REPUBLIC OF VANUATU
OFFICE OF THE OMBUDSMAN

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Port Vila
Vanuatu

PUBLIC REPORT

ON THE

ALLEGED BREACH OF THE LEADERSHIP CODE BY MR BARAK TAME SOPE MAAUTAMATE

3rd August 2004

1185/2004/05

PUBLIC REPORT ON THE
ALLEGED BREACH OF LEADERSHIP CODE
BY
MR BARAK TAME SOPE MAAUTAMATE

1. SUMMARY

The Ombudsman has decided to publish this report to ensure that any leader that is convicted of an offence under the Penal Code Act is liable to be dealt with under the Leadership Code Act, in addition to the punishment imposed under the Penal Code Act.

This report is about Mr Barak Tame Sope Maautamate who was convicted by the court under the Penal Code Act for two counts of forgery on 19 July 2002 and, it is in accordance with the Leadership Code Act that he should also be charged under section 27 of the Leadership Code, in addition to the sentence he received under the Penal Code Act.

On 13 November 2002, His Excellency the President of the Republic pardoned Mr Sope of the offences (sic) for which he was convicted. This pardon was made in accordance with Article 38 of the Constitution.

On 13 February 2003, the Supreme Court ruled on Mr Sope's claim that, he still remain as a duly elected Member of Parliament by virtue of the legal effect of the Presidential pardon. The Supreme Court of Vanuatu ruled that the Presidential pardon on 13 November 2002 was only for the un-served period of the three years sentence.

The court ruled that it is important to understand that the Presidential pardon cannot override nor stay the operation of an Act of Parliament, unless the Constitution as the supreme law expressly so provides to this effect.

The pardon does not have a retroactive effect. It pardons the penalty of conviction from the time it is granted. The pardon does not remove the conviction. Mr. Sope was convicted and was sentenced to three years imprisonment. He served his imprisonment sentence from 19 July 2002 to 12 November 2002. He was, then, pardoned on 13 November 2002. It is the un-served period of the three years sentence, at the time of the pardon, which has been pardoned. If the submission of the Mr Sope stands, then, it will be dangerous because it will create a legal friction. The conviction still stands and the President has no power to set it aside. The effect of pardon is to make the plaintiff, a new man and to give him a new credit from the date the pardon was granted. The pardon does not have retrospective effect of undoing what was done. The pardon does not mean acquittal.

On the 6 May 2003, in Civil Case No. 04 of 2003, the Court of Appeal heard Mr Sope's appeal against the decision taken by the Supreme Court in Civil Case No. 199 of 2002.

On 9 May 2003, the Court of Appeal ruled that the Supreme Court was correct to refuse the declarations sought by Mr Sope. The Court of Appeal dismissed the appeal by Mr Sope.

The Ombudsman found that Mr. Sope should have also been charged under Section 27 of the Leadership Code that states a leader who is convicted by a court of an offence under the Penal Code Act is in breach of the Code, and liable to be dealt with in accordance with sections 41 and 42 of the Leadership Code Act in addition to any other punishment that may be imposed under any other Act. In this case, the punishment referred to was the three years conviction that was imposed by the Supreme Court under the Penal Code Act.

The Ombudsman also found that in Civil Case No. 199 of 2002, the Supreme Court of Vanuatu has ruled that the Presidential pardon on 13 November 2002 was only for the un-served period of the three years sentence.

The Ombudsman therefore recommends that:

- The Public Prosecutor must decide within period not exceeding three months of receiving this report whether there are sufficient grounds or evidence to support a prosecution under Section 27 of the Leadership Code Act.

- The Public Prosecutor commences a prosecution against Mr. Barak Tame Sope Maautamate under section 27 of the Leadership Code Act for breach of the Code constituted by his conviction for forgery.

2. JURISDICTION, SCOPE AND METHOD OF INVESTIGATIONS

2.1. The Ombudsman has commenced this enquiry under Article 62(1) of the Constitution, section 11 of the Ombudsman Act and section 34 of the Leadership Code Act. This report is made so that sections 27 of the Leadership Code Act is upheld against Mr Sope maautamate.

2.2 The purpose of this report is to present the findings of the Ombudsman as required by the Constitution, the Ombudsman Act and the Leadership Code Act.

2.3 The scope of this investigation is to establish whether Mr Barak Tame Sope Maautamate, having been convicted of the criminal offence of forgery, is also liable for additional prosecution for consequent breaches of the Leadership Code Act.

2.4 This Office collects information and documents by informal request, summons, letters, interviews ,research and responses to working papers both by letters and court decisions.

3. RELEVANT LAWS, REGULATIONS AND RULES
(See **Appendix** F)

4. OUTLINE OF EVENTS

4.1 On 19 July 2002, Mr Barak Tame Sope Maautamate was sentenced to three (3) years jail for two counts of forgery under the Penal Code Judge Coventry stated on pages 18 & 19 of Criminal Case No.10 of 2002 that:

"You have been convicted on two charges of forgery. In deciding upon sentence the Court is aware of section 3 of Cap 174 [Members of Parliament (Vacation of Seats) Act]. However, at the heart of this is an enormous breach of trust placed in you by the people of Vanuatu. In my judgment, the correct sentence is one of three years imprisonment concurrent upon each count. I have considered whether it should be suspended. In all the circumstances it cannot.

4.2 On 13 November 2002, His Excellency the President of the Republic of Vanuatu, Fr John Bani, pardoned Mr Barak Tame Sope Maautamate of the offences (sic) for which he was convicted. This pardon was made in accordance with Article 38 of the Constitution.

4.3 Mr. Barak Tame Sope Maautamate later filed a claim in court seeking the court to declare that by virtue of the legal effect of the presidential pardon he still remains a duly elected member of Parliament.

4.4 On 13 February 2003, the Supreme Court of Vanuatu ruled that the Presidential pardon on 13 November 2002 was only for the un-served period of the three years sentence. Chief Justice, Vincent Lunabek stated on page 8 of Civil Case No. 199 of 2002 that:

> "It is important to understand that the Presidential pardon cannot override nor stay the operation of an Act of Parliament, unless the Constitution as the supreme law expressly so provides to this effect.

The pardon does not have a retroactive effect. It pardons the penalty of conviction from the time it is granted. The pardon does not remove the conviction. The plaintiff was convicted and was sentenced to three years imprisonment. He served his imprisonment sentence from 19 July 2002 to 12 November 2002. He was, then, pardoned on 13 November 2002. **It is the un-served period of the three years sentence, at the time of the pardon, which has been pardoned**. If the submission of the plaintiff stands, then, it will be dangerous because it will create a legal fiction. The conviction still stands and the President has no power to set it aside. The effect of pardon is to make the plaintiff, a new man and to give him a new credit from the date the pardon was granted. The pardon does not have retrospective effect of undoing what was done. The pardon does not mean acquittal."
(See detailed of the court decisions in **Annex B**).

4.5 On 6 May 2003, Vanuatu Court of appeal in a Civil Appeal case No. 04 of 2003 reviewed the decision of the Supreme Court in Civil case No. 199 of 2002.

4.6 On 9 May 2003, the Court of Appeal ruled that the Supreme Court was correct to refuse the declarations sought by Mr Barak Tame Sope. The Court of Appeal dismissed the appeal by Mr Barak Tame Sope (See details of the court decision in **Annex C).**

4.7 On 27 November 2003, Mr Barak Tame Sope was successfully elected back to Parliament during the by – election conducted for the parliamentary seat he vacated due to his conviction and sentence.

4.8 On 29 January 2004, the Ombudsman issued a Working Paper on the report. This was done after the first Working Paper was issued on 3 December 2002. The reasons for this is that additional documents were included after the first Working Paper was issued.

4.9 On 12 February 2004, Mr Sope's legal representative responded to the second issue of the Working Paper and stated that the report was unconstitutional.**(See details of this in Annex D**)

5. RESPONSE BY THOSE WITH COMPLAINT AGAINST THEM

5.1 The Ombudsman received a response **dated 23 May 2003** from the Geoffrey Gee & Partners, on behalf of Mr Barak Sope. Mr Sope in his reply stated that:

The Working Paper appeared vexatious. for the following reasons:

a) The matter has already been dealt with in the Criminal Courts resulting in imprisonment and loss of a parliamentary seat.

b) It has previously been the subject of an Ombudsman's Report. I refer you to S.19 of your Act. You are prohibited reuniting a previous enquiry or the reasons why your recommendations weren't followed.

c) There are legal issues of double jeopardy given the conviction.

The letter went further to ask these questions to the Ombudsman :

a) Are there any other similar sought of assertions being made.

b) If so why are they being drip fed on a weekly basis. Couldn't we just face all of them at once?

c) Is there pressure being exerted for political or other reasons by other persons or parties or countries and if so who.

d) As to why does it have anything to do with the by election which is required.

Finally the Ombudsman was referred to S.18(1) (b) and (d) of the Ombudsman Act and particularly:-

1. Other remedies (Criminal Prosecution) have already been undertaken.

2. Delay – why weren't charges put before the Criminal Court at the same time. Several years later is a delay which is unwarranted.

Mr Barak Tame Sope through his legal counsel complained that the actions of office of Ombudsman appeared to be personal and vexatious. and demanded [require] the Ombudsman to confirm the report would not be published pursuant to S.34 of Ombudsman Act.

5.2 Additional response from Mr Barak Tame Sope was through the legal firm of Geoffrey Gee and Partners in a constitutional application in March 2004 registered as civil case 49/2004.

5.3 MR SOPE'S SUBMISSIONS IN COURT

In the application Mr. Barak Tame Sope through his legal counsel was seeking the court to declare that his constitutional rights may be infringed if the Ombudsman issues a report. He supported his application with the following submissions:

1. It was open to the Prosecutor to lay a charge under S. 27 at the time of the trial for forgery.

2. The reports of the Ombudsman require the Public Prosecutor to issue charges under the Leadership Code or to decide if there is sufficient evidence.

3. The reports contain an implied threat requiring the Prosecutor to proceed or face further inquiry or public rebuke.

4. The reports are nothing more and nothing less than an attempt to further embarrass and ridicule Mr. Sope.

5. The demand for prosecution is unconstitutional, and does not accord equal treatment to the applicant..

6. The demand for a further prosecution puts the applicant at risk of double jeopardy.

7. The Ombudsman is conducting an enquiry on a matter that has previously been the subject of an enquiry.

5.4 OMBUDSMAN SUBMISSIONS IN COURT

In reply the Ombudsman submitted that:-

1. The two reports relate to the same enquiry, which is not yet complete, and copies of the documents were provided to Mr. Sope in accordance with the Ombudsman Act No. 27 of 1998.

2. It is premature for the Court to consider any infringement of Article 5 (2) (h) of the Constitution and submissions as to whether the applicant could have been charged and convicted at the same time as the forgery matters can be considered only if and after the Public Prosecutor decides to prosecute the applicant.

3. It is constitutionally proper for the Ombudsman to make recommendations at the working paper stage.

4. The applicant is attempting to prevent the Ombudsman from performing his duties and functions under the Constitution, the Ombudsman Act and the Leadership Code Act.

5. The Ombudsman is not directing or controlling the Public Prosecutor.

5.5 THE PUBLIC PROSECUTOR'S SUBMISSIONS IN COURT

The Public Prosecutor chose to appear as a friend of the court **[amicus curiae]** and made the following submissions:

1. That a prosecution could take place against the applicant in breach of section 27 of the Leadership Code Act (No.2 of 1998) and that his right to protection of the law as enshrined in Article 5 (1) (d) of the Constitution would not be infringed if such a prosecution did occur.

2. Such a prosecution would not be for the same offence. The original prosecution was for forgery under section 139 (1) of the Penal Code [CAP.135] with completely different essential elements from any proposed prosecution under Section 27 of the Leadership code Act.

3. A section 27 conviction could not have been entered at the time of the first conviction. It is a condition precedent to a prosecution under section 27 that the claimant has been convicted by a Court of an offence under the Penal Code Act, and such a conviction could not be entered until the conclusion of the first trial.

4. A section 27 prosecution would not infringe the applicant's right to equal treatment under the law or administrative action.

5. The working papers do not infringe the independence of the Public Prosecutor as enshrined in Article 55 of the Constitution.

The Prosecutor went on to submit that the Ombudsman has the responsibility under Ombudsman Act to investigate and report on the conduct of a leader (other than the President) if the Ombudsman has formed the view on reasonable grounds that a leader may have breached the code. The Ombudsman is then required to give a

copy of such a report to the Public Prosecutor and must follow the procedure set out in the Ombudsman Act. There could not at this stage be a breach of Article 55 but, in any event, the second recommendation does not seek to direct or control the Public Prosecutor's functions but simply puts forward a recommendation for consideration by the Public Prosecutor.

5.6 FINDINGS OF THE COURT

(a) While the court agreed that the applicant cannot be tried for the same offence or for any other offence which he could have been convicted of at his trial the court is of the view that a section 27 prosecution is not the same offence nor is it "any offence of which he could have been convicted of at his trial" in terms of article 5 [2] [h] of the Constitution;

(b) As such the Court was also satisfied that there has not been nor is there likely to be any infringement of the applicant's right to equal treatment under the law or administrative action by virtue of his position as a member of Parliament, or his former position as Prime Minister.

(c) On the independence of Public Prosecutor, the Court is of the view that the working paper does not infringe such independence as enshrined in Article 55 of the Constitution.

(d) The Court agreed that there cannot yet be any breach of Article 55 and there is no indication that there is any intention expressed as to how the Public Prosecutor's function ought to be exercised.

(e) The Court found that the Ombudsman is not conducting a fresh enquiry on a matter previously undertaken in breach of Section 19 (1) of the Ombudsman Act. The investigation is clearly an ongoing one. That is made perfectly clear because the same file number, 1185, has been used and even though the enclosures in the second working paper had just become available when the first working paper was sent to the applicant, the Ombudsman has not closed his file and has never published a report or recommendation under Section 33 and 34 of the Ombudsman Act.

(f) The Court was satisfied that the second Working Paper was effectively a re-issue of the first when further information, namely the High Court and Court of Appeal decisions, were included and have been considered by the Ombudsman. There was simply a reformulation of the recommendation in the light of subsequent events and a further draft of the same working paper.

(g) The court could not find anything sinister in the timing of the issue of the working a paper that showed something of a vendetta against the applicant and the Ombudsman is not attempting to embarrass and ridicule Sope as he is carrying out his statutory functions.

(h) The court found that the applicant's application was not premature as it falls within the wordings of Article 5 [2] [h] which states any person who feels his rights is likely to be infringed may apply to the court to enforce that right

(i) The court concluded that none of the grounds raised in the constitutional application filed by Mr. Sope have succeeded and dismissed the matter accordingly.

DISCUSSIONS OF THE COURT ON DIFFERENT ISSUES SUBMITTED BY PARTIES

"ROLE OF OMBUDSMAN"

Section 34 of the Leadership Code Act No. 2 of 1998 provides as follows:

1) The Ombudsman must investigate and report on the conduct of a leader (other than the President):

   a) if the Ombudsman receives a complaint from a person that a leader has breached this code;
   or

   b) if the Ombudsman has formed the view on reasonable grounds that a leader may have breached this Code.

