IN THE COURT OF APPEAL OF THE REPUBLIC OF VANUATU
(Appellate Jurisdiction)

Criminal Appeal CASE No.12 of 2002

BETWEEN: PUBLIC PROSECUTOR

Appellant

AND: HOLI SIMON, API JACK MARIKEMPO, PAUL WILLIE REUBEN, ERICK PAKOA

Respondents

Coram: ***Chief Justice Vincent Lunabek***
Justice Bruce Robertson
Justice John von Doussa
Justice Daniel Fatiaki
Justice Oliver Saksak

Counsels: *Mr. M.M. Hobart for appellant*
Mr. John Malcolm for Holi Simon & Erick Pakoa
Mr. Bill Bani for Api Jack Marikempo and Paul Willie Reuben

Date of hearing: *5th May 2003*
Date of judgment: *9th May 2003*

JUDGMENT

These 4 respondents and 4 other people, were arraigned on 2nd October 2002, on the following charges:

Count 1 – Inciting Mutiny

That the defendants between 4th July, 2002 and 31st August, 2002 at Port-Vila, being police officers who owed allegiance to the Republic, did, for mutinous endeavour to seduce other member of the police force from their duty and allegiance to the Republic, and did incite such persons to commit an act of

mutiny. The charge was laid in accordance with Section 60 of the Penal Code Act (CAP.135].

In the alternative:

Count 2 – Mutiny

That the defendants, between 4th July, 2002 and 31st August, 2002 at Port-Vila, did take part in a mutiny, or intended mutiny amongst the Force and knowing of any mutiny amongst the Force did not use their utmost endeavours to suppress such mutiny and knowing of any intended mutiny amongst the Force did not without delay give information thereof to their superior officer.

This charge, which was an alternative charge to Count 1, was laid under Section 46 of the Police Act [CAP.105].

Count 3 – Kidnapping

That the defendants on the 3rd August, 2002 at Port-Vila, did by force compel Hamilson Bulu, Nadine Alatoa, Michael Taun, Mael Apisai, Seule Takal, Ravei Nikahi, Noel Amkory, Philip Natato, Daniel Bangtor, John Mark Bell, Anatol Coulon, Obed Nalau, Rex Bovanga, Ben Bani, and Jessie Temar, to go from their place of residence to the Port-Vila Police station.

This Charge was laid under Section 105 of the Penal Code Act [CAP.135].

Count 4 – False Imprisonment

That the defendants did on 4th August, 2002 at Port-Vila without lawful authority arrest, detain and confine Hamilson Bulu, Nadine Alatoa, Miachael Taun, Mael Apisa, Seule Takal, Ravei Nikahi, Noel Amkory, Philip Natato, Daniel Bangtor, John Mark Bell, Anatol Coulon, Obed Nalau, Rex Bovanga, Ben Bani and Jessie Temar, against their will.

This charge was laid under Section 118 of the Penal Code Act [CAP.135].

The trial took place in the Supreme Court at Port-Vila between 18th November and 4th December 2002 before His Lordship Justice Coventry.

At the conclusion of the prosecution evidence the trial Judge ruled that there was insufficient evidence to sustain any of the charges against one of the accused and he was at that point discharged.

The Judge then heard the defence evidence. Each of the then seven accused gave evidence.

In the case of 3 accused the Judge was not satisfied beyond reasonable doubt of their involvement in the offending alleged in the charges against them and they were each found not guilty on each count.

The 4 present respondents were all convicted on each of the counts and on 5th December 2002, each was sentenced to 2 years imprisonment concurrent on all counts and the sentences were suspended for 2 years.

The appeal was initiated by the Public Prosecutor on the basis that the sentences imposed on the 4 men were manifestly inadequate.

Subsequently there was a cross-appeal by each of the four men against their convictions.

The appeals against conviction were maintained by Holi Simon and Erick Pakoa, but at the hearing before us the appeals against conviction by the other two respondents were abandoned.

As is to be seen in the setting out of the charges above, counts 1 and 2 were presented by the prosecution as alternatives. The primary Judge appears to have overlooked that fact and entered convictions on both counts 1 and 2.

