

**IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU**

(Civil Jurisdiction)

Civil Case No. 114 of 2009

BETWEEN: MICHAEL JESSOP
Claimant

AND: THE PUBLIC PROSECUTOR
First Defendant

AND: MAGISTRATE BEVERLY KANAS
Second Defendant

Coram: Justice D. Fatiaki

Counsel: Mr. Robert Sugden for the Claimant
Ms. Harders for the Defendant

Date of Decision: 2nd July 2010

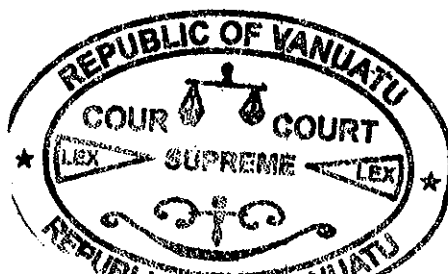
RULING

1. On 28th May 2009 there was a collision on Elluk Road close to the junction of Elluck and Pango Road between a bus driven by Natasha Motoutorua and the Claimant's vehicle. The accident was reported to the Police and a statement was recorded from the Claimant on the same day.
2. The complainant's police statement reads:

"Between 9 am to 9.15 am today 28th May 2009 I was on my way to the estate at Pango while travelling along the road at Sandalwood Apartments I saw the tourist bus on the left side of the carriage way with all intentions of turning left towards the Golden Lotus. So I proceeded on the right side of the road towards Pango this is when the bus turned right to go up Ellouk I braked and turned with the bus to try to prevent the collision which was about to happen. The bus and my vehicle did hit each other but with minimal damage to the vehicle nobody hurt.

To my knowledge the bus was in a position to turn left not right and I believe the driver of the bus did not look before turning right.

When I first saw the bus it was indicating left."



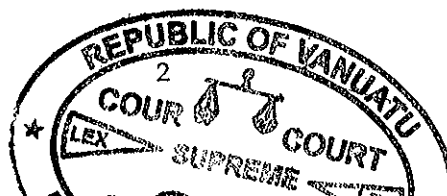
3. In summary the statement is exculpatory of the Claimant's role in the collision which is mainly attributed to the failure of Natasha Motoutorua "(to) look before turning right".
4. Be that as it may following police investigations into the accident, the Claimant was charged in the Magistrate's Court with Careless Driving. As presently advised the Claimant's prosecution is part-heard and awaiting a decision on a 'no-case' submission.
5. On 13 August 2009 before the ruling, on the 'no-case' submission was delivered, the Claimant commenced a private prosecution against Natasha Motoutorua who was the other driver involved in the accident, charging her with Careless Driving and Negligent Conduct Obstructing Other Road Users contrary to Sections 14 and 10 of the Road Traffic (Control) Act [CAP. 29] respectively. The relevant complaint and summons were issued by the Magistrate's Court and given criminal case No. 371 of 2009. The summons required Natasha Motoutorua to attend the Magistrate's Court at Port Vila on 29th August 2009 to answer the charges against her.
6. On 25th August 2009 the Public Prosecutor wrote to the Claimant's solicitor stating inter alia:

"The purpose of this letter is to advise you that, in accordance with the powers conferred by Section 10 of the Public Prosecutor's Act 2003, the Public Prosecutor will take over the prosecution of the matter of Jessop v. Motoutorua effective immediately. The Magistrates Court will be notified by copy of this letter and a separate letter in which the Public Prosecutor will seek an adjournment of the hearing in order to assess the merits of the proposed prosecution. In order to assist with an assessment of the merits of the case, could you kindly provide my office with copies of the material upon which your client relied in launching a private prosecution".

7. By letter also dated 25th August 2009 the Registrar of the Magistrate's Court was advised:-

"The Public Prosecutor will assume the prosecution in matter CR371 of 2009. According to the published list, the matter is before Magistrate Beverleigh Kanas on Friday 28th August 2009 at 2.00 pm for plea. On that day, an adjournment will be sought in order to assess merits of the prosecution".

