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IN THE HIGH COURT OF SOLOMON ISLANDS

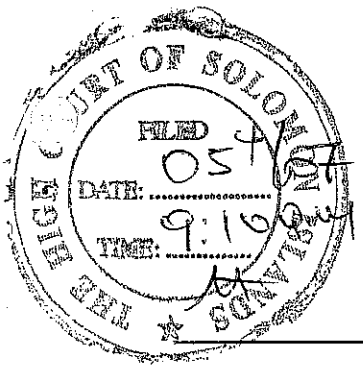
Civil Case No. 452 of 2006

(Civil Jurisdiction)

IN THE MATTER OF an application by Julian Ronald Moti QC for orders of certiorari and prohibition, pursuant to Order 61 of the High Court (Civil Procedure) Rules 1964 (as amended)

THE QUEEN v. PUBLIC SERVICE COMMISSION

EX PARTE JULIAN RONALD MOTI QC



AFFIDAVIT OF BRUCE KALOTITI KALOTRIP

I, BRUCE KALOTITI KALOTRIP of Pango Village, Efate, P O Box 196, Port Vila, Republic of Vanuatu, MAKE OATH AND SAY as follows:

1. I have been requested by Mr Charles Ashley of Messrs A & A Legal Service in Honiara, Solomon Islands, Counsel for the Applicant, Julian Ronald Moti QC ("Moti") in this matter, to provide a written statement detailing my involvement in previous proceedings connected with Moti in the Republic of Vanuatu.

2. I make this affidavit from:

(a) facts within my own knowledge save whereas so otherwise appears; and

(b) information derived from the public records of proceedings kept at the Supreme Court Registry in Port Vila, Republic of Vanuatu.

Such statements as relate to my own acts and deeds are true and accurate and those which relate to the acts and deeds of others I believe to be true.

3. I have not been offered nor received any inducement, reward or remuneration for making this affidavit.

4. Until December 1999, I was a ~~Senior~~ Magistrate in the Magistrate's Court at Port Vila.

5. On August 23, 1999, I was assigned to conduct a preliminary inquiry into two charges of unlawful sexual intercourse and one charge of indecent assault brought against Moti by the Public Prosecutor:

(a) pursuant to the order of the Court of Appeal of Vanuatu directing that "the matter be returned to the Senior Magistrate's Court to be considered afresh by a different Magistrate";

(b) following the issue by the Court of Appeal of Vanuatu of an order of certiorari "to bring up and quash the decision of the Senior Magistrate dated the 17th of April 1998 committing [Moti] to the Supreme Court for trial upon information."

Those orders are contained in the Judgment delivered by the Court of Appeal on April 23, 1999, a copy of which is now produced and shown to me and exhibited hereto marked "BKK1".

6. I commenced the preliminary inquiry at about 9.00am on Monday, August 23, 1999 with:

(a) Mr Ian Barker QC introducing himself and Dr David Chaikin as Co-counsel instructed by Mr Dudley Aru, Partner of Motis Pacific Lawyers, together appearing on behalf of Moti;

(b) Corporal Joshua Krem announcing his appearance as State Prosecutor in the matter.

7. When Corporal Krem proceeded to open the Prosecution case in the Bislama language, I interjected by asking him why he was speaking in a language which Moti's foreign Counsel obviously did not comprehend. In fairness to them, I granted Corporal Krem's request for a short adjournment to enable him to brief Mr Terry Gardiner, an Australian prosecutor who also dealt with Moti's case, to represent the Prosecution in the preliminary inquiry.

8. At the resumption of inquiry, Ms Heather Lini Leo, the Public Prosecutor rose to assert the "constitutional right" of the State to conduct proceedings in any of the three official languages of Vanuatu without regard for the disabilities of the accused and his legal representatives and any concern for justice. I told Ms Leo how troubled I was by her "silly" remarks and gave my reasons for ruling that the Prosecution proceed forthwith in English. Although she was one of the witnesses in the case, Ms Leo disclaimed any knowledge of the facts and nominated Mr Gardiner to take control of the Prosecution case.

9. After a further adjournment, Mr Gardiner began his presentation of the Prosecution case for committal of Moti. He referred to the draft information filed by the Prosecution, read the provisional charges and commented on the material relied upon by the Prosecution. No written submissions were filed by the Prosecution. I recorded the main points of Mr Gardiner's oral submissions and asked him some questions about the evidentiary relevance of various materials included in the Prosecution brief.

10. I allowed Mr Barker QC to address me next. He handed up his written "Outline Submissions" (a copy of which is now produced and shown to me and exhibited hereto marked "BKK2") and made a comprehensive reply to Mr Gardner's presentation. I then invited Mr Gardiner to respond and noted that he was "content to let the matter rest" for my decision. I informed Counsel that I would adjourn the matter for consideration. Mr Aru rose to inform me that both foreign Counsel were booked to fly out of Port Vila late in the afternoon. I

replied that I would endeavour to make a decision as soon as practicable and advised them that my Clerk would contact all Counsel when my decision was ready for delivery that afternoon.

11. I devoted the remainder of the morning and my entire luncheon recess to consider all of the materials and submissions presented during the hearing. Shortly after 2.00pm, I had drafted my decision for typing. When it was typed, I advised my Clerk to inform the lawyers of the appointed time for delivery of my decision.

12. Both the preliminary inquiry and the decision I had made conformed strictly to the requirements of Sections 143 – 146 (inclusive) of the Criminal Procedure Code [Cap. 136] (excerpts of which are now produced and shown to me and exhibited hereto marked "BKK3") and the dictum of Chief Justice Vaudin d'Imecourt in **Public Prosecutor v. Hollingson Issachaar** [1989-1994] 2 Vanuatu Law Reports 742 (a copy of which is now produced and shown to me and exhibited hereto marked "BKK4"). My decision was lengthier in content than the standard format earlier used by Magistrate Jerry Boe for the committal of Moti.

13. I delivered my decision in open court and in the presence of all Counsel, Moti and both the complainant and her father. A copy of my decision is now produced and shown to me and exhibited hereto marked "BKK5".

14. News of my decision was widely reported in the local and regional media. A copy of an article published on the front page of the *Nasara* newspaper on August 28, 1999 is now produced and shown to me and exhibited hereto marked "BKK6".

15. My decision was never appealed by the Prosecution.

16. By the end of 1999, I was getting somewhat disillusioned with my work and future career in the Vanuatu judiciary and decided to approach Acting Chief Justice Vincent Lunabek for advice and guidance. With encouragement from my judicial colleagues, I began contemplating a professional career in private practice. I had seen numerous vacancy notices advertised by local law firms.

17. I noticed that Motis Pacific Lawyers had advertised four vacancies for lawyers with experience in litigation, commercial and corporate work and offered prospects for further education and professional training abroad. I knew that Mr Aru had been recruited by that firm under an arrangement which enabled him to obtain postgraduate qualifications in Australia. I applied to the resident Managing Partner, Ms Ramona Wilson and was interviewed by her for a position as a litigation lawyer. Ms Wilson informed me that she had taken over control of the firm following Moti's relocation to Honiara and was still awaiting the Law Council's formal approval of her application for admission to the Vanuatu Supreme Court. She told me that the firm was desperately trying to recruit an experienced litigation lawyer who could take carriage of the court work while her admission was being formalized. After I was offered the position, I found out that the applicable rules prevented me from appearing in any court matter for another year. I had already tendered my resignation from the Vanuatu judiciary. After much discussion about my predicament, I finally persuaded Ms Wilson to support my application for postgraduate studies in legal practice at the University of Western Sydney which would qualify me for admission and enable me to advance my career without breaching the rule prohibiting my appearance in court for one year. With an employment undertaking kindly provided by Ms Wilson, I managed to secure a place at the University of Western Sydney and obtained the necessary visa to study in Australia during the 2000 academic year.

18. During the course of my postgraduate studies at the University of Western Sydney, I became very interested in pursuing a doctoral degree in international law. I informed Ms Wilson about my change of plans and notified her of my decision to remain in Australia to complete my doctoral program.

19. Contrary to what was reported in the international news media in October last year, I can honestly say that I was never "bribed" by Moti or anyone else to compromise my judicial duties when I presided in Moti's preliminary inquiry. I made my decision at the conclusion of that preliminary inquiry strictly on the basis of the materials and submissions presented to me by all of the Australian Counsel representing both the Prosecution and Moti. I have made public statements describing my "outrage" to the allegation of "corruption" leveled against me by the Australian Government and condemning

their audacity to presume my criminal complicity in such enterprise without even bothering to ascertain the truth from me.

