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

CRIMINAL APPEAL CASE No.07 OF 2015

BETWEEN: **NAYES SIPLY**
Appellant

AND: **PUBLIC PROSECUTOR**
Respondent

Coram: ***Hon. Chief Justice Vincent Lunabek***
Hon. Justice John von Doussa
Hon. Justice Daniel Fatiaki
Hon. Justice Dudley Aru
Hon. Justice David Chetwynd

Counsel: *Mr. R. Tevi for the Appellant in November 2015, Mr W. Kapalu in April 2016*

Mrs. L. Matariki for the Respondent

Date of Hearing: *10 November 2015, 20 November 2015, 12 April 2016*

Date of Judgment: *Friday 15 April 2016 at 4:00 pm*

JUDGDMENT

Introduction

1. Following a trial on 24 and 25 August 2015 Justice Saksak found the appellant guilty of counts of sexual intercourse without consent and committing an act of indecency without consent, those offences having been committed on 21 November 2014. The verdict was delivered on 25 August 2015 and the next day following receipt of a pre-sentence report His Lordship sentenced the appellant to six years

and six months imprisonment on the charge of sexual intercourse without consent. The conduct amounting to indecency in count 2 was treated as an aggravating feature of the sexual intercourse without consent and no additional sentence imposed.

2. On 1 March 2013 the appellant was sentenced to imprisonment for two years, but the sentence was suspended for three years, for unlawful entry into a dwelling house. Because the sexual offences had occurred within the three-year period Justice Saksak ordered that the two-year prison sentence take effect and directed that it be served cumulatively on the sentence imposed for the sexual offending, bringing the total period of imprisonment to eight years and six months.

3. The appellant has appealed both against his convictions and against the sentence imposed.

4. The appeal was first heard before this Court on 10 November 2015. Mr Tari, who had appeared for the appellant at trial, argued the appeal on his behalf. Judgment was reserved, with notice given that judgment would be delivered on 20 November 2015. However on 19 November 2016 the appellant in person filed an application requesting the Court not to deliver judgment the next day, and to reopen the appeal. Documents filed by him indicated that he wished to submit additional grounds of appeal against conviction and make further argument. He foreshadowed that the new grounds of appeal will include an allegation that there is further evidence which should be considered, and that his trial miscarried because of the incompetence of his counsel. The Court considered that the issues raised in the application were such that the appellant should be given the opportunity to amend his grounds of appeal

and to argue his application. Accordingly, judgment was not delivered and the appeal was set for further hearing at the next session of the Court.

5. At the call over for the April 2016 Session the Court enquired whether the matters foreshadowed in the application made on 19 November 2015 were to be pursued. The Court was informed that the allegation of incompetence of the appellant's counsel at trial was withdrawn, but the further evidence point would be developed. The appeal was recalled on 12 April 2016. In the interval since the last hearing the appellant engaged new counsel, Mr Kapalu, who filed an amended notice of appeal and a sworn statement of the appellant which annexed the further evidence which he seeks to adduce, and an explanation why it was not called at trial. We shall deal with those matters later in this judgment. First we deal with the proceedings in the Supreme Court.

The Evidence in the Supreme Court

6. At trial the defence was that the victim had consented to the sexual intercourse and by inference to the act of indecency (ejaculating on her stomach). There was no dispute that these incidents had occurred, indeed that there were two episodes of sexual intercourse on the night in question, but the appellant said the victim had consented. Accordingly the issue for determination by the Supreme Court judge was whether it had been proved beyond reasonable doubt that the victim did not consent to the two episodes of sexual intercourse and to the acts of indecency associated with them.

7. The judge heard evidence from a total of five witnesses including the appellant.

8. The victim said that she had met the appellant in January 2014 as a teaching colleague at a local school. This developed into a loving relationship between July and September 2014 but she made it very clear to the appellant that if he really loved her then he would not have sex with her until they were married. The appellant was already married with children and this understandably led to difficulties in his relationship with the victim. Oral sex occurred several times although she felt badly about it because she understood it to be sinful according to the bible. She had made a vow that she would maintain her virginity until she was married.

9. The appellant became persistent in his demands for sex but on 19 November 2014 the victim told him very clearly that she would not have sex with him until after marriage. As a result, it was agreed the relationship would end.

