IN THE SUPREME COURT OF

THE REPUBLIC OF VANUATU

(Criminal Jurisdiction)

Criminal

Case No. 20/487 SC/CRML

BETWEEN: **Public Prosecutor**

AND: **Charlot Salwai Tabimasmas**

Defendant

Date of Hearing:	24 November 2020 to 10 December 2020
By:	Justice G.A. Andrée Wiltens
Counsel:	Mr J. Naigulevu with Mr T. Karae and Ms L. Lunabek for the Public Prosecutor
	Mr F. Vosarogo with Mr D. Yahwa for the Defendant
Date of Decision:	16 December 2020

Verdict

A. Introduction

1. In early 2019 a constitutional case (Constitutional Case No. 18/3481) was filed in the Supreme Court challenging the validity of the relatively recently created positions of Parliamentary Secretary.

2. The challenge was brought by 16 Opposition Members of Parliament and it listed as Respondents to the case: firstly, the Republic of Vanuatu; secondly, the then Prime Minister, Charlot Salwai Tabimasmas; and thirdly, the 11 Members of Parliament then or previously appointed as Parliamentary Secretaries.

3. It was alleged that the establishment of the positions of Parliamentary Secretary was contrary to the Constitution of the Republic of Vanuatu.

4. In the course of the litigation certain written evidence was produced to the Court in the form of sworn statements. Of particular relevance was a sworn statement by Mr Tabimasmas, filed in opposition to the constitutional application. It is alleged to contain certain falsehoods, which it

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is alleged were deliberately included in the statement with full knowledge of the falsities and with intent to mislead the Court.

5. Accordingly, the Defendant is alleged to have committed perjury in relation to his sworn statement contrary to section 75 of the Penal Code [Cap 135].

B. Onus/Burden of Proof

6. This was a criminal prosecution. Accordingly, in order to succeed, the prosecution is required to prove all the legal ingredients of the charge beyond reasonable doubt.

7. In contrast Mr Tabimasmas was not required to prove anything, and was entitled to not give or call evidence without any adverse inference arising.

8. It is noted that only admissible relevant evidence should be taken into account in determining the outcome of the trial. I record further that prosecution and defence witness have equal value, and each witness is to be considered on his/her own merits. The evidence produced to the court comprised agreed facts, agreed witness statements, documentary exhibits and *viva voce* evidence.

9. The Court is able to draw inferences which logically flow from other proven facts. Where there is no direct admission as to intention, the prosecution must prove sufficient facts so that the requisite intention can be inferred. I remind myself that adverse inferences are to be drawn only if they are the only available inference to be drawn. Further, if there is more than one available inference, the inference most favourable to Mr Tabimasmas must be drawn.

C. The Elements of the Charge

10. The legal ingredients of perjury are:

- (i) An assertion of fact, opinion, belief or knowledge in a sworn statement made by a witness on oath;
- (ii) The assertion was known to the maker to be false; and
- (iii) The assertion was intended by the maker to mislead the tribunal.

11. Mr Tabimasmas' sworn statement was dated 22 April 2019, and filed in the Supreme Court that same day. He was named as the Second Respondent to the action. The sworn statement was part of the evidence produced to the Court, which made Mr Tabimasmas a witness. The sworn statement contained a number of assertions. It was accepted that the sworn statement comes within the definition of the first legal ingredient of the charge.

12. The assertion the subject of the charge is the repeated use of the phrase "...with the prior approval of the Council of Ministers".

13. That phrase was alleged to be untrue; and was alleged to be known to Mr Tabimasmas as being untrue, when he signed the statement before a Commissioner of Oaths. It is alleged that he deliberately included these words with the intention of misleading the Supreme Court. These matters were all contested.

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D. The Sworn Statement (Exhibit D)

14. The sworn statement set out that in January 2013, by Order 5 of 2013, the office of Parliamentary Secretary was added to the Schedule of the Official Salaries Act [Cap 168] ("the OSA") for the first time. The Order included the remuneration and benefits of the newly created position. Prior to this, legal advice had been sought from the State Law Office as to the legal effects of the establishment of the position, particularly with regard to the matters set out in the Leadership Code Act [Cap 240]. Mr Tabimasmas then summarised the legal advice given and appended a copy of the advice to the sworn statement. The first appointment was stated to have been made by the then Prime Minister, Mr Kilman.

15. Paragraph 7 of the sworn statement reads as follows:

> "I can confirm that subsequent to the establishment of the office of Parliamentary Secretary by Order 5 of 2013, there are various other orders that were made by the Prime Minister with the approval of the Council of Ministers adding to, varying and/or replacing the Schedule of the OSA in relation to the position of Parliamentary Secretary and these include the following:..."

16. There are then listed 24 Amendment Orders to the OSA made between 2013 and 2018. A copy of each of those Orders was also appended to the sworn statement.

