IN THE SUPREME COURT OF THE REPUBLIC OF VANUATU **Civil Case No.113 of 1997**

(Civil Jurisdiction)

IN THE MATTER OF CONSTITUTION OF THE REPUBLIC OF VANUATU

BETWEEN: LUCIANA MARIE PICCHI

Plaintiff

AND: THE ATTORNEY GENERAL OF THE REPUBLIC OF VANUATU

Defendant

RULING ON PROCEDURAL MATTERS

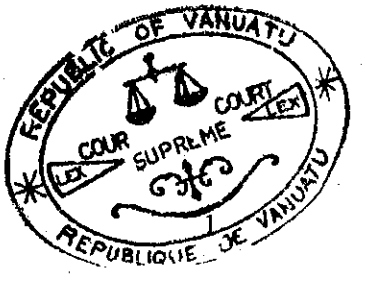
By a Ruling dated 14 September 2001 I struck out the parts of the amended petition which I considered to be without foundation. As a result of the arguments which gave rise to that Ruling certain questions arose which needed answering before or at the hearing of this petition. Those questions were set out in a Note dated 12 September. By paragraph 3 of the Directions part of that note the matters to be heard on 17 September were set out. They are

(a) "The application for leave to appeal, if such be needed, against the Ruling of 14 September 2001.

(b) Ground A of the Petition as set out in the Ruling (of 14 September), subject to any ruling of this Court or the Court of Appeal concerning (c) below.

(c) Argument on the following questions for consideration listed above;
Number : 1 (a) and (b), 2, 3, 4 and associated questions agreed by the parties".

I will set out each question for consideration as it is considered.



(a) **Application for Leave to Appeal** - ~~MK RB for Ireland~~ / not.

The petitioner sought leave to appeal, if it was needed, against the Court's finding that parts of the petition were without foundation.

The respondent did not oppose this.

I grant leave, if such is needed. The finding that certain parts were without foundation is final. It is important that any ruling of the Court of Appeal is made on this and any other preliminary issues before the main hearing of this petition.

It is also important to ensure, as far as possible that if there is an appeal from the main hearing to the Court of Appeal that all remaining issues are before that Court. This is a complex case involving a number of issues not previously ruled upon. However, there should be no 'yo-yoing' between this Court and the Court of Appeal as each issue comes to be determined.

(b) **Ground A of the Petition**

Counsel for the petitioner requested that this Ground be argued at the main hearing. There was concern and the need for further consideration as to whether it was viable in a constitutional petition. Counsel considered it might constitute supporting material for another ground which will be ruled upon by the Court of Appeal. The respondent did not object.

The Court therefore postponed consideration of this ground. There is necessarily the question as to whether this is an error in substantive law or procedural law.

(c) **Questions for Consideration**

1. (a) What is the ambit for one judge in a constitutional petition to enquire into the conduct of another judge of the same or higher rank ?

Counsel for the petitioner and the respondent both argued that the Courts jurisdiction in a constitutional petition is an original one and necessarily means such an enquiry must be carried out.

I agree with the submissions. The jurisdiction of the Supreme Court in a constitutional petition is a special and original one. It matters not the relative ranks of the judges concerned, the duty is upon the judge enquiring into the matters set out in the petition to do just that.

Article 53 (1) of the Constitution of Vanuatu states :- Anyone who considers that a provision of the Constitution has been infringed in relation to him may, without prejudice to any other legal remedy available to him, apply to the Supreme Court for redress.

Article 53 (2) states :- The Supreme Court has jurisdiction to determine the matter and to make such order as it considers appropriate to enforce the provisions of the Constitution.

Articles 6 (1) and (2), the Enforcement of Fundamental Rights, make similar provision.

Section 218 of the Criminal Procedure Code sets out the procedure to be adopted and places the duty to enquire into the petition on the Supreme Court.

In Maharaj –v- A.G. of Trinidad Tobago (No. 2) ([1979] AC 385) at page 394 Lord Diplock, when discussing similar provisions of the Constitution of Trinidad and Tobago, stated

"... on the face of it the claim for redress for an alleged contravention of his Constitutional rights under section 1 (a) of the Constitution fell within the original jurisdiction of the High Court under section 6 (2). This claim does not involve any appeal either on fact or on substantive law from the decision of [the judge]... what it does involve is an inquiry into whether the procedure adopted by that judge... contravened a right, to which the appellant was entitled under section 1 (a), not to be deprived of his liberty except by due process of law. Distasteful though the task may well appear to a fellow judge of equal rank, the Constitution places the responsibility for undertaking the inquiry fairly and squarely on the High Court."

1. (b) <u>To what extent if any, is this Court bound in these proceedings by the findings of the Court of Appeal in the Criminal proceedings ?</u>

Counsel for the petitioner argued that this court is so bound. It is a matter of res judicata by a superior court. This is significant in that the petitioner

alleges breaches of her fundamental rights as the trial judge did not give reasons for most of the vital factual decisions.

