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

Civil Appeal
Case No. 20/208 CoA/CIVA

BETWEEN: CLARENCE LAVINYA NGWELE
First Appellant

AND: TERRENCE JOHN KERR
Second Appellant

AND: PETER JOHN FOGARTY
Third Appellant

AND: ISLENO LEASING COMPANY LIMITED
Fourth Appellant

AND: SENIOR MAGISTRATE PETER MOSES
Respondent

AND: PUBLIC PROSECUTOR
Interested Party

Coram: *Hon. Chief Justice Vincent Lunabek*
Hon. Justice John von Doussa
Hon. Justice Raynor Asher
Hon. Justice Dudley Aru

Counsel: *Mr R E Sugden for the Appellants*
Mr Lennon Huri for the Respondent

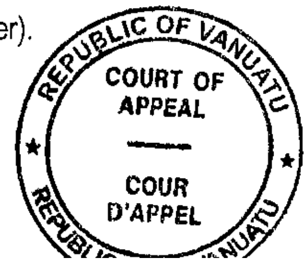
Date of Hearing: *7th May 2020*

Date of Decision: *15th May 2020*

JUDGMENT

INTRODUCTION

1. Clarence Ngwele, Terrence Kerr, Peter Fogarty, and the Isleno Leasing Company (the Appellants) together with Yoan Mariasua, are charged with making a false and misleading statement of intent to obtain money contrary to s130(c) and s30 of the Penal Code. On 25 September 2019 Senior Magistrate, Peter Moses, authorised the Appellants to stand trial in the Supreme Court at Port Vila, Vanuatu on 1st October 2019 on this charge, (the committal order).



2. On 18 October 2019 the Appellants filed a claim for judicial review in the Supreme Court of Vanuatu, seeking judicial review of the Senior Magistrate's committal order, and an order quashing the committal.

3. That judicial review application was struck out by Justice Viran Trief under rule 17.8(3) of the Civil Procedure Rules on 23 December 2019. That rule enables a judge to decide to not hear a claim if the claimant has no arguable case. She also answered other questions that are not relevant to this appeal. The Appellants now appeal the decision not to hear the case, to this court.

4. There is no question raised as to the judge's power to direct that a case will not be heard under r 17.8(3). The essence of the appeal is that the discretion was wrongly exercised, and there was an entirely arguable case for judicial review that should have been heard, and that the substantive outcome when the judicial review is heard should be that the committal order is quashed.

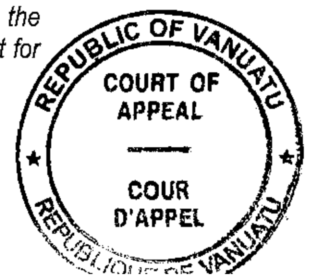
5. Section 130 of the Penal Code provides:

> "***130C. Obtaining money, etc., by false or misleading statements***
>
> *A person must not, with intent to obtain for himself or herself or another person any money or valuable thing or any financial advantage of any kind whatsoever, make or publish, or concur in making or publishing, any statement (whether or not in writing)*
>
> *(a) which he or she knows to be false or misleading in a material particular; or*
>
> *(b) which is false or misleading in a material particular and is made with reckless disregard as to whether it is true or is false or misleading in a material particular.*
>
> *Penalty: Imprisonment for 12 years."*

THE POWER TO COMMIT FOR TRIAL

6. Section 145(1) of the Criminal Procedure Code provides:

> "***145. Procedure to be followed by senior magistrate***
>
> *(1) The senior magistrate shall not be bound to hold any formal hearing but shall consider the matter without delay in whatever manner and at whatever time or times as he shall consider fit.*
>
> *(2) The senior magistrate shall decide whether the material presented to him discloses, if the same be not discredited, a prima facie case against the intended accused requiring that he be committed to the Supreme Court for trial upon information.*



> (3) *The senior magistrate shall allow, but shall not require, the accused to make any statement or representation."*
>
> [emphasis added]

7. The Court of Appeal considered this procedure in *Moti v Public Prosecutor*[1] and held that:

> *"... we are satisfied from the wording of the Section that the procedure envisaged in a preliminary enquiry is a speedy informal one primarily designed to ensure that an accused person shall not be committed to the Supreme Court for trial upon information unless a 'prima facie' case has been made out on all the 'materials' presented to the Senior Magistrate. The test in our view is **not** whether on the materials presented the intended accused should be convicted but the less stringent one of whether he could be convicted."*
>
> [emphasis in text]

8. Section 146(3) expressly prohibits the acceptance by the Supreme Court Registry of any information unless it has been 'specifically authorised' via a decision of the Senior Magistrate. It was held in *Moti* that the Senior Magistrate was not required to record its decision in writing.

