

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

Criminal Appeal
Case No. 17/983 SC/CRMA

BETWEEN: Johnson Namri
Appellant

AND: Public Prosecutor
First Respondent

Registrar of the Supreme Court of
Vanuatu

Second Respondent

Civil Appeal
Case No. 16/1736 SC/CRMA

BETWEEN: Johnson Namri
Appellant

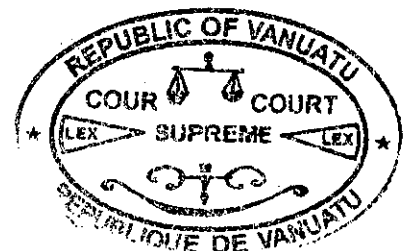
AND: Public Prosecutor
Respondent

Date of Hearing: Tuesday June 27th 2017

Date of Judgment : Friday July 21st 2017

Before: Justice Paul Geoghegan

Appearances: Counsel – Ms Bakeo (PSO) for the Appellant
Counsel – Ms Toa for State Law Office



JUDGMENT

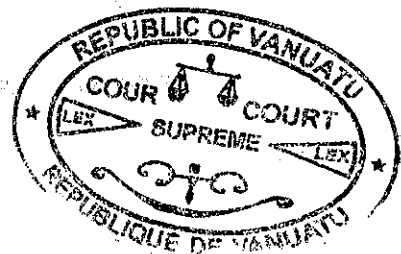
1. This judgment is in respect of two separate appeals filed by Mr Namri in respect of convictions entered against him in the Magistrates' Court on May 12th 2016 and March 31st 2017.

2. There is no dispute regarding the facts surrounding these appeals or the manner in which they were dealt with by the Magistrate.

3. On May 12th 2016, Mr Namri was present in the Magistrates' Court with his wife. They were appearing in respect of a family protection order which had been made in the Magistrates' Court on April 8th 2016, pursuant to the Family Protection Act No. 28 of 2008. Mr Namri's wife had applied for the order. The Magistrates' notes record that both parties had appeared before the Magistrate on May 10th. It was clear that there were discussions regarding the matter taking place through the parties' chiefs and the Magistrate recorded that both parties were to come with their chiefs for a further hearing on May 12th 2016 at 2 pm. The parties duly attended with their chiefs and the record indicates that there was disagreement between the chiefs and the parties as to how the matter was to be resolved. The Magistrates' notes record that:-

"The issues are really complicated therefore six months is given for a cool off period".

4. There is no dispute that during the hearing on May 12th Mr Namri assaulted his wife by punching her in the head. He has then been summarily convicted by the



Magistrate of contempt and breach of the Family Protection Order. A warrant of commitment was issued the same day and signed by the Magistrate and records:-

"Whereas Johnson Namri was on 12th May 2016 appeared (sic) with his chief and the applicant with her chief for further hearing, the applicant during the hearing stood up and punched the applicant on her head with powerful force, therefore I hereby convict on the offence(s) of:-

- *Breach of Family Protection Order contrary to section 21 of the Family Protection Act [Cap. 28]*
- *Contempt contrary to section 16 (1) of the Judicial Service and Court's Act [Cap. 270].*

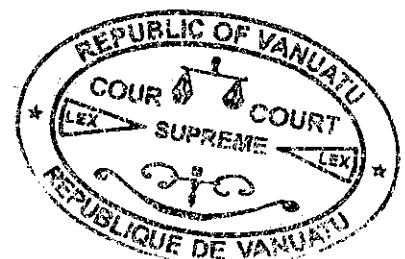
And Johnson Namri was sentenced to serve 5 months imprisonment for breach of domestic violence protection order and for assaulting the applicant by punching her on the head inside the Court room.

You are hereby commanded to keep the said Johnson Namri in custody for the period of five months with immediate effect and to be released on the 12th day of October 2016."

