IN THE SUPREME COURT **Criminal**

OF THE REPUBLIC OF VANUATU **Case No. 19/2630 SC/CRML**

(*Criminal Jurisdiction*)

BETWEEN: **Public Prosecutor**

AND: **Isleno Leasing Company Ltd**

Terrence John Kerr

Clarence Lavinya Ngwele

Peter Fogarty

Yoan Noel Mariasua

Defendants

Date of Hearing: 20th, 21st, 22nd, 23rd June 2022

Date of Judgment: 12th July 2022

Before: Justice EP Goldsbrough

In attendance: Mr Naigulevu, J for the Public Prosecutor

Mr Sugden, R for Isleno, Ms Ngwele and Mr Fogarty

Mr Hamel- Landry, D for Mr Kerr

Mr Bal, A for Mr Mariasua

Decision on Application

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1. Two applications are made and ordered to be heard together and before the commencement of the trial proper in this matter. The first application in time is an application for the exclusion of evidence and the second, related, application is for a permanent stay of the same criminal proceedings. The applications are made by the 1st, 3rd and 4th defendants but are supported by the remaining two defendants.

2. A substantial amount of material for the applications has been agreed upon and filed as a bundle of exhibits tendered by agreement. Some material not so included was annexed

to sworn statements filed by 3rd defendant and the secretary to counsel for the 1st 3rd and 4th defendants. Fortunately, those documents filed as annexures to those sworn statements are not crucial to the application. Some are before the court in other ways, for example as having been filed by the original author in the criminal matter itself. Otherwise, it may have been necessary to decide on their effect, which may not be as counsel for the defendants has presumed.

3. The material filed, submissions made and evidence heard relates solely to the applications themselves and does not form evidence within the criminal trial unless the court is asked to order the same. No such application has been received as yet and so the evidence remains evidence only for the two applications.

4. There is an agreement between counsel and the Court as to the jurisdiction to hear and determine both of these applications and that both applications can be heard before the start of the main trial as preliminary matters. On the application to exclude evidence, it was made clear that this is a general application to exclude on the grounds outlined in a memorandum of the defendants filed in October 2019 and that, should the need arise concerning evidence, possibly the same evidence, to seek exclusion on other grounds that this would be raised when that particular evidence was to be presented to the Court.

5. The memorandum filed in October 2019 by counsel for all of the defendants at that time save Mr Mariasua sought the exclusion of all evidence obtained after 16 November 2018 "as a result of the police and any other investigation initiated following the referral by the Minister for Justice of a so-called Commission of Inquiry Report to further investigate and prosecute".

Test to be applied

6. The application was based on principles discussed in *Bunning v Cross* [1978] HCA 22. The question on admissibility identified in *Bunning v Cross* can be usefully summarized as 'whether the public interest in the enforcement of the law as to safety in the driving of vehicles on the roads and in obtaining evidence in aid of that enforcement is so outweighed by unfairness to the applicant in the manner in which the evidence came into existence or the hands of the Crown, that notwithstanding its admissibility and cogency, it should be rejected.

7. Within *Bunning v Cross* there is a reference to *R v Ireland* [1970] HCA 21. In *Ireland* at p.335, Chief Justice Barwick said:-

"Whenever such unlawfulness or unfairness appears, the judge has a discretion to reject the evidence. He must consider its exercise. In the exercise of it, the competing public requirements must be considered and weighed against each other. On the one hand there is the public need to bring to conviction those who commit criminal offences. On the other hand there is the public interest in the protection of the individual from unlawful and unfair treatment. Convictions obtained by the aid of unlawful or unfair acts may be obtained at too high a price. Hence the judicial discretion."

8. No local Court of Appeal decision by way of precedent has been provided by counsel on this application, hence the reliance placed on precedent from other jurisdictions. There is certainly no local legislation on the question. I intend to deal with the application for the exclusion of evidence following those authorities referred to above, as opposed to the earlier England and Wales authorities beginning with *Kuruma v R* [1955] A C 197 and followed in *R v Sang* [1980] A C 402, which themselves have effectively been overruled by subsequent legislation putting in place a regime similar to that outlined in *Bunning v Cross*.

9. More recently an application for a permanent stay of these criminal proceedings has been filed and an agreement reached that the two matters may be heard together and determined together even though the applicable test may not be the same, based on the notion that the material relied upon is the same.