Mr. Hobart responsibly accepted that on the basis that he had sought conviction on only one or the other he could not maintain both convictions. Accordingly, by consent, the appeals of each of these 4 men are allowed to the extent that all convictions on count 2 are quashed.

Mr. Malcolm's appeal against conviction on behalf of his two clients was heard first. He contended that the Court should not have been satisfied beyond reasonable doubt that anyone had been inciting mutiny, or that there had been kidnapping or false imprisonment, but that if all or any of these offences were committed, then they were not committed by either of his clients.

In the early hours of the morning of 4th August, 2002 the Commissioner of Police, Mael Apisai was arrested.

Subsequently, fourteen other citizens were also arrested including the Attorney General, the Chairman and members of the Police Service Commission, various persons who had been applicants for the position of the Commissioner of Police, the President's Private Secretary, the Prime Minister's Private Secretary, and the Police Force's Legal Officer.

The former Police Commissioner had retired during 2001. The respondent Api Jack Marikempo was Acting Commissioner until March 2002. Subsequently after a Court challenge to the manner of the Acting Commissioner's appointment, Holi Simon became Acting Commissioner until 19 July 2002 when the Police Service Commission appointed Mael Apisai as the permanent holder of the office.

Holi Simon thought he had front running for the position and was indignant when he was not appointed. On the 20 July he made a written official complaint addressed to the police alleging illegal practice and irregularities in the selection process of the new Police Commissioner and asking for police action. The letter was specifically addressed to the respondent Erick Pakoa who was the District Commander Southern. This was passed on to Paul Willie Reuben another of the respondents who was Assistant Commissioner (Crime) at the time.

About the same time, Holi Simon filed a civil proceeding in the Supreme Court seeking judicial review of Mr. Mael Apisai's appointment and for an Order that his appointment be quashed.

The prosecution case was that Paul Willie Reuben who was the Assistant Commissioner (Crime) was asked by Api Jack Marikempo who was the Commander of the Mobile Force to draw up a draft of Operation Procedure 2002. This was a snap operation Order. No prior operation warning was issued. On the evening of 3 August these Orders were formalized, signed by Api Jack Marikempo and the operation was put into effect in the early hours of the next morning.

The prosecutor's contention was that each of these men were knowingly and actively involved in a joint criminal enterprise in that they first, were ignoring their sworn responsibilities and duties as senior members of the Police and inciting others to take action outside the law. Secondly, they were parties to the kidnapping and false imprisonment of the 15 various individuals who were taken from their homes and into custody on the 4th August.

This, as is so often the case in situations of this sort, was a case where the Court was invited to draw inevitable inferences from the total circumstances. The prosecution contended that it must have been obvious to all who were involved that what was being undertaken was manifestly unlawful. These officers

were planning an operation to arrest a variety of people who had been associated (no matter how slightly) with the process leading to the appointment of the new Police Commissioner. It was clearly a case in which a net was to be flung out and people dragged in who were to be interviewed. If anything emerged from the interview they could be prosecuted. The suggestion in the oral discussions in the group was that there may have been a seditious conspiracy.

The primary Judge found that was a mutiny in that police officers, subject to the discipline and authority of the Police Force, acted collectively in defiance and disregard of that discipline and authority.

The primary Judge found that Holi Simon had ignored proper instructions for him to meet with his new Police Commissioner and make a formal handover to him and had acted in defiance and disregard of his clear responsibility as a member of a disciplined Force.

There was no argument but that all the arrests were made without warrant as they could be for the cognizable offence of seditious conspiracy. But the Judge found that there was no evidence, no document which could support the arrest and nothing but rumour and vague suspicion. He found that vague suspicion formed itself into a belief in the existence of a conspiracy in the minds of some senior officers. When that was coupled with the rumour of the proposed suspension of senior officers, and the possibility of the moving in of the new Police Commissioner's men, plus the idea that a further 34 or 35 would be suspended, the concept of an operation to arrest those who had anything to do with the appointment was formed and then carried out.

The Public Prosecutor was not approached with regard to the proposed operation. The Force Legal Officer was not advised. People who in some peripheral way had been touched by or associated in anyway with the

appointment and swearing-in of Mr. Mael Apisai were included in the net. Other applicants for the post of Commissioner were even arrested.

