

**IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU
HELD AT PORT VILA ON**

(Criminal Jurisdiction)

CRIMINAL CASE No.15 OF 1998

JEAN JACQUES HARDOU
(Applicant/Intended Accused)

-versus-

PUBLIC PROSECUTOR
(Respondent/Public Prosecutor)

Coram : Acting Chief Justice Vincent Lunabek J.
Mr Garry M. Blake for the Applicant
Mr Daniel Willie for the Respondent

REASONS FOR JUDGMENT

By Motion of 27 May 1998, Mr Gary M. Blake sought for the following Orders, on behalf of the Applicant :-

1. That the Orders of Mr Jerry Boe, Magistrate, made on 25 May 1998, in Criminal Case No.113 of 1998 be set aside ;
2. That the Applicant's passport be returned to him ;
3. That the Respondent pay the Applicant's cost as taxed or as agreed ;
4. That the Court make such further or other orders as it deems fit.

An Affidavit of Mr Blake of 28 May 1998 was filed in support of the Motion thereof.

The relevant facts are as follows :

On 25 May 1998, Mr Willie Daniel, the Prosecuting Counsel of the Public Prosecutor's Office, appeared before His Worship Magistrate, Mr Jerry

Boe and applied orally on ex parte, inter alia, for an order (1) that the Defendant/Applicant be restrained from leaving the jurisdiction of Vanuatu. The Defendant, Jean Jacques Hardou was not present in Court and he was not legally represented before the Magistrate's Court at the relevant time.

It transpires from the handwritten notes of the learned Magistrate that the ex parte application was made on the basis that it was an urgent matter. A charge has been lodged against the Defendant on the basis of which a criminal charged of Unlawful Entry, contrary to section 143 of the Penal Code Act CAP 135, was laid against the Defendant. Whilst the police are still investigating the matter, the Defendant, a French citizen was trying to leave the jurisdiction on 26 May 1998. It is precisely on that basis that the Prosecutor sought the Magistrate's Court assistance for an order to prevent the Defendant from leaving the country.

On the 25 May, 1998 the learned Magistrate accepted the ex parte application and issued the following orders :-

1. That defendant be restrained from leaving the jurisdiction of this Court until further order of this Court.
2. That defendant's passport be confiscated by the Police and surrendered to the Court's Registry.
3. That defendant may apply to Supreme Court for redress of this order.

The Applicant's Counsel, Mr Blake, treated point 3 of the order of the learned Magistrate as a leave to appeal or a review of the said order of 25 May 1998 before the Supreme Court and on that basis issued the Notice of Motion.

It is submitted for the applicant that without prejudice as to arguments as to the merits, the proceedings before the Magistrate were flawed and without legal basis from the outset. It is thus, submitted that the learned Magistrate erred in granting the said orders in that :

- (a) The Criminal Procedure Code ("CPC") did not give him the power to make the orders in question at the point in time at which they were made. There was no issue as to bail as the Applicant was not before the Court.

- (b) If one accepts that a complaint under section 35 was duly made, what follows is that the judicial officer is required pursuant to section 36 to decide whether to issue a warrant or a summons.
- (c) Contrary to section 36(1) of the Criminal Procedure Code, the learned Magistrate did not issue either a summons or a warrant to compel the attendance of the Applicant before the Court.
- (d) The learned Magistrate purported to make orders in the nature of injunction, of a kind seen in civil matters, pending an investigation to be carried out with no fixed time limit for such investigation, and when no proceedings were properly on foot before the Magistrate's Court. It, therefore, submitted that such orders must of their nature have been ultra vires.

On the grounds set out above, it is requested for the Applicant that the orders made by the learned Magistrate on 25 May 1998 be set aside.

The Respondent/Public Prosecutor submitted to the following effect. The Prosecution made ex parte application to restrain the Applicant on 25 May 1998. It is then submitted that it is only a criminal practice which has normally been adopted and followed by the Courts.

This practice is that when the Prosecution is informed by the Police or other interested parties and as a matter of urgency that a person is alleged to commit a crime - and is about to leave the country, the police have information that that person will leave the jurisdiction whereas the investigation is still pending, not yet completed, and a reasonable complaint has been made against that person, then the Prosecution will act upon the information or complaint and formally lay a provisional charge against him/her and then appear ex parte before a Magistrate to seek for an order restraining the person's departure, intended leave.

The Prosecution contended that in this case, upon receiving information from the Police and upon reading the complaint, the Prosecution formed the view that there may be possibility that a criminal charge be laid against the Applicant Jean Jacques Hardou.

