IN THE COURT OF APPEAL OF THE REPUBLIC OF VANUATU
(Criminal Appellate Jurisdiction)

Criminal Appeal Case N.12 of 2015

BETWEEN: **MOANA CARCASSES KALOSIL**
Appellant

AND: **PUBLIC PROSECUTOR**
Respondent

Criminal Appeal Case N.13 of 2015

BETWEEN: **SERGE VOHOR**
ANTHONY WRIGHT
JONAS JAMES
Appellants

AND: **PUBLIC PROSECUTOR**
Respondent

Criminal Appeal Case N.14 of 2015

BETWEEN: **THOMAS LAKEN**
SILAS ROUARD YATAN
Appellants

AND: **PUBLIC PROSECUTOR**
Respondent

Criminal Appeal Case N.15 of 2015

BETWEEN: **TONY NARI**
JOHN AMOS VACHER
SEBASTIEN HARRY
ARNOLD PRASAD
Appellants

AND: **PUBLIC PROSECUTOR**
First Respondent

AND: **REPUBLIC OF VANUATU**
Second Respondent

Criminal Appeal Case N.16 of 2015

BETWEEN: **PAUL BARTHELEMY TELUKLUK**
STEVEN KALSAKAU
Appellants

AND: **PUBLIC PROSECUTOR**
Respondent

Criminal Appeal Case N.17 of 2015

BETWEEN: **JEAN YVES CHABOT**
MARCELLINO PIPITE
Appellants

AND: PUBLIC PROSECUTOR
Respondent

Coram: *Hon. Chief Justice Vincent Lunabek*
Hon. Justice John von Doussa
Hon. Justice Raynor Asher
Hon. Justice Stephen Harrop

Counsel: *Mr John Malcolm for Appellant in CRAC 12/015*
Mr Colin Leo for Appellants in CRAC 13/015
Mr Less Napuati for the Appellants in CRAC 14/015
Mr Avock Godden and Mr Nigel Morrison for the Appellants in CRAC 15/015
Mr Felix Laumae for the Appellants in CRAC 16/015
Mr Daniel Yawha for the Appellants in CRAC 17/015

Mr Josiah Naigulevu and Mr John Timakata for Respondent

Date of Hearing: *12-13 November 2015*

Date of Judgment: *20 November 2015*

JUDGMENT

Table of Contents

Introduction

[1] This is an appeal by 14 Members of the Parliament of Vanuatu against convictions in the Supreme Court for bribery.

[2] On 18 November 2014 there was a no confidence motion filed in Parliament against the then Prime Minister of Vanuatu Mr Joe Natuman. If the motion passed, a coalition that would feature a former Prime Minister, Mr Moana Carcasses Kalosil, the Leader of Opposition, could form an alternative Government. The notice of motion was signed by a number of Members of Parliament including the 14 appellants. Nineteen days earlier on 30 October 2014 the same 14 Members of Parliament had each been paid VT1,000,000 on the instruction of Mr Kalosil, and some had received other payments.

[3] The 14 appellants were each charged with bribery and corruption. Following a trial, Sey J found that the payments were bribes and found them all guilty. After the trial they were all sentenced to various terms of imprisonment. They all appeal both conviction and sentence.

[4] There were originally 16 accused. One, Willy Jimmy Tapangararua, pleaded guilty. The other, Robert Bohn, was found to be not guilty. Their respective verdicts are not in issue on appeal.

Summary of conclusions

[5] Under s 73 of the Penal Code [Cap 135] a corrupt act is a key element of bribery. A corrupt act involves the receipt of a benefit from a donor by a public official on the understanding that in return favour will be shown to the donor by the public official in his or her work or official acts.

[6] There was ample evidence before the Judge for her to have reached the decision that the advances of VT1,000,000 were bribes. The uncontested facts of payment and shortly thereafter signature of the notice of motion indicated a bribe, and the loan agreements and arrangements that purportedly documented the payments made no commercial sense. The direct evidence of seven Members of Parliament called by the prosecutor was that they were offered, and in some cases received, the payments in exchange for an understanding that they would support the Green Confederation party (the

Green Confederation) and its leader, Mr Kalosil, in its attempt to gain power in Parliament.

[7] The Judge's decision contained adequate reasons for her decision, and there were no errors of law or reasoning. In particular she applied the correct principles relating to the burden of proof and reaching inferences.

[8] There were no material procedural errors by the Judge, and the particulars that it is now claimed should have been provided were never sought by the defence.

[9] There was no demonstrated defence counsel incompetence, and nothing to indicate a miscarriage of justice in the decisions that were made. The appellants could not now complain about their decision not to give evidence, which was the tactical decision they decided on legal advice was in their best interests during the trial.

[10] The sentences imposed were properly reasoned and in the available range.

[11] The appeals against conviction and sentence are accordingly dismissed.

Core facts demonstrated by the documents

[12] The key facts are demonstrated through exhibits produced at the trial without opposition from the appellants, and can be stated shortly.

[13] On 29 August 2014 a request for an extraordinary session of Parliament and notice of motion of no confidence in the then Prime Minister Mr Natuman were sent by Mr Kalosil and other Members of Parliament to the Speaker of the House. Mr Kalosil was the President of the Green Confederation.

[14] On 24 October 2014 a summons was issued to Members of Parliament to commence a session of Parliament on 18 November 2014.

[15] Shortly before on 21 October 2014 a Mr Fong Man Kelvin of Hong Kong transferred USD500,000 into the Westpac bank account of Pacific International Trust Company (Pitco).

[16] The source of the funds was explained to Westpac to be the sale of shares in European Bank Limited. The sole agreement was signed by only one party on behalf of Pitco, a Mr Thomas Bayer.

[17] Westpac carried out due diligence on that transaction and a "Suspicious Transaction Report" form was completed and sent to the Vanuatu Financial Intelligence Unit reporting "The TT funds from the applicant have no source of funds on how the fund was generated. No RBV Licence to substantiate sale of shares in European Bank".

