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

Criminal Appeal
Case No 20/3532 COA/CRMA

BETWEEN **Public Prosecutor**
Appellant

AND **Charlot Salwai Tabimasmas**
Matai Seremiah
Jerome Ludvaune
Tomker Nedvunie
Respondents

CORAM:	*Hon. Chief Justice Vincent Lunabek* *Hon. Justice J. Mansfield* *Hon. Justice J. W. Hansen* *Hon. Justice O. A. Saksak* *Hon. Justice D. Aru*
COUNSEL:	*Mr. J. Naigulevu for the Public Prosecutor* *Mr. D. Yahwa for First-, Third- and Fourth-named Respondents* *Mr. G. Blake for Second-named Respondent*
DATE OF HEARING:	*8 February 2021*
DATE OF JUDGMENT:	*19 February 2021*

JUDGMENT OF THE COURT

Background

[1] This is succinctly set out in the Judge's decision. In November 2016, 27 members of Parliament signed a motion of no confidence in the Government of Vanuatu. To defeat the motion, the first and second-named respondents are alleged to have offered parliamentary appointments to the third and fourth-named respondents so they would withdraw their support for the motion and vote with the Government, therefore consigning the motion of no confidence to defeat. There was evidence before the Judge that this had been a long and enduring practice in Vanuatu where a government tries to remain in place, and in the vernacular is described as a "reshuffle". The third-named respondent was offered the position of Minister of Health, and the fourth-named respondent the position of Parliamentary Secretary to the Minister of Fisheries. The posts were accepted, and they withdrew their support for the motion.

[2] Consequently, the motion of no confidence was defeated, with several the signatories changing their allegiance. The government of the day continued in power and eventually completed its four-year term.

[3] The charges ultimately laid encompass ss 73and 75 of the Penal Code and s 23 and 24 of the Leadership Code Act. It is convenient to set out the provisions of those clauses now:

73. 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.

75. Offence of perjury

No person shall commit perjury.

Penalty: Imprisonment for 7 years.

Leadership Code Act

23. Bribery

A leader must not:
(a) corruptly ask for or receive; or
(b) agree to ask for and obtain; or
(c) corruptly offer,
any money, property or other benefit or advantage of any kind, for:
(d) himself or herself,
(e) another person or body,
(f) in exchange for his or her act or omission as a leader being influenced in any way, directly or indirectly.

24. Conflict of interest

A leader who has a conflict of interest in relation to a matter must not act in relation to the matter or arrange for someone else to act in relation to the matter, in such a way that the leader or a member of his or her close family benefits from the action.

[4] The trial commenced and the prosecution concluded its case on Friday 4 December 2020. No applications were received from the defence, and the Judge ruled there was a case to answer on each of the charges. He considered the matter further over the weekend, and on Monday 7 December, issued a minute (AB39). In that minute he set forward the ingredients of the various charges, and no issue has been taken with those. In the charges pursuant to s 73 Penal Code and s 23 Leadership Code, one of the essential ingredients was the term "corruptly". The Judge

sought submissions from prosecution and defence whether all the ingredients required had been established on the normal "no case to answer" criteria.

[5] He also sought submissions on a statement in *Field v R* that, "A bribe is corruptly accepted if in accepting the bribe the particular Member [of Parliament] is knowingly outside the recognised bounds of his or her duties."[1] He invited counsel to address these issues the next day, 8 December, either in writing or orally. Having heard submissions, the Judge ruled that in relation to charges 1–10, the prosecution had failed to establish a case to answer. In relation to charge 11, he found there was a case to answer. In that ruling of 8 December, the Judge found that corruption had not been established on any of the charges 1–10; and found the respondents not guilty and acquitted of those charges that they faced.

[6] The Public Prosecutor appeals that decision. It is said that the Judge was functus officio when he required and then considered the no case submissions; that he erred in law and fact when he ruled the prosecution had failed to establish the matters needed in respect of counts 1–10; that the judge erred in law and fact when he overlooked and/or failed to take into consideration all relevant evidence pertaining to the elements of the offences in counts 1–10; and the primary Judge erred in law and fact when deciding the prosecution had not established the element of corruption.

Submissions

[7] Mr Naigulevu stated that on reflection he could not properly advance the first Ground of Appeal that the judge was *functus officio* and abandoned that ground. That was a wise decision.

[8] Next, the Public Prosecutor submitted that the Judge had misunderstood and misapplied the law as to the application of s 164(1). The respondents, on the other hand, said that the Judge's approach was in accord with established authority, and he correctly applied the law.

[9] The next ground was the Judge overlooked evidence. The public prosecutor relied heavily on *Kalosil v Public Prosecutor* [2015] VUCA 43 and said what occurred here was the corrupt offer of a bribe. He relied on the prosecution evidence relating to urgency with which offers, and acceptance, of positions was done and the unusual hours of some of the meetings.

