

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

**Criminal Appeal
Case No. 15/1049 CoA/CRMA**

**Criminal Appeal
Case No. 15/1057 CoA/CRMA**

BETWEEN: Willy Jimmy Tapangararua

First Appellant

Silas Yatan

Second Appellant

AND: Public Prosecutor

Respondent

Date of Hearing: 4th – 8th days of April, 2016 at 9:00 AM
Date of Judgment: 15th day of April, 2016 at 4.00PM

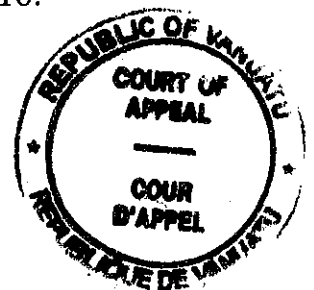
Coram: *Hon. Chief Justice Vincent Lunabek
Hon. Justice John von Doussa
Hon. Justice Ronald Young
Hon. Justice Duddley Aru
Hon. Justice Paul Geoghegan*

Counsel: *Mr Justin Ngwele for First Appellant
Mr Less Napuati for Second Appellant
The Public Prosecutor Mr Josiah Naigulevu*

JUDGMENT

Introduction

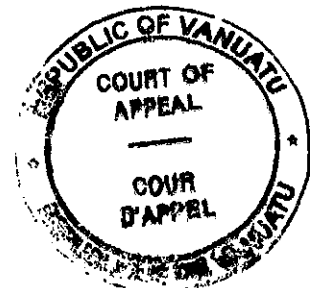
1. These are two notices of appeal filed by the First and Second appellants respectively on 16 December and 17 December 2015. The Second Appellant filed amended grounds of his appeal on 5 March 2016.



2. These appeals are filed against the orders and judgment made by a Supreme Court Judge pursuant to sections 41, 42 and 43 of the Leadership Code Act [Cap 240] against the First and Second Appellants and others on 7 December and 14 December 2015.
3. The appeals are joined and heard together.

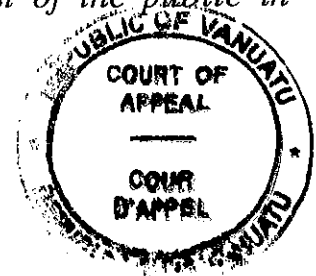
Background

4. The First and Second Appellants were charged with others for the offence of corruption and bribery of officials, contrary to section 73 of Penal Code Act [Cap 135].
5. The First Appellant entered a guilty plea and was convicted by the Supreme Court of this offence on 7 September 2015.
6. The Second Appellant and others entered not guilty pleas. They were tried and convicted by the Supreme Court of this offence on 9 October 2015.
7. The First and Second Appellants were sentenced with others by the Supreme Court on the said offence on 22 October 2015 in *Public Prosecution –v- Moana Carcasses Kalosil and Ors, criminal case No.73 of 2015*.
8. The First Appellant was convicted and sentenced to a term of 20 months imprisonment suspended for a period of 2 years. The second Appellant was convicted and sentenced for a term of 3 years imprisonment.



9. On 20 November 2015, this Court in *Kalosil -v- Public Prosecutor [2015] VUCA 43; Criminal Appeal Case 12 of 2015 (20 November 2015)* dismissed all appeals and confirmed the convictions and sentences of the Supreme Court in respect to the First and Second Appellants and all others.
10. The First and Second Appellants and others have been convicted for a Penal Code Act offence, contrary to section 73, the offence of Corruption and Bribery of officials. The maximum penalty for the said offence is an imprisonment for 10 years.
11. At the time of their respective convictions of the said offence, the First Appellant was a Member of Parliament and a Minister of State of the Republic of Vanuatu and the Second Appellant was a Member of Parliament. All others were also Members of Parliament (and among them Ministers of the Government of Vanuatu also).
12. The First and Second Appellants and others are convicted leaders.
13. The offence constitutes a serious breach of the Leadership Code Act [Cap 240] as this Court stated in *Kalosil -v- Public Prosecutor [2015] VUCA43*:

“It must be repeated that bribery is a serious crime. The bribing of Members of Parliament strikes at the heart of democracy and good government, debasing the decision-making processes of Vanuatu’s Parliament so that it is reliable, predictable, or fair, worse, a practice of bribes weakens the trust of the public in government, and damages the rule of law...”