There was no doubt a strongly felt belief that the appointment process of Mael Apisai was defective. The Court found that that was the case at a later stage, but that provided no justification or excuse for this high handed and unlawful intrusion into the lives of innocent women and men.

The Judge said:-

"It was the duty of those senior and experienced officers to look at the law, check the correct procedures, ensure the evidence existed, to form the basis for an operation and arrests before drawing up and launching an operation. They failed to act in accordance with the powers and authority vested in them and in accordance with the law. They arrested and imprisoned the Commissioner without any proper basis for doing so. There is no evidence of any attempt to see in confidence the Minister of Internal Affairs or the Prime Minister, about their concerns before the operation was launched. There is evidence that some senior and junior members of the force queried the legality of the operation. It was an action partly taken to forestall their own impeding discipline or suspension. I do not find on the evidence it has been shown that it was "a grab for power".

It was known by police officers and the public that a proper civil challenge was being made to the process of appointment. Those involved did not wait the few days for that case to be heard. The consent of Public Prosecutor was never obtained for the prosecution of charges of seditious conspiracy, as is required by Section 67 of the Penal Code."

In all of these maneuvers there was the shadowy presence of a private lawyer. The trial Judge found that the full extent and involvement of this man was

not really known but there can be no doubt that he behaved in a way which did no credit to himself or to his profession.

The present day use of the somewhat archaic word "mutiny" in a legislative enactment tends to conjure up a picture of sailors challenging the acts of a tyrannical swash buckling old captain. It rather too easily deflects from the essential elements of serious criminal behaviour which is encompassed by this offence in law.

A definition which was accepted by counsel and not challenged in the appeal is found in a pretrial ruling on 18 November 2002 Justice Coventry held:

"Whilst not seeking to lay down an exhaustive definition for the purposes of this case, the elements of mutiny would appear to be that-

(a) the defendants were subject to a defined discipline or authority, such as the police, the military or within a prison;

(b) two or more were acting together or collectively;

(c) in insubordination or defiance or disregard of that discipline or authority or by refusing to obey it."

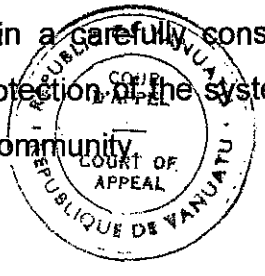
No one argued that each of the 4 persons now before the Court were not senior members of the Police subject to a defined discipline or authority. The evidence clearly demonstrated that two or more people acted together. The only matter in contention was the third element.

The primary Judge concluded, and we can see no basis upon which this Court could reach a different conclusion, that those police officers who were involved in the master minding of the operation were acting with insubordination or defiance or disregard of the discipline under which they operated.

Apart from the written instructions to Holi Simon to appear before the new Commissioner (which were ignored) it is true that there were not a rash of specific directions which were not followed. What was occurring was much more insidious. A group of people decided that the appointment process for the new Commissioner was not to their liking. We use that phrase advisedly because the evidence underlying the findings of the primary Judge suggested there was a mixture of motives. There was undoubtedly frustration, disappointment, anger and despair that the preferred candidate of this group of people had not been given the job. Secondly there was genuinely, passionately, and obsessively held belief that the process by which the new Commissioner had been appointed had been flawed, that it had not been in accordance with the law and the proper steps had not been taken.

Those motivations provided no justification for a group of Senior Police Officers taking the law into their own hands.

It was well known in the police and in the community that there had been a complaint made which could be properly and professionally investigated. Investigation meant carrying out well regulated police processes. It means collecting material so that there is a proper evidential basis for the apprehension of citizens of any rank or station. The rule of law in a civilized community means that nobody's liberty is interfered with unless and until there is a proper foundation. The fact that some potential offences are so serious an arrest without warrant can be justified, merely underlies the increased responsibility to ensure that such extraordinary power is not exercised except where there is available an unequivocal and cogent evidential justification. The clear obligation to obtain consent when dealing with some particularly serious matters from someone independent of the police is another building block in a carefully constructed system which ensures those who should enjoy the protection of the system can be guaranteed proper respect for every citizen in the community.



What is clear is that during July and the beginning of August there was a careful plan and operation to subvert all of that. A group of people for whatever reasons considered themselves to be above the law, to know best and who had determined to take the law into their own hands.

