

**BETWEEN:** Public Prosecutor

**AND:** Enoch Leon  
Defendant

*Date of Hearing:* 26 April 2019  
*By:* Justice G.A. Andrée Wiltens  
*Counsel:* Ms K. Mackenzie with Mr P. Toaliu for the Public Prosecutor  
Mr F. Tasso for the Defendant  
*Date of Minute:* 5 June 2019

---

**JUDGMENT**

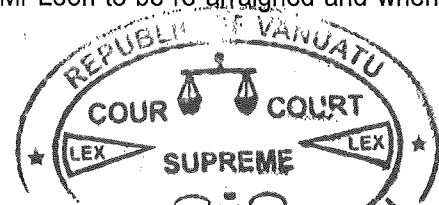
---

A. Introduction

1. This was an application to vacate guilty pleas in respect of 6 charges – 3 charges of sexual intercourse without consent and 3 charges of incest. I ruled immediately at the conclusion of hearing the matter that the application to withdraw the guilty pleas was declined, and I indicated that I would provide a written decision explaining the reasons why in due course. This is it.

B. Background

2. The criminal trial commenced on 6 December 2018. The complainant gave her evidence from behind a screen. She dealt with the allegations that comprised charges 1 and 2 of the Information. In particular, she re-iterated that she wished to proceed with her complaints, despite having at some time earlier indicated in writing that she wished to withdraw her allegations. What she had told me about charges 1 and 2 was sufficient to establish a *prima facie* case.
3. There had clearly been an expectation by Mr Leon that the complaints would be withdrawn, and I therefore allowed Mr Joel time with his client to re-assess their position, before the complainant was asked about her further allegations. Mr Joel subsequently asked for more time, which I allowed him. Eventually Mr Joel asked for Mr Leon to be re-arraigned and when



that was done Mr Joel pleaded guilty to six of the eight charges against him. Ms Lunabek, as prosecutor then entered a *nolle prosequi* in respect of the final two charges, which were dismissed. Mr Joel, on his client's behalf confirmed that the Summary of Facts tendered by the prosecution was true and correct in so far as they related to the admitted charges, and I duly convicted Mr Joel on the basis of his guilty pleas and the acceptance of the facts. I then scheduled the matter for sentencing and made time-tabling directions.

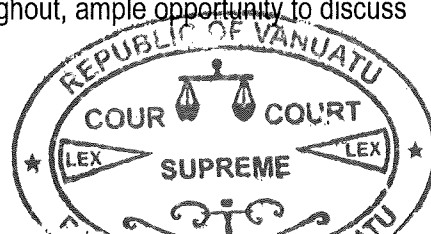
4. Sentencing submissions were not filed as per the time-tabling orders, which led to the sentencing date being re-scheduled. In the meantime, there was a change of counsel acting, with Mr Tasso taking over the defence from Mr Joel. Mr Tasso then filed the application to vacate the guilty pleas, with a sworn statement by his client in support. The application was then case-managed to be heard on 26 April 2019.

#### C. Application

5. The seven grounds pleaded in support of the application involved the following:
  - (i) Mr Leon was panicked when he pleaded;
  - (ii) The charges were not explained by Mr Joel;
  - (iii) Mr Leon did not understand what guilty/not guilty meant;
  - (iv) Mr Leon did not understand the elements of the charges;
  - (v) Mr Leon believed he had a defence to the charges;
  - (vi) Mr Leon believed he had reasonable grounds to defeat the case; and
  - (vii) The complainant had confirmed in writing she wished to withdraw the case.
6. In his sworn statement in support of the application, Mr Leon repeated grounds (i) to (v) above. He stated that he considered his defence to be strong, and he noted that there was a presumption of innocence in his favour. He opined that the Court would ultimately find him not guilty if a trial were conducted. Given the evidentiary burden on Mr Leon, the sworn statement is extremely brief.

#### D. Response to Application (filed in advance of the Applicant's submissions)

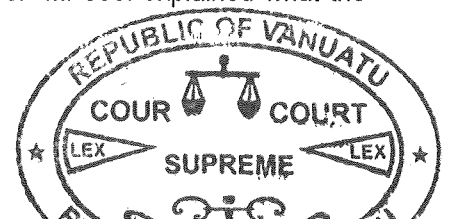
7. Ms Mackenzie traversed the history of this case, in much the same terms as I have described them above. She referred to relevant authority and submitted the two principle considerations in determining whether the application ought to be granted in the overall interests of justice involved close scrutiny of the circumstances surrounding the entry of the pleas and whether any reasonable defence was available.
8. It was further submitted that there was no evidence of Mr Leon's distress at the taking of his pleas – no application was made to adjourn the proceedings and no reference was made to this alleged indisposition in Mr Leon's Pre-Sentence Report. It was contended that Mr Leon had had the advantage of competent defence counsel throughout, ample opportunity to discuss



the issues and take legal advice, and that his understanding of the prosecution case is evident from his admissions to the Pre-Sentence Report writer. It was submitted there was no evidence of any miscarriage of justice; nor could it properly be said that there was a reasonable defence available.

