

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

**Criminal Appeal  
Case No. 23/988 CoA/CRMA**

**BETWEEN: Public Prosecutor**  
Appellant

**AND: Esrome Loughmani**  
Respondent

**Date of Hearing:** 14 August 2023

**Coram:** Hon Chief Justice V Lunabek  
Hon Justice JW von Doussa  
Hon Justice R Asher  
Hon Justice D Aru  
Hon. Justice VM Trief  
Hon Justice EP Goldsbrough

**Counsel:** J Naigulevu, the Public Prosecutor, for the Appellant  
E Molbaleh for the Respondent

**Date of Decision:** 18 August 2023

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**JUDGMENT OF THE COURT**

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1. This is an appeal against the dismissal orders of the Supreme Court of Vanuatu "for want of prosecution" on 5<sup>th</sup> June 2023 in the criminal case of the Public Prosecutor v. Esrome Loughmani, Criminal Case No. 22/ 96 SC/CRML at which time the Supreme Court acquitted the respondent Esrome Loughmani.

**Backgrounds**

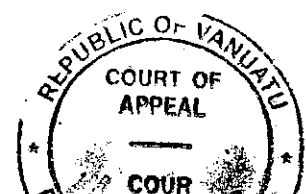
2. The respondent Esrome Loughmani was charged with forgery of residency cards of 55 Chinese nationals, contrary to s 140 of Penal Code and one count of obtaining money by deception of an amount of VT18,256,450 between 2017 and 2021. The respondent Esrome Loughmani entered not guilty pleas on the two counts.
3. The case was listed for trial for a week on 11<sup>th</sup> – 14<sup>th</sup> April 2023. The trial was adjourned due to court room availability and because counsel for the respondent was not ready for the trial and so he applied for an adjournment. The application of the respondent's counsel for an adjournment was granted and the trial was re-scheduled on 5<sup>th</sup> June 2023 at 9.00 am o'clock. The Court issued a notice of trial on 5<sup>th</sup> June 2023 at 9.00 am for that purpose.



4. On 5<sup>th</sup> June 2023 the prosecuting counsel, Mr Tristan Karae and the defence counsel, Mr. Eric Molbaleh were present in Court. Both counsels informed the Court they were ready for the trial on 5<sup>th</sup> June 2023. Mr Karae informed the Court that the prosecution witnesses were not immediately available in the premises of the Court but that they were on their way to Court.
5. The Court decided that the trial should commence and the prosecution to open their case. The Court read and explained to the appellant of his right of the presumption of innocence under section 81 of the Criminal Procedure Code [CAP 136]. The prosecution was invited to open its case. Mr. Karae realised that the first prosecution witness (the Director of Immigration) was not available in the vicinity of the Court. Mr. Karae applied for a short adjournment and the Court adjourned the trial to 9.35 am o'clock.
6. When the Court resumed at about 9.45 am Mr. Karae informed the Court that neither the Director of Immigration or other witnesses were available at the vicinity of the Court. Mr. Karae, then, applied for an adjournment to 1.30 pm or 2.00 pm o'clock.
7. It was then that Mr. Molbaleh strongly opposed any adjournment of the trial to 1.30 pm or 2.00 pm on the basis of delay and the effect the case was having on the accused who was at that time on suspension. Mr Molbaleh asked the Court to dismiss the case for want of prosecution. A further short adjournment was given to Mr. Karae to answer an incoming phone call. After 3 minutes, Mr. Karae returned to the Court room and informed that there was still no witness at the vicinity of the Court to give evidence.
8. The Court heard Mr. Molbaleh's oral application not to adjourn the trial but to dismiss it for want of prosecution. The court also heard Mr. Karae's response not to strike out the case as it was listed for a week trial and Mr. Karae re-applied for an adjournment till the afternoon to find out more with the Immigration officers.
9. The judge in the Court below decided to allow Mr. Molbaleh's objection to adjourn the trial for want of prosecution. He held that the request for adjournment was refused.
10. The judge then dismissed the two charges laid against the respondent for want of prosecution. He then acquitted the respondent of the two charges.

#### **Appeal – Preliminary considerations**

11. We granted leave to the Public Prosecutor's application to amend his grounds of appeal filed on 26 July 2023, with the three new amended grounds he wished to rely on.
12. We allowed the Public Prosecutor to tender two sworn statements filed on 21<sup>st</sup> July 2023 to be read. The first statement was of Tristan Karae. It states he was the prosecuting counsel in this matter and he attended at the Supreme Court on the 11<sup>th</sup> April 2023 at 9.00 am together with a number of witnesses, including the Director of Immigration Jeffrey Markson. The hearing did not



go ahead. He attached to his statement the list of 48 witnesses summoned for the trial including the 9 witnesses summoned to appear and give evidence on trial on 11<sup>th</sup> April 2023.

