

Public Prosecutor

v

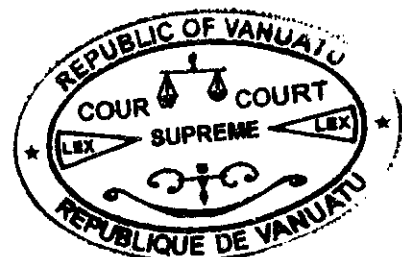
John James Vira Leo

Before: Justice G.A. Andrée Wiltens
Hearing: 21 - 22 May 2018
Counsel: Mr S. Blessing for the Public Prosecutor
Mr J. Boe for the Defendant
Decision: 28 May 2018

JUDGMENT

A. Introduction

1. This prosecution is old. Eight co-defendants have pleaded guilty to various related charges in relation to the incident in question which dates back to 2015; and they have all been sentenced. Only Mr Vira Leo has taken the matter to trial – but he is fully entitled to do that.
2. ~~The trial was to be heard from 22 - 24 May 2018, with much of the prosecution case apparently to be agreed, even though Mr Vira Leo was unrepresented. At a pre-trial conference in the week prior to trial his main concern seemed to be that he would be required to attend Court in other than his custom dress – he was very upset that at an earlier appearance he was excluded from the process until he changed his attire. It seems he is still seeking to appeal that decision. With the approval of Mr Blessing I made it plain to Mr Vira Leo he could dress as he liked at trial, subject to his attire being respectful and not indecent. I strongly advised him to get legal representation.~~

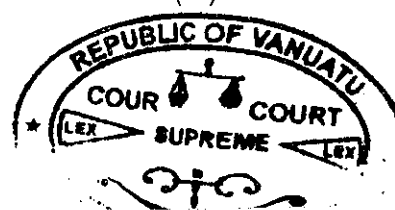


3. Mr Vira Leo duly appeared with Mr Boe on the first morning of trial. After Mr Vira Leo was arraigned and had entered pleas of not guilty to all the charges, Mr Boe sought a 2-day adjournment as he had only just been instructed that morning; and he intended to file a preliminary objection to jurisdiction. On the basis that the trial would still finish inside the 3 days scheduled, given the anticipated agreement of facts that was to be made, I allowed the adjournment for one day so that Mr Boe could formulate his jurisdictional challenge and be prepared for trial.
4. There were however further developments – Mr Boe had filed his “Preliminary Submissions”, Mr Blessing had filed an Amended Charging Document, and I was advised (after a lot of to-ing and fro-ing by Mr Boe) that there were to be no agreed facts at all, with all 12 prosecution witnesses needing to be cross-examined - and there was a revised trial estimate by counsel of 4 days.
5. We dealt first with the Amended Charging Document – despite later advising me that he had only been given the document earlier in the day, Mr Boe advised that he had “absolutely no objection” to my granting the prosecution leave to file the Amended Charging Document. I duly granted leave. On behalf of his client Mr Boe then entered pleas of not guilty to all 44 charges. I was unconcerned about the huge increase of charges, as the allegations were fundamentally the same as they had been; and it was apparent that Mr Boe would have plenty of time to prepare for trial, so the issue of undue prejudice to Mr Vira Leo would evaporate.
6. It was obvious that the trial could not be finished in the time available and had to be adjourned. I therefore adjourned the trial to the first available dates in the Court’s diary, namely the week of 22 October 2018 (5 days reserved), with present bail to continue on existing terms; and with a Bislama interpreter being available for the trial.

B. The Charges

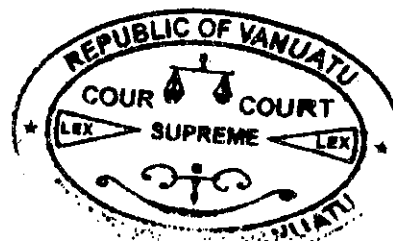
7. The Amended Charging Document contains the following 44 allegations of criminal misconduct:

- Forcible Entry, contrary to section 71 of the Penal Code, Cap 135 (x1)
- Intentional Assault, contrary to section 107(b) of the Penal Code, Cap 135 (x1)
- Threatening to Kill, contrary to section 115 of the Penal Code, Cap 135 (x12)
- Rioting, contrary to sections 68(3) and 70 of the Penal Code, Cap 135 (x1)
- Unlawful Entry, contrary to section 143(1) of the Penal Code, Cap 135 (x14)
- Malicious Damage, contrary to section 133 of the Penal Code, Cap 135 (x6)
- Arson, contrary to section 134(1) of the Penal Code, Cap 135 (x8)