There is no place for private lawyers acting covertly as advisers to the police in respect of such activity. In this case regrettably the lawyer who was engaged appears to have failed in his clear obligation to restrict himself to the civil action of Holi Simon in which he was legitimately engaged. In our judgment the primary Judge was extraordinarily merciful in his assessment of that lawyer's action. Much more trenchant criticism could have been made of him which would have withstood challenge in this Court.

If these four senior police officers are to be believed when they say that they were acting in accordance with their duty and responsibility as members of a disciplined and professional Police Force, then we must ask why were they meeting on the beach of Teouma, briefing on the Teouma bridge, orchestrating the arrest of innocent citizens in the small hours of the morning and willfully misleading the Minister of Internal Affairs about the need for firearms to be issued?

The fundamental flaw in Mr. Malcolm's argument is that he wanted the Court to view a whole raft of items in isolation, to observe them through a narrow lens, to ignore their context and background and to conclude from this artificial process that a non criminal explanation for each act or omission might exist.

The law, and the Courts which enforce the law, operate within the real of world. In other words surrounding material is considered not for its prejudice but because only with it can individual and isolated matters have proper meaning and their true nature determined.

In this case furthermore it was clearly known by those who created, arranged and implemented the snap operation that there was within the Court system the civil challenge to the appointment of the new Commissioner. The Courts in this country have a proud record of a fearless, sensible, sensitive and robust commitment to ensure that the rule of law and adherence to demands of proper process and integrity are maintained in all aspects of public life. Very shortly after this deplorable incident when the Court heard an application for judicial review it had declared that the process for appointing the Police Commissioner had miscarried and must be repeated. Later in the year this was re-enforced by this Court in an appeal on the same issue. The history of this Republic is replete with striking examples of the Court's readiness and ability to respond when unlawful, unfair and unreasonable behaviour is established.

Whether it was obsessional arrogance, impatience or blind zeal which permeated the operation, we are left with no doubt that the decision to arrest the Police Commissioner together with all others who had participated in a minor, major or incidental way in his appointment, was not merely misguided and in gross disregard of proper considerations, but manifestly and totally unlawful. It was a naked usurpation of power by taking the law into their own hands without justification or excuse.

We are not in any way persuaded that the fact that the rumour mill was suggesting that there were going to be suspensions or even dismissals by the new administration, places any different complexion on the situation. There is nothing to suggest that such action was either serious or imminent. The Courts in any event would have been available to respond with vigour and strength if that had happened in a way which lacked legal force and integrity.

Nobody in a democratic community founded on the rule of law, can ignore proper processes and adherence to regulation and statute. To do so is to incite mutiny. To put in operation this unlawful plan and deprive innocent citizens of

their liberty was kidnapping. To hold them without proper cause was false imprisonment.

There is a somewhat anomalous situation which emerges. To incite mutiny attracts a potential penalty of life imprisonment, whereas a police officer who actually commits mutiny under the Police Act attracts only a potential penalty of 5 years imprisonment. It is an interesting dilemma but not a matter which goes to the question of whether a crime has been committed. Here was a group of people within the Police Force who were clearly ignoring the necessary control and discipline structure which are essential in the Police Force. This was mutinous behaviour.

The next issue is whether each or all the 4 men were actively and knowingly involved in the commission of the three relevant offences. Mr. Malcolm argued that the law relating to joint criminal enterprise as defined in Osland v. R. 1998 (187) CLR 316 has no application in this Republic of Vanuatu. We do not agree.

We accept his submission that the Criminal Procedure Code [CAP.136] and the Penal Code [CAP.135] provide the basic criminal law in this country. Counsel argued that as no Section is headed as criminal enterprise there is no such concept. We find this argument without substance.

