

**BETWEEN: ABRAHAM ARU**  
*Appellant*

**AND: PUBLIC PROSECUTOR**  
*Respondent*

**Coram:** *Hon. Chief Justice Vincent Lunabek*  
*Hon. Justice John von Doussa*  
*Hon. Justice Ronald Young*  
*Hon. Justice Oliver Saksak*  
*Hon. Justice Daniel Fatiaki*  
*Hon. Justice Dudley Aru*  
*Hon. Justice Mary Sey*  
*Hon. Justice Paul Geoghegan*

**Counsel:** *Ms. J. Tari for the Appellant*  
*Mr. T. Karae for the Respondent*

**Date of Hearing:** 4 April 2016

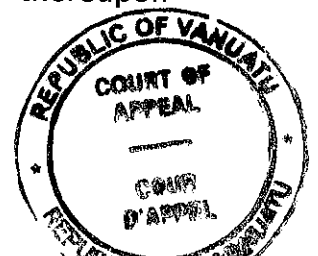
**Date of Judgment:** 15 April 2016

## **JUDGMENT**

1. The Appellant appeals the Recognisance for Keeping the Peace Orders (the Recognizance) made by a Judge of the Supreme Court on 10 March 2016.

### Background

2. The Appellant being the Defendant in the Supreme Court was charged with nine (9) counts of sexual intercourse without consent contrary to Sections 89 A, 90, and 91 of the Penal Code [CAP 135].
3. On 10 March 2016 he entered not guilty pleas to all nine (9) counts and the matter proceeded to trial. The trial commenced, the Prosecutor called the Complainant who was the only witness as to the conduct charged against her husband (the Appellant). The Complainant, after identifying herself and her relationship to the Appellant, refused to give further evidence resulting in the Prosecutor offering no further evidence. The Defendant was thereupon acquitted and discharged and released from custody.



4. On the acquittal and discharge the Judge bound over the Appellant to keep the peace. The Minute of the order made by the Judge records what happened as follows:

*"Mr Ken Massing anticipated problems because the complainant wife had expressed reluctance in giving evidence. He opened the case and called the complainant as his first witness. She was sworn, gave her personal details but indicated she did not want to give evidence against her husband. As the charges were rape there was no one else who could give evidence about the lack of consent. Mr Massing did not call anyone else and I acquitted and discharged the defendant. However, I said there was ample independent evidence to show he had injured his wife. In the circumstances I said I would bind him over to keep the peace ss. 23A – N CPC as per Fatiaki J PP v Naomet and Ors CRC 51/14."*

5. Thereafter, the Recognizance was entered into binding the Appellant for a period of two years with the payment of VT 5,000 for any failure to keep the peace.

#### Grounds

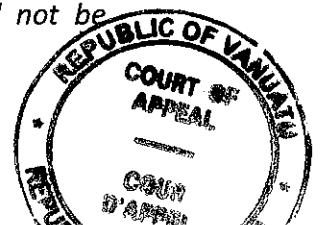
6. The Appellant raises three main grounds in his appeal stating that the Judge erred by issuing the Recognizance. Grounds (1) and (2) together plead that there was insufficient evidence on oath to prove that it was likely the Appellant would commit a breach of peace. Ground (3) pleads that the requirements of Sections 23A, 23B and 23G of the Criminal Procedure Code [CAP 136] (the CPC) were not met.

#### The Criminal Procedure Code

7. Part 2 B of the CPC makes extensive provision for the Prevention of Offences. It is sufficient for the purpose of this appeal to set out Section 23A which is referred to in the Judge's minute:

**"23A. Security for keeping the peace**

*(1) Whenever a magistrate is informed on oath that any person is likely to commit a breach of the peace, or to do any wrongful act that may probably occasion a breach of the peace, the magistrate may, in the manner herein after provided, require such person to show cause why he should not be*



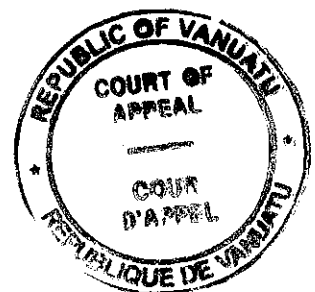
*ordered to enter into a recognizance, with or without sureties, for keeping the peace for such period, not exceeding one year, as the magistrate thinks fit.*

*(2) Proceedings shall not be taken under this section unless either the person informed against, or the place where the breach of the peace or disturbance is apprehended, is within the local limits of such magistrate's jurisdiction."*

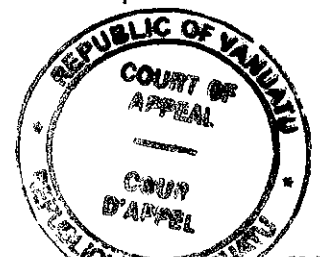
8. The balance of the provisions in Part 2B of the Criminal Procedure Code, like Section 23A, make it clear that Part 2B empowers, and regulates the procedure to be followed in the Magistrate Court. The Judge was not sitting as an officer of the Magistrate Court therefore the provisions of Part 2B could have no direct application to the situation that occurred in the Supreme Court on 10 March 2016. Had those provisions applied, the making of the Recognizance and its terms were not in accordance with Section 23A (1) There was no complaint on oath, the appellant was not asked to show cause why he should not be ordered enter into Recognizance and the period of the Recognizance exceeded one year. The relevant process where a person is required to show cause is set out in Section 23B to 23J of the Criminal Procedure Code, and includes inquiry into the truth of the information upon which the person has been required to show cause: section 23G. The minute does not record any inquiry of the kind contemplated by section 23G being made before the Recognizance was ordered.

