

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

Criminal Case No.74 of 2010

PUBLIC PROSECUTOR

-V-

FRED JAMES

Coram: Justice D. V. Fatiaki
Counsel: Mr. L. Malantugun for the State
Mr. W. Daniel for the Defendant
Date of Decision: 29 September 2010.

RULING

1. On 17th August 2010 the Defendant was committed for trial before the Supreme Court by a Senior Magistrate. The committal order was made at Murua, Tongoa and reads as follows:-

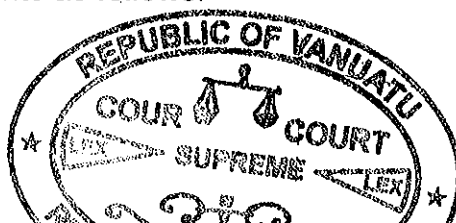
"COMMITTAL ORDER

*Whereas **Fred James** stands charged with the offence of Sexual Intercourse without consent contrary to section 91 of the Penal Code Act [CAP. 135]*

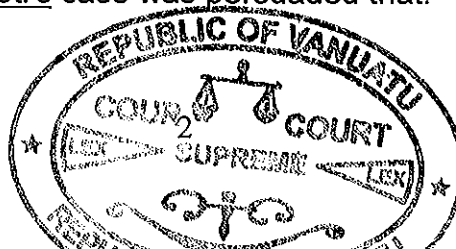
*And having considered the material presented to the Court and being satisfied that the material discloses a prima facie case, I hereby authorize the laying of the proposed information and the accused **Fred James** is committed to the Supreme Court for trial upon information.*

The Defendant/accused must appear in the Supreme Court at Dumba Port Vila on the 7th day of September 2010 at 9.00am."

2. On 7th September 2010 the Defendant appeared before me under prison escort and was arraigned on an Information filed by the Public Prosecutor charging him with 3 counts as follows:-



- Count 1: Threats to kill person contrary to section 115 of the Penal Code;
Count 2: Unlawful sexual intercourse contrary to section 97 of the Penal Code; and
Count 3: Sexual intercourse without consent contrary to section 91 of the Penal Code.
3. The Defendant pleaded "*not guilty*" to counts 1 and 3 and "*guilty*" to count 2. He was then remanded in custody to 15 September to allow for his counsel to appear for him and for the prosecution to consider its position in regard to counts 1 and 3. No conviction was entered against the Defendant on his guilty plea.
 4. On 15 September 2010 defence counsel appeared and asked that the Defendant be re-arraigned as the prosecution had indicated that it would be filing a fresh information with better details as to the date(s) the offences were allegedly committed. The prosecution also needed time to contact the complainant at Tongoa and the police investigators before deciding what to do with counts 1 and 3 to which the Defendant had earlier pleaded not guilty. The Defendant was then remanded to appear on 6 October 2010 to be re-arraigned.
 5. No fresh Information has been filed however, instead, on 23 September 2010 at the request of prosecuting counsel I heard an application in chambers to have the case called during the Court's upcoming Shefa circuit for the convenience of the witnesses in the case who were all residents on Tongoa island. Defence counsel opposed the application as the Defendant was already remanded in Port Vila. Counsel also orally advised the Court that the Defendant had been committed in his absence and counsel questioned the legality of the Information filed on the basis of such committal. According to defence counsel on the day of his purported committal in Tongoa, the Defendant was already in custody in Port Vila.
 6. Prosecuting counsel was somewhat taken aback by this most recent revelation and was unable to confirm or deny that the Defendant's committal had occurred in his absence. I am content to accept defence counsel's word and will rule on the matter on that basis.
 7. I accept at once that a preliminary enquiry is not a trial and therefore the protective provisions of the Criminal Procedure Code including sections 81, 88, 120 and 134(2), and even Article 5 (2) (e) of the Constitution may not be applicable. I also accept that the procedure in a preliminary enquiry is less rigid and formal than in an actual trial. (see: *Moti v. Public Prosecutor* [1999] VUCA 5).
 8. Notwithstanding the apparent informality of a preliminary enquiry, the Court of Appeal in Moti's case was persuaded that:



"... the opportunity for an accused person to make a statement or representation under section 145 (3), if it is to serve any useful or protective purpose, must be afforded before the decision is made that a 'prima facie' case exists upon the materials sufficient to commit the accused to the Supreme Court for trial upon information."

The actual wording of section 145 (3) is significant. It states

"The Senior Magistrate shall allow, but shall not require, the accused to make any statement or representation."

9. Needless to say the underlying assumption in the above observation is that the accused person is physically present at the preliminary enquiry. This is further reinforced by the requirements of section 143 of the Criminal Procedure Code which envisages an accused being "*provisionally charged*" before a senior magistrate and, during the course of the preliminary enquiry, being remanded "*in custody or on bail*". In similar vein section 146 requires a copy of the Senior Magistrate's written decision at the conclusion of a preliminary enquiry, to be delivered to the accused.
10. For the foregoing reasons the application to transfer this case to the Shefa circuit must be refused. The authorized Information against the Defendant being based upon an improperly conducted preliminary enquiry must be quashed and, in light of prosecuting counsel's concession, the case is returned to the Magistrate's Court to be dealt with afresh and in compliance with the provisions of Part VII of the Criminal Procedure Code [CAP. 136]
11. The Defendant who is presently in custody is ordered to be taken before the Magistrate's Court at 9.00 a.m. on 30th September 2010 for a fresh preliminary enquiry to be conducted by a senior magistrate.

DATED at Port Vila, this 29th day of September, 2010.

BY THE COURT


D. V. FATIAKI
Judge.

