



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

Criminal Appeal
Case No. 24/2949 SC/CRMA

BETWEEN: Desmond Selona
Appellant

AND: Public Prosecutor
Respondent

Date of Hearing: 8 April 2025
Before: Justice V.M. Trief
In Attendance: Appellant – Mr C. Leo
Respondent – Ms J. Tete, via video link from Luganville Court House
Date of Decision: 14 April 2025

JUDGMENT

A. Introduction

1. The Appellant Desmond Selona was charged with several charges of unlawful sexual intercourse contrary to subss 97(1) and (2) of the *Penal Code* [CAP. 135].
2. Mr Selona applied for and was granted bail awaiting the preliminary inquiry ('PI') hearing in his matter in the Magistrates' Court.
3. On 23 July 2024, the Prosecution filed a PI bundle at the Magistrates' Court at Luganville, Santo. It served the PI bundle on Mr Leo on 19 September 2024 in Port Vila.
4. On 5 August 2024, the Magistrates' Court conducted a preliminary enquiry in *Public Prosecutor v Selona*; PI Case No. 2009/24 and committed Mr Selona to



stand trial in the Supreme Court on charges of unlawful sexual intercourse. Mr Selona's appeal is against that decision of the Magistrates' Court.

B. Grounds of Appeal

5. On 18 September 2024, Mr Selona filed his Notice of Appeal and Memorandum of Appeal against his committal by the Magistrates' Court on 5 August 2024 on the grounds that he was not served with a PI bundle prior to the preliminary enquiry hearing, and that he was not present in Court for the preliminary enquiry hearing even though the Order of the Senior Magistrate Laloyer referred to him being present in Court and that if he was not present, the preliminary enquiry hearing could not have been conducted.
6. At the appeal hearing, Mr Leo advanced a further ground, namely that Mr Selona was not given notice of the preliminary enquiry hearing on 5 August 2024. When Ms Tete in her submissions pointed out that Magistrate Toaliu's Minutes dated 16 July 2024 recorded Mr Leo's appearance before him on that date as Mr Selona's lawyer, and that the matter was adjourned then to 9am on 5 August 2024 for preliminary enquiry, Mr Leo promptly withdrew his submission that Mr Selona had not been given notice of the preliminary enquiry on 5 August 2024. Those Minutes of Magistrate Toaliu were attached as Annexure 1 to the Respondent's submissions filed on 4 April 2025. In the face of evidence that Mr Leo had been present in the Magistrates' Court on 16 July 2024 and received notice on Mr Selona's behalf that the preliminary enquiry would be held on 5 August 2024, Mr Leo nevertheless submitted that Mr Selona had never received notice of the preliminary enquiry on 5 August 2024. In doing so, Mr Leo wasted the Court's time and did not assist the Court.

C. The Law

7. Section 201 of the *Criminal Procedure Code* [CAP. 136] ('CPC') provides as follows:
 201. (1) *Every appeal shall be brought by notice in writing which shall be lodged with the registrar of the court to which the appeal is made (hereinafter called "the appeal court") within 14 days after the date of the order or sentence appealed against.*
 - (2) *Such notice shall be signed or marked by the appellant or, if the appellant is represented by an advocate, the notice may be signed by such advocate.*
 - (3) *Within 14 days after filing his notice of appeal under subsection (1), the appellant shall lodge with the said registrar a memorandum of appeal.*



- (4) Every memorandum of appeal shall be signed or marked by the appellant or signed by his advocate and shall contain particulars of the matters of law or of fact in regard to which the court appealed from (hereinafter called "the trial court") is alleged to have erred; except by leave of the appeal court the appellant shall not be permitted on the hearing of the appeal to rely on any ground of appeal other than those set forth in the memorandum:

Provided that nothing in this subsection shall restrict the power of the appeal court to make such order as the justice of the case may require.

- (5) If a memorandum is not lodged within the time prescribed by subsection (3), the appeal shall be deemed to have been withdrawn but nothing in this subsection shall be deemed to limit or restrict the power of the appeal court to extend time.
- (6) The appeal court shall have power to extend any time herein provided for the taking of any necessary step in appeal, as it may consider fit.
- (7) An application for an extension of time for lodging a memorandum of appeal under subsection (3) shall be filed with the registrar of the appeal court together with a memorandum of appeal in conformity with subsection (4).
- (8) An appellant may at any time after he has filed a notice or memorandum of appeal or made an application for an extension of time abandon the appeal by giving notice in writing thereof to the registrar of the appellate court and upon such notice being given, the appeal shall be deemed to have been dismissed.
- (9) The appeal court or a judge thereof may at any time assign an advocate to the appellant in any appeal in which it appears desirable in the interests of justice that the appellant should have legal aid and that he has not sufficient means to enable him to be represented.

8. Sections 143-146 of the CPC, which are in Part 7 of the CPC titled, 'Offences triable in Supreme Court', provide as follows in relation to 'Preliminary Enquiry':

143. (1) Every offence triable only in the Supreme Court shall be the subject of a preliminary enquiry by a senior magistrate in accordance with this Part.
- (2) The prosecutor shall make a complaint and the intended accused shall be provisionally charged with the offence concerned before the Magistrates' Court presided over by a senior magistrate, in accordance with the appropriate provisions of Part 3.
- (3) Throughout the period of the preliminary enquiry, the intended accused shall remain subject to the jurisdiction of the said Magistrates' Court and shall be remanded from time to time for periods not exceeding 14 days at the discretion of the senior magistrate in custody or on bail.
144. The prosecutor shall prepare and furnish to the senior magistrate and to the intended accused a draft information for the charge or charges contemplated by the prosecution.



