IN THE COURT OF APPEAL OF THE REPUBLIC OF VANUATU
(Civil Jurisdiction)

CIVIL APPEAL CASE No.20 of 2001

BETWEEN: **LUCIANA PICCHI**
Appellant

AND: **THE ATTORNEY GENERAL OF THE REPUBLIC OF VANUATU**
Respondent

Coram: Hon. Chief Justice Vincent Lunabek
Hon. Justice Bruce Robertson
Hon. Justice John von Doussa
Hon. Justice Daniel Fatiaki

Counsel: P.T. Finnigan for the appellant
J. Ozols for the Respondent

Date of hearing: 30 October 2001
Date of judgment: 01 November 2001

JUDGMENT

This is an appeal against part of the ruling made in the Supreme Court of Vanuatu sitting at Port-Vila on 14 September 2001 in respect to an amended constitutional petition which had been filed by Mrs. Picchi on 21 June 2001. The respondent has sought to strike out the petition in its entirety. The primary Judge refused to do so. He struck out some parts and the appeal relates to some of those issues. If leave to appeal was required it was granted without opposition by the primary Judge on 2 October 2001.

There are also appeals in respect of a pre-trial ruling made on 2 October 2001 with regard to the future conduct of this case.

The constitutional petition has its genesis in the death of Franco Picchi on 28/29 November 1994. In April 1995, Berry Max and Jimmy Tui George Sapir and Serah Salome Obed admitted their participation in the murder of Franco Picchi and implicated the present appellant in the death.

Mrs. Picchi was on 10 April 1995 charged with the murder. She had left the jurisdiction by that date and Warrants for her arrest were issued. She was apprehended in Singapore on 19 April 1995 and eventually returned to Port-Vila on 6 July 1995. She thereafter was remanded in custody pending trial.

Following a trial before the then Chief Justice on 4 December 1995 she was found guilty of the murder of her husband and on 6 December she was sentenced to life imprisonment with a recommendation that she not be released for at least 30 years.

An appeal was filed against both conviction and sentence. It was heard by this Court in October 1996. On 1 November 1996 this Court quashed the conviction and granted Mrs. Picchi bail pending a decision as to whether there would be a re-trial.

On 3 December 1996 a Crown prosecutor advised the Supreme Court that there would not be an application for re-trial and the appellant was permitted to leave the jurisdiction.

She now contends that she was denied various of her constitutional rights during the course of the investigative and prosecution processes and at her trial as a result of which she seeks various declarations condemning the actions of the officers of the State involved compensatory damages, exemplary damages and reimbursement of legal costs and expenses.

This Court has had the benefit of detailed written submissions with regard to this appeal, the carefully reasoned judgment of the primary judge and the wealth of material about particular factual circumstances. We have been referred

to a multitude of decisions, some of which are quite ancient and from an amazing array of jurisdictions. No regard appears to have been given to contemporary jurisprudence in this area as it is encapsulated by the recent decision of the High Court of Australia in Sullivan v. Moody [2001] H.C.A. 59 11 October 2001 A21/2001 and the companion decision Thompson v. Connon 11 October 2001 A23/2001. Although they were not constitutional petition cases, the discussion on resolving the competing interests which the High Court of Australia recognized inevitably arise in this type of case, are most helpful and the conclusion reached we consider is of fundamental importance.

Secondly, it is not to be overlooked that this Court in its decision of 1 November 1996 did not make any finding about the innocence of Mrs. Picchi. The Court was of the view that there was material upon which others who had the responsibility within this Republic should decide whether there would be a further trial.

Mr. Finnigan places particular reliance on the reasoning of the majority of the Privy Council in Maharaj v. Attorney General of Trinidad & Tabago No.2 [1979] AC 385. He appears to overlook that all comments in that case were made after a finding that Mr. Maharaj had committed no contempt. This was determined in the earlier decision of the Privy Council. Maharaj v. Attorney General of Trinidad & Tabago No.1 [1977] 1 All E.R. 411. The Court in the 1979 case was considering the consequences of incarceration of a person who had been subsequently cleared of any wrong. That is not the case here. The issue still has to be determined in respect of Mrs. Picchi.

Thirdly, in all considerations and assessments of this case, a constant focus must remain on some fundamental issues which have never been in contention. Mr. Picchi died clearly as a result of an unlawful act. From 10 April 1995 there was available evidence (albeit from accomplices) that Mrs. Picchi was implicated in the killing. It is not to be overlooked that those accomplices at no point have ever retracted that allegation or deviated from it. There were other surrounding circumstances which were at least suspicious.

