

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

Criminal
Case No. 20/952 SC/CRML

BETWEEN: Parmod Archary
Applicant

AND: Public Prosecutor
Respondent

Date of Hearing: 24 June 2020
By: Justice G.A. Andrée Wittens
Counsel: Mr D. Yahwa for the Applicant
Mr J. Naigulevu with Mr K. Massing for the Respondent
Date of Decision: 26 June 2020

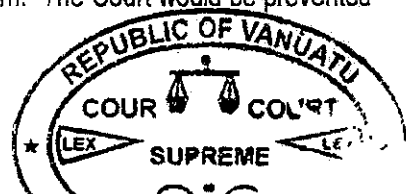
JUDGMENT

A. Introduction

1. This matter concerns an application to permanently stay Mr Archary's criminal prosecution currently underway in the Magistrate's Court. The prosecution was said to be an abuse of the process of the Court. Several bases for the application were put forward - all were opposed by the Public Prosecutor.
2. Immediately following the hearing, I orally indicated the application for a permanent stay was declined, and that written reasons would be subsequently provided. These are they.

B. The Law

3. This application for stay amounts to an attempt to end the case before any evidence is led. The effect of that would be that the public would be left in a position of not knowing the full extent of the allegations, nor the evidence that related to them. The Court would be prevented



from making an assessment of the merits of the matter; the process would be simply ended, with Mr Archary no longer being the subject of a criminal prosecution.

4. Accordingly, although the Supreme Court has jurisdiction in the right circumstances to make the orders sought, it is a remedy that is only rarely granted.
5. The onus is on the applicants to make out the grounds for their application. The test to be applied is on the balance of probabilities.
6. The authorities of *Attorney General's Reference (No 1 of 1990)* [1992] QB 630 and *Attorney General's Reference (No 2 of 2001)* [2004] 2 A.C. 72 describe the remedy as being available only in "...exceptional circumstances".
7. In terms of being satisfied this Court has jurisdiction to entertain this application, there is no need to look further than the authorities of *Connelly v DPP* [1964] AC 1254, *Moevao v Department of Labour* (1980) 1 NZLR 464 and *R v Horseferry Magistrate's Court ex p. Bennett* [1994] 1 AC 42.
8. This Court has a discretion to stay any criminal proceedings on the grounds of abuse where: (i) it would be impossible to give Mr Archary a fair trial; or (ii) where it would amount to a misuse of process because it offends the Court's sense of fairness and propriety to be asked to try Mr Archary in the circumstances of the particular case: see *R v Horseferry*.
9. The authority of *R v Derby Crown Court, ex p. Brooks* [1985] 80 Cr App R 164 determined a stay to be appropriate where the prosecution manipulated or misused Court processes for an unfair advantage, and in circumstances where the accused's preparation or defence was prejudiced by unjustifiable delay. The Court commented:

"The ultimate objective of this discretionary power is to ensure that there should be a fair trial according to law, which involves fairness both to the defendant and the prosecution."

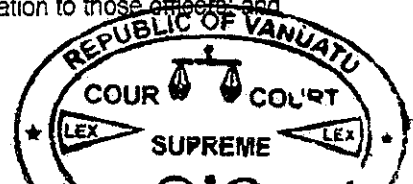
10. In general terms, it is for a prosecuting agency, not the Courts, to determine whether a prosecution ought to be commenced; and once commenced, whether it should continue to its natural conclusion: *Environment Agency v Stanford* [1998] C.O.D. 373.
11. There is a significant public interest in permitting criminal prosecutions to run their full course: *R v Crawley* [2014] EWCA Crim 1028. That is so even where the charges can be properly be described as something less than serious.

C. The Nature of the Charges and the Facts

12. The charges laid can be summarised as follows:

- (i) Improper Influence, contrary to s.48 of the Ombudsman Act

On 27 August 2019 Mr Archary obstructed officers of the Ombudsman's Office in advising VNPF line managers to not provide information to those officers; and

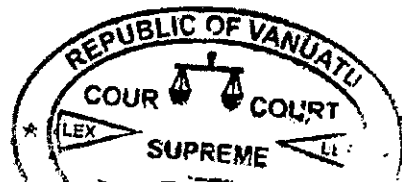


(ii) Preservation of Secrecy, contrary to s.28(1) of the Ombudsman Act

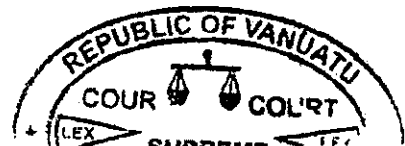
On 29 August 2019 Mr Archary disclosed a copy of a Search Warrant dated 25 August 2019 which related to an Ombudsman's Office investigation into VNPf mismanagement to Dan McGarry.