E. Hearing

9. Mr Leon gave evidence in support of his application. He told me he was a teacher by occupation. He confirmed as true and correct his sworn statement and told me that he believed he had a reasonable defence to the charges.
10. In cross-examination Mr Leon agreed that Mr Joel had explained the charges to him, that it was a criminal matter and that the allegations involved him having sex with his step-daughter. Mr Leon said Mr Joel had been polite in telling him it was a serious matter, but that he had not provided any details. Mr Leon knew what he was charged with, but said that Mr Joel had not told him that. Mr Leon maintained that Mr Joel had told him that Mr Joel thought they would be successful, as they had a case.
11. Mr Leon agreed that he had spoken with Mr Joel part-way through the complainant's evidence – he said he had panicked and said that he would plead guilty. He denied that Mr Joel had advised him to plead guilty – he said Mr Joel had told him it was a strong case and that it was up to Mr Leon to decide. Mr Leon said that he decided to plead guilty not because of what he had heard by way of the evidence, but because Mr Joel had told him the prosecution case was strong.
12. Mr Leon recalled entering not guilty pleas when the charges were first put to him on arraignment. He denied knowing there were 2 other additional charges against him – both of interfering with a witness. Mr Leon agreed he had spoken to Matildah Kalang, the Pre-Sentence Report author – he said she was against him, and had told that him he would be sentenced to life imprisonment. He said he was confused at the time.
13. Mr Leon said that he signed his sworn statement in support of the application without first reading it. He said his defence to the charges was that they are not true. Mr Leon acknowledged the police had put the allegations to him – he said he made admissions as he had no lawyer with him at the time. Mr Leon also said that he had heard his step-daughter allege he had sex with her before he left the Court to discuss the pleas with Mr Joel, and that when he returned he pleaded guilty.
14. Mr Joel also gave evidence, having the benefit of a waiver of lawyer-client privilege from Mr Leon. He has practised as a defence lawyer since 1991. Mr Leon had been his client since 2005.
15. Mr Joel only started acting in respect of the present charges in October 2018 – the Public Solicitor had acted for Mr Leon from his arrest in March 2018 until then. Mr Joel had his file with him as he gave his evidence, and referred to it from time to time to refresh his memory.
16. He related details of an interview with his client, in custody, on 5 December 2018 which ran from 3.10pm to 5.15pm. In that time, Mr Leon had given Mr Joel a series of questions he wanted put to the complainant – there were a number of pages. Mr Joel explained what the

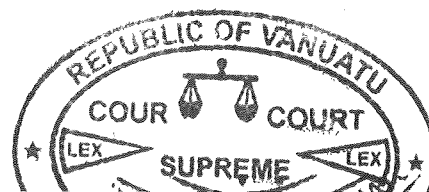


prosecution was required to prove, and they discussed the facts of the case and what the defence would be. Mr Joel told me he had no doubt that Mr Leon fully understood the prosecution case – he considered the questions put by Mr Leon were relevant.

17. Mr Joel confirmed they discussed potential defences, and the fact that he had received a letter from the complainant indicating she wanted to withdraw the charges. However, at trial, the complainant did not do that. As a result Mr Joel discussed the position with Mr Leon, for initially 5 minutes, but then further time was allowed. They discussed the fact that to continue on with the trial would result in losing mitigation, and that a plea would result in a more lenient sentence. Mr Leon thought about it, and then said that he wanted to change his pleas. Mr Joel did not consider Mr Leon to be stressed when he was on trial and when he pleaded guilty.
18. Mr Joel then approached the prosecutor to see if his client were to plead to the sexual charges, would she offer a *nolle prosequi* on the interfering with witness charges. She agreed. Mr Joel told me that Mr Leon was aware that he would make that approach – that Mr Leon knew what he was doing when he pleaded guilty, and that he was aware of what would happen to him if he pleaded guilty.
19. Mr Joel had made notes of what had occurred, although he did not have signed instructions.
20. Mr Joel confirmed that Mr Leon did not expect his daughter to maintain her allegations, which caused him to be a bit panicked. Mr Joel explained the charges to Mr Leon fully. He said that Mr Leon understood very well the difference between guilty and not guilty.
21. In cross-examination, Mr Joel conceded that Mr Leon was maybe a little panicked. He reiterated that on several occasions he had explained the charges to Mr Leon, including during the break in the complainant's evidence. Mr Joel denied that Mr Leon was very panicked that day and also denied that he had failed to explain the difference between guilty and not guilty to Mr Leon.
22. The final witness to give evidence was Matildah Kalang. In the course of preparing her pre-Sentence Report, she showed Mr Leon the prosecution summary of facts and the information with all the charges. She said she verbally explained both, and that Mr Leon confirmed to her that he understood that. She told me that Mr Leon told her it was the complainant's fault although he admitted that he had committed the offences – had sexual intercourse with his step-daughter. She considered that Mr Leon was attempting to shift the blame – she did not find him very co-operative. She told me, when cross-examined, that she had not mentioned life imprisonment.
23. I noted that the Pre-Sentence Report contained the not insignificant statement: "Mr Enoch agreed with the Prosecution Brief Facts".
24. Mr Taso's oral submissions did not assist me. I did not call on Ms Mackenzie to respond, as I already had her written submissions in opposition to the application.

