

BETWEEN: **Public Prosecutor**
 Appellant

AND: **Sebastien Kappel**
 Frank Steux
 Respondents

Date: 14 November 2019
By: Justice G.A. Andrée Wiltens
Counsel: Public Prosecutor for Appellant
 Public Solicitor and/or Mr J. Malcolm for the Respondents

JUDGMENT

A. Introduction

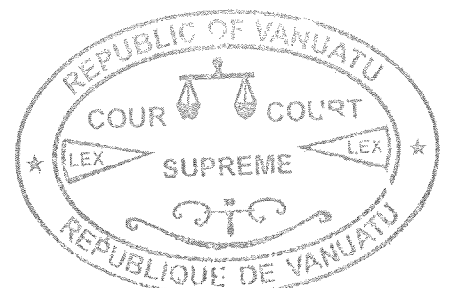
1. This is an appeal by the prosecution against a finding of no case to answer.

B. Background

2. The appeal is based on the Learned Magistrate's decision to find no case to answer using an incorrect legal test.

C. Decision

3. The written decision after having heard submissions as to the sufficiency of evidence to make out the prosecution's case plainly records that the evidence is insufficient to establish the case beyond reasonable doubt.



D. Discussion

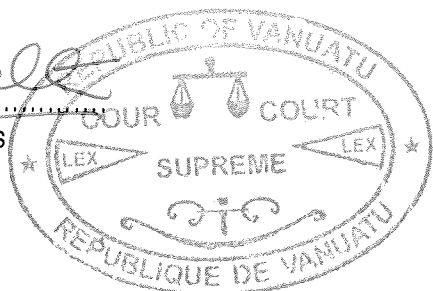
4. That is clearly not a correct statement of the law.
5. The provisions of section 164 of the Criminal Procedure Code require a lower test be applied at the conclusion of the prosecution case. At that point in the process, there should only be a no case to answer finding "...as a matter of law if there is no evidence on which [either Respondent] could be convicted". That standard is obviously quite different to proof beyond reasonable doubt.
6. In my view, there is no obvious answer to the point on appeal. The learned Magistrate has clearly adopted the incorrect test.
7. However, the learned Magistrate's decision was given on 23 September 2014. The application for Leave to file out of time was filed on 11 November 2014; and the Memorandum of Appeal on 24 November 2014. Thereafter nothing more has been done.
8. It appears there has been significant delay in the hearing of this appeal due to an inability to serve the Respondents, one of whom (at least) appears to no longer be in Vanuatu. I note that Justice Fatiaki on 2 December 2014 recorded that he would not call this matter again until the prosecution had its papers in order and had served the Respondents. As a result, the file has been left in abeyance.
9. Given the passage of time, the relative lack of seriousness of the alleged offending, and the fact that it appears at least one of the Respondents has left the jurisdiction, this matter is now considerably stale. It is unfair to the Respondents for the matter to linger on in the Court's diary.

E. Decision

10. I dismiss the appeal for want of prosecution and for breaching the obligation on the State under Article 5(2)(a) of the Constitution to have criminal matters dealt with within a reasonable time. A delay of more than 5 years cannot be considered reasonable.
11. The appeal is dismissed.

**Dated at Port Vila this 14th day of November 2019
BY THE COURT**

Gandhi Uelle
Justice G.A. Andrée Wiltens

The seal of the Supreme Court of Vanuatu is circular. It features a central scale of justice. The text "REPUBLIC OF VANUATU" is written along the top inner edge, and "REPUBLIQUE DE VANUATU" along the bottom inner edge. The words "COUR SUPREME" are written across the center, with "COUR" on the left and "SUPREME" on the right. The word "LEX" is written on two banners flanking the central text. There are small stars on either side of the banners.