

**IN THE COURT OF APPEAL OF  
THE REPUBLIC OF VANUATU**  
*(Criminal Appellate Jurisdiction)*

**Criminal Appeal**  
**Case No. 21/4193 COA/CRMA**

**BETWEEN:** LI JIANJUN

Appellant

**AND:** PUBLIC PROSECUTOR

Respondent

**Coram:** *Hon. Chief Justice Vincent Lunabek  
Hon. Justice Dudley Aru  
Hon. Justice Edwin Goldsbrough*

**Counsel:** *Mrs Nari and Mrs Bakeo for the Appellant  
Mr S. Blessing for the Respondent*

**Date of Hearing:** 28 July 2022

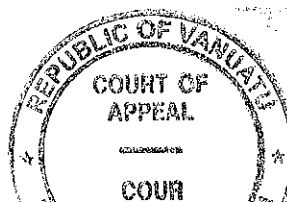
**Date of Judgment:** 29 July 2022

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**JUDGMENT OF THE COURT**

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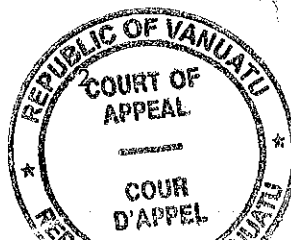
1. Pending the hearing of an appeal against conviction and, we are advised, sentence, Li Jian Jun, the applicant, seeks his release on bail. He was convicted in the Supreme Court on 17 December 2021 and filed a Notice of Appeal against conviction on or before 24 December 2021. That Notice of Appeal against conviction was filed without the benefit of legal advice as the applicant's then counsel had left the jurisdiction before the judgment recording the conviction had been delivered.
2. The applicant was sentenced on 19 July 2022 to four years and six months imprisonment following his conviction in December 2021. That sentence was expressed to be 'with immediate effect as of today'.
3. Within a few minutes following delivery of the sentence of imprisonment, the applicant made an application for bail pending appeal to the trial judge. That application was opposed by the prosecution and was unsuccessful. Reasons for the decision were published on the following day.



4. Although the notice of appeal against sentence had not been filed at the time of this hearing to determine the application for bail, this Court was advised that the Notice of Appeal against sentence was ready to be filed and would, time permitting, be filed before close of business on Thursday 28 July 2022.
5. The appeal against conviction could not be heard until the Supreme Court had completed its work which includes sentencing the offender. Ironically, this Court emphasized that point in Criminal Appeal Case 3440 of 2019 when the present appellant sought to appeal an interlocutory decision in the criminal matter. Appeals against conviction will only be considered after the criminal case is completed in the Supreme Court. A case is not completed until the final orders for sentence and any other ancillary matters have been made.
6. Counsel for the applicant have been offered a hearing within the next sitting of the Court of Appeal in August 2022 but declined the offer. They expressed the view that they would not be in a position to prepare and present the necessary material to do justice to the appeal within the two weeks available. The matter is therefore to be listed during the November 2022 sitting.
7. The present bail application is based on the delay between the imposition of the sentence and the hearing of the appeal, that the applicant has remained on bail with conditions throughout the criminal proceedings from the Magistrates' Court where he was first released on bail and that the sentence of imprisonment may be set aside if the appeal against conviction is successful.
8. Both in this Court and the court below reference was made to *PP v Giltrap* [2019] VUSC 128 wherein, at paragraph 10, the Court set out several relevant considerations:

*"It is my considered view that in this jurisdiction an application must show that there are matters which constitute exceptional circumstances before bail is allowed pending appeal. It must be pointed out that the conditions to be considered must be based on the inveterate practice of appellate courts in bail applications pending appeals. In such cases, the conditions to be satisfied before bail can be granted pending appeal are that:*

- (a) *There is possibility that a sentence of imprisonment be set aside entirely; or*
- (b) *The sentence is likely to be served completely before the appeal is heard; or*



(c) *There are exceptional reasons. These last criteria of exceptional reasons or exceptional circumstances must be those of the case and not the applicant/detainee.*

9. In the Supreme Court, the trial judge found that none of those three criteria were met. In this Court, we respectfully disagree. The whole sentence will not have been served by the time the appeal is heard (point B), but there remains the possibility that the whole sentence may be set aside if the appeal against conviction is successful (point A). That, however, does not amount to exceptional circumstances as any appeal against conviction promises that hope.
10. The exceptional circumstances, in our view, relate to the immediate sentence of imprisonment imposed without regard to section 50 of the Penal Code. Section 50 of the Penal Code provides:-

