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

Criminal
Case No. 25/926 SC/CRML

BETWEEN: JOHN KALTONGA
Defendant

AND: PUBLIC PROSECUTOR

Date of Bail Hearing: 2 and 3 December 2025
Before: Justice M A MacKenzie
Counsel: Mrs MG Nari for the Accused
Mrs M Silememea for the Public Prosecutor

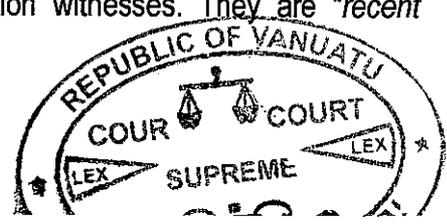
DECISION AS TO BAIL

The Application

1. Mr Kaltonga makes a third application for bail.
2. On 16 May 2025, Mr Kaltonga was declined bail by Justice Naigulevu. In declining bail, Justice Naigulevu held that Mr Kaltonga's family circumstances and the need to care for a baby did not amount to special and good reasons. And further that even with the presumption of innocence, the balance did not weigh in favour of granting bail. On 13 August 2025, I declined bail on the basis there was not a material change of circumstance.
3. For reasons I will explain, I accept there is now a material change of circumstance so that bail can be considered. After hearing from counsel, bail was refused. I said I would give written reasons. These are my reasons.

Material change of circumstance

4. Mr Kaltonga faces a charge of rape. He entered a not guilty plea to the charge on 3 June 2025. The trial commenced on Monday 1 December 2025. The complainant gave evidence. There are two other prosecution witnesses. They are "recent



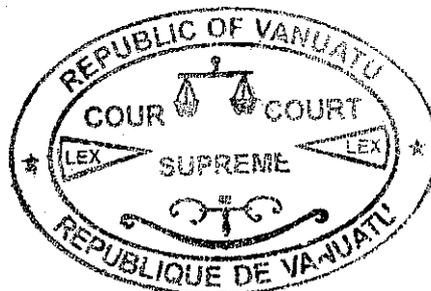
*complaint*¹ witnesses. They are to give evidence about what the complainant FN told them about what happened in the bedroom with Mr Kaltonga. For reasons unrelated to the witnesses, they were unavailable to give evidence this week. One had made travel plans by the time the summons was served on her, and the other is on Nguna island, and the prosecutor does not have her current contact details. This all stems from an inexplicable delay in the summons being served on the witnesses. I did ask counsel to confer to see if the evidence could be admitted by consent, so that the trial could be completed this week, but there was no agreement to that.

5. The prosecutor asked that the trial be part heard and a new date given after the end of January 2026 when one of the witnesses is back from another island. While Mrs Nari did not object to the trial being adjourned part heard, she said that Mr Kaltonga wished to re-apply for bail. Primarily, the material change of circumstance is the delay in concluding the trial when Mr Kaltonga has already been in custody for a number of months. The trial will continue on 16 February 2026.
6. I accept the delay in concluding the trial is a material change in circumstance, so that a fresh bail application can be considered.

The alleged facts

7. The complainant, FN and Mr Kaltonga are related. At the time of the alleged incident, FN was living with Mr Kaltonga's family at Siviri village, North Efate.
8. On 28 September 2024, FN attended a bridal event in Port Vila with relatives. She consumed alcohol. The festivities continued when the group returned to Siviri. FN did not drink any more alcohol, but she did have a shell of kava. She and Mr Kaltonga returned home in the early hours. Initially, FN sat on a couch, but then Mr Kaltonga suggested she sleep in his room. She and Mr Kaltonga are close so she did not think there was anything untoward about the suggestion.
9. There was a bed frame and a mattress on the floor in the room. Initially, FN lay on some clothes on the bed. Mr Kaltonga told her she could lie on the mattress which she did. Mr Kaltonga started to touch her leg up to her bottom and FN pushed him away, telling him they were all related. FN was very tired and went to sleep on the mattress. When she woke up, she felt as though things were not normal and she was not wearing her trousers or underpants.
10. Mr Kaltonga accepts that he and FN had sexual intercourse, but his position is that it was consensual.¹

