

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

Criminal Appeal
Case No. 24/3013 SC/RML

BETWEEN: Max Taleo
Appellant

AND: Public Prosecutor
Respondent

Before: Justice Oliver A. Saksak

Counsel: Mr John Malcolm for the Appellant
Mr Jordan Aru for the Respondent

Date of Hearing: 29th January 2025
Date of Judgment: 18th February 2025

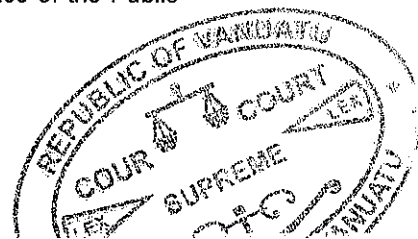
JUDGMENT

Introduction

1. This appeal is against the sentence imposed on the appellant by the Senior Magistrate on 12th September 2024 whereby the appellant was sentenced to an end sentence of 15 months imprisonment and suspended sentence of 14 months imposed for his earlier conviction in 2023 was activated. Both sentences were made to run concurrently.
2. The appellant appeals against both his conviction and sentence.
3. The sentence has however been stayed pending the outcome of the appeal pursuant to an appropriate application.

The Grounds

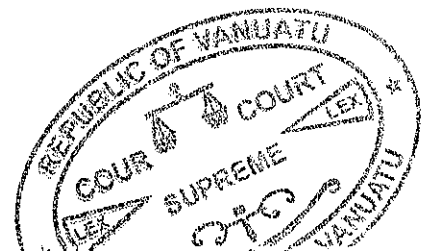
4. In relation to the conviction appeal there are four grounds-
 - a) The appellant did not plead guilty to the charge against him, rather it was his legal counsel, Mr Amos.
 - b) The guilty plea entered in respect to one charge was done so on the advice of the Public Solicitor which is incorrect.



- c) The appellant has a defence of self- defence and has been wrongly convicted of such assertion.
 - d) On rearrangement of charges (as amended) the appellant was not asked to plead to the charges, rather Mr Amos entered guilty pleas on the appellant's behalf without proper instructions. His wishes were for pleas of not-guilty to be entered.
5. And in relation to the sentence appeal the grounds are-
- a) The Public Solicitor neglected to advise the Court that at time of the dispute the complainant had attacked the appellant with a machete, and he had defended himself.
 - b) The Court was incorrectly advised by the Pubic Solicitor in respect to a previous conviction from 2018.
 - c) The assertions of alcohol and swearing were incorrect.
 - d) The Court was incorrectly advised as to the persons present and that all statements were written by a single police officer, not by the witnesses. And the investigating police officer is married to the complainant's sister.
 - e) There has been a miscarriage of justice.

The Background Facts

- 6. The appellant was initially charged with 11 counts of domestic violence that on 26 December 2023 the appellant committed acts of violence against members of his own family namely Nicky Moliva (Counts 1,2,3) against Ingrid Moliva (Count 4) against both Nicky and Ingrid Moliva (Count 5), against Laura Kalotiti (Count 6), against Lizzie Kalotiti (Count 7), against Laura and Lizzie Kalotiti (Count 8).
- 7. Further he was charged that on 27 December 2023 the appellant committed acts of violence against Lizzie Kalotiti (Count 10) and against both Laura and Lizzie Kalotiti (Count 11).
- 8. On the first plea date in February 2024 Ms Tari (currently the Public Solicitor) acted for the appellant who indicated on the charge sheet by the words " Not Guilty" to Counts 1, 3, 4, 5, 6, 7,8,9,10, and 11. However alongside Count 2 the word " Guilty" is written to show the appellant had pleaded or intended to plead guilty to that charge.
- 9. Ms Tari however recused herself from the case due to her family connections with the complainant and the case was transferred to Mr Amos who negotiated with the office of the Public Prosecutor to reduce the charges.