Therefore, because the Applicant Jean Jacques Hardou is leaving the jurisdiction, the Prosecution followed the normal practice used before the Courts in this jurisdiction.

The Prosecution further submitted that section 36 of the Criminal Procedure Code is applicable to a case where the police investigation is completed and the matter is ready to proceed in Court.

The Prosecution says the present proceedings are different. The matter is still under the police investigation. The intended accused is about to leave the jurisdiction. Section 36 of the Criminal Procedure Code would not apply to this case.

Further, the Prosecution argued that the Criminal Procedure code does not provide for a procedure whereby a person leaving the jurisdiction could be prevented to leave. So the Prosecution submitted that the Court can use its inherent powers to deal with a situation of this kind.

Finally, the Prosecution submitted that the practice followed allow the police to complete their investigations in the alleged incident. The charge laid by the Prosecution is only a provisional charge as the Prosecution has always done so in such proceedings.

It is only upon the completion of the investigation that the Prosecution will finalise the charge or not to lay a charge at all against the intended accused.

Mr Blake further responded on behalf of the Applicant that a practice is not a right. If a practice is wrong, it should be changed. It is not disputed that a person can be restrained. The point, here, is that (a) an order has been obtained ex parte, the Applicant is not present in Court and is not legally represented ; (b) the police have not completed their investigation. So they have not approached the Applicant. If the police find out that the Applicant Jean Jacques Hardou was leaving, it is opened to the police to come to Court, apply for a warrant of arrest and arrest the Applicant.

Whilst the police investigation is still pending, yet to be completed, the police or Prosecutor cannot come before the Court and applied for an order to restrain the Applicant from leaving the jurisdiction and confiscated his passports. There is no power to do so. In effect, if this is allowed, it will amount to a situation where there is no supervision of the conduct of police when they conducted their enquiries. The only way is to have inter partes hearing at the level of bail as section 37 provides the matter must come back to Court every 7 days.

It is contended for the Applicant that in this case it is totally open to the police to do whatever they like.

The Constitution guarantees freedom of movement at a time matters are still under investigation. It is contended for the Applicant that if section 36 of the Criminal Procedure Code does not apply to a situation where investigation is still going ahead, in this case, a charge was issued. It is a charge and there are procedures to deal with charges. It is, therefore, a dangerous practice to be followed by coming to Court on ex parte application seeking for restraining orders and confiscations of passports. The police has no power to do that. It is only at the bail stage of the proceedings that passports can be confiscated.

THE ISSUE

The issue for the determination of this Court can be summarised this way :

A complaint has been lodged against the suspect/Defendant. The police is investigating the matter and the investigation is yet to be completed but in the meantime, the suspect/Defendant will be leaving the jurisdiction. The question, arises then, is : Has the Magistrate got the power, be it his inherent powers (if any), to grant ex parte injunctive orders preventing the suspect/Defendant's departure or intended leave from the country whilst the suspect/Defendant is not present in Court (since he has not been approached by the Police and/or the Prosecutor) and further s/he is not legally represented in Court, for the sole purpose of assisting the police investigation about the complaint against the accused/Defendant, to be completed ?

In my view, the answer to this question is : NO.

On 11 June, 1998 I accept the submissions made on behalf of the Applicant, Jean Jacques Hardou, to the effect that, in this case, the Learned Magistrate ultra vires his powers, and on that basis, I make the following Orders and Directions :

1. That the Orders of the learned Magistrate Jerry Boe, made on 25 May 1998, in respect to Criminal Case No.113 of 1998 (Port-Vila, Magistrate Court Jurisdiction) be set aside ;
2. That the Applicant's passport be returned to him forthwith ;
3. That the Respondent pay the Applicant's costs as taxed or as agreed ;

4. That because of the importance of the issues raised about the police powers and individual rights of the Accused/Applicant relating to the criminal investigation, it is appropriate to defer the reasons of the decision as the Court will need time to consider the two (2) competing interests and set out guidelines in such specific circumstances, for the Courts and in particular the below Courts.

I now proceed with the reasons of the decision/judgment.

The essence of the prosecution argument is that section 36 of the Criminal Procedure Code Act CAP 136 "C.P.C." is applicable only to a case where the police investigation is completed and the matter is ready to proceed in Court. The situation in this case is different and section 36 of the CPC would not apply to this case. Furthermore, since the Criminal Procedure Code Act does not provide for a procedure whereby a person suspected to commit a criminal offence, could be prevented to leave the jurisdiction, the Prosecution said the Magistrate can use his inherent powers to do so.

