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

Criminal
Case No. 19/2630
SC/CRML

BETWEEN: **Public Prosecutor**

AND: **Isleno Leasing Company Limited,**
Terrence John Kerr,
Clarence Lavinya Ngwele,
Yoan Mariasua
Accused

Date of decision: ***20th day of October 2023***

Before: ***Justice E. P Goldsbrough***

Counsel: ***Blessing, S for PP***
Sugden, R for Isleno Company Ltd & C L Ngwele
Hamil-Landry, D for T J Kerr
Bal, A for Y Mariasua

DECISION ON STAY

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1. This decision is about a stay of criminal proceedings. Whilst the Court was considering the matter of its own volition, counsel on behalf of the defendants applied for the same. Submissions were invited from both the prosecution and defence. Those submissions were helpful, and the Court appreciates the work behind them.

2. The two allegations arise from a lease entered into in 2007 and a Deed of Release made and executed in 2011.

3. The current information was filed on 30 January 2023. Still, these proceedings began in 2019, and on 30 September 2019, an earlier version of the information containing what are effectively the same two charges against the same five defendants was filed. Now, only four defendants face immediate trial. An order severing a fifth defendant due to his ill health was made in May 2022. He was last reported to be suffering from serious ailments and receiving treatment in New Zealand.

4. There had been earlier attempts to start this trial before the file was allocated to me in November 2021. Various dates were then provided to counsel to begin the trial in 2022, which proved unsuitable. A more serious attempt to start the trial at the beginning of the legal year 2023 was thwarted by the prosecution's lack of adequate preparation until the trial eventually began in late March 2023. At that time, counsel for the prosecution indicated that it was expected to complete the prosecution case before the Easter break. Now, in October 2023, the prosecution case is not yet closed. There are eight or nine more witnesses to give evidence, two of them recalls or potential recalls.

5. The production in court of a folder of evidence prompted this application. That folder was said to be the Minute Book of Air Vanuatu, taken from its Head Office, which has been in the custody of the prosecution since its seizure. Although I stand to be corrected here, it was Monday, 2 October 2023, when the folder was first brought into court.

6. Earlier, a witness had given evidence that she had been the Executive Secretary to the Chief Executive Officer of Air Vanuatu and the Acting Board Secretary. Her evidence was that she had attended Board meetings where she took manuscript notes, which she eventually typed into draft minutes for circulation and approval. It seems that the Board of Air Vanuatu begins a board meeting with a motion to approve the Minutes of the previous meeting of the Board. In evidence in chief, she was taken through what she had done and asked to produce various drafts of minutes with further evidence about changes made or suggested, adopted or rejected. In some instances, she could produce something signed as the minute, in others, she could not. At the end of a morning session, counsel dealing with this witness for the prosecution indicated that he had completed all topics save for producing some documents she had given evidence about that were still missing. He asked for time to attempt to find those documents and resume her evidence in the afternoon to produce them. This request came in the context of neither the prosecution nor the witness being able to produce anything resembling an original. The witness insisted that material was stored on her work computer and saved to a machine other than the machine seized in a search. She was given several days to retrieve that material, but nothing resulted. After it was pointed out that the prosecution

should have the originals following the execution of a search warrant, this further time was given.

7. Providing original documents by the prosecution has been a recurrent theme of this trial. They have been requested many times but rarely produced. Often, the reason given was that the document was disclosed, and the electronic copy was available, so there is no need to have the original in court.

8. At the start of the afternoon session, the same counsel for the prosecution, not having found any documents, without seeking leave, began to ask the witness about other appointments she held, other than those she had given evidence about. He sought to introduce the notion that she was also the Acting Company Secretary and, as such, was entitled to produce the company's official records in evidence.

9. None of this intended evidence is featured in the disclosure. It was not canvassed in any statement she had made to the police. Following objections to introducing this undisclosed evidence, the Court ruled that the witness could not be taken to topics not included in her witness statements. The argument against the objection was simply that this was a mere detail that did not need to be canvassed in a witness statement or disclosed to the defence.

10. No mention of the folder purporting to be the Minute Book was made at this stage.

11. A renewed application to allow the witness to produce the documents that had been found was made after the adverse ruling on introducing undisclosed evidence had effectively provided the prosecution with further time to locate them.