10. The test to be applied in considering the application for a permanent stay is best set out for the purposes of this application in *Jago v District Court of N.S.W.* [1989] 168 CLR 23 where the England and Wales position is discussed (*Connelly v. D.P.P.* (1964) AC 1254) and the position taken in New Zealand (*Moevao v. Department of Labour* (1980) 1 NZLR 464). Jurisdiction to order a stay of proceedings recognizes the inherent power of a superior court to stay or dismiss a prosecution for abuse of process in terms consistent with the view of Lord Devlin expressed in *Connelly*. It will be exercised only in exceptional circumstances and when to allow a prosecution to continue would be to allow the court's own processes to be abused. As was said in *Moevao* by Richmond P at 138:-

"However it cannot be too much emphasised that the inherent power to stay a prosecution stems from the need of the Court to prevent its own process from

being abused. Therefore any exercise of the power must be approached with caution. It must be quite clear that the case is truly one of abuse of process and not merely one involving elements of oppression, illegality or abuse of authority in some way which falls short of establishing that the process of the Court is itself being wrongly made use of."

11. A further useful opinion can be found in *Moevao* when Richardson J said at 135:-

"The justification for staying a prosecution is that the Court is obliged to take that extreme step in order to protect its own processes from abuse."

Circumstances to be taken into account

12. The agreed evidence on these two applications attempts to set out the circumstances in which a report was produced, delivered and handed over by the Minister of Justice to both the Public Prosecutor and the Commissioner of Police. It further attempts to establish that the handing over of the Inquiry represented an improper instruction to investigate and prosecute.

13. The criminal charge faced by all the accused in this trial is making a false and misleading statement with intent to obtain money. That is said to be contrary to section 130 C and section 30 of the Penal Code. The particulars of the offence are that at Port Vila between the 9th May 2011 and 17th October 2011 with intent to obtain for Isleno Leasing Company Limited and Clarence Lavinya Ngwele money of 51,809,325 Vatu made, concurred in making, or executed a written statement or document, namely a Deed of Release dated 17th October 2011 the terms of which were false or misleading in material particulars:

that the terms of the Deed were false or misleading for the following reasons:

a. the terms were never agreed to by AVOL;

b. Peter John Fogarty acted without prior approval of the AVOL Board and had no authority to bind AVOL to the terms of the Deed of Release; and the false or misleading terms included clause "B", and clauses 1.1, 1.2, 1.3, 1.4, 1.5 and 8 of the Deed of Release;

and that the defendants acted in breach of section 130 C (a) in the following ways:

a. Clarence Lavinya Ngwele concurred in the making of the Deed and signed the same;

b. Peter John Fogarty concurred in the making of the Deed and signed it;

c. Yoon Noel Mariasua concurred in the making of the Deed, witnessed Peter Fogarty's signature on the Deed and facilitated the circumstances leading to the signing of the deed; and

d. Terrance John Kerr concurred with the making of the Deed and produced a draft Deed of Release consisting of terms, most of which were adopted in the final Deed.

14. Before this information being laid, indeed in 2011, civil proceedings had been instituted by Isleno Leasing Company (the first defendant in these criminal proceedings) seeking to enforce against Air Vanuatu Operations Limited (AVOL) the terms of a Deed of Settlement. The Deed of Settlement in those proceedings appears to be the same document called a Deed of Release in these criminal proceedings.

15. That Deed of Release purported to settle earlier civil proceedings instituted in 2009 which by then had not yet proceeded to trial.

16. The 2011 civil proceedings did continue to trial with a judgment in June 2016 by Chetwynd J in favour of AVOL, an appeal in November 2016 overturning that decision, a further trial judgment in August 2018 this time in favour of Isleno and an appeal heard on 8 November 2018 for which it would be normal to expect a decision to be handed down on Friday 16 November 2018.

17. The judgment in favour of Isleno was handed down on 20 August 2018 and by 3 September 2018 was the subject of an appeal by AVOL.

18. After the handing down of the 2018 judgment, on 29 August 2018, the board of directors of AVOL met and at Tab D of the agreed materials a minute of what was discussed and agreed is exhibited. The minute noted the recent judgment against AVOL and the award of VT 151 million to be paid by AVOL to Isleno, indicated an intention to appeal the decision and to seek the support of the shareholders in instituting a Commission of Inquiry, to seek a police investigation because AVOL intended to

appeal and wanted to delay payment of what is described as 'the fine', presumably the award of damages.

19. Shortly thereafter on 17 September 2018 at Tab E of the agreed documents, the chairman of the board wrote to the Prime Minister of Vanuatu, a shareholder in AVOL, enclosing a draft mandate for a Commission of Inquiry into the relationship between AVOL and Isleno including the controversial Deed of Release.

