IN THE SUPREME COURT OF THE REPUBLIC OF VANUATU
(Criminal Appeal Jurisdiction)

Criminal Appeal Case No. 3090 of 2016

BETWEEN: PUBLIC PROSECUTOR
Appellant

AND: MARIA SALVACION GURAY
Respondent

Before: ***Justice Chetwynd***
Counsel: ***Mr Boe for Appellant***
Mr Takau for Respondent

JUDGMENT

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1. This is an appeal from the Magistrates' Court by the Public Prosecutor pursuant to section 200(3) of the Criminal Procedure Code [Cap 136]. The judgment being appealed is dated 12th September 2016. On 12th September the Magistrate made an order that "*this matter is dismissed*". The matter was a criminal case involving the Respondent.

2. On 22nd August 2016 the Respondent was charged with 26 counts alleging theft and/or misappropriation from her employer. She appeared before the Magistrates' Court on 22nd August when the Public Prosecutor made an application for a remand in custody. The application was granted, the Respondent remanded and the case listed for mention on 5th September, some 14 days later. On 26th August the Respondent appeared before the Supreme Court on an application for bail. She was granted conditional bail and ordered to appear before the Magistrates' Court on 5th September. The Respondent was represented by Mr Takau at all times.

3. When the Respondent appeared on 5th September the Public Prosecutor asked for a further week to prepare the Preliminary Investigation bundle. The application was granted and the Respondent was bailed to appear on 12th

September for a PI hearing. That is all that is apparent from the notes made by the Magistrate on 5th September. A more detailed note of what occurred on 5th September appears in the Magistrate's type written ruling dated 13th September.

4. That ruling records that the Prosecutor and Defence Counsel appeared in Chambers and :

> *"In Chambers the Prosecutor with confidence, confirm to the Court and the Defence counsel that the investigation is completed however he needs a further one week to compile the documents together (PI bundle) then the matter will be ready to proceed to PI hearing."*

The ruling then goes on to say there was no objection from the defence and as a result the case was listed for a PI on 12th September. The prosecutor was directed to serve the defence with the PI documents, *"...before the said date for hearing".*

5. The case was heard in Chambers apparently on 12th September 2016 when both counsel for the prosecution and counsel for the defence appeared. The Prosecutor informed the Court that he did not have the case file. He told the Magistrate it was with the police officer who was conducting the investigation into the case on another island. The Prosecutor admitted that on 5th September he had mistaken the case for another he was involved in. He had not, apparently, been in possession of the case file then either. He asked the Magistrate to adjourn to a date after 23rd September so he could check what was happening.

6. Defence counsel objected to the application saying that his client was innocent until proven guilty and that as the Prosecutor was unable to properly inform the Court of the status of the investigation it would be unfair, *"...considering her circumstances".* No real details of those circumstances are noted but it is clear one of the reasons she was remanded on 22nd August was because she was a Pilipino national. Whether that was a circumstance referred to by the Magistrate on 5th September is unclear.

7. In his type written ruling the Magistrate made some findings. He said the Prosecutor had mislead the Court and Defence counsel into believing the

investigation was complete The Prosecutor had appeared on two occasions without the case file. There was no evidence to show the Prosecutor had made any effort to contact the investigating officer. As a result, on the 12th September the Prosecutor was in no better position to advise the Court about the status of the case than he had been earlier. The Magistrate was concerned he was being asked to adjourn the case without any certainty that on the new return date the Prosecutor would have any more information about the status of the case. It would appear it was on that basis the Magistrate made his ruling.

8. He made a number of rulings in fact but there is no need to deal with them individually. What the Magistrate basically ruled can be summed up by noting he ruled a person is innocent until found guilty and that all criminal charges are the same with the, *"seriousness of the offending"* being decided after conviction. He determined that Prosecutors were coming to Court to ask for remands based on the seriousness of the offence yet those Prosecutors did not know the details of those cases where they were seeking remands. The Magistrate felt such actions were unfair to the accused especially when the accused was subject to strict bail conditions and when there was likely to be no progress, in case management terms, at the adjourned hearing.

9. I have sympathy for the learned Magistrate. It ***can*** be very frustrating when counsel appear in court either unprepared or ill-prepared. It ***is*** unfair that someone whose guilt has not been established has their freedom restricted or even curtailed by reason of stringent bail conditions or remands in custody. However, in this appeal I have to say the Magistrate appears to have reached his decision rather too hastily. Just about everyone can quote the old adage about justice delayed being justice denied but, as is often the case in the law, how true that adage is depends very much on the circumstances of each case. As the Court of Appeal put it in the case of *Emelee* [1]:

> *"The consideration of delay was not a mathematical calculation but had to be determined according to the particular facts of each case. "*

The Court went on to say:

[1] *Public Prosecutor v Emelee* [2005] VUCA 31; [2006] 2 LRC 76 (6 June 2005)

"The charges of conspiracy to defeat the course of justice are serious ones and it seems that the accused are persons of some substance holding offices of significance. It is our view that there is legitimate public interest in public order in ensuring that such matters against such individuals are dealt with appropriately by the court. There must be a balance struck between consideration of human rights protection and the legitimate public interest in bringing offenders to account. The judge, in discharging the respondents, gave an entirely disproportionate response to the delay as alleged where there was no prejudice established, to which we shall shortly refer. In the instant case the appropriate balance clearly favoured the legitimate public interest because the delay generated by those other than the respondents was minimal and certainly not unreasonable."