#### F. Evaluation of Evidence

25. I found Mr Leon to be inconsistent and to be doing everything possible to attempt to extricate himself from what he obviously realised was a difficult position. I determined he had a strong

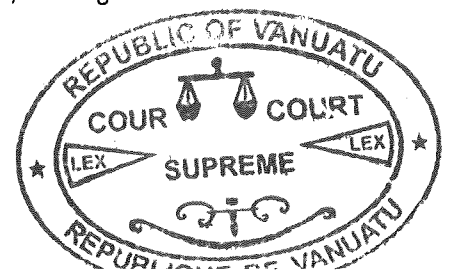


motive to do other than tell me the true position. What he said contradicted what the other witnesses told me – I was convinced the reason for that was that he was embellishing his account. I did not accept him as a witness of the truth.

26. The fact that he was or had been a teacher indicated he had attained a level of education such that his protestations of not knowing the difference between guilty and not guilty were incredible. His conduct of entering not guilty pleas on arraignment and then, after having heard his step-daughter's evidence in relation to charges 1 and 2 and having discussed his position with his counsel, changing his pleas confirm that assessment.
27. The language used in the information setting out the charges is not such as to require considerable explanation. The legal concepts involved were made simple by the common everyday language used. I noted further that Mr Leon gave his evidence in English and was clearly proficient in the language. Mr Leon's professed lack of understanding of the charges is difficult to accept.
28. Mr Joel had no motive to do anything but tell the truth; and he had notes of what had occurred which he had made at the time to assist him. His evidence was entirely credible – what on earth was he doing in custody with Mr Leon for over 2 hours (a fact that was unchallenged) if not discussing every aspect of the prosecution charges, the evidence and the possible defences?
29. I have no doubts that Mr Joel fulfilled his role capably and explained not only the difference between pleading guilty and not guilty, but also what would eventuate if either plea was entered. I accept that the prosecution case was fully explored with Mr Leon, and that his defences were canvassed to the degree explained by Mr Joel. If Mr Leon did not understand the case, then how was it that he produced several pages of questions he wanted put to the complainant, which Mr Joel considered relevant?
30. I accepted the evidence of Ms Kalang. It is quite preposterous to think, as alleged, that she would tell a prisoner about to be sentenced that he was likely to be given a sentence of life imprisonment. The remainder of her evidence was unchallenged. In my view she also had no motive other than to tell the truth.

#### G. Discussion

31. For the application to vacate his guilty pleas to gain any traction, Mr Leon needed to establish, on the balance of probabilities: (1) that the legal advice given to him was inadequate or wrong in law; or (2) a misunderstanding by him of the charge(s) and/or evidence had existed; and (3) that he had an arguable defence to the charge(s). Those matters then needed to be assessed against the over-riding consideration of whether there may be a miscarriage of justice in accepting the guilty pleas and not allowing the application.
32. There was simply no satisfactory evidential basis for this application to succeed. All the evidence in fact tends to the contrary of what was alleged – Mr Leon understood the charges, he understood the pleas he entered and what would follow on inevitably from that, and his bare denials do not constitute an arguable defence. I observed the complainant give evidence in relation to charges 1 and 2 – she was reluctant, but entirely credible; although that assessment

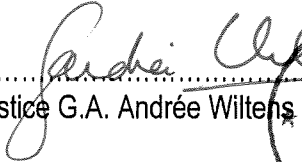


was made without the benefit of cross-examination. I note also the admissions made by Mr Leon to the police and subsequently to Ms Kalang.

H. Decision

33. For the reasons provided Mr Leon's application to vacate his six guilty pleas is dismissed.

Dated at Port Vila this 5th day of June 2019  
BY THE COURT

  
.....  
Justice G.A. Andrée Wiltens

