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

Criminal Appeal
Case No. 22/2513 SC/CRMA

BETWEEN: **Public Prosecutor**
Appellant

AND: **Kombe Jacinth**
Respondent

Date of Hearing:	5 December 2022
Before:	Justice V.M. Trief
In Attendance:	Appellant – no appearance (Mr L. Young)
	Respondent – Mrs P. Malites
Date of Decision:	18 January 2023

JUDGMENT

A. Introduction

1. This is an appeal against the dismissal on 6 September 2022 of the charges of intentional assault causing temporary injury and threatening language after the learned Acting Chief Magistrate accepted a no case to answer submission.

B. Background

2. The Respondent Ms Jacinth Kombe was charged with criminal trespass (Charge 1), intentional assault causing temporary injury (Charge 2) and threatening language (Charge 3).

3. The trial took place on 22 and 24 June 2022 and 26 July 2022.

4. The Prosecution called two witnesses: the complainant Djalal Lalioui and security guard Bani Nale Tossiano.

5. On 24 June 2022, after the complainant had given his evidence, Ms Kombe was re-arraigned and pleaded guilty to criminal trespass (Charge 1).

6. On 26 July 2022, at the close of the Prosecution case, the Court invited counsel to file written submissions as to no case to answer.

7. The Prosecution filed its submissions on 4 August 2022.

8. Ms Kombe filed no case submissions on 19 August 2022.

9. By Decision dated 6 September 2022, the learned Magistrate dismissed Charges 2 and 3 stating that there was no corroborated evidence to show that Ms Kombe caused intentional assault as corroboration is required to establish the respondent's guilt beyond doubt, and that the Prosecution wrongly charged the respondent and that the evidence at trial showed that she used abusive words and not threatening words.

C. Grounds of Appeal and Submissions

10. The grounds of appeal were as follows:

    i) The learned Magistrate erred in dismissing the charge of intentional assault in holding that there is no corroborated evidence and that the complainant's evidence should be corroborated;

    ii) The learned Magistrate erred in holding at the "no case submission" stage that corroboration is required to establish Ms Kombe's guilt beyond reasonable doubt with respect to the intentional assault charge; and

    iii) The learned Magistrate erred in holding that the Prosecution wrongly charged Ms Kombe as the proper section was not applied and that the words used by Ms Kombe were abusive words and not threatening words.

11. Mr Young submitted that the learned Magistrate erred both in law and in fact in holding at the no case to answer stage that the complainant's evidence should be corroborated as the test was whether or not the respondent could be convicted on the evidence so far presented. Proof beyond reasonable doubt was only required after conclusion of the whole case. He submitted that there was sufficient evidence on which the respondent could be convicted therefore there was a case to answer.

12. Mr Young also submitted that the learned Magistrate failed to assess whether or not there was sufficient evidence on which the respondent could be convicted but instead held that the Prosecution wrongly charged the respondent. However, the duty to charge and the choice of charge rests with the Prosecution and not the Courts. He submitted that Ms Kombe was correctly charged under section 114A of the *Penal Code.* The learned Magistrate referred to section 115 as the correct section however that is incorrect as section 115 relates to threats to kill.

13. Mrs Malites submitted that the Magistrates' Court made the correct decision but for different reasons. She submitted that the Prosecution had not adduced sufficient evidence as to 1 or 2 elements of intentional assault therefore there was no case to answer on Charge 2.

14. As to the dismissal of Charge 3 threatening language, Mrs Malites submitted that the language used was abusive only and not threatening, therefore the learned Magistrate was correct that there was no case to answer on Charge 3.

15. Mrs Malites urged this Court to dismiss the appeal and uphold the Magistrates' Court decision albeit on different grounds.

D. Discussion

16. In her Decision, the learned Magistrate applied section 164 of the *Criminal Procedure Code* [CAP. 136] (the 'CPC'). However, section 164 appears in Part 9 of the CPC, titled "Procedure in Trials before Supreme Court". It is not applicable to trials in the Magistrates' Court.

17. The applicable provision is section 135 of the CPC which appears in Part 6 of the Code, titled "Procedure in Trials before the Magistrates' Court".

18. Section 135 of the CPC is headed up, "Acquittal of accused person when no case to answer" and provides as follows:

> *135. If at the close of the evidence in support of the charge, it appears to the court that a* prima facie *case is not made out against the accused person so as to require him to make a defence, the court shall dismiss the case and shall forthwith acquit him.*

19. Section 135 of the CPC requires the Magistrates' Court to consider whether or not a *prima facie* case is made out against the accused person so as to require him to make a defence. If it appears to the Court that a *prima facie* case is not made out, the Court shall dismiss the case and forthwith acquit the accused.

Was corroboration of the complainant's evidence required?