2) The Ombudsman must give a copy of the report to the Public Prosecutor and where, in the opinion of the Ombudsman, the complaint involves criminal misconduct, to the Commissioner of Police within 14 days after forwarding his or her findings to the Prime Minister under Article 63 (2) of the Constitution.

3) Where an Act provided for the functions, duties, and powers of the Ombudsman, the provisions of that Act will apply when the Ombudsman is carrying out an investigation under this Act.

4) Notwithstanding subsection (3), for the purpose of fulfilling any function or duty lawfully conferred or imposed on the Ombudsman under this Act, the Ombudsman:

   a) Shall have full access at all convenient times to Government contracts, documents, books, accounts and any other material that relates to and is relevant to the investigation; and

   b) May, by notice in writing signed by the Ombudsman require any person having possession or control of any Government contract, documents, books, accounts or any other material that relates to and is relevant to the investigation to deliver such document or documents to the Ombudsman at such time and place as is specified in the notice; and

   c) May cause extracts to be taken from any Government contract, documents, books, accounts or any other material that relates to and is relevant to the inquiry without paying any fee therefore.

5) Where a person fails to comply with a notice or any other requirement under subsection (4) the Ombudsman may apply to the Supreme Court for an order requiring that person to do so.

(6) Where the complaint is against the Ombudsman the investigation will be carried out by the Attorney-General in accordance with the procedure set out in this part as if the attorney-General were vested with all the functions, duties discretions and powers of the Ombudsman."

Even under S. 11 (2) (b) of the Ombudsman Act No. 27 of 1998 and Article 62 (1) (c) of the Constitution, the Ombudsman can exercise his functions on his own initiative. In this case the Ombudsman has elected to initiate the report on the applicant and his conduct and is in the process of carrying out an enquiry but has not yet made public the result of such enquiry under S. 34 (1) of the Ombudsman Act.

ROLES OF PUBLIC PROSECUTOR

> The function of prosecution shall vest in the Public Prosecutor, who shall be appointed by the President of the Republic on the advice of the Judicial Service Commission. He shall not be subject to the direction or control of any other person or body in the exercise of his functions."

The recommendation as formulated in the report is merely that, a recommendation, and that is not, as the claimant would have it, a directive or a requirement for the Public Prosecutor to issue charges under the Leadership Code Act were the report published in those terms. The independence and integrity of the Public Prosecutor is preserved, and I cannot find that there is any direction or control contained in the working papers of the Ombudsman to curtail the exercise of the Public Prosecutor's functions or discretion. A copy of the working paper was referred to the Public Prosecutor on 29 January 2004 and he quite rightly declined to comment. In addition the Public Prosecutor cannot issue a prosecution under the Leadership Code Act without a recommendation from the Ombudsman.

There is certainly no implied threat or suggestion that the Public Prosecutor would face further inquiry or public rebuke should he not exercise his discretion in favour of a prosecution under section 27.

Equally, I cannot find in either report that there is anything which would indicate that the Ombudsman is attempting to embarrass and ridicule Mr. Sope. The Ombudsman is simply carrying out his statutory functions. I do not find that there is anything sinister in the timing of the issue of the working papers that shows something of a vendetta against the applicant.

The Court also discussed "double jeopardy" and concluded that in Mr Sope's case the elements to be proved and the evidence required for each prosecution in these circumstances are completely different.

The Court went on to distinguish between a forgery prosecution as are set out in Section 139 (1) of the Penal Code as being:

(a) the making of a false document;
(b) knowledge of the falsely of the document; and
(c) an intention that the document be used or acted upon as genuine or that some person be induced by the belief that it is genuine to do or refrain from doing anything.

For prosecution under Section 27 of the Leadership Code Act, the elements to prove are:

(a) that the defendant is a leader; and
(b) that the defendant has been convicted by the Court of an Offence under the Penal Code Act as listed in Section 27(2).

The Court concluded that in their view a Section 27 Prosecution is not the same offence nor is it any other offence of which he could have been convicted at his trial in terms of Article 5(2)(h) of the Constitution.

The Court cited a decision of the Court in Pearce v R (1998) 194 CLR 610 that said this:-

> *"The expression "double jeopardy" is not always used with a single meaning. Sometimes it is used to encompass what is said to be a wider principle that "no one should be punished again for the same matter". Further, "double jeopardy" is an expression that is employed in relation to several different stages of the criminal justice process: prosecution, conviction and punishment."*

I consider that it would be wrong for this Court to rule that that process should be curtailed and I do not find that the applicant's constitutional rights under Article 5 (1) (d), (k) or 5 (2) (h) have been infringed.

Refer to **Annex D** for full and detailed decision of the court.

6. FINDINGS

6.1 **Finding 1:** **The Ombudsman found that Mr. Sope has committed a prima facie breach of section 27(1)(b) of the Leadership Code Act and is liable to receive additional punishment under sections 41 and 42 of the Leadership Code.**

The Ombudsman has found that according to section 27 (1) (b) of the Leadership Code Act, Mr Sope is liable to be dealt with in accordance with sections 41 and 42 of the Code in addition to any other punishment that may be imposed under any other Act. In this case, the punishment referred to was the three years conviction that was imposed under the Penal Code Act.

7. RECOMMENDATIONS

The Ombudsman recommends that:

Recommendation 1: The Public Prosecutor must decide within 3 months of receiving this report, whether there are sufficient grounds or evidence to support a prosecution under this Code.

Recommendation 2: The Public Prosecutor commence a prosecution against Mr Sope under sections 27 of the Leadership Code Act for breach of the Leadership Code Act constituted by his conviction for forgery.

Dated the **3rd day** of **August 2004.**

Hannington G. ALATOA
OMBUDSMAN OF THE REPUBLIC OF VANUATU

8. INDEX OF APPENDICES

A Copy of judgment in Criminal Case No. 10, dated 19 July 2002.

B Copy of judgment in Civil Case No. 199, dated 13 February 2003.

C Copy of judgment in Civil Appeal Case No. 04, dated 9 May 2003.

D Copy of judgment in Civil Case No. 49 of 2004 dated 26 July 2004

F Relevant laws

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

Criminal Case No. 10 of 2002

PUBLIC PROSECUTOR
-vs-
BARAK TAME SOPE MAAUTAMATE

Prosecutor: Mr. Wiltens
Defendant: Mr. Malcolm

The defendant appears before the Court on two counts of forgery.

Count 1. Forgery – Contrary to sections 139 and 140 of the Penal Code, Cap 135.

PARTICULARS OF OFFENCE

BARAK TAME SOPE MAAUTAMATE at Port Vila Vanuatu did on or about 15th December 2000 forge a Government Guarantee Number VIC/12/0012000 in the sum of USD 5 million with a stated beneficiary Vanuatu Investment Corporation Limited (VICL) (document SFO 1260/1868)

Count 2. Forgery – Contrary to sections 139 and 140 of the Penal Code, Cap 135.

PARTICULARS OF OFFENCE

BARAK TAME SOPE MAAUTAMATE at Port Vila Vanuatu did between 8 January 2001 and 12 March 2001 forge a Government Guarantee Number VIC 011/2000/07 in the sum of USD 18 million with a stated beneficiary Dynamic Growth Management Projects PTY Ltd (document SFO 1260/1866)

Section 139 (1) Penal Code states:-

1. *Forgery is making a false document, knowing it to be false, with the intent that it shall in any way be used or acted upon as genuine, whether within the Republic or not, or that some person shall be induced by the belief that it is genuine to do or refrain from doing anything, whether within the Republic or not.*

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Section 59 states:-

AUTHORITY FOR THE GIVING BY THE STATE OF GUARANTEES AND INDEMNITIES.

59. Except as expressly authorised under this Act, it is not lawful for a person to give a guarantee or indemnity that imposes an actual or a contingent liability on the State.

Section 60 states:-

POWER TO GIVE GUARANTEES AND INDEMNITIES

60. (1) Subject to subsection (3), the Minister on behalf of the State, may from time to time, if it appears to the Minister to be necessary in the public interest to do so, give in writing a guarantee or indemnity upon such terms and conditions as the Minister thinks fit, in respect of the performance of the person, organisation, or Government agency but may only do so:

(a) with the prior approval of a simple majority of Parliament;

(b) after consultation with the Director-General;

(c) where such guarantee or indemnity is consistent with fiscal responsibility provisions of this Act.

2. The Minister must advise, and give reasons and provide documents where required, to Parliament as to why it is necessary in the public interest to grant the guarantee or indemnity, as the case may be, and must provide an assessment of the risks associated with the guarantee or indemnity.

3. Where a guarantee or indemnity is required as security for the raising of a loan under section 54 the Minister is not required to obtain the approval of Parliament but must in the report to Parliament under section 54 (2) (h) include the full details of the guarantee or indemnity and reasons why it was necessary in the public interest.

4. Any money paid by the State pursuant to a guarantee or indemnity given under this section will constitute a debt due to the State from the person, organisation, or Government agency in respect of whom the guarantee or indemnity was given, and may be recoverable as such in any Court of competent jurisdiction.

The prosecution says the Minister (by section 2 that means the "Minister from time to time responsible for Finance") had not signed the two guarantees. Further, there was no prior approval of Parliament, no consultation with the Director- General and no assessment as to whether such guarantees were consistent with the fiscal responsibility provisions of the Act, (Section 60 (1)).

Whilst there is no direct evidence of personal gain to the defendant the prosecution say the defendant was making attempts to trade them. To this end he sent a number of letters containing false information. The prosecution says this was not a well meaning or naïve course of conduct it was done knowing it was wrong.

The defendant rejected the prosecution suggestions concerning his intent in signing the guarantees and the surrounding actions he took and letters he sent. He stated that when he became Prime Minister Vanuatu was in very difficult financial circumstances. There was immense pressure to settle a number of large debts, in particular a US$ 5 million judgment debt to the Commonwealth Development Corporation (CDC) for the Belmol cattle project. Funds were needed urgently and the whole credibility of Vanuatu was at stake.

The defendant said his first political adviser, Bakoa Kaltongga, put a paper before the Development Committee of Officials. That was approved and passed to the Council of Ministers, (CoM). The Council of Ministers approved the paper. That paper empowered or required the Prime Minister and Minister of Finance to seek to arrange for the urgent provision of funds.

The defendant, as Prime Minister, was able to negotiate the CDC loan down from US$ 5 million to US$ 3 million. A special envoy was appointed, Eddy Galea, the Vanuatu Investment Corporation Limited (VICL) was created, Galea and Kaltongga were directors, and loan funds were being procured. To assist in this the US$ 5 million guarantee was made out to VICL and the US 18 million to Dynamic Growth Management Projects Pty Ltd.

The defendant rejected the suggestion he was defying the PFEMA. He said it was accepted practice to have all the documents, the "package" in place and signed before going to Parliament. Without that, Parliament would simply not consider the package. He stated the Minister of Finance had authorised his signing of the guarantees, the Minister being in effect the Director-General's superior. Given the financial pressures on the Government, the guarantees would be consistent with fiscal responsibility. Further, in closing, his advocate asserted that where the guarantee was security for a loan prior Parliamentary approval was not required (Section 60 (3)).

The trial and the prosecution and defence cases had proceeded on the basis that Parliamentary approval was required. This does not make a difference in view of my findings of fact.

The defence asserts the State Law Office was aware of what was happening and indeed there were supporting documents and actions. The defendant asserted that all other actions he took were to get the funds either into Vanuatu or readily available and to get the packages fully prepared for government and

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Parliamentary acceptance. Instructions had gone out that the guarantees were to be kept safe and not released until all the transactions were signed up and Parliamentary approval given.

That, in essence, is the prosecution and defence case.

This a criminal prosecution. It is for the prosecution to prove their case and to do so beyond reasonable doubt. Anything short of that will not suffice to found a conviction. It is not for this defendant to prove anything. He has raised a defence and it is for the prosecution to disprove it, not for the defendant to prove it.

There are two counts. I must necessarily consider each separately and not assume that a particular verdict upon one means the same verdict upon the other. I can look at the totality of the evidence when considering each count.

Apart from a few important points there was little challenge to the prosecution evidence. The evidence of Paul Westwood, a 'Handwriting and Questioned Document Examiner' was accepted. Where the defendant's signature appears on pertinent documents it was accepted as being his.

The collection and assembly of the documents was accepted. A chronology was placed before the Court. Objection was taken to certain paragraphs. As a result of these objections I ruled as follows.

Paragraphs 1- 8 were only admissible so far as going to shew the defendant was aware of Government Guarantees and how they are traded. The prosecution only relied on what was extracted. I have specifically not read the Ombudsman's reports. I only look at paragraph 1-8 in so far as the points raised above are concerned. I specifically disregard those parts of paragraphs 1-8 that go beyond this. I have disregarded paragraph 16 and its attendant table and documents. Similarly I have disregarded paragraph 18. Paragraphs 31-39 were not disregarded, but accepted on the basis of the dealing with the US$ 5 million dollar guarantee and its attendant US$ 2.4 million loan. Paragraphs 92 to 96 are disregarded.

The fact a paragraph of the chronology has not been disregarded does not mean I have accepted its contents. The 'Chronology' is no more than an extraction of matters appearing on documents and prosecution comment thereon. In forming my conclusions in this judgment I have acted upon the documents themselves and accompanying evidence.

David Osborne is a senior forensic accountant and works for the Serious Fraud Office of New Zealand. He prepared the Chronology and described the guarantees as very valuable documents. He stated VICL would have use of the $ 5 million guarantee for a year and Dynamic Growth Management Projects

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Pty Ltd have use of the $ 18 million guarantee for ten years. He said such documents are generally not market place documents and traded. They are sought after by fraudsters to obtain money from individuals. I point out that this, of course, does not mean in itself these particular guarantees were signed, or used fraudulently. He said such documents are secure and have a high credibility. He said the $ 5 million guarantee was made available as security for a $ 2.4 million loan. He was unsure if the $ 18 million guarantee had been pledged as security. He said the documents suggested an intention it was to be used as security for a loan from the Landesbank of Germany. He described the SWIFT system and its importance in lending credibility to transactions and communications. He said an approach to Banque of Hawaii was refused. The documents shew Mc Cullough Robertson, solicitors in Australia were then approached so they could use pressure to convince their bank, St George's, to use SWIFT messages and 'lend weight and legitimacy' to the proposed transactions.

In cross-examination he was referred to the last sentence of paragraph two of document 171, which stated *" Mc Cullough Robertson has advised that the originals of the two sovereign guarantees are in safe custody with a Brisbane Bank and will not be released for trade without the authority of the Government of the Republic of Vanuatu"*. That was a letter dated 10th August 2001 from the Australian Attorney-General's Department. It is not possible to say when that non- release condition was imposed nor why or by whom.

There was no challenge in cross-examination. Mr. Osborne agreed there was nothing in any document suggesting any personal benefit to the defendant.

I accept the evidence of Mr. Osborne. I also accept the evidence of Mr. Hosking and Mr. Thompson. Their statements were read, they dealt with the seizure of documents and there was no challenge.