17. Mr Tabimasmas' sworn statement went on to record in paragraph 8 that the appointments to the office of Parliamentary Secretary were made by way of employment contracts entered into with Mr Tabimasmas. This is an inaccurate statement, as all the appointments were in fact made by the then serving Prime Minister. Mr Tabimasmas was Prime Minister from February 2016 to early 2020, and accordingly he actually employed only some of the Parliamentary Secretaries listed. However nothing turns on this.

18. Paragraph 9 of the sworn statement reads as follows:

> "I can confirm that sub-article 39(1) of the *Constitution*, sub-section 4(2) of the *Government Act*, paragraphs 3(1)(a) of the *Official Salaries Act* and Order 5 of 2013 paved the way for the Second Respondent [Mr Tabimasmas] with the approval of the Council of Ministers, to establish the Office of the Parliamentary Secretary."

19. Paragraph 10 of the sworn statement then set out that the named Third Respondents to the constitutional case were either currently, or had previously served as, Parliamentary Secretary. They are then listed by date and position held. The relevant contract of employment for each such person was appended to the sworn statement.

20. Paragraph 11 of Mr Tabimasmas' sworn statement reads as follows:

> "I can confirm that the employments of the support staffs to the Parliamentary Secretary are also provided for by way of the orders made [by] the Prime Minister with the approval of the Council of Ministers."

21. Paragraph 12 of the sworn statement dealt with support staff employment contracts and their duties and responsibilities. There was mention of these appointments being necessary to assist Parliamentary Secretaries to carry out their duties and responsibilities. Examples of the employment contracts were also appended to the sworn statement.

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22. Paragraph 13 of Mr Tabimasmas' statement stated that Parliamentary Secretaries were appointed due to it being necessary to implement the policies of Government. The legal advice from the State Law Office was then cited as lawfully enabling such appointments to be made, as the duties and responsibilities of those serving as Parliamentary Secretary did not affect their ability to fulfil their principal tasks and duties as Members of Parliament.

23. Paragraph 14 of the sworn statement dealt with budgetary matters, stating that all the appointments of Parliamentary Secretaries "to the Prime Minister" had been budgeted for and were properly appropriated in the annual Appropriation Acts of 2016, 2017, 2018 and 2019. Those Appropriation Acts were also appended to Mr Tabimasmas' sworn statement.

E. Evidence

(i) General

24. I closely observed each of the witnesses when giving evidence before me. I was more concerned with their consistency than the manner in which each testified. I reminded myself that body language and assessments of witness demeanour are but a very small part of an overall analysis as to whether a witness is telling the truth and is an accurate reporter of past events. I looked for consistency within an account, when comparing different accounts by different witnesses, and I also compared these accounts with the exhibits produced.

25. I further had regard to the inherent likelihoods of that which was reported.

26. I considered also that different individuals may see things differently and recall events in a different way. Minor discrepancies between accounts were to be expected, and indeed could indicate that witnesses had not attempted to collude in order to tell a more unified tale. It was therefore also important to look out for an absence of discrepancies.

27. Applying all these considerations to the evidence given by witnesses enabled an assessment as to credibility and accuracy to be made, and those assessments informed my final determinations.

28. The particular charge now being addressed in this decision was one of 11 charges in the Information. Only the evidence relevant to this charge will be referred to, although other uncontentious background material was evidenced and considered.

(ii) Witnesses/Assessment

29. Ishmael Alatoi Kalsakau was the Attorney General of Vanuatu from 2007 until September 2015. As such he was the head of the State Law Office, the primary legal advisors to the Government. In January 2016 he became a Member of Parliament, and was in the Opposition throughout that 4-year term.

30. He was the original complainant and produced Mr Tabimasmas' sworn statement as Exhibit D.

31. He confirmed the case related to the legality of the Parliamentary Secretary positions. He was in a position to so advise as he was the first named Applicant in the Constitutional case. With particular reference to paragraphs 7, 9 and 11 of Mr Tabimasmas' sworn statement, Mr Kalsakau considered that the phrase "...with the approval of the Council of Ministers", when

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repeated, was untrue. He asserted the phrase was included in the sworn statement to attempt to validate the legality of the appointments of Parliamentary Secretaries.

32. He alleged that Mr Tabimasmas was using such appointments as an inducement to Members of Parliament to add support for him and his Government, particularly with regards to motions of no confidence. He further alleged that the Council of Ministers had not approved any of the appointments made by Mr Tabimasmas.

33. Mr Kalsakau confirmed that the first Parliamentary Secretary was appointed in 2013. He was then overseas and had not provided the legal advice relied on by the then Prime Minister to make the first appointment.

