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

CRIMINAL APPEAL CASE No. 06 OF 2014

BETWEEN: **LENGHAN PASVU YERCET**
Appellant

AND **PUBLIC PROSECUTOR**
Respondent

Coram: *Hon. Chief Justice Vincent Lunabek*
Hon. Justice John von Doussa
Hon. Justice Ronald Young
Hon. Justice Oliver Saksak
Hon. Justice Daniel Fatiaki
Hon. Justice Mary Sey
Hon. Justice Stephen Harrop

Counsel: *Ms J Tari (PSO) for the Appellant*
Mr D Boe (PPO) for the Respondent

Date of Hearing: *Wednesday 29 April 2015*
Date of Judgment: *Friday 8 May 2015*

JUDGMENT

Introduction

1. On the evening of 17 November 2013, the Appellant and a young woman related to him went looking for crabs. After they returned the complainant told another relative the Appellant had tried to remove her skirt but did not have sex with her. On the following day the complainant made a complaint to the police that she had in fact been raped by the Appellant.

2. A trial in the Supreme Court followed and on 27 October 2014, the Judge convicted the Appellant of having sexual intercourse with the complainant without consent contrary to s 91 of the Penal Code [Cap. 135].

3. The Appellant was subsequently sentenced to 4 years 11 months imprisonment.

4. The Appellant appeals against conviction only.

5. Both the complainant and the Appellant gave evidence at trial. This appeal is based on a challenge to the reasons given by the trial Judge for accepting the evidence of the complainant and rejecting the evidence of the Appellant.

Background Facts

6. On the evening of 17 November 2013 the Appellant, the complainant and others went looking for crabs. The Appellant and the complainant became separated from the others. The complainant's evidence was that the Appellant switched off his torch, pulled the complainant to him and pushed her to the ground. He then removed her skirt and under clothing and had intercourse without her consent.

7. Shortly after the complainant sent a text to a relative to say she was crying. Eventually the Appellant and complainant met up with the others and the complainant's relative noticed she had been crying. Later the complainant told her relative that while the Appellant had removed her skirt nothing further had happened. The complainant had some minor injuries she said were caused when she was pushed to the ground. The following day she was taken to the Police station. The complainant then told the police that she had been raped. The Appellant gave evidence at trial. He said that he had grabbed the complainant that night when they were looking for crabs and that he had sexual thoughts about the complainant but that he had not had sex with her. Later when he arrived home he said he had given his father this same description of the events of that night.

The Judgment Appealed From

8. The only direct evidence as to what happened that night came from the Appellant and the complainant. And so before the Judge could convict the Appellant he would have to be

satisfied the Appellant's version of events could not reasonably be true and that on the essential points he was sure the complainant was telling the truth. Questions of credibility were therefore essential to resolution of this case.

9. The Judge dealt with issues of credibility at paragraphs 49, 50 and 51 of this judgment. He said:

> *"49. On the question of credibility, having observed the complainant when giving evidence, I accept the complainant as a reliable and credible witness. I accept that there is no other reason why the complainant would make up such a story about a person she calls daddy and with whom she was living in his house at the time.*
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> *50. On the other hand, I reject the evidence of the defendant. Having observed him when giving evidence and from what he said he appeared to have a convenient memory after hearing the prosecution evidence. On oath he said that when he held the complainant's hands he then had in mind to have sexual intercourse with the complainant but then he remembered that she was his daughter and told her that he had been thinking of having sex with her but it did not happen.*
>
> *51. What kind of a father would tell his daughter something like that and furthermore, in his evidence the defendant also said that after the complainant and Sereline left the house, he told his father who is a church leader about what happened that he had thought of having sex with the complainant that night but it did not happen. There is no evidence before the court that can verify the truth of this statement. Having given full weight to the warning that it is dangerous to convict the defendant solely on the evidence of the complainant without corroboration I come to the conclusion that the prosecution has proven its case beyond reasonable doubt."*

<u>This Appeal – Discussion</u>

10. The first ground of appeal relates to the Judge's comment that he rejected the evidence of the Appellant because *"(he) appeared to have a convenient memory after hearing the prosecution evidence"* (at 50).

11. At the end of the evidence for the prosecution at trial the Judge asked counsel for the Appellant if he elected to give evidence. Counsel told the Judge no evidence would be called. The case was adjourned overnight for submissions to be made the following morning. Overnight it seems counsel and the Appellant further discussed the election not to give evidence. The following morning counsel for the Appellant advised the Court his client now wished to give evidence. The Judge then allowed him to do so (clearly correctly). The Appellant then gave evidence as we have described denying he had raped the complainant.

12. It is not immediately evident what the Judge meant when he referred to the Appellant having a *"convenient memory"*.

13. Counsel for the respondent suggested that the Judge's comments referred to the fact that the Appellant had only decided to give evidence denying the offending after he had heard the complainant's evidence. Counsel suggested that at first saying he was not giving evidence and then later changing his mind was a way of the Appellant advantaging himself.

14. The alternative explanation for the Judge's comments is that he was suggesting that the Appellant's evidence about what happened with the complainant was a recent invention.

