

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

Criminal
Case No. 18/2506 SC/CRML

PUBLIC PROSECUTOR

V

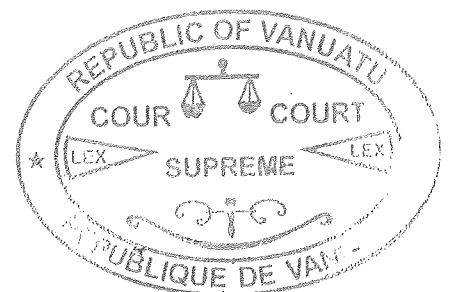
NIGEL JOHN GILTRAP

Coram: Chief Justice Vincent Lunabek
Counsel: Mr. Mark Hurley for Defendant/Appellant
Mr. Ken Massing for Public Prosecutor/Respondent

Date of Ruling: 30th September 2019

RULING ON BAIL APPLICATION PENDING APPEAL ON CONVICTION AND SENTENCE

1. This is a Motion by the appellant detainee, Nigel John Giltrap, for bail pending appeal against the conviction and sentence of 14 months imprisonment imposed on him by the Supreme Court for the offences of intentional assault.
2. The appellant was on 28 June 2019 found guilty by this Court of two counts of intentional assault, contrary to subsections (a) and (b) of section 107 of the Penal Code.
3. Following convictions, the appellant was sentenced to 14 months and 6 months imprisonment to be served concurrently which is a total of 14 months imprisonment.
4. The appellant has filed a Notice of appeal against his convictions and sentence of 14 months imprisonment. The grounds of appeal against convictions are contained in his notice of appeal against his convictions. The grounds of his appeal against the sentence are, amongst others matters, that the sentence is too severe.



5. Pending the hearing of his appeal in the week commencing 4 November 2019, the appellant has applied to be granted bail.
6. The prosecution opposed the motion for bail on the basis that it would not be in the interest of justice to release Mr. Giltrap from the Correctional Centre where he is kept in custody; the sentence of 14 months are within the range as the maximum penalty of the charges particularly count 2, is of 5 years imprisonment; the appeal will be heard on the week commencing 4 November 2019 and the time spent (3 months) does not constitute an unreasonable delay; the circumstances of offending on two very elderly couple are very serious offences and there is a high degree of flight-risk as the situation is now different from bail pending trial.
7. There is power in this Court (as the trial Court) to grant bail. That power resides in section 209 of the Criminal Procedure Code Act [CAP 136]. It provides as follows:

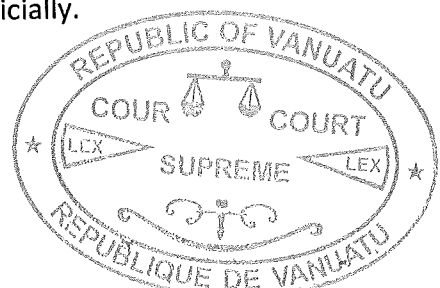
"RELEASE FROM CUSTODY OR SUSPENSION OF SENTENCE PENDING APPEAL

209. (1) *After the entering of an appeal by a person entitled to appeal, the trial court which convicted or sentenced such person **may** order that he be released from custody on bail subject to such conditions as the court may consider fit.*

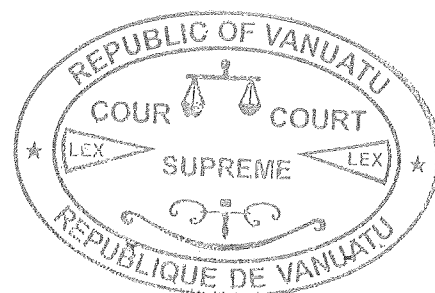
(2) An application for release from custody on bail under this section may be heard in chambers. In the Supreme Court such application shall be by motion served on the Public Prosecutor. In the Magistrates' Court such application may be made without formal process to any magistrate.

(3) If the appeal is ultimately dismissed and the original sentence confirmed or some other sentence of imprisonment substituted therefor, the time during which the appellant has been released from custody on bail or during which the sentence has been suspended shall be excluded in computing the term of imprisonment to which he is finally sentenced." [Underlined is my own].

