IN THE COURT OF APPEAL OF THE REPUBLIC OF VANUATU

APPEAL CASE NO 7 OF 1996

BETWEEN

ATTORNEY GENERAL

First Appellant

AND

NIPAKE EDWARD NATAPEI

Second Appellant

AND

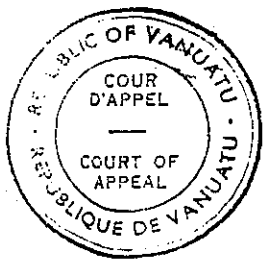
WILLY JIMMY, BARAK SOPE, ALBERT RAVUTIA, WALTER LINI, VINCENT BOULEKONE, SERGE VOHOR, JEFFRY LAVA, JOHN SOLOMON, KEASIPAI SONG, ALFRED MASING, JOHN DICKISON, SOKSOK VITAL, MUELSUL EDWARD, PAUL TELUKLUK, JOHN TARI,SHEM NAUKAUT, EDGEL WETIN, BAKON FRED, EMBERT JIMMY, ALLEN BULE, DEMIS LANGO, SATO KILMAN, NAUNUN IARIS , IAUKO HENRY, EDGEL WILLIAM, DAVID ROBERT KARIE, AND HILDA LINI

Respondents

Counsel -

Nathan Moshinsky QC for the Appellants
Lloyd Waddy QC with Jonathan Baxter- Wright for the Respondents

Date of Hearing and Judgment 16 September 1996



JUDGMENT

Coram: Vaudin d'Imécourt CJ, Thorp and Robertson JJA.

This is an appeal from the judgment of Lunabek J delivered on 2 September 1996 in which he granted relief to the present Respondents as petitioners claiming under Article 53 of the Constitution. It was held that their constitutional rights had been infringed by the actions of the Second Appellant, as Speaker of the Parliament of Vanuatu, in ruling that a request made by the Respondents to call an Extraordinary Session of Parliament was informal and refusing to accept and act upon it.

The relief granted on the petition was -

"1. A declaration that the decision of the Hon Speaker dated 29 August 1996 to dismiss the Petitioners' request for an Extraordinary Session of Parliament is unconstitutional and unlawful.

2. A declaration that the Speaker shall forthwith summon Parliament to meet in Extraordinary Session in seven days time.

3. A declaration that the Clerk of Parliament sends to each member a notice stating that the Extraordinary Session will commence in seven days' time.

4. A declaration that the constitutional rights of the Petitioners and each of them have been infringed.

5. Costs to be paid by the Respondents and to be taxed failing agreement."

The sole evidence before the Court below was an affidavit by the Respondent The Honourable Willie Jimmy MP. This established:

1. That on 26 August 1996 27 members of Parliament signed a request directed to the Speaker, purportedly in terms of Article 21(2) of the Constitution, asking that Parliament be summoned in Extraordinary Session to debate :

(a) A motion to reinstate two of their number who had earlier been suspended from Parliament: and

(b) A motion of no confidence in the Prime Minister.

(The two members who had earlier been suspended were amongst the twenty-seven signatories)

2. Those requests were delivered to the Speaker the same day.

3. By letter dated 29 August 1996 the Speaker advised the Respondents that he was rejecting their request. He stated as his reasons for doing so that he had received from the Prime Minister some 3 hours before receiving their request a formal request for an Extraordinary Session to debate 9 government bills, that he had accepted that request and issued summonses for a session on 30 September 1996. The Speaker noted:

"Since I have already accepted and ruled on the Hon. Prime Minister's request as in order and have issued summons to that effect, I am of the view that no such other request including your own Request can be entertained in advance of the one that has been accepted and ruled upon as in order by this office.

I therefore find your Request not in order and dismiss it accordingly on points of irregularities, and I do so rule."

Although various provisions have to be considered, those of central importance to the issues are Articles 6, 21 and 53 of the Constitution, and Order 14(1) of the Standing Orders of Parliament.

The relevant Articles of the Constitution provide:-

" Article 6. (1) Anyone who considers that any of the rights guaranteed to him by the Constitution has been, or is likely to be infringed may, independently of any other possible remedy, apply to the Supreme Court to enforce that right.

(2) The Supreme Court may make such orders, issue such writs and give such directions, including the payment of compensation, as it considers appropriate to enforce that right."

"Article 21. (1) Parliament shall meet twice a year in ordinary session.

(2) Parliament may meet in extraordinary session at the request of the majority of its members, the Speaker or the Prime Minister.

(3) Unless otherwise provided in the Constitution, Parliament shall make its decisions by public vote by a simple majority of the members voting.

(4) Unless otherwise provided in the Constitution, the quorum shall be two thirds of the members of Parliament. If there is no such quorum at the first sitting in any session Parliament shall meet 3 days later, and a simple majority of members shall then constitute a quorum.

