

PUBLIC PROSECUTOR

V

NAZARIO MARTIN PASCAL FIAKAIFONU

Respondent

Date of Hearing: 25th March 2021
Date of Judgment: 8th April 2021
Before: Justice Oliver Saksak
In Attendance: Mr Kevin Nathan for the appellant
Ms Viska Muluane for the respondent

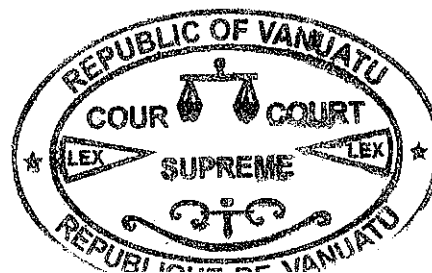
JUDGMENT

Introduction

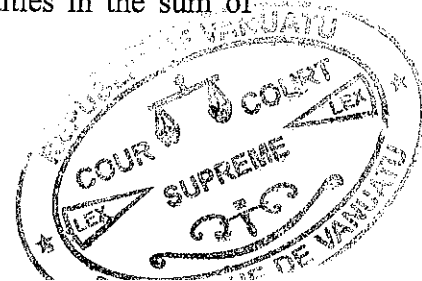
1. This is an appeal against the decision of the Magistrates Court dismissing Criminal Case 20/1825 in its entirety on 9th November 2020.

Background History and Facts

2. The respondent was charged with 8 counts altogether.
3. The charges in counts 1, 2, 3, 4, 5 and 6 related to the respondent's failures to pay his employee's monthly contributions due for the months of February through June 2020 respectively. These charges were laid under sections 26 (1) and 50 (1) (c) of the Vanuatu National Provident Fund Act [CAP.189] (the Act).
4. The charges in Counts 7 and 8 related to the respondent's failure to register his employees under sections 23 and 50 (1)(b) of the Act.
5. Prior to the charges being laid the respondent-
 - (i) On 18th July 2019 registered his Company Fonu Enterprises with the Vanuatu Financial Services Commission (the VFSC).



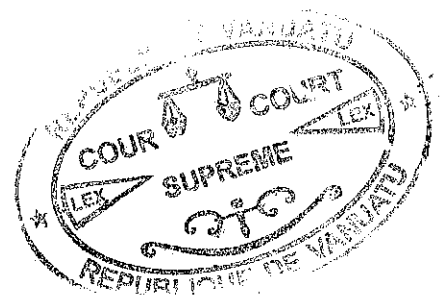
- (ii) On 25th May 20 registered his company with Customs Department for a business licence.
- (iii) On 28th May 2020, sought the assistance of Sakary Nunbel a VNPF Officer, to apply and register his employees with the VNPF.
- (iv) On 6th June 2020, was cautioned by Laurent Nimisa, a VNPF Inspector.
- (v) On 14th July 2020 the VNPF filed the 8 charges against the respondent in the Magistrates Court in Criminal Case No.20/1825 for the offences committed between February and June 2020, representing an amount of VT 34,480.
- (vi) On 22nd July 2020, the respondent was summoned to appear for plea in the Magistrates Court.
- (vii) He appeared in Court with only the summons but no charges, and no Preliminary Bundle of documents were served on the respondent.
- (viii) The matter was adjourned on 22nd July 2020 for the Prosecution to serve the respondent with the charges and the PI Bundle of documents.
- (ix) He was summoned again on 6th August 2020 to appear in Court on 9th October 2020.
- (x) On 18th August 2020 the VNPF sent employees registration numbers to the respondent.
- (xi) On 28th August 2020 the respondent paid all the unpaid contributions to VNPF.
- (xii) On 9th September 2020 he paid the surcharges and penalties in the sum of VT 10,582.



- (xiii) On 23rd September 2020 respondent's counsel wrote to VNPF requesting that all charges be withdrawn.
- (xiv) On 9th October 2020 respondent's counsel advised the Court all outstanding contributions had been paid and explained to the Court the non-payments were due to the late provisions of the employees registration numbers by the VNPF. As a result counsel for the VNPF requested for time to verify the information and sought a return date. The Court adjourned the matter and directed that Counsel for the VNPF file a memorandum to update the Court on the status of payments.
- (xv) Counsel for the VNPF failed to comply with the Court's direction.
- (xvi) On 12th October 2020 a notice of plea was issued returnable for plea on 9th November 2020.
- (xvii) On 9th November 2020 the respondent and his counsel appeared. Mr Nathan of Counsel for VNPF did not attend in time and without explanation. Following an oral application made by counsel for the respondent, the Magistrate dismissed all the charges against the respondent.

