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

Criminal Appeal
Case No. 18/1926 CoA/CRMA

BETWEEN: ALEX TABEVA
First Appellant

AND: CLENCY QWITA
Second Appellant

JOHN LEONA
AND: Third Appellant

PUBLIC PROSECUTOR
AND: Respondent

Coram: ***Hon Chief Justice Vincent Lunabek***
Hon. Justice John von Doussa
Hon. Justice Ronald Young
Hon. Justice Oliver A. Saksak
Hon. Justice Daniel Fatiaki
Hon. Justice Dudley Aru
Hon. Justice Gus Andrée Wiltens

Counsel: *Mr. Henzler Vira for the Appellants*
Mrs. Katrina Mackenzie for the Respondent

Date of Hearing: *7th November 2018*
Date of Decision: *16th November 2018*

JUDGMENT

Introduction

1. On an evening in June 2018 the three appellants had sexual intercourse with the complainant. The complainant said at trial the sexual intercourse was

without her consent. In statements made to the police each appellant said intercourse was with the complainant's consent. Each of the appellants was convicted of unlawful sexual intercourse, and Mr Leona and Mr Tabeva were also convicted of indecent assault after trial.

2. This appeal against conviction claims; the trial Judge did not properly consider the complainants' evidence and the elements of the offence; and that the verdict was unsafe and unsatisfactory.

3. The appellants were sentenced as follows: Mr Leona was sentenced to 7 ½ years' imprisonment; and Mr Qwita 5 ½ years imprisonment and Mr Tabeva 2 ½ years' imprisonment for the sexual intercourse counts, with concurrent lesser sentences for the indecency. Mr Tabeva and Mr Qwita also appeal against their sentences on the grounds the sentences was manifestly excessive.

The Evidence

4. Unfortunately the trial Judge in his verdict did not recount what the complainant said in evidence of the night's events. Equally unfortunately the Judge's trial notes were difficult to read. However counsel for the appellants and respondent accepted that a prosecution brief of facts, together with some additions fairly described the complainant's evidence. We therefore use that document as the basis of our description of the complainant's evidence.

5. The complainant and the appellants are all from the same village. On an evening in June 2017 the complainant, in the company of a relative went to a house where the three defendants were drinking home brew. Once the complainant arrived at the address she said she wanted to leave. She and the three appellants were outside the house. However Mr Leona prevented her from going and forced her to drink some home brew. Mr Leona then pulled her into the house and removed her clothes. When the complainant cried out

Mr Leona put his hand over her mouth. The appellant then sucked the complainant's breast and had intercourse with her without her consent.

6. Then the complainant said Mr Leona called Mr Qwita into the room. Mr Quita also put his hand over her mouth and had intercourse with her without her consent. Finally Mr Tabeva came into the room, sucked the complainant's breast and had intercourse with her without consent. He also put his hand over her mouth to stop her crying out.

7. At that time the complainant's mother came towards the house with a torch. The appellants ran off. The complainant ran off. She said she was scared of her mother and how she would react. Shortly after the complainant left the house she said she met Shano Tanona and told him she had been raped by the three boys.

8. Each of the three appellants made statements to the police. They did not give evidence. Mr Leona said the intercourse was consensual. He denied preventing the complainant from leaving and said he asked the complainant for sex and she agreed. The statement also identified, in part, what Mr Tabeva had done, which casts some doubt on whether the intercourse between Mr Tabeva and the complainant was consensual. It was common ground this evidence would not have been admissible against Mr Tabeva.

9. Mr Qwita also said the intercourse was consensual. He said he did not "block" the victim's mouth. He asked to have sex with her and she agreed.

10. Finally Mr Tabeva's statement also said the intercourse was consensual. Mr Tabeva denied the claims by Mr Leona that the complainant may not have consented to sex with him.

11. Some three months after these events the complainant made a statement to the police. The complainant said that after she made the statement it was not read back to her to confirm the accuracy of what was recorded.

12. The other evidence at the trial was from Eva Silva, the complainant's mother who confirmed that she approached the house, saw some people run away but did not see her daughter. There was medical evidence and statements by two police officers produced which were of no relevance.

13. A number of other persons were present inside or nearby outside the house when these events occurred. Statements were obtained from two of these persons. The statements were provided to the defence but the witnesses were not called to give evidence. There were no other witness statements taken.

