

BETWEEN: PUBLIC PROSECUTOR
Appellant

AND: MARTIN MAHE
Respondent

Coram: *Hon. Chief Justice Vincent Lunabek*
Hon. Justice John Mansfield
Hon. Justice Ronald Young
Hon. Justice Oliver Saksak
Hon. Justice Gus Andrée Wiltens
Hon. Justice Viran Molisa Trief

Counsel: *Mr Tristan Karae for appellant*
Mr Nigel Morrison for respondent

Date of Hearing: *5th July 2021*

Date of Judgment: *16th July 2021*

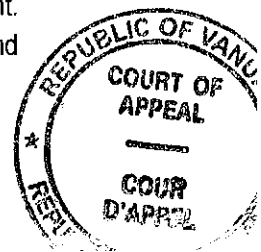
JUDGMENT OF THE COURT

A. Introduction

1. This is an appeal against the verdict of the trial judge in the Supreme Court orally pronounced on 30 April 2021. The reasons for the verdicts were published on 11 June 2021. The trial judge returned verdicts of not guilty in relation to all four (4) charges brought against the respondent.

B. Facts

2. Mr Mahe was charged with one count of intentional assault contrary to section 107(a) of the Penal Code Act (Count 1), one count of being drunk and disorderly contrary to section 148(b) of the Act (Count 2) and two counts of failure to comply with and observe the law contrary to section 13(1)(a) and section 19 of the Leadership Code Act.
3. It was alleged that on 4th April 2020 Mr Mahe had gone into a Vietnamese restaurant in Port Vila and assaulted Jackson Noel Katenga by squeezing his neck. Further it was alleged that Mr Mahe was drunk and acted in a disorderly manner, being shirtless, hitting tables and chairs and causing room dividers to fall, and causing diners to flee from the restaurant. Finally it was alleged Mr Mahe's actions were inconsistent and contrary to sections 13 and



19 of the Leadership Code Act. These latter two charges were wholly dependent on charges 1 and 2 being proved.

4. Mr Mahe denied all allegations. A trial was held. The Prosecutions called 6 witnesses namely Jackson Noal Katenga, Lisa Tran, Madonna Meltenoven, John Stephen, Andrew Kalman and James Bila.

C. The Judgment

5. The trial judge evaluated the evidence in relation to the assault charge in Count 1 and said:

9. *In relation to count 1, the main issue is whether the complainant was intentionally assaulted.*
10. *The complainant says he was having dinner in the restaurant with two Korean friends when Mr Mahe walked into the restaurant drunk and with no shirt. He says Mr Mahe was very drunk. When Mr Mahe saw him Mr Mahe walked towards him and put his arm around his neck and squeezed his neck pulling him down. Under cross examination he refused to answer questions relating to why Mrs Gesa was held in custody in Cell No 6. He told the Court that he will not answer those questions.*
11. *The security guard John Stephen said when he was called to assist the complainant Mr Mahe had his arm around the complainant's neck and was pulling him down.*
12. *Ms Meltenoven gave evidence that at the relevant time there were 6 people in the restaurant. The complainant and his two Korean friends having dinner and herself, Linda and Ketura. Around 6 pm they received a call from Donald Mr Mahe's driver ordering soup. Around 7pm Donald and Mr Mahe came to get the soup. Mr Mahe was drunk so she told Donald to take him home. When Mr Mahe entered the restaurant again she took his hand and led him to his car and told them to go home. She said Mr Mahe wore nylon shorts and no shirt.*
13. *Under cross examination, Ms Meltenoven said she was there in the restaurant when Mr Mahe entered, he was drunk but he did not assault the complainant. She maintained her evidence that there was no assault.*
14. *Ms Meltenoven gave her evidence confidently and without any hesitation. I accept her evidence as a witness of truth. She admitted under cross examination that the complainant and Mr Kalman attended her work place several times to get her to make a statement. She was concerned and got advice from Christina Gesa as her lawyer. She felt pressured to say something that did not happen. She filed a sworn statement to that effect in a related matter which was tendered as **Exhibit D4**. At paragraph 12 she deposed that:-*
 12. *I understood that he (Mr Kalman) wanted me to mention something which did not take place on that incident of 4 April 2020 and I did not want to lie".*