(5) Parliament shall make its own rules of procedure."

"Article 53. (1) 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.

(2) 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 relevant portions of the Standing Orders of Parliament provide:-

"Standing Order 14. (1) Whenever the Speaker so decides or is requested by the Prime Minister or the majority of the members of Parliament, he shall summon Parliament to meet in extraordinary session.

(2) .....

(3) .....

(4) .....

(5) The Clerk shall send to each Member a notice stating that the extraordinary session will commence on the date specified therein. The notice shall contain a statement of the matter or matters to be discussed during such session. The notice shall be given at least seven (7) days before the day appointed for the opening of the extraordinary session."

In the Court at first instance the position advanced for the Speaker by the Attorney General proceeded on different grounds from those specified in the Speaker's letter of 29 August. In essence it was argued:

First, that because 50 members had been elected to Parliament at the previous election, and because two of the 27 persons who signed the requests for an Extraordinary Session were at that time suspended from Parliament, the requests were not completed by a "majority of its members" as required by Article 21(2): and

Secondly, that the business proposed for the Extraordinary Session was not business which could be dealt with at an Extraordinary Session of Parliament.

Both arguments were rejected by Lunabek J, for the reasons set out in his judgment.

In this Court Mr Moshinsky did not seek to promote the second of those arguments. It is clearly not sustainable and need not be further considered by us.

The essential grounds of appeal pursued before us were:

Ground 1. It was essential to the judgment under appeal that the constitutional rights of the Respondents which were infringed were those given by Order 14(1), and that Order is not a part of the Constitution:

Ground 2. Order 14(1) is in any event invalid and ineffective to give the Respondents the rights they claim in that:

(a) As a "constitutional order" it should have been Gazetted, and was not: and

(b) Properly construed it conflicts with the provisions of Article 21(2), which must prevail.

Ground 3. The subject matter of the petition was parliamentary proceedings, and Parliament has the exclusive right to regulate its own proceedings. The relief granted breached the principles of separation of judicial and parliamentary powers implicit in the Constitution.

Ground 4. This request was not made by a majority of members. This was the same argument as had been put and rejected at first instance.

Ground 5. Article 53(2) gives the Court a discretion to grant relief. The discretion should not have been exercised in favour of the Respondents because of the factors considered in Ground 3 and because other remedies were available to the Respondents.

Ground 6. Paragraphs 2 and 3 of the relief granted were in the nature of mandamus, and the common law rule against ordering mandamus against the Crown should have been applied.

Ground 7. Lunabek J's refusal of the Appellants' request for a further adjournment was a denial of procedural fairness.

Grounds 1 and 2 can conveniently be considered together.

We accept Mr Moshinsky's submission in relation to Ground 1 that the Standing Orders are not part of the Constitution.

We do not accept his contention in relation to Ground 2, that the Standing Orders should have been gazetted. Although that issue is not in our view critical to the determination of this appeal, we accept that its significance (if correct) would be considerable. Consequently we state briefly why we do not accept that contention.

The submission is based upon the premise that Section 16 of the Interpretation Act, CAP. 132, applies to Standing Orders of Parliament. That section provides that:

"(1) All Constitutional Orders shall be published in the Gazette and shall be judicially noticed.

(2) In this section "Constitutional Orders" means any orders or declarations made in exercise of a power conferred by the Constitution on the President, the Council of Ministers or any other person or body except a court."

The language of s16(2) is wide. Taken on its own and without consideration of the rest of the Act or the special status of parliamentary standing orders it could encompass those orders. But there are compelling reasons for not accepting such a construction.

It was common ground that the declaration in Article 21(5) that "Parliament shall make its own rules of procedure" is a statutory confirmation of the principle that Parliament is master of its internal business and procedures, and is not subject to direction from the courts, so long as the rulings it makes are not inconsistent with obligations placed on it by the law from which it derives its powers.

The construction of s16 for which the appellants contend would necessarily mean that neither the original Standing Orders, nor any amendment of those, would take effect until published in the Gazette. It

is implicit in the retention of effective control by Parliament over its procedures that it should have power to amend these, by appropriate majority vote, to meet the requirement of particular situations as they arise. Standing Orders may, and not infrequently do, require suspension in whole or in part during a session. This could not effectively be achieved if the House had to adjourn until its decision had been Gazetted.

Similarly the Court should be slow to construe s.16 in such a fashion as to require the intervention of any third party in giving effect to its amendment of Standing Orders. This would introduce a risk that such person could hinder the full and effective exercise by Parliament of control over its own procedures.

