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

Criminal Appeal
Case No. 17/583 CoA/CRMA

BETWEEN: **MARCELLINO PIPITE**
PAUL B TELUKLUK
SILAS R YATAN
TONY NARI
JOHN AMOS
ARNOLD PRASAD
THOMAS LAKEN
JONAS JAMES
JEAN YVES CHABOT
SEBASTIEN HARRY
TONY WRIGHT
Appellants

AND: **PUBLIC PROSECUTOR**
Respondent

Coram: ***Hon. Chief Justice Vincent Lunabek***
Hon. Justice Ronald Young
Hon. Justice John Mansfield
Hon. Justice Dudley Aru
Hon. Justice Paul Geoghegan

Counsel: ***Christina Thyna for the First Appellant***
Mary Grace Nari for the Second to Eleventh Appellants (save for the appeal against sentence by the third and seventh appellants).
Less Napuati for the third and seventh appellants on their appeal against sentence.
Josiah Naigulevu Public Prosecutor and Tristan Garae for the respondent.

Date of Hearing: *31 March, 5 and 6 April 2017*

Date of Judgment: *7 April 2017*

JUDGMENT

INTRODUCTION

1. This judgment concerns appeals against conviction and sentence against 11 of the 12 persons convicted of conspiring to pervert the course of justice.

2. The Court of Appeal has concluded that the convictions of the appellants should be set aside. That is because the trial judge did not consider whether all the elements of the offence were made out in relation to each individual appellant.

3. The Public Prosecutor will now consider whether to lay the charges again.

4. The result does not condone the actions of the then Speaker as Acting President. The Court of Appeal in Vohor v. President of the Republic of Vanuatu [2015] VUCA 40 has already condemned that conduct.

BACKGROUND

5. On 9 October 2015, in Criminal Case No. 13 of 2015, 15 members of the Parliament of Vanuatu, included the Speaker of the Parliament Marcellino Pipite, were each convicted of the offence of Corruption and Bribery of Officials, contrary to Section 73 of the Penal Code Act [CAP 135] (the Penal Code).

6. On that date, directions were given for the steps to be taken prior to a sentencing hearing on 22 October 2015. That sentencing hearing took place, and sentences were duly imposed on those convicted of that offence.

7. Each of these persons was, ultimately, duly sentenced to a term of imprisonment.

8. It is not surprising that, upon the convictions being recorded on 9 October 2015, those convicted and their legal advisers might have met together to discuss the verdicts, the prospects of appeal from those convictions, the sentencing process, and related makers.

9. It is apparent that, at least for some of those convicted, there were discussions also concerning the possibility of seeking a pardon from the convictions by request to the President of the Republic, under Article 38 of the Constitution.

10. In a Memorandum of Agreed matters between the Public Prosecutor and the appellants (and provided to the Court on the hearing of the Information referred to below) certain facts were common ground.

11. The President of the Republic was absent from Vanuatu from 5 October 2015 until his return on 11 October 2015.

12. In the absence of the President, Pipite as Speaker was on 5 October 2015 appointed as Acting President of the Republic until the President's return. The President was expected to return to Vanuatu in the late afternoon on 11 October 2015.

13. Pipite in his capacity as Acting President granted a pardon to 11 of the convicted persons (including himself) and signed the Instrument of Pardon on 10 October 2015. The Instrument of Pardon was gazetted on 10 October 2015, and was published on 11

October 2015 (the Pardon). Pipite held a press conference and issued a press release about the pardon on that date.

14. As is now a matter of record, the President on his return rescinded the Pardon, by Instrument of Revocation of 15 October 2015. The issues as to the legal validity of the Pardon and the effectiveness of the Instrument of Revocation were the subject of Constitutional Cases 6 and 7 of 2015 in the Supreme Court: Natuman v. President of the Republic [2015] VUSC 148. The primary judge held that the Pardon was ineffective and the Instrument of Revocation was valid. The Court of Appeal in its decision Vohor v. President of the Republic of Vanuatu [2015] VUCA 40 (Vohor) upheld the decision of the Supreme Court, and dismissed the appeals from the Supreme Court decision.