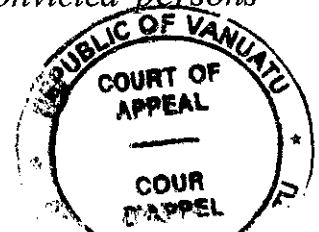


We comment that there have been breaches of s.21 of the Leadership Code Act by all Appellants in that they have accepted loans other than on commercial terms, and did not show at the trial, when they were still facing a charge under that section, that they satisfied the lending institution's usual business criteria. While that charge and the other Leadership Code charges have been dismissed because of the procedural tangle created by the 8 October 2015 decision, the fact of breaches of s.21 demonstrates the serious nature of the offending."

14. As the breaches of the Leadership Code Act are serious breaches, the Public Prosecutor made applications under section 27(1) (a) (b) of the Act [Cap 240] and the Act generally.

Applications of the Public Prosecutor pursuant to s.27 (1) (a) (b) of the Leadership Code Act [Cap 240].

15. The Public Prosecutor made two applications under section 27 (1) (a) (b) of the Leadership Code Act and invoked sections 41, 42, and 43 of the same Act [Cap 240]. The First Application was filed on 25 November 2015. Orders sought in it were in respect to the second Appellant and 13 others. The second application was filed on 2 December 2015 seeking orders in respect to the First Appellant. The two applications are of identical terms and heard together by the Supreme Court.
16. The Applications sought the following orders pursuant to section 27(1) (a) and (b) of the Leadership Code Act [Cap 240]:
1. *Pursuant to s.41 of Leadership Code Act [Cap 240] an order for dismissal from office of the following convicted persons*



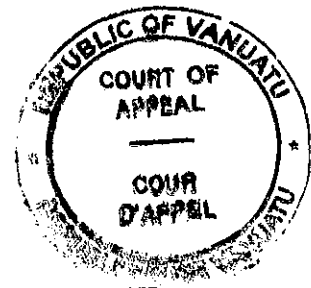
namely, Moana Carcasses Kalosil, Serge Vohor, Steven Kalsakau, Marcellino Pipite, Paul B Telukluk, Silas R Yatan, Tony Nari, John Amos, Arnold Prasad, Tony Wright, Sebastien Harry, Thomas Laken, Jean Yves Chabot, Jonas James and Willy Jimmy Tapangararua (in the second application).

2. *Pursuant to section 42 of Leadership Code Act [Cap 240] a consequential order that the afore-named convicted person having been dismissed from office under section 41 of the Leadership Code Act [Cap 240] be disqualified from standing for election as, or being appointed as a leader of any kind for a period of 10 years from the date of conviction;*
3. *Pursuant to section 43 of the Leadership Code Act [Cap 240] an order that where the afore-named convicted person is entitled to any other payment or allowances, on ceasing to be a leader as a result of being dismissed from office under the Leadership Code Act [Cap 240], that the entitlement (s) ceases;*
4. *And such other orders as the Court deems necessary.*

17. The applications were supported by the sworn statement of Superintendent George Songi dated 24 November 2015.

The Judgment of the Supreme Court under Appeal.

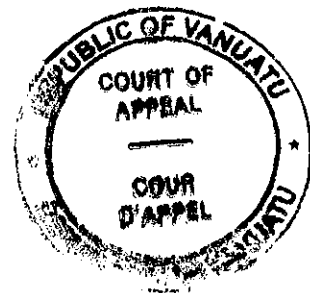
18. The Supreme Court heard the two applications on 7 December 2015, and orally granted the orders sought in the applications on the same date. In his written reasons of the decision published on 14 December 2015, the Learned Judge said:



"I am satisfied it is beyond any doubt that the breaches were and are serious. I confirm the orders made on 7th December dismissing all Defendants from office and disqualifying them from standing for election or being appointed as leader of any kind for a period of 10 years. Also I confirm the order that the Defendants have ceased to be leaders and pursuant to s.43 of the L.C.A; any entitlement to payments or allowances in connection with the being a leader on dismissal (ie- on 9 October 2015). It would appear from press reports that payments and allowances may have already been disbursed. If that is the case then such disbursement was premature to say the very least. Whoever was responsible should take steps to recover payments. In any event the Defendants are ordered that if any payments or allowances have been paid to them they are to repay them forthwith".

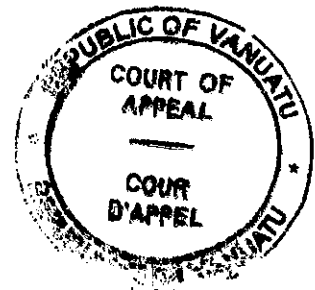
The substantive grounds of appeal

19. The First and Second Appellants are the only two appellants who filed notices and grounds of appeal challenging the Supreme Court orders of 7 December 2015 and its reasons dated 14 December 2015. The other Respondents in the Application filed by the Public Prosecutor on 25 November 2015 did not appeal the Supreme Court orders of 7th December and judgment dated 14 December 2015.
20. We note that the First Appellant advances his appeal on five (5) grounds. The second Appellant has only one ground of appeal in support of his appeal which raises the same issue as ground 2 of the First Appellant's. We shall deal with it at the same time when we consider ground 2 of the First Appellant's Appeal.



