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

CRIMINAL CASE No.121 OF 2014

PUBLIC PROSECUTOR

- v –

JOHN RAYMOND

Coram: *V. Lunabek CJ*
Counsel: *Mrs Tabisa Harrison for Public Prosecutor*
Mr Francis Tasso for the Defendant

Date: *29 September 2014*

PRE-TRIAL RULING

Accused John Raymond is charged with one count of indecency with a young person and indecency without consent, contrary to sections 98A and 98(a) of Penal Code respectively

He was remanded in custody on 14 August 2014 and was committed to stand trial in the Supreme Court.

On 2 September 2014, the Accused John Raymond was brought before me for pleas on the above mentioned offences.

On 2 September 2014, I was informed by the Defence counsel that, the accused is a deaf and mute person.

The Defence counsel also informed the Court that he has filed an Application for an inquiry into the fitness of the Accused John Raymond to stand trial.

I got a copy of the defence application for enquiry into the fitness to stand for trial. I adjourned the pleas. The state counsel informed the Court initially that the state will oppose the Application. I perused the application and adjourned it to 29 September 2014.

On 29 September 2014, I considered the application for the court to undertake an inquiry into the fitness of the accused to stand trial pursuant to section 91(1) of the criminal Procedure code.

The application is made on three (3) grounds:

First, that the accused is deaf and mute. He cannot speak. He cannot hear. He cannot read or write. He cannot communicate by any type of formal sign language. He is unable to conduct a defence to the charge. This renders him unfit to be put on trial.

Second, that although the accused can understand some basic informal sign language, he is unable to communicate accurately his story to his lawyer or to the court.

Third, that the accused by the provisions of Article 5(2) (a) of the constitution, has a constitutional right to a fair hearing.

"*Fundamental rights and freedoms of the individual*

(2) Protection of the law shall include the following-

(a) everyone charged with an offence shall have a fair hearing, within a reasonable time, by an independent and impartial court and be afforded a lawyer if it is a serious offence;

(b) everyone is presumed innocent until a court establishes his guilt according to law;

(c) everyone charged shall be informed promptly in a language he understand of the offence with which he is being charged;

(d) if an accused does not understand the language to be used in the proceedings he shall be provided with an interpreter throughout the proceedings;

(e) ..."

The Law:

The Criminal Procedure Code (CPC) Act (Section 91) [Cap 136] and the Penal Code (PC) Act (Section 13) [Cap 135] are the relevant legislations.

PART IV of CPC [Cap 136] is about Further Provisions concerning all criminal. There is a sub-head entitled: "Insanity or other incapacity of an Accused Person".

Section 91 of CPC provides:

ENQUIRY BY COURT AS TO INSANITY OF ACCUSED

91. (1) When at the commencement or in the course of a preliminary enquiry or a trial the court has reason to believe that the accused may be of unsound mind and consequently unfit to plead or incapable of making his defence, it shall enquire into the fact of such unsoundness and shall for that purpose order him to be detained in a hospital for medical observation and report for any period not exceeding 1 month.

(2) If the court after enquiry under subsection (1) is of opinion that the accused is of unsound mind and consequently unfit to plead or incapable of making his defence, it shall postpone further proceedings in the case.

(3) The provisions of the Penal Code shall thereafter apply to the case.

Part 1 of Penal code is about General Provisions. There is a sub-Head entitled: "Principals of criminal Proceedings".

Section 13 of Penal Code provides:

UNFITNESS TO PLEAD

"13. If any person charged with a criminal offence is by reason of insanity or other mental disorder unfit to plead or to stand trial, the court shall make an order placing him under guardianship in a manner to be prescribed in the order. The condition of the accused shall be established by a medical report ordered by the court."

I have been provided with a copy of a medical report dated August 25th 2014 from Vila Central Hospital signed by Dr Richard Leona, Acting Medical Services Manager and Andorin Aki ENT Nurse In charge. It is stated:

TO WHOM IT MAY CONCER

RE: John Raymond

Mr John Raymond 30 Yrs old was brought into ENT clinic on the 19/08/2014 for check-up. He has a long standing deafness since his childhood. He said he was sick when he was a little child. He has no recorded history of his illness.

On examination: Ears look normal, eardrum intact. Nose -ok, tonsils -ok, pharynx –ok, tongue normal, voice –ok. Hearing test indicate a ***left dead ear*** *and* ***right severe to profound hearing loss****.*

A hearing aid would have assisted him during his childhood days in the development of spoken language and comprehending.

Mr John Raymond would only lip-read and nothing much can be done now according to his age. Deafness totally impedes the development of spoken language.

Thank you for your understanding .