[18] On 28 October 2014 after another transfer between Pitco accounts, VT35,000,000 was drawn from a Pitco Vatu account by a cheque made out to Mr Kalosil. The VT35,000,000 was paid into Mr Kalosil's ANZ account. The ANZ carried out due diligence as to the source of the funds, and its records show that this was ascribed to an "Option Agreement" dated 27 October 2014 for the sale and purchase of a leasehold property between Mr Kalosil's wife Marie Louise Milne and Pitco. The agreement was signed for Pitco by Mr Bayer. VT35,000,000 was paid for the option to purchase the leasehold title for a total end purchase price of VT315,000,000. There were valuations produced showing the value of the leasehold title to be much less than this stated price.

[19] Meanwhile, on or about 27 October 2014, the appellants signed loan agreements. The documents showed that an entity bearing the name of a body associated with Mr Kalosil's party, the Green Confederation Development Fund Limited as trustee for the Green Confederation Trust, lent the appellants VT5,000,000 with an immediate draw down of VT1,000,000 (the loan agreements).

[20] On 30 October 2014 Mr Kalosil sent a letter to the ANZ Bank (the 30 October email) instructing it to make VT1,000,000 payments to various persons including the appellants. The email stated that the payments were "to help opposition MPs to develop further their communities and get more political support in preparation for the 2016 general election". As a consequence the bank made individual payments of VT1,000,000 from Mr Kalosil's private bank account which held the VT35,000,000 to each of the appellants and five others.

[21] On 18 November 2014 the motion of no confidence in Mr Natuman as Prime Minister was tabled in Parliament. It had been signed by all of the appellants. The majority of the appellants were from different parties to the Green Confederation, but some were from that party.

Contested evidence

[22] The prosecution called witnesses in two broad categories. There were bank witnesses. They produced the bank records which showed the transactions. Those records were admitted without objection. Their evidence was largely uncontentious. Then there was the evidence of a number of Members of Parliament and some of their associates. Aspects of their evidence were very contentious and they were strongly challenged in cross-examination. There were also a number of witnesses called to give supportive or corroborative evidence.

[23] The first Member of Parliament witness was Mr Natuman. He gave evidence that when he took over as Prime Minister from Mr Kalosil, Mr Kalosil came to see him and asked him to continue with a project called the "real estate project" involving the development of a hotel on land that he thought Mr Kalosil had an interest in. He was cross-examined on the fact that it is common for Members of Parliament to change sides. They will be offered "deals" to do so. But he said that in his experience these were discussions only and money would not be exchanged.

[24] Eleven other Members of Parliament were called by the prosecution. Most in one way or another gave evidence of being approached and offered a loan of VT1,000,000 or other rewards in the latter part of 2014. These were Mr Kalfau Moli, Mr Richard Mera, Mr John Tessei, Mr Bob Loughman, Mr Samson Samsen, Mr Charlot Salwai, Mr John Lum, Mr Isaac Hamariliu, Mr Jesse Dick, Mr Don Ken, Mr James Bule and Mr Hosea Nevu. Of these witnesses Mr Moli, Mr Samsen and Mr Nevu received VT1,000,000, and these three were indemnified from prosecution. They signed a form of loan agreement, and also it was deposed, so did a large number of the appellants, most at a meeting at the Green Confederation premises on or about 27 October 2014.

[25] The majority of the Members of Parliament who gave evidence for the prosecution linked the loan to Mr Kalosil or his party, and that party regaining power in Parliament. A number deposed that they were asked specifically to support Mr Kalosil and his party in

regaining power, as a condition of the provision of the loan. Two gave evidence that they received payments of other amounts in cash.

[26] The defence in general terms was aimed to show that the funds that were paid to the appellants were legitimate commercial loans, paid by Mr Kalosil and received by the appellants so the funds could be given to constituencies for community projects. The approach of defence counsel at the trial was not to take technical objection to the admission of bank records, and they specifically consented to the admission of a copy of Mr Kalosil's letter to the bank instructing it to make the payments of VT1,000,000 to the appellants. They sought also the admission of, and relied on, the loan agreements.

[27] The Members of Parliament and their associates called by the prosecution were challenged on their evidence about it being a condition of or understanding in relation to the loan that it was for support for Mr Kalosil and his party in Parliament. A majority insisted that the loan agreement and payments were based on their support in Parliament for the advancement of Mr Kalosil and his party. The appellants each elected not to give or call evidence.

The decision of Sey J

[28] In her judgment dated 9 October 2015 Sey J summarised the charges and the relevant statutory provisions, and set out the legal principles relating to proof, the drawing of inferences, and the meaning of bribery and corruption in the particular context. She noted that the case was based on circumstantial evidence. She quoted and accepted the evidence of Messrs Tessei, Mera, Nevu, Lum, Samsen and Moli to the effect that the advances to the Members of Parliament were on the basis that they were to support Mr Kalosil and his party. In respect of that evidence, she said at [114] that taking into account the defence challenges to their credibility the "evidence was clear consistent and corroborative. I found it credible and I accept it".

[29] She found that nine MPs had said they were approached by either Mr Kalosil or Mr Nari and offered a bribe stating at [111]:

> Taken together, the evidence of the bribes, the degree of improbability that the VT1,000,000 was to "help opposition MPs to develop further their communities ..." as appears on [the 30 October email] and the documentary exhibits relating to the bank statements ... make out a very strong case that the payments made by Moana Carcasses Kalosil to the MPs were "corruptly given" and "corruptly accepted." I so hold.

