IN THE SUPREME COURT
OF THE REPUBLIC OF VANUATU **Criminal Case No. 40 of 2002**
(Criminal Jurisdiction)

JOE HARRY
-vs-
PUBLIC PROSECUTOR

On 21st August 2002 the defendant was convicted before the Magistrate's Court of using threatening or abusive words or threatening gestures towards another, contrary to section 121 Penal Code. He was fined Vt8,000 and ordered to pay Vt2000 in costs. He appeals against that conviction on three grounds.

1. He was denied representation
2. The evidence did not support the conviction
3. There were fundamental procedural irregularities

1. Representation

The appellant could not afford a lawyer. He asked that a particular friend represent him. The prosecution objected to the friend and the Court upheld that objection.

There were two grounds of objection, firstly the friend had a previous conviction and secondly there were civil proceedings involving the complainant and the friend and, indeed, an injunction against the friend in those proceedings. The allegation in the criminal case arose indirectly out of those proceedings.

The appellant says the Court was wrong to do that. The fact there was an adjournment for a week for him to find a lawyer or, if possible, obtain the services of the Public Solicitor didn't remedy matters. In the end, he was tried without a lawyer.

Section 117 Criminal Procedure Code states:-

"*117 (a) Any person accused of an offence before any criminal court or against whom proceedings are instituted under*

this Code in any such court, may of right be defended by an advocate.

(b) In any Magistrate's Court, such person may be defended, with leave of the Court, by an agent or friend."

The Magistrate, when deciding whether or not to grant leave under subsection (b) is exercising a discretion. So long as only proper factors are taken into account, relevant factors are not ignored and the decision is not manifestly unreasonable an appeal Court will not interfere with the exercise of that discretion.

I find that the previous convictions of the friend and his involvement in civil proceedings connected with the complainant were both factors the Magistrate could properly take into account. Whilst the conviction might not have been too serious it concerned the obstruction of a maritime officer. The civil proceedings involved maritime matters and the appellant, a journalist, was making enquiries about those matters.

In these circumstances I can see nothing wrong in the way the Magistrate exercised his discretion. I dismiss this ground of appeal.

2. <u>The Evidence</u>.

The Magistrate had the benefit of hearing all the witnesses. It was open to him to believe some and not others. A close examination of the documents shews that the assessment of the witnesses and the factual findings the Magistrate made were entirely open to him. There were some inconsistencies between most witnesses. This in itself does not mean evidence should be rejected, or one version be acceptable in preference to another.

I dismiss this ground of appeal.

3. <u>Procedural irregularities</u>.

It was agreed that there had been no compliance with section 81, 88 and 136 Criminal Procedure Code.

Section 81 states:-

"*In every criminal trial in which a plea of not guilty has been entered, the judicial officer presiding shall, before the prosecution case is opened, read aloud to the accused the following statement of the presumption of innocence –*

> *'In this trial you will be presumed to be innocent unless and until the prosecution has proved your guilt beyond reasonable doubt. It is not your task to prove your innocence. If at the end of the trial, any reasonable doubt exists as to your guilt, you will be deemed to be innocent of the charge and will be acquitted'*

and shall record such step in the proceedings."

Section 88 states:-

"*In every trial in which a plea of not guilty has been entered, at the close of the case for the prosecution, and if the court shall decide that there is a prima facie case made out against the accused, the presiding judicial officer shall read aloud to the accused, whether or not he is represented by an advocate, the following statement –*

> *'In making your defence in this trial, you are entitled, in addition to calling other persons as witnesses, to give evidence yourself on your own behalf, upon oath or affirmation and subject to cross-examination by the prosecution. However you are not obliged to give evidence and may elect instead to remain silent. If you do not choose to give evidence, this will not of itself lead to an inference of guilt against you'*

and shall record this step in the proceedings."

Section 136 states:-

"*(1) If at the close of the evidence in support of the charge, it appears to the court that a case is made out against the accused person sufficiently to require him to make a defence, the court shall again explain the substance of the charge to the accused and after complying with*

the requirements of section 88, ask him whether he has any witnesses to examine or other evidence to adduce in his defence, and the court shall then hear any such witnesses and other evidence.

(2) If the accused person states that he has witnesses to call but that they are not present in court and the court is satisfied that the absence of such witnesses is not due to any fault or neglect of the accused person and that there is a likelihood that they could, if present, give material evidence on his behalf, the court may adjourn the trial and issue process or take other steps to compel the attendance of such witnesses."

The appellant says he is not a lawyer, does not know Court procedure, he was waiting to be called to give evidence and was not aware of the options available and their effect.

The respondent cited section 221 Criminal Procedure Code (Amendment) Act No. 13 of 1989 which states:-

> "*Subject to the provisions herein before contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of any error, omission or irregularity in the summons, warrant, charge, information, order, judgment or other proceedings under this Code, unless such error, omission or irregularity has in fact occasioned a substantial wrong or miscarriage of justice.*"

Compliance with sections 81, 88 and 136 clearly fall within "*other proceedings under this Code*".

The respondent argues that when one looks at the evidential findings of the Magistrate the framing of his judgment and the conduct of the appellant through the trial there has been no "substantial wrong or miscarriage of justice" occasioned by these omissions.

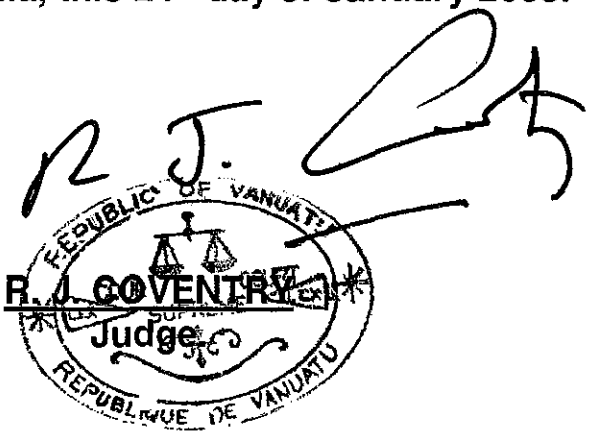
I do not accept that. The appellant wanted some kind of help to conduct his case. His friend, quite properly, was precluded from helping. He could not obtain representation through lack of finance

and the unavailability of the Public Solicitor. The defendant didn't give evidence although he called two witnesses. There were no legal points, there were issues of credibility and reliability.

I accept that section 221 might be applied in cases where there are failures to comply with section 81, 88 and 136. However, in this case, given the failures to comply I cannot with any certainty say there has not been a "substantial wrong or miscarriage of justice".

In these circumstances I must quash the conviction and set aside the sentence.

Dated at Port Vila, this 24th day of January 2003.



R. J. COVENTRY
Judge

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ORDER

1. The conviction of the defendant by the Magistrates Court on 21st August 2002 is quashed and the sentence set aside.

2. No order is made for retrial.

3. The defendant is bound over in the sum of Vt10,000 for 12 months.

Dated 24th January 2003.

R.J.COVENTRY
Judge