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.*
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.*

D. Application for Leave to file Appeal out of time

9. Subsection 201(1) of the CPC provides that every appeal must be lodged in writing within 14 days after the date of the order appealed against. In this case, the appeal must have been lodged by 19 August 2024. The appeal was filed on 18 September 2024 – 30 days out of time.
10. On 18 September 2024, Mr Selona filed Application for Leave to file Appeal out of time.
11. The Prosecution cited the Court of Appeal judgment in *Gamma v Public Prosecutor* [2007] VUCA 19 and submitted that given that there is a short delay of only 17 days (that is incorrect – the appeal was filed 30 days out of time) and that there is no prejudice to the Prosecution, it did not oppose the granting of an extension of time to appeal.



12. I accept that there was a 30-day delay but that there is no prejudice to the Prosecution. Accordingly, extension of time to appeal is granted pursuant to subs. 201(6) of the CPC.

E. Consideration

13. As to the ground of appeal that Mr Selona was not served with a PI bundle prior to the preliminary enquiry hearing, it is accepted that the Prosecution did not serve a PI bundle on him until 19 September 2024 via service on Mr Leo – see Sworn statement of Noel Saul filed on 4 April 2025. Both counsel acknowledged that s. 144 of the CPC required the Prosecution to furnish to the senior magistrate and Mr Selona a draft information for the charge(s) contemplated by the Prosecution. Ms Tete submitted, however, that there is no legislative requirement for a PI bundle to be served on the accused prior to the preliminary enquiry. Mr Leo could not cite any legislative provision that the PI bundle must be served on the accused prior to the preliminary enquiry. This ground of appeal is not made out.
14. As to the ground of appeal that Mr Selona was not present in Court for the preliminary enquiry even though the Order of the Senior Magistrate Laloyer referred to him being present in Court, Mr Leo submitted that if Mr Selona was not present, that the senior magistrate erred in conducting the preliminary enquiry and committing Mr Selona in Mr Selona's absence to trial in the Supreme Court.
15. In response, the Prosecution on 4 April 2025 filed the Sworn statement of Micheline Tasso, Senior State Prosecutor, in which she deposed the following:
3. *... on the 5th August 2024, I appeared for the committal hearing... presided by the Chief Magistrate Anna Laloyer at the Magistrates' Court in Port Vila and the Appellant who was the defendant in that particular case is connected to the hearing via telephone call from the Magistrates' Court on Santo.*
 4. *On that date the Chief Magistrate put the phone on loud speaker to enable myself, the Chief Magistrate and the defendant to be able to hear and communicated to each other.*
 5. *I swear that on that same date I hear the defendant speaking on the phone by confirming his name and his presence when the Chief Magistrate was addressing him.*
 6. *That, at that time the defendant was present without his lawyer.*
 7. *I further confirm that the Chief Magistrate also informed the defendant that she was satisfied with the Preliminary Inquiry (PI bundle) presented before her and she committed the case to the Supreme Court for the defendant to appear for plea on the 16th October 2024 at the Supreme Court in Luganville, Santo.*



8. *I further confirm that although the Committal Order dated the 5th August 2024 did not indicate that the committal hearing was done via telephone call, it did mention that the defendant was present in person during the committal hearing.*
16. First, the Chief Magistrate's Order dated 5 August 2024 noted that the Defendant was present in person before her (albeit via phone link from the Luganville Court House) for the preliminary enquiry in *Public Prosecutor v Selona*; PI Case No. 2009/24. The Chief Magistrate noted in the same Order that Ms Tasso was in attendance on behalf of the Prosecution.
17. Secondly, Ms Tasso in her evidence confirmed that she appeared before the Chief Magistrate on 5 August 2024 for the preliminary enquiry in *Public Prosecutor v Selona*; PI Case No. 2009/24 in Port Vila. Further, that the Chief Magistrate did not note it in her Order but that they connected by phone with Mr Selona who was present at the Luganville Court House without his lawyer. She confirmed that Mr Selona spoke over the phone and confirmed to the Chief Magistrate his name and presence. She also confirmed that the Chief Magistrate informed Mr Selona that she was satisfied that on the material in the PI bundle before her, that there was a *prima facie* case against him and that he was committed to the Supreme Court for plea upon information.
18. Thirdly, there is no evidence contradicting Ms Tasso's evidence. When I asked Mr Leo if there was any evidence disputing Mr Selona's presence at the PI hearing, his only submission was that he is instructed that Mr Selona did not attend the PI hearing on 5 August 2024.
19. On the evidence, I find that Mr Selona was present at the PI hearing on 5 August 2024. Accordingly, the second ground of appeal is also not made out.

F. Result and Decision

20. For the reasons give, the appeal is **dismissed**.

DATED at Port Vila this 14th day of April 2025
BY THE COURT


Justice Viran Molisa Trief

