

BETWEEN: **Geoffrey Morkro**
Appellant

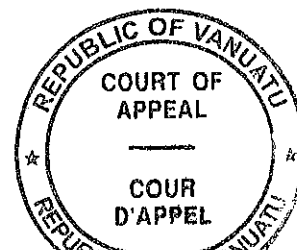
AND: **Public Prosecutor**
Respondent

Date of Hearing of Appeal: Monday, 16 July 2018
Before: Chief Justice V. Lunabek
Justice B. Robertson
Justice D. Aru
Justice G.A. Andrée Wiltens
Counsel Appearing: Mr N. Morrison for the Appellant
Mr S. Blessing for the Respondent

JUDGMENT

A. Introduction

1. This is an appeal against conviction on one charge of sexual intercourse without consent, laid contrary to sections 90 and 91 of the Penal Code Act [Cap 135]. That conviction was entered on 21 October 2016, after trial. The sole issue at trial was whether the sexual intercourse which had occurred had been consented to, or not.
2. On 22 October 2016 Mr Morkro was sentenced to a term of 5 years imprisonment, suspended for 2 years. Additionally, 200 hours of Community Work was ordered.



3. The Public Prosecutor appealed the sentence imposed. On 7 April 2017, the Court of Appeal allowed that appeal, and Mr Morkro was re-sentenced to a term of 3 years 9 months imprisonment – reflecting not only the fact that this was a prosecution appeal but also that Mr Morkro had virtually completed his 200 hours of Community Work. The sentence was not suspended.
4. On 30 June 2017, Mr Morkro filed this appeal against his conviction. The appeal is out of the 14-day prescribed period in section 94 of the Criminal Procedure Code [Cap 136] – to be within time it would have had to be filed by 5 November 2016. It is over 6 months, almost 7 months, out of time.
5. Accordingly Mr Morkro also applies for leave to appeal out of time, a discretionary remedy available to this Court under section 201 of the Criminal Procedure Code. That application is opposed by Mr Blessing, as is the appeal against conviction.

B. Leave to appeal conviction out of time

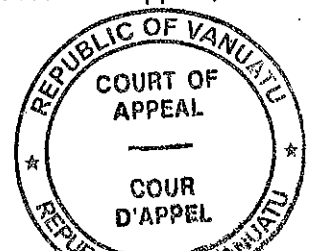
(i) Principles

6. The principles relating to an application of this type are clearly set out by this Court in *Gamma v PP* [2007] VUCA 19:

"The Applicant must demonstrate some special feature or features particular to the case that lead to the conclusion that in all the circumstances justice requires that leave be given. Amongst the considerations which will also be relevant in that overall assessment are the strength of the proposed appeal and the practical utility of the remedy sought, the length of the delay and the reasons for delay, the extent of the impact on others similarly affected and on the administration of justice, that is floodgates considerations, and the absence of prejudice to the Crown."

(ii) Discussion

7. We do not consider the approximate 2-months delay, which arises between the date of incarceration and the lodging of the appeal, is excessive; especially given the various difficulties Mr Morkro encountered in getting alternative legal representation. There is no prejudice to the prosecution. Further, we consider there is merit in the substantive appeal, for reasons that will shortly be discussed.



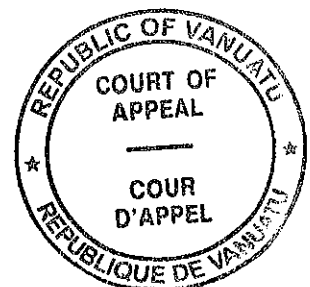
(iii) Decision

8. Accordingly, the application for leave to appeal conviction out of time is granted – in our view justice requires that.

C. Appeal against conviction

(i) Grounds

9. As part of the appeal against conviction, Mr Morkro alleges that:
- He gave his initial instructions to a Public Solicitor's Office counsel, which included a denial of the charge on the basis that sexual intercourse had taken place but was consensual; and he provided a list of 5 witnesses whom he wished called as part of the defence case;
 - His trial was called on at extremely short notice, so that he was unable to prepare his case or arrange for his witnesses to be present;
 - On the first day of trial a different Public Solicitor's Office counsel appeared for Mr Morkro, who had no knowledge of the instructions previously provided – and he maintained that the trial would have to proceed. Indeed, he did not even seek an adjournment;
 - On the second day of trial, a third Public Solicitor's Office counsel appeared and completed the case; and
 - There was no attempt to call the witnesses Mr Morkro had wanted called in his defence, and that evidence was both relevant and important to the defence case.

