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

Criminal Appeal Case No. 05 of 2009

CHRISTOPHER GEORGE DAWSON
-V-
PUBLIC PROSECUTOR

Coram:	*Hon. Justice B. Robertson* *Hon. Justice J. von Doussa* *Hon. Justice O. Saksak* *Hon. Justice D. Fatiaki*
Counsel:	*Messrs. P. Finnigan and J. Malcolm for the Appellant* *Mr. Standish for the Respondent*
Date of Hearing:	*20th & 27th April 2010*
Date of Decision:	*30th April 2010*

JUDGMENT

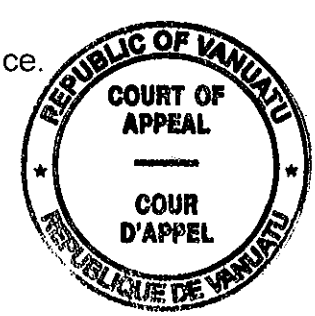
The Appellant was charged with three offences under the Penal Code Act [CAP. 135]. They were all of sexual intercourse without consent alleged to have occurred in Port Vila on 14th April 2008 and involved penile penetration of the vagina, penile penetration of the anus and digital penetration of the vagina. It was the same complainant in each case who was on the relevant date 16 years and two days.

By agreement on 18th December 2008 a doctor who was about to leave the jurisdiction gave evidence. The substantive hearing before the Chief Justice was on 9th, 10th, 11th, 12th and 13th March 2009.

On 1st December 2009 His Honour found Mr. Dawson guilty on all three counts and provided reasons for judgment which runs to some 75 pages.

On 18th December Mr. Dawson was sentenced to an effective term of 6 years and 6 months imprisonment.

He has appealed against both conviction and sentence.



The case was relatively straight forward. The identities of the Appellant and the complainant were not in dispute. There was no debate about the fact that they had been together on the day in question at Mr. Dawson's work premises in Port Vila and that there was sexual activity between them.

Mr. Dawson was adamant that all that took place was consensual. He denied any penile penetration of the anus and although he admitted that he endeavoured to penetrate her vagina with his penis he was unable to maintain an erection and this did not occur.

The complainant maintained that there had been no association of any sort between the two of them prior to the day of the alleged offending. Mr. Dawson on the other hand claimed that there had been prior association of a rather unusual kind, but not involving any sexual activity for about 2 years.

The Chief Justice found that the complainant was "*shy, quiet and respectful*" that she gave "*honest, credible and reliable evidence*" and said "*I find she is honest and simple when she made appropriate concessions*" The Judge accepted the evidence given by her that she had never met Mr. Dawson prior to 14th April 2008."

On the other hand the judge said on page 108 of the case book "*I find that the evidence given by the accused was inherently unlikely and implausible*". Later he said on page 119 "*.... the evidence of the accused are rejected as unreliable and less than candid. His version of events is implausible and not capable of acceptance."*

As Mr. Standish succinctly summarized the position there were three fundamental questions for determination.

1. What was the full extent of the sexual acts that took place between the Appellant and the Complainant at the business premises of Dawson's Builders on the afternoon of 14 April 2008? Was there merely digital penetration of the Complainant's vagina, coupled with attempted penile penetration (as claimed by the Appellant) or was there digital penetration of the Complainant's vagina followed by penile penetration of her anus and penile penetration of her vagina (as claimed by the Complainant)?

2. Were the sexual acts consensual (as claimed by the Appellant) or non-consensual (as claimed by the Complainant)?

3. Had there been two years of sporadic prior association between the Appellant and the Complainant before 14 April 2008 (as claimed by the Appellant) or did the Appellant and the Complainant have their first contact on 14 April 2008 immediately before the sexual encounter (as claimed by the Complainant)?

We do not disagree with this characterization although the 3rd issue was important only in as much as it provided a window as to the credibility of each which was the essential nature of the other two exercises.