Hamlison Bulu gave evidence. He is the Attorney General and held that office at the time of these events. He had no knowledge of the two guarantees until after the new government was established in April 2001. He was not aware of either going to Parliament. He was not aware of document 196. He had not had discussions about it, nor had it gone to Parliament.

Document 196 was the original document 2. It contained an error in the date on the last line of paragraph 1. Document 2 corrected that error.

He said he received document 171. He was anxious to retrieve documents on behalf of the Government. The first line of a letter dated 26th January 2001, signed by the defendant and the then Minister of Finance Morkin Stevens and addressed to Banque Hawaii stated " *The Government has finalised negotiations for USD$ 80,000,000 to be deposited into your account*". Mr

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Bulu said he was unaware of any such negotiations. He would expect to know of that.

In cross-examination he described the Development Committee of Officials (DCO). It consisted of Directors- General and at the time in question the Attorney-General or his representative. If a Government loan was proposed it would go first to the DCO and then to the Council of Ministers. He believed the Attorney- General was aware of the DCO decision of 7th June 2000 to work on the necessary legal framework for VICL (paragraph 2, document 1354). It was approved and the company incorporated.

He was not sure if the State Law Office advisor Mr. Downing had sent a letter to the defendant and Mr. Kaltongga stating how to go about issuing a bond or a guarantee. If the advice was sought it would have been given. It was put to Mr. Bulu there was a DCO document instructing the prime minister to look at ways of raising finance to assist the country. He was only aware of decision 444 (document 1123). It was suggested he was at the meeting and expressed concern. Mr. Bulu asked when the meeting was. He denied his office was involved in the destruction of any documents after the change of government. He denied knowledge of a similar document going to the Council of Ministers as went to the DCO. He could not recall a separate paper to document 1356.

Mr. Bulu accepted there were general discussions about the pressure to raise money and the Belmol debt. He said he was unaware of any documents being destroyed or not disclosed. He said he had met Eddy Galea outside the Prime Minister office, never inside, or in the presence of Mr. Kaltongga. He understood Mr. Galea was in Vanuatu about VICL. He was not aware Mr. Galea had been appointed special envoy.

He agreed when loans are set up a package is put together and then taken to Parliament for approval.

Defence Documents 1 and 2 (DD1 and 2) were put to him. He believed they were done prior to the coming into effect of the PFEMA.

He believed there might have been a letter from Mr. Downing about loans. If there was there would be a copy. There may have been discussions about the Government issuing guarantees to raise money. He said the CoM keeps records, if there was discussion it would be recorded.

The defendant's counsel stated certain documents had not been provided to the defendant. No specific written demand had been made for them, a general request for all written statements and documents had been made on 20th November 2001. Mr. Wiltens replied that everything seen had been disclosed.

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Overnight Mr. Bulu was requested to seek any further documents. Next morning he stated the Bill set out in DD 2 had been passed. He had the Official Gazette. He believed DD2 would have been drafted by State Law Office. He had found one document of Mr. Downing, a letter of 6 December 2000 addressed to Mr. Sope, (document 1884). That related to bonds.

I accept the evidence of Mr. Bulu. He answered questions fully and reliably.

Sumbe Antas was the Director of Customs and Island Revenue from October 1999 to May 2002. In the absence of the Director General for -Finance he acted in that capacity. In 2000 he acted "perhaps five times", each time for a period of 1 ½ to 2 weeks. In 2001 it was the same. He was aware of the provisions of the PFEMA, in particular sections 59 and 60. As acting D.G. he had not seen the two guarantees, (documents 1 and 2). If there had been a vote in Parliament he would have known as there has to be consultation with the Director General. He was not aware of any such vote. He had not heard of VICL or DG MP.

At that point the defendant's lawyer stated there was no objection to the witness referring to document 1074 on the basis that "80 million is a typing error for 18 million". If there was to be any suggestion of 80 then objection was taken. Prosecution counsel stated the document had already been proved. I ruled that if the '80' was a typing error for '18' then it was admissible. If it was sought to contend it was 80, then the objection could be renewed.

Mr. Antas said he had seen a copy of 1074 after April 2001. He was not aware of any negotiations. He was not aware of "any negotiations, papers or anything else" in relation to documents 1 and 2.

In cross-examination he agreed in 2000 he attended at DCO meetings. He couldn't remember how many. Jeffrey Wilfred was the Director General. He had been away in December. He couldn't remember for October and November. Mr. Antas couldn't remember if he attended DCO meetings in October, November or December. He said " I might have done... I'd have to look at the records".

I accept his evidence. He was not challenged on anything and was clearly truthful and reliable.

Bulekone Livo, the Clerk to Parliament, gave evidence next. He has held that position since 1983. As far as he was aware neither document 1 or 2 had been mentioned in Parliament. There were no motions either. If there had been, as clerk, he would be aware.

In cross-examination, he stated he did not attend DCO or Council of Ministers meetings. Over the years he had seen loan agreements put through Parliament.

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He agreed the Bill in DD2 was put through Parliament. He agreed the Bill in DD 2 was passed in September 1998 and that it purported to avoid PFEMA. He agreed DD2 was the normal format over the last few years for passing loan agreements. He could not remember debate in Parliament with questions being asked of Mr. Sope. He said it was possible.

In re-examination, he said there was no debate about documents 1 and 2. To the Court he said that he had checked the records. When he agreed 'normal format' to defence counsel's question he meant "Only a two section Bill and then annexures, concerning the activities". He could not say how common it was to exclude PFEMA.

I accept his evidence. It was honest and reliable .

Nadine Alatoa was Secretary-General to the Council of Ministers from August 1998 until January 2001, and again to the present from May 2001. She is responsible for the agenda and records of the Council of Ministers. She said a record is kept of all resolutions and agendas.

She said document 1123 is a record of decision 444. Document 1117 is an example of a paper tabled by a Minister. Last year she was told about documents 1 and 2. She searched through the records for documents concerning these guarantees. She found none. She searched for the period January to May 2001, many times.

In cross-examination she stated for a time Jimmy Andeng was Secretary-General to the Council of Ministers. He took her place in her absence. Between January and May 2001 she didn't attend meetings of the DCO. " I guess Jimmy Andeng did". She said before January there were weekly DCO meetings on a Wednesday afternoon. She had attended about 12, and if she couldn't attend a deputy would go. She would know of the agendas because she sent them to members. Any resolution papers to go to the Council of Ministers she would see. There were also minutes she would see. She could not recall if she was present at DCO when it discussed the incorporation of VICL.

There was much discussion about the financial problems the country was facing. She remembered discussions over Belmol.

She did recall the Prime Minister and Minister of Finance were asked to find ways to raise funds to help with the finances of the country. There were discussions in the DCO about giving the Prime Minister and Minister of Finance a mandate to do that. There was concern in the Council of Ministers that money was needed. It was put to her that the CoM asked the Prime Minister and Minister of Finance to investigate ways to raise money. She started to answer. "I think", when document 1179 paragraph 2 was put to her as an example of what was done. She replied it was a general, not specific

provision. She was not sure about a package proposal for the Prime Minister. She said on her return Mr. Andeng had followed the same procedures as she had. In re-examination she stated decision 556 (document 1179) was a specific proposal, not for general financing. The Council of Ministers did not resolve anything like paragraph 2 concerning Government guarantees. She saw nothing to endorse Government Guarantees.

I accept the evidence of Nadine Alatoa. She had a clear view of her functions and responsibilities. I must assess also whether she was and is reliable, particularly in the making and keeping of records and in her later search of and for specific records. I find she is. I find she is reliable in what she says in that regard.

The final witness for the prosecution was Jeffrey Wilfred. He was Director General of the Ministry of Finance from 1998 to June 2002. He knew of PFEMA and particularly sections 59 and 60. He was not aware of documents 1 and 2. He could not remember if he was in Vanuatu at the time. They were not discussed with him. He said had he been shewn them he would not have said they were consistent with the financial responsibility provisions of the Act. He explained why. He would have known if they had gone to Parliament. They hadn't. He was not aware of the negotiations referred to in document 1074. He would have been aware if there had been. He sat in the DCO not Council of Minister. Guarantees of 5 million and 18 million were not mentioned while he was there.

In cross-examination he agreed Vanuatu was facing financial difficulties. There was the Belmol debt and that was discussed in DCO. He agreed DCO was asked to put to the Council of Ministers a proposal requesting the Prime Minister and Minister of Finance to resolve the financial problems. *"I thought there was a paper. There was a paper on the Belmol matter"*. He agreed he saw the Council of Ministers decisions. It was put to him the Council of Ministers asked the Prime Minister and Minister of Finance to put up a package proposal for the Belmol matter. He replied *'No, I can't remember'*. It was put there was a Council of Ministers decision giving general authority to the Minister of Finance and Prime Minister to come up with a package prepared to resolve the general financial problems. He replied " *No, I wasn't aware . There was one for Vanair, when the Prime Minister was given that responsibility"*.

The prosecution closed its case. Counsel for the defendant then informed the Court he would call three or four witnesses, the defendant, Bakoa Kaltongga, Morkin Stevens and Jimmy Andeng. In the event Jimmy Andeng did not give evidence. I do not draw any adverse conclusion against the defendant from that. I judge this case throughout on the evidence and exhibits before me.

I will deal first with the evidence of Morkin Steven and Bakoa Kaltongga. I will then deal in detail with the evidence of the defendant.

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Morkin Stevens is an M.P and was Minister of Finance during the premiership of the defendant. He stated he had *"some knowledge of the PFEMA, not too much, basic background."*

He said he was called by the Prime Minister about signing document 1 on behalf of the government. He said the defendant told him it was drafted by the State Law Office. He continued *"if that is so, I'd let him sign on behalf of the Government . I would authorise the Prime Minister to sign it"*. He said concerning document 2 *"I did this the same way as the first. I'm not quite sure if I issued a letter, if I signed a letter authorising. I did say yes if passed by the State Law Office."*

He said prior to 15 December 2000 as Minister of Finance I was required to attend at Council of Ministers. When asked if he had any recollection of a Council of Ministers meeting authorising guarantees or securities to be investigated he replied *"I have really forgotten"*. He did not recall a meeting chaired by Mr. Sope.

In cross-examination he set out his educational and work background. He was in Parliament when PFEMA was debated and took part in the debate. He had to pay particular regard to that act after he became Minister of Finance. He said on 15 December he was called by the Prime Minister's first political advisor, Mr. Kaltongga, concerning the signing of the guarantee. It was the first time he'd heard of it. He thought the Director General of the Prime Minister's office was also present.

He believed Rowan Downing, the State Law Office advisor was also there. The Prime Minister *"asked me whether he can sign the document on behalf of the Government. I had not seen it before"*. He asked if it had been *"prepared by the State Law Office and the Prime Minister replied yes. Then I was no longer there. I think the document was signed the next day. There was a second meeting Kaltongga was present. That's all I can remember"*. He thought his authorisation was oral. When asked why he didn't sign he replied *" Because it was requested by the Prime Minister's Office."* He said the *"instrument was new to me"*. When asked if it was in the public interest to have the 5 million guarantee, he agreed and he gave no consideration to section 60 (1) a of PFEMA. He didn't know if the Director General of Finance had been consulted.

It was put to him "*Did you approve just because he (Prime Minister) asked you ?* He replied *"why do you ask this question. I am not afraid of the question. He (PM) was senior than me and I said yes. He didn't bully me."* He said if the document had came from solicitors in Australia, and not through State Law Office he wouldn't let Mr. Sope sign it. (Mr. Sope in evidence had said that was where the document had come from).

He stated it was a mistake when he'd said earlier in his evidence that documents 1 and 2 were signed at the same time.

In relation to document 2 he was called to the Prime Minister's office and told it was a State Law Office document.

"Q. Did you consider it financially prudent for Vanuatu.
A. No
Q. You just let Mr. Sope sign because he wanted to
A. Yes
Q. Did you know what would happen with the two documents.
A. No"

He was told they were being used as security for loans. He was not aware that the second guarantee had to be resigned. He said it was "possible" document 1074 was his letter. He was asked a number of other questions. He denied seeing document 1505 before. He was vague or evasive in answers.

I find Morkin Steven is not a reliable witnesses. He was the Minister of Finance in the defendant's cabinet. He had little knowledge or experience of fiscal matters. He had little appreciation of the functions and responsibilities of being Minister of Finance. It was clear that, certainly in the matters before the Court, he was little more than the defendant's puppet. When pressed on matters it should have been straightforward to answer he reacted with anger.

I consider the evidence of Bakoa Kaltongga. He was first political advisor to the Prime Minister. He described the financial pressure on the government and the negotiations concerning the Belmol debt.

He recalled preparing a paper for the DCO on ways to sort out the financial problems. It referred to securities, guarantees and bonds. He has looked through the documents but cannot find it. He remembered seeing written advice from Mr. Downing at State Law Office but couldn't recall if document 1884 was the letter. It was on the same lines. He presented his paper to the DCO. The Attorney General was present and commented. There was a general resolution to use guarantees to look for funding. He recalled a resolution of the Council of Ministers that the Prime Minister's Office, Minister of Finance and State Law Office were to work on the problem before any specific project about raising funds was to go through.

He was put in touch with Mr. Galea by the Prime Minister. He had a check done on Mr. Galea and as a result he was prepared to deal with him. Galea came up with ideas and details were sought to "package the deal".

'A'

Mr. Kaltongga was involved in the incorporation of VICL. Document 1354 was based on his paper and decision 444, document 1355, made by the Council of Ministers.

He had seen document 1 before it was signed. The dotted line and typed name were already on it. He said Eddy Galea drafted it. After it was signed it was given to Galea. Oral and written instructions were given by the Prime Minister. He could recall one specific point was the document could not be activated until it went through the Council of Ministers and Parliament.

He was present when document 196 and document 2 were signed. He could not recall who was present.

In cross-examination he agreed he was a friend of the defendant. He was appointed by the defendant to his position. It was suggested he had a selective memory. He could not remember other recommendations in his DCO paper . He had tried unsuccessfully to recover the documents.

The defendant introduced him to Mr. Galea. He denied running VICL, or being a director, only being involved in it. The defendant had said he was a director. He had not seen documents 1321, 1335 and 1336 before. He said most or all of the VICL meetings were in the Prime Minister's office.

Mr. Kaltongga saw the Prime Minister sign document 1 and give it to Mr. Galea. He said he saw the letter addressed to Galea that went with it. The instructions did not apparently forbid the release of the guarantee until Parliament or any other approval. He said the Prime Minister told him document 196 was given to Eddy Galea. He was asked in detail about compliance with section 60. His answers became vague and evasive. His demeanour changed from one of calm self-assurance to agitated, and slightly aggressive responding. On two or three occasions questions left him stuttering to produce an answer.

I do not accept the evidence of Mr. Kaltongga. He could not remember details which should have been simple, his whole demeanour changed when pertinent questions were posed. I find he was a knowing assistant of the defendant in these activities even if he did not know their full import. I specifically did not believe him concerning his paper to the DCO.

I turn now to the evidence of the defendant. I assess his evidence in the same way as the other witnesses, and not in any different way because he is the defendant.

