

IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU)

Civil Case No. 1A of 199

IN THE MATTER OF

THE NAGOL JUMP

BETWEEN:

WILLIE ASSAL AND CHIEF FRANCIS
ASSAL GENERALLY KNOWN AS THE
FELORA ASSOCIATION

First Applicants

AND:

CHIEF PIERRE VATU

Second Applicants

AND:

THE COUNCIL OF CHIEFS OF SANTO

First Defendants

AND:

SANTO REGIONAL COUNCIL

Second Defendants



Coram : Chief Justice Vaudin d'Imecourt

JUDGMENT

[CONSTITUTIONAL LAW - CUSTOM LAW]

This matter comes before me upon a petition of the First and Second Applicants herein, under the Supreme Law of Vanuatu, sections 5(1)(d), (g), (h), (i) and (k), and section 6(1), dated 27th May 1992 and signed by the Applicants, containing a number of annexed letters. Though informally drafted, I admitted them and waived the necessity for any formalities, no objections were raised by the 1st and 2nd defendants. The Applicants presumably apply for an order of Mandamus ordering the chiefs of Santo/Malo and Pentecost and the Local Government of Santo/Malo to give them the authority to jump, subject to whatever fee may be payable under the by-laws or alternatively an injunction preventing all the said parties from interfering with their constitutional rights, as they see it, to perform their: "Custom ceremony anywhere in Vanuatu and more particularly in Santo".

On the 29th of May 1992, having read the Application of Chief Pierre Vatu and his son Loulou Vatu and their letter of further Application dated 1st May 1992 signed P.Vatu, J.Netitau, L. Vatu, J.P. Angelo and Lucian V and a letter of the same date signed by the organisers of the Nagol jump, I gave them leave to make their application and evidence was heard on 29th May, 22nd and 23rd June 1992.

The various parties were represented as follows:-

The applicants were jointly represented by Mr Vincent Boulekone, and the Defendants, at their own requests, were represented by the President of the Malvatumauri - Chief Willie Bong Matur Maldo.

I heard evidence from the following witnesses for the Applicants, Louis Vatu, Chief Dominique Boulekone and Willie Assal. For the Defence, I heard Chief Telcon of the Malbangbang. The court then heard evidence from Francis Assal, and Juan Tavimel one of the Custom owners/plaintiffs and a jumper, both being willing to testify before the Court.

It would be right to set out here a brief history of the Nagol jump which is as rich in folklore as it is steeped in tradition.

The nangol Jump is an age old and sacred tradition or custom associated with the island of Pentecost and of a particular part of Pentecost at that, the Southern region. It would seem according to the evidence that I have heard, that it is limited to two villages of the Southern region of Pentecost. It would appear that there are two types of Nagol jump, one called nangol Addie, the other called nangol Abal. It is with the latter that we are concerned - Nagol Abal. What the exact difference is, I have not been told, but suffice it to say that it is claimed that the 1st Applicants, in the person of Willie Assal and his family or clan, are the custom owners of the Nagol Abal. The two villages that are the custom owners of the Nangal Abal and therefore have the custom powers or authority to build the towers are the inhabitants of the village of St Joseph in the South of Pentecost and the inhabitants of St Henri in the South East of Pentecost. Traditionally and for centuries, the custom ceremony of the Nagol Jumps were reserved to and performed only in those two villages by their custom owners. Lately it seems that, for reasons more akin to commercial sense, than to customary values, the Nagol jump has been allowed to be performed in other areas of Pentecost more accessible to tourism. But it remains essentially a custom ceremony of the Island of Pentecost. The Nagol jump or "Land Diving" is the most traditional and spectacular of all the customs of Vanuatu. As I said before it is exclusive to the South of Pentecost. As a result Pentecost itself is known world-wide. It is its main tourist attraction. The custom is deeply rooted in legend. The story is that of a young woman who being brutalised by her husband, ran away several times but each time, was caught and brought back, to receive more mistreatment at his hands. Finally she hid in a tree and he followed her up. When he reached her, she jumped daring him to follow. Seeing her land as if by magic without hurt, he too jumped only to be killed. What he did not know was that she had tied her ankles with vines from the tree to breach her fall. This legend is therefore re-enacted in Pentecost every year. The jump will only take place if weather conditions in the preceding months have been favourable. A rich yam harvest will