The Judge's Verdict

14. The Judge found that the complainant's evidence was truthful and reliable. He accepted there was no corroborative evidence but said it would only be if he was uncertain about her evidence that he would have to look for corroborative evidence. He said he was not uncertain about her evidence. The Judge rejected the statements by the appellants as untrue, and convicted the appellants on all charges except indecent assault with respect to Mr Qwita.

This Appeal

15. The first ground of appeal is that the trial Judge failed to properly consider the evidence of the complainant and the elements of the offence.

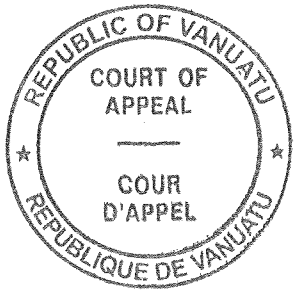
16. The appellants identified nine issues in support of this submission. They submit these factors meant it was unsafe to convict on the complainant's uncorroborated evidence. We consider each issue in turn.

17. First the appellants say that two witnesses to these events who gave statements to the police were not called as witnesses at trial and the prosecution did not advise the defence it was not proposed to call them to give evidence. This was contrary to S. 162(2) Criminal Procedure Code. An associated issue raised by the appellants is that the police knew the names of others who were present but did not interview these potential witnesses. The appellants say the prosecution's failures were prejudicial to the conduct of the appellants' case.

18. Counsel for the respondent accepted that the prosecution conduct of this case left a lot to be desired. The prosecution understood it failed in its obligation to interview all relevant witnesses and, where it did not propose to call to give evidence a person interviewed by the police, an appropriate notice should be given to defence counsel. We agree with counsel this was a poor effort at investigation and prosecution of this case. It is important these obligations, some statutory, are met by the prosecution.

19. However in this case we do not consider there is any risk of a miscarriage of justice arising from this failure. The statements by the two witnesses do not assist the appellant's case. They favour the prosecution. We simply do not know what, if anything, the other people in the vicinity may have heard or seen.

20. The third failure is the observation that the complainant did not immediately complain to her mother after the offending. The appellants say the evidence established the complainant ran away when she saw her mother. This was not the actions of someone who had been raped. Further the appellants say the complainant said she met another person immediately afterwards to whom she complained to but that person was not called as a witness. The Judge did not mention these issues in his judgment.

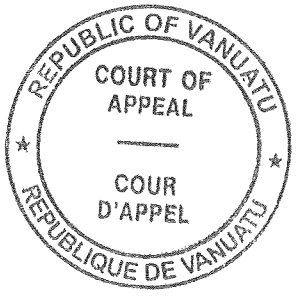


21. We do not consider that any inference contrary to the complainant's credibility can be taken from her avoidance of her mother or the evidential uncertainty about whether a recent complaint was made.

22. There may be many reasons why a complainant in such a situation might not wish to see her mother or immediately complain about a rape. In this case the complainant did say she was frightened of her mother's reaction. The Judge did not take into account any claim of a recent complaint in concluding the complainant was a truthful witness. We do not consider this issue is relevant to any claim of a miscarriage of justice.

23. Fourthly the appellants' claim that the evidence of the complainant's mother did not support the complainant's evidence. No explanation is given for this submission. We do not take it into account.

24. Fifthly the appellant submits that when the trial Judge said the complainant's was difficult to follow and that she was a difficult witness he should have rejected her evidence as untrue or unreliable. The Judge relevantly said:
"The complainant's evidence was sometimes difficult to follow. She was softly spoken and it was even difficult for the interpreter sitting next to her to hear what she was saying. Her evidence was also given in a very hesitant manner. She was clearly embarrassed in having to tell the intimate details of the incident to the court. I understand the pressures on a young woman giving evidence in open court about intimate sexual matters. This is especially so in a small community such as Loltong where the complainant knows everyone in the court, bar the professionals, and everyone knows her.
Even so, the complainant was still a difficult witness to follow. Although she what (sic) was said to be any class six school leaver there were language issues. Simple questions in Bislama posed no great difficulty but more difficult questions had to be translated from Bislama into language and the replies from *"language to Bislama."*



25. The Judge's difficulty was due to the complainant speaking softly and her inability at times to understand Bislama. The problems the Judge experienced with respect to the complainant's evidence were not difficulties which should have influenced his assessment of her credibility or reliability. The Judge said: "What is clear from the complainant's evidence is that she was certain that at no time did she consent to sexual intercourse with any of the defendants. She said so in her evidence in chief and in answer to questions during cross examination. She did not deviate from her assertions that what happened, happened without her consent being asked for or given."

