We reject this ground of challenge.

23. Mr Pipite says that there was an unreasonable time delay in the prosecution of 24 months. We do not consider such a delay was objectionable given there was a first trial, an appeal and a second trial. Some of the almost 12 month delay in the commencement of the second trial was the responsibility of the appellants. We are satisfied there was no unreasonable delay in hearing this trial.



24. Mr Pipite had legal advice before he pleaded guilty. There was significant evidence against Mr Pipite. We do not consider any of his complaints would justify setting aside his conviction. We dismiss this appeal.

25. Mr Yatan raised some additional matters. He submitted there was insufficient evidence at the trial of the other appellants to convict him or the other appellants.

26. The trial held was not a trial of Mr Yatan's guilt or otherwise. He had pleaded guilty. We have also concluded (paragraphs 31 -60) that there are no grounds to successfully appeal the verdicts after trial. We therefore reject this ground of appeal.

27. Mr Yatan also complains that if the trial Judge had deferred his sentencing he would have been in a better position to assess Mr Yatan's culpability.

28. After Mr Yatan pleaded guilty there was a summary of facts prepared. Mr Yatan was sentenced on that summary. The Judge did not have to delay sentencing for the trial. A resolution of the guilt of those who pleaded not guilty was not relevant to Mr Yatan.

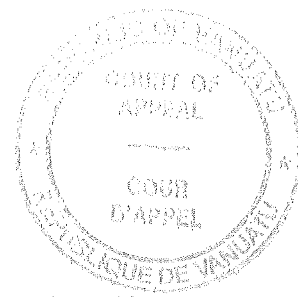
29. In any event the trial Judge at sentencing specifically checked with Mr Yatan's counsel (and the others) that they accepted the summary of facts provided. They confirmed they did so.

30. Finally other than the *"new"* evidence which we have dealt with Mr Yatan having pleaded not guilty and gone to trial in 2016 would have been well aware of the case against him. We reject this ground of appeal. It follows therefore we dismiss the two appellants appeals against conviction.

Appeal against Conviction by Mr Telukluk, Mr Prasad, Mr Harry and Mr Chabod

31. Counsel for the appellants identified in her notice and grounds of appeal five separate errors by the Judge which the appellants say meant they were wrongly convicted. In addition in her submissions counsel identified four other particular errors by the Judge in relation to each of the appellants which it was said also meant they were wrongly convicted. We consider first the more general grounds of appeal.

32. The first ground of appeal is that the Judge did not give proper consideration to what was described as "new" evidence, that is evidence which was not given at the first trial.



33. This new evidence is said to be as follows: Trial counsel for Mr Pipite, Mr Kapapa (at the bribery case) gave evidence at the second conspiracy trial (but not the first) that he received legal advice from another lawyer who was a former attorney-general not to proceed with the pardon. The appellants complaint is that this advice was not passed on to Mr Pipite. If it had been passed on Mr Pipite may well have not proceeded with the pardon with the consequence none of the appellants would have committed the crime.

34. The Judge said that Mr Kapapa:

> *"had informally consulted another lawyer, Ishmael Kalsakau – his advice had been that Pipite has not able to pardon. He (Mr Kapapa) also told Pipite informally he should wait for the President to return the next day and sort this out. Pipite replied" this is none of your business."*

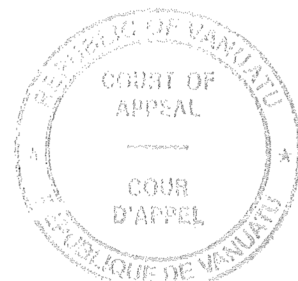
35. In addition Mr Kapapa's evidence was that on the Saturday morning at Mango's he told Mr Pipite to consult the State Law Office on the question of the pardon and that there was no reason not to wait until the following week for the President to return given Mr Pipite's conflict.

