

**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

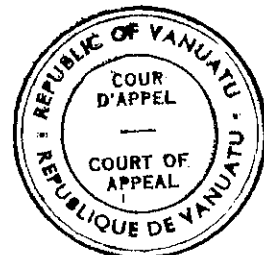
**JUDGMENT**

**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 4<sup>th</sup> of March 1999 against a decision of R. Marum J delivered on the 11<sup>th</sup> 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').



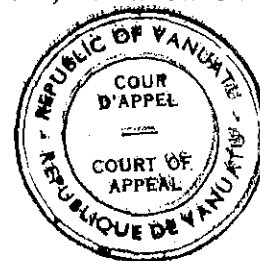
We record at once that Counsel for the Public Prosecutor did not wish to be heard on the jurisdictional question of the availability of prerogative relief in connection with committal proceedings and his concession that this Court treat this appeal as if leave to apply for prerogative relief had been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



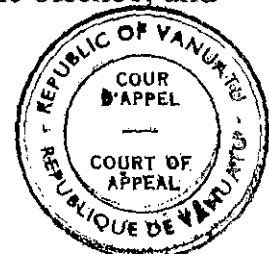
In interpreting this Section we have had our attention helpfully drawn to various dicta of the former Chief Justice as to the proper function and duties of a Senior Magistrate conducting a preliminary enquiry under the 'CPC' in The Public Prosecutor -v- Michael Mereka and The Public Prosecutor -v- Hollingson 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

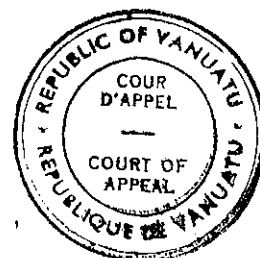


- (2) that the intended accused had sexual intercourse with the complainant knowing that she was under 13 years of age at the time.

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 17<sup>th</sup> day of April 1998, I attended at the Magistrate's Court in Port Vila for a preliminary enquiry in the abovementioned 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.*



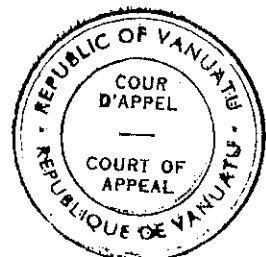
6. His Worship replied as follows: "Part VII of the Criminal Procedure Code lays down the procedure which I should follow. You don't have any right to cross-examined or discredit. After I have made my decision on *prima facie* case, then Section 145 (3) says that I can allow you to made a statement. 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 conformity 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.

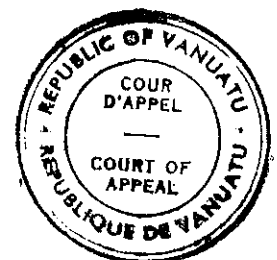
In light of our decision in this appeal, we refrain from making any further comment on the materials before the Senior Magistrate. We would merely observe the following:

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

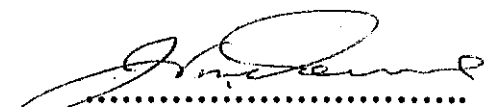
Thirdly, and this is common ground, that the 'CPC' does not appear to provide for the laying of an '*ex officio*' information in the Supreme Court.


For the foregoing reasons this appeal is allowed. Certiorari shall issue to bring up and quash the decision of the Senior Magistrate dated the 17<sup>th</sup> 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.

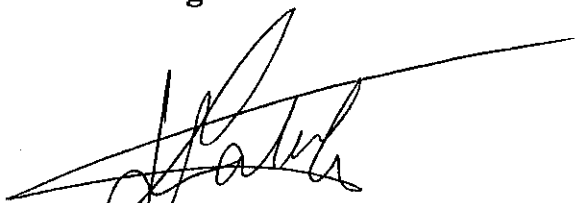


Dated at Port Vila, this <sup>23rd</sup>..... Day of April 1999.  
BY THE COURT

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

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

  
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**Daniel Fatiaki J.**  
Judge

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