6. The trial judge accepted the evidence of Ms Meltenoven and found there was no assault.
7. In relation to the charge of being drunk and disorderly in Count 2, the trial judge evaluated the evidence of the complainant with Mr Mahe's denial and the evidence of Lisa Tran and said at [21]:

"Lisa Tran said Mr Mahe is one of her regular customers and would not do such a thing. Ms Meltenoven in her evidence in chief, said when Mr Mahe and Donald entered the restaurant they were talking and laughing. She agreed Mr Mahe was drunk but he was not disorderly or hitting chairs as alleged by the complainant."

8. The trial judge made the following findings at [29] and [30]:

29. *"Given the contradictions in the prosecution evidence, I find that the complainant was not assaulted by Mr. Mahe. Similarly Mr. Mahe was not drunk and disorderly. There was no complaint made by the owner of the restaurant about Mr Mahe's behaviour if any. Mr. Bila confirmed that there was no evidence to charge Mr. Mahe."*

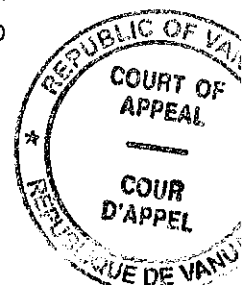
30. *When considering the evidence in totality, I am not satisfied that the prosecution has proved its case to the requisite standard in relation to count 1 and 2. It therefore follows that Counts 3 and 4 also cannot be sustained."*

D. The Appeal

9. The appeal raised one ultimate ground: whether the verdict entered was unsafe and unsatisfactory; and further, that the alleged failure to provide reasons for a decision amounted to an error of law.

E. Discussion

10. First, the Prosecutions complained about the trial judge's acceptance of Ms Meltenoven's evidence that there was no assault and submitted the reason for her not seeing the assault was due to the fact she was in the kitchen at the time the alleged assault occurred.
11. Mr Karae submitted the trial judge did not consider or failed to place sufficient weight on the evidence of the complainant and of John Stephen, the security officer who actually saw the assault and was called on to assist.
12. Secondly, the Prosecutions submitted the trial judge should not have accepted the evidence of Lisa Tran because she was not at the restaurant at the time of the alleged drunk and disorderly conduct charge.
13. Mr Morrison in response said the incident was a mere hug and not an assault. Counsel argued it was a case of a drunken man approaching the complainant who was reluctant to have any engagement and that was all there was to it.



14. In regard to Ms Tran's evidence Mr Morrison accepted the witness was not present at the beginning but maintained that she did attend when Ms Meltenoven had called her up on the phone.

F. The intentional assault point

15. The trial judge discussed this point at [25] of the verdict and set out the full report of Jackson Noal Katenga, the complainant. That report formed the basis of the complaint of the assault. The report makes no mention or complaint of any assault by Mr Mahe against Mr Katenga.

16. At [26] the judge said:

"In his Police statement of the same date the complainant attaches the above report as his complaint. In an earlier statement made by the complainant dated 5 April 2020 the complainant says Mr Mahe squeezed his neck. The latter report does not mention Mr Mahe assaulting the complainant and it was signed by the complainant."

17. Then in [27] of the verdict the judge said:

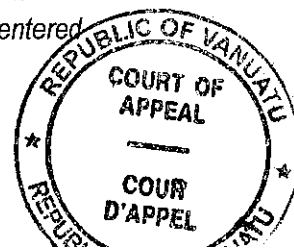
"Ms Meltenoven's evidence contradicts the complainant. She said there was no assault. When she was pursued by the complainant and Mr Kalman to make a statement, she sought advice from Mrs Gesa. Apparently the complainant did not like it and had Mrs Gesa arrested and placed in cell No 6 for assisting Ms Meltenoven. When cross examined about why Mrs Gesa was arrested the complainant refused to answer the questions."