Grounds of Appeal

6. The appellant advanced 4 grounds of appeal that-
- (a) In dismissing the charges there was no fair trial.
 - (b) Section 131 of the Criminal Procedure Code Act [CAP 136] did not give power to the Magistrate to dismiss the case.
 - (c) The Magistrate acted on incorrect factual basis, and
 - (d) The Magistrate failed to consider the public interest of the case and to warn the Prosecution before dismissing the charges, amounting to displaying a lack of procedural fairness.



Submissions By Appellant

7. Mr Nathan submitted as follows-

(a) In relation to Ground 1-that it was unfair for the case to be dismissed at the management stage, after only 2 conferences. There was a delay of almost 3 months from 14th July 2020 to 9th November 2020 and that the delay was not an unreasonable delay. Counsel relied on Regina v Derby Magistrates Court [1996] A.C 487.

(b) In relation to Ground 2, Counsel submitted that the Magistrate was in error when he dismissed the case under section 131 of the Criminal Procedure Code Act [CAP 136] when the case had not yet gone to the trial stage. Counsel relied on PP v Ramuno Phelix & Mickey Phelix Crac 20/494.

(c) In relation to Ground 3, Counsel submitted it was done on wrong factual basis in that paragraph 3 of the Magistrate's Order of dismissal states **"that all payments has (sic) been done prior to the lodging of the official complainant."** Counsel argued this was an error as the payments were made after the charges had been laid.

(d) In relation to Ground 4, Counsel submitted there was a wider public interest in the matter warranting that the case be allowed to progress to plea and/or trial. Counsel argued that for the Magistrate to dismiss the case only 4 months after charges had been laid, and during the management stages, was an error.

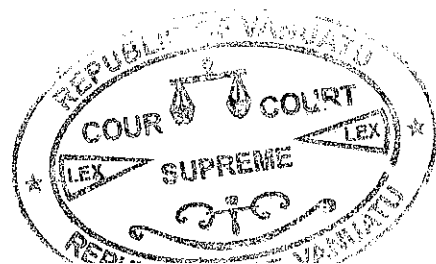
8. Mr Nathan submitted the decision of the Magistrates Court should be overturned and the matter be reinstated and remitted to that Court for hearing.

Submissions By Respondent

9. Ms Muluane argued and submitted that the Magistrates Court had dismissed the case for reasons that-

(a) Counsel for the appellant had failed to attend conferences to progress the matter,

(b) The respondent had made payments of all outstanding contributions including surcharges, and that



(c) Counsel had failed to comply with the Court's direction to file a memorandum updating the Court as to the status of the case.

10. In particular Ms Muluane argued and submitted as follows-

(a) In relation to Ground 1 that the offences charged were trivial as they involved only an amount of VT 34,980. Counsel in essence submitted Prosecution was not serious when counsel failed to attend hearings and provided no reasons for doing so.

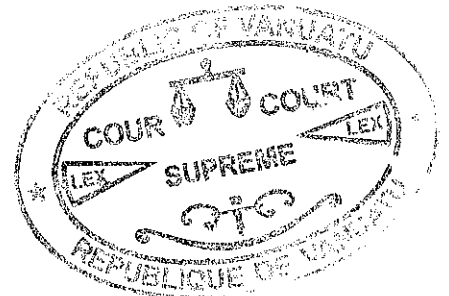
(b) In relation to Ground 2, Ms Muluane submitted sections 127 and 131 of the Criminal Procedure Code Act provided clear powers to the Magistrate to dismiss a case even at the Management level. It was submitted the term "trials" used in Part 6 of the Act is capable of a wider interpretation to include hearings at the management level.

(c) In relation to Ground 3, Ms Muluane submitted the reason for non-payment of contributions in time was due to the late provision of Employee Numbers by VNPF. It was argued in doing so VNPF had contributed to the failure and as such they had come to Court with unclean hands. Counsel agreed the word 'prior' used by the Magistrate in paragraph 3 of the Orders under appeal may have been a typographical error.

(d) Finally in relation to Ground 4, Counsel submitted that upon the respondent paying the outstanding contributions and surcharges breach was no longer in issue. And in view of the fact VNPF and its counsel failed to comply with the Court's order to file an update memorandum, that failure indicated VNPF had not taken any further and serious interest in pursuing the case to its end.