[30] She had held earlier at [98]–[99]:

> In this present case, there is some reasonable evidence from which it can be inferred that the individual payments of VT 1 million made by Moana Carcasses Kalosil to the other 14 accused persons and to PW8 Kalfau Moli, PW13 Samson Samsen and PW25 Hosea Nevu were bribery payments corruptly made on the pretext that the funds were "to help opposition MPs to develop further their communities and get more political support in preparation of the 2016 general election."
>
> I am satisfied that there is some reasonable evidence from which it can be inferred that the required element of "corruptly" has been established by the prosecution beyond reasonable doubt. I am equally satisfied on the basis of the evidence adduced that the corrupt payments were made in order to influence the MPs to vote in favour of the motion of no confidence which had been lodged against the Prime Minister Joe Natuman.

[31] She found that the appellants were guilty of bribery under s 73(2) of the Penal Code Act (Mr Kalosil on 18 charges and Mr Nari on one charge), and s 73(1) of the Penal Code Act (all the other appellants including Mr Nari). She adjourned other charges that had been laid under the Leadership Code Act, and we discuss that adjournment later.

Corruption and bribery of officials

[32] Section 73 of the Penal Code Act provides:

> **Corruption and bribery of officials**
>
> (1) No public officer shall, whether within the Republic or elsewhere, corruptly accept or obtain or agree or offer to accept or attempt to obtain, any bribe for himself or any other person in respect of any act done or omitted, or to be done or omitted, by him in his official capacity.
>
> Penalty: Imprisonment for 10 years.
>
> (2) No person shall corruptly give or offer or agree to give any bribe to any person with intent to influence any public officer in respect of any act or omission by him in his official capacity.
>
> Penalty: Imprisonment for 10 years.
>
> (3) For the purposes of this section, "bribe" means any money, valuable consideration, office or employment, or any benefit, whether direct or indirect, and the expression "public officer" means any person in the official service of the Republic (whether that service is honorary or not and whether it is within or outside the Republic) any member or employee of any local authority or public body and includes every police officer and judicial officer.

[33] The Judge set out the elements of the charges and it was submitted that this was incomplete. In our view the elements of s 73(1) are:

- A public officer.
- Accepting or obtaining any money, valuable consideration, office or employment, or any benefit, whether direct or indirect.
- Having done so corruptly.
- In respect of an act done or omitted in an official capacity.

[34] Section 73(2) involves:

- The offering or giving of any money, valuable consideration, office or employment, or any benefit direct or indirect to a person;
- With the intent to influence a public officer;
- Corruptly;
- In respect of an act done or omitted in an official capacity.

[35] Ultimately none of the appellants contested that they were a public officer. Clearly a Member of Parliament is a public officer. They strongly contested the other three elements.

[36] Bribe is clearly defined very widely and includes direct or indirect benefits. We have no doubt that a loan can be bribe. A loan, in ordinary parlance, is something given by the lender and it confers a benefit to the borrower, namely the provision, on terms, of money that a borrower otherwise would not enjoy. Although the word "bribe" has the connotation of "corruptly", as defined in s 73(3) it does not include that concept, which is left undefined in that subsection. In our view the bribe can be seen as part of the actus reus of the crime, and the corrupt purpose can be seen as its mens rea: see *Field v R* [2010] NZCA 556, [2011] 1 NZLR 784 at [48].

[37] The meaning of corruption has been the subject of a considerable body of authority, much of which was discussed by Sey J. She referred to leading authorities on the meaning of corruption. These included *R v Dillon and Riach* [1982] VR 434 at 436 where Brooking J stated:

> ...an agent does an act corruptly if he receives a benefit in the belief that the giver intends that it shall influence him to show favour in relation to the principal's affairs.

[38] Although this is an area of law by no means free of difficulty, we respectfully consider that to be a correct statement of the law. We do not consider it necessary to enter the debate as to whether corruption requires dishonesty, and note that in *Field v R* the New Zealand Court of Appeal devoted 57 paragraphs to the topic (among other things). Given Sey J's consideration of whether there was any commercial reality in the purported loan (which we refer to in more detail later), we reject the submission that she misdirected herself on this issue.

[39] We note also the Judge's reference to authorities such as *Borough Limerick* (1869) 1 O'Malley & Hardcastle's Reports 260 where in considering the meaning of "corruptly" emphasis was placed on the doing of a forbidden act for a purpose not innocent. It is certainly the case that if a member of Parliament does an act that is prohibited by legislation relating to Parliamentary duties, particularly one aimed at stopping corruption, that is an indication of corruption. This was the case in relation to these charges. Section 21 of the Leadership Code Act [Cap 240] provides:

> **Acceptance of loans**
>
> A leader must not accept a loan (other than on commercial terms from a recognised lending institution and only if the leader satisfies the lending institution's usual business criteria or in accordance with the customary practice of a particular place for or during a traditional ceremony), advantage or other benefit, whether financial or otherwise, from a person.

[40] The breach of this section is in itself a crime, and the appellants were charged with breaching it, but as we discuss later Sey J considered that she was unable to determine the Leadership Code charges. Nevertheless, the standard set by this section provides a benchmark against which a corrupt act can be measured. For reasons that this case amply demonstrates, loans other than verifiable commercial loans on usual commercial terms to Members of Parliament can easily be bribes, and are understandably forbidden.

[41] The issue of corruption lies at the heart of the appeal, and it is contended by the appellants that it was not proven beyond reasonable doubt.

Substantive grounds of appeal

Proof of the elements of the charge

[42] We were told by counsel for the appellants that at the end of the trial counsel were confident that the prosecution had failed entirely to establish guilt on any of the charges beyond reasonable doubt. It was submitted that the prosecution evidence was full of conflicts and that it was not shown that there was any discernible benefit required from the appellants for the advances. It was submitted that the Judge had failed to properly appreciate that the monies received were loans, and plainly commercial loans at that.

[43] The Judge reached the contrary view for the reasons she set out. To respond to this submission we need to go further than the Judge. That is because she did not need to set out her detailed reasons in her verdict as we discuss in the next section of this judgment. However faced as we are with these detailed submissions we must refer to the evidence in more detail.

