IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU

CIVIL CASE No.124 OF 1994

Between : The Government of the Republic of Vanuatu
Represented by the Attorney-General

- Applicant

And : The President of the Republic of Vanuatu

- Respondent

Coram : Sir Harry GIBBS

Attorney-General Mr Patrick Ellum for Plaintiff
Mr Robert Sugden for Defendant

Clerk & Interpreter/Translator : Timteo Kalmet

REASONS FOR JUDGMENT

. These proceedings were commenced by the Government of the Republic of Vanuatu represented by the Attorney-General, as Applicant, against the President of the Republic of Vanuatu, as Respondent.

By the initiating summons the Applicant sought the following relief :

1. The Applicant be given leave to apply for an order of certiorari to quash the decision of the President made on the 30th of July 1994 to "pardon" 26 prisoners.

2. The Applicant be given leave to apply for an order of certiorari to quash the instrument of reduction of sentence in relation to Lin Shiow Her dated the 27th of September 1994.

3. A declaration as to the proper exercise of the presidential prerogative of mercy.

4. The Applicant be given leave to apply for a restraining order, restraining the departure of the fishing vessel known as Lih Peng from Port-Vila harbour.

5. Such further or other orders as the Court deems fit.

6. Costs to be reserved.

On 29th September 1994 the Chief Justice made an order granting leave to the Applicant to apply for an order of certiorari and granted an interlocutory injunction restraining the President, his servant or agent from releasing or attempting to release the fishing vessel known as Lih Peng from Port-Vila harbour, until this Court makes a declaration as to the proper exercise of the Presidential prerogative of mercy.

Mr Sugden, who appeared for the Respondent, made a number of objections to the competency of these proceedings. Consideration of most of those objections may be postponed until I have stated my findings as to the facts of the case, but it is convenient to mention immediately one submission, namely that the Government of Vanuatu is not a legal entity and not a proper party to the proceedings. In response to this submission, Mr Ellum, the Attorney-General, who appeared for the Applicant, applied to amend the proceedings to substitute the name of the Attorney-General as the Applicant. Mr Sugden consented to this application without prejudice to his other submissions. I grant leave to substitute the name of the Attorney-General as Applicant.

Article 38 of the Constitution provides as follows :

" The President of the Republic may pardon, commute or reduce a sentence imposed on a person convicted of an offence. Parliament may provide for a committee to advise the President in the exercise of this function. "

In May 1994 the President had requested that a committee be appointed to advise him in the exercise of his power to pardon or reduce or commute sentences. The Parliament made no response to this request.

On 13th July 1994 the President wrote to the Attorney-General stating that he had decided to set up a commission to "look after" the selection of prisoners to be released during the Vanuatu Independence Anniversary and the selection of persons entitled to the award of medals. This letter nominated officers holding the following positions to act as members of the commission :

1. Principal Private Secretary, State Office ;

2. First Secretary, Prime Minister's Office ;

3. First Secretary, Ministry of Justice ;

4. Attorney-General ;

5. Commissioner of Police ;

6. A representative of the Private Sector.

His letter went on to ask that the commission be prepared for a meeting on the 22nd of July 1994 to decide on a final listing, for approval by the Head of State, of prisoners to be released at the forthcoming independence celebrations. The Anniversary of independence is 30th July.

The meeting proposed for the 22nd July was adjourned to the 26th July 1994. On that date only three persons attended the meeting. They were Father Dini (the President's Principal Private Secretary), Mr Ala (who was then the Solicitor General) and Mr Monomono (who was then Acting Commissioner of Police). Mr Monomono brought with him three documents which he provided to the others present. Those documents were the following :

1. A document headed "Vanuatu Prison Service - 1994" and comprising nine pages setting out, in respect of each of the 88 persons then in prison, the name, home island, offence, the date the sentence began, the date of discharge with remission, the date due for release without remission, the number of "days in", age and remarks. Not all the columns headed number of days in and remarks were completed. The remarks shown were either very good, good, fair or very poor.

2. A list comprising 44 names and headed "Recommendations. The following prisoners has been recommended for their imprisonment sentenced to be reduced by half."

3. A list comprising 20 names and headed "The following prisoners has been recommended for their imprisonment sentenced to be reduced by one third."

At this meeting Mr Monomono explained that he could not recommend any prisoners for release.

On 29th July 1994 the President wrote to the Prime Minister a letter which, translated from the Bislama, reads as follows :

" Dear Hon. Prime Minister,

I take this time to thank your office, the Police and the Commission to do the works in order for me to be able to release the prisoners, which has had a lengthy consideration.