15. The circumstances concerning the application for a Pardon came to the attention of, and were considered by, the Public Prosecutor.

THE CHARGES OF CONSPIRACY

16. On 14 November 2015 the Public Prosecutor laid an Information against 11 of those convicted persons Pipite, Tony Ngari (also referred to Nari – we adopt that description as it is used in the present Notice of Appeal), Thomas Laken, Silas Yatan, Jean-Yves Chabod, Paul Telukluk, John Amos, Arnold Prasad, Tony Wright, Sebastien Harry and Jonas James and one of the legal advisors Wilson Iauma for the offence of Conspiracy to Defeat Justice, contrary to section 79(a) of the Penal Code. Section 79(1) of the Penal Code defines the term 'Conspiracy'.

17. The Information alleged two offences. The first is said to have involved 5 of these persons, and Wilson Iauma meeting at Mangos Restaurant Seaside (Mangos) on 10 October 2015, namely Pipite, Nari, Laken, Yatan and Chabod. The second is said to have involved all 11 of those persons and Iauma meeting at Ministry of Infrastructure and Public Utilities (MIPU) also on the same day. It is now accepted that only one offence took place and the two meetings were part of the fulfilment of the one alleged conspiracy.

18. The particulars of the offence (the same in each case on the Information) are that these persons conspired together to obstruct and defeat the course of justice by planning and conspiring to facilitate the issuance of the Pardon for the purposes of obstructing, preventing, perverting or defeating the course of justice.

19. There is, of course no offence committed by a convicted person seeking a Presidential pardon, or indeed by a group of convicted persons together seeking a Presidential pardon, under Article 38 of the Constitution.

20. The essence of the alleged offence is that the conspiracy involved the application for a Presidential pardon to be made very quickly to Pipite as the Acting President and to be decided by him before the President returned on 11 October 2015.

21. It is accepted by the Public Prosecutor that it was necessary to prove that the alleged conspirators knew of those facts, and understood or expected that Pipite as Acting President would be likely to grant a

pardon to each of the applicants for a pardon, and that each of the alleged conspirators knew or understood that Pipite as Acting President, in the particular circumstances, would have a clear conflict of interest and would be acting unlawfully in granting the Pardon and in that context agreed that the request to Pipite as the Acting President for a pardon would be made.

22. There can be no doubt that Pipite as Acting President was in breach of the duties placed upon him under Article 66 of the Constitution. Article 66(1)(a) obliged Pipite to conduct himself so as not to place himself in a position in which he had or could have had a conflict of interest, or in which the fair exercise of his public duties (as Acting President and as Speaker) might be compromised. Section 24 of the Leadership Code Act [CAP 240] provides a definition of "conflict of interest". It is not necessary to refer to that Act in detail.

23. The Court of Appeal in Vohor said at [23] – [24]:

> "[23] Mr Pipite plainly breached the law, by breaching his duty not to place himself into a position of conflict and by acting not in accordance with law. It is difficult to imagine a more serious and obvious conflict of interest, and a more palpable failure of a leader to recognise his responsibilities to Parliament and his nation, than for a leader to pardon himself and others in the same position.
>
> [24] Any such Pardon by an Acting President was an act which demeaned the position of President and indeed the Speaker in breach of art 66(1)(b) and directly called his integrity, in the sense of his commitment to act in the interests of Vanuatu rather than himself, into question under act 66(1)(c). Also, his action breached art 66(1)(d) by greatly diminishing the respect for and confidence in the integrity of

the Government of the Republic of Vanuatu and its commitment to the rule of law."

24. The hearing of those charges took place in August 2016. The trial judge announced his verdict at the end of the hearing, on 16 August 2016. The judgment was published on 23 August 2016.

25. Each of the accused persons was found guilty of the offence charged, as the trial judge said at [23] of the Judgment:

> *"....in that they all, between the time of the conviction on 9th October 2015 and 11th October 2015, asked for or arranged pardons to be granted with the intentions that they escaped any sanction of the Court."*

26. They were remanded pending sentence.

27. On 29 September 2016, each of the accused persons were sentenced. The oral reasons for the sentences were published as a Sentence Judgment on 19 October 2016. The maximum sentence for the offence under section 79(a) of the Penal Code is 7 years imprisonment. Each of the 12 persons had a Pre-sentence reports concerning their individual positions.

