IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU
(Civil Jurisdiction)

Constitutional Case No. 16/1850 SC/CNST

BETWEEN: **MOANA CARCASSES KALOSIL**
First Applicant

AND: **SERGE VOHOR**
Second Applicant

AND: **STEVEN KALSAKAU**
Third Applicant

AND: **MARCELLINO PIPITE**
Fourth Applicant

AND: **JOHN AMOS**
Fifth Applicant

AND: **ARNOLD PRASAD**
Sixth Applicant

AND: **TONY WRIGHT**
Seventh applicant

AND: **SEBASTIEN HARRY**
Eighth Applicant

AND: **THOMAS LAKEN**
Ninth Applicant

AND: **JONAS JAMES**
Tenth Applicant

AND: **JEAN YVES CHABOD**
Eleventh Applicant

AND: **PAUL TELUKLUK**
Twelfth Applicant

AND: **SILAS YATAN**
Thirteenth Applicant

AND: **TONY NARI**
Fourteenth Applicant

AND: **REPUBLIC OF VANUATU**
Respondent

Hearing:	*October 12th, 13th, 25th and 26th and November 2nd, 2016.*
Judgment:	*November 11th, 2016.*
Before:	*Justice JP Geoghegan*
Appearances:	*Mr Ishmael Kalsakau for Vohor and Steven Kalsakau* *Mr George Boar for the Carcasses, Amos and Wright* *Mrs Nari for Pipite, Prasad, Laken, James, Chabod, Yatan, Nari, Harry and Telukluk* *Ms Williams and Mr Tabi for the State*

JUDGMENT

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1. The applicants in this application were all serving Members of Parliament in 2015 when they were charged with, and convicted of charges involving bribery and corruption. On October 22nd 2015, they were sentenced to various terms of imprisonment of between three and four years. An additional Member of Parliament, Willie Jimmy Tapangararua had pleaded guilty to the charges and was sentenced to 20 months imprisonment. He is not part of this application.

2. The applicants appealed against both conviction[1] and sentence[2] to the Court of Appeal which dismissed their appeals.

3. Consequent upon the applicants' conviction and sentence the Public Prosecutor made an application for orders pursuant to sections 41, 42 and 43 of the Leadership Code Act [Cap 240]. Those orders were granted on December 7th, 2015 with the effect that the applicants were dismissed from office, disqualified from standing for election or being appointed a leader of any kind for 10 years, and ceasing any entitlement to payments or allowances in connection with being a leader effective from October 9th, 2015.[3]

[1] Kalosil v. Public Prosecutor [2015] VUCA 43
[2] Public Prosecutor v. Kalosil – Sentence [2015] VUSC 149
[3] Public Prosecutor v. Kalosil [2015] VUSC 173

4. Subsequent to their conviction and sentence for bribery and corruption eleven of the applicants namely Marcellino Pipete, Tony Nari, Paul Telukluk, Silas Yatan, John Amos, Arnold Prasad, Tony Wright, Sebastien Harry, Thomas Laken, Jonas James and Jean Yves Chabod were charged with conspiracy to defeat the course of justice. Briefly, the charges related to an attempt by those charged to manufacture a presidential pardon in respect of the offences of bribery and corruption that they had been convicted of earlier. The attempt to manufacture a pardon would, if successful, have had the effect of bringing the judicial proceedings to a premature end with the result that a sentence could not be passed upon them. They were convicted of these charges after a defended trial and were sentenced on September 29th, 2016 to terms of imprisonment between two and four years cumulative upon the sentences imposed on October 2015.

5. The applicants now seek relief for an alleged breach of their constitutional rights which focusses on Article 27 (2) of the Constitution of Vanuatu. The applicants claim that their prosecution was in breach of the immunity conferred upon them by that article as they were prosecuted during a session of Parliament.

6. 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.

(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."

7. The privilege conferred by Article 27 is not unique to Members of Parliament. The same privilege is also conferred on Members of the National Council of Chiefs by virtue of Article 32 of the Constitution.

8. In respect of the alleged breach the applicants seek the following remedies:-

a) An order quashing their convictions and sentences.

b) An order quashing the decision of the Supreme Court in Criminal Case No. 762 of 2015 which dismissed the applicants from office and prevented them from access to payments and allowances connected to their positions as leaders.

c) A permanent stay of proceedings in Criminal Case No. 138 of 2016 in the Supreme Court relating to the prosecution of the offence of Conspiracy to Defeat the Course of Justice contrary to section 79 (a) of the Penal Code Act.

d) Alternatively, an order that all of the applicants be given early parole.

e) An order that the respondent and/or the Public Prosecutor pay the applicants their costs of and incidental to the proceedings in Criminal Case No. 73 of 2015, Criminal Case No. 762 of 2015 and Criminal Case No. 138 of 2016.