C. The Facts

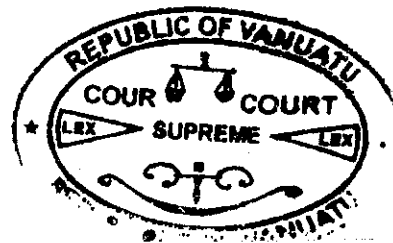
8. A summary of facts was tendered to assist with sentencing of a number of co-accused. This reduced version helpfully sets out the prosecution allegations.
9. Mr Vira Leo is said to be the leader of the *Tauraga Movement*, also known as *Custom Government* and *Tauraga Nation* in North-Eastern Penetecost. In about December 2010, he placed a customary caution or taboo in respect of a certain of the sea within the boundary of Nageha village. He did so under the guise or belief that he had a right to so act. The prosecution case is that Mr Vira Leo had no such right, and that he had not sought permission of the land owners or other villagers.
10. The taboo was said to be broken on about 10 December 2015 by two villagers who were seen to be looking for sea urchins, beche de mer.
11. The following day Mr Vira Leo instructed a co-defendant, Mr Viramauri, to confirm the sighting. The two villagers denied breaking the taboo. Mr Viramauri told them that Mr Vira Leo demanded an explanation from them. The two villagers decided to apologise with a tusked pig, and went to see Mr Vira Leo in person. The prosecution case is that Mr Vira Leo at first berated both villagers, then assaulted one of them repeatedly - before driving them both away. Mr Vira Leo is then said to have followed them, and threatened them to take their families away from the village or he would shoot them. Mr Vira Leo is then said to have taken a shovel to both of the villager's houses, as well as the Nageha village church, before returning to his own home. Mr Vira Leo was however not finished and he returned again and continued to damage the villagers' houses. The two villagers collected their families, abandoned their belongings and fled to a nearby village.
12. A number of co-defendants were gathered at Mr Vira Leo's nakamal at Varanyasu village that day. They agreed to go and completely destroy the houses Mr Vira Leo had damaged.
13. At about 7pm the villagers who had fled returned to check on their properties. They observed all the defendants and others further damaging their houses and stealing their property – in particular they saw Mr Viramauri uprooting and stealing 2 kava plant heads, a bunch of bananas, 2 mattresses, 8 pots, 5 dishes, a nappy and 2 chickens. At the same time another co-defendant stole 6 cans of tuna, 2 cracker biscuits, 2 blue batteries and a bunch of bananas. The group took their stolen items back to Mr Vira Leo's nakamal and cooked a shared dinner together. They then agreed to return the next morning and burn down the houses belonging to the two villagers and their families.
14. The next morning the defendants and others, allegedly led by Mr Vira Leo, returned to Nageha village and set fire to four houses and burnt them to the ground – the value of those houses was agreed by those convicted to be VT 1million each.



15. The villagers who fled found it impossible to re-settle, partly at least due to being further threatened. Other villages did not want to get involved in their plight. The victims total some 20 people, some elderly and some very young. They were forced to live in isolated bush areas and scavenge to survive. Eventually one of the complainants reported the matter to the police, which led to a number of arrests and 9 persons being charged – including Mr Vira Leo.
16. It became apparent during argument, that Mr Vira Leo does not accept much of the prosecution case. He advanced a different factual scenario. He agreed a "gorogoro" (taboo) had been issued, and claimed customary authority, as Chief, to do that. The defence version of events is that the 2 complainants trespassed into the taboo area and were actually observed (by witnesses the defence will call) to gather beche de mer, in breach of the taboo. He says that was later admitted by the transgressors.
17. Mr Vira Leo's position is that there was then a Customary Court convened, involving some 5 Chiefs, which imposed "*leodingvuha*" (a restoration of customary laws) in the form of the 3 usual customary remedies:
- a fine of 5,000 tusked pigs;
 - if not paid, to leave the village voluntarily; or
 - as a last resort, to be subject to a custom eviction.
18. Mr Vira Leo's position is that the fine was not paid, there was no voluntary departure, and therefore what followed was all a part of a customary eviction and therefore not justiciable under Vanuatu's written laws.