The Court of Appeal, in the criminal proceedings, specifically allowed the appeal quashed the conviction and returned the case for retrial on this ground.

Counsel for the respondent opposed this approach. No authorities were cited to the Court.

In my judgment this Court is not bound by the Court of Appeal's ruling on the question as to whether or not the trial judge's judgment failed to give reasons for his decisions.

In enquiring into this petition I am exercising a special and original jurisdiction. It is for this Court to give its decision having enquired into the matters raised by the petition and after hearing all parties. This Court cannot, in exercising this jurisdiction, be bound by another court's finding when exercising another jurisdiction, in this case, an appeal in criminal proceedings.

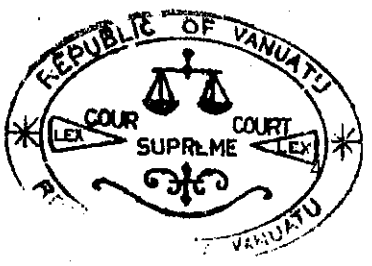
Articles 6 and 53 provide for remedies under the Constitution "independently of" or "without prejudice to" any other legal remedy. The remedy available in the criminal proceedings has been sought and obtained. The remedy sought in these proceedings is a different one in a different jurisdiction.

Although the point appears identical, it might be that different considerations apply when it is being considered in one jurisdiction as opposed to the other.

It should, of course, he pointed out that it is unlikely, if the considerations are the same, that this Court will find differently on this issue from the Court of Appeal.

2. <u>What is the meaning of "party or parties" in section 218 (3) and (5) of the Criminal Procedure Code ?</u>

3. <u>Is the State the only correct respondent ? Should the police be respondents on Ground B ? Should any other persons be respondents ?</u>



Section 218 of the Criminal Procedure Code sets out the procedure to be followed upon the lodging of a constitutional petition.

By subsection 3 the petitioner "shall ...cause a copy of the petition... to be served on the party or on all those parties whose actions are complained of."

By subsection 5, the Court after preliminary matters "shall summon the party or parties whose actions are complained of to attend the hearing."

Subsection 6 requires the Court, at the hearing to enquire into the matters raised and give its decision "after hearing all parties."

No similar provisions from any other jurisdiction have been cited to this Court.

These words necessarily raise questions of Law which have not been considered in Vanuatu before. They also raise practical questions; the former judge whose conduct is complained of is no longer resident in the country; the Public Prosecutor might well be a person whose actions are complained of, the current post holder is resident in the country, the post holder at the time of these events is no longer resident in the country. Complaints are made of the conduct of the former Chief Justice whilst conducting the trial. There is also a complaint relating to words said, and possibly actions done, by the former Chief Justice before the petitioner was even arrested.

The petitioner's counsel says the position is simple. Complaint is made against the State acting through its judicial and executive arms. The state is the party whose actions are complained of, it is before the court and the hearing can proceed. The petitioner will call her witnesses then the respondent call such witnesses as it thinks fit and the Court can do likewise. There was no requirement for the Court to summons the former judge or Public Prosecutor.

The respondents' counsel opposed this view. He argued that the Court cannot say once the Attorney General, acting on behalf of the state, has been summoned and appeared that is the end of this matter. The enquiry must be carried out by the Court. It is for the Court to summons the persons whose actions are complained of. In this case that is the former Chief Justice and, perhaps, the former Public Prosecutor. A distinction should be made between the enquiry process and the hearing. It was for

the Court to find the documents and obtain their production, to find the witnesses and secure their attendance. It is an inquisitorial process.

The petitioners' counsel rejected this stance and stated it was for the parties to put up the material.

The former Chief Justice is certainly someone whose actions are complained of. He cannot be summoned and questioned about his conduct of the trial and the judgment, even if resident in Vanuatu. However, the petitioner alleges that within a day or so of the murder of her husband, and long before the petitioner was a suspect, the former Chief Justice stated in conversation to another judge that he had had Interpol investigate the family, that they were criminals and similar remarks. This is set out in the affidavit of that judge.

The petitioner states that this material falls outside anything done whilst acting or purporting to act in a judicial capacity. The Chief Justice can be summoned and questioned in the witnesses box about this.

The Court of Appeal in Francois and Others –v- Ozols and others (Civil Case No. 155 of 1996) at page 11 stated

" The opening words of Article 5 are critical to the understanding of the nature of the fundamental rights and freedoms that are guaranteed. The words " The Republic of Vanuatu recognizes ..." are not apt to create private rights, and obligations between individuals. The words are a covenant by the Republic to all persons (subject only to a qualification in respect of non-citizens) that in its relationship with them the Republic will recognize the fundamental rights and freedoms set out in Article 5. The provisions of Article 6 provide the means by which compliance by the Republic can be enforced....

"The rights and freedoms guaranteed by Article 5 are to be accorded a generous interpretation: Attorney General-v- Timakata (1983) 2 Vanuatu Law Reports 679 at page 682. But this does not mean that the provisions of Article 5 can be applied to situations that are quite outside their evident scope and purpose, which is to regulate the relationship between the Republic and its people.