8. On 28th August 2009 Criminal Case No. 371 of 2009 was called before Magistrate Beverleigh Kanas (the Second Defendant) for plea. What transpired in Court (in the absence of the relevant Magistrate's Court



record) is deposed in the Claimant's sworn statement of 10th September 2009, as follows:-

- “3. *My prosecution was listed before the Second Defendant for plea on 28 August at 2.00 p.m. and, on the advice of my lawyer I attended that hearing just see whether the Public Prosecutor acted in accordance with her letters.*
4. *When the hearing commenced, present apart from myself and the Second Defendant was Wycliff Tarilengi who represented and made submissions on behalf of Natasha Motoutorua. There was no-one present representing the Public Prosecutor seeking an adjournment in accordance with the letter in Annexure 'B'.*
5. *I saw the letters, copies of which are annexure 'B', open on the desk in front of the Second Defendant.*
6. *Wycliffe Tarilengi began to make submissions in defence of Natasha Motoutorua and I asked what right he had to be there doing that. No-one said anything and no reference was made to the letters of the Public Prosecutor at any stage of the hearing.*
7. *Wycliffe Tarilengi submitted to the Second Defendant that my charges should be struck out because my lawyer, Robert Sugden, had not been appointed a State Prosecutor under section 33 of [CAP. 136] and because I had not obtained the leave of the Public Prosecutor to begin the private prosecution.*
8. *Wycliffe Tarilengi did not tender any sworn statements and no witness was called to give evidence in support of these factual assertions.*
9. *The Second Defendant agreed with Wycliffe Tarilengi and struck out the charges that she had brought into being.”*

Although in the above extract there is a clear suggestion that Wycliffe Tarilengi represented Natasha Motoutorua (who was not present) when the Claimant's private prosecution was called before the Second Defendant, later, in the same sworn statement the Claimant confirms that the Careless Driving charge against himself “... *is being prosecuted by Wycliff Tarilengi.*” (see: paragraph 13).

9. On 11th September 2009 the Claimant issued a claim for Judicial Review in the Supreme Court against the Public Prosecutor and Magistrate Beverly Kanas. The Claimant sought the following orders:

“1. AGAINST THE FIRST DEFENDANT:-

A quashing order requiring the First Defendant to bring up for quashing her decision made on or about the 25th August, 2009 in the purported exercise of her powers under section 10 of the



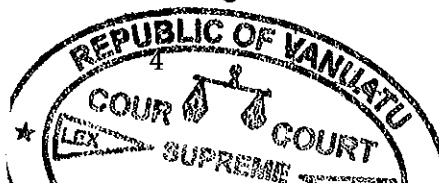
Public Prosecutor's Act of 2003 to take over the prosecution of the Claimant's private prosecution in CR371 of 2009. Michael Jessop v. Natasha Motoutorua under the Road Traffic (Control) Act.

2. AGAINST THE SECOND DEFENDANT:-

(i) A quashing Order requiring the Second Defendant to bring up for quashing her decision and consequent Order to dismiss the charges in the Claimant's private prosecution in CR371 of 2009.

(ii) A prohibiting Order requiring the Second Defendant to not have any further involvement in CR371 of 2009."

10. The claim also advanced numerous grounds in support of the orders sought including, that the Public Prosecutor's decision to take over the Claimant's private prosecution was *ultra vires* and made without considering the evidence upon which the private prosecution was based and, in respect of the Magistrate's dismissal of the complainant's private prosecution, the grounds assert a breach of natural justice, error of law, and void for apprehended bias.
11. On 1st October 2009 the Solicitor General filed a defence on behalf of the Defendants and an application to strike out the claim for judicial review on the ground that it did not disclose any arguable grounds of review against the Public Prosecutor's decision to take-over the Claimant's private prosecution and, in respect of the Magistrate's decision, the application asserts that the Claimant lacks standing (if the Solicitor General's submissions in support of the Public Prosecutor are upheld).
12. At the outset the Solicitor General properly conceded that the decisions of the Public Prosecutor are reviewable by the Court but, the basis and scope for such a review is much narrower than for decisions of ordinary administrative decision-makers. Judicial Review of the Public Prosecutor's decisions is permitted counsel submits, only for (proved): "*official misconduct*"; "*malafides*"; "*flagrant impropriety*"; "*wholly irrational or perverse*"; "*improper or arbitrary motives*"; "*improper policy*" or "*abdication of his function*".
13. On that basis the Solicitor General forcefully submits that the so-called errors identified in the Claimant's submissions "*even if proved (are not) errors of a kind which give rise to judicial review against (the decision of) a Public Prosecutor*".
14. Furthermore, "*.... the Court should not invent provisions which are not contained in the relevant legislation. There is no express obligation to conduct any particular investigation before acting*". And counsel boldly submits that an error of law which informs a decision not to continue with a prosecution is not an error which goes to the scope of the Public