[44] The real issue raised by the appellants' submissions is two-fold. First it is submitted that the appellants gave and received genuine commercial loans, and there can be no complaint about that. Second they submit that it was not proven that there was anything corrupt in the giving or receipt of the money, in the sense of an intention or understanding to benefit Mr Kalosil or his party. It was contended that there was at the very least a reasonable possibility that they received a genuine loan enabling them to pass on money to their constituents, nothing more.

Genuine commercial loan?

[45] We consider first whether there was a reasonable possibility that this was a genuine commercial loan to the appellants. We put to one side the background to Mr Kalosil getting the funds, which was not relied on by the Judge (although before us the prosecution clearly considered it important background).

[46] There are a number of features of the loans that show them not to be at all commercial, or indeed loans at all. These are:

- The evidence of all the Members of Parliament including Mr Bohn was that they were approached informally by Mr Kalosil or others and offered the loans. Commercial loans are not usually initiated in this way.

payment. Borrowers do not generally borrow with no expectation that they can repay the principal sum in due course.

- The interest rate is stated to be 11 per cent. No interest has been paid or sought.

- That interest rate would mean that an appellant would have to pay VT550,000 per annum for interest, the first payment being due on "EACH 30 September 2016" (a strange concept in itself). This obliged each appellant to devote approximately a tenth of his income to interest, a prospect that was unlikely to be commercially acceptable to either lender or borrower.

- Repayment in full including all interest was required following the next Vanuatu general election. This could be at any time and would have left the borrowers exposed to a very early repayment.

[47] The loans then were not between commercial parties, had no commercial purpose, were not on commercial terms, and were on terms that in any event nobody observed or showed any intention of observing. A combination of all these factors show the loan to be entirely uncommercial. Indeed they give rise to the clear inference that they were not loans at all, and that the payments of VT1,000,000 were cash advances without any attendant obligation to repay the principal plus interest at the expiry of the term.

[48] This conclusion means that we agree entirely with Sey J's reference to the "degree of improbability" of the payments being for the purpose stated, and her description of the arrangements as a "pretext".

[49] We do not ignore the fact that there was evidence that at least some of the money was intended to go to constituents. Even if it was, gaining the goodwill of constituents was a benefit for both the giver and the receiver of the money, in that the perception of them in the community would be enhanced.

[50] We also emphasise a point we have already made, that on occasions in the hearing did not appear to be appreciated. A loan can be a bribe. In terms of the definition of bribe in the s 73(3) of the Penal Code a loan is valuable consideration and it confers a benefit on the borrower, and indeed the lender. Here the benefit for the appellants from the loan was the receipt of money. Even if that was by way of loan, the benefit was there to be enjoyed by the appellants who received VT1,000,000, and the terms that we have outlined were so lacking in commerciality to be a significant circumstance indicating corruption.

Proof of intention of appellants to benefit Mr Kalosil or his party

[51] This is a key element of the charge that the payments were corrupt. The appellants contended that there was no proven arranged "act to be done in an official capacity" as the favour promised or understood in return for the bribe, and this was fatal to the prosecution case.

[52] The evidence that the prosecution adduced in support of its submission that there was an intention to benefit Mr Kalosil or his party worked in two ways. First there was the circumstantial evidence arising from the circumstances and terms of the payment, an aspect of which was the lack of reality about the so-called loan agreements that we have already discussed. The second was the direct evidence from the Members of Parliament called by the prosecution and some other corroborative witnesses, to the effect that the payments were made to influence the appellants to support Mr Kalosil and his party.

[53] This second issue was the focus of much of the evidence and submissions, and the Judge rightly devoted a significant part of her judgment to it.

[54] Not every Member of Parliament plainly stated that it was a condition of the payment that he was to support Mr Kalosil and his party. In particular Mr Nevu did not refer to this. Others like Mr Samsen were unclear about whether such a condition was imposed at the outset, although the general tenor of Mr Samsen's evidence was that there was such a term.

[55] Other Members of Parliament called by the prosecution were quite clear on the point. Much of their evidence on the point was referred to by the Judge.

[56] Member of Parliament Mr Kalfau Moli gave evidence that he was offered the loan by Mr Kalosil at the Green Confederation's office "on condition that he be made Prime Minister".

[57] Mr Richard Mera said that Mr Kalosil offered him the loan at the Green Confederation office and in exchange "... for us to change the government." He had said that when he came to power he could give them the balance of the VT5,000,000. Mr Kalosil said that if they were patient with him until the end of the year "I will erase this loan of 5 million". He thought that the loan was not genuine.

[58] Mr John Tessei said he was given cash by the appellant Mr Tony Nari, who wanted him to sign the Green Confederation loan agreement and that "... they expected me to vote in favour of the motion against the Prime Minister that they had lodged". He said that once the Green Confederation had formed the government "... you can forget about it".

[59] Mr Samson Samsen was more uncertain about what was said by Mr Kalosil when he discussed with him the initial loan agreement although he thought it was "... not a good lending". Later in his evidence however he said that "... the nature of the agreement ... was to make Moana Carcasses Prime Minister".

[60] Mr John Lum deposed that he was offered VT1,000,000 to be paid "... in the event of the motion passing", the motion being the motion of no confidence.

[61] Mr Isaac Hamariliu said he was offered a loan by Mr Kalosil and if he accepted it and Mr Kalosil became Prime Minister then "... whatever we hadn't repaid would not need to be paid back".

[62] The evidence of the Member of Parliament Mr Don Ken is remarkable because of his immediate reaction to Mr Kalosil's approach. Mr Ken was in the government and the Minister of Youth and Sport. Mr Kalosil approached him at the supermarket. Mr Kalosil

- The Green Confederation is not a commercial lender and it and its associates are not in the business of lending money.