28. Sentences were imposed as follows:

(1) Pipite – 4 years imprisonment;

(2) Nari – 3 years imprisonment;

(3) Laken – 3 years imprisonment;

(4) Yatan – 2 years and 6 months imprisonment;

(5) Chabod – 2 years and 3 months imprisonment;

(6) Telukluk – 2 years and 3 months imprisonment;

(7) Amos – 2 years and 3 months imprisonment;

(8) Prasad – 2 years and 3 months imprisonment;

(9) Wright – 2 years and 3 months imprisonment;

(10) Harry – 2 years and 3 months imprisonment;

(11) James – 2 years imprisonment; and

(12) Iauma – 2 years imprisonment (suspended for 2 years and 200 hours community work).

THE APPEALS

29. Each of those persons (other than Iauma) has appealed against the conviction and against the sentence.

30. The appeals are outside the time for appeals allowed under Rule 35 of the Criminal Appeal Rules.

31. There are 3 notices of appeal. One notice of appeal dated 13 March 2017 (but filed on 10 March 2017) is on behalf of 9 of the appellants (excluding Wright and Harry). The amended notice of appeal dated 22 March 2017 includes the 11 appellants. These is a separate notice of appeal on behalf of Pipite dated 23 March 2017.

32. On 21 March 2017, a judge of the Court of Appeal gave leave to the then (proposed) appellants to appeal out of time. We accept that, on the material before the Judge that was an appropriate exercise of his discretion. We note that there is, or may be, some slight inconsistency between the relevant provisions of the Appeal Rules and the Criminal Appeal Code Act [CAP 136] and the Constitution. It provides in Article 50 of the Constitution that the Court of Appeal must be constituted of at least 2 Supreme Court judges. The power to make interlocutory orders may or may not be covered by the operation of that provision. In respect of administrative orders, it would probably not apply as Article 50 relates to the judicial decision making by the Court of Appeal.

33. To avoid any suggestion that the appeals are out of time, we give leave to all the appellants to appeal out of time against their convictions and sentences. That includes Wright and Harry, who may not have been covered by the earlier leave order in any event as they were not then nominated as appellants.

34. On the appeal:

(1) Pipite in his notice of separate appeal (grounds 2.1 and 2.3 concerned only sentences but ground 2.2 is not confined to that) was separately represented by Ms Thyna;

(2) All the appellants were represented by Mrs Nari concerning the appeals against conviction, and all but Pipite, Laken and Yatan were represented by her on the appeals against sentences; and

(3) Laken and Yatan were represented by Mr Napuati on their appeals against sentence.

35. The appeals against conviction involved both arguments of general application to all appellants, and in the cases of Telukluk and Wright separate and specific arguments.

36. We will therefore consider the appeals against conviction under 3 subheadings:

(A) All Appellants

(B) Telukluk

(C) Wright

37. In the way we have resolved the appeals against conviction, we do not need to consider the appeals against sentence, in relation to each of the appellants.

38. We note that certain issues about what was the evidence before the trial judge, and the availability of the judge's notes of evidence were resolved during the hearing. The Court expresses its appreciation to all counsel for their efforts in reviewing and then addressing the relevant material in a short period of time.

CONSIDERATION: CONVICTION APPEALS

(A) ALL APPELLANTS

Although Pipite filed a separate notice of appeal, the grounds of appeal, and the contentions, concerning the conviction are consistent with those of the other appellants.

(1) The primary judgment

39. There is no real issue about the general analysis of the elements of the offence. In particular, it is common ground that any agreement of the alleged conspirators (who need not all have the same degree of involvement or the same degree of knowledge) must be shared by each conspirator to act in a certain way, and that the proposed action agreed upon must have the consequence of perverting the course of justice, and that the intention of each of the conspirators was in fact to pervert the course of justice. The analysis of the trial judge at [2] – [6] of his reasons has not been challenged. It is not necessary for each of the alleged conspirators to have been involved to the same extent, or for the full period while the unlawful agreement was conceived and completed. The offence is the unlawful agreement itself.