13. He attended at the Supreme Court on 5<sup>th</sup> June 2023 at around 9.00 am in the morning. Soon after the court proceedings, he went straight to his office and typed up everything that he was able to recall about what happened at the Court that morning. He provided a written chronology of the events that morning that he was able to remember. The relevant part showed the following:-

9:40AM - The Prosecution makes submission for an adjournment to 1 pm to find out information with the Immigration officers. Defence makes submissions - case to be struck out for want of prosecution. Prosecution makes responses - should not be struck out, this case is listed for a week trial – asking for a short adjournment - Court adjourns till 1 pm.– received a phone call from Mathias;

9:52AM - Mathias arrived to court with Officer Danille Stacy;

9:55AM - Court resumes – I returned and informed the Court that an Immigration Officer has just arrived;

10:00AM - Judge decide to make ruling on the application made by Defence. Dealing with the application to discuss the case. The ruling was in favour of dismissing the case against the accused person. Reason to be provided – no appearance by witnesses, prosecution has no evidence to offer this morning – no respect for court timing by witnesses – cases had been delayed since last year 2022 – no excuses for non – appearance;

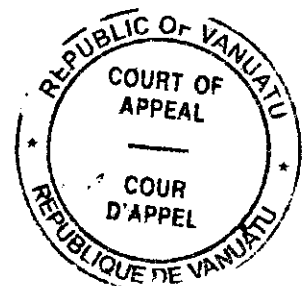
10:10AM - Director of Immigration arrives at the court premises.

14. The second statement was of Jeffrey Markson. It states he is the Director of Immigration of the Government of Vanuatu. This case was an important case for his department. He attended at the Supreme Court together with other witness on 11<sup>th</sup> April 2023 before 9.00 am in the morning. The mater did not proceed and he returned back to his office. On 5<sup>th</sup> June 2023, he had waited in his office for directions to attend the Court to give evidence and to avoid the earlier experience of standing around, and when he received the directions, he went straight to the court house at Dumbea at a little after 10.00 am in the morning.

### **Appeal Grounds**

15. The grounds of appeal are that:

1. The learned trial judge erred in law when he dismissed the charges preferred against the respondent and acquitted him without regard to all relevant circumstances of the case.



2. The learned trial judge erred in law when he failed to exercise his discretion in a judicial manner which required the appropriate balancing between the protection of the respondent's rights and the legitimate public interest in bringing the offender to account.
  3. The learned trial judge erred in law when he dismissed the charges and acquitted the respondent without any proper basis and/or evidence of any prejudice likely to be suffered by the respondent.
16. We consider each ground of appeal in turn.

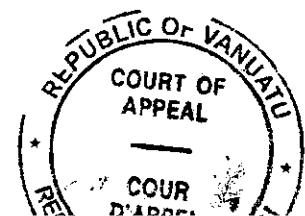
### **Appeal Submissions and Considerations**

**Ground 1:** The learned trial judge erred in law when he dismissed the charge preferred against the respondent and acquitted him without regard to all relevant circumstances of the case.

17. The Appellant asserts that the learned judge dismissed the charges preferred against the Respondent without considering and having regard to all the relevant circumstances of the case. *The relevant circumstances of the case were referred to in the judgment of this Court in the case of Public Prosecutor v Eric Pierre [2022] VUCA 30; CA 06-02 (24 October 2022). In that case, this Court said after acknowledging the trial judge's discretion:*

*"It is a discretion which must be exercised judicially after considering the reasons, if any, for the numbers of any previous adjournments, the convenience of witnesses and how many times they have attended court, the date of the alleged commission of the offence, the nature and seriousness of the charge and any other relevant circumstances. The more serious the charge, the more carefully must that discretion be exercised and the more reluctant will the judge be to refuse an adjournment."*

18. In Public Prosecutor v Donald Withford [2006] 14 this court observed that when a court is invited to determine an application for adjournment, it must "... *make a rational evaluation of the local circumstances.*"
19. The Appellant asserted and submitted that no serious consideration was given to these matters. There was no discussion about how nine prosecution witnesses attended on the 11<sup>th</sup> April 2023 including the Director of Immigration and a number of his senior officers, how this date appeared to have been the first and only prior fixture that was subsequently vacated, and it was so vacated not because of any fault of the prosecution but because the respondent's counsel was not ready and had sought an adjournment. There was no consideration given to the convenience of witnesses.
20. Mr. Molbaleh, in his response, submitted in essence that the application for the adjournment of the trial on 11 April 2023 was due to the fact there was no available court room. Apart from that, he did not address the relevant circumstances of the case. He did mention that the learned judge



properly exercised his discretion to dismiss the charges and acquitted the Respondent. However, he did not explain the basis of his submission.

