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

Criminal Appeal 2419 of 2016

KIKI CHILIA

v

PUBLIC PROSECUTOR

Coram: ***Hon.Chief Justice Vincent Lunabek***
Hon Justice John von Doussa
Hon Justice John Mansfield
Hon Justice Oliver Saksak
Hon Justice Daniel Fatiaki
Hon Justice Dudley Aru
Hon Justice Mary Sey
Hon Justice Paul Geoghegan

Counsel: *Mr. Saling Stephens for the Appellant*
Mr. Damien Boe for the Respondent

Date of Hearing: *14th & 15th November 2016*
Date of Judgment: *18th November 2016 at 4.00 pm*

JUDGMENT

INTRODUCTION

1. The Appellant Kiki Chillia was jointly charged with Kalo Willie and John Ture in criminal case no. 46 of 2014 with one count of kidnapping contrary to section 105 of the Penal Code Act and two counts of sexual intercourse without consent contrary to sections 90 and 91 of the Penal Code Act [CAP. 135].

2. Following a defended hearing before Chetwynd J. in the Supreme Court, the Appellant was found guilty and convicted as charged on 9th June 2016. On 7th July 2016, the Appellant was sentenced to a total of 9 years 8 months

imprisonment for the two counts of sexual intercourse without consent and for the kidnapping conviction he was sentenced to 3 years imprisonment. The Appellant appeals the conviction and sentence as being erroneous in law and thus occasioning a miscarriage of justice.

3. During the call-over of this appeal on 7th November 2016, the Public Prosecutor made an application for this Court to summarily reject and strike out the appeal pursuant to section 204 of the Criminal Procedure Code (CPC) on the basis that there was no sufficient ground of appeal in the notice and grounds of appeal filed on 20 July 2016. Defence counsel acknowledged the defects complained of by the Public Prosecutor and he substituted a fresh notice and grounds of appeal dated 4th November 2016.

4. Section 204 of the CPC provides as follows:

> ***"204. Summary rejection of appeal***
>
> *(1) When a memorandum of appeal has been lodged, the appeal court shall peruse the same together with the record of the case and if it considers that there is not sufficient ground for interfering, it may notwithstanding the provisions of section 201 reject the appeal summarily:*
>
> *Provided that no appeal shall be rejected summarily except in the case mentioned in subsection (2) unless the appellant or his advocate has had the opportunity of being heard in support of the same.*
>
> *(2) Where an appeal is brought on the ground that the conviction is against the weight of the evidence, or that the sentence is excessive, and it appears to the appeal court that the evidence is sufficient to support the conviction and that there is no material in the circumstances of the case which could raise a reasonable doubt whether the conviction was right or lead the appeal court to the opinion that the sentence ought to be reduced, the appeal may, without being set down for hearing, be summarily rejected by an order of the appeal court certifying that it has perused the*

record and is satisfied that the appeal has been lodged without any sufficient ground of complaint.

(3) Whenever an appeal is summarily rejected notice of such rejection shall forthwith be given to the Public Prosecutor and to the appellant or his advocate.

5. Having heard from both counsel, we accordingly reserved our final decision on the application to reject and strike out pending a consideration of the merits of the appeal.

CONSIDERATION

6. The appeal is advanced on the following grounds:

Ground 1

The primary judge convicted the three defendants on a purported charge of coercion when the three men were actually charged for kidnapping. There was virtually no material evidence to support that charge.

Ground 2

There was no evidence adduced before the Court by the prosecution that the three men had had sex with the victim without her consent.

Ground 3

The primary judge was actually coaching the prosecuting counsel in the case when he should be sitting independently as a Judge. [This ground was abandoned at the appeal hearing.]

Ground 4

The primary Judge instructed his Associate to send emails to the three counsel in Port Vila while he was in Santo to say his judgment on the voire dire hearing was an error and should be disregarded.

7. The Appellant was charged with kidnapping contrary to section 105 of the Penal Code which provides as follows:

"105. Kidnapping

No person shall –

(a) convey any person beyond the limits of the Republic without the consent of that person, or of some person legally authorised to consent on behalf of that person; or

(b) by force compel, or by any fraudulent means induce, any person to go from any place to another place.