11. As such, it was submitted by the respondent's counsel that the only course open for the Magistrate in the circumstances in which matters evolved was to dismiss the case and the charges, and in doing so, there was no error on the part of the Magistrates Court, and that the appeal should be dismissed.

12. The respondent sought a permanent stay of the proceeding.



Relevant Legal Provisions

13. Part 6 of the Criminal Procedure Code Act provides for “PROEDURE IN TRIALS BEFORE THE MAGISTRATES COURT”.

Section 127 of the Act provides:

“NON-APPEARANCE OF COMPLAINANT AT HEARING

127. If, in any case in which a court has jurisdiction to hear and determine, the accused person appears in answer to the summons served upon him at the time and place appointed in the summons for the hearing of the case, or is brought before the court under arrest, then if the complainant, having had notice of the time and place appointed for the hearing of the charge, does not appear the court shall dismiss the charge, unless for some reason it shall think it proper to adjourn the hearing of the case until some other date, upon such terms as it shall think fit, in which event it may, pending such adjourned hearing, either release the accused from custody or remand him to prison, or take such undertaking for his appearance as the court shall think fit. (Underlining for emphasis)

14. Section 130 of the Act provides:

“ADJOURNMENT

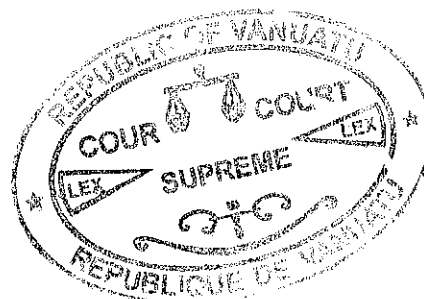
130. (1) Before or during the hearing of any case it shall be lawful for the court in its discretion to adjourn the hearing to a certain time and place to be then appointed and stated in the presence and hearing of the party or parties or their respective advocates then present, and in the meantime the court may allow the accused person to go at large or may commit him to prison, or may release him upon bail conditioned for his appearance at the time and place to which such hearing or further hearing shall be adjourned.”

15. Section 131 of the Act provides:

“NON-APPEARANCE OF PARTIES AFTER ADJOURNMENT

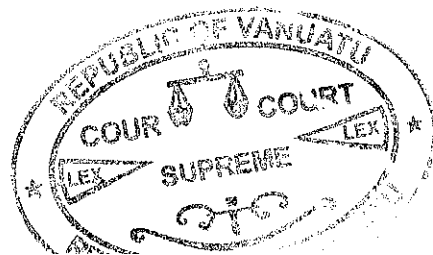
131. If at the time and place to which a hearing or further hearing has been adjourned, the accused person does not appear before the court which made the order of adjournment the court may issue a warrant for the arrest of the accused and cause him to be brought before the court. If the complainant does not appear the court may dismiss the charge with or without costs as it may consider fit.”

(Underlining for emphasis)

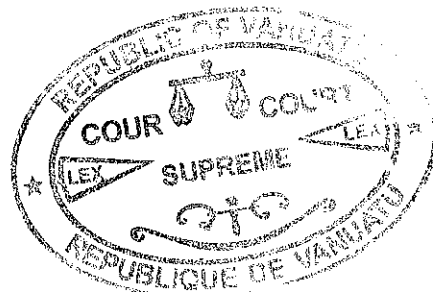


Discussion

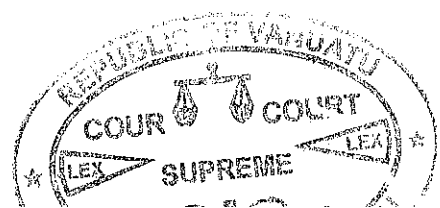
16. On Ground 1, the issue is whether the Magistrate err in dismissing the case without a fair trial? The answer is in the negative, there was no unfairness to the VNPF. Instead it was the respondent who was prejudiced and treated unfairly in the process.
17. The chronology of events show clearly that on 22nd July 2020 the respondent appeared in compliance with a summon. No charges or PI Bundle of documents had been prepared and served on him by the Prosecution. To summon the respondent to appear in Court without charges and without papers was grossly unfair and prejudicial to the respondent.
18. The respondent was summoned again to appear on 9th October 2020. However as he had then received his employees registration numbers on 18th August 2020, he took steps to pay all outstanding contributions on 18th August 2020. And he paid all surcharges as well on 9th September 2020.
19. On 9th October 2020 the respondent appeared in Court and his counsel advised the Court all contributions and surcharges had been paid.
20. As a result of the advice Mr Nathan requested another adjournment in order to verify the information. The Court granted the request but ordered that a memorandum be filed by Counsel.
21. It is apparent from Mr Nathan's request for adjournment he appeared in Court unprepared or without instructions from the VNPF. This was another unfairness to the respondent.
22. Then there was the failure by Counsel to comply with the Court's direction to file a memorandum. Further Mr Nathan did not appear on 9th November 2020. Counsel did explain that he appeared late on that date over the Bar Table without filing proper evidence by sworn statement.