The appeal against conviction was advanced first on the basis that because of the delay between the hearing of the trial and the delivery of verdict this in and of itself meant that the convictions could not be sustained. Additionally and in the alternative it was submitted that the verdicts were not in conformity with the evidence which had been heard and that the judge had misdirected himself with regard to issues of recent complaint, corroboration and credibility.

On the first day of the appeal hearing the Court heard from both Mr. Finnigan and Mr. Malcolm in support of the Appellant's case. We had dialogue about the extensive written submissions which have been filed.

In the later part of that morning it became apparent that there were serious issues being raised with regard to the critical finding of the judge that the complainant was a credible and reliable witness whereas he rejected the evidence of Mr. Dawson.

This aspect of the case was critically influenced by the diametrically opposed positions as to whether there had been any previous association between them.

Before lunch Mr. Finnigan indicated that there might be an application for leave to call further and additional evidence on the appeal. Provision for this is found in section 210 of the Criminal Procedure Code [CAP. 136].

> "***Further Evidence***
>
> *210. (1) In dealing with an appeal, the appeal court, if it thinks additional evidence is necessary, shall record its reasons and may either take such evidence itself or direct it to be taken by the trial court.*
>
> *(2) ....."*

The Court invited all counsel to discuss the possibility during the adjournment. When we returned to Court and a formal application was made, Mr. Standish not surprisingly complained that he had no clear knowledge of what was proposed to be led or the material in support of what had to be viewed as an extraordinary application or the detailed grounds justifying this exceptional course of action.

The Court accordingly adjourned the appeal part-heard to provide the Appellant with the opportunity to make a formal application to call further evidence

accompanied by detailed sworn statements in support. We required that this material be filed by 5.00 p.m. on 22nd April. The Respondent was given until noon on Monday 26th April to file any response and we adjourned the matter until 27th April 2010. An application was duly made and responded to.

Mr. Finnigan's first substantive grounds of appeal were delay per se and operative delay which we can conveniently consider together.

The old adage of the law that justice delayed is justice denied remains a fundamental precept today. There can be no question that a period of 8 ½ months from the conclusion of a hearing of a criminal case until the delivery of a verdict is regrettable and should not have occurred.

The proper approach to such delay was considered by this Court in Swanson v. Public Prosecutor [1998] VUCA 9 where the Court for sound reasons refrained from laying down a tariff. It noted that where there is a substantial period of delay the Court must carefully scrutinize the total circumstances to ascertain whether by reason thereof the process has lost the integrity which is an essential aspect of a judicial system which will enjoy public confidence.

As the Canadian Supreme Court noted in R v. Morin (1992) 12 CR 1 (SCC) there is a balancing exercise to be undertaken. The submissions on behalf of the Respondent included references to matters which could have influenced the extraordinary period of time between hearing and verdict. We accept Mr. Finnigan's submissions that these did not have an evidential base and are not critical to our assessment of the matter.

The Appellant placed particular emphasis on the Canadian decision of Rahey v. The Queen (1987) 39 DLR (4th) 481 (SCC) where the Court ordered a permanent stay of proceedings. The facts of that case were quite different from the present. Most notably the eleven months period of delay was between the close of the prosecution case and the accused being required to elect whether to give evidence and call evidence in support of his case.

In the present case the entire evidence was completed. By consent a doctor's evidence had been taken three months earlier but the parties had made their entire contribution to the case. All the evidence had been called and the parties were simply awaiting the delivery of the Court's verdict.

Mr. Finnigan was also attracted to the New Zealand High Court decision in Tunstall v. Police (2003) 7 HRNZ 205. The facts in that case were also materially dissimilar to the present. Although the 42 week period was not markedly different to that in the present case, the charge was driving with excess of blood alcohol which has a maximum penalty of three months imprisonment. That is to be compared with the present case where the Appellant faced three charges of non

consensual sexual activity each of which has a maximum penalty of life imprisonment.