10. Two days later on Friday 21 November after a school picnic, the victim returned home and, being distressed by the breakup of the relationship, began drinking vodka on the veranda of her house. She put some music on and over a five-hour period had three drinks of vodka. At about 5pm she opened a bottle of wine and had a drink from that. She then fell asleep and when she awoke saw the appellant sitting beside her. He had come in without her knowledge. He asked her why she was drinking. She told him she was just sad. She felt tired and hungry as she had not eaten anything for lunch. She got up and went inside to turn off the music and the appellant followed her. But she then was unable to remember anything until she woke up naked on the floor with the appellant on top of her thrusting his penis into her vagina. She was numb and shocked and unable to do anything.

11. The appellant withdrew his penis and ejaculated on her belly. She took a tissue and wiped it off. She then blacked out again. When she awoke she found the appellant was again having sex with her. On withdrawing he again ejaculated on her belly. She then blacked out again and later saw the appellant sleeping beside her. The appellant said to her that he had told her he would always get what he wanted and that he would be gentle because she was drunk. She went to the bathroom and when she returned the appellant put her head down so that she could perform oral sex on him but he could not achieve an erection and she refused. The appellant then left saying that he would return later to "*do it properly so that you can enjoy it, when you are sober*". He did return later, knocked and called out but the victim hid and did not answer.

12. On the Sunday the victim went to church and asked God for forgiveness. She also wrote a letter to the appellant telling him that she could never become his wife because of what he had done.

13. There were three other prosecution witnesses. One confirmed advising the victim prior to the offending how to handle the unwanted attention she was receiving from him. The judge found this evidence was admissible and relevant to show the victim's state of mind before the incident. Another witness confirmed meeting the victim at school on the Monday after the incident with red eyes and of her distress in recounting what the appellant had done. A doctor also gave evidence that she saw the victim on 25 November; she was described as being distraught and teary during the consultation.

14. The appellant elected to give evidence. He said that despite the breakup on 19 November the victim had continued to send him text messages one of which was on 21 November asking him to go over to see her. He said that he arrived at around 8pm when she was on the veranda drinking and that after he greeted her she started kissing him. He was afraid of being seen from the nearby headmaster's house so he asked her if they could go inside. He said that while inside she started to kiss him. She removed her clothes and he removed his. They performed oral sex on each other. She told him that she was drunk and that he could have sex with her. She said that if he wanted to do anything he should do it gently. He said that she asked him not to ejaculate inside her so that is why he withdrew and ejaculated on her belly. After that he slept with her on his chest naked. He said she asked him for sex again and that duly occurred with her asking him to do it gently.

15. The judge believed and accepted the evidence of the victim and her supporting witnesses and disbelieved the appellant's evidence about what happened where it differed from hers. His Lordship emphasised the victim's determination, following her strong Christian beliefs, that there would be no sex before marriage. He described her as being weak and vulnerable, having not eaten lunch and then drinking vodka and wine. She was clearly intoxicated and incapable of giving consent to sexual intercourse and acts of indecency. She was in a blackout state at the relevant times and there was clearly no true consent because of her inability to give it.

16. His Lordship also noted the corroborating evidence about the victim's distress in the days following the incident. His Lordship also relied on text messages sent by the appellant to the victim on 22 and 24 November as providing corroboration of her

evidence that she was intoxicated and had blacked out, that his actions were done against her free will and consent and noted that he admitted guilt and shame for his actions.

Grounds of appeal argued on 10 November 2015

17. Mr. Tevi submitted that the convictions were not supported by the evidence given at trial. He said that in light of the victim's evidence about blacking out "*the court has failed to enquire for a medical report to determine the complainant's level of alcohol consumption before actually pronouncing the verdict*". He submitted that the victim had welcomed the appellant and allowed him to enter her home. He noted that the headmaster's residence was less than 10 metres away from the victim's residence but she did not shout out or scream when she realised that he was having sex with her. On the contrary she remained calm and silent during both incidents of sexual intercourse.

Grounds of appeal argued on 12 April 2016

18. Mr Kapalu filed amended grounds of appeal, but in substance the amended grounds repeated, though in a different order, the original grounds. The only new substantive ground alleged that the Court relied on hearsay evidence.

19. On 7th April 2016, the further evidence had been filed as annexures to a sworn statement from the appellant. The appellant contend that on the basis of the further evidence the Court should, in the interest of justice, set aside the verdict and order a

re-trial at which the further evidence can be considered on the essential question of the credibility of the victim, and on the issue of consent.

