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

Criminal Appeal
Case No. 21/3518 COA/CRMA

BETWEEN: **Ronnie Vira**
Appellant

AND: **Public Prosecutor**
Respondent

DATE OF HEARING:	***7 February 2022***
CORAM:	***Chief Justice V. Lunabek*** ***Justice J.W. Hansen*** ***Justice R White*** ***Justice O. Saksak*** ***Justice D. Aru*** ***Justice V.M. Trief*** ***Justice E. Goldsbrough***
COUNSEL:	***C Leo — Counsel for Appellant*** ***B Ngwele — Counsel for Respondent***
DATE OF JUDGMENT:	***18 February 2022***

JUDGMENT OF THE COURT

[1] Following trial, the appellant was convicted of two charges of sexual intercourse without consent and one charge of an act of indecency without consent. On the two sexual intercourse charges he was sentenced to nine years and six months' imprisonment concurrently, and on the indecency charge he was sentenced to two years, six months' imprisonment to be served concurrently.

[2] The appellant appealed both conviction and sentence. At the commencement of the hearing, he abandoned the appeal against sentence, and we need say no more about it.

Background

[3] During 2016 and 2017, the complainant was residing with the appellant and his wife (her uncle and aunt) at Freshwata. The complainant was from Malekula, but her parents sent her to a school in Port Vila. Because they could not afford board, they arranged for the complainant to stay with the appellant, and his wife.

[4] At some time in 2016 the complainant said the appellant had kissed and groped her by touching her vagina and breasts, which led to charge 3. Later, on occasions in 2017, the complainant alleged that the appellant forced her to perform fellatio and had licked her vagina, which had led to charge 2. In the

same year she alleged that the appellant had forced her to engage in sexual intercourse with full penile penetration.

[5] At trial, the appellant accepted the facts as alleged against him but said it was with the full consent of the complainant and that they occurred while his wife was at work. The second limb of the defence was if there was no actual consent then the appellant had reasonable grounds to believe there was consent.

The trial

[6] The only evidence adduced at trial was from the complainant and the appellant and, as the Judge noted, his verdict depended wholly on the issue of credibility. He reminded himself that it is the prosecution who must prove beyond reasonable doubt that the complainant did not consent, and noted the appellant had no onus of proof. He went on, at [6] and [7] of his verdict, to warn himself of matters relating to the evaluation of credibility and reliability and continued that for the verdicts to be guilty he had not only to accept the complainant's evidence, but to reject contrary evidence of the appellant. There then followed a careful analysis of the evidence that concluded with the Judge rejecting the evidence of the appellant and accepting that of the complainant.

[7] That included the acceptance of her reasons why she did not make contemporaneous or early complaints. The Judge noted that the focus of cross-examination was on the opportunities the complainant had to avoid the offending. However, the Judge accepted the complainant's evidence as follows:

> *"9. Evelyn explained that she was scared of Mr Vira. He had threatened to remove her from her school if she had told anyone. Further he had gone into intimate details of Mr Vira and his wife's sexual practices, which embarrassed Evelyn and disenabled her to speak to her aunt. Mr Vira told me he had no authority to stop Evelyn from going to school, but that did not mean that he could not have made the threat; and as an adult and a caregiver to a teenager that would have been real. Mr Vira confirmed that he had spoken to Evelyn about the intimate activities he and his wife enjoyed. Evelyn's account on these matters had a ring of truth to it — Mr Vira's did not, where it differed from what Evelyn had said.*
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> *10. Evelyn told me about the lay-out of Mr Vira and Ms Vira's house. She slept in the living room. Mr and Ms Vira had their own room. Their son had no fixed sleeping place, he moved about it seemed. The television room, an add-on to the house, was also used by various of them to sleep in. There was no dispute as to this by Mr Vira. The point being made was that Evelyn could have raised the alarm had she wished by calling out or banging on the living room walls.*
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> *11. Evelyn explained that she was a quiet person, and when she cried, she did so, if not silently, then at least quietly. Mr Vira told me she did not cry at all. From that evidence it is clear that neither neighbours nor Ms Vira would have been alerted.*
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> *12. Evelyn kept what she said was going on secret. As explained, she was afraid of what Mr Vira might do, as demonstrated not only by his threat re schooling but also by bouts of anger when he was refused what he wanted. The anger was displayed by hitting the walls and his uttering profanities. Mr Vira said these things did not occur. I believed Evelyn's account as to this.*
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> *13. Evelyn really had nowhere to go, she explained. She was unable to tell her aunt, was scared of the repercussions if she told anyone else and couldn't leave the house where she was*

residing to move in elsewhere. There was some relief in 2017 when Mr Vira went to Australia for approximately 6 months. However, Evelyn stated that his conduct resumed on his return.