Penalty: Imprisonment for 10 years."

8. It is apparent from the information dated 1st August 2014 that although no subsection of s.105 has been specified, the **particulars of wrong** clearly show that the charge was laid under subsection (b) of s.105. Of significance is the fact that the allegation does not refer to circumstances alleging that the complainant had been conveyed "beyond the limits of the Republic without her consent" which is one of the elements to be proved under subsection (a). The particulars state as follows:

> "**Kiki Chilia, Kalo Willie** and **John Ture** sometaem long numba 2nd June 2014 long eria blong numba 2 lagon, yufla ie bin kidnapem girl ia Letisha Reuben olsem, yufala ie bin draggem hem mo pullem hem ie go insaed long Black Double Cabin Mitsubishi Truck mo transportem hem ie go long Mele Beach we long taem ia hemi againsem tingting blong hem."

9. We are satisfied that these particulars gave reasonable information to the defendants as to the nature of the offence charged. Section 71 of the Criminal Procedure Code Act provides that each charge shall contain a statement of the specific offence *"together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged"*. Even though there was no specification under s.105 we are satisfied that the charge was laid under subsection (b) of s.105.

10. Defence counsel submitted that the prosecution had not proved all the elements of kidnapping beyond reasonable doubt, namely, by force compel, or by any fraudulent means induce, any person to go from any place to another place. In arguing **ground 1**, Mr. Stephens submitted that for the prosecution to succeed they had to establish all the elements in s.105 to show that the complainant was taken by force from one place to another i.e. from Stella Marie to Mele Beach. Counsel further submitted that there was no evidence of kidnapping and that when the vehicle stopped the complainant, of her own

accord opened the door and got into the back seat of the vehicle. It is further submitted that several opportunities were made available to the complainant for her to have escaped during the night of 2 June 2014. Firstly, she could have escaped when the Appellant and his co-accused had stopped to buy bread at La Parisienne bakery. Secondly, when the three men went out of the vehicle to buy kava at a nearby nakamal and she was in the vehicle alone, she made no attempt to escape from the men. Counsel also submitted that the complainant could have escaped when the Appellant went into Reynold's kava bar to buy cigarettes but she did not make any attempt to escape.

11. This submission is flawed as it fails to consider the evidence before the Court that at the time the complainant was left in the vehicle all the doors were either locked or someone stayed in the vehicle with her. We consider that from the moment she was taken from Stella Marie to La Parisienne then to the nakamal at Freshwater and to Reynold's nakamal and finally to Mele beach was a continuing process of movement from one place to another which satisfies the requirement of kidnapping under s.105 (b).

12. The prosecutor contended that the evidence adduced at trial supported subsection (b) of s.105. There was evidence that inducement was obtained by fraudulent means before and when the complainant boarded the vehicle. There is also evidence that she was induced by the Appellant's lies because he had told her that he knew her uncle who had done some legal work for him. He had also told her that he would drop her off. We agree.

13. The trial judge's assessment about the offence of kidnapping is to be found at paragraphs 22 and 23 of his judgment as follows:

> *"22. I do not accept the defence evidence which says Ms. LR went on that journey completely of her own free will. I believe that she may have gotten into the vehicle to begin with but that was on the basis that the men were going to take her home. They did not. Had they told her what they planned, and I believe there was some pre-planning involved, she would not have gone with them. I believe her completely when she said in answer to a question from me that she would not have climbed into the vehicle had she known of the men's intentions. She was kidnapped by all three men.*
>
> *23. There is no question in my mind that all the defendants knew she did not want to accompany them for the whole journey. At the very least they must have known when they got to Freshwater to deliver the*

bread that she wanted to go home. They could not have mistaken her requests to be taken home for anything else. They could not have been under any mistaken belief she was a willing passenger. She made her requests clear and they are guilty as charged on the first count of kidnapping."

