

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

Criminal
Case No. 24/2149 SC/CRML

BETWEEN: SAM MARIAWA
Applicant

AND: PUBLIC PROSECUTOR
Respondent

Date of Bail Hearing: 21 November 2025
Before: Justice M A Mackenzie
Counsel: Mr R Melsul for the Applicant
Mr M Kalwatong for the Respondent

DECISION AS TO BAIL

Introduction

1. Mr Mariawa makes an application for bail. He faces a charge of sexual intercourse without consent contrary to ss 90(a) and 91 of the Penal Code [CAP 135]. A long time ago, he entered a plea of not guilty to the charge.
2. A trial in Tanna was abandoned in March 2025. This is because the defendant filed an alibi notice during the trial. The matter was listed in the November 2025 Tanna Court Tour for call over/trial. Mr Mariawa did not appear on 17 November 2025, so a warrant for his arrest was issued. The summons was not served directly on him, but rather his mother. When Mr Mariawa was arrested and brought before the Court, two things emerged:
 - a. Mr Mariawa should have been living on Efate, but since November 2024 he has been back in Tanna. His bail was varied to enable him to attend his trial in November 2024, but he remained on Tanna, because of wrong advice from his former counsel. I accept that is a genuine error and put that to one side in considering bail.
 - b. The prosecutor opposed readmission to bail. The primary reason is that police had recently received information from the complainant that there had been contact between she and Mr Mariawa. She alleges that on 15 November 2025, she and Mr



Mariawa had sexual intercourse. There was no detail given to me as to whether this was a consensual encounter or a possible criminal act. The police need to investigate that issue as soon as possible. But at the very least, if there has been contact between the complainant and Mr Mariawa, that is a breach of non-association condition (not to interfere with prosecution witnesses).

Result

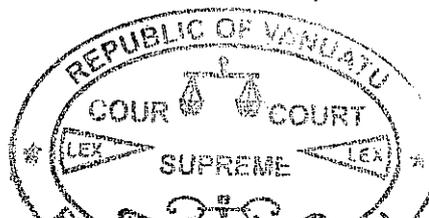
3. After hearing oral submissions from counsel, I declined to grant Mr Mariawa bail. I said I would give written reasons. These are my reasons.

The alleged offending

4. The alleged offending occurred at Loutapus village, Tanna in April 2020. Mr Mariawa and the complainant were married and have 8 children together. At some point they separated, as Mr Mariawa started a relationship with another female.
5. On 4 April 2020, the complainant went to her garden at Loutapus. It is alleged that Mr Mariawa followed her, grabbed her and said they would have sex. He pulled her to the ground and lay on top of her. He forced her, tore her underwear and then had sexual intercourse with her. The complainant told police that Mr Mariawa used a knife to threaten her whenever he wanted to have sex.
6. The complainant immediately told a family member what had happened and reported the incident to police on 5 May 2020. For some inexplicable reason, police failed to act on the complaint for 4 years. Mr Mariawa was interviewed by police in 2024, and said the sex was consensual, and initiated by the complainant.

Relevant statutory provision and applicable legal principles

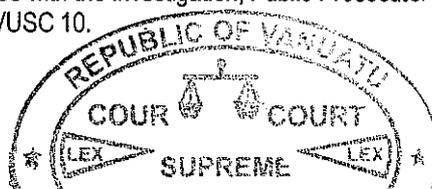
7. Bail is to be considered under s 60 of the Criminal Procedure Code [Cap 136] ("CPC"). In this case, because the charge of sexual intercourse without consent carries a penalty of life imprisonment, ss 60 (1) and (3) apply. Section 60 (3) is an exception to s 60 (1) but gives no guidance as to the applicable principles.
8. 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.
9. 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."

10. 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.
11. 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.
12. 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
13. The primary factors relating to bail are the risks of:
 - i. failing to appear.
 - ii. interference with witnesses or evidence.¹

¹ The risk of interference does not relate only to the risk of interference with the investigation; *Public Prosecutor v Winslett* [2016] VUSC 210 and *Public Prosecutor v William* [2019] VUSC 10.



iii. offending if bail is granted.

14. Other relevant factors include:

- i. the seriousness of the alleged offences.²
- ii. the presumption of innocence. The presumption of innocence is a right enshrined by Article 5 of the Constitution.³
- iii. the nature and quality of the evidence,
- iv. the stage of the investigation and
- v. The defendant's personal circumstances.

15. 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.

16. 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.