An injunction, like damages, is a remedy. It is an equitable remedy sought before the Civil and/or equitable jurisdiction. The Court has no power to grant an injunction simply because an application for an injunction is made. In civil jurisdiction, for an applicant to be entitled to a remedy such as an injunction s/he has to show to the satisfaction of the Court that s/he has a legal cause of action to substantiate the claim. A legally recognised cause of action is usually a "tort" but it also could be a "contractual action". In domestic cases the "cause of action" will usually be "assault" and "battery".

A cause of action can be termed as facts that entitle a person to sue in a Court of law. The cause of action may be a wrongful act, such as trespass, or the harm resulting from a wrongful act, as in tort of negligence, or a wrongful act on the basis of a contract (i.e. breach of contract).

Now, let's take an example for illustration purposes.

Peter, a sick person went to see his doctor and asked for some chloroquine tablets. The chloroquine tablets are remedies to cure the diseases of Malaria caused by the mosquitos. A qualified and professional doctor should not give, Peter, chloroquine tablets, just because Peter asked for them. The doctor is to be satisfied through medical diagnosis such as blood test that Peter has the malaria disease: [i.e. the test is positive].

The malaria diseases constitute the basis or cause which entitle Peter to be treated or given chloroquine tablets.

In the case before this Court, the Prosecutor sought the injunctive order in order to allow the police to complete their investigations in the alleged complaint against the Defendant/Applicant, Jean Jacques Hardou. I am not going to embark upon theoretical dissertation as to whether or not the injunction, as a civil remedy, be used in such criminal cases. Assuming that, it is possible, the question which comes directly to my mind is : is it a legal cause of action justifying the granting of an injunctive order against the Defendant from leaving the country ?

For my part, I am afraid to say that it is not.

A judicial officer (Judge or Magistrate) has not and should not appear to have any responsibility for the institution of prosecutions. Equally, it is not the function of the Court to control or to assist the police enquiries. This is absolutely wrong for a judge or Magistrate to do so.

What really matters for the Court is to protect its own process. A judicial officer, in the criminal justice system, has to ensure that the prosecution has not manipulated or misused the process of the Court so as to deprive the Defendant/accused of a protection provided by the law and the law includes the Constitution.

Article 5 of the Constitution provides :

“(1) The Republic of Vanuatu recognises that, subject to any restrictions imposed by law on non-citizens, all persons are entitled to the following fundamental rights and freedoms of the individual without discrimination on the grounds of race, place of origin, religious or traditional beliefs, political opinions, language or sex but subject to respect for the rights and freedoms of others and to the legitimate public interests in defence, safety, public order, welfare and health-

- (a) life ;
- (b) liberty ;
- (c) security of the person ;
- (d) protection of the law ;
- (e) ...
- (f) ...
- (g) ...

- (h) ...
- (i) *freedom of movement* ;
- (j) ...
- (k) ...

(2) *Protection of the law shall include the following :*

- (a) *everyone charged with an offence shall have a fair hearing, within a reasonable time, by an independent and impartial Court and be afforded a lawyer if it is a serious offence ;*
- (b) *everyone is presumed innocent until a Court establishes his guilt according to law ;*
- (c) *everyone charged shall be informed promptly in a language he understands of the offence with which he is being charged ;*
- (d) ...
- (e) *a person shall not be tried in his absence without his consent unless he makes it impossible for the Court to proceed in his presence ;*
- (f) ...
- (g) ...
- (h) ... ”

The facts of this case show that the orders issued by the Learned Magistrate on 25 May 1998 were made on ex parte basis, that is , the Defendant/Applicant was not present in Court and he has not been informed by the Police/Prosecution of the offence with which he is being charged and nor about the ex parte hearing of 25 May 1998.

Further as the Prosecution conceded, “...the charge laid by the Prosecution is only a provisional charge as the Prosecution has always done so in such proceedings. It is only upon the completion of the investigation that the Prosecution will finalise the charge or not to lay a charge at all against the intended accused”. It is clear from what it is said above that the prosecutor has not made the decision to prosecute the Defendant/Applicant. The provisional charge constitutes “a hold on

charge” that is an excuse to seek for the Court’s assistance in the completion of the police investigation in the matter.

For my part, I think it is open to a judicial officer (Judge or Magistrate) to conclude that it is an abuse of the process of the Court for a prosecutor to lay an information or a charge against an intended accused when the Prosecutor/Police has not reached a decision to prosecute.

The process of laying a charge is, I think, assumed by Parliament to be the first stage in a continuous process of bringing a prosecution.

