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

Criminal
Case No. 16/138 SC/CRML

PUBLIC PROSECUTOR – VS – **MARCELLINO PIPITE**
PAUL TELUKLUK
SILAS YATAN
TONY NARI
JOHN AMOS
ARNOLD PRASAD
TONY WRIGHT
SEBASTIEN HARRY
THOMAS LAKEN
JONAS JAMES
JEAN YVES CHABOD
WILSON IAUMA

Hearing: ***2nd, 3rd, 4th, 5th, 8th, 9th, 10th, 11th, 12th and 16th August 2016***

Date of Judgment: ***16th August 2016 at 5.30pm (written reasons published 23rd August 2016)***

Before: ***Justice Chetwynd***

Counsel: ***Mr Josaia Naigulevu and Mr Tristan Garae for the Public Prosecutor***
Ms Christina Thyna for Marcellino Pipite, Silas Yatan & Thomas Laken`
Ms Kayleen Tavoa for Paul Telukluk & Sebastien Harry
Mrs Mary Grace Nari for Tony Nari, Arnold Prasad, Jonas James, Jean Yves Chabod & Wilson Iauma
George Boar for Tony Wright & John Amos

JUDGMENT

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1. The Defendants Mr Pipite, Mr Yatan, Mr Nari, Mr Laken, Mr Chabod and Mr Iauma are charged with conspiracy to defeat the cause of justice contrary to section 79(a) of the Penal Code Act Cap 135. The particulars refer to events at Mangos Restaurant on 10 October 2015. All the Defendants; namely Mr Pipite, Mr Telukluk, Mr Yatan, Mr Nari, Mr

Amos, Mr Prasad, Mr Wright, Mr Harry, Mr Laken, Mr James, Mr Chabod and Mr Iauma are charged with conspiracy to defeat the cause of justice contrary to section 79(a) of the Penal Code Act. The particulars refer to events at the Ministry of Infrastructure and Public Utilities ("MINPU") on 10 October 2015.

2. The offence under s.79(a) is a statutory rendering of the common law offence of conspiring to pervert the course of justice. Whilst the common law may provide guidance it must not be forgotten that this is a statutory offence. The elements of the offence are as set out in section 79(a). There must, of course, be a conspiracy between two or more people. A conspiracy has no special or unusual meaning in the context of section 79(a). It simply means two or more people concurred with each other about a course of action, or they were of the same mind in bringing about a given result. In simple terms they were in agreement with each other. This does not mean that conspirators must to be 100 percent of the same mind but they must be broadly in agreement with a course of action.

3. The concept of a conspiracy does not require all those who are alleged to be conspiring to be present in each other's company at the same time. Person A may meet and reach agreement with Person B about a course of action. Person B may then separately meet with Person C and come to the same agreement with C as he did with A. Person A may meet with Person D and reach an agreement which is the same agreement as he made with B. And so a conspiracy may grow. Traditionally, in the law conspiracies were known as wheel conspiracies, when there is a central or controlling figure at the centre or hub of the conspiracy, and other persons who could be visualised as spokes of the wheel; or a chain conspiracy which can be thought of as more linear in form. All that is required for a conspiracy to be established is that there is agreement between two or more people.

4. It is also necessary to establish the offence under section 79(a) to have proof that what the conspirators have agreed should happen must have a tendency to obstruct, prevent or defeat the course of justice and must be intended by them to obstruct, prevent or defeat the course of justice. It is a two part requirement. In *R v. Murray* [1] it was said:

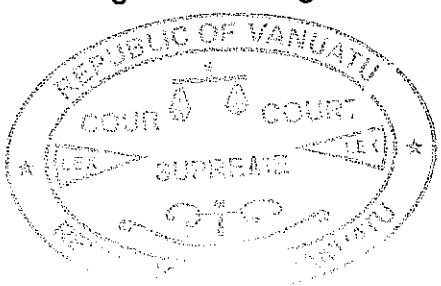
> *An act done with the intention of perverting the course of justice is not enough. The act must also have that tendency....there must be a possibility that what the accused has done without more might lead to injustice."*

It was also made clear in *Murray* that the phrase "without more" refers to the action of a defendant. The fact that further action by others may be necessary before injustice can occur is irrelevant. It does not matter in this cases that the pardons were necessarily granted by someone else.