20. A Commission of Inquiry (CoI) was to be established (Tab G) and paid for by AVOL Tab F. The Minister of Justice asked the Attorney General's office to prepare the necessary notice and appointment and this was done after an assurance was received that the CoI would not be inquiring into anything touching on the pending civil appeal. The note was not, as it should have been, gazetted. The Commissioners were appointed, began their work before taking any oath of office and produced an interim and then a final report. No oral evidence was taken or asked for and, in order not to alert anyone who may eventually be the subject of subsequent criminal investigations, the CoI workings were kept confidential, otherwise characterized as secret by the applicants. Each various step can be found in the agreed facts at various Tabs.

21. Whilst not accepted by the Public Prosecutor who fought valiantly to argue to the contrary, it seems pretty clear that the real purpose of the CoI must have been to consider the same circumstances as were before the Court of Appeal. One need only turn to the reasons given by the Chairman of the Board in his letter to the Prime Minister to see that. If it had nothing to do with anything before the Court of Appeal, how would it assist in 'delaying payment of the fine'?

22. The report was handed over in a most public way, appearing on the front page of the Daily News on the date immediately preceding the scheduled delivery date of the judgment expected from the Court of Appeal, the appeal itself having been described to AVOL as not having gone well.

23. Commissioners were paid by AVOL, not by the Ministry of Justice nor at agreed Ministry rates of remuneration and, as said in evidence by him, the then Chairman of AVOL, worked closely with him in the preparation of the report.

24. There are not many commercial enterprises that can call on the Prime Minister to seek direction from the Council of Ministers to institute a Commission of Inquiry into

commercial transactions, let alone a transaction that had been through the courts of Vanuatu over a long period. This is said to be the overbearing nature of the state coming into play making these criminal proceedings an abuse of process.

25. There were several, serious irregularities with the Commission of Inquiry. The party seeking the Inquiry paid for it, rather than the government. Its existence was not gazette and it worked in secret. But far more significantly, at least in my view, it traversed matters that were the subject of both active and imminent court proceedings. The proviso to section 1 (1) of the Commission of Inquiry Act [Cap 85] prohibits this when it says:-

> Provided that no Commission of Inquiry shall be appointed to inquire into facts which are the subject of legal proceedings for so long as such proceedings are pending. If a Commission has already been appointed, its authority shall be immediately terminated upon the commencement of any legal proceedings relating to the facts which led to such appointment.

26. There are obvious and cogent reasons for this. Yet that provision was ignored. I am asked to find that this was a deliberate deception orchestrated by the then Minister of Justice when he responded to the inquiry coming from the office of the Attorney General. I do not need to do so. It was done, it was wrong for it to have been done and there is no need to find that it was part of a conspiracy as suggested. That may well be for others to determine but for the purposes of this application, it was simply wrong.

27. The presentation of the report to the Court of Appeal has had the desired effect on that appeal decision which remains undelivered to this day. Again whether that amounts to a crime itself is not, fortunately, for this Court to determine. My role is to consider the effect of this wrongdoing, should I find wrongdoing, on these criminal proceedings.

Effect of these circumstances – the voir dire

28. It is not intended by the prosecution to use the Commission of Inquiry report as evidence in the criminal trial. The application to exclude evidence seeks the exclusion of all evidence collected following the delivery of that report to the Public Prosecutor and the Commissioner of Police. Given that it was the forwarding of the Commission of Inquiry report that triggered the police investigation into what had taken place within AVOL, in effect the application seeks the exclusion of all evidence against all of the accused.

29. There is no complaint made against either the police or the office of the Public Prosecutor in this application. The application seeks the exclusion of the evidence because of what is submitted to be the illegal activities in the appointment and conducting of the Inquiry itself. If this were another jurisdiction the phrase 'fruit of the poisoned tree' may be applicable.

30. In this jurisdiction and following those precedents earlier discussed, the Court is confined to looking at the conduct of those responsible for law enforcement. In the majority of cases already cited it is the behaviour of the police officers investigating the alleged offences that is considered. In *Bunning,* for example, it was the administration of the breath test. In that judgment, Stephen and Aickin JJ at paragraph 27 said when discussing the judgment of Barwick in *Ireland* "is no simple question of ensuring fairness to an accused but instead the weighing against each other of two competing requirements of public policy, thereby seeking to resolve the apparent conflict between the desirable goal of bringing to conviction the wrongdoer and the undesirable effect of curial approval, or even encouragement, being given to the unlawful conduct of those whose task it is to enforce the law.

