

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

**Criminal
Case No. 20/681 SC/CRML**

BETWEEN: 1. Charlot Salwai Tabimasm
2. Tomker Nedvunie
3. Matai Seremaiah
4. Seule Simeon
5. Jerome Ludvaune
Applicants

AND: Public Prosecutor
Respondent

Date of Hearing: 4 June 2020

By: Justice G.A. Andrée Wiltens

Counsel: Mr V. Vosarogo with Mr D. Yahwa for the Applicants CS Tabimasm and T Nedvunie

Mr N. Morrison for the Applicant M. Seremaiah

Mrs M-N Ferrieux Patterson for the Applicants S. Simeon and J. Ludvaune

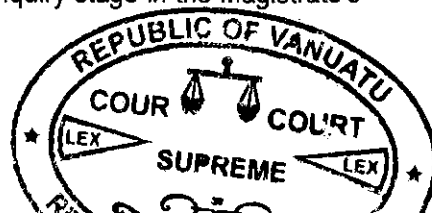
Mr J. Naigulevu with Mr T. Karae for the Respondent

Date of Decision: 15 June 2020

JUDGMENT

A. Introduction

1. This matter concerns an application to permanently stay the criminal prosecution of the five applicants, at the time sitting Members of Parliament. They are provisionally charged, and are being dealt with in the one case file. This is at the preliminary inquiry stage in the Magistrate's Court.



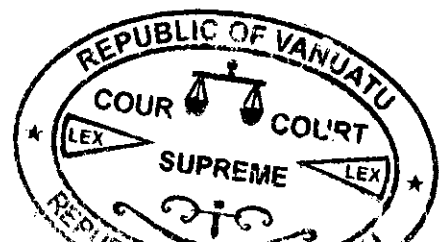
2. Initially the application was filed on behalf of only Mr C.S. Tabimasmamas and Mr T. Nedvunie. The other applicants have subsequently joined in, and are seeking the same relief.
3. The prosecution was said to be an abuse of the process of the Court on several bases, but all were strongly opposed by the Public Prosecutor.

B. Procedure

4. For offences triable only in the Supreme Court, as in this case, the usual procedure involves provisional charges being placed before the Magistrate's Court in order that a preliminary inquiry can be made(see sections 143 -146 of the Criminal Procedure Code).
5. The purpose of such preliminary inquiry is to ascertain whether there is sufficient evidence to establish a *prima facie* case. If a *prima facie* case is not established, the accused must be discharged. If a *prima facie* case is established, the Senior Magistrate then (i) authorises the laying of the provisional charge(s) in the form of an Information; and (ii) commits the accused for trial in the Supreme Court. The case will then be remanded to the next Supreme Court plea day in Port Vila, usually the first Tuesday of each month. The Public Prosecutor's Office will prepare and file the Information, together with a Summary of Facts, prior to the accused appearing in the Supreme Court to enter his/her plea(s).
6. If the accused elects to plead guilty, the case is further remanded for pre-sentence reports and sentencing submissions to be filed prior to the accused being sentenced. If the plea is not guilty, the matter will be set down for trial. At the conclusion of having heard the evidence and counsel's submissions, the presiding Supreme Court Judge delivers his/her verdict. If guilty, the accused would be remanded for sentence; if not guilty, the accused would be discharged.
7. The whole process is intended to be public, transparent and fair to an accused.
8. This application for stay amounts to an attempt to prevent all of these steps from occurring and to end the case before it has properly begun. The effect of that would be that the public would be left in a position of not knowing the full extent of the allegations, nor the evidence that related to them. The Courts would be prevented from making an assessment of the merits of the matter; the process would be simply ended, with all the defendants no longer being the subject of a criminal prosecution.
9. Accordingly, although the Supreme Court has jurisdiction in the right circumstances to make the orders sought, it is a remedy that is only rarely granted by the Court.

C. The Law

10. The onus is on the applicants to make out the grounds for their application. The test to be applied is on the balance of probabilities.
11. The authorities of *Attorney General's Reference (No 1 of 1990)* [1992] QB 630 and *Attorney General's Reference (No 2 of 2001)* [2004] 2 A.C. 72 describe the remedy as being available only in "...exceptional circumstances".