be indicative of the fact that the all important vines have the right qualities for the jump. Towers of up to 80 feet are built. No nails or any artificial materials are used in its constructions. Dimensions and tolerances of the lianas are all dictated by traditional methods. The tower building is under the supervision usually of one man to whom goes the honour of the last jump. In spite of the origins of the jump, and perhaps because of it, no women are allowed to jump or even approach close to the towers. The lianas must be exact to each persons requirements, too long, they will crash to their deaths and too short they will be jerked back violently into the tower. The season for the jump is April and May. It goes without saying that the tower building itself, requires precision and the most abominable accidents sometimes occur as indeed it did on a memorable occasion when the Queen of England visited Vanuatu a few years ago and a young man died in her presence. Might it be said that Pentecost has the best climatic conditions at that time of year for this ceremony to be performed or, might others say that the custom is a Tabu custom and that the spirits that guide and protect it are from South Pentecost and that only there at the most auspicious of times can it be safe and, therefore, that the custom should not be exported? I don't know - this is not a custom court but a court of law. This application comes before me under the Supreme law of Vanuatu, namely the constitution and I will give my judgment according to law.

SUMMARY OF EVIDENCE

I am told that the Nagol jump has now become big business. Two groups of Tour organisers, Tour Vanuatu and Frank King Tour, organise boat loads of Tourists to come and watch the ceremony being performed. I am told that they provide dates when boats of tourists are brought to the area so as to allow those who are entitled to, to build their towers and prepare their jumps to match a particular arrival of tourists. I am told that the dates given are either not convenient to the 1st Applicants and their groups, or simply they are not informed of the arrivals and therefore lose out in the financial rewards of jumping at a time coinciding with the arrival of Tourists. Angered by such tactics, they formed themselves into a group known as the Felora Association and attempted to obtain permission to organise their own tours. That being refused to them, they decided that there was nothing else left to do but to take their custom ceremony out of Pentecost. In order to do so, they had to find a convenient location. It seems that they found one in Beleru, the custom lands of the Vatu family or Clan, on the island of Santo. That implied the exportation of the custom to Santo. The 1st Applicants had to have leave in custom to export the ceremony and the leave must come, it seems, 1st from the council of Chiefs of South Pentecost - the Malbangbang and then from the Council of Chiefs in the Island of Pentecost - the Bilmavanua - Willie Assal claims that he had the permission of the Malbangbang and that he had a signed document authorising him to take the custom out, from the Chief of the Malbangbang and in particular, Chief Telcon, its president. He claims that agreement was given on the 27th April 1992. Willie Assal told me that it was pursuant to that agreement that he approached Loulou Vatu and Chief Pierre Vatu to use their lands at Beleru in Santo and that is why he came and did a custom ceremony with the Vatu clan to be allowed to bring the custom to Santo. He further mentions that initially he had received the authority of the Regional Council of Santo/Malo who told him to acquire the various permissions before they would consider his application. He claims that once he

had obtained all the permissions, "they", meaning all the chiefs, then changed their minds and tried to stop him. When one looks more carefully at the document of the 27th April 1992, signed by Chief Telcon and Chief Rafael, it is quite clear that they do give permission to export the custom, that permission refers to the exportation of the custom for 3 years for the months of April and May. These are important months, as the custom ceremonies can only be performed during those months for ceremonial purposes. Either because those are the most auspicious months for the custom ceremony or more than likely, as we have seen in the history of the nangol jump, because that is the safe vines which are used and tied to jumpers' feet in order to break the fall after the jump. A more careful look at the document clearly shows, therefore, that permission could not have been contemplated for the year 1992 as the month of April was already over. Indeed, Willie Assal admitted that permission was not granted for 1992, but for 1993/94 and 1995.