There are 26 prisoners who are released, those whose sentences were reduced by half are 31, those whose sentences were reduced by one third are 19. "

The letter enclosed three lists. The first list was headed "Independence Pardoning of Prisoners 30 July 1994" and contained 26 names. The second list was headed "Recommendations. The following prisoners has been recommended for their imprisonment sentence to be reduced by half" and comprised 31 names. The third list was headed "Recommendations. The following prisoners has been recommended for their imprisonment sentence to be reduced by one third" and contained 19 names. It will be observed that the headings on the second and third lists sent with the President's letter are

virtually identical with those on the lists supplied by the Acting Police Commissioner. The list of prisoners whose sentences were to be reduced contained the same names, and (with one exception) in the same order, as those on the lists supplied by the Police, except that 13 of those whose sentences the Police recommended should be reduced by one half, and one of those whom the Police recommended should have their sentences reduced by one third, appear in the list of persons to be pardoned.

The President, according to his own affidavit, made the decisions which were conveyed by the letter and the enclosures on the basis of information contained in the Police list, and his committee's recommendation except in two cases. He pointed out that 5 of the 26 released were due to come out of prison by the 30th of July 1994 in any event. The two cases to which the President gave particular consideration were the following :

1. Morris Ben was serving a long sentence of imprisonment imposed for rape. The President stated that he had received information from the wife of Morris Ben that he was in serious ill health due to harsh treatment by the Police. He caused Ben to be brought to his office. Ben had great difficulty walking and his legs appeared badly beaten so the President asked that he be allowed immediate medical treatment which he had been informed by Ben and his wife had not previously been allowed. The President stated that he understood from Father Dini and truly believed that Ben then spent a month in Port-Vila Central Hospital having treatment. In view of the serious effect of imprisonment on his health the President considered that he had suffered enough and should be released.

2. Lin Shiow Her had been sentenced for an offence involving illegal fishing. In April or May 1994 the President was asked by the then acting Prime Minister, Mr. Serge Vohor, to release Lin Shiow Her, and the Taiwanese fishing boat "Lih Peng" of which he was captain. Mr Vohor said that this would be good for relations between Vanuatu and Taiwan, and for the development of the new township of Santo. The President considered this to be good grounds for release in the circumstances of the case.

It has been alleged that subsequently, on 27th September 1994, the President signed an instrument reducing the sentence of Lin Shiow Her to allow for his release on 30th July 1994, releasing the confiscated fishing vessel, and reducing the fine imposed on Lin Shiow Her. No copy of this alleged instrument could be found, and for that reason I can not give consideration to this aspect of the case. In any event, Lin Shiow Her was released as a result of the President's letter, and I am informed that the fishing vessel, the subject of the confiscation, is no more than a rotting hulk.

The Attorney-General indicated that if the Court decided in his favour it was not intended to seek an immediate return of the prisoners, whose release was effected in July 1994. Rather, the intention is to invite the President to convert his decision into a commutation, suspending the sentences so that those who re-offend may be returned to prison. If the President declines to take this course, the Prime Minister would have power, he submitted, to release the prisoners on licence.

During the course of argument, Counsel for the respondent drew attention to section 16 of the Interpretation Act, which is in the following terms :

" (1) All Constitutional Orders shall be published in the Gazette and shall be judicially noticed.

(2) In this section, "Constitutional Orders" means any orders or declarations made in exercise of a power conferred by the Constitution on the President, the Council of Ministers or any other person or body except a court. "

Clearly an order or declaration made to give effect to a pardon granted under article 38 of the Constitution must be a "Constitutional Order" within this definition. It is common ground that no instrument concerning the release of the 26 prisoners was published in the Gazette.

On a previous occasion, in April 1994, when the President exercised his power to reduce sentences, he did so by a number of formal instruments, which were gazetted.

It seems clear that section 16 (1) is a mandatory provision, for its purpose is to ensure that Constitutional Orders are made public, and to put beyond doubt the terms of any order or declaration to which section 16 refers ; once an order or declaration is gazetted, judicial notice must be taken of it. Although the section does not declare what shall be the consequences of a failure to obey its provisions, there is a strong argument that the intention of the legislature was that a Constitutional order shall take effect only when published in the gazette. However it is unnecessary in the present case to decide that question. The letter of the 29th July 1994, on its proper construction, was neither an order nor a declaration. Rather, it is a request to the Prime Minister to do what needed to be done to enable the President to release the 26 prisoners and to effect the reductions of the sentences of the other offenders mentioned in the second and third lists enclosed with the letter. What needed to be done was to prepare an appropriate order or declaration and to publish it in the gazette, and then to give effect to the order or declaration. It is true that the President had decided that the 26 prisoners should be pardoned and asked the Prime Minister to give effect to that decision. The words "who are released" in the second sentence of the letter must mean "who are to be released". The evidence does not reveal whether or not the President knew that a more formal instrument was required to bring about the release of the 26 prisoners. It is immaterial what the President actually intended ; the question whether a pardon has been granted is an objective one : see A.G of Trinidad and Tobago v Phillip [1995] 1 A.C. 396, at 411. His letter is couched in the form of a request and not in the form of an order and it does not say that the President had pardoned the prisoners who, it was contemplated, would be pardoned on the 30th of July. However the Prime Minister, or his staff, and the Acting Commissioner of Police, mistakenly treated the letter as a pardon and in consequence the prisoners were released.

