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

Criminal Appeal
Case No. 18/391 CoA/CRMA

BETWEEN: PUBLIC PROSECUTOR
Appellant

AND: MICHAEL SUAKI
Respondent

Coram:	***Hon. Chief Justice Vincent Lunabek*** ***Hon. Justice John von Doussa*** ***Hon. Justice Raynor Asher*** ***Hon. Justice Dudley Aru*** ***Hon. Justice David Chetwynd*** ***Hon. Justice Gus Andrée Wiltens***
Counsel:	*J. Naigulevu for the Appellant* *L. Bakokoto for the Respondent*
Date of Hearing:	*Monday 16th April, 2018*
Date of Judgment:	*Friday 27th April, 2018*

JUDGMENT

Introduction

1. This is an appeal out of time by the Public Prosecutor arising from a dismissal of a rape charge against the respondent, Michael Suaki, at the conclusion of the Prosecution case on 23rd October 2017. The judge initiated the dismissal himself, before the defence had been asked to open. Having heard the arguments relating to the substantive appeal, we allow the Public Prosecutor's application for leave to appeal out of time.

2. The Public Prosecutor submits that the judge was in error in dismissing the charge in this way. It submits that he wrongly referred to Section 135 of the Criminal Procedure Code (CPC) [CAP 136] as that section applies to the Magistrates' Court. We note the fact that the judge referred to section 135 of the CPC was an inadvertence. We consider that the judge was actually dealing with the issue under section 164 of the CPC, which was the correct procedure- and that is accepted by Mr. Naigulevu, the Public Prosecutor.

3. It is substantially submitted that the judge erred in law when he determined as a requirement of Section 164 of the Criminal Procedure Code (CPC) that it was unsafe to convict the defendant. It is claimed that the judge erred in law when he took into account inconsistencies in the prosecution evidence and issues of credibility.

Background

4. The facts can be stated shortly. Mr. Suaki went to the complainant's house and asked her and her sister-in-law to accompany him to his kava garden to clean it. They followed him into to the garden while the complainant's husband and her children stayed at home. Mr.Suaki is alleged to have then sent his sister-in-law to fetch water from a creek some 200 meters away. Whilst she was away, the complainant said that Mr. Suaki demanded that she have sex with him. She refused at first. She says he forced her to have sex with him, removing her clothes without her consent. She said she was afraid of a bush knife that Mr. Suaki had at that time.

5. After having given this evidence, under cross-examination the complainant changed what she had said, claiming that sex did not happen on the garden but in fact on the bushes halfway to the garden.

6. The complainant did not tell her sister-in-law about anything having happened. The complainant did not tell her husband. It was later when the husband saw Mr. Suaki touch his wife's buttock with his finger, and make a gesture towards her with his hand, suggesting sexual intercourse, that he became suspicious that something was going on. He then voiced his suspicion to Mr. Suaki, who came up to him with a knife and cut the husband's arm.

7. At the closure of the prosecution's case the primary judge, prior to the no-case submissions, of his own motion ***"pursuant to section ...164 of the CPA"*** ruled there was no prima facie case established. He said:

"7. The primary question for the Court to ask itself at the conclusion of the prosecution case is whether as a matter of law there is any evidence on which the accused could be convicted? In this complaint the complainant alleged she was forced to have sex against her will or consent but there was no evidence of any torn clothes or bruises on her body. There was no evidence of her crying after the incident so that Mary Therese could see and confirm. The complainant never told Mary or her husband about it. She did give evidence of another time when she alleged the defendant forcefully had sex with her in front of her son. But she was inconsistent on whether it was before or after 6th April 2016.

8. The Court comes to the conclusion that it would be unsafe to convict the defendant on such evidence. Accordingly the trial has to be stopped at this point".

Legal framework

8. Section 164(1) of the Criminal Procedure Code provides:

> ***"If, when the case for the prosecution has been concluded, the judge rules, as a matter of law that there is no evidence on which the accused person could be convicted, he shall thereupon pronounce a verdict of not guilty."***

9. The wording of this section is unique to Vanuatu, although Commonwealth jurisdictions generally have a procedure for the dismissal of a charge during the trial at the judge's instigation. We see no reason to interpret the power of a judge to intervene in favour of the accused person in a manner different from those other jurisdictions, if a consistent interpretation is available from the words used.

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.

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 admissable 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.