26. We therefore reject the submission that the difficulties experienced by the Judge was a reason to reject the complainant's evidence.

27. Sixthly the appellant raised the failure of the police to read back the complainant's statement to the complainant. We do not consider this failure had any relevance to any miscarriage of justice claim.

28. The other complaints by the appellants related to the Judge failing to properly consider the inconsistencies in the complainant's evidence. It was submitted that if these inconsistencies had been properly considered by the Judge they would have cast doubt on the complainant's evidence. The Judge in his decision said: "The complainant gave a detailed statement to the police. That statement was given in September 2017 some three months after the incidents. It is quite often the case that police officers will write out in their own hand the evidence of a witness or a complainant. There is nothing untoward in that but it can, as it did in this case, lead to problems when a witness says the statement was not read back to them. The defence have pointed out that there are discrepancies between what the complainant said in court and what it is said she told the police. The inconsistencies were about who was present at the defendant's home other than the defendants and whether she was raped on a bed or on the floor. I do not accept that these inconsistencies are so extensive or substantial that they render all of the complainant's evidence as unreliable. I find that the complainant's evidence was truthful and reliable."

29. The Judge was entitled to conclude that although there may have been some minor inconsistencies in the complainant's evidence they did not affect his view of her credibility. He gave reasons why the inconsistencies did not affect his view on credibility. We see nothing wrong in his approach.

30. The appellants also identified what they claimed were further inconsistencies with respect to the complainant's evidence. In particular, the complainant said that initially when her mother approached the house she could not escape because Mr Qwita was holding her down. The appellants say that Mr Qwita was outside at this time and could not have been holding the complainant down. This is not an inconsistency. It is a difference in the evidence of the complainant and one of the defendants. The Judge concluded the complainant was telling the truth and so her version of the events was correct. He was entitled to react his conclusion.

31. We therefore reject the first ground of appeal based on these evidential challenges.

32. The second ground of appeal was that in the circumstances of this case the Judge should not have concluded the complainant's evidence was true without corroborative evidence. As to corroboration in this case the Judge said:

"There is no evidence to corroborate the complainant's state of mind at the time of the alleged offending. However if I am satisfied that her evidence is truthful and reliable then there is no need for corroborative evidence. I bear in mind that if there is any of the complainant's evidence which I an uncertain about then I do need to find corroborative evidence to support that evidence, but only that evidence. Otherwise, I can accept the complainant's evidence as it stands."

33. This Court has previously said that it would be appropriate to review whether the corroboration rule should still be the law of Vanuatu. This has not proved to be such an appropriate case.

34. In this case the Judge was aware of and considered the corroboration rule. The corroboration rule does not prohibit a Judge from accepting the evidence of a complainant in a case of alleged sexual assault without corroboration. It simply requires Judges to remind themselves of the dangers of convicting on the uncorroborated evidence of a complainant. The trial Judge in this case was aware of such a danger. He was entitled however to believe the evidence of the complainant as he did. We therefore reject this ground of appeal.

35. The appeal against conviction is therefore dismissed.

Sentence Appeal

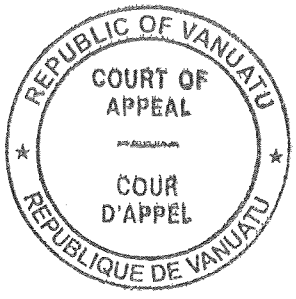
36. Mr Leona was sentenced to 7 ½ years' imprisonment for the rape and a concurrent sentence of 3 years for the indecent assault.

37. Mr Qwita was sentenced to 5 ½ year's imprisonment. The reduced sentence was said to reflect his relative youth at 19 years of age.

38. Finally Mr Tabeva was sentenced to 2 ½ year's imprisonment and 6 months concurrent for the indecent assault. Mr Tabeva's sentence was significantly discounted given his age at the offending was said to be 15 years or 16 years.

39. Mr Leona has not appealed his sentence. Mr Qwita has appealed his sentence although no submissions were made to support this appeal. Mr Qwita was 19 years at the time of the offending and he has already had a significant discount of 2 years for his youth. His appeal is dismissed.

40. In support of his appeal, Mr Tabeva submits that given his age, and S. 54 of the Penal Code his sentence should have been suspended. He submits that he should not be subject to the negative influences of older inmates in prison. The principle of rehabilitation and reintegration will best be served by a suspended sentence.



