

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

Criminal Case No. 3868 of 2016

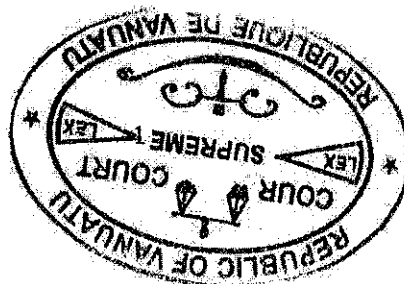
**PUBLIC PROSECUTOR**  
**v.**  
**MALAO JEAJEA**

Date of RULING:  
Before:  
In Attendance:

9<sup>th</sup> day of December, 2016 at 3:00PM  
Justice Daniel Fatiaki  
Counsel – Ken Massing for the State  
Counsel – Jane Tari for the Defendant

**BAIL RULING**

1. On 9 November 2016 the defendant was arrested from his home at Malo island, and was taken before the Magistrate's Court in Luganville on a charge of Sexual Intercourse Without Consent contrary to Section 90 and Unlawful Sexual Intercourse contrary to Section 97 of the Penal Code. The defendant was remanded in custody for 14 days to 23 November and again on the 23 November to 7 December 2016 when it is anticipated a PI will be held by the Magistrate's Court to ascertain whether there is sufficient evidence to support the charges being committed to the Supreme Court for trial.
2. On 25 November 2016 the Public Solicitor's office filed an application for bail in the Supreme Court on behalf of the defendant urging several grounds in support including the defendant's past unblemished record; his wife and daughter's weak state of health rendering them heavily dependent on the defendant and the unlikelihood of interference with the complainant who lives in a different village some distance from where the defendant resides. The defendant also offers several conditions that he will abide by in the event that bail is granted including not interfering with any prosecution witness; residing in his home village and attending any court dates as and when required. Later the defendant filed a sworn statement in support of the bail application grounds and conditions offered.
3. On 6 December 2016 the prosecutor filed a response to the application opposing it on three principal grounds:

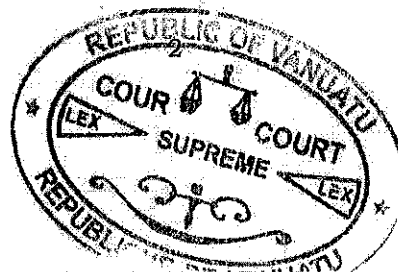


- (1) There is a likelihood of the defendant not turning up at his next court date since he lives on Malo island off the coast of Santo and some distance from Luganville town;
  - (2) There is a risk of interference with the complainant and prosecution witnesses who are all residents on Malo island;
  - (3) The defendant faces serious charges that carry life imprisonment and 14 years imprisonment respectively and investigations remain incomplete.
4. Let me say at once that an incomplete police investigation is not a proper ground for refusing bail to an applicant who has been charged and brought before the court unless he has contributed to that incompleteness. There can be no such thing as a "holding charge" and a charge(s) should not be laid if investigations are incomplete.
5. I am fortified by the provisions of Section 37 of the CPC headed: PERSONS ARRESTED WITHOUT WARRANT HOW TO BE DEALT WITH which clearly states of such a person:

*"(2) The court, if it has jurisdiction, may try the offence alleged to have been committed".*

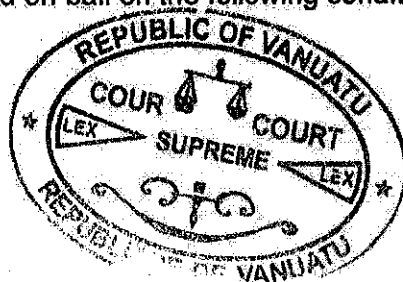
And if there is no jurisdiction to try the offence, then the court may remand the accused in custody for up to a maximum of 14 days "*pending the initiation of a preliminary inquiry under the provision of Part VII*" [subsection (3)]. Further, in terms of subsection (4), if no preliminary inquiry is initiated by the prosecutor within the 14 days remand period and the charge is not nollied under Section 29 or withdrawn, then the accused person "... shall be brought before the Supreme Court" for it to consider whether the accused should be discharged.

6. The above tight statutory time-line for dealing with an arrested accused person assumes that the prosecution should be "*trial-ready*" when an arrested and charged person is brought before the court and, in my view, militates against any possibility of a "*holding charge*" or an incomplete police investigation.
7. Turning next to the specific grounds. As to (1), there is always a possibility that a defendant on bail may not turn up to a court date but in the absence of evidence of similar prior instances of absenteeism or absence of a fixed residential address and/or dependant family members, the risk remains a mere possibility and nothing more. Such a risk (if real) may be reduced by requiring regular attendance and



signing-in at a police station and confining the place of residence of a bailed defendant as well as restricting his movements therefrom.

8. As to (2), again there is always a risk of interference with a complainant or prosecution witness but that too can be controlled and reduced by appropriate conditions and is greatly diminished by early recording of a complainant's statement as has occurred in the present case. Likewise the recording of a caution statement from the defendant which is incriminatory renders such risk a remote possibility.
9. In the present case the defendant and the complainant live in different villages albeit according to the prosecution, "*within the same area*" (whatever that may mean). No evidence has been provided by the prosecution as to actual distances and walking times as should have been done if this objection is to be taken seriously.
10. As to ground (3), the seriousness of the offences charged is undoubted but that alone is insufficient to overcome the presumption of innocence which the defendant presently enjoys or his constitutional right to liberty. The strength of the prosecution's evidence is a more opposite ground of objection but the prosecution was unable to assist much in that regard in the absence of the relevant police file or the investigating officer both of which should have been present in Court.
11. Although I accept that the grant of bail is not a right of an accused person, nevertheless, given the constitutionally protected fundamental rights and freedoms of every individual, the prosecution bears a heavy onus in opposing any application for bail. This means that merely verbalising common risk factors is not enough, there must be some evidence produced to the court to influence its discretion to refuse bail.
12. The weight and significance of a refusal of bail by the Magistrate's Court is reinforced by the provisions of Sections 66 to 69 of the CPC which collectively gives an unsuccessful applicant for bail, a statutory right to a second application for bail to the Supreme Court and makes the magistrate "*personally responsible*" for forwarding the file to the Supreme Court for review of the refused application and, if granted, the magistrate is again made personally responsible for securing the applicant's release from prison.
13. In light of the foregoing and after carefully considering the application and opposing submissions, I am satisfied that the defendant is not a flight-risk and I direct that he be released on bail on the following conditions:



- (1) To keep the peace and not re-offend;
- (2) To reside in Nanuku village on Malo Island everyday;
- (3) To not attempt to enter or go to Tawivil village;
- (4) To not directly or indirectly attempt to make contact with the complainant or interfere with any prosecution witness;
- (5) To not leave Sanma Province without the prior written approval of the Court;
- (6) To keep in weekly contact with the Public Solicitor's office for the purpose of ascertaining future court dates;
- (7) To report and sign-in at Santo Police Station every Friday between the hours of 9am to 4pm;
- (8) To provide a reliable mobile phone contact number to be provided to the Public Prosecutor's office and Public Solicitor's office at which he may be readily contacted; and
- (9) To attend all future Supreme Court dates as advised including on Monday 6 February 2017 at 9.00 a.m.

DATED at Luganville, Santo, this 9<sup>th</sup> day of December, 2016.

BY THE COURT

