IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU
(Civil Jurisdiction)

Civil Case No.113 of 1997

IN THE MATTER OF THE CONSTITUTION OF THE REPUBLIC OF VANUATU

BETWEEN: LUCIANA MARI PICCHI
Petitioner

AND: THE ATTORNEY GENERAL OF THE REPUBLIC OF VANUATU in his capacity as representative of the Republic of Vanuatu.
Respondent

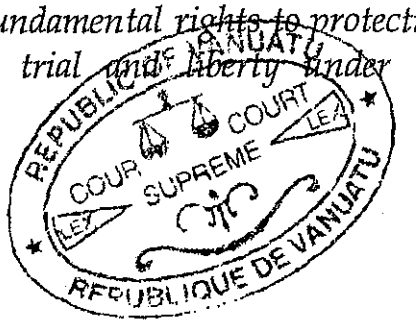
JUDGMENT

On 4th December 1995 the petitioner Luciana Mari Picchi was convicted of the murder of her husband Franco Picchi. She was sentenced to life imprisonment with a recommendation she serve not less than thirty years.

On 1st November 1996 the conviction was quashed and a retrial ordered. She was granted bail. No retrial was sought, the charge was withdrawn and she left Vanuatu on 3rd December 1996. She had spent eleven months in custody from the date of her conviction.

Luciana Mari Picchi now brings a constitutional petition against the Republic of Vanuatu alleging breaches of her fundamental rights. There have been a number of previous judgments and rulings in the course of this petition. For this judgment I look at the contents of the Second Amended Petition. Paragraph 1 seeks:-

"1. A declaration that the petitioner's fundamental rights to protection of the law, natural justice, fair trial and liberty under the



Constitution of the Republic of Vanuatu including the right to a reasoned decision provided for in s. 95 (1) of the Criminal Procedure Code were infringed in the following respects:-

(a) By the trial Judge, in conducting himself during the Court (sic) of the Trial, delivery of judgment and sentence in a manner that was irrational and biased so as to deny the petitioner a fair and impartial trial, particulars of which are set out in Schedule "A" to this Statement of Claim.

(b) By the Vanuatu Police, in approaching 2 of the Imperial employees, Jack Ross and Samuel Toara, whom the Police knew or ought to have known were intended to be called by the defence and through untruths and misrepresentations leading these potential witnesses to doubt, contradict and retract their previous statements in which they identified Franco Picchi as being at the Imperial Nightclub at 1 am on 29th November 1994 thereby undermining their credibility, reliability and consistency as witnesses thereby denying the petitioner a fair trial and opportunity to satisfy the trial Judge that a reasonable doubt existed and thereby avoid the petitioner's conviction.

(c) By the Public Prosecutor advising Police Officer Samson Kalo that he did not have to attend on John Malcolm to make an affidavit confirming his previous statement to the police thus leaving the petitioner to face the prospect of calling a Police Officer who was exhibiting the likelihood of being a potentially hostile witness.

thereby denying the Petitioner a fair trial.

Paragraphs 2 - 6 seek compensation, exemplary damages, the petitioner's legal expenses in the trial and appeal and costs of the petition.

In essence the complaints in the petition divide into two parts:-

A. The Trial Judge - the petitioner alleges he behaved in an irrational and bias way so as to deny her a fair and impartial trial. Particulars were set out in a 22 point "Schedule of Alleged Bias and Lack of Impartiality".

B. The Nightclub Witnesses - the petitioner alleges these were vital defences witnesses. There was interference with two, undermining their credibility and reliability and the third rendering him potentially hostile to the defence.

Certain parts of the original petition in this case were struck out under Section 218 (5) Criminal Procedure Code as being without foundation. That ruling was appealed (CAC 20 of 2001). When the Court of Appeal dismissed the appeal it stated, *(pages 6 and 7)*

> *"The sole issue before the Court of Appeal in 1997* (the appeal from the criminal conviction) *was whether the conviction for murder should be sustained. Attention was directed to that matter and nothing else. The Court held that the conviction was not sustainable and therefore quashed it. Mrs. Picchi has not been put on trial again. The onus on her, in this new proceeding, is to establish that her being tried and incarcerated was in all the circumstances a breach of her constitutional rights. Every issue essential to the present claim will need to be proved by proper evidence produced in Court and legally admissible in the current case."*

At page 3 the court drew attention to the cases of *Sullivan v. Moody* [2001] HCA 59 and *Thompson v. Cannon* (Ibid) in *"resolving the competing interests which ... inevitably arise in this type of case."*

Further the Court stated (at page 5) *"Breaches of constitutional rights must be based on reality and not on some theoretical or assumed scenario. The approach of the Privy Council in Ferguson v. The Attorney General of Trinidad and Tobago [2000] 5LRC500 is clearly relevant, persuasive and appropriate."*

At page 6 the Court also stated "*On the issue of undisclosure* (a point in the appeal) *there is implicit an unarticulated assertion that Mrs. Picchi was innocent. That has yet to be determined or at least there must be established that there is a reasonable doubt as to her guilt. This will have to be determined by admissible evidence tendered and accepted in the Supreme Court on the Constitutional Petition.*"

The process is inquisitorial. Both the petitioner and the respondent are legally represented. The petitioner called eight witnesses, the Court called one witness, the respondent called no witnesses.

The petitioner called Judith Hannam, Marcello Rigghi, Joseph Franconieri, Rowan Downing, John Malcolm, Timothy Koelmeyer, Samuel Toara and Jack Ross. The petitioner was not called. The Court called Inspector Namaka. I will deal in turn with the evidence of each witness later. The judgment and some of the evidence notes of the original trial judge were put in evidence, together with various exhibits, statements and documents mainly produced by Mr. Malcolm. They are listed on pages 1 and 2 of the "*Index*" compiled by the Court as the hearing progressed. I remind myself to judge this case on the admissible evidence before me and to examine carefully the extent to which documents and their contents are admissible and, if so, of what.

In view of the judgment of the Court of Appeal the petitioner set out first to show there was at least a reasonable doubt as to her guilt.

The prosecution case at the original trial was that the petitioner was having an affair with Tui George Saipir, the first of the three accomplices to give evidence against her. The second accomplice-witness was Berri Max Jimmy. He was offered a million vatu to assist in the murder. The third accomplice was Serah Salome, the Picchi's house girl. She acted out of loyalty and sympathy for Mrs. Picchi.

The prosecution alleges the petitioner, Tui and Berri carried out the murder by assault with pieces of wood and strangulation on the

living room of the Picchi's home in Tassiriki. That occurred about 8 p.m. on the evening of 28th November 1994.

The petitioner's counsel called the following witnesses in this regard:-

Judith Hannam - to say about 1 - 2 a.m. on the morning of 29th November she heard a tyre skidding on gravel and a man screaming and saying words to the effect of *"No"*. This was a long way from the Picchi house and close to where the deceased's body was found in the later morning in the back of a truck, having been pushed down a bank.

The suggested inference being this was the place and approximate time when the killing took place, and not at the house several hours earlier.