9. This constitutional petition accordingly covers the initial trial in respect of which all applicants were convicted, the subsequent appeal which was unsuccessful, a further criminal proceeding resulting in additional convictions for 11 of the 14 applicants and the hearing which led to the orders made pursuant to sections 41 to 43 of the Leadership Code Act.

10. The applicants' petition is pursuant to Articles 6 and 53 of the Constitution. Article 6 entitles the applicants to supply to the Supreme Court for the enforcement of any constitutional right which has been breached and empowers the Court to:-

> *"Make such orders, issue such writs and give such directions including the payment of compensation, as it considers appropriate to enforce the right."*

11. Article 53 provides the right to anyone who considers that a provision of the Constitution has been infringed, to apply to the Supreme Court for redress and provides the Supreme Court with jurisdiction to determine the matter and, if appropriate, enforce the provisions of the Constitution.

12. In determining this matter I remind myself that I should approach the issue on the basis that each applicant has their own constitutional rights and so where necessary the position of an applicant may have to be considered according to their individual circumstances. The reality in this case however is that the position of all of the applicants is the same in respect of this matter.

13. The focus of this application is on Article 27 (2) and in particular upon the words *"during a session of parliament"* and *"prosecuted for any offence"*. Those words are significant as the applicant's claim that they were prosecuted for the original bribery and corruption offences during a session of Parliament and therefore in clear breach of their constitutional rights.

14. With reference to the orders made under the Leadership Code Act and the 2016 convictions the applicants say that if the Court finds a breach of their constitutional rights resulting in the quashing of the 2015 convictions and sentences, it follows, as a matter of logic that the 2016 convictions and sentences must suffer the same fate.

15. There is no dispute in respect of the great majority of background facts in this case. It is not disputed that Parliament was in session on the following relevant dates:-

    a) 18 November to 2 December 2014.

    b) 29 May to 4 June 2015.

    c) 8 to 16 June 2015.

16. There is no real dispute in respect of the events which occurred from the time the applicants were charged to the time that they were tried and convicted.

17. On November 17th 2014 the Public Prosecutor filed a document in the Supreme Court intituled *"Public Prosecutor v. Moana Carcasses Kalosil retyped indictment"*. The document set out the details of one count of corruption and bribery of officials contrary to section 73 (2) of the Penal Code Act [Cap. 135].

18. On December 11th 2014, a further document was filed in the Supreme Court which named not only Mr Kalosil but also all of the alleged co-offenders who would subsequently face trial in the Supreme Court. Despite the first page of the document which referred to all of the co-offenders the second page of the document commenced by stating:-

> *"The 17th day of November 2014, the Court is hereby informed by the Public Prosecutor that Moana C KALOSIL is charged with the offences of corruption and bribery of officials".*

19. The document then went on to stipulate four separate counts of corruption and bribery of officials against various of those named in the header sheet.

20. On December 18th 2014, the Magistrates' Court issued summonses for each of the applicants to attend Court on January 8th 2015 to answer the charges laid against them. Each summons referred to each of the defendants as Members of Parliament.

21. On January 8th 2015 each of the applicants appeared in the Magistrates' Court to answer the charges against them. They were represented by counsel and appeared before a Senior Magistrate who adjourned the proceedings to a preliminary investigation hearing on March 16th 2015 at 9 am. The remand of the applicants to that date was on the following bail conditions:-

> *"(a) Defendants must not act in any manner so as to interfere with Prosecution Witnesses.*
>
> *(b) Defendants must not repeat offending while on bail.*
>
> *(c) Any of the defendants travelling overseas must disclose his travelling itinerary to prosecution prior to his departure.*
>
> *(d) Defendants must attend preliminary enquiry hearing in the Magistrates' Court at Port Vila on 16th March 2015 at 9 am.*
>
> *(e) If any of defendants (sic) breaches any of these conditions, he will be arrested and detained in custody until this case is further called for hearing."*

22. On March 13th 2015, Vanuatu was struck by Cyclone Pam with very significant consequences to various parts of the country including Port Vila. The scheduled hearing on March 16th did not take place. It was not adjourned or dealt with in any other administrative way. It simply never took place. Accordingly, on May 28th the Acting Public Prosecutor, Mr John Timakata sent an email to the Secretary of the Chief Magistrate asking that a further date be set for the hearing of the preliminary inquiry. As a result of that request the matter was listed for hearing in the Magistrates' Court on June 12th 2015 at 10 am. A notice of hearing dated May 29th was sent from the Magistrates' Court to the Public Prosecutor and to the three counsel appearing for the applicants.

