

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

Criminal Appeal
Case No. 20/494 SC/CRAC

BETWEEN: Public Prosecutor
Appellant

AND: Rampuno Phelix & Mickey Phelix
Respondents

Date of Hearing: 2 June 2020
Before: Justice V.M. Trief
In Attendance: Appellant – Mr P. Sarai
Respondents – Mr L. Moli
Date of Decision: 2 June 2020

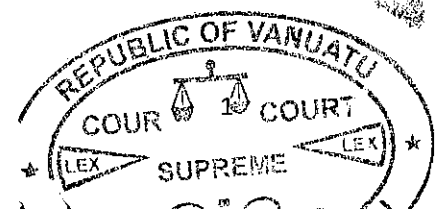
JUDGMENT

A. Introduction

1. On the third occasion that Prosecution did not appear for the Preliminary Inquiry ('P.I.'), the Magistrates' Court dismissed the charges against the Respondents Mr Rampuno Phelix and Mr Mickey Phelix. It purported to do so pursuant to s. 131 of the *Criminal Procedure Code* [CAP. 136] (the 'CPC').
2. The Prosecution appeals on a number of grounds. At the conclusion of the hearing of the appeal, I delivered my decision and reasons. I set them out in this written judgment.

B. Background

3. The Respondents face 3 charges of threats to kill and 1 charge of intentional assault. If committed to trial, the trial will be in the Supreme Court due to the maximum penalty available for the offence of threats to kill.



4. The P.I. into the charges was adjourned twice. It was first listed in the Magistrates' Court on 13 November 2019. The Prosecution did not appear and the P.I. bundle was not ready. It was next listed on 11 December 2019. Neither party appeared. In any case, the Magistrate adjourned the P.I. to 19 February 2020.
5. On 19 February 2020, the Prosecution again did not appear. The Magistrate granted Mr Moli's application and dismissed the charges pursuant to s. 131 of the CPC.

C. Grounds of Appeal

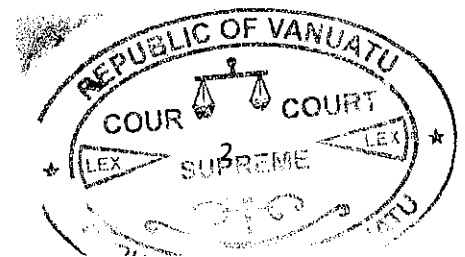
6. Mr Sarai advanced 3 grounds of appeal:
 - i) That the Magistrate acted on an incorrect factual basis;
 - ii) That the Magistrate failed to warn the Prosecution before dismissing the charges (lack of procedural fairness); and
 - iii) That the Magistrate failed to consider the public interest.

D. Discussion

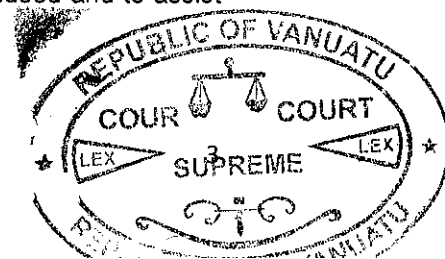
7. In the course of the hearing, counsel and I considered the wording of s. 131 of the CPC which reads as follows:

131. *If at the time and place to which a hearing or further hearing has been adjourned, the accused person does not appear before the court which made the order of adjournment the court may issue a warrant for the arrest of the accused and cause him to be brought before the court. If the complainant does not appear the court may dismiss the charge with or without costs as it may consider fit.*

8. Section 131 of the CPC provides the Magistrates' Court the power to dismiss the charges against an accused if the complainant does not appear at the trial in that Court. The section appears in Part 6 of the CPC which is headed, "Procedure in Trials before the Magistrates' Court". This matter was not listed for trial in the Magistrates' Court; it was listed for P.I. and if committed for trial, that trial would have to be held in the Supreme Court. Accordingly it seemed to me, and neither counsel disagreed, that this provision does not apply to a matter listed for P.I.
9. I note also that the procedure for a P.I. is set out in sections 143-146 of the CPC. Those sections are part of Part 7 of the CPC, headed "Offences Triable in the Supreme Court".
10. In the circumstances, the Magistrate's decision to dismiss the charges on 19 February 2020 was *ultra vires* s. 131 of the CPC. It must be set aside.
11. In case I am wrong as to the Magistrate's exercise of power under s. 131 of the CPC, I will deal with each of the grounds of appeal.



