IN THE SUPREME COURT OF THE REPUBLIC OF VANUATU
(Criminal Appeal Jurisdiction)

Criminal Appeal Case No. 1825 of 2017

BETWEEN: PUBLIC PROSECUTOR
Appellant

AND: CLIFFSON TANGWA and ANDREW STANDLEY LEO
Respondents

Hearing: ***11th September 2017***
Before: ***Justice Chetwynd***
Counsel: ***Mr Massing for the Appellant***
Ms Tari Aru the Respondents

JUDGMENT

1. This is an appeal by the Public Prosecutor against an order of the Magistrates' Court dismissing the charges against the respondents. That order is dated 26th June 2017.

2. A little about the history of the case is required. The two respondents are Police Officers. In August 2014 they were involved in the arrest of one Tom Johnny. A complaint was lodged on 9th September 2014 alleging that they assaulted Tom Johnny causing him to suffer permanent injuries namely, and amongst other minor injuries, two broken teeth and 2 broken ribs. Both officers entered not guilty pleas when they appeared before the Magistrate on 23rd October 2014. The case was adjourned for trial to 6th November 2014. The trial did not proceed then or indeed at all. At a hearing on 26th June 2017 the Magistrate recorded that between 21st April 2016 and 26th June 2017 the case had been adjourned for trial 13 times. I am not sure that is an accurate statement and it is likely the relevant date should have been noted as 21st April 2015. In any event, it is clear from the notes and records from the Magistrates' Court that between the charge dated 1st September 2014 and the date of dismissal the case was listed for a hearing of one kind or other some 17 times. From the date of the not guilty pleas the case was listed for trial on at least13 separate dates.

3. At the June hearing the Magistrate noted that the prosecutor was not present and pursuant to section 131 of the Criminal Procedure Code dismissed the charge.

4. It is against that order the appeal is made. The sole ground of appeal is that the Magistrate failed to take into account all the relevant circumstances. It is argued that there were good reasons for all the adjournments and that it was both prosecution and defence counsel who, on different occasions, asked for and were granted adjournments. In other words delay was "caused" by both sides.

5. There were basically two reasons for such requests. First, difficulty with arranging for the attendance of witnesses and secondly counsels' involvement with Supreme Court hearings at Luganville or other venues. Indeed the reason why prosecuting counsel (and to be fair defence counsel as well) did not appear before

the Magistrate on 26th June 2017 was that they were both appearing before the Chief Justice who was sitting in Luganville that day. There were other reasons why adjournments were necessary, for example on one occasion the Magistrate was away on leave on the day set for trial.

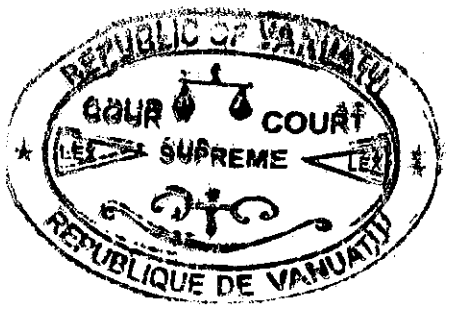
6. It is also submitted that public interest is best served if the appeal is allowed because the charges involve serious allegations of assault against two police officers. It is suggested that the public needs to know that everyone is subject to the law and that will be shown if the appeal is allowed.

7. Before considering the appeal it should be mentioned that only one of the respondents was present in court at today's appeal. I took the view that proceeding with the appeal in the absence of one respondent would not prejudice anyone and certainly not the absent respondent. All the parties were legally represented and there was no conflict with Ms Tari Aru representing both respondents.

8. This case illustrates the problems faced by prosecutors, and others involved in the judicial process, when resources are limited. If resources are not made available to prosecutors, to public defenders, to the police, to correctional services or to the courts then there is a grave danger of delay in disposing of criminal cases. This is especially so in a country such as Vanuatu made up as it is of many different islands. The cost of providing legal services evenly and equally throughout such a country is prohibitive. The costs of travel are particularly problematic. This is what has happened in this case with witnesses for the prosecution and the defence having dispersed throughout Vanuatu and abroad. It has made it difficult to arrange for everyone to be present when required.

