

BETWEEN: Public Prosecutor

AND: Olivier Nako
Defendant

Date: 20 June 2019
Before: Justice G.A. Andrée Wiltens
In Attendance: Ms M. Taiki for the Public Prosecutor
Mr L. Molli for the Defendant

JUDGMENT

A. Introduction

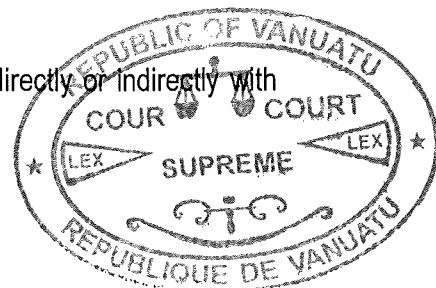
1. This is an appeal against a Magistrate's Court decision to: (i) not hear 2 fresh charges, (ii) not consider a remand application, (iii) not determine an arrested person's custodial status, and (iv) "put the case on hold" pending a Supreme Court decision on the issue of that person's alleged breach of bail.

B. Background

2. Olivier Nako is due to have a Preliminary Inquiry hearing on 25 June 2019 in respect of a charge alleging sexual intercourse without consent. The allegation is by a 14-year old former neighbour. Mr Nako's de facto partner discovered the alleged relationship on social media and she is a prosecution witness.
3. Mr Nako was remanded in custody on 23 January 2019. He was granted bail, on terms consented to by his counsel, by the Chief Justice on 13 May 2019. Those terms included:

"2. Must not reoffend while on bail

3. Must not interfere or come into contact or communicate directly or indirectly with prosecution witnesses



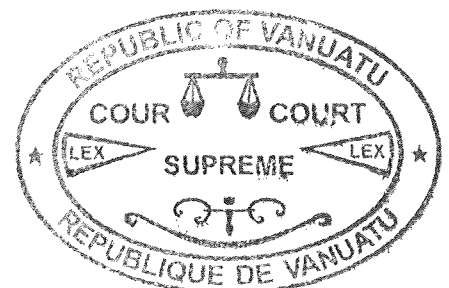
4. Is not allowed to have a mobile phone while on bail"

C. In the Magistrate's Court

4. Mr Nako's very recently wife complained to the police of assault and domestic violence offending by Mr Nako. It is alleged that Mr Nako went to his fe facto's home in the evening, demanded money which he took and wanted her mobile phone. When she opposed him taking her mobile phone he twice assaulted her to her head before leaving with her phone.
5. This caused the prosecution to file 2 further charges against Mr Nako. The prosecution also sought that the Magistrate remand Mr Nako in custody on the basis of the new charges and that he had breached his bail.
6. The Magistrate declined to exercise any jurisdiction and simply put the charges and the issue of Mr Nako's bail "on hold". He was apparently of the view that only the Supreme Court had jurisdiction, and he considered it was not appropriate for bail be granted twice.

D. Discussion


7. There is clearly a misunderstanding here. The fact that the Supreme Court granted bail does not preclude the Magistrate's Court from considering whether a breach of any of the conditions imposed has or has not occurred. While the Magistrate's Court has no jurisdiction to amend a Supreme Court order, it can and should when asked to do so, look at whether or not there has been a breach of that bail. If there has been, the Magistrate should remand the defendant in custody for the Supreme Court to reconsider bail. If there has not been, then the existing bail continues. If there are further charges, the Magistrate can consider whether bail is appropriate in relation to those charges, taking all the circumstances into account.
8. The Magistrate has clear obligations under sections 35 and 36 of the Criminal Procedure Code in relation to dealing with the new charges. Mr Molli concedes the Magistrate did not appropriately deal with the charges. I agree.
9. The new charges filed in the Magistrate's Court are unconnected with the alleged earlier offending. There is no law preventing the Magistrate from considering, whether in the light of all the facts known to him, Mr Nako could be allowed bail on the new charges – either on the same terms, or more stringent terms. The fact that Mr Nako had Supreme Court-issued bail in respect of the earlier charge does not alter that basic position.
10. The Magistrate was required to deal with Mr Nako's custody status – section 60 of the Criminal procedure Code. Mr Molli accepts the Magistrate was wrong to not do so. Again, I agree.
11. The Magistrate has no power/jurisdiction to "hold over" a case, or to adjourn a criminal matter *sine die*. Those concepts are alien to the criminal law, for the very good reason that to remand in custody or adjourn on bail cannot be left for an indeterminate period. Every appearance must be accorded a time/date – out of fairness.



E. Decision

12. Before me, Mr Molli conceded that Mr Nako had breached conditions 2, 3 and 4 of the bail grant. Although he suggested this Court should nevertheless re-impose bail on stricter terms, he was unable to explain what such more stringent conditions could be in light of Mr Nako's breaches.
13. Mr Molli's concessions stem from his client having told him he had assaulted his de facto and taken her mobile phone – he was intending to plead guilty to the new charges.
14. In the circumstances, I direct the Magistrate to take pleas on the new charges. The matter is then to proceed in the usual manner.
15. The Magistrate does not need to deal with bail – it is now revoked due to Mr Nako's admitted breaches.
16. Mr Nako has just arrived at Chambers, having been absent when the hearing took place. A Warrant for his arrest is now to be prepared and served on him. He is remanded in custody to next appear in the Magistrate's Court on 25 June 2019, and if committed for trial to then appear in the Supreme Court at plea day on 2 July 2019.

Dated at Port Vila this 20th day of June 2019
BY THE COURT


Justice G.A. Andrée Wiltens