As per ss. 35 & 36 of the Criminal Procedure Code Act CAP 136, criminal proceedings in Magistrate’s Courts may be commenced by any person believing reasonably that an offence has been committed by making a complaint “under oath”, orally or in writing, before a Judge or Magistrate. The Judge or Magistrate may then issue a summons. Where the police or Public Prosecutor are initiating the proceedings they may simply present a charge to the Judge or Magistrate (without a complaint), who may issue a summons.

In this case, I accept the Applicant’s submission that the learned Magistrate purported to make orders in the nature of injunctions, of a kind seen in Civil matters, pending an investigation to be carried out with no fixed time limit for such investigation, and when no proceedings were properly on foot before the Magistrate’s Court. The Orders issued were ultra vires the powers of the learned Magistrate.

I understood that it is perhaps hard on the Prosecutor to characterise the ex parte application before the learned Magistrate as an abuse of the process of the Court because I am sure there was no intention by the Prosecutor, Mr Daniel Willie, to abuse the process of the Court. He thought he could legitimately do this on the basis of the criminal practice he mentioned to this Court. For my part, I do not think that he can.

- It is of a vital importance to understand that the constitutional rights and freedoms of the individual under Article 5 of the Constitution, applicable during the investigation stage, apply as Supreme law, as with other rights and freedoms provisions. These are supplemented by common law and statutory provisions.

The constitutional rights will apply in addition to any statutory or common law right.

In this case, the Prosecutor contended that because the Criminal Procedure Code does not provide for a special procedure for such situation, the learned Magistrate can use his inherent powers under section 29 of the Courts Act CAP 122.

The prosecutor is right in pointing out that the Criminal Procedure Code does not provide for a special procedure to cover the situation where a complaint has been laid against a person, the police is investigating the matter but before the completion of the investigation, the intended Defendant will be leaving the jurisdiction.

However, I strongly disagree with the Prosecution's argument that in such circumstances, the learned Magistrate can use his inherent powers under section 29 of the Courts Act CAP 122. This argument is misconceived.

Section 29 of the Courts Act CAP 122 provides :

"(1) Subject to the Constitution, any written law and the limits of its jurisdiction Court shall have such inherent powers as shall be necessary for it to carry out its functions.

(2) For the purpose of facilitating the application of any written law or custom any provision may be construed or used with such alterations and adaptations as may be necessary and every Court shall have inherent and incidental powers as may be reasonably required in order to apply such written law or custom." (my emphasis)

By perusing section 29 of the Courts Act, it is interesting to note that the Court has inherent powers to carry out its functions. The functions of the Court is to interpret and apply the law. Therefore, in order to facilitate the application of a law (written law or custom), the Court shall have inherent and incidental powers to interpret (that is to construe or use) any provision with alterations and adaptations so as to apply the law (written law or custom).

The expression "*any provision may be construed, or used...*" related to an existing provision made by Parliament.

In my judgment the Court can only use its inherent and incidental powers by interpreting an existing provision so as to apply the law in a particular given case.

In this case, the Prosecutor rightly says that there is no special provision to cover the special situation under consideration. But, yet, by inviting the learned Magistrate to exercise his inherent powers (as he did) where there is no provision because Parliament does not provide for that special situation, amounts to an abuse of the process of the Court. As a result, the learned Magistrate has wrongly exercised his inherent powers by substituting himself to Parliament and as such ultra vires his powers.

Further, it is also interesting to note that the exercise of inherent powers by the Court is subject to the Constitution, any written law and the limits of the jurisdiction of a Court.

I will limit myself with the constitutional aspect of the point raised hereof. As I mentioned above, the exercise of the inherent powers of the Court, is subject to the Constitution... in order to carry out its functions.

In this case, the factual situation of the case under consideration, shows that the Prosecution applied ex parte i.e. the Defendant was not present in Court, he was not legally represented because he has not been informed by the Prosecution/Police promptly of the offence with which he is being charged and therefore not aware about the ex parte hearing until he received the sealed ex parte orders of the learned Magistrate preventing him from leaving the jurisdiction and confiscating his passports. [i.e. orders preventing the intended Accused Applicant from exercising his freedom to move in and out of the jurisdiction].

In my view, by inviting the learned Magistrate, to exercise his inherent powers, on the basis of the criminal practice under consideration in this case, contravenes the provisions of the Constitution in the following way :

- (1) Whilst the police investigate a criminal allegation against a Defendant, the said Defendant's freedom of movement guaranteed under Article 5(1)(i) of the Constitution of Vanuatu (1980) is still applicable ; and therefore
- (2) To issue orders on ex parte basis, in criminal jurisdiction, against the Defendant from leaving the country and confiscating his passports at this point of time [that is, whilst the police investigation is yet to be

completed, the Prosecution has not reached the decision to prosecute but yet a provisional charge (“a hold on charge”) has been issued, the defendant is not present in Court, he is not legally represented because he is not informed by the Prosecution promptly of the offence with which he is being charged] conflicts with the Defendant’s rights and freedoms enshrined and protected under Articles 5(1)(i) and 5(2)(a)(c)(e) of the Constitution.

