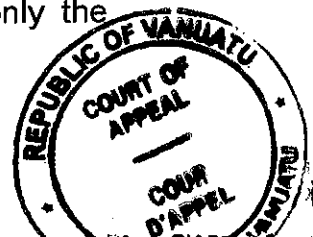


asserted serious past criminal behaviour and sexual offending by the appellant committed against the complainant when she was a child.

5. To understand these grounds of appeal it is not necessary to recite in detail much of the evidence given at trial or to detail the alleged offences as described by the complainant in the course of her evidence. At the time of the alleged offences the complainant was 26 years old. She was living with her two children with the appellant and her mother on Gaua. She gave evidence about three separate incidents each of which founded one of the charges upon which the appellant was convicted.
6. The first incident is alleged to have occurred on 21st December 2012. The complainant said that she was still sleeping in her bed late in the morning when she was awakened by a man who was touching her breast. She lifted the blanket that covered her face and as she did so the man touched her private part. She recognised the man as her father. He then showed her pornographic movies on his mobile phone. She said she got up and kicked him away and ran outside. At the time she made no complaint about this conduct to anyone.
7. The second incident is alleged to have occurred on 27th April 2013. That evening she had visited her boyfriend elsewhere. Whilst she was away, one of her children who had been sleeping in the appellant's house started crying. Her brother and her parents went looking for the complainant. Her brother found her as she was returning home. He admonished her for leaving her children unattended and causing their mother to go out and looking for her. She was then walking home with her brother following her. On the way they met the appellant. He directed her brother to continue on and he remained with the complainant. The complainant alleges the appellant then had intercourse with her by force. Afterwards she cried and returned home but did not report the incident to her mother or others as the appellant had told her she should not denounce him in front of family members. After that event she moved out of the appellant's house and lived in a neighbouring village with other relatives she referred to as her step-parents. Although the appellant came to the relative's house and asked the complainant to return home she refused.
8. The third incident is alleged to have occurred on 25th June 2013. The complainant was still living with her step-parents. This day they were away from their house attending to their gardens. She said she received a telephone call on her mobile phone which displayed the caller's number as 5541076 which she knew to be the appellant's mobile phone number. She answered the call and the appellant told her to go and meet her mother and him in a garden. As she thought her mother would be there with the appellant she went as requested, but when she arrived she saw only the

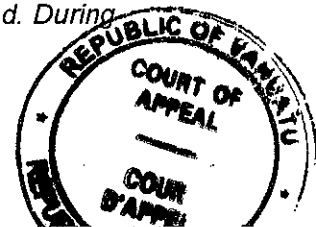


appellant. Her mother was not there. The appellant was holding a sharp bush knife. Without going into further detail, the complainant says the appellant demonstrated the capability of the knife by cutting a head of banana and then directed her into the bush where he again forcibly had sexual intercourse with her after removing some of her clothing.

9. The complainant made no contemporaneous complaint about that incident either, but later spoke with a village chief who had come to ask her to return to her parents' home. She told the chief about the three incidents and said that was why she refused to return to her parents' house. The chief initiated a course of events that led to the complainant making a formal report to a woman who dealt with cases of violence against women, and the complainant later took that statement to Santo and to the police. In due course the appellant was charged.
10. Gaua is a distant island which required the trial judge, counsel involved in the trial and some of the witnesses to travel considerable distances. The remoteness of the trial venue and difficulties with travel meant that witnesses, for very good practical reasons, were called as they could be available. The trial began on Saturday 29 August 2015. The prosecution called 5 witnesses.
11. The appellant then gave evidence in his own defence. The appellant denied that any of the offences alleged had taken place. He said that the complainant's evidence was an entirely false story concocted as result of a dispute over a quite different topic which involved the complainant who had sided with the appellant's sister in law against the appellant and his wife.
12. As the complainant was still in Luganville when the trial commenced, she was not the first witness. The other four prosecution witnesses were called ahead of her. Doctor Turnbull gave evidence on Monday 29 August 2015. During his examination in chief he identified a medical report dated 30 April 2014 written by him. This report was prepared immediately following a consultation he had with the complainant. The report in parts material to this appeal says that:

"During medical history taking, it became clear that Franita has had a very long history of sexual assault by her father, Jansen, on multiple occasions since she was about 10 years of age. She informed me that she was assaulted sexually on a weekly or more frequent basis with knife threats to enforce sexual submission for about 3 years before Jansen was sent to prison for sexually abusing his daughter. During the medical history, she informed me that 10 years had passed since his imprisonment and that Franita was hoping that the sexual abuse was finished forever.