12. In terms of being satisfied of the jurisdiction of this Court to entertain this application, there is no need to look further than the authorities of *Connelly v DPP* [1964] AC 1254, *Moevao v Department of Labour* (1980) 1 NZLR 464 and *R v Horseferry Magistrate's Court ex p. Bennett* [1994] 1 AC 42.
13. This Court has a discretion to stay any criminal proceedings on the grounds of abuse where: (i) it would be impossible to give the accused a fair trial; or (ii) where it would amount to a misuse of process because it offends the court's sense of fairness and propriety to be asked to try the accused in the circumstances of the particular case: see *R v Horseferry*.
14. The authority of *R v Derby Crown Court, ex p. Brooks* [1985] 80 Cr App R 164 determined a stay to be appropriate where the prosecution manipulated or misused Court processes for an unfair advantage, and in circumstances where the accused's preparation or defence was prejudiced by unjustifiable delay. The Court commented:
- "The ultimate objective of this discretionary power is to ensure that there should be a fair trial according to law, which involves fairness both to the defendant and the prosecution."
15. In general terms, it is for a prosecuting agency, not the Courts, to determine whether a prosecution ought to be commenced, and once commenced whether it should continue to its natural conclusion: *Environment Agency v Stanford* [1998] C.O.D. 373.
16. There is a significant public interest in permitting criminal prosecutions to run their full course. In *R v Crawley* [2014] EWCA Crim 1028 the Court stated:

"[t]here is a strong public interest in the prosecution of crime and in ensuring that those charged with serious criminal offences are tried. Ordering a stay of proceedings, which in criminal law is effectively a permanent remedy, is thus a remedy of last resort."

D. The Nature of the Charges and the Facts

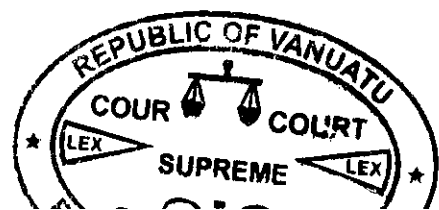
17. The charges laid are summarised below, using the surnames of the Defendants only. All, save the last charge, are said to have occurred in Port Vila, Efate on 22 or 23 November 2016, and allege the following:

- Charge 1: sections 73(2) and 30 of the Penal Code [Cap 135]

Tabimasmass corruptly giving a bribe to Ludvaune with the intention of influencing Ludvaune's no confidence vote, and with Seremaiah facilitating this.

- Charge 2: sections 73(2) and 30 of the Penal Code [Cap 135]

Tabimasmass corruptly giving a bribe to Nedvunie, namely offering and later appointing Nedvunie to be Parliamentary Secretary in the Ministry of Fisheries with the intention of influencing Nedvunie's no confidence vote, and with Seremaiah facilitating this.



- Charge 3: sections 73(2) and 28 of the Penal Code [Cap 135]

Simeon attempted to corruptly give a bribe to Albert William (an MP) with the intention of causing Albert William to withdraw as a no confidence vote signatory and to vote against the no confidence motion.

- Charge 4: section 73(1) of the Penal Code [Cap 135]

Ludvaune corruptly accepting a bribe, namely the position of Minister for Health, offered by Tabimasmas and facilitated by Seremaiah with the intention of causing Ludvaune to withdraw as a no confidence vote signatory and vote against the no confidence motion.

- Charge 5: section 73(1) of the Penal Code [Cap 135]

Nedvunie corruptly accepting a bribe, namely the position of Parliamentary Secretary in the Ministry of Fisheries, offered by Tabimasmas and facilitated by Seremaiah with the intention of causing Nedvunie to withdraw as a no confidence vote signatory and vote against the no confidence motion.

- Charge 6: section 23 of the Leadership Code [Cap 240] and section 30 of the Penal Code [Cap135]

Tabimasmas corruptly offering a benefit to Ludvaune, namely the position of Minister for Health, facilitated by Seremaiah, in exchange for Ludvaune's vote against the no confidence motion.

- Charge 7: section 23 of the Leadership Code [Cap 240] and section 30 of the Penal Code [Cap135]

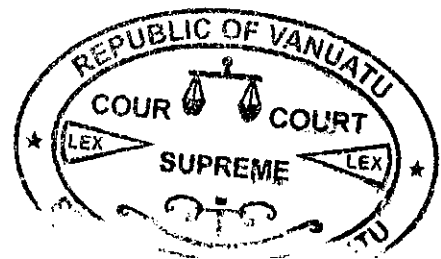
Tabimasmas corruptly offering a benefit to Nedvunie, namely the position of Parliamentary Secretary in the Ministry of Fisheries, facilitated by Seremaiah, in exchange for Nedvunie's vote against the no confidence motion.

