

**IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU**
(Constitutional Jurisdiction)

Constitutional Case No. 120 of 2016

BETWEEN: JOHN AMOS
Claimant

AND: REPUBLIC OF VANUATU
Defendant

Coram: Mr. Justice Oliver A. Saksak
Counsel: Georg F Boar for the Petitioner
Hardison Tabi for the Respondent

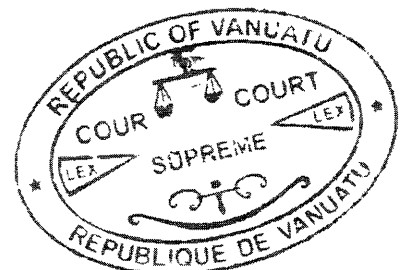
Date of Hearing: 3rd February 2017
Date of Judgment: 28th June 2017

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JUDGMENT

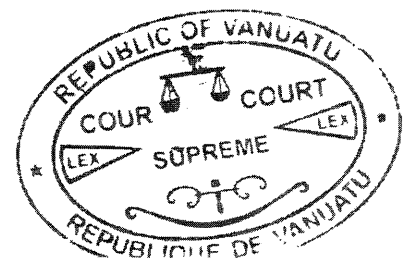
Introduction

1. This is a constitutional application filed alleging breaches of the petitioner's fundamental rights under Article 5 (1) (c), (d) (K) and Article 5 (2).
2. The Petitioner seeks the following reliefs:-
 - a) A declaration that this fundamental rights in Article 5 (1) and (2) were breached.
 - b) An Order to stay Criminal Case No. 60 of 2015 and Criminal Case No. 138 of 2016.
 - c) Monetary compensation, and
 - d) Costs.



Background and Chronology

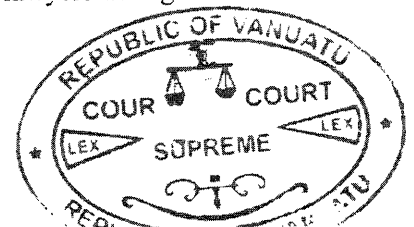
3. Mr Boar filed the original application on 26th January 2016 on an urgent basis but with the wrong parties named as respondents.
4. On 2nd March 2016 the case was called for the first conference. The Public Prosecutor made an oral application to have the Public Prosecutor and the Attorney General removed as respondents pursuant to the Public Prosecutor's Act and the Government Proceedings Act. The application was allowed. The Minute issued on 2nd March records this position.
5. Mr Boar indicated his intention to file an amended application and the Court issued directions to that effect. The amended application was filed on 4th March 2016. The next returnable date was 6th April 2016.
6. On 6th April 2016 the listing was vacated due to the Court of Appeal sitting. Listing was vacated to 14th April 2016 but on this date the matter was adjourned for 14 days for the respondent to file defences and sworn statements. The case was made returnable on 10th May 2016.
7. On 10th May 2016 the listing was vacated due to the Judge allocated to do the Criminal cases from Luganville, Santo. The matter was returnable on 6th June 2016.
8. On 6th June 2016 Mr Boar indicated he had prepared summonses for endorsement by the Court to be served on four lawyers to be cross-examined at trial fixed for 1st August 2016. Direction was issued for petitioner to pay trial fees of VT 15,000 within 7 days. Fees were never paid.
9. On 1st August 2016 the trial was vacated because the four lawyers were giving evidence in Criminal Case No. 138 of 2016. The trial in that case ran from 2nd -16th August 2016. The summonses were only presented on 1st August by Counsel for endorsement by the Court. The case was adjourned to 5th September 2016.



10. On 5th September 2016 the listing was vacated due to the Judge attending a judicial conference in Papua New Guinea. The listing was vacated to 2nd December 2016.
11. On 2nd December 2016 the listing was vacated to 3rd February 2017.
12. On 3rd February 2016 Mr Boar withdrew the summonses to cross-examine the four lawyers and requested 14 days to file written submissions. Mr Tabi sought 14 days to file written submissions in response. The matter was adjourned to 10th March 2017 for the formal hearing of submissions.
13. On 28th February 2017 Mr Boar filed written submissions on behalf of the Petitioner. Mr Tabi filed written submissions on 17th March 2017.
14. On 22nd March 2017 Mr Boar sought a further adjournment to April and the hearing was adjourned to 26th April 2017.
15. On 26th April 2017 Mr Boar sought a further 2 weeks adjournment to take instructions from his client. The hearing was adjourned to 18th May 2017.
16. On 17th May 2017 Mr Boar apologized he had not yet obtained instructions from his client and sought a further adjournment. Mr Tabi objected and proposed to the Court that the Court formulate its decision based on the written submissions without further hearing. Ultimately both Counsels agreed to this course.