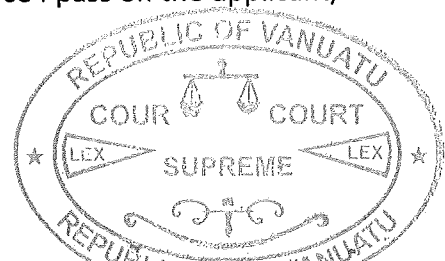
8. However that power is discretionary as it can be shown by subsection (1) of section 209 which uses the word "**may**". It has to be exercised judicially.



9. From the outset, it is important to point out that the principles to be considered in an application for bail after the conviction cannot be treated as the same as those in an application for bail before conviction. The presumption of innocence which is a guiding legal principle in criminal cases no longer exists after a person has been found guilty by a competent court. By the same note, the right of appeal does not revive that pre-conviction presumption of innocence. It will therefore be a case of exceptional circumstances which will justify the Court in granting bail to a person who has been found guilty and convicted.
10. It is my considered view that in this jurisdiction an application must show that there are matters which constitute exceptional circumstances before bail is allowed pending appeal. It must be pointed out that the conditions to be considered must be based on the inveterate practice of appellate courts in bail applications pending appeals. In such cases, the conditions to be satisfied before bail can be granted pending appeal are that:
- (a) There is possibility that a sentence of imprisonment be set aside entirely; or
 - (b) The sentence is likely to be served completely before the appeal is heard; or
 - (c) There are exceptional reasons. These last criteria of exceptional reasons or exceptional circumstances must be those of the case and not the applicant/detainee.
11. I consider that the above conditions are a refinement of those set out in the case of **Public Prosecutor v Walker [2007] VUSC 73**.
12. The appellant filed a sworn statement on 15 July 2019 in support of his motion. He sought bail with the conditions and grounds set out in his motion which are summarized below:
- 1. There are good grounds to appeal as to convictions and sentence.
 - 2. Even if the appeal as to conviction is unsuccessful the appeal against sentence is manifestly excessive and is likely to succeed.



3. If either the appeal against conviction or sentence on 12 July 2019 prior to the appeal being heard in the Court of Appeal's session commencing 4 November 2019 will be over 3 ½ months.
 4. It will be difficult for the appellant to prepare for his appeal hearing if bail is refused because his ability to communicate with his counsel will be severely limited.
 5. The appellant is not a "flight risk" given that he has business interest in Santo and he will surrender his passport.
 6. Whilst on conditional bail from 27 March 2018 the appellant complied with all conditions including attendance at Court (sometimes at short notice).
13. Applied in this case, I now consider if the conditions set in paragraph 10 are satisfied before bail is granted pending appeal.
14. First condition: is there a possibility that a sentence of imprisonment be set aside entirely?
15. Again in this case, I make no comments on the substance of Notice and Memorandum of appeal of the applicant. It is part of his right to appeal against his conviction and sentence before the Court of Appeal. The facts as found by the Court in this case lead up to his conviction and sentence. The sentence of 14 months imprisonment is within judicial range bearing in mind of the seriousness of the charge which is reflected in the maximum penalty of 5 years imposed by Parliament under subsection (b). It has to be noted that the maximum penalties set by law under subsections (a), (b), (c) and (d) of section 107 of the Penal Code (Amendment) Act No.15 of 2016 are substantively increased. They were then: 3 months, 1 year, 5 years and 10 years respectively. They are now 1 year, 5 years, 10 years and 14 years imprisonment respectively for subsections (a), (b), (c) and (d). The law as amended comes into effect on 27th February 2017. The facts of the present case come under the new law (as amended). This is the new dimension that I consider when I approach the sentencing of the applicant/detainee Giltrap in terms of its seriousness and the makeup of the starting point sentence. The sentence I pass on the applicant/detainee



reflects the intention of the law maker and the particular circumstances of the offending. I note the submissions of Mr. Hurley and the comparative analyses of the cases referred by him. It is to be said that these cases and corresponding decisions made before the new law (as amended) must be readjusted and/or reconsidered for this category of offence under section 107 (a) and (b) of the Penal Code.