Rather than look at the facts of specific cases it is important to note the underlying principles. These were enunciated by the New Zealand Court of Appeal in Martin v. The Tauranga District Court (1995) 2 NZLR 419 which adopted a similar approach to that espoused by Sopinka J. in *Morin* at page 13.

The New Zealand Supreme Court recently considered delay in *Williams v. The Queen [2009] NZSC 41*. Wilson J. on behalf of Elias CJ, Blanchard, Tipping and McGrath JJ and himself at paragraph 10 said

> "*There are thus two distinct rights, the right to a fair trial and the right to trial without undue delay. The two rights overlap however where the consequence of undue delay in bringing an accused to trial is that a fair trial cannot be held, both rights are then breached.*"

There is no suggestion that there was undue delay in bringing Mr. Dawson to trial but delay in providing a verdict. In *Williams* the New Zealand Court had particular regard to the decision of the House of Lords in *Attorney General's Reference (No. 2 of 2001) [2004] 2 AC 71* where the Court was considering the appropriate remedy for a breach of the right to be tried within a reasonable time. The House of Lords by a majority of 7-2 held that a permanent stay of proceedings was not the only or usual remedy for such a breach and at paragraphs 20 – 23 explained why a knee jerk reaction was not appropriate.

We are satisfied that there has not been demonstrated to have been any actual prejudice through delay in the present case. Although there is some criticism that the judge did not comment to the extent that the Appellant's counsel might have wished on some aspects of the case as presented, the extraordinarily extensive and comprehensive analysis which was eventually provided by the Chief Justice demonstrated that:-

- he had fully grasped the entire case;
- he had correctly applied the relevant legal principles to the evidence which had been led before him; and
- he analyzed and assessed the evidence he had heard;
- apart from the anxiety and apprehension which arose from the period of time in which everybody awaited advise of the outcome, nothing had occurred which infected the integrity of the process.

The judge specifically recognized the last of these factors in the reduction which he made in sentence. That is a response which has been accepted as an appropriate means of marking delay, short of a total stay or a deemed acquittal.

We should not be taken as indicating that where there is inordinate delay this Court will never consider a stay or other mechanism by which an accused person avoids facing the consequences of the acts alleged against him. But in the total circumstances of this case there is nothing which suggests that an objective appraisal of the interests of Mr. Dawson, the interests of the complainant and the interests of the community as a whole (all of which have to be balanced) could lead to any conclusion but that the appeal should be determined upon the basis of its own particular facts, and that the period of delay although highly regrettable, is not of such a nature as to require the exoneration of Mr. Dawson.

The case was not legally difficult. At heart it required an assessment of conflicting evidence. It was essentially a case of "*she said*", "*he said*" on the two elements on which there was substantial divergence namely the extent of the sexual activity and whether their sexual encounter was proved beyond reasonable doubt to be non consensual. A verdict within days was initially anticipated and should have occurred. The delivery of the verdict needed to be accorded the highest priority. But in the absence of any serious actual prejudice it would seriously undermine public confidence in the administration of justice if Mr. Dawson were to be excused facing the consequences of his actions merely because of the passage of time.

A detailed consideration of how the Chief Justice went about his assessment we specifically refrain from commenting upon, for reasons which will become apparent. We simply note that the judge's assessment of the medical evidence which had been adduced in examination-in-chief and cross-examination was available to him. It is unhelpful to seek to draw particular conclusions from a matter which was not investigated in a detailed way or to criticize the trial judge when counsel failed to create the evidential foundation. The complainants estimates of time and her assessment of the degree of physical restraint neither of which were the subject of a thorough evidential analysis are not the only touch stone for assessing whether the activity was consensual.

The judge was entitled to place reliance upon the complainants observed distress and her consistency on the essential factors. These were potent factors in the assessment he was required to undertake on the evidence he had.

