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

Criminal Appeal
Case No. 21/418 CoA/CRMA

BETWEEN: CHARLOT SALWAI TABIMASMAS
Appellant

AND: PUBLIC PROSECUTOR
Respondent

Coram:	***Hon. Chief Justice Vincent Lunabek*** ***Hon. Justice Raynor Asher*** ***Hon. Justice Oliver Saksak*** ***Hon. Justice Dudley Aru*** ***Hon. Justice Richard White***
Counsel:	*Mr F Vosarogo and Mr D Yawha for the Appellant* *Mr T Karae for the Respondent*
Date of Hearing:	*3rd May 2021*
Date of Decision:	*14 May 2021*

JUDGMENT

Introduction

1. The appellant Charlot Salwai Tabimasmas appeals against a sentence decision of Justice G A Andree Wiltens in which, following his conviction for perjury, Mr Tabimasmas was sentenced to a sentence of imprisonment of two years and three months, suspended for a period of two years.

2. We briefly summarise the background to this appeal which is more fully set out in the sentencing notes and verdict of Justice Andree Wiltens.[1]

3. The Appellant was the Prime Minister at the time of his trial. There had been a Court challenge to an appointment to the position of Parliamentary Secretary. The Appellant provided a sworn statement dated 22 April 2019 to the Supreme Court which stated on three occasions within that document that the appointment was made by the Prime Minister with the approval of the Council of Ministers.

[1] Case No. 21/487 SC/CRML.

4. In his verdict, Judge Andree Wiltens found that this statement was made to persuade the Court to find that the position of Parliamentary Secretary had been lawfully created. He found that statement was false, and that none of the relevant appointments had gone before the Council of Ministers. He found that Mr Tabimasmas was fully aware that the sworn statement contained the incorrect statements of fact and that he intended to mislead the Supreme Court.

5. The essence of the appeal is that the Judge erred in his assessment of the seriousness of the offending, and thereby reached a starting point that was too high. There is no challenge to the Judge's assessment of personal mitigating factors or the suspension of the sentence.

Preliminary points

6. The Public Prosecutor applied for summary dismissal of the appeal because there had been a failure to comply with the Appeal Court directions, and there had been insufficient materials supplied to support the grounds of appeal. Also, in the course of the hearing, the Public Prosecutor submitted that the points now raised in the appeal were materially different from those raised in the original memorandum of appeal.

7. We have every sympathy for the Public Prosecutor's application so far as it exposes a serious failure on the part of the Appellant's lawyers to comply with the Court's directions. A Minute was issued by the Supreme Court directing the Appellant to file Appeal Book A and a submission by 4:00pm on 26 March 2021. In fact, the case on appeal and submissions on appeal were not filed until 27 April 2021. There was no communication by the lawyers for the Appellant to the Court or the Public Prosecutor which sought to explain the delay and provide assurances as to the failure being promptly corrected.

8. Despite our concerns about this failure to observe specific Court directions, which are essential to the efficient conduct of Court business, we will not accede to the application for summary dismissal and we decline to dismiss the appeal.

9. This is a serious sentencing matter involving the liberty of a citizen of Vanuatu. To deprive a person of the right to appeal because of a procedural failure by that person's lawyers, would be a very rare event. To dismiss the appeal could lead to a significant personal injustice for the Appellant. Moreover, we note that the Public Prosecutor through its Counsel, Mr Karae, has fairly accepted that no specific prejudice has arisen as a consequence of the delay. Thus, while the delay has considerably inconvenienced the Court in its preparation and we have no doubt the Public Prosecutor, we have decided that the appeal will proceed.

10. Further, we are not prepared to decline to hear the matters set out in the submissions because they do not reflect the original memorandum of appeal. The main reason is because we do not discern any material prejudice arising. The Public Prosecutor has provided a complete and thorough analysis of the Respondent's submissions, and we discern no prejudice.

11. We now turn to the substance of the appeal.

The substantive submissions

12. Mr Vosarogo appearing for Mr Tabimasmas adopted the three-step approach to sentencing, set out in *Public Prosecutor v Andy.*[2] The third step, the discount for a guilty pleas, did not arise as there was no guilty plea. As to the second step, the assessment of factors personal to the offender, Mr Vosarogo had no complaint as to the learned Judge's analysis.

13. In relation to the first step, the fixing of a starting point, Mr Vosarogo made three submissions. The first was that the Judge failed to take into account a mitigating factor, namely that Mr Tabimasmas had State lawyers prepare his sworn statement and he did not draft it physically himself. It was said that this factor should have provided "a cushion of understanding for his role in the impugned sworn statement". It was said that he was providing the statement not by choice, but by virtue of his position in the constitutional challenge case. The submission appeared to be that it was the State Law Office that was more at fault than Mr Tabimasmas, although it was accepted by Mr Vosarogo that Mr Tabimasmas was responsible for the statement.