He gave a brief history of his career. He has been an M.P. since 1983. He was Minister of Finance in 1996 prior to the PFEMA. He has held other ministerial

'A'

positions and been deputy Prime Minister. He took part in the debate on PFEMA and said *" I am knowledgeable of its contents"*.

He produced DD1 and 2. He stated the usual procedure was to put together all documents required for a loan, get them signed then present them to Parliament for approval. He said if this wasn't done it would just be sent back. He cited examples where this has happened.

Mr. Sope described the financial pressures on the Government and the particular difficulties with the repayment of the CDC loan for Belmol He was told he had to fix it. He went twice to London and succeeded in reducing the debt from $ 5 to $ 3 million. There were negotiations with an Italian Group to find a solution, There was pressure from the Police and others demanding money. He went to China and obtained the waiving of debts. Further grants, not loans, were obtained.

Mr. Sope agreed he signed documents 1 and 2 and 196. He told Mr. Kaltongga to speak to Eddie Galea and liaise closely with Mr. Downing of the Attorney General's Chambers. He received written advice from Mr. Downing in document 1884 relating to bonds. There was another letter about guarantees.

A paper was prepared which went to the DCO and the Council of Ministers. Authority was given to him as Prime Minister and to the Minister of Finance to *" look at letters of guarantee, look at securities and other means of raising finance. That was in December/January"*. He said the DCO paper is not in the documents. The resolution of the Council of Ministers gave the authority and they were to work "closely with the Attorney General's office and put together something to come back to the Council of Ministers".

Document 1179 is two decisions. Paragraph 2 was nothing to do with the first. It was to deal with the financial situation.

Mr. Sope said he knew the requirements before a guarantee could issue. He stated Jeffrey Wilfred was the Director General at the time of issue of the guarantee. The package was still being prepared. He could not go to Parliament without something to shew. He said the Minister of Finance and Attorney General advised *"get something in and we will go to Parliament. You have to have a Bill as well"*.

He stated he sought the approval of the Minister of Finance when he signed. He thought there was a letter from the Minster of Finance authorising him to sign. He thought the Minister was present each time. He said all non-personal documents were left in the PM's office when he ceased to be Prime Minister in May 2001.

'A'

He stated he told McCullough-Robertson that the originals of the guarantees must not be given away without *"the Government of Vanuatu saying it was OK to use them. Document 171, paragraph 2 last line that is the position".*

He agreed his signature was on document 1074 and that Morkin Stevens signed. The figure should be 18 not 80 and 'finalised' should read 'finalising' They are typing errors.

Since May 2001 there had not been other papers or bills for approval of loans, securities or guarantees.

Mr. Sope was then cross-examined. He agreed he wrote in 1996 for the return of ten US$10 million guarantees from England to trade them. He said the then Prime Minister asked him to do this. He said he didn't know how guarantees are traded. He was trying to get the guarantees back to Vanuatu.

Counsel for the defendant objected to cross-examination upon the Ombudsman's reports. The Court upheld the objection. Document 1376 paragraph 1 was put to the defendant, it was suggested this was so the guarantees could be traded. The defendant said there was an other letter, *"not this one", "It does exist",*

Mr. Sope said VICL was set up with the advice and drafting of the Attorney General. Mr. Galea was appointed special envoy(not roving ambassador). He agreed he tabled document 1117 in the Council of Ministers but it was prepared by the Director General.

There was no reference to the Government providing financial assistance to VICL. Mr. Sope said it wasn't needed at the time. Mr. Galea was managing director and Mr. Kaltongga a director. He did not agree Mr. Galea could be do almost anything without reference to the Government.

Mr. Sope agreed he signed document 1 so VICL could get the loan for Belmol. Lawyers McCullough Robertson had been appointed to represent the Government. Mr. Sope agreed he wrote the letter of 22 March 2001 to them. He agreed paragraph 4 document 35 was untrue. He said a letter had been sent correcting it. The correction letter has not been found. Mr. Sope said he didn't know till later there was only 9,000 not 12,000 cattle on the ranch.

Paragraph 5 talked of the government having issued a sovereign guarantee for 5 million to be used at the discretion of Mr. Galea. He agreed it was correct that is what is said. Mr. Sope accepted that by law a letter of guarantee can only be given by the government.

Q. How can you say what is in paragraph 5, that the government issued a Sovereign guarantee?

'A'

A. Silence.
Q. Repeated
A. Silence
Q. Repeated
A. The government has. I signed the document.

Mr. Sope said he had made it clear in writing to Mr. Galea that the guarantee was not to be released without approval. Neither that document nor any copy has been found.

He agreed he knew the provisions of Section 60. He said the Minister of Finance wanted him to sign it and gave him authority. He was there.
Q. Did he give you a letter of authority to sign it and then watched you signing ?
A. I signed it, he was there.

In cross-examination on further occasions Mr. Sope was unable to answer pertinent questions. On occasion there were silences, at other times bold acceptance of acts which in law should not have taken place. In particular he stated document 1 was drafted by Galea. He was asked if the number VIC/12/001200 had significance. He replied *"I don't know"*. It was put to him it was made up. The answer was silence.

Q. It was put there to make it look authentic.
A. I don't know.

I do not accept the evidence of Mr. Sope. He could not explain a wealth of facts and statements he had made. On occasion he was reduced to silence. There was no answer to the question put. His evidence was inconsistent with documents he signed.

His case depended upon a number of documents, none of which have been found or produced. I accept documents will sometimes innocently get lost. In this case a whole series of documents, all relating to these matters and which should have been in different places have not been found. They exculpate the defendant. No copies have been found. I do not believe they exist. Diligent searches have been made to no avail. People one would expect to have at least some recollection of events the defendant describes have none.

The evidence shews that Mr. Sope restricted the knowledge of the existence of the vital documents to as few people as possible, particularly in the government. Indeed, on the evidence only Morkin Stevens and Bakoa Kaltongga knew. Morkin Stevens did as he was told. Mr. Kaltongga acted as Mr. Sope's assistant. There was no need whatever to do this, had these

transactions been genuine or intended for nothing other than the best arrangements possible to meet Vanuatu's financial circumstances.

The evidence shews that as soon as the guarantees were sent off Mr. Sope set about getting them accepted as genuine and into a position to be traded. First of all he tried the Banque of Hawaii. When that failed he tried elsewhere. It is clear he was in close and frequent contact with Mr. Galea. In the attempts to get them accepted and traded he issued letters containing lies and he knew they were lies. I accept a Prime Minister has documents prepared for him and might sign them with little more than a cursory check. These documents did not fall in that category. They related to the very arrangements which would help alleviate the severe financial problems facing the country.

The defence primarily was that there was no mens rea. The prosecution asserted there was sufficient for a conviction if it could be shewn the defendant knew the documents to be false and he signed them intending others to accept them as genuine and act upon them. Others did treat them as genuine and act on them. The defence asserted there was no wrongful intent as all along he was wanting to relieve the financial problems of the country, he ensured as far as possible no release until Parliament approved and when the packages were ready he would go to Parliament . He said he was prevented from doing this by the fact negotiations were not completed, other factors and then the fall of his government.

On the evidence I reject this defence. It has been rebutted beyond reasonable doubt. These were not well intentioned but misguided and unlawful acts. There is no evidence of any intent to seek Parliamentary or other statutorily required approval or follow proper procedures at any time. There is no evidence of any intent to seek Parliamentary approval before or after any package was completed. There is nothing emanating from the defendant directing others to keep the guarantees in the strictest safety until formal approvals were given. Paragraph 2 of document 1179 is not a general mandate. It relates only to Decision 556.

Section 109 (2) Criminal Procedure Code states "when a person is charged with an offence and facts are proved which reduce it to a lesser offence, he may be convicted of the lesser offence although he was not charged with it". This section was mentioned by defence counsel in closing.

There are offences set out under section 64 PFEMA. In view of my findings I do not need to address this issue.

I am satisfied beyond reasonable doubt that Mr. Sope did sign documents 1 and 2, and indeed document 196. Those documents were false. The numbers on them were wholly fictitious. They were not guarantees of the Government as they purported to be since no authority existed for them. The defendant knew

as charged

SENTENCE 'A'

You have been convicted on two charges of forgery. Your advocate Mr. Malcolm says you have given much to this country both before and after Independence. You have been Prime Minister, deputy Prime Minister and held other ministerial posts. He says in other ways you have given much to the community.

It is a sad day for any country when some one with that record is convicted of forgery. This is not just an ordinary case of forgery. You were Prime Minister at the time, one of the highest positions in the country. When a person is elected as a Member of Parliament a trust is placed in that person. He or she has the duty to work for the good of the country. The higher up in government a person goes the greater that trust. These forgeries were able to be carried out as a result of the position you held. That is a gross breach of trust. It brings disgrace upon yourself and it brings disgrace upon the country as a whole and the people.

I do not underestimate the pressures that were upon you as Prime Minister. However, I have rejected your defence as to why you did these acts. The evidence clearly pointed in the opposite direction.

There is a suspicion that somewhere along the line you would gain personally. That somewhere there is a bank account with funds or ready to receive funds. I do not and must not sentence on that basis.

However, I am satisfied you wilfully disregarded an Act of Parliament designed to prevent misuse of Sovereign guarantees. I have rejected the suggestion these were well-intentioned but misguided acts. It is on this basis that I must sentence.

In deciding upon sentence the Court is aware of section 3 of Cap 174 (Members of Parliament (Vacation of Seats) Act).

I take into account the fact you have a wife and family. It will be difficult for them. I am informed you have no other income or assets beyond your parliamentary salary and allowances. I treat you as a person with no previous convictions. There can be no credit for a plea of guilty. The sentence is not increased by reason of a full trial.

There must necessarily be a deterrent element to this sentence.

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However, at the heart of this is an enormous breach of the trust placed in you by the people of Vanuatu. When I first started to examine sentence I considered a term of 5-6 years. I take into account your age, your state of health, the mitigation generally and the fact it will not be easy for you to serve a sentence.

In my judgement the correct sentence is one of three years imprisonment concurrent upon each count. I have considered whether it should be suspended. In all the circumstances it cannot.
There will be no order for costs.

Informed of right of appeal.

Dated at Port Vila this 19th day of July 2002.

REPUBLIC OF VANUATU COUR SUPREME COURT LEY LEX REPUBLIQUE DE VANUATU 21/7/02

R.J.COVENTRY
Judge

'B'

IN THE SUPREME COURT OF THE REPUBLIC OF VANUATU
(Civil Jurisdiction)

CIVIL CASE No.199 OF 2002

BETWEEN: BARAK TAME SOPE MAUTAMATE of Ifira Island, South Efate in the Republic of Vanuatu.
Plaintiff

AND: THE SPEAKER OF PARLIAMENT, Hon. Henry Taga TARIKAREA C/- Parliament House, Port Vila in the Republic of Vanuatu.
Defendant

Coram: ***Vincent LUNABEK, CJ***

Mr. Kalkot Mataskelekele for the plaintiff
Messrs. M. B. Edwards and A. K. Loughman for the defendant

Date of Hearing: 4th February 2003.

Date of Judgment: 13th February 2003.

JUDGMENT

This is an Originating Summons of the plaintiff dated 12th December 2002 and filed on 13th December 2002. The plaintiff in this action is Mr. Barak Tame Sope Mautamate of the Island of Ifira, South Efate in the Republic of Vanuatu. The defendant is the Speaker of Parliament, Hon. Henry Taga Tarikarea. In this Summons, the plaintiff seeks for the following declarations:-

1. That the plaintiff still remains a duly elected Member of Parliament by virtue of the legal effect of the Presidential pardon;

2. That the Speaker of Parliament forthwith permit the plaintiff to attend the current Parliament sittings;

3. Costs; and

4. Other and further orders as the Court may deem fit.

At the outset, the facts are not in dispute. The plaintiff files an affidavit date 14 December 2002 in support of the Summons. The substantive parts of which are struck out as irrelevant. The plaintiff was duly elected a Member of Parliament on 2nd May 2002. He was convicted by the Supreme Court of offences of forgery on 19th July 2002 and sentenced on the same date to a term of 3 years imprisonment.

On 5th November 2002, the plaintiff filed Notice of Appeal and a Notice of Motion to enlarge time to appeal against the sentence at the Court of Appeal Registry in Port Vila.

On 13th November 2002, His Excellency the President of the Republic pursuant to Article 38 of the Constitution pardoned the plaintiff of the offences (sic) for which he was convicted.

On 12th December 2002, the plaintiff by counsel filed this Originating Summons. On 13th December 2002, the plaintiff's counsel filed a notice of appointment to hear the Originating Summons as a matter of urgency.

This Court sat and heard the application for urgency on 16th December 2002 and refused the application because there is no urgency shown by the plaintiff. The matter was then set for hearing on 4th February 2003 at 9 a.m.

On 4 February 2003, the plaintiff asks the Court to determine three questions. They are set out below:-

1. Does the Presidential pardon granted to the plaintiff on 13th November 2002 completely pardon the plaintiff of his conviction and/or sentence imposed by the Supreme Court on July 19th, 2002?

2. What effect in law if any did the Presidential pardon have on the provisions of the Members of Parliament (vacation of seats) Act [CAP 174] in particular the provisions of Section 3 (1) as they relate to the plaintiff?

3. Given the Presidential pardon does Mr. Sope Mautamate still remain a Member of Parliament or has his parliamentary seat become vacant under the terms of [CAP.174]?

The defendant says that the only issue is:

Is the plaintiff's parliamentary seat restored by virtue of him being pardoned by the President of the Republic of Vanuatu under Article 38 of the Constitution?

Both parties agree that the critical question is for the Court to determine the legal effect of the pardon and not whether the pardon was legally given.

Before me there is no dispute that the President had discretion to grant pardon and there is no challenge to its validity.

The power of the President to pardon is provided under Article 38 of the Constitution. I am asked to determine the legal effect of the presidential pardon of 13 November 2002 in relation to the plaintiff and in particular whether his parliamentary seat has become vacant under Section 3 of the vacation of seats Act [CAP.174].

Before I can determine the legal effect of the presidential pardon under Article 38 of the Constitution, I must bear in mind that I am dealing with a constitutional provision. I have to ascertain the clarity of that provision and its meaning. The starting point of a construction and/or interpretation of a provision of the Constitution is the Constitution itself. It is the supreme law of Vanuatu. Where there is room for debate or it is possible that ambiguity exists assistance may be gained from consideration of the cases of the commonwealth or other jurisdictions. But any of that is in all circumstances and at all time subject to the clear and unambiguous words of the Constitution which is the supreme law. (See A.C. No.11 of 2001, A.C. No.6 of 2002, and other Supreme Court decisions including CC No.124 of 1994 referred to me in Court).

Article 38 of the Constitution provides:

> ***"The President of the Republic of Vanuatu may pardon, commute or reduce a sentence imposed on a person convicted of an offence. Parliament may provide for a committee to advise the President in the exercise of this function".*** (Emphasis added).

By Article 38, the President has authority to pardon a sentence imposed on a person who is convicted of an offence. It is clear from this Article that, the President has the power to pardon a sentence. Article 38 is silent on how and from when or what is the starting point the pardon of a sentence comes in force. It is also silent on whether the President has the authority to pardon a conviction secured by a court against a person for the commission of an offence.