The prejudice referred to was dealt with this way:

"We are also unanimously of the view that the original application to strike out was misconceived. The issue was an alleged breach of a fundamental right enshrined in the Constitution namely Article 5 (2) (a) which provides for the right to a fair hearing within a reasonable time. Such a breach must be considered under the terms of Article 6 of the Constitution which provides:-

"(1) Anyone who considers that any of the rights guaranteed to him by the Constitution has been, is being or is likely to be infringed may, independently of any other possible legal remedy, apply to the Supreme Court to enforce that right.
(2) The Supreme Court may make such orders, issue such writs and give such directions, including the payment of compensation, as it considers appropriate to enforce the right."

The application must be formulated and heard in terms of the Constitutional Application Rules 2003, which require a sworn statement by the applicant under r. 2.3(2) (a). No such document was ever filed in this case and consequently there was no evidence of any other detrimental or prejudicial

effects to the respondents other than the delay complained about. This must be the process to be followed in future cases where there are questions of breaches of constitutional rights raised.

10. The issue of delay was also dealt with in the case of *Dawson v Public Prosecutor* [2010] VUCA 10; Criminal Appeal Case 05 of 2009 (30 April 2010) which in turn referred to *Swanson v. Public Prosecutor* [1998] VUCA 9. These cases all confirm that there are no set rules or tariffs and that where:

"...there is a substantial period of delay the Court must carefully scrutinize the total circumstances to ascertain whether by reason thereof the process has lost the integrity which is an essential aspect of a judicial system which will enjoy public confidence."

11. In the present case and in all the circumstances the possible "delay" of one month between charge and likely PI hearing was not excessive or even substantial. There was no suggestion the Respondent would suffer real or substantial prejudice. The Magistrate did say he considered it would be *"unfair"* to delay a case where a Defendant was, "... *on remand or is under strict bail conditions and his/her liberty is taken for granted".* Unfortunately there was no analysis by the Magistrate of what *"strict"* bail condition in this case would be unfair because of delay and why that would be so. The record shows the Respondent had been ordered to surrender her passport to the Supreme Court; to remain on Efate; to live at an address at Tassiriki, Port Vila; to be of good behaviour; not to approach within half a kilometre of Bauerfield Airport, report to the police Monday, Wednesday and Friday, and appear in court when summoned. The conditions were not particularly onerous and whilst her freedom of movement was restricted to a degree, the Respondent was free to apply for a variation of the conditions at any time. There was no suggestion by Counsel for the defence that the bail conditions were unreasonable given the nature of the charges and his client's circumstances.

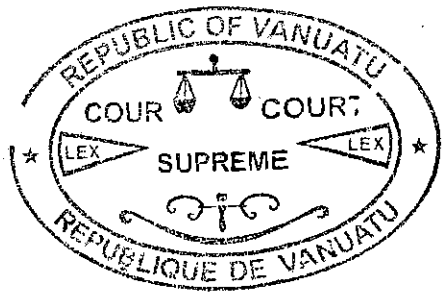
12. Although it is very tempting to banish time wasters from your court by dismissing cases, Magistrates (and indeed judges because they too are disposed to feel the same way) must guard against such action when, in reality, the purpose in

doing so is not to promote the interests of justice but to punish the person for wasting your time. What should have happened in this case was for the Magistrate to have granted the Prosecutor's application to adjourn but with a strong warning that unless he was in a position to actually tell the Court what was going on at that adjourned hearing, he would have to face the probability the case would be dismissed.

13. The Magistrate does not appear to suggest the Prosecutor deliberately mislead the Court, that ***would*** be a serious matter which would need to be pursued with the Public Prosecutor as a disciplinary issue, he seems to be more concerned at what might be termed the cavalier attitude towards preparation which he sees as becoming prevalent in cases before him. This too is something which could be raised with the Public Prosecutor, not so much as a disciplinary matter but more so as a best practice issue. Whilst delay which results in the prosecution process losing integrity most likely will result in a case being dismissed, public admonishment of defaulting counsel is to be preferred as a means of trying improve best practice before the Courts

14. It is should also be noted that whilst the Magistrate is correct in saying Courts must adopt an even handed approach in the administration of justice, the seriousness of the alleged offending is a factor taken into consideration where it is contended there has been undue delay. Cases involving many charges or complicated facts with many witnesses cannot always be treated the same as say a simple case of careless driving. In the present case there were already a large number of charges before the Court spanning a period of 2 years. There also seems to be a suggestion that investigations were required in other provincial areas. There is no certain indication as to when the investigation began but as the charges cover the period to April 2016 it is reasonable to assume it started round about that time.

15. Another factor to take into account is that the courts can and have taken delay into account when sentencing. The recent cases of *PP v. Meltek* [2016] VUSC.120 and *PP v. Toame* [2016] VUSC.146 illustrate that principle in action.



16. So far as section 15 of the Penal Code [Cap 135] is concerned, the cases referred to above [2] and the section itself make clear that the time limits set out in ss. (a), (b) and (c) only relate to the period before a prosecution is commenced. It is not authority for the proposition a prosecution can extend over the time scales set out in the section. Once a prosecution has commenced there is an obligation on both the prosecutor and the court to complete it in a timely manner.

17. In all the circumstances the order by the Magistrate cannot stand and must be quashed. The case should be called on for a PI as soon as possible and it should proceed in the usual manner thereafter. As the Magistrate dismissed the charges and discharged the Respondent she is going to have to be summoned to court for the PI. The question of bail will also have to be addressed afresh. One might assume there is a presumption conditional bail would be granted on the same terms as those which applied before discharge but that, of course, is a matter for the Magistrates' Court.

DATED at Port Vila this 24th day of November 2016.

BY THE COURT

D. CHETWYND
Judge

REPUBLIC OF VANUATU
COUR COURT
LEX SUPREME LEX
REPUBLIQUE DE VANUATU

[2] See paragraphs 9 and 10 above