36. Given that evidence there can be no doubt Mr Pipite was well aware, in the opinion of Mr Kapapa, he could not legitimately give a pardon. Mr Pipite's reaction made it clear he was not interested in that advice.

37. Mr Pipite reacted similarly to the advice of Mr Solomon Bethuel the CEO of the State Office. Mr Bethuel told Mr Pipite the process of pardon was not right and State Law should be involved. This advice was given immediately before the pardons were signed. Mr Pipite said to Mr Bethuel it was none of his business.

38. This *"new"* evidence did not assist the defence case. It is clear from the evidence we have recounted that Mr Pipite was determined to proceed with the pardon irrespective of the advice he received. There is nothing to suggest that Mr Pipite would have suddenly halted his plan if Mr Kapapa had told him of the conversation he had had with the other lawyer.

39. The second complaint under this heading is from Mr Takau's evidence. Mr Takau was counsel for seven of the defendants in the bribery case. His evidence at the conspiracy trial was that his clients, the appellants, would not have come to the MIPU offices that Saturday to complete the requests for pardon if he had not called them to come. The essence of Mr Takau's evidence was that after the requests for pardon were drafted he said he asked his clients (the appellants) to come and sign the requests. He said he just told his clients to sign and they did.



40. The Judge rejected Mr Takau's evidence as unreliable and incredible unless corroborated. He gave reasons. The Judge was entitled to reject Mr Takau's evidence on this point given it was uncorroborated. The fact Mr Takau asked his clients to come to the MIPU office and sign the request for a pardon would not have provided the appellants with a defence to the charge. We reject this challenge.

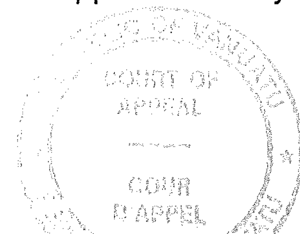
41. Rather unusually the appellants' submissions with respect to these two evidential points were framed as allegations of bias or perceived bias by the trial Judge. No such actual bias or perceived bias was established. We have however considered the substance of the complaints based on an analysis of the evidence. We are satisfied there is no basis for any complaint.

42. The next ground of challenge is that the Judge rejected the evidence of Mr Molbaleh, Mr Takau, Mr Kapapa yet relied upon their evidence to convict the appellants. With respect to the evidence of the above witnesses the Judge said that in his view these witnesses were not telling the Court all they could about the relevant events. The Judge said that only where the particular witnesses' evidence had supporting evidence would he be relying upon it.

43. The specific claim that the Judge relied upon evidence he had rejected is that some prosecution witnesses had given evidence as to the timing of the signing of the requests for pardon. The Judge accepted the evidence of Mr Leo that between 11 – 45am and noon he saw the appellants signing the requests. The Judge was entitled to accept the evidence of Mr Leo as accurate for the reasons he identified. However it is clear from the Judge's decision that the precise timing of the signing of the requests for pardon was not a matter of significance. It occurred sometime late morning and early afternoon. The Judge's focus was understandably on whether the requests were signed by each of the defendants rather than the exact time. The evidence the Judge relied upon, as he was entitled to, was that all of the appellants signed the requests for pardon before the pardons were formally granted at about 2pm. The difference between witnesses as to the precise time was of no significance. We therefore reject this ground of appeal.

44. The third ground of appeal was that the Judge had made a numbers of errors in recounting the evidence which cast doubt on his analysis and therefore on his decision to convict. Without deciding whether the Judge did make errors some of the complaints by the appellants are about evidence that had no or peripheral significance in the case.

45. The appellants complain that the Judge said Mr Prasad went to church on the day of the pardon. Mr Prasad's evidence was that he had dropped his family off at church. The difference was of no significance.



46. The appellants submit the Judge was wrong in his conclusions as to when the request for pardons and then pardons were signed. The Judge said that the evidence was that Mr Molbaleh went to print the pardon instrument at 1.00pm. The evidence of some witnesses was that the letters of request were printed at 1.00pm and the pardon instrument was printed at 1.30pm.