No independent observer who objectively studies this case could but be very skeptical about the extraordinary story which Mr. Dawson gave in evidence of the long term association between him and the complainant. It has to be said that it had all the hallmarks of a carefully contrived story which sought to cover those aspects of the case which he could not dispute and provided a rather amazing story to cover the rest. In the manner in which the case was presented it had all

the hallmarks of contrived invention to justify and cover a very embarrassing situation.

We specifically reject the submission that the complainant should be considered as lacking credibility because of deceitful behavior involving a cheque in which she had been involved 2 years earlier when she was 14 whereas the appellant was to be seen as a 50 years old man with no previous convictions and thus of exemplary character. What Mr. Dawson contended took place did no credit to him and by any standard was reprehensible and places a shadow over his character when any credibility assessment had to be made.

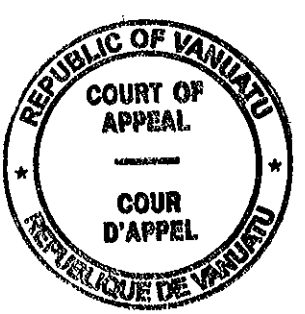
As the application for the calling of further evidence demonstrated, at least by the time the matter was being ventilated in the Court of Appeal it was overwhelmingly clear that an important factor in the trial could have been when? and how? Mr. Dawson first began to maintain that there had been a long association between them and the evidence in support of that. The reason why this is so important is the diametrically opposed and unshakeable position of the complainant that there had never been any previous association between them at all. It has to be said that her own narrative has some unusual and discomforting aspects and called for rigorous and thorough appraisal against any factors which would confirm or undermine her description of events and credibility.

We are unable to understand why once there was any suggestion that Mr. Dawson was being challenged about the timing of his claim of prior association, evidence was not called in rebuttal of the inference that it was a concoction which had been created near the time of the trial to cover the embarrassing aspects of the situation he found himself in. Perhaps the answer is that it was not sufficiently put to him. Whatever is the case the important fact now is that it did not happen.

Sustained efforts were taken to prove that there had been a problem between the complainant and her employers 2 years previously. What was materially relevant was how much of that Mr. Dawson knew at the time of the offending and in what detail. Also when he knew her date of birth and how. If he knew of these when the offending took place that could be a critical factor which the judge had to engage with in deciding whether Mr. Dawson's explanation of a long term association could reasonably have been true. If it could have reasonably been true, what effect did that have on the constant denial of an earlier association between the two people? It would not determine the outcome but would seriously influence an assessment of whether the complainant was a credible witness.

Having received the application with the supported sworn statements from Mr. Garry Blake and the Appellant it is now unequivocally established that Mr. Dawson not later than the 23rd April had made a statement to his lawyer/friend Mr. Blake in which he asserted that:-

- he had known the complainant for about 2 years;



- he knew that about at that time she had been sacked from her job after being accused of stealing;

- he knew where she was working;

- he knew that she had a birthday the previous weekend; and

- when they had their encounter at his work place she was anxious to be away by *3.30* to get back to work.

It is common ground that at the time that the document was created neither Mr. Dawson nor those advising him had received any disclosures from the Prosecution. In her initial statement the complainant talked about her need to be back at work at *3.30*. Just a coincidence? She had had a birthday over the previous weekend. There had been an incident involving a cheque at her workplace 2 years earlier and she lost her job as a result. Are those all matters which Mr. Dawson had managed to discover in the few days involved?

We have not received a convincing explanation as to why this was not investigated at the trial. The issues now raised which have a domestic complexion rather fall into significance in the wider picture but in the final analysis their strength is not the ultimate test. The question is whether in the interests of justice this material should be available as part of the essential credibility assessment.

