IN THE SUPREME COURT
OF THE REPUBLIC OF VANUATU
(Other Jurisdiction)

Constitutional
Case No. 17/1073 SC/CNST

BETWEEN: Marcellino Pipite

First Applicant

Paul Telukluk

Second Applicant

Silas Yatan

Third Applicant

Tony Nari

Fourth Applicant

John Amos

Fifth Applicant

Arnold Prasad

Sixth Applicant

Tony Wright

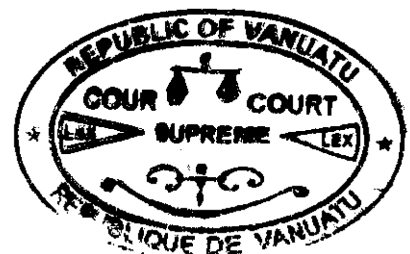
Seventh Applicant

Sebastien Harry

Eighth Applicant

Thomas Laken

Ninth Applicant



Jean Yves Chabod

Tenth Applicant

Wilson Iauma

Eleventh Applicant

AND: Republic of Vanuatu

Respondent

Date of TRIAL:	*2nd day of June, 2017 at 9:00 AM*
Date of Judgment:	*5th day of June, 2017*
Before:	*JP GEOGHEGAN*
Appearances:	*Mary Grace Nari for Mr Telukluk, Mr Nari, Mr Amos, Mr Prasad, Mr Wright, Mr Harry, Mr Chabod and Mr Iauma*
	Christina Thyna for Mr Pipite
	Less John Napuati for Mr Yatan and Mr Laken
	Kent Tari for the State appearing with Josaia Naigulevu, Public Prosecutor

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JUDGMENT

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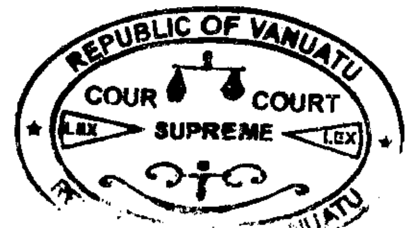
1. On August 23rd 2016 each of the applicants in these proceedings was found guilty and convicted of one count of conspiracy to defeat justice contrary to section 79 (a) of the Penal Code. On September 29th 2016 they were sentenced



to terms of imprisonment between two and four years. In the case of the applicant Mr Iauma that sentence was suspended for two years and an additional penalty of 200 hours community work was imposed.

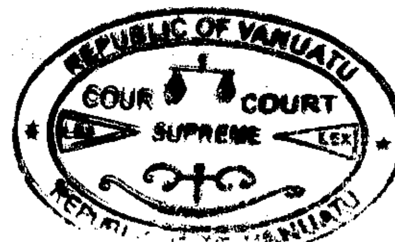
2. The circumstances giving rise to the charges arose out of the previous convictions of 15 Members of Parliament on a charge of corruption and bribery of officials contrary to section 73 of the Penal Code Act. Between the time of that conviction and the scheduled sentencing of those individuals Mr Pipite, in his role as Acting President of the Republic of Vanuatu, granted pardons to himself and the other convicted individuals. Mr Iauma had assisted in that process through his role as lawyer for one or more of the individuals.

3. In the criminal proceedings instituted against the applicants it was alleged by the Public Prosecutor that the applicants conspired together to obstruct and defeat the course of the justice by planning and conspiring to facilitate the issuance of a pardon. While ordinarily the President has clear power to issue a pardon, it was asserted that the particular circumstances of the applicants meant that the request, issuing and acceptance of pardons amounted to a criminal offence.

4. Each of the applicants (other than Mr Iauma) appealed against the convictions and sentence. In a judgment issued by the Court of Appeal on April 7th 2017[1] the Court granted the appeals against convictions and quashed those convictions. The Court of Appeal also quashed the conviction of Mr Iauma. It is not necessary for the purposes of this judgment to set out the reasons as to why the Court of Appeal reached that view and the essential part of the judgment is set out in paragraphs 101 to 104 where the Court stated:-

   "101. We do not accept the submissions of the Public Prosecutor that, despite such errors as may have been found in the judgment appealed from, the Court should nevertheless dismiss the appeals against conviction. The reasons for our judgment above indicate why we do not think it is appropriate to do so.

