

BETWEEN: Li Jian Jun
Applicant

AND: Republic of Vanuatu
Respondent

Date: 11 June 2019.
Before: Justice G.A. Andrée Willens
Counsel: Mr S. Hakwa for the Applicant
Mr S. Kalsakau for Respondent

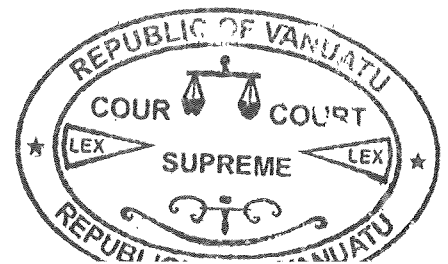
JUDGMENT

A. Introduction

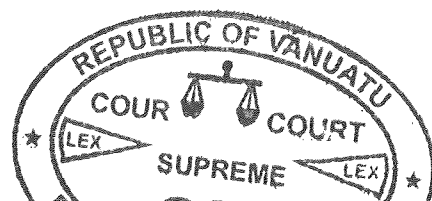
1. This Constitutional application flows from a criminal prosecution. The trial was scheduled to resume today, having been adjourned from 5 June 2019 to enable Mr Li's counsel further time to prepare. The application is based on the delays inherent in the prosecution, which are alleged to be such that Mr Li can no longer have a fair trial as guaranteed to him as a permanent citizen of Vanuatu under the Constitution.

B. The Application

2. The application was filed early this morning and caused Justice Saksak, the trial Judge, to adjourn the criminal proceedings pending the outcome of this Constitutional application.
3. As a direct consequence, two Chinese nationals are adversely affected in that they travelled to Vanuatu in time to give evidence on 5 June 2019, which was then deferred to 10 June 2019. They are due to return to China tomorrow, early in the morning. That may well jeopardise the criminal trial, in the sense of the cost and their willingness to return to give evidence.



4. The adjournment by Justice Saksak led to the Respondent filing an application to treat an urgently arranged Conference as the first hearing of, and to strike out, the Constitutional application. A sworn statement by Mr Simcha Blessing came with the application to strike-out, and shortly before the scheduled 2.30pm Conference, the Respondent's submissions were filed.
- C. Discussion
5. The first matter addressed was an oral application for me to recuse myself on the basis of perceived bias. This was on the basis that I had dealt previously with Mr Li and that he had filed proceedings against me and several other Judges of the Court of Appeal.
6. I declined the application. The Constitutional application referred to was in respect of a Mr Zheng, who had faced immigration issues which I had dealt with. Mr Li was not a party to that litigation although he often accompanied Mr Zheng. I made no decisions in relation to Mr Li, nor any rulings or directions.
7. The suggestion that Mr Li was representing Mr Zheng with his immigration issues is nonsense – Mr Li is not a practising lawyer. He was present at times, as I have indicated, but he was not involved in the proceedings other than to support Mr Zheng.
8. I was certain that a fully informed independent and impartial observer would not reasonably apprehend any bias on my part in hearing this matter. I accordingly declined to recuse myself.
9. Mr Hakwa sought to defer the application to strike out, rightly submitting that matters had proceeded extremely swiftly. However, when I asked Mr Hakwa for submissions regarding the real issues he was able to respond without difficulty. In the circumstances, I considered the urgency of the situation such that it was necessary for a decision to be made without delay. I was not minded to simply adjourn this application which would prejudice the criminal trial if there was merit in the application. Accordingly I deemed the Conference as the first hearing, and proceeded to hear the merits of the arguments as to striking out.
10. Mr Hakwa complained of late disclosure and difficulties with translations. These are matters for the trial Judge.
11. Mr Hakwa conceded I had jurisdiction to strike out the application.
12. He accepted that numerous authorities, of high distinction, were to the effect that Constitutional applications should be a last resort where alternative remedies are available. He conceded further that alternative remedies are available in his client's case.
13. Mr Hakwa further conceded that at no stage prior to this Constitutional application was a formal protest made by the defence regarding delay. That seemed to me to be determinative of the matter.
14. The criminal trial was scheduled to run from 3 to 14 June 2019. The matter was initially adjourned for 2 days for the witnesses to arrive. On 5 June 2019, it was Mr Hakwa's




application to further adjourn so that he could adequately prepare. That was granted. However, rather than prepare for trial, the time was seemingly used to prepare and file, on the morning of the resumption of the trial, this Constitutional application based on delay. Mr Hakwa did so knowing he had alternative remedies, and fully understanding the legal requirement to advance those as a first measure.

15. Today is 11 June 2019. The Court still has available to it, the days of 12, 13 and 14 June 2019 to progress the criminal trial – and once the Constitutional application has been dealt with, there is no good reason not to unless the case were to be permanently stayed. Hence I determined to continue on and deal with the strike out application..
16. It may well be that further time to complete the trial is needed, as it will be starting so late. However, that is surely better than the costs and inconvenience of a second set of flights and accommodation, if the witnesses are still willing to return to give their evidence.
17. While much of the delay to date in this prosecution is explicable, there is much that can be attributed to the defence. It seems incongruous that the defence on the one hand need more time to prepare, while at the same time, it seeks a permanent stay on the basis of delays.

D. Decision

18. The application to strike out the Constitutional application is granted. There is no justification for such an application when other remedies are readily available.
19. Mr Kalsakau sought indemnity costs, arguing that the process adopted by the defence was simply a delaying tactic. He sought the costs of the two witnesses' return airfares and accommodation costs, if that is what ultimately transpires, to be assessed subsequently and taxed if not agreed. He further sought VT 100,000 for his legal costs incurred today, which he asked be paid within 7 days.
20. Mr Hakwa consented to both orders, and I make them accordingly.
21. I remit the criminal trial case back to Justice Saksak for continuation at 9am tomorrow 12 June 2019. I do so, without having been able to discuss his work commitments and without knowing if he has arranged for other matters to be scheduled. However, if at all possible, it strikes me as imperative that the witnesses' evidence be heard in the remaining time scheduled for this trial, if they can be persuaded to remain longer and alternative return flights can be sorted out for them to be able to do so. Whether that be tomorrow or the days following, that for me is a priority to prevent injustice.

Dated at Port Vila this 11th day of June 2019
BY THE COURT


Justice G.A. Andrée Wiltens*

