

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

Criminal
Case No. 24/2762 SC/CRML

BETWEEN: JOSHUA JIMMY
Applicant

AND: PUBLIC PROSECUTOR
Respondent

Date of Hearing: 3 June 2025
Before: Justice M A MacKenzie
Counsel: Mrs P Malites for the Applicant
Ms R Siri for the Respondent

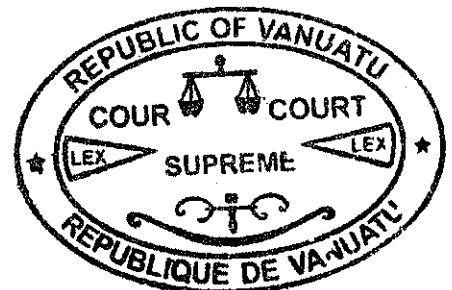
DECISION AS TO VARIATION OF BAIL

Introduction

1. Mr Jimmy was granted bail by the Supreme Court on 12 September 2024. The bail conditions included that he must not leave Efate and must not interfere with prosecution witnesses. Mr Jimmy seeks that his current bail conditions be varied to enable him to return to Epi Island pending trial.
2. The application to vary bail is strenuously opposed by the prosecutor.
3. Mr Jimmy is currently remanded on bail awaiting trial. The trial date is 23 September 2025. The trial was to take place on 10 and 11 April 2025, but did not proceed because the complainant was unfit to attend the trial.

Result

4. After hearing oral submissions from counsel, I declined to vary bail. I said I would give written reasons. These are my reasons.



The alleged offending

5. The alleged offending took place in Epi. Mr Jimmy pleaded not guilty to a charge of rape (count one) and pleaded guilty a charge of malicious damage to property (count two).

Count one - rape

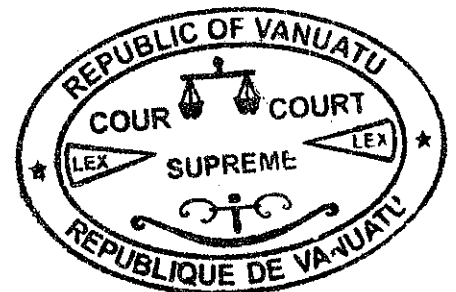
6. At the time of the alleged offending the complainant was aged 17 years. She and Mr Jimmy are distantly related. It is alleged that on 5 July 2024 Mr Jimmy had non-consensual sexual intercourse with the complainant outside her home, which ceased when they were interrupted by the complainant's mother. Mr Jimmy then ran off.
7. Mr Jimmy's position is that the sexual intercourse was consensual.

Count two - malicious damage to property

8. When Mr Jimmy ran off, he was chased by the complainant's father. A short time later, Mr Jimmy returned to the complainant's home and started throwing stones at the house. As a result, solar panels of their security lights were broken. Mr Jimmy also punched louvre windows.

Applicable legal principles

9. There is no specific provision in the Criminal Procedure Code providing for variation of bail. However, the Supreme Court has such inherent powers as is necessary to carry out its functions by virtue of s 65 of the Judicial Services and Courts Act [CAP 270]. It is axiomatic that having granted bail, the Supreme Court has the power to vary bail terms and conditions.
10. Neither Mrs Malites nor Ms Siri were able to provide me with any cases to assist the Court with the test to be applied in considering an application to vary bail.
11. In a New Zealand case *Chisholm v R* [2018] NZHC 2413, Jagose J said that the test to be applied is the same as that which applies in imposing conditions in the first place. So, the approach is to reassess what terms and conditions of release are reasonably necessary in order to manage one or more the bail risks identified.
12. The grant of bail initially fell to be considered under s 60 of the Criminal Procedure Code [Cap 136]. In this case, because the charge of sexual intercourse without consent carries a penalty of life imprisonment, s 60 (1) and (3) apply. s 60 (3) is an exception to s 60 (1) but gives no guidance as to the applicable principles.

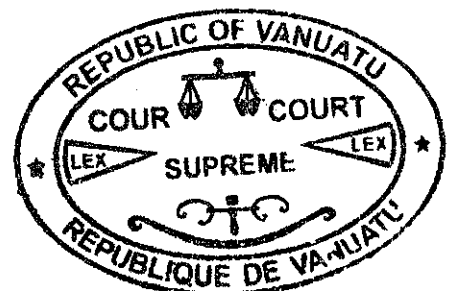


13. Section 60 (1) provides that a person charged with an offence with a penalty of life imprisonment is ineligible to be granted bail. However, s 60 (3) provides a gateway for bail in such a case.
14. In Public Prosecutor v Whitford [2006] VUSC 36 the Court said that for the exception in s 60(3) to apply there must be special or good reasons on which the Court is satisfied to grant bail and made pertinent observations about what evidence is required when s 60(3) applies (at 12) :

"When an application is made under Section 60 of the Criminal Procedure Code for someone who has been charged with an offence carrying a maximum term of life imprisonment, it is in my view essential that the applicant comes with good evidence to persuade the Court that his situation is special or such that the Court has to invoke Subsection 3. It is trite law that what is said from the bar table (said by lawyers) is not evidence to support a proposition or an application that is before the Court. It is duty of the applicant to come to Court with all relevant evidence to support his application or proposition."