*"COMMENCEMENT OF SENTENCE*

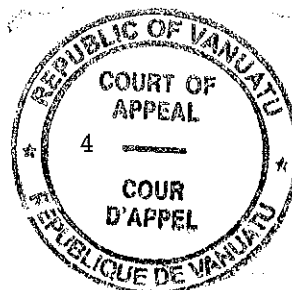
*If the offender has not been held in custody pending trial and no warrant of arrest or remand is issued against him or her at the time of conviction in the circumstances authorized by the rules of criminal procedure, no sentence of imprisonment may be enforced until the time of appeal against such sentence has expired or the offender earlier elects to begin serving his or her sentence.*

11. With one exception, counsel for both the applicant and prosecution conceded that all the provisions of the section are met in this case. The applicant has not been held in custody pending trial and no warrant of arrest or remand was issued against him at the time of conviction. In those circumstances the sentence of imprisonment imposed may not be enforced until the time to appeal against such sentence has expired.
12. That provision is qualified if the offender elects to begin serving his or her sentence earlier. This is the one difference between the parties. It is submitted by the prosecution that this applicant has elected to start his sentence earlier than the fourteen days provided for.
13. It is difficult, if not impossible, to regard that submission as having any foundation in fact. Firstly, neither the prosecution nor defence raised the issue with the trial judge nor was the applicant advised or informed that he had the right to make such an election. Further, it is clear from the record that the applicant did not want the sentence of imprisonment to be immediately implemented. He made a bail application within forty-five minutes of the imposition of sentence.



There can be no greater indication than that, in our view, that the applicant was not making an early election.

14. Further, no election, in our view, can be effectively made until the offender is informed of the need to and understands the nature of the election. There is nothing on the record to indicate that this was done and all counsel agree that, in fact, no explanation was sought or given. It might be fair to conclude that the provisions of section 50 of the Penal Code took present counsel somewhat by surprise.
15. It is, in our view, exceptional that a sentence is imposed without regard to a significant provision giving rights to an offender that he should have explained to him or her.
16. Given that finding, we turn to consider whether the applicant is a suitable candidate for the grant of bail pending appeal. In that regard, we note that he has been on bail since the initial grant of bail in October 2017 by the Magistrates' Court, confirmed in December 2018 in the Supreme Court and has regularly complied with the obligation to attend court for his trial, even when it took more than two years to complete.
17. We note several conditions prescribed concerning the bail granted as set out in the decision of the Magistrate in October 2017, subsequently varied by the removal of conditions (g) and (h) of that order.
18. Records confirm that the applicant surrendered his passport to the custody of the police. A request has been made to ascertain if that passport has now expired. If the applicant is now entitled to a replacement passport, that replacement passport if any must also be surrendered. For the avoidance of doubt, it is repeated here that the applicant whilst on bail may not leave Vanuatu nor the island of Efate without leave of the Court and the relevant authorities are advised accordingly. The remaining conditions are re-imposed and for clarity set out below. Liberty is granted to the applicant to approach the Supreme Court, as opposed to the Court of Appeal, should the conditions of bail require variation.
19. The bail conditions are:

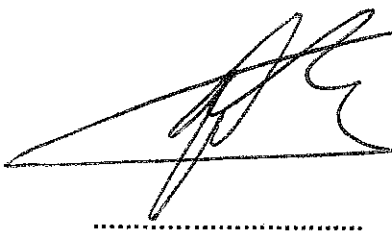


- (a) Continued surrender of his passport and any replacement to the Police forthwith who will convey same to Registrar of the Supreme Court to have custody thereof until further orders of the court;
- (b) The bond paid of VT500,000 to the Registrar of the Supreme Court remain until this matter is finally adjudicated;
- (c) The defendant must not interfere with the prosecution witnesses, either directly or indirectly;
- (d) The defendant be of good behaviour;
- (e) The defendant must not leave the Republic of Vanuatu and the island of Efate until this case is finally adjudicated;
- (f) The defendant must sign at the Central Police Station every Friday at any time between 8:00 am and 4:00 pm until this case is finally adjudicated;
- (g) The defendant must provide details of his residential address to the Police and must remain at that address until the court orders otherwise;
- (h) The defendant must attend the Court of Appeal at Port Vila on the 7<sup>th</sup> day of November 2022 at 8:30 am for the hearing of his appeal and at any other date thereafter as advised;
- (i) If the defendant breaches any of these conditions, he will be liable to arrest and detention in custody until the case is complete and the bail bond is forfeited to the State.

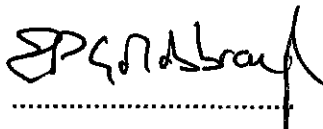
20. The application for bail pending appeal is granted. The applicant is to be released on bail with the conditions set out above.

DATED at Port Vila, this <sup>29<sup>th</sup></sup> day of July 2022.

BY THE COURT



Hon. Chief Justice V. Lunabek



Hon. Justice E. Goldsbrough



Hon. Justice D. Aru