23. It is accepted that the allocation of the date of June 12th was made without the knowledge that that date would coincide with a session of Parliament.

24. On June 9th 2015, counsel for the applicants Tony Nari, Sebastien Harry, Jonas James, John Amos and Thomas Laken wrote to the Assistant Registrar of the Magistrates' Court seeking an adjournment of the hearing on June 12th. The relevant part of that letter states:-

> *"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 courteosy we will be seeking an adjournment on the 12th of June 2015 for a new date to be set for PI".*

25. The letter was copied to Mr Timakata and to other counsel appearing for the applicants. There appears to have been no response to that letter and accordingly on June 12th 2015, Mr Timakata appeared in respect of the matter as did the applicants and their counsel. Mr Timakata's evidence, which I accept, was that he attended Court that day without the relevant investigators and he had already advised them that a

preliminary investigation hearing would not proceed on June 12th 2015 due to the fact that Parliament was in session during that time.

26. What is clear however is that all of the applicants attended the Magistrates Court that day. No summons had been issued requiring the applicants to attend and the bail conditions issued on January 8th which had required them to attend on March 16th made no reference to any further Court dates.

27. I consider that the bail conditions previously in place in respect of the applicants had expired on March 16th. For bail to continue past that date a Magistrate would have to renew or continue bail. At the very least there was no bail condition requiring the applicants to attend Court on June 11th. In addition it was clear that counsel were aware of the Article 27 (2) issue and there was an effective agreement that the matter would not proceed in any way other than to fix another date. Why this was not done administratively thereby avoiding the need for any appearance by counsel at all is unclear.

28. In respect of this issue, the collective evidence of the applicants was that they were aware that Article 27 (2) of the Constitution meant that they could not be required to attend Court. For example, Mr Carcasses gave evidence that he had told his lawyer that he should not have to attend Court because Parliament was in session. His lawyer advised him however that he should attend and he did so. Each of the applicants gave evidence that they acted on the advice of their lawyers in attending Court in circumstances where they considered themselves exempted from doing so by the provisions of Article 27 (2). In the circumstances, the attendance of the applicants at Court on that day is therefore understandable. No evidence in respect of this matter was given by any of the counsel who advised the applicants at that time.

29. As it happened, Parliament was adjourned from June 11th to June 16th as a result of the need to form a new government. Accordingly, the House did not sit on June 12th.

30. None of the applicants actually appeared before the Chief Magistrate that day. While they attended the court the evidence establishes that counsel were taken into chambers at which time there was a request to adjourn matters to June 23rd or after the Parliamentary session had concluded. The notes of the Senior Magistrate produced at the hearing include the following words, after recording counsel's appearances:-

"We ask that the matter be adj to June 23rd or after Parliament."

31. As a result, the matter was adjourned for a preliminary hearing on June 23rd 2015. The Magistrate's note record that all defendants were to be present in Court for the preliminary investigation but there was no reference in those notes to the applicants being on continuing bail or bail of any kind.

32. On June 23rd the Chief Magistrate further adjourned the case to July 14th at4:15 pm for a conference hearing. On that occasion the applicants were bailed on what were effectively the same conditions as their previous grant of bail.

33. There appears to be no record of any formal minute made by the Court on July 14th 2015. However a hand written note made by the Chief Magistrate that day records the appearance of the Public Prosecutor and various counsel for the applicants and then records that all present agree that the Preliminary Hearing could take place on Tuesday July 21st at 2:30 pm. It also records that the applicants would be summonsed to appear in person.

34. It appears that the preliminary investigation hearing did not take place on July 21st but on August 7th 2015. The reason for that is entirely unclear. In any event, nothing turns on that particular fact.

35. From there the matter proceeded to trial as already referred to.

36. By way of further background, on November 21st 2014, the then Prime Minister of Vanuatu, the Honourable Joe Natuman introduced to Parliament a written motion for

the suspension of all of the applicants in this case with the exception of Mr Yatan whose name did not appear in the motion. The motion introduced by the Prime Minister made allegations of bribery and breaches of the Leadership Code, namely. the same allegations which formed the foundation of the criminal prosecution against them. Despite the protests of Mr Carcasses as Leader of the Opposition that such a motion was in breach of the member's constitutional rights under Article 5 of the Constitution and in violation of orders 34 and 42 of the Standing Orders of Parliament, the Members of Parliament voted on the motion on November 25th and resolved to suspend the applicants from Parliament. The applicants subsequently filed an urgent constitutional petition with the Supreme Court alleging breaches of their constitutional rights under Articles 5 (1) (d), (5) (2) (a-b), 16, 17, 21, 28, 43 (2) and 47 (1) and in violation of orders 34 and 42 of the standing orders of Parliament. On December 2nd 2014, the Supreme Court granted declarations that the constitutional rights of the applicants had been infringed and made, inter alia, an order quashing the decision to suspend and exclude the applicants from Parliament. That decision was upheld by the Court of Appeal[4].

