

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

**Criminal
Case No. 20/487 SC/CRML**

BETWEEN: Public Prosecutor

AND: Charlot Salwai Tabimasmass
Defendant

Date: 3 February 2021
By: Justice G.A. Andrée Wittens
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

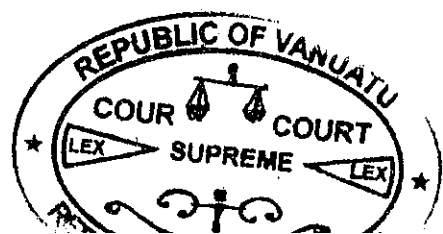
Sentence

A. Introduction

1. Mr Tabimasmass was found guilty after trial of one charge of perjury. Accordingly, he is to now be sentenced in respect of that charge.

B. Facts

2. In early 2019 a constitutional case (Constitutional Case No. 18/3481) was filed in the Supreme Court challenging the validity of the position of Parliamentary Secretary. The challenge was brought by 16 Opposition Members of Parliament and it listed as a Respondent to the case the then Prime Minister, Mr Tabimasmass, among others.
3. It was alleged that the establishment of the position 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 Tabimasmass, filed in opposition to the constitutional application.



5. Mr Tabimasmás' sworn statement was dated 22 April 2019, and was filed in the Supreme Court that same day. The sworn statement was part of the evidence produced to the Court, which made Mr Tabimasmás a witness; and it contained a number of assertions.
6. The assertion the subject of the charge, is the repeated use of the phrase "...with the approval of the Council of Ministers".
7. 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] 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]. The first appointment was stated to have been made by the then Prime Minister, Mr Sato Kilman.
8. 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:..."

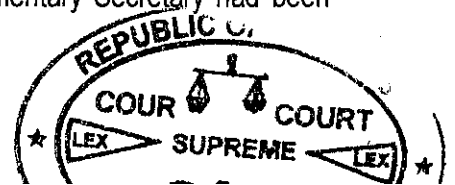
9. There are then listed 24 Amendment Orders to the OSA made between 2013 and 2018. A copy of each of those Orders was appended to the sworn statement.
10. Paragraph 9 of the sworn statement reads as follows:

"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 Tabimasmás] with the approval of the Council of Ministers, to establish the Office of the Parliamentary Secretary."

11. Paragraph 11 of Mr Tabimasmás' 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."

12. Mr Tabimasmás' sworn statement was tendered to the Supreme Court in opposition to the Constitutional Application seeking to strike down the position of Parliamentary Secretary. The position was important to the Government as a form of political patronage. Being able to offer additional employment benefits, over and above those of being a Member of Parliament, was a useful bargaining tool to secure support from individual Members of Parliament. Not only were there 13 Ministerial positions available, the advent of this new position had the considerable advantage of increasing the possible inducements that could be offered in return for supporting the Government. Mr Tabimasmás was aware of this, and he actively pursued 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.
13. For that reason I found that Mr Tabimasmás was anxious that the Court uphold the legality of the position of Parliamentary Secretary. His sworn statement was tendered to the Court to attempt to persuade the Court to find that the position of Parliamentary Secretary had been



lawfully created. The alleged approval by the Council of Ministers was therefore a significant factor for the Court to consider as Mr Tabimasm's sworn statement evidenced that the appointments were not made solely at the whim of the Prime Minister. Reading the language used in the sworn statement as every day common usage, the sworn statement made it plain that each and every such appointment had the support of the Council of Ministers.

14. Given that Mr Tabimasm admitted that none of his appointments or variations of terms had gone before the Council of Ministers, the sworn statement cannot be correct.

15. The conclusions the evidence drove me to were as follows:

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

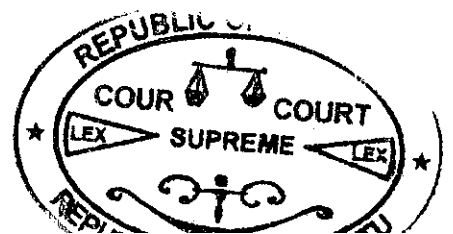
C. Sentence Start Point

16. The sentence start point is to be assessed by having regard to the maximum sentence available for this type of offending, and factoring in both the aggravating and mitigating aspects of the offending.

