

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

Criminal Case No. 61 of 2012  
Criminal Case No. 62 of 2012  
Criminal Case No. 63 of 2012  
Criminal Case No. 64 of 2012

**PUBLIC PROSECUTOR**  
**V.**  
**LENI DANIEL TIABONG**  
**JANO NAPA KURANA**  
**PETER MAX**  
**SAWI KALPUKAI**

**Coram:** Justice D. V. Fatiaki

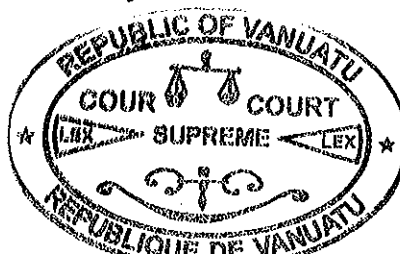
**Counsels:** Mr. T. Karae and Mrs. L. Matariki for the State  
Mr. J. Kausiama for the Defendants (no appearance of the defendants)

**Date of Decision:** 13 July 2012.

**RULING**

1. These four (4) cases were initially committed to the Supreme Court for trial on 3<sup>rd</sup> July 2012 by order of the Magistrate Court dated 13<sup>th</sup> June 2012. The committals were made on draft informations that had been filed along with the witness statements that the Prosecution relied upon to establish a "***prima facie***" case against each defendant.
2. On 26<sup>th</sup> June 2012 **Notis blong Trial** was issued to the defendants by the Registrar of the Supreme Court in the absence of an Information filed by the Public Prosecutor's office. The **Notices** purported to attach a "***copy blong informasen***" along with advice about services provided by the Public Solicitor's office.
3. **Section 147** of the **Criminal Procedure Code** provides for the issuance of a **Notice of Trial** once an information has been "***filed by the Public Prosecutor in accordance with section 146 (3)***" which reads:

"The Public Prosecutor must file the information in the Registry of the Supreme Court at least 7 days before the date specified for trial in the Supreme Court".



4. Plainly, in the absence of "*the (authorised) information*" **no** trial notice should have been issue **nor** should the case have been entered in the Supreme Court criminal call-over list for **3 July 2012**.
5. In accordance with **section 146 (3)** "*the information*" should have been filed in the Supreme Court registry by the Public Prosecutor **before** 27 June 2012 in order to comply with the minimum seven (7) days required under the section. This did not occur. Instead "*the informations*" were **all** filed on 3 July 2012, the call-over day. In the result the registrar's Notice of Trial were issued prematurely and in breach of **section 147**. The fact that none of the Defendants appeared at the call-over also indicates that the Notices of Trial were not served on them.
6. I cannot avoid the unfavourable impression created by the above circumstances where criminal cases committed for trial by the Magistrate Court are being hastily listed before the Supreme Court without proper compliance with the mandatory requirements of the law as to the filing of an information and the issuance of a trial notice.
7. These are avoidable errors that could be easily eliminated by the introduction, administratively, of an appropriate call-up and check-list reinforced by, a refusal to compromise on the requirements of the law. In this regard the duty to file an information is that of the Public Prosecutor **not** the Registrar of the Supreme Court.
8. In my view the mere fact that a Senior Magistrate has committed a case for trial in the Supreme Court on a specific date is **not** a good or sufficient reason for failing to comply with the law or worse, ignoring it.
9. In future, in the absence of "*information*" filed within the given time **no** Notice of Trial should be issued **nor** should the case be listed in the Supreme Court's monthly criminal call-over list. No longer will this Court
10. The above is sufficient cause for concern but it pales beside the more serious error that was committed by the Magistrate Court in committing the case to the Supreme Court for trial.
11. The relevant committal orders ( omitting the Defendant's name, case No. and charge) is a standardized document which reads as follows:

"IN THE MAGISTRATE COURT  
OF THE REPUBLIC OF VANUATU  
(Criminal Jurisdiction)

Criminal Case PI No.

**PUBLIC PROSECUTOR V. (Name of the defendant omitted)**



Non appearance of the State Prosecutor  
Non appearance of the Defendant

**COMMITTAL ORDER**

Having considered the materials presented to Court regarding the above case, I confirm that a prima facie case is disclosed. Accordingly I authorise the laying of the proposed information against the intended accused person (defendant's name omitted) and he is hereby committed to the Supreme Court for trial upon information.

(Description of the offence omitted)

The defendant is hereby committed to stand trial in the Supreme Court on the 3<sup>rd</sup> of July 2012 at 9.00 am.

**DATED at Port Vila this 13<sup>th</sup> day of June 2012  
BY THE COURT**

(Signed)

.....  
**Magistrate.”**

12. On the face of the committal orders the defendants were committed for trial in their absence and also in the absence of a prosecutor.
13. **Part 7** of the **Criminal Procedure Code** deals with offences triable only in the Supreme Court and, in particular, **section 145** and **146** sets out the procedure which Senior Magistrate must follow in conducting a preliminary inquiry (**PI**) into such offences.
14. For Completeness, **section 143** sets out the circumstances when a **PI** is to be held and **section 144** requires the prosecutor to “prepare and furnish to the senior magistrate ..... a draft information for the charge or charges contemplated by the Prosecution.”
15. **Section 145** and **146** sets out the procedure to be followed by a senior magistrate conducting a preliminary enquiry as follows:

**“PROCEDURE TO BE FOLLOWED BY SENIOR MAGISTRATE**

**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.*

## **THE DECISION**

**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.*

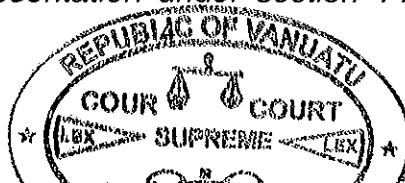
*(2) If the information is not authorised, the intended accused shall be by the same decision immediately discharged from the jurisdiction of the Magistrates' Court and if in custody shall be forthwith released. If the information is authorised, the senior magistrate shall by the same decision remand 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."*

16. Even accepting the breadth and information envisaged by the wording of **subsection (1) of section 145**, I cannot accept that such informality authorized the committal of an accused person for trial in the Supreme Court in his absence and in the absence of the Prosecutor.
17. I say the above advisedly because of the existence of provisions within **section 145** and **146** which assume the presence of the intended accused person at his committal, in particular, **section 145 (2)** which allows for the possibility that the material presented by the Prosecution to the committing Magistrate might "*be discredited*" before a committal order is made, and, **section 145 (3)** which empowers the Magistrate "*to allow the accused to make any statement or representation*" at the committal.
18. As the Court of Appeal pointed out its judgment in **Moti v. Public Prosecutor** [1999] VUCA 5 (at p3):

*"We are persuaded that the opportunity for an accused person to make a statement or representation under section 145 (3), if it is to serve any*



*useful or protective purpose ..... must be afforded **before** the decision is made that a prima facie case exists upon the materials sufficient to commit the accused to the Supreme Court for trial upon information."*

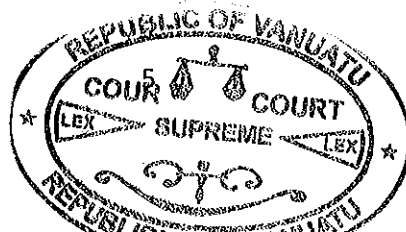
A fortiori the affording of the "opportunity" to discredit the evidence and make any statement or representation, would be rendered otiose if a committal could, nevertheless, be ordered in the absence of the accused.

19. In similar vein **section 145(1)** requires the committing Magistrate to record his decision on the **PI** in writing and "*deliver copies to the prosecutor and the intended accused*". Needless to say this requirement is a further pointer to the need for **both** the Prosecution and the accused to be present in Court at the date of the decision.
20. In light of the foregoing I am firmly of the view that the committals in the above mentioned four (4) cases were irregularly ordered in the absence of **both** the Prosecution and the named Defendant and must be and is hereby quashed and the cases returned to the Magistrate Court to be dealt with in accordance with the law.
21. Having so-ordered that the case be returned to the Magistrate Court for fresh committals I would highlight for the consideration of the Prosecutor the following matters:
  - (a) In regards to Criminal Case No. 62 of 2012; PP v. Jano Napakaurana consideration should be given to the age of the Defendant (which is recorded as **14 years** in his interview without a date of birth) and whether or not it is in the public interest to continue with the prosecution.

I note also that the charge initially laid in the committal proceedings was the lesser charge of Act of Indecency with a Young Person and was the information "*authorized*" to be laid by the committing magistrate. **Section 146 (3)** then requires the Public Prosecutor to file "*the (authorized) information*" and if, after further consideration or with additional evidence the Public Prosecutor considers that the information should be amended **section 146 (4)** permits such an amendment "*with the leave of the Supreme Court*".

No such leave was sought or granted in the present case, instead, the Public Prosecutor filed an information that had **not** been "*authorized*" by the committing magistrate and which charged a completely new and much more serious offence in breach of the above- mentioned provisions.

- (b) As for Criminal Case No. 64 of 2012; PP v. Sawi Kalpukai consideration needs to be given to amending the information so as to amalgamating Counts 1 and 3 and properly recording that Count 2 which charges a quite different offence, are in almost identical terms to that charged in Count 1



and 2 which cannot be correct. Count 2 is therefore defective and must be redrafted if it is to continue.

- (c) Concerning the (2) remaining committals in Criminal Case No. 61 of 2012 Public Prosecutor v. Leni Daniel Tiabong and Criminal Case No. 63 of 2012 Public Prosecutor v. Peter Max, both concern offences of Possession of Cannabis involving minimal quantities of cannabis of less than **1 gram**.

Furthermore in Leni Tiabong's case the offending took place on **14 May 2010** (over 2 years ago) and the charge was filed on **14 October 2010**. In Max Peter's case the date of the offence is **9 February 2011** (over 18 months ago) with the charge filed on 23 February 2011. Both cases involve 4 and 2 witnesses respectively, and there can be **no** acceptable reason why there has been such an inordinate delay in the committal of the cases for trial.

In this regard in **PP v. Mulonturala** [2009] VUCA 38 where there had been a delay of 2 years and 6 months between the committal and the trial in that case, the Court of Appeal said:

*"The Constitution guarantees a trial within a reasonable time (Article 5(2)(a)) and that has not occurred in this case... We are not concerned to apportion blame but to note that what occurred was unsatisfactory and is a factor which we need to now take into account."*

The prosecutor is invited, in the circumstances, to consider whether both defendants' constitutional right to receive a "fair hearing within a reasonable time ..." has been breached and therefore whether these charges too should be proceeded with.

**DATED at Port Vila, this 13<sup>th</sup> day of July, 2012.**

**BY THE COURT**

  
**D. V. FATIAKI**  
Judge.

