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

Criminal Case No 17/2585 SC/CRMA

PUBLIC PROSECUTOR
V
ANTONY JUDE

Before: **Chetwynd J**
Hearing: **4th April 2018**
Counsel: **Mr Blessing for the Prosecution**
Mr Thornburgh for the Defendant

JUDGMENT

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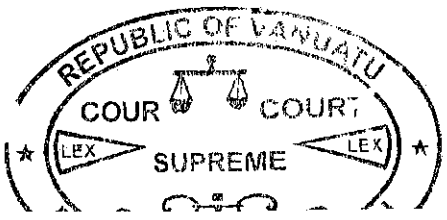
1. This is an appeal by the Public Prosecutor against an Order made by Magistrate Kalo on 8th September 2017. A notice dated 18th September was filed on 19th. A memorandum filed on 25th September referred to an order being made by another Magistrate but as was made plain in my Minute published on 1st December 2017, I am dealing in this appeal with Magistrate Kalo's order of 8th September 2017.

2. That Order reads:-

DISSMISSAL ORDER

THE COURT upon considering the Bail variation Order made 25th August, 2017 and also upon hearing the Defence's grounds of unreasonable delay and presumption of innocence, in support of the defendant's liberty under the Constitution of Vanuatu pursuant to Article 5(2)(a) and (b); it hereby orders as follows:

The Magistrate then dismissed the case for want of prosecution and acquitted the defendant. The Magistrate also put an end to the bail conditions the defendant was subject to.



3. The Memorandum of Appeal dated 25th September advanced two main grounds. An Amended Memorandum of Appeal, seemingly dated 22nd August 2017 but actually filed on 23rd February 2018, has one ground and an alternative. Ground (a) alleges;

> *The learned Magistrate erred in law inasmuch as he acted ultra vires his power and legal authority in dismissing the matter for want of prosecution;*

In support of that ground the prosecution argues that the jurisdiction of the Magistrate is set by section 14 of the Judicial Services and Courts Act [Cap 270]. There is no dispute that is correct and that a Magistrate only has jurisdiction to hear and determine, in a summary way, criminal proceedings in respect of an offence for which the maximum sentence does not exceed 2 years imprisonment.

4. The problem for the prosecution is that they have proceeded on the basis the defendant has committed serious offences. In its *Submissions in Support Of The State's Intention To File Fresh Charges And Apply For The Accuses* (sic) *Remands Afresh* the prosecution note the charges set out in the draft information filed on 2nd April 2017. There are said to be seven counts. There is no copy of the draft information on file but there is no reason to doubt the submission that there was one count under the Vanuatu Foreign Investment Promotion Act [Cap 248], two under the Labour (Work Permits) Act [Cap 187], two under the Customs Act 2013 and two under the Immigration Act (including one of complicity in the Immigration Act offence pursuant to the Penal Code). These may well be serious offences but none are punishable by a maximum sentence which exceeds 2 years imprisonment.

5. The charge under the Vanuatu Foreign Investment Promotion Act [Cap 248] carries a maximum sentence of a fine of VT 5 million (section 26); those under the Labour (Work Permits) Act [Cap 187] are punishable by fines of up to VT 100,000 (or on a second conviction VT 200,000 or 6 months imprisonment); The Customs Act offences are punishable by fines of VT 5 million or 6 months imprisonment (or both); and those under the Immigration Act by up to 2 years imprisonment or a VT 1 million fine (or both). In short these offences could have, should have, been dealt with in a summary way by the Magistrate.

6. Section 24 of the Criminal Procedure Code is the authority for any Magistrate to deal with an accused person according to the Magistrate's jurisdiction, i.e. the jurisdiction set out in section 14 of the Judicial Services and Courts Act.

7. The prosecution argue that what the Magistrate should have done following the prosecution's failure to appear was to adjourn the matter and then deal with the case following the procedure described in section 37 of the Criminal Procedure Code that is, sending it to the Supreme Court to hear. However, this was a case that a Magistrate could hear and determine in a summary way. That being so, there is no reason why the Magistrate could not have dealt with the case according to section 127 of the Criminal Procedure Code by dismissing it in the absence of the complainant. The question is not could the Magistrate do what he did but should he have done so. The appellant's argument as to *ultra vires* is misconceived and must fail.

8. The only other "error" the prosecution point to is the restriction set out by the Court of Appeal in the *Emelee* case [1]. The present case can be distinguished from *Emelee.* The order made on 8th September followed on from applications to vary bail and, apparently, to amend the charges. This was not a defence application made by the defendant based solely on his rights under the Constitution. The Magistrate was faced with a situation where there were outstanding applications from the prosecutor, no one attended to make them. The Magistrate considered there had been undue delay and the case should be dismissed. One of the considerations he had in mind was the defendant's rights under the Constitution but he also took into account the presumption of innocence and the delay which he decided had been unreasonable. There is nothing in the appeal which seriously challenges the Magistrate's reasoning.

9. The prosecution has clearly wrong footed itself. It convinced itself there were serious charges to be dealt with and proceeded as if a preliminary enquiry was necessary in accordance with section 143 of the Criminal Procedure Code. No preliminary enquiry was required because these were summary matters and the

[1] *Public Prosecutor v Emelee* [2005] VUCA 11; Criminal Appeal Case 02 of 2005 (6 June 2005)

Magistrate was capable of hearing the charges. In short, they were within his summary jurisdiction. It is possible that this mind set of the offences only being triable by the Supreme Court occurred because of the forced change of prosecutor but when the matter can me under the Public Prosecutors control someone should have sat down and considered the matter afresh. These charges with large fines payable appear on face value to be serious offences. As I have said they may well ***be*** serious charges but at the same time they are charges that are within a Magistrate's jurisdiction. The offences attract large fines but they do not attract sentences of imprisonment which exceed two years.

10. The appeal must fail and is hereby dismissed.

Dated at Port Vila this 13th April 2018

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D. CHETWYND
Judge