40. As we have noted above, the factual matters to be proved in the present circumstances (as accepted by the Public Prosecutor) are that:

(i) each of the conspirators agreed to a course of action;

(ii) the course of action involved a request being made to the President by some of those convicted of the offence of bribery on 9 October 2015, for a pardon;

(iii) that the request would be considered by Pipite, as Acting President before the President's return;

(iv) that Pipite would, or was likely to, grant the pardon;

(v) that Pipite as Acting President would so act in circumstances where it was unlawful for him to do so, because of his position as one of the convicted persons; and finally

(vi) that each of the alleged conspirators had the intention that Pipite as Acting President would act in that way, being aware that it was unlawful for him to do so.

41. It is those particular circumstances to which the trial judge was referring at [7] of his judgment when he referred to R v. Murray [1982] 75 Cr App. 58. The trial judge therefore appropriately noted the stage of the criminal proceedings, where sentence was still to be passed and the role of Pipite as Acting President was to become critical.

42. Any convicted person may seek a pardon from a criminal conviction, either alone or with one or more other persons who were convicted of the same offences. The President is empowered to grant a pardon under Article 38 of the Constitution. It would not matter, in normal circumstances that the pardon was sought before sentences were imposed for the offences: See Sope v. Republic of Vanuatu [2004] VUCA 20; Vohor at [27].

43. When there is an Acting President, the Acting President may exercise those powers: Vohor at [26]. However, as explained above, in the particular circumstances Pipite as Acting President could not lawfully do so.

44. In our view, the following passages of the trial judge's reasons cause concern. After referring to R v. Kellett [1976] 1QB 372, the trial judge said:

> "7. In the present case the defendants are alleged to have conspired to obstruct the course of justice by agreeing to facilitate the issuance of pardons. It must be understood that the defendants are ***not*** being charged with asking for a facilitating the issuance of pardons. They are accused of obstructing, preventing or defeating the course of justice by asking for a facilitating the issuance of pardons. In the particular circumstances of this case it is not the pardons which are the crux of the offences it is the defendants' intention in obtaining those pardons.
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> 8. There is no dispute that all the defendants were, on 9th October 2015, convicted of various offences involving the corruption and bribery of officials. Those convictions and the reasons for them are set out in the detailed judgment of Her Ladyship Sey J dated 9th October 2015. After handing down her verdict Her Ladyship adjourned the case for sentence. The fact that even though the Court had pronounced its verdict the judicial proceedings in criminal case 73 of 2015 were continuing is an important facet of this case. The effect of pardons granted by the Speaker as Acting President would be to bring those judicial proceedings to a premature and abrupt halt, to bring them to an end before sentence could be passed and before any other lawful sanction could be imposed (including any sanctions available under the Leadership Code Act)."

45. It can be seen that the emphasis is on the preventing of the sentencing process being brought to a "premature and abrupt halt." That appears to be the "intention" referred to in [7].

46. That is confirmed by the following paragraph. The trial judge referred to R v. Kellet [1976] 1 QB 372 to support the proposition it is the intention to interfere with the course of justice (the sentencing) rather than to interfere with the course of justice by unlawful means. At [10], the trial judge said it did not matter that the appellants had a right to apply for a pardon.

47. That confined focus is also confirmed by [11] and [12] of the judgment. After again referring to R v. Kellet, a case where the conspiracy alleged was to get a witness to alter or withhold evidence, the trial judge continued:

> "[11] In this case that means the legality or not of the Speaker, as Acting Head of State, granting pardons is irrelevant. It would be irrelevant whether or not the Speaker's own conviction had any effect on any power he had under Articles 37 and 38. As set out above, *"it is not an intent to interfere with the course of justice by unlawful means, but to interfere with the course of justice per se."*
>
> [12] The more relevant questions in this case are whether the Defendants agreed or arranged amongst themselves that they were going to request Pardons for those convicted but not sentenced on 9th October 2015; and whether they did so intending such Pardons to prevent the Court from completing the sentencing on 22nd October 2015 or otherwise avoid any sanction following conviction. Those questions do not involve consideration of what might be termed motive. The reasons for the defendants wanting to obtain Pardons are probably as verbalized by Mr Pipite at the press conference on Sunday 12th October. However, just as the legality of what the Acting Head of State did is irrelevant so the reasons why the defendants did what they did are irrelevant. Section 12 of the Penal Code [Cap 135] which says:

A mistake of fact shall be a defence to a criminal charge if it consists of a genuine and reasonable belief in any fact or circumstance which, had it existed, would have rendered the conduct of the accused innocent.

As pointed out above in paragraph 10 above it is not doing something unlawful it is the intention to interfere with the justice per se. As was said in a Channel Islands case from 1980.

"It is plain, however, that the crime of perverting the course of justice covers acts which would in other circumstances be perfectly legal."

"...we think that however proper the end the means must not be improper."

The motives of the defendants are of no help in this case and whether the Court or indeed the public thinks the rationale underlying what Mr Pipite said in the press conference is flawed as being mistaken, immoral, fanciful, perverse or just plain irresponsible is of no consequence."

48. Those passages show that the trial judge regarded it as an offence under section 79(a) to have agreed to seek the pardons at the point in time when convictions on the bribery offence had been recorded but sentences had not been imposed.

49. It is obvious the pardons, if granted, would have prevented the sentencing for the offences. That would have been the case if the pardons were granted by the President. The President might have deferred considering any pardon requests until after the sentencing, but the President was not obliged to do so. Had the President given pardons before sentencing, obviously the purpose of sentencing would have disappeared.

50. We did not understand the Public Prosecutor to argue that the seeking of pardons or an agreement to seek pardons of itself have amounted to an offence under section 79(a).

51. It is necessary to see whether, in the context of the whole judgment, that is reflected in the subsequent analysis of the trial judge.

52. It is necessary to do so because it is not wrong to seek pardons, and to do so before sentencing. Because the offence of conspiracy is completed by the agreement, in the particular circumstances, it is also correct to say that what Pipite as the Acting President did in granting the pardons is not itself a necessary element of the offence. But, as we have noted, the state of knowledge of those who were parties to the agreement to seek pardons about the role of Pipite in the circumstances and the unlawfulness of Pipite considering and granting the pardons is an important element of the offence.

53. The findings of fact are recorded in [14] – [22] of the judgment.

54. The findings record that the prospect of pardons was raised immediately after the convictions were recorded on 9 October 2015, at a meeting late on 9 October 2015. The Prime Minister was briefed at that time. There was a meeting at Mangos on 10 October 2015, and at a meeting at MIPU later that day.

55. The trial judge found that by the time of the Mangos meeting Pipite and Nari were committed to the idea of pardons and "set in train" arrangements to persuade the other convicted persons to accept pardons.

56. At [17] of the findings, with a focus on the role of Pipite, the trial judge found:

> "Those who were advocating pardons realized very early on they had to move quickly. They knew the President was going to return to Port Vila the next day 11 October. There was absolutely no guarantee His Excellency would be of the same mind as Mr Pipite, The only guarantee of pardons being granted was if they were granted by Mr Pipite as Acting Head of State and before the President's return."

57. The balance of [17] refers to findings about who was present from time to time at MIPU that day.

58. The following paragraph [18] records the findings that all the defendants had spoken amongst themselves and all the lawyers and had agreed to ask for, or had in some way arranged for, Pipite as Acting President to grant the convicted persons a pardon. All had (it is found) accepted that a pardon would bring the proceedings in which they were to be sentenced to an end: see [19].

59. It is significant to Iauma's position that the findings were expressed in relation to "they" (that is, the appellants) wanting to avoid being sentenced. There is no separate consideration of Iauma's position. He was not being sentenced.

60. In addition, at [19], the trial judge remarked that not one of those pardoned went to the Acting President or the President to say they did not ask for pardon. Again, that remark – assuming it has

significance, does not inform or show any separate consideration of Iauma's position.

