

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

**Criminal Appeal**  
**Case No. 20/2794 SC/CMLA**

**BETWEEN:** **Silas Rovu**  
Appellant

**AND:** **Public Prosecutor**  
Respondent

*Date of Hearing:* 9 November 2020

*Before:* Chief Justice V. Lunabek  
Justice J. Mansfield  
Justice R. Young  
Justice O. Saksak  
Justice G.A. Andrée Wiltens  
Justice V. M. Trief

*In Attendance:* Mr T. Karae for the Appellant  
Mr R. Willie for the Respondent

*Date of Decision:* 20 November 2020

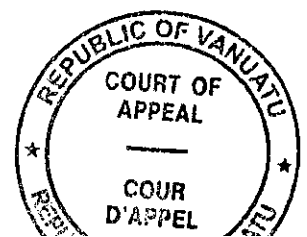
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## JUDGMENT

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### A. Introduction

1. Mr Rovu faced four counts in the Supreme Court of criminal conduct. Counts 1 and 2 related to the same incident. Mr Rovu was charged with indecency without consent (contrary to section 98(a) of the Penal Code Act) and unlawfully entering a dwelling house (contrary to section 143(1) of the Penal Code Act).
2. Essentially, the allegations were that Mr Rovu unlawfully entered the victim's house, went to where she was sleeping at night and began masturbating in front of her.
3. Count 3 (contrary to section 98A of the Penal Code Act) was a separate incident about a year earlier. There, it was alleged that Mr Rovu exposed his penis in the presence of a young girl.
4. The 4th count was also entirely separate, but about the same time as Count 3. It is alleged that Mr Rovu masturbated his penis in the presence of a woman who was his neighbour. (Contrary to section 98(a) of the Penal Code Act).
5. Mr Rovu was convicted by the trial Judge on all four counts. He now appeals against the convictions. There are multiple grounds.

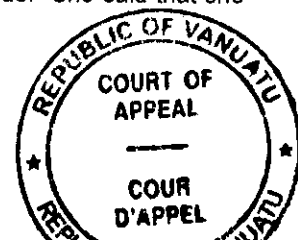


**B. Appeal Grounds**

6. With respect to Counts 1 and 2 the Appellant says that the Judge could not have been satisfied beyond reasonable doubt that it was the Appellant who was identified by the female witness; and secondly, the Judge wrongly relied upon hearsay evidence in convicting the Appellant.
7. The Appellant's case, with regard to Counts 1,3 and 4 is that the Prosecution had to prove that the accused was "*in the presence of*" the complainant when he exposed his penis. The Prosecution failed to prove that he was in the presence of the complainant and so each Count should fail.
8. The second ground of appeal with regard to Counts 1, 3 and 4 is that the Judge failed to warn himself as to the dangers of convicting on the uncorroborated evidence of the complainants and because of that failure the appeal must succeed and verdicts of not guilty should be entered.
9. Finally, with respect to Counts 1, 3 and 4, the Appellant says that the decision by the Judge was in error in that he expressed only a preference for the evidence of the complainant in Count 4 rather than being satisfied beyond reasonable doubt as to her evidence.

**Counts 1 and 2**

10. We consider Counts 1 and 2 first. Counsel for the Appellant accepted that the Judge had correctly identified the essential elements of these offences. As to Count 1 the accused person must commit an act of indecency; the act of indecency must be in the presence of another person; and that they must undertake that act without that person's consent knowing that the person did not consent.
11. As to Count 2, the unlawful entry Count, again, the Appellant accepted the Judge correctly identified the elements of the offence. They were that the accused person entered the house intending to commit an offence (here the indecency) and the house was used for human habitation.
12. The Prosecution case was that the complainant Mrs Narguet, her husband Mr Narguet and the Appellant Mr Rovu, were neighbours at Port Olry on Santo Island. On the evening of the 24-25 April 2019 the complainant Mrs Narguet was in her bed close to sleep in her house. She had been out until about 3am. As she went to sleep, she heard a sound near her ear. She then took her mobile phone from under her pillow and shone its light. The light shone on a man's face. She said she recognised the man as her neighbour, Mr Rovu. She saw that he had pulled his shirt over his back and his trousers were down to his knees. She said he was masturbating his penis near her. After the complainant shone her mobile phone in his face, Mr Rovu grabbed her phone and ran outside. The complainant followed him and called out his name. She said that Mr Rovu dropped her mobile phone near the door of the house and ran outside. She said that she was then joined by her husband.