D. The Challenge to Jurisdiction

19. Mr Boe's challenge to jurisdiction, if I understood him correctly, was founded on a carefully woven linear path through the Constitution. He commenced with Article 74, which is to the effect that the rules of custom shall form the basis of ownership and use of land in Vanuatu. He accepted however, that once land is leased, custom no longer dictates the position. He advanced his proposition to include the seashore and then the sea – and when pressed restricted the extent of his proposition to the nearest reef out to sea. His submission included the proposition that it follows that custom authorities, usually the Chiefs, have the right to administer, manage, implement and enforce customary laws in relation to all land and the seashore, extending out to the reefs.
20. Mr Boe submitted that Mr Vira Leo, as Chief, had the right to impose *gorogoro* over certain parts of the sea – with the result that no one was any longer able to enter that area or to harvest beche de mer. He submitted that the complainants had trespassed criminally – he said he would later deal with my consternation that a breach of custom could lead to criminal



misconduct if his submissions were correct; but he never went back to that issue. I remain consternated.

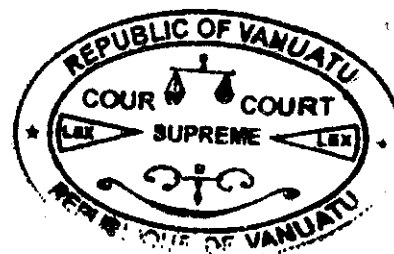
21. Mr Boe then referred to Articles 47 and 51. He submitted that Article 47 should be read as requiring this Court to deal with this case in conformity with custom – as the Court had no competence, authority or jurisdiction to deal with the consequences of leodinguha. The Courts ability to deal with issues of this type are constrained by Parliament's lack of clear guidelines under Article 51. Mr Boe asked that this Court refer the case to "Custom jurisdiction". He was unable to explain to me what exactly that meant.
22. Mr Boe went on to submit that Article 95 of the Constitution also had application. He submitted that pre-independence foreign laws were only temporary, whereas Vanuatu customary law is to continue permanently. Despite questioning Mr Boe as to how this submission affected the present decision, I remain unclear.
23. Mr Boe also referred in his written submissions to the Interpretation Act [Cap 132] being subordinate to the Constitution. It was not made clear to me why.

E. The Response

24. Mr Blessing bluntly refuted all Mr Boe's submissions as simply misconstruing the Constitution and completely misunderstanding the present prosecution. This was an attempt, he submitted, to justify and/or attempt to excuse criminal acts as being part of customary.
25. Mr Blessing relied on Article 49(1) of the Constitution and section 28 (1)(2) and (3) of the Judicial Services and Courts Act [Cap 270] as supporting his main submission that this Court had jurisdiction and that the Penal Code had pre-eminence over customary law. Mr Blessing placed great emphasis on Article 74 of the Constitution.
26. Mr Blessing took issue with Mr Boe's submission that Mr Vira Leo had customary rights over any part of the sea, relying on the Mines and Minerals Act [Cap 190] to define "land" as including "land beneath water" and "the seabed and subsoil beneath the territorial sea". Section 2(1) of the Act provides: "The property in minerals, in their natural condition, in land is vested in the Republic of Vanuatu." Mr Blessing therefore submitted as property that was vested in the Republic, Article 74 of the Constitution could not give Mr Vira Leo any rights over the taboo area. I did not find this submission to advance his case.

F. Discussion

27. Firstly, I comment on the lack of assistance from counsel. This argument was extremely poorly presented. Counsel have a duty, as officers of the Court, to assist Judges to come to decisions based on as much relevant information and precedent authority as possible. The lack of preparation and legal research was telling.



28. There appear to me to be a number of fundamental points that need to be considered:

- Article 47(1) of the Constitution states:

"47. The Judiciary

(1) The administration of justice is vested in the judiciary, who are subject only to the Constitution and the law. The function of the judiciary is to resolve proceedings according to law. If there is no rule of law applicable to a matter before it, a court shall determine the issue according to substantial justice and whenever possible in conformity with custom."

- Article 49(1) of the Constitution states:

o **"49. The Supreme Court, The Chief Justice and other Judges**

o (1) The Supreme Court has unlimited jurisdiction to hear and determine any civil or criminal proceedings, and such other jurisdiction and powers as may be conferred on it by the Constitution or by law."