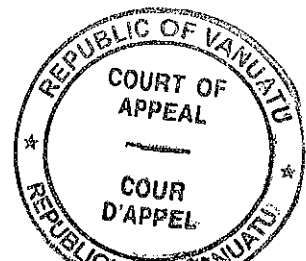


(ii) Opposition

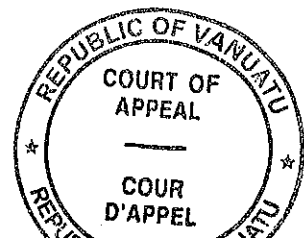
10. Mr Blessing pointed out that trials in the outer islands of Vanuatu are often called on at short notice – and that what transpired in this particular case is no different to what normally occurs. Due notice was given to the Public Law Office of the trial, as usual.
11. Mr Blessing has attempted to get an explanation from the counsel who appeared at trial to explain why the initial counsel could not carry on with the case at trial, why an adjournment was not applied for, and why a third counsel was involved. Mr Morkro has waived legal professional privilege. However, for reasons unexplained, Mr S. Carlo, counsel who appeared at trial, has not supplied such a statement.
12. Mr Blessing argued strongly that the evidence of the other intended defence witnesses would make no difference to the outcome of the case.

(iii) Discussion

13. Mr Blessing, quite properly, was unable to speculate as to what had transpired regarding the running of the defence case – and was hamstrung in being able to assist this Court with a possible counter explanation to what the appellant had deposed. This Court therefore was left with the uncontroverted evidence from the appellant to the effect that the trial, from the defence perspective, was seriously mishandled.
14. On that basis, we accept the trial was brought on at very short notice to Mr Morkro so that he was unprepared for trial and had no opportunity to arrange for his witnesses to be present. Further, Mr Carlo appeared without Mr Morkro's instructions, and did not seek an adjournment when he learnt what those instructions entailed. There is no explanation why a third counsel appeared for Mr Morkro on the second day of trial/sentence. We regard this state of affairs is unsatisfactory.
15. The findings of Justice Saksak at the conclusion of the trial require some examination. We set them out in brief:



- The complainant was an 18 year old student. She left school at about 2.45pm as she was hungry. While looking for mangoes to eat she chanced upon Mr Morkro who demanded sex while in possession of a .22 rifle. The complainant tried to talk Mr Morkro out of it, and she also physically resisted, but she was scared of the gun and he forced her to the ground, removed her clothes and had sexual intercourse with her. He then told her not to tell anyone. However she went home, distressed, and told her mother and her elder sister that Mr Morkro had "had sex" with her.
- The complainant's elder sister confirmed the recent complaint; and told the Court that their mother had become angry and had beaten the complainant. The mother said the complainant had been distressed and alleged "rape". The mother confirmed she had beaten her daughter out of anger.
- Mr Morkro gave evidence. He explained that he had met with the amorous complainant 3 days prior when she wanted to use his mobile phone. He agreed on condition that in return she agreed to have sex with him. Mr Morkro said the complainant agreed and thereafter he was looking for an appropriate time/place to put the plan into action. While on his way to go hunting with a friend (he had the gun, his friend had the bullets), he went into a store to buy chewing gum and happened to see the complainant. He gestured to her and she nodded – and they went into some bushes where out of sight they had consensual sexual intercourse. He also told the Court he had heard the complainant crying – he assumed that was after her mother had beaten her.
- Mr Morkro's wife gave evidence about a later confrontation with the complainant's family at which Mr Morkro denied having had sex with the complainant. The effect of her evidence was seen as irrelevant to the issue of consent, but was seen by Justice Saksak as undermining Mr Morkro's credibility. Given that he had admitted to having had sex, both to the police during interview, and in Court, his earlier denials were clearly inconsistent.
- Justice Saksak rejected the entirety of Mr Morkro's evidence – on the basis of lack of credibility and due to inherent unlikelihood. The Court did not accept there was



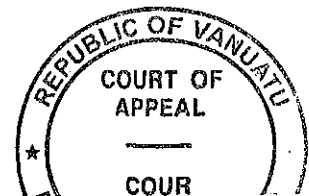
a plan; nor the explanation for Mr Morkro's going hunting with an unloaded gun and without ammunition.