12. There is now before the Court an application to recall the same witness to give the evidence that was previously excluded at this point. The application does not reference the earlier decision but is based on the notion that there was no need to disclose. It is, in effect, an interlocutory appeal. It remains to be determined.

13. Earlier reference was made to disclosure being an issue throughout the trial. Given the number of documents involved, an attempt had been made to use information

technology. Expensive software and equipment were procured. But the documents were not themselves the digital version seized in several instances. They were digital copies made from hard-copy originals. So, a set of draft minutes said to come from the machine of the Acting Board Secretary had handwritten annotations on its digital facsimile.

14. One document digitised for the trial ended on page 28 when the original made many more pages than that. Quite why it was not noticed that a document which would always end with a signature page had no such page goes to show how dangerous it was to rely on these digital replicas.

15. Disclosure was also an issue after a successful application to adjourn based on witnesses being on holiday occurred. Suddenly and without notice, a flurry of further disclosure was made. That prompted a decision that the prosecution could not take advantage of adjournments necessitated by their failure to prepare for the trial to disclose material that had been in their possession for several years but not disclosed with other material when the bulk of disclosure was made.

16. Then, applications were required to allow disclosure of material that the prosecution thought had been disclosed but had not been disclosed because of counsel's failure. That application was allowed, given that counsel had made a genuine mistake.

17. On the surprise Minute Book, prosecution counsel argued that this had been the subject of disclosure. That submission was based on the assumption that the book contained only that which had been disclosed as individual documents, albeit from different sources. However, the existence of the Minute Book itself was not referred to. That, in my view, is not how disclosure works.

18. To see just how the material was disclosed, reference was made to the USB stick on which it was provided. A few folders are used to identify topics, but inside each folder for each document, a 12-digit number is prefaced with PP. No other identifier was provided, so it had to be opened to see what each document was.

19. There is no authority I have been able to find within this jurisdiction on how to effect disclosure. Still, I am aware of European authorities, which have determined that disclosure must be effected meaningfully. Simply providing the documents in their hundreds or thousands without a defined scheme to navigate them has been held improper.

20. The Chief Executive Officer of Air Vanuatu has not yet completed his evidence in chief. As the present Chief Executive Officer, it is intended to ask him to produce this Minute Book. But so much time has already been spent on asking various other members of the board to say what the minutes are from the meetings they held. Surely, from the beginning, it should have been the subject of separate disclosure if reliance were to be had on the company minute book. It was in the hands of the prosecution all of this time since it had been seized.

21. A further recurrent theme has been the attempts by the prosecution to reopen matters after they have failed to present material in the first place. Lack of experience perhaps means that they have found recovery difficult once they have been interrupted by an upheld objection. Often, in that situation, a quick decision not to ask any further questions has led to the premature ending of a witness's evidence. To recover, an application will be made to recall at the next session or sitting.

22. That also takes place when the trial resumes after a break because no witness was available to give evidence. The opportunity is then taken to try and repair the damage done earlier, to the extent that one begins to question whether the lack of a next witness is deliberate. When this application disrupted the hearing, the then witness wanted to be excused, and the following witness had left the jurisdiction, so even absent the time taken to hear and determine this application, there were no witnesses available to give evidence.

23. A better example flowed from the evidence of a police officer. He had been given the task of creating a property seizure report by a superior officer. His evidence suggested that he had complete his assigned task, which included explaining the nature of the document to the person whose house had been searched and obtaining a signature from

the same householder acknowledging that the property seized was as listed, effectively asking her to adopt the document as accurate. In cross-examination it was elicited that the officer did no such thing but delegated the latter task to another.

24. That resulted in the document being taken from the list of exhibits and moves to a marked for identification list. That could be changed once more when the officer who explained the document and obtained the signature gave evidence about that. Later, her name was not on a list of outstanding witnesses. After the effect of that omission had been made clear to the prosecution, the next list contained her as a witness, and application was made to permit her undisclosed evidence. That application was refused. An application to recall the other officer was granted to allow him to produce the document as an exhibit, without the significant evidence surrounding whether the document was explained to the householder and her signature obtained. In addition to demonstrating a lack of trial preparation that serves to demonstrate that the prosecution team respond to matters correctly only when the effect of their decisions has become apparent.