- There is no obvious commercial reason why the Green Confederation or Mr Kalosil would target only a number of Members of Parliament to lend them money, particularly when the money was to be used to assist their constituents (on the defence theory of the case), and particularly when the majority of the borrowers were not Green Confederation members.

- There was no written offer or proposal of terms prior to the signing of the loan agreement.

- Some of the loan agreements were not signed by the lender.

- The loans were for VT5,000,000 with an initial VT1,000,000 to be paid, and the balance to be advanced subsequently. Other than the initial payment of VT1,000,000 there was no further payment made or sought.

- The loan agreements have never been enforced by either the Green Confederation for repayment of the VT1,000,000, or the appellants for the balance to be lent of VT4,000,000.

- The loans were unsecured. There was a security stated, being the borrower's severance pay whenever it becomes due and payable. However there was no charge or other security over this entitlement, so the reference was commercially meaningless. Commercial lenders do not lend generally when they are unsecured.

- In any event Members of Parliament would be unlikely to be able to repay the VT5,000,000 from this source. According to Mr Bohn in his evidence, Members of Parliament are entitled to one month of severance pay for one year served. The monthly entitlement to salary is VT406,000 plus sitting fees. It can be assumed that not all of the appellants will have served more than 12 years in Parliament, which means that their entitlement will be less, in some cases much less, than the principal sum plus accrued interest. Thus a lender will have no realistic commercial expectation of payment at the end of the term, and the borrower will have no realistic expectation that he can repay it. Commercial lenders do not generally lend without an assurance of

mentioned the prospect of a loan to him and the motion of no confidence before Parliament. His evidence was that he replied:

> Mr Carcasses I can't give you my account number, I can't discuss anything with regards a loan, I can't counter play that in connection with the motion, because smacks of bribery, its my country and its not cheap.

[63] A look at the cross-examination of these witnesses does not show any significant damage to their credibility, and indeed their answers overall tended to reinforce their earlier testimony. While some of the appellants were already Green Confederation supporters, there must have been political sense in Mr Kalosil giving those who already supported him the same payments that he gave to those whose support he sought.

[64] Although two Members of Parliament who gave evidence about the VT1,000,000, Messrs Bule and Nevu, did not refer to any condition or act in return for the loan, that has to be seen in conjunction with the seven Members of Parliament who gave clear evidence about the requisite "act to be done in an official capacity"; namely, in return for the loan that was put forward by Mr Kalosil and his supporters, they were to support Mr Kalosil and his supporters on the vote of no confidence on 18 November 2014.

[65] The core uncontested facts indicate a bribe. The giving of unsolicited advances to Members of Parliament by Mr Kalosil and the Green Confederation, who shortly thereafter supported an important motion favouring the Green Confederation, is strong circumstantial evidence of a bribe. The fact that the loan that purports to document the advance runs contrary to any sensible commercial practice is further circumstantial evidence of a bribe. And the direct evidence that the Judge found to be credible of the seven Members of Parliament who say they were being paid the money in return for supporting Mr Kalosil and the Green Confederation shows a bribe.

[66] In our view the evidence showing that the advances were corrupt bribes in breach of s 73 of the Penal Code Act was very strong. On the evidence Sey J was fully justified to find the charges proven beyond reasonable doubt.

Alleged errors in relation to proof

[67] It was argued that the Judge, in coming to this conclusion, misdirected herself on the onus of proof, her ability to find inferences, and her ability to consider the lack of evidence from the appellants in relation to certain issues.

[68] This submission can be shortly dispatched, and indeed was not pursued at the oral hearing of the appeal.

[69] The Judge in her reasons carefully set out the onus and standard of proof. She gave herself an orthodox direction on inferences, noting that while the elements of charges have to be proven beyond reasonable doubt, in a circumstantial case the facts relied on in combination to prove the element only have to be proven on the balance of probabilities (*Thomas v R* [1972] NZLR 34 (CA), *R v Puttick* (1985) 1 CRNZ 644 (CA) at 647). She quoted this Court in *Swanson v Public Prosecutor* [1998] VUCA 9 where it was stated:

> In a circumstantial case, where the accused makes no statement out of Court and/or elects not to give evidence, inferences can be drawn from the absence of any explanation from the person "with the unique knowledge of the complicated dealings to which the charges relate" (a quote from *R v Connell* [1985] NZLR 223 at 227).

[70] While guilt must not be inferred from silence, we have no doubt that a Judge can draw inferences from the failure of an accused to exercise the right to give evidence, when there are proven facts which on an objective examination and in the absence of an explanation are supportive of guilt. If an explanation is required and should be in the accused's knowledge, the failure to provide that explanation cannot be ignored. The absence of evidence does not prove guilt, but it can be considered as part of a reasoning process in establishing whether an element is proven. This principle is known in New Zealand as the *Trompert* principle from the leading case of *Trompert v Police* [1985] 1 NZLR 357 (CA).

[71] As we have outlined, the facts of the loan, the advance and the support for the no confidence motion within a short time frame created the inference that the loan was intended to obtain a benefit for the Green Confederation, and was received knowingly on that basis. Any accused could have shown this inference to be wrong by giving an explanation of what happened to show his conduct to be innocent and lacking the element of corruption, but none of the appellants did this. Another accused Mr Robert Bohn did, and he was acquitted, although as we will explain the circumstances of him receiving the loan were different.