37. It is accepted that there has never been any parliamentary authorization of a prosecution as would otherwise be required by Article 27 (2) and it is accepted that none of the applicants were arrested during a session of Parliament.

38. The real focus in respect of this petition is on the events of June 12th and whether what took place at that time could be said to be in breach of Article 27(2). I acknowledge that additional arguments were also raised on behalf of the applicants however the events of June 12th are at the heart of the applicants case.

Submissions

39. The thrust of the applicant's submissions were quite straight forward and essentially focused on the appearance of the applicants in the Magistrates' Court on June 12th contending that that appearance involved a prosecution of the applicants in breach of Article 27 (2).

[4] Boedoro v. Carcasses [2015] VUCA 2.

40. Mr Boar submitted also that the issuing of a summons by the Magistrates' Court also involved a breach of Article 27 (2) and referred to the Parliamentary privilege manual[5] which, under the heading *"Enumeration of Privileges for the Parliament of the Republic of Vanuatu"* states:-

> *"Immunity of members from arrest and imprisonment for civil causes while attending Parliament and starting from the time and date of the issuance of the summons by the Speaker for Parliament to sit and for the duration of the sitting and until the date and time of the closing of the sitting by the Speaker".*

41. During closing submissions Mr Kalsakau submitted, in addition to the principal submission of the applicants, that the placing of bail conditions upon the applicants while Parliament was in session is not only a breach of Article 27 (2) but an attack on the separation of powers and the sovereignty of Parliament.

42. All counsel for the applicants placed reliance on PP v. Tari, a case involving the issuing of a writ of certiorari by the Supreme Court quashing criminal proceedings issued against three Members of Parliament in circumstances where it was found that they were arrested and prosecuted for offences when Parliament was in session and in the absence of any authorization having been obtained from Parliament.

43. For the State, Ms Williams advanced a number of submissions as follows:-

a) That the *"offence"* covered by Article 27 (2) must be an offence which has occurred in the discharge of the Member's duties as Members of Parliament during a session of Parliament. It was submitted that such an interpretation is consistent with the need to obtain the authorization of Parliament in exceptional circumstances. It was submitted that given that the offences with which the applicants were charged could not be said to involve the discharge of the applicant's duties as members of Parliament, Article 27 (2) could have no application.

[5] Sworn Statement of Moana Carcasses Kalosil dated September 28th 2016, Exhibit MK18,

b) That no prosecution was carried out during a session of Parliament. This submissions centred on the fact that Parliament was adjourned on June 11th 2015 and resumed on June 16th 2015. It was submitted that on this basis there was no meeting of Parliament and no infringement of Article 27.

c) That Article 55 of the Constitution meant that the Public Prosecutor was not subject to the direction and control of Parliament.

d) That the motion to suspend the applicants, tabled in Parliament on November 24th, 2014 amounted to an authorization by Parliament to prosecute the applicants.

c) That the Court had no jurisdiction to quash the convictions even in the event of a breach of Article 27 (2) being established.

Discussion

44. In Tari v. Natapei[6] the Court of Appeal underlined the supremacy of the Constitution and stated:

> *"The Republic of Vanuatu is a constitutional parliamentary democracy. The Constitution is the foundation document. As clause 2 of it notes, the Constitution is the Supreme law of the Republic of Vanuatu[7].*
>
> *In Chapter 4 the Constitution provides for a Parliament in clauses 16, 17, 21, 22 and 27 in particular, are enumerated the important place of Parliament, and the rights and immunities which were attached to it and its members.*
>
> *Where there is room debate, or it is possible that ambiguity exists, assistance may be gained from a consideration of the way in which Parliaments and other places have operated in the past or operate now. But any of that is an old circumstances and at all times subject to the clear and ambiguous words of the Constitution which is the Supreme Law."*
>
> *"The Courts in upholding the law and enforcing the provisions of the Constitution, will necessarily have regard to the entire constitutional framework and to the*

[6] Tari v. Natapei [2001] VUCA 18
[x] [2001] VUSC 113

manner in which similar organs or Governments operate in other parts of the world. But is it only when the Constitution itself is not clear about rights and responsibilities in this independent State, that precedents from other jurisdictions will be of assistance".