The point is amply covered by Section 31 of Penal Code dealing with co-offenders. The issue was comprehensively discussed in ***Criminal Appeal No.2 of 1997 in the case of Samson Kilman & Others (Appellants) v. the Public Prosecutor (Respondent).***

"The doctrine of common purpose which we consider formed the basis of the reasoning of the trial judge has recently been considered by the High Court of

Australia in McAuliffe v. The Queen (1995) 183 CLR 108; 130 ALR 26. The High Court, in a joint judgment, said at CLR:

The doctrine of common purpose applies where a venture is undertaken by more than one person acting in concert in pursuit of a common criminal design. Such a venture may be described as a joint criminal enterprise. Those terms – common purpose, common design, concert, joint criminal enterprise – are used more or less interchangeably to invoke the doctrine which provide a means, often an additional means, of establishing the complicity of a secondary party in the commission of crime. The liability which attaches to the traditional classifications of accessory before the fact and principal in the second degree may be enough to establish the guilt of a secondary party; in the case of an accessory before the fact where that party counsels or procures the commission of the crime and in the case of a principal in the second degree where that party, being present at the scene, aids or abets it commission: see Giorgianni v. The Queen (1985) 156 CLR 473. But the complicity of a secondary party may also be established by reason of a common purpose shared with the principal offender or with that offender and others. Such a common purpose arises where a person reaches an understanding or arrangement amounting to an agreement between that person and another or others that they will commit a crime. The understanding or arrangement need not to be express and may be inferred from all the circumstances. If one or other of the parties to the understanding or arrangement does, or they do between them, in accordance with the continuing understanding or arrangement, all those things which are necessary to constituted the crime, they are all equally guilty of the crime regardless of the part played by each in its commission: cf R v. Lowery and King [No.2] (1972) VR 560 at 560, per Smith J.

Not only that, but each of the parties to the arrangement or understanding is guilty of any other crime falling within the scope of the common purpose which is committed in carrying out that purpose. Initially the best of what fell within the scope of the common purpose was determined objectively so that liability was

imposed for other crimes committed as a consequence of the commission of the crime which was the primary object of the criminal venture, whether or not those other crimes were contemplated by the parties to that venture: Mansell and Hebert's Case (1556) 2 Dyer 128b [73 ER 279]; Ashton's Case (1698) 12 Mod 256 [88 ER 1304]; R v. Radalyski (1899) 24 VLR 687; R v. Kalinowski (1930) 31 SR (NSW) 377. See generally Smith, a Modern Treatise on the Law of Criminal Complicity (1991), pp 209-214. However, in accordance with the emphasis which the law now places upon the actual state of mind of an accused person, the test has become a subjective one and the scope of the common purpose is to be determined by what was contemplated by the parties sharing that purpose: see R v. Johns [1978] 1 NSWLR 282 at 287-290, per Street CJ.

It is sufficient to make one of the parties sharing the common purpose guilty of an offence committed by another of the parties sharing the common purpose that the offence must have been foreseen as a possible incident of the common unlawful enterprise: see Chan Wing-Siu v. The Queen [1985] AC 168 and Hui Chi-Ming v. The Queen [1992] 1 AC 34 at 49-51."

Before us the respondents Api Jack Marikempo and Paul Willie Reuben accepted their involvement and did not pursue this ground of appeal. It was however vigorously advanced on behalf of Holi Simon and Erick Pakoa.

As far as Mr. Simon is concerned the central finding of the trial Judge was that he was satisfied beyond reasonable doubt that Mr. Simon was a prime mover of a mutiny in that by his words and actions he incited others to act with mutinous intent.

The Judge basically rejected the evidence of Holi Simon that once he had made his complaint and commenced his civil action he removed himself entirely from the situation and concentrated on his proposed civil case. That evidential

position had to be weighed within the total context. We have no difficulty in understanding why the Judge who heard and saw this witness did not accept this contention.

It is clear that the list which was drawn up of the people who were to be dragged in by Snap Operation was a list which was influenced by Holi Simon. If there was any room for uncertainty as to his position it was totally put to rest first in the manner which Holi Simon rose from his bed in the small hours of the morning of the 4th August and proceeded to Vansec House because he had been told by others officers that he might be needed. It is simply unbelievable that a man who had been the Acting Police Commissioner would have blindly wandered into this situation when requested by fellow senior officers without demanding to know what they were doing? Why they were doing it? How they were doing it? And the justification for what was occurring. It is potent evidence of his clear involvement in the matter. If anyone had still been left with any question mark over the true position then looking at the manner in which he behaved in television interviews and in the manner in which he described to police officers in Santo what had occurred would remove any doubt.