- Charge 8: section 23 of the Leadership Code [Cap 240]

Ludvaune corruptly receiving a benefit, namely the position of Minister for Health, offered by Tabimasmas and facilitated by Seremaiah in exchange for Ludvaune's withdrawal of his no confidence vote signature and his vote against the no confidence motion.

- Charge 9: section 23 of the Leadership Code [Cap 240]

Nedvunie corruptly receiving a benefit, namely the position of Parliamentary Secretary in the Ministry of Fisheries, offered by Tabimasmas and facilitated by Seremaiah, in exchange for Nedvunie's withdrawal of his no confidence vote signature and his vote against the no confidence motion.



- Charge 10: section 23 of the Leadership Code [Cap 240] and section 28 of the Penal Code [Cap135]

Simeon attempted to corruptly give a benefit to Albert William (an MP) with the intention of causing Albert William to withdraw as a no confidence vote signatory and to vote against the no confidence motion.

- Charge 11: section 24 of the Leadership Code [Cap 240]

Tabimasmas benefitted from acting in a conflict of interest situation, namely appointing Ludvaune as Minister for Health in exchange for Ludvaune's withdrawal of his no confidence motion signature and his vote against the no confidence motion in order to preserve Tabimasmas' position as Prime Minister.

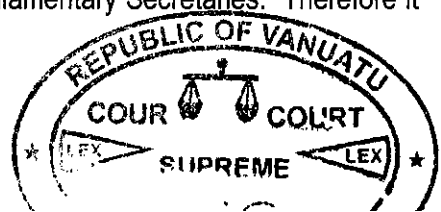
- Charge 12: section 24 of the Leadership Code [Cap 240]

Tabimasmas benefitted from acting in a conflict of interest situation, namely appointing Nedvunie as Parliamentary Secretary in the Ministry of Fisheries in exchange for Nedvunie's withdrawal of his no confidence motion signature and his vote against the no confidence motion in order to preserve Tabimasmas' position as Prime Minister.

- Charge 13: section 75 of the Penal Code [Cap 135]

Tabimasmas, on 23 April 2019 at Port Vila made an assertion on oath in a judicial proceeding which he knew to be false, intending that the assertion mislead.

18. The thrust of the prosecution case, as evidenced by all the charges save the last, is that Tabimasmas, with the assistance of Seremaiah, avoided a no confidence vote in Parliament going against him and his Government by persuading Ludvaune and Nedvunie to withdraw their names from the no confidence motion and voting against the no confidence motion.
19. Simeon is alleged to have participated in the endeavour by attempting to do much the same with another MP, Albert William.
20. The prosecution case is that the persuasion referred to above was done by way of the offer of (i) a bribe or (ii) a benefit, both acts being contrary to the criminal law. This explains the duplication of the allegations laid as contrary to differing legislation.
21. The allegations comprise not just the offers by Tabimasmas facilitated by Seremaiah, as well as the acts by Simeon, but also the acceptances by Ludvaune and Nedvunie.
22. The conduct is also alleged to involve Tabimasmas acting in a manner to achieve a benefit for himself when in a position of conflict as a leader – that benefit being said to be his continuation in the position of Prime Minister and leader of the Government.
23. The final charge is an allegation of perjury – to knowingly relate a falsehood, with the intention that the falsehood be accepted. Although this charge is of a different nature to the others, the alleged falsehood relates in part to the appointment of Parliamentary Secretaries. Therefore it is quite appropriately joined in with the other charges.

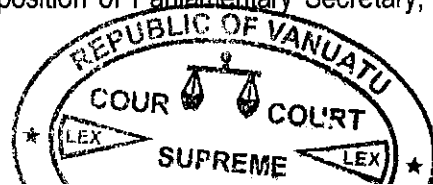


E. Abuse of Process Application

24. Mr Vosarogo advanced two grounds for his application, namely unfair conduct and non-availability of evidence. He relied on the substantial sworn statement filed by Mr Tabimasmās in support of the application. Additionally, he adopted the submissions made by Ms Ferrieux Patterson in relation to the adequacy of the Charges.
25. Mr Morrison sought to support the application on the basis of unfair conduct; and he also adopted the position advocated by Ms Ferrieux Patterson in relation to the adequacy of the Charges.
26. Ms Ferrieux Patterson submitted the application be granted on the grounds of unfair conduct, misconduct and/or delay. She further submitted that Article 27(1) of the Constitution had application. Ms Ferrieux Patterson relied on the sworn statement of Mr Ludvaune filed in support of the application.
27. She submitted also that an interim stay be granted pending the charges being made "precise and specific."