¹ FN was cross examined on this basis

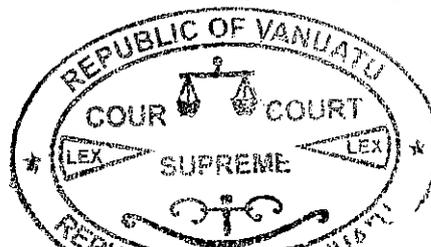


Applicable principles

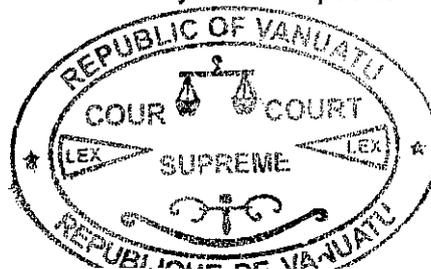
11. Bail is to be considered under s 60 of the Criminal Procedure Code [Cap 136] ("CPC"), because the charge of unlawful sexual intercourse carries a penalty of life imprisonment. Section 60 (3) is an exception to s 60 (1) but gives no guidance as to the applicable principles.
12. Section 60 (1) provides 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.
13. 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."

14. 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.
15. 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.



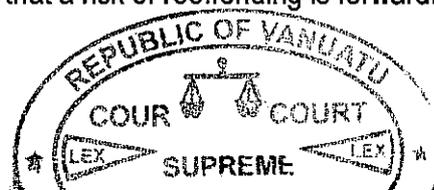
16. There are a number of factors which inform whether bail should be granted. They are distilled from various cases, including;
- a. *Public Prosecutor v Festa* [2003] VUSC 65.
 - b. *Leo v Public Prosecutor* [2013] VUSC 203.
 - c. *Manipen v Public Prosecutor* [2013] VUSC 177.
 - d. *Reno v Public Prosecutor* [2015] VUSC 180.
 - e. *Public Prosecutor v William* [2019] VUC 10.
17. The primary factors relating to bail are the risks of:
1. failing to appear.
 2. interference with witnesses or evidence. 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.
 3. offending if bail is granted.
18. Other relevant factors include:
1. the seriousness of the alleged offences. 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.
 2. the presumption of innocence. The presumption of innocence is a right enshrined by Article 5 of the Constitution. 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.
 3. the nature and quality of the evidence,
 4. the stage of the investigation and
 5. The defendant's personal circumstances.
19. 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.



20. 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.

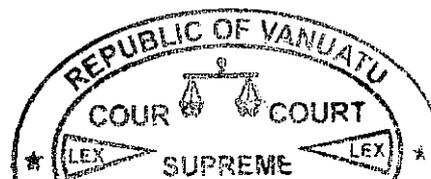
Should bail be granted?

21. Because s 60 of the CPC applies, Mr Kaltonga is required to show good or special reasons for a grant of bail.
22. The primary submission as to good or special reasons is that the delay in concluding the trial is unfair on Mr Kaltonga, as he has been in custody for a number of months. Mrs Nari contends that Mr Kaltonga is entitled to have a fair trial within a reasonable timeframe. Further, Mrs Nari submits that as Mr Kaltonga's new counsel, she needs to be able to take proper instructions for the trial and submissions and it would be easier if Mr Kaltonga was granted bail.
23. The submission as to taking instructions from Mr Kaltonga has lost force now that the key witness, the complainant has given evidence. I appreciate that Mrs Nari took on the case at short notice, and the Court is grateful. Even if Mr Kaltonga gives evidence (he is not obliged to, but can if he wishes), counsel's obligation was to put the defence case to the witnesses, particularly the complainant FN. After all, there was only the two of them in the bedroom. Mrs Nari did that, so I infer she has already taken thorough instructions from Mr Kaltonga.
24. I accept that in some cases, delay in concluding a trial could amount to special or good reason. It will be context specific. Mr Kaltonga entered a plea of guilty to the charge on 3 June 2025. By the time the trial resumes, the time between plea and the resumed trial will be 8 months. I do not regard that delay to be either undue or unreasonable. I appreciate that Mr Kaltonga has been in custody for longer than that. He was arrested and spoken to by Police on 7 March 2025 and remanded in custody. So, when the trial resumes on 16 February 2026, he will have been in custody for about 11 months. Again, I do not consider that to be either an undue or unreasonable delay in concluding the trial. In the context of this case, I do not accept that the delay in concluding the trial or Mrs Nari's need to take proper instructions amount to special or good reasons.
25. Mr Kaltonga proposes to live with his aunt in Port Vila. He proposes two sureties, his mother Marie Kaltonga and his aunt Noeleen Kalkaua. Mrs Nari contends that with the support of the sureties and strict bail conditions, any bail risks can be mitigated. Specifically, she submits that there is no risk that Mr Kaltonga will fail to appear and there is a low risk of interference with witnesses or evidence now that the complainant has given evidence and that the two other prosecution witnesses are at a distance. Mrs Nari strongly contends that a risk of reoffending is forwarding



looking and that Mr Kaltong's history with the Police is not a reason to keep him in custody. Her submission is that is unjust when investigations are pending and are not cases which have been listed in Court.