34. He confirmed that the Attorney General was required to attend Council of Ministers meetings to provide legal advice but had no voting rights. There was no elaboration as to what exact involvement the Attorney General or members of his staff played at such meetings. It is accordingly unknown to the Court whether legal advice was given only when sought or was generally expected to be provided as and when appropriate.

35. It was suggested to Mr Kalsakau that the State Law Office had given Mr Tabimasmas legal advice regarding the constitutional case and had drafted Mr Tabimasmas' sworn statement. He agreed, but pointed out that the State Law Office had been acting on the instructions of Mr Tabimasmas when preparing the draft sworn statement. Once the draft was prepared, it was Mr Tabimasmas' responsibility to check it prior to signing it as true and correct.

36. Mr Kalsakau was shown a bundle of documents which became Exhibits F, 1 to 7. They comprised various Orders which amended the OSA schedule, each of which recorded in template style that the then Prime Minister, with the approval of the Council of Ministers, had made the order that followed. 7 such orders made up the exhibit. Mr Kalsakau agreed that each order recorded the approval of the Council of Ministers; and accepted that the State Law Office would have prepared them. He also accepted that if any orders had been incorrect they could have been subsequently recalled or removed by the Council of Ministers. There were no such recalls in his time as Attorney General.

37. Mr Kalsakau did have motive to first complain about Mr Tabimasmas' conduct as they were in opposition to each other in Parliament, and as Mr Warsal stated, with some humour, the Opposition was "always" contemplating no confidence motions. However, time has moved on, and while still opposed to each other, Mr Kalsakau is currently in a more senior role as Deputy Prime Minister to Mr Tabimasmas, now a Member of Parliament.

38. I accepted Mr Kalsakau's evidence as credible and accurate. I noted that there was limited cross-examination in relation to the issues relating to this charge, and he stood up to this in a manner that satisfied me it was safe to rely on his evidence.

39. Sato Kilman Litunvanu was a long-standing Member of Parliament, but was not re-elected in 2020. He has held numerous Ministerial portfolios, including serving as the Prime Minister on 4 occasions. He was also a named applicant in the constitutional case, challenging the legality of the position of Parliamentary Secretaries.

40. It was his evidence that the Prime Minister had the ability to create positions under the OSA. He stated there was a process to be followed for every position created. Firstly, the Prime

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Minister decided the position to be created. He must then take the proposal to the Council of Ministers for approval. If the Council of Ministers approved, then the State Law Office would prepare the documents which would be signed by the Prime Minister. Lastly, the newly created position was then Gazetted.

41. Mr Kilman, as Prime Minister at the time, followed this process in appointing the first Parliamentary Secretary in 2013. He was shown Exhibit F and confirmed that the various Orders were amendments to the OSA. Mr Kilman stated that he later became aware that Mr Tabimasmas did not seek or obtain Council of Ministers approval to create or amend the posts Mr Tabimasmas dealt with during his term as Prime Minister.

42. In cross-examination Mr Kilman agreed that unless Council of Ministers decisions are later rescinded they remain valid. He confirmed that he had signed Order 5 of 2013 as Prime Minister. He had obtained legal advice from the State Law Office prior to that appointment. He could not recall the date the Council of Ministers approved of the appointment, but claimed it would be recorded in the Council of Ministers' records. He had presented a discussion paper to the Council of Ministers, which included the legal advice received, prior to the Council of Ministers approving the appointment.

43. It was put to him that Mr Tabimasmas did not have to seek Council of Ministers prior consent to make further appointments as the previous Order 5 of 2013 had not been rescinded. Mr Kilman's reply was that only in relation to Parliamentary Secretaries attached to the Prime Minister's Office, was this correct. However he stated that to appoint further or different Parliamentary Secretaries to be attached to other Government Departments, the prior approval of the Council of Ministers was required. Only when replacement appointments on previously settled terms and conditions were made was no prior approval required.

44. Mr Kilman gave his evidence in an unassuming and straight-forward manner. He recounted he had been Prime Minister for numerous limited periods but that he had no recall of the exact dates involved. He seemed to have no particular axe to grind in this case. He explained his role in establishing the Parliamentary Secretary posts in 2013, which sat squarely with what other witnesses told the Court.

45. He was not cross-examined to any great extent, but maintained his account without deviating. I accepted him as a credible and accurate witness. It was significant in my view that there was no challenge to his evidence recorded in paragraph 42 above.

46. Bob Loughman has been a Member of Parliament since 2004, and he is the current Prime Minister. He has held a number of Ministerial portfolios while in Parliament. He stated that he was familiar with the former positions of Parliamentary Secretary. It was his evidence that the Prime Minister could appoint to various positions under the OSA, "...usually after a Council of Ministers decision". He stated that Parliamentary Secretaries were appointed after a Council of Ministers meeting.