The Facts

17. The Petitioner was tried and convicted along with 13 other former members of Parliament in Criminal Cases No. 75 of 2015 on charges of bribery and corruption on 9th June 2015. Sentencing was scheduled to take place on 22nd June 2015. However on 12 June 2015, one of the convicted persons occupying the position of Speaker of Parliament and as Acting President of the Republic of Vanuatu exercised the power of pardon under Article 38 of the Constitution and pardoned all of the 13 members including himself. In the process leading up to the pardon the lawyers acting for the Petitioner gave various advices.



18. All the 14 members were again charged with conspiracy to defeat the course of justice in a separate criminal case No. 60 of 2015. This case was renumbered to become Criminal Case No. 138 of 2016. The 5 lawyers involved were also arrested and charged. However before the trial hearing the Public Prosecutor granted immunity to 4 lawyers to give evidence for the Prosecution against the petitioner. As a result of that the petitioner was found guilty and sentenced to 2 years and 3 months imprisonment. The 14 members appealed against their conviction and were successful on their appeal. The Court of Appeal quashed their convictions and sentences on 20th April 2017.
19. Other facts are helpfully set out in the respondents written submissions filed on 17th March 2017 from paragraphs 1-17 inclusive.

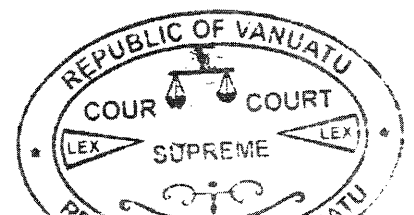
Allegations

20. The petitioner alleges that-
- a) His rights under Article 5 (1) (c), (d), (k) and Article 5 (2) (a) of the Constitution were breached.
 - b) There was a breach of legal professional privilege and a conflict of interest.
 - c) The trial in Criminal Case No. 138 of 2016 was unfair.

As a result, the petitioner is asking this Court to inquire into the conduct of the Court in Criminal Case No. 138 of 2016 and seeking compensation for the alleged breaches.

The Issues

21. Mr Boar for the Petitioner raised 4 issues as follows-
- a) Can this Court enquire into the conduct of the other Court of relevant or higher jurisdiction?



- b) Did the prosecution of the petitioner for conspiracy to defeat the course of justice in Criminal Case No. 138 of 2016 breach his rights under Article 5 (1), (c), (d), (k), and Article 5 (2) (a) of the Constitution?
- c) If the Court determines there was a breach of solicitor client privilege or that there was clear conflict of interest and that the solicitor’s involvement was the deciding factor in the judgment, will that solicitor be accountable and remedy the petitioner for loss and damages?
- d) Was the trial in Criminal Case No.138 of 2016 a fair trial?

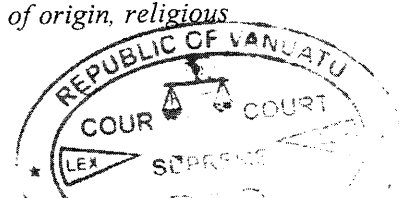
22. The respondent raised 4 issues as follows-

- i. Whether or not the advices and services rendered to the petitioner by his lawyer which led to the pardoning of the petitioner and the others protected by legal professional privilege?
- ii. Whether or not the relationship between these petitioner and his lawyer constitutes a right under Article 5 (1) (c), (d), (k) and Article 5 (2) (a) of the Constitution?
- iii. Whether or not the granting of immunity to the petitioner’s lawyer breached any constitutional rights of the petitioner?
- iv. Was the trial of Criminal Case No. 138 of 2016 in breach of Article (2) (a) of the Constitution?