5. "Obstruct, prevent or defeat" have no special meanings in the section. Those words bear their natural meaning of to make "something" more difficult to achieve or prevent "something" happening.

6. That "something" in section 79(a) is "the course of justice". Again that phrase bears its natural meaning and simply refers to judicial proceedings, including the investigation which might lead to judicial proceedings coming into being [2].

[1] *R v Murray [1982]* 75 Cr App 58
[2] *R v. Brown* [2004] EWCA 744



7. In the present case the defendants are alleged to have conspired to obstruct the course of justice by agreeing to facilitate the issuance of pardons. It must be understood that the defendants are ***not*** being charged with asking for or facilitating the issuance of pardons. They are accused of obstructing, preventing or defeating the course of justice by asking for or facilitating the issuance of pardons. In the particular circumstances of this case it is not the pardons which are the crux of the offences it is the defendants' intention in obtaining those pardons [3].

8. There is no dispute that all the defendants were, on 9th October 2015, convicted of various offences involving the corruption and bribery of officials. Those convictions and the reasons for them are set out in the detailed judgment of Her Ladyship Sey J dated 9th October 2015. After handing down her verdict Her Ladyship adjourned the case for sentence. The fact that even though the Court had pronounced its verdict the judicial proceedings in criminal case 73 of 2015 were continuing is an important facet of this case. The effect of pardons granted by the Speaker as Acting President would be to bring those judicial proceedings to a premature and abrupt halt, to bring them to an end before sentence could be passed and before any other lawful sanction could be imposed (including any sanctions available under the Leadership Code Act).

9. In the case of *T v. The Queen* [4] it was said;

> *"The offence in question is not committed by an act that can have no effect on the course of justice. Conversely, however the offence may be committed even if in the result the act does not affect the course of justice. The offence is complete when the act is done with the requisite intent, and does not cease to be criminal because it does not have the intended effect of perverting the course of justice. It is sufficient if the act creates a significant risk that the course of justice will be affected."*

This is confirmation of what was said in the earlier cases of *R v. Kellet* [5] and *R v.Clark* [6]*:*

> *"It is not an intent to interfere with the course of justice by unlawful means, but to interfere with the course of justice per se."*

10. It matters little in this case whether or not the Defendants have or had *"a right to apply for a pardon under Article 5 of the Constitution"* as is suggested by at least one of the defendants. Nor does it matter whether or not the President has power to grant a pardon in accordance with Article 38 of the Constitution or whether or not the Speaker, in accordance with Article 37, shall perform the functions of the President when the latter is overseas.

11. As was said in *Kellet* ; [7]

> *"The Judge should direct the Jury that a threat (or promise) made to a witness is an attempt to pervert the course of justice if made with the intention of persuading him to alter or withhold his evidence whether or not what he threatens (or promises) is a*

[3] *R v. Murray* [1982] 75 Cr App 58
[4] *T v. The Queen* [2011] EWCA Crim 729
[5] *R v. Kellet* [1976] 1QB 372
[6] *R v. Clark* [2003] All ER
[7] Ibid

> *lawful act, such as the exercise of a legal right and whether or not he has any other intention or intends to do the act if the evidence is not altered or withheld."*

In this case that means the legality or not of the Speaker, as Acting Head of State, granting pardons is irrelevant. It would be irrelevant whether or not the Speaker's own conviction had any effect on any power he had under Articles 37 and 38. As set out above, *"It is not an intent to interfere with the course of justice by unlawful means, but to interfere with the course of justice per se."*

12. The more relevant questions in this case are whether the Defendants agreed or arranged amongst themselves that they were going to request pardons for those convicted but not sentenced on 9th October 2015; and whether they did so intending such pardons to prevent the Court from completing the sentencing on 22nd October 2015 or otherwise avoid any sanction following conviction. Those questions do not involve consideration of what might be termed motive. The reasons for the defendants wanting to obtain pardons are probably as verbalised by Mr Pipite at the press conference on Sunday 12th October. However, just as the legality of what the Acting Head of State did is irrelevant the so the reasons why the defendants did what they did are irrelevant. The defendants cannot invoke section 12 of the Penal Code [Cap 135] which says;

> *A mistake of fact shall be a defence to a criminal charge if it consists of a genuine and reasonable belief in any fact or circumstance which, had it existed, would have rendered the conduct of the accused innocent.*