Parliament could, by sufficiently specific and unequivocal legislation, define and limit the manner in which the making and amendment of Standing Orders could be effected: though not, we think, to the extent that it did not retain effective power to make and "un-make" procedural rules. But the language of s.16 is neither specific nor unequivocal. Indeed it is difficult to comprehend what is intended by the words "orders and declarations" in subsection (2), particularly when they are contrasted with the specification of "proclamations, rules, regulations, by-laws, orders or statutory orders" in s.12. While Parliament's procedural rules have traditionally been described as "Orders," their essential nature is more that of "rules." That is the term used in Article 21(5). The absence of specific reference to Parliament in s.16 is also to be contrasted with the specification of its "standing orders" in Article 89(3) of the Constitution.

The approach to s 16 urged on behalf of the Appellants would raise questions about the validity and recognition by the Courts of much of the legislation enacted since Vanuatu became an independent nation. Counsel were unable to assist us with regard to the provisions of the Standing Orders of the Representative Assembly prior to Independence. Under Article 89(3) of the Constitution they would remain in effect if section 16 applies to the Standing Orders of Parliament.

However for all the reasons discussed we consider that such a construction could not be sustained.

We said earlier that this issue was not in our view one which is vital to the determination of this appeal. The reason for that view is that Grounds 1 and 2 both proceed on the assumption that the only right of the Respondents which may have been infringed rested on the provisions of Order 14. In our view that is clearly not so. The correct analysis is that the constitutional right of a majority of members to

require that Parliament be summoned in extraordinary session is found in Article 21(2) of the Constitution.

The use of the word "shall" in Article 21(1) and the word "may" in Article 21(2) is not in our opinion intended to indicate that the calling of an extraordinary session is a matter of discretion. It merely recognises whereas there must be at least two ordinary parliamentary sessions each year, in addition there "may" be extraordinary sessions if requested.

To construe Article 21(2) as the Appellants propose would -

(i) Deprive the majority of members of the House from exercising the power to legislate, by majority decisions, as is the plain intention of the Constitution - see Articles 1, 4 and particularly 21(3): and

(ii) Give the Speaker, an officer of Parliament, the discretionary power to determine whether or not a majority of its members should have the opportunity to make parliamentary decisions at any time other than during the biannual ordinary sessions.

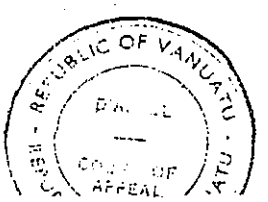
That result would be so contrary to the plain intention of the Constitution that the Court would only adopt such a construction if the language of Article 21(2) compels that course. It does not.

The judgment under appeal proceeded at least in part on the assumption that Order 14(1) was a valid and relevant provision. That is hardly surprising in view of its terms and the absence in the hearing before the learned judge of any suggestion that the Standing Orders were either invalid or irrelevant. At the same time he also saw Article 21(2) as important. In any event the determination of questions of law at first instance is not decisive of their resolution on appeal.

In our view the only tenable construction of Article 21(2) is that a majority of members can require that Parliament be summoned to consider business in Extraordinary Session. Unless that construction is adopted there would be no purpose in the Constitution providing for extraordinary sessions.

It follows that if the Respondents' request was within the parameters of Article 21(2), the Speaker's rejection of that request was a breach of the Respondents' right under that Article to have Parliament summoned.

Ground 3.



We have already noted, and indeed emphasised, the principle that Parliament is not subject to direction by the Courts so long as its proceedings are not inconsistent with obligations placed upon it by the law from which it derives its powers. If authority is needed for that view it is provided by two cases cited for the Appellants, *Rediffusion (Hong Kong) Ltd v A/G of Hong Kong* [1970] AC 1136, and *Cormack v Cope,* [1974] 131 CLR 432. Both make it plain that the Courts have a duty to interfere "if the constitutionally required process of law-making is not properly carried out:" (per Barwick CJ in *Cormack v Cope at 453.)*

The appellants argue that the Respondents cannot complain about being refused an extraordinary session because they can have their business considered at the next ordinary session. That would amount to an effective denial of the right to require an Extraordinary Session which is given by the Constitution.

The judgment under appeal made an apt reference to the following statement by Megarry VC in *John v Rees* (1969) 2 All ER 363 about the role of the Court in cases such as this. At page 367 he says: -

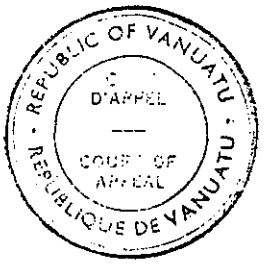
"I must make explicit what all lawyers will recognise as implicit, but which those who are not lawyers may not fully appreciate. I am not in the least concerned in this case with the rightness or wrongness or the desirability or undesirability of any political views or policies within the confines of any political or other unit. My concern is merely to see that those concerned in these proceedings obtain justice according to law, irrespective of politics."

We respectfully adopt that approach. We emphasise that a direction by the Court that the Speaker calls a session of Parliament does not in any way bind or even influence Parliament or its members as to the manner in which they dispose of the business put before it. That remains entirely a matter for legislative and not judicial determination.