In this case, the exercise of the learned Magistrate of his inherent powers is in conflict with the provision of the Constitution and in particular Article 5 of the Constitution.

It is common ground that where there is a conflict between a constitutional right and a statutory or common law rule, the Constitution will prevail, which is the case here and I so rule.

One final matter, I will mention, is that, an order to confiscate the passport of an accused person cannot be made at this stage of the proceedings, as the learned Magistrate did in this case, since it is a discretionary power of a judicial officer when considering bail applications and the order to confiscate an accused’s passport is considered as one of the condition of the bail.

In the instant case, the bail proceedings has not yet been canvassed and yet the learned Magistrate decided to exercise his discretion by issuing an order to confiscate the accused’s passport without allowing the accused to come before the Court and make his representations and defence. [There is no evidence before the Court that by the Applicant/Defendant action, it is difficult for the police to bring him before the Court].

The learned Magistrate has no jurisdiction to do that unless he issued a Summons or a Warrant of Arrest to compel the Accused’s attendance before the Court so that bail applications could be appropriately and adequately considered by His Worship ; hence, the order confiscating the Accused’s passport.

For these reasons, the orders of the learned Magistrate of 25 May 1998 were set aside.

The following is a GENERAL GUIDELINE for the Magistrate Courts in such situations.

Where an application is made before the Magistrate's Court, seeking for a restraining order to prevent a suspect person to leave the jurisdiction on the basis, inter alia, that that person is suspected of committing a criminal offence, the police is investigating the matter and the investigation is yet to be completed but the police has information that that person is or will be leaving the jurisdiction, as the presiding judicial officer :-

- check the Court file ;
- make sure that there is either :-
 - a complaint lodged ; or
 - a preferment of a charge against the said suspect person/intended accused.

AND TAKE NOTICE of the following :-

- (1) A criminal complaint may be lodged by any person "under oath", orally or in writing, before a judicial officer (Judge or Magistrate), you may then issue a summons or a warrant ;
- (2) Where the police or public prosecutor are initiating the proceedings, they may simply present a charge to the judicial officer (Judge or Magistrate) (without a complaint), you may issue a summons or a warrant to compel the attendance of the accused person before the Court.

As a matter of practice, persons suspected of committing serious offences are (1) more likely to be arrested and brought directly before the Court on a charge, or (2) they will be arrested, charged, then bailed by the police, to appear in Court later.

These suspected of committing minor offences could be brought before the Court in that way, but more likely, brought to Court by summons depending on the circumstances.

If you issue a summons to compel the attendance of the accused person, verify that the summons contain :

- the name of the person charged,
- a brief statement of the offences alleged,
- time and place of the Court sitting,
- your signature on the summons.

AND, the summons may be served on the accused by :

- wherever possible, by formal service,
- when the accused cannot be found, by leaving it with an adult member of the accused's family,
- leaving it with the accused's employer,
- in the case of a company, by deliver it to an officer of the company ; or by sending it by registered post to the registered office of the company.

If you issue a warrant of arrest to compel the attendance of the accused person before the Court,

TAKE NOTICE OF the following situations :-

- In most cases where there is no statutory power to arrest without a warrant, proceedings will be commenced by the issue of a summons, rather than by the issue of a warrant of arrest.
- A warrant of arrest is most commonly used where there is some doubt that the person charged or to be charged will actually attend the Court if summonsed. Similarly, if the person has already been summonsed but has failed to appear in the Court in answer to the summons, the Court can issue a warrant for the person's arrest.
- If the police have good reason to suspect that a person will not answer a summons and make an appearance in Court, it is possible for them to ask a Magistrate to issue a warrant of arrest in situations where a summons would normally be the appropriate method to bring the suspect to Court.

A warrant of arrest may be issued by a Judge or a Magistrate.

The warrant must contain :

- the name of the person authorised to execute it ;
- the name of the person to be arrested ;
- a statement of the offence ;
- your signature as a judicial officer.

AND the warrant may be directed to :

- individual police officers,
- any other person if necessary to execute it immediately.

DATED AT PORT-VILA, this 24th DAY of JUNE, 1998

BY THE COURT

.....
Vincent LUNABEK, J.
Acting Chief Justice