#### Discussion

9. The decision of Fatiaki J in **Public Prosecutor v Naomet** [2014] VUSC 51 is referred to in the Minute. The circumstances of that case are distinguishable from the present case. In that case (a) there was some warning by the Judge contemplating issuing an order requiring a recognizance (b), there was a guilty plea on a charge of unlawful assembly which relates to public disturbance and breach of peace and (c) more importantly, the parties consented to a Recognizance and there was sufficient evidence on the guilty plea to justify the making of the order. But what is important about the reference in the Minute to the decision is that Fatiaki J whilst recognising that the recognizance was not being ordered under Part 2B of the Criminal Procedure Code considered similar principles applied when a recognizance was ordered in the Supreme Court.



10. Whilst the provisions of Part 2B of the Criminal Procedure Code had no application to the Appellant in this case a Judge of the Supreme Court does have jurisdiction in a matter before the Court in appropriate circumstances to require a person to keep the peace and to that end to order that person to enter into a recognizance. This was recognised by Fatiaki J, and we infer by the Judge in this case. That power arises under the jurisdiction granted to the Supreme Court (and its Judges) under Section 28 of the Judicial Services and Courts Act [CAP 270] and is a part of the jurisdiction of a Superior Court long recognised under the common law: see Halsbury's Laws of England, 3<sup>rd</sup> Edit Vol 10, para 905.
11. Cases where it will be appropriate for a Supreme Court Judge to be exercising this power are likely to be rare as the foremost jurisdiction where threats to peace are likely to be dealt with is that of the Magistrate Court under Part 2B. Nevertheless, if in a matter that is before the Supreme Court a judge is satisfied that a party is likely to commit a breach of the peace, or do any wrongful act that may probably occasion a breach of the peace, the judge has the power to order the person to enter into a recognizance with or without sureties for keeping the peace. In this event the judge is not acting under Part 2B and the period of the recognizance could exceed one year.
12. However, whilst the jurisdiction of the Supreme Court to make such an order exists, it should be exercised in a similar way to the power under Part 2B of the Criminal Procedure Code to protect the liberty and freedom of the person concerned. As in the Magistrate's Court the power of the Supreme Court should only be exercised where there is evidence on oath to give rise to apprehension that the person concerned is likely to commit a breach of the peace, or to do a wrongful act that may probably occasion a breach of the peace, and only after the person has been asked to show cause why he should not be ordered to enter into the recognizance. The opportunity to show cause must give the person a meaningful opportunity to be heard not only as to the making of such an order, but also as to its duration and terms. If the person does not accept the truth of the information that has been placed before the Judge, then inquiry must be made in accordance with the usual procedures for conducting criminal trials. The person required to show cause must have the opportunity to call any witnesses he wishes to call, and the judge must adjudicate on the truth and strength of the evidence. Only if it is proved



beyond reasonable doubt that it is necessary for keeping the peace should the person be ordered to enter into the recognizance.

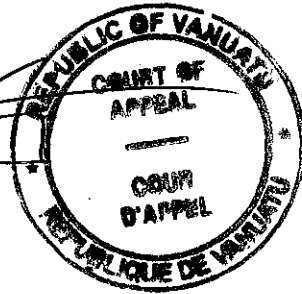
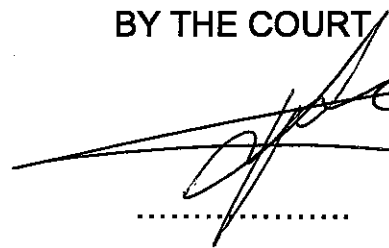
13. In this case the Appellant had been acquitted because the person who was the putative complainant for a recognizance to keep the peace had refused to give evidence as to adverse behaviour by the Appellant. Counsel for the Appellant informed this Court that there was no evidence from any other person who had witnessed the events that had been the subject of the charge. Counsel for the Respondent did not challenge this. There was on the Court file a medical report describing minor bruising, but absent evidence from the complainant as to the cause of those bruises, the medical report did not establish a basis for an apprehension that the Appellant might commit a wrongful act towards the Complainant, or towards anyone else.
14. The facts alleged by the Public Prosecutor's case against the Appellant were strongly disputed by the Appellant. When the Complainant refused to give evidence at trial her earlier complaints of wrongdoing against the Appellant, absent any other eyewitness support, ceased to provide a sufficient basis to require the Appellant to show cause, let alone to require the Appellant to enter into the recognizance.

#### Conclusion

15. The appeal should be allowed and the Recognizance Order for Keeping the Peace dated 10 March 2016 is therefore set aside.

DATED at Port Vila this 15 day of April, 2016

BY THE COURT



.....  
Hon. Vincent Lunabek

Chief Justice