However, according to Franita, during 2013 Jansen again sexually assaulted Franita on two occasions, once in April 2013 and once in June 2013. Exact dates are not clear to Franita but the experience of these two attacks are clear in her mind. During



the first case, she claimed that her father used knife threats and physical force, including a blow to her head.

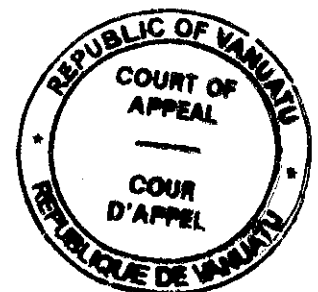
My examination shows no evidence of sexually transmitted disease or pregnancy from these assaults. Most of the damage to Franita from this sexual abuse is emotional in nature rather than physical.

In conclusion my examination shows no lasting physical injury on Franita's body but Franita shows evidence that she has been emotionally traumatized by what she claims have been many repeated sexual assaults and physical violence/threats by her father both as a child and on two occasions during 2013. The patient feels that her father has failed to learn his lesson from law enforcement 10 years ago. According to the patient she is frequently afraid of repeated sexual abuse or violence.

Personally I feel that this is one of the worst cases of rape, incest and adultery that I have been requested to examine in Torba Province".

13. The prosecutor in opening the case did not indicate that evidence of past sexual conduct by the appellant towards the complainant would be led. This court has been told from the bar table by the appellant's counsel that no objection was raised at that point to the admission of the medical report into evidence as counsel had no knowledge what evidence was to be led from the complainant or how the Prosecution would contend it was admissible. Counsel said she taken by surprise by the history of past offending. The medical report was simply received into evidence without comment from the Court or counsel.
14. The complainant gave her evidence following Doctor Turnbull. In the course of her evidence-in-chief the prosecutor sought to ask her about past sexual abuse by the appellant. Counsel for the appellant objected. After short argument the trial judge rule that the proposed line of questioning was not relevant to the offences charged and disallowed it. Consequently no evidence was given by the complainant (or anyone else at the trial) about any of the alleged past behaviour of the appellant. The past history of child abuse relied on by Doctor Turnbull in reaching the opinion expressed in his report was not verified or tested by any evidence.
15. Turning to the Digicel letter, in her evidence the complainant was definite that the reason why she attended the garden where the alleged offence on 25 June 2013 took place was the telephone call she received from the appellant on his mobile phone 5541076. In her cross-examination a letter from the Customer Care Manager of Digicel dated 26 August 2015 was shown to her. The letter said:

"Re: Confirmation Detail for Digicel Mobile Number 5541076



As per request received on the 24th of August 2015, this is to confirm that after our report search, number was active however there are no records for incoming or outgoing activity made to or from the number 5541076 on the requested date 25th June 2013".

16. The complainant said she understood the letter but adhered to her evidence that the call she received was made on 25th June 2013 and was made on mobile phone 5541076.
17. An application by the appellant's counsel at that stage of the trial, and again at the end of the evidence to tender the Digicel letter was refused as the contents of the letter was not verified by evidence from the maker of the letter.
18. Counsel for the appellant thereupon set about making arrangements to have the maker of the letter travel from Port Vila to give evidence as to the truth of the contents. The Court granted an adjournment for two days to enable the witness to travel to Gaua. Air flights were booked. The exercise would obviously be an expensive one, especially as the witness could be required to spend time in Gaua until a return flight was available. Given the practical problems, the Public Solicitor's Office in Port Vila contacted the Public Prosecutor's Office in Port Vila. It has been agreed before this Court that the Public Prosecutor himself then attended the office of Digicel and inspected such records as he required to verify the truth of the contents of the Digicel letter. Agreement was then reached between the Public Solicitor's Office and the Public Prosecutor that the letter of 26 August 2015 would be tendered by consent as to the truth of its contents. Counsel for the appellant in Gaua was informed of this arrangement. Travel arrangements for the Digicel witness were cancelled.
19. When the case was recalled the Court was informed that there had been a new development that would not require the witness to be called. However when the appellant's counsel sought to tender the Digicel letter by consent, the prosecutor argued that the letter was to be tendered only as proof that the letter had been written, not as proof of its the contents. Production of the letter on the basis suggested by the prosecutor would serve no useful purpose at all as the existence of the letter was not an issue in the case. The letter was of value as evidence only if it was admitted as to the truth of its contents. For reasons which are not apparent to us, it seems that the judge was not properly informed about the agreement that had been reached, and admitted the letter only as proof that it was written.
20. As the trial judge noted in his written verdict, the strength of the prosecution case relied entirely upon the evidence of the complainant. That evidence was subject to vigorous attack by the appellant on the ground that it was