14. *Evelyn went to study in 2018 on the basis of being awarded a scholarship. She maintained that although nothing happened in 2018 on her return to Port Vila in terms of objectionable behaviour of Mr Vira, that had not prevented him from attempting to repeat his earlier conduct. She managed to ward him off."*

[8] The Judge concluded his findings:

"20. *Mr Vira says that all that occurred was consensual. He recalls Evelyn coming to live with them so as to be close to her school. One day, at lunch time, he saw her coming out of the shower and his attitude towards her changed — he was smitten. He kissed her 3 times that lunch time. Their affair advanced following their initial interaction to including all the activities Evelyn accused him of doing. He said that she participated fully and willingly and without any coercion by him.*

21. *He gave an elaborate account of the first time he had sexual intercourse with Evelyn. He said that she initiated things by waking him at 2am in the morning on a pretext to get him to go to her in the television room. The oral sex he then performed on her was with consent, and she gave every indication that she enjoyed it and wanted to progress to penetrative sexual intercourse, which is what occurred. I found his version to be fanciful and bear little relation to the truth. I did not believe him as to Evelyn being the driver of the situation.*

C. *Decision*

22. *I reject all Mr Vira's evidence where it does not match that of Evelyn. I am wholly convinced that Evelyn not only told me the truth, but that she told me only the truth. I put Mr Vira's evidence to one side, as I did not believe his account in relation to the issue of consent.*

23. *Looking at Evelyn's evidence, I am sure that what she said was the truth, namely that not only was there no actual consent by her to any of Mr Vira's conduct, but further that he could not reasonably have believed that she may have been consenting. I reject the suggestion made that the sexual activity was often Evelyn's idea — Mr Vira was the driver on every occasion. Not only did Evelyn say she was not consenting, but she also demonstrated as much by her physical reactions to Mr Vira's advances.*

24. *I find that the sexual interactions were without Evelyn's consent.*

25. *Mr Vira is accordingly found guilty of all 3 charges."*

[9] The one matter not mentioned in the early part of the verdict was the requirement for the prosecution to prove the appellant had no reasonable grounds to conclude the complainant was consenting. However, it is clear the Judge was alive to this element of the offence when he delivered his decision at [22] and [23] above.

Application to adduce new evidence

[10] Before turning to the appeal, we need to deal with an application for leave to adduce fresh evidence, which was filed extremely late. It was not received by the Court until last Friday, 4 February at

4.30 p.m. There is absolutely no explanation in the application, or the supporting sworn statement as to this delay. It should have been explained.

[11] What is sought is to adduce evidence from the appellant's wife. In the alleged new evidence, she confirms that after the acts of purported unlawful sexual intercourse, the complainant went to study in Noumea. During that period, she exchanged emails with the complainant, and she states the complainant never mentioned any of her husband's alleged sexual offending. She did say that the complainant requested to come to Vanuatu for a two-week holiday and that she cautioned the complainant about the cost of air travel. She goes on to say that when the complainant arrived, she texted the appellant and asked him to pick her up at the airport, and that eventually the complainant stayed with the appellant and his wife during that two-week holiday. She says that during that two-week period the complainant did not mention to her anything about the appellant's conduct or that he had had unlawful sexual intercourse with her, and, following the holiday she returned to Noumea.

[12] Clause 2(2) of the Court of Appeal rules gives this Court full discretionary power to receive further evidence on questions of fact. The proviso to the section is that in the case of an appeal from a judgment after a trial on the merits, such further evidence shall not be admitted "except on special grounds." This Court stated the correct approach to such applications in *Adams v Public Prosecutor* [2008] VUCA 20 at:

> *"Turning now to the merits of the appeal, section 210 of the Criminal Procedure Code [CAP.136] provides that the Court of Appeal can receive additional evidence. However, the circumstances in which an appeal court will receive evidence of the kind advanced by the appellant are well established and clear. Where the evidence sought to be adduced is "fresh evidence", being evidence that existed at the time of the trial but was not called, as opposed to "new evidence" which is evidence that comes into existence after the trial, the fresh evidence must meet four characteristics which are correctly identified by Mr Toa in his written submissions by reference to the decision in R v. Nguyen [1998] 4 VR 394 at 400-401. The Court must be satisfied that the fresh evidence is:*
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> *(a) Evidence that was not available or could not with reasonable diligence have become available at the trial;*
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> *(b) The evidence is relevant and otherwise admissible;*
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> *(c) The evidence is apparently credible (capable of belief);*
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> *(d) There is a significant possibility that the evidence, if believed, would reasonably have led to the acquittal of the appellant if the evidence had been before the Court at trial.*
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> *The purpose of these principles is to require that at a trial each party leads all the evidence which they wish to rely on, and to prevent an unsuccessful party later reformulating the basis of his case and seeking to have a second attempt to establish a position which failed at the first trial. Finality in litigation, both criminal and civil, is a fundamental object of the court process. Subject to the right of appeal, it is only in exceptional circumstances that a party can revisit the evidence by supplementing that given at the trial."*

