

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

Criminal Case No. 1541 of 2017

**JOHN FORDHAM**

Private Prosecutor

**V.**

**KIKI COLMAR  
GRAHAM HACK**

Defendants

**Before:** *Justice Daniel Fatiaki*

**In Attendance:** *Counsel – Robert Sugden for John Fordham  
Counsel – Nigel Morrison for Kiki Colmar  
Counsel – Silas Hakwa for Graham Hack*

**Date of Delivery:** *11 August 2017*

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**RULING**

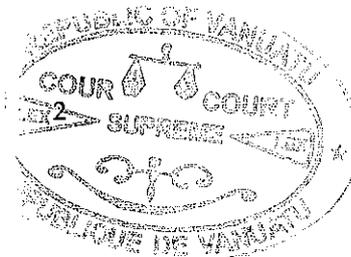
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1. This is a private prosecution commenced in this Court by way of a purported Information charging the defendants jointly with three offences namely, Soliciting Attempted Intentional Premeditated Homicide contrary to Section 106(1)(b), 28 and 35 of the Penal Code (“PC”) [CAP. 135] (Count 1); Procuring Attempted Intentional Premeditated Homicide contrary to Sections 106(1)(b), 28 and 30 of the Penal Code [CAP. 135] (Count 2) and Conspiracy to Commit Intentional Premeditated Homicide contrary to Sections 106(1) PC and 29 of [CAP. 135] (Count 3).
2. I say at once that the charges as drafted are not easy to understand in its use of “*technical terms*” including the pre-selection of a paragraph “(b)” and the use of a term that is relevant to the sentence rather than to the elements of the offences charged. Likewise the reference in the statement of offence to an inchoate crime is both unhelpful and confusing and may be non-compliant with the provisions of Sections 71 and 74 of the Criminal Procedure Code (“CPC”).
3. Be that as it may by Section 14(2) of the Judicial Services and Courts Act [CAP. 270] the Magistrate’s Court only “*has jurisdiction to hear and determine in a summary way criminal proceedings for an offence for which the maximum punishment does not exceed imprisonment for 2 years*” and a senior magistrate may hear and determine criminal proceedings “*for an offence for which the maximum punishment does not exceed 10 years*”.
4. The soliciting and procuring offences with which the defendants are jointly charged carry maximum sentences of life imprisonment and are therefore triable only in the Supreme Court [see: Sections 28(4), 30 and 35 of the PC]. The Conspiracy charge however, is not so clear in light of Section 29(4) of the PC which cryptically states:



"a conspiracy to commit a criminal offence shall be punishable only where expressly provided by any provision of law".

5. In accordance with Section 143(1) of the CPC every offence triable only in the Supreme Court shall be the subject of a preliminary enquiry ("PI") by a senior magistrate carried out in accordance with PART VII.
6. By way of relevant background.
7. On the night of 15 December 2013 Paul Tunat and 2 other men went to the house of the private prosecutor, John Fordham, at Luganville in Santo where they twice deactivated the lighting in the yard. This brought Mr. Fordham outside to check the external switch box. While Mr. Fordham was checking the box, Paul Tunat spoke to him and advanced within 2 metres of him and discharged a loaded pistol at him. Fortunately the bullet missed its target and the three (3) men ran off. Paul Tunat was subsequently arrested and charged inter alia with Attempted Intentional Homicide contrary to Section 106 and Section 28 of the Penal Code.
8. In August 2014 following a trial in the Supreme Court, Paul Tunat was convicted and sentenced to 8 years imprisonment (see: Public Prosecutor v Paul Tunat [2014] VUSC 112).
9. In November 2014 Paul Tunat unsuccessfully appealed to the Court of Appeal against his conviction (see: Tunat v Public Prosecutor [2014] VUCA 36).
10. On 14 February 2017 a private prosecution was commenced by John Fordham in the Magistrate's Court, by the lodgement of a sworn written complaint against the defendants and the issuance of warrants for their arrest. It is unclear on what basis or authority the arrest warrants for the defendants were filed at the same time as the sworn complaint, but in any event, Section 36(1) of the CPC clearly vests the authority in a "judicial officer" to elect "*in his discretion*" to issue either a summons or a warrant to compel the attendance of an accused person.
11. On 6 April 2017 the defendants appeared before the Magistrate's Court at Luganville, Santo and both were granted bail on various conditions including a condition (6) "*... that they appear before the Magistrates Court at Port Vila on 18<sup>th</sup> May 2017 at 9.00 a.m. for Preliminary Inquiry*". By order dated 18 May 2017 the defendants' bail was extended to 30<sup>th</sup> May 2017.
12. On or about 18 May 2017 a bundle of Preliminary Inquiry Papers (PI papers) comprising a draft Information with excessive evidential particulars; statements of 19 witnesses including 2 statements and an interview record of Paul Tunat; and several documentary exhibits including a usage record of a mobile No. 678 5541978 for the month of December 2013 was lodged in the Magistrates Court at Port Vila. The PI papers were accompanied by a written submission of counsel for the private prosecutor outlining the case against the defendants and highlighting the evidence in support as well as providing a summary of each prosecution witness's evidence.