So when he claims that permission was granted, that was only partly true. He knew very well that permission had not been granted for the year 1992. He, Willie Assal, accompanied Chief Telcon (the president of the Malbangbang - the council of chiefs of South Pentecost) to Vila, where he knew Chief Telcon was trying to put the final touches to the permission he had given, by contacting the Malvatumauri (the National council of Chiefs of Vanuatu) and get their authority. He tells me that while he was in Vila, his jumpers arrived in Santo - minded to jump. They did that either because they honestly believed that they had secured authority or because they were just "hot heads", minded to do as they please - never mind custom - or permission from anyone - plainly it could not have been the letter of the 27th April 1992 which could have misled them as Willie Assal himself admitted, he knew that permission was granted for 1993/94/95. The Applicants also called Chief Dominique Boulekone in support of their application. But I do not see how his evidence assists the Applicants at all. He is a representative of the Bilmavanua. The Bilmavanua is the council representing all the regional council chiefs of Pentecost - Chief Boulekone is one of their 3 representatives in Santo. He told me that he had asked the president of the Chiefs of Santo/Malo to allow them to speak at the meeting, but that the Chiefs had refused. He went on to say, that he had been contacted by Chief Telcon, the President of the Malbangbang, who asked him to stop the Nagol jumpers from coming - at the time apparently Chief Telcon was at Vila. He went on to say "At the request of Chief Telcon, I stopped the boat that was supposed to bring them over - but they took another boat and came nevertheless, possibly because the order coming from Chief Telcon had not been passed on to them or reached them. I stopped the boat because I knew that all the customary permission had not been obtained and followed, that is why I stopped the boat". It is unimaginable, therefore, that the others, Willie Assal and the jumpers who are also islanders steeped in tradition would not have been aware of the lack of customary authority. In my view they knew very well, but were "hot heads", determined to come in search of profits, never mind the breach of custom. Indeed, Chief Dominique Boulekone said in terms "to those who wanted to come I had already said that they should not come, I told them that there had been contacts with the local Santo Government, when they arrived they knew that there would be problems, I stopped the boat and yet they took another boat". Later in his evidence he went on to say "I did everything I could to contact Chief Pierre Vatu and Loulou Vatu, I told them Chief Telcon had contacted me before the departure

of the board from Pentecost - the jumpers called me and it is then that I told them what Chief Telcon had said and that he was not in agreement for them to come and jump in Santo. I also told Loulou Vatu why I had stopped the board, namely that chief Telcon did not agree, I told him there would be problems. I stopped the boat, but they took another boat and decided to come, they knew very well that there would be problems if they came to Santo" and finally he says and agrees that in such a situation as this, the final decision must come from the Malvatumauri - namely the National council of chiefs. Those were the answers given by Chief Dominique Boulekone when questioned by Chief Willie and I believe him. I believe that he was telling the truth when he said that these jumpers intended to come, come what may, and just would not listen to their chiefs.

Louis Vatu is the son of Chief Pierre Vatu who owns land at Belaru where it had been planned the jump would take place. In his evidence he says that he was summoned to a meeting of the local council of chiefs of Santo/Malo - he came in the morning. He then saw the Local Government Council Secretary, who told him that he would be heard in the afternoon together with the jumpers. He came back in the afternoon - was allowed in when Chief Willie Bong Matur Maldo arrived. Before any discussion at all he said, (and out of the blue) - he was told that they had to: "pay a fine, 5 tusked pigs or 100,000 Vatu, after which you will leave the Island of Santo". They were not allowed to speak, but were read Exhibit "A". That document sets out in the clearest of terms the procedure to be followed if an application is to be made under custom for a custom to leave its territory. The fine was a custom fine and nothing to do with this Court. Loulou Vatu went on to say that if he had been allowed to speak, he would have been able to put before the committee, all the trouble that the jumpers had encountered and would have been able to argue their case for them - instead they were denied their right to be heard and their right to be given reasons for being refused permission both by the local council and the chiefs. From the evidence that I have heard, either Loulou Vatu is not telling the truth, or he is deluding himself. He knew all the reasons why he was not being allowed to have the custom ceremony of Nagol jumping on his land. He had already been informed of it by Chief Dominique Boulekone. It seems to me that far from being "prevented" to explain himself, he has been given all the explanations he needed. In Chief Willie Bong Matur Maldo's letter which was read he was being told that if they all went back to Pentecost, the discussions would start from there and proceed in an orderly fashion to the top and a decision would then be taken for future years. He, it seems, jumped the gun. Not satisfied he decided to instruct counsel and to seize the court of the matter. He now wants the court to decide whether they should be allowed to jump in Santo or not. He, together with the Felora association, applied for a declaration under Sections 5 and 7 of the constitution that their constitutional rights had been breached.