The Law

23. Article 5(1), (c), (d), (k) and Article 5 (2) (a) of the Constitution State:

“(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 –

(My emphasis)

(a)N/A

(b)N/A

(c) *security of the person;*

(d) *protection of the law;*

(e).....N/A

(f)N/A

(g)N/A

(h)N/A

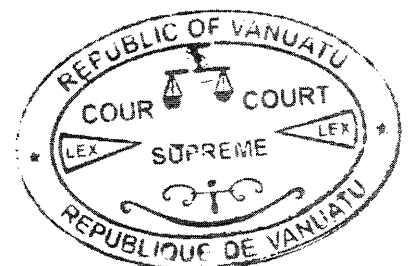
(i)N/A

(j)N/A

(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.”*



24. Article 67 States-

a. *“For the purposes of this Chapter, a leader means the President of the Republic, the Prime Minister and other Ministers, Members of Parliament, and such public servants, officers of Government agencies and other officers as may be prescribed by law.”*

(My emphasis)

25. Section 8 of the Public Prosecutors Act [CAP. 293] states-

“The functions of the Public Prosecutor are:

(a) to (h)N/A,

(l) to prosecute breaches of the Leadership Code [Cap. 240];”

(my emphasis)

26. Section 9 Subsection (7) of the Public Prosecutors Act States:

“The Public Prosecutor may grant indemnity from prosecution for any offence to a person on account of:

(a) an undertaking given by that person to give evidence in a specified proceeding; or

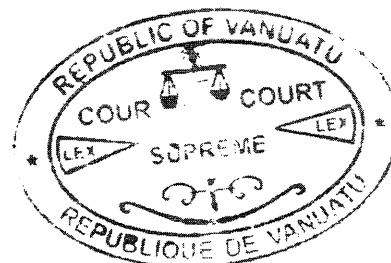
(b) an understanding or expectation that that person will give such evidence.”

(My emphasis)

27. Section 8 of the Legal Practitioners Act [CAP.119] states-

1) “Any person who wishes to complain concerning the conduct of a legal practitioner or an employee shall do so by lodging a complaint in writing to the Secretary containing specific allegations of misconduct which may consist of acts or omissions.”

(My emphasis)



The Leadership Code Act [CAP 240]

28. Section 1 states-

"The purpose of this Code is to give effect to Chapter 10 of the Constitution by providing for a Leadership Code to govern the conduct of the leaders of the people of Vanuatu."

(My emphasis)

28.1. Section 2 states-

"In Chapter 10 of the Constitution, Article 66 provides that a leader must conduct himself in such a way, both in his public and private life, so as not to:

(a) place himself in a position in which he has or could have a conflict of interest or in which the fair exercise of his public or official duties might be compromised; or

(b) demean his office or position; or

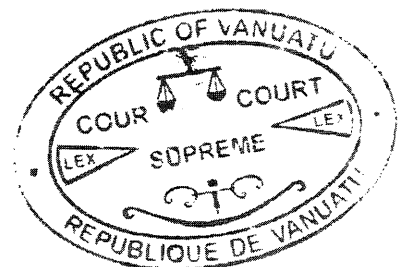
(c) allow his integrity to be called into question; or

(d) endanger or diminish respect for and confidence in the integrity of the Government of the Republic of Vanuatu....."

28.2. Section 3 States:-

"A leader holds a position of influence and authority in the community. A leader must behave fairly and honestly in all his or her official dealings with colleagues and other people, avoid personal gain, and avoid behaviour that is likely to bring his or her office into disrepute. A leader must ensure that he or she is familiar with and understands the laws that affect the area or role of his or her leadership."

(My emphasis)



28.3. Section 13 states-

(1) A leader must:

(a) comply with and observe the law:

(b) comply with and observe the fundamental principles of leadership contained in Article 66 of the Constitution:

(My emphasis)

28.4. Section 19 states-

" A person who does not comply with Part 2, 3 or 4 is guilty of a breach of this Code and is liable to punishment in accordance with Part 6. "

(My emphasis)

28.5. Section 23 States-

"A leader must not:

a) corruptly ask for or receive; or

b) agree to ask for or obtain; or

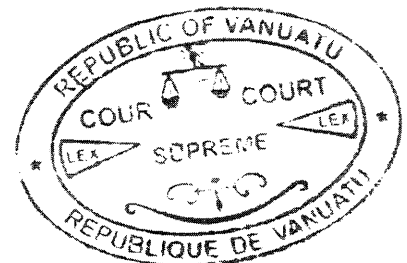
c) corruptly offer,

any money, property, or other benefit or advantage of any kind, for:

d) himself or herself, or

e) another person or body,

in exchange for his or her acts or omissions as a leader being influenced in any way, either directly or indirectly."