Marcello Rigghi - was living in the Picchi house as a family friend for several weeks until a day before the murder. Tui asserted that most lunch times he had sex with Mrs. Picchi at the house, and also on Sundays' at Devil's Point. Rigghi said that assertion was impossible as most lunch hours he was around the house, he would have known. Only one Sunday in three months was he not with them, so nothing could be going on at Devil's Point.

Joseph Franconieri said on the morning of 29th November he spent 1 ½ - 2 hours in the Picchi house, mostly in the lounge, making telephone calls on behalf of Mrs. Picchi. He said the house was clean, there was nothing special, no smell, nothing to indicate recent cleaning of the house. The prosecution case was that the living room and surrounds had been carefully cleaned to clear up the blood.

Timothy Koelmeyer is a forensic pathologist. He gave opinions working from the photographs, evidence and descriptions. His conclusions were that in several regards the evidence of Tui and Berri was not consistent with the injuries to the body of Franco Picchi and with his clothing.

Samuel Toara and Jack Ross gave evidence that they saw Franco Picchi at approximately 1 am on 29th November at the Imperial Nightclub. If that was so, then the murder could not have taken place at approximately 8 p.m. the previous evening.

The other witnesses of the petitioner did not address the issue of showing there was a reasonable doubt. The respondent called no evidence. Had that happened then there was the possibility that the hearing of the petition would have become a retrial of the issue before the original trial court.

I will address the evidence of Toara and Ross later. There is also further comment I will make on the evidence of Hannam, Rigghi and Koelmeyer later. However, on the basis of their evidence before me (excluding Toara and Ross) given the prosecution assertion of when, where and how the murder took place and in the absence before me of any witness called by the prosecution at the trial itself, I must find for the purposes of this petition that the petitioner has established the existence of a reasonable doubt.

The matter does not rest there. I have read the judgment of the Judge at the original trial. I have also examined the recorded evidence and cross-examination of many witnesses and looked at the photographic exhibits. In my judgment on the face of that evidence it was open to the trial Judge to find the prosecution had proved beyond reasonable doubt that the petitioner had murdered her husband.

The Court of Appeal in its judgment of 1st November 2001 at page 6 stated:-

> *"This Court was of the view that because there were conflicts in the evidence which needed to be subject to an articulated resolution, in the absence of it the Court could not be sure that a conviction was justified. The conclusion that she was guilty on the evidence could have been available, but the reasoning process needed to be set out in the judgment."*

I do not propose to examine the evidence in great detail. In any event, apart from the witnesses listed above, I have not heard the witnesses in person giving evidence. It is possible to speculate about ways in which inconsistencies and anomalies could be rationalized to sustain a guilty verdict particularly those arising from witnesses I have heard. I have not done that and do not propose to do so.

It must be stated that if Berri and Tui and Serah were lying (there was no room for mistake) it was a monstrous enterprise to damn Mrs. Picchi. Whilst there is no obligation upon the defendant to suggest a motive for this, there is no evidence as to why not one but three people should maintain such lies. The nearest to even a possible motive occurs in the case of Serah (page 114 of the Judgment). There is no suggestion of who else might have a motive or why. Mr. Picchi was a womaniser and a heavy gambler but was using earnings and family money to pay the debts.

If the killing took place as Berri, Tui and Serah said it would have been a traumatic event for all. One in which, months later, recollections of the three, both of the night and surrounding events might be different in some matters. It must be stated there is consistency in much of the events they describe and details are given which might be dismissed as being unbelievable if the story had been concocted (e.g. the use of the blood pressure machine, the wearing of rasta wigs). The explanations given by Mrs. Picchi for the payments she made to Berri after the killing were open to rejection as unbelievable.

There were powerful points raised by Professor Koelmeyer when called for the defence, e.g. the tramline bruising to the chest, the drag marks, the fractured eighth vertebra. These were addressed in cross-examination at the trial. The net effect was that Professor Koelmeyer did not say the injuries simply could not have been inflicted as described by the accomplices, he used words such as *"I can't discount the possibility"* (page 661 typed transcript when talking about tramline

bruising, and nalnals, p. 663) *"it is fair to say that the thicker and heavier the wood the less likely it is that it may have left a tram line bruise"*.

In evidence in chief before me Professor Koelmeyer precluded the presence of a blindfold *"My reconstruction says a blindfold was not there"*. (Tui and Berri said Picchi was blindfolded when attacked). There were defence bruises on the outer aspects of the forearms and hands, suggesting someone covering up his head. If blindfolded Professor Koelmeyer asserted, he wouldn't see the blow coming and so not defend himself. In answers to the Court he accepted the natural reaction of a person, even when blindfolded would be to protect the head once he had realized he was under attack. This reaction would also leave the side of the chest (the site of the tramline bruising) unprotected. The evidence showed that his hands were tied behind his back at the start of the attack, but later came free.

The evidence at trial of Professor Koelmeyer substantially supported the descriptions of the killing given by Berri and Tui. The trial Judge in his judgment considered these points e.g. page 24 the tramline injuries, page 25 finger marks bruising (referred to by Sgt. McDonald at trial and Prof. Koelmeyer before me) supporting Tui's account of holding Mr. Picchi's legs during the assault.

I was concerned that Professor Koelmeyer's assessment of the accomplices' story on certain aspects, had changed from it being unlikely to "not possible". There is the question of the blindfold mentioned above. Further in the trial he stated (p. 10 typed transcript) *"photo 9 shows heavy scratches or drag mark. The marks are consistent with the body having been dragged across a rough surface such as concrete"*. In evidence before me he described Picchi as obese, *"that kind of dead weight would leave drag mark .... All we have is very superficial drag marks"*, (p. 45 my notes).

Jack Ross and Samuel Toara gave evidence at the trial. If their evidence was true or might have been true that was the end of the prosecution case. Franco Picchi simply could not have been seen alive

at about 1 am on the 29th. Having heard their evidence and cross-examination the trial judge stated he could place no reliance on either. I will deal in more detail with their evidence later.

I reiterate that this is not a retrial nor do I seek to make findings upon the original charge. In my judgment a verdict of guilty was open to the trial Judge. The Court of Appeal quashed that verdict for the failure to set out the reasoning process. This Petition is not brought in respect of that failure, although that failure is utilized as evidence of the alleged *"irrational and bias"* manner in which the trial judge conducted himself.

However, I must first look at the allegations made by the petitioner to see if they have been proved.

The petitioner alleges her fundamental rights to protection of the law, natural justice, fair trial and liberty ... including the right to a reasoned decision provided for by Section 95 (1) Criminal Procedure Code were infringed as set out in paragraphs (a), (b) and (c).

Paragraph (a) states:-

> *"By the trial judge, in conducting himself during the Court (sic) of the Trial, delivery of judgment and sentence in a manner that was irrational and biased so as to deny the petitioner a fair and impartial trial..."*

Particulars were set out in the schedule. I will deal with each in detail after considering Section 95 (1) Criminal Procedure Code. That states:-

> *"Every judgment shall ... contain the point or points for determination, the decision thereon and the reasons for the decision ..."*

The Court of Appeal found a failure to articulate the reasons for the decision. That failure was rectified by the quashing of the conviction and the ordering of a retrial. Given the length and complexity of the trial that would have seemed a daunting prospect. The simple fact is the law provided a remedy, application was made (by appeal) for it and the remedy granted.