[13] The insurmountable hurdle facing the appellant is that the evidence is clearly not fresh, and it did not require reasonable diligence to discover it. It was known at the time of trial. What the wife said is:

> *"2. I was not able to give its evidence in the Court below because my former solicitors advised me not to give evidence.*
>
> *3. I was advised by my former solicitors that the appellant's evidence was sufficient to hold him not guilty."*

[14] The solicitor is not named and, in circumstances such as this, this Court is entitled to expect the sworn statement of the solicitor confirming that such advice was given. We do not even know if the solicitor concerned was the same one acting for the husband, and the reasons behind such purported advice. We would add to the principles set out at [12] above that in circumstances such as this the appellant, or the purported witness, must waive any privilege they have so that it is open to the prosecutor to obtain a sworn statement of the solicitor so that all relevant material is before the court. This did not occur.

[15] No special ground exists that would warrant the granting of this application. It is designed to strengthen the appellant's position that all that occurred was consensual. It could have been given at the time. A decision was made at trial not to call the wife. Given that Evelyn had revealed the offending to her, and she got the appellant to apologise and pay money to the complainant, there are self-evident reasons why such a decision was made.

[16] The application to adduce fresh evidence is without merit and is dismissed.

Decision

[17] This Court in *Pakoa v Public Prosecutor* [2019] 51 at [44] cited with approval from *Dovan v Public Prosecutor* [1988] VUCA 7:

> *"We cannot accept that, in deciding if a verdict is unsafe or unsatisfactory, in asking ourselves if we have a lurking doubt, we can or should hear a virtual repeat of the type of arguments usually presented in Counsel's closing speech. The appeal court is not to be regarded simply as an opportunity to have a second bite at the same cherry... Thus, before it will intervene in such a case, this Court must have some ground for considering the verdict unsafe or unsatisfactory that goes beyond the simple question of whether we feel we might have come to a different conclusion if we had been the trial judge on the appearance of the written record."*

We concur.

[18] Before an appeal court could allow such an appeal, "we must have reached the position that any reasonable decision maker *must* have entertained a doubt" as to guilt: *Morrison v Public Prosecutor* [2020] VUCA29 at [20].

[19] Further, this Court in *Walker v PP* [2007] VUCA 12 cited with approval the following passage from *Devries v Australian National Railways Commission* [1992] HCA 41:

> *"10. More than once in recent years, this Court has pointed out that a finding of fact by a trial judge, based on credibility of a witness, is not to be set aside because an appellate court thinks that the probabilities of the case are against even strongly against that finding of fact. If the trial judge's finding depends to any substantial degree on the credibility of the*

witness, the finding must stand unless it can be shown that the trial judge had failed to use or had palpably misused his advantage, or has acted on evidence which was inconsistent with facts incontrovertibly established by the evidence, or was "glaringly improbable."

Again, we concur.

[20] We have set out the judge's finding on the evidence in full above. We do not need to rehearse that evidence further. The Judge carefully considered the evidence, rejected that of the appellant, and accepted that of the complainant. Such a finding was clearly open to him. It is not for this Court to re-hear this matter. But there is ample evidence to demonstrate that the complainant did not consent, and as the Judge found, her actions and responses would have made it perfectly plain to the appellant that he had no reasonable grounds to believe such consent was forthcoming. (It is enough to mention the appellant's threat to prevent the complainant going to school and his anger and profanities when he did not get what he wanted). The appellant is simply attempting "to have another bite of the same cherry."

[21] The appellant has fallen well short of establishing that the judge "had failed to use or had palpably misused his advantage, or has acted on evidence which was inconsistent with facts incontrovertibly established by the evidence", or was "glaringly improbable".

[22] In cases such as this, where there is ongoing sexual activity, it may be preferable for the issue of reasonable belief in consent to be mentioned up front along with the other elements of the offending. But this is not a criticism of the judge. His verdict makes clear he was conscious of the need for the prosecution to prove beyond reasonable doubt there was no consent, nor was there any reasonable basis for the appellant to believe there was consent. The accepted evidence of the complainant clearly establishes this.

[23] This is an appeal without merit. It follows the appeal against conviction is dismissed.

Dated at Port Vila, this 18th day of February 2022.
BY THE COURT

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Hon. Chief Justice Vincent Lunabek

REPUBLIC OF VANUATU COURT OF APPEAL COUR D'APPEL REPUBLIQUE DE VANUATU