12. The leading Commonwealth decision, still cited in Australian and New Zealand decisions, is *R v Galbraith (1981) 73 G App R 124;[1981] 2 A11 ER 1060.* It was stated in that case:

> ***"How then should the Judge approach a submission of "no case"? (1) If there is no evidence that the crime alleged has been committed by the defendant there is no difficulty. The Judge will of course stop the case. (2) The difficulty arises where there***

is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence (a) Where the Judge comes to the conclusion that the Crown's evidence, taken at its highest, is such that a jury properly directed could not properly convict on it, it is his duty, on submission being made to stop the case. (b) Where however the Crown's evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence on which the jury could properly come to the conclusion that the defendant is guilty, then the Judge should allow the matter to be tried by the jury. It follows that we think the second of the two schools of thought is to be preferred.

There will of course, as always in this branch of the law, be borderline cases. They can safely be left to the discretion of the Judge."

13. That approach has been applied to the cases of judge sitting alone. The Privy Council in Haw Tua Tau v. Public Prosecutor [1982] AC 136 at 151 said:

> ***"In their Lordships' view the same principle applies to criminal trials where the combined roles of decider of law and decider of fact are vested in a single judge (or in two judges trying capital cases). At the conclusion of the prosecution's case what has to be decided remains a question of law only. As decider of law, the judge must consider whether there is some evidence (not inherently incredible) which, if he were to accept it as accurate, would establish each essential element in the alleged offence. If such evidence as respects any of those essential elements is lacking, then, and only, is he justified in finding "that no case against the accused has been made out which if rebutted would warrant his conviction", within the meaning of section 188(1). Where he has not so found, he must call upon the accused to enter upon his defence, and as decider of fact must keep an open mind as to the accuracy of any of the prosecution's witnesses until the defendant has tendered such evidence, if any, by the accused or other witnesses as it may want to call and counsel on both sides have addressed to the judge such arguments and comments on the evidence as they may wish to advance".***

14. R v. Galbraith has been applied by the Supreme Court in PP v. Verlili [2017] VUSC 166 and PP v. Samson Kilman & Others [1997] VUSC 21 and PP v. Natuman [2017] VUSC 210. The nature of the power to dismiss has been considered in New Zealand, where despite the particular legislative provision in that country, previously s 347 of the Crimes Act, and now s 147 of the Criminal Procedure Act, *R v Galbraith* was applied,

(see *R v Flyger* [2001] 2 NZLR 271) and also in *Haw Tua Tau v Public Prosecutor* which set out a similar approach.

15. We refer to *Fong v The Attorney General of New Zealand* [2008] NZCA 425 where after a consideration of relevant authority including *Flyger* the New Zealand Court of Appeal quoted *Parris v Attorney General* [2004] 1 NZLR 519 (CA), and then summarised the New Zealand test for dismissal of a charge by a judge before the conclusion of a trial:

> ***"The Court then correlated the jurisdiction to allow an appeal against conviction under s.385(1)(a) and the exercise of the s.347 discretion:***
>
> > ***[13] ... There should be a s.347 discharge when, on the state of the evidence at the stage in question, it is clear either that a properly directed jury could not reasonably convict, or that any such conviction would not be supported by the evidence. In most cases these two propositions are likely to amount to much the same thing.***
> >
> > ***[14] It is vital, however, to appreciate the proper compass of the work "reasonably" in this context. The test must be administered pre-trial or during trial on the basis that in all but the most unusual or extreme circumstances questions of credibility and weight must be determined by the jury. The issue is not what the Judge may or may not consider to be a reasonable outcome. Rather, and crucially, it is whether as a matter of law a properly directed jury could reasonably convict. Unless the case is clear-cut in favour of the accused, it should be left for the jury to decide. If there is a conviction this Court on appeal had the reserve power to intervene on evidentiary grounds. The constitutional divide between trial Judge (law) and jury (fact) mandates that trial Judges intervene in the factual area only when, as a matter of law, the evidence is clearly such that the jury could not reasonably convict or any such conviction would not be supported by the evidence ...***
>
> ***[53] Flyger and Parris contemplate a limited qualitative assessment of the prosecution case, under which a s.347 discharge is appropriate even where there is an evidential basis for a verdict of guilty if the relevant evidence is "so manifestly discredited or unreliable that it would be unjust for a trial to continue" (the words used in Flyger) and the case is thus "clear-cut in favour of the accused" (as it was put in Parris). The approach taken in Parris also brings into play the recent jurisprudence on s.385 appeals, see R v. Munro [2008] 2 NZLR 87 (CA) and R v. Owen [2008] 2 NZLR 37 (SC)".***

16. Section 164(1) of the CPC refers to the judge reaching a conclusion that there is ***"no evidence on which the accused person could be convicted".*** This leaves it open to a judge to consider not only whether there is such evidence, and in certain very limited circumstances, whether the quality of that evidence is so manifestly discounted or unreliable that the judge can conclude that there is no evidence on which the accused person could be convicted.