20. The Australian Federal Police have never interviewed me at any time in connection with their probe into Moti's discharge at the preliminary inquiry I conducted on August 23, 1999.

21. I have never been charged with the commission of any alleged offences in the Republic of Vanuatu or elsewhere in connection with my judicial role in Moti's preliminary inquiry.

22. Although I was nominally joined as the First Defendant to a judicial review application to excise my order to award costs against the State of the Republic of Vanuatu for the "unjustified and oppressive prosecution" of Moti, I was never notified thereof nor involved in the consensual settlement of those proceedings. Earlier this year, I inspected the records of the judicial review proceedings (Civil Case No. 197 of 2003) in the Supreme Court Registry and obtained copies of the following documents (which are now produced and shown to me and exhibited hereto marked "BKK7"):

(a) "Claim for Judicial Review" filed on November 18, 2003, wherein paragraphs 2 and 3 stipulate as follows:

> "2. In the proper exercise of his administrative function the First Defendant [i.e. I] refused to commit Moti. Nor did he authorize the laying of the proposed information against the intended accused [Moti] ... Also under the power vested to him by s. 146(1) of the Criminal Procedure Code ... he discharged the intended accused [Moti] ...
>
> 3. No issue is taken as to the lawfulness of such orders."

(b) "Affidavit in Support" of Public Prosecutor Nicholas Mirou sworn on November 18, 2003, wherein he deposes at paragraphs 7 and 15 as follows:

"7. The file retrieved from the archives was filed as *closed* due to the fact that the First Defendant made a decision on 23rd day of August 1999. The matter was closed after the First Defendant refused to commit Moti to stand trial at the Supreme Court on charges of a number of counts alleging sexual intercourse.

15. I seek the orders of the court to quash the order with reference to costs against the state, as it is ultra vires the powers of the First Defendant to make such an order, in that he was only exercising an administrative function when he conducted the preliminary inquiry."

(c) "Order" of the Supreme Court granted by consent on April 15, 2004, wherein Chief Justice Vincent Lunabek states as follows:

"I am informed and satisfied that by facsimile dated April 2, 2004, Mr Julian Moti sent a letter to the Public Prosecutor, Mr Nicholas Mirou, regarding his intention not to contest the claim made by the Public Prosecutor ...

The Court grants Orders quashing Order 5 of the decision made by Magistrate Bruce Kalotiti, in preliminary inquiry matter of Public Prosecutor v. Julian Moti (Cr. No. 7 of 1998) dated 23 August 1999, which reads as follows:

'In my opinion, the prosecution of the intended accused was unjustified or oppressive. Accordingly, in the exercise of my powers pursuant to section 101(1) of the Criminal Procedure Code [Cap. 136] ("CPC"), I hereby ordered that the State to pay to the intended accused his costs of and occasioned by this prosecution to be taxed, if not agreed. I also certify for two counsels.'"

SWORN by the abovenamed)
Deponent at Port Vila this)
3rd day of April, 2007)

Before me:

COMMISSIONER FOR OATHS TOM BETHUEL

Commissioner for Oaths

This Affidavit is filed on behalf of the abovenamed Applicant, Julian Ronald Moti QC by his Advocates, Messrs A & A Legal Services, Barristers & Solicitors, P O Box 1553, Honiara, Solomon Islands.

IN THE HIGH COURT OF SOLOMON ISLANDS

Civil Case No. 452 of 2006

(Civil Jurisdiction)

IN THE MATTER OF an application by Julian Ronald Moti QC for orders of certiorari and prohibition, pursuant to Order 61 of the High Court (Civil Procedure) Rules 1964 (as amended)

THE QUEEN v. PUBLIC SERVICE COMMISSION

EX PARTE JULIAN RONALD MOTI QC

EXHIBIT "BKK 1"

This is the Exhibit marked "BKK 1" referred to in the Affidavit of Bruce Kalotiti Kalotrip sworn on , the 30th day of April, 2007.

Before me:

Commissioner for Oaths

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

Criminal Case No. 01 of 1999 (Appeal)

JULIAN MOTI
Appellant

-v-

PUBLIC PROSECUTOR
Respondent

JUDGMENT

Coram: Hon. Acting Chief Justice Vincent Lunabek
Hon. Justice Bruce Robertson
Hon. Justice John von Doussa
Hon. Justice Daniel V. Fatiaki

Counsel: The Appellant in person
Mr. Terry Gardiner for the Respondent

This is an appeal brought pursuant to leave granted by the Acting Chief Justice on the 4th of March 1999 against a decision of R. Marum J delivered on the 11th of September 1998 refusing the appellant's application for leave to apply for an order of certiorari to quash the decision of the Senior Magistrate's Court committing the appellant to the Supreme Court for trial upon information.

The learned Acting Chief Justice in granting leave to appeal expressed the view that this appeal raises important issues of law suitable for our consideration. In essence this appeal concerns the law and procedure applicable to a preliminary enquiry conducted in accordance with Part VII of the Criminal Procedure Code [CAP. 136] ('CPC').

We record at once that Counsel for the Public Prosecutor did not wish to be heard on the jurisdictional question of the availability of prerogative relief in connection with committal proceedings and his concession that this Court treat this appeal as if leave to apply for prerogative relief had been granted. We propose accordingly to proceed to deal with the merits of the application.

The Appellant was provisionally charged in a draft information laid before Senior Magistrate's Court containing seven counts of Unlawful Sexual Intercourse contrary to section 97(1) of the Penal Code CAP 135 ('PC') which collectively allege that over several months in 1997 the appellant had sexual intercourse with (The complainant) knowing that she was '*only 13 years of age*'.

The maximum penalty provided in section 97(1) of the Penal Code for an offence of Unlawful Sexual Intercourse is imprisonment for 14 years and as such is '*an offence triable only in the Supreme Court*' [see: Section 4 (1) (a) of the Courts Act (CAP 122)]. Section 143 of the 'CPC' requires a Senior Magistrate in such a case to hold a preliminary enquiry in accordance with Part VII of the 'CPC' and Section 145 of the 'CPC' lays down the procedure to be followed by the Senior Magistrate holding a preliminary enquiry.

The Section reads:

"(1) The Senior Magistrate shall not be bound to hold any formal hearing but shall consider the matter without delay in whatever manner and at whatever time or times as he shall consider fit.

(2) The Senior Magistrate shall decide whether the material presented to him discloses, if the same be not discredited, a prima facie case against the intended accused requiring that he be committed to the Supreme Court for trial upon information.

(3) The Senior Magistrate shall allow, but shall not require, the accused to make any statement or representation."

In interpreting this Section we have had our attention helpfully drawn to various dicta of the former Chief Justice as to the proper function and duties of a Senior Magistrate conducting a preliminary enquiry under the 'CPC' in The Public Prosecutor –v- Michael Mereka and The Public Prosecutor –v- Hollingson Issachar. Both cases are reported in (1989-94) 2 V. L. R. at p. 613 and 742 respectively. We would respectfully endorse those observations as they accurately identify minimum requirements.

We are satisfied that Sections 145 and 146 ought to be read as a composite whole and not as a series of sequential steps required to be followed in a particular order by the Senior Magistrate conducting a preliminary enquiry. Further we are satisfied from the wording of the Section that the procedure envisaged in a preliminary enquiry is a speedy informal one primarily designed to ensure that an accused person shall not be committed to the Supreme Court for trial upon information unless a '*prima facie*' case has been made out on all the '*materials*' presented to the Senior Magistrate. The test is in our view is **not** whether on the materials presented the intended accused should be convicted but the less stringent one of whether he could be convicted.

For the sake of completeness we note that the Senior Magistrate is required in terms of Section 146 (1) to record his decision in writing, and in particular, state whether he authorises or does not authorise the laying of the proposed information against the intended accused, and, Section 146 (3) expressly prohibits the acceptance by the Supreme Court Registry of any information unless it has been '*specifically authorised*' by a decision of the Senior Magistrate.

In the particular context of the present charges the Senior Magistrate was required to be satisfied in respect of each count with which the appellant was charged, that there was some evidence to establish each of the elements or ingredients of the offences, namely:

(1) that the victim or complainant in the offence is a girl aged '*less than 13 years of age*' at the time of the commission of the offence; and

(2) that the intended accused had sexual intercourse with the complainant knowing that she was under 13 years of age at the time.