A. The Trial Judge The Schedule of Alleged Bias and Lack of Impartiality

1. *This paragraph was abandoned at the hearing of the petition.*

2. *The trial Judge's unjudicial method of analyzing the evidence over more than 120 pages setting out substantially uncritically the prosecution's evidence; excusing prevarications by Tui, Berri and Serah, reviewing the defence's evidence by posing [within square brackets] hypothetical questions substantially, critical of the respondent (sic) but not attempting to resolve them, then in about half a page delivering an unreasoned judgment, making no findings of facts, considering only the prosecution's case and not considering the defence's case.*

I do not find there was an *"unjudicial method of analyzing the evidence"*. Section 95 (1) sets out what must be in a judgment. Judges will have different ways of writing judgments, and these might differ from case to case even for the one judge. In criminal proceedings they must comply with Section 95 and address the matters that arise in all criminal cases and the specific points arising in the trial (e.g. as in this case the law relating to accomplices). I have dealt above with the failure to articulate reasons.

The structure of the judgment is clear. There is a brief description of how the body was found. There is then a summary of the prosecution and defence cases. There was a detailed consideration of the pertinent law. There then followed a summary of the evidence. This

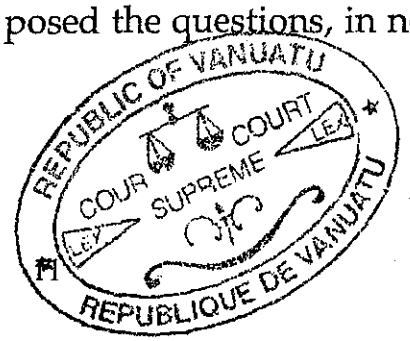
was done witness by witness in considerable detail over the next 110 pages. There then followed a page and a half of specific findings and the verdict.

After setting out Tui's evidence (*9 pages*), there are two pages of examination of that evidence and a checking of details against the evidence of other witnesses (*pages 24 - 26*). The same approach is taken to Berri's evidence (*9 pages and two pages, 39 and 40*). Serah's evidence covers 14 pages with only a line of comment about corroboration at the end.

The trial judge considered the evidence of Dr. Peach, the prosecution witness who carried out the autopsy, and that of Professor Keolmeyer side by side, where there were differences in finding he preferred that of Professor Koelmeyer. There was a half page of discussion of the evidence set out, as with the others, in square brackets.

The evidence of the defendant was set out over 42 pages. Complaint is made that throughout hypothetical questions, substantially critical of the petitioner are posed with no attempt to resolve them. Those questions were placed in square brackets. No other witnesses evidence is treated in this way.

In weighing and assessing the evidence of a witness regard is necessarily paid to what other witnesses say on a topic, particularly ones of importance. Differences were pointed out and questions posed about who was right, or the inferences to be drawn from consistent or inconsistent remarks, comments are made. Whilst another judge might approach this question in a different way I do not find this is in itself supportive of the petitioner's contentions. The defendant's evidence was necessarily going to come under close scrutiny. The failure, as accepted by the Court of Appeal, was, having highlighted the differences and posed the questions, in not resolving them or giving reasons.



The trial judge did, when sentencing (page 128), set out a résumé of what he saw the evidence shewed and the sequence of essential events.

In an earlier judgment I have criticized the phrase *'unreasoned judgment'* in the petition. It suggests *'irrationality'* or *'lack of reason'* as opposed to the Court of Appeal's finding of a failure to state reasons.

3. *The trial Judge's straining to explain the remarkable mistakes as to dates and times of Tui, which in a murder prosecution, surely ought to call for highly critical comments. Being appallingly unreliable on date is a strong finding in respect of credibility overall.*

The trial judge did find that Tui *"was appalling at remembering dates"*, (page 128). It is a strong finding in respect of overall credibility. When dealing with the evidence of Serah and Ezra the trial judge stated *"one's experience of Ni-Vanuatu generally, and in this case particularly, is that they are notoriously wrong about dates and times. The evidence tends to support Mrs. Picchi on this."* The trial judge was in fact highlighting deficiencies in the evidence of prosecution witnesses. What he had to do was to assess whether Tui was truthful and reliable upon the central issue, the killing itself, or whether his errors on dates and times were such as to render him unreliable on vital matters or for the judge to doubt his veracity. The remarks "one's experience of Ni-Vanuatu generally..." should not have been made.

I did not hear the evidence of Tui. However on a reading of his evidence it was open to the judge, as he did, to say here is a man who is hopelessly unreliable on dates and times, yet on the central issues I accept his evidence. Every day courts hear evidence from witnesses who make errors over dates, times, places, sequences of events, descriptions. That does not mean a witness is necessarily being untruthful - indeed the alibi when the details are all consistent might raise the suspicion of fabrication. It does not mean a witness is

unreliable or untruthful if the central events in question are not dependent upon those areas where errors occur. It is a matter for the judge or jury to make their assessments.

4. *The unreasoned finding by the trial Judge that Professor Koelmeyer's evidence was consistent with the accounts of the accomplices of the events of 28th November 1994, when the whole thrust of Professor Koelmeyer's evidence was the very opposite.*

At page 39 the trial judge stated:-

"I take the view that the forensic evidence namely that of Professor Koelmeyer and Dr. Peach, is capable of corroborating the evidence of this witness (Berri) in a material particular, namely that the injuries to the body of Mr. Picchi were capable of having occurred in the manner this witness describes. I note Professor Koelmeyer's reservations regarding the tram line injuries but even then he states that he cannot entirely exclude that those injuries were caused by nalnals. It is further capable of being corroboration of Berri's evidence that the strangulation came towards the end of the incident."

At page 66 the trial judge stated:-

"The important point to remember is whether the forensic evidence given in this Court, whoever it may come from is consistent with the evidence of those who say they killed him, or so inconsistent that they could not have done so in the manner that they say they did."

I have read through the trial evidence of Professor Koelmeyer. The principal thrust of his evidence was directed towards the question of inconsistencies.

However, his examination of the photographs, documents and evidence was not confined to those matters. He looked at the whole matter. He agreed with a number of findings of Dr. Peach, (page 637

of the typed transcript of the evidence), he had *"no difficulty with Dr. Peach setting the estimated time of death by several hours, ... [it] is not inconsistent with the account given by the prosecution witnesses."*

He accepted the best evidence would come from observation of the body at time of autopsy (page 638). The injuries to the left hand were consistent with the application of force to them, not a blow by the them (p. 644). He said (page 646) photo 9 shows heavy scratches or drag marks consistent with the body having been dragged across a rough surface such as concrete, the heavy blow to the back of the head, the ligature marks, the small bruises to the ankle.

In my judgment it was open to the trial judge to take the view of Professor Koelmeyer's evidence that he did. There was a consideration of the principal inconsistency, the tramline bruising and the size of the nalnals. It might be said more should have been made of the inconsistencies. That is a matter of judgment, and in any event it was a topic which was open to argument before the Court of Appeal. I cannot find anywhere in the evidence that Professor Koelmeyer says *'it could not have happened the way Tui and Berri describe it.'*

Professor Koelmeyer was an expert witness. In that capacity the judge accepted he was giving, as best he could, an objective assessment and analysis.