47. When the Council of Ministers was asked to consider a Parliamentary Secretary position, documents would have been prepared for discussion by the Council of Ministers as the benefits attached to each position had to be determined. Those benefits were part of the Order signed by the Prime Minister. Exhibit F comprised examples of such Orders, which were recorded as having been made "...with the approval of the Council of Ministers".

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48. He stated that Council of Ministers prior approval was required because of funding issues in creating new posts, and as such those matters must be referred to in the Schedule. When new positions were created, the funding needed to be set out with clarity. A policy paper would have been put to the Council of Ministers dealing with such matters, which then needed to be endorsed by the Council of Ministers before any appointment was made.

49. When serving as a Minister in the Tabimasmas Government in 2018-9, Mr Loughman recalled a new Parliamentary Secretary position was created to be attached to the Ministry for Climate Change. Mr Loughman recalled that there was no Council of Ministers' decision to make that particular appointment. He came to know this when he was acting Prime Minister and chairing a Council of Ministers meeting. At that time he was shown a photograph which he was told was of the new Parliamentary Secretary. He himself had no prior knowledge of the appointment despite having regularly attended Council of Ministers meetings.

50. Mr Loughman was an experienced Parliamentarian and he responded in a steady manner to all matters put to him. I had no doubts about his veracity or reliability. His evidence regarding the process to be adopted was hardly challenged, and it accorded with the earlier evidence of Mr Kilman.

51. Ronald Warsal is a lawyer and was the Minister of Justice and Community Services in the Tabimasmas Government in 2016 – 2018.

52. He confirmed there was a process involved in the creation of new positions of Parliamentary Secretary. He stated such posts were appointed by the Prime Minister "...by virtue of the Council of Ministers, as per the OSA". He stated the Council of Ministers had to first approve of an appointment before the Prime Minister could make the appointment.

53. He could not recall any Council of Ministers approvals for new Parliamentary Secretary positions while he was a Minister in the Tabimasmas Government.

54. When cross-examined, Mr Warsal stated that his understanding is that Prime Ministerial decisions have to be made in accordance with the law, by consultation and consensus. The Prime Minister, he said, was unable to do things alone.

55. It was put to him in cross-examination that if amendments to existing salaries were made, this would not amount to a new appointment. Mr Warsal disagreed with that proposal answering that the new Parliamentary Secretaries came with new personal assistants, and as such they were new appointments.

56. It was put to him further that the Memorandum of Agreement (Exhibit L) signed in 2016 between numerous political parties with the intention of forming the Tabimasmas Government was designed to create and maintain a stable Government for 4 years. Mr Warsal stated that the document was a policy document only, and that the legal formalities still had to be adhered to.

57. Mr Warsal's evidence dove-tailed neatly with that of others, and also the documentary exhibits produced. He did not waiver during cross-examination. I accept him as a credible and accurate witness.

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58. Toara Alan Daniel is currently unemployed, but was previously a Member of Parliament from 2002 to 2020. He has held several Ministerial portfolios over many years. He was the Minster of Health in the Tabimasmas Government from February to November 2016. In that time he was unaware of any Parliamentary Secretary positions being discussed at Council of Minsters meetings.

59. He was not cross-examined in relation to his core evidence, which I considered consistent with the other evidence produced. I accepted his evidence.

60. Jotham Napat became a Member of Parliament in 2016 and was the Minister for Public Works from 2016 to 2018. He became the Deputy Prime Minister between June and December 2019. While he served as a Minister in the Tabimasmas Government there were no referrals of any Parliamentary Secretary positions to the Council of Ministers for approval that he could recall.

61. Mr Napat was an impressive witness who answered all matters put to him directly and without hesitation. I accepted his evidence which was consistent with previous accounts and exhibits produced.

62. Senior Sergeant Terry Lapinpal was the officer in charge of the investigation into this case. In the course of investigating this matter he obtained. or arranged for others to obtain, several Search Warrants.

63. He searched the Offices of the Prime Minister seeking Council of Ministers Minutes and records covering the period from 5 December 2012 through to 19 June 2019. In particular what was being sought were records in relation to the positions of Parliamentary Secretaries.

64. He produced a matrix of the information obtained. It was produced as Exhibit B, pages 91 to 166 inclusive. There was no record relating to Parliamentary Secretaries.

65. There was no challenge to this evidence. Accordingly I accepted it.

66. Charlot Salwai Tabimasmas has been a Member of Parliament since 2002. In 2013, he was the Finance Minister. He stated that in 2013 he was asked, as Minister of Finance, to prepare a budget for the new position. He stated he was unable to exactly recall if the Council of Ministers had given prior approval to the appointment by then Prime Minister Mr Kilman. I considered this odd, in that the thrust of his defence was that the first appointment in 2013 was validly made and provided a legitimate basis for his subsequent appointments. Yet, his evidence as this was equivocal.