Police unity, police toughness and police discipline do nothing to assist this appellant. There was no other logical inference but that he was fully aware and agreed with what was happening.

The Judge's conclusion was:

"I am satisfied beyond reasonable doubt he was a prime mover in this mutiny. By his words and actions he incited others. There was no proper lawful basis for the arrests and he knew that and as such they amounted to kidnapping followed by false imprisonment. I find him guilty and convict as charged of all four counts."

There has been nothing demonstrated before us which suggested that this was not a conclusion which was amply available to the trial Judge and nothing has been urged before us which suggests we would be justified in interfering with it. Accordingly Holi Simon's appeal against conviction on the three remaining charges are dismissed.

The other respondent contesting his conviction was Erick Pakoa. He has been a policeman for 20 years holding the rank of Superintendent and Head of Southern Command. The heart of his case was the contention that he was bound to obey the command of the person to whom he reported, who was Paul Willie Reuben Abel the Acting Commissioner of Police (Crime). As with Mr. Holi Simon the primary Judge found that on issues which were embarrassing or revealing, this respondent was vague in his evidence. He accepted that he asked his investigator George Towmey to proceed with Holi Simon's complaint. There was delay because of Independence Day celebrations and the fact that there was a degree of unease and volatility in the community following the imprisonment of a former Prime Minister.

Mr. Pakoa held the line that he received the Snap Order for Operation Procedures from Paul Willie Reuben signed by his superior Api Jack Marikempo and he was obliged to obey.

The Judge clearly rejected this position and was influenced by the manner in which this respondent behaved during the critical 48 hours and he concluded:

"I am satisfied he was a party to those offences. He was closely involved with the investigation and could ascertain and know how much or how little material there was to base the operation upon. His behaviour at the police station on the morning of 4th August was of an angry man, not a professional policeman carrying out orders. He specifically closely associated himself with the operation in the days that followed. He remained defiant. The suggestion of only following

orders came later. He said in clear terms that if anyone "touches my officers" then action will be taken against them. Marikempo said he signed the Snap Order at 9PM on 3rd August. Pakoa was giving his briefing at 8PM. That was at Teouma bridge and not at the police station. Some senior and junior members of the force were anxious about the legality of the Operation. Erick Pakoa had greater access than nearly everyone to the material which would decide that. I am satisfied beyond reasonable doubt that Erick Pakoa was an important part of this mutiny. He incited others by his actions and commands and he was necessarily a party to the kidnapping and false imprisonment."

Nothing in that reasoning is demonstrated as being capable of challenge. It is in our judgment an inevitable inference from the totality of the evidence. Any other conclusion would be naïve, blinkered and quite unrealistic.

Just as with the position of Mr. Holi Simon there are substantial indications that they are behaving now like those who close their eyes and ears to what is obviously occurring around them. When particular acts and omissions are looked at in context then innocent explanation for each part alone becomes artificial and unworldly.

These two men were, in their own particular ways, clearly on a mission. There was a group who had decided that the existing Commissioner was to be removed. They were prepared to take the law into their own hands to achieve that end. It is a nonsense to suggest that this particularly senior officer was in all the circumstances merely following orders which were not manifestly unlawful. Section 22 of the Penal Code could provide him no assistance and similarly Section 12 was of no avail.

We are satisfied that Mr. Pakoa also was properly convicted of each of the three counts.

The matter which has exercised us substantially is the prosecutor's submission about the inadequacy of the sentence..

We have given the matter the most anxious consideration. As Mr. Hobart properly noted where there is an appeal against sentence by the prosecution the Court of Appeal will only interfere if there has been the most serious default in the adequacy of the sentence imposed. There is, and must always be, a substantial area of sentencing discretion available particularly to a Judge who has heard and seen witnesses. In this case the primary Judge was involved with the entire matter for some two and a half weeks. We recognize and respect the position of that Judge who had advantages we cannot have.

A fundamental issue in this case must be the need for general deterrence. The responsibility of the Court to condemn totally unacceptable acts and omissions is paramount.

However well motivated these men might have been, there can never be any justification for anyone in a free and democratic society taking the law into their own hands. After their years of service, training and discipline in the Police each of these men knew that they were bending the rules. There is nothing more corrosive or damaging in society than that sort of behaviour by police officers.