14. We consider that the charge laid under s.105 of the Penal Code met the s. 71 requirement and clearly indicated that the charge was kidnapping. We are satisfied that the Appellant was properly convicted for the offence of kidnapping and not "*on a purported charge of coercion*" as contended by defence counsel. This ground of appeal must fail.

15. As to **ground 2**, the Appellant admitted that he had sexual intercourse with the complainant because she consented to him doing so. We consider that this issue of consent is not borne out by the evidence which shows that the complainant testified that she said "No" when the Appellant asked her to have sex with him.

16. We consider that paragraph 20 of the judgment accurately reflects what the complainant said at the hearing:

> "*20. The evidence then turned to the sexual intercourse. Ms. LR described the sequence of the sexual assaults. She said the first man to force her to have sex was Kalo Willie. She was then forced to have sex with Kiki Chilia and then exit the vehicle and have sexual intercourse with John Ture on the beach. Kalo confirms in his statement that he was the first to have sexual intercourse with Ms. LR. John Ture confirms that in his statement that he had sexual intercourse with her on the beach. Neither of them have anything to say about consent. I accept Ms. LR's evidence on that issue. She declined initially to have sexual intercourse with Kalo Willie. He ignored her protests and removed her clothes and then raped her. She describes how badly she felt about what was happening. I have no doubts about that evidence. As indicated John Ture also confirms in his statement to the police that he had sexual intercourse on the beach with Ms. LR. I accept wholly what Ms. LR says in her evidence that she did not put up any fight. That does not mean that she consented to what was happening to her. In all the circumstances, given all that had gone before, it cannot be the case that John Ture took her lack of fight to be consent. There is no way he could have mistaken her lack of protest to be consent."*

17. The main complaint advanced by the Appellant is that the conviction cannot stand because of the inconsistencies between the statements of the complainant and her evidence before Court. In his legal submissions dated 11th November 2016, Mr. Saling Stephens highlighted what he said were a host of inconsistencies in the complainant's evidence and he submitted that during cross examination the complainant never stated that the three men had forced her to get into the vehicle and neither was she forcefully grabbed by the hand nor did she say that she was injured on both knees either. Counsel further submitted that there was no evidence before the Court that the sexual intercourse with the Appellant was without the complainant's consent.

18. It is noteworthy that nowhere in the records of the proceeding is there reference to Mr. Stephens cross-examining the complainant on prior inconsistent statements. We asked counsel whether he had put those inconsistencies to the complainant during cross examination. His response was that he had not done so but he had raised it in his submissions. This is regrettable. Counsel cannot ask for the rejection of evidence of a witness where her version of events (she did not consent) was not challenged in cross-examination by the allegedly inconsistent statements she is said to have made.

19. We consider that what the complainant said was the evidence the trial judge accepted and he explained it in his judgment that he does not believe the Appellant. He clearly preferred the complainant's evidence. His Lordship detailed his findings and conclusions at paragraphs 21 and 24 of the judgment as follows:

> *"21. I do not accept a word that Kiki Chilia says in his evidence. He gave the distinct impression he was making it up as we went along. I accept he made a statement early on saying he was the only one to have sexual intercourse but I do not accept his evidence on that and I do not accept that his sexual intercourse with Ms LR was consensual. I do wholly accept the evidence of the complainant. Kiki Chillia frequently said things in his evidence which were not put to Ms. LR when she was cross examined. He explained this by saying he had not put things in his statement because he had forgotten them but telling his story now reminded him of the detail. None of this "detail" had been put to Ms LR and the "detail" was clearly an attempt to make credible a story which was otherwise incredible. I do not accept his evidence that Ms. LR was the instigator of the sexual activity. I do not accept that she had pornography on her phone and asked him to watch it with her. I accept what she says, because of her earlier listening to music and speaking*

to her mother the battery on her 'phone was flat'. I accept that the men had in any event taken her phone from her and that she only got it back when she was released at Korman. I do not accept his timings of events either. I have no doubts the initial encounter with Ms. LR was much earlier than he says. He hugely embellished his evidence with detail not put to Ms. LR and I had no doubts that the reason why it was not put to her was because he had just made it up. He was lying."