17. There should be no difference between the approach taken in those jurisdictions where there are jury trials or trials with assessors, and Vanuatu. A judge sitting alone in Vanuatu should in cases where the prosecutor has adduced evidence capable of supporting the essential elements of the prosecution case, only exercise the s164(1) discretion in the most unusual and extreme circumstances. A judge who does so intervene halts the natural progression of the time honoured trial process, where if the prosecution has made out a case it is for the defence to decide what steps it will take and present such evidence as it wishes, followed by submissions and a decision by the judge.

18. Therefore, where the evidence in a criminal trial is on its face sufficient to prove the case, a judge will only take the step of dismissing a charge where the evidence is "so manifestly discredited or unreliable that it would be unjust for a trial to continue". The circumstances must be extreme. To take an obvious example, where a complainant has admitted deliberately lying about the crucial events so as to make it travesty to proceed. And if the judge does contemplate such a step, the judge must give notice of this to the parties that such a course is contemplated and why, and give the prosecutor a reasonable opportunity to present submissions in opposition to a dismissal and the defence an opportunity to reply,

The exercise of the power in this case

19. In this trial it is not clear whether Saksak J gave the prosecution such an opportunity. There was no submission that he failed to do so, and we will assume that he did.

20. Therefore the question we must determine is whether the evidence of the complainant was so clearly and obviously discredited to warrant the extraordinary step that was taken. On the face of the judge's reasoning it was not. He referred to inconsistencies in her evidence, and a lack of corroboration. However, there are often inconsistencies in the evidence of witnesses who are ultimately believed, and there is no requirement for corroboration in a rape case. If the trial had run its natural course, and for instance the defence called evidence, it is possible that there could have been an admission, or some other corroboration that accidentally emerged in the defence evidence, and it is possible that the case would be proven to the requisite standard. The judge's premature intervention cut short the natural trial process. He was wrong to do so, given the reasons that he stated.

21. If this was the total of the material available we would therefore allow the appeal.

22. However in a criminal appeal such as this, we have a discretion under s 206(3) as to whether to order a re-trial. There was an extraordinary development in this case which has persuaded us that we should allow the acquittal to stand, and exercise our discretion not to order a retrial.

23. At the close of the complainant's evidence, which featured the weaknesses referred to by the judge, she made a most significant concession. She accepted, having previously denied it, that she was motivated in bringing the charge by a wish for revenge against the defendant. He had stabbed her husband because of an incident that indicated that she was having an affair with him, and this appears to be what was driving her. We have concluded that this concession, now on record, when coupled with the inconsistencies in her evidence, makes it entirely improbable that in a subsequent trial Mr. Suaki could be convicted. In our view, these developments make this case one of those borderline cases, where the complainant's failing were so significant to warrant a dismissal, as there was no evidence that a judge or jury could accept, on which to convict.

24. That being so, to put the defendant through the ordeal of a further trial, would in our view be unfair and unwarranted, as would the cost to the State and the added burden on

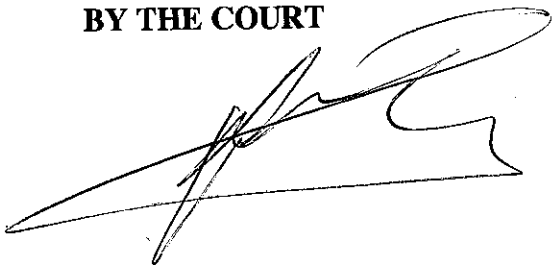
the Court system. Despite the strength of the Prosecution submissions, and the erroneous approach taken, we have decided to dismiss the appeal.

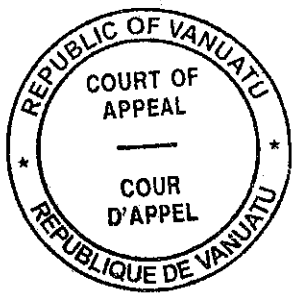
Result

25. The appeal is dismissed.

DATED at Port Vila, this 27th day of April, 2018.

BY THE COURT





Hon. Vincent LUNABEK

Chief Justice.