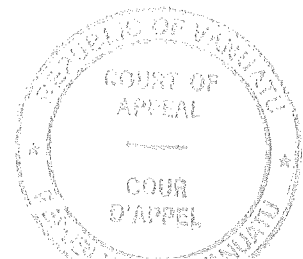
47. There was considerable and variable evidence as to the timing of the printing of the requests and the pardon. But the exact timing of each was of no significance. What was clear from the evidence of Mr Rarua was that at least some of the appellants knew about the intended pardon by mid-morning on the Saturday. The appellants further complained that the Judge had made errors about the exact timing of the visit by some of the appellants to the MIPU. We do not consider the exact timing of the visit by the appellants to the MIPU was vital. The important point, as the Judge found, was that the appellants came to the MIPU and did sign the requests for the pardon and that this was before the pardon was granted.

48. The appellants also complained about the Judge's assessment of Mr Takau's evidence regarding a request by him to the appellants to come to the MIPU to sign the requests for pardon. The important point is that the Judge accepted the evidence that all of the appellants went to the MIPU building and signed the request before the pardon.

49. As to what was discussed between the appellants at the MIPU the appellants submit the Judge's conclusions were about the group of appellants as a whole without considering individual appellants' states of mind. They submitted that the Judge had therefore failed to consider the state of mind of each appellant separately, as he was required to do.

50. The Judge identified which individual appellants went to the MIPU building. He accepted evidence that at the MIPU building each of the appellants signed the request for a pardon. The Judge found they did so knowing that Mr Pipite could not legitimately pardon himself or the other appellants. The Judge therefore concluded that with that knowledge and believing Pipite was going to pardon them they signed the request and they then joined the conspiracy. Each individual appellant's involvement was identified. At the end of the judgment when the Judge summarised the events he did not detail each appellants' involvement. However he had identified individual involvement earlier in his judgment when he considered each appellant's culpability. No error by the Judge has been established in this submission.

51. The next ground of appeal is that the Judge wrongly accepted some circumstantial evidence relevant to his decision to convict.



52. The first such evidence is said to relate to a folder which contained the letters of request for pardon. The letters of request could not be found after the pardon. The appellants say the Judge was wrong to conclude the appellants had taken the folder and the requests. This error affected his assessment of their credibility.

53. As to this the Judge said:

"The fact that despite strenuous efforts to locate the original or drafts of letters in the names of others tends, if anything to show the subterfuge in this whole escapade employed by Pipite and Nari in particular, and with the assistance/connivance of some of the lawyers involved – it does not diminish the prosecution allegations."

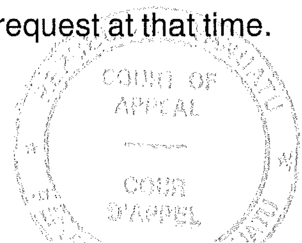
54. The essential point in this evidence was that the Judge was satisfied that there had been signed requests for each of the appellants for a pardon. The originals and the drafts of the letter of request disappeared. Obviously they were important constitutional documents where it could be expected care would be taken in their preservation. Only the appellants and their lawyers had possession of the letters. And they had reason, given the events that followed the pardon, to not want the letters to be seen. The Judge's inference that the appellants and their lawyers had the opportunity and motive to make or destroy the letters was open on the evidence. However the Judge's conclusion was not vital to a resolution of the case. We reject this ground of appeal.

55. The second item of objectionable circumstantial evidence is said to be the Judge's conclusion that the appellants were at the Ministers' Office between 10am – 1pm discussing the pardons. This conclusion was said to be in conflict with the evidence of Mr Molbaleh and Mr Iauma.

