

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

Civil Appeal Case No. 2180 of 2016

BETWEEN: MOANA CARCASSES KALOSIL
First Applicant

SERGE VOHOR
Second Applicant

STEVEN KALSAKAU
Third Applicant

MARCELLINO PIPITE
Fourth Applicant

JOHN AMOS
Fifth Applicant

ARNOLD PRASAD
Sixth Applicant

TONY WRIGHT
Seventh Applicant

SEBASTIEN HARRY
Eighth Applicant

THOMAS LAKEN
Ninth Applicant

JONAS JAMES
Tenth Applicant

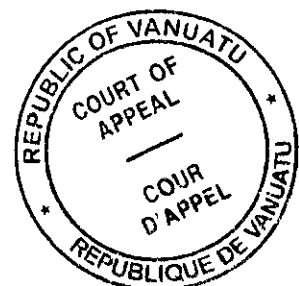
JEAN YVES CHABOD
Eleventh Applicant

PAUL TELUKLUK
Twelfth Applicant

SILAS YATAN
Thirteenth Applicant

TONY NARI
Fourteenth Applicant

AND: THE REPUBLIC OF VANUATU
Respondent



Coram: *Hon. Chief Justice Vincent Lunabek*
Hon. Justice Bruce Robertson
Hon. Justice Oliver Saksak
Hon. Justice Daniel Fatiaki
Hon. Justice John Mansfield
Hon. Justice Dudley Aru
Hon. Justice David Chetwynd
Hon. Justice Paul Geoghegan

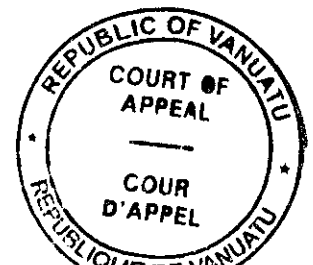
Counsel: *Mr George Boar for the Applicants*
Mr Hardison Tabi (SLO) for the Respondent

Date of Hearing: *Monday 11th July 2016 at 1:30 pm*
Date of Judgment: *Monday 11th July 2016*
**Date of Reasons
for Judgment:** *Friday 22nd July 2016 at 4 pm*

REASONS FOR JUDGMENT

1. In the list of work for this session of the Court of Appeal was a document entitled "*Notice of Motion*". It sought pursuant to section 65 of the Judicial Services and Courts Act [Cap. 270], the inherent jurisdiction of the Court of Appeal and or pursuant to section 31 (2), 31 (7) and section 48 (3) of the Judicial Services and Courts Act for orders that:-

- "a) The hearing of this Motion be abridged.*
- b) This Honourable Court would be pleased to suspend and or stay the execution of the custodial sentence of the Applicants pending the determination of the Constitutional Application filed herein.*
- c) The Applicants have filed a Constitutional Application No. 1850 of 2016 pursuant to article 27 (2) of the Vanuatu Constitution which in effect sought*



that this Honourable Court would revisit the prosecutions of the Applicants in criminal case No. 73 of 2015, and to quash the conviction of the Applicants as per the judgment of the Supreme Court Criminal Case No. 73 of 2015 and the Judgment of the Court of Appeal in Criminal Appeal Case No. 12 of 2015.

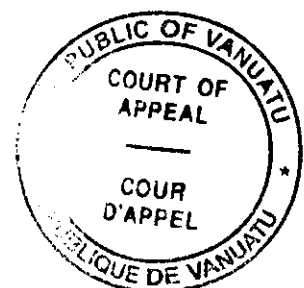
d) Costs be reserved.”

2. Each of the Applicants were charged, prosecuted and convicted of various criminal offences, and sentenced to terms of imprisonment. These were the subject of unsuccessful appeals to the Court of Appeal.
3. It is now contended that the proceedings were in contravention and breach of article 27 (2) of the Vanuatu Constitution. It provides that:-

“27. Privileges of members

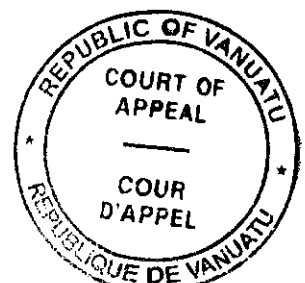
- 1) *No member of Parliament may be arrested, detained, prosecuted or proceeded against in respect of opinions given or votes cast by him in Parliament in the exercise of his office.*
- 2) *No member may, during a session of Parliament or of one of its committees, be arrested or prosecuted for any offence, except with the authorization of Parliament in exceptional circumstances.”*

4. It was submitted that parts of the criminal process occurred while Parliament was in session and at no material time did Parliament authorize the Prosecution of the Applicants in Criminal Case No. 73 of 2015.