It is now convenient to consider the preliminary objections taken by the Respondent. It was submitted that the President cannot be sued in any Court in Vanuatu, or alternatively cannot be sued by the Attorney-General. Neither of these broad submissions can be accepted. By Article 33 of the Constitution it is provided that the Head of the Republic shall be known as the President and shall symbolise the unity of the Nation. The Constitution confers on the President certain specific powers which he may exercise on his own discretion (Articles 38, 39 (3), 44 and 59 (2)), and others which he may exercise only on advice (Articles 28 (3), 47 (2), 55, 56 and 69 (b)) or after consultation (Articles 49

(3), 59 (1), 61 (1)). It imposes certain duties on the Président (Article 16 (3), (4)). The President does not exercise general executive power - by Article 39 (1) that is vested in the Prime Minister and the Council of Ministers.

It is impossible to contend that the President succeeded to the position of the British Sovereign, or that his powers are to be assumed to have the same characteristics as those of the British Sovereign. The New Hebrides was ruled as a Condominium and the Constitution of Vanuatu came into being as a result of the agreement and approval of a Constitutional Committee and of a subsequent agreement between the Governments of Great Britain and France. Article 95 (2) of the Constitution continues, until the Parliament otherwise provides, the British and French laws in force or applied in Vanuatu immediately before the day of Independence to the extent that they are not expressly revoked or incompatible with the independent status of Vanuatu. This provision does not mean that the position of the President of Vanuatu is governed by the Constitutional laws of either Britain or France, since the Constitutional position of the Heads of States of those two countries is very different one from the other. The nature of the powers and position of the President of Vanuatu can be determined only by a consideration of the Constitution itself. No doctrine of immunity based on the position of the British Crown can be imported into the Constitution of Vanuatu. Further, the courts of Vanuatu are not the President's Courts ; they are set up by the Constitution.

The Constitution is the supreme law of Vanuatu (Article 2) and there is nothing in the Constitution to support the notion that the President, or any other official or body mentioned in the Constitution, is above the law. It must follow that if the President acts contrary to the law, appropriate proceedings can be brought against him in the Courts of Vanuatu. It is clear, for example that if the President purported to exercise, without advice or consultation, a power which the Constitution declared was exercisable only on advice or after consultation, or if the President purported to appoint under Article 44 or Article 59 (2) someone who was not a member of the classes from which according to those Articles the appointment must be made, proceedings could be brought against the President to set aside his actions or declare their invalidity. Similarly if he refrained from performing his mandatory duty under section 16 he could be compelled by mandamus to do his duty.

The further argument that the President cannot be sued by the Attorney-General is equally unsustainable. This argument is based on the fact that the President symbolises the unity of Vanuatu (article 2) whereas the Attorney-General represents Vanuatu in all civil proceedings (section 1 (2) of Law Officers Act). Therefore, it is argued, if the President is sued by the Attorney-General, Vanuatu is in effect suing itself. The fact that the President symbolises Vanuatu and that the Attorney-General represents Vanuatu does not mean that those two persons have the same identity. There is simply no principle which will prevent the Attorney-General from obtaining relief in an appropriate case against the President.

A much more significant argument presented for the respondent is that the exercise by the President of his powers under article 38 cannot be judicially reviewed. In support of this argument the court was referred to the laws of both Britain and France. In the latter country, according to the opinion

of Maître Louzier, pardons are granted at the discretion of the President, who is the only judge of their appropriateness, and who, in theory, should not be influenced by considerations other than the common good. The considerations that may motivate the President include the convicted criminal's good behaviour, family or health reasons, actions of remorse, fresh evidence, national reconciliation (for political crimes or offences) and humanitarian reasons etc. Another instance in which pardons appear to be granted in France is in the case of shorter sentences where the pardon is granted to prevent casual offenders from coming into possibly harmful contact with hardened criminals. Disputes as to the interpretation of a pardon are justiciable but according to the opinion of Maître Louzier, disputes as to the legality of a decision to pardon fall outside the jurisdiction of the courts. Maître Louzier refers to a number of cases in which the Council of State has disqualified itself from hearing challenges to the legality of pardons on the ground that sentences handed down by the judiciary are subject to decisions to pardon and therefore cannot be considered as originating from an administrative authority. However he adds : " The question has been asked under French law whether a case challenging a favourable or unfavourable decision in a clemency request could be submitted to a court without challenging the French legal principle of the division of powers. The question has remained unanswered, as no court has as yet been requested to decide on any challenge to the legality of a decision to pardon. "

