

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

Civil Appeal Case No. 16/3797 CoA/CIVA

BETWEEN: MOANA CARCASSES KALOSIL
First Appellant

SERGE VOHOR
Second Appellant

STEVEN KALSAKAU
Third Appellant

MARCELLINO PIPITE
Fourth Appellant

JOHN AMOS
Fifth Appellant

ARNOLD PRASAD
Sixth Appellant

TONY WRIGHT
Seventh Appellant

SEBASTIEN HARRY
Eighth Appellant

THOMAS LAKEN
Ninth Appellant

JONAS JAMES
Tenth Appellant

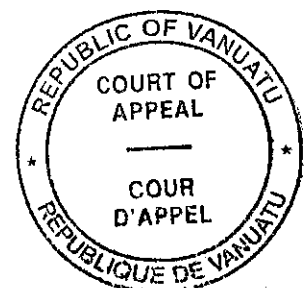
JEAN YVES CHABOD
Eleventh Appellant

PAUL TELUKLUK
Twelfth Appellant

SILAS YATAN
Thirteenth Appellant

TONY NARI
Fourteenth Appellant

AND: THE REPUBLIC OF VANUATU
Respondent



Coram: *Hon. Chief Justice Vincent Lunabek
Hon. Justice John Mansfield
Hon. Justice Ronald Young
Hon. Justice Oliver Saksak
Hon. Justice Dudley Aru*

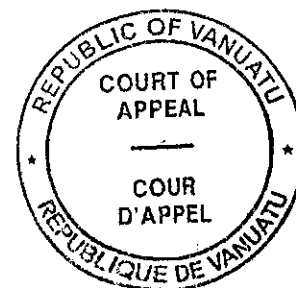
Counsel: *Mr Dane Thornburgh for the First Appellant
Mr George Boar and Mr Ishmael Kalsakau for the Second to Fourteenth Appellants
Ms Florence Williams-Reur and Mr Hardison Tabi (SLO) for the Respondent*

Date of Hearing: *Thursday 30th March 2017 at 11:00 am*
Date of Judgment: *Friday 7th April 2017 at 4:00 pm*

JUDGMENT

INTRODUCTION

1. Article 27 (2) of the Vanuatu Constitution provides that no Member of Parliament may be arrested or prosecuted for any offence during a session of Parliament. However Parliament may authorize such an arrest or prosecution where there are exceptional circumstances.
2. In December 2014 the Magistrate Court issued summonses for the appellants to appear in Court to answer corruption and bribery charges. In October 2015 the Supreme Court convicted and sentenced the appellants on corruption and bribery charges.



3. In the Supreme Court by Constitutional Petition the appellants alleged their prosecution was in breach of Article 27 (2) in that they were prosecuted while Parliament was in session and without parliamentary approval. The Judge in the Supreme Court concluded, in a judgment given on 11 November 2016, that the prosecution of the appellants did not infringe Article 27 (2). It is from that decision

that the appellants now appeal. The appellants say the Judge misinterpreted the meaning of Article 27 (2).

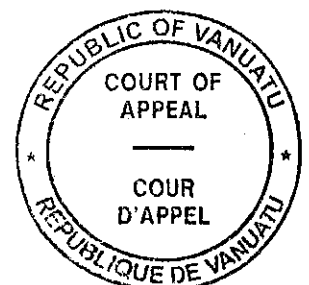
4. The appellants' case as to the correct interpretation of the Article can be summarized in this way:-

(a) Once the prosecution of the appellants for an offense had begun in the Courts (on 17 November 2014 at the earliest) then from the day following, when Parliament was in session, parliamentary authority was required to continue the prosecution. This permission was not obtained so a breach of the Article 27 (2) occurred.

(b) In particular, Parliament was in session on 12 June 2015 when a hearing and therefore the prosecution of the case was held in breach of Article 27 (2).

(c) Although the primary Judge did not consider remedy for a breach, given his findings, the breaches of Article 27 (2) if established should result in the quashing of the corruption and bribery charges faced by the appellants.

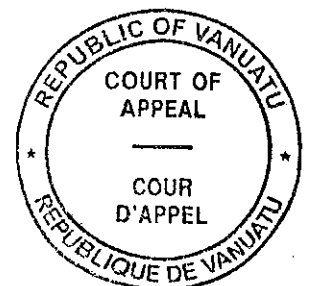
The pivotal issue before this Court therefore was the meaning of "prosecuted" in the context of Article 27 (2).