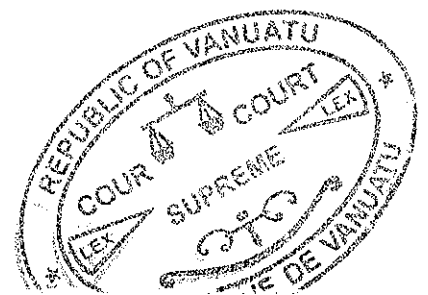
10. The charges were amended and reduced to only four charges of domestic violence laid pursuant to sections 4 and 10 of the Family Protection Act No. 28 of 2008.
11. The appellant was re-arraigned on the amended charge on 5 August 2024 on which date Mr Amos appeared and entered guilty pleas to the three charges in Counts 1, 2 and 3. He entered not guilty plea to the charge in Count 4 and the prosecutor entered nolle prosequi under section 29 of the Criminal Procedure Code Act [Cap 136].
12. The Senior Magistrate recorded the guilty and not guilty pleas with the decision of the Prosecutor to enter nolle prosequi on its fourth charge and directing that a pre-sentence report and sentencing submissions be filed, and adjourning sentence to 4th September 2024.

The Sentence

13. The sentencing Senior Magistrate after recording that the appellant had admitted the allegations at [4] and applying the case laws of Moses v R [2020] NZCA 269, Philip v PP [2020] VUCA 40, PP v Tawi [2023] VUSC 194, pp v Kalotrip [2024] VUMC 8 and PP v Malsrake [2021] VUSC 343 adopted a starting sentence of 20 months for all three counts to which the appellant pleaded guilty and increasing the period by 4 months for the aggravating features listed at [8] (a) – (f) inclusive. These were that the offending was unprovoked, that the offence occurred within the confines of the family home where the victim should feel safe and protected, that there was a serious breach of trust, the victim being the defendant's half brother, that there were repetitive assaults to the victim's body, head and other vulnerable parts of the body causing severe pain to the victim and that the victim was humiliated in front of his family and children.
14. In mitigation the Senior Magistrate allowed a discount of 25% for guilty plea reducing the start sentence down to 18 months. And for mitigating factors stated at [13] (a) – (f) inclusive, the sentence was reduced further by 3 months leaving an end sentence of 15 months imprisonment.
15. Further, in view of the previous sentence imposed on the appellant in 2023 which was suspended, the Senior Magistrate activated the sentence of 14 months to be served concurrently with the 15 months sentence for the domestic violence offences.

Submissions

16. Mr Malcolm for the appellant submitted there was a miscarriage of justice in that the mandatory requirement of section 133 of the Criminal Procedure Code Act [Cap 136] were not followed. Counsel argued that it was obvious from the minute and order of the Court dated 5th August 2024 on the date of re-arraignment that it was defence Counsel who entered guilty pleas on behalf of the appellant, not the appellant himself.



17. Section 133 of the Criminal Procedure Code [CPC] Act states:

"133. Accused to be called upon to plead

- (1) The substance of the charge or complaint shall be stated to the accused person by the court, and he shall be asked whether he admits or denies the truth of the charge.
- (2) Subject to subsection (5) if the accused person pleads guilty to or admits the truth of the charge, his admission shall be recorded as nearly as possible in the words used by him, and the court shall convict him and pass sentence upon or make an order against him, unless there shall appear to it sufficient cause to the contrary.
- (3) If the accused person does not admit the truth of the charge the court shall proceed to hear the case as hereinafter provided.
- (4) If the accused person refuses to plead, the court shall order a plea of not guilty to be entered for him.
- (5) Notwithstanding the foregoing provisions of this section upon a plea of guilty or admission of the truth of a charge by an accused person the court may make brief enquiry into the nature of the facts admitted and the effect of such facts in law and if the court has reason to believe that he may not be guilty of the offence charged, it shall substitute a plea of not guilty and proceed to hear the case."

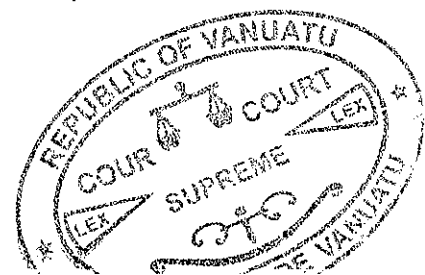
(my underlining for emphasis)

18. Mr Malcolm submitted some New Zealand cases as authority to support his arguments such as Glenson v R [2018] NZLR 349 where the Court said at [16]:

"It is only in exceptional circumstances that an appeal against conviction will be entertained following the entry of guilty. An Appellant must show that a miscarriage of justice will result if his conviction is not overturned where the Appellant fully appreciated the merits of his position and made an informed decision to plead guilty, the conviction cannot be impugned."