56. The Judge rejected the evidence of Mr Molbaleh and Mr Iauma on this point as he was entitled to. He was entitled to infer in the circumstances what the appellants had gathered for and that they were discussing the pardon. The circumstances overwhelmingly pointed to the reason for the gathering at the Ministers Office was the proposed pardon. Letters of request for the pardon and the pardon instrument were being drafted. We reject this ground of challenge.

57. Further the appellants submit that the Judge appeared to accept contradictory evidence as to the time Mr Telukluk arrived at the MIPU. Mr Leo said Mr Telukluk was there from 12 noon. Mr Molbaleh said from 3pm. The 3pm time was significant because the pardons were said to have been completed by 2pm. If Mr Telukluk did not arrive to sign his request for a pardon until after the pardon had been granted then that could caste doubt on his participation in the conspiracy.

58. However for reasons given the Judge accepted the evidence of Mr Leo that Mr Telukluk was present at 12 noon at the MIPU and signed the request at that time.



The Judge made it clear that he would only accept Mr Molbaleh's evidence if it was corroborated by a credible witness. Mr Molbaleh's evidence as to the time Mr Telukluk arrived at the MIPU was not corroborated and so the Judge was entitled to reject it as unreliable.

59. Finally in this ground of appeal the appellants submitted that it was not clear what evidence was accepted and what rejected. We are satisfied the Judge in his decision set out clearly what witnesses' evidence he accepted and what he rejected. He gave reasons for his conclusions. The appellants also submit the Judge *"hand picked evidence that was suitable to the final outcome... whilst ignoring the actual evidence presented by the prosecution."*

60. As we have said the Judge made extensive credibility findings. He rejected evidence from both the prosecution and defense witnesses as he was entitled to.

61. The Judge *"hand-picked"* evidence on the basis of his assessment of the credibility and reliability of the witness as was his duty. We reject this ground of appeal. For the reasons given the appeals against conviction are dismissed.

<u>Appeal Against Sentence</u>

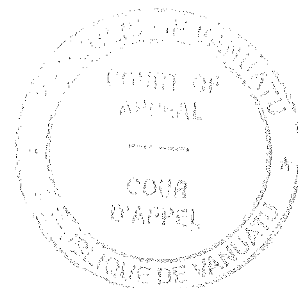
62. We consider first the grounds of appeal that are common to all appellants and then any grounds particular to each appellants.

63. The appeals against sentence are based on four grounds.

64. The first ground is that the Judge's sentence before consideration of suspension was too high. In particular the appellants who pleaded guilty say the Judge should have given a full 1/3 deduction for their early guilty plea.

65. Two aspects of the appellants submissions are of particular relevance. First, the appellants say that the fact of the first trial and then conviction should be ignored in assessing whether the plea came at the earliest reasonable opportunity. And secondly, the timing of the guilty plea in relation to the second trial.

66. The Court of Appeal allowed the appeal against conviction on 7 April 2017. A new information charged the appellants with conspiracy to defeat the course of justice on 27 April 2017. After a number of adjournments sought by these appellants they pleaded guilty on 5 April 2018. This plea was made after the trial was due to commence on 4 April 2018 and after discussion between counsel and the Judge as to the issues at trial.



67. A plea of guilty 12 months after charge and the day after the trial was due to commence cannot possibly be said to be at the first reasonable opportunity. In fact in was a very late plea.

68. Further as to the appellants' previous not guilty pleas and trial we are satisfied the judge was entitled to take this background into account in assessing the appropriate discount.

69. A discount for a guilty plea has three purposes. Firstly it is a recognition that the defendant is truly remorseful for the offending. Secondly it is recognition that considerable state resources may be saved by a guilty plea. Finally it saves witnesses the potential trauma of giving evidence.

70. The circumstances of the first trial and the very late plea with respect to the proposed second trial meant the appellants could not claim a discount for early acceptance of guilt as a display of remorse. It was proper however for the judge to recognize the saving of the state resources, although modest in this case.