From those discussions of evidence the judge found at [29] there were contradictions in the prosecution evidence and concluded there was no assault inflicted by Mr Mahe on the complainant as alleged. It did not matter therefore that Ms Meltenoven may have been in the kitchen for some of the time. She told the Court what she had seen and the judge regarded her evidence as reliable.

18. The evidence of the complainant lost credibility when he refused to answer questions in cross-examination in relation to the arrest of Mrs Gesa. It was also significant to the judge, and understandably so, that the complainant in one report of the incident (recorded in Exhibit D2) did not mention any assault. And the evidence of the security officer also is questionable as to its credibility and reliability also in light of the Report which made no mention of any alleged assault, and in light of the steps taken by Mr Katenga and Mr Kalman in attempting to get Ms Meltenoven to make a false statement to be used in evidence against Mr Mahe. The judge recorded this at [14] of the verdict.

G. Lisa Tran's Evidence

19. Ms Tran's evidence related to the charge of drunk and disorderly conduct against Mr Mahe. The complaint was that recorded in [20] of the verdict that "when Mr Mahe walked into the restaurant he was drunk and disorderly and hitting chairs and tables in his way as he entered the restaurant."



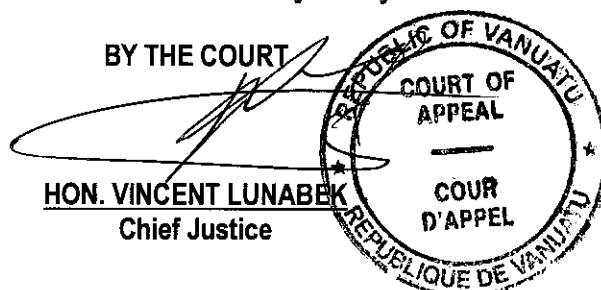
20. All Ms Tran said was that Mr Mahe was a regular customer and would not do such a thing. This is an opinion as to character of Mr Mahe. The report set out by the judge in [25] of the verdict makes no mention of hitting chairs and tables. The judge accepted at [24] Mr Bila's evidence that Mr Mahe, although drunk, was not disorderly. That was the end of that charge.

H. Conclusions

21. Nothing was made of the charges complained of in counts 3 and 4 as these hinged on the charges in Counts 1 and 2. Once the charges in Counts 1 and 2 fell, the charges in Counts 3 and 4 fell as well.
22. The judge said in [30] that he had considered "*the evidence in totality, I am not satisfied that the prosecution has proved its case to the requisite standard*". It is not correct that the judge did not provide reasons for his conclusions. The reference to his reasons is sufficient to show that that submission was not correct. The refinement of that argument was that there were no reasons given for rejecting the evidence of the complainant and of the security guard. That is also not correct. The short answer is that there was evidence inconsistent with their evidence, which the judge found to be impressive and reliable. There were also inconsistencies in the version of events presented by the complainant including that he did not mention any assault in one report of the incident, and there was his refusal to answer relevant questions about the reasons for him having Mrs Gesa apprehended.
23. We accept there may have been some areas in which the judge might have referred to the evidence in his reasons in a little more detail. But that is clearly not sufficient to disturb the findings and verdict of the judge. He had the benefit of seeing all the witnesses. There were differences in critical respects between the evidence of the complainant and the security guard on the one hand and of Ms Meltenoven, Mr Bila and Ms Tran on the other. Those latter three persons were assessed by the judge as credible witnesses. In those circumstances, it is not at all surprising that the judge did not regard the charges as proved beyond reasonable doubt. The Prosecution's submissions that the verdict was unsafe and unsatisfactory is not made out by pointing to evidence which, if accepted in its entirety, might prove the charges beyond reasonable doubt. That ignores all the other evidence. We do not see any error of law made by the Judge.
24. The appeal is dismissed.

DATED at Port Vila this 16th day of July 2021

BY THE COURT



HON. VINCENT LUNABEK
Chief Justice