(i) Unfair Conduct

28. Mr Vosarogo submitted that the prosecution case centred on the creation of the position of Parliamentary Secretary, and the manner in which those posts were dispensed in November 2016. He was critical that the prosecution relied to a large extent on Mr A. Kalsakau who was the leader of the Opposition in November 2016 and at the forefront of the no confidence motion. Mr Kalsakau had publicly announced at the time the no confidence motion was defeated, that legal action would follow.
29. Mr Vosarogo was critical of the timing of this prosecution – 2 years 5 months after Mr Kalsakau's public "threat" (as Mr Vosarogo described it), and shortly after the Court of Appeal's determination in mid-2019 that the position of Parliamentary Secretary was unconstitutional and not lawful. Mr Vosarogo submitted that it was also significant that Mr Kalsakau only acted on his stated intention very shortly prior to the 2020 National Election, which he was contesting, and which all the Defendants were also contesting.
30. Mr Vosarogo pointed out that Mr Kalsakau (PW1) had been Attorney-General in 2013 when the position of Parliamentary Secretary were first mooted; and that Mr Kalsakau had provided legal advice at the time to the effect that the positions were lawful. It ill-behoves Mr Kalsakau, according to Mr Vosarogo, to now allege corruption and bribery when MPs were appointed to such roles in November 2016 given Mr Kalsakau's earlier legal advice.
31. Mr Vosarogo was also concerned that other significant prosecution witnesses who are at the heart of the prosecution case are compromised by the allegations – Mr Kilman (PW3) was the Prime Minister in 2013 and instrumental in creating the position of Parliamentary Secretary,



and Mr Warsal (PW25) who had at one time been appointed as a Parliamentary Secretary. He submitted that these witnesses did not present with "clean hands"; in other words that they were tainted and had improper motives for their allegations.

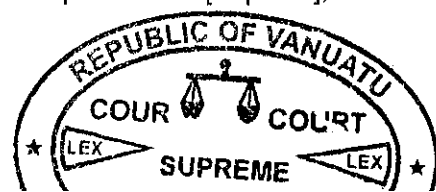
32. Mr Vosarogo pointed to the changes of allegiance from the initial 19 February 2016 Memorandum of Agreement, entered into when the coalition Government was formed with Mr Tabimasmas as Prime Minister and leader. He submitted that such machinations, often behind the scenes, are part and parcel of political manoeuvrings throughout the entire democratic world. They cannot be characterised as bribery or corruption.
33. Mr Morrison advanced the proposition that the contentious position of Parliamentary Secretary had not been created by any of the Defendants, but were created by Mr Kilman (PW3). He submitted that when the coalition Government was formed in February 2016, it inherited several Parliamentary Secretaries previously appointed; and reported that several of the prosecution's witnesses had been so appointed at various times. He too was critical of Mr Kalsakau's motives and the timing of the prosecution which was commenced shortly prior to the 2020 General Election.
34. Mr Morrison submitted that corruptness stems from knowing unlawfulness, which is an element of the alleged charges he considered beyond proof. Accordingly he submitted a stay was the appropriate remedy.
35. Ms Ferrieux Patterson also submitted that the prosecution centred on the sharing of politically appointed positions, which she suggested was an inevitable consequence in all democracies. She also submitted that such conduct could not be construed to be bribery and corruption. She was critical of the manner in which this prosecution commenced and on what it was based.
36. Ms Ferrieux Patterson further submitted that:

"No member of Parliament may be arrested, detained, prosecuted or proceeded against in respect of any opinions given or votes cast by him in Parliament in the exercise of his office." (emphasis provided by Mr Ferrieux Patterson)

37. Her submission was that that this prosecution had completely disregarded the guaranteed privileges of MPs, and that this added to the unfairness of the situation her clients now faced. She submitted this was further cause for a stay to be granted.

(ii) Non-Availability of Evidence

38. Mr Vosarogo restricted this ground of his application to only those charges that are laid under the Leadership Code Act, namely Charges 6 -12 inclusive.
39. Mr Vosarogo submitted that no complaint had been made to the Vanuatu Ombudsman regarding the issues around the alleged breaches of the Leadership Code Act [Cap 240]; and



further, that no Ombudsman's Report has been produced regarding this. Accordingly, he submitted that the charges under the Leadership Code had not been properly instituted.

