IN THE COURT OF APPEAL OF

THE REPUBLIC OF VANUATU APPEAL CASE NO. 2 /1990

SAMSON LENCY -v- THE PUBLIC PROSECUTOR

JUDGEMENT

This is an appeal against a decision of Cooke C.J. sitting in the Supreme Court in Luganville on 14 March 1990, when the appellant was convicted of attempted rape contrary to section 91 Penal Code Act No. 17 of 1981 and sentenced to eight years imprisonment.

His appeal against sentence is on two grounds. The first ground is that the learned trial judge should have disqualified himself from hearing the case. This ground arises as the complainant in the case was one Caroline Tagar, the wife of Wycliff Tagar who is, and has been for some time, employed as a magistrate and as such has worked under the supervision of the learned Chief Justice. It is therefore said by the appellant that the learned Chief Justice could not deal with the case "without bias or the appearance of bias."

In a small jurisdiction such as this it is inevitable that magistrates and judges will be required to deal with cases involving people they have met or with whom they have had previous dealings. It would be quite wrong to suggest that they should disqualify themselves from dealing with every such case. Clearly there will be cases where it is inappropriate for a particular magistrate or judge to hear a particular case, depending on how well they know any individual involved, but each case would need to be considered as it arises.

Account also needs to be taken as to whether the individual known to the magistrate or judge is to give evidence thereby requiring an assessment by the court on credibility.

In this case the complainant did not give evidence before the tribunal and therefore the learned Chief Justice was not required to assess her credibility. Any professional tribunal in these circumstances is capable of putting matters of personal feeling to one side and assessing the correct sentence on the facts of the case. This ground of

appeal we feel should fail.

The second ground of appeal relates to the facts of the case or at least as to which facts the court should take into account when sentencing an offender following a plea of guilty. Counsel for both parties to this appeal sought guidance from the court that point and to that end we give our opinion on some of the various situations which may arise.

It is our view that where an accused puts forward matters which go to contradict the very basis of the charge against him the court should enter a not guilty plea on his behalf and set the matter down for trial. Where the accused puts forward matters which contradict the prosecution facts then, if the judge considers that they are matters which will affect his sentence, he must decide the point in favour of the accused. If he decides that he cannot do so the court must call for evidence. The burden on the prosecution in those circumstances is to prove whatever point challenged beyond reasonable doubt.

When the accused puts forward in mitigation matters which do not contradict the prosecution facts but are extraneous to it, unless the judge feels the matters are not something that would affect his sentence, he should again accept the accused's contentions or allow the accused to call evidence on the point.

When the accused puts forward matters which, whilst not amounting to a denial of his guilt of the charge, give such a different version of the facts that it amounts to a different case, from that presented by the prosecution, the matter should also be tried as a plea of not guilty.

Exceptions will arise outside the scope of these example which the court cannot attempt to envisage which future courts will no doubt decide taking into account these general guidelines.

In the present case the appellant put forward matters not in contradiction of the prosecution facts but extraneous to it. He did not give sworn evidence on those matters nor was evidence given in rebuttal. The matter was however dealt with to some extent in the papers at page 12 of the appeal book. It is not clear why the additional statement was taken from the complainant but it indicates that the appellant had raised the issue of a prior meeting at some stage before the hearing.

It was therefore open to the learned trial judge to make a determination on the issue from the accused's statement and the papers before him from the preliminary enquiry. This would have involved him in assessing credibility as referred to above and as we have said it may well be that once this

became necessary the judge then should have reconsidered the question of his suitability to try the case.

Clearly the learned trial judge went on to make a determination against the accused. We consider this in the circumstances unfortunate. Considering the facts of the case however and accepting the appellant's version of the prior meeting we are not of the view that the sentence of eight years is manifestly excessive or improper and therefore dismiss the appeal.

Dated at Port Vila, this 26TH day of October, 1990.

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

MR JUSTICE E. GOLDSBROUGH
COURT OF APPEAL JUDGE

MR JUSTICE G. WARD
COURT OF APPEAL JUDGE