

**IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU**
(Criminal Jurisdiction)

Criminal
Case No. 18/1359 SC/CRML

PUBLIC PROSECUTOR
v.
BEN JOHN

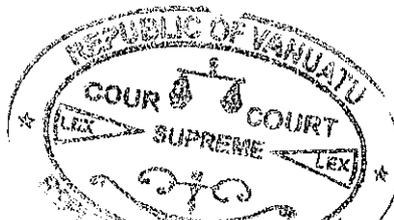
Coram: *Justice D. V. Fatiaki*

Counsel: *Ms L. Lunabek for the State*
Mr H. Vira for the Defendant

Date of Delivery: *10 August 2018*

REASONS FOR DECISION

1. On 10 August 2018 this court granted the defendant's application to vacate the guilty plea entered by him at his arraignment on 5 June 2018 for reasons now provided.
2. The defendant was represented by counsel at his arraignment and without demurrer, the defendant agreed to the facts outlined by the prosecution which told of him dragging the complainant to an isolated area and forcibly undressing her and having penile intercourse with her until he ejaculated. The defendant was convicted on his guilty plea for an offence of Sexual Intercourse Without Consent contrary to Sections 90 and 91 of the Penal Code.
3. A pre-sentence report was ordered as well as sentencing submissions from counsels. The defendant was granted bail and the matter was adjourned for sentence on 29 June 2018. Unfortunately, no pre-sentence report was available and no sentencing submissions was provided by defence counsel on the due dates. Instead, on 2 August 2018 defence counsel filed a Memorandum attaching copies of three (3) handwritten documents all dated 4 April 2018 from the complainant, her mother, and her chief. Although their reasons differ, their request was the same namely, to withdraw the case against the defendant.
4. It is unclear to whom the documents were written or given but it is clear that they all pre-date any charges laid against the defendant. In essence, the letters confirm important exculpatory elements of the defendant's voluntary caution statement given to the police on 1 March 2018 during their investigations into the case.

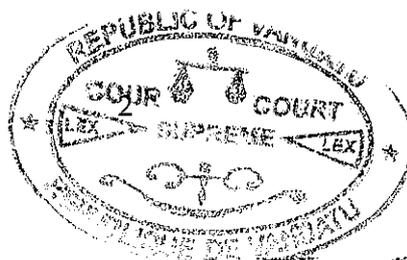


5. Be that as it may, in his application and sworn statement in support of the application to vacate and change his plea, the defendant deposed that he had consistently instructed his original defence counsel of his intention to plead not guilty to the charge. Then, just before his arraignment he informed his now different defence counsel, that he would be pleading guilty. The reason he deposed is that while he was on remand in prison, fellow detainees had advised him to plead guilty and he would receive a suspended prison sentence as he was a student and also below 18 years of age.
6. The legal principles and circumstances in which an application to vacate a guilty plea may be granted after conviction but before sentence, are conveniently set out in the judgments of this Court in: PP v O'Connor [2008] VUSC 19 and PP v Varasmaite [2011] VUSC 277 and need not be canvassed or repeated. Suffice it to say that in the Varasmaite case where the defendant had said that he pleaded guilty on the advice of counsel that the court would "... *be lenient with me to impose lower sentence*", although the application to vacate the guilty plea was declined, the court, nevertheless, said (at para. 13):

"I accept also that this accused is relatively unsophisticated and that these are very serious charges. Furthermore given Mr Laumae's absence, and what I can assume to be the unexpected (by Mr Laumae) assumption of responsibility on the part of Mr Tari to advise as to plea, if all other considerations were equal then the application would be allowed".

(my underlining)

7. In the present case accepting that the defendant pleaded guilty on the advice of unidentified fellow prison inmates that he would receive a suspended sentence based on his plea and his relative youth, both of which are well-recognised mitigating factors, that would not be sufficient in itself to undermine the integrity or genuineness of his guilty plea is in so far as the advice received was directed at the likely sentence and not at an essential element or ingredient of the offence.
8. In this latter regard in the defendant's caution statement recorded by the police on 1 March 2018, the defendant made the following exculpatory statements:
- "Long Sunday 11 February 2019 mi bin stap long ENAN Church mi faenem (the complainant) start long last year finis";
 - "... mi bin havem sex wetem hem long taem ia mi no save se hemi wan student";
 - "Long Sunday 11 February 2018 mi bin stap long ENAN Church mi faenem (the complainant) wetem smol sister blong hem ... (the complainant) italem se 'yu kam yu kam go putum mitufala' afta mi go olsem girlfriend blong mi";
 - "mi wantem talem se mi no bin pushim hem mo too no no kilim hem mo mi no forcem hem. Mi bin stap toktok good nomo";



- “Mi wantem talem se ol family blong mi ibin go mekem custom ceremony finis igo long family blong (complainant) we oli kakae wan pig wetem wan kava wetem fulap local kakae olsem taro, manioc etc...”; and lastly:
 - “Taem we mifala igo stap nao ol family blong (complainant) oli sendem toktok ikam se bae olgeta oli kam tekem aot report long Police ...”.
9. It is unfortunate that the police, despite being aware of the exculpatory assertions in the defendant’s caution statement, did not see fit to record further statements from the complainant and other witnesses to either disprove or verify the truth of the defendant’s assertions. In the event they remain unchallenged.
 10. Furthermore, the above exculpatory statements are materially and substantially confirmed by the earlier mentioned handwritten documents provided by the complainant, her mother, and her village chief.
 11. Needless to say, the exculpatory statements having been confirmed by the complainant and others, there is not the slightest doubt in my mind that they constitute in the absence of any contrary evidence, a complete defence to the charge that the defendant pleaded guilty to and which he now seeks to vacate.
 12. The foregoing constitutes the Court’s reasons for granting the defendant’s application to vacate the defendant’s conviction and guilty plea and substituting therefor a not guilty plea. The defendant’s bail was extended on condition that he appear for his trial in the Supreme Court on 20 August 2018 at Isangel, Tanna.

DATED at Port Vila, this 10th day of August, 2018.

BY THE COURT


D. V. FATIAKI
 Judge.