67. On or around 11 February 2016, Mr Tabimasmas was sworn in as Prime Minister. Prior to this he was a signatory to the Memorandum of Agreement (Exhibit L) between numerous political parties which included provision for the appointment of 4 Parliamentary Secretary posts. That document was entered into with a view to maintaining stability of Government for the 4-year term, and he succeeded in serving as Prime Minister for the full term.

68. Mr Tabimasmas confirmed signing his sworn statement, Exhibit D, in April 2019. This document had been prepared by the State Law Office, after a briefing on the constitutional case by 2 State Law Office lawyers. He was told that he had to file a sworn statement for the Court. Mr Tabimasmas maintained that following the briefing he had raised a point about the Council of Ministers decision. He was about to go overseas and gave instructions that the

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2013 Council of Ministers decisions be checked. He did not say what was to be checked, and he was not asked.

69. Mr Tabimasmas signed the sworn statement on his return from oversea. A Commissioner of Oaths went to his Office, took his oath and witnessed him swearing the document as true and correct. When presented with the document for signature, Mr Tabimasmas asked about the 2013 Council of Ministers decisions. He stated that he was then advised that most of the Council of Ministers files had been destroyed by Cyclone Pam and that there were no 2013 records. Mr Tabimasmas then told the Court that he responded to this by asking: "So, what happens now?" He stated that he was assured it was in order for him to sign the sworn statement, and he did so accordingly. It is however clear that numerous of the 2013 Council of Ministers records were still available, which fact undermines the credibility of this part of his account. Further, it was his obligation to ensure the sworn statement was accurate, not the task of the State Law Office lawyers.

70. Mr Tabimasmas confirmed paragraph 14 of Exhibit D was accurate in that there was budgetary appropriation for the positions of Parliamentary Secretary in the 2016 to 2019 financial years.

71. In cross-examination, Mr Tabimasmas related that he had previously been Minister of Lands in 2004, Minister of Education in 2007 and again from 2008 to 2010, Minister of Justice in 2012 to 2013, and Minister of Internal Affairs in 2014. He had then been Prime Minister from 2016 for 4 years. Prior to entering politics Mr Tabimasmas had worked as an accountant. He accepted that he was well versed with accounts and of the need to keep accurate and proper records.

72. Mr Tabimasmas confirmed that Council of Ministers decisions were based on discussion papers addressing the particular issue at hand. Part of those discussions invariably involved the financial and legal implications of the proposal involved.

73. He accepted the 2016 Memorandum of Agreement (Exhibit L) was a political document and not legally binding. When asked that the proposed Parliamentary Secretary appointments referred to in the document would still have to pass the normal approval process he answered that it was his belief the Parliamentary Secretary position had been created in 2013 under the OSA. The position was already in existence and it was therefore just a question of a budget being appropriated.

74. He did not agree that attaching Parliamentary Secretary posts to different Government Departments had any affect on the process. He went on to state that the documentation required was created by the State Law Office, and if there was a requirement for prior Council of Ministers approval, the State Law Office would have so advised. He pointed out that there were State Law Office personnel at all Council of Ministers meetings. However, there was no evidence relating to the capacity in which those lawyers attended.

75. Mr Tabimasmas was taken to the Memorandum of Agreement and it was pointed out that the 4 positions referred to were to be attached to Internal Affairs, Education, Agriculture and Fisheries and the Prime Minister's Office. He agreed, but stated they were all under the Prime Minister's Office budget, although they would be working under different Ministries. He did not agree that their remuneration and benefits differed – he stated they were identical, and that each had the same number of staff.

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76. When shown Exhibit F, Mr Tabimasmas had to back-track as the documentary evidence was against him. He then agreed that in fact there were budgetary differences and that the number of staff under each Parliamentary Secretary was not the same. It was then put to him that because of the variations and different positions, each appointment should have first gone to the Council of Ministers. He was unable or unwilling to respond to that proposition when first asked. When the question was put a second time he reluctantly replied: "Yes, because it relates to budget". I considered that a telling concession.

77. Mr Tabimasmas accepted that the constitutional case, to which his sworn statement related, concerned the legality of Parliamentary Secretary appointments; and that his sworn statement was filed in response to the application. The case followed attempts in 2019 by his Government to strengthen the appointments process relating to Parliamentary Secretary posts by an Amendment to the Constitution which had then gone to the President for his assent. It follows that Mr Tabimasmas was well aware of the issues relating to the legality of the appointments – why otherwise attempt to amend the legislation?

78. Mr Tabimasmas went into greater detail relating to the preparation and swearing of his sworn statement, Exhibit D. He agreed that the State Law Officers were giving him advice; and that he gave them his instructions. He accepted that the ultimate responsibility for ensuring the accuracy of the sworn statement was his, not the lawyers – although he stressed that his legal knowledge was limited and that he needed their advice. He stated that he signed Exhibit D as he trusted the lawyers who had prepared it. He agreed he had not raised any reservations about the contents of the sworn statement before signing it.

