

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

Criminal Case No.46 of 2014

PUBLIC PROSECUTOR

-V-

DAVID PATTINSON

Coram: Justice D. V. Fatfaki

Counsel: Mr. D. Boe for the State
Mr. C. Leo for the Defendant

REASONS FOR BAIL DECISION

1. On 9 May 2014 the defendant was committed by the Magistrate's Court, Port Vila for trial in the Supreme Court for offences of Unlawful Sexual Intercourse and Act of Indecency involving a child under the age of 13 years. He was granted bail with several conditions including, condition (3): "That the defendant must not re-offend"; and condition (6): "That the defendant is restrained from entertaining children and young adults on his yacht".
2. On 3rd June 2014 the defendant appeared in the Supreme Court and pleaded "*not guilty*" to an information containing 3 counts of Attempted Unlawful Sexual Intercourse; Unlawful Sexual Intercourse; and Indecent Assault. His bail was extended on the same terms and conditions imposed in the Magistrate's Court.
3. On 29 July 2014 the Public Prosecutor's Office filed a document entitled: PROSECUTION'S APPLICATION FOR REMAND IN CUSTODY pursuant to Section 37(3) of the Criminal Procedure Code [CAP. 136]. Attached to the document was a copy of the defendant's bail bond with the above conditions (3) and (6) circled. There was also a handwritten police statement form comprising 10 pages and a VICTIM IMPACT STATEMENT of a young person named Alto Akuma.
4. The allegation(s) made in the document against the defendant are expressed as follows:

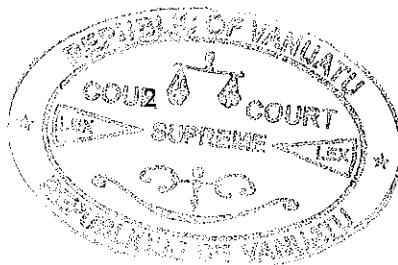


"... the aforementioned accused between the July 2013 at Port Vila committed acts of indecency in the presence of a person and committed sexually abused with children under stipulated age of majority. The acts were, specifically, masturbating and licking his penis in her presence and pushing his penis inside the victim's anus".

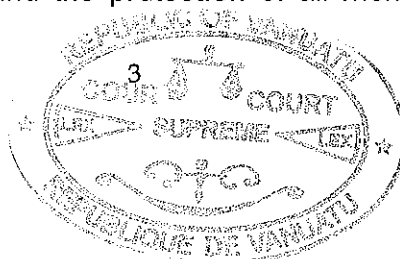
5. More specifically, the application asserts:

"the accused has not abided to bail conditions. The contravening conditions are condition 3 and 6 of the application order. Condition 3 provides that the defendant must not reoffend and condition 6 states that the defendant must not entertaining children and young adults".

6. I say at once that the application document looks more like a submission or memorandum for the Court rather than an application and was not supported by a sworn statement as is the usual and expected practice. The reference to Section 37(3) of the CPC was also misguided as is clear from the opening words of the section which states: *"If the accused person is brought before a Magistrate's Court ..."*. Furthermore there was no charge included in the papers as required by the section.
7. Be that as it may, the documents were ordered to be served on defence counsel. I am grateful for defence counsel's appearance on very short notice late on Tuesday afternoon (29 July 2014) despite not having been served with any of the papers.
8. After hearing counsel from the Public Prosecutor's Office and defence counsel briefly in opposition, the Court ordered the defendant to be immediately released from police custody and prosecuting counsel was directed to file and serve a proper application with sworn statement if he wished to pursue the matter further.
9. The short-comings in the form of the application was drawn to prosecuting counsel's attention as well as the irrelevance of Section 37(3). A perusal of the unsworn police statement also clearly indicated that the fresh incidents all occurred at the defendant's hotel room. On that basis alone, there could not be a breach of condition (6) which is expressly confined to the defendant's *"yacht"*. As for the alleged breach of condition (3), in the absence of any charge(s) and/or a sworn statement verifying the truth of the contents of the police statement, no breach could be established.



10. What happened next can only be viewed with the gravest concern. Wednesday 30 July 2014 was Independence day, a public holiday.
11. On Thursday afternoon (31 July 2014) defence counsel filed an urgent application supported by a sworn statement. The application sought bail for the defendant who had earlier been ordered to be released from police custody late on Tuesday afternoon.
12. The sworn statement deposed by defence counsel attached a copy of a charge sheet dated 30 July 2014 wherein the defendant was charged with an offence of Act of Indecency with a Young Person contrary to Section 98A of the Penal Code. The alleged victim is named in the charge as Alto Akuma a young person "*only 14 years old*". It may be noted at once that the charge is not the same as those laid in the information pending before the Supreme Court.
13. Defence counsel describes how the situation came about. Apparently on the day following his release by the Court ie. a public holiday, the defendant was called by police on his mobile and upon establishing the defendant's whereabouts, the police went and arrested him at Au Bon Marché Supermarket at Manples, Tebakor whilst the defendant was shopping. The defendant was taken to the police station and later to a hurriedly convened special sitting of the Magistrate's Court where the fresh charge was laid in the absence of defence counsel and the defendant was remanded in custody until 13 August 2014 when a preliminary inquiry into the charge would be held.
14. All of the above happened without the knowledge of defence counsel who had requested the police and the prosecutor late on Tuesday to be immediately informed if any action was to be taken against his client the defendant. Counsel even left the police his mobile contact.
15. Having heard both counsels I am left with the distinctly unfavourable impression that the police intentionally failed to inform defence counsel of the events that occurred on the afternoon of Wednesday 30 July 2014 at Au Bon Marché supermarket and at the Magistrate's Court with the view to ensuring that the defendant would be unrepresented before the Magistrate's Court.
16. Such cavalier behavior on the part of police officers charged with the enforcement of the law and the protection of all members of the public is



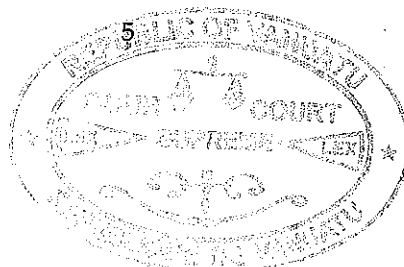
deserving of criticism and sanctions. What occurred should not have happened and is a sad reflection on the officers concerned.