12. As to the first ground of appeal, Mr Sarai submitted that para. 4 of the Magistrate's order of dismissal on 19 February 2020 incorrectly stated that neither party appeared on 11 December 2019. There is nothing in this ground of appeal. The Magistrate's notes evidenced by the Prosecution shows that both counsels had left before the Magistrate entered his Chambers to deal with the P.I. That counsel were present elsewhere on the Court premises is irrelevant. Neither counsel appeared before the Magistrate.
13. The second ground of appeal advanced was that Prosecution had not been accorded procedural justice as the Magistrate should have relisted the case once more, with a strong warning to the Prosecution that there was a risk of the charges being dismissed. This was particularly required where the charges in question are objectively serious. Mr Sarai cited the judgment in *PP v Guray* [2016] VUSC 154.
14. As to the final ground of appeal, Mr Sarai submitted that in dismissing the charges, the Magistrate had erred in not striking a balance between the public interest in bringing offenders to account, particularly where the charges are for serious offences, and the protection of human rights. He referred to *PP v Emelee* [2005] VUCA 31. For this reason too, the Magistrate should have issued a warning to Prosecution instead of dismissing the charges then and there.
15. Mr Moli submitted that in *PP v Guray* the time period involved was 1 month whereas here, the P.I. had been delayed over 3 months (November 2019-February 2020). Throughout that 3 month period, the Respondents complied with their onerous bail conditions of travelling from North Efate to Port Vila every week to report to the Port Vila Police Station and attending Court even when the prosecutor failed to appear. The case had been twice adjourned without any evidence of the matter being progressed. Mr Moli stated that on 19 February 2020, he applied for dismissal of the charges on these grounds and in his submission, the Magistrate properly exercised his discretion to dismiss the charges.
16. I consider the second and third grounds of appeal together as both ultimately assert that the Magistrate should have issued a warning instead of dismissing the charges. It is accepted that the P.I. was adjourned just twice, albeit over a 3 month period. The Magistrate dismissed the charges on the third occasion that the P.I. was listed. In those circumstances, I do not consider that there was undue delay. If there is any concern that the Respondents' bail conditions are too onerous, it is always open to the Defence to apply for their variation, particularly given their strict compliance record over the 3 month period.
17. Given the seriousness of the charges, I agree with the Prosecution submissions that rather than dismissing the charges, the Magistrate should have issued a warning to the Prosecution that if an adjournment would be sought on the next occasion, it must also provide the Court with information as to the reasons why or risk having the charges dismissed. That said, it should not take the Magistrate issuing a warning for the Prosecution to provide this information. The Prosecution should be providing this information every time it seeks an adjournment, in fairness to the accused and to assist the Court to weigh the interests involved.



E. Other

18. After I delivered my oral decision and reasons, Mr Moli applied without opposition for variation of bail so that the Respondents sign in at the Port Vila Police Station once a month instead of weekly. I granted the application and set out the varied bail conditions below.

F. Result

19. The appeal is **upheld**. The Magistrate's Order dated 19 February 2020 is set aside, and the charges against Mr Rampuno Phelix and Mr Mickey Phelix are reinstated.

20. The matter be relisted in the Magistrates' Court for Preliminary Inquiry.

21. The Defence application for variation of bail conditions is **granted**. Mr Rampuno Phelix and Mr Mickey Phelix's bail is extended and is subject to the following conditions, namely that:

- 1) They must not leave the island of Efate.
- 2) They must not interfere directly or indirectly with the Prosecution's witnesses.
- 3) They must sign in at the Port Vila Police Station on the first Friday of every month between the hours of 8.30am-4.30pm, commencing Friday 5 June 2020.
- 4) They are to appear in Court when required as and when required.

DATED at Port Vila this 2nd day of June 2020

BY THE COURT

VM Trief
.....
Viran Molisa Trief
Judge