[10] Mr Naigulevu also said that having read the Supreme Court decision in *Field* he could not maintain his acceptance of the test from the Court of Appeal decision in *Field* adopted by the Judge. He said to do so would be import a test into Vanuatu law that added an incorrect gloss to the legislation. He submitted that the New Zealand legislation being considered in *Field* was significantly different from the Vanuatu legislation being considered.

[11] The respondents submit the public prosecutor failed to assert the Judge had failed to consider direct or circumstantial evidence. The respondents submitted there was a complete absence of direct evidence to establish corruption and the doctrine of reasonable hypothesis need to be applied to the circumstantial evidence that was relied on by the prosecution. They are also critical

[1] *Field v R* [2010] NZCA 556, [2011] 1 NZLR 784 at [64].

of the public prosecutor seeking a different definition for "corruption" for that in *Field*, which he had accepted at the no case stage.

Discussion

[12] Both parties rely on the decision of this Court in *Public Prosecutor v Suaki* [2018] VUCA 23. There, this Court stated:

> *"11. ... It seems to us therefore that a consideration of a "no case to answer" by the judge's own motion or a submission of "no case to answer" ought to be upheld in trials on indictment if the judge is of the view that the evidence adduced will not reasonably satisfy a jury (judge of fact), and this we think will be the case firstly, when the prosecution has not led any evidence to prove an essential element or ingredient in the offence charged and secondly, where the evidence adduced in support of the prosecution's case had been so discredited as a result of cross-examination, or so contradictory, or is so manifestly unreliable that no reasonable tribunal or jury might safely convict upon it."*

[13] Further, at 15, this Court referred to *Fong v The Attorney General of New Zealand* [2008] NZCA 425, which stated (at 53):

> *"Flyger and Parris contemplate a limited qualitative assessment of the prosecution case, under which a s.347 discharge is appropriate even where there is an evidential basis for a verdict of guilty if the relevant evidence is "so manifestly discredited or unreliable that it would be unjust for a trial to continue" (the words used in Flyger) and the case is thus "clear-cut in favour of the accused" (as it was put in Parris). The approach taken in Parris also brings into play the recent jurisprudence on s.385 appeals, see R v. Munro [2008] 2 NZLR 87 (CA) and R v. Owen [2008] 2 NZLR 37 (SC)."*

[14] We see nothing in the ruling of the Judge to suggest he did not approach his decision with other than the correct statement of principles in mind.

[15] Grounds 3–4, relating to evidence being overlooked or not taken into consideration and whether the element of corruption had been established, overlap.

[16] In his ruling the Judge referred to *Field v R* [2010] NZCA 556 and the following statements:

> *"[58] ... In our view, corruption is conduct conducive to a breach of duty; it may or may not involve dishonesty or fraud. ...*
>
> *[64] ... A bribe is corruptly accepted if in accepting the bribe the particular Member [of Parliament] is knowingly outside the recognised bounds of his or her duties."*

[17] The Judge recorded that the Public Prosecutor accepted that analysis of the New Zealand Court of Appeal as a correct statement of the law in Vanuatu and having application to this case. The Judge, in his ruling, continued:

"27. *All Members of Parliament in November 2016 would have been expected to support, oppose, or abstain in relation to the Motion of no confidence. The fact that D3 and D4 had initially supported the motion did not in any way bind them to continue to do so. They were persuaded to change their minds, and that was done by offering the inducement of certain Parliamentary positions, which they accepted.*

28. *However, in order for that to comprise criminal conduct, the offers had to be made "corruptly" and had to be accepted "corruptly.*

29. *What occurred, on the evidence, cannot be so characterised. D1 and D2 were concerned with the stability of Government — that was the driver behind their conduct. They sought nothing untoward in return, simply a vote in support of the existing Government. D3 and D4 did no criminal acts, nor did they act in any way contrary to their Parliamentary obligations or duties. They accepted a better position of employment in return for changing their vote. Re-shuffles such as occurred here are apparently not uncommon.*

30. *To be corrupt, the prosecution had to establish evidence that what occurred, on the part of all 4 Defendants was "...outside the recognised bounds of their duties" as Parliamentarians. ..."*

[18] As noted, the appellant submitted that the subsequent Supreme Court decision in *Field* meant that the statement of law relied on by the Judge, and previously accepted by him, could no longer stand. He also submitted that the statement at [64] of the Court of Appeal decision in *Field* is too broad and has no application in Vanuatu. He submitted because the Vanuatu legislation is different from the New Zealand legislation, to apply the test prescribed by the Judge from *Field* was to add something into Vanuatu law that does not exist.

