

IN THE COURT OF APPEAL OF

THE REPUBLIC OF VANUATU

Appeal Case No. 6/19<sup>89</sup>~~90~~

**PETER YUNAX -v- THE PUBLIC PROSECUTOR**

JUDGEMENT

This is an appeal against the decision of the Chief Justice sitting in the Supreme Court on 27th November, 1989, wherein the appellant was convicted of rape, contrary to section 91 Penal Code Act No. 17 of 1981 and sentenced to four years imprisonment.

The first ground of appeal against conviction is that there was a material irregularity in the course of the trial. This arises since when the trial began on 3rd October 1989, the accused did not have the benefit of legal representation. After hearing evidence in chief from the complainant the court adjourned further hearing of the case to a date when counsel for the accused could be present. At the resumed hearing on the 27th November 1989 his counsel was indeed present and the case continued to its conclusion, no objection having been taken by counsel to the preceding events.

The right to be afforded a lawyer is contained in Article 5 of the Constitution which states:

"Protection of the law shall include the following:-

- (a) everyone charged with an offence shall have a fair hearing, within a reasonable time, by an independent and impartial court and be afforded a lawyer if it is a serious offence;..."

The appellant clearly falls within the terms of that Article, charged as he was with an offence carrying life imprisonment as a maximum penalty.

Considering what action, if any, this court should take in these circumstances we were referred to section 221 of the Criminal Procedure Code Act 21 of 1981, as amended, which provides:-

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221. (1) Subject to the provisions hereinbefore contained no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account-
- (a) of any error, omission or irregularity in the summons, warrant, charge, information, order, judgment or other proceedings before or during the trial or other proceedings under this Code; or
  - (b) of any misdirection in any directions to assessors,
- unless such error, omission, irregularity or misdirection has in fact occasioned a substantial wrong or miscarriage of justice.
- (2) In determining whether any error, omission, or irregularity has occasioned a substantial wrong or miscarriage of justice the court shall have regard to the question whether the subject could and should have been raised at an earlier stage in the proceedings.

Taking those provisions into account this court notes that although it was open to him at the resumed hearing to raise the issue, the counsel for the appellant did not see fit to do so. Furthermore we do not consider that this situation resulted in any substantial wrong to the appellant or any miscarriage of justice and therefore do not intend to interfere with the verdict of the learned trial judge on the ground.

The second and third grounds of appeal may be taken together. On the evidence presented to the trial judge it was in our view open to him to find that the complainant consented to intercourse under the belief that it was part of her medical treatment. Alternative explanations may be put forward as they have been by counsel in this court but as we do not consider the Chief Justice's finding an unreasonable one it is therefore not open to this court to interfere with it.

As to sentence we consider four years imprisonment, erring, if at all, on the lenient side. The appellant took advantage of his position as a mother and child health worker to deceive the complainant into having sexual intercourse with him, on more than one occasion. It was a serious breach of trust. This court is therefore of the opinion that the final ground of appeal fails.

The appeal against conviction and sentence is accordingly dismissed.