[1] Pipite v. Public Prosecutor [2017] VUCA 13

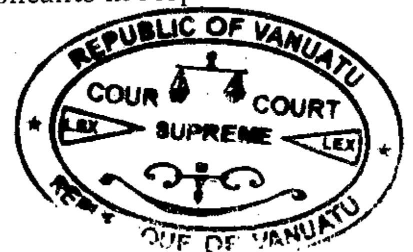


> 102. *Accordingly, the appeals against conviction are allowed and the convictions of each of the appellants is quashed. It is a matter for the Public Prosecutor whether he continues with the Information so that a re-trial takes place in the Supreme Court in relation to the events of 9-10 October 2015.*
>
> 103. *Our reasons for judgment indicate that the conviction of Iauma is beset with the same difficulties as those which apply to the appellants. In the circumstances, it would be unjust if a conviction against him were to stand.*
>
> 104. *We also quash his conviction. If it were necessary, we would give him leave to appeal out of time for the purpose of appealing against his conviction, and then allow the appeal for reasons given above".*

5. Following the decision of the Court of Appeal the Public Prosecutor made a decision to re-lay informations against the applicants in these proceedings who are each now facing one charge of conspiracy to defeat justice contrary to section 79 (a) of the Penal Code, namely, the same charge they had been convicted of in August 2016.

6. The applicants, by way of this Constitutional Application, now seek various forms of relief as follows:-
   a) A declaratory order that the laying of the information by the Public Prosecutor is an infringement of the applicant's rights under Article 5 (2) (h) of the Constitution.
   b) An order for permanent stay of proceedings in Criminal Case No. 1005 of 2017.
   c) An order for compensation as assessed by the Court.
   d) An order for costs.
   e) Any other orders deemed fit by the Court.

7. In essence, it is the position of the applicants that the decision of the Court of Appeal constituted an effective acquittal of the applicants or otherwise bars the Public Prosecutor from re-laying charges against the applicants in respect of the



events of October 9th and 10th 2015 and that the applicants are protected from fresh criminal proceedings by virtue of Article 5 (2) (h) of the Constitution which provides as follows:-

> *"(2) Protection of the law shall include the following:-*
>
> > *(h) No person who has been pardoned, or tried and convicted or acquitted, shall be tried again for the same offence or any other offence of which he could have been convicted at this trial."*

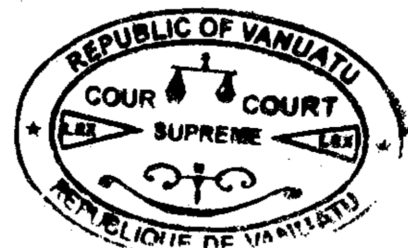
8. It is the position of the applicants that the Court of Appeal did not direct a re-trial in its judgment of April 7th 2015 and that the Court of Appeal's decision amounted to a discharge of the offences for conspiracy under section 79 (a) of the Penal Code which now prevents the Public Prosecutor from re-laying new informations.

DISCUSSION

9. As a preliminary matter, the applicants had filed an application for leave to file an amended application. The concern of the applicants counsel was that the original application had referred to the applicants having been acquitted by the Court of Appeal. Counsel acknowledge that the judgment of the Court of Appeal does not include use of the word *"acquittal"* however it was accepted by all counsel, and by the court at the outset of this hearing that the issue to be determined was whether the Court of Appeal's judgment amounted to an acquittal or discharge of the applicants or in some other way operates to prevent the Public Prosecutor from pursuing a re-trial by virtue of Article 5 (2) (h). The hearing has proceeded on that basis and accordingly the application for amendment was not pursued.

10. The jurisdiction of the Court of Appeal is set out in the Judicial Services and Courts Act [Cap. 270] which provides at section 48 (3) that :-

> **"48. Appellate jurisdiction**



(3) For the purpose of hearing and determining an appeal from the Supreme Court, the Court of Appeal:

- (a) may exercise such powers as may be prescribed by or under this Act or any other law; and
- (b) has the powers and jurisdiction of the Supreme Court; and
- (c) may review the procedure and the findings (whether of fact or law) of the Supreme Court; and
- (d) may substitute its own judgement for the judgement of the Supreme Court.