40. Mr Vosarogo relied on the authorities of *Tapangararua v PP* [2016] VUCA 10 and *Nari v Republic of Vanuatu* [2015] VUSC 132 as authority for his proposition. He did not elaborate in what way the authorities assisted his argument.

41. Ms Ferrieux Patterson did not specifically address this ground, although she also relied on it.

(iii) Delay

42. Ms Ferrieux Patterson also did not address this ground specifically in the sense of pointing to delay causing particular prejudice or unfairness. I assumed the delay complained of was the period of some 2 years 5 months between Mr Kalsakau's public statement in November 2016 and the commencement of the prosecution.

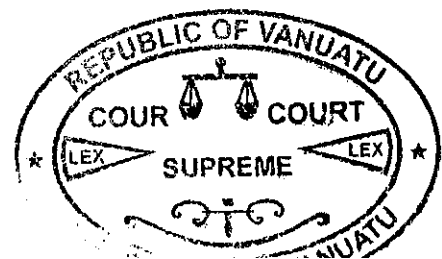
F. The Response

43. Mr Naigulevu relied on his filed written Response, his further Response and the sworn statements filed in opposition to the application by Mr Kalsakau, Mr D. Simon and Mr T Lapinal (x2).

44. Mr Naigulevu explained the prosecution case emanated from his Office – it was not a private prosecution brought by Mr Kalsakau, or any other individual. He explained further that the standard prosecutorial guidelines had been complied with in making the decisions of whether there is sufficient evidence to prosecute, who should be the subject of a criminal prosecution and for what alleged offending. That followed not just the receipt of the complaint by Mr Kalsakau, but was after a full police investigation into all the circumstances.

45. The prosecution case, in his submission, was largely a matter of bribery and corruption; and it had very little to do with the post of Parliamentary Secretary. It was not the prosecution of a power sharing arrangement.

46. Mr Naigulevu submitted that the suggestion of delay contributing to an abuse of process was a flawed analysis of the position. He pointed to the authorities of *R v Morin* [1992] 1 SCR 771 and *Martin v District Court of Tauranga* [1995] 2 NZLR 419 which set out the extensive list of factors that need to be considered, none of which have been submitted to apply in this instance. The test to be applied is that the delay must be inordinate or unconscionable, with resulting prejudice so that a fair trial is no longer possible. That was not the situation here, in his submission. Mr Naigulevu pointed to the evidence produced in the statements of Mr Simon and Mr Lapinpal, which set out the investigative steps undertaken, and which explain the lapse of time prior to the charges being preferred.



47. Mr Naigulevu contested the reliance by Mr Vosarogo on the authorities he cited to support the contention that there was a pre-requirement of a complaint and/or an Ombudsman's Report. He pointed to the authority of *Kalosil v PP* [2015] VUCA 43 where the Court stated:

"The Ombudsman section of the Act does not inhibit the powers of a prosecutor to prosecute, although in the event of a report it places obligations on the prosecution".

48. In any event, there is evidence that a complaint was filed with the Ombudsman, and that the Ombudsman made enquiries. The explanation provided for no report being prepared was that the enquiries did not establish sufficient evidence existed to take the matter further. Accordingly, there was no formal report prepared; nor was there any need for the matter to be referred to the Police Commissioner or the Public Prosecutor.

G. Discussion

(i) Unfair Conduct

49. This is not, in my view, a prosecution regarding the legality or otherwise of the post of Parliamentary Secretary. The fact that such posts are referenced in the charges is of no more import than the mention of the post of Minister of Health.

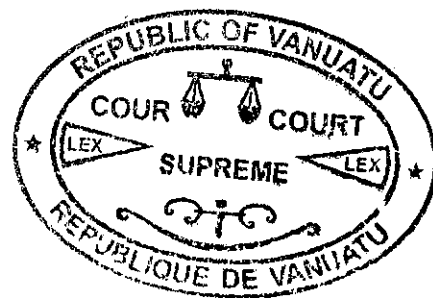
50. The majority of the charges deal with bribery and corruption. To "bribe" connotes dishonestly persuading someone to act in one's favour by means of some form of inducement. "Corrupt" conduct connotes causing one to act dishonestly in return for money or personal gain. Those concepts are at the heart of this prosecution.

51. Whether there is sufficient evidence of that as against any of the applicants is not a matter for this Court – that is what the preliminary inquiry process is designed to ascertain.

