

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

**Criminal**  
**Case No. 25/1316 SC/CRML**

**BETWEEN: TUTA KAI**  
Applicant

**AND: PUBLIC PROSECUTOR**

Date of Bail Hearing: 15 September 2025  
Before: Justice M A MacKenzie  
Counsel: Mrs K Karu for the Applicant  
Mr C Shem for the Respondent

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### **DECISION AS TO BAIL**

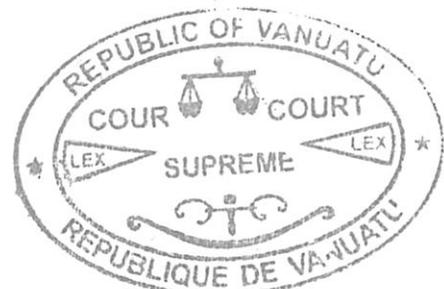
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#### **Introduction**

1. Mr Kai makes an application for bail. He faces 5 charges, being:
  - one charge of unlawful entry of a dwelling house contrary to s 143(1) of the Penal Code [CAP135]
  - two charges of sexual intercourse without consent contrary to s 97(1) of the Penal Code [CAP 135].
  - two charges of threat to kill contrary to s 115 of the Penal Code [CAP 135].
2. Mr Kai has pleaded not guilty to the charges and a trial is listed to commence on 8 December 2025.

#### **Result**

3. After hearing oral submissions from counsel, I declined to grant Mr Kai bail. I said I would give written reasons. These are my reasons.



## The alleged offending

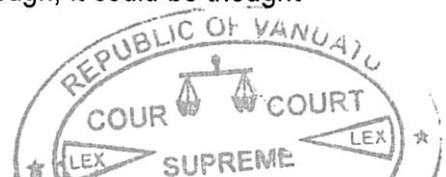
4. The alleged offending occurred in November and December 2024. The complainant and Mr Kai are known to each other. It is alleged that in November 2024, Mr Kai went to the complainant's home when she was sleeping. She was alone in the house. While there, it is alleged that Mr Kai asked the complainant to have sex. She said "no", but Mr Kai removed her clothes, put his penis in her mouth and digitally penetrated her vagina. Then Mr Kai had sexual intercourse with the complainant. After that, Mr Kai threatened to kill the complainant if she entered into a new relationship.
5. The complainant was fearful, so relocated to another area. On 21 December 2024, Mr Kai went to the complainant's new home, and threatened to kill her.

## Relevant statutory provision and applicable legal principles

6. Bail is to be considered under s 60 of the Criminal Procedure Code [Cap 136] ("CPC"). In this case, because the charge of sexual intercourse without consent carries a penalty of life imprisonment, ss 60 (1) and (3) apply. Section 60 (3) is an exception to s 60 (1) but gives no guidance as to the applicable principles.
7. Section 60 (1) provides that a person charged with an offence with a penalty of life imprisonment is ineligible to be granted bail. However, s 60 (3) provides a gateway for bail in such a case.
8. In *Public Prosecutor v Whitford* [2006] VUSC 36 the Court said that for the exception in s 60(3) to apply there must be special or good reasons on which the Court is satisfied to grant bail and made pertinent observations about what evidence is required when s 60(3) applies (at 12) :

*"When an application is made under Section 60 of the Criminal Procedure Code for someone who has been charged with an offence carrying a maximum term of life imprisonment, it is in my view essential that the applicant comes with good evidence to persuade the Court that his situation is special or such that the Court has to invoke Subsection 3. It is trite law that what is said from the bar table (said by lawyers) is not evidence to support a proposition or an application that is before the Court. It is duty of the applicant to come to Court with all relevant evidence to support his application or proposition."*

9. Consistent with *Whitford*, I consider that for the exception in s 60(3) to apply, there must be special or good reasons for bail to be granted, when s 60(1) and (3) are read together. The starting point is that a person accused of an offence punishable by life imprisonment is ineligible for bail. The rationale for s 60(1) must presumably be to reflect Parliament's intention that liberty of an individual is appropriately curtailed when alleged offending falls into the most serious category. If immutable though, it could be thought



to be draconian and inconsistent with Article 5 of the Constitution and in particular, the presumption of innocence.