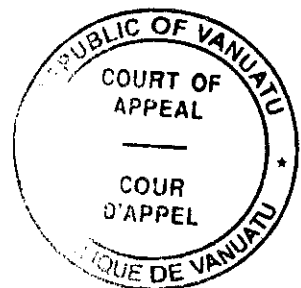
5. The relevant Constitutional Application pursuant to articles 6 and 53 of the Constitution was filed in the Supreme Court on the 9th of June 2016 although it appears no substantive steps have been taken in regard to it.
6. In a nut-shell, the applicants sought an order from this Court that pending the determination of the Constitutional Petition the applicants should be released from their custodial sentences which would be suspended and/or stayed in the meantime.
7. At the Call-Over the Bench raised questions as to the jurisdiction of the Court of Appeal to entertain this notice of motion and set the matter down for substantive argument at 1:30 pm on the 11th of July.
8. At the conclusion of the hearing the Court ruled that the notice of motion should be dismissed for lack of jurisdiction and that reasons would be provided which we now proceed to do.
9. The starting point for consideration is the very nature and operation of the Court of Appeal. Its jurisdiction pursuant to article 50 of the Constitution and s. 48 of the Judicial Services and Courts Act is to entertain appeals. It generally does not have original jurisdiction.
10. Nevertheless, Mr Boar argued that the Court of Appeal could consider his motion under a variety of statutory provisions.
11. First under section 31 of the Judicial Services and Courts Act which provides:-

“31. Review of convictions and reservation of questions of law



- (1) *The Supreme Court has power at any time to review the conviction of a person by the Magistrates' Court, whether or not there has been an appeal against the conviction.*
- (2) *The Supreme Court may exercise the power:*
 - (a) *on its own motion; or*
 - (b) *upon the petition of the Public Prosecutor; or*
 - (c) *upon the petition of the defendant or any other interested person.*
- (3) *If the Supreme Court reviews a conviction and is of the opinion, by reason of new evidence or otherwise, that a miscarriage of justice has or may have occurred, the Supreme Court may do all or any of the following:*
 - (a) *set aside the conviction;*
 - (b) *order a new trial before the Magistrates' Court that made the conviction;*
 - (c) *make such other orders in the interest of justice and give all necessary and consequential directions.*
- (4) *If the Supreme Court makes an order setting aside a conviction, the convicted person:*
 - (a) *if he or she is imprisoned – must be released immediately; or*
 - (b) *if he or she has paid a fine – must be refunded the amount paid.*
- (5) *A judge may reserve for the consideration of the Court of Appeal on a case to be stated by the judge any question of law which may arise on the hearing of any criminal or civil proceedings.*
- (6) *The judge must not deliver judgement in the proceedings until he or she has received the opinion of the Court of Appeal.*
- (7) *The Court of Appeal has power to determine every such question after hearing argument."*

12. Specific reliance was placed on s.31 (7) but that provision is not relevant as no case has been reserved under s.31 (5).



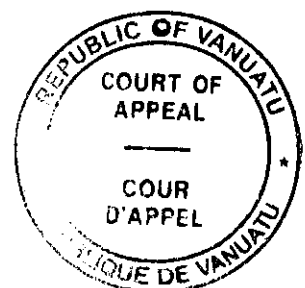
13. Secondly, it was argued there was jurisdiction under section 48 of the same Act which provides:-