Although for a good reason it is extraordinary to permit additional evidence to be called on the appeal, the test must be what the interests of justice require. The evidence now available in the draft from the Appellant and from his friend Mr. Garry Blake raise issues about how quickly Mr. Dawson was making these assertions and what he knew within days, if not sooner of the alleged offending. That material raises as many questions as it provide answers but we are persuaded that in the interests of justice there needs to be an opportunity to have this material put into the balance with whatever other evidence may flow from it. It may well be that other material will emerge which will have to be looked at alongside of the material which the parties initially chose to put before the judge. There is a new facet of the case which has to be analyzed and engaged with in reaching the critical credibility assessment.

In saying that we do not overlook the fact that the case is about whether the complainant is credible and believable on the issue of consent. But if the Court was satisfied that it was more likely than not that there had been a prior association (which she is consistently denying) that is a matter which would require careful analysis and elucidation.

There should be no doubt that on the basis of the evidence which was led at the trial we would have reached the same conclusion as the Chief Justice. But we have been brought to the point of accepting that there are areas of inquiry which were not put before the trial Court (which should have been put before the Court) and which could make a difference. That is not saying that it necessarily will alter the situation for the full inquiry may introduce matters about which we know nothing at this stage.

This is a particularly serious alleged offending with serious consequences. Justice is not served if a conviction has a legitimate question mark hanging over it even if that is because of the act or omission of the Appellant and his advisors.

Counsel both noted that section 210 is expressed in the widest possible terms but there was an acceptance that courts in the interpretation of such provisions have taken the view that evidence should be new in the sense that it was not reasonably available at the time of the first hearing and must be relevant and otherwise credible and could have a material effect on the decision.

We were referred to the decision of this Court in Adams v. Public Prosecutor [2008] VUCA 20. It is to put matters too high to suggest that legal newness is an absolute pre-requisite. It is a very important factor but the overriding test must be the potential for a miscarriage of justice.

This material is not new but it involves an area which was never properly considered let alone focused upon. The challenge to Mr. Dawson was insufficiently clear and the response inadequately made. Further we don't accept that the Court in all circumstances must be satisfied that new evidence will necessarily or inevitably lead to a different outcome. The question is whether if the evidence had been before the Court, is there a sensible and rational possibility of an acquittal?

The difficulty with the current case is that the sole contentious matter is credibility.

The comprehensive submissions of both counsel and their own analysis of the record and the decision of the Chief Justice demonstrate that although there was a challenge advanced that Mr. Dawson's story was contrived it was not squarely argued that it was something which had been thought up at a late stage.

The Chief Justice simply did not know that Mr. Dawson had been telling his own advisors within days of his apprehension of the 2 year association. This issue was never properly engaged with in the evidence of either the complainant or the accused.

It should have been tested as against the absolute constant and immoveable denials of any contact made by the complainant. The complainant had to be

challenged as to the basis on which she contended that Mr. Dawson knew of these matters when such knowledge could be consistent with there having been an ongoing association.

We certainly do not conclude that this new evidence will necessarily alter the outcome but we are persuaded they it must have a material effect upon the assessment process which a trial judge is required to make.

In a similar way there are substantial problems with regard to the evidence of the doctor. They are possibly a consequence of the fact that the evidence was taken before the doctor left the jurisdiction which was before the evidence of the complainant had been given.

There is an argument that there is an inconsistency between what the complainant said happened to her by way of restraint and forcible behaviour and the doctor's report as to what he saw a short time afterwards.

Counsel on both sides conjectured as to why this may be so and what the consequences are. The problem is that the matters which should have been investigated at an evidential level were not sufficiently touched upon. If the complainant's evidence may arguably be unreliable about the degree to which she was mistreated, restrained and forced that also would require careful assessment in determining her general credibility.

We had discussion with counsel about the tests which have been applied by Appellate Courts as to when and in what circumstances a Court will contemplate what is effectively a second bite of the cherry. The factual circumstances in the various cases are extraordinarily different but the common thread is what the interests of justice require.