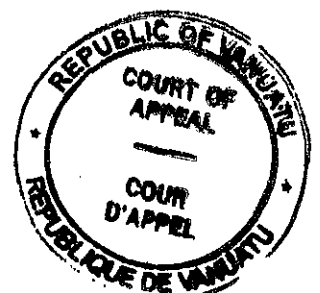


fabricated. Significant aspects of the attack on the complainant's credit were that the complainant did not make contemporaneous complaint about any of the alleged offences, and that, so the appellant asserted, there was no telephone call to the complainant from him on 25 June 2015 asking her to come to the garden.

21. In rejecting the criticism that the complainant made no contemporaneous complaints about the alleged offences the Court in its reasons said: "*I accept that she was traumatised as she was subjected to sexual abuses or violence when she was a child*" and it was difficult for her to tell what her father had done to her on the occasions alleged. The Court found that the evidence of Doctor Turnbull showed a history of lengthy sexually abuses and violence which contributed to her present state of being traumatised and emotional.
22. The absence of any evidence to establish the history of childhood abuse related by Doctor Turnbull in his report rendered that history and Doctor Turnbull's opinion based on it valueless, and no weight should have been placed on it. It provided no basis on which to explain away criticisms of the complainant's evidence and behaviour which were excused by the trial judge on the basis of it.
23. There is a further aspect of the alleged history of past abuse that is of concern. Doctor Turnbull obtained a history from the complainant that the appellant had previously been in prison for his offending. However the Supreme Court was told during the trial and on sentencing by the prosecution that the appellant had no previous conviction. If that is correct, the complainant's report to the contrary to the Doctor is troubling.
24. In rejecting the appellant's submission about the relevance of the disputed telephone call the court said:

"They say that the description of what happened in the garden is a fabrication. They say that the complainant cannot be believed because a letter of 26 August 2015 by one Relvie Matariki, customer care Manager of Digicel (Vanuatu) Limited shows that the mobile phone No. 5541076 which is in the mobile phone of the Defendant, was active but however, there are no records for incoming or outgoing activity made to or from the number 5541076 on the date of 25 June 2013. This letter of 26 August 2015 was admitted only for the fact that it was made but not to the truthfulness of its content. I reject the content of the said letter of 26 August 2015".

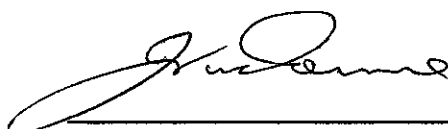
25. The appellant has therefore been deprived of the opportunity to have that central submission in his defence to the alleged offence on 25 June 2013, and his general attack on the complainant's credit, evaluated against evidence that the telephone call did not happen.



26. In our opinion the weight that was wrongly given to the information in the medical report of Doctor Turnbull, and the rejection of the Digicel evidence has deprived the appellant of the opportunity to have his case properly analysed and assessed, and the verdict must be considered unsafe.
27. At the conclusion of the trial we therefore announced that the appeal would be allowed, the verdict of guilty on each count would be set aside, and that a re-trial would be ordered. In the meantime the appellant would be released on bail.
28. The formal orders which the Court then made were:
1. The appeal is allowed.
 2. The convictions on two counts of sexual intercourse without consent and one count of indecency without consent are set aside.
 3. A re-trial on the above three counts is ordered.
 4. Bail is granted on the following conditions:
 - a) The Defendant is to depart Port Vila by 24th November 2015 and thereafter remain on Gaua Island unless permitted to leave by the Prosecutor;
 - b) The Defendant must not re-offend or interfere with Prosecution witnesses;
 - c) The Defendant must not make contact either directly or indirectly with the complainant;
 - d) The Defendant to appear to stand trial at the time and date to be notified to defence counsel;
 - e) The Defendant is to provide to the Court a mobile contact which is to be maintained and available to be contacted at all times without changing such contact number.

DATED at Port Vila, this 20th day of November, 2015

BY THE COURT



Hon. Justice John von DOUSSA