Counsel for the plaintiff submitted that the legal effect of a Presidential pardon, which is a constitutional instrument, must be absolute, otherwise the power is rendered meaningless. Therefore, notwithstanding the time and date of a pardon being granted, in Vanuatu usually after the conviction of a person, the legal effect of the pardon starts at the very time the conviction and/or sentence was imposed on the convicted person. It is further submitted for the plaintiff that although he was convicted and sentenced on 19 July 2002 and, although the Presidential pardon was only granted on 13 November 2002, the pardon, in order to be absolute, or completely effective, was deemed to have come into effect on 19 July 2002, i.e. it is effective ab initio.

The above submissions must be rejected for the following reasons.

The power of pardon under Article 38 cannot be read and interpreted in isolation. It must be read and interpreted in conjunction with other provisions of the Constitution in particular Articles 5 & 6 relating to duties and jurisdictions or powers of the Supreme Court in the protection and enforcement of fundamental rights of the people and Articles 47 (1), 49 (1) and 50 in relation to the administration of justice which is vested in the judiciary, the unlimited jurisdictions and/or powers of the Supreme Court in its

original and/ or first instance and appellate levels to hear and determine civil and criminal proceedings as enshrined in the Constitution.

It follows that under Article 38, the President has no power to pardon a conviction secured by the Court on a person for the commission of an offence. The presidential pardon cannot make a conviction a nullity. What the pardon does is to remove the penalty/sentence imposed by the Court.

The presidential power to pardon a sentence under Article 38 of the Constitution, translates the intention of the constitutional founding fathers that the power of pardon which is the prerogative of mercy is different and must be so from the prerogative of justice. It does not, therefore, embrace the prerogative of justice. It follows, then, that only the Courts on appellate levels can quash a conviction.

I am also assisted and supported by the submissions made on behalf of the defendant's counsels and the persuasive authorities referred to and in particular the *English case of R. v. Foster (1984) 2 All ER 679*. In Foster, the English Court of Appeal held that the effects of a pardon is such as to remove from the subject of punishment whatsoever that flow from the conviction, but does not eliminate the conviction itself. I adopt and accept the decision of the English Court of Appeal in Foster as, I think, there is room for debate on the legal effect of the presidential pardon under Article 38 of the Constitution and the principles of law applied in that case will assist this Court in its judgment in the case at hand.

The plaintiff's further submission that the instrument of pardon starts to have effect not from the date of the instrument but from the very date the sentence had been imposed and in the present case, 19th July 2002, is also rejected.

Article 38 is silent on the point. The words of the instrument of pardon may be instructive in interpreting the effect of the pardon and ascertain from when or the date of its coming into effect.

The instrument of pardon, granted by the President on 13 November 2002, to pardon the plaintiff is set out below for ease of reference.

"PARDON

WHERAS *Article 38 of the Constitution provides inter alia, for the President of the Republic of Vanuatu to Pardon a person convicted of an offence;*

AND WHEREAS BARAK TAME SOPE *was convicted and found guilty of certain offences by the Supreme Court of the Republic of Vanuatu on 19 July, 2002 and sentenced to three years imprisonment.*

AND WHEREAS *I am of the opinion that the continued imprisonment of BARAK TAME SOPE may be injurious to his health;*

In the exercise of the power conferred on me by Article 38 of the Constitution ***I, FATHER JOHN BENNETT BANI,*** *President of the Republic of Vanuatu,* ***HEREBY PARDON*** *BARAK TAME SOPE of the offences for which he was convicted in the Supreme on 19 July 2002.*

MADE at the State Office this 13th day of November, 2002.

.....

FATHER JOHN BENNETT BANI

President of the Republic of Vanuatu" (Emphasis added).

The instrument of pardon is a constitutional instrument. It was dated 13 November 2002 and published on 14 November 2002 in an Extraordinary Gazette No.9. In accordance with Section 16 of the Interpretation Act [Cap.132], I take judicial notice of it.

I note that the ground of the pardon of the plaintiff in the opinion of His Excellency the President, was that the continued imprisonment of the plaintiff may be injurious to his health.

I note further that the instrument does not show from when or the starting point the pardon starts to have effect.

I note finally that the term of the instrument was inelegantly drafted, in that it purported to give to the President of the Republic a power to pardon Barak Tame Sope of the offences for which he was convicted in the Supreme Court of Vanuatu on 19 July 2002. [Emphasis added]. This has the effect of pardoning not only the offences but also the conviction of the plaintiff and it is not possible as it is beyond the presidential power under Article 38. To save the pardon instrument of its legality, it has to be read down to its constitutional limit. To do that end, it is now read down to mean:-

"President of the Republic, Hereby Pardon the sentence imposed on Barak Tame Sope by the Supreme Court of Vanuatu of the offences for which he was convicted on 19 July 2002."

As the date of the coming into effect of the constitutional instrument of pardon is not expressly spelt out in the instrument itself, the date of its publication in the Official Gazette must be taken to be the date the maker of the constitutional instrument, here, the President intended the instrument to come into force, which is 14 November 2002.

The plaintiff submitted also by counsel that the pardon being a constitutional instrument, it overrides the effects of all other laws including the Penal Code Act [CAP.136] and the Members of Parliament (Vacation of Seats) Act [CAP.174].

These submissions must also fail and are rejected for the following reasons:-

First, it is not necessary to determine what effect the pardon has on the Penal Code Act as there is no issue in this case with respect to that Act.

Second, a constitutional instrument is subject to the law unless expressly provided for in the Constitution. The Constitution is the supreme law of Vanuatu but that does not make every instrument issued under powers granted under it above the law. The Constitution being the supreme law

means that neither an Act of Parliament nor a decision of a Court can make law inconsistent with it. It does not mean that anything done under the Constitution overrides other laws in Vanuatu. This is also applicable to an act or decision made by an authority exercising a power given to it by the Constitution such as, the Executive and the President of the Republic.

Third, the Members of Parliament (Vacation of Seats) Act [CAP.174] is a valid law as it is not inconsistent with the Constitution. In this case, counsel for the plaintiff does not challenge the constitutional validity of the Members of Parliament (Vacation of Seats) Act [CAP.174] and in particular Section 3(1) of the Act. Section 3(1) of the Act is a valid provision as conceded by counsel on behalf of the plaintiff.

The plaintiff's counsel further submitted that Section 3 of the Members of Parliament (Vacation of Seats) Act [CAP.174] was legally deemed to have never come into play in the plaintiff's case because the plaintiff legally, did not have 3 years sentence imprisonment (by virtue of the pardon). This argument cannot stand and must fail.

It is important to understand that the Presidential pardon cannot override nor stay the operation of an Act of Parliament, unless the Constitution as the supreme law expressly so provides to this effect.

The pardon does not have a retroactive effect. It pardons the penalty of conviction from the time it is granted. The pardon does not remove the conviction. The plaintiff was convicted and was sentenced to three years imprisonment. He served his imprisonment sentence from 19 July 2002 to 12 November 2002. He was, then, pardoned on 13 November 2002. It is the un-served period of the three years sentence, at the time of the pardon, which has been pardoned. If the submission of the plaintiff stands, then, it will be dangerous because it will create a legal fiction. The conviction still stands and the President has no power to set it aside. The effect of pardon is to make the plaintiff, a new man and to give him a new credit from the date the pardon was granted. The pardon does not have retrospective effect of undoing what was done. The pardon does not mean acquittal.

Section 3 of the Members of Parliament (Vacation of Seats) Act [CAP.174] provides:

"3.(1) If a member of Parliament is convicted of an offence and is sentenced by a court to imprisonment for a term of not less than 2 years, he shall forthwith cease to perform his functions as a member of Parliament and his seat shall become vacant at the expiration of 30 days thereafter:

Provided that the Speaker, or in his absence, the Deputy Speaker, may at the request of the member from time to time extend that period for further periods of 30 days to enable the member to pursue any appeal in respect of his conviction, or sentence, so however that extensions of time exceeding in the aggregate 150 days shall not be granted without the approval of Parliament signified by resolution.

(2) If at any time before the member vacates his seats his conviction is set aside or a punishment other than imprisonment is substituted, his seat in Parliament shall not become vacant as provided by subsection (1), and he may again perform his functions as a member of Parliament.

(3) For the purpose of subsection (1) no account shall be taken of a sentence of imprisonment imposed as an alternative to or in default of the payment of, a fine."

By perusing the language of section 3 of the Act, it is clear that the plaintiff has lost his Parliamentary seat on 19 August 2002 by operation of that section.

The fact that the plaintiff has lost his Parliamentary seat under Section 3(1) of the Act, is not a penalty of the conviction. The loss of the seat was merely a consequence flowing from his conviction. The penalty imposed on the plaintiff for his offence was three years imprisonment, not loss of his Parliamentary seat. This follows from Section 3 of the member of Parliament (Vacation of Seats) Act [CAP.174].

Finally, I accept the defendant's submissions that it was the fact of the conviction and a sentence of imprisonment of not less than 2 years being imposed that resulted in the plaintiff losing his seat. As Foster's case held the conviction remains even though the plaintiff has been pardoned from serving the remainder of his sentence.

The operation of subsection 3(1) of the Act is clear. If a member of Parliament is convicted and sentenced to more than two years imprisonment then subject to the proviso in subsection 3(1) and subsection 3(2) the loss of his or her seat is automatic after 30 days. Neither the proviso in subsection 3(1) nor subsection 3(2) applied in this case so the plaintiff automatically lost his seat on 19 August 2002.

The proviso of subsection3(1) does not apply because no extension was ever sought from the speaker. Nor was one granted.

Subsection 3(2) does not apply because neither the conviction nor the sentence had been set aside within 30 days of his conviction. The plaintiff well after the 30 days elapsed, has been pardoned. It is clear from the wording of subsection 3(2) that if a member's seat has become vacant under subsection 3(1), then, even if his conviction or sentence is subsequently set aside, his seat in Parliament is not restored.

The same must be the case with a Presidential pardon. As the pardon was granted after the plaintiff had lost his seat in Parliament the granting of the pardon cannot reinstate it. On the reasoning in Foster's case, the conviction has not been set aside so even if it had been granted prior to the plaintiff's seat being vacated, that alone would not have been sufficient for the seat not to have been automatically vacated. If the pardon had been granted prior to the vacating of his seat the court would have had to decide whether the pardon amounted to the setting of aside of the sentence. This is not the case here. If it did then his seat would not have been vacated. However, as the pardon came after the seat was vacated the pardon, even if it is seen as setting aside the sentence, it was too late his seat had been vacated and could not be restored by the pardon.

The plaintiff as a result of his conviction and sentence automatically lost his seat in Parliament on 19 August 2002. The pardon he was granted on 13 November 2002 did not re-instate his seat in Parliament. The Act does not provide any mechanism for a member to have his or her seat restored once it has been vacated under Section 3. Section 3 is self-executing and once a seat has become vacant under it the seat cannot be restored. A member who has lost his or her seat under Section 3 of the Act must be reelected to Parliament if he or she wishes to take a seat in Parliament again. The effect of conviction is the imprisonment. As a result of imprisonment for three years the plaintiff lost his Parliamentary seat pursuant to Section 3 of the Act.

The declarations sought by the plaintiff are refused. The defendant is entitled to the costs of the proceedings against the plaintiff.

My answers to the questions posed are as follows:

1. Answer to question 1:

   No. The Presidential pardon is a full or complete pardon but only from the date of the pardon. The Presidential pardon granted to the plaintiff on 13 November 2002 pardons the plaintiff of his un-served part of his sentence which starts on 14 November 2002. The pardon has no retroactive effect. There is no power to pardon the conviction of a person under Article 38 of the Constitution.

2. Answer to question 2:

   The way the question is framed is too general. It does not warrant a specific answer. In the practical context of the present case, there is no effect of the Presidential pardon on the provisions of the Members of Parliament (Vacation of Seats) Act [CAP.174] as they relate to the plaintiff. The plaintiff well after the 30 days elapsed, has been pardoned on 14 November 2002, whereas Section 3(1) of the Act [CAP.174] operates and affects the plaintiff by the loss of his parliamentary seat as at 19 August 2002.

3. Answer to question 3 is:

No. The plaintiff does not remain a member of Parliament. The plaintiff has lost his Parliamentary seat on 19 August 2002 by operation of Section 3 of the Act [CAP.174]. His Parliamentary seat is not restored by virtue of him being pardon by the President of the Republic of Vanuatu under Article 38 of the Constitution.

The Court makes the following ORDERS:

1. THAT, the declaration sought in point 1 of the Summons is refused.

2. THAT, the declaration sought in point 2 of the Summons is refused.

3. THAT, the costs of the action are awarded in favour of the defendant against the plaintiff and they are determined at 160,000 Vatu.

4. THAT, the plaintiff agrees to pay the total amount of 160,000 Vatu by three (3) installments as set out below:-

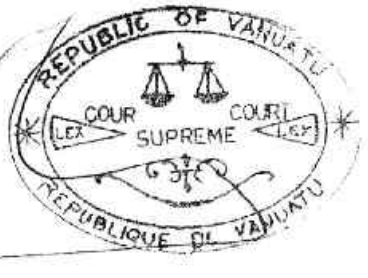
   (a) the plaintiff shall pay the first installment of 50,000 Vatu by 28 February, 2003; and

   (b) the plaintiff shall pay the second installment of 50,000 Vatu by 31 March, 2003; and

   (c) the plaintiff shall pay the third installment of 60,000 Vatu by 30 April, 2003.

DATED at PORT-VILA this 13th DAY of FEBRUARY 2003

BY THE COURT



Vincent LUNABEK
Chief Justice

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

Civil Appeal Case No. 04 of 2003

BETWEEN: BARAK TAME SOPE MAAUTAMATE
Appellant

AND: THE SPEAKER OF PARLIAMENT, HON. HENRI TAGA TARIKAREA
Respondent

Coram: **Hon. Justice Robertson**
Hon. Justice von Doussa
Hon. Justice Fatiaki
Hon. Justice Saksak

Counsels: Mr. S. R. Southwood QC and Mr. P. Keyzer for the appellant
Mr. M. B. Edwards and Mr. A. K. Loughman for the respondent

Hearing Date: 6th May 2003
Judgment Date: 9th May 2003

JUDGMENT

This appeal concerns the legal effect of a pardon granted by His Excellency the President of the Republic of Vanuatu under Article 38 of the Constitution.

On 19th July 2002 the appellant was a duly elected Member of Parliament. That day he was convicted by the Supreme Court of the offences of forgery and sentenced to a term of three years imprisonment.

Section 3 of the Members of Parliament (Vacation of Seats) Act [CAP. 174] provides:-

> "3. *(1) If a member of Parliament is convicted of an offence and is sentenced by a court to imprisonment for a term of not less than two (2) years, he shall forthwith cease to perform his functions as a member of Parliament and his seat shall become vacant at the expiration of thirty days thereafter.*
>
> *Provided that the Speaker, or in his absence, the Deputy Speaker, may at the request of the member from time to time extend that period for further periods of 30 days to enable the*

member to pursue any appeal in respect of his conviction, or sentence, so however that extensions of time exceeding in the aggregate 150 days shall not be granted without the approval of Parliament signified by resolution.