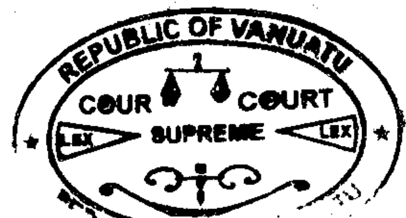
11. Also applicable is the Western Pacific Court of Appeal Rules 1973. In her submissions, Mrs Nari referred to rule 31 of those rules, however rule 31 applies to Civil Appeals and not criminal appeals. The applicable provision of the Western Pacific Court of Appeal Rules 1973 is rule 36 which provides:-

"36 (1) *On any appeal against conviction to the Court of Appeal, the Court of Appeal shall allow the appeal if it thinks that the conviction should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or that the judgment of the Court before which the appellant was convicted should be set aside on the ground of a wrong decision on any question of law or that on any ground there was a miscarriage of justice and in any other case shall dismiss the appeal;*

Provided that the Court of Appeal may, notwithstanding that it is of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.

(2) Subject to the special provisions of these Rules, the Court of Appeal shall, if it allows an appeal against conviction, either quash the conviction and direct that an acquittal be entered, or, if the interests of justice require, order a new trial.

(3) On an appeal against sentence, the Court of Appeal shall, if it thinks that a different sentence ought to have been passed, quash the



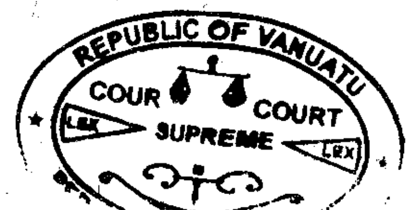
sentence passed at the trial and pass such other sentence warranted in law (whether more or less severe) and substitution therefore as it thinks ought to have been passed, and in any other case it shall dismiss the appeal, or make such other order as it thinks fit".

12. It is clear pursuant to rule 36 (2) that the Court of Appeal, in the event of allowing an appeal against conviction may either quash the conviction and direct that an acquittal be entered or order a new trial.

13. The central submission made by Mrs Nari was that the Court of Appeal failed in this case to direct a re-trial. When pressed on this issue, and asked to advise the Court as to exactly what words the Court of Appeal should have used which in order to comply with the Court of Appeal rules, Mrs Nari submitted that the Court should have recorded that *"this matter is returned to the Supreme Court for a re-trial".*

14. That submission simply does not stand up to scrutiny. It could not be clearer from the judgment that the Court of Appeal intended that the Public Prosecutor be permitted to continue *"with the information so that a re-trial takes place in the Supreme Court in relation to the events of 9-10 October 2015".* The Court of Appeal was not required to use any specific terminology in order to direct a re-trial and the words engaged in the judgment are unambiguous and clear.

15. Mrs Nari also referred in her submissions to the fact that the laying of a fresh information against the applicants by the Public Prosecutor was a misuse of the Public Prosecutor's discretion. In this regard counsel simply wish to have their cake and to eat it as well. It cannot be argued on the one hand that the Court of Appeal judgment amounts to an acquittal and on the other that the Public Prosecutor's actions constitute the wrongful exercise of a discretion. If the applicants were in fact acquitted by the Court of Appeal then the Public Prosecutor would not be entitled to prosecute them again. It would not involve the exercise of a discretion. The applicants would be protected by Article 5 (2) (h) of the Constitution and the common law doctrine of autrefois acquit.



16. That however, is not the case here. It is plain from the judgment that the Court of Appeal has not acquitted the applicants. While the applicants were successful in their appeals and the convictions of each of them were quashed the Court of Appeal clearly and plainly contemplated a re-trial and recorded that it was a matter for the Public Prosecutor as to whether or not that course was adopted. That simply reflects the standard course followed in such matters and which was explained simply in a case referred to me by Mr Tari and decided by the Irish Court of Criminal Appeal[2] where it was stated that :-

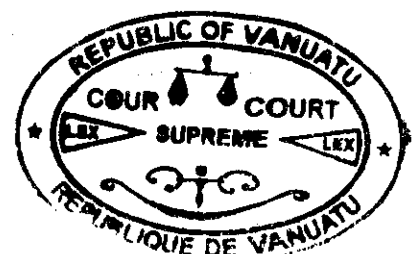
> *"The Ordering of a re-trial does not of course compel the prosecutor to put the appellant on trial a second time, it merely authorizes her to do so. Whether the appellant will in fact be re-tried on foot of this Order is a matter for the prosecutor."*

17. That is exactly the position here.

18. Counsel for the applicants referred me to a number of authorities in support of their submissions. Mrs Nari referred to the Supreme Court decisions in PP v. Rory and Socklen[3] and PP v. Waltersai Ahelmalahlah[4] in support of an argument that the applicants were actually discharged by the Court of Appeal and that such a discharge amounts to an acquittal. In both of the cases referred to, the Supreme Court discharged the defendants without conviction pursuant to section 55 of the Penal Code. Those authorities involve the application of a specific legislative provision by the Judges dealing with those cases. They have absolutely no application or relevance to the matters under consideration in this case.