45. The Court of Appeal also referred to the fact that the Courts in upholding the law and enforcing the provisions of the Constitution, will necessarily have regard to the entire Constitutional framework and to the manner in which similar organs or Governments operate in other parts of the world. But it is only when the Constitution itself is not clear about rights or responsibilities in this independent state, that precedence from other jurisdiction will be of assistance.

46. An understanding of the purpose served by Article 27(2) is clearly essential to assist in determining its application to the facts of this case.

47. To understand the basis for Parliamentary privilege it is important to appreciate the history of the development of Parliamentary privilege in the United Kingdom. A very helpful history is set out in the decision of the Chief Justice in Natapei v Tarī and I do not propose to repeat it here. The Chief Justice emphasised in that decision however, that while privilege in the United Kingdom had its source in the lex Parliamentis, the common law and statute law the same could not be said in the Republic of Vanuatu where such privileges are derived from the Constitution as the supreme law of the Republic of Vanuatu.

48. Having said that, an appreciation of the development of Parliamentary privilege elsewhere provides some assistance in understanding the purpose of the privilege conferred by Article 27(2). In the United Kingdom the freedom from arrest is a freedom from civil rather than criminal arrest. It was, in earlier times an important privilege necessary for the proper functioning of Parliament due to the fact that arrest was often part of the process for commencing civil proceedings by compelling the appearance of the defendant before the court. But if a Member of Parliament commits a crime they may be arrested like anyone else.

49. In the New Zealand Parliament there is Parliamentary privilege in respect of civil arrest but not criminal arrest. There are also restrictions on the service of legal processes upon Members of Parliament within the precincts of Parliament. What ios clear is that the purpose of such privilege is to enable the House to go about its business effectively, with its Members free to attend meetings without being detained or impeded by court processes.

50. The privileges of Members set out in Article 27 are also set out in the Members of Parliament (Powers and Privileges) Act [Cap. 95]. Sections 2 and 3 of that Act confirm the privileges of freedom of speech and freedom from arrest for members of Parliament. Of some interest is the fact that section 3 (b) refers to no Member of Parliament being liable to arrest:

> *"(b) Within the precincts of Parliament when Parliament or a committee thereof is sitting, for any criminal offence,*
>
> *without the consent of the Speaker."*

51. This is clearly consistent with a privilege, the primary purpose of which, is to enable Parliament to attend to its business and to enable Members to attend the House or committee meetings without interruption. The privilege set out in Article 27 (2) does not provide Members of Parliament with immunity from prosecution.

52. Article 27 (1) is consistent with the freedom of speech accorded to most Parliamentarians in countries with a Parliamentary democracy. It ensures that Members are able to speak openly and freely without fear of arrest, detention, prosecution or the threat of litigation. Article 27 (2) serves a different but equally important purpose in ensuring that Members are able to devote their time to Parliament without distraction. It does not mean however that Members of Parliament cannot be arrested or charged with a criminal offence.

53. Accordingly, I am of the view that an interpretation of Article 27(2) which takes into account as it must, its purpose, means that there are actually significant restrictions on what, at first blush, might appear to be a wide sweeping privilege.

54. While there is a clear reference in Article 27(2) to a restriction on the arrest of a Member of Parliament *"during a session of Parliament or of one of its committees"* I consider that it does not prevent an arrest occurring between the date of commencement of a session of Parliament and the date of closure of that session. To construe Article 27(2) as preventing such action would be to confer a privilege on a Member of Parliament which could not have been intended. By way of example, if a Member of Parliament were committing acts of serious violence at his home, which involved a serious and immediate danger to the inhabitants it could not be seriously argued that simply because the offending occurred between the opening and closing of a session of Parliament, that Member of Parliament could not be arrested. It would be clear also, in those circumstances, that it would not be possible to obtain the authorization of Parliament prior to such an arrest. The privilege conferred on Members of Parliament must be linked to the operations of Parliament.

55. At this point it is apposite to refer to the Supreme Court decision in Public Prosecutor v. Tari[8] upon which counsel for the applicants placed considerable reliance. That case involved involved criminal proceedings issued against the Speaker and two Deputy Speakers of Parliament. They were charged with sedation and were arrested when Parliament was in session. In addition, the Public Prosecutor presented the signed formal charges to the Magistrate while Parliament was in session. The defendants were successful in obtaining a writ of Certiorari quashing the criminal proceedings on the basis that the arrest and commencement of proceedings were in breach of Article 27 (2) and were accordingly unlawful.

56. While PP v. Tari illustrates the importance of the rights conveyed under Article 27 (2) it is of no particular assistance in this case as there was no analysis of the purpose and

[8] [2001] VUSC 136

meaning of Article 27 (2) and specifically what is meant by *"prosecuted for any offence"*.