Ground 4.

It is a difficult question whether a member who has been "suspended from the service of Parliament," (which was the status of two of the Respondents on 26 August,) retains the right to join in a request for an extraordinary session: see the discussion in Browning, *House of Representatives Practice,* 2nd Edition 504-5.

But the argument on this issue is a barren one.



If those two respondents were, by reason of their suspension, not "members" for the purposes of Article 21(2), then the total number of members for the purposes of that Article would be 48, of whom 25 had joined in the request. There must be a consistency of approach. If suspended members lack the ability to exercise members' rights under Article 21 then such members cannot be taken into account in determining what constitutes a majority. The request was made either by 27 out of 50 members or alternatively 25 out of 48 members.

Ground 5.

This argument preceded first upon the basis that the Court should not interfere in matters affecting the regulation of Parliamentary proceedings. That proposition has been considered and rejected in the discussion of Ground 3.

The second aspect of the 5th ground of appeal was that in any event the Court should refrain from intervening because an alternative remedy was available to the Respondents. This was identified by Mr Moshinsky as the ability to present a motion further to Article 43(2) when Parliament next sits in ordinary session. That ability undoubtedly exists. However the Constitution provides the additional right for a majority of members to require an extraordinary session of Parliament when specified business can be considered. The suggested alternative is a denial of that Constitutional right.

Ground 6.

We do not believe that the technicalities of the Common Law, and the limitations upon the English Courts' power to direct the King which for good and sufficient historical reasons those Courts recognise, have any relevance to the proper interpretation of the Constitution of Vanuatu. The power expressly given to the Court by Articles 6 and 53 to enforce the provisions of the Constitution makes reference to other approaches unhelpful.

It would be wrong in principle to limit the plain terms of those articles by reference to the ancient history of a very different society, and on that account to stultify the intention of the Constitution that the Court should play a significant role in supporting the rights created by the Constitution.

Ground 7.

The suggested prejudice to the Appellants from the refusal of a longer adjournment was said to arise from the circumstances -

First, that they were unable to give evidence of the suspension of two of the Respondents: and

Secondly, that they could not obtain the assistance of senior counsel.

The first caused no prejudice, as the judge specifically considered the position which would have followed from proof of the suspensions.

As to the second, there is no doubt that the issues before the Court were important and required urgent consideration. However the urgency was not such that some consideration might not have been given to an adjournment over the weekend, if that would have permitted the Appellants to get the assistance of senior counsel.

But if the Appellants were at the time prejudiced on this account, (and that has not been clearly shown) any such prejudice is now spent, as Mr Moshinsky responsibly conceded. He advanced in this Court every point which was ever arguable in support of his clients' case.

While we have differed from some of the conclusions reached by the learned trial judge, we are satisfied that he was right in concluding that a parliamentary democracy such as was created by the Constitution of this country can only operate effectively if a majority of the members of parliament can require that it be called into session to deal with parliamentary business. We are also satisfied that Article 21(2) was intended to ensure that parliamentary business was not restricted to biennial ordinary sessions, but could be conducted in extraordinary session whenever a majority of members believed that step was necessary.

We consider the learned judge was right in concluding that unless that provision were made effective, Parliament's ability to direct and control the Executive Branch of government would be significantly lessened, and the power of the many would become the power of the few.

It follows that the determinations reached by Lunabek J must be confirmed save in the following two respects:

(1) This appeal was brought on as a matter of urgency and in our view requires determination without delay.

We have not found it essential to the determination of any of the central issues to decide whether a suspended member of Parliament is entitled to join in a request for an extraordinary session in terms of Article 21(2). It was sufficient to find, as we have, that the word "members" in Article 21(2) can only have one meaning and that on either construction of that term the request made on the 26 August 1996 must have been made by a majority of members.

We accordingly express no opinion about the finding that the Constitutional rights of the Respondents Robert Karie and Hilda Lini were infringed by the Speaker, finding only that the Constitutional rights of the other 25 Respondents were so infringed.

(2) A breach of the right to an extraordinary session clearly called for urgent action. Standing Order 14(5) provides that "no less than 7 days'" notice must be given. We agree with Mr Waddy's submission that any period of notice substantially longer than 7 days would generally be inappropriate. In this case urgency has been increased by the time involved in the Court's determination of these proceedings.

The stay of the declarations and orders until this day's date is not extended. However those provisions now require amendment to recognise the passage of time and practical considerations. For that reason the words "in 7 days' time" are deleted from the second and third declarations made at first instance, and are replaced by the words "on Wednesday 25 September 1996."

Save for the amendments quoted above the relief granted in the Court below is confirmed and the appeal dismissed.

The Respondents are entitled to their costs on this appeal, which are to be agreed or taxed.

Vaudin d'Imécourt CJ Thorp JA Robertson JA

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