61. The following paragraph [20] rejects the claims by any of those accused of having been ordered by the lawyers to accept pardons. The finding is made that no accused person was forced into the seeking of pardons by legal advice. The advice given was called "vague written advice". The comment is made that:

> "This is a classic case where the lawyers should have said "no" instead of saying "perhaps". The advice should have been clearer if, as the lawyers say, they were telling the politicians not to travel the pardon route".

62. Again, no reference is made to the position of Iauma. There are no lawyer specific findings about what "the lawyers" or any specific lawyer said or did not say, or to which of the accused persons any such advice was given. The judge was clearly critical of them collectively. There is no specific finding about what Iauma did. In [21] the trial judge refers to the fact that Iauma is the only lawyer charged with the offence. He adds:

> "Whilst I personally believe that to be wrong, because I am of the view that all of them were complicit in some way, I cannot just add defendants to a case."

63. These generic remarks do not identify Iauma's role at all in the events leading to the pardon.

64. There is no other consideration of, or findings about, Iauma.

65. In [23], the trial judge finds all accused persons guilty of the charge by having asked for or arranged pardons to be granted with the intention that "they escaped any sanction of the Court" in relation to the sentencing for the convictions of 9 October 2015 (our emphasis). In its terms, this shows that the attention of the trial judge was not on the role of Iauma.

66. That paragraph and indeed the judgment generally, also lacks any focus on the state of mind or understanding of the accused persons about the lawfulness or unlawfulness of Pipite as Acting President granting the pardons to be sought.

67. The trial judge, in conclusion, recognised that different persons would have different levels of culpability.

(2) The first ground of appeal

68. The appellants say the trial judge erred in fact and in law by finding that because the appellants had conspired with the intention to stop prison sentences by obtaining pardons, they necessarily had the intention to pervert the course of justice.

69. For the reasons already given, that contention is correct.

70. That does not mean that the charges in the Information did not disclose an offence. They referred to the particular circumstances without detailing them. Further particulars were not sought. The hearing of the Information proceeded, apparently on a common understanding of what the Public Prosecutor was alleging.

71. What is more critical is that we consider that the trial judge misdirected himself by considering that the charge was made out by the appellants (we treat them together at this point) meeting and agreeing to seek a Presidential pardon immediately after the convictions on 9 October 2015 and before the sentencing for those convictions.

72. The trial judge has fallen into error by not addressing and making findings:

(a) concerning the state of mind of each of the appellants about the desirability of having the pardon requests considered by Pipite as Acting President, before the President's return; and

(b) their individual states of mind about the lawfulness or unlawfulness of Pipite considering and granting the pardons in the particular circumstances.

73. In any charge of conspiracy, it is necessary for the Prosecutor to establish beyond reasonable doubt both:

(a) the existence of an agreement or combination which has the unlawful characteristic alleged; and separately

(b) the participation of each of the conspirators in that agreement or combination.

See e.g. Ahern v. The Queen (1988) 165 CLR 87.

74. Commonly, but not routinely, the acts of the several alleged conspirators will be evidence both of the fact of the unlawful combination, and of the participation of each of the alleged conspirators in that unlawful combination.

75. In this matter, the course of the evidence proceeded on that basis, leaving the trial judge with the task of siphoning the evidence to determine whether the unlawful combination existed and to determine whether each of the alleged conspirators participated in it. That was an onerous task. Regrettably, it led to a general description of the evidence and findings which do not indicate how each of the alleged conspirators was or became a participant in the unlawful combination.

76. That is important in this case, because (as the appeals of Telukluk and Wright indicate) there is significant contested evidence about their participation. That applies generally to each of the appellants. They gave evidence about their individual involvement, or non-involvement, which has not been separately addressed or made the subject of findings. It is also important because, at least on some evidence, the pardons were signed at 2:00 pm on 10 October 2015. It is not clear whether an appellant whose involvement commenced only after that time, that is after that appellant was pardoned, was or became a participant in the agreement. In Kalosil v. Public Prosecutor (2015) VUCA 43 at [72] the Court referred to the need for the judgment to explain why the conclusion was reached.