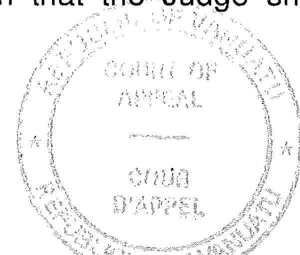
71. As to the guilty plea discount the judge said:

> *"However, these pleas were NOT entered at the earliest opportunity. These pleas were entered after a contested trial and after being sentenced, when most refused to accept their convictions; and after appeals against their convictions – when again there was no acceptance of their convictions. The pleas entered before me in April 2018 are at a late stage in the criminal process – the charges emanated from acts done in October 2015, 2.5 years before the pleas were entered.*
>
> *I note that the public apologies and custom reconciliation ceremonies were not undertaken spontaneously by the defendants of their own free will – they did this so as to comply with their parole requirements. As such, these measures cannot properly be considered as mitigation*".

72. For the reasons given we see no error in the judge's approach. We reject this ground of appeal.

73. The second ground of appeal is that the prosecutor agreed with the appellants prior to sentencing to support a suspended prison sentence before the sentencing Judge. We note our comments at paragraphs 12 to 18. The prosecutor did not support a suspended sentence. This failure may reasonably have influenced the Judge not to suspend the prison sentences of the appellants.

74. We are not convinced that the prosecutor did agree to support a suspended prison sentence at sentencing. We are satisfied that what the prosecutor did agree to do was not oppose a defence submission that the Judge should suspend any sentence of imprisonment.



75. We are satisfied that Mr Napuati's sworn statement of 7 November 2018 is a full and accurate account of what happened in discussions between defence counsel and the prosecutor. Mr Napuati's evidence is essentially similar to the evidence of the Public Prosecutor Mr Naigulevu. The description also accords with what the lawyer for the defendants and the prosecutor would understand to be law.

76. The suggestion by some counsel that there was a plea-bargain between the prosecutor and counsel could not be correct. There could be no such bargain because no judge could be bound by any agreement counsel might reach. All counsel would have known and understood that position.

77. It seems probable that some counsel and perhaps their clients have turned the offer of the prosecutor not to oppose a suspended prison sentence into positive support for such a sentence. Mr Napuati's sworn statement, as well as the prosecutors, makes it clear all that was being offered was the absence of opposition. The prosecution's written submissions at sentencing simply identified the relevant statutory provision together with three listed factors they said might be relevant to the question of suspension.

78. The final matter relevant to this appeal point is that the decision for suspension was the Judge's. Even if the prosecutor had supported a suspended sentence there is nothing to suggest the outcome would have been different. The Judge identified why he had decided not to suspend the sentence. There were no new facts or submissions which the prosecutor could make which would have been relevant to that decision.

79. We therefore reject this ground of appeal against sentence.

80. The appellants submit any sentence of imprisonment imposed on them should have been suspended.

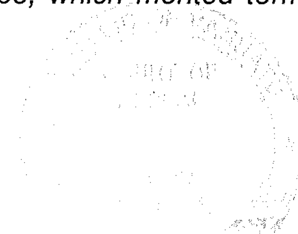
81. After identifying the relevant factors in s.57 of the Penal Code relating to suspension the Judge said:

"In my analysis, there are numerous compelling reasons which militate against suspension:

- *All the defendants are intelligent, mature men – they should have known better than to get involved;*

- *They all knew very well what they were doing and that it was wrong – yet they went ahead anyway;*

- *They all have previous convictions, of a significant type, which merited terms of immediate imprisonment;*



- *The extremely serious nature of the offending involved, especially given their positions in the community;*

- *To suspend the sentences would be to send entirely the wrong message to the community. Not only must the conduct be denounced, there must be a serious deterrent message sent, so that the gravity of this offending is well recognized by all*".