5. *The trial judge's failure to control and weigh Berri's refusal to answer questions in cross-examination on crucial matters relating to where the truck was facing, how the deceased was placed on the truck, and by whom.*

6. *The failure of the trial Judge to control and weigh Serah's refusal to answer cross-examination on crucial issues or her repeated "mi no remember".*

Berri started his evidence on 18th October 1995 at 9 am. He completed it about 3 pm on Monday 23rd October. The parts relevant to this ground of the petition are found at pages 194 - 196. This took place late in the morning of 20th. He had been in the witness box for over two days, and had been cross-examined about many things, including his earlier statements.

Serah Salome went in the witness box at 3:10 pm on 23rd October. She completed her evidence on 30th in the afternoon. Although there were substantial breaks, and a weekend she was in the witness box for a long time.

A witness' failure or refusal to answer a question can be for many reasons. It is not uncommon after a long time in a witness box and lengthy cross-examination for a witness to get tired of the whole process and refuse to answer, or lapse into answering every question with *'I don't remember'*, even when the question has been answered earlier. An attitude of truculence might be exhibited, especially if the witness is stating what is set out in documents before the questioner.

It might be such behaviour is because a witness is not telling the truth. Such behaviour might well found points in favour of the cross-examiner in closing addresses. It is for the judge to decide what direction to give to the witness. The witness cannot be physically made to respond. Fine or imprisonment is unlikely to assist in this type of circumstance. In the final analysis it is a factor in deciding the truth and reliability of a witness. I can see nothing in the documents before me to suggest the failure to require Berri or Serah to answer was done through bias or impartiality. The trial judge, when deciding to accept their evidence should have commented on that behaviour when dealing with the question of acceptance.

In evidence before me on this petition Ross and Toara began, at the later stages of their evidence to exhibit the same behaviour (see PART B, The Nightclub Witnesses of this judgment).

7. *The trial Judge's method of analysis, changing dramatically when approaching the defence's evidence, more particularly that of Mrs. Picchi. Her evidence was regularly interpolated with critical comments, even though by comparison with Tui, Berri and Serah's it is almost totally consistent with innocence.*

8. *The failure to weight the consistency of Mrs. Picchi's evidence.*

9. .....

10. *The few, as it were, begrudging findings in favour of Mrs. Picchi, none of which were weighed by the trial Judge.*

I have dealt above with the point set out in paragraph 7. The defendant's evidence is consistent with innocence. The question is whether it was accepted or not. In making that assessment the trial judge could and did look at it in itself and when set alongside the evidence of other witness. He chose to do that by interpolation.

I have presumed in paragraph 8 that *'weight'* should mean *'weigh'*. The question must be asked *'consistency'* with whom or what. The central evidence of Berri, Tui and Serah covered the killing itself and disposal of the body. There was immense scope to examine the consistency of their evidence with each other and other witnesses. The very nature of Mrs. Picchi's evidence rendered far fewer areas for the examination of consistency with other witnesses.

The Court of Appeal has found that the rejection of Mrs. Picchi's evidence was open to the trial judge and that he did. The failure was to state the reasons for that rejection.

9. *The undermining of the evidence of plainly neutral witnesses; Ross, Toara, Ernst, Hannam and Rigghi, in the face of their credible evidence.*

It is not entirely certain in the petition what is meant by the "undermining of the evidence". In respect of Ernst, Hannam and Rigghi they could reasonably be described as neutral witnesses. The weighing and assessment of their evidence, given its clear inconsistency with the prosecution case, required detailed exposition. That did not occur as the Court of Appeal found, and was a part of the whole set of reasons which led to the quashing of the conviction and the ordering of a retrial.

The evidence of Ross and Toara was assessed by the trial Judge and not accepted. There is a clear basis upon which these conclusions could be reached e.g. the conflicting statements of each, the wrong identification by Ross of the man with Picchi, their remarks in cross-examination, (pages 120 -122). (See also my assessment of the evidence of Ross and Toara during the petition hearing, Part B The Nightclub Witnesses).

11. *The omission of the trial Judge to deal with the detailed written presentation of the case for the defence.*

...

13. *The failure of the trial Judge to make reference to the defence's submission or on inference drawing in a case which was set out in writing which the respondent still relies upon.*

P. 22 is the document in question. It runs to some 47 pages. I have read it. It is a detailed exposition of the law and evidence laying particular emphasis on the points for the defence. Pertinent questions are posed and the relevant evidence examined in relation thereto.

It is a powerful document which raised and put on behalf of the defendant the points in her favour. There is a detailed analysis of the prosecution witnesses description of the killing together with the forensic evidence.

There is no obligation on a trial judge to specifically refer to and *"deal with"* the written representations of the case for the defence. He or she must, of course address the salient points in the defence case. In practice that will generally be the same as dealing with the defence's written submissions. This did not happen in some respects and the Court of Appeal ruled accordingly.

12. *Whilst at the outset referring to the burden and onus of proof, yet 120 pages plus later in his brief conclusion, the trial Judge makes no reference or reference back to burden and onus and no effort to set his construction of the evidence into the WOOLMINGTON standard frame.*

At page 126 the trial judge, in his conclusion stated he was *"sure beyond reasonable doubt"* that Tui and Berri were telling the truth. He had *"no doubt whatsoever"* that Tui was having sex with Mrs. Picchi even if there was a tendency to exaggerate. He had no doubt Serah was the defendant's close confidante. He stated *"I am satisfied beyond reasonable doubt that Luciana-Mari Picchi is guilty as charged"*.

It is doubtful if there was a failure concerning the issue of direction on the burden and standard of proof which in itself would vitiate the proceedings. There is a strong argument to say there was a failure to set the findings of fact, the resolution of the conflicts in the evidence, within the burden and standard of proof. Again any such failing was rectified by the quashing of the conviction.

14. *The derogatory remarks made by the trial Judge of the accused's evidence that she was a practicing Roman Catholic, insinuating that she couldn't be a practicing Roman Catholic and have married a divorced man when the evidence that she was a practicing Catholic was being called not to suggest that she was a good Catholic but to explain why Mrs. Picchi could have resorted to magic. Catholicism involves belief in matters supernatural; magic does likewise.*

Mr. Malcolm gave evidence on this point, (see pages 27-28 of my notes of evidence).

It is no part of this judgment to pass comment upon the framing of this paragraph of the Schedule. Suffice it to say that members of any of the Christian churches might take exception at their beliefs being equated with belief in *"magic"*, particularly of the kind suggested in this case.

The question I have to address is whether there is evidence of bias or lack of impartiality. Evidence was led from the petitioner, as defendant, that she had consulted a *"clever"* (supplier of custom medicines) to stop her husband gambling, philandering and beating her. Some remedies had been tried. She said at the start of her evidence that she was a practicing member of the Roman Catholic Church. According to Mr. Malcolm's evidence the Judge said *"I see"* with a disparaging sneer. There were also a series of questions by the judge about related but peripheral matters. This start was intended to put her actions in the context of the kind of woman she was. Mr. Malcolm said *"It was a bad start"*.