It is obvious that this reference to the law of France does not assist the argument that the exercise of the power of pardon is not justiciable, since the refusal of the Council of State to entertain jurisdiction in such a case depends on the constitution and powers of that Tribunal. On the other hand, the French experience does show the variety of the considerations that may cause the pardoning power to be exercised.

Although the power of the President of Vanuatu to grant a pardon is entirely derived from the Constitution, that power is one that corresponds to the power of the English Crown, so that English decisions may be of assistance - see Attorney General of Trinidad and Tobago v Phillip, supra at p410. The generally accepted view of the English Courts is that at Common Law the exercise of the Royal prerogative of mercy lies solely within the discretion of the sovereign. Lord Diplock said in DeFreitas v Benny [1976] A.C. 239, at p247 : " Mercy is not the subject of legal rights. It begins where legal rights end. " In Council of Civil Service Unions v the Minister for the Civil Service [1985] A.C. 374 Lord Roskill suggested, at p418, that prerogative powers such as the prerogative of mercy are not susceptible to judicial review because their nature and subject matter are such as not to be amenable to the judicial process. In Burt v Governor General [1992] 3 NZLR 672 Cooke P expressed doubt as to the correctness of the generality of these propositions ; he considered that in modern law there was a wider power in the courts to review decisions made in the exercise of the prerogative. He said, at p618, " the claim that the courts should be prepared to review a refusal to exercise the prerogative of mercy, at least to the extent of ensuring that elementary standards of procedure have been followed, cannot by any means be brushed aside as absurd, extreme or contrary to principle. " However his judgment does not support the argument that the grant of a pardon may be reviewed judicially. On the contrary he referred at p615, to the concession of counsel that if policy were a factor in a refusal review would not be available and remarked that " it is not difficult to think of cases in which it has been a factor in the grant of a pardon." It is clear that if an act which purported to be a pardon was not truly such, eg if it extended

V. now R. v. Sec'y. Home Dep't ex p. Bentley 1993 4 All E.R. 442 – held justiciable (C.A.)

to offences not yet committed, the court could hold it to be invalid - Attorney General of Trinidad and Tobago v Phillip, supra. + Reckley v. Minister 1996 1 A.E.R. 562 (PC) – held not justiciable.

As I have already said, the letter of the 29th of July 1994 was not a pardon and for the reasons I have given, the court has the jurisdiction and power in these proceedings to make a declaration accordingly. It is convenient to do so.

It remains to consider the principal argument of the Attorney-General which was that the decision taken by the President on the 29th of July 1994 was not a proper exercise of his discretion.

In support of his submission, the Attorney-General said that persons were "pardoned" who made no claim to innocence and that persons with more serious convictions were released while those with less serious convictions remained in prisons. It was also said that persons with previous convictions were released, but the President had no information before him regarding the previous convictions of the persons released, although in a few cases the offender had been sentenced for a breach of probation or for violating the terms of release on licence. He seeks to review the President's decision on the grounds which are available to challenge any exercise of administrative discretion. I am prepared to assume that there may be cases in which the court will review the grant of a pardon, eg. where corruption is established. It should be made clear that there was no corruption in the present case. Although I doubt whether a decision to grant a pardon can be challenged by applying the tests applicable to establish the invalidity of an exercise of judicial discretion, it is desirable to consider whether, if those tests are applicable, they have been satisfied in the present case.