79. The difficulty with this aspect of his evidence is that Mr Tabimasmas was fully entitled to rely on the State Law Office for legal advice. However, he claimed to also rely on the State Law Office to draft up a factual statement and to assure him that it was in order for him to sign it. Before signing the document, Mr Tabimasmas was himself required to closely read the contents of his statement prior to taking an oath and verifying the contents as true and correct. He admitted that he did not do so. The State Law Office had no role to play in that. The lawyers were certainly not in position to confirm or otherwise the factual aspects of the sworn statement. Accordingly, it is not legitimate for Mr Tabimasmas to put this forward as justification for his conduct.

80. Mr Tabimasmas was asked in particular about paragraphs 9 and 11 of the sworn statement and the phrase "...with the prior approval of the Council of Ministers". He responded, stating that he understood this to refer to the 2013 Council of Ministers approval.

81. He confirmed that, while he was the Prime Minister, there had been no approval by the Council of Ministers for any Parliamentary Secretary appointment. He went on to say: "We believed the position had been created in 2013." He did not elaborate as to who the "we" were in reference to.

82. It was put that when he signed the sworn statement, Mr Tabimasmas knew that he and his Government had not obtained Council of Ministers approval for any of the Parliamentary Secretary appointments. He responded that he understood the positions had been created in 2013. He went on to say that "...they were extra appointments and therefore subject to budget allocation [sic]". The question was put again. Mr Tabimasmas answered: "Yes, but the positions had been created in 2013."

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83. When asked if any of his appointments had gone before the Council of Ministers, Mr Tabimasmas answered: "No." He was next asked why not, if there were budgetary considerations? He replied: "We believed the positions existed already and we believed that only a budget was needed. If there had been advice provided by the State Law Office to bring this into order, because they were there, then we would have. There was no such advice." Again, there was no elaboration to clarify who the "we" were.

84. Further, this purported reliance on State Law Office advice is unsupported by evidence. As mentioned earlier, there is no evidence before the Court as to the capacity in which the lawyers were attending Council of Ministers meetings. Were they attending in order to ensure the legality of everything that took place, or were they present so that at any point in time legal advice could be sought in respect of particular issues? For Mr Tabimasmas to be able to rely on State Law Office to the extent he now claims, clear evidence supporting such reliance could and should have been led from a number of witnesses, especially Mr Ishmael Kalsakau. The absence of such evidence leaves only Mr Tabimasmas' evidence to be evaluated.

85. Mr Tabimasmas was next shown Exhibit F, 7. It was Order 196 of 2016, signed off by him as the Prime Minister. He was asked to explain why he signed it if it had not first gone to the Council of Ministers. He responded: "This is a document drafted by the State Law Office and brought to me for signing off on." That answer did not really address the issue.

86. Mr Tabimasmas confirmed that on his return from overseas, and prior to signing Exhibit D, he was not given the Council of Ministers 2013 records – he stated this was for "the very simple reason that they had been destroyed by Cyclone Pam". He confirmed that when he signed there were no supporting documents to confirm paragraphs 9 and 11; and he responded that he "...didn't check anything. I just signed when it was brought to me." That amounted to an admission of recklessness. This evidence was also contradicted by the fact that a significant number of Council of Ministers decisions prior to Cyclone Pam remained in existence.

87. Mr Tabimasmas re-iterated that he not checked anything before signing when it was put to him and that he was well aware, as an accountant, of the importance of checking documents prior to signing them. He went on to say that for Court documents he relied on and had every confidence in the State Law Office "...as he had no legal knowledge to do more". I considered this was also evading the issue and laying blame on others.

88. He disagreed when it was put that he had been prepared to overlook the truth.

89. Mr Tabimasmas then volunteered that in 2016 no Council of Ministers discussion paper for the post of Parliamentary Secretary had been prepared. He stated that he had raised this matter with the Council of Ministers. One Minister, Joe Natuman, then allegedly said that there was no need and that it was within the Prime Minister's powers. Mr Tabimasmas again made the point that State Law Office lawyers were present, and if they had so advised the Council of Ministers could have taken the decision then.

90. Finally Mr Tabimasmas advised that all Council of Minsters meetings are chaired by the Prime Minister, with records kept of all decisions. He accepted that there were numerous recorded Council of Minsters decisions in Exhibit Book B, pages 91 to 166 which pre-dated Cyclone Pam and remained available. He accepted also that in that entire document of some 75 pages, each page of which recorded perhaps 20 decisions, there was not a single entry relating to the post of Parliamentary Secretary.