57. I consider that the word *"prosecute"* also needs to be interpreted with the primary purpose of Article 27(2) in mind.

58. Black's Law Dictionary refers to a prosecution as:-

> *"A proceeding instituted and carried on by due course of law before a competent tribunal, for the purpose of determining the guilt or innocence of a person charged with crime."*[x]

59. Merriam Webster Dictionary defines prosecution as:-

> *"The act or process of holding a trial against a person who is accused of a crime to see if that person is guilty".*

60. The New Zealand Law Dictionary defines *"prosecution"* as:-

> *"The proceedings with, or following out, any matter in hand".*
>
> *"The proceeding with any suit or action at law stop a person is said to prosecute his or her action or suit; but a person instituting a criminal proceedings is said to prosecute a case against the defendant"*[9].

61. I do not consider there to be any dispute between counsel as to the fact that prosecutions commenced against the applicants, in the case of Mr Kalosil on November 17th and in the case of the remaining applicants on December 11th with the filing of an information. That process was consistent with sections 34 and 35 of the Criminal Procedure Code [CAP 130] which govern the institution of proceedings.

62. The word *"prosecute"* anticipates a linear process commencing upon the laying of a charge or information and continuing through to a trial and eventual verdict followed by sentencing if required.

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[9] Peter Speller New Zealand Law Dictionary (8th Ed, Lexis Nexis, Wellington 2015) at 241
[x] Bryan Garner "Black's Law Dictionary" (10th Ed)

63. It will be immediately apparent that such a process involves a number of stages, some of which will require a defendant's attendance at Court and others which will not. At its widest definition *"prosecution"* will also include such matters as disclosure and inspection of documents and briefing of prosecution witnesses, all of which may take place without input from a defendant.

64. In considering the primary purpose of Article 27 (2) which is to ensure that Parliament can go about its business without interruption and that its Members be free to attend all meetings of a Parliamentary session, it will be clear that it could not have been intended that the holding of a Parliamentary session would bring a halt to any aspect associated with the prosecution of a Member of Parliament. Accordingly, I am of the view that the restriction on prosecution is a restriction on 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. Accordingly, a Member of Parliament could not be compelled to attend a Court hearing while Parliament is in session. Other aspects of the prosecution may however occur at those times.

65. By way of example, in the case of an alleged fraud, the forensic analysis of accounts may be vital step in the prosecution of the defendant. Equally in cases of sexual offending or illegal possession of supply of drugs it may be vital to undertake DNA or other scientific analysis of the material seized by the police as a result of their investigations. These steps are crucial in the prosecution of the relevant charges however it could not be suggested that the wording of Article 27 (2) could extend to a prevention of these vital and necessary steps.

66. Having reached that view as to the interpretation of Article 27(2) regarding prosecution I then turn to consider the issue of whether Parliament was is in session for the purposes of the Article.

67. Ms Williams submitted that Parliament was not in session on June 12th, as it had been adjourned on June 11th to June 13th,

68. Article 21 (1) of the Constitution provides that:-

"Parliament shall meet twice a year in ordinary session".

69. The Constitution contains no definition of "session" however Article 21 (5) empowers Parliament to make its own procedure. That procedure is set out in Parliaments Standing Orders. Section 12 of The Standing Orders of the Parliament of Vanuatu governs procedure relating to Ordinary Sessions. Section 12 (1) provides that:-

"Parliament shall meet in two ordinary sessions during one calendar year. Each session shall be divided into one or two meetings as the case may be".

70. Section 12 (5) provides that:-

"When at the end of any meeting, an ordinary session is adjourned to be continued during another meeting, the Speaker shall inform the Minister of the date on which the next meeting shall commence".

71. It is accordingly clear that the procedure of Parliament specifically contemplates the possibility of an adjournment of a session. That contrasts with the language contained in the Standing Orders regarding sittings of Parliament which may be *"suspended by the Speaker at any time for such time as he thinks appropriate".*[10] There is also reference to an *"Adjournment of Parliament"* which means *"adjournment until the next sitting day".*[11]

72. Article 21 (4) refers to the required quorum in Parliament and provides that if there is no quorum *"at the first sitting at any session Parliament shall meet three days later....".*

73. In all of the circumstances, I consider that the word *"session"* in Article 27 (2) of the Constitution should be interpreted as meaning the period of time from the opening of Parliament until the formal closing of Parliament. I consider that that applies the ordinary and natural meaning of the word and no other provisions of the Constitution

[10] See section 16 (2) the Standing Orders of the Parliament of Vanuatu
[11] See section 16 (4) the Standing Orders of the Parliament of Vanuatu

or any statutory provision suggest otherwise. Accordingly I consider that the hearing on June 12th took place during a session of Parliament.