(2) If at any time before the member vacates his seats his conviction is set aside or a punishment other than imprisonment is substituted, his seat in Parliament shall not become vacant as provided by subsection (1), and he may again perform his functions as a member of Parliament.

(3) For the purpose of subsection (1) no account shall be taken of a sentence of imprisonment imposed as an alternative to or in default of the payment of, a fine." (Emphasis added)

The appellant made no request to the Speaker or the Deputy Speaker to extend the 30 day period under s. 3 (1). Nor did any event occur that attracted the operation of s. 3 (2). However on 13th November 2002 the President in exercise of powers under Article 38 of the Constitution executed an instrument of pardon, and that instrument was duly gazetted as a Constitutional Order the following day: see s. 16 of the Interpretation Act [CAP. 132]. The Constitutional Order reads:-

"PARDON

WHEREAS *Article 38 of the Constitution provides inter alia, for the President of the Republic of Vanuatu to Pardon a person convicted of an offence;*

AND WHEREAS BARAK TAME SOPE *was convicted and found guilty of certain offences by the Supreme Court of the Republic of Vanuatu on 19th July, 2002 and sentenced to three years imprisonment.*

AND WHEREAS *I am of the opinion that the continued imprisonment of BARAK TAME SOPE may be injurious to his health;*

In the exercise of the power conferred on me by Article 38 of the Constitution ***I, FATHER JOHN BENNETT BANI****, President of the Republic of Vanuatu,* ***HEREBY PARDON*** *BARAK TAME SOPE of the offences for which he was convicted in the Supreme Court on 19th July 2002.*

MADE at the State Office this 13th day of November, 2002.

.....

FATHER JOHN BENNETT BANI

President of the Republic of Vanuatu." (Emphasis added)

Article 38 of the Constitution provides:-

> ***"PRESIDENTIAL POWERS OF PARDON, COMMUTATION AND REDUCTION OF SENTENCES***
>
> *38. The President of the Republic may pardon, commute or reduce a sentence imposed on a person convicted of an offence. Parliament may provide for a committee to advise the President in the exercise of this function."*

After the pardon was granted the appellant sought to resume his seat as a duly elected Member of Parliament, contending that the pardon had the effect of removing the cause of his disqualification retrospectively from 19th July 2002 when the conviction and sentence were imposed. The respondent, the Speaker of Parliament, considered that the seat formerly held by the appellant had become vacated at the expiration of 30 days after the conviction and sentence had been recorded, and that the grant of a pardon had not change that position. The appellant then commenced proceedings by originating summons in the Supreme Court seeking the following declarations:-

1. That the plaintiff still remains a duly elected Member of Parliament by virtue of the legal effect of the Presidential pardon;
2. That the Speaker of Parliament forthwith permit the plaintiff to attend the current Parliament sittings.

The originating summons was heard by the learned Chief Justice who ordered that the declarations sought be refused. The appellant now appeals to this Court.

It was accepted by both parties in the presentation of their cases before the Chief Justice that under Article 38 of the Constitution the President has a discretion whether or not to grant the pardon, and that in the present case that discretion had been validly exercised. The only issues argued before the Chief Justice concerned the construction of the Constitutional Order, and its legal effect having regard to the provisions of s. 3 of the Members of Parliament (Vacation of Seats) Act. There was no question raised before the Chief Justice concerning the manner in which the President went about exercising the power under Article 38.

The learned Chief Justice in the course of his reasons for judgment held that on the proper interpretation of Article 38, the President

had no power to pardon a conviction so as to remove it from the record, or otherwise render it a nullity. His Lordship held that a pardon granted under Article 38 had the effect, prospectively from the time of the grant, of removing the penalty imposed by the Court and all the consequences that flow from the penalty, but no more. It did not remove the conviction. His Lordship held that under the Constitution only a Court exercising appellate jurisdiction had the power to set aside or quash a conviction. Accordingly it was necessary to read down the Constitutional Order in this case to be within power. Even though the Constitutional Order by its terms purported to grant a pardon for the "*offence*" it had the effect of granting a pardon in respect only of the punishment of imprisonment and its consequences.

The Chief Justice rejected an argument that because the pardon was a Constitutional Order it overrode all the other laws of the Republic of Vanuatu, including s. 3 of the Members of Parliament (Vacation of Seats) Act. His Lordship held that a Constitutional Order is subject to the law unless the Constitution expressly provides to the contrary. In our opinion the Chief Justice was plainly correct to so hold, and the contrary has not been argued before this Court. However, as appears below, the appellant contends that s. 3 of the Members of Parliament (Vacation of Seats) Act must be read down to accommodate the grant of a pardon under Article 38.

The Chief Justice held that by operation of s. 3, at the expiration of 30 days after the conviction and sentence, that is on 19th August 2002, the appellant's seat was automatically vacated. As the pardon was granted after the appellant had lost his seat, the pardon could not have the effect to restoring him to it.

In oral argument before this Court, the appellant accepted that a pardon granted under Article 38 is not the equivalent of an acquittal but merely relieves the convicted person from the consequences of the conviction. This is the common law position which flowed from the exercise of the Royal prerogative of mercy: see *R. v. Cosgrove [1949] Tas SR 99, Re Royal Commission on Thomas Case [1980] 1 NZLR 602, R. v. Foster [1984] 2 All ER 678, and Kelleher v. Parole Board of New South Wales [1984] 156 CLR 364*. In the Republic of Vanuatu, however, the Constitution is the supreme law (Article 2 of the Constitution), and the effect of a pardon granted under Article 38 must be determined by a consideration of the Constitution itself. We agree with the following passage for the judgment of Sir Harry Gibbs in *Attorney General v.*

The President of the Republic of Vanuatu [1994] VUSC 2 (Civil Case No. 124 of 1994):

> *"It is impossible to contend that the President succeeded to the position of the British Sovereign, or that his powers are to be assumed to have the same characteristics as those of the British Sovereign. The New Hebrides was ruled as a Condominium and the Constitution of Vanuatu came into being as a result of the agreement and approval of a Constitutional Committee and of a subsequent agreement between the Governments of Great Britain and France. Article 95 (2) of the Constitution continues, until the Parliament otherwise provides, the British and French laws in force or applied in Vanuatu immediately before the day of Independence to the extent that they are not expressly revoked or incompatible with the independent status of Vanuatu. This provision does not mean that the position of the President of Vanuatu is governed by the Constitutional laws of either Britain or France, since the Constitutional position of the Heads of States of those two countries is very different one from the other. The nature of the powers and position of the President of Vanuatu can be determined only by a consideration of the Constitution itself. No doctrine of immunity based on the position of the British Crown can be imported into the Constitution of Vanuatu. Further, the courts of Vanuatu are not the President's Courts; they are set up by the Constitution."*

Sir Harry Gibbs went on to observe that although the power of the President of Vanuatu to grant a pardon is entirely derived from the Constitution, that power is one that corresponds to the power of English Crown, so that English decisions (and we would add the decisions of other common law systems) may be of assistance. In this case the decisions referred to above that state the common law position do provide assistance. They support the interpretation placed on Article 38 by the Chief Justice.

Counsel for the appellant in the course of his very detailed and thorough argument has taken the Court to decisions of the Supreme Court of the United States of America which have construed the effect of a pardon in a similar way.

Counsel contends that the effect of these authorities is to support the general statement appearing in *8 Halsbury, Laws of England, 4th Ed. at para. 952:*

> *"The effect of a pardon under the Great Seal is to clear the person from all infamy, and from all consequences of the offence for which it is granted, and from all statutory or other disqualifications following upon conviction. It makes him, as it were, a new man so as to enable him to maintain an action against any person afterwards defaming him in respect of the offence to which he was convicted."*

It is conceded by the respondent that the pardon granted to the appellant in this case is an unconditional free pardon. The appellant contends that s. 3 of the Members of Parliament (Vacation of Seats) Act imposes a disqualification upon a member of Parliament who is convicted and sentenced to more than two years imprisonment. The grant of an unconditional free pardon, it is said, removes that disqualification, and does so with effect from the date on which the punishment was imposed. Thus, the effect of the pardon is to remove that which disqualified the appellant so that he must be restored to his seat as an elected member of Parliament. In so far as a literal application of the words of s. 3 might suggest otherwise, it is submitted that s. 3 must be read down so as to allow the restoration of the seat to an elected member of Parliament who is granted a pardon . This is so as it is beyond the power of Parliament to abridge the constitutional power of pardon under Article 38: see s. 9 of the Interpretation Act that provides that every Act shall be read and construed subject to the Constitution and where any provision of an Act conflicts with a provision of the Constitution, the latter shall prevail.

For reasons which follow, we are unable to accept that the pardon granted to the appellant has the effect contended for.

As the arguments of counsel for the appellant acknowledge, the provisions of s. 3 of the Members of Parliament (Vacation of Seats) Act are critical to the outcome of this case. At times in the course of his arguments counsel came close to contending that s. 3 is constitutionally invalid, but ultimately this submission was not made, nor could it be in these proceedings. If the constitutional validity of an Act of Parliament is to be attacked, it must be done by Constitutional Petition where the Attorney General is a party joined to represent the Republic of Vanuatu: see Article 53 of the Constitution, s. 218 of the Criminal Procedure Code Act [CAP. 136] and *Picchi v. The Attorney General, Civil Appeal Case No. 20 of 2001, Judgment 1st November 2001.*

This Court in *Carlot v. Attorney General (1988) 1Van LR 407* and *Sope v. Attorney General (1988) 1Van LR 411* has held that s. 2 of the Members of Parliament (Vacation of Seats) Act is constitutionally valid. The reasons in those cases lead also to the conclusion that s. 3 is constitutionally valid. In *Sope v. Attorney General at 415* the Court said:-

"We have held in Appeal No. 4/88 that s. 2 of the Members of Parliament (Vacation of Seats) Act 1983 is constitutional insofar as there is power to unseat members if that is necessary to ensure the proper functioning of Parliament. To that we would add if it is necessary to ensure that only persons of proper character are members. That is necessary to preserve the reputation and integrity of Parliament. Thus bankrupts and convicts may be excluded."

By its terms, s. 3 (1) of the Members of Parliament (Vacation of Seats) Act provides that two consequences follow if a member of Parliament is convicted of an offence and is sentenced to imprisonment for a term of not less than two years. First, the member "*shall forthwith cease to perform his functions as a Member of Parliament*". That provision is in the nature of a disqualification that removes the entitlement of the person concerned to hold the office.

Secondly, s. 3 (1) provides that the "*seat shall become vacant*" at the expiration of the prescribed time. The argument of the appellant characterises this happening as a disqualification of the member, but that is not what the section says. Once the seat becomes vacant there is no longer a member who holds it. The vacation of the seat is an event separate and independent from the disqualification of the member. The seat becomes vacant automatically by operation of the Act. Once the seat becomes vacant, thereafter provisions of the Representation of the People Act [CAP. 146] comes into play, and under the provisions relating to a vacancy, a by-election should occur to fill the seat afresh.

Counsel sought to support the argument that s. 3 (1) operates solely as a disqualification of the member by referring to the Explanatory Note which accompanied the introduction of the Bill which amended s. 3 (1) to its present form. The Explanatory Note said that in its previous form the words used in the section were ambiguous and could be interpreted to mean that a person convicted of any offence however petty would be disqualified. As amended "*the section (would) disqualify a member who was convicted of an offence and sentenced to imprisonment for 2 years or more.*" We do not think the Explanatory Note helps the appellant's argument. First, reference may only be made to secondary material such as an explanatory note where the words of the Act passed by Parliament are ambiguous. In the present case, we do not think that there is ambiguity in the words used. Secondly, as we have just noted, the section prescribes two distinct consequences. The first is a consequence

disqualification, and the Explanatory Note can be sensibly understood as referring to that part of the section.

It may be accepted for the purpose of deciding this appeal that as a general proposition the grant of a pardon has the effect in law stated in *Halsbury*, including the removal of any disqualification. However neither that statement, nor the many decisions to which the Court has been referred by the appellant's counsel concerning the common law position, establish that a pardon has the retrospective effect for which the appellant contends.

As a matter of logic, the pardon can only operate from the time when it is granted. From that time forward the consequences of the conviction and sentence, including disqualification, are removed. That this is so is recognised in the leading case of *R. v. Cosgrove [1948] Tas SR 99* where Morris CJ said at 105 – 106:-

> *"Blackstone states the effect of a pardon in Vol. 4, p. 402, as follows:*
> *'4. Lastly, the effect of such pardon by the King, is to make the offender a new man; to acquit him of all corporal penalties and forfeitures annexed to that offence for which he obtains his pardon; and not so much to restore his former, as to give him a new, credit and capacity.'*
>
> *That passage is entirely consistent with what Hawkins says.*
>
> *Accordingly, a pardon is in no sense equivalent to an acquittal. It contains no notion that the man to whom the pardon is extended never did in fact commit the crime, but merely from the date of the pardon gives him a new credit and capacity. The plea in my opinion is not sustained."* (Emphasis added).

We do not understand the decision in *Hay v. Justices of the Tower Division of London (1890) 24 QBD 561*, on which the appellant heavily relies, to decide otherwise. In that case a statute provided that "*Every person convicted of felony shall for ever be disqualified from selling spirits by retail, and no licence to sell spirits by retail shall be granted to any person who shall have been so convicted as aforesaid ...*". The plaintiff applied for a licence to sell spirits by retail. He had at one time being convicted of felony but had received a free pardon. It was held that the disqualification imposed on him by the statute was removed by the pardon, and that the licence might be granted to him. It is significant that at the time when the plaintiff applied for his licence the disqualification had already been removed by the pardon. No question of retrospective operation arose.

Although, once it is granted, the pardon "*makes him a new man*" (*Halsbury*) it is clear that a pardon does not undo events that have already happened, or remove rights that have become vested in a third party. This most clearly appears from the decisions of the United States of America to which the Court has been referred. Counsel for the appellant relied on the following passage from the majority judgment in *Ex parte Garland 71 US 333 (1866) at 380 – 381*:-

> "*Such being the case, the inquiry arises as to the effect and operation of a pardon, and on this point all the authorities concur. A pardon reaches both the punishment prescribed for the offence and the guilt of the offender; and when the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offence. If granted before conviction, it prevents any of the penalties and disabilities consequent upon conviction from attaching; if granted after conviction, it removes the penalties and disabilities, and restores him to all his civil rights; it makes him, as it were, a new man, and gives him a new credit and capacity.*"

However, immediately following this paragraph the judgment continues at 381-

> "*There is only this limitation to its operation: it does not restore offices forfeited, or property or interests vested in others in consequence of the conviction and judgment.*"

In *Knote v. United States 95 US 149 (1877)*, in a unanimous decision, the Supreme Court of the United States said, after citing with approval *Ex parte Garland* and number of other decisions to like effect:-

> "*A pardon is an act of grace by which an offender is released from the consequences of his offense, so far as such release is practicable and within control of the pardoning power, or of officers under its direction. It releases the offender from all disabilities imposed by the offense, and restores to him all his civil rights. In contemplation of law, it so far blots out the offence, that afterwards it cannot be imputed to him to prevent the assertion of his legal rights. It gives to him a new credit and capacity, and rehabilitates him to that extent in his former position. But it does not make amends for the past. It affords no relief for what has been suffered by the offender in his person by imprisonment, forced labor, or otherwise; it does not give compensation for what has been done or suffered, nor does it impose upon the government any obligation to give it. The offense being established by judicial proceedings, that which has been done or suffered while they were in force is presumed to have been rightfully done and justly suffered, and no satisfaction for it can be required. Neither does the pardon affect any rights which have vested in*

others directly by the execution of the judgment for the offense, or which have been acquired by others whilst that judgment was in force." (Emphasis added)

In the present case, if the literal meaning of words s. 3 (1) of the Members of Parliament (Vacation of Seats) Act are given full effect, the seat became vacant at the expiration of the prescribed time. That would be an event that is not and cannot be reversed by the later granting of a pardon to the member of Parliament under Article 38. It is for this reason that counsel argues that the words in s. 3 (1) must be read down so that a pardon can operate to allow the seat to be restored. How the section is to be read down, or how the words used are to be construed to achieve this effect is not stated in counsel's submissions.