16. Second Condition: Is the sentence likely to be served completely before the appeal is heard? I answer that in the negative – No.
17. Third conditions: Are there exceptional reasons or exceptional circumstances of the case justifying release of the detainee on bail pending appeal?
18. To my mind, the business reasons are not relevant. The family reasons too are not relevant.
19. The Applicant does not set as a ground in his motion or sworn statement filed in support of his health conditions as a condition for his release on bail pending appeal. The applicant's health condition was raised by his Counsel in his submissions. The Court received a number of emails from the wife of the Applicant and the lawyer of the applicant. Then there was a letter written by Dr. Samuel Kemuel, General Surgeon – Vila Central Hospital on 23rd August 2019 the relevant part of it is this:-

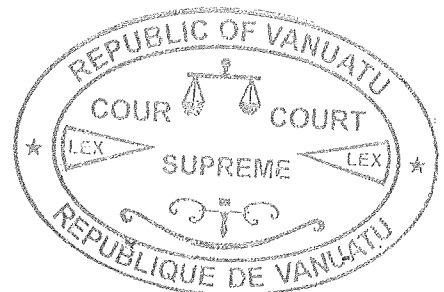
"Access to toilet

I saw the above mentioned gentleman in Vila Central Hospital surgical clinic on the 22nd of this month (August) with symptoms of blood in stool and abdominal pain for further investigation. He was seen previously on the 6th of the same month and some treatment instituted but with little effect.

Although our investigation of his condition so far has been inclusive, his symptoms warrant further tests that we will work out how to proceed with once we establish communication that he be given free toilet access or on as – required basis to help with some of his symptoms.

Sincerely,

Dr. Samuel Kemuel



General Surgeon – Vila Central Hospital.”

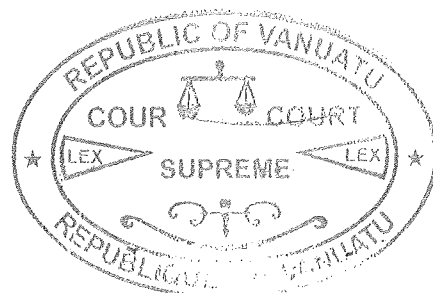
20. While the Court was waiting for Dr. Samuel Kemuel for the manner or how further tests will be carried out, the Court received a letter on 29th August 2019 from Amyes Road Medical Centre, 7 Amyes Road, Hornby, Christchurch 8042 entitled:

“To whom it may concern.” The relevant part is this:

“This man’s wife has reported to me that he, Nigel Giltrap, is currently in Vanuatu and unable to leave. He complains of several month’s lower abdominal pain. He has rectal bleeding. His bowel motions are dark. He has constant diarrhea. His father died of bowel cancer.

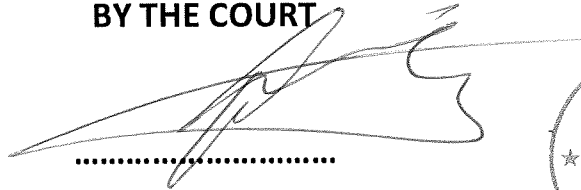
It is my opinion that he needs urgent investigation with colonoscopy and I have made an appointment for him to have one at Christchurch colorectal. Could you please assist us by making his passage to New Zealand possible?”

21. As a fact, the medical evidence of his conditions was so poorly advanced before the court as no sworn statement was filed to verify information stated or asserted.
22. The best I could treat the medical conditions of the applicant is to consider it as prospective medical condition.
23. They are not exceptional reasons or exceptional circumstances of the case to justify release on bail pending appeal. Because of the way the health condition is so poorly advanced before the court, I treat it as constituting potential information in favour of high degree of flight-risk that exist in this case which would militate against the release on bail pending appeal, now that there is a conviction. This is so because the release on bail pending appeal is one thing but to permit a convicted detainee going overseas is completely a separate matter that has to be properly considered with all seriousness and gravity in the interest of criminal justice by the courts in this country.
24. The motion for bail pending appeal against conviction and sentence of 14 months imprisonment is refused.



DATED at Port Vila this 30th day of September, 2019.

BY THE COURT



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Vincent Lunabek

Chief Justice