In his substantive application the Appellant raises numerous grounds which collectively allege non-compliance on the part of the Senior Magistrate with the provision of Section 145 of the CPC [CAP 136] before deciding that the materials disclosed a '*prima facie*' case against the Appellant, in particular, the Appellant complains that he was denied the opportunity to contest the allegation before the Order was made committing him to the Supreme Court.

In this latter regard, in his Affidavit in support of the application, which is undisputed, the Appellant deposed as to what occurred in the preliminary enquiry conducted by the Senior Magistrate in respect of the draft information filed against him, as follows:

> *"3. On the 17th day of April 1998, I attended at the Magistrate's Court in Port Vila for a preliminary enquiry in the abovecaptioned proceedings. At about 9.25 am on that morning, His Worship Jerry Boe, the Senior Magistrate, commenced the preliminary enquiry. Corporal Krem, appearing on behalf of the Public Prosecutor, tendered the 'PI' papers compiled by the Prosecution, outlined the Prosecution case and read the charges. He then proceeded to read the statements of various witnesses in open court.*
>
> *4. After reading the statement, Corporal Krem sat down. The Senior Magistrate continued writing notes while we waited. His worship then announced as follows: "Having heard materials presented to me, I find that a prima facie case is disclosed. I am therefore referring the accused Julian Moti to the Supreme Court for trial upon the information", or words to that or like effect.*
>
> *5. Immediately, I stood up and asked the Senior Magistrate whether I had a right to discredit the material presented by the Prosecution and why I did not get an opportunity to discredit that material before His Worship announced his decision.*

6. *His Worship replied as follows: "Part VII of the Criminal Procedure Code lays down the procedure which I should follow. You don't have any right to cross-examined or discredit. After I have made my decision on prima facie case, then Section 145 (3) says that I can allow you to made a statement. That the time you can make a statement and I'll record what you say. That the law, Mr. Moti. I didn't make the law. I can't do anything about it. As I said last week, if you want to change the law, you can go to Parliament and ask them to change it", or words to that or like effect.*

We are persuaded that the opportunity for an accused person to make a statement or representation under Section 145 (3), if it is to serve any useful or protective purpose, must be afforded **before** the decision is made that a '*prima facie*' case exists upon the materials sufficient to commit the accused to the Supreme Court for trial upon information. Having said that however, we do not consider that the constitutional protections afforded an accused person in a preliminary enquiry necessarily entails a right to cross-examine witnesses.

Upon our enquiry as to how he might exercised his right, the Appellant amongst other things, drew our attention to the absence of any evidence to establish the first ingredient of the offence with which he was charged namely, that the complainant was less than 13 years of age at the time of the commission of the offences.

We do not accept the submission that the words "*if the same be not discredited*" provide the Appellant with any rights at the preliminary enquiry. He has rights under Section 145 (3). The somewhat inelegant phrase in our view refers to what might happen at the eventual trial, and not at this point.

We have carefully, considered the various witness statements produced by the Prosecutor to the Senior Magistrate including the statements of the complainant, her parents, and an extract of her birth certificate, and are satisfied that, having regard to the dates of the offences charged in the draft information i.e. between May 1997 and October 1997, the complainant

was never '*less than 13 years of age*' albeit that the materials show she was 13 years of age.

Indeed counsel for the Respondent conceded as much at the hearing of the appeal but he sought to categorize the error in the reference to subsection (1) instead of subsection (2) of Section 97 in the **Statement of Offence** as a '*typographical error*' which the Senior Magistrate could have amended to bring it into confirmity with the materials presented.

Unfortunately that did not occur in this case.

In the result the Appellant was committed for trial on an information that charges him with an offence under Section 97 (1) which was not open on the materials before the Senior Magistrate and the order committing the Appellant for trial must be quashed.

In light of our decision in this appeal, we refrain from making any further comment on the materials before the Senior Magistrate. We would merely observe the following:

Firstly, in the scheme envisaged under Part VII of the 'CPC' the prosecutor bears the primary responsibility for the accuracy and adequacy of the draft information furnished to the Senior Magistrate;

Secondly, it is at least arguable that the constitutional protections afforded an accused person may not apply to '*the (provisionally charged) intended accused*' in a preliminary enquiry; but arise only at the stage of the trial; and

Thirdly, and this is common ground, that the 'CPC' does not appear to provide for the laying of an '*ex officio*' information in the Supreme Court.

For the foregoing reasons this appeal is allowed. Certiorari shall issue to bring up and quash the decision of the Senior Magistrate dated the 17th of April 1998 committing the Appellant to the Supreme Court for trial upon information. The matter is accordingly returned to the Senior Magistrates Court to be considered a fresh by a different Magistrate.

Dated at Port Vila, this ...23rd... Day of April 1999.
BY THE COURT

.....
J. Bruce Robertson J.
Judge

.....
John. W. von Doussa J.
Judge

.....
Daniel Fatiaki J.
Judge

.....
Vincent Lunabek J.
Acting Chief Justice

REPUBLIC OF VANUATU
COUR D'APPEL
COURT OF APPEAL
REPUBLIQUE DE VANUATU

IN THE HIGH COURT OF SOLOMON ISLANDS

Civil Case No. 452 of 2006

(Civil Jurisdiction)

IN THE MATTER OF an application by Julian Ronald Moti QC for orders of certiorari and prohibition, pursuant to Order 61 of the High Court (Civil Procedure) Rules 1964 (as amended)

THE QUEEN v. PUBLIC SERVICE COMMISSION

EX PARTE JULIAN RONALD MOTI QC

EXHIBIT "BKK 2"

This is the Exhibit marked "BKK 2" referred to in the Affidavit of Bruce Kalotiti Kalotrip sworn on , the 3rd day of April, 2007.

Before me:

Commissioner for Oaths TOM BATHUEL

IN THE SENIOR MAGISTRATES' COURT OF THE REPUBLIC OF VANUATU AT PORT VILA

CR 75/98

(Criminal Jurisdiction)

PUBLIC PROSECUTOR **v.** **JULIAN MOTI**

OUTLINE OF INTENDED ACCUSED'S SUBMISSIONS

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1. This statement and representation is made by the intended accused pursuant to **Criminal Procedure Code** [Cap 136], Section 145(3): see **Moti v. Public Prosecutor** Appeal Case 1 of 1999, unreported, p 5.

2. The task of the Senior Magistrate is to decide whether on the material presented to him there is a prima facie case against the intended accused requiring that he be committed for trial: **Criminal Procedure Code**, Section 145(2).

3. The expression "prima facie case ... requiring that he be committed for trial" requires proof of a case sufficiently strong to **require** committal, the question being, is there evidence on which the intended accused **could** be convicted (**Moti**, p 3)?

4. An affirmative answer to the question requires the Senior Magistrate to be satisfied:

   (1) there is sufficient **admissible** evidence, that is, evidence which would be properly admitted at trial: see **Penal Code**, Section 8(1) and **Criminal Procedure Code**, Section 162(2) and (3) and **Public Prosecutor v. Mereka** (1989) Vanuatu LR 613 at 614.

(2) the evidence is sufficient to permit the Supreme Court to **lawfully** convict the intended accused (the expression in **Moti** at p 3 "whether he could be convicted" must mean whether he could be **lawfully** convicted: **May v. O'Sullivan** (1955) 92 CLR 654 at 656).

5. "Committed for trial must mean lawfully committed and legally committed for trial": **R v. Gee** (1936) 2 All ER 89 at 91.

6. It is clear therefore that for the Senior Magistrate to commit Mr Moti for trial in respect of any of the 3 offences charged, the Prosecutor must first present material which, if presented in the Supreme Court, could lawfully be admitted as evidence and be adequate to sustain a conviction, that is:

(1) it must be relevant;

(2) it must otherwise comply with the rules of evidence;

(3) it must be capable of proving the offence charged.

7. There is no such evidence.

8. The complaint alleges Mr Moti committed 2 offences against **Penal Code**, Section 97(2) and 1 offence against Section 98(2) on 1 May 1997 and 13 October 1997. The draft information alleges:

(1) unlawful sexual intercourse on 1 May 1997;

(2) unlawful sexual intercourse on 13 October 1997;

(3) indecent assault between May and October 1997.