9. Against that background it must nonetheless be accepted that every person charged with an offence has the fundamental right to have a fair hearing within a reasonable time. That is not just something that I think would be a good idea it is a fundamental right set out in the Constitution:

> *"FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL*
>
> *5. (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 interest in defence, safety, public order, welfare and health-*
>
> *(a) life;*
>
> *(b) liberty;*
>
> *(c) security of the person;*



(d) protection of the law;

(e) freedom from inhuman treatment and forced labour;

(f) freedom of conscience and worship;

(g) freedom of expression;

(h) freedom of assembly and association;

(i) freedom of movement;

(j) protection for the privacy of the home and other property and from unjust deprivation of property;

(k) equal treatment under the law or administrative action, except that no law shall be inconsistent with this sub-paragraph insofar as it makes provision for the special benefit, welfare, protection or advancement of females, children and young persons, members of under-privileged groups or inhabitants of less developed areas.

(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) if an accused does not understand the language to be used in the proceedings he shall be provided with an interpreter throughout the proceedings;

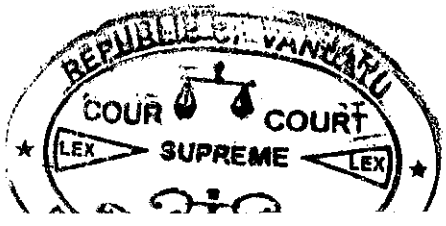
(e) a person shall not be tried in his absence without his consent unless he makes it impossible for the court to proceed in his presence;

(f) no-one shall be convicted in respect of an act or omission which did not constitute an offence known to written or custom law at the time it was committed;

(g) no-one shall be punished with a greater penalty than that which exists at the time of the commission of the offence;

(h) no person who has been pardoned, or tried and convicted or acquitted, shall be tried again for the same offence or any other offence of which he could have been convicted at his trial." (My emphasis)

10. Allowing this appeal will, to my mind, offend against the rights of the respondents to have a fair trial within a reasonable time. The second leg is easily dealt with, over 3 years from charge to trial is not a reasonable time. This is especially relevant since allowing the appeal would not necessarily mean the trial would occur anytime soon. The prosecution would still need to make the appropriate arrangements for witnesses. The appellant did not set out any proposals in submissions to ensure there was no further delay.



11. The first leg is in many ways dependant on a trial occurring within a reasonable time. It is a well recognised problem that memory fades and changes over time. Whilst witnesses can, to a certain extent, refresh and revive memories by reading their statements that is not a guarantee that their evidence will be accurate given the length of time between the alleged offending and the likely date of a trial.

12. I accept that the right to a fair trial within a reasonable time is subject to "*the rights and freedoms of others and to the legitimate public interest*" however, the appellant has not shown that the rights and freedoms of others or, in particular, the legitimate public interest is more important in this case than the rights of the respondents. A balancing act is always required with such considerations and in this case the balance is in favour of the respondents. Given the events of the last couple of years in the courts it is unlikely that any member of the public will be under any misapprehension that there are people or sections of society who are or which are not subject to the law.

13. In all the circumstances this appeal must fail. The appellants have not shown any error in the manner the Magistrate dealt with this case. This was clearly an instance where the Magistrate could exercise discretion and there is nothing to show the Magistrate exercised that discretion incorrectly.

14. I would draw counsels' attention to one comment the Magistrate made which is very pertinent. I do so in an attempt to assist counsel in the future should they face such a problem as is apparent in this case. In the penultimate paragraph of the decision the Magistrate says, in effect, there was no indication to the Court as to how the case could be advanced. If counsel are aware there might be a delay in a case then they should try to assist the court by outlining ways they will try and mitigate the causes of the delay. Counsel on ***both sides*** should try to mitigate delay. This may be by the simple expedient of agreeing evidence. It might be by trying to arrange evidence over video links. When there are factual differences counsel should, between themselves, indentify what they are and how they can be resolved. By far the simplest way to lessen the possibility of delay is to engage in dialogue with opposing counsel at an early stage of the case and not leave discussion to the last minute.

15. The appeal is dismissed but I will make no order as to costs.

DATED at Luganville this 11th day of September 2017.

BY THE COURT

D. CHETWYND
Judge

REPUBLIC OF VANUATU COUR SUPREME COURT LEX LEX REPUBLIQUE DE VANUATU