19. The exceptional circumstances include three broad categories discussed by the New Zealand Court of Appeal in R v La Page [2005] RTCA at [17] which are:

- a) Where the appellant did not appreciate the nature of, or did not intend to plead guilty to a particular charge,
- b) Where on the admitted facts the appellant could not in law have been convicted of the offence charged, or
- c) Where the plea was induced by a ruling which embodied a wrong decision on a question of law,"



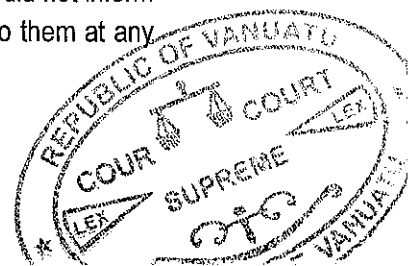
20. The Court of Appeal of New Zealand held that in these circumstances the appellant must raise a defence of some substance.
21. The other determining factor is the interest of justice of the defendant. Counsel relied on Richie v Police [2022] NZHC 494 where despite the evidence showing no serious defence, the Court granted leave where it was in the interest of justice to do so.
22. In relation to the Vanuatu cases, Mr Malcolm relied on PP v Rarua [2008] VUSC 18 where the Court upheld the New Zealand case of Le Page. Counsel also relied on PP v Leon [2019] VUSC 62 where the Court at [31] said that to gain traction on the plea charged the appellant had to establish on the balance of probabilities (a) inadequate or wrong legal advice, (b) misunderstanding of the charges and (c), an arguable defence.

Responding Submissions

23. Mr Aru opposed the application on grounds that Mr Amos acted on the instructions of the defendant and that Counsel had not made any sworn statements because there has not been any waiver of privilege. Further that despite the provision in section 133 of the CPC Act the Magistrates Court had allowed numerous cases where pleas were entered by counsel as a matter of practice. Counsel sought an adjournment for a waiver of privilege so that Mr Amos and Ms Tari could depose to sworn statements to enlighten the Court with a balanced view of the facts. Mr Malcolm objected due to the delay and prejudice already caused to the defendant.

Discussion

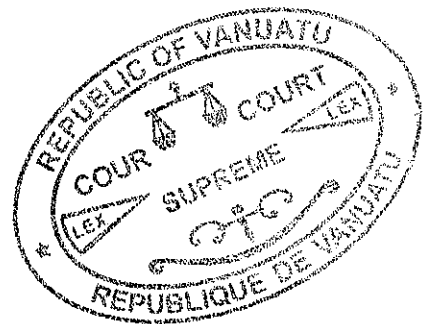
24. First, about the submissions. The Court made specific orders on 25th September 2024 for the filing and service of appeal books together with the amended notice and grounds of appeal and written submissions with periods of 14 days. Mr Malcolm complied by filing Appeal Book A on 18/10/24, Appeal Book B on 18/11/24 and Appellant's submissions on 4/01/24. Counsel relied on those documents in his oral submissions.
25. Prosecutions on the other hand made only very brief oral submissions which did not adequately respond to or address the points raised by Mr Malcolm in his written submissions. Counsel Mr Aru omitted to refer the Court to the respondent's submissions filed on 2/12/24 which contains more detailed and extensive submissions in which even Mr Malcolm did not address or respond to orally.
26. It first occurred to me that Prosecutions had not complied with the orders of 25/9/24, however it was only on 11th February 2025 when it was discovered there were in fact submissions by Prosecutions, even then the Court was already in the process of writing and formulating its judgment. All Counsel have a duty to inform the Court about their written submissions and to either speak to them or inform the Court they simply wish to rely on them. Mr Aru did not inform the Court about the submissions filed on 2nd December 2024 and did not refer to them at any time during his oral submissions.