As pointed out above in paragraph 10 above it is not doing something unlawful it is the intention to interfere with the justice per se. As was said in a Channel Islands case from 1980 [8];

> *"It is plain, however, that the crime of perverting the course of justice covers acts which would in other circumstances be perfectly legal."*

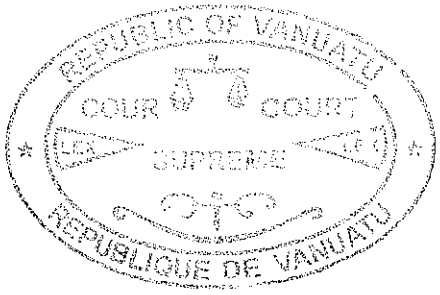
In the recent case of *Public Prosecutor v Natuman* [9] I referred to another comment in the case of *Kellett* mentioned earlier:

> *"...we think that however proper the end the means must not be improper".*

The motives of the defendants are of no help in this case and whether the court or indeed the public thinks the rationale underlying what Mr Pipite said in the press conference is flawed as being mistaken, immoral, fanciful, perverse or just plain irresponsible is of no consequence.

13. As in any other criminal case, the burden of proof is on the prosecution. It is for the prosecution to prove all the necessary elements of the offence beyond reasonable doubt. As is usual, the defendants do not have to prove anything. The law states quite clearly that they are innocent until found guilty or they plead guilty. They do not have to prove they are innocent; there is that presumption in law. I told them as much at the beginning of the trial when I read out section 81 of the Criminal Procedure Code.

[8] *Attorney General v. Weston* [1980] JLR 43
[9] *Public Prosecutor v Natuman* [2016] VUSC 49; CR 814 of 2016 (20 April 2016)



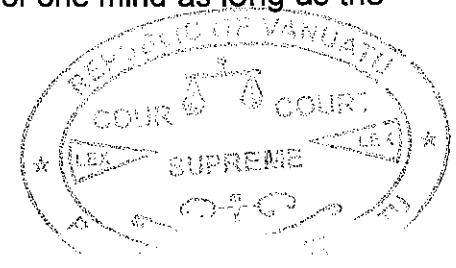
14. There is considerable evidence against some of the Defendants leaving no doubt they did decide to ask for pardons following discussions between themselves and the lawyers. There is very little doubt in my mind that the issue of pardons first arose immediately after Court on 9th October 2015. Quite probably it arose following comments by Mr Serge Vohor outside the Court house on 9th October and repeated later at a "meeting" where the briefing of the Prime Minister was conducted. It should be mentioned that Mr Vohor was neither defendant nor witness in this case. On the next day, 10th October 2015, at Mangos Restaurant the possibility of pardon was further discussed.

15. Arrangements were then made over the next few hours and all the defendants called into the Ministry of Infrastructure and Public Utilities. The evidence of what happened during the morning of 10th October 2015 at Mangos and then later at MINPU comes mainly from the lawyers advising the Defendants. Given their position one might consider some of that evidence is tainted. However there is independent evidence of Mr Pipite, Mr Nari, Mr Yatan, Mr Laken and Mr Iauma and Mr Kalosil being at Mangos. The staff at Mangos gave unchallenged evidence about who was in the restaurant that morning. I accept that evidence and, taken together with other evidence, it is clear those defendants were at Mangos together and they discussed, amongst other things, the possibility of pardons. The evidence is they asked for details about "Sope's case" and asked for advice about pardons.

16. There indeed appears to have been some half-hearted advice proffered against that course of action. However, Mr Pipite, with the forceful encouragement of Mr Nari, decided to proceed along the pardon path. It is clear that by the time the meeting at Mangos broke up Mr Pipite and Mr Nari were committed to the idea of pardons. They then set in train arrangements to persuade the other defendants to accept pardons. Mr Moana Kalosil, who was also at Mangos, decided not to seek a pardon and stuck with the appeal route.