9. In the case of *Moti v Public Prosecutor* it was held that in a committal hearing an accused person has the right under s145(3) to representation, and to make a statement. However, the statutory protections do not give a right to cross-examine witnesses. In that case the Court of Appeal upheld the appeal, and granted Certiorari to bring up and quash the decision of the Senior Magistrate.

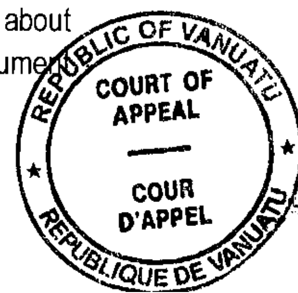
BRIEF FACTS

10. This prosecution has a long and somewhat complex background of civil litigation that we do not propose to set out. That background can be found in a number of decisions in civil cases of this Court and the Supreme Court.

11. The events in question arise out of a lease agreement relating to a commercial aircraft, entered into between the Appellant Isleno Leasing Company Limited (Isleno) and Air Vanuatu (Operations) Limited (Air Vanuatu). The lease agreement was allegedly repudiated by Air Vanuatu, and there were then civil proceedings filed by Isleno.

12. In October 2011 there were discussions between Isleno and Air Vanuatu about settling the claims in relation to the lease. On 17 October 2011 a docume

[1] [1999] VUCA 5 at page 3



referred to as a 'deed of release' was signed between Isleno and Air Vanuatu. The creation and signing of that deed of release has given rise to the criminal proceedings.

13. The deed of release provides for Air Vanuatu to pay to Isleno the sum of VT51,809,325 for 'contractual payment arrears'. It is to pay all Isleno's legal costs. Isleno is to commence all maintenance and repairs on the aircraft in question and is to commence operating the aircraft immediately. That operating of the aircraft was to be in terms of the original contract which provided that the lease rate would be VT42,000 per block hour with a minimum payment whether the aircraft was flown or not, for 50 hours. It is a background factor that it is alleged that this deed of release was highly disadvantageous to Air Vanuatu, and profitable for Isleno.

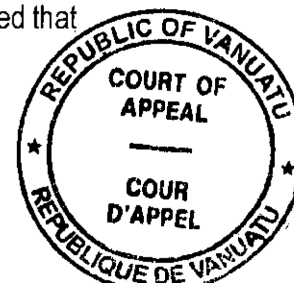
14. The particulars of the charge are that the four Appellants and Yoan Mariasua concurred in making or executing the deed of release the terms of which were false and misleading in the following material particulars:

> *"That the terms of the deed were false or misleading for the following reasons:*
>
> *(a) The terms were never agreed by [Air Vanuatu];*
>
> *(b) Peter John Fogarty acted without prior approval of the [Air Vanuatu] Board and had no authority to bind [Air Vanuatu] to the terms of the deed of release."*

15. It is stated in the charge that both Ms Ngwele and Peter Fogarty concurred in the making of the deed and signed it, that Yoan Mariasua concurred in the making of the deal and witnessed Peter Fogarty's signature and facilitated the circumstances leading to the signing of the deed, and that Terrence Kerr concurred with the making of the deed and produced a draft deed of release, most of the terms of which were adopted in the final deed.

THE BASIS OF THE APPEAL

16. The first ground of appeal covered a number of related points. It is that the deed of release was not "false or misleading" as alleged, and that, to quote, "no amount of evidence can prove that it **was**". The evidence is broadly traversed in the Appellants' submission, and it is said that this evidence does "not exclude the possibility that the Board approved the terms of the deed". This submission relates to the question of whether the Board at any stage agreed or directed that a deed of release in the terms set out, be executed.



17. Moreover, it is argued that even if there was no Board approval, it has not been established the deed was false or misleading.

18. The appellants also challenge whether the allegedly false and misleading parts of the deed could have enabled a financial advantage to accrue to Isleno. It is said there was no implied statement arising out of the deed which would fall within the charge. The Deed was a contract, containing terms not representations.

19. It is also submitted, relying on what is said to be "the rule in *Turquand's* case" that the deed was binding on Air Vanuatu, even if the Board had not approved its terms, because it was signed by its Chief Executive Officer. The "internal management" rule applies.

