

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

**Criminal Appeal**  
**Case No. 21/2423 SC/CRMA**

**BETWEEN:** **Public Prosecutor**  
Appellant

**AND:** **Morris Noaida**  
Respondent

*Date of Hearing:* 10 August 2022  
*Before:* Justice V.M. Trief  
*In Attendance:* Appellant – Mr K. Massing  
Respondent – Mrs K. Karu, for Mr H. Vira  
*Date of Hearing:* 18 November 2022

---

**JUDGMENT**

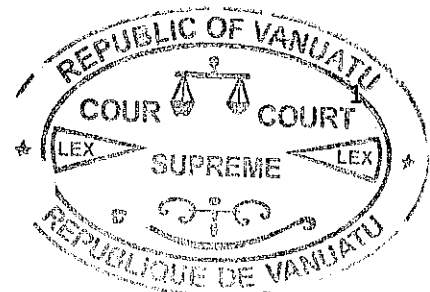
---

A. Introduction

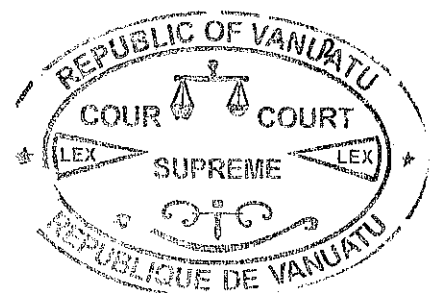
1. This is an appeal against the dismissal of the charges in Preliminary Inquiry Case No. 21/23 ('P.I. Case 21/23') by the Magistrates' Court on 9 July 2021.

B. Background

2. The Respondent Morris Noaida was charged with sexual intercourse without consent involving his 10 year old step-daughter.
3. On 4 January 2021, he was remanded into custody. He was released on bail on 29 January 2021.
4. The Prosecution failed to appear on numerous dates that P.I. Case 21/23 was listed including on:
  - i) 18 January 2021;
  - ii) 15 February 2021;



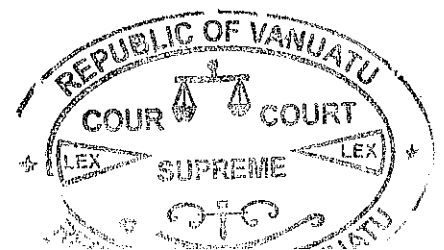
- iii) 12 April 2021;
  - iv) 26 April 2021;
  - v) 3 May 2021;
  - vi) 17 May 2021;
  - vii) 16 June 2021; and
  - viii) 9 July 2021.
5. By Decision dated 9 July 2021, the Magistrates' Court dismissed the charges against Mr Noaida pursuant to s. 131 of the *Criminal Procedure Code* [CAP. 136] (the 'CPC').
- C. Grounds of Appeal and Submissions
6. The grounds of appeal were as follows:
- i) The learned Magistrate erred in dismissing P.I. Case 21/23 as the Magistrates' Court had no jurisdiction to deal with the matter; and
  - ii) The learned Magistrate failed to take into account the "public interest" element of the matter being prosecuted.
7. Mr Massing submitted that as the case had not yet been committed to trial (which trial could not ever be held in the Magistrates' Court), that Court did not have jurisdiction to dismiss the charge pursuant to s. 131 of the CPC which provides as follows:
131. *If at the time and place to which a hearing or further hearing has been adjourned, the accused person does not appear before the court which made the order of adjournment the court may issue a warrant for the arrest of the accused and cause him to be brought before the court. If the complainant does not appear the court may dismiss the charge with or without costs as it may consider fit.*
- (my emphasis)*
8. Mrs Karu submitted that the Magistrates' Court made the correct decision but used the wrong section of the CPC. As it was a preliminary enquiry case, the Court should have used subs. 145(2) of the CPC, in the absence of any material presented by the Prosecution, to decide that no prima facie case was disclosed against Mr Noaida and declining to authorise the laying of the proposed charge against him. She submitted that this Court should uphold the Magistrates' Court decision but under the correct provision of the CPC.
9. Mrs Karu also submitted that a balancing exercise is involved in considering the public interest. She submitted that it was not in the public interest that P.I. Case 21/23 was adjourned many times without the Prosecution appearing nor ever filing a preliminary enquiry bundle, which bundle still has not been filed to date.
10. Mrs Karu submitted that alternatively, if the appeal is allowed, that the Supreme Court should itself conduct the preliminary enquiry and dismiss the matter as no prima facie case exists against Mr Noaida.