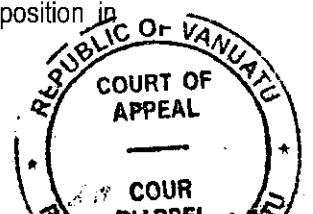
21. We noted the Trial judge reasons for his decision to dismiss the charges against the appellant and acquit him accordingly were summarised at paragraphs 19, 21 and 23 of his Ruling of 5 June 2023 when he stated:

*“19. Regrettably there has been no serious steps taken by the complainant of the case to ensure the complaint is presented. The unavailability of the Director and other witnesses in Court today when the case was called and trial had commenced clearly demonstrate the lack of seriousness on their part to assist the Prosecution with prosecuting the complainant.*

*20. The Minutes of 11<sup>th</sup> April 2023 was clear as to the trial date. The Notice of Trial dated 12<sup>th</sup> April 2023 was clear as to the date. The summons issued on 3<sup>rd</sup> June 2023 were endorsed with the date 5<sup>th</sup> June 2023 at 9.00 am as the trial date.*

*21. There has been no courtesy made to the prosecutor, defence counsel or to the court by anymore by email or telephone advising of the difficulties, if any, of meeting the allocated date and time.”*

22. We understand the frustration of the judge at the circumstances; however, we find he did not exercise his discretion correctly.
23. We agree with the appellant's submissions that there was no serious consideration given to the circumstances of the case. The trial was set for hearing on 11 April 2023. Nine prosecution witnesses attended the court for the trial on 11 April 2023 including the Director of Immigration and a number of the senior officers of the Immigration. The date of 11 April 2023 was the only prior date set for the trial. There was no other date. The trial could not proceed on 11 April 2023 as the respondent's counsel was not ready and he sought an adjournment of the trial and there was no Court room. The new date for the trial was fixed for hearing on 5 June 2023. We note that the adjournment was not caused by the prosecution and because the respondent's counsel was not ready for the trial on that date.
24. We also agree with the appellant's submissions that there was no consideration given for the convenience of witnesses. It was quite possible that some of the prosecution witnesses may have felt discouraged after attending on the 11<sup>th</sup> April, and leaving the court without giving evidence. On 5 June 2023, prosecution witness Mathias arrived at the Supreme Court premises before the judge made his ruling, the judge was informed of the presence of that witness but nevertheless, the judge went on to make his ruling. The Director of Immigration arrived at 10.10 am just after the judge dismissed the case and acquitted the respondent.
25. We further agreed with the Appellant's submissions that the learned judge acknowledged that the two charges were serious charges but nothing more was made of that observation on the balance of his decision of 5 June 2023. It appeared it did not cause him to exercise more carefully his discretion nor did it appear to have any bearing on his discretion to refuse the adjournment. The seriousness of the charges as alleged can be gleaned from the charges and the surrounding circumstances pertaining to the two counts, having regard to the respondent's position in



government service at the material time. The allegations include his readiness to abuse his office for personal gain, his readiness to manipulate his employer's work procedures and official property to derive personal gain and advance his illicit intent, the number of people (55) that he was able to manipulate in order to obtain substantial financial gain, the significant amount of money (VT18,256,450) that he was able to make from this scheme, the loss of substantial revenue that his employer and the government would have been deprived of (VT18 million plus), the loss of credibility to and public confidence on his employer due to his conduct as well as the significant length of time (four years) over which he was able to perpetuate his scheme.

26. We allow the appeal on the first ground.

**Ground 2:** The Appellant asserted that the learned judge failed to exercise his discretion judicially by conducting a balancing exercise between the respondent's interest on one hand and the public's interests on the other.

27. The appellant pointed out to the court that there appeared to be no evidence at all that any balancing exercise was attempted within the judgment of the court below of 5 June 2023. The appellant suggested that the substantial part of the decision was disproportionately inclined in favour of the respondent's interest.

28. We agree with the submission of the appellant that the learned judge gave a disproportionate response in favour of the respondent's claim of a delay, without any consideration of what must be regarded as a legitimate public interest in bringing the respondent to account. The respondent was a public servant who was alleged to have abused the authority of his public office and manipulated a considerable number of unknowing victims, in order to enrich himself and cause substantial loss of revenue to his employers, the Vanuatu Government. It was in the public interest that he be tried for the serious allegations that were made against him. The case of *Public Prosecutor v Emelee* [2005] VUCA 31; [2006] 2 LRC 76 (6 June 2005) was in support of this ground of appeal.

