

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

Criminal
Case No. 20/3209 SC/CRML

PUBLIC PROSECUTOR

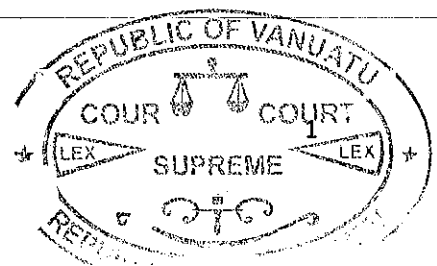
v

EDWARD IAVILU

Date of Trial: 14 September 2021
Before: Justice V.M. Trief
In Attendance: Public Prosecutor – Ms J. Tete
Defendant – Ms F.L. Kalsakau

**RULING IN RELATION TO THE PROSECUTION'S NOTICE OF
INTENTION TO ADDUCE PROPENSITY EVIDENCE**

- A. Introduction
1. This is a ruling on the Prosecution's notice of intention to adduce propensity and/or similar fact evidence filed on 27 August 2021.
- B. The Charges
2. The Defendant Edward Iavilu pleaded not guilty to 2 charges of sexual intercourse without consent and 1 charge each of intentional assault and threats to kill.
- C. Submissions
3. By way of Notice of Intention to Adduce Propensity Evidence, the Prosecution gave notice of its intention to lead propensity and/or similar fact evidence to prove that Mr Iavilu has or had a propensity to act in a particular way or to have a particular state of mind namely to use and/or threaten physical, sexual and verbal violence against the complainant when she refuses to comply with his demands or attempts to end their relationship. It will rely on the evidence to prove Mr Iavilu's guilt.



4. The evidence sought to be adduced includes Mr Lavilu's August 2020 convictions in the Magistrates' Court on 1 count each of domestic violence, threats to kill and intentional assault, the facts of that offending against the complainant and a June 2020 restraining order obtained by the complainant.
5. Ms Tete submitted that the applicable test is whether the evidence establishes a 'pattern of behaviour' and whether the probative value of the evidence substantially outweighs any prejudicial effect that evidence has on the accused.
6. Ms Tete cited *Pakoa v Public Prosecutor* [2019] VUCA 51. One of the grounds of appeal in *Pakoa* was that the trial judge erred in admitting evidence from the Appellant's former partner Manuela about the abuse that she suffered at his hands. The Court of Appeal noted that no objection was taken at trial to Manuela's evidence and it was satisfied that the evidence was admissible as its probative value far outweighed its prejudicial effect and established the Appellant's propensity to use a knife, at [30] and [41]:

[30] *Turning to the first complaint it turns out that this was in fact an attack on the Judge allowing in the evidence of the appellant's former partner, Manuela, and his finding that the appellant had a propensity for violence and to using a knife during violent attacks. This submission is fatally flawed. At trial there was no objection taken to this evidence, although there was a closing submission the evidence should have been excluded. It was far too late to raise that in closing, and even more so at this stage of an appeal. In any event, we are quite satisfied that evidence is admissible as its probative value far outweighed its prejudicial effect and established the appellant's propensity to use a knife. We can only assume that a tactical decision was made not to object to the evidence when the witness was called.*

[41] *By referring to all of the evidence, having just rejected all of the appellant's evidence, it obviously must be a reference to the full body of the prosecution evidence advanced at trial. We are satisfied, from a careful perusal of that evidence which was admitted without objection and considered by the Court, that his finding of premeditation was correct. All of that evidence, back to that of Manuela, through the discussions and the threats made in front of the Chief, to the long-term abusive nature of this relationship, to the argument earlier in the night with the head-butting and the readiness to carry and use knives are all relevant to be considered by the trial Judge. Indeed, we consider the finding he reached in the circumstances of this case to be inevitable.*

(my emphasis)

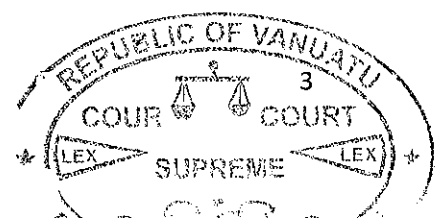
7. Ms Tete submitted that the evidence sought to be adduced relating to Mr Lavilu's previous offending is relevant to a fact in issue.
8. Further, that it establishes a pattern of conduct with underlying unity when compared to the conduct the subject of the charges in this matter, and that the probative value of the evidence substantially outweighed any prejudicial effect of that evidence on Mr Lavilu. It was submitted to be highly probative in setting out the context or background in which the Prosecution alleges that the present alleged offending was committed.
9. Ms Kalsakau submitted that whether or not to admit propensity evidence is a discretionary exercise requiring a weighing up of the probative value of the evidence against the risk of an unfair trial if the evidence is admitted. Further, that the probative

value of the evidence must substantially outweigh any prejudicial effect on the accused for the evidence to be admitted.

