IN THE SUPREME COURT
REPUBLIC OF VANUATU
(Criminal Jurisdiction)

Criminal Case No. 814 of 2016

PUBLIC PROSECUTOR

-v-

JOE YHAKOWAIE NATUMAN
ARU MARALAU

Before: Chetwynd J
Hearing: 18th April 2016

Mr Naigulevu for the Public Prosecutor
Mr Morrison for Mr Natuman
Mr Nalyal for Mr Maralau

Judgment

1. Mr Natuman is charged with two counts of obstructing or interfering with the execution of a criminal process contrary to section 79(c) of the Penal Code [Cap 135]. Mr Maralau is charged with one count of complicity to obstruct or interfere with the execution of a criminal process contrary to sections 30 and 79(c) of the Penal Code. Both defendants appeared before the Learned Chief Magistrate for a Preliminary Inquiry and after hearing argument by the prosecutor and defence counsel he made an order dated 15th March 2016. The order refers, by way of case stated (and in accordance with section 17 of the Judicial Services and Courts Act [Cap 270]) a question of law to this Court. That question can probably be best expressed as asking what are the elements necessary for there to be a conviction under section 79(c) ?

2. The Chief Magistrate made some findings in his Decision of 15th March. He found that the there was a criminal legal process on foot when the two defendants issued the instructions at the heart of the charges. He said, *"there was a complaint lodged and the police had been carrying out its investigation".* He also found that the legal process or criminal investigation did not stop as a result of what the defendants did.

3. At this point I would state the obvious and say this is not an appeal from the Magistrates' Court. I am not asked to comment on the Learned Magistrate's findings. This is a case stated by the magistrate involving a question on a point of law only. No decision needs to be made, nor will be made, about the facts. However, a synopsis of the facts will assist with ascertaining the answer to the question of law.

4. In brief, in 2012 there were difficulties with the office of the Commissioner of Police. The incumbent, Mr Bong, was suspended and towards the end of 2012 Mr A C Edmanley was appointed as Commissioner. Apparently, at a meeting in March 2014 Mr Edmanley and the defendant Mr Natuman, who was the then Prime Minister and Minister

responsible for the Police, discussed a criminal case involving allegations of mutiny. That case implicated at least 8 defendants including Mr Bong and the defendant Mr Maralau. In August 2014 investigations were completed and the file handed to the office of the Public Prosecutor. Shortly after that there was another meeting between Mr Natuman and Mr Edmanley. At that meeting the prosecution say Mr Natuman told Mr Edmanley to cease all investigations into the alleged mutiny. This is the factual basis for count 2. It is said that Mr Edmanley's reply to Mr Natuman was to the effect that the matter was now out of his hands anyway as the file was with the Public Prosecutor.

5. Over the next two months there were a number of Emails sent to the Commissioner, Mr Edmanley. There was also at least one meeting between the Acting Prime Minister Mr Ham Lini and Mr Edmanley. The purpose of the Emails and the meeting was to repeat the instructions being put forward by Mr Natuman; that is to cease investigations into the alleged mutiny. On 15th September 2014 Mr Edmanley was suspended as Police Commissioner and Mr Maralau appointed as Acting Commissioner. On 19th September 2014 Mr Natuman (as Prime Minister) wrote to Mr Maralau (as Acting Police Commissioner) and again gave instructions that all investigations into the alleged mutiny must cease. The 19th September letter forms the basis of count 1. Mr Maralau is then said to have issued his own instructions to various officers to cease investigations and disband any investigation team. That is the basis of the charge against him, i.e. count 3.

6. To complete the picture, the Public Prosecutor's office filed charges against Mr Bong and 7 others (including Mr Maralau) in the Magistrates' Court in November 2014. On 22nd December Mr Edmanley was dismissed as Commissioner of Police by the Police Service Commission. On 15th July 2015 a *nolle* is entered putting an end to the case and the charges involving the 8 alleged mutineers. On 8th February 2016 a complaint was laid in respect of the charges against Mr Natuman and Mr Maralau.