(Count 3 was added as recently as last Friday, notwithstanding that the judgment of the Court of Appeal was that the "matter" before it was to be considered afresh, not some other matter.)

9. The evidence on which the Prosecutor has to rely is found substantially in various statements purporting to be by Puaita Salmon. None of them are on oath, and they are not evidence.

A. <u>As to the first statement (15 December 1997)</u>:

(1) It is a typed statement purporting to have been signed by the complainant on 15 December 1997. It cannot have been signed then, because the typed statement is merely a copy of two handwritten statements apparently made on 15 December 1997.

(2) It is not on oath.

(3) It is in someone else's handwriting.

(4) It is in English whereas the complainant's nationality is said to be French.

(5) There is no evidence about whether the complainant can speak English or whether the statement is an accurate translation.

(6) It contains so much inadmissible material that it is not reasonable to expect the Senior Magistrate to extract from it those parts which might be admissible in evidence if repeated in the Supreme Court. For example, the statement makes frequent references to circumstances unconnected with the offences. It makes frequent references to sexual acts not charged: see, for example, **Gipp v. The Queen** (1988) 72 ALJR 1012, The statement makes reference to the complainant telling her father "everything" so long after the events that it cannot possibly be admissible as evidence of recent complaint: **Kilby v. The Queen** (1977) 129 CLR 460.

B. As to the second statement (31 December 1997):

(1) It is not on oath.

(2) It is in handwriting different from the first statement. The only contribution by the complainant appears to be the signature. There is no evidence whether she spoke in French or English to the unidentified person who wrote the statement; or whether the statement is an accurate translation.

(3) The reference to the "3 balls" is mere fantasy and sufficient to make all her evidence incapable of acceptance: see medical report of Dr Spooner annexed.

C. As to the third statement (9 January 1998).

(1) It is not on oath.

(2) It appears to be in the same handwriting as the second statement. Again, there is no evidence about how the statement was taken, in what language the complainant spoke, or whether it is an accurate translation.

(3) It is almost wholly inadmissible as referring to offences not charged.

D. As to the fourth statement (5 February 1998):

(1) It is not on oath.

(2) It is in still different handwriting, and remains entirely unexplained.

E. As to the fifth statement (18 February 1998):

(1) It is not on oath.

(2) It is in different handwriting from the first 4 statements. Again, there is no evidence of whether she spoke English or French or whether the statement is an accurate translation.

(3) She purports to say that the statement of 5 February 1998 was not of her will, yet that statement seems to have been made in her father's presence.

F. As to the sixth statement (23 March 1998):

(1) It is not on oath.

(2) It appears to be in the hand of the person who wrote the fifth statement. One may guess that this was Police Officer Namaka. Again, how the statement was taken is unexplained. There is no evidence of whether she spoke in English or French or whether the statement is an accurate translation.

(3) Most of it is inadmissible and there is real difficulty in severing those parts which might be admissible.

10. (a) There is no evidence at all in any admissible form to prove any of the offences charged. At the very least the statements should be attested to by oath or declaration.

(b) To the extent the material refers to the first charge, on 15 December 1997 it was alleged firstly that the act occurred on 8 May 1997 (see "Memo" p 2), whereas it changed to 1 May 1997 on 23 March 1998.

(c) There is no material at all supporting the allegation of an act said to have been committed on 13 October 1997. The statement of 23 March 1998 at p 3 refers to acts alleged to have been committed in Noumea on "the Sunday night" of 12 October 1997. Even if true, such acts could not constitute an offence against the law of Vanuatu: **Penal Code**, Sections 1-4.

(d) As to the third count, see the "Memo" of 15 December 1997 p 8, and the statement of 23 March 1998 p 2. Which is said to be the offence charged? In light of the Court of Appeal judgment, Count 3 should not be considered at all.

11. None of the other statements presented by the Prosecutor are admissible:

(a) they are not on oath.

(b) they are almost wholly irrelevant.

12. "Material" referred to in **Criminal Procedure Code** Section 145(2) should be interpreted as meaning "admissible evidence" and does not extend to informal statements not on oath. The proceedings contemplated by Section 145(2) are in the nature of traditional committal proceedings, notwithstanding that a practice has developed under Section 145(1) of holding "paper committals". The history of committal proceedings is conveniently summarised in the judgment of Dawson J in **Grassby v. The Queen** (1989) 168 CLR 1 at 11-19. Section 145 does not on its face suggest a departure from the ordinary rule that a court requires evidence to be sworn or affirmed. A departure from ordinary procedure would require some statutory provision: eg **Justices Act** (NSW), Sections 48 AA - 48D.

13. Whether or not Section 145 permits informal unattested statements to be received in evidence, Mr Moti claims the right to cross-examine the makers of the statements presented to the Senior Magistrate, before a decision is

made whether or not to commit for trial. See **Constitution**, Article 5 (2) (a) and **Moti** at pp 5 and 6. There is no authority on the point, but Criminal Procedure Code Section 162(3) suggests the right to cross-examine witnesses at the preliminary inquiry is necessary to avoid injustice.

Orders Sought

14. On the basis of our submissions, Mr Moti prays that:

    1. the Senior Magistrate decide that the material presented to him does not disclose a prima facie against Mr Moti requiring that he be committed to the Supreme Court for trial upon information;

    2. therefore, the Senior Magistrate does not authorise the laying of the proposed information against Mr Moti;

    3. accordingly, Mr Moti be discharged;

    4. all conditions previously imposed on Mr Moti and any undertakings given by him in relation thereto be discharged with immediate effect;

    5. in the premises, on the basis of the Senior Magistrate's opinion that the prosecution of Mr Moti was unjustified or oppressive, the State be ordered to pay Mr Moti his costs of and occasioned hereby to be taxed, if not agreed.

Submission on Costs

15. Considering that the Public Prosecutor:

    (a) had initially disputed and ultimately admitted his "typographical error" in charging Mr Moti wrongly on 7 counts of unlawful sexual intercourse under Section 97(1) of the Penal Code;

    (b) caused Mr Moti so much expense and inconvenience in pursuing his earlier application for the grant of an order of certiorari all the way up to the Court of Appeal;

    (c) has persisted in prosecuting these charges against Mr Moti (as well as adding another count late last Friday) without adequately, if at all,

reflecting on the quality and sufficiency of the evidentiary material required by statute to support a prima facie case;

(d) has put Mr Moti to great expense in retaining overseas counsel to represent him in these proceedings;

(e) has caused untold embarrassment and notoriety to Mr Moti and disrupted his professional career;

Mr Moti submits that this prosecution was "unjustified" or "oppressive" and, accordingly, applies to this Honourable Court under Section 101(1) of the CPC for an order that the State pay all of his costs of and occasioned hereby to be taxed, if not agreed.

Respectfully submitted

IAN BARKER QC
Barrister-at-Law

DR DAVID CHAIKIN
Barrister-at-Law

MOTIS PACIFIC LAWYERS

August 23, 1999

IN THE HIGH COURT OF SOLOMON ISLANDS

Civil Case No. 452 of 2006

(Civil Jurisdiction)

IN THE MATTER OF an application by Julian Ronald Moti QC for orders of certiorari and prohibition, pursuant to Order 61 of the High Court (Civil Procedure) Rules 1964 (as amended)

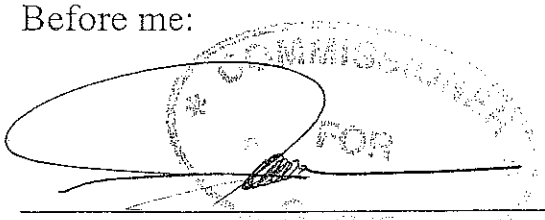
THE QUEEN v. PUBLIC SERVICE COMMISSION

EX PARTE JULIAN RONALD MOTI QC

EXHIBIT "BKK 3"

This is the Exhibit marked "BKK 3" referred to in the Affidavit of Bruce Kalotiti Kalotrip sworn on , the 30th day of April, 2007.

Before me:



Commissioner for Oaths TOM BETHUEL

PART VII

OFFENCES TRIABLE IN SUPREME COURT

Preliminary Enquiry

PRELIMINARY ENQUIRY TO BE HELD

143. (1) Every offence triable only in the Supreme Court shall be the subject of a preliminary enquiry by a senior magistrate in accordance with this Part.