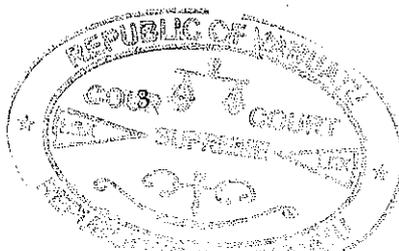
13. In a brief written submission dated 7 June 2017 counsel for the second defendant submitted that on the basis of the PI materials lodged "*there is no prima facie case made out against Mr. Graham Hack*".
14. By order dated 19 June 2017 a senior magistrate authorised the filing of an Information against the defendants and committed them for trial in the Supreme Court on 4 July 2017 at 9.00 a.m.
15. The draft Information that was included in the PI papers contains three (3) counts, namely, Soliciting Attempted Intentional Premeditated Homicide; Procuring Attempted Intentional Premeditated Homicide and Conspiracy to Commit Intentional Premeditated Homicide. In the absence of "*the consent in writing of the Public Prosecutor*", the charge of Conspiracy was, in my view, improperly included in the draft Information and indeed, should not have been committed [see: Section 29(5) of the Penal Code].
16. Be that as it may by an Information dated 4 July 2017 filed in the Supreme Court, all three offences were again charged with identical particulars, against the defendants without attaching the written consent of the Public Prosecutor authorising the laying of the Conspiracy charge. Count 3 is accordingly struck out as legally incompetent and ultra vires.
17. The Information is signed by "**R. E. Sugden**" the lawyer for the private prosecutor and commences with the words:

*"The 4 day of July, 2017 the Court is informed by the Private Prosecutor, JOHN FORDHAM that Kiki Colmar also known as Christopher Colmar, and Graham Hack are charged with the following offences"*.

18. After extensive discussions with counsel for the private prosecutor and defence counsels it was agreed that the court should first consider and determine as a preliminary jurisdictional matter the following questions:
  - (i) *Does a private prosecutor have the right to file an Information in a private prosecution for a trial in the Supreme Court? and*
  - (ii) *If not, can the private prosecutor pursue a trial in the Supreme Court on charges initiated other than through an information under Section 146(3) of the Criminal Procedure Code?*
19. I am grateful to all counsels for the helpful written submissions provided to the Court.
20. On the first question, counsel for the private prosecutor refers to the provisions of Sections 35, 36, 143, 144 and 152 of the CPC and Sections 8, 10 and 14(2) of the Public Prosecutors Act [CAP. 293] and submits:

*"the relevant legislation reveals a legislative intention that private prosecutions be instituted and conducted in the Supreme Court by private prosecutors and that the trials be 'upon information' Section 145(2) of the CPC"*.

I disagree.

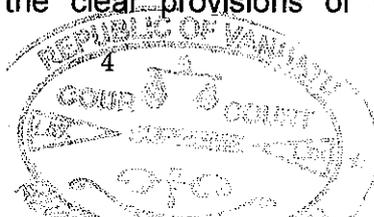


21. The Criminal Procedure Code contains separate and distinct definitions for the "Deputy Public Prosecutor"; an "Assistant Public Prosecutor"; a "state prosecutor"; a "Prosecutor" and a "private prosecutor". I accept that the definition of a "Prosecutor" is inclusive but that does not mean that the term is interchangeable with or always includes a "private prosecutor". Indeed the express exclusion in brackets of "a prosecutor" in the definition of a "private prosecutor" reinforces this restrictive view.
22. Even accepting that a "private prosecutor" can swear and sign a complaint to initiate a criminal proceeding [see: Section 35(2) of the CPC] and further that the Supreme Court can order a "private prosecutor" to pay costs [see: Section 99(2) of the CPC], neither provision supports the submission. Indeed Section 99(1) clearly states (so far as relevant for present purposes):

"... it shall be lawful for the judicial officer who acquits or discharges a person accused of an offence, if the prosecution for such offence was originally instituted on a summons or warrant issued by a court on the application of a private prosecutor, to order such private prosecutor to pay to the accused such costs as ... the judicial officer shall consider reasonable".