I find that the Judge should not have interrupted the defendant, especially so early in her evidence, and particularly concerning what was a feature of the prosecution case which she had to address. Most if not all defendants will be nervous, especially at the start of their evidence. It is vitally important a defendant can settle down and give her or his evidence. Interruptions disrupt that process. They should only be made to ensure evidence is recorded accurately or for some other vital reason.

Whatever the reason for the interruptions and questioning, such behaviour so early in the defendant's evidence might when placed with other points raise an apprehension of a predisposition against the defendant or one that formed at that time. I will consider this later with other points.

15. *The cutting-off by the trial Judge of an answer by the defence's expert, Professor Koelmeyer, in cross-examination from the public prosecutor, in respect of questions over the effect of the flow of blood from the head whilst the deceased was blindfolded, including, the unreasoned dealing with counsel's objection to the cutting off of the question: the trial Judge refused to allow the answer which was directed to Professor Koelmeyer expressing his opinion that this involved one of the major areas of inconsistency. The trial Judge overruled the answer "because the question went to science and not fact". The defence's position is that the principal reason Professor Koelmeyer was called to give evidence was to provide scientific evidence to assist the Court with facts. Also, it was in answer to the prosecutor's own question.*

The refusal by the trial judge to allow this answer could have been an error of law or evidence of bias. On its own it is not possible to say which. I will deal later with the question whether in isolation points might not indicate bias whereas collectively they do.

16. *The rude treatment by the trial Judge of some male defence witnesses who, when entering the witness box and went to take a seat, being asked:*
*"**Are you tired?**"*
and when a potential witness replied
*"**No**",*
were told, rudely, and without explanation to:
*"**Stand up**".*

The only evidence in this regard comes from Marcello Rigghi. He states (page 7 of my notes) *"I went in the witness box. I'm not sure if the judge was in Court. I was asked to swear on the Bible. I was standing. I swore on the Bible. I then sat down and waited. The Judge looked at me and asked if I was tired. I said I wasn't. He looked at me and then said "**Then***

stand up". *It was definitely impolite and inappropriate ... [when talking about the name of an island] ... he wasn't making fun of me, but as if I was saying something strange or weird ... I didn't observe him react in anyway."*

I do not consider one instance of that kind the allegation in supports the petition.

17. *The needless insulting remarks made by the trial Judge of Ni-Vanuatu in respect of a matter that arose during the examination of Samuel Toara relating to the use of the word 'uncle' to describe the association between the witnesses Samuel Toara and Leisongi Peter in Ni-Vanuatu culture, as being akin to knowing who was the father of a litter of puppies.*

Words such as *"uncle", "cousin", "cousin brother"* are often used in Vanuatu in a broad way and do not connote the precise relationship which they do in ordinary English. This remark of the trial judge as recorded by the defence was insulting and should not have been made.

18. *The description of Tui and Berri, at least, as otherwise, ordinary, good and kind Ni-Vanuatu, when on the trial Judge's findings they were plainly anything but: Tui killed for sex; and Berri murdered for money.*

I do not accept this ground as supporting the petition. The view of the trial judge was that it was the *"evil influence"* of the defendant that *"led those three into this terrible murder"*. That was a view open to him on the evidence.

19. *Failing to adjourn the sentencing for a period of one week until Senior counsel instructed, Mr. P. T. Finnigan, could return to Port Vila to make the submissions.*

20. *The failure to allow the defence to have the background of Mrs. Picchi fairly put before the Court, including, the right to have psychiatric and medical reports considered.*

This was clearly a failing in the conduct of the sentencing and the Court of Appeal has so pointed out (page 21 of the judgment). In itself it did not need remedying at that time as the conviction was quashed. The question again arises as to whether this was pure error or is evidence of bias. I will address that question later.

21. *The cutting-off of submissions made by the assistant counsel, Mr. Malcolm; such submissions being directed to the issue of diminished responsibility and what has been known as either 'battered wife syndrome', or 'dominated person'.*

I do not accept this ground as supporting the petition. Diminished responsibility, *'battered wife syndrome'* and *'dominated person'* are, if anything, defences. They were not raised. The defence advanced was completely inconsistent with them, and the defence had been rejected. The Court of Appeal heard the evidence of Mrs. Blackwell, and the question of battered wife syndrome and 'denial'. There was no determined case cited to the Court to support that.

22. *After having disclosed to former Supreme Court Justice Rowan Downing that the trial Judge had called Interpol to investigate the petitioner and Franco Picchi and asserting the view as a consequence that the petitioner was a wanted criminal in Italy, and not the type of person wanted in Vanuatu, nevertheless:*

a. *conducted the trial of and made the final adjudication upon the petitioner; and*
b. *omitted to disclose to the petitioner the information he had obtained from Interpol, and seek the petitioner's informed consent to conduct the trial.*

This is a ground which must be looked at closely. The only evidence comes from Mr. Downing. He used notes. His judicial experience prior to appointment was limited to sitting on Courts Martial for the Royal Australian Air Force. He accepted there were *"differences"* between himself and the trial judge. It related to judicial conduct. He was keeping notes of incidents he considered bore upon this. He stated *"Ultimately a series of notes I had of which this is a part, found their way into a report of the International Commission of Jurists"*. There was an enquiry and a published report. Rowan Downing gave further evidence about this.

At the time of the conservation in question Mr. Downing was a judge. By the time of the trial he had ceased to be a judge and was resident overseas. He says he did not learn of the trial until after sentence and before the Court of Appeal hearing.

Rowan Downing gave evidence that a day or so after the murder he had had a conversation with the trial judge. Notes were made about ten minutes later. He said *"the Chief Justice informed me he had had Interpol investigate the Picchis. He told me they were criminals, you know (as a manner he used to speak), and said they'd been in Cook Islands and been involved in fraud there. He also told me they were not the type of people who were wanted here."*

In cross-examination he was asked about line 3 of his note. He stated *"Picchi"*, singular, had been in Cook Islands. Mr. Downing continued *"I intended reference to Mr. Picchi. Not expressing reference to Mrs. Picchi."*

He was asked *"You were the judge before whom application for the warrant of arrest was made."* He replied *"I believe that was the case. I have no independent recollection of that. Many warrants were sought in the time I was a judge."*

A few days later the Court recalled Rowan Downing. In answer to the Court he said *"I have a recollection I did sign a warrant in relation to this. [It was the warrant of arrest]... I can't recollect who made the application at all. It was a judicial task I had to undertake."*

The Court asked at the time of considering the application for a warrant if he recollected the conversation with the Chief Justice. He replied *"I can't recall. In any event it wouldn't have influenced me one way or the other. I can't remember if I thought about it. I simply can't recall. It is a matter I would have taken into account. The decision would have been entirely independent of anything I'd heard."*

At page 20 of its 1997 judgment concerning the appeal against conviction the Court of Appeal stated *"The hallmark of an independent legal system is the non-involvement of the judge in any investigation process. We accept that there will sometimes be occasions, particularly in a smaller jurisdiction, when a judge may be required and expected to undertake roles which are outside those traditionally undertaken by Judges. If that arises it means that the Judge should not have any further involvement in the case."*

It is clear that, for whatever reason, there was strong animosity between Rowan Downing and the trial judge. I must approach his evidence with care. On his own evidence he was collecting and contemporaneously recording acts of the trial Judge which he considered generally bore adversely upon the Judge's conduct.