Considerations

29. The 8 issues raised are confined to only 5 because 2 of the 4 issues raised by Mr Boar are the same with the issues raised by the State. I therefore consider and deal with them as follows:-

A. Can this Court enquire into the conduct of the other Court of relevant or higher jurisdiction?

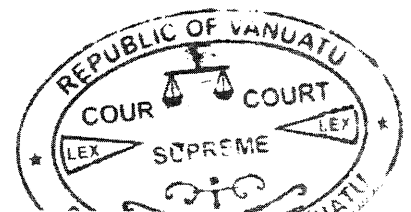
Mr Boar submits the Court can do so on the basis of sections 218 and 221 of the Criminal Procedure Code Act [CAP 136] and on the basis of what the Courts have said in the cases of Picchi .v. Attorney General [2001] VUSCA 106, and Maharaj.v. AG of Trinidad and Tobago (No. 2) (1979) AC 385.

The State has not responded to or addressed this as an issue. I presume they do not treat it as one and neither does the Court. It is a non- issue and the Court does not have to consider and determine it.

B. Did the prosecution of the petitioner for conspiracy to defeat, the course of justice in Criminal Case No.138 of 2016 breach his rights under Articles 5 (1), (c), (d), (k) and (2) (a) of the Constitution? I consider this is the same issue raised by the State stated in paragraph 22 as (ii) and (iii).

In his written submissions on this issue Mr Boar argues that because the lawyers were the same who defended the petitioner in the Bribery Case No. 73 of 2015 who became witnesses against him in Criminal Case No. 138 of 2016, the petitioner's rights to security of the person, protection of the law and equal treatment under the law in Article 5(1) (a), (c), (d), (k), and (2)(a) were breached.

I am not at all convinced by that argument. Mr Boar omitted perhaps by oversight or deliberately to make any submissions touching on the Leadership Code Act [CAP.240] and Chapter 10 of the Constitution. And neither the State has done so. This in my view is the starting point.



First, Article 5 (1) of the Constitution is clear that all persons have equal rights but those rights are not absolute rights. They are rights “ subject to respect for the rights and freedoms of others and to the legitimate public interest in defence, safety, public order, welfare and health”

The facts and evidence are clear. The petitioner and the other 12 were Members of Parliament. As such they are or were leaders under Article 67 of the Constitution. The lawyers are not included in the Constitution or under section 5 of the Leadership Code Act as “ leaders”

As a leader it was in the legitimate public interest that the petitioner was prosecuted and not his legal advisers. The lawyers sought indemnity by writing to the Public Prosecutor because they had made statements to the Police which indicated they did not coerce the petitioner to sign the pardon. The Public Prosecutor accepted their applications by exercising his discretion under section 9 of the Public Prosecutors Act. That was a proper exercise of discretion.

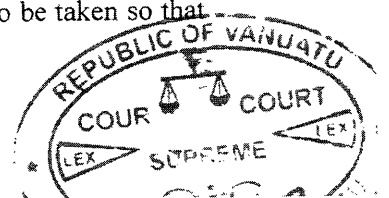
And even if the lawyers were not prosecuted because they are not leaders for the purposes of the Chapter 10 of the Constitution and the Leadership Code Act, the trial judge in Criminal Case No. 138 of 2016 said in paragraph 21 of his judgment as follows-

“ Personally , I believe all the lawyers involved should face some sanction. I thought briefly about contempt proceedings but came to the conclusion disciplinary proceedings should be the preferable method of dealing with the lawyers. That is a matter for the law council....”

(my emphasis)

Section 8 of the Legal Practitioners Act states that any person who wishes to complain about the conduct of a legal practitioner shall lodge a complaint in writing to the secretary of the Law Council.

Therefore whilst the lawyers were granted immunity from prosecution, the avenue for disciplinary action under the Legal Practitioners Act remains open to be taken so that



they are treated equally before the law. That being so, the complaint by the petitioner that there was no equal treatment under the law is untenable and is rejected by the Court.