Ground 1

21. The first Appellant contends that the Supreme Court erred as it failed to determine whether the Court had jurisdiction to deal with the application by the Public Prosecutor to invoke sections 41, 42 and 43 of the Leadership Code Act [Cap 240] given that the Appellant was never charged and convicted under the same law.
22. In this submissions, Mr Ngwele, on behalf of the First Appellant, referred to section 1 of the Leadership Code Act which states the purpose of the Code is to give effect to Chapter 10 of the Constitution by providing for a Leadership Code to govern the conduct of the Leaders of the people of Vanuatu.
23. He places emphasis on the term 'leader'. He says that on 7 September 2015, the First Appellant pleaded guilty to the charge of Corruption and Bribery of officials, contrary to s.73(1) of the Penal Code Act [Cap 135] and he was convicted of the said offence. He was sentenced on 9 October 2015. The First Appellant did not appeal against his sentence.
24. He submitted that because of his conviction and sentence the First Appellant ceased to perform any of his functions as a Member of Parliament because his seat had become vacant 30 days after the First Appellant's sentence by operation of s.3(1) of Members of Parliament (Vacations of Seats) Act [Cap 174].
25. It is also submitted for the First Appellant that section 41 of the Leadership Code Act [Cap 240] had become redundant by operation of section 3(1) of Members of Parliament (Vacation of Seats) Act.



26. We are of opinion that the above submissions are not right and we reject them.
27. We agree with the Learned Judge that the starting point to understand the meaning and extent of the term 'leader' and the broad jurisdiction and issues raised must be Chapter 10 of the Constitution and more particularly Articles 66 and 68 and sections 1, 19 and 27 of Leadership Code Act which set out the relevant legislative scheme. Article 66 deals broadly with the 'Conduct of Leaders'. Article 68 provides that:

"68. Parliament to give effect to this chapter

Parliament shall by law give effect to the Principles of this chapter."

28. Section 1 of the Leadership Code Act gives effect to Article 68 of the Constitution.

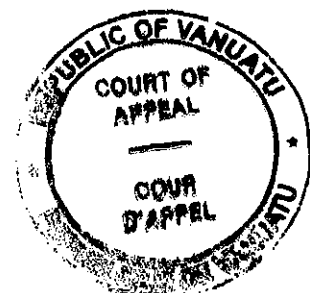
"1. Purpose

The purpose of this code is to give effect to chapter 10 of the Constitution by providing for a Leadership Code to govern the conduct of the leaders of the people of Vanuatu."

Section 19 of the same Act [Cap 240] provides:

"19. Breach of Leadership Code

A person who does not comply with Part 2, 3 or 4 is guilty of a breach of this code and is liable to punishment in accordance with Part 6."



Section 27 of the Act (which is in Part 3) provides:

“27. Other offences punishable under the Act

(1) A leader who is convicted by a court of an offence under the Penal Code [Cap 135] and as listed in subsection (2) is:

(a) in breach of this code; and

(b) liable to be dealt with in accordance with sections 41 and 42 in addition to any other punishment that may be imposed under any other act

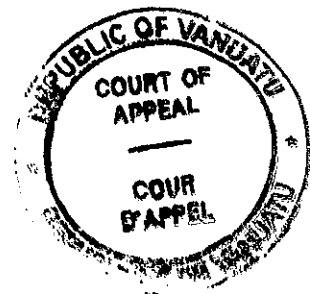
(2) The offences are:

(a) ...

(m) corruption and bribery of officials

...”

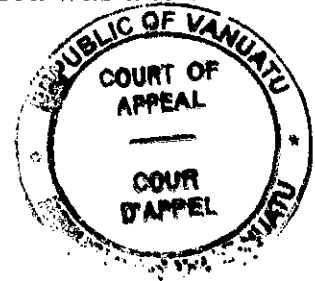
29. The foregoing laws supported the Respondent in his application on the 7th December 2015 and provided the Court the basis for exercising its jurisdiction. We observe that the power of the Supreme Court to exercise jurisdiction over the adjudication is found not only in section 39 (1) of the Leadership Code Act, but also in Article 49(1) of the Constitution, and sections 28(1) and 65(1) of the Judicial Services and Court Act.
30. We agree with the Learned Judge that section 27 of the Leadership Code Act is quite clear that if a Leader is convicted of an offence under the Penal Code Act [Cap 135] listed in subsection (2), he or she is in breach of the Leadership Code Act. The consequence of being in breach is that the leader is then liable to be dealt with in accordance with sections 41 and 42 of the Leadership Code Act.