20. In *Walker v Public Prosecutor* [2007] VUCA 12, the Court of Appeal stated as follows at [15]:

> *15. Applying the common law as part of the law in Vanuatu the position may be summarized as follows:*
>
> *(a) There is no requirement of law that there must be corroborative evidence of a vital witness's evidence before a judge can be satisfied beyond reasonable doubt an offence has been proven.*

21. The complainant was a vital witness in relation to the intentional assault charge. There is no requirement of law that his evidence must be corroborated before the Court can be satisfied beyond reasonable doubt that an offence has been proven: *Walker* at [15(a)].

22. The Prosecution bears the burden of proving the following elements of intentional assault causing temporary damage:

i) That Ms Kombe assaulted the complainant on his body;

ii) The assault was intentional; and

iii) Damage of a temporary nature was caused to the complainant's body.

23. The complainant gave evidence that Ms Kombe followed him to his premises. She asked for money but he refused. He wanted to move Ms Kombe away from the premises but she resisted. In the process, she grabbed both his arms causing him bruises. This evidence goes to the first and third elements of the offence. Mr Young submitted that the inference to be drawn was that Ms Kombe intended to assault the complainant in the way that she did because he wanted to move her away from his premises and had refused to give her money as she had requested.

24. Mrs Malites submitted that the complainant gave contradictory versions of events as to when the assault occurred. However, that goes to questions of credibility or reliability which do not arise in a "no case to answer" assessment. Such matters are to be weighed in the final deliberations at the conclusion of the trial in light of the entirety of the evidence presented. The Prosecution had led evidence to prove each element of the offence charged therefore there was a case to answer. Ground 1 of the appeal has been made out.

Was proof beyond reasonable doubt required at the "no case to answer" stage?

25. In *Public Prosecutor v Suaki* [2018] VUCA 23, the Court of Appeal considered the application of s. 164(1) of the CPC and what a "no case to answer" assessment entails. Subsection 164(1) applies to trials in the Supreme Court however the Court of Appeal's comments at [10]-[11] are equally applicable to section 135 of the CPC:

> *10. At this point we need to make a distinction between the determination made at the close of the prosecution case, and the ultimate decision on the guilt of the accused to be made at the end of the case. Whereas the latter test is whether there is evidence which satisfies the Court beyond a reasonable doubt of the guilt of the accused, 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.*
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> *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 admissible 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)*

26. Clearly, the learned Magistrate erred in applying the standard of proof of beyond reasonable doubt at the no case to answer stage when she said, "*This is a case where such evidence should be corroborated to establish the guilty of the defendant beyond reasonable doubt*". This standard of proof is applicable only at the conclusion of the whole case: *Suaki* at [11]. Ground 2 of the appeal has been made out.

Did the Prosecution wrongly charge Ms Kombe?

27. The *Penal Code* [CAP. 135] was amended by way of the *Statute Law (Miscellaneous Provisions) Act* No. 2 of 2021 and a new section 114A inserted which provides as follows:

> *114A. (1) A person must not use threatening:*
>
> *(a) written, spoken or automated words; or*
>
> *(b) gestures,*
>
> *towards another person.*
>
> *(2) A person who fails to comply with subsection (1), commits an offence punishable on conviction to imprisonment for a term not exceeding 3 years.*

28. Sections 120 and 121 of the *Penal Code* were also repealed by way of the *Statute Law (Miscellaneous Provisions) Act* No. 2 of 2021. Section 121 had provided for an offence of abusive or threatening language. That has now been replaced by the new section 114A. In addition, the duty to charge and the choice of charge rests entirely with the Prosecution and not the Courts. Accordingly, the charge of threatening language (Charge 3) was correctly laid under section 114A of the *Penal Code.*

29. The learned Magistrate also erred in characterizing the language used as abusive rather than threatening as section 114A provides only for threatening language.

30. The complainant's evidence was that Ms Kombe called him "*fils de pute*" (bastard) and told him that she would make every way possible to remove him out of the country. I accept Mr Young's submission that this constituted threatening language as the complainant is a non-national who was being threatened with deportation out of the country. Ground 3 of the appeal has been made out.

31. For the reasons given, the Magistrates' Court erred in dismissing Charges 2 and 3 charge against Ms Kombe. The appeal must be allowed and Ms Kombe be retried by the Magistrates' Court.

E. Result and Decision

32. The appeal is **allowed**.

33. The Magistrates' Court Decision dated 6 September 2022 with regard to the dismissal of Charges 2 and 3 against Ms Kombe is **quashed**.

34. Charges 2 and 3 against Ms Kombe are **reinstated**.

35. Ms Kombe has already been sentenced for criminal trespass (Charge 1) in the Magistrates' Court Decision dated 6 September 2022 with a warning not to offend in the same manner again and not to interfere with the complainant and his wife within a period of a year.

36. Ms Kombe is to be retried in the Magistrates' Court.

DATED at Port Vila this 18th day of January 2023
BY THE COURT

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Justice Viran Molisa Trief