It is disingenuous to say *"Ultimately a series of notes I had of which this is a part, found their way into a report of the International Commission of Jurists"*. Questions were not directed to what he considered his own duty was in these circumstances. This whole case was a cause célèbre.

It is perhaps surprising he had forgotten signing the warrant that was to be used for the extradition proceedings in Singapore.

I find that remarks of the kind alleged were made by the trial Judge to Rowan Downing. It is not entirely clear what the judge was saying he had done and whether he was referring to Mr. Picchi or both Mr. and Mrs. Picchi. Given those remarks and what they necessarily import he had done, the principles reiterated by the Court of Appeal applied.

It is accepted there was no disclosure to the defendant or her counsel. There could not be an informed consent to his conducting the trial.

As far as Mr. Downing is concerned when he signed the warrant of arrest, he had either forgotten about the remark, it didn't then come to his mind, or it was a matter which did come to his mind and he decided nevertheless he could still properly make the decision.

There is, of course, a considerable difference between signing a warrant of arrest and conducting the trial, though both are judicial acts.

Questions do arise as to whether, approximately a year after the conversation, the trial judge recollected it and whether the reference to criminals referred only to Mr. Picchi or both of them and what enquiries had been made. Whatever the answers to these questions may be having made the enquiries and made those remarks, the trial judge should have excused himself or at the least, should have disclosed what had happened to the defendant and her counsel before commencement of the trial.

So far I have considered the points in Schedule A. I will consider the witnesses who gave evidence before me on the general allegation of irrationality and bias.

I accept Judith Hannam as a truthful witness. I have dealt at paragraph 9 with her evidence concerning the cries at 1 - 2 am. She also stated:-

> *"I was concerned that the judge at no stage looked at me and seemed to show disbelief in what I was saying. He kept looking out of the window and pulling the sort of faces as if he didn't believe me... I was present for the sentencing. He seemed to be really nasty to her (the defendant) and particularly biased towards her, which I thought was unfair ... [he said] if he could give her the death sentence he would, and he would like to pull the switch."*

She then gave evidence of the conditions in the prison where Mrs. Picchi began serving the sentence.

I have set out above the evidence of Marcello Rigghi in this regard (consideration of paragraph 16 of Schedule A).

Jose Franconieri gave evidence about the house the next morning. The main thrust of his evidence went to the question of whether or not there had been a *"clean up"*. There was nothing in his evidence before me about the behaviour of the judge.

John Malcolm one of the petitioner's defence lawyers at the trial also gave evidence before me.

Mr. Malcolm has given an immense amount of his time and effort to defend Mrs. Picchi in the criminal trial and to pursue this Constitutional Petition on her behalf. It is also clear that he has deep-seated belief that the judicial system failed her. The careful assembly of notes, transcripts and legal authorities, the arranging for the presence of witnesses, the preparation of arguments and the conducting of many hearings all bear testimony to this. No-one could see all that and not have admiration for his devotion to the cause of justice.

I must assess his evidence and all the other evidence and the arguments in this petition objectively.

Mr. Malcolm gave evidence during the hearing of the petition whilst still continuing as a member of the legal team acting on behalf of the petitioner. In a larger jurisdiction, or one with legal aid available this should not, or course, happen. Even in a small jurisdiction a person should not act as lawyer and witness although the Court recognizes the difficulties in this case.

Mr. Malcolm gave lengthy evidence about this saga from the earliest days to the present. He gave evidential support for several of the points enumerated in the schedule and referred to the contacts with the witnesses Toara and Ross and the lack of contact with Kalo. He cited several examples of what he saw as bias or lack of impartiality, e. g. the failure to await the return of Mr. Finningan for mitigation and the witness to be called in mitigation, the questions about background and religion, the *"disparaging"* and *"sneering"* treatment of the defendant by the Judge, the failure to require vital witnesses to answer questions, the ruling about what is *"science"* and what is *"fact"*, when Professor Koelmeyer was giving evidence.

It must be remembered that some of what Mr. Malcolm describes is evidence of what he recalls as being said and done, some of his evidence, e.g. if a remark was made disparagingly, was assessment and opinion. I accept his evidence when he describes matters of fact. I accept that the assessments he makes and opinions he holds are genuine. It is for the Court to decide whether the evidence supports the allegations in the petition.

B. The Nightclub Witnesses

I now consider paragraphs 1 (b) and (c) of the petition.

> *(b) By the Vanuatu Police in approaching two of the Imperial employees, Jack Ross and Samuel Toara, whom the Police knew or*

ought to have known were intended to be called by the defence and through untruths and misrepresentations leading these potential witnesses to doubt, contradict and retract their previous statements in which they identified Franco Picchi as being at the Imperial Nightclub at 1 a.m. on 29th November 1994 thereby undermining their credibility, reliability and consistency as witnesses thereby denying the petitioner a fair trial and opportunity to satisfy the trial judge that a reasonable doubt existed and thereby avoid the petitioner's conviction.

(c) *By the Public Prosecutor advising Police Officer Samson Kalo that he did not have to attend on John Malcolm to make an affidavit confirming his previous statement to the police thus leaving the petitioner to face the prospect of calling a Police Officer who was exhibiting the likelihood of being a potentially hostile witness.*

Thereby denying the petitioner a fair trial."

I must consider specifically the evidence of Samuel Toara and Jack Ross. If either or both were or might be reliable and truthful then that was an end to the prosecution case.

There are two parts to the consideration of their evidence, first the assessment of their truth and reliability and second the contact with those witnesses by the police and whether that activity breached or led to a breach of the petitioner's constitutional rights.

In his judgment at pages 120 - 122 the trial judge considered their evidence. Given the fact they each initially said they saw Franco Picchi at 1 a.m. then later made statements saying they didn't, the trial judge's rejection of their reliability is unremarkable. The misidentification by Ross of the person with Picchi at the time only lends weight to this. The evidence of both these witnesses is one of recognition or identification; the Courts are aware of the care that must be taken in such cases.

The principal reason the trial judge rejected the evidence of each must have been their inconsistent statements, especially when the later statements declare uncertainty about the identification. It must be remembered there were other reasons for the rejection.

I therefore look at how the change came about. The petitioner says quite simply once the police had the accomplices' evidence and a time of death of 8 p.m. they set out to undermine the credibility of any witness who said he saw Picchi at 1 a.m. at the Imperial Nightclub. In this regard consideration must be given to the statement of Police Officer Samson Kalo and the fact the defence considered they could not call him at the trial.

I have heard the evidence of Samuel Toara and Jack Ross in this regard. I consider it carefully. It must be remembered that they are relating events that took place over seven years ago, although events that will have lodged in their minds shortly after their occurrence.

Each in evidence before me said they saw Picchi at the nightclub at 1 a.m. and made a statement to that effect. They later, after persuasion from the police, they say, made a further statement casting doubt upon the earlier one.