Yours sincerely

Andorin Aki
ENT Nurse In Charge

Dr. Richard Leona
Acting Medical Services Manager

The Defence Counsel provides the Court with persuasive authorities in support of the application. I set them out for ease of reference.

A person cannot be tried for a criminal offence unless that person is fit to plead to the charge against him: R v Dashwood [1943]KB 1; R v Benyon [1975] 2QB 111; R v Presser [1958] VicRp 9; [1958] VR 45; Kesavarajah v The Queen [1994] HCA 41; [1994] 181 CLR 230 at 244. Shortly stated, the principle is that a person should not be put on trial unless he is in a position to comprehend the course of proceedings and to make a proper defence to the charge: R v Pritchard [1836] EngR 540; [1836] 7 C & P 303 at 304 [1836] EngR 540;173 ER 135. In R v Presser at 48, Smith J elaborated the minimum standards about which the Court must be satisfied if an accused person is to be tried without unfairness or injustice. Smith J said:

[The accused needs] to understand what it is that he is charged with. He needs to be able to plead to the charge and to exercise his right of challenge. He needs to understand generally the nature of the proceedings, namely, that it is an inquiry as to whether he did what he is charged with. He needs to be able to follow the course of the proceedings so as to understand what is going on in the court in a general sense, though he needs not, of course, understand the purpose of all the various court formalities. He needs to be able to understand, I think, the substantial effect of any evidence that may be given against him; and he needs to be able to make his defence or answer to the charge. Where he has counsel he needs to be able to do this through his counsel by giving any necessary instructions and by letting his counsel know what his version of the fact is and, if necessary, telling the court what it is. He needs not, of course, be conversant with court procedure and he needs not have the mental capacity to make an able defence; but he must, I think, have sufficient capacity to be able to decide what defence he will rely upon and to make his defence and to make his defence and his version of the facts known to the court and to his counsel, if any.

These remarks have been approved by the High Court of Australia in Kesavarajah at 245 and by Gaudron J Hayne J in Eastman v The Queen [2000] HCA 29; (2000) 203 CLR 1 at 20 and 99 respectively. The effect of the remarks was summarised in Kesavarajah at 245 by Mason CJ, Toohey and Gaudron JJ (with whom Dean and Dawson JJ agreed on this on this point) in these terms:

"In Reg. v. Presser, Smith J. elaborated the minimum standards with which an accused must comply before he or she can be tried without unfairness or injustice. Those standards, which are based on the well-known explanation given by Alderson B. to the jury in R. v. Pritchard, require the ability (1) to understand the nature of the charge; (2) to plead to the charge and to exercise the right of challenge; (3) to understand the nature of the proceedings, namely, that it is an inquiry as to whether the accused committed the offence charged; (4) to follow the course of the proceedings; (5) to understand the substantial effect of any evidence that may be given in support of the prosecution; and (6) to make a defence or answer the charge. (citations omitted)"

Kesavarajah v. The Queen (1994) 181 CRL 230 at paragraph 31, cited in R v. Abdulla [2005] SACS 399 (21 October 2005).

A person may not be fit to plead because of mental illness or physical incapacity. A physical incapacity may take a number of forms. The accused may have suffered such substantial head injuries that he is unfit to plead: R v Bradley (No 2) [1986] NTSC 23; (1986) 85 FLR111; or the accused may have language difficulties which prevent him from being able to make a good defence and no interpreter is available: R v Grant [1975] WAR 163; Ngatayi v The Queen (1980) 147 CLR at 9 per Gibbs, Mason and Wilson JJ; R v Begum (1985) 93 Cr App R 96. Another instance of physical incapacity which might cause an accused to be unfit to plead is where the accused is a deaf mute. For more than 150 years it has been settled law that a person who is a deaf mute may, depending on the degree of the disability, be unfit to plead: R v Prichard where Alderson B followed and applied R v Dyson (1831) 7 C & P 305(n).

In R v Dyson and R v Prichard a deaf mute who was unfit to plead was held to be "insane" within the meaning of the Criminal Lunatics Act 1800 (UK) and was ordered to be kept in custody at the pleasure of the Crown. When it is understood that the accused in both Dyson and Pritchard were charged with a capital felony, the apparent severity of the order to keep them in custody at the pleasure of the Crown is ameliorated. Notwithstanding developments in medical science and the reduction in the number of capital felonies, the principle stood. In R v Berry (1876)1 QBD 447:
'a deaf mute charged with larceny who did not have " intelligence enough to understand the nature of the proceedings" was held not to be sane. Lush J said (at 451):
If it appears at any time during the trial that the prisoner is of non-sane mind, the proper course is to stop the trial and direct him to be detained during the Queen's pleasure. On that I base my judgment. Such a course was adopted in the present case. I understand the finding of the jury, that the prisoner was not capable of understanding, and, as a fact, had not understood, the nature of the proceedings, to mean that the prisoner has not sufficient intellect to understand the nature of the proceedings.'