15. Consistent with *Whitford*, I consider that for the exception in s 60(3) to apply, there must be special or good reasons for bail to be granted, when s 60(1) and (3) are read together. The starting point is that a person accused of an offence punishable by life imprisonment is ineligible for bail. The rationale for s 60(1) must presumably be to reflect Parliament's intention that liberty of an individual is appropriately curtailed when alleged offending falls into the most serious category. If immutable though, it could be thought to be draconian and inconsistent with Article 5 of the Constitution and in particular, the presumption of innocence.
16. If s 60(3) is interpreted from its text and in light of its purpose, bail can be granted by the Supreme Court, when a person is accused of an offence punishable by life imprisonment. It involves the exercise of discretion. It must reflect Parliament's intention to ensure there is an exception so that bail can be granted in such circumstances. Otherwise issues of unconstitutionality might arise. I consider then that the starting point in considering whether to grant bail where s 60(3) applies must be the ineligibility for bail under s 60(1). That suggests, consistent with *Whitford*, that there is high bar or hurdle for an applicant to overcome; that is to say special or good reasons.
17. It follows then that when a bail variation is being considered, there must be special or good reasons for bail to be varied.
18. There are a number of factors which inform whether bail should be granted. They are distilled from various cases, including:

- a. Public Prosecutor v Festa [2003] VUSC 65



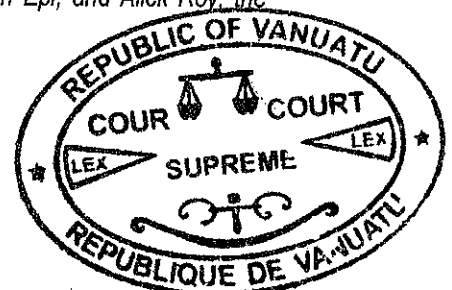
- b. Leo v Public Prosecutor [2013] VUSC 203
- c. Manipen v Public Prosecutor [2013] VUSC 177
- d. Remo v Public Prosecutor [2015] VUSC 180
- e. Public Prosecutor v William [2019] VUSC 10

19. The cases identify that the primary factors relating to bail are whether Mr Jimmy is a flight risk, the risk of interference, and the risk of offending if bail is varied as sought. Other relevant factors include the seriousness of the alleged offences, the presumption of innocence, the nature and quality of the evidence, time to trial and Mr Jimmy's personal circumstances. This is a non-exhaustive list of factors.
20. It is a matter of balancing and weighing all relevant considerations but particularly the risk factors in order to assess whether bail should be varied. There will always be a tension between the presumption of innocence and other relevant considerations.

The bail variation proposal

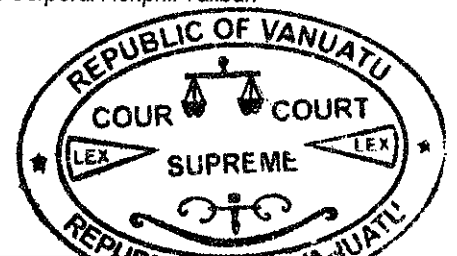
21. Mr Jimmy seeks to return to Epi Island and to amend the surety to Mr Roy Alick.¹ He proposes to live with Mr Alick Roy in Lotika Village, South Epi. Mr Alick Roy lives with his wife and children. I asked Mrs Malites for information about Mr Roy's children. He has 3 sons and a daughter aged 8 years.
22. Lokita Village is 6 km away from Tekilele Village, where the complainant and her family reside so it is submitted that there is a sufficient geographical distance to manage any risks. Mr Jimmy acknowledges that his garden is in fact in Tekilele Village but again any risk of contact with prosecution witnesses can be managed with conditions.
23. Mr Jimmy contends that there special circumstances or good reasons for bail to be varied. The good reasons are that he wants to return to Epi Island to harvest his kava plantation. The family's sole source of income is the kava plantation. He contends that his kava plantation is currently being destroyed by roaming cattle. He has had to pay members of the community to assist with the harvest as his younger brother is not capable of managing or harvesting the plantation. Further, that he has incurred significant financial burdens in maintaining the kava plantation while he has been in Port Vila. Mr Jimmy contends that if he is not able to harvest the kava, he risks losing everything he has invested.

