IN THE APPEAL COURT OF
THE REPUBLIC OF VANUATU

CASE No. 7 OF 1993

BETWEEN : **BEN MORRIS**
- Appellant

AND : **PUBLIC PROSECUTOR**
- Respondent

JUDGMENT OF THE COURT (Gibbs, Los and Downing JJA)

Appellant in person.
Mr J. Baxter-Wright for the Respondent.

The appellant was sentenced on the 3rd June 1993 to imprisonment for a total of 15 years having been found guilty on charges of unlawful entry, malicious damage, intentional assault and attempted rape.

By his Notice of Appeal dated the 16th June 1993 he sought to appeal against his sentence.

Following clarification from the Appellant of the intent of the Notice of Appeal the Court heard the appeal upon the basis that it was also an appeal against conviction.

The appellant has further sought to call fresh evidence before this Court. He submitted that he had a number of witnesses who were not called to give evidence but whom he now desires to call. He further sought leave to cross examine the prosecutrix and other prosecution witnesses.

Section 210 of the Criminal Procedure Code gives this Court the power to receive additional evidence. However, the principles to be applied by the Court when considering whether to permit fresh evidence to be called are set out in R V Parks [1961] 3 All E.R. 633 at 634 per Lord Parker C.J. :-

> "It is only rarely that this court allows further evidence to be called, and it is quite clear that the principles on which this court acts must be kept within narrow confines, otherwise in every case this court would be asked in effect to carry out a new trial. As the court understands it, the power under S.9 of the Criminal Appeal Act 1907, is wide. It is left entirely to the discretion of the court, but the court in the course of years has decided the principles on which it will act in the exercise of that discretion. Those principles can be summarized in this way. First, the evidence that is sought to call must be evidence which was not available at the trial. Secondly, and this goes without saying, it

must be evidence relevant to the issues. Thirdly, it must be evidence which is credible evidence in the sense that it is well capable of belief ..."

The Appellant conceded that one of his witnesses was at Court at the time of the trial and asserts that the others had not received letters from those representing him asking them to come to court. He does not suggest that an adjournment was sought to permit the witnesses to be found and brought to court. It is thus clear that the evidence was available to be called, but it was simply not called. Further the Appellant asserted that he wished to give evidence at his trial, but his counsel advised him against this course. He clearly accepted the advice at the time.

No reasonable or compelling reason for the failure to call the fresh evidence has been provided. The Court will not permit any fresh evidence to be called.

It is clear from the notes of the learned Chief Justice that an opportunity was given, and indeed taken, to cross-examine the prosecutrix and the other prosecution witnesses. It is not suggested that there is anything new which has been discovered and could be put to any of these witnesses. The Appellant had a clear opportunity to cross-examine at the trial. The Court sees no reason to permit the further cross examination of any witnesses.

The evidence against the Appellant was overwhelming. The evidence of the taxi driver, Mr Mathias, who drove the Appellant and Mr Siro to the location from which they walked to the home of the prosecutrix, is quite unequivocal. The learned Chief Justice considered the evidence of Mr Siro with the caution that is required. The evidence of the prosecutrix is also entirely consistent with that of Mr Siro. The individual evidence of each of these witnesses supports the evidence of each other witness and when combined with the clear identification by the prosecutrix of the Appellant the Court cannot see any reason for disturbing the finding made by the learned Chief Justice.

The Appellant has not pointed to any error of law or procedure which would cause this Court to set aside the convictions and order a retrial.

The learned Chief Justice after convicting the Appellant proceeded to sentence him as follows :-

Count 1 - Unlawful Entry - 4 years imprisonment.

Count 2 - Malicious Damages - 12 months imprisonment concurrent.

Count 3 - Intentional Assault - 5 years imprisonment concurrent.

Count 4 - Attempted Rape - 15years imprisonment concurrent.

In his sentence the learned Chief Justice said in part :-

" I bear very much in mind that the chances are that as a result of the sentence I will impose upon you, you are likely to die in prison. But it is clear that no woman is safe with you outside prison and that they must be protected from you. You were given every chance to reform and you have failed to take it. It is my view that you can become a very dangerous man when in drink. I have no doubt that you must be kept in a secure institution until such time as you are old enough not to have anymore sexual urges of this nature."

The principles which guide a court when considering a sentence the subject of an appeal are quite clear. The sentence should not be altered by this Court merely because the members of this Court might have passed a different sentence. The only reason for altering the sentence is if a sentence is excessive or inadequate to such an extent as to satisfy this Court that there has been a failure to apply the right principles. In R.V Ball [1951] 35 Criminal Appeal Reports 164 at 165 Hilbery J observed :-

" In deciding the appropriate sentence a Court should always be guided by certain considerations. The first and foremost is the public interest. The criminal law is publicly enforced, not only with the object of punishing crime, but also in the hope of preventing it. A proper sentence, passed in public, serves the public interest in two ways. It may deter others who might be tempted to try crime as seeming to offer easy money on the supposition, that if the offender is caught and brought to justice, the punishment will be negligible. Such a sentence may also deter the particular criminal from committing a crime again, or induce him to turn from a criminal to an honest life. The public interest is indeed served, and best served, if the offender is induced to turn from criminal ways to honest living. Our law does not, therefore, fix the sentence for a particular crime, but fixes a maximum sentence and leaves it to the Court to decide what is, within that maximum, the appropriate sentence for each criminal in the particular circumstance of each case. Not only in regard to each crime, but in regard to each criminal, the Court has the right and the duty to decide whether to be lenient or severe ".

The Court is of the view that the learned Chief Justice has placed too much emphasis upon the removal of the Appellant from society in order to protect it from further attacks. The purpose of imposing a custodial sentence is not only to protect society from the prisoner, but also to punish the prisoner for his crime. Whilst it is clear that a judge may take into account the needs of society it is not appropriate to increase the

sentence purely for the protection of society. A judge should not impose a sentence longer than that which is appropriate in the circumstances of the case simply for the purpose of protecting society, although the protection of society is a matter to be considered in imposing the sentence : see Veen v The Queen (No 2) (1988) 164 CLR 465.

The Appellant has 54 prior convictions, most are for unlawful entry and theft. On the 25th April 1989 he was sentenced to 8 years imprisonment for rape.

Given all the circumstances of this case, the sentence of 15 years in respect of the conviction on attempted rape is manifestly excessive. The Court therefore will substitute a term of imprisonment of 12 years in lieu of the period of 15 years imposed by the Court below. The Court otherwise confirms the sentences in respect of the other counts.

Dated this 15th day of October 1993.

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A N D : **PUBLIC PROSECUTOR**

- Respondent

ORDER OF THE COURT OF APPEAL

Corum : Court of Appeal

Appellant in person
Mr J. Baxter-Wright for the Respondent

1. The sentence of 15 years in respect of the conviction on attempted rape is reduced to a term of imprisonment on that Court of 12 years.

DATED at Port Vila this 15th day of October 1993.

BY THE COURT OF APPEAL

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