

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

**Criminal**  
**Case No. 25/2203 SC/CRML**

**BETWEEN: ALPHOSE MALCOLM**  
Applicant

**AND: PUBLIC PROSECUTOR**

Date of Bail Hearing: 21 August 2025  
Before: Justice M A MacKenzie  
Counsel: Ms B Taleo for the Applicant  
Ms J Tete for the Respondent

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### **DECISION AS TO BAIL**

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#### **Introduction**

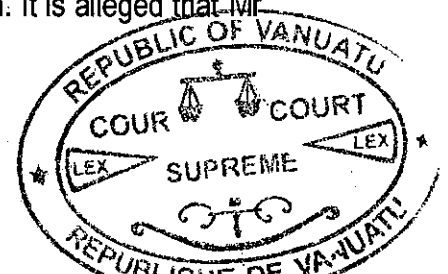
1. Mr Malcolm makes an application for bail. He faces a charge of sexual intercourse without consent contrary to s 97(1) of the Penal Code [CAP 135]. He is jointly charged with others.
2. The Preliminary Inquiry has been completed. Mr Malcolm has been committed for trial in the Supreme Court and is due to enter a plea to the charge on 15 September 2025.

#### **Result**

3. After hearing oral submissions from counsel, I declined to grant Mr Malcolm bail. I said I would give written reasons. These are my reasons.

#### **The alleged offending**

4. The alleged offending occurred in the Banks Islands. The complainant is vulnerable because she is aged 17 years and has a mental health condition. It is alleged that Mr Malcolm and two others raped the complainant in turns.



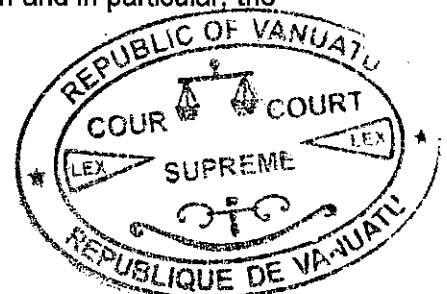
5. The complainant was walking from her mother's village when she was forced into bushes by one of the defendants. Mr Malcolm was not present at that point. It is alleged she was raped by the first defendant, Mr Willington. At some point after that, Mr Malcolm and the second defendant, Mr Hendry arrived. Mr Malcolm was allegedly holding a knife. Mr Hendry alleged raped the complainant and Mr Malcolm followed.
6. The complainant immediately told her husband what had happened when she got home.

### Relevant statutory provision and applicable legal principles

7. Bail is to be considered under s 60 of the Criminal Procedure Code [Cap 136] ("CPC"). In this case, because the charge of sexual intercourse without consent carries a penalty of life imprisonment, ss 60 (1) and (3) apply. Section 60 (3) is an exception to s 60 (1) but gives no guidance as to the applicable principles.
8. Section 60 (1) provides that a person charged with an offence with a penalty of life imprisonment is ineligible to be granted bail. However, s 60 (3) provides a gateway for bail in such a case.
9. In *Public Prosecutor v Whitford* [2006] VUSC 36 the Court said that for the exception in s 60(3) to apply there must be special or good reasons on which the Court is satisfied to grant bail and made pertinent observations about what evidence is required when s 60(3) applies (at 12) :

*"When an application is made under Section 60 of the Criminal Procedure Code for someone who has been charged with an offence carrying a maximum term of life imprisonment, it is in my view essential that the applicant comes with good evidence to persuade the Court that his situation is special or such that the Court has to invoke Subsection 3. It is trite law that what is said from the bar table (said by lawyers) is not evidence to support a proposition or an application that is before the Court. It is duty of the applicant to come to Court with all relevant evidence to support his application or proposition."*

10. Consistent with *Whitford*, I consider that for the exception in s 60(3) to apply, there must be special or good reasons for bail to be granted, when s 60(1) and (3) are read together. The starting point is that a person accused of an offence punishable by life imprisonment is ineligible for bail. The rationale for s 60(1) must presumably be to reflect Parliament's intention that liberty of an individual is appropriately curtailed when alleged offending falls into the most serious category. If immutable though, it could be thought to be draconian and inconsistent with Article 5 of the Constitution and in particular, the presumption of innocence.

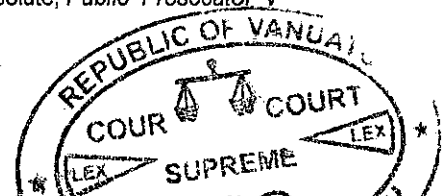


11. If s 60(3) is interpreted from its text and in light of its purpose, bail can be granted by the Supreme Court, when a person is accused of an offence punishable by life imprisonment. It involves the exercise of discretion. It must reflect Parliament's intention to ensure there is an exception so that bail can be granted in such circumstances. Otherwise, issues of unconstitutionality might arise. I consider then that the starting point in considering whether to grant bail where s 60(3) applies must be the ineligibility for bail under s 60(1). That suggests, consistent with *Whitford*, that there is high bar or hurdle for an applicant to overcome; that is to say special or good reasons.
  