10. Ms Kalsakau cited *Hughes v The Queen* (2017) 263 CLR 338 in which the High Court of Australia held that there is likely a high degree of probative value where:
 - i) The evidence, by itself or together with other evidence, strongly supports proof of a tendency; and
 - ii) The tendency strongly supports the proof of a fact that makes up the offence charged.
11. Finally, Ms Kalsakau submitted that the prejudicial effect of adducing evidence of Mr lavilu's previous convictions would outweigh the probative effect of that evidence due to the following factors:
 - i) It would distract the trier of fact;
 - ii) It would consume inordinate Court time; and
 - iii) There is less prejudicial evidence to prove the same point.

D. Discussion

12. There is no Vanuatu statutory provision in relation to the adducing of propensity evidence.
13. I accept that the applicable test is whether the evidence establishes a 'pattern of behaviour' and whether the probative value of the evidence substantially outweighs any prejudicial effect that evidence has on the accused: *Pakoa v Public Prosecutor* [2019] VUCA 51 at [30].
14. Does the evidence establish a pattern of conduct? Mr lavilu has previous convictions for intentional assault and threats to kill (1 charge each; offending committed in July 2020). In this matter, he faces 1 charge each of intentional assault and threats to kill. I find that the evidence of Mr lavilu's previous convictions, the facts of that offending and the restraining order obtained by the complainant by itself strongly support proof of Mr lavilu's propensity to use physical and verbal violence including threats to kill against the complainant when she did not accede to his demands including by attempting to end their relationship. I consider that the evidence establishes a pattern of conduct with underlying unity when compared to the conduct the subject of the charges in this matter.
15. What is the probative value of the evidence? I consider that the evidence relating to the previous offending and behaviour is relevant to the facts in issue for Counts 2-4 which relate to alleged offending in October and November 2020. That is, I consider that Mr lavilu's tendency strongly supports the proof of a fact that makes up the offences charged in this matter (intentional assault, sexual intercourse without consent and threats to kill) all of which involve acts of physical or verbal violence against the complainant.



16. The 2020 convictions post-date the alleged offending in Count 1 (July 2016) and cannot be used to prove the Count 1 charge. Further, the prejudicial effect from the 4-year gap outweighs the probative value, if there was any.
17. Is there any prejudicial effect of the evidence sought to be adduced on the accused? The previous convictions relate to July 2020 offending. There is no risk of unfairness due to the passage of time between those convictions and the Counts 2-4 offences charged in this matter. Addressing each of the factors raised by Ms Kalsakau:
- i) I do not accept that admitting the evidence would distract me as the trier of fact from determining whether or not the alleged offending the subject of the charges in this matter actually happened on the dates alleged. At all times the Prosecution must prove all elements of the offences beyond a reasonable doubt and I need to consider and determine whether it has discharged its burden to prove that the alleged offending the subject of the charges in this matter actually happened on the dates alleged. Evidence of prior convictions would not distract me from doing that;
 - ii) The evidence is of prior convictions therefore I do not accept that adducing it would consume inordinate Court time and open up new areas such that more witnesses are likely to be called; and
 - iii) I do not accept that there is less prejudicial evidence available to prove the same point as other evidence would not prove the prior convictions in the same way as those convictions themselves.
18. In conclusion, I do not accept that evidence sought to be adduced would have any prejudicial effect on the accused as submitted.
19. On balance, weighing these factors, I consider that the probative value of the evidence sought to be adduced substantially outweighs any prejudicial effect that it may have on Mr Iavilu. Accordingly, the evidence is admissible and the Prosecution may adduce it.
20. I record my thanks to counsel for their submissions which assisted me.

**DATED at Port Vila this 14th day of September 2021
BY THE COURT**

..... *VM Trief*
Justice Viran Molisa Trief