Before I can give my decision, I must refer to two other matters:

1. The evidence of Chief Telcon
2. The constitution

I leave the evidence of Chief Telcon last, because in my view, Chief Telcon came through as, what I would call, a real chief. Ready to take his punishment on behalf

of his people in spite of the fact that he was innocent himself and ready to pay, as chief, the custom fines awarded against the Nagol jumpers, "my people and my responsibility", he said. He claimed that there was never any question of his authorising the exportation of the Nagol jump for 1992, but that the agreement was for 1993, 94 and 95, as long as the Malvutumauri was in agreement. He said that he did not know with whose authority Francis Assal was bringing the jumpers to Santo, as he himself was in Vila with Willie Assal. He heard the rumour that jumpers were going to Santo and he phoned the local council of Pentecost to try to prevent their departure. The jumpers, he said, were still in Pentecost when he rang. "I wanted them to know that all the enquiries and permission required to export the custom ceremony had not yet been agreed." He then went on to agree that the Felora association would not be made to pay any part of the fine. I believe him.

I heard next from Francis Assal, at my own request, as he was in Court. He told me it was true that he had been phoned and told not to bring the jumpers to Santo. He claims that he went back to his village, had a meeting with his village chiefs at which, they said he could go. I wonder if his village chiefs had been told that the custom was being breached or that Chief Telcon had forbidden the ceremony from leaving. As for Juan Tavimel, I just do not believe his evidence.

Section 2 of the Constitution says "The constitution is the Supreme law of the Republic of Vanuatu".

Section 5(1) says, "The Republic of Vanuatu recognises, that, subject to any restrictions imposed by law on non-citizens, all persons are entitled to the following fundamental rights and freedoms of the individual etc ...

3. Protection of the law
4. Freedom of Expression
5. Freedom of assembly and association
6. Freedom of movement
7. Equal treatment under the law or administrative action except that no law shall be inconsistent with this sub-paragraph in so far as it makes provision for the special benefit, welfare, protection or advancement of inhabitants of less developed areas.

Section 6(1) states: "Anyone who considers that any of the rights guaranteed to him by the Constitution has been, is being or is likely to be infringed may ... apply to the Supreme Court to enforce that right.

(1) The Supreme Court may make such orders etc

Section 7 creates fundamental duties. The applicants refer to paragraph (F) - but section 8 says that none of the fundamental duties are justiciable but rather that public authorities are to encourage compliance therewith.

Under section 30(1) The National Council of Chiefs has a general competence to discuss all matters relating to customs and tradition and may make recommendations for the preservation and production of Ni-Vanuatu culture and languages.

Section 47(1) states: "The administration of justice is vested in the judiciary, who are subject only to the constitution and the law. If there is no rule of Law applicable to a matter before it, a Court shall determine the matter according to substantial justice and whenever possible in conformity with custom."

Section 53(1) states: "Anyone who considers that a provision of the constitution has been infringed in relation to him may, without prejudice to any other legal remedy available to him, apply to the Supreme Court for redress."

Section 53(2) states: "The Supreme Court has jurisdiction to determine the matter and to make such order as it considers appropriate to enforce the provisions of the constitution."

The Applicants' case is that it is their right under section 5(1)(g), (h), (i) and (k) have been breached and they apply for redress under both section 6(1) and (2) and, as I see it, under section 53(1) and (2).

Upon the evidence that I have heard, it is quite clear that the meeting of the 27th May 1992, was nothing more or less than a meeting at which the Local Government Council was trying to find a way to pacify feelings that were running high. The Nagol jumpers had been told that the right to export their custom was being considered, that the local Pentecost Chiefs could see no reasons why they should not come out in 1993, 94, and 95, but that further permission had to be obtained. They were told not to come just yet, that it would cause problems. At the meeting itself they were told "go back, you will be heard, but custom must be followed and until custom is followed no decision can be made".