12. There are a number of factors which inform whether bail should be granted. They are distilled from various cases, including:
  - a. *Public Prosecutor v Festa* [2003] VUSC 65
  - b. *Leo v Public Prosecutor* [2013] VUSC 203
  - c. *Manipen v Public Prosecutor* [2013] VUSC 177
  - d. *Reno v Public Prosecutor* [2015] VUSC 180
  - e. *Public Prosecutor v William* [2019] VUC 10
  
13. The primary factors relating to bail are the risks of:
  - i. failing to appear.
  - ii. interference with witnesses or evidence.<sup>1</sup>
  - iii. offending if bail is granted.
  
14. Other relevant factors include:
  - i. the seriousness of the alleged offences.<sup>2</sup>
  - ii. the presumption of innocence. The presumption of innocence is a right enshrined by Article 5 of the Constitution.<sup>3</sup>
  - iii. the nature and quality of the evidence,
  - iv. the stage of the investigation and

<sup>1</sup> The risk of interference does not relate only to the risk of interference with the investigation; *Public Prosecutor v Winslett* [2010] VUSC and *Public Prosecutor v William* [2019] VUSC 10.

<sup>2</sup> With reference to *Public Prosecutor v Jeajea* [2016] VUSC 159 and *Public Prosecutor v Borenga* [2023] VUSC 167, the seriousness of the offending alone is insufficient to overcome the presumption of innocence, a right enshrined under the constitution.

<sup>3</sup> There is also the right to liberty, the right to the protection of the law and freedom of movement. I accept they are fundamental rights and freedoms, but in the context of bail, they are not absolute; *Public Prosecutor v William* [2019] VUSC 10.



v. The defendant's personal circumstances.

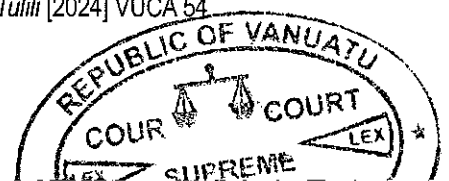
15. It should be noted that these factors are non-exhaustive. An assessment as to whether bail should be granted in an individual case will always be fact specific.
16. It is a matter of balancing and weighing all relevant considerations but particularly the risk factors in order to assess whether bail should be granted. There will always be a tension between the presumption of innocence and other relevant considerations.

### Discussion

17. The starting point is that Mr Malcolm is ineligible for bail because s 60 of the CPC applies. Mr Malcolm needs to demonstrate good or special reasons for bail to be granted as he faces a charge of rape. However, he does not advance any such good or special reason. Mr Malcolm proposes to live in Santo with his sister and brother-in-law. The high note of the application is that any risk of interference with the complainant can be mitigated by bail conditions and that there is a geographical distance because the alleged offending took place on Banks.
18. The prosecutor submits that no good or special reason for bail has been put forward by Mr Malcolm, and therefore bail should not be granted.
19. I accept that the seriousness of the offending alone does not displace the presumption of innocence.<sup>4</sup> Mr Malcolm is entitled to the presumption of innocence, a fundamental right enshrined in Article 5 of the Constitution. However, as was said in *Public Prosecutor v William* [2019] VUSC 10, in the context of bail, it is not an absolute right. This is a serious alleged rape. It has concerning features. Mr Malcolm is alleged to have been in possession of a knife, watched his associate rape a young woman, and then he took his turn. The complainant was very vulnerable because she was young, outnumbered, and taken advantage of sexually by three men, one of whom had a knife.
20. In this case, I consider that all three of the primary risks are engaged. There is a risk that Mr Malcolm will not attend Court, offend on bail and interference with the complainant. As explained at paragraph 19 above, this is a rape with serious features. If he either pleads guilty or is found guilty, the sentence will inevitably be a lengthy fulltime custodial sentence.<sup>5</sup> That may incentivise him not to come to Court. The risk of offending on bail arises from the callous nature of the alleged offending, and its seeming random nature. I cannot conceive of any bail condition that could mitigate the risk of another similar alleged incident. Finally, the risk of interference is mitigated by geographical distance, but that ignores the reality of modern communications. Mr Malcolm could easily locate the complainant on social media and start communicating

<sup>4</sup> See *Public Prosecutor v Jeajea* [2016] VUSC 159.

<sup>5</sup> With reference to *Public Prosecutor v Scott* [2002] VUCA 29 and *Public Prosecutor v Tulili* [2024] VUCA 54



with her. Again, that risk is difficult, if not impossible to manage or mitigate by bail conditions.

21. This is serious alleged offending. The complainant is very vulnerable. When considering bail, the Court should always identify bail risks but then consider whether they can be mitigated to an acceptable level so that bail can be granted. As discussed, I am not persuaded that the risks I have identified can be adequately mitigated by bail conditions, as proposed.
22. Further, while I acknowledge Mr Malcolm is entitled to the presumption of innocence, s 60 of the CPC applies. It is for Mr Malcolm to establish that there are good or special reasons for bail to be granted. He has not done so, and accordingly, bail is refused.

**DATED at Port Vila this 21st day of August 2025  
BY THE COURT**

*man*  
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Justice M A MacKenzie