On the other hand, it is to be acknowledged that their breach and error of judgment was not at the most serious end of the spectrum. The most significantly mitigating factor is that within the day of this illegal arrest and false imprisonment, each of the people who had been unlawfully acted against was taken to a Court. Thereafter none of the responents, or those who they were controlling and supervising, sought to interfere in any way with the proper processes of the law. In other words there was not any endeavour to subvert the processes of justice apart from initiating this wrongful and quite unjustified action on the particular day.

These are men who have served well and loyally over many years in the Police. Because of their mistake and serious misjudgment in this matter they have almost inevitably brought their police careers to an end. We specifically stood the matter down to obtain full instructions as to the effect on them of these convictions. We are advised that since they were charged, they have been suspended on half pay.

It is clear that there will be internal discipline proceedings against them. They have a series of rights of appeal including to the Minister because of their seniority. In the light of the way in which other cases had been dealt with, it is virtually inevitable that each will be dismissed from the Police because of this behaviour. Accordingly they will lose rights and privileges attaching to their positions and will be severely disadvantaged. They will have no entitlement to severance, superannuation, retirement or other benefits which would have been their right had they disengaged voluntarily or in a lawful way.

It is also to be considered in the balance that they were given legal advice although that was clearly wrong and irresponsibly provided.

We are aware that there was a custom ceremony involving the issues in this incident which requires consideration also. However as the Public Prosecutor noted before us there has been no sign of individual contrition regret or remorse by these men at a personal level. They demonstrate defiant self justification.

As in any criminal situation their position must be weighed alongside the effect upon their victims. Although the immediate interference with their liberty was for something in the order of 20 hours, the long term consequences including the recurring nightmare remains. The victims continuing apprehension about future events is not to be minimized or ignored. As well the integrity of the

rule of law is a vital factor which has to be recognized particularly by police officers whose sworn duty is to maintain the law.

The Court is particularly concerned that this is the second time within a period of a few years that police officers have taken the law into their own hands. The previous occasion was the kidnapping and taking from Efate for some hours of the then President of the Republic. It was by a group of much more junior officers than these men. After conviction they were given suspended sentences. This Court heard an appeal in respect of the convictions but nobody raised before the Court of Appeal the issue of sentence.

There should be no misapprehension that because people have what they misguidedly think is good cause, the Courts will countenance such behaviour or excuse people who act unlawfully. Any person within this country who takes the law into their own hands should assume, that the inevitable response will be a loss of liberty.

The country has a long and proud history of adherence to the rule of law; of Courts which have steadfastly worked for its maintenance and of citizens with a healthy respect for the Courts decisions. There are clearly available avenues of redress for those with a grievance. These have been shown to work. That is the only way that matters can be challenged by those who perceive injustice or unlawfulness by people in high or low places.

We are of the view that the two year sentence imposed was a merciful response to the seriousness of the offending but we have not been asked to reconsider its length. The critical issue has been whether the suspension of that sentence can be justified for all or any of these men. There is always a concern about the possibility 5 months after an initial sentencing of requiring a term of imprisonment to be served. It can have the potential to be destabilizing and can make people who have behaved like thugs appear as martyrs.

Even allowing for the strict rules which apply to appeals by the Public Prosecutor, we are of the view that suspension makes the sentences manifestly inadequate. Every citizen and particularly every police officer must understand that any dereliction of duty, or challenge to the disciplined command of their Force or any taking into their own hands their approaches to the enforcement of the law, will lead to actual time in prison. We are of the view that these men are equally culpable and we are not willing to differentiate between them.

Leave to appeal against the sentences is granted and the orders for suspension are quashed in each case.

Because of the technical issue the appeals against conviction in respect of count 2 are allowed but the appeals on all of the other 3 counts are confirmed.

The four respondents will be taken into custody immediately to serve the two year sentences.

Dated at Port-Vila this 9th day of May 2003

BY THE COURT

.....
Vincent LUNABEK CJ

.....
J. Bruce ROBERTSON J

.....
John von DOUSSA J

REPUBLIC OF VANUATU COUR D'APPEL COURT OF APPEAL REPUBLIQUE DE VANUATU

.....
Daniel FATIAKI J

.....
Oliver A. SAKSAK J