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91. Mr Tabimasmas was an unconvincing witness. He was caught out in relation to all the Parliamentary Secretary positions being identical in terms of remuneration and benefits, initially insisting that to be the case but when confronted with evidence to the contrary having to concede that there were differences. That was a not insignificant point. Had he not been confronted, his defence of relying on the 2013 creation of the first such position would have been much stronger. Having to accept the contrary however, undermined his repeated statements to that effect.

92. His evidence in relation to the budgetary implications of further appointments was unrealistic and unconvincing.

93. Parliamentary budgets are set early during the Parliamentary year – they are often the first Act of Parliament to be passed in any given year e.g. Act No. 1 of 2016, see Exhibit D, paragraph 13. Accordingly to create a further Parliamentary Secretary position partway through the year, is to cause a material affect on the annual budget. Suddenly additional funding must be found. Further, the posts were not for single occupancy. A Parliamentary Secretary was often appointed with supporting staff – on occasions, as evidenced at the trial, up to four staff. Accordingly the annual budget had to accommodate the remuneration and benefits of up to five additional employees, all paid at attractive rates (as evidenced by Exhibit F). It is inconceivable that the Council of Ministers not have a supervisory role in any such new appointment. As Mr Warsal stated, the Prime Minster could not do it all by himself.

94. The common law rule, established as long ago as 1894 in the case of *Browne v Dunn* requires counsel to put contradictory matters to all witnesses, so that they have the opportunity to respond. That is not only fair to the witness, but it greatly assists the fact-finder in determining which version is to be accepted. I note that the obligation is mandatory. Many parts of Mr Tabimasmas' evidence were new — in the sense that they had not been put to the prosecution witnesses. The effect of that is that the Court is simply unable to place full weight on those parts of his evidence.

95. Mr Tabimasmas stood to lose a great deal as a result of this charge being proved against him. He was content to cast blame on others. I did not accept the allegation regarding Mr Joe Natuman's opinion that no Council of Ministers discussion paper was required to be discussed as the Prime Minister had the power to make such appointments. This allegation was cast towards the end of cross-examination. It had not been put to any of the other prosecution witnesses, and was not led in-chief. This was a late, rather unwise and desperate allegation, by a person in a difficult and stressful situation. I note, even though there was no requirement or obligation to do so, that Mr Natuman was not called to confirm this evidence.

96. Mr Tabimasmas also had few qualms about attempting to minimise his responsibilities. He sought to cast blame on State Law Office personnel in numerous respects, including alleging that they had assured him it was safe to sign Exhibit D. I note too that those persons were not called to corroborate what was alleged – again I acknowledge there was no onus on Mr Tabimasmas to do so. However, if this had actually occurred as Mr Tabimasmas stated, it was in his interests to call evidence from those who were best placed to confirm that.

97. The authority of *Jones v Dunkel* [1959] HCA 8 accordingly has application. There is an available inference, adverse to Mr Tabimasmas, that can be drawn by his not calling witnesses known to be able to corroborate or confirm parts of his evidence, which is that the calling of those witnesses would actually have undermined his credibility, not enhanced it. Given that Mr

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Tabimasmas had no compunction in naming Mr Napuat and the two State Law Office personnel involved with his sworn statement, one would have expected them to be called as witnesses, though no obligation or onus on the defence exists. Their evidence would have gone a long way to exonerating Mr Tabimasmas, if these witnesses had testified to confirm his account. Their absence hurts Mr Tabimasmas' defence.

98. In conclusion, I determined that I could accept Mr Tabimamas' evidence only where it was materially supported by other independent evidence. There is very little evidence of that kind before me. Accordingly, I reject the evidence relating to Mr Natuman's interjection in the Council of Ministers meeting and I reject the evidence that Mr Tabimasmas had been assured it was safe for him to sign the sworn statement. I do not accept that the State Law Office staff advised Mr Tabimasmas there were no surviving 2013 Council of Ministers records.

F. Discussion

99. Exhibit D was tendered to the Supreme Court in opposition to the Constitutional Application seeking to strike down the positions of Parliamentary Secretary. Those positions were important to the Government as a form of political patronage – being able to offer additional employment benefits, over and above being a Member of Parliament, was a useful bargaining tool to buy support from individual Members. Not only were there 13 Ministerial positions available, the advent of this new post had the considerable advantage of increasing the possible inducements that could be offered for supporting the Government. Mr Tabimasmas was aware of this; and he actively pursued exactly such a policy to defeat at least one motion of no confidence the Court heard about in evidence in relation to the other charges in the Information.

100. For that reason I am sure that Mr Tabimasmas was anxious that the Court uphold the legality of the positions of Parliamentary Secretary. Exhibit D was tendered to the Court to attempt to assist or persuade the Court to find that the positions of Parliamentary Secretary had been lawfully created. It was therefore a significant additional factor for the Court to consider that the appointments were not made solely at the whim of the Prime Minister. Reading the language used as every day common usage, Exhibit D made it plain that each and every such appointment had the prior support of the Council of Ministers.