5. I refer to the warrant of commitment as that appears to be the only place on the record which records the term of Mr Namri's imprisonment. The Magistrates' notes do not do so and merely record the following:-

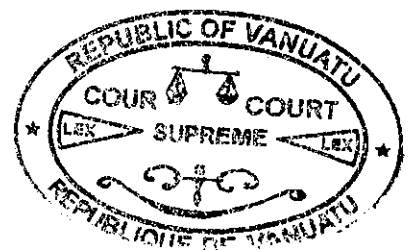
"The respondent stood up and punched the applicant in her head with powerful force inside the Court room.

Conviction of contempt and breach of DV order".



6. There is no dispute that no charges were laid in accordance with sections 34 to 37 of the Criminal Procedure Code, Mr Namri was not asked to plead to any charge, Mr Namri was not offered the opportunity to be heard in respect of the charge and Mr Namri was not afforded the opportunity to seek legal advice.
7. Mr Namri subsequently applied for bail which was granted pending the hearing of this appeal.
8. On March 26th 2017 Mr Namri again assaulted his wife. The assault was a very serious one and involved him striking her with a hammer while she was attending church. Mr Namri accepts that that assault took place.
9. Mr Namri was arrested by the Police on March 27th and was brought to the Magistrates' Court on March 28th where he was remanded on bail in respect of three charges of intentional assault.
10. On March 31st 2017 it appears that the Police arrived at Mr Namri's property, took him to the Police Station in Central Vila and later in the afternoon he appeared before the same Magistrate who had dealt with him nearly a year later. Mr Namri was informed that he would be convicted of breaching the Family Protection Order and was sentenced to 3 months imprisonment. The warrant of Commitment signed that day states:-

"Whereas Johnson Namri of Port Vila was convicted of various offences of-



1) *Offence to breach Family Protection Order and whereas on the 31st March 2017 the said Johnson Namri was sentenced to be imprisoned for 3 months;*

Now therefore you are hereby commanded to keep the said Johnson Namri in custody for the period of 3 months."

11. The Magistrates' notes of the hearing are dated March 30th 2017. While nothing in particular turns on the issue of the date I assume for the purposes of this appeal that was an error. The notes record the following:-

"Hearing of breach of DV Order:-

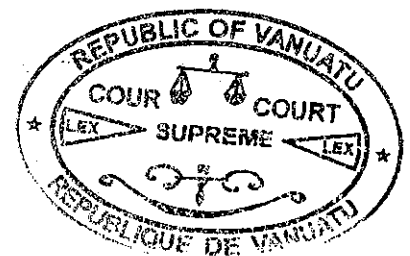
I was informed of a serious breach of DV Order issued on 12th April 2016 whereby such order will lapse on 12th April 2017.

I was also informed that the applicant cannot appear for hearing of the breach because of the permanent injury sustained from the respondent.

With the applicant's condition, I verbally order for a medical report to be filed with the police statement from the applicant and an independent statement from any family member of the applicant so I can just rely on the documents/staments (sic) and hear the breach with the appearance of the respondent in person.

I also order that a police officer or two must be present during the hearing of the breach because the respondent has a short temper and can do anything during the hearing.

I then listed to hear the breach on the 31/03/17 and for the documents/statements to be filed before the hearing".



12. The Magistrates' notes made on March 31st 2017 record the following:-

"THE HEARING

Having considered the statements I ordered to be filed and hearing from the Respondent with the presence of the Police officers, I conclude that the breach is a very serious breach.

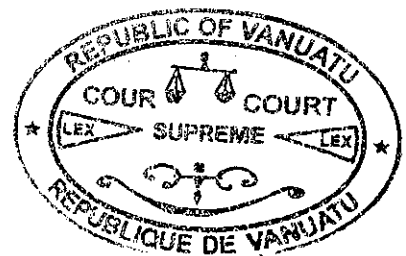
I therefore pursuant to section 21 (1) of the Family Protection Act No. 28 of 2008 convicted (sic) the Respondent and sentenced him to 3 months imprisonment".