D. Discussion

11. Section 131 of the CPC appears in that Act's Part 6 titled, "Procedure in Trials before the Magistrates' Court".
12. However, Mr Noaida's case was not at the trial stage. Even if it was, the trial could be held only in the Supreme Court as He was charged with an offence punishable by life imprisonment. The trial could never have been held in the Magistrates' Court.
13. Mr Noaida's case was still at the preliminary enquiry stage. Sections 143-146 of the CPC provide for preliminary enquiries and are set out in Part 7 of the CPC titled, "Offences triable in Supreme Court".
14. Every offence triable only in the Supreme Court shall be the subject of a preliminary enquiry by a senior magistrate in accordance with Part 7 of the CPC: subs. 143(1), CPC.
15. The prosecutor shall prepare and furnish to the senior magistrate and to the intended accused a draft information for the charge(s) contemplated by the prosecution: s. 144, CPC.
16. Such charge was dated and filed on 4 January 2021, and furnished to the Magistrates' Court and to the accused.
17. Sections 145 and 146 of the CPC provide as follows:
  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.*

*(my emphasis)*
18. It is accepted that no preliminary enquiry bundle has ever been filed in the Magistrates' Court in P.I. Case 21/23. Accordingly, no material has yet been presented to the senior magistrate to enable the senior magistrate to decide whether or not the material discloses a prima facie case against Mr Noaida requiring that he be committed to the Supreme Court for trial, in accordance with subs. 145(2) of the CPC.
19. The senior magistrate's decision in a preliminary enquiry is prescribed by s. 146 of the CPC which provides as follows:
  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.

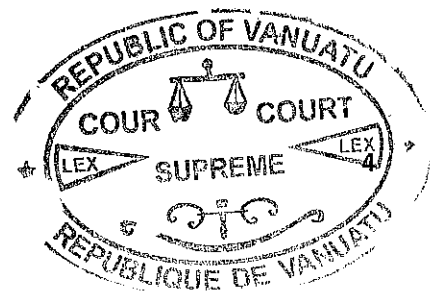
- (2) If the information is not authorised, the intended accused shall be by the same decision immediately discharged from the jurisdiction of the Magistrates' Court and if in custody shall be forthwith released. If the information is authorised, the senior magistrate shall by the same decision remand 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) The Public Prosecutor must file the information in the registry of the Supreme Court at least 7 days before the date specified for trial under subsection (2).
- (4) Despite any other Act or law to the contrary, the Public Prosecutor may amend the information with the leave of the Supreme Court.

*(my emphasis)*

20. The decision following a preliminary enquiry shall show clearly that the senior magistrate either authorises or does not authorise the laying of the proposed information against the intended accused: subs. 146(1), CPC.
21. In the current matter, the senior magistrate erroneously applied s. 131 of the CPC as the matter before him could not ever be tried in the Magistrates' Court. The senior magistrate was required by subs. 146(1) of the CPC to decide whether he authorised or did not authorise the laying of the proposed information against Mr Noaida. The senior magistrate did not do so.
22. In the circumstances, the Magistrates' Court erred in dismissing the charge against Mr Noaida when it is required to complete a preliminary enquiry in accordance with subss 145(2) and 146(1) of the CPC. Accordingly, the appeal must be allowed although on different grounds than those advanced by Mr Massing and the matter remitted to the Magistrates' Court for this purpose.
23. A preliminary enquiry must be conducted by the Magistrates' Court. If the laying of the proposed charge is authorised, then the accused will be committed to the Supreme Court for trial. Accordingly, I cannot agree with Mrs Karu's submissions that this Court should uphold the Magistrates' Court decision but under subs. 145(2) of the CPC or alternatively, that this Court should itself conduct the preliminary enquiry.
24. I do agree with Mrs Karu's submission that it was not in the public interest that P.I. Case 21/23 was adjourned many times without the Prosecution ever filing a preliminary enquiry bundle. However, the Magistrates' Court erred in dismissing the charge under s. 131 of the CPC. The relevant provisions that apply and that the Magistrates' Court needed to be complied with are in Part 7 of the CPC.

E. Result

25. The appeal is **allowed**.



26. The Magistrates' Court Decision dated 9 July 2021 is set aside, and the draft charge against Mr Noaida is **reinstated**.
27. The matter Preliminary Inquiry Case No. 21/23 is to be relisted in the Magistrates' Court to be dealt with under Part 7 of the *Criminal Procedure Code*.

**DATED at Port Vila this 18<sup>th</sup> day of November 2022  
BY THE COURT**

*VM Trief*  
.....  
Justice Viran Molisa Trief