19. Mrs Nari also refer to the case of Sokomanu v. PP[5] and submitted that this case is similar to Sokomanu in that the applicants in this case have been discharged by

[2] Director of Public Prosecutions v. Cunningham [2013] IECCA 62
[3] CRC 201 of 2014
[4] [2013] VUSC 49.
[5] [1989] VUCA 3



the judgment of the Court of Appeal and no re-trial was *"ordered"* by the Court of Appeal.

20. There is absolutely no substance to this submission. Sokomanu involved an appeal in respect of conviction and sentence on various charges including seditious conspiracy and incitement to mutiny. The Court of Appeal determined that the verdicts against the appellants were unsafe and unsatisfactory and accordingly set those verdicts aside. In its judgment the Court of Appeal stated:-

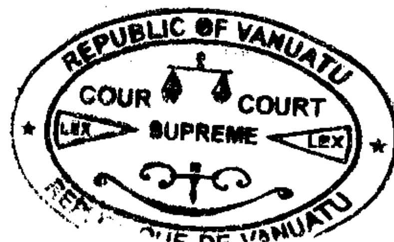
    "There is no question of ordering a new trial in these circumstances. Each of the appellants is discharged".

21. Counsel for the applicants appear to believe that there is some substantial and relevant significance to the use of the words *"ordering a new trial"*. There is not. It is clear that even where the Court of Appeal orders a re-trial, the Public Prosecutor is not necessarily bound by such an order and is free to make a decision as to whether or not a re-trial will be pursued. The Court of Appeal is not required to use the word "order" when directing a re-trial and the absence of such a word does not diminish or invalidate the Court of Appeal's directions in respect of the applicant's appeals.

22. For the sake of completeness I refer to other authorities referred to by counsel for the applicants.

23. Counsel referred to the Court of Appeal decision in Urinmal v. PP[6] as being a case similar to the applicants' case and one where the Court of Appeal applied Article 5 (2) (h) of the Constitution in favour of one of the appellants Mr Maltape. With respect to counsels submission, Urinmal is not remotely relevant to the applicants' position in this case as the factual background is completely different. Mr Maltape was charged with soliciting and inciting an offence and was tried and acquitted after a hearing in the Magistrates' Court. He was then charged and convicted in the Supreme Court on a count of unlawful assembly arising from

[6] [2013] VUCA 6



exactly the same facts as the charges laid in the Magistrate Court. The Court of Appeal determined that the offences that were the subject of the Magistrates' Court charge and the offences being pursued in the Supreme Court were the same and the evidence relied on to support the charge in the Supreme Court was the same as the evidence relied upon in the Magistrates' Court. It was held that Mr Maltape could have been convicted in the Magistrates' Court of unlawful assembly in that:-

> *"He was therotically at risk on that evidence in that first hearing, and in bringing the unlawful assembly charge and adducing the same evidence in the Supreme Court the prosecution was putting him at risk again despite his earlier acquittal. This was unfair, and at odds for the generally recognized prohibition on defendants being placed in a situation of double jeopardy".*

24. The circumstances in Urinmal were completely different from the circumstances in this case and are of no assistance to the applicants at all.

25. Counsel for the applicants also referred to the cases of Picchi v. PP[7] and Mass v. PP[8] as somehow supporting the applicants' position that they were discharged and acquitted by the Court of Appeal.

26. Picchi involved an appeal against conviction on a charge of murder. The Court of Appeal allowed the appeal and stated:-

> *"We accordingly allow the appeal against conviction and return the matter to the Supreme Court where Mrs Picchi can be retried. It is of course open to the prosecuting authorities, in light of their assessment particularly of the medical evidence, to decide not to offer evidence. We are clear that it is a matter for the prosecuting authorities and not a case for an appeal Court to enter an acquittal."*

27. Picchi does not assist the applicants in any way and if anything simply demonstrates that there is no mandatory template for the direction for a re-trial.