BACKGROUND FACTS

5. Some factual background is necessary to give context to the parties' submissions and our conclusions.

6. Parliament was summonsed to meet for its second session in 2014 commencing on 18 November 2014. On 17 November the Public Prosecutor filed a document in the Supreme Court alleging bribery and corruption against Moana Carcasses, one of the appellants. The other appellants were also mentioned in that document. On 2 December 2014 the second session of Parliament for 2014 was closed. On 11th December the Public Prosecutor filed a further document alleging corruption and bribery by the appellants and on 18 December 2014 the Magistrates Court issued summonses to the appellants. The appellants attended the Magistrate Court on 8 January 2015 to answer the charges. On 29 May the first session of Parliament for 2015 began. It finished on 4 June 2015. A further session began on 8 June and ended on 15 June. The trial of the appellants was from 7-11 September and then 15-17 September 2015.
7. We will consider in further detail the events of 12 June 2015, which give rise to the second ground of appeal, later in this judgment.
8. This summary therefore establishes that during various Parliamentary sessions from 2014 until trial, the Appellants were before the Courts (the Magistrates and Supreme Court) facing the corruption and bribery charges.

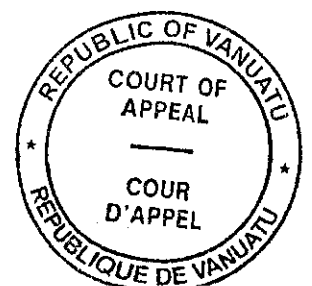


THE SUPREME COURT JUDGMENT

9. In the Supreme Court the primary Judge concluded that the restriction on prosecution in Article 27 (2) is limited to *"..... a requirement that a Member of Parliament attend Court or some other aspect of a criminal prosecution while Parliament is in session without the authorization of Parliament"* (Kalosil and Others v. Republic of Vanuatu [64]).
10. He concluded therefore that given the facts in this case the MPs had not been *"prosecuted"* in the sense meant in Article 27 (2).
11. As to the events of 12 June 2015 the Judge concluded that while Parliament was in session on that date the appellants had not been required to attend Court then and therefore were not prosecuted in breach of Article 27 (2).

FIRST GROUND OF APPEAL

12. The appellants' case is that the straight forward facts in this case illustrate the breach of Article 27 (2). Parliament was in session on at least three occasions between the commencement of this prosecution in November 2014 and the trial in September 2015. The appellants as Members of Parliament were being prosecuted during sessions of Parliament. Their constitutional rights had therefore been breached



because Parliament had not authorized the continuation of the prosecution under Article 27 (2).

13. The appellants say that the Judge fell into error when he failed to give the words in Article 27 (2) their clear and unambiguous meaning, in particular the word "prosecuted". The words in Article 27 (2), the appellant's submit, mean exactly what they say. Being "prosecuted for an offense" meant from the time a Member of Parliament was charged with a crime until finally dealt with by the Courts. Applying this definition to the facts of this case established a breach of Article 27 (2).
14. Counsel for the appellants submitted that the decision of this Court in Tari v. Natapei¹ and the Supreme Court in Public Prosecutor v. Tari² supported this submission.

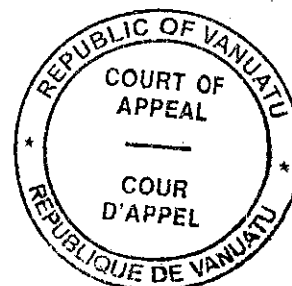
DISCUSSION

15. We are satisfied this ground of appeal must fail.
16. Article 27 provides as follows:-

"27. Privileges of members

(1) No member of Parliament may be arrested, detained, prosecuted or proceeded against in respect of opinions given or votes cast by him in Parliament in the exercise of his office.

¹ [2001]VUCA 18
² [2001] VUSC 136



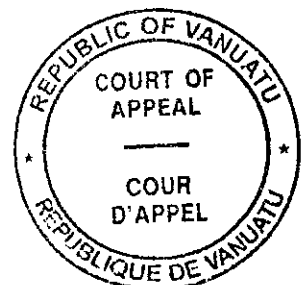
(2) No member may, during a session of Parliament or of one of its committees, be arrested or prosecuted for any offence, except with the authorisation of Parliament in exceptional circumstances."

17. In considering the meaning of Article 27 (2) and in particular the word "prosecuted" we consider, the words used in Article 27, the constitutional context and the purpose of Article 27.