It seems to me, that it is they who were not giving the chiefs a fair hearing or a fair chance of reaching an agreement under custom, rather than they who were being prevented from exercising their rights under Section 5(1) (j), (h), (i) and (k). Under Section 30(1) the general council of chiefs has a general competence to discuss all matters relating to custom and tradition and may make recommendations for the preservation and promotion of Ni-Vanuatu culture and languages.

This is, it seems to me, the very constitutional right which these applicants are seeking to prevent the National Council of Chiefs from exercising. There can be nothing more "Custom" than the nangol jump. It seems to me that the council of chiefs was seeking to take its responsibility under the constitution seriously. If permitted they would, no doubt, have reached a satisfactory answer to all.

They cannot and must not be prevented from doing so. It is also clear to me, that in Pentecost, an unfairness is being created towards the First Applicants and their clan. They must be given a fair chance to earn a fair share of the reward from the tourist industry and if they are not, then they too, would have a claim against those in Pentecost, (local council or tour organisers) who are behaving unfairly towards them, if that is what is happening. I cannot decide that issue here, it is a different issue altogether.

Looking at the present Application, therefore, it is ill-timed and ill-based. The Nagol jumpers ought to go back to Pentecost, whence they came. Once there, they should exhaust all avenues of custom channels and thereafter, if they see that their "constitutional rights" are being infringed, then by any means, they may seek redress from the Court.

I am now seized of the matter. As far as Nagol jumping is concerned, there is no "rule of Law" that is "applicable" to it. It is not illegal per se to do it, clearly, as it is permissible in Pentecost. But, I am now in the unenviable position of having to resolve this matter. Since there is no rule of law governing the matter, I must have recourse to section 47(1) of the constitution, I shall have to determine the matter according to "substantial justice" and, if at all possible, in conformity with custom.

The whole history of Nagol jumping is connected with Pentecost. Save, I am told, on one occasion during the 10th Anniversary celebration of independence and possibly on one other occasion when it was performed for some film making, the Nagol jump has not left Pentecost.

I pointed out before, that it was a particularly dangerous performance. It requires it seems, precise weather conditions, at the right time of year and very close scrutiny from expert tower builders. Furthermore, if taken out of Pentecost, what tourist would want to go there. They would have no cause to go to Pentecost, they will remain in Vila or Luganville, with all the ensuing loss it would occasion to Pentecost.

ORDERS

Therefore, I direct, in conformity with custom, that the Nagol jumping should return to Pentecost. I do not go as far as saying that it must be performed solely in its traditional villages of Pentecost, as that may cause untold hardship to those who do not have access to tourism. But what I do say and do order is as follows: That if any custom owner chooses to perform the Nagol jump in Pentecost, but outside the traditional villages from where it originates, then all Nagol custom owners and their clan are to share equally in the responsibility to ensure safety and good training and equally, all shall share in the proceeds collected from tourism as a result of these jumps. At the end of the day, the responsibility shall rest with those tour organisers to ensure that the money received or payable to the organisers, shall be paid in a trust account opened with a reputable bank in Vanuatu so that the money can therefore benefit all those who own the custom and their clans in an equitable division.

I do not order that the custom shall never leave Pentecost, but what I do order is that on those rare occasions when it is allowed to leave Pentecost that it should only do so:

1. With the majority consent of the custom owners taken on a vote, on the majority consent of all the local chiefs taken according to custom. That all the custom ceremonies and permission should be obtained and followed and that the final decision should rest with the Malvatumauri on a majority decision taken according to custom;

That on those rare occasions when it does finally leave Pentecost, wherever outside of Pentecost it is allowed to be performed, that all the custom owners should be allowed to take part in the performances if they should wish to and that all the custom owners and their clans would share in an equitable manner, the proceeds which will be placed in a bank account held at a reputable bank in Vanuatu to the benefit of all those traditional custom owners of the nangol ceremony and their clans.

10 July 1992

Simon Charles Vaudin d'Imecourt
Chief Justice