14. However, the Judge referred to the fact that State lawyers had drafted the sworn statement. It is noted specifically at paragraph [79] of his verdict that the State lawyers were not in a position to "confirm or otherwise the factual aspects of the sworn statement". This was reflected in his conclusion at paragraph [110] that Mr Tabimasmas was fully aware that his sworn statement contained incorrect assertions of fact. He had noted earlier in the judgment at paragraph [97] that although Mr Tabimasmas had named two State Law Office personnel involved in his sworn statement, he had not called them as witnesses.

15. It is no excuse for perjury, for someone who had signed and was in charge of a document containing that perjury, to say that someone else did the physical drafting. Mr Tabimasmas was plainly responsible for the false sworn statement. This was a specific finding of the Judge in the verdict and underlies the sentencing remarks. There was a basis of fact for the conclusion.

16. Therefore, we do not accept this first submission.

17. The second submission was that the Judge breached what was called the principle in *House v The Queen.*[3] It was submitted that the Judge had allowed extraneous matters of fact to affect his approach, namely that there was only a single charge and not three separate charges, and there was therefore 'a single criminality' and not three acts of perjury. It was submitted that this meant that the Judge viewed the culpability of the perjury more seriously than he should have.

18. There was only one relevant charge, and that charge related to one particular sworn statement and one particular false assertion within that statement, namely that the orders of the Prime Minister were made with the approval of the Council of Ministers. The fact that the false statement

[2] Criminal Appeal Case No. 9 of 2010.
[3] (1936) 55 CLR 499.

had been made on three separate occasions within the same document did not mean that there had to be three separate charges laid. Indeed, it could well be said that to do so would be an error and unnecessarily complicate the case. There was one false statement made on one occasion, but the fact that it occurred three times within that statement meant that it had an added aspect of seriousness. The Judge did not make any error in taking into account the repetitive nature of the false statement in assessing the gravity of offending. We do not agree with this second submission.

19. The third submission was that the Judge should have taken into account the fact that the sworn statement was not of material importance in the proceedings in which it was made, and ultimately did not affect the outcome.

20. If it had affected the outcome of the case and led to specific adverse consequences, that might have been an aggravating factor. However, if it is being suggested that the lack of such tangible harm was a mitigating factor which should have led to a reduction in sentence, we do not accept this. The Judge made no error in this regard. He did not say that he relied on the impact of the offending.

21. Instead, in assessing the seriousness of the offending, he correctly noted that the Appellant had a very senior position within Government as Prime Minister, with high obligations to the community as to his personal probity. As the Judge noted, "his misconduct accordingly inevitably had the effect of diminishing the standing of all political leaders within the community".[4] The Judge also noted the untruths related to the very essence of the constitutional challenge and not some peripheral issue. Mr Tabimasmas was seeking to deceive the Supreme Court for political gain, and thereby strike at both the legitimacy of the Government of Vanuatu and the integrity of the Supreme Court.

22. In our view, the Judge's assessment of the serious aspects of the offending was entirely correct. The Judge did not focus on the material consequences of the perjury, but rather the effect it would have on the administration of justice in the Republic of Vanuatu.

23. We do not agree with this third submission.

Final comment

24. In our assessment, the sentence was thorough and can be regarded as lenient. For the various reasons that we have outlined, this was a very serious act of perjury by the Prime Minister of Vanuatu, directed to the Supreme Court. Two of the three arms of the Government of Vanuatu, the political and the judicial, were impugned by the wrongful act. It showed that a politician at the highest level was prepared to lie on oath, and was prepared to deceive the Court system at its highest level.

25. While recognising this, the sentencing Judge decided on an entirely reasonable starting point of four years imprisonment, as against the maximum available of seven years imprisonment. Mr

[4] At [20].

Tabimasmas intended his sworn statement to be believed, to his significant advantage in the Court case. Because of the extent of the breach of trust given his high position, the starting point was well within the range.

26. The Judge then showed considerable leniency in reducing the starting point for personal circumstances to two years and three months imprisonment. He then showed significant leniency yet again, in imposing a suspended sentence. In our view, the Judge gave the fullest recognition to the sadness of Mr Tabimasmas' fall from grace, given his previous good character.

27. We do not see any basis for any criticism of the Judge's decision.

Result

28. The appeal is dismissed.

DATED at Port Vila, Vanuatu this 14th day of May, 2021

BY THE COURT

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Hon. Chief Justice V. Lunabek