101. Mr Tabimasmas made much of the precedent he considered created by the 2013 appointment. His defence was that the Council of Ministers decision in respect of that appointment held good for all subsequent appointments. However, that proposition does not accord with the evidence of Mr Kilman, Mr Loughman or Mr Warsal. It also sits most uncomfortably with the budgetary issues that each appointment attracts, which require Council of Ministers approval. I did not accept this contention.

102. Paragraph 7 of Exhibit D also makes it plain that Mr Tabimasmas was advising the Supreme Court that subsequent to Order 5 of 2013 "... there were various other orders that were made by the Prime Minister with the approval of the Council of Ministers...". Given that Mr Tabimasmas admitted none of his appointments or variations of terms had gone before the Council of Ministers, this statement cannot be accepted as correct. It also undermines reliance on the 2013 appointment as being the touchstone for all future appointments.

103. In his final submissions, Mr Vosarogo submitted that there was, on his interpretation of section 3(1) of the OSA, no requirement in any event for prior Council of Ministers approval to

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be obtained. That cannot be a correct interpretation as the section reads, so far as it is relevant:

> **"3. Amendment of Schedule**
>
> (1) ....., the Prime Minister may with the prior approval of the Council of Ministers, by Order –
>
> (a) Add to, vary or replace the Schedule; ..."

104. It is apparent that the words "may with" are part of the whole phrase concerning Council of Ministers approval, and are not disjunctive. The whole phrase "...with the prior approval of the Council of Ministers" cannot be seen to be discretionary or optional. The meaning I ascribe to this piece of legislation is that the Prime Minister may add to, vary etc only with the prior approval of the Council of Ministers. In other words, without the prior approval of the Council of Ministers, it is impermissible for the Prime Minister to so act.

105. However, if that interpretation is incorrect, Mr Vosarogo's submission cannot be given weight as whether or not prior approval was necessary has nothing to do with the essence of the charge. Mr Tabimasmas made the assertion in his evidence before the Court – whether he required prior approval is beside the point. The crux of the matter is whether the assertion made was knowingly untrue and intended to mislead.

106. Mr Vosarogo further submitted that Mr Tabimasmas had been mistaken when making his assertion, relying on the statutory defence contained in section 12 of the Penal Code, which states:

> **"12. Mistake of fact, reasonable belief**
>
> A mistake of fact shall be a defence to a criminal charge if it consists of a genuine and reasonable belief in any fact or circumstance which, had it existed, would have rendered the conduct of the accused innocent."

107. The submission is wholly dependent on my assessment of Mr Tabimasmas' evidence. For the various reasons previously given, I do not accept Mr Tabimasmas' evidence of mistaken belief. I note further that such mistaken belief must also be reasonable before it can be given weight. To rely on one decision taken in 2013 but supposedly applying to all further appointments is unreasonable in my view, especially looking at the clear wording of section 3(1) of the OSA.

108. Further, nowhere in the sworn statement does Mr Tabimasmas set out that it was his belief. The language used makes it obvious that he was stating as a fact that he had obtained prior approval from the Council of Ministers prior to make his appointments and amendments to the Schedule. Given that his obligation was to provide accurate information to the Supreme Court so that the Court could properly adjudicate, it is reprehensible not to have apparently checked the statement prior to swearing the contents as true and correct.

109. Ignorance of the law, something frequently resorted to by Mr Tabimasmas in his evidence, is not a defence – see section 11 of the Penal Code. In any event, I do not accept that Mr Tabimasmas is deficient in his understanding of the relevant legal aspects to this case, which frankly are uncomplicated. His experiences of life, and bearing in mind that he served for a period of time as Minister of Justice, disqualify him to avail himself of such a claim.

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G. Result

110. I find the following facts proved beyond reasonable doubt:

- In April 2019, Mr Tabimasmas was fully aware that his sworn statement contained assertions of fact that were incorrect and therefore untrue, as there had been no prior Council of Ministers approval to the various appointments and variations made by him as Prime Minister.

- Mr Tabimasmas included the assertion three times in order to enhance the defence to the constitutional application which sought to have the post of Parliamentary Secretary declared unconstitutional. He was looking for the Court to validate the appointments.

- By providing untrue information, Mr Tabimasmas intended to mislead the Supreme Court. He intended that the Supreme Court accept his assertions, thereby hoping to add credence to the validity of the appointments as having the approval not just of the Prime Minister but also the Council of Ministers.

111. Accordingly, I find that all the legal ingredients of the charge have been proved beyond reasonable doubt.

112. As a result, I find Mr Tabimasmas guilty of perjury.

Dated at Port Vila this 16th day of December 2020
BY THE COURT

.....
Justice G.A. Andrée Wiltens