As a consequence, at every stage of this case there was "a jury issue" to be determined. In light of the available information it would have been irresponsible on the part of any authority not to have pursued the matter against Mrs. Picchi. Not withstanding the well-highlighted existence of conflicting possibilities, any person with an investigative or adjudicative role would have had to conclude that the allegation implicating Mrs. Picchi needed to be the subject of a formal hearing. A criminal trial was inevitable.

The present application is made in the circumstances in which there has never been an acquittal. This Court held that there had not been a sufficient articulation of reasons for a verdict of guilty to be sustained. But the Court accepted that there was an evidential foundation upon which conviction could have been appropriate.

The case is therefore unusual in that the deficiencies of the past have already been recognized, remedied and acknowledged in the setting aside of the conviction, but the issue as to whether Mrs. Picchi was criminally involved in the death of her husband remains an entirely open question.

Against that backdrop the primary Judge first struck out paragraph 41 to 43, 46(f), 48(b) and prayer 1(e) of the Amended Constitutional Petition, namely, the allegation that the failure of the trial Judge to provide a judgment articulating his reasons for this decision before convicting and, thereafter imprisoning the Petitioner, constituted an infringement of the Petitioner's Constitutional rights under Article 5(d) to protection of the law, including, a fair hearing by an independent and impartial Court under Article 5(2)(a) and, in consequence, the deprivation of the Petitioner's liberty through imprisonment for a period from early December 1995 until November 1996 breached Article 5(1)(b).

Secondly the primary Judge struck out paragraph 4, 12-23, 44, 45(c) to (e) and 46(a)(iii), (b) (c) 48(a) and prayer 1(a)(iii) and (b) of the Amended Constitutional Petition which alleged that the failure on the part of the

Prosecution to make timely disclosure of some evidence to the Petitioner prejudiced the Petitioner's right to a fair trial and thus infringed the Petitioner's constitutional right under Article 5(1)(d) to protection of law, under Article 5(2)(a) to a fair trial and under Article 5(1)(b) to liberty.

Thirdly he ruled that the Supreme Court was not bound by the Court of Appeal's assessment on the question as to whether or not the trial Judge' judgment failed to articulate adequate reasons for his decision.

Finally, he ruled that the State was not the only party to the proceeding and that the former Commissioner of Police and the former Chief Justice were parties.

We are not satisfied that Mrs. Picchi's appeals against each ruling or decision in the total circumstances of this case made by the primary Judge, are well founded. We are not satisfied that there is an error in any of the assessment he made.

Breaches of constitutional rights must be based on reality and not on some theoretical or assumed scenario. The approach of the Privy Council in *Ferguson v. The Attorney General of Trinidad and Tobago* [2000] 5L.R.C. 500 is clearly relevant, persuasive and appropriate.

Timely disclosure is now an important factor in most jurisdictions. It has for a decade or more been a developing jurisprudence throughout the Common law world. We agree with the learned primary Judge that in the total circumstance of this case although what occurred may not have been best practice, there could not in reality have been a breach of any constitutional right in the failure to make timely disclosure. There was probative material pointing to Mrs. Picchi so no matter how early disclosure had occurred, it was inevitable that steps would have been taken following investigation for arrest, return to Vanuatu, committal to trial and eventual trial of Mrs. Picchi.

Secondly we agree with the primary Judge that the failure by the former Chief Justice to articulate sufficiently the reasons as to why he reached his verdict could not be considered as a breach of Article 5 in respect of which compensation could now be held in all the circumstances as available relief.

The strickingly powerful condemnation made of Mrs. Picchi by the trial Judge is consistent only with his undoubtedly clear view, reached having heard and seen all witnesses, that her guilt had been established beyond any doubt. This Court was of the view that because there were conflicts in the evidence which needed to be subject to an articulated resolution, in the absence of it the Court could not be sure that a conviction was justified. The conclusion that she was guilty, on the evidence could have been available, but the reasoning process needed to be set out in the judgment.

The failure to do so has been recognised and vindicated by the quashing of the conviction. There has never been a judicial determination as to whether Mrs. Picchi was criminally implicated in the death of her husband.

On the issue of undisclosure there is implicit an unarticulated assertion that Mrs. Picchi was innocent. That has yet to be determined or at least there must be established that there is a reasonable doubt as to her guilt. This will have to be determined by admissible evidence tendered and accepted in the Supreme Court on the Constitutional Petition.

