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

CRIMINAL CASE No. 762 of 2015

PUBLIC PROSECUTOR

-V-

MOANA CARCASSES KALOSIL and 14 Others

Before: **Chetwynd J**
Hearing: **7th December 2015**

JUDGMENT

1. In this matter the Public Prosecutor has made an application for ss. 41 and 42 of the Leadership Code Act [Cap 240] (the "LCA") to be invoked following the conviction of 15 Defendants for offences under the Penal Code [Cap 135]. The details of the Defendants are set out in the Schedule attached. The application was opposed by all of the Defendants.

2. What led to the application being made can be told briefly and in any event the facts will be well known to most readers, especially those in the jurisdiction. The 15 Defendants were Members of Parliament. All had been charged with offences under section 73 of the Penal Code which, as is set out in the heading to the section, relates to Bribery and Corruption of Officials. They stood their trial before Sey J and all of them (bar Willy Jimmy Tapangararua who had entered a plea of guilty) were convicted. After a trial lasting several weeks Her Ladyship handed down her written judgment on 9th October 2015 [1]. Shortly after the Defendants were sentenced. All 14 of the Defendants who had contested the charges appealed against their convictions and sentences. The appeals were heard on 12th and 13th November 2015 and a decision delivered a week later on 20th November [2]. The appeals against conviction and sentence were dismissed.

3. Originally the Defendants were also charged with offences under s.21 of the LCA. As a result of what the Court of Appeal later described as a "*procedural tangle*" Her Ladyship adjourned those charges. Their Lordships' view was that the adjournment *"raised the possibility of double jeopardy"*. At the Public Prosecutor's request the charges were dismissed. This was on the basis that should the appeal fail; the Public Prosecutor could then proceed under ss. 41 and 42 of the LCA. This he has done by an application dated 23rd November together with supporting

[1] *Public Prosecutor v Kalosil* - Judgment as to verdict [2015] VUSC 135; Criminal Case 73 of 2015 (9 October 2015)
[2] *Kalosil v Public Prosecutor* [2015] VUCA 43; Criminal Appeal Case 12 of 2015 (20 November 2015)

documentation. That application is in respect of 14 Defendants. An application dated 2nd December 2015 (with supporting documents) was lodged in respect of Mr Tapangararua alone. The two applications though are in identical terms.

4. The application was first listed for hearing on 2nd December. As some of the Defendants' counsel indicated they had not had enough time to prepare for the hearing it was adjourned to Monday 7th December 2015. Because 14 of the Defendants were serving their sentences of imprisonment production orders were issued so that they could be present when the applications were argued. At the hearing Mr Ngwele helpfully provided written submissions and I also heard oral submissions from counsel for all the Defendants. I gave a very brief decision indicating the applications had been granted and said I would provide more detailed written reasons as soon as I was able. These are those reasons.

5. The first issue raised concerned the appearance (on 7th December) by Mr Timakata. He explained that he was representing the Public Prosecutor who was out of the jurisdiction. There was some suggestion that Mr Timakata should not be heard because his appointment as Public Prosecutor had come to an end. I took the view that both applications were already before the court (on 2nd December) with such a sufficiency of supporting documentation that I could proceed to deal with them without further ado. If I thought it was necessary to hear from the Public Prosecutor I would be entitled to grant leave to Mr Timakata to appear and I could ask him to assist with any additional argument on behalf of the Public Prosecutor. It would then be a matter for Mr Timikata to decide whether he thought he had the requisite authority. As it turned out, I had no reason to ask for any further submissions from the Public Prosecutor.

6. All of the Defendants raised the issue of jurisdiction. The argument was that a conviction under the LCA was required before ss. 41 and 42 could be invoked. It was said that such a conviction should follow the normal course for criminal convictions. The authority for that was said to be s 39 (1) of the LCA. That section states:

> *Proceedings against a leader for a breach of this Code, or against another person under section 30, are to be conducted in the same way as any other criminal proceeding.*

7. Some Defendants argued that that was a process involving investigation, charges and prosecution before the courts. Counsel pointed out that there had been no convictions under the LCA. Some referred to the lack of a "new" preliminary enquiry before the Magistrates' Court. There of course had been the previous charges brought pursuant to the LCA (under s 21 of the LCA) but they had been adjourned and then dismissed [3]. The Defendants argued it was because of that dismissal the issue of *autrefois acquit* could be put forward as a reason why the applications should not be granted or indeed heard.

[3] See paragraph 3 above

8. Mr Malcolm for Mr Kalosil argued that his client (and by logical extension all the other Defendants) was protected by Article 5 of the Constitution. Article 5 deals with the fundamental rights of the individual including the protection of the law [4]. Article 5(2) sets out in more detail what protection of the law involves or includes. There is no need to recite the details of the Article here.