17. The maximum penalty for this type of offending is 7 years imprisonment.

18. I have had regard to precedent authority in relation to the following:

- In *Nisbet v R* [2017] NZCA 476 a number of factors were highlighted as impacting on the appropriate start point as follows:
 - the seriousness of the perjury when viewed in the context of the case in which it occurs;
 - the level of premeditation involved in the perjury;
 - the extent to which the perjury is maintained;
 - the motivation for the perjury; and
 - the harm caused by the perjury.

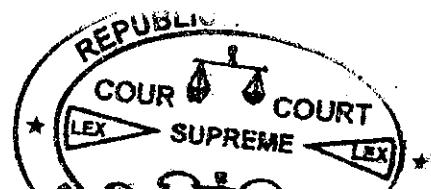


- The Court in *Nisbet* described perjury as a serious criminal offence which directly undermines the importance of complete candour to the proper administration of justice. The overriding sentencing principles attendant upon such offending were said to remain the need to denounce the offending and to deter others who might be tempted to similarly derail the justice system.

19. There are no mitigating factors to Mr Tabimasm's offending.

20. However, there are aggravating factors that need to be taken into account, as follows:

- At the time, Mr Tabimasm was the Prime Minister, a very senior position within Government with resultant high obligations to the community as to personal probity. His misconduct will accordingly inevitably have the effect of diminishing the standing of all political leaders within the community;
- The untruths in the sworn statement were addressing the very essence of the constitutional challenge, not some peripheral issue. Further, this was done with a view to deceiving the Supreme Court for political gain; thereby striking at both the legitimacy of the Government of Vanuatu and the integrity of the Supreme Court;
- The fact that the untruthful aspect of the sworn statement was thrice stated gives the offending a flavour of repeat offending. It is noted that even at the commencement of the trial Mr Tabimasm maintained that the sworn statement was entirely accurate and truthful. Accordingly, that was his position from April 2019 to late November 2020. Significantly, he maintained that to be the correct position throughout the constitutional case;
- Mr Tabimasm gave evidence that while giving instructions to his legal advisors, he instructed two State Law Office staff members to check official records from 2013 prior to his signing the sworn statement. That indicates the deliberateness of the inclusion of the untruths in the sworn statement, as well as a degree of premeditation on his part;
- The motivation for this perjury was to preserve the position of Parliamentary Secretary, such that Mr Tabimasm could continue to appoint Members of Parliament to that position as a legitimate exercise of his personal patronage and thereby extend his tenure of power within Government. As well as maintaining a stable Government, what Mr Tabimasm did was for his personal benefit, in terms partly of remuneration, but also, significantly, in terms of his ability to maintain his position as Prime Minister; and
- Mr Tabimasm was not averse to casting blame on others for what transpired. That was inappropriate as the responsibility for the inaccuracy of his sworn statement was entirely his. Due to being Prime Minister and therefore Chair of the Council of Ministers' meetings, what was contained in the sworn statement were



matters of Mr Tabimasmas' personal recollection. There was no need for any checking of a legal nature to be done.

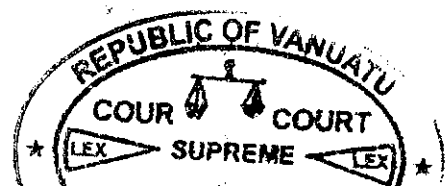
21. The sentence start point I adopt for this offending is 4 years imprisonment. In doing so, I reject as manifestly excessive the prosecution submissions that the end sentence should be set at more than 4 years imprisonment. That would be unduly harsh.

D. Personal Factors

22. Mr Tabimasmas' relevant personal factors are as follows:

- Mr Tabimasmas is a Chief from Pentecost. He is now almost 59 years old. He resides with his wife. They have 3 grown-up children of their own as well as an adopted daughter. They have 4 grandchildren. Before entering politics, Mr Tabimasmas was an accountant by occupation. He has been in Parliament as an elected member for some 18 years. He is the family's sole breadwinner, and contributes significantly to members of the extended family especially in terms of paying the fees for their continued education.
- He has no previous criminal convictions.
- Mr Tabimasmas is on medication for various health issues including Hepatitis B, diabetes, high blood pressure, high cholesterol and the aftermath of a mild stroke in 2017. He is also concerned about his wife's health as she also suffers from diabetes.
- Mr Tabimasmas will inevitably suffer a significant fall from grace. Having been the only Prime Minister to date to hold power for a complete 4 year term, he succeeded in being re-elected for the current Parliament but as a member of the Opposition. Following his being found guilty it is likely that politics will no longer be an available means of supporting himself and his family. He will revert to simply being a member of the Community, with less standing and having to live with a degree of notoriety.
- Mr Tabimasmas has made a very large and valuable contribution to Vanuatu by dint of his political work. He has served as the 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 was Prime Minister from 2016 for 4 years, and was held in high public regard.
- Mr Tabimasmas is reported to be deeply sorry and apologetic. He has apologised to the people of Vanuatu for his "wrong doing" at two public reconciliation ceremonies in which he expressed his remorse for his actions. He has very strong support from fellow Chiefs, elders in the community and numerous church leaders. He has produced a very large number of testimonials, all of which speak highly of him and his personal traits.