It was clear both Toara and Ross could not understand why, seven years later, they were being called again to give evidence. At the end of cross-examination Ross said *"If you are asking me questions around the Franco Picchi case, if so I have forgotten everything."* In answer to the Court's questions about Superintendent Namaka's visit Toara answered questions and then said *"I don't want to talk about it."*

This is an understandable reaction from people not involved in the law when they are asked to go over matters they have given statements about and been questioned about. It was possibly the attitude of Berri/Tui when in cross-examination at the trial they started refusing to answer or said its all in the statement.

It was open to the defence to lead evidence to explain fully how their second statements came to be made. Each had also been seen by Mr. Malcolm about going to Court. Ross said he was seen before giving the second statement. Toara said Malcolm told him *"if you 'put out' the first statement, you will go to Court and you go to gaol because you are lying. After this I told the Court that the Namaka statement was a false one and the Delphine statement was the true one."* I do not accept Mr. Malcolm brought pressure to bear on Mr. Toara as to which statement was the true one.

The net effect of the evidence of Ross and Toara before me was that both said their first statements were true and that they felt pressured by the police to make the second ones, casting doubt on their earlier statements.

Samson Kalo, a police officer, had given a statement saying he saw Picchi at the nightclub, but he later withdraw that. The defence felt unable to call him in those circumstances.

The Court called Superintendent Namaka. He was in charge of the investigation, but not towards the end. He was not giving evidence from records or notes.

He described the investigation as slow at first, for a long time, until the confessions of Berri, Tui and Serah. The statements of Ross, Toara and Kalo had been taken by that time. He said he was suspicious of Mrs. Picchi at an early stage for reasons which would not be adduceable in evidence but would draw the attention of an investigating police officer. He gave examples.

At first he couldn't remember seeing Toara and Ross. He had not received information that Mr. Malcolm had seen them. He stated they went back to Ross and Toara given the inconsistency of a time of death of 8 p.m. with their sightings. He didn't do that in May 1995 the time of the arrest of the petitioner, because *"we didn't think of it at the time"*. To questions in cross-examination from the petitioner's counsel, he answered he could not remember.

I find that Ross, Toara and Kalo made statements saying they saw Picchi at 1 a.m. at the nightclub. There is nothing to suggest those identifications were not genuinely made. It is difficult to assess reliability, particularly with the possibility of one identification, feeding upon the talk of an earlier on. This case was the *'big news'* for months, all three knew each other from the nightclub.

It is also clear that when it was known these statements were inconsistent with the accomplices' story and, in one case at least, the defence were going to use the evidence, the witnesses were seen again by Inspector (as he then was) Namaka. Ross and Toara say they were persuaded to doubt the earlier statements. Supt. Namaka, as far as his memory goes, says it was a question of clarification in view of the strength of the statements made by the accomplices.

In a jurisdiction which is more sophisticated and the police more highly trained such a visiting or revisiting of witnesses would either not take place or be handled with the utmost care, whether it was by the defence or police. I must look, as far as I can, at the realities of Vanuatu in 1994 and 1995.

There must have been a desire in the mind of Inspector Namaka to resolve this evidence which was inconsistent with confessions of the accomplices. On the other hand before me neither Ross nor Toara appeared frightened or in awe of the Court. They did not appear to be likely to be altered in their views by mild pressures. Neither gave any evidence of great pressure being bought to bear. Toara said he is a Christian and at the trial he took an oath to tell the truth.

The petition alleges "*... through untruths and misrepresentations leading these potential witnesses to doubt, contradict and retract their previous statements.*" The evidence before me of both Ross and Toara was not so much a persuasion, by untruths or misrepresentation, for them to change their stories, but more a question of Inspector Namaka saying to them in the light of the accomplice evidence you can't be right in what you say, and asking or requiring them to sign another

statement. Neither gave evidence of threats or pressures being brought to bear.

I do note that the affidavits of Jack Ross of 9th October 1995 and the later one filed on 1st August 2001 are in good English. In examination in chief Ross stated in Bislama *"I do not know how to read. If it is in Bislama I will read it."* Both his witness statements were recorded in Bislama. The second statement gave reasons why he doubted his earlier identification and how he came to make it. The same basic reasons were given in Toara's second statement *"... we had been talking a lot about it ... I wasn't too sure about it but a lot of us were saying yes he did come to the club that time so I too just went along and said yes he came that time."*

I find the petitioner has not made out ground 1 (b) of the petition. The evidence before me shews that two witnesses made statements which if truthful and reliable would mean acquittal. When the accomplices evidence was known they were revisited by a police inspector. At best, for the petitioner's case, with little persuasion or pressure they signed statements casting doubt on their earlier identifications and giving reasons for that. The evidence before me falls short of showing that the persuasion or pressure was sinister in its application nor as far as these two were concerned would cause them to wrongfully alter their evidence.

There was ample opportunity at the trial to explain the whole background of how the second statements came to be made. In any event there was a successful appeal and the order of a retrial.

I specifically consider ground 1 (c).

There is no evidence before me concerning Samson Kalo. Once served with Kalo's statement there was no obligation on him to attend upon defence lawyers. There can be no complaint about the Public Prosecutor's advice, although it might not be best practice. It was open to the defence to sub poena Kalo and call him. If he came up to proof and gave the evidence in his statement the purpose in

calling him would be fulfilled. If he was unsure, then the defence would not have lost anything. If he did contradict what he had said, his witness statement could be put to him and he would be declared a *'hostile'* witness in the particular sense of that word. In those circumstances his evidence would be disregarded and no harm would be done to the defence case.

Accordingly I find the petitioner has not made out Ground 1 (c) of the petition.

I have considered individually the twenty-two points of the Schedule of Particulars Alleged Bias and Lack of Impartiality. It is necessary to consider them collectively.

I enumerate the points I will take into account by reference to their schedule number. In doing this I will include points which I have found on their own do not show bias or lack of impartiality, but might do so when combined with other points. I do not include those that have been rejected. Many I have included are at the margin of support.

5. The trial Judge's failure to control and weigh Berri's refusal to answer questions in cross-examination.

6. The failure to control and weigh Serah's refusal to answer questions in cross-examination.

7. The trial Judge's method of analysis of Mrs. Picchi's evidence, interpolations, critical comments, change in approach.

8. The failure to weigh the consistency of Mrs. Picchi's evidence.

9. The undermining of the evidence of neutral witnesses, Ross, Toara, Ernst, Hannam and Rigghi.

10. The few begrudging findings in favour of Mrs. Picchi.

...

14. The remarks and questioning of the trial judge concerning the defendant's religion and magic and the interrupting of her early in her evidence.

15. The cutting off by the trial Judge of an answer by Professor Koelmeyer.

16. Impoliteness towards witnesses, staring out of the window, etc

17. Remarks about the Ni-Vanuatu, use of the word *"uncle"*.

19 + 20. The failure to adjourn the sentencing to allow the return of senior counsel and the calling of mitigation witnesses.

22. The conversation with Mr. Downing.

To these must be added the remark made upon sentencing when the judge said that if there was a death penalty and no-one else would *"I would happily pull the switch"*.

It must be remembered that the trial itself went on for many days. These are points extracted from a mass of material, days of hearing and a lengthy judgment, and a conversation a year earlier.

