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

Criminal
Case No. 20/3209 SC/CRML

PUBLIC PROSECUTOR

v

EDWARD IAVILU

Dates of Trial:	14 and 15 September 2021
Before:	Justice V.M. Trief
In Attendance:	Public Prosecutor – Ms J. Tete
	Defendant – Ms F.L. Kalsakau

DECISION AS TO NO CASE TO ANSWER

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1. After Ms Tete closed the Prosecution case, Ms Kalsakau made an application that there was no case for the Defendant to answer pursuant to s. 135 of the *Criminal Procedure Code* [CAP. 136] (the 'CPC'). She cited *Public Prosecutor v Kilman* [1997] VUSC 21.

2. Ms Tete opposed the application, referring to s. 164 of the CPC and citing *Public Prosecutor v Verlili* [2017] VUSC 166. She submitted that there was evidence that the Court could convict Mr Iavilu of Count 2 on, even if the Court had reservations about the manner in which witnesses gave their evidence. She conceded that there was no evidence on which Mr Iavilu could be convicted in relation to Counts 1, 3 and 4.

3. Given the concession, I pronounced a verdict of not guilty on Counts 1; 3 and 4. Mr Iavilu is acquitted and discharged accordingly.

4. I then adjourned for lunch. On resumption, I gave my ruling in relation to Count 2.

5. I have belatedly realised and now record that s. 135 of the CPC applies to the Magistrates' Court. Subsection 164(1) of the CPC is the applicable provision:

> *164. (1) If, when the case for the prosecution has been concluded, the judge rules, as a matter of law that there is no evidence on which the accused person could be convicted, he shall thereupon pronounce a verdict of not guilty.*

6. The Court of Appeal in *Public Prosecutor v Suaki* [2018] VUCA 23 stated at [10] and [11]:

10. *... we consider that the objective of a "no case to answer" assessment is to ascertain whether the Prosecution has led sufficient evidence to necessitate a defence case, failing which the accused is to be acquitted on one or more of the counts before commencing that stage of the trial. We therefore consider that the test to be applied for a 'no case to answer" determination is whether or not, on the basis of a prima facie assessment of the evidence , there is a case, in the sense of whether there is sufficient evidence introduced, on which, if accepted, a reasonable tribunal could convict the accused. The emphasis is on the word "could" and the exercise contemplated is thus not one which assesses the evidence to the standard for a conviction at the final stage of a trial.*

11. *The determination of "no case to answer" motion does not entail an evaluation of the strength of the evidence presented, especially as regards exhaustive questions of credibility or reliability. Such matters are to be weighed in the final deliberations in light of the entirety of the evidence presented. In our view therefore, the question which the judge has to consider at the close of the prosecution case in a trial on the indictment on information is whether the prosecution has given admissable evidence of the matters in respect of which it has the burden to proof. It is for him as a matter of law to determine whether the evidence adduced has reached that standard of proof prescribed by law. The standard of proof required by law here is not proof beyond reasonable doubt which only comes after the conclusion of the whole case. It seems to us therefore that a consideration of a "no case to answer" by the judge's own motion or a submission of "no case to answer" ought to be upheld in trials on indictment if the judge is of the view that the evidence adduced will not reasonably satisfy a jury (judge of fact), and this we think will be the case firstly, when the prosecution has not led any evidence to prove an essential element or ingredient in the offence charged and secondly, where the evidence adduced in support of the prosecution's case had been so discredited as a result of cross-examination, or so contradictory, or is so manifestly unreliable that no reasonable tribunal or jury might safely convict upon it. In our view, such evidence can hardly be said to be supportive of the offence charged in the indictment on the information or any other offence of which he might be convicted upon.*

(*my emphasis*)

12. The Prosecution called 2 witnesses. Anita Sam gave evidence that on 30 October 2020, she saw Mr Iavilu hit the complainant Jenny Napuat on her left side and head. Ms Napuat in her evidence completely resiled from what she had said in her statements to the Police in November 2020. I declared her a hostile witness and granted Ms Tete leave to cross-examine her. She stated several times that what she had told the Police in her statement dated 12 November 2020 was untrue. She then answered 'yes' to a question from Ms Tete that what she told the Police was true that on 30 October 2020 Mr Iavilu hit her. Ms Napuat denied that her statements to the Police dated 11 November 2020, 12 November 2020 and 26 November 2020 were true. Under cross-examination by Ms Kalsakau, Ms Napuat stated that it was not true that Mr Iavilu hit her on 30 October 2020.

13. Applying the test as set out in Suaki at [11], I considered that the evidence adduced in support of the Prosecution's case was so contradictory (within Ms Napuat's own evidence, and between Ms Sam and Ms Napuat's account) and so manifestly unreliable that no reasonable tribunal or jury might safely convict on it. Accordingly, I held that as a matter of law there is no evidence on which Mr Iavilu could be convicted.

14. I pronounced a verdict of not guilty on Count 2 and informed Mr Iavilu that he was acquitted and discharged on that charge as well.

DATED at Port Vila this 15th day of September 2021
BY THE COURT

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Justice Viran Molisa Trief

REPUBLIC OF VANUATU
COUR COURT
LEX SUPREME LEX
REPUBLIQUE DE VANUATU