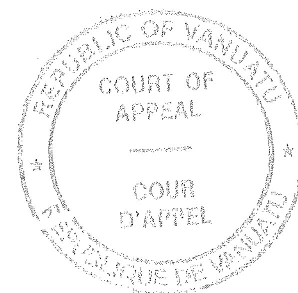
82. The decision whether to suspend any prison sentence is an exercise of discretion by the sentencing Judge. And so an appellant must show the Judge exercised the discretion improperly, for example he took into account irrelevant matters or failed to take into account relevant matters. It is not a question of whether this court agrees or disagrees with the Judge's decision.

83. Counsel for all appellants submitted that the public interest supported a suspended sentence. There is no evidence to support this submission. We consider that the public interest did not favour suspension. These members of parliament used unlawful means to try to avoid conviction and sentencing for corrupt practices as members of parliament.

84. We see no error in the Judge's approach. In his sentencing remarks the Judge acknowledged the contribution each appellant had made to Vanuatu through their public service. However the Judge relevantly took into account the serious facts of the offending. As he pointed out each of the appellants had committed this offending while awaiting sentence on other very serious charges. These charges had warranted significant sentences of imprisonment. Further the offending itself was inherently serious. It involved the misuse of Presidential powers to advantage the appellants by by-passing the criminal justice system. The Judge's conclusion was therefore that the facts of the offending, taking into account the positive aspects of the appellants, was simply too serious for suspension. We see no error in this approach.

85. Some appellants said the Judge made an error when he sentenced the appellants before the completed trial of those appellants who had pleaded not guilty. The appellants submitted that the judge should have waited for the completion of the trial so that the facts on which the appellants would be sentenced was clear.

86. The Judge sentenced the appellants on the basis of the summary of facts provided by the prosecution. The Judge confirmed with counsel that the summary was the basis on which sentencing was to proceed.



87. There was nothing wrong with the Judge's approach. He proceeded to sentence the defendants after guilty pleas based on an agreed and unchallenged set of facts. We reject this ground of appeal.

88. Some appellants submitted that the Judge's start sentence of 5 years imprisonment was too long. Two reasons were advanced. First the 5 year start sentence was higher than the start sentences imposed by the Judge at the first trial. This was unfair given the appellants vulnerability to being resentenced by the second Judge only arose because an appeal on conviction had been allowed.

89. The second reason for the submissions is that the Judge was wrong to impose the same start sentence on all the appellants. In doing so the Judge failed to distinguish between the culpability of individual appellants.

90. We accept that the appellants vulnerability to an increased sentence from the first trial only arose because of the successful appeal and so there was some unfairness in the increases in sentence given by the second trial Judge.

91. At the original sentencing the Judge imposed a start sentence of 4 years imprisonment for Mr Pipite whom he concluded to be the most serious offender. Others with lesser culpability had start sentences of 3 years and those said to be least culpable 2 years and 3 months imprisonment.

92. The proposition of unfairness we identified above is however subject to the proposition that wholly excessive or wholly inadequate sentences should not be supported.

93. We will return to this issue after we consider the claim that the Judge should have identified individual culpability and therefore differentiated start sentences. The sentencing Judge adopted a common start sentence of 5 years imprisonment for all appellants.

94. The respondent accepted that a differentiation approach should have been undertaken by the Judge. We agree. There was different culpability for the offending between appellants on the facts. Individual start sentences should have reflected that responsibility.

95. Given our view as to the merits of the above two submissions we propose to undertake a reconsideration of the start sentence of each appellant.

96. First as to relative culpability. We are satisfied that Mr Pipite's conduct surrounding the conspiracy was the most serious. The evidence established he was a driving force behind the decision to pardon, and despite contrary advice he signed the pardon instruments for himself and others when he knew of his

conflict of interest. Mr Nari was less culpable than Mr Pipite but was a significant force behind the pardons. As the judge said at the first sentencing his eagerness at the very early stages of the conspiracy drove the others on.