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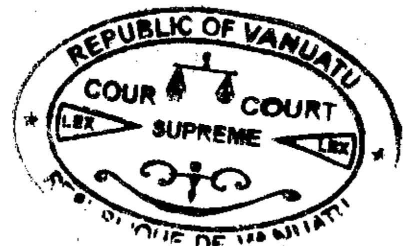
[7] [1996] VUCA 4
[8] [2015] VUCA 8

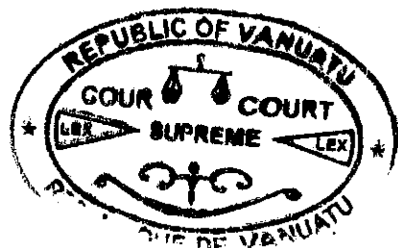


28. Mass simply involved an appeal against convictions for soliciting an unlawful assembly and inciting and soliciting theft. Mr Mass's appeal was successful and his convictions were quashed. In that case the Court of Appeal specifically stated that the case was not one which required the application of the proviso in rule 36 (1) of the Western Pacific Court of Appeal rules 1973 as the errors by the Judge which were identified in the appeal went to fundamental trial issues and there was insufficient evidence to convict the appellant of both counts. Accordingly no retrial was ordered.

29. Neither Picchi or Mass are of any assistance to the applicants in this case. The applicants' submission that no order for re-trial was made by the Court of Appeal in the applicants' criminal appeal because of the fundamental errors of the Supreme Court simply flies in the face of paragraph 102 of the judgment which is clear and unambiguous.

30. This is not a case where the Court of Appeal considered, as it did in Mass, that there were fundamental trial issues and/or that there was insufficient evidence to convict the applicants. This is a case where the Court of Appeal held that the Judge at first instance had misdirected himself in his consideration of the evidence and that he had erred in failing to address and make findings in respect of such matters as the applicants' state of mind at specific times. There can be no doubt that the Court of Appeal did not acquit the applicants. Equally, there can be no doubt that the Court of Appeal specifically contemplated and allowed for, the fact that there might be a re-trial.

31. Both Mrs Thyna and Mr Napuati adopted the submissions of Mrs Nari. I wish however, to refer to an additional submission made by Mrs Thyna that, in the event of this Court determining that a re-trial was ordered I should consider comments, which Mrs Thyna attributed to one of the Court of Appeal Judges during the course of the appeal hearing, that a lesser charge might be appropriate and that accordingly the Public Prosecutor was somehow not



permitted to re-lay the same charge as had originally been laid against the applicants in the Supreme Court.

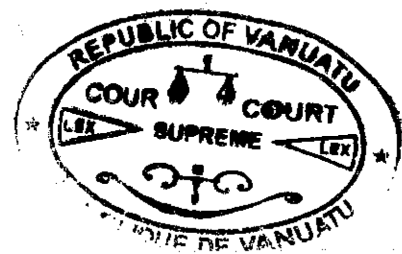
32. Not only is this submission without any proper foundation, but I consider it to be irresponsible. The decision of the Court of Appeal, which in this particular case comprised five Judges, is contained in the judgment issued by the Court. While it is appropriate for counsel to refer to a dissenting judgment, it is not permissible or appropriate for counsel to refer to the observation or comments of one appellate Judge which are not contained in the Court of Appeal Judgment. Quite apart from the fact that such observations or comments may not be able to be verified, they are simply irrelevant. The voice of the five Judges of the Court of Appeal are expressed as one in the Court's judgment.

CONCLUSION

33. It will be clearly apparent from the preceding paragraphs that I consider the applicant's application to be completely without basis. I consider that the Court of Appeal clearly and unambiguously directed that the matter was to be the subject of a re-trial while recognizing that whether such a trial took place or not would depend upon the wish of the Public Prosecutor to pursue it. The Public Prosecutor in this case has decided to pursue a re-trial and he is perfectly entitled to take such a step. Accordingly, this is not a case where Article 5 (2) (h) of the Constitution has any application. For that reason the application is dismissed.

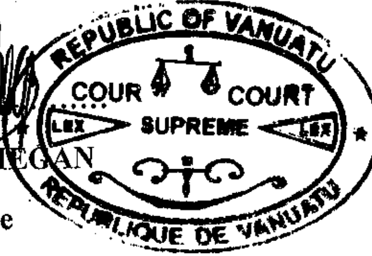
34. I note that the applicants in this case are due to appear to enter pleas to the charge laid against them on June 6th and they will be required to attend and enter their pleas accordingly.

35. This is a case where the State is entitled to costs as the successful party and costs are to be agreed within 21 days of the date of this judgment failing which they are to be taxed.



DATED at Port Vila this 5th day of June, 2017

BY THE COURT



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JP GEOGHEGAN

Judge