77. It is not necessary to analyse the competing evidence concerning each of the appellants. Save for Pipite, whose evidence was clearly rejected by the trial judge, their individual circumstances were not addressed.

78. That may be a consequence of the trial judge having taken the approach (erroneously we have found) that the offence charged would be made out simply by agreeing to apply for a pardon before being sentenced on the bribery charge. The offence is complete by the agreement, but the elements of the agreement must be those which involved the commission of the crime of attempting to pervert the course of justice.

(3) It is appropriate nevertheless to address the other grounds of appeal.

79. Counsel made the point that the Instrument of Pardon was signed (on the undisputed evidence) about 2 pm on 10 October 2015, and lodged with the State Law Office about 4:30pm that day.
Counsel further made the point that the appellants (on the evidence, and consistent with the findings of the trial judge) attended MIPU on the early afternoon to sign the letters requesting the pardon, but the letters were not given to Pipite as Acting President before the Instrument of Pardon or (on the evidence) at all. There are several unsigned letters requesting a pardon in evidence. The Public Prosecutor's submission is that the letters were signed by most of the appellants, and referred to some evidence to support that.

80. Pipite was found to be in the discussions considering a pardon from the first discussion and at Mangos. He did not need to have spoken to each of the appellants, as their respective involvement differed over time. Telukluk and Wright gave evidence of a peripheral or no involvement in, or knowledge of, the plan to have Pipite consider pardons for them as Acting President. On the other hand, to their credit, some of the convicted persons, although at the discussions, elected not to seek pardons, or at least not to do that at that time.

81. The sequence of events referred to is obviously a very curious one. It is admissible evidence to prove that at least some of the appellants were aware of the "window of opportunity" presented whilst Pipite was Acting President. It is also admissible to show Pipite's deep involvement in the plan and he was found to have granted the pardons in the light of the discussions. He knew enough not to grant pardons to three of the persons convicted on 9 October 2015 who had expressly declined to be part of the agreement.

82. The trial judge clearly found that Pipite as Acting President granted the pardons following the meeting at Mangos and during the meeting at MIPU. The evidence clearly showed that the documents comprising letters of requests for pardon, the Instrument of Pardon, and a letter of request by Pipite for advice about the power of the Acting President to grant a pardon or pardons and the material for Gazettal were all being prepared during the afternoon of 10 October 2015 whilst the meeting at MIPU was taking place.

83. The trial judge clearly did not accept the evidence of Pipite that his decision to grant pardons was independent of, and unrelated to the discussions between various of the appellants on 10 October 2015.

84. Once that step was taken, the precise sequence of events does demonstrate or tend to demonstrate that there was agreement between Pipite and some (or all) of the appellants to seek pardons through Pipite as Acting President prior to the return of the President on 11 October 2015.

85. However, apart from those general observations, it is not necessary to address its particularity. That sequence of events, if accepted by the Public Prosecutor as accurate, will no doubt be part of his consideration about future charges.

86. Ground 3 complains that the trial judge wrongly admitted evidence of three lawyers who, in various ways, were involved either in the course of one or other or more of the meetings on 9 and 10 October 2015 and/or in drafting documents to seek pardons or to grant the pardons. It is now clear that the three lawyers gave evidence after being granted immunity from prosecution for their roles in the events on that event period.

87. Those matters did not make their evidence inadmissible. Nor was it protected from being given because it was within the protection of client legal privilege (of one or more of the appellants) and had not been waived. Client legal privilege does not extend to considerations or events which take place in furtherance of the commission of an offence: R v. Cox and Railton (184) 14 QBD 153.

88. A further submission was made under this ground about the quality of their evidence. Counsel for Pipite accepted that the thrust of the evidence was to dispute that Pipite (and others) were told by lawyers that Pipite would not be acting wrongfully in granting the pardons, including to himself. There is no detailed analysis of their evidence to support the establishment of a ground of review based on factual error, or to show that a significant finding of fact adverse to the appellants was made on unsatisfactory or contradictory evidence.