27. The respondent's submissions is also extensive. It includes an introduction and background facts (para 1-6) , the jurisdiction of the Court (para 7-8), the guideline judgments in support of the conviction and sentence (para 9-12), the facts of the offending (para 13-16) the grounds of appeal (para 17-47) and the conclusion (para 48-52).
28. In relation to jurisdiction Prosecutions referred to section 200 (1) of the CPC Act [Cap. 136] and section 31 of the Judicial Services and Courts Act [Cap 270].
29. For guideline judgments the cases referred were:
- Dovan v PP [1998] VUCA 7
 - Pakoa v PP [2019] VUCA 51, in support of the conviction,
 - PP v Gideon [2002] VUCA 7 upholding Skinner v The King (1913) 16 CLR 336 in support of the sentence.
30. Counsel then referred to the Article 5 (1) (d) of the Constitution, section 117 of the CPC Act in relation to the defendant's right to be defended by a lawyer and to have a fair hearing or trial. Mr Aru also referred to the Rules of Etiquette and conduct of Legal Practitioners Order dated 3rd June 2011 issued pursuant to the Legal Practitioners Act [Cap 119]. In particular Counsel referred to Rule 87 (2) of the Order and further to the Magistrates Bench Book Chapter 11, Guide 3 and 4. All those provisions are submitted in support of Prosecution's argument that as the appellant had Mr Amos as his defence lawyer who impliedly has the right to act on behalf of the appellant in all legal matters, including entering a plea. Further that entering pleas in the Magistrates Court was a matter of practice. Counsel therefore submitted the Senior Magistrate had acted fairly in accordance with established guidelines and laws and that no injustice or miscarriage of justice occurred.
31. Finally in relation to waiver of privilege Prosecutions relied on the cases of Iaru v PP [2022] VUCA 9 and Nakato v PP [2023] VUCA 37 which are cases in which the Court of Appeal emphasized the necessity of a waiver of privilege to reassess agreed facts.

Waiver of Privilege

32. The law as to waiver of privilege is trite and not in doubt. The appellant has not waived privilege but he has filed sworn statements dated 23/09/24 and 11/10/24 in support of his appeal which in my view is highly improper. Those sworn statements are therefore not admissible and are rejected as evidence of facts surrounding his rearrignment on 5th August 2024, not on 9th September 2024 as he states in his written submissions at paragraph 9.



Article 5 (1)(d) of Constitution

33. This provides for the fundamental right to protection of the law as follows:

5. *Fundamental rights and freedoms of the individual*

(1) *The Republic of Vanuatu recognizes, that, subject to any restrictions imposed by law on non-citizens, all persons are entitled to the following fundamental rights and freedoms of the individual without discrimination on the grounds of race, place of origin, religious or traditional beliefs, political opinions, language or sex but subject to respect for the rights and freedoms of others and to the legitimate public interest in defence, safety, public order, welfare and health –*

- (a) *life;*
- (b) *liberty;*
- (c) *security of the person;*
- (d) *protection of the law;*
- (e) *freedom from inhuman treatment and forced labour;*
- (f) *freedom of conscience and worship;*
- (g) *freedom of expression;*
- (h) *freedom of assembly and association;*
- (i) *freedom of movement;*
- (j) *protection for the privacy of the home and other property and from unjust deprivation of property;*

(k) *equal treatment under the law or administrative action, except that no law shall be inconsistent with this sub-paragraph insofar as it makes provision for the special benefit, welfare, protection or advancement of females, children and young persons, members of under-privileged groups or inhabitants of less developed areas.*

(2) **Protection of the law shall include the following –**

(a) *everyone charged with an offence shall have a fair hearing, within a reasonable time, by an independent and impartial court and be afforded a lawyer if it is a serious offence;*

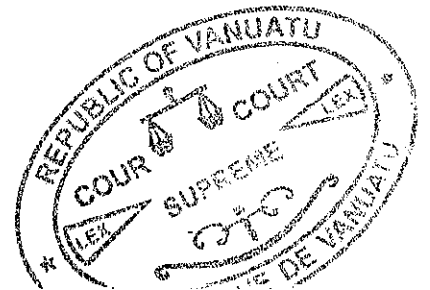
(b) *everyone is presumed innocent until a court establishes his guilt according to law;*

(c) *everyone charged shall be informed promptly in a language he understands of the offence with which he is being charged;*

(d) *if an accused does not understand the language to be used in the proceedings he shall be provided with an interpreter throughout the proceedings;*

(e) *a person shall not be tried in his absence without his consent unless he makes it impossible for the court to proceed in his presence;*

(f) *no-one shall be convicted in respect of an act or omission which did not constitute an offence known to written or custom law at the time it was committed;*

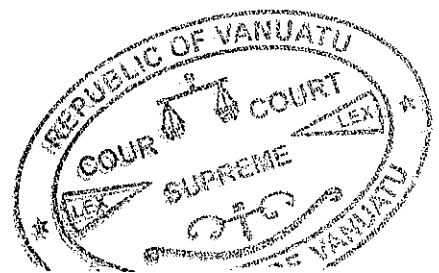


(g) no-one shall be punished with a greater penalty than that which exists at the time of the commission of the offence;

