

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

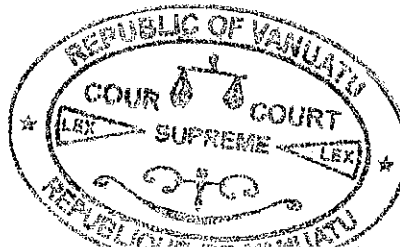
Criminal Case No.29 of 2013

**RICHARD LEO**  
**-v-**  
**PUBLIC PROSECUTOR**

**Coram:** Justice D. V. Fatiaki  
**Counsel:** Mr. E. Csiba for the Applicant  
Mrs. T. Harrison for the State  
**Date of Ruling:** 4 November 2013.

**RULING**

1. On **11 October 2013** the defendant appeared before the Magistrate's Court in Port Vila charged with two offences Threats to Kill (Count 1) and Sexual Intercourse Without Consent (Count 2) ("*the first set of charges*"). The case was adjourned for Preliminary Inquiry ("PI") on **25 October 2013** and the defendant was remanded in custody.
2. On **18 October 2013** the defendant lodged an urgent application for bail supported by a sworn statement deposed by the then defence counsel (Mr. Jerry Boe). The application was served on the Public Prosecutor's office and was heard on the same day.
3. Upon prosecuting counsel's indication that he was not opposing the application, the defendant was released on conditional bail which included a residential condition that the defendant reside with his sister at **Ohlen, Freshwind** area as well as a condition that the defendant not re-offend and with a view to his continued monitoring, the defendant was ordered to report weekly at the Public Prosecutor's office.
4. On **25 October 2013** the defendant appeared before the Magistrate's Court for the PI on the first set of charges, but, for reasons that remain unclear, the PI did not go ahead. The PI was adjourned to **8 November 2013** and the defendant's bail which was granted by this Court on **18 October 2013** was extended. Later that same day, the defendant was again brought before the Magistrate's Court on another set of charges containing two (2) counts of Incest and two (2) Counts of Unlawful Sexual Intercourse committed in 2012 and 2013 on his "*biological daughter*" ("*the second set of charges*").

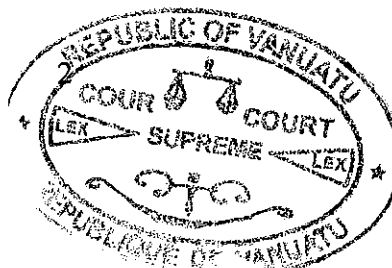


5. Both offences in the second set of charges carry a maximum penalty of 10 years and 5 years imprisonment respectively, and were, therefore, offences for which the Magistrate's Court had jurisdiction to grant bail [see: **Section 60 (1)** of the **Criminal Procedure Code** (CAP. 136)]. Despite the defendant being bailed on a similar sexual offence in the first set of charges, the Magistrate remanded him in custody.
6. The relevant Magistrate's Court record reveals that no application was made for bail, instead, defence counsel is recorded as agreeing to the defendant's remand. The PI for the second set of charges was fixed for **8 November 2013** to coincide with the new PI date set for the first set of charges against the defendant.
7. When defence counsel was asked why he had not sought bail in the Magistrate's Court, he responded that it was a "*common practice*" to accept a defendant's remand by the Magistrate's Court and later seek bail in the High Court instead. If I may say so, if such a "*practice*" exists then it needs to be changed immediately. Such a "*practice*" ignores the power of the Magistrate's Court to grant bail to accused persons but, more disconcertingly, such a "*practice*" diminishes and devalues the constitutional "*presumption of innocence*" and an accused person's fundamental right to personal liberty and freedom of movement [see: **Article 5 (1) & (2)**].
8. In this regard too, **Section 37 (3)** of the **Criminal Procedure Code** [CAP. 136] ("*CPC*") relevantly provides that if an accused person is brought before the Magistrate's Court on a charge(s) that is beyond the jurisdiction of the Magistrate's Court: "... *the Court may release him on bail or remand him in custody for a period not exceeding 14 days pending the initiation of a preliminary inquiry ...*". Clearly then, there cannot be a lawful "*practice*" which denies an accused person the opportunity to apply for bail and the Magistrate's Court the opportunity, to consider such an application, unless, the offence with which the accused is charged is "*punishable by life imprisonment*".
9. Be that as it may, on **29 October 2013** the defendant again applied to the Supreme Court for bail in respect of the second set of charges. In defence counsel's sworn statement in support, counsel deposed to his unsupported "*opinion*":

*"... that once the accused has been arrested for the related offence questioned released on bail and complying with the bail conditions, he cannot be arrested unless there is an abscond of bail conditions. This is not the case".*

and later counsel writes:

*"the applicant has been remanded on mere information and as such no proper charge to the allegation has been drawn and as such it is only proper that he be released on bail".*



10. Unlike the previous occasion when the defendant sought and was granted bail which was unopposed, State counsel forcefully opposed this second application for bail on the grounds that the offences with which the defendant is charged are "serious"; the defendant presents a continuing danger to his young daughters; and lastly, the defendant is likely to interfere with the complainants who are his step-daughter and biological daughter respectively.
11. In my view these concerns can be adequately addressed by imposing strict bail conditions including a curfew, that seeks to eliminate or reduce the particular concerns whilst maintaining the defendant's liberty.
12. Notably State counsel did not suggest that police inquiries were on-going or incomplete or that the defendant's personal safety would be "at risk" if he was released on bail. Neither did counsel suggest that the defendant was a "flight risk" or had breached any of the conditions imposed when bail was earlier granted by the Court on the first set of charges.
13. Defence counsel in moving the application denies that the defendant is a danger to the community and deposes that the defendant is a member of the Board of Directors of **Radio Vanuatu**. The defendant has also been ordered under this existing bail conditions to reside with his sister in **Ohlen** away from the family home where the complainants reside. The defendant also undertakes not to re-offend or interfere with prosecution witnesses and is willing to abide by additional bail conditions if required by the Court.
14. **Section 60 of the Criminal Procedure Code (the "CPC")** provides so far as relevant):

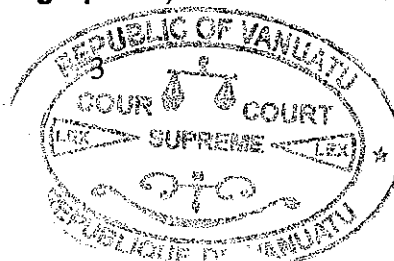
*"60. (1) When any person, other than a person accused of an offence punishable by life imprisonment, ..... appears or is brought before a court, and is prepared at any time (or) at any stage of the proceedings before such court to enter into a bond in writing, with or without conditions, for his subsequent appearance before the court, such person may be temporarily released from custody on bail.*

*(2) The conditions of such release shall be fixed with due regard to the circumstances and shall not be oppressive or unreasonable.*

*(3) Notwithstanding anything contained in subsection (1) the Supreme Court may in any case direct that any person be released from custody on bail or that the conditions required by the Magistrate's Court or a police officer be amended so as to be less onerous.*

(my underlining)

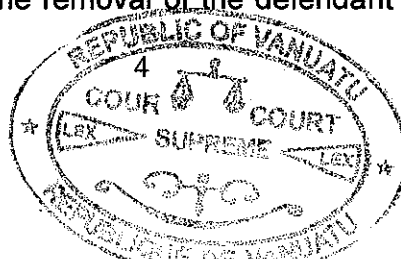
15. Speaking of the above provision in **Public Prosecutor v. Whitford [2006] VUSC 36 *Bulu J.*** said (at paragraph 10):



*"... in my view that provision envisages two situations. The first is that anyone charged with an offence that attracts life imprisonment is not granted bail. The second situation is where someone in that situation can be granted bail if the Court considers it appropriate. Subsection 1 contains the rule. Subsection 3 contains the exception to the rules. The provision however is silent on a guideline for the Courts to use in the exception to the rule."*

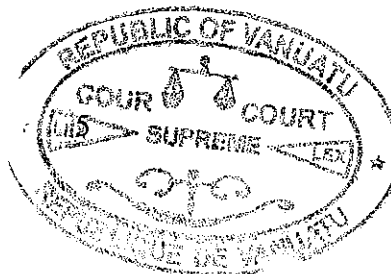
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16. In addition to those observations, I would add that the **subsection** also anticipates that the accused person is willing or "*prepared*" to enter into a written bond with or without conditions "*... for his subsequent appearance before the Court*". This primary statutory consideration for bail ie to ensure that the accused person will appear at his next court appearance date is further reinforced by the provisions of **Section 61**; **Section 62 (2)** and **Section 65** of the CPC. Furthermore, in my view, the "*preparedness*" of an accused person to enter into a written bail bond, whether he is represented by counsel, or appears in person, can only truly be ascertained from the accused person himself.
17. As for other guideline "*factors*" to consider, in **Public Prosecutor v. Festa** [2003] VUSC 65 **Treston J.** in declining the application for bail in that case where the accused was charged with an offence involving 2.82kg of cannabis, enumerated the following relevant factors:
  - (1) "*Whether there is a risk that the defendant will fail to appear in court on the date to which he has been remanded ...*";
  - (2) "*Whether there is risk that the defendant might interfere with other witnesses or other evidence ...*";
  - (3) "*Whether there is a risk that the offender may offend while on bail*";
  - (4) "*The nature of the offence with which the defendant is charged*";
  - (5) "*The strength of (the) evidence and probability of conviction ...*";
  - (6) "*The seriousness of the punishment (for) which the defendant is liable ...*"; and
  - (7) "*Whether police investigations are still on-going or complete*".
18. I turn next to consider the above "*factors*" in the context of the present case and in light of the competing submissions. As to the first and primary "*factor*" I am **not** satisfied that, in all the circumstances, the defendant presents a "*flight risk*" and I find in the defendant's favour.
19. As for "*factors*" (2) and (3) although I accept that the young age of the complainants and their relationship with the defendant makes them vulnerable to influence, the removal of the defendant from the family home