(2) The prosecutor shall make a complaint and the intended accused shall be provisionally charged with the offence concerned before a Magistrate's Court presided over by a senior magistrate, in accordance with the appropriate provisions of Part III.

(3) Throughout the period of the preliminary enquiry, the intended accused shall remain subject to the jurisdiction of the said Magistrate's Court and shall be remanded from time to time for periods not exceeding 14 days at the discretion of the senior magistrate in custody or on bail.

DRAFT INFORMATION PREPARED BY THE PROSECUTOR

144. The prosecutor shall prepare and furnish to the senior magistrate and to the intended accused a draft information for the charge or charges contemplated by the prosecution.

PROCEDURE TO BE FOLLOWED BY SENIOR MAGISTRATE

145. (1) The senior magistrate shall not be bound to hold any formal hearing but shall consider the matter without delay in whatever manner and at whatever time or times as he shall consider fit.

(2) The senior magistrate shall decide whether the material presented to him discloses, if the same be not discredited, a *prima facie* case against the intended accused requiring that he be committed to the Supreme Court for trial upon information.

(3) The senior magistrate shall allow, but shall not require, the accused to make any statement or representation.

THE DECISION

146. (1) The senior magistrate shall record his decision in writing and deliver copies to the prosecutor and the intended accused. The decision shall show clearly that the senior magistrate either authorises or does not authorise the laying of the proposed information against the intended accused. If the information is so authorised, a copy of the decision shall be sent by the senior magistrate to the nearest registry of the Supreme Court.

(2) If the information is not authorised, the intended accused shall be by the same decision immediately discharged from the jurisdiction of the Magistrate's Court and if in custody shall be forthwith released. If the information is authorised, the senior magistrate shall by the same decision remand him to a date specified for trial in the Supreme Court either in custody or on bail, regardless of whether he was previously remanded during the course of the preliminary enquiry in custody or on bail.

(3) No information shall be accepted for filing in the registry unless it has been specifically authorised by a decision of the senior magistrate in accordance with this Part.

Initiation of Prosecutions in Supreme Court

NOTICE OF TRIAL

147. The Registrar of the Supreme Court shall endorse on or annex to every information filed by the Public Prosecutor in accordance with section 146(3), and to every copy thereof delivered to an officer of the court or police officer for service thereof, a notice of trial, which notice shall be in the following form, or as near thereto as may be—

"A.B.

Take notice that you will be tried on the information whereof this is a true copy at the Supreme Court ..... Registry at .....
on the ..... day of ..... 19....."

COPY OF INFORMATION AND NOTICE OF TRIAL TO BE SERVED

148. (1) The Registrar shall deliver or cause to be delivered to the officer of the court or police officer serving the information a copy thereof with the notice of trial endorsed on the same or annexed thereto, and, if there are more accused persons committed for trial than one, then as many copies as there are accused persons.

(2) The officer of the court or police officer aforesaid shall, as soon as practicable and 3 days at least before the day specified therein for trial, deliver to each accused person committed for trial the said copy of the information and notice and explain to him the nature and requirements thereof.

(3) When any accused person has been released from custody and cannot readily be found, the officer of the court or police officer shall leave a copy of the information and notice of trial with someone of his household for him at his dwelling-house, and if no such person can be found, shall affix the same to the door of the dwellinghouse of the accused person.

RETURN OF SERVICE

149. The officer serving the copy or copies of the information and notice or notices of trial shall forthwith make to the Registrar a return and shall give the approximate time, the date and manner of service thereof.

POSTPONEMENT OF TRIAL

150. (1) It shall be lawful for the Supreme Court upon the application of the prosecutor or the accused person, if the court considers that there is sufficient cause for the

IN THE HIGH COURT OF SOLOMON ISLANDS

Civil Case No. 452 of 2006

(Civil Jurisdiction)

IN THE MATTER OF an application by Julian Ronald Moti QC for orders of certiorari and prohibition, pursuant to Order 61 of the High Court (Civil Procedure) Rules 1964 (as amended)

THE QUEEN v. PUBLIC SERVICE COMMISSION

EX PARTE JULIAN RONALD MOTI QC

EXHIBIT "BKK 4"

This is the Exhibit marked "BKK 4" referred to in the Affidavit of Bruce Kalotiti Kalotrip sworn on , the 30th day of April, 2007.

Before me:

Commissioner for Oaths TOM BETIUEL

IN THE SUPREME COURT OF)
THE REPUBLIC OF VANUATU) Criminal Appeal No.5 of 1994

BETWEEN:

PUBLIC PROSECUTOR

Appellant

AND:

HOLLINGSON ISSACHAAR

Respondent

Coram: C. Vaudin d'Imecourt C.J

JUDGMENT

[CRIMINAL LAW - Committal Proceedings - obligation to give reasons for refusing to commit]

In this matter the prosecution seek leave to Appeal out of time against the refusal by the learned magistrate, Mr Jimmy Garae, to give reasons when refusing to commit the Respondent for trial following a preliminary enquiry pursuant to Section 145 of the Criminal Procedure Code [CAP 136].

The Respondent although served fails to appear. Mr Baxter-Wright (the Public Prosecutor) submits that the Court should hear the Appeal in the absence of the Respondent upon the basis that whatever the outcome of the Appeal it will not affect the Respondent's position and he undertakes not to revive this prosecution as against the Respondent in any event. He submits that this Appeal is based on a point of law of general importance as to whether or not reasons should be given when a magistrate decides not to commit a person to stand his trial before the Supreme Court.

Upon Mr Baxter-Wright's undertaking, leave is hereby granted to appeal out of time.

There are two grounds of Appeal, namely that:

(i) The learned magistrate erred in law in failing to give reasons for his decision that there was no case to answer;

(ii) The learned magistrate misunderstood the case of *Public Prosecutor v Michael Meraka* [Appeal No. 7 of 1992]

Mr Baxter-Wright submits that it is wrong in law for the learned Magistrate to refuse to give reasons when refusing to commit a defendant for trial on the basis that it puts both the defendant and the prosecution in an impossible position in that they would not know whether the Magistrate had reached his decision on proper grounds. He submits that this is unfair to both parties.

Committal proceedings in Vanuatu are governed by section 143 to 146 of CAP 136, and more precisely for the purposes of this appeal by sections 145(2) and 146(1). Section 145(2) states:

> "The senior magistrate shall decide whether the material presented to him discloses, if the same be not discredited, a prima facie case against the intended accused requiring that he be committed to the Supreme Court for trial upon information."

Section 146(1) states:

> "The senior magistrate shall record his decision in writing and deliver copies to the prosecutor and the intended accused. The decision shall show clearly that the senior magistrate either authorises or does not authorise the laying of the proposed information against the intended accused. If the information is so authorised, a copy of the decision shall be sent by the senior magistrate to the nearest registry of the Supreme Court."

The law of Vanuatu therefore requires two things of a magistrate, (i) that he decides whether there be a prima facie or not to commit for trial, and (ii) that he should give his decision in writing showing clearly whether he authorises or does not authorise the laying of an information. He then has the obligation to serve that decision on the prosecution and the accused. What the statute does not require him to do is to give reasons for his decision.

He may well write his decision as follows "having considered the whole of the evidence in this case I have come to the conclusion that the prosecution has not disclosed a prima facie case to commit this defendant for trial. I therefore refuse the laying of the proposed information herein." That in my view would satisfy the strict wording of the law. Mr Baxter-Wright submits that this would be unfair both to the defendant and the prosecution because it would not disclose the working of the mind of the learned magistrate who could well be acting capriciously. As far as the defendant is concerned, he of course, suffers no prejudice at all since he is not going to be tried. As for the prosecution, Mr Baxter-Wright further submits that such a decision would deprive them of a right to appeal because they would not be in a position to know whether the learned magistrate had erred in law or not or whether or not he had properly considered all the facts before him. I find no force in that submission for two reasons. Firstly, if the learned magistrate refuses to commit in a case where clearly there is a prima facie case, the prosecution will know that straight away and could appeal on that ground; secondly a defendant is not acquitted when a magistrate fails to commit. The prosecution has a further opportunity to find more evidence upon which to bring him before the magistrate upon which he could then be committed to stand his trial. So no injustice will be caused. In the rare cases where the evidence is so discredited before the learned magistrate that he refuses to commit, he will say so, for that is commonsense, and magistrates must always adopt the commonsense approach in these circumstances. It must at all times be remembered that a committing magistrate is not trying a defendant. All that the law requires of him is to assess the evidence and to decide whether there is a prima facie case upon which a defendant should be tried or not. He is not called upon to ask himself "if I were the tribunal of fact would I convict

this defendant or not". Under the law all he needs to ask himself is: "upon the evidence that I have heard has the prosecution shown that there is a prima facie case for the defendant to answer." If so the defendant ought to be committed to stand his trial; if not the learned magistrate should refuse to commit.