Mr Boar posed a question in his paragraph 4.9 of the written submissions that if the solicitors were not granted immunity could the petitioner have been convicted? The answer to this question may have been obvious. But the real question is whether the legitimate public interest in defence, safety, public order, welfare and health guaranteed in Article 5(1) of the Constitution and the purpose of the Leadership Code Act be served and safeguarded? I say not, and that must be the overriding and paramount consideration in this case.

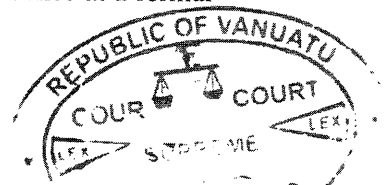
Having said all that, I have come to conclude that no rights of the petitioner under Article 5 (1), (c), (d), (k) and Article 5 (2) (a) were breached by his prosecution for conspiracy to defeat the course of justice in Criminal Case No. 138 of 2016 by not prosecuting the 4 lawyers as well.

- C. Was there a breach of legal privilege and conflict of interest? This was also the first issue raised by the respondents.

Mr Boar submitted the evidence of the petitioner that the solicitors facilitated the pardon initiatives, gave advices and prepared the documents then asked him to come and sign them, were uncontroverted. Mr Boar referred to the old English case of Beard. vs .Lovelace [1577] Cary 62 as authority for submitting that at common law legal professional privilege protects all communications.

The State however submitted that the petitioner's lawyers were Gregory Takau and Eric Molbaleh. Their evidence in the trial were that Mr Takau did not prepare the petitioner's letter requesting the Acting President to pardon him and that Mr Molbaleh did not advise the petitioner to do so.

In light of those evidence the petitioner's evidence in support of his Constitutional application therefore cannot be said to be uncontroverted as submitted by Mr Boar. Indeed Mr Boar had served summonses on the 4 lawyers to give evidence at a formal



hearing but later withdrew the summonses resulting in there being no formal hearing but that legal submissions be filed to assist the Court formulate a judgment. Mr Boar and his client made that choice and they now have to live by the consequences of their choice.

I accept that the common law position on legal professional privilege is old and well settled. However there is an exception which the State submitted relying on the Australian Case of Attorney General (NT).v. Kearney [1985] HCA 60 where the Court said-

“..... The existence of the privilege reflects, to the extent to which it is accorded, the paramountcy of this public interest over a more general public interest, that which requires that in the interests of a fair trial litigation should be conducted on the footing that all relevant documentary evidence is available.

One exception to which this general rule is subject is that communications by a client for the purpose of being guided or helped in the commission of a crime or fraud are not privileged from discovery.”

(My underlining for emphasis)

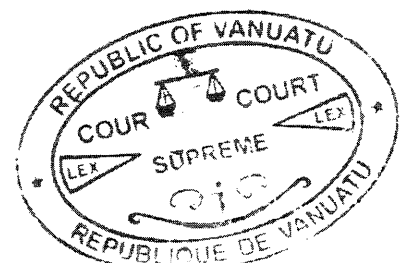
I also accept the State’s submission that the other case authority on point is that of Varawa.v.Howard Smith & Co Ltd [1910] HCA 11.

For the reasons given, I answer this issue in the negative.

D. Was the hearing in Criminal Case No. 138 of 2016 a fair trial?

Mr Boar argued his client will never receive a fair trial. The reality is the petitioner has had two trials. So it is not a case of “ never”. And have those trials been fair? I have no doubt they were. In fact I am persuaded by the State’s submission that the petitioner is estopped from raising this issue.

For those reasons, this issue is answered in the affirmative.



30. Mr Boar raised a side issue of abuse of process by arguing that had this Constitutional Case been determined before the verdict in Criminal Case No. 138 of 2016 it would have stayed the prosecution. Mr Boar relied on the cases of Moti.v. The Queen (2011) HCA50 and Williams .v. Spautz (1992) 174 CLR 509.


The short answer to this is that the petitioner did not specifically plead abuse of process in his application (original or amended). Therefore it is an abuse of process to raise it in the final submissions.

The Result

31. The Petitioner's Constitutional Application is unsuccessful and is hereby dismissed with costs. The respondents are entitled to their costs of and incidental to this action on the standard basis as agreed or be taxed by the Master.

DATED at Port Vila this 28th day of June 2017

BY THE COURT


OLIVER.A.SAKSAK
Judge