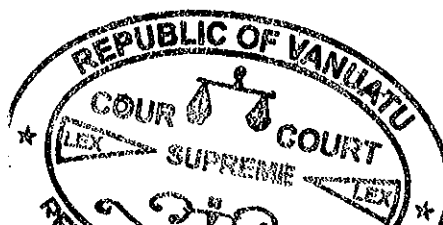
Prosecutor's power or initiates the proper exercise of the discretion. Decisions to initiate or not to vitiare or to discontinue prosecutions may be based on judgments about the prospects of success on questions of fact and law which the Public Prosecutor is empowered to make even though he or she may be wrong on the law or mistaken on the facts.

15. I say "*boldly*" advisedly, because, unlike in many other common law jurisdictions where the office and functions of the Public Prosecutor are not prescribed by legislation, in Vanuatu it is. In this regard I accept the submissions of the Claimant's counsel that "*the power to take away a right given to a member of the public (to institute a private prosecution under the Criminal Procedure Code [CAP. 136]) must be exercised correctly in accordance with the terms in which the power is given (by section 10 of the Public Prosecutor's Act [CAP. 293]) and the Courts will examine the exercise of such power by way of judicial review (as it has done in respect of similar constitutional entities such as the Public Service Commission and the Ombudsman) (my addition in parenthesis).*"
16. The ancient common law right of a citizen to institute a private prosecution is generally accepted by the Solicitor General albeit that it is considered to be of less significance in the modern context. In Vanuatu the right has an additional statutory foundation to be found in the Criminal Procedure Code [*see*: from the use of the term "*Any person*" in section 35 (1) and the express mention in section 99 (1) of a "... prosecution ... originally instituted on a summons or warrant issued by a court on the application of a private prosecutor". (my underlining)]
17. In the present context and for the sake of completeness reference may be made to the provisions of sections 35 (4) and 36 (1) of the Criminal Procedure Code [CAP. 136] which gives a magistrate discretionary power to refuse, to admit the complaint (of a private prosecutor) or to issue a summons or warrant to compel the attendance of the accused person before a court (on the complaint of a private prosecutor) respectively. (*see*: also the definition of a "*private prosecutor*" in section 1 of the Criminal Procedure Code).
18. Returning then to the powers of the Public Prosecutor to take over and discontinue a private prosecution, these are prescribed in sections 8 and 10 of the Public Prosecutor's Act [CAP. 293] which has as one of its purposes: "*to set out the functions and powers of the Public Prosecutor, the Deputy Public Prosecutor, Assistant Public Prosecutors and State Prosecutors*".

"8. Functions of the Public Prosecutor

(1) *The functions of the Public Prosecutor are (so far as relevant for present purposes):*

(f) *to discontinue prosecutions regardless of who instituted them;*



(2) *In the performance of his or her functions, the Public Prosecutor must have regard to:*

(a) considerations of justice and fairness; and

(b) the need to conduct prosecutions in an effective, economic and efficient manner; and

(c) the need to ensure that the prosecutorial system gives appropriate consideration to the concerns of the victims of crime."

19. It is clear from the above provisions that in the exercise of the power to discontinue a private prosecution, the Public Prosecutor is required to have regard to 3 very broadly-worded considerations, namely:

"(a) considerations of justice and fairness; and

(b) the need to conduct prosecutions in an effective, economic and efficient manner; and

(c) the need to ensure that the prosecutorial system gives appropriate consideration to the concerns of the victims of crime".

If I may say so these considerations are apt to include a host of factors quite unrelated to the adequacy of the evidence or the likelihood of a successful prosecution.