It cannot rationally be argued in the present case that the power given by article 38 was exercised for a purpose for which it was not conferred, or in a way that frustrated the policy or objects of the article. The whole purpose of article 38 was to allow the President to grant mercy to persons convicted, and that is what he did. Although in the U.K. and other Commonwealth countries, a pardon is frequently granted to reprieve persons who have been wrongly convicted, it is quite clear that neither the power under the prerogative nor that conferred by article 38 is limited in that way. Nor is it possible to hold that the President refused or neglected to take into account matters which he should have taken into account, or that he took into account matters which he should not have taken into account, within the well known test in Associated Provincial Picture Houses Limited v the Wednesbury Corporation [1947] 1 KB 223. The statement of the President that he considered the information placed before him is uncontradicted. He also considered the matters which have been mentioned in respect of Morris Ben and Lin Shiow Her and it was within his discretion to consider those matters. It was the submission of the Attorney-General that the President failed to consider the fundamental rights guaranteed by article 5 of the Constitution, particularly the rights to security of the person, protection of the law, protection for privacy of the home and of other property and equal treatment under the law. It is not possible to say that the President has infringed the right of one citizen by granting a pardon to another. In any case, it would be unwarranted speculation to suggest that security or privacy is endangered by granting a pardon to a person who has previously infringed the privacy of a home or the security of a person. Nor is it right to say that in the exercise of the power of pardon the President is obliged to treat all persons

equally. It is within his discretion to grant a pardon in one case and not in another if on the consideration to the matter, he considers that to be an appropriate course.

The exercise of the power to pardon would be impossible if the courts could weigh one case against another and hold that a pardon to A was invalid because B, whose crimes seem less serious, did not receive a pardon. The grant of a pardon may properly be made as an act of clemency on a national anniversary, or as a gesture of reconciliation to a section of society, or because of the ill-health of a convicted person or of great hardship suffered by that person's family. A comparison of the nature of the offences for which two offenders were convicted is by itself not decisive. It is not proved that the President did not consider the seriousness of the offence in every case, or the need to protect the public and to deter others from the commission of crime or the feelings of the victims. There is no evidence that the President failed to take these matters into account. The final argument of the Attorney-General is that it should be concluded that the decision of the President was so unreasonable that no reasonable person could ever have come to it, within the final branch of the Wednesbury Corporation test. It would require a strong case to satisfy this test, but on examination, the criticism voiced by the Attorney-General of the decision of the President appears to be far too strongly stated. Some of the prisoners to be released were young and others were serving sentences which with remissions, were due to expire later in 1994 or in some cases before the 30th of July 1994. It is true that the President decided to grant pardons in about 10 cases where the sentence imposed was 3 years or more and that in about 8 cases in relation to which the President did not decide to grant a pardon, the prisoners were serving sentences of less than 3 years. In all except seven cases of those whom it was decided to release the conduct of the prisoner was shown as very good. Of the other cases, no remarks appear after the name of Morris Ben, and there were five cases, where the conduct was shown only as good, but where the sentences were short or the date for release was near. The case most difficult to explain is that of Fred Lonis, for whom the Police had recommended a one-third reduction, and whose conduct had only been fair. However, there is no evidence to show what considerations of policy actuated the President in this or other cases. In the cases of the persons serving the longest sentences, Morris Ben and Lin Shiow Her, the President gave reasons which were unassailable. It cannot be said that in the circumstances it was established that the decision of the President was irrational within the Wednesbury Corporation test if that is applicable. In fairness to the President, it should be added that he was not provided with the assistance of the committee which article 38 contemplated should be established.

If it be assumed that a decision to grant a pardon can be challenged by applying the tests applicable to the validity of other discretionary orders, the challenge in the present case must fail. As I have said, I doubt whether those tests are applicable where a pardon is granted or decided to be granted.

I have held that the decision in the present case lacked the formality of a pardon and shall make an appropriate declaration but shall refuse all other relief to the Attorney-General.

Normally in a case such as the present, I would make no order as to costs. However in the present case counsel for the respondent had refused to make an admission as to the letter of the 29th of July 1994 on the ground that the notice to admit which had been given was irregular. Further, at the

trial, counsel took every possible objection to the evidence with the result that a great deal of time was taken up with the proof of a fact which was not seriously in issue, namely that the President had written the letter of the 29th July 1994. Particularly in a case such as the present, involving a Constitutional issue, between two high officers of State, it was inappropriate to take up the time of the court in this way. I considered ordering the President to pay the costs of that issue, to mark the undesirability, in a case such as the present, of contesting matters that are not really in contest, but it would seem a futility to do so, as it is likely that all costs will be met from the public purse.

I order as follows :

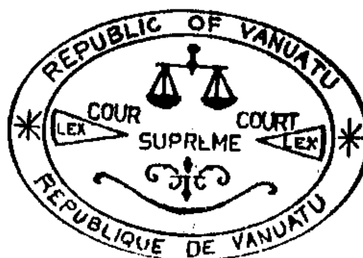
(1) The Attorney General is substituted as applicant.

(2) It is declared that the letter of 29th of July 1994 signed by the President was not a pardon within article 38 of the Constitution.

(3) The other relief sought is refused.

(4) No order as to costs.

Sir HARRY GIBBS
Presiding Judge



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