IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU CRIMINAL APPEAL CASE No.1 OF 1995

IN THE MATTER of an appeal from the Magistrates Court of the Republic of Vanuatu by :

PUBLIC PROSECUTOR

Appellant

- and -

JOSHUA BONG

Respondent

JUDGMENT

This matter comes before this court by way of an appeal against the decision of the learned Magistrate Mr Bruce Kalotiti, delivered on 5 May 1995 in which he "dismisses" the case against the respondent without taking a plea to the charge.

This matter started as a criminal prosecution against the respondent under section 1 (a) of the Maintenance of Family Act CAP 42, which charged the respondent with the offence of failing to make adequate provisions for the maintenance of his wife and children.

It would appear that at the date of the hearing before the learned Magistrate, he had before him a letter dated 28 April 1995 from the wife, indicating that the parties had decided to return together and that they had reconciled their differences.

The learned Magistrate accepted this letter as being the true factual state of affairs between the parties. Indeed he was led to believe through Counsel for the respondent that this was indeed correct. I am now told that this so called reconciliation has not in fact taken place but that the parties are still looking for a home in which to settle, and that meanwhile the respondent still continues to live with his mistress. I refer to this as being the state of affairs now between the parties, although it is not relevant to this appeal at all.

On the 5 May 1995, the learned Magistrate did not take a plea from the respondent, but proceeded to consider section 118 of the Criminal Procedure Code Act CAP 136, and came to the view that this section could apply and decided to apply it rather than proceed against the respondent under the charge. Instead of using the words "I terminate this action" he uses the words "I dismiss this action" in his judgment.

Upon this the prosecution appeals, on the basis that such a "dismissal" means that the respondent, who has not in fact reconciled with his wife, is now free from prosecution of the

original charge he faced before the learned Magistrate and cannot now be charged and prosecuted again for an offence that has been "dismissed".

I find that submission to be totally erroneous in the present case. Had a plea of Not Guilty been taken and a verdict of Not Guilty been entered in favour of the respondent, there would have been force to this submission. But the learned Magistrate was careful not to take any plea from the respondent at the time. His "dismissal" amounted to no more than a "termination" under section 118 of CAP 136. That cannot and does not act as a bar to the proceedings under section 1 (a) of CAP 42 being reinstated against the respondent. He has not been tried and has not been acquitted of those charges and there are no reasons why these proceedings cannot now be reinstated against him.

Section 118 of CAP 136 gives wide powers to the Magistrate's Court to facilitate settlement in an amicable way, according to custom or otherwise in cases involving proceedings for an offence of a personal or private nature. I cannot imagine any case that better fits that description.

It is not for me to substitute what I would have done had I been in the learned Magistrate's position, for what he did. I have to consider whether or not he erred in law. I have no doubt that he has considered the law here with great care and that he has applied the correct principles quite properly and that he has therefore not erred in law. He was quite right not to take a plea from the respondent once he had formed the view that section 118 could be applied by him.

For these reasons, I dismiss this appeal.

Dated at Port Vila this 28 day of June 1995

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CHARLES VAUDIN d'IMECOURT
Chief Justice

REPUBLIC OF VANUATU
COUR SUPREME COURT
LEX LEX
REPUBLIQUE DE VANUATU