[19] It is true that there are differences between the two sets of legislation. The New Zealand legislation being considered in *Field* is aimed specifically at Members of Parliament. The Vanuatu legislation is expressed more broadly and extends to all public officials. However, having said that, there is a great deal of similarity between the relevant sections.

[20] In the Supreme Court in *Field* the Court was focussed on a somewhat narrow point that focussed on "gratuities" after the event. However, there are statements that are helpful given the careful review of similar legislation in England, Canada and New Zealand and the authorities starting with *Cooper v Slade* in in 1858.

[21] In a lengthy passage considering the issue, the Supreme Court stated:[2]

"[52] The authorities in relation to such provisions can be best divided into two relevant categories: first, those dealing generally with what must be established to show that a defendant has acted corruptly and, secondly, those dealing specifically with what is in issue in the present case, that is, whether the receipt of an after-the-event reward is corrupt in the absence of an antecedent bargain or promise.

[53] There are some cases in the first of the categories just discussed where the courts have read more into the word "corruptly" than Lord Cranworth and Willes J. In these cases, the judges have looked for something which could be regarded as dishonest or dishonourable, or perhaps some obviously improper action on the part of the official concerned.[58] Predominantly, however,

2 *Field v R* [2011] NZSC 129; [2012] 3 NZLR 1; (2011) 25 CRNZ 693 (27 October 2011)

the approach of Lord Cranworth and Willes J has been adopted. Amongst the relevant cases is R v Smith,[59] where the appellant's defence to a charge of corruptly offering a bribe was that he had done so simply for the purpose of exposing corruption. In dismissing his appeal, the Court referred to the conflict of opinion in Cooper v Slade between Willes and Coleridge JJ and preferred the approach taken by Willes J.[60] Another similar case is R v Wellburn,[61] which involved a prosecution under s 1 of the Prevention of Corruption Act 1906 (UK). The recipient of the alleged bribes was an army officer and the other defendants worked for a radio equipment supplier which wished to supply equipment to the Iranian government. A possible view of the evidence was that the recipient had acted as an intermediary between the supplier and people on the Iranian side of the transaction in circumstances where a contract could not be secured without the payment of bribes to the relevant Iranian officials. The Recorder of London, taking his guidance from Smith (and through Smith from Willes J), rejected the argument that the Crown had to show that the other defendants had dishonestly intended to weaken the recipient's loyalty to the Crown[62] and, instead, summed up in this way:[63]

> *"Corruptly" is a simple English adverb and I am not going to explain it to you except to say that it does not mean dishonestly. It is a different word. It means purposefully doing an act which the law forbids as tending to corrupt.*

In upholding the convictions, the Court of Appeal disapproved of the more open-textured approaches taken in other cases[64] and followed Smith, again adopting the remarks of Willes J.[65] To the same broad effect is R v Godden-Wood.[66] Finally, there is the judgment of the Privy Council in Singh v State of Trinidad and Tobago[67] in which the Privy Council expressly endorsed[68] the approach taken by Willes J in Cooper v Slade including his assertion that word "corruptly" encompasses:

> *[15]... purposely doing an act which the law forbids as tending to corrupt voters, whether it be to give a pecuniary inducement to vote, or a reward for having voted in any particular manner.*

Also endorsed by the Privy Council was the conclusion of Willes J that in the circumstances just postulated:

> *Both the giver and the receiver in such a case may be said to act "corruptly".*

[54] The Canadian cases have taken broadly the same approach as that adopted in the cases discussed in the preceding paragraph. In particular, the Canadian courts have generally adopted the view of Lord Cranworth and Willes J in Cooper v Slade,[69] albeit that in secret commission cases the concept of corruption which is invoked necessarily includes non-disclosure by the agent to the principal.[70] There is thus no requirement to show anything akin to a corrupt bargain.[71]"

[22] The effect of this is that "corruptly" is to be given its ordinary meaning. The breadth of circumstances that could apply show that it is unproductive to try to burden a word in common usage with restrictive meanings and rules. As the Supreme Court said of the Court of Appeals statement in *Field* set out at [16] above it is a comment. But it can also be a helpful comment in assessing the improper behaviour to see if it has been carried out "corruptly".

[23] The evidence clearly shows that "reshuffles" are a feature of parliamentary democracy in Vanuatu. Indeed, a Court can take judicial notice that such occurs in almost all parliamentary democracies especially those whose systems often lead to coalition governments. It is not open to suggest that once a motion of no confidence was signed by the requisite number of members, a Prime Minister would simply sit back and allow the motion to proceed. Any Prime Minister is going to attempt to

defeat the motion, and in our view the evidence clearly showed that what occurred here was political manoeuvring. In it, the Prime Minister was successful, and the stability of the Vanuatu Government was maintained. It is important to note that it cannot be seriously suggested that once members have signed a motion of no confidence, they are unable to change their mind and must vote in accordance with the motion. Members are at perfect liberty to change their mind, to withdraw their support for the motion, or even to vote against it when it came before the parliament.