Failure to give adequate reasons

[72] A number of counsel criticised the Judge for not going through the elements of the charge and for not giving adequate reasons for her decision. It is clear from *Picchi v*

Public Prosecutor [1996] VUCA 9 that reasons must be given. However, following *Swanson v Public Prosecutor* [1998] VUCA 9 which in turn adopted the approach of Cooke J in *R v Connell* [1985] 2 NZLR 233 (CA) that a summary of the relevant facts, a making of key credibility findings, and a brief statement of reasons can be sufficient. Not every contested piece of evidence needs to be addressed. As was stated by Cooke J in *R v Connell* at 237:

> Further, what the Judge sitting alone delivers is intended to be a verdict. It need not be supported by elaborate reasons. To require the Judge to set out in writing all the matters that he has taken into account and to deal with every factual argument would be to prolong and complicated the criminal process to a degree which Parliament cannot have contemplated. There are cases where a point or argument is of such importance that a Judge's failure to deal expressly with it in his reasons will lead this Court to hold that there has been a miscarriage of justice. A demonstrably faulty chain of reasoning may be put in the same category. But it is important that the decision to convict or acquit should be made without delay. Careful consideration is an elementary need, but not long exposition.

[73] In our view the Judge did enough. She made clear credibility findings, set out her key conclusions as to the corrupt nature of the transaction, and made no errors of reasoning. We bear in mind that she had been asked the day before to take into account the decision of 8 October 2014 and this had led her to conclude that she would adjourn the Leadership Code charges. It must have followed that at the last minute she had to excise and change significant parts of her judgment.

Procedural grounds of appeal

[74] The first of the procedural grounds of appeal is that there were inadequate particulars provided by the prosecutor.

Particulars

[75] The charges that were filed contained particulars. Typically the charge set out the date of the offence, the offer of the money, the amount and the terms of payment, and the allegation was that the money was offered or given in exchange for influencing of an appellant or in exchange for an act done as a public official. The specific criticism of Mr Morrison was that the alleged future corrupt act was not particularised.

[76] Section 71 of the Criminal Procedure Code Act provides that each charge shall contain a statement of the specific offence "together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged". We

consider that the charges laid met the s 71 requirement, although further particulars could have been sought and ordered.

[77] We are not satisfied that such particulars had to be provided or ordered by the Judge in the absence of a request from the defence. This case had a considerable gestation, lasted for nine days of evidence and one day of submissions, and featured a number of senior and learned counsel. At no point were particulars sought. It can be assumed from this that the lawyers involved in the trial thought they understood the case they had to answer. They had the benefit of an opening from the Crown, and the detailed witness statements provided ahead of trial. They made a no case to answer submission at the end of the Crown case, which demonstrated an understanding of the case against them.

[78] Mr Godden relied on the Australian High Court decision of *Kirk v Industrial Court (NSW)* [2010] HCA 1, (2010) 239 CLR 531 in support of the proposition that a charge must do more than just follow the words of the section. We agree, but these charges did far more than that, referring as they did to the dates, the capacity of the defendant, and the details of the specific advance. Moreover, *Kirk* was a judicial review decision and related to very different circumstances from the present. In that case the charge was they failed entirely to inform the defendant of the alleged wrongdoing.

[79] It was clear from the briefs of evidence and the way that the case was run that the future act or condition of the money payments was that the recipient would support the Green Confederation and Mr Kalosil when the notice of motion of no confidence was put on 18 November 2014, and when it was not put on that day, the condition continued to apply in the weeks that followed. Our examination of the transcript and in particular the cross-examination shows that this was clearly understood by the parties, which is presumably why they did not seek particulars.

[80] We do not consider that there was any miscarriage of justice in the charges proceeding as framed, and do not uphold this ground of appeal.

Admission of exhibits

[81] Some of the appellants raised objections in this appeal in their written submissions to the admission of Mr Kalosil's email instructing the bank and the bank statements showing payments to the individual appellants, on the basis that they were hearsay. However no objection was recorded by counsel at the time during the trial, and indeed the

Judge was studious in obtaining the views of counsel on matters such as the admission of documents. The absence of objection to the documents, which appeared to be sensibly admitted as there could be little doubt as to the fact that they were genuine and relevant, is fatal to the complaint now raised. If objection had been made at trial, we have no doubt that the prosecutor could have had the evidence admitted by calling more evidence, but he did not need to do so. It would bring the administration of justice into disrepute if such belated admission points were accepted on appeal, and highly relevant evidence was excluded so unfairly.

The decision not to give evidence

[82] None of the appellants gave evidence. The sole accused who was found not guilty, Mr Robert Bohn, did give evidence, which appeared to lead some appellants to regret their decision. In the lead up to the hearing of the appeal a number of appellants said they had believed they should not give evidence on the basis of erroneous advice from incompetent counsel. In the end only Mr Napuati on behalf of Messrs Laken and Yatan pursued the point. Messrs Laken and Yatan filed affidavits deposing that they had been advised not to give evidence by their counsel Mr Gregory Takau. They waived privilege. We gave leave for an affidavit in reply from Mr Takau to be filed by the prosecutor. He confirmed that based on his assessment of the case and the prosecution evidence he advised his clients to not give evidence. Mr Napuati cross-examined Mr Takau.

[83] The approach to allegations of counsel incompetence was considered by the Solomon Islands Court of Appeal in *Malaketa v R* [2007] SBCA 5, where the Court adopted the decision of Gleeson CJ in *R v Birks* (1990) 19 NSWLR 677. Any allegation of counsel incompetence is examined from the point of view of the fairness of the Court process and outcome, rather than the characterisation of counsel's conduct. As was observed by the New Zealand Supreme Court in *R v Sungsuwan* [2005] NZSC 57, [2006] 1 NZLR 730 (SC) and the Court of Appeal in *R v Scurrah* CA159/06, 12 September 2006 at [13]–[15], an appellate Court will not second-guess tactical decisions made by counsel in the course of a trial. Inevitably there is often no demonstrably right or wrong answer to many of the decisions made in the course of a trial, and appeals cannot be turned into a hindsight-driven review of those decisions.