D. The Application

13. Mr Yahwa advanced a number of grounds for his application. He relied on his written submissions (x 2), and the 14 sworn statements in support of the application.
14. Mr Naigulevu relied on his written Response and 9 sworn statements filed in opposition to the application. I afforded him the opportunity of responding even though I did not need to hear from him.
15. I say immediately that I believe someone other than Mr Yahwa prepared the written submissions; I find it difficult to accept that Mr Yahwa drafted them himself. However, Mr Yahwa should have gone through and perfected them before attempting to speak to them in the course of argument. In my judgment, the poor quality of the submissions reflects the paucity of merit in the application.
16. It was submitted in support of the application that the Ombudsman's Office had not, as required, given Mr Archary prior notice of the investigation. Section 21(1) of the Ombudsman Act was cited as establishing this proposition. However, subsection (2) makes it plain that prior notice is not required to be given where the Ombudsman, on reasonable grounds, considers that to do so would interfere with the inquiry. The lack of prior notice accordingly cannot be a basis to support the application – the central contention is wrong in law.
17. It was further submitted that Mr Archary has not been given the opportunity to respond or reply to the allegations against him, as required by Article 62(4) of the Constitution. Also cited as support for this submission was Section 61(4) of the Ombudsman Act, which was then quoted. However, there is no such section in the Ombudsman Act. The quotation was pure fabrication. I consider the constitutional protection in Article 62(4) is aimed at ensuring fairness to those being investigated and publicly reported on. Mr Archary has the opportunity at his trial of responding to the allegations. There is no breach of his constitutional rights. This aspect also does not support the application for a stay.
18. There was complaint regarding a letter sent to Mr Archary by a member of staff at the Ombudsman's Office, which was described as "rude and nasty". Even if Mr Archary considered the letter to be such, that cannot either by itself or in conjunction with other matters be support for an application for a stay due to abuse of process. It is difficult to see, no matter how objectionable a letter might be, what prejudice could flow which would make a fair trial no longer possible. This aspect of the matter does not advance the case for a stay.

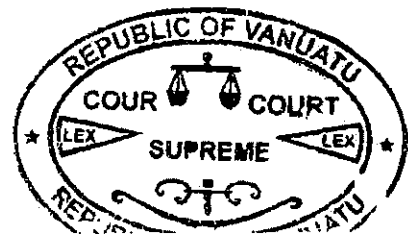


19. Mr Yahwa made great play of the fact that a Search Warrant was obtained as part of the Ombudsman's investigation, but not pursuant to section 24 of the Ombudsman Act. This was submitted to evidence an intention on the Ombudsman's part to not give Mr Archary prior notice of the investigation. The fact that the Search Warrant was sought pursuant to the Criminal Procedure Code ("CPC") is unexceptional – indeed Mr Naigulevu pointed out that section 55 of the Criminal Procedure Code clearly envisages persons other than police officers executing Search Warrants. The inference arising from this is that the Ombudsman may seek a Search Warrant under the CPC.
20. Mr Yahwa was unable to provide any authority, despite being repeatedly asked to do so, to the effect that the Ombudsman was prohibited from seeking Search Warrants except pursuant to the Ombudsman Act.
21. Additionally, Mr Yahwa's assumption as to the Ombudsman's motive is incorrect. An Ombudsman Act s.24 Search Warrant does not involve the prior giving of notice. Such a Search Warrant is available only in limited circumstances, one of which relates to another power of the Ombudsman to acquire evidence and/or compel attendance for interview, namely under a Section 22 Notice. Where there is a breach of such a notice, and other conditions are met, then an application for a s.24 Search Warrant is permissible.
22. If Mr Yahwa's submission was to be correct, then the Ombudsman would be required to issue a s.22 Notice, which would need to be breached and further conditions would need to be extant before the Ombudsman was able to apply for a Search Warrant. That cannot be correct.
23. Mr Yahwa's submissions in support of this contention also hold no merit.
24. Complaint is made that although the Search Warrant is addressed to Mr Archary, it was served on all the other managerial staff at VNPF. This submission is misconceived. The Search Warrant is not addressed to any one person, or even a group of persons. It does record satisfaction of the reasonable cause test as to suspicion of criminal conduct by Mr Archary and members of the Board of NVPF, but the document authorises the bearer of the document to enter VNPF premises and obtain documents. It also authorises the bearer to arrest, in the case of resistance or obstruction, Mr Archary, any VNPF Board member or NVPF manager, and even the Minister. There is no merit in this allegation – indeed in the circumstances to have not shown the Warrant to all who might be affected by it could be said to be unfair.
25. Mr Yahwa was critical of the fact that the Search Warrant appeared on FaceBook. He was unable to answer when asked for evidence to show that this was done by any member of the investigation or prosecution teams. He was also unable to explain what prejudice arose to his client arising from this which would mean that Mr Archary was unable to have a fair trial.
26. There was a submission that Mr Archary was unlawfully detained in the VNPF Conference Room during the execution of the Search Warrant. Complaint is also made that prior to this there was an unlawful meeting involving VNPF managerial staff at which the staff were