23. For these various factors the sentence start point is reduced by 3 months for his personal circumstances, a further 4 months for his lack of previous convictions, a further 6 months for his



fall from grace, and 8 months for his valuable contributions to the people of the Republic of Vanuatu.

E. Sentence:

24. The end sentence that I impose for this offending is term of 2 years 3 months imprisonment.

F. Suspension:

25. Section 57(1) of the Penal Code requires the Court to consider whether the end sentence should be imposed immediately or be suspended. The Court has jurisdiction to suspend all or part of the sentence if immediate incarceration is not appropriate:

- In view of the circumstances,
- In particular, the nature of the crime, and
- The character of the offender.

26. In this context I also have regard to section 37 of the Penal Code which mandates the Court to have regard to the possibility of keeping offenders within the community "...so far as that is practical and consistent with the safety of the community". This proposition sits comfortably alongside the law in other jurisdictions.

27. On the one hand this offending is serious, and exhibits blatant dishonesty. Further, the repeat nature of the offending points to a suspension of any part of the sentence as not being appropriate.

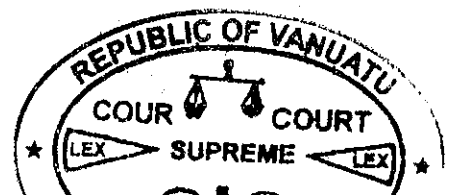
28. On the other hand, Mr Tabimasmass is no threat to other members of the community, and he has not previously offended. He has made a significant and widely recognised contribution to the Republic of Vanuatu. It is highly unlikely he will again offend in such a manner, as given the end sentence that must be imposed he will no longer be a Member of Parliament. Additionally, I take into account that his fall from grace is a significant factor and a punishment in itself. In my view his conduct which resulted in this conviction can properly be seen as an isolated error of judgment, although a very serious error.

29. Having regard to all the circumstances, I am satisfied that a suspended sentence, taking into account Mr Tabimasmass' previous standing within the community and the public interest this case has attracted, will act as a real deterrent to others.

30. I further consider that there is sufficient denouncement of this offending as a result of Mr Tabimasmass no longer being able to continue to be a Member of Parliament.

31. I consider the character of Mr Tabimasmass to be pivotal in determining whether or not to suspend the sentence.

32. Accordingly, I am prepared to exercise my discretion and to suspend the sentence of 2 years 3 months imprisonment for a period of 2 years. Mr Tabimasmass must remain offence-free for that period in order to avoid incarceration for this offending.

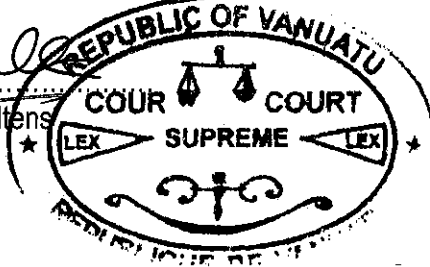


G. Other

33. Mr Tabimasma has 14 days to appeal if he disagrees with this sentence.

**Dated at Port Vila this 3rd day of February 2021
BY THE COURT**

Gendai Ull
.....
Justice G.A. Andree Wiltens



The seal of the Republic of Vanuatu Supreme Court is circular. The outer ring contains the text "REPUBLIC OF VANUATU" at the top and "REPUBLIC OF VANUATU" at the bottom. Inside the ring, the words "COUR" and "COURT" are positioned on either side of a central scale of justice. Below the scale, the word "SUPREME" is written in a larger font, flanked by two triangles containing the word "LEX". At the bottom of the seal, there is a decorative flourish.