¹ In support of the application to vary bail, Mr Jimmy filed a number of sworn statements – he filed sworn statements, as did his wife Antionette Kalsau, Joseph Tasaruru, the Area Administrator of South Epi, and Alick Roy, the proposed surety



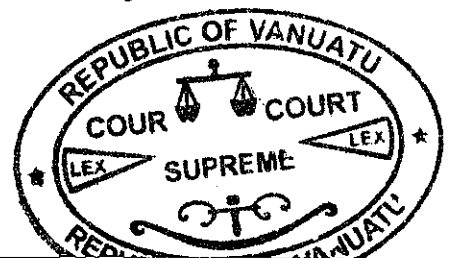
24. Mr Jimmy contends that any perceived risk in returning to Epi Island can be managed with the imposition of strict bail conditions. He is willing to comply with any reasonable conditions, including restrictions on movement and reporting to local authorities. He proposes to report to the Area Secretary to ensure monitoring and compliance with bail.
25. The prosecutor raised concern about tensions within the community. Mr Jimmy's position is that any previous tensions have been addressed and reconciled through customary processes.
26. The prosecutor opposes any variation to bail on a number of grounds.²
27. The grounds for opposing the bail variation include:
 - a. There is currently no active police presence at South Epi, which means that bail conditions are unenforceable.
 - b. That there are no special or good reasons for Mr Jimmy to return to South Epi, as his family is managing his kava plantation, which will generate an income for the family.
 - c. While Mr Jimmy proposes to live with the surety in a village 6 km away from where the complainant's family reside, his kava plantation is situated in Tekilele Village in close proximity to where the complainant's family are living. As such, there is a risk of interference with witnesses, exacerbated by tensions between the families. The sworn statements filed by both Mr Jimmy and the prosecution highlight that there have been tensions between the two families. Mr Jimmy asserts that tensions have dissipated because there has been custom reconciliation but Mr Pakoa, the complainant's father has a different perspective. Mr Pakoa asserts that tension continues, and that he has recently been verbally abused by Mr Jimmy's father. Mr Jimmy details tensions in his sworn statement filed on 3 June 2025, and believes that Mr Pakoa has displayed bias and prejudice towards him.
 - d. That there is a risk of Mr Jimmy failing to appear at trial, due to the remoteness of where he proposes to live. In his sworn statement, Corporal Taliban details the efforts he went to in order to arrest Mr Jimmy in terms of time and resources. Police had to travel from Tongoa to South Epi by boat, hire a vehicle and then travel on foot to reach the village where Mr Jimmy lives, as there is no active police presence in South Epi. Apart from the ship fare to Port Vila, the complainant's father paid for all the expenses involved in the arrest process.

² Sworn statements have been filed in opposition – Berry Willie Pakoa, Rubby Jimmy and Corporal Ronphil Taliban



Consideration

28. The presumption of innocence is a right enshrined by Article 5 of the Constitution. There is also the right to liberty, the right to the protection of the law and freedom of movement. I accept they are fundamental rights and freedoms, but in the context of bail, they are not absolute; Public Prosecutor v William [2019] VUSC 10.
29. I consider that there is a real risk of interference with witnesses. The risk of interference does not relate only to the risk of interference with the investigation; Public Prosecutor v Winslett [2016] VUSC 210 and Public Prosecutor v William [2019] VUSC 10.
30. The risk of interference with witnesses arises from the fact that both the complainant's parents will be witnesses at the trial. Mr Jimmy has already proven that he can react angrily or aggressively given that he has pleaded guilty to the charge of malicious damage to property. Further, the sworn statements paint a picture of unresolved issues and tensions within the community which I infer will likely escalate if Mr Jimmy returns to South Epi. The fact that he proposes to live in another village is meaningless given that his kava plantation is in very close proximity to where the complainant's family is living. The reality is that there is a credible risk of him coming into contact with the complainant's parents, which gives rise to a risk of interference with witnesses. It is clear from Mr Jimmy's sworn statements that he regards Mr Pakoa to be the aggressor and the problem.
31. I assess that there is a high likelihood of offending on bail if the variation is granted. It will bring Mr Jimmy into close proximity with Mr Pakoa and the complainant's mother. There are acknowledged tensions, Mr Jimmy has already damaged the family's property and there is a distinct possibility of offending.
32. There is a risk that Mr Jimmy will not attend the trial if he returns to South Epi, given that it is a remote location. If he does not, there may well be difficulties in arresting him, practically and logistically, given the matters set out in Corporal Taliban's sworn statement.
33. While I accept that it is important for the kava to be harvested, I do not consider that to be a special or good reason to warrant bail being varied as sought. Mr Jimmy has already arranged for others in the community to assist with the kava plantation, and there is no cogent reason given as to why that cannot continue, so that Mr Jimmy can continue to support his family.
34. I do not consider that the proposed living arrangements with Mr Alick Roy are suitable given the charge faced by Mr Jimmy. I am not prepared to endorse that arrangement as there is a female child living in that home.
35. Can strict conditions mitigate the identified risks to an acceptable level so that bail can be varied? All three of the primary risk factors are engaged here. Stringent conditions



will not meet these risks, particularly the high risk of interference with witnesses. That is because there cannot realistically be any oversight and monitoring of bail. The Area Secretary has no power to monitor compliance with bail, and bail conditions will be unenforceable if Mr Jimmy returns to South Epi due to the lack of police presence. Any breaches will not likely be dealt with, which renders conditions meaningless.

36. Taking all the factors discussed above, I decline to vary bail to allow Mr Jimmy to return to South Epi. He has not demonstrated good reasons for bail to be varied, and strict bail conditions will not mitigate sufficiently the risks identified given the lack of police presence, and enforceability issues.

DATED at Port Vila this 5th day of June 2025

BY THE COURT

Justice M A Mackenzie