13. Her husband Mr Richard Narguet, also gave evidence. He said he was sleeping in another room from his wife. He heard his wife call out the name of Mr Rovu. He ran outside to where his wife was. There was no sign then of Mr Rovu. Mr and Mrs Narguet then said that they saw someone standing by an unfinished house near their home. Mr Narguet said he shone his torch towards that person, and he saw that it was Mr Rovu. He called out to him but Mr Rovu then ran away.
14. The next day Mr Narguet said that he reported what had happened to the chief of the local village. Later, he saw Mr Rovu drinking at a bar with his friends and approached him with a hammer. Mr Rovu then ran away.
15. Mr Rovu gave evidence. He denied he had entered the Narguets' house that evening. He said that he had gone out to have a few drinks during the course of the evening and his mother had been with him. His mother left around 4am and went home. Later, he returned home. At that stage, she was still in the kitchen and he went to bed. He said that he would not do such a thing to his neighbours. In addition, Mr Rovu's mother gave evidence. She said that after she was at home about 4am or later, her son had come home and had gone to bed after talking to her.
16. The Judge's conclusions about the evidence are set out at paragraph 15 of his Judgment as follows:

*"I prefer the evidence of the complainant and her husband. The complainant saw the Defendant's face and her husband Richard heard the complainant calling the Defendant's name from inside the house as he ran outside."*

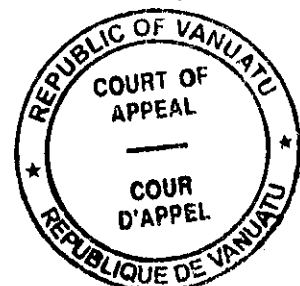
And further, at paragraph 21 of the Judgment, the Judge said:

*"As to Counts 1 and 2, the evidence of Mrs Marie Christine Narguet and her husband Mr Richard Narguet identified the Defendant as the person who entered their house and masturbated near Mrs Marie Christine Narguet. They know him; he is their neighbour; they both saw him that night and Mrs Narguet called out his name when he was masturbating near her and he ran outside. Her husband heard him call the Defendant's name. Mrs Narguet did not consent to his masturbation and he knew it as he snatched the mobile phone shining his face and ran outside."*

And further, at paragraph 22:

*"The Defendant entered the house with intention to commit an offence and the house was a dwelling house as Mr and Mrs Narguet were asleep inside with their children."*

17. The Judge concluded therefore that all elements of the two charges had been proved beyond reasonable doubt. He convicted Mr Rovu.