17. Those who were advocating for pardons realised very early on they had to move quickly. They knew the President was going to return to Port Vila the next day 11th October. There was absolutely no guarantee His Excellency would be of the same mind as Mr Pipite. The only guarantee of pardons being granted was if they were granted by Mr Pipite as Acting Head of State and before the President's return. At various times throughout Saturday there were meetings with the other defendants at MINPU. There is independent evidence from a security guard about that. He states that Nari, Amos, James and Harry left the MINPU compound late in the afternoon. There is evidence from the lawyers (Molbaleh, Kapapa, Leo and Takau) that taken together shows all the Defendants at one time or the other throughout Saturday10th October went into the MINPU buildings. Some of the Defendants admit being there and signing a request for a pardon. Others say they never asked for a pardon. There is independent evidence from Correctional Services officers that by at least early on Sunday morning 11th October, the defendants were aware they had been pardoned. That could only be because they had been in touch with someone who had told them a pardon would be granted.

18. There is no doubt in my mind that at some time on Saturday 10th October and certainly by the morning of Sunday 11th October all the Defendants had spoken amongst themselves and with the lawyers and had agreed to ask for or had in some way arranged for the Speaker, as Acting President, to grant them a pardon. As pointed out earlier there is no requirement for conspirators to be completely and absolutely of one mind as long as the consensus was they would be obtaining pardons.



19. When asked in Court, all the Defendants accepted that they knew a pardon would bring the proceedings in CRC 73 of 2015 to an end, that a pardon would mean they would not be sentenced. They acknowledged they were aware a pardon would prevent the Supreme Court from sentencing them for the convictions announced on the 9th October and that there would be no adverse consequences following the court finding them guilty of bribery and corruption. They acknowledged a pardon would have the tendency to interfere with the course of justice and that they intended the pardons to have exactly that effect. It is notable that not one of the Defendants who now say they did not ask for a pardon, or can't remember signing a letter of request for a pardon, ever went to the Acting President on Sunday or His Excellency the President on the Monday and said there must be some mistake, I didn't ask for or want a pardon.

20. I do not accept that the defendants were coerced in any way by the lawyers to accept pardons. In respect to Mr Pipite, he has filed a sworn statement in civil proceedings where he says he acted of his own free will [10]. They may have grounds for complaint about the vague written advice given by the lawyers but there is nothing to suggest the defendants were forced into a course of action by those lawyers or the advice they gave. Those of the legal profession who were present at the last session of the Court of Appeal will remember the court's entreaty to counsel to have the strength of conviction to sometimes say no the clients. This is a classic case where the lawyers should have said "no" instead of saying "perhaps". The advice should have been clearer if, as the lawyers say, they were telling the politicians not to travel the pardon route.

21. Personally, I believe all the lawyers involved should face some sanction. I thought briefly about contempt proceedings but came to the conclusion disciplinary proceedings would be the preferable method of dealing with the lawyers. That is a matter for the Law Council. Only one of the lawyers involved, Mr Wilson Iauma, is charged with a criminal offence. Whilst I personally believe that to be wrong, because I am of the view all of them were complicit in some way, I cannot just add defendants to a case. Prosecutions only take place after a proper process has been concluded

22. I also have misgivings about the charges and the information laid against all the defendants. It is also clear that others were involved or complicit in the conspiracy but have not been charged. Be that as it may, as I have said I can only deal with those properly before the Court. With regard to those defendants properly before the Court, I do not accept the Public Prosecutors contention that the two charges protect them against duplicity. It is clear from the evidence that there was one continuing conspiracy. There was only one conspiracy even though the different conspirators were involved at different places and at different times. It is right therefore that the defendants should only be convicted of one offence.

23. I find all the Defendants guilty of conspiracy to defeat, obstruct or prevent the course of justice in that they all, between the time of conviction on 9th October 2015 and 11th October 2015, asked for or arranged pardons to be granted with the intention that they escaped any sanction of the Court. I will seek counsels advice and assistance as to what should happen to count one.

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[10] See the sworn statement dated 16th October 2015 filed by Mr Pipite in Constitutional Case No. 6 of 2015 *Natuman & Ors v. The President of the Republic and Ors*

24. I accept that some Defendants were probably drawn into the conspiracy reluctantly. That aspect is a matter for mitigation and can be dealt with at the time of sentencing.

25. All Defendants are to be remanded in custody pending sentence to 29th September 2016 at 9:00am. I ask that the Probation Officers please provide pre-sentence reports for each defendant.

DATED at Port Vila this 23rd day of August, 2016.

BY THE COURT

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D. CHETWYND

Judge

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