74. If there has been a prosecution during a session of Parliament has it been a prosecution of an *"offence"* within the meaning intended by the Constitution? In this regard, the Constitution contains no definition of *"offence"*.

75. The State submits that Article 27 (2) must be construed to mean that any *"offence"* must have occurred in the exercise of duties in Parliament or the exercise of official functions during a session of Parliament which is why any arrest or prosecution requires the authorisation of Parliament when Parliament is in session.

76. It was submitted that as the offences with which the applicants were charged related to matters undertaken by the applicants outside their duties and not done during a session of Parliament, Article 27 (2) somehow does not apply.

77. In support of that submission that State relied upon the American Supreme Court decision of United States v. Brewster (70/45); 1972 which involved a United States Senator who was charged with the solicitation and acceptance of bribes. With respect to the reference to Brewster I consider that it turns on its own unique facts and upon the interpretation of a provision which is quite different from Article 27 (2). The focus of Brewster was on the extent of an immunity conferred upon the House of Representatives by what is known as the *"Speech and Debate"* clause in the Constitution. That clause provides that neither Senators nor Representatives shall be questioned in any other place regarding speech or debate in the House.

78. In addition the State relies upon a decision of the High Court of Australia in R v Boston [1923] HCA 59 in support of a submission that the allegations of corruption and bribery of public officials amounts to a criminal offence and is therefore not covered by Article 27(2). That case involved an issue as to whether payment of money to a Member of Parliament, to induce him to use his position as a Member outside Parliament and for the purpose of influencing or placing pressure on Ministers, could

be said to be capable of constituting a bribe pursuant to a specific statutory provision. I do not consider it to have any particular application to this case.

79. This merely emphasizes the Court of Appeal's previously expressed concern that it may be unwise to draw on the interpretation of overseas constitutional provisions in interpreting the constitutional provisions of Vanuatu.

80. The overall submission of the State in this regard appears to be that the privilege conferred by Article 27 (2) does not apply to any offence which is unrelated to Parliamentary duties. With respect, I am of the view that the Constitution should not be read down in that way. The reference to *"any offence"* means exactly that. There is no legitimate reason why the Court should interpret the term *"any offence"* as meaning *"any offence unrelated to the duties of a member of Parliament"*. I am aware that, at first sight, that may appear to conflict with the views expressed at paragraph [50] regarding the issue of arrest however I consider that consider that the words *"any offence"* should be accorded their natural and ordinary meaning in the absence of any compelling reason to do otherwise. I do not consider that to be inconsistent with the purpose of Article 27 (2) as previously expressed.

81. As to the submission by the State that pursuant to Article 55 of the Constitution the Public Prosecutor was not subject to the direction and control of any person or body (including Parliament) in carrying out the prosecutions of the applicants, as the offences were outside their duties as Members of Parliament, I reject such a submission. The clear purpose of Article 55 is to underline the independence of the Public Prosecutor. It does not permit the Public Prosecutor to ignore the provisions of the Constitution.

82. It is submitted additionally that it is an abuse of process on the part of the applicants to suggest that Parliament had not authorized their prosecution when in fact Parliament had, on November 24th 2014 considered the offence which the applicants had allegedly committed and by a motion tabled by the Honorable Prime Minister at that time, had decided to suspend the applicants. There is no merit to this submission. The motion tabled in the House was one dealing with a specific issue of internal

discipline. While it clearly demonstrates that Parliament was aware of the circumstances giving rise to the prosecution and while one may readily infer that such authorization would likely have been granted, that does not amount to the authorization required by Article 27(2). Such an authorization would have to be specifically considered by Parliament, presumably as the result of an application by the Public Prosecutor to the Speaker.

83. Ms Williams also submitted that in their application to the Supreme Court to set aside the motion suspending them from Parliament the applicant's position had been that any allegations of corruption and bribery were a matter to go before the Court rather than to be resolved in Parliament and that the applicants were now *"going behind their initial position"* in maintaining that the Court had no power to deal with their prosecution in respect of such allegations. With respect to that submission I think it misconstrues the position. The applicant's application to the Supreme Court was not an application which involved any reliance on Article 27 (2) and most certainly did not involve an analysis of the extent of the privilege conferred by Article 27 (2). The issue in the Supreme Court was whether Parliament could consider allegations of misconduct against a Member without properly establishing the truth of the conduct alleged. As stated by the Court of Appeal at paragraph 21:-

> *"Where for example the misconduct alleged is for criminal conduct (including a breach of the Leadership Code) it will be for the Courts first to consider whether the allegations have been established. If the facts are found proved, Parliament is then free to act as it thinks appropriate on the facts established by the Courts".*

84. The hearings in the Supreme Court and Court of Appeal in respect of the Parliamentary motion to suspend the applicants could not operate as an estoppel preventing the applicants from raising their constitutional rights under Article 27 (2).