Although there is no obligation under the law placed upon a magistrate to state his reasons when committing or when refusing to commit a defendant to stand his trial, there is also nothing to prevent him from doing so and in some circumstances, commonsense may dictate that in the interest of justice and in the public interest he should state his reasons for his decision.

On the second ground of this Appeal, namely that the learned magistrate erred in basing his decision not to state his reasons for refusing to commit upon the decision of this Court in Public Prosecutor v Michael Meraka [Appeal No. 7 of 1992], I need not spend much time. The decision in that case had nothing to do with whether or not a magistrate should give reasons when hearing a preliminary inquiry. But the prosecution cannot succeed on that ground alone.

For the reasons I have stated above, this Appeal is dismissed.

Delivered at Port Vila on 18th day of July 1994

Charles Vaudin d'Imecourt
Chief Justice

IN THE HIGH COURT OF SOLOMON ISLANDS

Civil Case No. 452 of 2006

(Civil Jurisdiction)

IN THE MATTER OF an application by Julian Ronald Moti QC for orders of certiorari and prohibition, pursuant to Order 61 of the High Court (Civil Procedure) Rules 1964 (as amended)

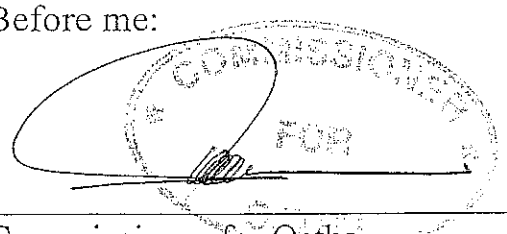
THE QUEEN v. PUBLIC SERVICE COMMISSION

EX PARTE JULIAN RONALD MOTI QC

EXHIBIT "BKK 5"

This is the Exhibit marked "BKK 5" referred to in the Affidavit of Bruce Kalotiti Kalotrip sworn on , the 30 day of April, 2007.

Before me:



Commissioner for Oaths

IN THE SENIOR MAGISTRATE'S COURT
OF THE REPUBLIC OF VANUATU Criminal Case 7of1998

(*Criminal Jurisdiction*)

PUBLIC PROSECUTOR -V- JULIAN MOTI

On the 23rd day of August 1999, the Court of Appeal of Vanuatu issued an order of certiorari to bring up and quash the decision of Magistrate Boe dated the 17th day of April 1998 committing Mr. Julian Moti to the Supreme Court for trial upon information. The Court of Appeal also ordered the matter to be returned to this Court "to be considered afresh by a different Magistrate".

In compliance with that order, I conducted a new Preliminary Inquiry earlier today, in accordance with Part VII of the Criminal Procedure Code [CAP. 136].

The intended accused, Mr. Julian Moti, was provisionally charged on two counts of Unlawful Sexual Intercourse contrary to Section 97(2) and one count of Indecent Assault contrary to Section 98(2) of the Penal Code [CAP. 135].

Having considered the material presented to the Court by Mr. Terry Gardner for the Prosecution, and after Hearing Mr. Gardner and Mr. Ian Barker QC and Dr David Chaikin of Counsel for the intended accused, I have decided as follows:

1. That there is *no prima facie* case disclosed against the intended accused requiring that he be committed to the Supreme Court for trial upon information.

2. Pursuant to Section 146(1) of the Criminal Procedure Code [CAP.136], I therefore do not authorise the laying of the proposed information against the intended accused.

3. Accordingly, pursuant to Section 146(2) of the Criminal Procedure Code [CAP.136], the intended accused is hereby immediately discharged.

4. All conditions previously imposed on the intended accused and any undertakings given by him in relation thereto are discharged with immediate effect.

5. In my opinion, the prosecution of the intended accused was unjustified or oppressive. Accordingly, in exercise of my powers pursuant to Section 101(1) of the Criminal Procedure Code [CAP. 136], I hereby ordered that the State to pay to the intended accused his costs of and occasioned by this prosecution to be taxed, if not agreed. I also certify for two counsels.

Dated At Port-Vila this 23rd day of August 1999.

REPUBLIC OF VANUATU — TRIBUNAL DE PREMIERE INSTANCE — MAGISTRATES' COURT — REPUBLIQUE DE VANUATU

BRUCE KALOTITI KALOTITI
Magistrate

1. That there is *no prima facie* case disclosed against the intended accused requiring that he be committed to the Supreme Court for trial upon information.

2. Pursuant to Section 146(1) of the Criminal Procedure Code [CAP.136], I therefore do not authorise the laying of the proposed information against the intended accused.

3. Accordingly, pursuant to Section 146(2) of the Criminal Procedure Code [CAP.136], the intended accused is hereby immediately discharged.

4. All conditions previously imposed on the intended accused and any undertakings given by him in relation thereto are discharged with immediate effect.

5. In my opinion, the prosecution of the intended accused was unjustified or oppressive. Accordingly, in exercise of my powers pursuant to Section 101(1) of the Criminal Procedure Code [CAP. 136], I hereby ordered that the State to pay to the intended accused his costs of and occasioned by this prosecution to be taxed, if not agreed. I also certify for two counsels.

Dated At Port-Vila this 23rd day of August 1999.

BRUCE KALOTITI KALOTIT
Magistrate

REPUBLIC OF VANUATU — TRIBUNAL DE PREMIERE INSTANCE — MAGISTRATES' COURT — REPUBLIQUE DE VANUATU

IN THE HIGH COURT OF SOLOMON ISLANDS

Civil Case No. 452 of 2006

(Civil Jurisdiction)

IN THE MATTER OF an application by Julian Ronald Moti QC for orders of certiorari and prohibition, pursuant to Order 61 of the High Court (Civil Procedure) Rules 1964 (as amended)

THE QUEEN v. PUBLIC SERVICE COMMISSION

EX PARTE JULIAN RONALD MOTI QC

EXHIBIT "BKK 6"

This is the Exhibit marked "BKK 6" referred to in the Affidavit of Bruce Kalotiti Kalotrip sworn on , the 3rd day of April, 2007.

Before me:

Commissioner for Oaths

Nasara

Port Vila Vanuatu. P.O. Box 70 .Telephone : 26250 - Fax : 26251 - Vol 1 :54 Wed 28 August , 1999. 100vt (VAT) email -nasara@vanuatu.com.vu

Charges against Moti "unjustified and oppressive"

State to pay lawyer's costs

Julian Moti finally had his day in court last Monday when Senior Magistrate Bruce Kalotiti dismissed complaints that he had sexually assaulted a 13 year old Tahitian girl two years ago.

Following his highly-publicised arrest and release on bail in March last year, the head of regional law firm, Motis Pacific Lawyers, battled all the way to the Court of Appeal to get Magistrate Jerry Boe's initial decision to commit him for trial quashed.

In its landmark decision delivered in ...il this year, the four judges of the Court Appeal found that Moti had been wrongly committed for trial and quashed Magistrate Boe's decision. The case was then sent back to the Magistrates' Court "to be considered afresh by a different Magistrate".

At the committal hearing last Monday, Moti was represented by Australia's leading criminal lawyers, Ian Barker QC and Dr David Chaikin PhD. Barker QC, a former Director of Public Prosecutions and Solicitor-General, is the President of the New South Wales Bar Association and in the Law Council of Australia. Dr Chaikin formerly held very senior positions in the Australian Attorney-General's Department and the Commonwealth Secretariat in London.

The Prosecution office wanted to conduct the case in Bislama rather than in English language. After three adjournments which saw four different prosecutors standing in for the Prosecution, Magistrate Kalotiti issued a firm ruling that he will proceed without any further delay or excuses.

The hearing didn't take long to conclude. The Senior Magistrate announced his decision in the afternoon. He found that "there is no prima facie case disclosed against the intended accused requiring that he be committed for trial" and, therefore, did "not authorise the laying of the proposed information" against Moti. The Court ordered that Moti be "immediately discharged".