23. It is therefore apparent if there was any unfairness in the process leading to the dismissal of the charges and the case, the unfairness was done to the respondent and not to the appellant.
24. Therefore their appeal fails on the first ground.
25. In relation to Ground 2, I accept Ms Muluane's submission that sections 127 and 131 of the Criminal Procedure Code Act was capable of a wider interpretation to include pre-trial conference hearings. This conclusion is reached from the term "**hearing**" used throughout section 127 and section 131.
26. The term "trial" is used only in section 132 of the Act but that in my view relates to the "hearing" done after an accused person is called upon to plead to the charges laid against him or her under section 133 of the Act.
27. And where the accused person pleads not guilty, the Court shall proceed to hear the complainant and the witnesses for the prosecution. This is provided in section 134 of the Act.
28. These 2 sections provide for trial hearing proper which occurs late. The power to dismiss a charge by the Magistrate is available under sections 127 and 131 of the Act and these can be exercised at "**hearings**" earlier held than at "**Trial**" proper when a plea of not guilty has been entered.
29. Mr Nathan relied on the cases of Regina v Derby Magistrates Court and PP v Phelix but those cases are distinguished and do not assist his appeal.
30. The appeal therefore fails on the second ground.
31. The third ground: whether the Magistrate acted on incorrect factual basis. This complainant relates to the use of the word "**prior**" in paragraph 3 of the Magistrates Court's order.



32. The Notes of the Magistrate relating to the 9th October 2020 attendance records a delay in the releasing of the respondent's employees registration numbers but that upon receiving the numbers, **“ payment was directly paid.”**
33. It is obvious that this occurred after charges had been laid on 14th July 2020. Payments were only made in August and September 2020 by the respondent.
34. The facts received by the Magistrate on 9th October 2020 were correct facts. Mr Nathan sought time to verify those facts and to file a memorandum updating the Court. But he did not do so. As such the only facts the Magistrate had were those given to him on 9th October. There was no other fact contradicting those provided by the respondent.
35. It is apparent therefore the word **“prior to”** used by the Magistrate may have been the wrong word. It should have properly been **“after”**.
36. The appeal is successful on Ground 3 but only to the limited extent that the word **“prior to”** used in paragraph 3 of the order is deleted and replaced with the word **“after”**.
37. Finally Ground 4: Whether the Magistrate failed to consider the public interest of the case? The answer is **“ No”**.
38. Public Interest must be considered and balanced with delays causing prejudices and unfairness to accused persons, and the lack of seriousness in prosecuting a complainant, and the attitude of counsel towards orders and directions of the Court.
39. In this case the VNPF did not assist the respondent by returning his employee numbers early so he could meet timelines as required by sections 26 and 50 of the VNPF Act. Further they were not ready at the first conference on 22nd July 2020. They had not served relevant documents on the respondent. And they had not briefed counsel adequately for the appearance on 9th October 2020. And finally counsel did not comply with the Court's clear order to file a memorandum on 9th October 2020, and Counsel did not appear on 9th November 2020.



40. For those factors the balance tilted heavily in favour of the respondent. Had there been any evidence of a new breach after remedying the first breach, public interest would dictate that the matter be proceeded with to the plea and trial stages. But that did not occur in this case.

41. The appeal therefore fails on Ground 4.

The Result

42. The appeal is allowed but only on the limited ground that the term “prior to” used in paragraph 3 of the orders under appeal is deleted and replaced with the word “after”.

43. Otherwise, the appeal is dismissed on all other grounds.

44. In the circumstances of the case, there will be no order as to costs.

DATED at Port Vila this 8th day of April 2021.

BY THE COURT


OLIVER.A.SAKSAK

Judge