In our opinion to achieve the effect contended for, much more than merely reading down s. 3 in some unspecified way would be required. Once the seat is vacated, the Representation of the People Act provides the procedures by which the seat is to be filled. It would be necessary also to impose a limitation or qualification on the provisions of that Act so as to allow the election process to give a way to the reappointment of the former member in the event of a pardon. To achieve the result contended for would involve a major rewriting of the law to bring about this effect. It is beyond the power of the Court to do this. The role of the Court is to interpret, not rewrite, laws enacted by Parliament.

Counsel for the appellant conceded in the course of argument that if and when a new member is duly elected to fill a seat that has been vacated under s. 3 (1), a pardon thereafter granted to the former member cannot operate to remove the new member from office. In such a case, the pardon could not have the effect of reinstating the former member. In the present case, there has so far been no election to fill the vacant seat, and it is said that this problem does not arise. However, once it is conceded that a pardon cannot restore the former member to the seat if the seat has been filled by a duly elected new member, in our opinion it must follow that, as a matter of construction, there is no implied limitation to be read in s. 3 (1) to the effect that the literal meaning of the words in that section do not apply in the event of a pardon. In short, we do not consider that the plain reading of s. 3 (1) is to be qualified so as not to apply in a case where a convicted member of Parliament later receives a pardon.

It was suggested in the course of argument that as Parliament when enacting s. 3 gave specific and express attention to the judicial power to set aside a conviction or punishment it should be inferred that Parliament overlooked the power of the President to grant a pardon under Article 38. We are unable to accept that argument. Section 3 could have, but does not, provide that the seat becomes vacant immediately upon conviction and imposition of sentence. Rather, the seat becomes vacant at the expiration of a period of time. That a period of time is allowed is consistent with Parliament having recognised that other events might overtake the conviction and sentence so that the member again becomes qualified to continue holding the seat.

The fact that Parliament referred expressly to the appeal process does not give rise to the inference that Parliament did not recognise that the President could act to grant a pardon under Article 38. If the convicted member considered that the conviction and penalty should not have been imposed, or was unduly harsh such that the member might gain the grant of a pardon, it could be expected that the member would not only seek a pardon but would at the same time seek to appeal. The provisions of s. 3 (2) would enable a member to gain further time within which an application to the President could be considered.

In our opinion the learned Chief Justice was correct to refuse the declarations sought by the appellant. In our opinion the appeal must be dismissed with costs against the appellant.

Dated at Port Vila, this 9th day of May 2003.

BY ORDER OF THE COURT

.....
Hon. Justice Robertson

.....
Hon. Justice von Doussa

.....
Hon. Justice Fatiaki

.....
Hon. Justice Saksak

COUR D'APPEL
COURT OF APPEAL
REPUBLIQUE DE VANUATU

'D'

IN THE SUPREME COURT

OF THE REPUBLIC OF VANUATU

(Civil Jurisdiction)

Civil Case No. 49 of 2004

BETWEEN: BARAK TAME MAAUTAMATE SOPE

Applicant

AND: THE REPUBLIC OF VANUATU

Defendant

Coram: Justice Treston

Mr. Malcolm for the Applicant
Ms. Lini-Leo & Ms. Wano for Respondent - Ombudsman
Ms. Wodak for Respondent - Public Prosecutor
No appearance on behalf of the Attorney General

Date of Hearing: 19 July 2004

Date of Decision: 26 July 2004

RESERVED JUDGMENT

APPLICATION

In this Constitutional application the Claimant, Barak Tame Maautamate Sope, applies for a declaration that the recommendation in a report entitled "Breach of Leadership Code by Mr. Barak Sope" issued by the

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Ombudsman dated 29 January 2004 is unconstitutional. He also seeks costs. The grounds are that the recommendation in the report is contrary to Articles 5 (1) (k), 5 (2) (h) and 55 of the Constitution of the Republic of Vanuatu.

The applicant also seeks a declaration that any prosecution of the applicant taken by the Public Prosecutor would be unlawful and seeks an order prohibiting publication of the Ombudsman's report.

The Applicant has filed a sworn statement. The Respondents have not sought to cross-examine him and have filed no sworn statements in response.

FACTS

The applicant was the Prime Minister of Vanuatu from November 1999 to April 2001. On 19 July 2002 he was convicted on two counts of forgery of Government Guarantees during the period that he was Prime Minister. He was sentenced to 3 years imprisonment. On 13 November 2002, the then President of the Republic pardoned the Claimant from the un-served part of his sentence.

The Supreme Court later held that the applicant did not remain a Member of Parliament and he lost his parliamentary seat. That decision was upheld by the Court of Appeal on 9 May 2003.

On 3 December 2002, the Ombudsman had produced a document entitled "Working paper on the alleged breached (sic) of the Leadership Code by Mr. Barak Sope Maautamate". A copy of the document was provided to the applicant for his commentary on 15 May 2003. That contained the following recommendation: -

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"That the public Prosecutor should decide within 3 months of receiving this report, whether there are sufficient grounds of evidence to support a prosecution under the Leadership Code Act."

On 28 May 2003 the applicant's solicitor wrote a response contending that the report appeared vexatious and that the matter had already been dealt with by the criminal courts and that there were elements of double jeopardy involved. The letter required the report not to be published. No response was received.

In or about December 2003 the applicant contested a by-election and was elected back into Parliament.

On 9 January 2004 the Ombudsman produced a further document entitled *"Working paper on the breach of Leadership Code by Mr. Barak Sope"*. This was sent to the applicant by letter dated 29 January 2004.

The recommendations contained in the later document were: -

"*Recommendation 1:* *The Public Prosecutor commence a prosecution against Mr. Sope under sections (sic) 27 of the Leadership Code Act for breach of Leadership Code Act constituted by his conviction for forgery.*

Recommendation 2: *The Public Prosecutor must decide within 3 months of receiving this report, whether there are sufficient grounds or evidence to support a prosecution under this Code"*

D3

The applicant's lawyer responded in a letter dated 12 February 2004 that the report was unconstitutional. The Ombudsman replied by letter of 24 February 2004.

SUBMISSIONS

The applicant submits: -

1. It was open to the Prosecutor to lay a charge under S. 27 at the time of the trial for forgery.

2. The reports of the Ombudsman require the Public Prosecutor to issue charges under the Leadership Code or to decide if there is sufficient evidence.

3. The reports contain an implied threat requiring the Prosecutor to proceed or face further inquiry or public rebuke.

4. The reports are nothing more and nothing less than an attempt to further embarrass and ridicule Mr. Sope.

5. The demand for prosecution is unconstitutional, and does not accord equal treatment to the applicant.

6. The demand for a further prosecution puts the applicant at risk of double jeopardy.

7. The Ombudsman is conducting an enquiry on a matter that has previously been the subject of an enquiry.

d4

The Ombudsman submits: -

1. The two reports relate to the same enquiry, which is not yet complete, and copies of the documents were provided to Mr. Sope in accordance with the Ombudsman Act No. 27 of 1998.

2. It is premature for the Court to consider any infringement of Article 5 (2) (h) of the Constitution and submissions as to whether the applicant could have been charged and convicted at the same time as the forgery matters can be considered only if and after the Public Prosecutor decides to prosecute the applicant.

3. It is constitutionally proper for the Ombudsman to make recommendations at the working paper stage.

4. The applicant is attempting to prevent the Ombudsman from performing his duties and functions under the Constitution, the Ombudsman Act and the Leadership Code Act.

5. The Ombudsman is not directing or controlling the Public Prosecutor.

The Public Prosecutor has elected to make submissions effectively in the role of amicus curiae. He submits: -

1. That a prosecution could take place against the applicant in breach of section 27 of the Leadership Code Act (No. 2 of 1998) and that his right to protection of the law as enshrined in Article 5 (1) (d) of the Constitution would not be infringed if such a prosecution did occur.

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2. Such a prosecution would not be for the same offence. The original prosecution was for forgery under section 139 (1) of the Penal Code [CAP.135] with completely different essential elements from any proposed prosecution under Section 27 of the Leadership Code Act.

3. A section 27 conviction could not have been entered at the time of the first conviction. It is a condition precedent to a prosecution under section 27 that the claimant has been convicted by a Court of an offence under the Penal Code Act, and such a conviction could not be entered until the conclusion of the first trial.

4. A section 27 prosecution would not infringe the applicant's right to equal treatment under the law or administrative action.

5. The working papers do not infringe the independence of the Public Prosecutor as enshrined in Article 55 of the Constitution.

The Prosecutor went on to submit that the Ombudsman has the responsibility under Ombudsman Act to investigate and report on the conduct of a leader (other than the President) if the Ombudsman has formed the view on reasonable grounds that a leader may have breached the code. The Ombudsman is then required to give a copy of such a report to the Public Prosecutor and must follow the procedure set out in the Ombudsman Act. There could not at this stage be a breach of Article 55 but, in any event, the second recommendation does not seek to direct or control the Public Prosecutor's functions but simply puts forward a recommendation for consideration by the Public Prosecutor.

LAW

Some assistance can be obtained from decided cases as to the approach to be take to a constitutional application such as this.

In Picchi v Attorney General CAC No. 20 of 2001 the Court of Appeal said at page 5: -

> *"Breaches of constitutional rights must be based on reality and not on some theoretical or assumed scenario".*

The Court of Appeal had also reaffirmed in Francois & ors v Ozols & ors CC155 of 1996 that: -

> *"The rights and freedoms guaranteed by Article 5 are to be accorded on generous interpretation"*, and that
> *"The provisions of Articles 6 (and also those of Article 53) provide a new procedure for seeking the review of administrative decisions by organs of government and public officials, and the correction of 'inappropriate', unlawful or unjust exercises of government power."*

In Timakata v Government CC No. 5 of 1994 Downing J said: -

> *"I might add that when interpreting the Constitution some consideration has to be given to its functionality. If interpreted too rigidly it could become a document of great constraint rather than one which sets forth the rights of the people and government structures of the Republic of Vanuatu."*

I approach my task mindful of these principles and aware that the application falls to be dealt with under the Constitutional Procedures Rules Order No. 26 of 2003.

d7

FINDINGS

Section 34 of the Leadership Code Act No. 2 of 1998 provides as follows: -

"ROLE OF OMBUDSMAN

(1) The Ombudsman must investigate and report on the conduct of a leader (other than the President):

(a) if the Ombudsman receives a complaint from a person that a leader has breached this Code; or

(b) if the Ombudsman has formed the view on reasonable grounds that a leader may have breached this Code.

(2) The Ombudsman must give a copy of the report to the Public Prosecutor and where, in the opinion of the Ombudsman, the complaint involves criminal misconduct, to the Commissioner of Police within 14 days after forwarding his or her findings to the Prime Minister under Article 63 (2) of the Constitution.

(3) Where an Act provides for the functions, duties, and powers of the Ombudsman, the provisions of that Act will apply when the Ombudsman is carrying out an investigation under this Act.

(4) Notwithstanding subsection (3), for the purpose of fulfilling any function or duty lawfully conferred or

imposed on the Obudsman under this Act, the Ombudsman:

(a) *shall have full access at all convenient times to Government contracts, documents, books, accounts and any other material that relates to and is relevant to the investigation; and*

(b) *may, by notice in writing signed by the Ombudsman require any person having possession or control of any Government contract, documents, books, accounts or any other material that relates to and is relevant to the investigation to deliver such document or documents to the Ombudsman at such time and place as is specified in the notice; and*

(c) *may cause extracts to be taken from any Government contract, documents, books, accounts or any other material that relates to and is relevant to the inquiry without paying any fee therefor.*

(5) *Where a person fails to comply with a notice or any other requirement under subsection (4) the Ombudsman may apply to the Supreme Court for an order requiring that person to do so.*

(6) *Where the complaint is against the Ombudsman the investigation will be carried out by the Attorney-General in accordance with the procedure set out in this part as if the Attorney-General were vested with*

all the functions, duties discretions and powers of the Ombudsman."

Even under S. 11 (2) (b) the Ombudsman Act No. 27 of 1998 and Article 62 (1) (c) of the Constitution, the Ombudsman can exercise his functions on his own initiative. In this case the Ombudsman has elected to initiate the report on the applicant and his conduct and is in the process of carrying out an enquiry but has not yet made public the result of such enquiry under S. 34 (1) of the Ombudsman Act.

I consider that it would be wrong for this Court to rule that that process should be curtailed and I do not find that the applicant's constitutional rights under Article 5 (1) (d), (k) or 5 (2) (h) have been infringed.

Those rights under the Constitution are as follows: -

"FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL

(1) The Republic of Vanuatu recognizes, that, subject to any 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 race, place of origin, religious or traditional beliefs, political opinions, language or sex but subject to respect for the rights and freedoms of others and to the legitimate public interest in defence, safety, public order, welfare and health -

(a) life;

(b) liberty;

(c) *security of the person;*

(d) *protection of the law;*

(e) *freedom from inhuman treatment and forced labour;*

(f) *freedom of conscience and worship;*

(g) *freedom of expression;*

(h) *freedom of assembly and association;*

(i) *freedom of movement;*

(j) *protection for the privacy of the home and other property and from unjust deprivation of property;*

(k) *equal treatment under the law or administrative action, except that no law shall be inconsistent with this sub-paragraph insofar as it makes provision for the special benefit, welfare, protection or advancement of females, children and young persons, members of under-privileged groups or inhabitants of less developed areas.*

2. *Protection of the law shall include the following-*

(a) *everyone charged with an offence shall have a fair hearing within a reasonable time, by an independent and impartial*

court and be afforded a lawyer if it is a serious offence;

(b) everyone is presumed innocent until a court establishes his guilt according to law;

(c) everyone charged shall be informed promptly in a language he understands of the offence with which he is being charged;

(d) if an accused does not understand the language to be used in the proceedings he shall be provided with an interpreter throughout the proceedings;

(e) a person shall not be tried in his absence without his consent unless he makes it impossible for the court to proceed in his presence;

(f) no-one shall be convicted in respect of an act or omission which did not constitute an offence known to written or custom law at the time it was committed;

(g) no-one shall be punished with a greater penalty than that which exists at the time of the commission of the offence;

(h) no person who has been pardoned, or tried and convicted or acquitted, shall be tried again for the same offence or any

other offence of which he could have been convicted at his trial."