20. As a second ground of appeal it is said that if there was anything about the deed of release misleading as to authority to bind, Peter Fogarty had authority to sign it on Air Vanuatu's behalf and so it is binding Air Vanuatu, irrespective of express approval by the Board.

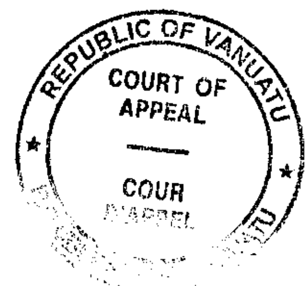
21. As the third ground it is submitted that there was no evidence of knowledge of falseness on the part of the Appellants, or was no sufficient evidence of their involvement or knowledge. There was a particular focus placed by Mr Sugden for the Appellants on the position of Terrence Kerr. He submitted that there was nothing that came close to indicating any close involvement in the signing of the deed on his part.

22. It is also said that there was no evidence of an intent to obtain money on the part of the appellants

DISCUSSION

Approach

23. It is important to bear in mind that the proceedings in question are for judicial review. This is not an appeal against the decision of the Senior Magistrate. Indeed, undoubtedly for good policy reasons there is no provision for appeal against committal, which is an initial sieving mechanism.



24. The grounds for judicial review has been variably described as falling within the three classes of illegality, irrationally and procedural impropriety[2]. Public bodies and authorities must act in accordance with the law, fairly and reasonably[3]. As we have set out, judicial review can apply to a committal order. Plainly a decision maker exercising such a power must act lawfully, and with procedural fairness. When exercising the power of committal, the senior magistrate must consider whether there is a prima facie case.

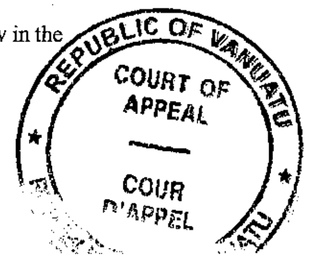
25. In the one successful judicial review decision in Vanuatu to which we have been referred, relating to a decision of a Senior Magistrate to commit, *Moti v Public Prosecutor*[4], the application was upheld because of an error of law by the Senior Magistrate. In that case, because of the age of the complainant, the appellant could never have been found guilty of the age specific charge. It was therefore not open to the senior magistrate to find a prima facie case, because Mr Moti could not be convicted. The decision to commit was unlawful in the sense that the legal test for committal, a prima facie case, was plainly not met. Similarly here, if the Senior Magistrate could be shown to have no material before him upon which the Appellants could be convicted, judicial review could be available in respect of the committal.

26. In essence this is the nature of the appellants' challenge to the Senior Magistrate's decision. There are no specific allegations of procedural unfairness. The general submission of Mr Sugden for the appellants is that the senior magistrate should not have committed the Appellants because there was before him insufficient evidence to establish a prima facie case.

27. We emphasise that as the Supreme Court judge recognised, the task for a judge considering judicial review was not to read and analyse all the evidence that was before the senior magistrate, as if it was an appeal. The appellants had to show the Court on Review, as they did in *Moti,* that it was not open to the Senior Magistrate to find there was a prima facie case; that the appellant could not be convicted. The Supreme Court judge struck out the claim because it was not arguable that there was insufficient evidence to establish a prima facie case against the appellants. The appellants were unable to show that they could not be convicted.

The evidence before the Senior Magistrate

[2] To *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (HL) at 410-411
[3] Sir Robin Cooke *"The Struggle for Simplicity in Administrative Law"* in M Taggart (Ed) Judicial Review in the 1980s: Problems and Prospects, Oxford University Press, Auckland 1986 at 17
[4] [1999] VUCA 5 at page 3



28. The Senior Magistrate had before him submissions of the Principal State Prosecutor, Simcha Blessing, (the Prosecutor's submission). That submission involved the consideration of over 1,600,000 "evidentiary documents".

29. In addition to referring the Senior Magistrate to all these evidentiary documents, the Prosecutor's submission in a 63 page document summarised all that evidence. References were provided to the documents and the evidence supporting each of the elements of the charges against each of the Appellants. The Prosecutor's submission is a very detailed document, and all the referrals to the evidence are clearly referenced. There is nothing to suggest that this material was not examined by the Senior Magistrate.

30. There has been no attempt by the appellants to analyse the various documents that were before the senior magistrate, and only a very general summary of the Appellants' criticism of the strength of the evidence has been provided to us.

