IN THE COURT OF APPEAL OF THE REPUBLIC OF VANUATU
(Criminal Appellate Jurisdiction)

Criminal Appeal
Case No.17/2185 CoA/CRMA

BETWEEN: ANDRINA KELEP
Appellant

AND: PUBLIC PROSECUTOR
Respondent

Coram:	***Hon. Chief Justice Vincent Lunabek*** ***Hon. Justice John von Doussa*** ***Hon. Justice Ronald Young*** ***Hon. Justice Daniel Fatiaki*** ***Hon. Justice Dudley Aru*** ***Hon. Justice David Chetwynd*** ***Hon. Justice Paul Geoghegan***
Counsel:	*Mr. E. Toka for the Appellant* *Mr. K. Massing for the Respondent*
Date of Hearing:	*9th Nov. 2017*
Date of Judgment:	*17th Nov. 2017*

JUDGMENT

1. On 24 August 2016 the appellant and his wife were charged in the same Information on separate counts of Sexual Intercourse Without Consent contrary to Section 89A, 90 and 91 of the Penal Code [CAP. 135].

2. Although the Statement of Offence did not identify the particular paragraph of Section 90 that was being charged, in the appellant's charge, the particulars were:
"*... sometimes long 10 March 2016 long Malekula, you ibin havem sexual intercourse wetem* (the complainant) *without consent blong hem olsem you bin pushum cock blong you go inside long vagina blong hem*".

[translation: On 10 March 2016 at Malekula, you had sexual intercourse with (the complainant) without her consent in that you inserted your penis into her vagina].

3. Such particulars are consistent with an offence of sexual intercourse without consent against paragraph (a) of Section 90 and is to be contrasted with the offence under paragraph (b) where intercourse occurs with the consent of the

complainant but consent is obtained in circumstances that renders it involuntary.

4. At their arraignment the appellant and his wife denied the charges as recorded in the verdict: "*... on the basis that –*

"*(a) the complainant had consented to sexual intercourse, and*

(b) they had reasonable belief that the complainant was consenting to sexual intercourse".

5. The trial at Lakatoro, Malekula lasted for 2 days and both the appellant and his wife gave sworn testimony in their defence. The trial judge delivered his verdict convicting the appellant and acquitting his wife. The appellant was remanded on bail and was eventually sentenced on 9 August 2017, to a term of 5 years imprisonment backdated to 28 October 2016.

6. The appellant appealed against the sentence imposed by Notice of Appeal dated 22 August 2017. Grounds of appeal were later filed on 11 October 2017. The appeal was listed for hearing during the present session.

7. Before the hearing of the appeal however, and after perusing the appeal papers members of this Court became concerned with the appropriateness of the appellant's conviction and counsel were duly informed. When the appeal was called on for hearing several days later the Court addressed its concerns with both counsel and noted an application by the appellant to include an appeal against his conviction. The hearing was further adjourned to allow respondent counsel time to consider four issues raised by the Court:

(1) The nature of the charge and conviction entered against the appellant;

(2) The meaning and effect of paragraph 8 of the verdict and what was the evidence of intimidation;

(3) The manner in which the trial judge dealt with the element of reasonable belief on the appellant's part; and

(4) How the findings of credit against the complainant affects the conclusions of the trial judge as to the appellant's guilt.

8. At the resumed hearing counsel for the respondent filed written submissions and addressed the court orally in seeking to sustain the appellant's conviction.

9. In respect of issue (1) counsel for the respondent concedes that the particularisation of the charge is not clear and the prosecution should have clearly stated the provisions it relied on.

10. As we have noted the particulars of the charge alleged an offence of sexual intercourse without consent. At the beginning and during the trial this was the allegation the appellant was entitled to assume he faced.

11. In his decision the trial judge said that as to the complainant's consent, the prosecution had to prove either the complainant did not consent or that her consent was obtained (as relevant here): "*by means or threats of intimidation of any kind*". The judge concluded that the prosecution had proved the complainant's consent was obtained by intimidation. Given this proposition was not the prosecution case before or at trial, it was not open for the trial judge to convict the appellant on this basis when the allegation of consent obtained by intimidation had never been put to the appellant when he gave evidence nor advised to his counsel.

12. The second issue of concern relates to the judge's finding with respect to *"intimidation"*. There was no evidence before the trial judge that, in fact, the complainant's consent was obtained by intimidation.