89. Ground 4 also has no merit. The complaint is that the conspiracy found to have existed arose from the discussions on 9 and 10 October 2015, including at Mangos and or MIPU. As the trial judge properly found, the agreement which the Public Prosecutor attacked as an unlawful conspiracy was an evolving one, with differing degrees of participation and involvement on the part of the several appellants. He correctly treated that agreement process as one offence.

90. Grounds 5 and 6 concern the individual positions of Telukluk and Wright. It is not necessary to separately consider those grounds. We note the submissions, to highlight that the individual circumstances of each alleged conspirator were not considered in the judgment.

(B) <u>Telukluk</u>

91. There is no specific reference to Telukluk in the findings of fact in the judgment. The general findings must be taken to relate to him.

92. The sentencing remarks are also uninformative. It is said he had 'less of a role'....and 'was on the periphery of what went on but he was still involved': at [5].

93. The opening written submission on behalf of Telukluk is part of a group submission, putting in issue that the conduct of all the alleged conspirators did not, in any instance, constitute the commission of the offence.

94. The sentence submission on his behalf asserts that he did not discuss the issue of a pardon with any of the other alleged

conspirators on 9 October 2015, that in the late afternoon of 10 October 2015 his lawyer Robin Kapapa telephoned him to meet, and ultimately he was directed to the MIPU and to see Iauma. He arrived there about 5:00 pm, and saw another lawyer Eric Molbaleh leaving the building. Molbaleh told him Iauma had gone home, so Telukluk went home. The next event was being informed on 11 October 2015 that he had been pardoned.

95. The Public Prosecutor has pointed to some evidence to contradict that submission.

96. The trial judge has not explained how he has considered those competing submissions, or what detailed findings he has made against Telukluk.

(C) WRIGHT

97. Similar considerations apply to Wright. There is no specific reference to him in the findings of fact in the judgment. The general findings must be taken to relate to him.

98. The sentencing remarks identify him also as being "on the periphery" at [11]. The fact that he did not accept his role in the conspiracy is given as one reason why he is not given any sentence discount for remorse.

99. In the written submissions on the hearing on his behalf, reference is made to his evidence at the hearing. It was argued that on 9 October 2015, after attending Court to receive judgment and being convicted on the bribery charge, he went home. He was unwell. He

did not go to Mangos on 10 October 2015. Around 5:00 pm on that day he went to MIPU, but did not see anybody then. The submission does not say why he went there. He did not request a pardon, and only learned of it of 12 October 2015. No other significant evidence was identified.

100. The Public Prosecutor has referred to some evidence upon which different findings were sought. There are no reasons given why, in the light of that evidence, Wright was convicted of the offence. There is nothing in the reasons indicating what evidence was rejected, or for what reason, or what contrary evidence was relied upon.

CONCLUSION

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 are do not think it is appropriate to do so.

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 retrial takes place in the Supreme Court in relation to the events of 9 – 10 October 2015.

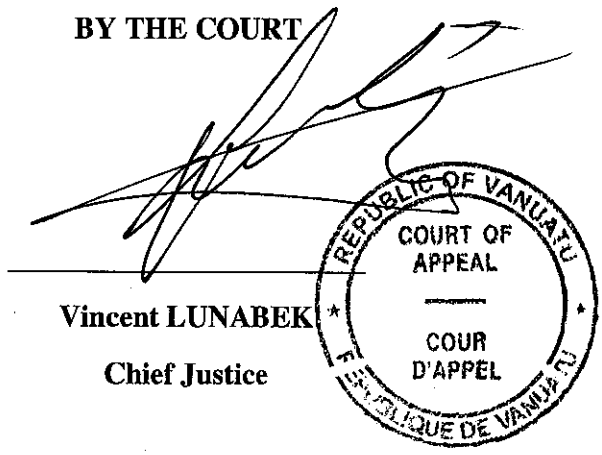
103. Our reasons for judgment indicate that the conviction of Iauma is beset with the same difficulties as those which apply to the

appellants. In the circumstances, it would be unjust if the 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.

DATED at Port Vila this 7th day of April, 2017.

BY THE COURT



Vincent LUNABEK

Chief Justice