

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

Judicial Review
Case No. 18/1514 SC/JUDR

BETWEEN: **JOE YHAKOWAIE NATUMAN MP**
Claimant

AND: **ESMON SAEMON MP Speaker of Parliament
of the Republic of Vanuatu**
Defendant

Coram: *Hon. Justice D. V. Fatiaki*

Counsel: *Mr E. Nalyal for the Claimant
Mr F Gilu for the Defendant*

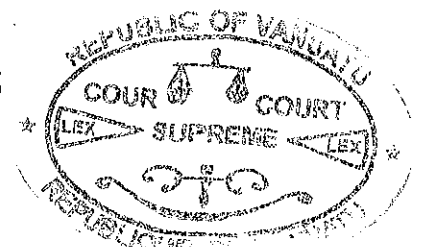
Date of Judgment: 30 May 2018

JUDGMENT

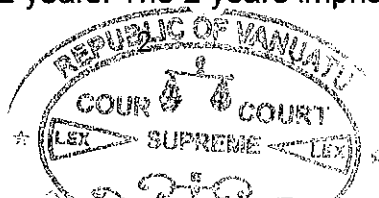
1. I have before me an urgent claim for judicial review filed late on 28 May 2018 and served on the defendant and State Law Office in the late afternoon of 28 May 2018. On 29 May 2019 the claim was placed before me and was listed to be dealt with at 3pm. I am grateful to State counsel for facilitating the Court's oral indications and appearing on very short notice.

2. I cannot leave these introductory remarks without making some observations about the quite unreasonable pressure and time frames within which I have had to deal with this application. In that regard the relevant chronology of significant dates and events may be summarised as follows:

- 16 March 2018 – Claimant sentenced to 2 years imprisonment suspended for 2 years;
- 16 April 2018 – Marks the expiration of 30 days after the claimant's sentence was imposed;
- 25 May 2018 – The date when the Speaker's letter was delivered to the claimant;
- 28 May 2018 – Urgent application for JR filed in Court;



- 29 May 2018 – Application heard;
 - 30 May 2018 – Extraordinary session of Parliament commences.
3. From the foregoing it is plain that between 16 March 2018 and 25 May 2018 a period of 10 weeks there was no activity on the part of the claimant or the defendant. The claimant neither appealed his conviction or sentence within the 30 day grace period given by the relevant legislation nor did he apply to the defendant for an extension of the time within which his parliamentary seat would, in the words of Section 3(1), “... *become vacant*”.
 4. On the defendant's part it is equally clear that he did not write to the claimant a potentially affected or “*at risk*” MP within the 30 day grace period before his seat became vacant drawing his attention to the provisions of Section 3 of the Members of Parliament (Vacation of Seats) Act and pointing out the risk(s) he took in doing nothing and urging the claimant to seek clarification of the matter.
 5. The end result of all this inactivity until the 13th hour, meant that the Court was placed under quite avoidable and unacceptable pressure to hear and determine the claimant's urgent application within the space of 36 hours before the Extraordinary Session of Parliament was scheduled to commence at 2pm this afternoon. The delays and inaction should not have occurred and should not be repeated in future applications of a similar nature.
 6. The claimant is the elected representative for the constituency of Tanna Island since 22 January 2016 and is a Member of Parliament. He is also the Deputy Prime Minister and Minister of Trade Industry, Tourism and Ni-Vanuatu Business. The defendant is the Speaker of Parliament.
 7. On 16 March 2018 in Public Prosecutor v Joe Yhakowaie Natuman and Aru Maralau Criminal Case No. 16/1758 (unreported) the Supreme Court after the claimant entered guilty pleas on two charges of obstructing or interfering with the execution of a criminal process contrary to Section 79(c) of the Penal Code, sentenced the claimant to concurrent sentences of 2 years imprisonment suspended for a period of 2 years. The 2 years imprisonment is significant. It is



also common ground that there has been no appeal against the claimant's conviction or sentences and the claimant has remained at large and claims to have "continued as an MP, Deputy Prime Minister and Minister of Trade ..." until he received a letter from the defendant on 25 May 2018.