7. The charges against both Defendants are based on section 79(c) of the Penal Code. Count 1 alleges Mr Natuman, *"on or about the 19th September 2014, being the Prime Minister.....intentionally obstructed and interfered in the preventing the execution of a criminal process, in that you issued a letter of instruction dated 19th September 2014 instructing the police to stop the criminal investigations into the mutiny case of 2014"* . Count 2 is in similar language but alleges Mr Natuman gave verbal instructions to the then Police Commissioner to stop investigations. Count 3 concerns only Mr Maralau and alleges he gave verbal instructions to stop the investigation. The language of the particulars is somewhat tortured as it alleges both defendants obstructed and interfered in the preventing of the execution of a criminal process. If strictly construed the particulars can only be saying that someone else was preventing the execution of a legal process and the defendants obstructed or interfered in that persons actions. Be that as it may, the Learned Magistrate (and this Court) understood the defendants to have been charged with obstructing and interfering with the execution of a legal process.

8. The whole of section 79 is set out below:

79. Conspiracy to defeat justice etc.

No person shall –

(a) conspire with any other person to accuse any person falsely of any offence or to do anything to obstruct, prevent, pervert, or defeat the course of justice;

(b) in order to obstruct the due course of justice, dissuade, hinder or prevent any person lawfully bound to appear and give evidence as a witness from so appearing or giving evidence, or endeavour to do so; or

(c) obstruct or in any way interfere with or knowingly prevent the execution of any legal process civil or criminal.

Penalty: Imprisonment for 7 years.

The section clearly creates 3 offences. There can be no other reason why the section is set out as it is other than to have each sub section creating a separate offence. It should be noted that all three subsections refer to obstruction. However, only subsections (a) and (b) refer to obstruction in relation to *"the course of justice"*. Subsection (c) refers to obstruction of or interference with something entirely different, *"the execution of any legal process"*. The two phrases have very different meanings and as they are used in different parts of the section they should be given those different meanings where they appear.

9. The course of justice has long been held to mean something more than just criminal proceedings already in being [1]. The course of justice includes the police investigation of a possible crime. Even the destruction of evidence *before* an investigation begins is something which would tend to obstruct, prevent, pervert or defeat the course of justice [2] because without the evidence there might not even be an investigation. Destruction of evidence in those circumstances may well be said to have occurred in the course of justice. This, of course, is to be read in conjunction with section 78 of the Penal Code which provision covers the situation when judicial proceedings are already in being. It is plain that offences can be committed contrary to ss. 79(a) and (b) even though there is no actual case before the courts. Indeed the fact that an offence can occur by the destruction of evidence before an investigation suggests an offence can occur when the possibility of an investigation is only in the mind of the person who destroys the evidence.

10. Legal process on the other hand seems to refer to actual proceedings in a civil action or a criminal prosecution. There is a strong case to say the phrase contemplates a narrower definition and is referring to a summons, warrant or complaint in criminal proceedings or a claim, petition or a writ in civil cases [3]. There is some strength to the

[1] *R v. Selvage & Morgan* [1982] QB 372
[2] *R v Kiffin* [1994] Crim L.R. 449, CA
[3] See Rule 2.1 Civil Procedure Rules 2003

argument for adopting this latter meaning because s.79(c) refers to interfering with or knowingly preventing **the execution** of legal process not merely the legal process itself. The section seems to be aimed at preventing, for example, the obstruction of or interference with the service of a summons.