[84] For that reason a person is generally bound by the way in which the trial is conducted by counsel. As Gleeson CJ said in *R v Birks* at 685:

> However, there may arise where something has occurred in the running of the trial, perhaps as a result of "flagrant incompetence" of counsel, or perhaps from some other cause, which will be recognised as involving, or causing, a miscarriage of justice. It is impossible and undesirable to attempt to define such cases with precision. When they arise they will attract appellate intervention.

[85] Mr Takau plainly made a considered decision to advise his clients not to give evidence, a decision that was also made by all the other counsel with the possible exception of counsel representing Mr Bohn. None of the other appellants has challenged their counsel's competence, and we can see why given the well known possible consequences of an accused going into the witness box.

[86] At the hearing in front of Sey J all the appellants made a submission of no case to answer at the close of the Crown case. She then as she was bound to do recited to the appellants their rights under s 88 of the Criminal Procedure Code. This provides that in making their defence in the trial they were entitled in addition to calling other persons to give evidence themselves. They were not obliged to do so and might elect to remain silent. If they chose not to give evidence that of itself would not lead to an inference of guilt. Having given this advice she asked each appellant through their counsel what election they made. Some communicated their election immediately, others asked to do so the next day. She was plainly careful to place no time pressure on the appellants or counsel to make this important decision.

[87] It is the duty of counsel to give advice on the issue of whether an accused should give evidence. The decision in the end must be that of the accused. This course was plainly followed in the case of Mr Laken and Mr Yatan. They knew of their right to give evidence as it had been explained to them by the Judge, and they made a decision, undoubtedly influenced by the advice they had received from Mr Takau. The process was entirely orthodox and fair. There is nothing to indicate that there was an error by counsel, and critically there is nothing to indicate that any miscarriage of justice arose from the process, the Judge's conduct, or the decision made. This ground of appeal must fail.

[88] We also record a faintly made written submission that the Judge should have obtained confirmation from each appellant personally that they did not wish to give evidence. This submission is plainly untenable. It is not the Judge's duty to check on what is communicated by counsel, even on the important issue of giving evidence. The Court system works on the basis that counsel speak for their client, and are assumed to

have performed their duties as officers of the Court. There is no suggestion counsel breached their duties in this respect.

[89] The written submissions of some appellants came close to submitting that because Mr Bohn had given evidence, and thereafter been found not guilty, there was a miscarriage of justice because they had not given evidence. The factor that is overlooked in this is that first, there were material differences in the case against Mr Bohn than that against the others. He was an old personal friend of Mr Kalosil of 25 years, and a generous payment for his constituents was more easily explained. He was a political supporter of Mr Kalosil, and independently wealthy, claiming to divert all his Parliamentary income and monies received in that capacity to his constituents. He was able to say that he was not a person to whom the offer of a benefit from a friend would have required anything in return. Moreover, it hardly needs be said that the fact that one witness was found to be credible by virtue of his demeanour and responses to questions, does not establish that another different accused would be similarly believed. To the contrary, it is entirely possible that a different accused of different demeanour and answers would not be believed, and his position could be worsened by the decision to give evidence. We note also that the features showing a lack of commerciality of the loan were surprisingly not put to Mr Bohn in cross-examination.

Accomplices warning

[90] It was submitted that the Judge should not have allowed other Members of Parliament to give evidence against the appellants and at the very least should have warned herself of the danger of accepting the evidence of accomplices. Counsel relied on ss 30–32 of the Penal Code which define complicity and co-offenders, and many dicta that have warned against the dangers of allowing or accepting the evidence of accomplices. In *Public Prosecutor v Picchi* [1995] VUSC 10 this Court commented on the dangers of such evidence, and the fact that accomplices may have their own personal motive to deceive the Court.

[91] None of the Members of Parliament who were called were co-offenders. None had been charged. The three Members of Parliament who gave evidence for the prosecutor and who had signed loan agreements and received the VT1,000,000 all received indemnities. In these circumstances they were not co-offenders, and they had no obvious motive to lie or place blame on the other appellants, with the possible exception of two of

the Members of Parliament who had received cash payments of approximately VT500,000 and in theory at least could have been charged.

[92] The Members of Parliament who gave evidence were not parties of the other accused Members of Parliament, as each appears to have been approached individually about the money and to have not liaised with others save at the Green Confederation meeting, and when Mr Nari was speaking about advances to other Members of Parliament. They were not accomplices in the usual sense of being co-parties or persons who were part of a common scheme. None of them had any obvious motive to lie in the witness box, and it was entirely proper for the prosecutor to call them.

[93] We accept that it would have been good practice for the Judge to have articulated a warning to herself in her judgment about the need to be careful in assessing the evidence of witnesses who may have had a wish to ingratiate themselves with the Court to avoid further repercussions. But this was not asked for by counsel at the trial, which makes it more difficult for them to complain about it now, and indeed the prosecution witnesses to a considerable extent were not cross-examined on the basis of improper motive. Clearly at the time counsel did not think that the interests of justice from their client's perspective required an accomplice warning, or any warning.

[94] Thus while the Judge should have reminded herself as she would have a jury, that the evidence of the three Members of Parliament could be influenced by their association with the appellants and their wish to avoid being seen as part of their group, the fact that she did not do so does not mean there was a miscarriage of justice. The careful nature of her consideration of the evidence and her acceptance of Mr Bohn's evidence show that she was very aware of the nuances of the evidence, and we have no doubt that she was aware of possible motivations behind the evidence of the individual witnesses. The appeal cannot succeed on this basis.

