

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

Bail Application No. 20 of 2015

**FABRICE TABISAP
V.
PUBLIC PROSECUTOR**

Mr. J. Garae for the Applicant
Mr. S. Blessings for the Respondent

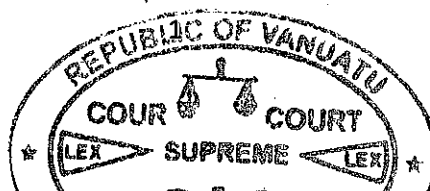
BAIL RULING

1. On 15 October 2015 Aru J. delivered reasons for refusing a bail application by the defendant on 13 October 2015. The application was opposed by the prosecution on the basis that the offence was a serious one and the defendant who comes from Melsisi Area in Pentecost was a flight risk. Aru J. in refusing the application noted that:

"although the defendant may not be a flight risk, the fact that he will reside at Solwe area if released on bail poses a real risk of interference with prosecution witnesses as the defendant is related to the complainant whose family also lives at Solwe area".

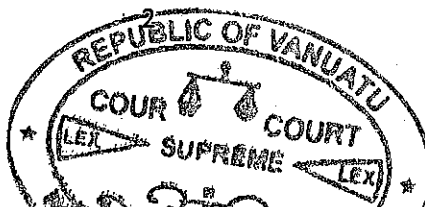
He also stated that the refusal of bail did not prevent the defendant *"applying again at a later stage if circumstances change"*.

2. This is a second application by the defendant in this court for bail. Although this is not an appeal against the decision of Aru J and requires this Court to exercise its discretion afresh, in order that this Court might be persuaded in the defendant's favour it needs to be shown to the Court's satisfaction that there has been a change in material circumstances since the defendant's last unsuccessful bail application.
3. The present application advances several grounds in support including that the defendant is not a flight-risk as the defendant and his parents live in Santo and the defendant *"cannot interfere with the prosecution witnesses"* as he will be residing *"under the direct supervision of Chief Michael Tanmonok in Chapuis 2 Area"*. This latter ground is confirmed by a sworn statement of Chief Michael Tanmonok of Central Pentecost who resides at Chapuis 2 Area, Luganville. The chief undertakes to look after the defendant if he is released on bail and to



ensure that the defendant complies with all bail conditions imposed on him as well as attends court on any date(s) notified to him.

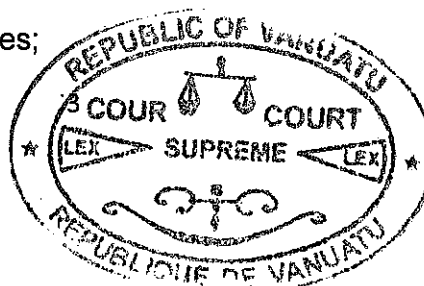
4. If I may say so this proposed change in the defendant's residence while on bail is a material change in the circumstances advanced before Aru J. and entitles this Court to exercise afresh its discretion under Section 60 of the Criminal Procedure Code "to direct that any person be released from custody on bail ...".
5. Prosecuting counsel opposes the grant of bail on two main grounds. Firstly, because the offence is serious and may even be increased to a more serious offence based on the evidence and secondly, because the defendant since the refusal of bail by Aru J. has been convicted by the Magistrate's Court on 16 October 2015 for an offence of Escaping for which the defendant was fined VT5,000 and ordered to pay VT1,000 costs. Accordingly, counsel strongly submits that the defendant is a real "flight-risk" and the Court should dismiss the application.
6. I accept, on its face that the conviction for Escaping presents a serious impediment to the defendant's application, but, upon enquiring with defence counsel and the defendant, it transpires that the defendant had run away from the police station whilst under arrest in the present case. He had done so in a state of panic and fear and had run to the safety of his parents who promptly returned him to the police station. It is unfortunate that a more humane and merciful approach was not taken in addressing this temporary and wholly understandable absence.
7. In those circumstances, I do not consider that the defendant is a real flight risk. In my view the defendant a young unsophisticated 18 year old villager faced for the first time with the intimidating and unfamiliar surroundings of a police station and the prospect of being locked up in a cell, saw an opportunity (perhaps due to a lapse in police attention) to escape to the safety and security of his parents and took it albeit that it was short-lived.
8. As for the nature and quality of the evidence in the case, prosecuting counsel accepts that there is no confession and no physical injuries to the complainant other than tenderness and redness to the hymen area which remains intact. There was also no anal examination despite the complainant having claimed that the defendant had penetrated her anus both digitally and with his penis on several occasions a month before the medical examination. Indeed counsel concedes there is no independent physical evidence to establish penetration of either the complainant's anus or vagina. In those circumstances the existing charge of Act of Indecency With A Young Person is entirely justified and proper



given that the complainant was 6 years of age at the time of the alleged offending.

9. After carefully considering all the circumstances and grounds advanced by the defendant and the changed circumstance of the offer of Chief Michael Tanmonok to house and keep the defendant under strict supervision at Chapuis 2 Area away from the complainant's home at Solwe, and, also considering the submissions of prosecuting counsel in opposing the application including the defendant's recent conviction of escaping from lawful custody, I am nevertheless satisfied that this is a case where the Court should grant the defendant's application for bail.
10. Needless to say I have borne in mind that the defendant has already been committed for trial and has pleaded not guilty to the Information. Furthermore the defendant has been remanded in custody since 18 September 2015 in Luganville prison which does not have separate facilities for young remandees.
11. I have also borne in mind the relevant Articles of the Convention of the Rights of the Child which was ratified by Vanuatu in Act No. 26 of 1992 and which expressly provides in Article 3 that "*in all actions concerning children undertaken by ... courts of law, the best interests of the child shall be a primary consideration*"; Article 20 (1) which provides that a child who is "*... temporarily deprived of his family environment ... shall be entitled to special protection and assistance provided by the State*" and finally Article 40(1) which recognises "*... the right of every child ... accused of having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth ... and which takes into account the child's age and the desirability of promoting the child's reintegration ... in society*".
12. The defendant in this case was born in 1997 and would have been just 18 years of age at the time of the offence. Although strictly not a "*child*", having observed him and heard him in Court there is not the slightest doubt in my mind that the defendant is a nervous, fearful, immature and impressionable teenager who should be kept away from adult offenders and in a caring environment under close adult supervision. I am also assisted by prosecuting counsel's most recent concession.
13. Accordingly in exercising afresh the court's discretion under Section 60 of the Criminal Procedure Code the defendant is ordered to be released forthwith on bail with the following conditions:

- (a) To keep the peace at all times;




- (b) Not to re-offend;
- (c) Not to contact, approach or interfere with prosecution witnesses either directly or indirectly especially the complainant;
- (d) To report at the Police Station at Luganville and sign every Friday during working hours between 7.30am to 4.30pm;
- (e) Not to leave Santo island;
- (f) To reside at all times with and under the supervision of Chief Michael Tanmonok at Chapuis 2 area, Luganville, Santo and not to enter Solwe area unaccompanied or associate with young children without adult supervision; and
- (g) To appear in Court as and when notified by the court;

14. The defendant is also warned that a breach of any of the above conditions will result in his immediate arrest and return into prison custody.

DATED at Luganville, Santo, this 3rd day of December, 2015.

BY THE COURT


D. V. FATIAKI
Judge.