26. The prosecutor opposes bail. She submits that there is no undue or unreasonable delay. Mrs Silememea contends that two of the primary risks are engaged, being a risk of indirect contact with witnesses and a risk that the sureties will not have sufficient control over Mr Kaltonga in light of his proven criminal convictions and pending cases.
27. I accept that the seriousness of the offending alone does not displace the presumption of innocence. See *Public Prosecutor v Jeajea* [2016] VUSC 159. Mr Kaltonga is entitled to the presumption of innocence, a fundamental right enshrined in Article 5 of the Constitution as the trial is not yet finished. However, as was said in *Public Prosecutor v William* [2019] VUSC 10, in the context of bail, it is not an absolute right.
28. There is no credible risk of Mr Kaltonga failing to appear. Given the family relationships involved and modern communications, there is a risk Mr Kaltonga may contact the other two prosecution witnesses. However, that would not justify a continued custodial remand. The real issue here is a risk of re-offending if bail is granted. The best predictor of future behaviour is past behaviour. Mr Kaltonga has three convictions for offending which took place at Siviri village in 2023. On 9 November 2023, Mr Kaltonga was sentenced to 80 hours community work for charges of domestic violence and idle and disorderly behaviour. On that same day, Mr Kaltonga was sentenced to 60 hours community work and VT 3,000 towards the cost of the prosecution for charges of idle and disorderly, threatening language, malicious damage to property. Then on 17 October 2024 Mr Kaltonga was sentenced to 8 months imprisonment suspended for 1 year and a VT 7,000 fine for intentional assault. Those three convictions say two things about Mr Kaltonga. Firstly, that he has a propensity for committing criminal offences. These are not one-off convictions. Secondly, on all three occasions, the offending took place at Siviri village. Ordinarily, Mr Kaltonga lives in Siviri village with his parents, including one of his sureties Marie Kaltonga. An available inference is that Mrs Kaltonga is unable to have any positive influence over her son. That is not a criticism about Mrs Kaltonga at all.
29. There are also four further pending cases, where complaints have been made to the Police in 2020 and in May 2023. The prosecutor describes them as pending cases. The Police investigations have finished. One of the cases involving an alleged act of indecency and burglary is with the Public Prosecutor's office and is awaiting reallocation to another prosecutor. There are three other cases which are recorded in the Police PIMS system but not registered in the prosecution "case management system cross check with Court case management system". Those three cases involve allegations of Court protection order, indecent assault/indecent act on a



young person and threats to kill and rape. For the sake of completeness, I note that Mr Kaltonga denies knowing one of the complainants. It is inexplicable and bewildering that these four further allegations, which have been investigated by Police, appear to have stalled at the Public Prosecutor's office. While only limited weight can be placed on those matters, they do suggest that Mr Kaltonga does not have a lot of respect for the law, and on the face of it, is willing to commit crimes.

30. I assess taking all of the information into account, but placing most weight on the three proven convictions, that there is a high risk of reoffending if Mr Kaltonga is granted bail. I have no doubt about the sincerity of Mr Kaltonga's sureties. But a surety's role is only as good as a defendant's willingness or ability to accept assistance. I have little confidence that Mr Kaltonga would listen to his aunt, and there is only so much his mother can do from a distance. And as I have said, the three proven convictions all took place at Siviri village, so it would seem that Mr Kaltonga was not listening his mother.
31. I do not consider that bail conditions can mitigate the risk of reoffending to the extent where bail can be granted. Mr Kaltonga will commit offences if he is minded doing so. His proven criminal history is an important risk predictor for the future. Those incidents were not that long ago, and cannot be put down to a one-off indiscretion.
32. Further, while I acknowledge Mr Kaltonga is entitled to the presumption of innocence, s 60 of the CPC applies. It is for Mr Kaltonga 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 3rd day of December 2025
BY THE COURT**

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Justice M A Mackenzie