15. The difficulty with counsel's first suggestion is that defendants in criminal cases invariably give evidence after a complainant has given evidence and therefore are always aware of what the complainant has said. The fact the Appellant changed his mind about giving evidence does not change the fact that he already knew what the complainant had said when she gave evidence. It could not therefore be suggested that the Appellant's change of mind about giving evidence had anything to do with a convenient memory.

16. Counsel's alternative explanation that the Judge rejected the Appellant's evidence because it was recently invented has no evidential basis on which the Judge could have reached this conclusion. It was never put to the Appellant in cross-examination that his description of events had been recently made up as it should have been if it was part of the prosecution's case.

17. As counsel for the Appellant submitted, if recent invention had been alleged then the Appellant could have applied to call evidence from his father. Given the opportunity his father would have said that on the evening of the alleged rape his son had told him that he had nearly got into trouble that day. That he had wanted to have sex with the complainant, while they were out searching for crabs. That he had held the complainant but she had resisted, and he had let her go. A brief of evidence was available to this Court from the father.

18. As counsel for the Appellant submitted, that evidence would only have been admissible at trial in response to an allegation by the prosecution that the Appellant's version about the events of that night had been recently made up. There was no cross-examination to this effect.

19. This raised the second observation by the Judge as to why he rejected the evidence of the Appellant. The Appellant had given evidence of his conversations with his father. In his judgment as to this evidence the Judge said that there *"was no evidence before the Court to verify the truth of the statement"*.

20. As we have noted the Appellant's father could only give evidence as to what his son told him immediately after these events to respond to a claim that the Appellant had recently invented his description of the events that evening. There was no such allegation at trial and therefore the father's evidence would not have been admissible. The Judge was therefore wrong to rely upon the absence of this evidence as a reason for rejecting the Appellant's evidence.

21. These were the only reasons the Judge identified for rejecting the Appellant's evidence. He was wrong to do so, on these grounds. Without these reasons the Judge could not say the Appellant's evidence could not reasonably be true. On this ground alone the appeal must be allowed and the finding of guilt set aside given the question of credibility of the Appellant was at the heart of this prosecution.

22. The next ground of appeal relates to the Judge's reasons for accepting the complainant's evidence.

23. The Judge said:

> "*"49. On the question of credibility, having observed the complainant when giving evidence, I accept the complainant as a reliable and credible witness. I accept that there is no other reason why the complainant would make up such a story about a person she calls daddy and with whom she was living in his house at the time."*

24. There are different approaches throughout the common law world as to whether an accused can be asked if they know of any reason why a complainant might lie about a complaint. We do not need to resolve those differences as far as the law of Vanuatu is concerned. Here the Judge concluded that the absence of a reason for a false complaint supported the complainant's evidence. This was the wrong approach. This reversed the onus of proof. It effectively said to the Appellant – you have not established any reason why the complainant would lie against you and I therefore accept her evidence. It is not for an accused to establish the complainant was lying but for the prosecution to prove the complainant's evidence is truthful. Furthermore, the Appellant was never asked at trial if he knew any reason why the complainant would lie assuming this was an admissible question. And so the conclusion the Judge reached that the complainant had no reason to lie was not available to him on the evidence.

25. The appeal will therefore also be allowed on this ground of appeal given the Judge did not identify any other reasons why he accepted the complainant's evidence.

26. The appeal is allowed, the verdict of guilty set aside. We order a retrial. Counsel for the Appellant invited us to consider refusing to order a retrial. We are not prepared to do so. This was a serious allegation. It is in the community's interest that there be a properly entered verdict after trial based on a proper assessment of the facts and the law.

27. Before we complete this judgment we have a serious matter to comment on. After the allegation of rape was made the Appellant was interviewed by the police. We understand he gave a detailed statement. That statement was not produced at trial in Court by the prosecution. This was a serious failure by the prosecution.

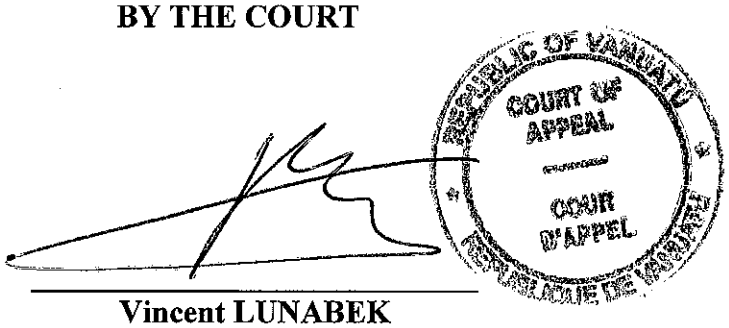
28. When an accused person is asked by the police to make a statement to the police and does so, that statement must be tendered in evidence by the prosecution irrespective of its content. It is for a Judge to determine what if any part of that statement is inadmissible.

A statement is made by an accused at the police request. It does not matter if the statement is an admission or a denial of the crime alleged. If there is a trial the statement must be produced in evidence. It will be for the Judge to assess its importance as evidence at the trial.

29. We remind the prosecution that this principle of open disclosure applies to all relevant evidence held by the police relating to a particular prosecution. It does not matter if the evidence, whether a witness statement, physical evidence or other evidence is in favour of or against the prosecution case. The information at least must be provided to an accused person and any lawyer acting for him/her.

DATED at Port Vila this 8th day of May, 2015

BY THE COURT



Vincent LUNABEK
Chief Justice