In making this assessment I must take into account the fact that at no stage before sentence did the defence make an application for the judge to step down and order a retrial before another judge. This is a course which requires courage upon the part of counsel and should not lightly be made. It requires careful assembly of the matters in support and care in its making. Nevertheless, if counsel considers it is proper to make it, then it must be made.

By the close of the defence case part or all of paragraph 5, 6, 14, 15, 16 and 17 would be apparent. The failure to make such an application does not mean these points do not support the petitioner's case. Some

of the points which occurred or were known later have strength. However, no application was made at the time.

In the case of *Peter Harold Swanson v. The Public Prosecutor (CAC 11/97)* the Vanuatu Court of Appeal stated:-

> *"We consider that the presumption of bias on the part of persons engaged in a judicial capacity is well set out in the New Zealand Court of Appeal decision in Auckland Casino Ltd. v. Casino Central Authority ... The Court endeavoured to reconcile the various formulations of the test for presumptive judicial bias such as are found in R. v. Gough [1993] AC 646 and Webb v. R. [1994] 122 ALR 4 and other authorities. The Court while opting for the 'real danger' of bias test, considered there was little practical difference between that and a test based on a reasonable apprehension or suspicion on the part of a fair minded and informed member of the public that the juror (or judge) had not discharged his or her duty impartially.*

"As Cooke P. (as Lord Cooke of Thondon then was*) noted at p. 149 of the Auckland Casino case;*

> *"If a reasonable person, knowing all the material facts would not consider that there was a real danger of bias, it would seem strained to say that nevertheless he or she would reasonably suspect bias. One must query whether the law should countenance such refinements."*

I respectfully follow these dicta.

In the United Kingdom, the House of Lords in *Porter v. Magill [2002] 1AER p. 465* the head note states (paragraph 2) *"In determining whether there had been apparent bias on the part of a tribunal, the Court should no longer simply ask itself whether having regard to all the relevant circumstances, there was a real danger of bias. Rather the test was whether the relevant circumstances, as ascertained by the Court, would lead a fair-*

minded and informed observer to conclude that there was a real possibility that the tribunal had been biased".

In that case the Court considered an auditor had indulged in an exercise of self -promotion which he should not have done, but it was quite another matter to conclude from that exercise that there was a real possibility that he was biased.

Mrs. Hannam, a neutral witness, from what she saw felt *"I was concerned the judge at no stage looked at me and seemed to show disbelief in what I was saying ... he seemed to be really nasty to her (the defendant) and particularly biased towards her, which I thought was unfair."* Some of her observations came after conviction, and during sentence.

Marcello Rigghi said *"It (telling him to stand up) was definitely impolite and inappropriate ... he wasn't making fun of me, but at if I was saying something strange or weird ... I didn't observe him react in any way".*

There was nothing in the evidence of Jose Franconieri about the behaviour of the Judge, although questions were put.

The evidence of Mr. Malcolm speaks for itself.

In making my decision I do not just take into account what actual witnesses felt, I must look to the totality of the points set out and all the circumstances of the case above and what the fair-minded and informed member of the public would conclude. Would he or she form a reasonable suspicion or apprehension of bias? Was there a real danger of bias?

I must distinguish between what are impolite or injudicious remarks and what is evidence tending to shew a real danger of bias.

In my judgment there were some aspects of the conduct of the trial, the judgment and the sentence which were open to criticism. There were occasions of impoliteness and conduct which a judge should not indulge in. There were matters which might have been better

handled e.g. the refusal of witnesses to answer questions. The evidence whether the conversation with the other judge was still a live and remembered issue at the time of trial and what enquiries were made are open question. If forgotten it would not have effect.

However, even collectively I find the points raised by the petitioner, when taken to the full, fall short of proving the petition. The principal failure was in not stating the reasons for conclusions which were available on the evidence.

Despite these findings I nevertheless look to what ensued. The petitioner was sentenced to life imprisonment with a recommendation she serve not less than 30 years. She served 11 months. Following upon an appeal before the Court of Appeal her conviction was quashed. The Court declined to enter a not guilty verdict but sent the matter back for retrial. Within days the charge was withdrawn and the petitioner was free to leave the country.

In the case of *Herbert Ferguson v. The Attorney General of Trinidad* and Tobago before the Judicial Committee of the Privy Council ([2001] UK PC 3) Lord Steyn at page 8 stated:-

> *"It can readily be accepted that the constitutional guarantees of the process, protection of the law, and a fair hearing are of generous width ... on the other hand their Lordships are satisfied that the question whether there has been a breach of constitutional guarantees in respect of due process, protection of the law, and a fair hearing, must be approached in the light of the proceedings as a whole. This is the view which the European Court of Human Rights has consistently taken in respect of the fair hearing guarantee under article 6 of the European Convention on Human Rights ... A similar approach was recently enunciated by the Privy Council ... In the context of the Constitution of Trinidad and Tobago there is a close link between the three guarantees of due process, protection of the law and fair hearing since the fundamental concept of a fair trial is common to them all ... There is therefore no reason to doubt that the issue whether there has been a breach under any of these guarantees must be judged on a realistic*

assessment of the proceedings considered as a whole. This view does not undermine those guarantees. On the contrary, the cause of human rights is served by concentrating on matters of substance and approaching with scepticism technicalities and causally irrelevant breaches."

If the matter is approached in this way any complaints the petitioner had were remedied by the quashing of the conviction and the ordering of a retrial. As matters turned out, she was not placed in jeopardy again. I have already found that on my assessment of all the evidence before the trial Judge, a verdict of guilty was clearly open to him. As the Court of Appeal stated when the preliminary issues in this case were before them (CAC 20 or 2001, page 4):-

"The present application is made in the circumstances in which there has never been an acquittal. This Court held that there had not been a sufficient articulation of reasons for a verdict of guilty to be sustained. But the Court accepted that there was an evidential foundation upon which conviction could have been appropriate."

"The case is therefore unusual in that the deficiencies of the past have already been recognized, remedied and acknowledged in the setting aside of the conviction, but the issue as to whether Mrs. Picchi was criminally involved in the death of her husband remains an entirely open question ..."

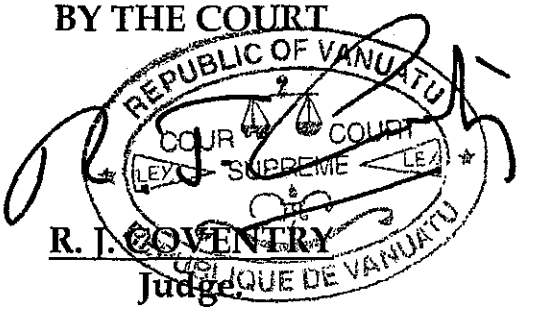
"Breaches of constitutional rights must be based on reality and not on some theoretical or assumed scenario. The approach of the Privy Council in Ferguson v. The Attorney General of Trinidad and Tobago is clearly relevant, persuasive and appropriate."

It would have been open to the Court to dismiss this petition on this basis alone. However, I considered it right that enquiry should be made into the petitioner's specific complaints and findings made thereon.

The petition is dismissed.

Dated at Port Vila, this 4th day of December 2002.

BY THE COURT



R. J. COVENTRY
Judge