(h) no person who has been pardoned, or tried and convicted or acquitted, shall be tried again for the same offence or any other offence of which he could have been convicted at his trial"

(Underlining for emphasis)

34. It is one thing when an accused person is legally represented by a lawyer or lawyers but it is quite another, and a fundamental one whether that accused person has had a fair trial in relation to the charges against him or her.
35. In the appellant's case there were initially 11 charges of domestic violence laid against him. The lawyer who assisted the appellant then was Ms Jane Tari. The records from the Magistrate's Court file show that on 6th March 2024, Ms Cecile Dehinavanua attended Court for Ms Tari and guilty plea was entered to the charge in Count 2. However for Count 1 and 3 to 11 inclusive, not guilty pleas were entered, and the case was adjourned for trial to 18 March 2024. The defendant was initially charged on 28th December 2023 and remanded in custody. He sought bail which was initially refused but was reagitated before a Judge on 29th December 2023 and granted.
36. On 18th March 2024 the record shows the trial was adjourned again to 2-3 May 2024 at 9:00am for trial. However on 2nd May 2024 the record shows that the defendant was not present and that Ms Tari was in Santo, that her cases were reallocated and that it was 10 days after the passing of late Jacob Kausiama, Public Solicitor (as he was then). The matter was further adjourned to 18th June 2024 at 9:00am for a 2 days trial.
37. On Monday 17th June 2024 Mr Amos sent an email to Ms Anne Marie Molvara requesting an adjournment of trial fixed for 18-19 June 2024 because 18th June 2024 was Shefa day and Public Holiday for both himself and the defendant, Mr Taleo. Further Counsel informed that the defendant was previously represented by Ms Jane Tari but that the file was recently allocated to him.
38. The obvious result was that trial were adjourned on 18 and 19 June 2024. The Clerk of Court issued a Notice of Hearing dated 20th June 2024 notifying Counsel Mr J.Aru and Mr A. Kalo that trial was set for 5th August 2024 at 9 O'clock am.
39. On 5th August 2024 the record shows Mr Jordan Aru attended for the Public Prosecutor and Mr K. Amos for the defendant. The prosecutor introduced the amended charge filed on 11/06/2024 with 4 counts. It is recorded that Mr Amos informed the Court that " I will enter plea." Subsequently the Court recorded guilty pleas in relation to Counts 1, 2 and 3 and not guilty plea in relation to Count 4 for which Prosecutions entered nolle prosequi. The Court the adjourned the case for sentence to 5th August 2024.



40. From December 2023 to the first trial date in March 2024 was a little over 2 months. But from March to June when trials were adjourned, it was another 4 months. As the case was adjourned for trial the defendant/ appellant expected a trial. However that expectation was wrong when the appellant on 5th August 2024 guilty pleas were entered in his behalf by Mr Amos. He had understood from the initial 11 charges that he was only pleading or to plead guilty to only the charge of assault in Count 2 but not the balance of the charges. When guilty pleas were therefore entered on his behalf on 5th August 2024, he lacked the understanding of what occurred. What occurred went against his wishes. And the fact that when his case was handled by the Public Solicitor's Office, it was handled by three different officers, namely Ms Tari, Ms Dehinavanua and then Mr Amos. This may have contributed to the misunderstandings but we cannot be certain because privilege has not been waived and there is no evidence from any of those lawyers to assist the Court. Therefore I will leave this to one side. The lack of a waiver of privilege alone is not sufficient to disallow this appeal.

41. But I come to the more substantive issue which will bear on the outcome of the appeal, and this is a legal issue of whether or not in convicting and sentencing the appellant the Court below had followed the provision of section 133 of the CPC Act?