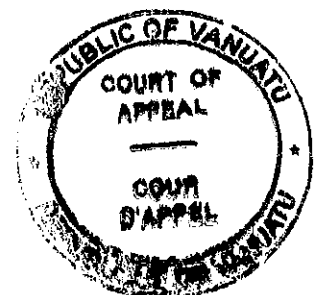
31. We emphasise that the breach that is impugned is not another criminal offence, but a breach of the Leadership Code Act. The subsistence and enforcement of those breaches were intended to give effect to Chapter 10 of the Constitution.
32. We reject the first Appellant's arguments that by the time section 41 of the Leadership Code Act was invoked, he was at the time by virtue of the operation of section 3(1) of the Members of Parliament (vacation of seats) Act no longer a leader and therefore, section 41 could no longer be applied against him.
33. We reject also the First Appellant's argument that his conviction on 7 September 2015 and his sentence on 9 October 2015 had the same effect.
34. We accept the Public Prosecutor's submissions that notwithstanding the effect of section 3(1) of the Members of Parliament (Vacation of Seats) Act the First Appellant was deemed to be a leader at the time section 41 was invoked by the operation of section 50 of the Leadership Code Act. That section provides:

"50. Defence to prosecution

It shall not be a defence to a prosecution under this Act that the accused was not at the time of an investigation or is not in the course of prosecution under this Act or in the event of a conviction at time of sentencing a leader, and for the purpose of establishing jurisdiction it shall be sufficient for the prosecution to establish that at the time of the offence the accused was a leader."



35. We accept the Learned Public Prosecutor's submissions that the 'offence' referred to in section 50 can only be the offence referred to in section 27(2) (m) of the Leadership Code Act. In the case of the First Appellant, it was an offence of corruption and bribery of officials contrary to section 73(1) of the Penal Code Act committed on the 6th October 2014, and contained in count 52 of an information dated 2nd September 2015.
36. At the time of offending, on the 6th October 2014, the First Appellant was ostensibly a Member of Parliament. There was no dispute about this point.
37. By definition, the First Appellant was a leader within the meaning of the term defined in Article 67 of the Constitution which provides:
- "67. Definition of a leader*
- For the purpose of this chapter, a leader means the President of the Republic, the Prime Minister and other Ministers, Members of Parliament, and such Public Servants, Officers of Government agencies and other officers as may be prescribed by law."*
38. At the material time, the First Appellant was also the Minister of Finance. We are, therefore, of the view that applying section 50 of the Leadership Code Act, the First Appellant was a 'leader' on the 7th December 2015 when the orders were given and the written judgment delivered by the Learned Judge on the 14th December 2015. Accordingly, ground 1 of the First Appellant's appeal must fail. We, accordingly, dismiss it.



Grounds 2 and 4 (First Appellant) and Ground of the Second Appellant's Appeal

39. We now consider grounds 2 and 4 of the First Appellant and the one ground of the second Appellant's appeal as they raise the same issue.

40. The First Appellant asserts that his right contained in Article 5(2) (h) of the Constitution was infringed by the institution of sections 41, 42 and 43 proceedings. The second Appellant also asserts a similar breach of Article 5(2) (h) in relation to him in his amended ground of appeal filed on 5 March 2016 by the institution of sections 41, 42 and 43 proceedings. Article 5(2) (h) of the Constitution provides:

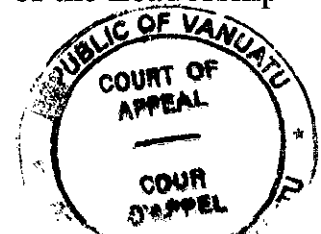
“5. Fundamental rights and freedoms of the individual

(2) Protection of the law shall include the following-

(a) ...

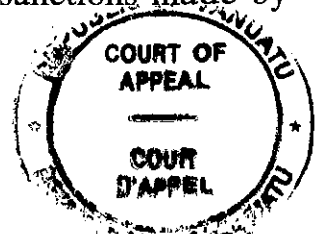
(h) no person who has been pardoned, or tried and convicted or acquitted shall be tried again for the same offence or any other offence of which he could have been convicted at his trial. “

41. The First and Second Appellants argued and submitted to the same effect that during the prosecution of the First and Second Appellants and others in Criminal Case No.73 of 2015, the Public Prosecutor should have charged them (the two Appellants) and others under sections 41, 42 and 43 of the Leadership Code Act. They say the Public Prosecutor did not elect to include in that proceeding charges under sections 41, 42 and 43 of the Leadership



Code Act. They say that by instituting a separate criminal case No.762 of 2015 invoking sections 41, 42 and 43 after their convictions, breached Article 5(2) (h) of the Constitution because the Appellants could have been convicted of the Sections 41, 42 and 43 offences at trial.