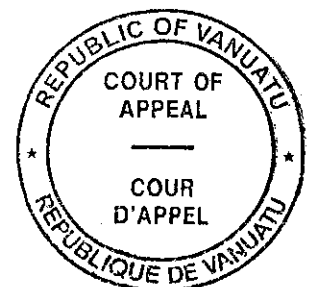
18. Article 27 is concerned with privileges of Members of Parliament while exercising Parliamentary functions. Article 27 (1) effectively gives immunity from arrest, detention, prosecution or being proceeded against for opinions given or votes cast in Parliament in the exercise of the parliamentarian's office. This Article is therefore designed to protect Parliamentary speech. Parliamentarians must be free to speak their mind in Parliament in the exercise of their parliamentary function without fear of outside interference.

19. Article 27 (2) is more limited but its focus is also on protecting Parliamentary function. The limitations on prosecution of a crime in Article 27 (2) relate only when Parliament is in session.

20. The words "prosecuted" or "prosecution" have wide possible meaning as the primary Judge said (see at [58] to [60]) (Kalosil and Others v. Republic of Vanuatu, Supreme Court, Constitutional Case No. 16/1850). We agree with the Judge the prosecution of a crime commences when charges are laid in Court and ends with a resolution of the charges. This process will involve both administrative and adjudicative functions.



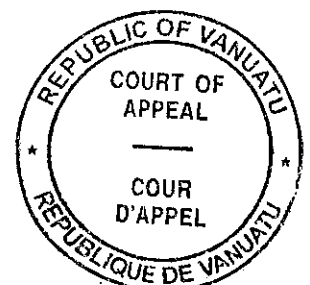
21. The focus in Article 27 (2) is not on this wide definition. Its focus is on the prohibition of a Member of Parliament being prosecuted in particular circumstances, that is when Parliament is in session. And so by its words the Article is not, contrary to the appellant's submission, a broad prohibition against prosecution.
22. We are satisfied that the purpose of Article 27 (2) is to ensure that the business of Parliament is not unduly interfered with when a Member of Parliament is charged with a crime. This is why the Article is concerned to limit prosecution during Parliamentary session only.
23. Parliamentarians must be free to attend Parliament when the business of Parliament requires them to be present. This is the focus in Article 27 (2); the protection of Parliamentary function. But when Parliament is not "*in session*" then the prosecution should be free to continue.
24. This approach is consistent with Article 5 of the Constitution. In particular Article 5 (i) (k) provides for the equal treatment under the law of all persons in Vanuatu. And so any interpretation of the meaning of Article 27 (2) must take into account that requirement of equal treatment of all under the law. Therefore when there is no requirement for a Member of Parliament to attend Parliament (outside of a session) then equal treatment under the law requires continued prosecution.



25. If the appellants' interpretation of Article 27 (2) was correct then it would be very difficult to try a Member of Parliament for a crime. The appellants' submission was that as soon as a Parliamentary session began after a charge or information was filed in Court alleging a crime against a Member of Parliament the prosecution would be in breach of Article 27 (2) unless Parliamentary permission was granted. Parliamentary permission may only be given in exceptional cases where no prosecution could effectively proceed. We do not consider that Article 27 (2) was intended to give what would effectively be an immunity from prosecution for some Members of Parliament. There are no provisions in the Constitution or in the need to protect Parliamentary functions which would require such a wide immunity from prosecution for an alleged crime.
26. Finally we do not consider either Tari v. Natapei³ or PP v. Tari⁴ assist the appellants. In Tari there was an arrest of the Member of Parliament when Parliament was in session. This was a clear breach of the Article 27 (2), but it has no relevance to the present case given the different facts. In Tari v. Natapei this Court emphasized that unless there was uncertainty about a provision in the Constitution authority from other jurisdictions may not be helpful. We have not felt it necessary to consider overseas authority.
27. Taking into account these interpretive aids we are satisfied that "*prosecuted*" has a restricted meaning in relation to Article 27 (2). The prohibition in Article 27 (2) against prosecuting a Member of Parliament will therefore only apply where the

³ See note 1

⁴ See note 2

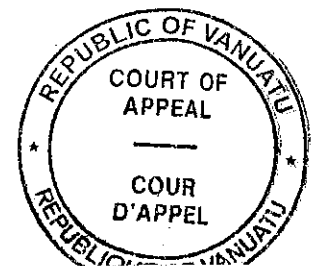


member is required to attend Court or is required to personally undertake any action by the prosecution that could interfere with his Parliamentary duties while Parliament is in session. Only then is he being "*prosecuted*" in terms of Article 27 (2).