52. The criticisms of Mr Kalsakau's involvement in the prosecution and his earlier actions will no doubt be a matter of close cross-examination; but it is not evidence of an abuse of process in relation to this prosecution. I accept that considerations well outside Mr Kalsakau's alleged political motives were taken into account before this case was commenced in the Courts. The fact that numerous MPs are involved as witnesses and Defendants does not amount to an abuse of process.

53. The notion of coming to Court with "clean hands" is not known to the criminal law. It only has application if equitable relief is sought.

54. There is no unfair conduct in the process so that any of the Defendants cannot have a fair trial and which would warrant a permanent stay.



(ii) Non-available Evidence

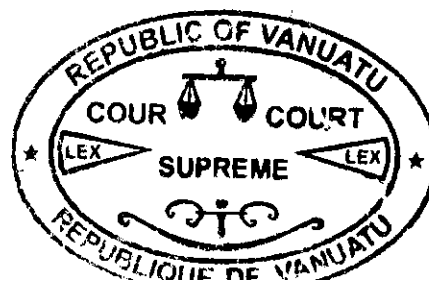
55. On my reading of the cases cited by Mr Vosarogo relating to no complaint to the Ombudsman, as well as no formal Ombudsman's Report having prepared, neither is legally required prior to a prosecution being commenced. Indeed, the Ombudsman Act makes it plain in section 11(2)(b) that the Ombudsman may exercise his/her functions on his/her own initiative – accordingly no complaint is required.
56. Further, Division 3 of the Ombudsman Act is headed "Actions after enquiries completed". In this section guidance is given regarding reporting by the Ombudsman. Section 31(1)(b) mandates the Ombudsman, if after due enquiry, is of the opinion that criminal proceedings are justified, to refer the matter to the Commissioner of Police and the Public Prosecutor. Subsection (2) specifically excludes an investigation into the conduct of a leader under the Leadership Code.
57. There is no apparent requirement in the legislation or the cases cited by Mr Vosarogo that a Report must be prepared and disseminated. What material there is in this regard will of course have to be disclosed, and if relevant, can be the subject of cross-examination.
58. The second ground of this application, namely non-availability of evidence is not made out to the required standard.

(iii) Delay

59. The delay between Mr Kalsakau's public statement and the commencement of the prosecution is largely explained by the enquiries that followed the complaint filed – firstly, by the Ombudsman's Office; and secondly, by the investigation by the police before the matter was referred to the Public Prosecutor. In my view, there is no undue delay established.
60. Further, and significantly, there is no evidence of any specific prejudice to any of the applicants deriving from this aspect.
61. This ground for a stay has also not been made out.

(iv) Parliamentary Privilege

62. Parliamentarians are subject to the law, including the criminal law, just as every other citizen of Vanuatu. The privilege extended in Article 27(1) of the Constitution does not and cannot excuse criminal behaviour.
63. Ms Ferrieux Patterson's submissions to the contrary are roundly dismissed.



H. Interim Stay Application

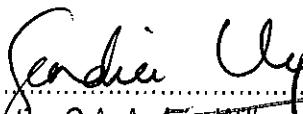
64. Ms Ferrieux Patterson maintained that the charges were generalised allegations and lacking in particularisation. She pointed to section 71 of the Criminal Procedure Code as requiring Charges to be sufficient to necessarily contain a statement of offence together with "...such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."
65. In her submissions Ms Ferrieux Patterson initially sought an interim stay, pending the perfection of the charges, but in her written submissions she provided the authority of *John L Pty Ltd v Attorney-General* (NSW) [1987] HCA 42 where the Court stated that inadequate particulars required the charge to be "...quashed as insufficient in law and invalid". That would equate to a permanent stay.
66. Mr Naigulevu refutes the submission of inadequacy of detail in all the charges.
67. I am satisfied the provisional Charges are appropriately drafted. In any event, as previously explained, this case is yet to pass through the preliminary inquiry stage. If it does and the Senior Magistrate authorises the laying of an Information, it is at that stage that an application for further and better particulars of the charges can be made – if such is warranted. That is the appropriate procedure; not the granting of a stay, be it interim or final.

I. Result

68. The application for a permanent stay of this prosecution case on the basis of abuse of process is dismissed. None of the grounds advanced have been established on the balance of probabilities.
69. The application for a stay to perfect the charges is also dismissed.
70. This case is remitted to the Magistrate's Court for the preliminary inquiry to be heard. I understand that will be at 2pm on 29 June 2020. Bail for the applicants is continued on existing terms until then.

Dated at Port Vila this 15th day of June 2020

BY THE COURT


Justice G.A. Andree Wiltens