31. That 'those who enforce the law themselves respect it' is a right society may insist upon from law enforcement agencies also seems to be established in *Ireland.* Here, it is not those who were responsible for investigating these alleged crimes, against whom no criticism is levelled. It is, to begin with, a decision of the Board of Directors of AVOL, then a successful request made to AVOL shareholders who happen to be members of the Executive Government and Cabinet, a decision of the Council of Ministers, a decision of the Minister of Justice to put into effect a Council of Minster's decision for a Commission of Inquiry, the unlawful execution of the work of the Commission of Inquiry and the underlying, expressed intent of AVOL, to delay civil proceedings in the Court of Appeal

32. Whilst the Commission of Inquiry may have had other effects, which others must perhaps consider, in terms of this prosecution it did no more than highlight the need for a police investigation, something which AVOL should have sought a long time ago but which was a stated objective following the relevant board meeting.

33. Whatever view one takes of the circumstances surrounding the appointment and working of the Commission of Inquiry, it of itself did not affect the proper investigation of those alleged offences. The basis on which evidence may be excluded has its origins

in considering the actions of those responsible for law enforcement, not the behaviour of alleged victims (AVOL), members of the Executive of the government of the day acting as shareholders of AVOL, members of the Commission of Inquiry or even the Minister responsible for Justice.

34. The Minister of Justice is not immediately responsible for the day-to-day administration of law enforcement. The police act under the directions of the Commissioner of Police who is subject only to the general direction of the responsible Minister (who is not the Minister of Justice).

35. Should there be a doubt as to the scope of those 'responsible for law enforcement following the *Bunning* discretion, consideration may be given to *Kadir v The Queen* and *Grech v The Queen* [2020] HCA 1. Given that the *Bunning* discretion has now been codified, at least in New South Wales, by the Evidence Act 1995 s 138 there is a discussion beginning at paragraph 11 of the judgement. In particular, at paragraph 12 it is said:-

> 'Notably, the exclusion is not confined to evidence that is improperly or illegally obtained by police or other law enforcement agencies.'

36. Vanuatu does not yet have the advantage of legislation governing the admissibility of evidence in circumstances such as these. Following from those cases where the discretion has been identified, this is not a case where the evidence should be excluded for the reasons complained of.

Effect of these circumstances -the application for a permanent stay

37. Do these criminal proceedings amount to an abuse of the processes of the Court, or are they an affront to justice? That question concerns the balance between competing interests once again. Those interests are the wrong alleged to have taken place which has affected these proceedings and the public interest in bringing wrongdoers to account for their actions. I would find that question more difficult to determine were I to consider the pending civil matter in the Court of Appeal. Those civil proceedings are far more directly connected to the circumstances of the Commission of Inquiry, given the stated objective from AVOL for the Inquiry. These criminal proceedings are not so directly affected making the decision on those competing interests easier to determine.

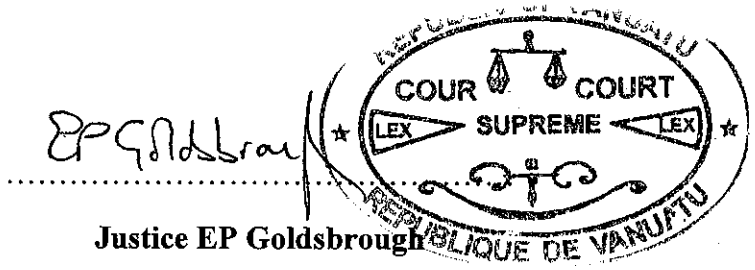
38. I do not consider that a reasonably well-informed member of the public observing what has taken place leading to these criminal proceedings and taking into account the need for alleged criminal activities to be investigated and, where appropriate, brought to court for a determination would conclude that the continuation of these proceedings would amount to an abuse of process. I am inclined to believe that the well-informed, reasonable member of the public would take the view that it would indeed be an affront to justice if the matter did not proceed to a fair trial within a reasonable time leading to a decision as to the guilt or innocence of these accused.

39. The 'extreme step' as identified in *Jago* (*op cit* at 10) is not here necessary to protect the court from abuse of its own processes.

40. The application to exclude evidence is dismissed, as is the application for a permanent stay of these proceedings.

Dated at Port Vila this 12th July 2022

BY THE COURT



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Justice EP Goldsbrough