In R v Governor of Stafford Prison; ex parte Emery, [1909] 2 KB 81 Lord ALverstone CJ noted that the practice had long existed of including within the word "insane" persons who, for mental or physical infirmity, could not follow what Was happening in a case. See also R v Podola [1960] 1 QB 325 at 356.

In Kesavarajah the High Court had to consider the meaning of the word "insane" in s 393 of the Crimes Act 1958 (Vic). The Court explained that, in that context, the word "insane" is not used in a colloquial sense but has an extended meaning which includes an accused person who does not have sufficient understanding to comprehend the nature of the trial so as to make a proper defence to the charge. Mason CJ, Toohey and Gaudron JJ (with whom Deane and Dawson JJ agreed) said:
However, it has long been recognised that, in a context such as s. 393, the word "insane" does not mean "insane in the colloquial sense" or "insane within the M'Naughten Rules". In England, the courts have always applied Alderson B.'s interpretation in R v Prichard of s.2 of the Criminal Lunatics Act, namely, that " the question is, whether the prisoner has sufficient understanding to comprehend the nature of this trial, so as to make a proper defence to the charge." In the context of s.393, the word signifies inability, by reason of some physical or mental
Condition, to follow proceedings of the trial and to make a defence in those proceedings. (Citations omitted).

That was the common law position. It has the consequence that a person who was unfit to plead because he was a deaf mute was liable to be detained at the pleasure of the Crown.

In the present case, I consider the Application, the provisions of s. 91 (1),(2) and (3) of the Criminal Procedure Code Act (Cap. 136), the medical report dated 25 August, 2014 and the persuasive authorities in support of the Application. I accept the persuasive authorities as my own and I apply them in the present case. I peruse s.13 of the Penal Code Act (Cap135). I note the Accused John Raymond is deaf mute, in the following degree - He has a long standing deafness since his childhood. His hearing test indicates a left dead ear and a right severe to profound loss. A hearing aid would have assisted him during his childhood day

in the development of spoken language and comprehending. Deafness totally impedes the development of spoken language.

There is no professional sign language interpreter available or found in the country. The accused is not trained to communicate by sign language or he does not benefit from any hearing aid since his childhood apart from informal lip-read.

In the light of the above, to be fit to plead, the Accused must be able at the time of trial or Preliminary Inquiry (PI) to: [Kesavarajah v The Queen (1994) 181 CLR 230]

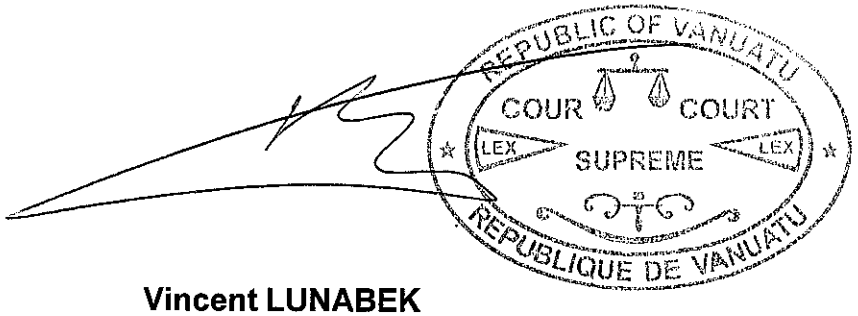
1. Understand the nature of the charge.
2. Plead to the charge.
3. Understand the nature of the proceedings, ie, that it is an inquiry as to whether the accused committed the offence.
4. Follow the course of the proceedings.
5. Understand the evidence.
6. Making a defence or answer the charge.

In this case, I am of opinion that Accused John Raymond is unfit to plead or stand trial because of his physical inability to comprehend the nature of the trial so as to make a proper defence to the charge. The words "other mental disorder" within the meaning of section 13 of Penal Code Act, has an extended meaning which includes an accused person in the similar situation as the Accused John Raymond. Mrs Harrison on behalf of the Public Prosecutor informed the court that the prosecution conceded to the ruling of the Court.

The proceedings in this case (Public Prosecutor –v- John Raymond, Criminal case No. 121 of 2014) are further adjourned. I have released the accused from the pre-trial custodial remand. I have also issued a Notice to the Public Prosecutor, the Public Solicitor, the Accused John Raymond, his father or brother and his chief to recall this case on Wednesday 29 October 2014 to consider section 13 of Penal Code and its application in the situation of the Accused John Raymond.

DATED at Port-Vila this 29th day of September 2014

BY THE COURT



Vincent LUNABEK
Chief Justice