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Charges against Moti "unjustified and oppressive"

The Magistrate also ruled that "In my opinion, the prosecution of the intended accused was unjustified and oppressive. Accordingly, in exercise of my powers pursuant to Section 101 (1) of the Criminal Procedure Code [CAP. 136], I hereby order the State to pay to the intended accused his costs of and occasioned by this prosecution."

Before flying back to Sydney, Barker QC and Dr Chaikin described the prosecution of Moti as "disgraceful". "This was an abysmal investigation involving a concocted story, tainted and unsworn statements followed by a completely unmeritorious prosecution. Mr Moti's persecution by the authorities has cost several millions of vatu in public money which could have been usefully diverted for the betterment of this beautiful country" said Dr Chaikin.

"Mr Moti is a well-known and highly-respected international lawyer. The damage to Mr Moti's professional reputation is irreparable and beyond quantification. We trust the better judgment of the Prosecution not to abuse their powers by inventing new charges, having failed miserably to get past the post twice already."

It is understood that Police Commissioner Peter Bong was prepared to testify that former Ombudsman Marie-Noelle Patterson had pressured his officers to arrest and prosecute Moti.

Vanuatu's U.N. Charge D'Affaires Participates in Information Mission Noumea

The Vanuatu Chargé d'Affaires at the United Nations in New York, Mr. Selwyn Aru, is in New Caledonia as a member of a delegation from the U.N. at the invitation of the French Government.

It is an information mission, also comprising the Ambassadors from Chile and Papua New Guinea to the U.N.

The visit follows a Resolution of the U.N. General Assembly, after a report of the De-Colonisation Committee. The Resolution notes aspects of the progress in New Caledonia under the Nouméa Accord and invites France to send an information mission to the Territory.

In its communiqué in July this year, the leader of the Melanesian Spearhead Group expressed concern on the marginalisation of the FLNKS in the new institutions of Government in New Caledonia.

The mission is meeting the new authorities in New Caledonia as well as the local authorities f the three provinces. They will meet political and union leaders, personnel of the Rural Development and Land Union Agency, employers' federation, chamber of commerce, amongst others, and visit schools, a clinic and a mining centre.

"Biological resources are the foundation of Vanuatu's subsistence ,": Bani

The Principal Environment Officer Mr. Ernest Bani has released for public comment a draft National Biodiversity Conservation Strategy.

Biological resources are the foundation of Vanuatu's subsistence and cash economy, the key to our successful tourism industry and important within ni-Vanuatu culture. The Strategy sets out the goals of ni-Vanuatu for sustainable management of these resources into the new century.

The work that led to formulation of this strategy has been significant in itself. A field research team led by Ms. Leah Silas Nimoho of Ambae discovered a number of new species. Community participation fostered awareness of the importance of many of our special plants and animals. While key decisions about how we can better manage these resources have been made.

In releasing the draft Mr. Bani invited all interested members of the public to contact the Environment Unit for a copy of the draft strategy. Comments are welcome up until 10 September, after which the strategy will be revised and finalised.

UMP President reiterates punishment for Jimmy faction

The Union of moderate Pati ,UMP president, Serge Vohor has dismissed any intentions of stepping down from his position saying, he will continue until a congress takes place.

Vohor in an interview with Nasara assured all UMP supporters that all UMP leaders involved the split which currently sees a faction for UMP in government will

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The Vanuatu N

IN THE HIGH COURT OF SOLOMON ISLANDS

Civil Case No. 452 of 2006

(Civil Jurisdiction)

IN THE MATTER OF an application by Julian Ronald Moti QC for orders of certiorari and prohibition, pursuant to Order 61 of the High Court (Civil Procedure) Rules 1964 (as amended)

THE QUEEN v. PUBLIC SERVICE COMMISSION

EX PARTE JULIAN RONALD MOTI QC

EXHIBIT "BKK 7"

This is the Exhibit marked "BKK 7" referred to in the Affidavit of Bruce Kalotiti Kalotrip sworn on , the 30 day of April, 2007.

Before me:

Commissioner for Oaths

Form 34 - Claim for judicial review (r.17.4)

IN THE SUPREME COURT OF THE REPUBLIC OF VANUATU (CIVIL JURISDICTION)

CIVIL CASE NO 197 OF 2003

BETWEEN:

PUBLIC PROSECUTOR
Claimant

Lawyer for the Claimant

Nicholas H. Mirou, Public Prosecutor of Public Prosecutors' Office, PMB 035, Port Vila, Republic of Vanuatu

AND:

BRUCE KALOTITI KALOTRIP
First Defendant

Lawyer for the First Defendant:

Mr. Dudley Aru, Solicitor-General of State Law Office, PMB 048, Port Vila, Republic of Vanuatu

AND:

THE REPUBLIC OF VANUATU
Second Defendant

Lawyer for the Second Defendant:

Mr. Dudley Aru, Solicitor-General of State Law Office, PMB 048, Port Vila, Republic of Vanuatu

CLAIM FOR JUDICIAL REVIEW

Date of filing: **18th November 2003**
Filed by: Public Prosecutor
Address for service: Public Prosecutor's Office, PMB 035, Port Vila, Vanuatu.

The Claimant claims a quashing order that;

Order 5 of the decision in the preliminary inquiry matter of *Public Prosecutor –v- Julian Moti (CR#7of 1998)* dated 23rd August 1999, which reads as follows, "In my opinion, the prosecution of the intended accused was unjustified or oppressive. Accordingly, in the exercise of my powers pursuant to Section 101(1) of the *Criminal Procedure Code* [CAP 136] ("CPC"), I hereby ordered that the State to pay to the intended accused his costs of and occasioned by this prosecution to be taxed, if not agreed. I also certify for two counsels." The said decision made by his Worship Mr. Bruce Kalotiti Kalotrip is quashed.

The following grounds supporting claim are:-

1. The First Defendant whilst in the employ of the Second Defendant presided over the preliminary inquiry hearing of the matter of ***Public Prosecutor –v- Julian Moti*** on 23 August 1999(CR 7 of 1998), in order to determine whether or not there was a prima facie case on which the defendant might be committed for trial in the Supreme Court on a provisional Information alleging two offences of Unlawful Sexual Intercourse under s97(2) Penal Code and one offence of Indecent Assault under s98(1) Penal Code .
2. In the proper exercise of his administrative function the first defendant refused to commit Julian Moti . Nor did he authorize the laying of the proposed information against the intended accused.(See Orders #1 & 2 of decision)
   Also under the power vested to him by s.146(1) of the Criminal Procedure Code [CAP 136] ("CPC") he discharged the intended accused (See Order#3 of the decision) .
3. No issue is taken as to the lawfulness of such orders.
3 The claimant asserts however that the order as to costs under s101(1) CPC and the certification as to the need for two counsel (See Order #5 of the decision) is ultra vires the power of the First Defendant in that it was a wrongful exercise of a power which power is only to be exercised following the dismissal of a charge (or charges) after a trial . The claimant further asserts that a "discharge" under s146(1) CPC is to be distinguished from a dismissal of a charge under s101(1)CPC.

Signed by the **Public Prosecutor**)

at **PORT VILA**)

on **13th November 2003**)

Nicholas H Mirou
Public Prosecutor

PUBLIC PROSECUTION DEPT. PARQUET

PPOJR1/2003/nm/jm/bkk/vu

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

Judicial Review No. 197 Of 2003

IN THE MATTER OF a claim for judicial review from the Magistrates Court sitting at Port Vila

BETWEEN:

PUBLIC PROSECUTOR
Claimant

AND:

BRUCE KALOTITI KALOTRIP
First Defendant

AND:

THE REPUBLIC OF VANUATU
Second Defendant

AFFIDAVIT IN SUPPORT

I, **Nicholas H Mirou**, Esquire Public Prosecutor for the Republic of Vanuatu of Public Prosecutor's Office, Private Mail Bag 035, Port Vila, Vanuatu duly **SWORN, SAY ON OATH**: -

1. I am the claimant in this matter.

2. I make this affidavit from the facts within my own knowledge save whereas otherwise appear. Such statements as relate to my own acts and deeds are true and accurate and those, which relate to the acts and deeds of others I believe to be true.

3. I was appointed Public Prosecutor of the Republic of Vanuatu on 5th May 2003.

4. The claim for judicial review arise out of criminal proceedings number CR 7 of 1999 between *Public Prosecutor and Julian Moti* (hereinafter "Moti"), on charges of "Unlawful Sexual Intercourse"(2 counts) and "Indecent Assault"(1 count).