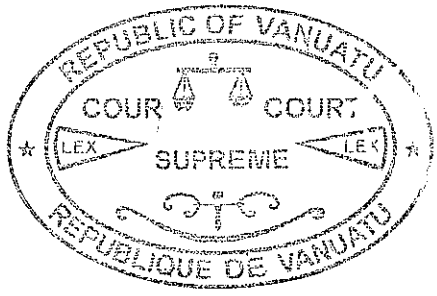
9. Mr Laumae also raised the issue of double jeopardy. He argued that by invoking the provisions of the LCA his clients faced further punishment. Having already been sentenced by Sey J his clients were subject to double jeopardy if further punishment was meted out. He went further and suggested the application to invoke the LCA now was *res judicata*.

10. Apart from the jurisdictional issues counsel maintained that invoking s. 41 of the LCA was otiose due to effect of the Members of Parliament (Vacation of Seats) Act [Cap 174]. Section 3(1) provides:

> *If a member of Parliament is convicted of an offence and is sentenced by a court to imprisonment for a term of not less than 2 years, he shall forthwith cease to perform his functions as a member of Parliament and his seat shall become vacant at the expiration of 30 days thereafter*
>
> *Provided that the Speaker, or in his absence, the Deputy Speaker, may at the request of the member from time to time extend that period for further periods of 30 days to enable the member to pursue any appeal in respect of his conviction, or sentence, so however that extensions of time exceeding in the aggregate 150 days shall not be granted without the approval of Parliament signified by resolution.*

Mr Ngwele noted in addition that any extension under the section had expired. In all the circumstances it was said the Defendants were no longer Members of Parliament or leaders. They could not therefore be dismissed from office as they occupied no office.

11. In regard to the provisions of s. 43 of the LCA, the loss of benefits, it was said on behalf of the Defendants that other Acts of Parliament prevented the full operation of the "punitive" provisions of the section. As I understood the arguments, it was said that the operation of the Members of Parliament (Vacation of Seats) Act meant that rights and benefits under the Employment Act and the Vanuatu National Provident Act had already accrued to the Defendants and therefore the LCA could not now operate to deprive them of those rights and benefits.



[4] Article 5(1)(d)

12. In answer to all the arguments put forward it is simply necessary to look at the provisions of the LCA. The starting point is whether or not the Defendants are leaders. It has to be acknowledged that there was no actual finding by either Sey J or the Court of Appeal that the Defendants were leaders. Even so there can be absolutely no doubt that all the Defendants are Leaders. Article 67 of the Constitution defines leaders thus:

> *For the purposes of this Chapter, a leader means the President of the Republic, the Prime Minister and other Ministers, Members of Parliament, and such public servants, officers of Government agencies and other officers as may be prescribed by law.*

S.5 of the LCA includes further definitions of a leader. There has been no suggestion that the Defendants were not covered by the statutory definitions of a leader. There has been no argument the Defendants were not leaders. Given the detailed definition in Chapter 10 of the Constitution such argument would, in any event, be futile.

13. We can then turn to the conduct of leaders. The conduct of leaders, including the duties imposed on them, is also set out in Chapter 10 of the Constitution. It is also clear from the LCA itself (See s. 2(3)) that it was enacted to give effect to the principles set out in Chapter 10 and as was required by Article 68.

14. Part 3 of the LCA deals with breaches of the LCA or put another way, what might happen if a leader does not conduct him or herself in accordance with the obligations set out in Chapter 10 of the Constitution. Section 19 of the LCA provides:

> *A person who does not comply with Part 2, 3 or 4 is guilty of a breach of this Code and is liable to punishment in accordance with Part 6*

If we then turn to section 27 of the LCA (which is in Part 3) we read:

> *(1) A leader who is convicted by a court of an offence under the Penal Code [Cap. 135] and as listed in subsection (2) is:*
>
> *(a) in breach of this Code; and*
>
> *(b) liable to be dealt with in accordance with sections 41 and 42 in addition to any other punishment that may be imposed under any other Act.*

Listed at s 27(2)(m) is the offence of *corruption and bribery of officials.*

15. Section 27 makes it quite clear that if a leader is convicted of an offence listed in subsection 2, he or she is, the instant they are convicted, in breach of the LCA. The consequence of being in breach is that the leader is then liable to be dealt with in accordance with section 41 and 42.