28. Other than in these circumstances the prosecution of a criminal charge against a Member of Parliament will be entitled to continue even when Parliament is in session without a breach of Article 27 (2). And in these circumstances there will be a continuing prosecution but during this time the Member of Parliament will not be "*prosecuted*" in terms of the Article given the Member of Parliament is not subject to any obligation imposed by the Court which may interfere with Parliamentary duties. We therefore reject this ground of appeal.

GROUND TWO

29. The appellants' case is that while Parliament was in session on 12 June 2015 the appellants were required to attend the Magistrate Court for a Preliminary Inquiry. The appellants submit the requirement to appear and their appearance on 12 June meant they were being "*prosecuted*" in breach of Article 27 (2). Some factual background is required to understand this submission and the Primary Judge's conclusion.
30. After the appellants' first appeared in Court they were bailed and March 16 was set for the Preliminary Inquiry hearing in the Magistrates Court. On March 13 Cyclone Pam struck Vanuatu. Understandably the March 16 Court hearing did not take place, the Courts were not operating.



31. To get matters back before the Magistrates Court the Prosecution wrote to the Chief Magistrate asking for a further date to be set for the Preliminary Inquiry. A "Notice of Hearing" of the Preliminary Inquiry was sent to the appellants with a hearing date of 12 June. Unbeknown to the Magistrates Court Parliament was to be in session between 9 and 18 June.

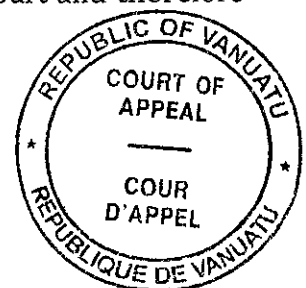
32. On 9 June Counsel for the appellants wrote to the Assistant Registrar of the Magistrates Court. The letter said in part:-

"We understood the above matter is listed for PI hearing on the 12 of June 2015 at 10 am. We received instructions that the above accused persons will not be available to attend Court on that date for reasons that they are currently attending the first ordinary session of Parliament which commenced from the 8th to the 19th of June 2015.

As such, by way of courtesy we will be seeking an adjournment on the 12th of June 2015 for a new date to be set for PI".

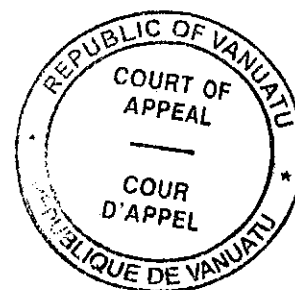
33. A copy was also sent to the Public Prosecutor. The Public Prosecutor did not directly respond to the letter but he accepted the point made by the appellants and cancelled the attendance of his investigators for 12 June. On 12 June all parties agreed that the Preliminary Inquiry would be adjourned to a date when Parliament was not in session. In fact on 12 June, despite the contents of their letter, the appellants appeared in Court.

34. The appellants submit that the Notice of Hearing given by the Magistrates Court for a 12 June hearing was a requirement that the appellants appear in Court and therefore



they were "*prosecuted*" while Parliament was in session and so a breach of Article 27 (2) occurred.

35. The primary Judge concluded that in fact the Court had not required the appellant to be present on 12 June and that they were voluntarily present at Court. And so no breach of Article 27 (2) occurred. He said that the appellants' bail conditions had expired on 16 March, no further bail was granted, no summons issued and therefore there was no obligation on the appellants to appear in court on 12 June 2015.
36. The appellants' case is that the notice of hearing given to the appellants of the Preliminary Inquiry on 12 June did require them to appear in Court and therefore they were being prosecuted in breach of Article 27 (2).
37. We are satisfied the events surrounding 12 June did not constitute a breach of Article 27 (2). When the Court allocated the June date for the Preliminary Inquiry it did not know Parliament was in session. In the letter of 9 June the appellants told the Court they would not be present at Court because Parliament was in session. When the case was called on 12 June it was adjourned with all parties agreement on the basis that Parliament was in session (although we note the sitting of parliament for 12 June was adjourned). This was as Article 27 (2) intended. And so no appellant was "*prosecuted*" on 12 June. The fact that the appellants appeared that day was a matter for them.
38. We also reject this ground of appeal.



RESULT

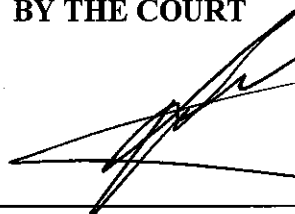
39. For the reasons given the appeal is dismissed.

COSTS

40. The appellants will together pay costs of VT100,000 to the respondent.

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

BY THE COURT



Vincent LUNABEK
Chief Justice