8. The body of the letter which is the particular subject matter of the present claim is dated "Wednesday 23rd May 2018" and is signed by the defendant. It reads as follows:

"Dear Mr. Natuman

VACANCY OF YOUR SEAT IN PARLIAMENT

We write in our capacity as the Speaker of Parliament of the Republic of Vanuatu.

We refer to the above mentioned matter and wish to inform you that as per the Court sentence pronounced on 16th March 2018 by the Supreme Court in the Public Prosecutor Vs Joe Yhakowaie Natuman and Aru Maralau's Criminal Case No.16/1758 SC/CRML;

And as per the Advice of the Attorney General dated 29th March 2018 to the Honorable Prime Minister in relation to the same (see attached);

We wish to inform you that by the operation of the law, mainly the requirement of the section 3 of the Members of Parliament (Vacation of Seats) Act [CAP.174] your seat to which you were elected on 22nd January 2016 as Member of Parliament for Tanna Constituency became vacant on 16th April 2018 as advised by the Attorney General from the State Law Office to the Honorable Prime Minister and for which a copy was also served to me as Speaker of Parliament on 20th April 2018.

Consequently, the notices of calling of Parliament from the Office of the Speaker and the Office of the Clerk have not been served to you to allow you to attend the upcoming sessions of Parliament.

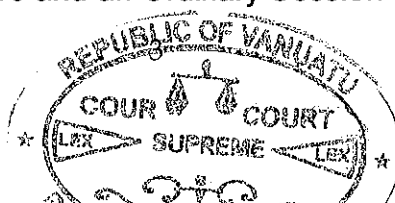
And it is for the said reasons that, as Speaker of Parliament, I would no longer allow you to enter the Parliament Chamber but rather encourage you to seek Court's interpretation on your conviction (sic) of two years imprisonment and suspended sentence.

May I also wish you well and pray that God almighty will guide you in your future endeavors.

Yours sincerely,

Hon. Esmon Saemon MP Speaker of Parliament"

9. It is common ground that the "... upcoming sessions of Parliament" mentioned in the letter refers to an Extraordinary Session of Parliament scheduled to commence on 30 May 2018 and an Ordinary Session starting on 11 June 2018.



10. Counsel for the claimant's submission is that the defendant's letter has effectively declared the claimant's seat in Parliament as vacant by operation of the law pursuant to Section 3 of the Members of Parliament (Vacation of Seats) Act [CAP. 174] which provides:

"3 Vacation of seat on sentence

- (1) *If a member of Parliament is convicted of an offence and is sentenced by a Court to imprisonment for a term of not less than 2 years, he shall forthwith cease to perform his functions as a member of Parliament and his seat shall become vacant at the expiration of 30 days thereafter.*

Provided that the Speaker, or in his absence, the Deputy Speaker, may at the request of the member from time to time extend that period for further periods of 30 days to enable the member to pursue any appeal in respect of his conviction, or sentence so however that extensions of time exceeding in the aggregate 150 days shall not be granted without the approval of Parliament signified by resolution.

- (2) *If at any time before the member vacates his seat his conviction is set aside or a punishment other than imprisonment is substituted, his seat in Parliament shall not become vacant as provided by subsection (1), and he may again perform his functions as a member of Parliament.*
- (3) *For the purpose of subsection (1) no account shall be taken of a sentence of imprisonment imposed as an alternative to or in default of the payment of, a fine."*

11. During the course of counsels' submissions little mention was made of the meaning and effect of the proviso to subsection (1) which reads:

"Provided that the Speaker, or in his absence, the Deputy Speaker, may at the request of the member from time to time extend that period for further periods of 30 days to enable the member to pursue any appeal in respect of his conviction, or sentence so however that extensions of time exceeding in the aggregate 150 days shall not be granted without the approval of Parliament signified by resolution."