13. Despite the reference in the Magistrates' notes to "hearing from the respondent" there is not dispute in this case that Mr Namri was never provided with an opportunity to seek legal advice, no formal charge was ever laid and no plea was ever entered to the "charge".

14. With reference to the purported convictions for breach of a family protection order the State, very responsibly, has conceded that the process followed by the Magistrate was unlawful and that Mr Namri's convictions cannot stand. However the State maintains that the Magistrate was correct in sentencing Mr Namri for contempt in respect of the incident in the Magistrates' Court on May 12th.

15. Turning firstly to Mr Namri's convictions for breach of a family protection order, subsection 21 (1) of the Family Protection Act provides that:-

"21 (1) A person who breaches a family protection order is guilty of an offence punishable on conviction by a term of imprisonment not exceeding 2 years or a fine not exceeding 50,000 Vatu, or both."



16. Clearly, the breach of a protection order is a serious criminal offence.

17. The instituting of criminal proceedings is covered by sections 34 and 35 of the Criminal Procedure Code [Cap. 136] which provides:-

"INSTITUTION OF PROCEEDINGS

34. *Proceedings shall be instituted by the making of a complaint or a preferment of a charge.*

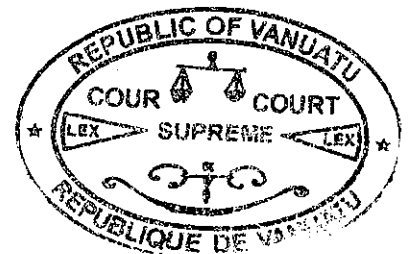
COMPLAINT AND CHARGE

35. *(1) Any person who believes from reasonable and probable cause that an offence has been committed by any person may make a complaint thereof to a judicial officer.*

(2) A complaint shall be made under oath and may be made orally or in writing but if made orally shall be reduced to writing by the judicial officer, and, in either case, shall be signed by the private prosecutor and the judicial officer:

Provided that where the proceedings are instituted by a prosecutor or by a public officer authorised under section 33, a formal charge duly signed by any such person may be presented to a judicial officer and shall be deemed to be a complaint for the purposes of this Code.

(3) Subject to subsection (4) the judicial officer upon receiving any such complaint shall, unless such complaint has been made in the form of a



formal charge under subsection (2) draw up or cause to be drawn up and shall sign a formal charge.

(4) Where the judicial officer is of opinion that a complaint or formal charge made or presented under this section does not disclose any offence, he shall make an order refusing to admit such complaint or formal charge and shall record his reasons for making such order."

18. Overarching these specific provisions is article 5 (2) (a) of the Constitution which provides that:-

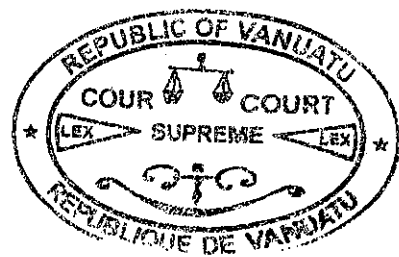
"5. Fundamental rights and freedoms of the individual

(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;

19. It is fundamental to any system of justice that persons who are subject to criminal proceedings are not dealt with in an arbitrary fashion or are not otherwise afforded a fair hearing. It is also self-evident from sections 34 and 35 of the Criminal Procedure Code that the institution of criminal proceedings must be undertaken in accordance with those sections.

20. In both cases it was not open to the Magistrate to deal with Mr Namri in the way that he did regardless of the view which he took of Mr Namri's conduct and regardless of whether, as with the incident on May 12th 2016, the Magistrate was actually a witness to the breach of the order. While the incident of May 12th most



certainly constituted a contempt of Court it did not entitle the Magistrate to ignore the very clear provisions of the Criminal Procedure Code. Quite apart from that, it is clear from the undisputed facts that the Magistrate dealt with Mr Namri in a completely arbitrary fashion and without affording him the opportunity to seek legal advice or to be heard in any way. What must be said however is that even if those steps had been taken by the Magistrate, it could not have cured the fundamental defect that no criminal proceedings had been instituted.

