IN THE COURT OF APPEAL OF

THE REPUBLIC OF VANUATU APPEAL CASE NO. 3/1990

MORRIS BEN -v- THE PUBLIC PROSECUTOR

JUDGEMENT

This appellant was convicted of unlawful entry, rape and theft and sentenced to three years, eight years and two years imprisonment respectively, all concurrent. At the same time he was sentenced to a total of three years imprisonment, consecutive to the rape sentence, for four offences of unlawful entry and five of theft thus giving a total sentence of eleven years imprisonment.

He now appeals against the convictions on the rape trial and against sentence on all the offences.

The grounds of appeal against conviction are:

(a) the Court erred in fact and law in finding that the statements of the accused were voluntary and admissible in evidence.

(b) the Court erred in accepting the statement of the accused as a statement of truth.

(c) the Court erred in failing to accept the evidence of the witnesses for the defence as evidence of truth.

(d) the Court erred in finding that the Prosecution had satisfied the onus of proof.

Counsel for the appellants has drawn the Court's attention to a number of matters that he suggests show the accused's written statement was not voluntary or credible and that the learned Chief Justice showed, by his comments to the assessors, an attitude biased against the defence. To some extent, the arguments on the latter point depend on our views of the former.

During the trial, the admissibility of the statement was challenged and the evidence heard on a voir dire. At the

conclusion the learned Chief Justice stated:

"I listened with care to the evidence given by the police officer and I am satisfied beyond reasonable doubt that what he said was the truth. I am not satisfied that the accused told the truth and reject his allegations against the police officer. I am satisfied that the prosecution have proved beyond all reasonable doubt that the statement was voluntarily made and accordingly I admit the statement."

Mr Rissen objects to that on two main grounds:

1. That it appears his conclusion on the credibility of the police officer was based on the evidence of the witness alone.

2. that he has place too high a burden on the accused.

We agree the choice of words is, perhaps, unfortunate but we cannot accept counsel's complaint. The passage cited falls at the end of a lengthy ruling which includes an exhaustive account of the evidence on both sides. It is clear the learned Chief Justice made his decision at the end of that and had given consideration to it all.

As far as the burden on the accused is concerned, he has stated the need to be "satisfied" and not the need to be "satisfied beyond reasonable doubt" as used for the police officer. The burden on the accused is not as high and we accept that his choice of words sufficiently shows he has distinquished between the two.

The complaint that the Court showed bias has been based on a suggested difference in approach between his presentation to the assessors of the evidence of prosecution and defence. We have studied the matters raised with care and related them to the evidence as shown in the record and can see no ground for objection. In summing up to the assessors, the Judge is entitled to express his own view on the evidence so long as he makes it plain to the assessors that they may accept or disregard it and that it is their own opinion that is important. However, in this case, the learned Chief Justice did not express any such view. His summing up of the evidence on both sides was fair and comprehensive and his direction on the burden and standard of proof was impeccable.

This ground of appeal fails.

The final grounds against conviction are that the Court failed properly to assess the evidence and the result is, therefore, unsafe and unsatisfactory.

Mr Rissen sought to support this ground on a restatement of his arguments before the lower Court and asked this Court to reconsider the evidence as a trial court.

This Court has previously stated the test in such cases in Dovan v Public Prosecutor and we need cite only one

passage:

"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 Counsels' 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."

The conclusion reached by the learned Chief Justice was one that he was entitled to reach on the evidence before him and we see no reason to consider it unsafe or unsatisfactory.

The appeal against conviction is dismissed.

The appeal against sentence is now solely based on the ground that the total sentence is excessive. Again. we do not agree.

For the offences comitted on the night of the rape, the Court imposed a total sentence of eight years and that was a proper sentence. The remaining three years was for a series of offences committed over a number of months prior to the rape.

The Court was correct to consider these offences should be consecutive to the rape sentence and could have imposed more than three years. As an act of mercy and no doubt with the total sentence in mind, the learned Chief Justice made all the remaining sentences concurrent with each other. We do not feel the total sentence is in any way wrong or excessive.

Appeal against sentence dismissed.

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

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

MR JUSTICE G. WARD
COURT OF APPEAL JUDGE

MR JUSTICE E. GOLDSBROUGH
COURT OF APPEAL JUDGE