12. The proviso plainly refers to the 30 day grace period in the foregoing substantive provisions to which it is attached and permits the Speaker or his Deputy to extend that statutory grace period of 30 days until the extension reaches a total 150 days (ie. after 4 x 30 day extensions) before Parliamentary approval must be obtained.

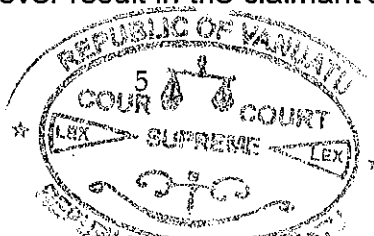


Theoretically, therefore, the vacation of an MP's seat pursuant to Section 3(1) can be deferred or postponed for a period of up to 150 days after the MP has been sentenced to "*imprisonment for a term of not less than 2 years*".

13. On one view it can be said that the existence of the proviso indicates that the vacation of an MP's seat upon his conviction and sentence for a criminal offence does not immediately result in his seat being vacated and presumably, the MP continues to be a member of Parliament albeit one who has ceased to perform his functions as an MP which in turn, presumably includes attending and taking up his seat in Parliament during any parliamentary session or sitting. In other words once an MP is convicted and sentenced to imprisonment for a term of not less than 2 years he ceases or is disabled from performing his functions as an MP by operation of Section 3(1) albeit that his seat is not vacant or vacated.
14. The claimant seeks 4 orders as follows:
 - (i) *A declaration that the decision of the Defendant of 23 May 2018 that the seat of the Claimant in Parliament is vacant, is of no effect.*
 - (ii) *A mandatory order requiring the Defendant to serve on the Claimant forthwith the notices of calling of Parliament for the upcoming sessions of Parliament commencing 30 May 2018.*
 - (iii) *An order prohibiting the Defendant from stopping the Claimant from entering Parliament for the said Sessions of Parliament commencing 30 May 2018.*
 - (iv) *A quashing order that the decision by the Defendant of 23 May 2018 that the Parliament seat of the Claimant is vacant, is quashed.*

15. However at the hearing of the application defence counsel indicated that it would suffice if the Court merely issued a declaration that the claimant's seat was not vacant if the Court was minded to uphold the claim which was opposed.

16. In support of the claim counsel submits firstly, that Section 3 of the Members of Parliament (Vacation of Seats) Act is "*ambiguous as regards the claimant's sentence*". Secondly, in the absence of any specific mention therein, the provisions of subsection (1) has no application to a suspended sentence of imprisonment which may never result in the claimant's incarceration and further



counsel submits that, a suspended sentence of imprisonment more accurately falls within the category of "... a punishment other than imprisonment" within the contemplation of subsection (2). Finally, counsel submits that the rationale of Section 3 read as a whole is clear – if a convicted MP is actually incarcerated in prison then self-evidently he cannot at the same time be in Parliament and by the same token, if such an MP is not confined or incarcerated in a prison because his sentence is suspended, then he is free and able to perform his functions in Parliament and his seat cannot become vacant. In other words the Section only has application where a sentenced MP is actually incarcerated in prison as a result of this sentence and not otherwise.

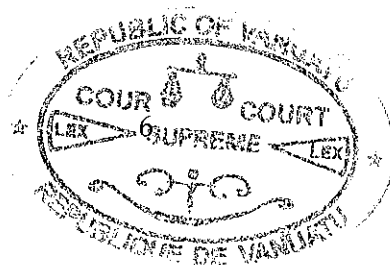
17. Defence counsel in opposing the claim relies on the written advice of the Attorney General as to the meaning and effect of Section 3 and, equally forcefully, submits that there is no ambiguity in the various subsections of Section 3 or in its meaning and effect as disclosed in the clear language used in the section.

18. I was also referred to the following authorities and decisions which I have read and considered. They are:

- (1) Korman v Natapei [2010] VUCA 14;
- (2) Sope v Speaker [2003] VUCA 5;
- (3) Government v Maseng Nalo [2004] VUSC 4; and
- (4) Section 57(1) of the Penal Code.