42. Section 133 of the CPC Act is mandatory. The section is headed:

"133. Accused to be called upon to plead

(1) a) *The substance of the charge or complaint shall be stated (or put) to the accused person (defendant) by the court, (through the clerk)*

b) *The accused shall be asked whether he admits or denies the truth of the charge."*
(emphasis added)

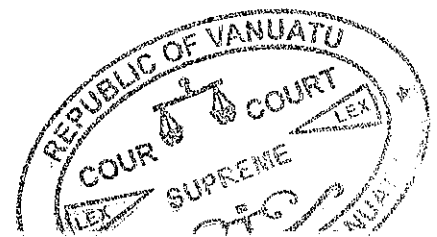
The question therefore in the appellant's case is were these steps or requirements afforded to the appellant on 6 March 2024 or 5th August 2024? From the record of proceedings on file in respect of appearances on those dates, there is absence of recording of those steps being observed or done, whether by omission, oversight or ignorance does not matter. The provision is mandatory and Ignorance is and cannot be an excuse.

43. Next, subsection (2) which is made subject to sub-section (5). This subsection provides for the situation where an "accused person pleads guilty or admits the truth of the charge, his admission shall be recorded as nearly as possible in the words used by him, and the Court shall convict him and pass sentence upon or make an order against him, unless there shall appear to its sufficient cause to the contrary." (emphasis added).

44. The typed Minute and Order of 5th August 2024 records in paragraph 4:

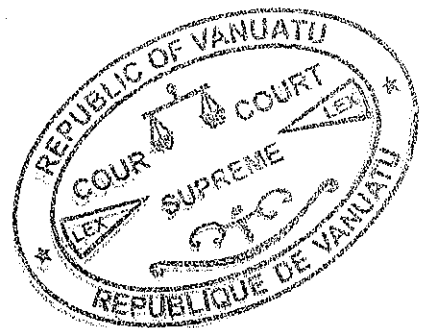
" The defendant was re-arraigned and the defence Counsel entered the defendant's plea as follows:

Count 1 Domestic violence..... guilty



Count 2 Domestic violence guilty
Count 3 Domestic violence guilty
Count 4 Domestic violence not guilty”

45. Neither those typed minutes nor the handwritten notes show the actual words issued by the appellant when he pleaded and the reason is obvious, it was because Mr Amos entered the pleas on his behalf and not the appellant himself. The provision of section 133 (1) and (2) had therefore not been followed in the Court below.
46. But it does not stop there as subsection (2) is subject to subsection (5). This subsection places a discretion on the Court in a guilty plea situation to “ make brief enquiring into the nature of the facts admitted and the effect of such facts in law and if the Court has reason to believe that he (accused) may not be guilty of the offence charged, it shall substitute a plea of not guilty and proceed to hear the case.” (my emphasis)
47. What could have possibly prompted an enquiry into the appellant’s case when he through Mr Amos as his legal Counsel pleaded guilty. In such a circumstance, it became more essential for the Senior Magistrate to stop and ask the defendant (a) whether he understood what was going on ? (b) whether the pleas entered by Mr Amos on his behalf were consistent with his instructions? (if any), or (c) whether the facts as attached to the amended charge dated 11 June 2024 were accepted by the defendant as correct?
48. I find nothing in the Minute and Order dated 5th August 2024 and in the sentence under appeal dated 12th September 2024 to show those requirements in section 133 (1), (2), and (5) were observed or carried out by the Senior Magistrate.
49. A further element or factor to prompt such an enquiry is the fact that was already before the sentencing Magistrate prior to plea and trial. In the bundle of documents before the Magistrate was a Record of Interview. When asked about the allegations beginning at paragraph 30 through paragraph 47 and except for paragraph 32, the defendant said he would speak only in Court. He neither admit nor deny any allegations made against him but reserved his right to speak in Court. That necessarily implies that he be given an opportunity under subsections (1), (2), and (5) of section 133, but it appears obvious from the record that he was not given that opportunity.
50. The end result of the failure and/omission is simply that there was a miscarriage of justice. The appellant was denied his day in Court. He must be afforded that opportunity to ensure he has a fair trial. That is his fundamental right under Article 5 (1) (d) and (2) of the Constitution.



The Result

- 51. I therefore conclude for the reasons given, that the appellant's conviction and sentence dated 12th September 2024 and the Minute and Orders dated 5th August 2024 are unsafe, and are hereby quashed.
- 52. The appeal is allowed and the case is to be returned to the Magistrate's Court for rearraignment on Counts 1, 2, 3 and 4 and trial, depending on pleas.
- 53. The requirements in section 133 of the CPC Act must be adhered to by the Court.
- 54. Bail is extended to the appellant on existing conditions pending the completion of his case.

DATED AT Port Vila this 18th day of February 2025

BY THE COURT


Hon. Oliver A Saksak

Judge