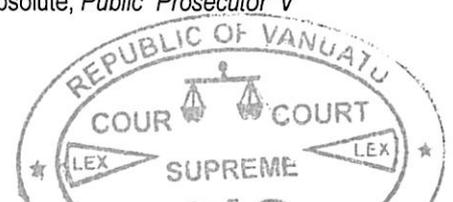
10. If s 60(3) is interpreted from its text and in light of its purpose, bail can be granted by the Supreme Court, when a person is accused of an offence punishable by life imprisonment. It involves the exercise of discretion. It must reflect Parliament's intention to ensure there is an exception so that bail can be granted in such circumstances. Otherwise, issues of unconstitutionality might arise. I consider then that the starting point in considering whether to grant bail where s 60(3) applies must be the ineligibility for bail under s 60(1). That suggests, consistent with *Whitford*, that there is high bar or hurdle for an applicant to overcome; that is to say special or good reasons.
11. There are a number of factors which inform whether bail should be granted. They are distilled from various cases, including:
  - a. *Public Prosecutor v Festa* [2003] VUSC 65
  - b. *Leo v Public Prosecutor* [2013] VUSC 203
  - c. *Manipen v Public Prosecutor* [2013] VUSC 177
  - d. *Reno v Public Prosecutor* [2015] VUSC 180
  - e. *Public Prosecutor v William* [2019] VUC 10
12. The primary factors relating to bail are the risks of:
  - i. failing to appear.
  - ii. interference with witnesses or evidence.<sup>1</sup>
  - iii. offending if bail is granted.
13. Other relevant factors include:
  - i. the seriousness of the alleged offences.<sup>2</sup>
  - ii. the presumption of innocence. The presumption of innocence is a right enshrined by Article 5 of the Constitution.<sup>3</sup>
  - iii. the nature and quality of the evidence,

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<sup>1</sup> The risk of interference does not relate only to the risk of interference with the investigation; *Public Prosecutor v Winslett* [2010] VUSC and *Public Prosecutor v William* [2019] VUSC 10.

<sup>2</sup> With reference to *Public Prosecutor v Jeajea* [2016] VUSC 159 and *Public Prosecutor v Borenga* [2023] VUSC 167, the seriousness of the offending alone is insufficient to overcome the presumption of innocence, a right enshrined under the constitution.

<sup>3</sup> There is also the right to liberty, the right to the protection of the law and freedom of movement. I accept they are fundamental rights and freedoms, but in the context of bail, they are not absolute; *Public Prosecutor v William* [2019] VUSC 10.



- iv. the stage of the investigation and
- v. The defendant's personal circumstances.

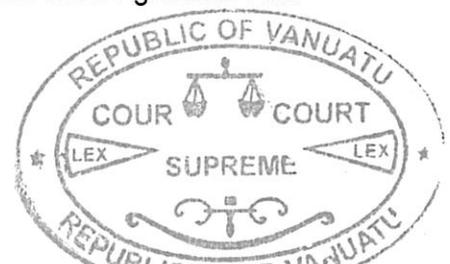
14. It should be noted that these factors are non-exhaustive. An assessment as to whether bail should be granted in an individual case will always be fact specific.
15. It is a matter of balancing and weighing all relevant considerations but particularly the risk factors in order to assess whether bail should be granted. There will always be a tension between the presumption of innocence and other relevant considerations.

## Discussion

16. The starting point is that Mr Kai is ineligible for bail because s 60 of the CPC applies. Mr Kai needs to demonstrate good or special reasons for bail to be granted as he faces two charges of rape. However, he does not advance any such good or special reason. Bail is sought because Mr Kai has spent a number of months in custody already and it is contended that he has a good defence. Mr Kai proposes to live at Freshwota with his sister. In the bail application, Mr Kai proposed to live in Pango but Mrs Karu clarified that his sister is now living in Freshwota. Mrs Karu submitted that Mr Kai is willing to comply with any bail conditions the Court thought necessary.
17. The prosecutor filed written submissions. The primary concern is a risk of interference with the complainant given the circumstances of the December 2024 incident.
18. I accept that the seriousness of the offending alone does not displace the presumption of innocence.<sup>4</sup> Mr Kai is entitled to the presumption of innocence, a fundamental right enshrined in Article 5 of the Constitution. However, as was said in *Public Prosecutor v William* [2019] VUSC 10, in the context of bail, it is not an absolute right. This is a concerning alleged rape. Mr Kai is alleged to have gone into the complainant's home while she was sleeping and engaged in non-consensual sexual activity.
19. I consider that two of the primary risks are present here. There is a risk of interference with the complainant and a risk of offending if bail is granted. The risks of interference and offending arise from the alleged December 2024 incident, where Mr Kai is said to have visited the complainant's new address and threatened to kill her. Mr Kai could locate the complainant again and offend. The complainant is fearful. On the face of it, that fear is justified because despite moving to another location, Mr Kai was able to find out where the complainant lived, and allegedly threatened to kill her.
20. When considering bail, the Court should always identify bail risks but then consider whether they can be mitigated to an acceptable level so that bail can be granted. I am

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<sup>4</sup> See *Public Prosecutor v Jeajea* [2016] VUSC 159.



not persuaded that the risks I have identified can be adequately mitigated by bail conditions, as proposed. The alleged December 2024 incident shows that Mr Kai could seek out the complainant if he was minded to do so. Bail conditions cannot mitigate such risk to an acceptable level so that bail can be granted.

21. I acknowledge Mr Kai is entitled to the presumption of innocence. However, s 60 of the CPC applies. It is for Mr Kai to establish that there are good or special reasons for bail to be granted. He has not done so. Further, as explained there are concerning aspects to the alleged offending. Accordingly, bail is refused.

**DATED at Port Vila this 15th day of September 2025  
BY THE COURT**

*Mackenzie*  
.....  
Justice M A MacKenzie