Thirdly we do not accept that there is an estoppel rising in respect of the comments made by the Court of Appeal which will control the constitutional petition, arising from the criminal appeal. The sole issue before the Court of Appeal in 1997 was whether the conviction for murder should be sustained. Attention was directed to that matter and nothing else. The Court held that the conviction was not sustainable and therefore quashed it. Mrs. Picchi has not been put on trial again. The onus on her, in this new proceeding, is to establish that her being tried and incarcerated was in all the circumstances a breach of her constitutional rights. That matter has never been before a Court let alone

determined. It is misconceived to assume it is an issue which in any material way has been determined between the parties to this present claim.

The primary Judge was correct to find that attention has never been directed to the point. Every issue essential to the present claim will need to be proved by proper evidence produced in Court and legally admissible in the current case. Drawing attention to affidavits in other proceedings (particularly where they include the most rank and irresponsible hearsay) is not of probative value and does not provide the Court with assistance on material matters.

The final issue in contention before us was the ruling of the Judge with regard to the meaning of Section 218 of Criminal Procedure Code. That provides:

> *"(1) Every application to the Supreme Court for the exercise of its jurisdiction under Articles 6, 53(1), 53(2), and 54 of the Constitution shall be by petition and shall be valid no matter how informally made.*
>
> *(2) The Supreme Court may on its own motion or upon application being made therefor by any party interested in the petition summon the petitioner before it to obtain any further information or documents it may require.*
>
> *(3) The petitioner shall, within 7 days of the filing of his petition in the Supreme Court or within such longer period as the Court may on application being made therefor order, cause a copy of the petition together with copies of supporting documents filed in relation to such petition to be served on the party or on all those parties whose actions are complained of.*
>
> *(4) Any party who is served with a copy of the petition in pursuance of subsection (3) may without prejudice to any other legal remedy available to such party apply to the Supreme Court for an order dismissing the petition on the ground that the petition is without foundation or vexatious or frivolous.*

(5) *Unless the Supreme Court shall be satisfied in the first instance that the petition is without foundation or vexatious or frivolous, it shall set the matter down for hearing and enquire into it. It shall summon the party or parties whose actions are complained of to attend the hearing.*

(6) *On the day appointed for hearing, the Supreme Court shall enquire into the matters raised the by the petition and after hearing all parties concerned shall give its decision and its order or directions (if any) thereon in open court."*

This is the framework which Parliament has laid down to apply in respect to the hearing of any constitutional petition. The Section contemplates the involvement of those whose actions are complained of. We respectfully adopt and accept the reasoning of the primary Judge when he said:

> *"What therefore does "party or parties whose actions are complained of" mean? As the only respondent can be the State acting through one if its arms and represented by the Attorney General it should have been simply stated in Section 218 that the petition be served upon the Attorney General. There was no need to mention "parties". The Attorney General, once served, will perforce contact the persons whose actions are complained of in order to prepare the case for Court. Unless the State is a 'party' within the confines of Section 218 then there is no provision for service of the petition upon the State. That would be absurd, unless it is to be presumed service would in any event take place upon the State and that Section 218 is a provision to ensure those whose actions are specifically complained of are brought before the Supreme Court for the purposes of the enquiry. Would they then become a 'party' as opposed to a person whose actions are complained of, and as represented by the Attorney General for the State?*
>
> *There does not appear to be an interpretation and a course of action which renders consistent the provisions of Section 218 within itself*

and with the Constitution. The Constitution of course provides the only respondent is the State. The Attorney General as its representative must be served with the petition. As a matter of statutory interpretation 'party' in Section 218 must mean the State. Within that broad term 'party' are other parties, namely those specifically whose actions are complained of, in this case the former Chief Justice, the former Commissioner of Police and the former Public Prosecutor. The purpose of the statutory provisions is, in my judgment, to ensure that the specific persons whose actions are complained of are before the Court for the purposes of the enquiry and if necessary, the making of any Orders and award of compensation."

Accordingly we find no basis to interfere any of the decisions reached on either 14 September 2001 or the 2nd October 2001 which have been complained of before us. The appeal is dismissed. The respondent is entitled to costs in the usual way.

DATED at PORT-VILA, this 1st DAY of NOVEMBER, 2001

BY THE COURT

.....
V. LUNABEK CJ

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J.B. ROBERTSON J

.....
J. von DOUSSA J

.....
D. FATIAKI J

REPUBLIC OF VANUATU COUR D'APPEL — COURT OF APPEAL