19. It is accepted by both counsels that the outcome of this claim turns on the interpretation of Section 3 of the Members of Parliament (Vacation of Seats) Act and its meaning and effect in regards to the suspended sentence of 2 years imprisonment imposed on the claimant.

20. In brief, the claimant says that the Section does not apply to a suspended sentence of imprisonment and the defendant says that it does apply to a suspended prison sentence with the consequences set out in subsection (1).



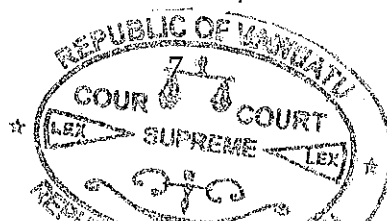
21. In my view the intention and purpose of Section 3 is clearly expressed in its heading and concerns the vacating of a members parliamentary seat upon the imposition of a sentence of imprisonment. It is not concerned with whether or not the sentenced MP is physically able to occupy his seat.
22. In particular, Subsection (1) contains two pre-conditions to its operation namely:
- (1) The member of Parliament must be "*convicted of an offence*" and
 - (2) The member must be sentenced "*to imprisonment for a term of not less than 2 years*"

Once fulfilled, two consequences follow under the subsection, one is immediate and the other is, a deferred consequence. Firstly, the affected member is immediately disqualified from "*performing his functions as a Member of Parliament*"; and secondly, by operation of law, the said member's parliamentary seat "*... shall become vacant at the expiration of 30 days*" after the imposition of the sentence of imprisonment.

23. In my view the immediate consequence put beyond any doubt the fallacy of the claimant's argument. Upon his conviction and sentence an MP "*... shall forthwith cease to perform his functions as a member of Parliament*". This latter expression or phrase includes in my view, attending parliamentary sittings or sessions and occupying a seat in Parliament.
24. In my view a suspended sentence of imprisonment once imposed remains a sentence of imprisonment for all intent and purposes and does not change its essential nature or quality as a sentence of imprisonment merely because it is additionally, ordered to be suspended. I am fortified by the relevant provisions of Section 57(1) of the Penal Code (Amended) Act No. 25 of 2016 which is entitled: "**PROVISIONS FOR SUSPENSION OF SENTENCES OF IMPRISONMENT**" and provides:

"57. (1) *The execution of any sentence imposed for an offence against any Act, Regulation, Rule or Order may, by decision of the court having jurisdiction in the matter, be suspended subject to the following conditions:*

- (a) *if the court which has convicted a person of an offence considers that:*



(i) in view of the circumstances; and

(ii) in particular the nature of the crime; and

(iii) the character of the offender,

it is not appropriate to make him or her suffer an immediate imprisonment, it may in its discretion order the suspension of the execution of imprisonment sentence it has imposed upon him or her, on the condition that the person sentenced commits no further offence against any Act, Regulation, Rule or Order within a period fixed by the court, which must not exceed 3 years; and

(b) if, at the end of such period, the person the execution of whose sentence has been suspended in accordance with this section has not been convicted of any further offence against any Act, Regulation, Rule or Order, the sentence is deemed to have expired; and

(c) if, before the end of such period, the person the execution of whose sentence has been suspended in accordance with this section is further convicted of any offence against any Act, Regulation, Rule or Order, the court shall order that the suspended sentence shall take effect for the period specified in the order made under paragraph (1) (a) of this section unless it is of the opinion that it would be unjust to do so in view of all the circumstances which have arisen since the suspended sentence was imposed, including the circumstances of any further offending, in no case concurrently with any subsequent sentence.

(d) Where a court decides under paragraph (1) (c) that a suspended sentence is not to take effect for the period specified in the order, then, subject to this Act, the court must either:

(i) order that the suspended sentence:

(ia) take effect with the substitution of a lesser term of imprisonment; or

(ib) be cancelled and replaced any non-custodial sentence that could have been imposed on the offender at the time when the offender was convicted of the offence for which the suspended sentence was imposed; or

(ic) be cancelled; or

(ii) decline to make any order referred to in subparagraph (i) concerning the suspended sentence.