42. We are of the view that the above submissions cannot be sustained as they are made on a misapprehension of the law.
43. Sections 41, 42 and 43 of the Leadership Code Act can only be invoked when a leader is convicted of an offence under the Penal Code listed in subsection (2) of section 27 of the Leadership Code Act. It must be understood that without a conviction, one is unable to invoke those sections. We agree and accept the Learned Public Prosecutor's submissions that sections 41, 42 and 43 cannot be applied to commence criminal proceedings like Penal Code offences. Rather the conviction of Penal Code offences may be used to instigate a section, 41, 42 and 43 proceeding. The Penal Code offence in that context is like a predicate offence. It is not necessary to lay charges and call for evidence like ordinary criminal proceedings. This has already taken place. What is required though in a section 27(1) and 41 proceedings is proof that the convicted person is a leader, and that he or she has been convicted of a Penal Code offence listed in subsection (2) of section 27 in circumstances that can be described as serious breaches. The measure of seriousness of a breach may be determined according to the 5 factors enumerated in section 41(2) of the Leadership Cod Act.
44. We must also point out that sections 41, 42, and 43 of the Leadership Code Act do not create offences that can become the subject of a criminal charge. They constitute sanctions made by



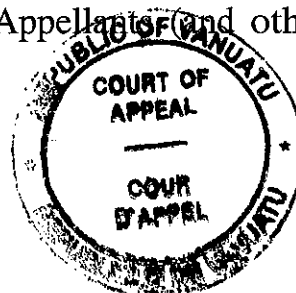
orders of court after a conviction has been obtained. In the context of an application seeking an order under section 41, the conviction of a leader of a penal code offence listed in subsection (2) of section 27 of the Leadership Code Act, constitutes a breach under the Code. It is that breach that is sanctioned by the Leadership Code Act. Sections 41, 42 and 43 can never be a subject of prosecution in the ordinary sense as they are not offences but they are sanctions that can be made by orders of the Court as provided in those sections.

45. The case of Sope –v- Republic of Vanuatu [2004] VUSC; Civil Case 049 of 204 (26 July 2004) was referred to by Counsel Mr Napuati on behalf of the second Appellant. The facts of that case are different from the present case and have to be distinguished. The comments made by Treston J in Sope Case in respect to section 27 (1) (a) (b) of the Leadership Code Act do not assist the appellants but they are in support of the Respondent’s application.

In the present case, at the time of offence, the First and Second Appellants were leaders as defined under Article 67 of the Constitution . By operation of s.50 of the Leadership Code Act, they were still leaders on 7 December 2015 when Supreme Court Judge made orders pursuant to ss. 41, 42 and 43 of the Leadership Code Act.

We are of the opinion that the Learned Judge based on the material evidence before him was satisfied of the seriousness of the breaches of the Leadership code Act.

We are satisfied that the Judge was right to issue orders pursuant to s.41 dismissing the First and second Appellants (and others) from office.



We are also satisfied that orders made pursuant to ss.42 and 43 are triggered by the making of orders pursuant to section 41 of the Leadership Code Act [Cap240].

46. We are not satisfied that the Public Prosecutor's application pursuant to s.27 (1) (b) of the Leadership Code Act invoking orders pursuant to sections 41, 42, and 43 are infringing the constitutional rights of the First and second Appellants. We, therefore, dismiss grounds 2 and 4 of the First Appellant's appeal. We also dismiss the one ground of the second Appellant's appeal.

Grounds 3 and 5

47. We finally consider grounds 3 and 5 of the First Appellant's appeal. We do note that these two grounds make similar assertions. Grounds 3 asserts that the First Appellant was no longer a 'leader' at the time the application was made. They are the same claims or arguments advanced in ground 1. The critical operative term here is a 'leader'. We are of the view that by the operation of section 50 of the Leadership Code Act, the First Appellant was a leader at the time of the breach. Grounds 3 and 5 must therefore fail. They are accordingly dismissed.
48. We therefore dismiss the two appeals.

DATED at Port Vila this 15th day of April, 2016.

BY THE COURT

.....
Vincent Lunabek
Chief Justice