and the imposition of a targetted non-interference order would considerably reduce the opportunity of that occurring.


20. "**Factors**" (3) and (4) are independent of the defendant and requires a consideration of the nature of the offences charged and the strength and quality of the prosecution's evidence. In the absence of the PI deposition or a sworn statement from the investigating officer, it is difficult to accurately gauge or assess these "*factors*", but, there can be no doubting the seriousness of offences that carry maximum prison terms of between 5 years to life imprisonment. Furthermore, the fact that the victims are young and closely-related to the defendant means that the likelihood of a prison sentence is high in the event of a conviction.
21. Having said that, defence counsel produced a copy of the defendant's police caution interview record which indicates that the prosecution would have little difficulty in establishing the "*actus reus*" of the offences charged in respect of the second set of charges. The establishment of the "*mens rea*" is less certain however, given the defendant's answers and the nature of the penetration alleged (ie. digitally) as well as the definition of "*sexual intercourse*" in **Section 89A (a)** read with the provisions of **Sections 6 and 9** of the **Penal Code [CAP. 135]**.
22. The Court is also mindful that the second set of charges allegedly occurred in 2012 and 2013 and not whilst the defendant was on bail on the first set of charges. There is no suggestion therefore that the defendant had re-offended whilst on bail or breached the conditions of his bail.
23. In such circumstances, does the recharging of the defendant whilst on bail, constitute a "*change of circumstances*" enabling this Court to reconsider the bail earlier granted to the defendant on the first set of charges? In my considered view, it should not and it behoves the police to ensure, as much as possible, that an accused person is not charged in a "*piece-meal*" fashion and that all investigations against an accused person are completed before the laying of any criminal charges. A person's liberty should not be so-easily prejudiced by the mere laying of successive charges by the police or prosecution after he has been granted bail as occurred in this instance.
24. In this regard too I draw attention to the provisions of **Section 72 (1)** of the **CPC** as to "*joinder of counts*" and **Section 139** which permits "*amendment of a charge*" by the addition of new charge(s), to an existing charge before a trial has commenced. If that amendment had occurred in this case by adding four (4) new counts to the pre-existing first set of charges, then, it is unlikely that the defendant would have been remanded in custody.
25. Having said that, there is little doubt in the court's mind that the prosecution's untested evidence on the second set of charges is strong and, unless contradicted or shaken at trial, is likely to result in the defendant's conviction and imprisonment.

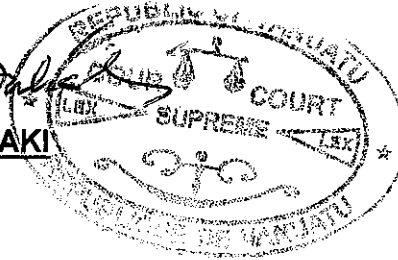


26. In light of the above, and mindful that there is no right of appeal against an order refusing bail (see: **Section 70** of the CPC), the defendant's application is granted in respect of the second set of charges. The defendant's existing bail is accordingly extended on the same conditions.
27. To avoid any further confusion and duplicity of proceedings and applications, I order that the charges in the **Magistrate's Court Criminal Case No. 144 of 2013** and **Magistrate's Court Criminal Case No. 154 of 2013** be consolidated into a single amended charge sheet to be filed and served by the prosecution on **6 November 2013**.
28. The Magistrate's Court file in **Criminal Case No. 154 of 2013** is to be immediately returned to the Magistrate's Court with a copy of this ruling.

**DATED at Port Vila, this 4<sup>th</sup> day of November, 2013.**

**BY THE COURT**

  
**D. V. FATIAKI**  
Judge.



The seal of the Supreme Court of Vanuatu is circular. It features a central emblem with a scale of justice and a book. The text around the perimeter includes 'REPUBLIC OF VANUATU' at the top, 'SUPREME COURT' in the middle, and 'VANUATU' at the bottom. There are also the letters 'LAW' on either side of the central emblem.