5. On 14th October 2003, I received a letter from Mr. Sampson Endehipa, current Attorney General that referred me to the outstanding claim for costs in the amount

of Vatu7, 422,500 against the State in the matter of Julian Moti. The claim was made by Ms. Loa Damena of Pacific Lawyers

Annexed hereto and marked with the letter "A" is a true copy of the letter with the attached Memorandum of Fees based on professional fees and payment to overseas counsels.

6. By letter dated 14th October 2003, I wrote to Ms. Damena requesting for time to locate the file in my office and review the proceeding before making my official stand on the issue of costs.

Annexed hereto and marked with the letter "B" is a true copy of my letter dated 14th October 2003.

7. The file retrieved from the archives was filed as *closed* due to the fact that the first defendant made a decision on 23rd day of August 1999. The matter was closed after the first defendant refused to commit Moti to stand trial at the Supreme Court on charges of a number of counts alleging sexual intercourse.

Annexed hereto and marked with the letter "C" is a true copy of the decision by Bruce Kalotiti Kalotrip dated 23rd August 1999

8. I ascertained during the review of the proceedings, that the matter first registered with the courts on 17th April 1998. The records indicate that Moti was committed by his worship, Mr. Jerry Boe to stand trial in the Supreme Court on a number of charges alleging unlawful sexual intercourse. The file in this matter was registered as CR75 of 1998.

9. From the Public Prosecutor's internal court file's, the file notes indicate that, Moti applied for leave to the Supreme Court (Acting Justice Marum) for writ of certiorari to quash the decision of the committing magistrate, because he was not given an opportunity to make a statement in court. On 11th September 1998, Acting. Justice Marum refused to grant leave.

10. Our records show that Acting Chief Justice Vincent Lunabek (as he then was), made granted Moti leave to appeal to the Court of Appeal on the refusal by Acting Justice Marum to grant leave to apply for writ of certiorari. The case file is registered as CR 12 of 1998

Annexed hereto and marked with the letter "D" is a true copy of the decision by his lordship Acting Chief Justice Lunabek dated 4th March 1999.

11. Public Prosecutors record further indicates that the Court of Appeal in Criminal Case (Appeal) 1 of 1999 granted the writ of certiorari and quashed the committing magistrate's decision to commit. The matter was returned to the Senior Magistrates Court to be considered a fresh by a different Magistrate.

Annexed hereto and marked with the letter "E" is a true copy of the Court of Appeal decision dated 23rd April 1999.

12. That based on the information contained in the file, both the State and lawyers representing Moti have not enforced Order 5 of the first defendant. I am unable to ascertain as to what appropriate measures was taken by the parties to conveniently expedite this matter, since 23rd August 1999, and acknowledge that the courts have no record of any proceedings undertaken for 'contempt of court' or 'enforcement of orders'.

13. I accept that my office received 3 reminder letters from Pacific Lawyers in relation to this matter dated 15 October 2003, 24 October 2003 and 7th November 2003 respectively.

Annexed hereto and marked with the letter "F" are true copies of the three (3) letters from Pacific Lawyers.

14. On 11th November 2003, I informed Ms. Damena of my decision to file a claim for judicial review with regard to the award of costs against the State by the then magistrate Mr Kalotrip.

Annexed hereto and marked with the letter "G" is a true copy of the letter to Pacific Lawyers.

15. I seek the orders of the court to quash the orders with reference to costs against the state, as it is ultra-vires the powers of the first defendant to make such an order , in that he was only exercising an administrative function when he conducted the preliminary enquiry.

16. Undue delay has occurred ,although my office was not notified of any discussion on the costs issue which may have taken place between the State Law office and Mr Moti's then lawyers .It is to be noted that during part of the period 21 September 1999- 21 September 2003 the present Justice Buli was the Attorney General. Enquiries by one of my officers has not led to any further clarification on what had occurred in this period.

17. The issue of whether Mr Moti has suffered any substantial hardship in the past 4 years is not known. It is submitted that the issue for consideration on this application relates to both the lawfulness of the order as well as the quantum of costs noting in particular that this matter was only the subject of a preliminary enquiry as to whether a prima facie case could have been made out on the allegations against Mr Moti.

17. In the circumstances deposed to herein above I grave leave from this Honorable Court to apply for relief sought in the claim.

SWORN at PORT VILA)

this 18th day of)

November, 2003)

Nicholas H Mirou

Before me:

Shirley George

Commissioner for Oaths

Commissioner for OATHS
REPUBLIC OF VANUATU

REPUBLIQUE DE VANUATU
REPUBLIC OF VANUATU
PUBLIC PROSECUTION DEPT
PARQUET GENERAL

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

Judicial Review No 197 Of 2003

IN THE MATTER OF a claim for judicial review from the Magistrates Court sitting at Port Vila

BETWEEN:

PUBLIC PROSECUTOR
Claimant

AND:

BRUCE KALOTITI KALOTRIP
First Defendant

AND:

THE REPUBLIC OF VANUATU
Second Defendant

AFFIDAVIT OF SUPPORT

Deponent: NH Mirou

Sworn:

Filed:

Nicholas H Mirou
Public Prosecutor
Public Prosecutor's Office
PMB 035, Port Vila
Republic of Vanuatu

Tel: (678) 22271/26166
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IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU
(Civil Jurisdiction)

CIVIL CASE No.197 of 2003

BETWEEN: PUBLIC PROSECUTOR
Applicant /Claimant

AND: JULIAN MOTI
First Defendant

AND: BRUCE KALOTITI KALOTRIP
Second Defendant

AND: THE ATTORNEY GENERAL
Third Defendant

Counsels: *Mr. Nicholas Mirou, Public Prosecutor for the claimant*
Mr. Fredrick Gilu for the second and third defendants
The first defendant is not present nor represented

ORDER

UPON hearing Mr. Nicholas Mirou, the claimant and Mr. Gilu Frederick for the second and third defendants;
UPON being informed by the learned Public Prosecutor that all documents relating to the proceedings have been sent by airmail to Mr. Julian Moti's business address at Honiara, Solomon Islands;
AND UPON reading the affidavit of the learned Public Prosecutor, Mr. Nicholas Mirou dated and filed on 5 April 2004,

I am informed and satisfied that by facsimile dated April 2, 2004, Mr. Julian Moti sent letter to the Public Prosecutor, Mr. Nicholas Mirou, regarding his intention not to contest the claim made by the Public Prosecutor and UPON being finally satisfied that the second and third defendants consent to the jurisdiction of the Court and are binding by any Order of the Court,

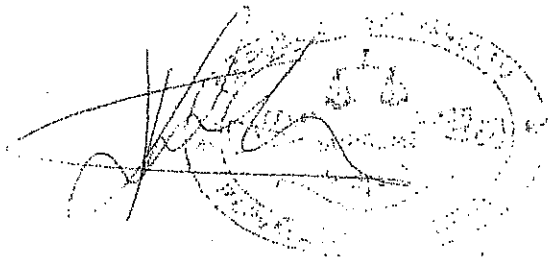
The Court grants Orders quashing Orders 5 of the decision made by Magistrate Bruce Kalotiti, in preliminary inquiry matter of Public Prosecutor v. Julian Moti (Cr. No. 7 of 1998) dated 28 August 1999, which reads as follows:

> "In my opinion, the prosecution of the intended accused was unjustified or oppressive. Accordingly, in the exercise of my powers pursuant to section 101(1) of the Criminal Procedure Code [CAP.136] ("CPC"), I hereby ordered that the State to pay to the intended accused his costs of and occasioned by this prosecution to be taxed, if not agreed. I also certify for two counsels."

There will be no Order as to costs.

Dated at Port-Vila this 15th day of April 2004

BY THE COURT



Vincent LUNABEK
Chief Justice

IN THE HIGH COURT OF SOLOMON ISLANDS

(Civil Jurisdiction)

Civil Case No. 452 of 2006

IN THE MATTER OF an application by Julian Ronald Moti QC for orders of certiorari and prohibition, pursuant to Order 61 of the High Court (Civil Procedure) Rules 1964 (as amended)

THE QUEEN v. PUBLIC SERVICE COMMISSION

EX PARTE JULIAN RONALD MOTI QC

AFFIDAVIT OF BRUCE KALOTITI KALOTRIP

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