18. To return to the submissions of the Appellant, the first ground of appeal relates to the circumstances of the identification of Mr Rovu as the offender. In cases where identification is an issue it is appropriate for Judges to warn themselves of the need for caution when considering the reliability of identification evidence. That is because it is well established that mistakes can be made where prosecutions rely upon the identification of an offender by a witness. Honest witnesses who are certain in their own mind that they are identifying a particular person can be mistaken. Multiple witnesses can be mistaken.
19. In this case there was no warning expressed by the Judge. However, the Judge detailed the evidence which satisfied him that the identification of Mr Rovu as the offender, was reliable. These factors included the following.
20. Firstly, the offender was well-known to Mrs Narguet. He was her neighbour.
21. Secondly, the identification was of someone who was standing effectively within a few metres at the most of Mrs Narguet.
22. Thirdly, although the identification was at night, Mrs Narguet shone the light on Mr Rovu's face and was then able to identify him. Mrs Narguet was able to identify the fact that Mr Rovu had pulled his shirt over his back and his trousers were down to his knees. She had sufficient time to identify the fact that he was masturbating.
23. In those circumstances, there was ample evidence which the Judge was entitled to rely upon to conclude Mrs Narguet's identification was accurate.
24. There was also some supportive evidence. Almost immediately after the incident occurred Mr and Mrs Narguet went outside. They were then able to identify Mr Rovu a short distance away from their house. When they called out to him, he ran off. Again, as well as Mrs Narguet knowing Mr Rovu, Mr Narguet also knew Mr Rovu, as his neighbour.
25. We therefore reject the first ground of appeal. We are satisfied there was ample evidence on which a reliable identification of Mr Rovu could and was made.
26. The second ground of appeal relating to Counts 1 and 2 was that the Judge erred in relying on the hearsay evidence of the second Prosecution witness, namely, Mr Narguet.
27. The evidence of Mr Narguet by itself was not hearsay. He was entitled to give evidence that his wife cried out the name of Mr Rovu. While that was not independent evidence that Mr Rovu was the offender, it was evidence that immediately after the event Mrs Narguet believed the offender was Mr Rovu. In addition, Mr Narguet's evidence on seeing Mr Rovu immediately after the offending near their house, was relevant evidence. It was not in any sense hearsay evidence. He was entitled to give evidence of what he saw.
28. It is correct that the Judge said at the end of his decision that in addition to Mrs Narguet's identification Mr Narguet identified the person who entered their house. Clearly, that was not

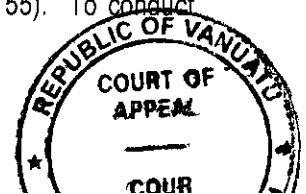


accurate. But for the reasons we have given, we are satisfied that the Judge was entitled to rely upon the evidence of Mrs Narguet as to the identification of the offender. That evidence was supported by the observations of Mr Narguet and Mrs Narguet immediately after, outside their residence, when they saw Mr Rovu, called out to him and he ran off.

29. The third ground of appeal relating to Count 1 also applies to Counts 3 and 4. The Respondent's submission is that the Judge erred in failing to clearly define the meaning of the phrase "*in the presence of*". Counsel submitted that the meaning of the phrase "*in the presence of*" in terms of section 98(a) of the Penal Code Act required the Prosecution to prove that an accused person was in close proximity to the alleged victim and was aware that at the time he committed the indecency that the complainant was watching.
30. Even if we accept the Appellant's submission as to the meaning of "*in the presence of*" with respect to Count 1 (which we do not for reasons later given), Mr Rovu was clearly in her presence in terms of section 98. The evidence established Mr Rovu entered the Narguets' house and was standing beside Mrs Narguet when he was masturbating. We reject this ground of appeal.
31. Independent of Count 1 there was no challenge to Count 2. We are satisfied, given our conclusions with respect to Count 1, all of the elements of Count 2 were established.
32. The appeal with respect to Counts 1 and 2 is therefore dismissed.

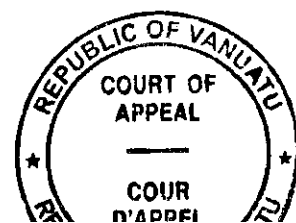
### Count 3

33. Count 3 involved an allegation that Mr Rovu had exposed his penis to a young child. The child was Ms LN. The evidence the Judge accepted was that in March 2018, Ms LN was playing with her sisters after school outside their house near the gate. Mr Rovu was inside his house. Ms LN said she saw his penis through the window of his house. She said that he pushed his penis through the window and then urinated. When she saw him, she said he stopped.
34. Mr Rovu gave evidence. He denied that he would do such a thing. No one had told him about this particular complaint until he was charged.
35. The Appellant's first ground of appeal is that the Judge failed to warn himself about the dangers of convicting on the uncorroborated evidence of a complainant where the accused faces an allegation of improper sexual conduct.
36. This Court has previously said that a Judge may need to warn him or herself of the danger of convicting on the uncorroborated evidence of the complainant in an allegation of sexual offending (*Walker v Public Prosecutor* [2007] VUCA 12 at p.5).
37. However, more recently we have expressed concern about the rule and identified the need to review its application in Vanuatu (*Tabeva v Public Prosecutor* [2018] VUCA 55). To conduct



such a review on an appropriate case will require the Public Prosecutor to identify such a case and prepare relevant submissions for this Court's consideration. We invite them to do so in a suitable case.