- Article 5(1) of the Constitution states:

o **"5. Fundamental rights and freedoms of the individual**

o (1) The Republic of Vanuatu recognises that...all persons are entitled to the following fundamental rights and freedoms of the individual without discrimination....but subject to respect for the rights and freedoms of others and to the legitimate public interest in defence, safety, public order, welfare and health -

- (b) liberty
- (c) security of the person
- (d) protection of the law
- (f) freedom of conscience and worship
- (i) freedom of movement
- (j) protection for the privacy of the home and other property and from unjust deprivation of property
- (k) equal treatment under the law...."

- Article 7 of the Constitution states:

"7. Fundamental duties

Every person has the following fundamental duties to himself and his descendants and to others -

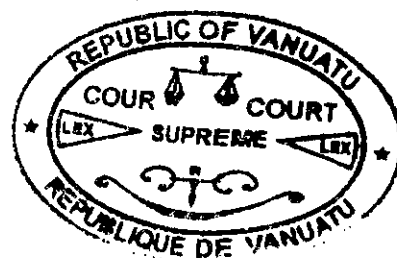
- (a) to respect and to act in the spirit of the Constitution;
- (f) to respect the rights and freedoms of others and to cooperate fully with others in the interests of interdependence and solidarity;..."

- Article 95 (3) of the Constitution states:

"95. Existing law

(3) Customary law shall continue to have effect as part of the law of the Republic of Vanuatu."

- Section 28 of the Judicial Services and Courts Act [Cap 270] states:



"28. Unlimited jurisdiction throughout Vanuatu

- (1) The Supreme Court has:
- (a) unlimited jurisdiction throughout Vanuatu to hear and determine any civil and criminal proceedings in Vanuatu, including matters of custom; and
 - (b) all jurisdiction that is necessary for the administration of justice in Vanuatu."

- Section 1 of the Penal Code [Cap 135] states:

"1. Offences within the Republic

The criminal law of the Republic shall apply to any act done or omitted within its territory."

- Sections 8 and 9 of the Interpretation Act [Cap 132] state:

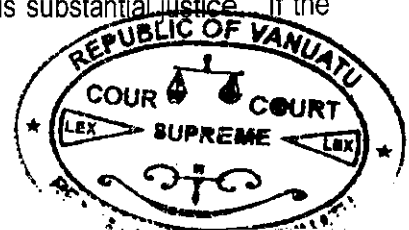
- o **"8. General principles of interpretation**
- o An Act shall be considered to be remedial and shall receive such fair and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit.

- o **9. Acts subordinate to the Constitution**
- o (1) Every Act shall be read and construed subject to the Constitution and where any provision of an Act conflicts with a provision of the Constitution the latter provision shall prevail."

29. The principles of statutory interpretation are important – hence I quoted the most significant provisions. Reading the plain words of Article 47 of the Constitution, it is surely patently clear to all, that the Supreme Court is required to resolve proceedings, civil and criminal, according to law. It naturally follows that the Supreme Court has jurisdiction to hear this particular criminal case, and all others – if there were any doubts about that, such doubts are easily answered by looking at Article 49 and Section 28 of the Judicial Services and Courts Act and section 1 of the Penal Code.

30. The next consideration is to examine in what manner the Supreme Court must undertake this task. Article 47 of the Constitution assists in compelling the Supreme Court to determine this case according to law – in this case the Penal Code sets out very clearly the criminal acts that Parliament considered the Supreme Court should be determining in accordance with the Criminal Procedure Code [Cap 136]. I fully accept that if there were no rules of law applicable, then the Supreme Court would need to determine the case according to substantial justice. That is not the case here.

31. Customary considerations would only be a factor in the Supreme Courts' considerations if there were no rules of law applicable to what it was determining; and if it were possible to determine the matter on the basis of substantial justice. It is at that point that customary considerations would come into play, such that, if possible, the Court's determination on the basis of substantial justice would also conform with custom. Of the three bases on which the Court must make a determination, customary considerations are the least significant or compelling. The most compelling basis requires the Court to determine the matter in accordance with law; if no rules of law are in place, then the next basis of determination is substantial justice. If the



matter is to be determined on the basis of natural justice, it is only then, if possible, that conformity with custom is to be considered.

32. The Constitution applies to Chiefs as much as to any other citizens in Vanuatu – as do the provisions of the Penal Code; see section 1. Mr Blessing's submission that this is an attempt by Mr Vira Leo to justify or excuse his alleged misconduct has real merit. Hence the several passages of the Constitution quoted above.