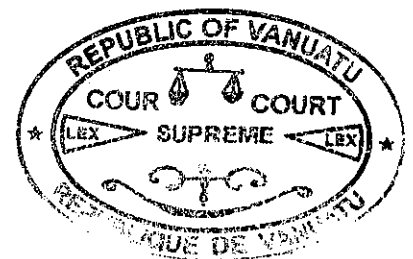
21. For these reasons the appeals against Mr Namri's convictions for breach of the protection order must succeed and both the conviction and sentences imposed must be quashed.

22. Turning to the issue of contempt, I consider that the Magistrates' finding of contempt and sentencing of Mr Namri must also be quashed on the basis that the Magistrate failed to follow any appropriate process in dealing with the matter and again dealt with Mr Namri in an arbitrary and unacceptable fashion.

23. The Vanuatu Court of Appeal outlined how the issue of contempt should be dealt with in its decision in In re Civil Contempt of Court, de Robillard¹. In that case the Court of Appeal stated:-

"Much more important in the ultimate determination of this case was the recognition of a central procedures and the unswerving observation of them which cannot be emphasized enough.

¹[1997] VUCA 1



Lord Donaldson MR said in *M v. P* (contempt of Courts: Committal order), *Butler v. Butler* [1993] FAM167 at 174 that the procedures are designed to ensure that:-

"(1) No alleged contemnor shall be in any doubt as to the charges which are made against him;

(2) He shall be given a proper opportunity of showing cause why he should not be held in contempt of Court;

(3) If an order of committal is made, the accused:-

(a) Knows precisely in what respects he has been found to have offended; and

(b) Has given a written record of those findings and of the sentence passed upon him."

In *R v Hill* [1986] Crim LR 457 (where the appellant was held in contempt after abusing the Judge) the criminal division of the Court of Appeal held that the following steps, were appropriate and should be taken to safe guard the Court's authority:-

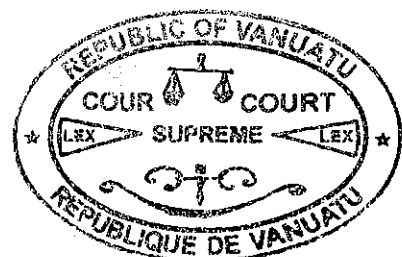
(1) The immediate arrest and detention of the offender;

(2) Telling the offender distinctly what the contempt is stated to have been;

(3) Giving a chance to apologize for affording the opportunity of being advised and represented by counsel in making any necessary order for legal aid for that purpose.

(4) Granting any adjournment that may be required;

(5) Entertaining counsel's submissions.



(6) *If satisfied that punishment is merited, imposing it within the limits fixed by statute."*

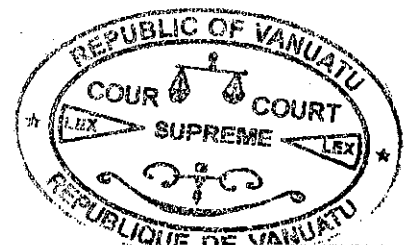
24. Later in the judgment the Court of Appeal stated:-

"It is a fundamental principle that a person in contempt must be given the opportunity to answer the charges against him or her; Doyle v. Commonwealth of Australia [1985] HCA 46; (1985) 60 ALR 567. That involves allowing the person's legal representative adequate time to call such evidence as is necessary for a defence; Duo v. Duo [1992] 3 All ER 121 (CA). The defendant must also be offered the opportunity cross examine any witnesses; Aslam v. Singh [1987] 1FLR 122.

There is no doubt that the Court has power to intervene immediately but given that a committal order is the ultimate sanction against an individual, the Court should use that power with great caution and only in circumstances in which it is absolutely necessary to act immediately; Ansah v. Ansah [1977] FAM138 143 per Ormrod]; Danchevsky v. Danchevsky [1975] FAM17 at 22 per Lord Denning MR.