38. In this case no warning was given. However we are satisfied, given the strength of the evidence in count 1, that no such warning was required. We therefore reject this ground of appeal.
39. We are however, concerned about other aspects of the case against Mr Rovu with regard to this charge.
40. The complainant was nine years old at the time of the alleged offending and eleven years of age when she gave evidence. Section 83 of the Penal Code Act sets out the obligations of a Judge when a young child is to give evidence in Court. Before such a child can be sworn in as a witness, the Judge must explore whether or not the child understands the oath. If the Judge is concerned that the child does not understand the oath, then the child may be asked to promise to tell the truth. It does not appear as though this process was undertaken in this case. The importance of this provision is that it ensures the child has had explained to them in suitable age appropriate language that giving evidence is a solemn occasion and it is vital the child tells the truth. While of concern by itself, we would not have allowed the appeal on this basis alone.
41. The second and more important aspect relates to the question of identification. We have previously mentioned the need for Judges to warn themselves of the need for caution in assessing the reliability of identification evidence. In this case, the Judge did not identify any particular evidence as to the circumstances under which the identification came to be made and through which an assessment of the reliability of the identification could be made. Although it seems apparent the young child did know Mr Rovu, it is not apparent how far she was from the man she saw at the time of the identification; what the particular physical circumstances of the identification was; and how long she was able to observe the man's actions.
42. Given these circumstances we consider the need for caution relating to Ms LN's identification evidence had particular importance in this Court. The Judge's failure to acknowledge the need for caution in accepting the child's identification significantly undermined his acceptance of the accuracy of her evidence.
43. The third aspect of concern relating to Ms LN's evidence is whether or not it could be established beyond reasonable doubt that what Mr Rovu did was indeed an act of indecency. If what Mr Rovu was doing was urinating out of the window, then by itself it would not necessarily be with an indecent intent however offensive. The Judge did not address this matter at all in his Judgment. Given the description of the events by the child and in particular the fact that he was urinating meant there was doubt about whether what Mr Rovu was doing was indecent.
44. Fourthly, as to the credibility of the witnesses the Judge gave one reason only for accepting the evidence of the complainant, Ms LN. He said:



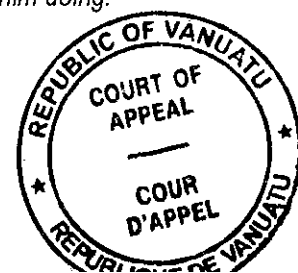
*"There was no reason for her to make such a statement against her uncle unless it is true."*

45. The Judge did not deal with the question of the credibility of Mr Rovu's evidence. He had denied the offending.
46. It is not sufficient for a Judge, in deciding a question of contested credibility, to identify as the sole reason for believing a witness the fact that no motive can be identified for an untrue statement.
47. Nor was it fair or appropriate in such a case for the Judge not to have dealt with the Appellant's evidence and identify why he was rejecting it as untrue.
48. In those circumstances, we think there were a number of inadequacies in the Judge's reasoning. We think there was reasonable doubt whether the Appellant committed the crime. For those reasons therefore the appeal will be allowed and a verdict of not guilty entered with regard to Count 3.

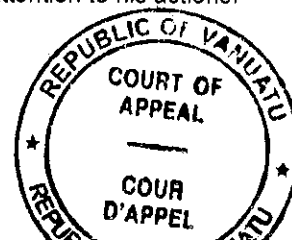
#### **Count 4**

49. As to Count 4, that related to an allegation by Mrs Narguet that in March 2018 Mr Rovu had indecently exposed himself to her. She had been sweeping outside her house. She was alone with her three-year old son. Her house is about five meters from Mr Rovu's house. Whilst she was sweeping, she heard someone whistling. She looked towards the main road but there was no one there. She heard the whistling again and thought it was from the direction of Mr Rovu's residence. She looked and saw the Appellant standing at the window and masturbating and facing her. She called out and at that instant the Appellant stopped. She said that it was definitely her neighbour Mr Rovu because she knew him well and saw him every day.
50. The Appellant gave evidence. He denied he masturbated to the complainant.
51. The grounds of appeal were twofold. Firstly, the corroboration point, which we have previously dealt with and rejected.
52. However, we are concerned about several aspects of the Judge's decision in this case. Firstly, in dealing with the competing evidence, the denial by the Appellant and the evidence of Mrs Narguet, the Judge in resolving the question of credibility said:

*"Having seen and heard Ms Christine Narguet give evidence, I prefer her evidence to the Defendant. There was no reason for her to be making up the story against her neighbour and clearly demonstrated with her hands what she saw him doing."*



53. The Judge did not consider Mr Rovu's evidence and explain why he rejected it. While this need not be fatal to a prosecution, we think it important that where there is a direct denial by a Defendant of a criminal act, and where the Defendant's evidence is not to be believed then the Defendant is entitled to know why the Judge has rejected his evidence. This is the essence of the judicial function. Reasons illustrate that the Judge has based her/his conclusion on facts and logic.
54. Secondly, in a criminal case it is not a question of which evidence a Judge prefers. For there to be a conviction the Judge must be satisfied the evidence of the Prosecution witnesses proving the elements of the charge, are true. In addition, a Judge must reject the evidence of a Defendant as untrue if they deny the offending. Only then will there be proof beyond reasonable doubt. The idea of a preference with respect to core evidence, creates the idea of a credibility finding on the balance of probabilities. That is, that the evidence of the witness for the Prosecution is more likely to be true than the evidence of a Defendant. That is not the test in criminal cases. We acknowledge that the Judge did correctly say that it was for the prosecution to prove the case beyond reasonable doubt. But here that general observation was undermined by the particular analysis of the evidence by the Judge.
55. Part of the Defence case, in addition to the claim of mistaken identity, was that if indeed he was masturbating in his own home, he was not aware the complainant was looking. It was not, in those circumstances therefore, an act of indecency. Nor was it in the presence of the complainant.
56. If the evidence for the Prosecution was no more than Mrs Narguet looking into the house of the Appellant and seeing him masturbating, then in our view that would not be sufficient evidence to establish the charge. It would not be an indecent act nor would it be in the presence of the complainant if there was doubt about whether the accused knew or should have known he was being observed but continued with his actions.
57. We think in this context "*in the presence of*" means that an accused person either knew he was seen undertaking the act or it was reasonable in the circumstances to believe that others could be watching, assessed objectively.
58. The Prosecution presumably introduced the evidence of the whistle in an attempt to prove that Mr Rovu was the whistler and he was attempting to draw attention to himself from Mrs Narguet. The Judge did not make that finding in his judgement.
59. In one sense, what happened as described by Mrs Narguet is in conflict with the proposition that his whistling was trying to attract her attention. The evidence was that as soon as Mrs Narguet looked towards his house and saw Mr Rovu, he stopped masturbating. That act of stopping once observed is as consistent with him understanding that he had been seen and stopping (not indecent or in the presence of) as it is with an attempt to try and draw her attention to his actions.

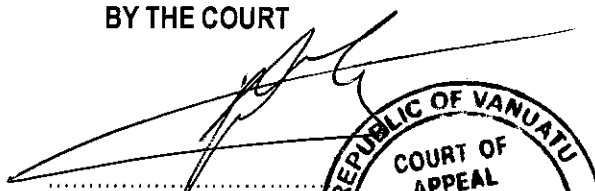




60. In those circumstances, we cannot be satisfied on the evidence that the Prosecution have proved either an act of indecency; nor can we be satisfied that the act was intended to be in the presence of the complainant. For those reasons, we are satisfied the conviction with regard to Count 4 was wrongly entered and we allow the appeal and direct an entry of a not guilty verdict.
61. In summary we confirm the convictions in Counts 1 and 2 and direct acquittals in relation to counts 3 and 4.

**DATED at Port Vila this 20th day of November 2020**

**BY THE COURT**

  
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Chief Justice V. Lunabek