11. In English cases involving the obstruction of a police officer in the execution of his duty it was said that the obstruction needed to be wilful in order that someone could be convicted of an offence of obstruction. In the English case of *Hinchliffe* [4] involving obstruction of a police, it was held that the prosecution had to show the defendant did something with the intention of making it more difficult for the officer to carry out his duties. It is immaterial that the defendant does not know what he is doing is obstruction [5]. In the interesting English case of Willmot it was said that if the defendant is trying to assist but in fact makes it more difficult for an officer to execute his duty he is not guilty of obstruction. The facts of the case were the police chased a car which drove into a car park of a private club. The driver got out and resisted arrest. Willmott was the proprietor of the club and knew the driver. He came out and attempted to intervene in the arrest, saying that the police were on private property and had no rights. Eventually, the driver walked with the police to the police car but then refused to get in. Willmott intervened again, this time trying to persuade the driver to get into the car. In the process, Willmott pushed between the police and the driver, and the driver got away.

The court found that Willmott was trying to help the police, but that his bungled attempt at help (by persuading the driver to cooperate with the police) had led to the police officers being obstructed. Because his intention was not to cause an obstruction, his appeal against the original conviction was upheld. The judge said;

> *". . . there must be something in the nature of a criminal intent of the kind which means that it is done with the idea of some form of hostility to the police with the intention of seeing that what is done is to obstruct, and that it is not enough merely to show that he intended to do what he did and that it did in fact have the result of the police being obstructed."*

12. If on the other hand the act is intended to obstruct the motive for doing so is immaterial [6]. This is akin to view expressed in *R v Kellet* [7];

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

Of course *Kellett* was concerned with a charge of attempting to pervert the course of justice, an entirely different offence to obstruction. However the view expressed by the court *Kellet* in relation to intent is of assistance when considering the intent in obstruction or interfering in the execution of legal process.

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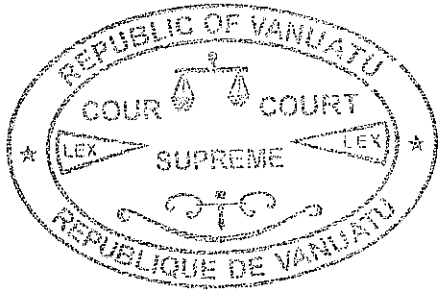
[4] *Hinchliffe v Sheldon* [1955] 3 All ER
[5] *Moore v Green* [1983]1 All ER
[6] *Hall v Ellis* [1983] QB 680
[7] *R v Kellet* [1976]QB 372



13. That, to a certain extent, highlights the difficulty with this matter. There appears to have been some confusion in the way the case was argued before the Learned Chief Magistrate because although the prosecution has proceeded under s.79(c) they appear to have argued their case as if it were a charge under 79(a). These are **not** conspiracy to pervert the cause of justice charges. At the risk of wearing a groove in the record, both defendants are charged under s.79(c).

14. What the prosecution must prove is that Mr Natuman did something which made more difficult the execution of legal process or, which to his knowledge interfered with the execution of legal process. In relation to Mr Maralau it must be proved that he was complicit, (that is he aided, counselled or procured Mr Natuman) in his (Mr Natuman's) obstruction of or knowing interference in the execution of legal process. In both cases the questions need to be asked; what execution and what legal process ? Given what is said above, it must be bourn in mind that legal process is not the same as the course of justice. The prosecution must also establish that the defendants had an intention to obstruct or interfere with the execution of legal process and that intention must be something more than merely intending to do something which obstructed or interfered with the execution of legal process. If it is established that the defendants' intention was something more than mere intention for example, *"something in the nature of criminal intent"* then their motives for doing what they did is irrelevant. That is the answer to Learned Magistrate's question.

15. Although I am only asked to answer the question of law I believe I have some obligation to raise other issues. First, after reading the submissions of the prosecution I cannot but think that they have charged the defendants with the wrong offence. I cannot but think that there has been a complete misunderstanding of the mischief that s.79(c) is aimed at. Secondly, I am concerned that none of the parties thought to look at the provisions of the Police Act and in particular section 6.

Dated 20th April 2016 at Port Vila.

Chetwynd J

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