

BETWEEN: Public Prosecutor
Appellant

AND: Paul Wari & Jonathan Wako
Respondents

Date of Hearing: 29 July 2021
Before: Justice V.M. Trief
In Attendance: Public Prosecutor – Ms B. Ngwele
Respondents – Mr G. Takau
Date of Decision: 2 August 2021

JUDGMENT

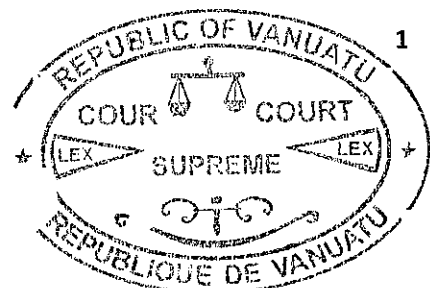
A. Introduction

1. The Appellant Public Prosecutor appealed against the dismissal of the charges by the Magistrates' Court on 13 August 2020.
2. Having heard counsel, I gave my decision orally. I now set it out in writing.

B. Background

3. On 19 May 2020, the Respondents Paul Wari and Jonathan Wako entered the following pleas in the Magistrates' Court:

a. Mr Wako	Count 1	Guilty
b. Mr Wari	Counts 2 and 3	Not Guilty
4. The Prosecution then entered *nolle prosequi* on the Count 2 charge, leaving the one Count 3 charge against Mr Wari.



5. Mr Wari's trial on the Count 3 charge was set for 25 and 26 June 2020, with Mr Wako's sentencing to occur after that.
6. On 25 June 2020, the Prosecution and all witnesses attended Court. The trial did not proceed due to the transfer of the presiding Magistrate to Santo.
7. The matter was next listed for trial on 13 August 2020. The Prosecution did not attend.
8. By Orders dated 13 August 2020, the Magistrates' Court dismissed the charges against Mr Wari and Mr Wako on the following grounds:
 - a. *That the prosecutor did not appear in Court today;*
 - b. *That the matter has been listed more than 3 times;*
 - c. *That there has been no progress on the matter; and*
 - d. *That the Prosecutor has no real prospect of pursuing the matter.*

C. Grounds of Appeal

9. Ms Ngwele advanced the following grounds of appeal:
 - i) The learned Magistrate erred by acting on a number of incorrect factual basis, taking into account irrelevant considerations; and
 - ii) The learned Magistrate erred by not giving the Prosecution an opportunity to be heard before dismissing the charges.

D. Discussion

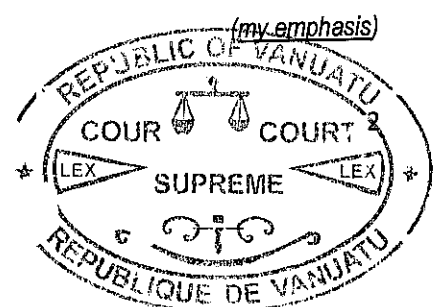
Mr Wako

10. Mr Takau stated at the outset that Mr Wako pleaded guilty to the charge against him and is awaiting sentencing, therefore the Magistrates' Court erred in dismissing the charge against him. I agree. The appeal must be allowed in respect of Mr Wako.

Mr Wari

11. The Magistrates' Court has the power to dismiss charges pursuant to s. 131 of the *Criminal Procedure Code* [CAP. 136] (the 'CPC') which provides as follows:

131. *If at the time and place to which a hearing or further hearing has been adjourned, the accused person does not appear before the court which made the order of adjournment the court may issue a warrant for the arrest of the accused and cause him to be brought before the court. If the complainant does not appear the court may dismiss the charge with or without costs as it may consider fit.*



12. The Magistrates' Court purported to dismiss the charge under s. 131 of the CPC.
13. It is undisputed that the Prosecution and complainant did not appear on 13 August 2020, therefore the Magistrates' Court could have dismissed the charge against Mr Wari for the non-appearance of the complainant. However, the Court stated other reasons for doing so, which other reasons Mr Takau properly conceded were not provided for in s. 131 of the CPC.
14. It was common ground therefore that the learned Magistrate proceeded on an incorrect factual basis, taking into account irrelevant considerations, in her dismissal of the charge against Mr Wari.
15. It was also common ground that the learned Magistrate acted in a procedurally unfair manner by not giving the Prosecution an opportunity to be heard before dismissing the charges.

E. Result

16. The appeal is **allowed**. The Magistrates' Court Orders dated 13 August 2020 are set aside, and the charges against Mr Paul Wari and Mr Jonathan Wako are reinstated.
17. The matter Criminal Case No. 2332 of 2019 be relisted in the Magistrates' Court for:
 - a. The sentencing of Mr Wako. Counsel are agreed that the sentencing of Mr Wako should occur forthwith before Mr Wari's trial, as Mr Wako will likely be called as a witness in that trial; and
 - b. The trial of Mr Wari on the Count 3 charge.

**DATED at Port Vila this 2nd day of August 2021
BY THE COURT**