97. Based on the summary of facts all other appellants were in a lower category of culpability.

98. In summary therefore Mr Pipite is in the most serious category, Mr Nari in the next category of seriousness and the other appellants in the lowest category.

99. As to start points we consider each category in turn taking into account the facts of the offending together with the sentences imposed in 2016 as relevant to the submissions of unfairness.

100. We are satisfied the proper start sentence for Mr Pipite is 5 years imprisonment. We acknowledge this is one year higher than the 2016 start sentence. In setting the start sentence in 2016 the Judge does appear to have overlooked a seriously aggravating features of this offending, that it was committed while awaiting sentence on other very serious charges. This applies to all appellants.

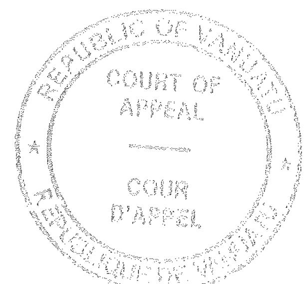
101. As to Mr Nari we consider a start sentence of 4 years imprisonment properly reflects his culpability.

102. Finally we consider a start sentence of 3 years imprisonment properly reflects the culpability of the other appellants.

103. We see no reason to differ from the assessments of personal mitigation in the two 2018 sentencing judgments relating to the appellants.

104. For the reasons given the appeal against the refusal to suspend the sentences is dismissed. The appeals against sentence are allowed except for Mr Pipite. The final sentences imposed are in fact similar to the final sentences imposed in 2016. Mr Pipite and Mr Yatan's appeals against conviction are dismissed. Mr Telukluk, Mr Prasad, Mr Harry and Mr Chabod's appeals against conviction are dismissed. The appeals against sentence for all appellants except Mr Pipite are allowed. The sentences are now:

   (i) Mr Pipite's start sentence 5 years imprisonment less 4 months for personal mitigation less 15% for his guilty plea. Final sentence: 3 years 10 months imprisonment (sentence confirmed). The sentence will commence on 8 October 2018;



(ii) Mr. Nari: start sentence 4 years imprisonment less 4 months personal mitigation less 15% for guilty plea. Final sentence: 3 years 1 month imprisonment. The sentence will commence on 8 October 2018;

(iii) Mr Yatan: start sentence 3 years imprisonment, less 4 months personal mitigation less 15% for guilty plea. Final sentence: 2 years 3 months imprisonment. The sentence will commence on 8 October 2018;

(iv) Mr Amos: start sentence 3 years imprisonment, less 4 months personal mitigation less 15% for guilty plea. Final sentence: 2 years 3 months imprisonment. The sentence will commence on 8 October 2018;

(v) Mr Laken: start sentence 3 years imprisonment, less 4 months personal mitigation less 15% for guilty plea. Final sentence: 2 years 3 months imprisonment. The sentence will commence on 8 October 2018;

(vi) Mr James: start sentence 3 years imprisonment, less 4 months personal mitigation less 15% for guilty plea. Final sentence: 2 years 3 months imprisonment. The sentence will commence on 8 October 2018;

(vii) Mr Telukluk: start sentence 3 years imprisonment, less 4 months personal mitigation. Final sentence: 2 years 8 months imprisonment. The sentence will commence on 1st October 2018;

(viii) Mr Prasad: start sentence 3 years imprisonment, less 4 months personal mitigation. Final sentence: 2 years 8 months imprisonment. The sentence will commence on 1st October 2018;

(ix) Mr Harry: start sentence 3 years imprisonment, less 4 months personal mitigation. Final sentence: 2 years 8 months imprisonment. The sentence will commence on 1st October 2018;

(x) Mr Chabod: start sentence 3 years imprisonment, less 4 months personal mitigation. Final sentence: 2 years 8 months imprisonment. The sentence will commence on 1st October 2018.

DATED at Port Vila, this 16th day of November, 2018.

BY THE COURT

Hon. Vincent LUNABEK
Chief Justice.