

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

Criminal Appeal
Case No. 20/2284 SC/CRML

PUBLIC PROSECUTOR

V

**MELINDA DENNY BILL, LEAH RORY,
HUDSON TARI JNR, MORRIS ISAAC BEBE**

Respondents

Date of Judgment: 24th February 2021
Before: Justice Oliver Saksak
In Attendance: Ms Betina Ngwele for appellant
No appearance for respondents (Mr Andrew Bal)

JUDGMENT

Introduction

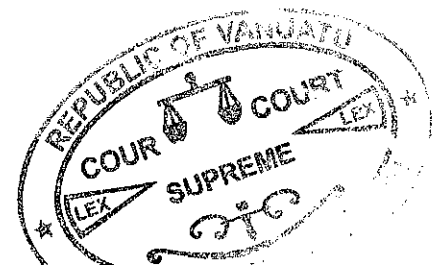
1. This is an appeal against the dismissal order issued in the Magistrates Court on 11th August 2020.
2. The Magistrate during a Preliminary Inquiry hearing dismissed 2 charges of kidnapping (section 105) and Intentional assault (section 107 (a) PCA).

Grounds

3. Two grounds of appeal were advanced that-
 - (a) The Magistrate erred in dismissing the charges against the 4 respondents pursuant to section 131 of the Criminal Procedure Code Act [CAP 136] (the CPC Act).
 - (b) The Magistrate erred in law in not allowing procedural fairness to the prosecution to be heard before dismissing the charges.

Management of Appeal

4. The appeal was first listed for review on 31st August 2020. Mr Bal did not appear on the date. The Court issued directions for the filing of Appeal Books by 21/09/20 and for responding submissions by 5th October 2020. Hearing was scheduled for 20 October.



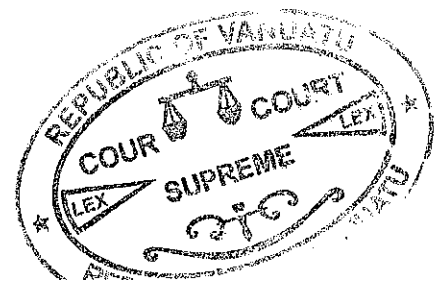
5. On 20th October Mr Bal did not appear. Ms Ngwele filed Appeal Books by then. The Court adjourned the hearing to 3rd November 2020 giving a further 7 days to the respondents to file responses.
6. On 3rd November Mr Bal attended and requested a further 7 days to file responses and submissions. The Court granted an extension.
7. By Notice issued on 18th November 2020 the matter was made returnable for hearing on 23rd November 2020.
8. On 23rd November 2020 Mr Bal attended and sought further time to file submissions. The Court allowed an extension to 27th November by 4:30pm and adjourned the hearing to 2nd February 2021.
9. On 2nd February 2021 at 1:31pm Mr Bal sent an email to the Court informing he had been suffering from severe cold and flu and that he would not attend but he would produce his sick leave as soon as “ *am done from the Hospital*”.
10. Ms Donald responded at 4:18pm on 2nd February informing Mr Bal due to his request the matter was rescheduled for hearing to 24th February 2021 at 9:00.

The Hearing

11. At the hearing of the appeal today at 9:00am. Mr Bal did not appear. Only Ms Ngwele appeared. No correspondences whatsoever has been received from Mr Bal.
12. Ms Ngwele informed the Court Prosecution was simply relying on its written submissions filed on 31st September 2020.

Discussion

13. Mr Bal has been served with the Appeal Book. Counsel has not filed any responses or submissions.
14. The Court has given the respondents and their counsel more than ample time to file their responses and submissions.
15. Their failure and/or omission indicate there is no opposition or challenge to this appeal.
16. I have read the written submissions filed by the appellant. I accept their submissions that section 131 of the CPC Act is usable when a case is called for trial and is adjourned.



17. The appearance on 11th August 2020 in the Magistrates Court was for the purpose of Preliminary Inquiry.
18. I accept Prosecution's submissions that as such the proper provision are under Part 7 of the CPC Act sections 143, 144, 145 and 146.
19. The dismissal order records the reasons for dismissal. These were procedural reasons of non-attendances by prosecutors and adjournments of up to 5 times. That is the wrong approach.
20. It appears to me from the materials available, the Magistrate had all the materials he needed to consider whether or not a prima facie case was made out against the 4 accuseds to require their appearance in the Supreme Court (section 145 (2)). The Magistrate did not do that, instead he focused on the delays and the adjournments. That was the wrong focus and approach.
21. Having done so, his decision did not meet the requirement of section 146 of the CPC Act.
22. Despite the delay and adjournments the Magistrate could simply have proceeded under section 145 (2) of the CPC Act and record his decision under section 146.
23. Had the Magistrate done that, it is my view there would be no grounds of appeal.
24. For the reasons given, this appeal is allowed.
25. The formal orders are:-
 - (a) The dismissal order dated 11th August 2020 is hereby quashed and vacated.
 - (b) The case be reinstated in the Magistrates Court and relisted for a PI Hearing.
 - (c) The respondents are to be served personally with copies of this judgment.

DATED at Port Vila this 24th day of February 2021.

BY THE COURT


OLIVER A. SAKSAK

Judge