instructed to prevent Mr Archary's entry into the VNPF offices that day. These matters too were said to evidence an abuse of process.

27. I reject this submission. Whether there was such a meeting or not, Mr Archary did enter the VNPF offices. How it is said that the meeting was unlawful is left entirely to the imagination. Further, what occurred to Mr Archary during the search was not unique to him. Other VNPF personnel were also asked to allow the Ombudsman's Office staff to execute the Search Warrant, by keeping out of their way and waiting in the Conference Room. This was not a detention; nor was it unlawful. Mr Naigulevu pointed to the positive obligation on staff to co-operate which is set out in section 24(3) of the Ombudsman Act. The Search Warrant itself also indirectly reflects this in providing for the ability to arrest those who resist or obstruct.
28. Mr Archary considers himself to have been subjected to degrading treatment, apparently. He was not allowed to visit the bathroom unaccompanied; and he was humiliated in front of his staff. These matters cannot support an application for a stay on the basis of an abuse of process. There are other remedies available if Mr Archary wishes to pursue them.
29. Mr Yahwa also made submissions relating to the lack of a Search List being provided to his client. He maintains the police always provide such. In the absence of any suggestion that relevant information or material has gone missing this submission falls on barren ground.
30. Curiously, Mr Yahwa also submitted that there was non-available evidence. He took umbrage from the fact that the prosecution had not included the Search Warrant in the preliminary inquiry bundle. Despite that, there is no suggestion the information has been kept from him or his client – indeed, Mr Archary appended a copy of the Search Warrant to his first sworn statement. This evidence is plainly available, and if it is required, it is available to be produced at trial. This submission was unfathomable.
31. Mr Yahwa submitted that it was an abuse of process that the prosecution had unnecessarily delayed the hearing of evidence. Mr Naigulevu responded that only 2 hearings have been scheduled, and the second of those was adjourned due to the last-minute application for a stay being filed by Mr Yahwa. There is no merit in this point.
32. It was further submitted that the prevention of Mr Archary travelling for work purposes was a prosecution ploy evidencing an abuse of the process. This was submitted to have caused Mr Archary "hassle" and "inconvenience". Neither of those repercussions, if established, is sufficient to show prejudice to Mr Archary's right to a fair trial.
33. Mr Yahwa's other submissions are largely repetitive, and of little moment. I have not addressed every point as many of them relate to possible defences Mr Archary has to the charges. This decision is not considering the merits of the prosecution case in any way. The sole focus is to see whether a stay is appropriate.



34. The last matter to address is the charges. Initially Mr Yahwa had submitted they were defective in their wording. However, at the hearing he withdrew his objections to the manner in which the charges were framed. He was content with their present form.


E. Result

35. The application for a permanent stay of this prosecution case on the basis of abuse of process is dismissed. None of the grounds advanced to suggest there has been an unfairness in the process have been established on the balance of probabilities. Further, there is no evidence of any prejudice to Mr Archary, such that he is unable to have a fair trial.

36. This case is remitted to the Magistrate's Court for the trial to be heard. Bail for the applicant is continued on existing terms until then.

Dated at Port Vila this 26th day of June 2020

BY THE COURT


Justice G.A. Andrée Wilfens