85. While it is submitted on behalf of the State that the acceptance of an argument that requires the authorization of Parliament before prosecution for any offence during a session of Parliament amounts to an inappropriate interference with the role of the

Prosecutor in commencing a criminal proceeding, that is exactly what the Constitution requires. It is important to recognize however that there are limits to the privilege conveyed under Article 27 (2). In that sense the purpose of Article 27 is to enable Parliamentary business to run smoothly and efficiently. In order to do so, Members of Parliament must be free to attend Parliament while it is in session without fear of arrest or requirement to attend any legal process. That does not mean however that the investigation of alleged criminal offending or preparation of a prosecution is prevented by Article 27 (2). In that sense the privilege conferred on the Members pursuant to Article 27 is not dissimilar to that conferred upon Members of Parliament in other jurisdictions. What perhaps separates Vanuatu from other jurisdictions however is that in other jurisdictions such as the United Kingdom the privilege is restricted to arrest in respect of civil matters.

86. With reference to the *"second thread"* of the arguments advanced on behalf of the applicants by Mr Kalsakau, that from the time the prosecution of the applicants commenced on November 17th, 2014, they had been prosecuted throughout the three sessions of Parliament, I consider such an argument to be unsustainable. It would effectively grant a Member of Parliament an immunity rather than a privilege and would have the effect of frustrating an otherwise valid prosecution and, in some cases where time is of the essence, completely preventing an otherwise valid prosecution. That cannot be what was intended by the Constitution.

87. As for Mr Kalsakau's submission that the applicants should not have been subject to bail conditions during a session of Parliament, I also regard that submission as unsustainable. Again, if one considers the example of a Member of Parliament who is facing charges of serious violent offending against his wife, it could not be seriously argued that the courts would be restrained from imposing a bail condition which prevented him from having any contact with the complainant. It will be clear from my previous observations that Article 27(2) is aimed at enabling Parliament to function effectively and without interruption. Bail conditions do not necessarily conflict with that aim.

Conclusion

88. There can be no doubt that a prosecution of the applicant Moana Carcasses Kalosil commenced on November 17th, 2014.

89. A prosecution against the remaining applicants appears to have commenced on December 11th, 2014

90. Despite the submissions on behalf of the applicants that those incidents amounted to a contravention of Article 27 (2) I reject that submission. It will be clear from my interpretation of Article 27 (2) that those steps could never have amounted to a breach of the applicant's constitutional rights.

91. I also reject the applicant's submissions that being placed on bail amounted to a breach of their constitutional rights. I have already referred to the reasons for that and will not repeat them.

92. I consider that the central issue is whether or not the applicant's attendance at the Magistrates' Court on June 12th amounted to a breach of their constitutional rights under Article 27 (2). I do not consider that is does. Any bail conditions requiring the applicant's to attend Court had expired on March 16th. I do not consider that the bail conditions continued after that date and I consider that if they had appeared on March 16th it was highly likely that the Public Prosecutor would have taken into account any dates for a Parliamentary Session to ensure that the applicants would not be required to attend during such a session. In any event, what the Public Prosecutor may or may not have done is not relevant to the issue to be determined.

93. The allocation of the date of June 12th was an allocation made without knowledge of the fact that it fell during a session of Parliament. I am satisfied that the applicants were absolutely aware of the privilege conferred upon them by Article 27 (2) and the issue was raised squarely with the Public Prosecutor who took immediate steps to ensure that the preliminary hearing would not proceed but that the matter would be

dealt with, effectively on the basis of a management conference. It was not a hearing which the applicants were required to attend or which they were compelled in any way to attend. They were not subject to bail conditions at that time and had not been served with summonses to attend Court. In the circumstances, they were completely within their rights not to attend Court and the advice that they received from their lawyers was wrong.

94. The fact that they chose to attend Court was ultimately the applicant's choice based on the legal advice which they received. It was not as a result of any compulsion or requirement for them to attend and, given the conclusion which I have reached as to the construction of Article 27 (2) therefore did not amount to a prosecution in breach of Article 27 (2).

95. For these reasons the applicants Constitutional Petition is dismissed accordingly.

96. In these circumstances the State is entitled to costs and in the event of costs not being agreed within 28 days they are to be taxed.

Dated at Port Vila, this 11th day of November, 2016

BY THE COURT

JP GEOGHEGAN
Judge