However, while I agree that the applicant cannot be tried for the same offence or for any other offence which he could have be convicted of at his trial the offence to be considered must be included under section 27 of the Leadership Code Act, which provides as follows: -

(1) A leader who is convicted by a court of an offence under the Penal Code Act [CAP. 175] and as listed in subsection (2) is:

(a) in breach of this Code; and

(b) liable to be dealt with in accordance with sections 41 and 42 in addition to any other punishment that may be imposed under any other Act.

(2) The offences are:

(a) intentional homicide;

(b) intentional assault causing death or damage of a permanent nature;

(c) rape or attempted rape;

(d) abduction;

(e) incest;

(f) sexual intercourse with a girl under care or protection;

(g) indecent assault;

(h) a serious intentional assault;

(i) perjury;

(j) making a false statement;

(k) fabricating or destroying evidence;

(l) conspiracy to defeat justice;

(m) corruption and bribery of officials;

(n) theft or misappropriation or false pretences;

(o) fraud or fraudulently obtaining credit;

(p) receiving property dishonestly obtained;

(q) demanding with menaces;

(r) robbery;

(s) extortion;

(t) forgery or uttering forged documents;

(u) unlawful discrimination;

(v) unlawfully entering;

(w) any of the offences under Part XV of the Representation of the People Act [CAP. 146];

(x) attempting to commit any of these offences.

(3) This section does not limit the power of a court to deal with a person under any other Act.

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The applicant was convicted of forgery. That offence is referred to in S.27 (2) (t).

I am of the view that a Section 27 prosecution is not " the same offence" nor is it "any other offence of which he could have been convicted at his trial" in terms of Article 5 (2) (h).

In Pearce v R [1998] 194 CLR 610 the Court said this: -

> *"The expression "double jeopardy" is not always used with a single meaning. Sometimes it is used to encompass what is said to be a wider principle that "no one should be punished again for the same matter". Further, "double jeopardy" is an expression that is employed in relation to several different stages of the criminal justice process: prosecution, conviction and punishment."*

The elements to be proved and the evidence required for each prosecution in these circumstances are completely different.

The elements for a forgery prosecution are set out in section 139 (1) of the Penal Code as being: -

(a) the making of a false document;

(b) knowledge of the falsely of the document; and

(c) an intention that the document be used or acted upon as genuine or that some person be induced by the belief that it is genuine to do or refrain from doing any thing.

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The elements for a section 27 prosecution under the Leadership Code Act are: -

(a) that the defendant is a leader; and

(b) that the defendant has been convicted by a Court of an offence under the Penal Code Act as listed in section 27 (2)

But, in addition a section 27 conviction could not have been entered at the time of the conviction for forgery because for such a conviction it was a condition precedent to a prosecution under the Leadership Code Act that the applicant had been convicted by a Court of an offence under the Penal Code Act. As a matter of pure logic in these circumstances the Penal Code Act prosecution must predate and precede the Leadership Code Act prosecution. There is no double jeopardy. I am also of the view that the consideration in this application must be limited to consideration of a Section27 prosecution and not to any other possible prosecution under other provisions of the Leadership Code Act because that is the course which has been contemplated.

I am also satisfied that there has not been nor is there likely to be any infringement of the applicant's right to equal treatment under the law or administrative action by virtue of his position as a Member of Parliament, or his former position as Prime Minister.

Article 66 of the Constitution relates to a Leadership Code and provides as follows: -

"***CONDUCT OF LEADERS***

(1) Any person defined as a leader in Article 67 has a duty to conduct himself in such a way, both in his public and private life, so as not to-

(a) place himself in a position in which he has or could have a conflict of interests or in which the fair exercise of his public or official duties might be compromised;

(b) demean his office or position;

(c) allow his integrity to be called into question; or

(d) endanger or diminish respect for and confidence in the integrity of the Government of the Republic of Vanuatu.

(2) In particular, a leader shall not use his office for personal gain or enter into any transaction or engage in any enterprise or activity that might be expected to give rise to doubt in the public mind as to whether he is carrying out or his carried out the duty imposed by subarticle (1)."

In the light of this there is no evidence of any unequal treatment, and in addition the application does not refer in any detail to any unequal treatment nor does the sworn statement of the applicant. Under Articles 66 and 67 of the Constitution the conduct of Leaders is defined and the investigation of a potential Section 27 prosecution would not infringe the applicant's right to equal treatment under the law.

As to the independence of Public Prosecutor, I am of the view that the working paper does not infringe such independence as enshrined in Article 55 of the Constitution, which provides as follows: -

> ***"PUBLIC PROSECUTOR***
>
> *The function of prosecution shall vest in the Public Prosecutor, who shall be appointed by the President of the Republic on the advice of the Judicial Service Commission. He shall not be subject to the direction or control of any other person or body in the exercise of his functions."*

The recommendation as formulated in the report is merely that, a recommendation, and that is not, as the claimant would have it, a directive or a requirement for the Public Prosecutor to issue charges under the Leadership Code Act were the report published in those terms. The independence and integrity of the Public Prosecutor is preserved, and I cannot find that there is any direction or control contained in the working papers of the Ombudsman to curtail the exercise of the Public Prosecutor's functions or discretion. A copy of the working paper was referred to the Public Prosecutor on 29 January 2004 and he quite rightly declined to comment. In addition the Public Prosecutor cannot issue a prosecution under the Leadership Code Act without a recommendation from the Ombudsman.

There is certainly no implied threat or suggestion that the Public Prosecutor would face further inquiry or public rebuke should he not exercise his discretion in favour of a prosecution under section 27.

Equally, I cannot find in either report that there is anything which would indicate that the Ombudsman is attempting to embarrass and ridicule Mr. Sope. The Ombudsman is simply carrying out his statutory

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functions. I do not find that there is anything sinister in the timing of the issue of the working papers that shows something of a vendetta against the applicant.

I agree also with the submission that there cannot yet be any breach of Article 55 and there is no indication that there is any intention expressed as to how the Public Prosecutor's function ought to be exercised. Of course the applicant is entitled to bring these proceedings now by virtue of Article 6 (1) of the Constitution which provides as follows: -

"ENFORCEMENT OF FUNDAMENTAL RIGHTS

(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."

These circumstances could mean that the rights of the applicant "are likely to be infringed" in his view so he may apply to the Supreme Court at this stage and I do not accept the Ombudsman's submission that the application is premature.

I find that the Ombudsman is not conducting a fresh enquiry on a matter previously undertaken in breach of Section 19 (1) of the Ombudsman Act. The investigation is clearly an ongoing one. That is made perfectly clear because the same file number, 1185, has been used and even though the enclosures in the second working paper had just become available when the first working paper was sent to the applicant, the Ombudsman has not closed his file and has never

published a report or recommendation under Sections 33 and 34 of the Ombudsman Act which provides as follows: -

"PUBLICISING PROCEEDINGS, REPORTS ETC

33. For the purpose of giving effect to any findings or recommendations of the Ombudsman following an enquiry into the conduct of a government agency or a leader, the Ombudsman may:

(a) publicise proceedings, reports and recommendations; and

(b) make reports and recommendations to the Parliament, the Prime Minister and other relevant persons and bodies as provided for by this Act, and

(c) give advice

34. (1) Subject to subsection (2), the Ombudsman must:

(a) make public by way of a written report the results of any enquiries carried out by him or her including any findings, recommendations and opinions; and

(b) furnish the complainant (if any) with a copy of his or her report.

(2) The Ombudsman may decide to keep a report, or part of it, confidential to the Prime Minister or the person in charge of the

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government agency the subject of the enquiry, on the grounds of public security or public interest.

(3) If the Ombudsman decides to keep a report, or part of it, confidential he or she must inform the complainant (if any) in writing of his or her findings without in any way prejudicing the grounds on which the Ombudsman decided to keep the report, or the part, confidential"

The difference between the recommendations in the Working Papers was that on 29 January 2004 an additional recommendation was made namely that: -

"The Public Prosecutor commence a prosecution against Mr. Sope under Sections (sic) 27 of the Leadership Code Act for breach of the Leadership Code Act constituted by his conviction for forgery."

I am satisfied that the second Working Paper was effectively a re-issue of the first when further information, namely the High Court and Court of Appeal decisions, was included and had been considered by the Ombudsman. There was simply a reformulation of the recommendation in the light of subsequent events and a further draft of the same working paper.

CONCLUSION

I find that none of the grounds raised in the application have succeeded, and the Constitutional application is accordingly dismissed.

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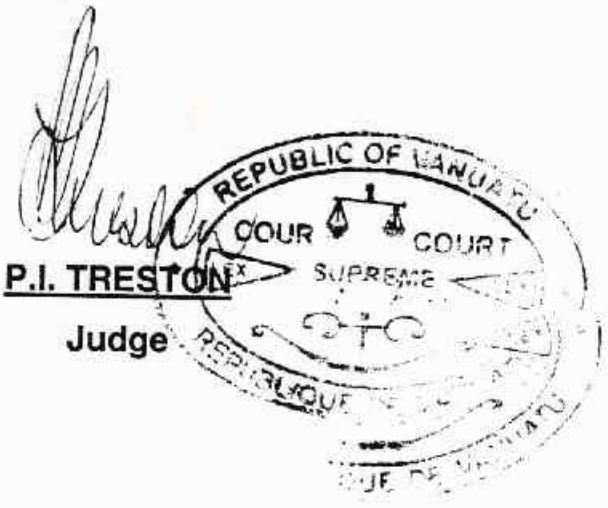
I award costs on the standard basis, in favour of the Attorney General, the Ombudsman, and the Public Prosecutor against the applicant as agreed or as determined by the Court.

Dated AT PORT VILA, this 26th day of July 2004

BY THE COURT



P.I. TRESTON

Judge

APPENDIX F

THE CONSTITUTION OF THE REPUBLIC OF VANUATU

THE LEADERSHIP CODE
THE PENAL CODE (CAP 135)

CONSTITUTION OF THE REPUBLIC OF VANUATU

CONDUCT OF LEADERS

66.(1) Any person defined as a leader in Article 67 has a duty to conduct himself in such a way, both in his public and private life, so as not to-

(a) place himself in a position in which he has or could have a conflict of interests or in which the fair exercise of his public or official duties might be compromised;

(b) demean his office or position;

(c) allow his integrity to be called into question; or

(d) endanger or diminish respect for and confidence in the integrity of the Government of the Republic of Vanuatu.

(2) In particular, a leader shall not use his office for personal gain or enter into any transaction or engage in any enterprise or activity that might be expected to give rise to doubt in the public mind as to whether he is carrying out or has carried out the duty imposed by sub-article (1).

DEFINITION OF A LEADER

67. For the purposes of this Chapter, a leader means the President of the Republic, the Prime Minister and other Ministers, members of Parliament, and such public servants, officers of Government agencies and other officers as may be prescribed by law.

LEADERSHIP CODE ACT of 1998

DUTIES OF LEADERS

13. A leader must:

(a) comply with and observe the law;

(b) comply with and observe the fundamental principles of leadership contained Article 66 of the Constitution;

(c) comply with and observe the duties obligations and responsibilities established by this Code or any other enactment that affects the leader; and

(d) not influence or attempt to influence or exert pressure on or threaten or abuse persons carrying out their lawful duty.

MISUSE OF PUBLIC MONEYS

20. A leader must not use, or agree to the use of, any public money for a purpose other than the purpose of which it may lawfully be used.

OTHER OFFENCES PUNISHABLE UNDER THIS ACT

27. (1) A leader who is convicted by a court of an offence under the Penal Code Act [CAP 135] and as listed in subsection (2) is:

(a) in breach of this Code; and

(b) liable to be dealt with in accordance with sections 41 and 42 in addition to any other punishment that may be imposed under any other Act.

(2) The offences are:

(t) forgery or uttering forged documents;

OBEYING THE LAW

28. A leader acting in his or her capacity as a leader who fails to abide by an enactment that imposes on the leader a duty, obligation, or responsibility is in breach of this Code.

SPECIFICATION PROVISIONS

29. Without limiting the generality of section 28 a leader who fails to abide by the provisions of an Act that provides for:

(a) the public service; or

(b) public finance or economic management; or

(c) expenditure review committee or audit functions; or

(d) government contracts or tenders;

is in breach of this Code

DISMISSAL FROM OFFICE

41 (1) Where a leader is convicted of a breach of the Leadership Code the court may, if it regards the breach as serious, make an order dismissing the leader from office

(2) In determining whether the breach of this code is serious, the court may have regard to

(a) in the case of a breach involving a financial matter, the amount involved:

(b) whether the conduct of the leader was significantly below what would be expected of a leader

(c) where it is possible to discern, the motives of the leader,

(d) the extent to which the breach diminished the respect or public confidence in the leader's position; and

(e) whether the leader has been previously convicted of a breach of this Code.

DISQUALIFICATION FROM FUTURE OFFICE

42. Where the leader is dismissed from office under section 41 the leader is disqualified from standing for election as, or being appointed as, a leader of any kind for a period of 10 years from the date of the conviction.

PENAL CODE (CAP 135)

FORGERY DEFINED

139. (1) Forgery is making a false document, knowing it to be false, with the intent that is shall in any way be used or acted upon as genuine, whether thin the Republic or not, or that some person shall be induced by the belief that it is genuine to do or refrain from doing anything, whether within the Republic or not.

(2) For the purposes of this section, the expression "making a false document" includes making any material alteration in a genuine document, whether by addition, insertion, obliteration, erasure, removal or otherwise.

(3) For the purposes of this section the expression "false document" mean a document :-

(a) of which the whole or any material part purports to be made by any person who did not make it or authorise its making;

(b) of which the whole or any material part purports to be made on behalf or any person who did not authorise its making;

(c) in which, though it purports to be made by the person who did in fact make it or authorise its making, or purports to be made on behalf of the person who did in fact authorise its making, the time or place of its making, whether either is material, or any number or

distinguishing mark identifying the document, whether either is material, is falsely stated;

(d) of which the whole or some material part purports to be made by a fictitious or deceased person, or purports to be made on behalf of any such person; or which is made in the name of an existing person, either by him or by his authority, with the intention that it should pass as being made by some person, real or fictitious, other than the person who makes or authorises it.

(4) It is immaterial in what language a document is expressed or in what country or place and whether within or beyond the Republic it is expressed to take effect.

(5) The crossing of any cheque, banker's draft, post office money order, postal order or other document the crossing of which is authorised or recognized by law, is a material part of such document.

PROHIBITION OF FORGERY

140. No person shall commit forgery.

Penalty: Imprisonment for 10 years

UTTERING FORGED DOCUMENTS

141. No person, knowing a document to be forged, shall;

(a) use, deal with, or act upon it as if it were genuine;

(b) cause any person to use, deal with, act upon it as if it were genuine.