16. The documentation supporting the applications included a copy of the judgement of Sey J dealing with the conviction of all the Defendants. Also included was a copy of the Court of Appeal decision dismissing the Defendants' appeals against conviction and sentence [5]. The Public Prosecutor has therefore established without any shadow of a doubt that the Defendants are leaders who have been convicted of offences contained in subsection 2 of section 27. As such they are, *"liable to be dealt with in accordance with sections 41 and 42".*

17. There is no requirement under s. 27 of the LCA for there to be a separate conviction. Practically speaking that would require a conviction for having a conviction which seems to be something of a nonsense. Whilst other "offences" under the LCA might require prosecution leading to a conviction when there is a breach of the LCA by reason of a conviction under the Penal Code that breach is dealt with in accordance with s. 27(1)(b). That matters of a criminal nature can be dealt with other than in strict accordance with procedures set out in the Criminal Procedure Code is recognised in that code. Section 2(2):

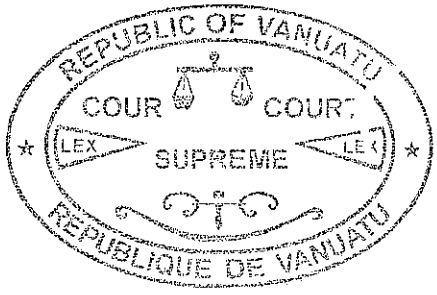
> *Notwithstanding any other provisions of this Code, a court may, subject to the provisions of any other law of criminal jurisdiction in respect of any matter or thing to which the procedure described by this Code is inapplicable, or for which no procedure is so prescribed, exercise such jurisdiction according to substantial justice and the general principles of law.*

18. There can be no Constitutional objection to dealing with breaches of the LCA in this manner. As indicated above, s. 2(3) clearly states the LCA was enacted to give effect to Chapter 10 of the Constitution. Nor can there be any question of double jeopardy. S. 27 (1)(b) allows the additional measures set out in ss.41 and 42 to be imposed in addition to any other punishment imposed by any other Act. The possibility of double jeopardy was raised by the Court of Appeal when dealing with the likely effect of there being separate convictions under s.21 of the LCA. Given that the provisions of s.27 recognise the exceptional and onerous obligations and duties placed on a leader as set out in the Constitution, there is nothing inequitable, improper or unconstitutional in those provisions. It is also plain from the wording of s.27 that the provisions are effective from the date of the conviction(s) under the Penal Code (which in this case would be 9th October).

19. Looking at these applications, the only real question to be considered is whether the breaches are serious enough for an order to be made dismissing the Defendants from office under s.41. In that regard I can do no better than to adopt what the Court of Appeal said:

> *"It must be repeated that bribery is a serious crime. The bribing of Members of Parliament strikes at the heart of democracy and good government, debasing the decision-making processes of Vanuatu's Parliament so that it is not reliable, predictable, or fair. Worse, a practice of bribes weakens the trust of the public in government, and damages the rule of law."*

Later the Court said:



[5] See paragraph 2 above

"We comment that there have been breaches of s 21 of the Leadership Code Act by all appellants in that they have accepted loans other than on commercial terms, and did not show at the trial, when they were still facing a charge under that section, that they satisfied the lending institution's usual business criteria. While that charge and the other Leadership Code charges have been dismissed because of the procedural tangle created by the 8 October 2015 decision, the fact of breaches of s 21 demonstrates the serious nature of the offending."

20. I am satisfied it is beyond any doubt that the breaches were and are serious. I confirm the orders made on 7th December dismissing all the Defendants from office and disqualifying them from standing for election or being appointed as a leader of any kind for a period of 10 years. Also I confirm the order that the Defendants have ceased to be leaders and pursuant to s. 43 of the LCA, any entitlement to payments or allowances in connection with the being a leader ceased on dismissal (i.e. on 9th October 2015). It would appear from press reports that payments and allowances may have already been disbursed. If that is the case then such disbursement was premature to say the very least. Whoever was responsible should take steps to recover payments. In any event the Defendants are ordered that if any payments or allowances have been paid to them they are to repay them forthwith.

Dated 14th December 2015 at Port Vila

David Chetwynd
Judge

REPUBLIC OF VANUATU COUR SUPREME COURT LEX LEX REPUBLIQUE DE VANUATU

THE SCHEDULE

THE PUBLIC PROSECUTOR Mr Naigulevu and Mr Timakata

MOANA CARCASSES KALOSIL represented by Mr Malcolm of Geoffrey Gee & Partners

SERGE VOHOR represented by Mr Leo of Leo Lawyers

STEVEN KALSAKAU represented by Mr Laumae of Transmelanesian Lawyers

MARCELLINO PIPITE represented by Mr Yosef of Yawha & Associates

PAUL B TELUKLUK represented by Mr Laumae of Transmelanesian Lawyers

SILAS R YATAN represented by Mr Napuati of Warsal Lawyers

TONY NARI represented by Ngwele of Indigene Lawyers

JOHN AMOS represented by Mr Boar of Boarlaw

ARNOLD PRASAD represented by Mr Ngwele of Indigene Lawyers

TONY WRIGHT represented by Mr Leo of Leo Lawyers

SEBASTIEN HARRY represented by Mr Ngwele of Indigene Lawyers

THOMAS LAKEN represented by Mr Napuati of Warsal Lawyers

JEAN YVES CHABOT represented by Mr Ngwele of Indigene Lawyers

JONAS JAMES represented by Mr Leo of Leo Lawyers

WILLY JIMMY TAPANGARARUA represented by Mr Warsal of Warsal Lawyers