24. *I do not accept that any sexual intercourse was consensual. Ms. LR was repeatedly raped by these three men. They took advantage of her vulnerability and I find all three defendants guilty as charged on the second count of rape. There is simply no question that they believed she was a consenting partner in the sexual encounter. I do not believe there is any way they could have mistaken her silence as consent especially as she had specifically told at least two of them she did not wish participate in any sexual activity. I have no difficulty in finding that Kiki Chilia dropped off the two other defendants after the offences had taken place at Mele beach and then drove the complainant to Klems Hill where he raped her again. I do not accept there is any way he could have held the mistaken belief that she was consenting to that final act of degradation. He is guilty as charged on the third count."*

20. The judge was entitled to make these findings. He had listened to their evidence and observed the manner in which each gave evidence. He completely accepted the evidence of the complainant. Moreover, the judge had considered the issue of corroboration and whether it was relevant in this case and he correctly applied the law in light of the facts before him. We accept the trial judge's findings of primary facts as well as his evaluation of those facts. We consider them as clear credibility findings he was entitled to make and we will not interfere with them.

21. It is timely to state that we are mindful of the long settled principle, stated and restated in common law jurisprudence as well as in this jurisdiction, that an appellate court should not interfere with the trial judge's conclusions on credibility and primary facts unless satisfied that he was plainly wrong. Accordingly, we reject **ground 2** of the appeal.

22. The complaint in **ground 4** is that the primary judge had instructed his associate to send emails to the three counsel in Port Vila while he was in Santo to say his judgment on the *voir dire* hearing may have been sent in error as an

earlier draft of that judgment, and not the final judgment. It is submitted by the Appellant's counsel that if the primary judge admits there is an error in his reasons for his judgment on *voir dire*, then the whole judgment on the *voir dire*, the conviction and sentence is a miscarriage of justice and should be quashed. The Appellant's counsel further submitted that the judge adopted the evidence of the witnesses from the *voir dire* hearing and the judge treated that as part of the evidence during the trial proper. We asked prosecuting counsel whether there was an understanding and agreement that the evidence given during the *voir dire* would be admissible during the trial and his response was that the Appellant was not a party to the *voir dire.*

23. The judge's footnote relates to the **Decision on Voir Dire** which was given on 25th day of February 2016. It explains why the judge sent the email. In any event, the note is self-explanatory and merely alludes to the fact that the judge had circulated a draft in error. It states:

> *"Note: This is a corrected copy of my decision. It would appear that in my haste to publish this decision before I left on tour to Santo I caused a draft copy to be sent to the parties. Unfortunately I only discovered my mistake when I tried to access the decision during the second week on tour."*

24. We have considered the **Decision on Voir Dire** at pages 30 to 34 of the appeal book and it seems clear to us that it exclusively concerns the statements made by Kalo Willie and John Ture. We agree with Mr. Boe that the Appellant was not a party to the *voir dire*. We are satisfied that this ground of appeal has no relevance to the appeal issues and therefore it fails. In any event, there is no reason to think that any draft judgment circulated was materially different from the final judgment. No counsel, and in particular counsel for the appellant, tried to show that.

    This ground of appeal has no merit.

CONCLUSION

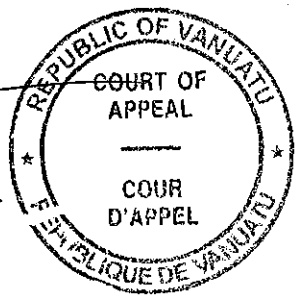
25. There is nothing to indicate that any miscarriage of justice arose from the process, the Judge's conduct, or the decision made. In the end result, we remain unconvinced that any prejudice or injustice would be occasioned by dismissing the appeal.

26. We see no merit in any of the grounds of appeal. For these reasons the appeal is dismissed. The Appellant must pay the Respondent's costs of the appeal at the standard rate.

27. In the circumstances, we consider that it is no longer necessary to discuss the application to "reject and strike out" referred to earlier on in this judgment.

Dated at Port Vila this 18th day of November, 2016

BY THE COURT



Hon. Chief Justice Vincent Lunabek