25. Setting out such detail the history of this trial seems necessary as the grant or refusal of a permanent stay of criminal proceedings is quite correctly regarded as an extreme measure. A stay of proceedings is not only an exceptional but also a most unsatisfactory remedy. Charged with a criminal offence, the individual is entitled to a verdict, either condemning or vindicating them. Society is entitled to expect a decision in a criminal trial reflecting the guilt or innocence of the accused.

26. Only when allowing a trial to continue would seriously compromise the very integrity of the judicial system should a stay be considered and granted. That is the test which I intend to apply to this set of facts. That test can be seen in various authorities which I have considered. As set out in *Jago v District Court of NSW* [1989] HCA 46

> "To justify a permanent stay of criminal proceedings, there must be a fundamental defect which goes to the root of the trial "of such a nature that nothing that a trial judge can do in the conduct of the trial can relieve against its unfair consequences""

27. This is not a case where an application for a stay needs to be supported by sworn evidence. The facts to be considered are readily apparent - c.f. *R v Stringer* [2000] NSWCCA 293.

28. As was said in *R v Littler* [2001] NSWCCA 173

> "As shown by *Jago v District Court of New South Wales* [1989] HCA 46; (1989) 168 CLR 23, a permanent stay is a remedy of last resort, only used in most exceptional circumstances, where any trial would involve such oppressive unfairness, incapable of being overcome, that it would be an abuse of process."

29. In *Dupas v The Queen* [2010] HCA 20 a further explanation of when a stay might be considered: -

> "There is no definitive category of extreme cases in which a permanent stay of criminal proceedings will be ordered. In seeking to apply the relevant principle in *Glennon*[1], the question to be asked in any given case is not so much whether the case can be characterised as extreme, or singular, but rather, whether an apprehended defect in a trial is "of such a nature that nothing that a trial judge can do in the conduct of the trial can relieve against its unfair consequences.""

30. Finally, I considered the statement found in *TS v R* [2014] NSWCCA 174: -

> "In order to justify an order for a permanent stay of proceedings there must be a fundamental defect going to the root of the trial which is of such a nature that nothing that a trial judge can do can relieve against its unfair consequences"

31. Here, the defence have been seriously prejudiced throughout the trial beginning with inadequate and improper disclosure, repeated attempts at late disclosure, continuing and repeated attempts to introduce undisclosed material, time scheduled but not used for the hearing of prosecution witnesses, and recalling or attempts at recalling witnesses because of prosecution failures to lead relevant evidence in the first place. A trial which should not have taken more than six weeks has already taken more than six months and

[1] **Glennon** v The Queen (1994) 179 CLR 1

shows no sign of coming to an end, and with each delay, the prosecution seeks to capitalise on it by further disclosure or the reopening of determined issues.

32. The defence are entitled to know what they face. They should not have to reconsider a defence adopted based on disclosed material as it changes over time. The court should not be used as a training ground nor for a dress rehearsal of a trial.

33. Before embarking on evidence, an earlier stay application based on what could only be described as an illegal Commission of Inquiry (COI), hastily arranged, and funded by Air Vanuatu, which was concluded between the hearing of an appeal and the date a decision was expected to be delivered was dismissed. A provision of the enabling legislation for a COI prohibits the same whilst court proceedings are pending, hence the suggestion of illegality. The rationale behind that decision was that there was a lack of connection between those who acted illegally and those who were responsible for this prosecution. I still believe the decision was correct based on the facts presented to me.

34. This situation, however, is quite different. To allow this trial to continue would be an affront to justice. A fair trial here is no longer possible, nor would it, in my view, be fair to allow the prosecution to further benefit from their lack of preparation for it. That has already been demonstrated to an extent far greater than should have been the case.

35. The applications for a permanent stay of these proceedings are granted and the proceedings permanently stayed in respect of all those presently on trial.

DATED at Port Vila this 20th day of October 2023.

BY THE COURT

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E. P. Goldsbrough
Judge of the Supreme Court

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