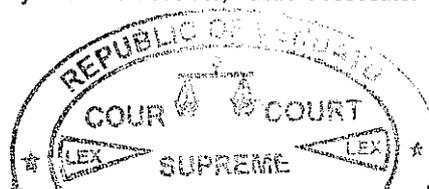
Discussion

17. The starting point is that Mr Mariawa is ineligible for bail because s 60 of the CPC applies. Therefore, he needs to demonstrate good or special reasons for bail to be granted as he faces a charge of rape. However, in my view Mr Mariawa does not advance any such good or special reason. Mr Melsul contended there were two special or good reasons, being:

- a. The presumption of innocence. The presumption of innocence is a fundamental right every accused person accused. It is vitally important, but if it was to be treated as a special or good reason, then s 60 of the CPC would be rendered meaningless. To state the obvious, every person to whom s 60 applies is presumed innocent. I discuss this in more detail at paragraph 20 below.

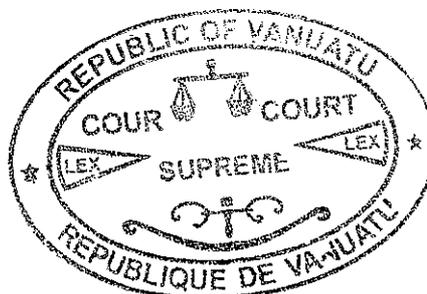
² With reference to *Public Prosecutor v Jeajea* [2016] VUSC 159 and *Public Prosecutor v Borenga* [2023] VUSC 167, the seriousness of the offending alone is insufficient to overcome the presumption of innocence, a right enshrined under the constitution.

³ 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.



- b. That Mr Mariawa is to assume the duties of his chief, who has passed away. There is no evidential basis for that assertion. Even if there was, Mr Mariawa proposes to live in a village about 10km away so it is difficult to see how he could actually fulfil that role.
18. Mr Mariawa proposes to live in Loaniae village, near east Tanna with a relative. Mr Melsul places emphasis on the fact that the complainant lives at Loutapus village, which is about 10 km away. He submits then there is no risk of interference or offending, and that strict bail conditions will mitigate those risks, if they exist.
19. The prosecutor submits that no good or special reason for bail has been put forward by Mr Mariawa, and therefore bail should not be granted. Further, Mr Kalwatong contended that there is a high risk of interference and offending if bail is granted. That arises from the complainant's recent statement to police that there has been contact between she and Mr Mariawa, and that they had sexual intercourse.
20. I accept that the seriousness of the offending alone does not displace the presumption of innocence.⁴ Mr Mariawa 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 serious alleged rape. It has concerning features. Mr Mariawa is alleged to have followed the Complainant to her garden, grabbed her and then raped. At the least, it is brazen, if proved.
21. In this case, I consider that two of the primary risks are engaged. There is a risk that Mr Mariawa will contact the complainant and will offend on bail. The risk of interference is high. Mr Mariawa knows where the complainant lives, and they have a relationship history. He must know the places the complainant is likely to go. Further, there is a very recent allegation of contact between them, which at the least is a breach of bail, if true. While I accept the risk of interference may be mitigated to an extent by geographical distance, Mr Mariawa proposes to live about 10 km away which is not that far. If he was minded doing so, Mr Mariawa could easily travel to Loutapus village, and that risk is difficult to manage or mitigate by bail conditions.
22. The risk of offending on bail arises from the recently reported incident between Mr Mariawa and the complainant. There is a possibility that this was a non-consensual encounter. The police need to investigate this properly, but if it was a consensual encounter, then it does not make much sense for the complainant to have reported it to police. If the sexual intercourse was non-consensual, then it was a very brazen act, in circumstances where Mr Mariawa is on bail, is not to contact the complainant and is facing a rape charge.

⁴ See *Public Prosecutor v Jeajea* [2016] VUSC 159.



- 23. This is serious alleged offending. 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 not persuaded that the risks I have identified can be adequately mitigated by bail conditions, as proposed. The conditions are reliant on Mr Mariawa's compliance and the recent alleged contact casts doubt on his willingness or ability to comply with bail conditions.

- 24. Further, while I acknowledge Mr Mariawa is entitled to the presumption of innocence, s 60 of the CPC applies. It is for Mr Mariawa to establish that there are good or special reasons for bail to be granted. He has not done so, and accordingly, bail is refused.

**DATED at Port Vila this 21st day of November 2025
BY THE COURT**