The decision of 8 October 2015

[95] Sey J was referred to a decision of Fatiaki J of 8 October 2015 in *Tony Nari and others v The Republic of Vanuatu* Constitutional Application No.5 of 2015, declaring that, there was a breach of ss 20(3) and 21(4) and 21(5) of the Ombudsman's Act in the enquiry which lead to Official Preliminary Report on the alleged bribery. The Judge observed at [20]:

So far as relevant for present purposes Article 5(1)(k) of the Constitution provides:

> The Republic of Vanuatu recognizes, that *subject to* restrictions imposed by law on non-citizens, all persons are entitled to the following fundamental rights and freedoms of the individual without discrimination on the grounds of ... political opinions ... *but subject to* respect for the rights and freedoms of others and to the legitimate public interest in ... public order, welfare and health –
>
> *(k) equal treatment under the law ...*
>
> (emphasis added)

[96] The Judgment of Fatiaki J was not binding on Sey J. In our respectful view Fatiaki J should not have made a substantive determination of breach in the case management hearing that was before him. Further, it is our preliminary view that he was in error in treating the Ombudsman's enquiry as a prerequisite to the laying of a charge under the Leadership Code Act. The prosecutor may initiate a prosecution for a breach of the Code under s 19 even if there has not been such an enquiry, or if there has been an enquiry and it is defective. 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.

[97] As a decision of the same court Sey J was bound to pay regard to the 8 October 2015 decision, but she was not bound to follow it. She should have proceeded to determine the Leadership Code Act charges despite the 8 October 2015 decision.

[98] She did not do so. To adjourn them was to raise the possibility of double jeopardy. The prosecutor now asks that we dismiss the charges, given that if the appeal was dismissed the prosecutor could proceed under ss 41–42 of the Leadership Code Act seeking an order for dismissal of each of the appellants from office. On our findings it is difficult to see how a Court could regard the conduct as anything other than serious. If the prosecution takes this step, that will be a matter to be heard by a Supreme Court Judge. It follows that we now dismiss those charges by consent.

[99] We record that the outcome in terms of the prison sentences imposed if the appellants had been found guilty of the Leadership Code charges would not have been much different than what has transpired, as the culpability of the appellants could be taken into account fully in the sentencing for the proven Penal Code offending, as indeed it was.

The appeals against sentence

[100] The maximum sentence for bribery is 10 years' imprisonment. Sey J carried out an extensive review of sentencing decisions for bribery, noting how seriously the crime is regarded. She emphasised that bribery needed to be "weeded out" in Vanuatu.

[101] She fixed a starting point for Mr Kalosil who appeared to have orchestrated the payments and faced far more charges than the other offenders, at four years' imprisonment. Given his high level of office as Deputy Prime Minister she increased that to five years. For Mr Nari she fixed the same starting point and increased it by six months because of aggravating factors of the offending, leaving an end starting point of four years and six months' imprisonment. For the other offenders she fixed a starting point of three years' imprisonment, increased by one year to four years because of their high office and their gross breach of trust.

[102] In our view all these starting points were in the range, and that of Mr Kalosil right at the bottom of the available range. It must be repeated that bribery is a serious crime. The bribing of Members of Parliament strikes at the heart of democracy and good government, debasing the decision-making processes of Vanuatu's Parliament so that it is not reliable, predictable, or fair. Worse, a practice of bribes weakens the trust of the public in government, and damages the rule of law.

[103] In Mr Kalosil's case he lead a bribery scheme that involved large sums of money, and corrupted one the most solemn functions of Parliament, the selection of a leader. Given his high position, multiple offending, and the amount of money involved, a starting point of six or seven years could have been justified. He is fortunate there was no cross-appeal. Mr Nari was not a leader in the same way and did not offend so many times, but we are satisfied on the evidence that he was a deputy to Mr Kalosil, helping him find recruits to receive the bribes, so the difference between his starting point and that of the other offenders was justified.

[104] The starting point for the other Members of Parliament of a total of four years' imprisonment was in our view correct, reflecting the serious nature of the crime, but the fact that they were recruited and persuaded into bribery, and were not initiators.

[105] We comment that there have been breaches of s 21 of the Leadership Code Act by all appellants in that they have accepted loans other than on commercial terms, and did not

show at the trial, when they were still facing a charge under that section, that they satisfied the lending institution's usual business criteria. While that charge and the other Leadership Code charges have been dismissed because of the procedural tangle created by the 8 October 2015 decision, the fact of breaches of s 21 demonstrates the serious nature of the offending.

[106] The Judge considered the particular mitigating circumstances relating to each offender in great detail, following the sentencing methodology set out in *Public Prosecutor v Andy* [2011] VUCA 14. In the end she saw no basis for differentiating between the appellants, deducting one year's imprisonment for personal mitigating factors. The factual material for each appellant varied widely, and all were able to point to some personal mitigating factors. Having considered the Judge's decision and the submissions made, we see no basis for interfering with her assessment.

[107] We have considered new sworn statements filed by some appellants setting out their circumstances including their medical circumstances. The new material does not persuade us that the appeals against sentence should be allowed.

Result

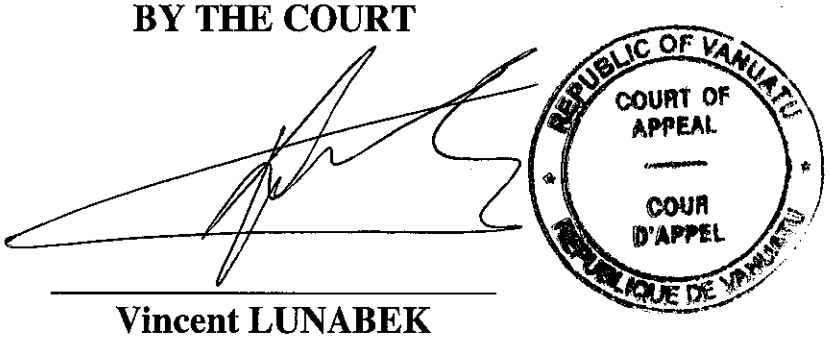
[108] The appeals against conviction are dismissed.

[109] The appeals against sentence are dismissed.

[110] The outstanding charges laid under the Leadership Code Act are dismissed by consent.

DATED at Port-Vila this 20th day of November, 2015

BY THE COURT



Vincent LUNABEK
Chief Justice