[24] We are quite satisfied that whether one applied the formulation relied upon by the Judge, that urged on us by Mr Naigulevu or by simply applying the common meaning of "corruptly", as the authorities reviewed by the Supreme Court in *Field* suggest, the outcome would be the same. The respondents did not act corruptly in terms of the relevant legislation, and in terms of *Wellburn*, the law does not forbid the political manoeuvring that went on here. To apply Mr Naigulevu's approach to its logical conclusion would mean that offers of position during coalition discussions and agreements would be caught as corrupt and be criminal offending. We do not accept it was the intention of the legislature to turn political manoeuvring into criminal behaviour. Having said that the correct test in Vanuatu must be to construe the word "corruptly" in its ordinary meaning.

[25] We would also add that when such motions are before a parliament in any country, it is not surprising that there are urgent and indeed late-night meetings. The inferences sought to be drawn from those facts by the appellant are untenable.

[26] In relation to the evidence, Mr Naigulevu relied heavily on the decision in *Kalosil* at paragraphs 33–39. *Kalosil* is a case well removed from the present. It was a case where bribes of VT1 million were paid, purporting to be loans which, on the evidence, they clearly were not. The evidence here is that what occurred was an attempt by the first two respondents to maintain political stability. The practice of offering parliamentary positions is apparently longstanding in Vanuatu. The 3rd and 4th respondents, as with other members of parliament, were entitled to change their mind. Furthermore, it is important to note this was all carried out quite transparently by those involved and was widely reported in the media.

[27] Furthermore, as the respondents submit, the doctrine of reasonable hypothesis is relevant. In *R v Baden-Clay* [2016] HCA 35 the High Court of Australia said:

> *"The prosecution case against the respondent was circumstantial. The principles concerning cases that turn upon circumstantial evidence are well settled.[3] In Barca v The Queen,[4] Gibbs, Stephen and Mason JJ said:*
>
> > *"When the case against an accused person rests substantially upon circumstantial evidence the jury **cannot** return a verdict of guilty unless the circumstances are 'such as to be inconsistent with any reasonable hypothesis other than the guilt of the accused': Peacock v The King.[5] To enable a jury to be satisfied beyond reasonable doubt of the guilt of the accused it is necessary not only that his guilt should be a rational inference but that it should be 'the only rational inference that the circumstances would enable them to draw'..." [emphasis added]*

3 *Barca v The Queen* (1975) 133 CLR 82 at 104; [1975] HCA 42.
4 (1975) 133 CLR 82 at 104; [1975] HCA 42.
5 (1911) 13 CLR 619 at 634; [1911] HCA 66.

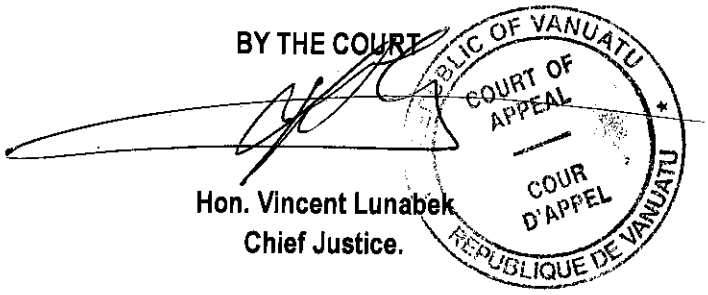
[28] Quite clearly, the finder of fact could draw a rational inference that the motivation for the offering of parliamentary posts was the stability of government, and that is clearly not corrupt. Other than the references to the timing of meetings, and the urgency, no other hypothesis has been advanced by the prosecution. It is a long bow to suggest that corruption is established by urgency and late-night meetings. Virtually all democratic institutions facing a vote of no confidence would have meetings with urgency and, of necessity, at odd times. That goes no way towards establishing corruption, and indeed, as the respondents submitted, in analysing the accepted test of "no case to answer", the evidence for the prosecution has been so discredited to the extent no reasonable tribunal could convict on it. (*Suaki*).

[29] It follows that the Judge has applied the correct test to the "no case to answer" decision, and we are quite satisfied he was correct in concluding that the prosecution had failed to lead any direct or circumstantial evidence to show the actions were done "corruptly". There is nothing in relation to the circumstantial evidence to suggest that the non-corrupt motive of the stability of government was not rationally available to the decider of fact.

[30] The appeal is dismissed.

DATED at Port Vila, this 19th day of February 2021

BY THE COURT



Hon. Vincent Lunabek
Chief Justice.