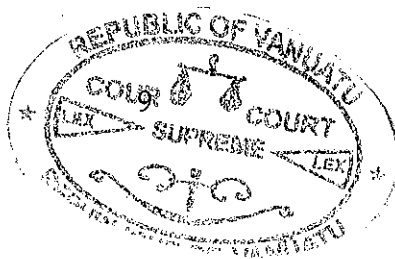
(2) The court must, when ordering the suspension of the execution of the sentence of imprisonment, explain clearly to the person sentenced the nature of the Order and must ascertain that he or she has understood its meaning."

25. Subsection (1) of Section 57 clearly provides that it is the "... execution" or implementation of the sentence that is suspended based on a consideration of three enumerated factors and a determination that "... it is not appropriate to make (the offender) suffer an immediate imprisonment". In my view the



distinction is therefore one between a sentence of "*immediate imprisonment*" and a sentence of imprisonment where execution is suspended. In both instances however, the sentence is one of imprisonment and where it is not suspended, then it is to be served by the incarceration of the offender in a prison, and, if execution is suspended for a period fixed by the Court, then paragraph (b) provides that at the end of the fixed period "... *the sentence is deemed to have expired*" [*see*: in this latter regard the dictum of Lord Radcliffe in St. Aubyn v AG (1952) AC 15 at p53].

26. Paragraph (a) also makes clear that the correct sentencing sequence when imposing a suspended sentence of imprisonment is, firstly, the Court must determine that the appropriate penalty is imprisonment and next how long should the term of imprisonment be for and, finally, whether the sentence of imprisonment ("*it has imposed on him or her*" – past tense) should be suspended or not.
27. As for claimant's counsel's reliance on the proviso and subsection (2), I am satisfied that the submission is misconceived. It is common ground that the claimant did not request an extension of the 30 day grace period granted to him nor has he appealed against his conviction or against the sentence imposed on him within the relevant appeal period. In the absence of any appeal there can be no question of the claimant's conviction being set aside or a punishment other than imprisonment being substituted. Quite simply neither the proviso nor subsection (2) are relevant considerations.
28. Subsection (3) reinforces the view that subsection (1) is dealing with a primary sentence of imprisonment imposed by the Court after conviction and not with a secondary sentence of imprisonment imposed for breach or in default of the primary sentence and where there has been an intervening or triggering event between the original sentence imposed which may or may not be a sentence of imprisonment and the secondary sentence of imprisonment.
29. Similarly and for much the same reasons "... *no account shall be taken of*" the order for the suspension of a sentence of imprisonment for the purposes of

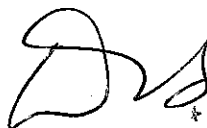


determining what is meant by the expression: "... sentenced ... to imprisonment for a term of not less than 2 years" as provided for in subsection (1).

30. In light of the foregoing discussion I am satisfied that the provision of Section 3 of the Members of Parliament (Vacation of Seats) Act is neither ambiguous or confusing. Subsection (1) clearly says what it means and applies to any sentence of imprisonment for a term of not less than 2 years (whether the execution of such a sentence has been suspended or not).
31. A suspended sentence of imprisonment is and remains a sentence of imprisonment until the condition imposed for its suspension has been fulfilled and the sentence is "*deemed to have expired*". Until that event occurs the sentence of imprisonment remains extent and may be executed by activation in accordance with paragraphs (c) and (d) of Section 57(1).
32. I reject the claimant's submissions to the contrary and accordingly dismiss the application in its entirety.
33. Given my observations about the delays and the parties' inactivity I make no order as to costs.

DATED at Port Vila, this 30th day of May, 2018.

BY THE COURT


D. V. FATIAKI
Judge.