33. Mr Vira Leo's self-described "customary" imposition of fines, invitation to leave and finally forced eviction of the two complainants and their families, and the disrespect to their personal property, appears to me (subject to proof) to be totally at odds with:

- the true intent, meaning and spirit of the complainants' protected rights set out in the Constitution;

- the true intent, meaning and spirit of Mr Vira Leo's obligations set out in the Constitution; and

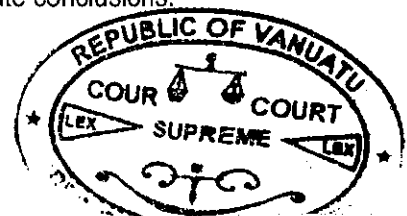
- the various provisions earlier referred to in the Penal Code.

34. Article 95 of the Constitution was inserted into the document to deal with transitional matters. What it plainly says is that customary law will continue to have effect as part of the laws of Vanuatu. Pre-independence, customary law played a relatively minor part in the way the laws were administered. Some thirty-eight years later, that continues to be the position. Article 95 was not ever intended to give greater prominence to customary considerations – just to maintain the status quo.

35. There has been no diminution of significance; neither has customary law taken on added significance; except in one area and that relates to ownership and use of land. Had Parliament wished, customary law in the area of alleged criminal misconduct could also have been devolved to the Chiefs – that has not occurred. There cannot be a clearer message of Parliament's intent than 38 years of silence in the face of many calls for change.

36. I note that there have been scholarly commentaries suggesting that customary law ought to be given greater prominence in Vanuatu: see "Law and Custom in Vanuatu" by H Bulu, a paper presented at the July 1985 Vanuatu Law Congress; and "Beyond Case Law: *Kastom* and Courts in Vanuatu" by Miranda Forsyth (2004) 35 VUWLR 427.

37. I note also a Solomon Islands Court of Appeal case: *Loumia v DPP* [1986] SBCA 1. Although not identical, the Court there was faced with a similar jurisdictional challenge where a convicted man sought to appeal on the basis that he had killed due to the accepted customary practice to exact revenge in that way for a previous death caused by the deceased to one of his colleagues. The Penal Code was held to apply – the defence of customary compulsion was rejected. I find some support in that decision for coming to my ultimate conclusions.



38. In Vanuatu the only cases I have been able to locate are (i) *PP v Georges Lingbu* Appeal Case 3 of 1983 where Chief Justice Cooke held that unfamiliarity with the Constitution was no excuse; and that customary law applied only to matters not covered by the Constitution or the Penal Code; and (2) *PP v Kota* [1993] VULawRp 7 where Justice Downing made several pertinent comments as follows:

"There is a conflict I believe between the Constitution and the Statutory Law of Vanuatu on the one hand, and Custom. I wish to make it clear that this conflict is not a conflict between Custom and English or French Law, but between Custom and the Law of Vanuatu as passed by Parliament and [the] people of Vanuatu. It raises the question of the role of Chiefs. I think it stems from a misunderstanding of the power that the Chiefs now are able to exercise, and I think that the Chiefs must realise that any powers they wish to exercise in Custom is subject to the Constitution of the Republic of Vanuatu, and also subject to the Statutory Law of Vanuatu."

"The Constitution by Article 5(1)(b) provides for the liberty of people. It also by Article 5 (1) provides for the freedom of movements. The Constitution provides therefore that no person shall be forced by another to do something against his or her will. The section 105 of the Penal Code makes it quite clear that no person shall by force compel any person to go from any place to another."

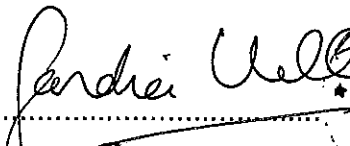
"...this has arisen again from the fundamental misunderstanding of the constitutional rights by Chiefs, together with those around the Chiefs, whether they be assistants or members of committees of the communities."

G. Result

39. The preliminary submission that the Supreme Court has no jurisdiction to hear this criminal trial is rejected.
40. The invitation to refer the case to "Custom jurisdiction" is declined.
41. The trial will continue in the Supreme Court at Dumbea 9am on 22 October 2018.

Dated at Port Vila this 28th day of May 2018

BY THE COURT


Justice G.A. Andrée Wiltens