- Justice Saksak concluded that the immediate response by the complainant in being distressed, her early voluntary complaint, coupled with her clear and credible evidence before him as to lack of consent, was sufficient to establish proof of the charge.

16. Contrary to what Mr Blessing submitted, Mr Morrison submitted that the further witnesses who should have been called at trial might well have impacted on those findings as follows:

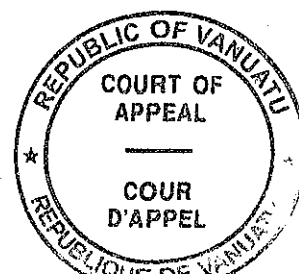
- Johnny Solomon and Jean Jacques Ciry, in their sworn statements, say they observed the meeting between Mr Morkro and the complainant 3 days prior – at 9pm at night, in Mr Morkro's truck, and at the markets, when the complainant was being rather amorous with Mr Morkro. That's where Mr Morkro alleged the arrangement was entered into; and the amorous advances are consistent with her agreement to later engage in sexual intercourse.
- Rex and Lyn Nathan, in their sworn statements, say they agreed to look after Mr Morkro's son while he went hunting with a friend; and they later observed the couple separately coming out of some bushes shortly after the sexual intercourse. They say the complainant was not distressed. Further, shortly after the complainant had gone inside her house, they heard her crying. If accepted this evidence would need to be assessed in relation to Mr Morkro's possession of the gun; and it goes directly to the central issue of consent.
- Azelton Nathan was the friend who was intending to go hunting with Mr Morkro. He confirmed he had purchased some bullets for that purpose; and that Mr Morkro would bring his gun. If accepted, this evidence supports Mr Morkro's version of why he was out and about with an unloaded gun and without bullets.

17. We respectfully agree with Mr Morrison. We cannot say that if this evidence had been called and it was to this effect, Justice Saksak's findings would have been different. However, we are of the view that this further evidence is admissible and relevant to the



issues that Justice Saksak had to determine. As a result, there was clearly an error by counsel to not call this evidence, nor to seek an adjournment so that it might be called. Mr Morkro's defence has been done an injustice.

18. Another feature of the case causes this Court some concern. It appears that shortly before the trial, perhaps a week or so (although dated 3 May 2016), the complainant may have attempted to withdraw her allegations. This was done in the form of a typed letter, signed by the complainant. The letter states that the complaint emanated from the complainant's parents; there was an earlier arrangement made to engage in sexual intercourse between the complainant and Mr Morkro; and Mr Morkro's rifle was not used to compel her to participate.
19. The prosecution attempted to lead this evidence, but were met with an objection by defence counsel to the effect that the document ought not to be admitted into evidence, as the maker of the statement (allegedly Mr Morkro's brother) was not in Court. Accordingly, the letter was not admitted into evidence. Given that the defence case disputed lack of consent, contended an earlier arrangement to engage in sexual intercourse had been struck and gave an innocent account for Mr Morkro's possession of the rifle at the time, it seems odd to this Court that this highly relevant evidence was excluded by the defence. This may have been a tactical decision, but in the absence of an explanation by the counsel involved, we are not convinced that it was. We consider it may well have been done in error.
20. It is a great pity that trial counsel did not participate in the appeal process by explaining his conduct at trial. Had that been done, the position this Court finds itself in may well have been different. In the absence of a cogent explanation for some of the matters that apparently occurred, we only have the evidence of the appellant. If criticism is inherent in our having to accept that uncontroverted account, then the fault for that must lie with counsel's lack of co-operation. It seems to us that whenever counsel conduct is challenged, as in this case, it behoves the counsel concerned to put forward his/her explanation for the manner in which the trial was conducted. To not explain certain conduct in circumstances such as these appears to us to be an abrogation of counsel's obligations to the Court.



D. Result

21. We see nothing wrong with the decision made by Justice Saksak on the evidence as it was presented to him. However, we consider a miscarriage of justice may well have occurred taking all the various aspects of this case, as discussed earlier, into account.
22. Accordingly, we allow the appeal out of time against conviction and order a re-trial.
23. We note that Mr Morkro was on bail prior to trial. We order that, pending the re-trial, bail be re-granted on the same terms and conditions as previously set.

Dated at Port Vila this 20th day of July 2018

BY THE COURT



Chief Justice V. Lunabek