17. Article 5 of the Constitution clearly provides that all persons are entitled to the fundamental right to liberty; security of the person; and protection of the law which includes a "*presumption of innocence*" as well as a "*right to counsel*". In addition every person is entitled to "*freedom of movement*".
18. No-one can and should be denied his fundamental rights and freedoms without due process and unless clearly restricted or limited by law. Having said that I accept, at once, the power of a police officer to arrest, without warrant, any person whom he suspects upon reasonable grounds of having committed a cognizable offence [s. 12 (1) CPC]. But, in effecting an arrest a police officer is not permitted to use more restraint than is necessary to prevent an escape [s. 7 CPC]. Furthermore, if an arrested person willingly submits to custody by word of action, then there is no need for an arresting officer to either touch or confine the person [ss. 4(1) & (3) CPC].
19. In light of the foregoing, the very public arrest of the defendant, an elderly man of 73 years in a busy supermarket on a public holiday, and his handcuffing by the three (3) arresting officers was unnecessary, high-handed and oppressive.
20. The Court accepts that it has power to grant the defendant bail under Section 60(3) of the CPC. Whatsmore the power is exerciseable notwithstanding that the defendant has been denied bail in the Magistrate's court.
21. Undoubtedly, the grant of bail is an exercise of the Court's discretion and must be done judicially. Although the discretion is unfettered, some assistance can be distilled from other relevant provisions of the CPC.
22. For instance, a person accused of an offence punishable by life imprisonment cannot be bailed by a police officer or by the Magistrate's Court [S. 60(1)]; a primary purpose of bail is to secure the attendance of the defendant before a court [ss. 60(1); 61 and 62(2)]; bail may be granted with or without conditions [ss. 60(1) & (2); 61]; conditions may also be imposed that are "... *necessary in the interests of justice or for the prevention of crime*" [s. 62(2)];
23. Reference may also be made to **Section 80** of the CPC which contains a clear statement as to the "*presumption of innocence*" in an accused's



favour. The section also refers to the "*burden of proof*" in a criminal trial being on the prosecution and to the required standard of proof being "*guilt beyond reasonable doubt*".

24. Lastly, **Section 117** of the CPC recognizes the right of an accused person to be defended by an advocate in any proceedings instituted under the CPC. These latter provisions reinforce the fundamental rights and freedoms in Article 5 of the Constitution.
25. A convenient non-exhaustive check-list of relevant factors to consider on a bail application might include the following:
- Every accused person is presumed innocent until proven guilty;
 - An accused person has a fundamental right to liberty and freedom of movement unless denied in accordance with the law;
 - The primary test for bail is whether or not the accused is likely to appear before the Court for his trial;
 - The seriousness of the charge(s) and the nature and strength of the prosecution's evidence in support of the charge(s);
 - The likelihood of the accused interfering with prosecution evidence and/or witnesses;
 - The likelihood of the accused re-offending while on bail;
 - The accused's character and antecedents;
 - The likelihood of further charges being laid against the accused;
 - Any reason(s) for an earlier refusal of an application for bail by the accused;
 - Whether the accused has a reliable contact or permanent address;
 - Whether further police investigations are required or necessary; and
 - Whether or not the accused would be seriously prejudiced in the preparation of his defence;
26. Having said that, most of the above factors may be adequately dealt with by fashioning and imposing suitable bail conditions, such as, surrendering a travel document; confining an accused to an island or locality; limiting his place of residence and imposing a curfew on his movements as well as a regular "*reporting-in*" condition. Requiring a surety could also be considered



as well as "non-contact" orders that extend to third parties and intermediaries. The only limitation is that any conditions imposed "shall not be oppressive or unreasonable" [s. 60(2) of CPC].

27. In the present application in the absence of any record of the Magistrate Court proceedings prosecuting counsel eschewed any reliance on breach of bail conditions by the defendant. Instead, counsel opposed the application on the basis that this was a new charge involving a new victim and the Magistrate was exercising a fresh discretion. He was therefore entitled to ignore the fact that the defendant was already on bail because the new offence occurred after bail was granted to the defendant.
28. More specifically, State counsel submits that police investigations are still "on-going" in so far as there is a need to record the statements of other potential witnesses. Counsel accepted however that the victim's statement had been recorded and formed the basis on which the fresh charge was laid.
29. A perusal of the victim's statement indicates there is some *prima facie* evidence to establish touching of the victims exposed penis by the defendant in the privacy of a hotel room he occupied. Counsel frankly admitted however that the evidence was equivocal in that it could not discount the possibility that the offending behavior was initiated by the victim or that he was a willing participant who had visited the defendant's hotel uninvited on at least a dozen occasions before the alleged incident occurred.
30. Despite the vigour of the opposition to bail, given the circumstances of the alleged offending conduct the Court does not consider the defendant to be either a "flight-risk" or a "danger to society" such as to warrant his remand in custody. The defendant was accordingly ordered to be immediately released on bail on the same conditions imposed by the Magistrate's Court on 9 May 2014.

DATED at Port Vila, this 11th day of August, 2014.

BY THE COURT



D. V. FATIAKI
Judge.