"10. Taking over prosecutions

(1) *If a prosecution in respect of an offence has been instituted by a person other than the Public Prosecutor, the Public Prosecutor may take over and assume the conduct of the prosecution.*

(2) *In exercising the powers under subsection (1), the Public Prosecutor must act impartially having regard to the evidence available and, if the Public Prosecutor thinks it necessary, the Public Prosecutor may request the Commissioner of Police to conduct an investigation into the offence before deciding whether or not to take over the prosecution.*

(3) *The Public Prosecutor may take over a prosecution whether or not the person otherwise responsible for the prosecution consents.*

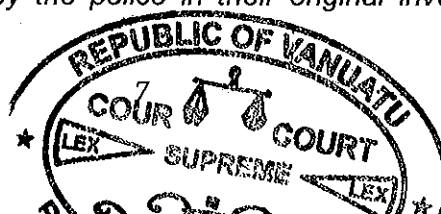
(4) *If the Public Prosecutor takes over a prosecution, the Public Prosecutor may decline to proceed further in the prosecution.*

(5) *If the Public Prosecutor decides to take over a prosecution, the Public Prosecutor must, as soon as practicable by notice in*



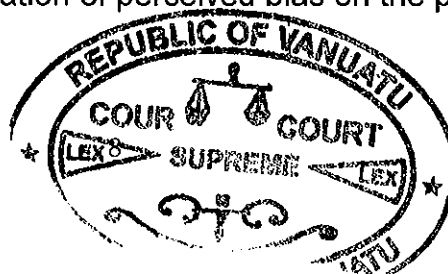
writing, inform the person otherwise responsible for the prosecution and:

- (a) by notice in writing, inform the registrar or other proper officer of the court in which the prosecution is to be heard; or
 - (b) if the prosecution is being heard by a judge or magistrate – inform the judge or magistrate in such manner as the Public Prosecutor thinks fit, that the Public Prosecutor has taken over the prosecution.
 - (6) Failure by the Public Prosecutor to notify or inform under subsection (5) does not affect any of the Public Prosecutor's functions or powers in relation to the prosecution."
20. Again in the exercise of the power to take over a private prosecution (which is different from the power to discontinue), the Public Prosecutor is required "to act impartially having regard to the evidence available and if (considered) necessary (to) request an investigation into the offence before deciding whether or not to take over the prosecution".
21. In this latter regard I accept as correct, the Solicitor General's submission that in exercising the power to take over a private prosecution, the Public Prosecutor is not "required to undertake any kind of investigation" and further, the "requirement to act impartially does not preclude the Public Prosecutor from having regard to considerations other than "the evidence available", which counsel submits constitutes a non-exclusive minimum requirement.
22. In this latter regard the Public Prosecutor relevantly deposes in her sworn statement:
- "4. There is no fact in the said Sworn Statement that would have persuaded me to continue the private prosecution. There is nothing that I consider should have overridden the discretion of the Police to charge Michael Jessop or not to charge Natascha Motoutorua.
 5. To date, the Claimant has not provided any further material to me or my office which would cause me to consider that there is a case to pursue against Natascha Motoutorua for negligent driving. On his own admission (contained in his Statement to police marked as Annexure "C" to the Sworn Statement I consider that the Claimant attempted to overtake the vehicle ahead of his on the right hand side. That amounts to an admission of negligent driving.
 6. There is nothing in the Sworn Statement which had not previously been gathered by the police in their original investigation, nor



has the claimant identified the existence of any other independent witness previously unknown to police".