The evidence of false and misleading statements

31. We do not accept that the deed of release does not contain a number of relevant statements, as distinct from contractual terms. First, it states at recital B that "the parties have agreed to settle their differences on the terms hereinafter appearing".

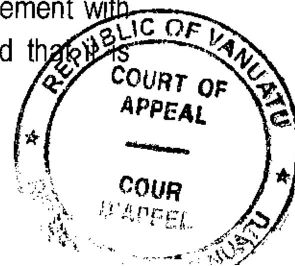
32. Second, it says in the acknowledgement at 8(b) "each has entered this deed voluntarily and without any involvement, compulsion, duress or undue influence". The meaning of this statement is plain.

33. Third, it is said in the execution page beside where Peter Fogarty has signed as acting CEO:

> *"Signed by Air Vanuatu (Operations) Limited (Releasee) by its duly authorised representative*
>
> *In the presence of:"*

34. Mr Mariasua has signed as the witness. Both Mr Fogarty and Mr Mariasua appear to have written out their names.

35. It could be said of the first statement that it is represented as a matter of fact Air Vanuatu through its Board of Directors wished to enter into a settlement with Isleno on the terms of the deed. It could be said of the second that it is



represented as a matter of fact Air Vanuatu was entering a deed voluntarily and thus of its own volition, and with full knowledge. It could be said of the third that it is represented as a matter of fact the Board of Air Vanuatu had expressly authorised Peter Fogarty to sign the deed of release, and that Mr Mariasua, who was the Chair of the Board and a witness, was supportive of that position. It could be said further that Ms Ngwele had signed the deed of release as the duly authorised representative of Isleno, and insofar as she had any knowledge of the involvement of the Air Vanuatu Board, it could be argued that she was a party to these false representations about the Board voluntarily approving the settlement and the deed.

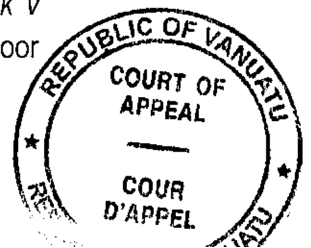
36. Therefore it is arguable that all these critical statements can be sheeted home directly or on the basis of party liability to Ms Ngwele, Mr Fogarty, Mr Mariasua, and through the involvement of directors of Isleno, to Isleno itself.

37. Thus, on the face of the deed itself, without further evidentiary support, there is a prima facie case of statements of fact being made in the Deed of Release against all the Appellants except Mr Kerr. That arguable case is strengthened by all the evidence referred to in the prosecutor's submissions, presented to the Senior Magistrate, which shows close links with all the appellants to Isleno and each other.

38. Is there a prima facie case that the statements are false? An indication as to the knowledge and approval of the Deed could be expected to appear in the Board minutes at the relevant time. However, the Board minutes do not appear to support an argument that the Board was supportive of the deed of release and wanted to settle on the basis of the terms of that deed of release. The minutes at the relevant time could be construed as indicating that that the parties were still far from reaching agreement. Those minutes were before the Senior Magistrate.

39. Mr Sugden argued that there was a possibility that the Board had approved the terms of the deed. But his primary focus was that even if there was no Board approval, the evidence did not show that the deed could be seen as false or misleading. For the reasons we have given we are quite unable to accept this submission. It could well be that the prosecution does ultimately fail to prove the charges. But it cannot be said there is no prima facie case. In our view there was such a case on the material before the Senior Magistrate.

40. We do not consider that the rule in *Turquand's* case (*Royal British Bank v Turquand* (1856) 6 EL & BL 327), sometimes referred to as the indoor



management rule, assists. It is true that Mr Fogarty, the acting CEO, signed the Deed, and that a genuine outsider would have no obligation to check that he was authorised to sign in terms of the company articles and policies. But the Prosecution argues that Mr Fogarty with the other appellants was part of the fraud, and appointed wrongly to ram the deed through knowing it was not approved by the Board. It is basic that the indoor management rule cannot be used as an engine for fraud. The rule enables those dealing with a company to rely on the ostensible authority of a director. But it can be of no assistance to a third party dealing with a company who knows of the detail of the directors' authority, and of any limitations on that authority.