A wise practical approach is to be found in the words of Lord LJ and Moran (1985) 81 Cr App Rep 51 at 53 where principles relating to the procedural safeguards in an appeal against some committal were summarized as follows:-

"The following principles should be borne in mind. First, a decision to imprison the man for contempt of Court should never be taken too quickly. The Judge should give himself time for reflection as to what is the best course to take. Secondly, he should consider whether that time for reflection should not extend to a different day because overnight



thoughts are sometimes better than thoughts on the spur of the moment. Thirdly, the Judge should consider whether the seeming contemnor should have some advice.... If the circumstances are such that it is possible for the contemnor to have advice, he should be given an opportunity of having it".

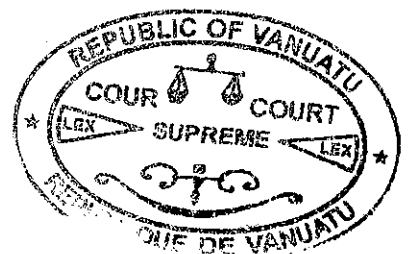
25. Section 16 (1) of the Judicial Services and Courts Act [Cap. 270] provides that:-

"16. Contempt and concurrent jurisdiction

(1) The Magistrates' Court has the power to punish summarily a person for contempt of court by imprisonment for a term not exceeding 2 months or a fine not exceeding VT 20,000."

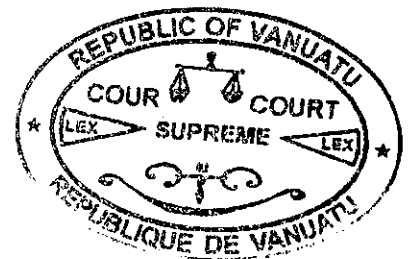
26. It has not been argued in this case whether or not the fact that Mr Namri assaulted his wife actually amounts to a contempt of Court given that it does not fall within the usual behavior such as obstruction, prejudice or abuse of the administration of justice, insulting behavior directed at the Court or disregard of a Judge's ruling. That is not relevant however in the circumstances.

27. While one might consider that Mr Namri could have had no defence available to him in view of his disgraceful behavior I do not consider that it was open to the Magistrate to deal with the matter in the way that he did. The Magistrate could have laid a complaint of assault which would have resulted, presumably, in Mr Namri's conviction and sentence. He could have placed Mr Namri in custody for a brief period while legal representation was arranged for him so that some submissions could be made to the Magistrate before sentencing Mr Namri in respect of the



matter. At the very least, Mr Namri should have been afforded the opportunity to obtain legal advice, to have contempt of Court and the consequences of contempt of Court explained to him, to be given an opportunity to apologize and to be given the opportunity to make representations before he was sentenced to imprisonment. None of these things happened and even in a case as blatant as this those steps should have been observed. Accordingly Mr Namri's "conviction" for contempt cannot be permitted to stand.

28. There are other reasons why the conviction should not be allowed to stand. There is no specific reference by the Magistrate to discrete terms of imprisonment for contempt and for assault. Clearly the term of imprisonment for contempt could not have been for a period greater than two months but the failure to distinguish between the two offences and to refer to five months' imprisonment in the blanket manner which the Magistrate did, makes it impossible to know the sentence which he actually passed in respect of contempt or the reasons for arriving at that sentence. It is incumbent on any judicial officer to provide reasons for a decision which is made and that was lacking on this occasion.
29. For all of these reasons the convictions entered against Mr Namri are quashed and the sentences set aside.
30. It will be for the Public Prosecutor to determine whether or not charges should be laid in respect of the offending.
31. As Mr Namri has been successful in his appeal he is entitled to costs against the respondent on a standard basis as agreed or to be taxed.



DATED at Port Vila this 21st day of July, 2017

BY THE COURT



JP Geoghegan

Judge