(my underlining)

23. The highlighted text is clear in identifying the person against whom the costs order is to be made and relates back to the person who "originally instituted" the prosecution in the Magistrates Court by lodging a sworn complaint and applying for a summons or warrant. It does not mean or imply, as counsel submits, that a private prosecution can be instituted in the Supreme Court.
24. In this latter regard Section 35(2) of the CPC enables a "private prosecutor" to institute proceedings in the Magistrates Court by making and signing a complaint under oath before a judicial officer. Significantly within the same subsection and by way of contrast, the proviso permits a "prosecutor" or an authorised "public officer" to institute proceedings by signing and presenting a formal charge without having to make and sign a complaint on oath. Subsection (3) requires the judicial officer to draw up a formal charge where the complainant is a private prosecutor.
25. I say "significantly" because the contrasting use of "private prosecutor" and "prosecutor" in the same subsection in the context of a "complaint" and a "formal charge" suggests that a private prosecutor is not permitted or expected to draw up a formal charge in the Magistrates Court, and much less, an Information for a trial in the Supreme Court.
26. On the scheme outlined in counsel's submissions a private prosecution can be initiated, progressed and tried without the authorisation, knowledge or participation of the Public Prosecutor who is constitutionally vested with "the function of prosecution" (see: Article 55) including the power "to institute, prepare and conduct preliminary enquiries" [see: Section 8(1)(a) of the Public Prosecutor Act].
27. I accept that a citizen's right to initiate a private prosecution in the Magistrates Court is a valuable right but the "right" is not unlimited and, in my view, is necessarily constrained by the clear provisions of the CPC dealing with



Preliminary Enquiries [see: Part VII of the CPC and Section 8(1)(a) of the Public Prosecutor Act] and the various provisions dealing with the initiation of a prosecution in the Supreme Court by way of an Information [see: Sections 146(3), 147, 151 and 152].

28. Section 146(3) clearly states:

*"The Public Prosecutor (**not** "prosecutor" or "private prosecutor") must file the information in the registry of the Supreme Court at least 7 days before the date specified for trial ..."*

and Section 151 reinforces the involvement of the Public Prosecutor by providing "***expressio unius exclusio alterius***":

*"All informations drawn up pursuant to Section 146(3) shall (**not** "may") be in the name of and signed by or on behalf of the Public Prosecutor by the Deputy Public Prosecutor, an Assistant Public Prosecutor or a State Prosecutor".*

29. All of the designated signatories of an Information are either officers of the Office of the Public Prosecutor or appointed by the Public Prosecutor under Section 22 of the Public Prosecutor Act. There is, in my view, no possibility for a "*private prosecutor*" or his counsel to draw up and/or sign an Information initiating a prosecution in the Supreme Court without the written appointment and authorisation of the Public Prosecutor.

30. In this latter regard Section 22 of the Public Prosecutor Act permits the Public Prosecutor to appoint in writing, a legal practitioner to be a "*State Prosecutor*" for the purpose of any prosecution. There is no evidence that such an appointment was either sought or made in favour of "**R. E. Sugden**" the lawyer for the private prosecutor in the present case.

31. Accordingly, in the absence of such written appointment or authorisation, I answer the first question: "**No**".

32. As for the second question, I am not persuaded by counsel's submission that this Court has, in the face of clearly contrary statutory provisions, an "*inherent jurisdiction*" to permit or countenance an Information signed by a private prosecutor or his counsel without the written sanction of the Public Prosecutor.

33. I am fortified by the provisions of Section 10 of the Public Prosecutor Act which deals with power of the Public Prosecutor to take over and assume the conduct of a prosecution instituted by a private prosecutor whether or not he consents to it, and to decline to proceed further with the prosecution [see also: Section 8(1)(f) of the Public Prosecutor Act] and by Section 29 of the CPC which deals with the Public Prosecutor's power to enter a "*nolle prosequi*" at any stage "*in any criminal case*". Such powers would be rendered impotent and otiose if a private prosecution could be initiated and prosecuted to a conclusion without the knowledge, acquiescence, or involvement of the Public Prosecutor.

34. In my view, contrary to the submissions of counsel for the private prosecutor, the relevant legislative scheme and intention of the various provisions highlighted in



this Ruling is that any and all prosecutions in the Supreme Court are exclusively vested in the Public Prosecutor consistent with his constitutional function.

35. In light of the Court's consideration of the relevant provisions of the CPC and the Public Prosecutor Act, the answer to the second question is also: "**No**".
36. The Information dated 4 July 2017 signed by "**R. E. Sugden**" as the lawyer for the Private Prosecutor is accordingly quashed and as the defendants have not yet pleaded to the information, I make no order regarding them.
37. I make no order as to costs in light of the provisions of Section 99(3) of the Criminal Procedure Code.

**DATED at Port Vila, this 11<sup>th</sup> day of August, 2017.**

**BY THE COURT**

  
**D. V. FATIAKI**  
**Judge.**