41. The respondent accepts that Mr Tabeva was under the age of 16 years at the time of the commission of the offence. S. 54(1) and (2) of the Penal Code Act (CAP. 135) provides:

> "54 IMPRISONMENT OF MINORS
>
> (1) A person under 16 years of age is not to be sentenced to imprisonment unless no other method of punishment is appropriate.
>
> (2) If a person under the age of 16 years of age is sentenced to imprisonment the Court must give its reasons for doing so. "

42. As to Mr Tabeva's sentencing the Judge said:

"The courts must obviously treat such offending as extremely serious (see *Scott* cited above). In this case I think it would send the wrong message if Mr Tabeva was not sent to prison. The message would be you can participate in serious offending along with adults but whilst they will be sent to prison you will not. However, I must bear in mind the very young age of Mr Tabeva. He has no previous convictions and has taken part in a reconciliation process so would be liable to a sentence of 7 ½ years. However due to his young age his sentence will be heavily discounted and he will serve 2 1/2 years imprisonment. He will be sentenced to 6 months imprisonment for the offence of committing an act of indecency. The sentences to be served concurrently. He will be serving his sentence in the company of his relatives who can support him during his incarceration. He will also be able to take part with them in the rehabilitation modules of sexual offending, victim awareness and family violence. From what they told the probation officer all three defendants would benefit from such rehabilitation."

43. In addition we note that Vanuatu has ratified the United Nations Convention on the Rights of the Child. The Convention provides that imprisonment of young persons should be a last resort and for the shortest possible time [Article 37(b)]. Further Article 37(c) provides that if imprisoned a young person should be separated from adults unless it is considered that would not be in the child's best interest. We were told Vanuatu does not have any youth prison or facility to keep youth offenders separate while in prison.

44. These provisions all stress the importance of avoiding prison for young persons if at all possible. These principles must always however be balanced against the seriousness of the crime actually committed by the young person.

45. This was a very serious rape by three young men of a young woman. The young woman was restrained. The event would have been very traumatic for her. The starting point the Judge adopted at sentencing based on the facts of the offending of eight years, was modest. A significantly higher start point could have been justified. We acknowledge Mr Tabeva did not initiate the rapes and perhaps became involved in part because of his immaturity. On the other hand he knew two other men had raped the complainant immediately before him.

46. Neither the respondent nor the appellant disputed the Judge's sentence of 2 ½ year's imprisonment before considering suspension. This sentence already contained a significant discount for the appellant's youth of some 5 years.

47. While we accept there is some strength to the appellants' submissions on suspension relating to the appellant's youth we consider this very serious crime must be marked by some period of imprisonment without suspension. We consider the Judge's decision to refuse to suspend any of the 2 ½ year's prison sentence failed to adequately reflect S. 54 of the Penal Code and Vanuatu's commitment to the Convention on the Rights of the Child. We therefore allow the appeal against sentence quash the sentence of imprisonment and substitute the following sentence.

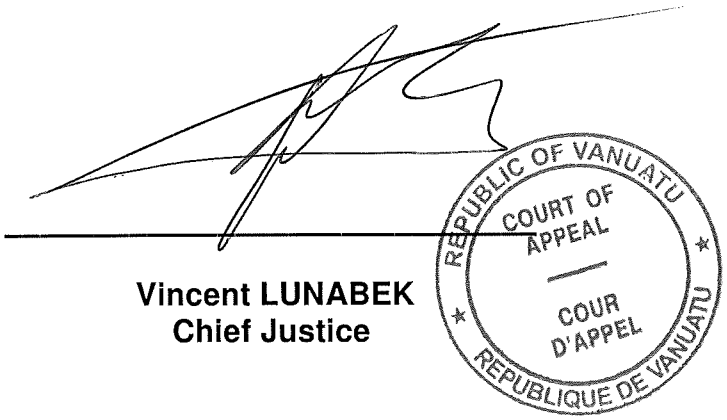
(a) Mr Tabeva will be sentenced to 2 ½ years' imprisonment on the unlawful sexual intercourse charge and 6 months concurrent on the indecent assault charge.

(b) Of the 2 ½ year's imprisonment 15 months will be suspended for a period of 3 years. The appellant will therefore serve 15 months in prison. That sentence will commence from 3 July 2018, the date of his imprisonment by the Supreme Court.

(a) Mr Tabeva will also be subject to a period of supervision from his release from prison of 12 months. It will be a condition of the probation that he undertakes rehabilitation courses as identified by his probation officer and undertakes schooling or training as directed by the probation officer.

DATED at Port Vila this 16th November, 2018.

BY THE COURT



Vincent LUNABEK
Chief Justice