“48. Appellate jurisdiction

- (1) Subject to the provisions of this Act and any other Act, the Court of Appeal has jurisdiction to hear and determine appeals from judgements of the Supreme Court.*
- (2) The Chief Justice must, in consultation with the other judges of the Supreme Court, decide the composition of the Court of Appeal for the hearing of proceedings before the Court.*
- (3) For the purpose of hearing and determining an appeal from the Supreme Court, the Court of Appeal:*
 - (a) may exercise such powers as may be prescribed by or under this Act or any other law; and*
 - (b) has the powers and jurisdiction of the Supreme Court; and*
 - (c) may review the procedure and the findings (whether of fact or law) of the Supreme Court; and*
 - (d) may substitute its own judgement for the judgement of the Supreme Court.*
- (4) The Court of Appeal may deal with the appeal on the notes of evidence that were recorded in the Supreme Court without hearing the evidence again. However, the Court of Appeal may receive further evidence.*
- (5) In the exercise of the appellate jurisdiction of the Court of Appeal, any judgement of the Court of Appeal has full force and effect, and may be executed and enforced, as if it were an original judgement of the Supreme Court.”*

14. This likewise has no application. The Court of Appeal under s.48 (3) (b) has the powers and jurisdiction of the Supreme Court only when *“hearing or determining an appeal from the Supreme Court”*.

15. Next counsel sought to rely on section 65 which provides:-



“65. Inherent powers of Supreme Court and Court of Appeal, and custom

(1) The Supreme Court and the Court of Appeal have such inherent powers as are necessary to carry out their functions. The powers are subject to:

- (a) the Constitution; and*
- (b) any other written law; and*
- (c) the limitations of each Court's jurisdiction.*

(2) For the purpose of facilitating the application of custom, a provision of any Act or law may provide that it may be construed by the Court of Appeal, the Supreme Court or the Magistrates' Court with such alterations and adaptations as may be necessary.

(3) The Supreme Court and the Court of Appeal have the inherent and incidental powers as may be reasonably required in order to apply custom.

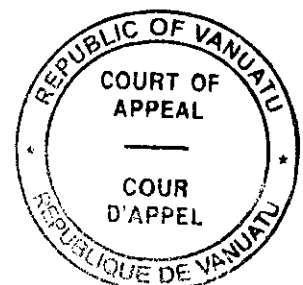
(4) The Magistrates' Court has the incidental powers as may reasonably be required in order to apply custom.”

This section is concerned with the application of custom which does not arise in the present case.

16. Finally it was submitted that there was jurisdiction under section 221 of the Criminal Procedure Code Act [Cap. 136] which provides in subsections 1 and 2:-

“221. Error or omission in charge or other proceedings

- (1) Subject to the provision herein before contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of any error, omission or irregularity in the summons, warrant, charge, information, order, judgment or other proceedings under this Code, unless such error,*



omission or irregularity has in fact occasioned a substantial wrong or miscarriage of justice.

(2) *In determining whether any error, omission, or irregularity has occasioned a substantial wrong or miscarriage of justice the court shall have regard to the question whether the subject could and should have been raised at an earlier stage in the proceedings.”*

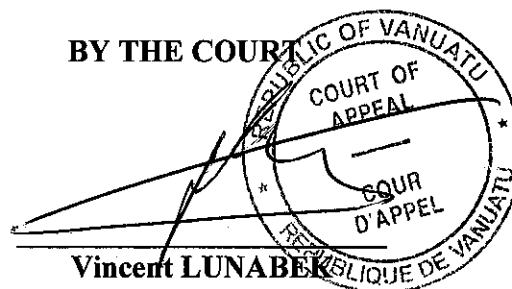
17. This facilitation provision does not apply to the present circumstances either.

18. Despite the best endeavors of Mr Boar, we were taken back to the starting proposition. The motion sought an exercise of original jurisdiction so it could not be commenced in the Court of Appeal.

19. What it seeks is connected with an ancillary to the Constitutional Petition which is properly lodged in the Supreme Court. It will be for a Judge there to consider whether in all the circumstances such relief is necessary or appropriate pending the determination of the Constitutional Petition. Alternatively, it may direct that the hearing of the petition should be expedited. Whatever approach is necessary it is a Supreme Court issue.

DATED at Port Vila this Friday 22nd day of July, 2016

BY THE COURT



Vincent LUNABEK
Chief Justice