

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

**Criminal  
Case No. 23/761 SC/CRML**

**BETWEEN: Touguen Herkins (Toucien)**  
**Applicant**

**AND: Public Prosecutor**

**Coram: Justice Dudley Aru**  
**Counsel: Mr. C. Leo for the Applicant**  
**Ms. J. Tete for the Public Prosecutor**

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**DECISION**  
**(Application for bail pending Appeal)**

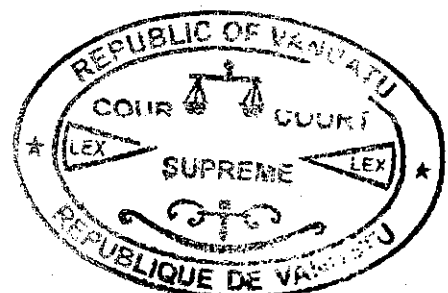
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**Introduction**

1. This is an application for bail pending appeal against sentence.

**Background**

2. The applicant was charged and pleaded guilty to two counts of unlawful sexual intercourse with a child under 13 years of age contrary to s97(1) of the Penal Code [CAP135]. He was sentenced to an end sentence of 4 years imprisonment to be served concurrently.
3. On the day of sentencing, the applicant was informed and ordered that unless he elects to begin serving his sentence immediately, he must present himself to the Correctional Centre to begin serving his sentence by no later than 430pm on 12 March 2024. He was also informed that upon his failure to comply, the Centre Manager will inform the Public Prosecutor and the Court.
4. The applicant did not comply with the directions and did not present himself to the Correctional Centre on 12 March 2024. On the 19 August 2024 the Public Prosecutor applied for a warrant for his arrest. I directed that a sworn statement in support be filed before the matter is heard.
5. Before the sworn statement could be filed, the Public Prosecutor on 3 September 2024 filed a further application to revoke the earlier application for the warrant of arrest on the basis that the applicant had surrendered himself to the Correction Centre to begin his sentence. The application for the warrant of arrest was then dismissed on the papers.



## Application for Bail

6. The Application for bail was filed on 25 September 2024 supported by a sworn statement of the applicant himself. A further sworn statement was filed this morning by the applicant's father undertaking to supervise the applicant if bail is granted.
7. The applicant is applying for orders that he be released on bail pending determination of his appeal. The grounds for the application are that the applicant is now serving his sentence and has appealed the sentence which is likely to be heard by the Court of Appeal in its November session. Prior to that he is applying to be released on bail.
8. The Public Prosecutor opposes the application and indicated that they wished to be heard in response.

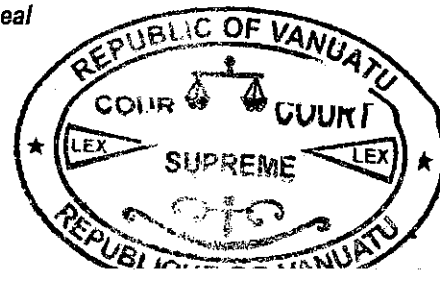
## Submissions

9. Mr Leo submits the applicant is currently serving his sentence. As he has filed an appeal against his sentence, he applies to be released pending the hearing of his appeal. He further submits that he relies on the Court's inherent jurisdiction to grant him bail.
10. It was further submitted that if bail is granted the applicant's father has given an undertaking to supervise his son if bail is granted. In the amended notice of appeal, the only ground of appeal raised is that the sentence was too excessive.
11. Ms Tete on the other hand submits that the Public Prosecutor maintains their objections to the application being granted. She referred to **Public Prosecutor v Nigel J Giltrap** Criminal Case No 18/2506 and submitted that three criteria identified at paragraph 10 of the judgment must be satisfied in order for bail to be granted.
12. It was further submitted that the offence is punishable by a maximum sentence of imprisonment for life and as the end sentence imposed was 4 years imprisonment, it was not likely that the sentence will be completely served before the appeal is heard in November. It was submitted that the applicant did not present himself to begin his sentence on 12 March 2024 as directed. He remained on the run for 5 months before surrendering himself to the authorities. Therefore, bail should be denied.

## Discussions

13. This is an application for bail pending appeal. The applicant currently is serving a sentence of 4 years imprisonment. The procedure for an application of this nature is provided for under s 209 of the Criminal Procedure Code Act [CAP 136].

*"209. Release from custody or suspension of sentence pending appeal*



(1) *After the entering of an appeal by a person entitled to appeal, the trial court which convicted or sentenced such person may order that he be released from custody on bail subject to such conditions as the court may consider fit.*

(2) *An application for release from custody on bail under this section may be heard in chambers. In the Supreme Court such application shall be by motion served on the Public Prosecutor. In the Magistrates' Court such application may be made without formal process to any magistrate.*

..."

*(emphasis added)*

14. And it is a matter of discretion whether or not bail is granted. In *Giltrap*, at [10] the Court identified the relevant factors to be considered when determining such an application.

*"..... an application must show that there are matters which constitute exceptional circumstances before bail is allowed pending appeal. It must be pointed out that the conditions to be considered must be based on the inveterate practice of appellate courts in bail applications pending appeals. In such cases, the conditions to be satisfied before bail can be granted pending appeal are that:*

- (a) There is possibility that a sentence of imprisonment be set aside entirely; or*
- (b) The sentence is likely to be served completely before the appeal is heard; or*
- (c) There are exceptional reasons. These last criteria of exceptional reasons or exceptional circumstances must be those of the case and not the applicant/detainee.*

*11. I consider that the above conditions are a refinement of those set out in the case of **Public Prosecutor v Walker [2007] VUSC 73.***

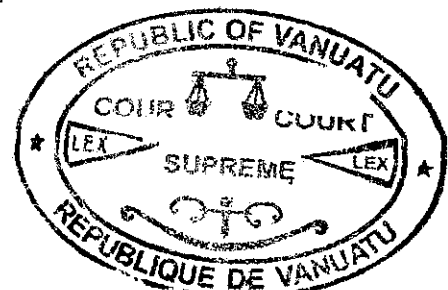
..."

- a) Possibility of imprisonment sentence being set aside entirely*

15. The offending concerns two counts of sexual intercourse with a child under the age of 13 years. The applicant pleaded guilty to both counts and was sentenced accordingly. Considering what the Court of Appeal has said in relation to sexual offence cases of this nature, it is highly unlikely that the sentence of imprisonment will be set aside entirely.

- b) Likelihood that the sentence will be completely served before the appeal is heard*

16. The applicant deposes in his sworn statement that a memorandum of appeal was filed on 11 September 2024 which has now been amended with only a single ground and an application to appeal out of time has also been filed on 13 September. The applicant was sentenced on 27 February this year, 2024 to an end sentence of 4 years imprisonment. It is therefore not likely that the sentence will be completely served before the appeal is heard given that the next Court of Appeal session is listed for the 4th to 15th November 2024.



c) Exceptional circumstances

17. The exceptional circumstances to be considered are those related to the case not the applicant. No exceptional circumstances of the case were made out by Mr. Leo as to why the applicant should be released on bail pending appeal.

**Result**

18. Having considered these factors, I am of the view that the application must be declined.
19. The application for bail pending appeal is therefore dismissed.

DATED at Port Vila this 8<sup>th</sup> day of October, 2024

BY THE COURT

Dudley Ari  
Judge