13. In his decision the judge recounted the appellant's evidence that he had reluctantly agreed to sexual intercourse at the complainant's request. The judge then said:

> "*But there is the other side of the coin, that facing RM. She was clearly intimidated by the thought that she would face the consequences of her action alone unless she got her cousin brother into it as well. And that is what happened. Her consent was obtained by intimidation ...*"

14. It is difficult to understand the meaning of this statement. It does not identify any utterance by the appellant or any act instigated by him which did or could intimidate the complainant. The only *"intimidation"* identified by the trial judge is the complainant's own thought that she might have to face the consequences of her actions alone. Her "*actions*" are not identified, and the intimidation is her own. We also note no reasons are given for rejecting the appellant's evidence that what occurred was consensual sexual intercourse.

15. We are satisfied the judge did not identify any evidence on which he could have concluded the complainant's consent was obtained by intimidation. This leads into the third concern about the conviction.

16. The appellant's defence was that the complainant consented to sexual intercourse or, if that was rejected, then he had a belief based on reasonable grounds that the complainant was consenting. (***see:*** McEwen v. Public Prosecutor [2011] VUCA 32 at para. 17). As well as proving the absence of consent, the prosecution had also to disprove the appellant's claim. Although the judge identified this issue as relevant he did not make any findings as to whether the prosecution had disproved the appellant's belief based on reasonable grounds that the complainant consented. Without making such findings the judge could not have properly convicted the appellant.

17. As to the fourth issue, in acquitting the appellant's wife the trial judge observed that the case against her was "*more complex and technical*" and came down to the question of the credibility of the wife and the complainant as witnesses. In resolving that question the trial judge said:

"I accept Mr Toka's submissions that the evidence of Renatha, Roy and Chief Jack in relation to the sexual acts are hearsay and cannot be admissible. Putting all that aside, the Prosecution is left with Rose's evidence. And her evidence lacks credibility in that –

a) She lied about her age in examination in chief at the very beginning when she said she was only 15 years old. In fact she recognised her date of birth in her Birth Certificate given as 3rd March 1997 putting her at 18 years old.

I. Next, she lied that it was Asneth who called her first. How could that happen when Asneth did not know her phone number in the first place?

II. Next, she lied about not knowing why Asneth asked her to go to her house because when she answered Asneth saying "My phone is black out, I have to charge it first...", this indicates the movies were in her phone.

III. Next, she clearly lied about how many times Asneth rang. It was not two as she said but 3 as confirmed by her Dad and Asneth. Next, she lied about the defendant's children being at the sea with grandpa. It is not possible the children and their grandpa would be out in the open at that time of the night.

IV. Next, she lied that Renatha was her aunt, infact Renatha is her sister-in-law.

V. Next, she lied about closing her eyes when Andriana was having sex with her but at the same time she said she saw Asneth rubbing on Andriana's back at the time of sex. How could that be if she had her eyes closed?

These inconsistencies cast doubt about the truth of her story."

And then the trial judge said:

"Rose's evidence lacks corroboration. I remind myself of the danger of finding guilt and convicting Asneth on uncorroborated evidence. ***The many inconsistencies in Rose's evidence cast much doubt on the truth of her story.*** *And as long as these doubts exist, the Prosecution has not discharged its duty of proof beyond reasonable doubt as to the guilt of Asneth Kelep. And it follows that she must be given the benefit of that doubt.*

Accordingly and for those reasons and findings, *I return the verdict of not-guilty on you Asneth Kelep. You are hereby discharged and acquitted of the charge of sexual intercourse without consent".*

(our underlining and highlighting)

18. Given the adverse finding of credibility against the complainant and its consequence on the prosecutions' case against the appellant's wife, it was incumbent on the trial judge to fully and carefully consider the complainant's evidence as it related to the appellant. Although the evidence as summarised in the verdict is short, it did raise a similar credibility issue of the appellant's word against the complainant's. Unfortunately a similar analysis did not occur with the evidence against the appellant and no findings were made in that regard.

19. In the result the trial judge acquitted the appellant's wife because he seriously doubted the credibility of the complainant and yet, convicted the appellant presumably because he believed the complainant's evidence as it related to the husband.

20. In light of the foregoing discussions we are satisfied that the appellant's conviction must be considered unsafe and it is accordingly quashed. Although respondent's counsel orally sought a retrial we do not consider that such an order is either appropriate in the circumstances or in the interest of justice. It is therefore refused.

DATED at Port Vila, this 17th day of November, 2017

BY THE COURT

Hon. Chief Justice Vincent Lunabek.

REPUBLIC OF VANUATU COURT OF APPEAL COUR D'APPEL REPUBLIQUE DE VANUATU