23. The submission also receives some support from the discretionary provisions of section 12 and subsection 10 (4) which provides that "*if the Public Prosecutor takes over a prosecution, the Public Prosecutor may decline to proceed further in the prosecution*" which, in my view, would include the refusal to request the conduct further investigations or inquiries into the case (my underlining for emphasis).
24. It is noteworthy that the Public Prosecutor's powers to take over and discontinue a private prosecution may even be exercised in even where the Public Prosecutor has a possible or actual conflict of interest in the prosecution (see: section 13 generally).
25. I am satisfied that the Public Prosecutor (against whom there is no suggestion of "*flagrant impropriety*", "*misconduct or mala fides*") has properly exercised the power to take over the Claimant's private prosecution in Criminal Case No. 371 of 2009 and to discontinue it. Furthermore, in doing so, the Public Prosecutor was entitled to have regard to non-evidential considerations, including, the undesirability of having duplicitous prosecutions of the same incident continuing in the same Court at the same time.
26. The real possibility of contrary and conflicting decisions being rendered on the same incident and in the same Court albeit by different magistrates and the inevitable chaos and confusion that would ensue from such an undesirable event, can only but be inimical to the interests of justice and fairness and is likely to bring the administration of criminal justice into disrepute.
27. As for the orders sought against the Second Defendant against whom there is an allegation of "*apprehended bias*" based on a close family relationship existing between the Second Defendant and the police officer responsible for investigating the case, in light of the Court's determination of the lawfulness and validity of the Public Prosecutor's actions in taking over and discontinuing the Claimant's private prosecution. I reach the firm conclusion that any further consideration of this aspect of the claim is unnecessary and ultimately, futile.
28. The discontinuance of a prosecution is tantamount to the entering of a *nolle prosequi* pursuant to which the Court is required to discharge the accused. Furthermore on the Claimant's own admission, the Second Defendant was the Magistrate who "*signed and issued*" the charge and summons in the Claimant's private prosecution. This fact, I suggest, militates against any allegation of perceived bias on the part of the Second Defendant.



29. I am also not satisfied that the bare assertion of "a close family connection" based on a common surname without more, between the Second Defendant and the police investigator is sufficient to support the serious allegation of perceived bias made against the Second Defendant. In this regard the Claimant deposes in his sworn statement (op. cit) as follows:

"14. I am informed as a result of inquiries made by my lawyer and verily believe that Constable Jack Kanas is a close family relation of the Second Defendant, Beverley Kanas."

30. What the inquiries were? and when they were made? is not disclosed neither is the date when the Claimant was informed of the close family relationship between the Second Defendant and the police investigator but, it is likely, to have been sometime after the Claimant was charged and, very probably, after his private prosecution was summarily dismissed on 28 August 2009 otherwise it would raise the possibility of a waiver against the Claimant.

31. I also note in this regard, that the allegation is not that the Second Defendant had personal knowledge of the 'strong arm' tactics and threats allegedly made by the police investigator (presumably acquired after the issuance of the charge and summons in the private prosecution) or that she had a close personal and family relationship with Natasha Motoutorua the accused in the Claimant's private prosecution and which would have a direct bearing on the colour of her actions in the case.

32. I am also mindful of the provisions of section 55 of the Judicial Services and Courts Act [CAP. 270] which reads (in its relevant parts):

"Protection of judges, magistrates and other officers

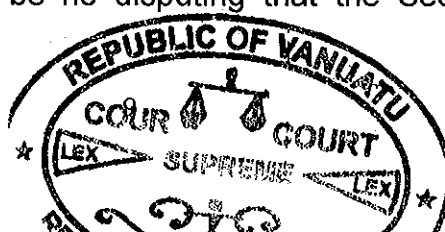
(1) Subsection (2) applies to person who is a judicial officer, or an officer of the Court of Appeal, the Supreme Court or the Magistrates' Court who is acting in a judicial capacity.

(2) The person is not liable to be sued in any court for any act done, or ordered to be done, by the person in the discharge of his or her judicial duty if the person:

(a) acted in good faith in doing or ordering the act; and

(b) believed that he or she had the jurisdiction to do or order the act whether or not the act was within the limits of his or her jurisdiction."

33. Although section 55 was not referred to in counsel's very helpful submissions, there can be no disputing that the Second Defendant in




dismissing the Claimant's private prosecution in open Court was "*acting in a judicial capacity*" at the relevant time.

34. In the result I also decline to make the orders sought against the Second Defendant.
35. The Solicitor General's application is granted, the Claimant's application for a judicial review is dismissed with costs of VT100,000.

DATED at Port Vila, this 2nd day of July, 2010.

BY THE COURT


D. V. FATIAKI
Judge.