In this case there is a factual scenario presented by the complainant which it must be said, had some unusual aspects and which the trial judge believed on the basis of the evidence presented to him. As we have said that conclusion was clearly available but it is now clear that there were at least two issues which could challenge whether that assessment was correct. They were not ventilated or agitated or properly analyzed in the Supreme Court process. That was not a failing by the Judge. He did not have the material.

Mr. Standish placed substantial weight on the fact that in an interchange between Mr. Dawson and Mr. Blake when the later arrived at the police station. Mr. Dawson did not at that stage immediately say that he had known the girl for a long time. We are not persuaded that the answer was in fact responsive at all to the question asked but importantly was within the context of Mr. Blake (for reasons which appear wise and prudent to so many in the legal profession) was telling his client to say nothing. This was the case again when Mr. Dawson with

Mr. Morrison the next day went to the police station and he said he did not wish to say anything.

If a person has a right to say nothing then it is difficult to see how an inference is to be drawn against them from exercising the right which they were offered. Some countries have varied the nature and form of the right to silence so that suspects are warned of the inferences which may be drawn from the failure to provide immediate explanations. It is not the law in this jurisdiction.

We are satisfied that it is of potential relevance that we now know that his contention of a past association did not emerge months after the event but within days of the incident.

A trial is not a place for ambush and although we are at a loss to understand why the Appellant in re-examination (when effectively recent contrivance was being raised although we accept not specifically in those terms as it should have been) did not produce the document he had written not more than 9 days after the event. It would have shown a consistency of approach from the beginning no matter how bizarre aspects of his story may be.

Criticism was made of the trial judge's assessment that despite the desire of the authorities to keep the problems about the cheque out of the public arena there was a likelihood that the confidentiality had not been maintained. We see no error in his view but perhaps a different complexion would have been put upon it if the Judge had known that the relevant material was within the knowledge of Mr. Dawson in April 2008 and not merely at his trial.

The reasons which are advanced in the sworn statement of Mr. Blake as to why proper challenge did not occur are not convincing but that is not the end of the inquiry. What we have to be satisfied is that if all the pertinent issues had properly been put before the Court it is inevitable that the outcome would have been the same. We cannot do that. What else might emerge from a properly focused and careful analysis of what was known by whom and when can only be speculation. However there are sufficient question marks raised by the failure of appropriate process to say that essential integrity is in doubt and the process must regrettably be repeated.

There is no question of this court indicating a view as to the ultimate outcome. It is simply because the case was entirely dependent upon the evidence of the complainant which was totally accepted in the Court below that a new assessment is required now that there are other factors which were not previously introduced.

Accordingly the application to adduce further evidence must be granted and on the basis of it, we are satisfied that the appeal must succeed and the convictions be set aside.

There is no basis for considering that Mr. Dawson should not face a new trial properly conducted with all matters in focus and the fundamental issues covered in the evidence so that a judge is properly appraised of the total relevant circumstances and can make the necessary determinations thereon.

Having said that the appeal against conviction must succeed an appeal against sentence does not arise. We do record that Mr. Standish was concerned that there had been an appeal against sentence filed before the sentence had been imposed and that there were no submissions in support. Those are tantalizing factors but are not now relevant.

The State accepted that if the conviction appeal was successful it was appropriate for Mr. Dawson to be admitted to bail pending a re-hearing. We accordingly do so on the same terms and conditions which applied prior to his sentencing.

What is of overwhelming importance is that there should be no delay in the retrial. This case has already been prolonged for too long and must be disposed off with all due speed.

The matter is to be listed before Justice Fatiaki at 9.00 a.m. on Thursday 6th May 2010 for timetable arrangements to be made and hopefully a trial date set for the rehearing. Everybody involved in this exercise has a clear duty to ensure that matters are dealt with the greatest possible speed.

DATED at Port Vila, this 30th day of April, 2010.

BY THE COURT

.....
Justice J. Bruce Robertson

.....
Justice Oliver A. Saksak

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

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Justice John von Doussa

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Justice Daniel Fatiaki