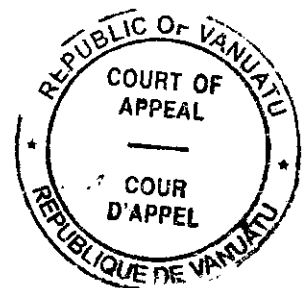
29. We allow also this second ground of appeal.

**Ground 3:** The learned trial judge erred in law when he dismissed the charges and acquitted the respondent without any proper basis and/or evidence of any prejudice likely to be suffered by the respondent,

30. The appellant contended that there was no evidential basis supporting any assumption that delay had occurred and an adjournment would have been prejudicial to the interest of the respondent.

31. The appellant referred to the following submission by Mr. Molbaleh to dismiss the charges in paragraph 11 of the decision under appeal:

*"Mr. Molbaleh objected strongly to any adjournment of the trial on the delay and the effect the case is having on the accused, who is currently on suspension. Mr. Molbaleh asked the Court to dismiss the case for want of prosecution."*



32. The learned trial judge decision appeared to have been first expressed in paragraph 14 of his Decision when he said:

*"I therefore decide to allow Mr. Molbaleh's objection and his request to dismiss the case for want of prosecution."*

33. It is noted that the material before the Court pointed only to the fact that the information containing the allegations against the respondent was dated the 27<sup>th</sup> September 2022.

34. The first trial date was on 11<sup>th</sup> April 2023. That trial date was vacated and the new trial date was fixed on 5<sup>th</sup> June 2023. The appellant contended that although there appeared to have been issues with the courtroom, the substantive and material reason why the trial did not go ahead on 11<sup>th</sup> April 2023 was the respondent's counsel was not ready and sought an adjournment. The adjournment was granted and the new trial date was then fixed on 5<sup>th</sup> June 2023, nearly two months later.

35. We noted that the adjournment sought by the prosecuting counsel was for a period of 3 and one half hours only.

36. In such circumstances, it would be difficult to say that a postponement of some 3 and one half hours was unreasonable or further represented in any way a prejudice to the interests of the respondent. An adjournment of that length would probably have allowed the court to progress the trial on the same day (5 June 2023).

37. There was some evidence also that one of the prosecution witnesses (Mathias) turned up before the learned judge made his decision on 5 June 2023. The learned judge was informed of the presence of that witness by the prosecuting counsel but nevertheless, the learned judge made his decision dismissing the charges and acquitted the respondent in any event. Another witness (Jeffrey Markson) and others turned up after 10.00 am.

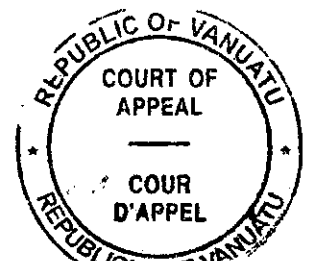
38. It was noted that the argument of delay was never fully explained or canvassed by the respondent's counsel and no material was ever offered to substantiate the claim. There was no explanation that was ever sought by the court below.

39. Accordingly, the ground of prejudice that was suggested to have been the result of an unspecified delay was never substantiated or proven by evidence, and in the result the decision of the learned judge to dismiss the charges and acquit the respondent on 5<sup>th</sup> June 2023 was wrong in law and principle.

40. We allow also the third ground of the appeal.

### **Appeal Decision**

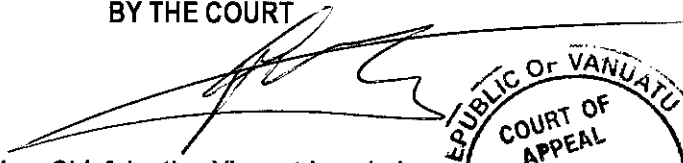
41. The appeal is allowed. The orders of the court to dismiss the charges and to acquit the respondent cannot stand. They are quashed.



42. The trial of Mr. Esrome Loughmani is re-listed before the learned judge and must be advanced at the earliest possible date in the Supreme Court.
43. The case is listed on Monday 9<sup>th</sup> October 2023 in the Supreme Court at Port Vila at 8.30 am. That is not a trial date but a date for setting the trial date for this case. Mr. Esrome Loughmani is ordered to appear at that time.

**DATED at Port Vila this 18<sup>th</sup> day of August 2023**

**BY THE COURT**

  
Hon. Chief Justice Vincent Lunabek