"It follows from this purpose that proceedings brought under Article 6 will name the Attorney General as representing Vanuatu; see s.1 of the Law Officers Act [CAP 118] and may also name the Minister,

Government official or other public official whose exercise of power, or inaction is said to constitute the breach."

What therefore does " party or parties whose actions are complained of " mean ? As the only respondent can be the State acting through one if its arms and represented by the Attorney General it should have been simply stated in section 218 that the petition be served upon the Attorney General. There was no need to mention "parties". The Attorney General, once served, will perforce contact the persons whose actions are complained of in order to prepare the case for Court. Unless the state is a 'party' within the confines of section 218 then there is no provision for service of the petition upon the state. That would be absurd, unless it is to be presumed service would in any event take place upon the State and that section 218 is a provision to ensure those whose actions are specifically complained of are brought before the Court for the purposes of the enquiry. Would they then become a 'party' as opposed to a person whose actions are complained of, and as represented by the Attorney General for the State ?

There does not appear to be an interpretation and a course of action which renders consistent the provisions of section 218 within itself and with the Constitution. The Constitution of course provides the only respondent is the State. The Attorney General as its representative must be served with the petition. As a matter of statutory interpretation 'party' in section 218 must mean the state. Within that broad term 'party' are other parties, namely those specifically whose actions are complained of, in this case the former Chief Justice, the former Commissioner of Police and the former Public Prosecutor. The purpose of the statutory provision is, in my judgement, to ensure that the specific persons whose actions are complained of are before the Court for the purposes of the enquiry and if necessary, the making of any Orders and award of compensation.

The answer to Questions 2 and 3 in my judgment is that the state is not the only a party; the former Commissioner of Police and the former Chief Justice are also parties. The former Commissioner is a party in that one or more of his officers is alleged to have committed wrongful acts. The former Chief Justice cannot, be asked questions about his conduct of the trial nor his judgment. However, he must be included as a "party" concerning the Interpol conversation and can give evidence about that.

The questions arise as to whether the current post holder or the one at the time of the events in question is the correct 'party' to be served and summoned. Further, whether it is the head of department, head of section

or person whose actual wrong doing in question becomes the party, and is to be summoned. The Attorney General as representing the State can represent such people. I find it is a matter for the court to decide within the confines of each individual case as to who is to be a party and as such served and summoned.

On the papers before me no specific complaint is made against the former Public Prosecutor. However, it might be that he should be a party if directions were given to the police about re-interviewing the Imperial Night Club witnesses, and if so, what were those directions. At this stage I will not direct that he is served as a party. However, I will give directions for the search for and production to the Court of any pertinent documents.

The question has arisen as to how the Court is to conduct the preliminary parts of the enquiry concerning the production of documents, serving and summoning of witnesses. Without limiting the power of the Court to act in other ways for the production of any relevant documents of the Public Prosecutor these should be searched for and produced by the Attorney General.

Once in possession of any documents and, if necessary, having heard the former Commissioner, I will be in a position to decide whether or not the former Public Prosecutor is to be served.

As far as service of the former Commissioner, Inspector Namaka and the former Chief Justice is concerned section 218 (3) is clear, it is for the petitioner to serve them. I so order, and give leave to serve outside the jurisdiction, and will hear any application for substituted service.

4. <u>What are the Courts obligations to summons or notify a party whose actions are complained of ? How is this to be effected if the party is overseas ?</u>

The answer to these questions rests upon the finding of the meaning of the words "party or parties". Section 218 (5) is clear the Court " shall summon the party or parties whose actions are complained of to attend the hearing". There is little difficulty if the party is within the jurisdiction. In this case at least one party is outside the jurisdiction. That party can be requested to attend but cannot be summoned. The hearing itself can take place but will necessarily have to face the difficulty of the absence of one or more pertinent witnesses.

Any person, particularly a judge, whose conduct is complained of in a constitutional petition should be made aware of the fact, whether or not he or she can be summoned. In this case, by directing service upon the former Chief Justice he will become aware of the proceedings and allegations.

Accordingly I order

1. The respondent, through its representative the Attorney General produces to the Court in 21 days any documents indicating what if any directions were given by

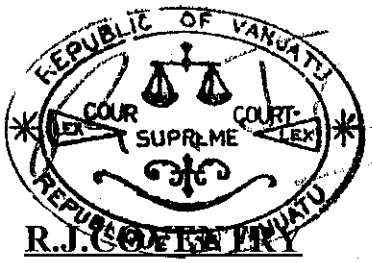
   (a) the Public Prosecutor to the Police
   (b) Senior police officers to junior police officers
   concerning any contact with the Imperial Night Club witnesses after their initial witness statements were taken.

2. The petitioner serves

   (a) the person who was Commissioner of Police at the time of the events,
   (b) the former Chief Justice,
   and (c) Inspector George Namaka

   with the petition and supporting documents.

DATED AT PORT VILA this 2nd day of October 2001.



R.J. COVENTRY
Judge

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