41. As Justice Wright stated in *B Liggett (Liverpool), Limited v Barclays Bank, Limited:*[5]

> *"[t]he rule proceeds on a presumption that certain acts have been regularly done, and if the circumstances are such that the person claiming the benefit of the rule is really put on inquiry, if there are circumstances which debar that person from relying on the prima facie presumption, then it is clear, I think, that he cannot claim the benefit of the rule."*

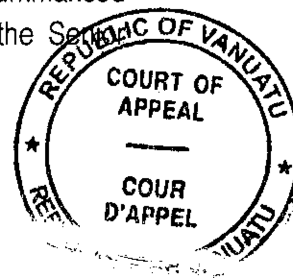
42. In this case it is at the core of the prosecution that Ms Ngwele, Mr Fogarty, Mr Mariasua and Mr Kerr all knew that the Board had not authorised Mr Fogarty to sign the deed in these terms; that they were not just on enquiry but knew the true postion. In those circumstances they are plainly unable to rely on the rule.

43. Mr Sugden argued that there was no prima facie case of intent to obtain money through the statements. We cannot agree. Plainly the contract with Air Vanuatu would provide a large additional sum for Isleno, and an income stream. It is the Prosecution case that in one way or another all the individual Appellants were connected to Isleno. On a prima facie basis a flow of money to the company could be seen as a flow of money to them. In terms of section 130C the action of getting a deed of release signed could be seen as providing them with a "valuable thing" or a "financial advantage of any kind".

Mr Kerr's position

44. Mr Kerr was in a different position from the other Appellants in that he has not signed the deed of release. However, there was evidence before the Senior Magistrate that he was involved in the signing of the deed. This was summarised at pages 33 – 36 of the prosecution's submissions, handed to the Senior

[5] [1928] 1 KB 48 at 56-57



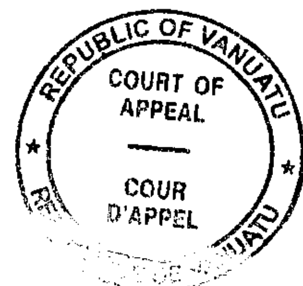
Magistrate. The particular matters connecting Mr Kerr to the deed of release included:

- Water, electricity and other bills in the names of both Ms Ngwele and Mr Kerr at the relevant time, indicating that they were living together.
- Common knowledge that they were de facto partners.
- An email of 9 May 2011 between Mr Kerr and Ms Ngwele which appears to forward the deed of release.
- Mr Kerr had been actively involved in managing the aircraft.
- Evidence of a close relationship between Mr Kerr and Peter Fogarty as well as Ms Ngwele.
- Mr Kerr was sent material in the name of Mr Mariasua on 19 October 2011 undermining a Board member, Simeon Athy, who was not in favour of the settlement.

CONCLUSION

45. The Appellants have failed to show any error on the part of the Supreme Court judge in deciding that the judicial review application could not succeed. We agree with her conclusion that the judicial review application was doomed. There had been no material put before the Court which showed that the Senior Magistrate acted unlawfully or was guilty of any procedural unfairness, or indeed any other error, when he determined that there was a prima facie case and committed the Appellants on the charge.

46. We emphasise that in reaching this conclusion we do not express any view on the merits of the prosecution itself. It may well be that when the prosecution goes to trial, the prosecution will be unable to prove the elements of the charge. What we do determine is that the Senior Magistrate had material before him which provided a lawful basis for him to commit the Appellants for trial on the charge in question.



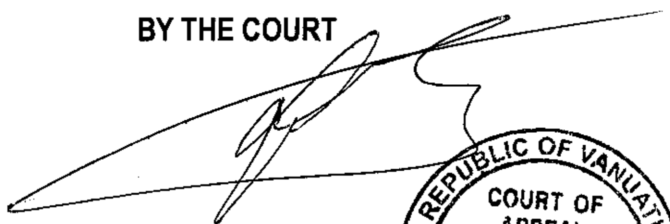
RESULT

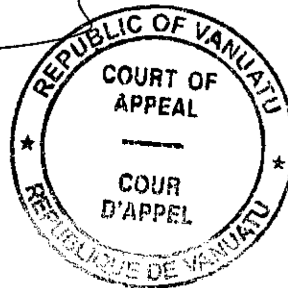
47. The appeal is dismissed.

48. The respondent seeks costs of VT 30,000. Cost will follow the outcome, and we order that costs of VT 30,000 to be paid by the unsuccessful appellants to the respondent.

DATED at Port Vila this 15th day of May, 2020.

BY THE COURT





Hon. Vincent Lunabek
Chief Justice.