20. The Criminal Procedure Code [Cap. 131] makes provision for this Court to receive further evidence:

> ***"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) ……."*

21. Whilst the section enables the reception of further evidence the circumstances in which an appeal Court will do so are well established and clear: Adams v. PP [2008] VUCA 20 and Dawson v. PP [2010] VUCA 10. The Court must be satisfied that the further evidence is:

a) Evidence, if it existed at the time of trial, that was not available, or could not with reasonable diligence have become available to the appellant at the trial;

b) The evidence is relevant and otherwise admissible;

c) The evidence is apparently credible (capable of belief); and

d) There is a significant possibility that the evidence, if believed, would reasonably have led to the acquittal of the appellant if the evidence had been before the trial Court.

22. The further evidence advanced by the appellant is two letters written to him by the victim, one dated 11th July 2015 and the other dated 25th August 2015 (the day the

appellant was convicted in the Supreme Court), a gate key and a flashstick containing a lyric by David Grey entitled *"Please forgive me"*.

23. The appellant has deposed that these items were given to him by a solicitor acting for the victim's employer after the trial was completed. It may be accepted that these items were not available to the appellant at trial. It may also be accepted that the items came from the victim and, save possibly for the keys, would be relevant and admissible at trial as items going to the state of mind and credibility of the victim.

24. The critical question in this case is whether there is any significant possibility that these items of evidence could reasonably have led to the acquittal of the appellant if they were in evidence at trial.

25. In our opinion the answer is plainly in the negative. Both letters convey a sad account of the victim's hopes and dreams for the love which she had felt for the appellant but which were shattered by the events which happened against her will and contrary to her religious beliefs. The lyric seems to be a nostalgic reflection on the love she once shared with the appellant. The letters and the lyric are entirely consistent with the victim's evidence that she did not consent to intercourse, and that she treasured her virginity that she was saving for the man she would one day marry. The keys are apparently the keys to the front gate of the victim's home where the crime took place. The production of these keys, which are mentioned in the evidence of both the victim and the appellant at trial add nothing in favour of the appellant's case.

26. In our opinion, the further evidence would not in any way undermine the confidence which the Supreme Court had in the evidence of the victim. Its receipt into evidence would not add anything to the chance of an acquittal. The application to adduce the further evidence is therefore rejected.

Discussion and decision

27. We are satisfied that the judge was justified on the evidence he heard in finding the charges proved beyond reasonable doubt. There was a significant conflict as to the nature of the encounter which the judge was required to resolve. He clearly considered the appellant's version of events but rejected it where it differed from that of the victim. He was on the evidence entitled to do so. He understandably found support for his conclusions in the corroborative evidence provided by the supporting prosecution witnesses, and indeed in the appellant's evidence itself where he clearly acknowledged that the victim was drunk. He also appeared through his text messages to acknowledge that she had not consented to what occurred nor that she would have given up her strong commitment to no sex before marriage.

28. This was an unusual case in the sense that the victim was adamant that she would not have sex with the appellant before marriage. He was well aware of that long before 21 November but the point had been reinforced only two days earlier when her stance led to the ending of the relationship. There was an unwavering and consistent refusal to consent to intercourse, making it extremely unlikely that there was consent on the night in question. That reinforced the point that intercourse was only achieved through the significant intoxication of the victim and was not the result of a change of mind on the issue. She was simply not capable of giving true

consent as her blackout state confirmed. Her strong Christian beliefs meant she would clearly not have consented had she been in a fit state to decide whether to consent.

29. It was not the obligation of the court to request a medical report but even if the judge had asked the prosecutor for more information on the topic it is difficult to see what could possibly have been provided. The victim clearly stated the extent of her intoxication and limited recall, she was cross-examined about it and the judge was entitled to conclude, as he did, that this was one of those not uncommon cases where the victim was incapable of giving true consent because of her level of intoxication, whatever that level actually was.

30. The submission that the victim had welcomed the appellant and allowed him to enter her home was not in accordance with the victim's evidence, which the judge accepted. She denied any such invitation and in any event inviting the appellant into the house could not of itself have amounted to consent to sexual contact nor indeed given rise to reasonable belief in consent on the appellant's part.

31. As to the latter, the judge ought to have recorded as a necessary element to be proved by the prosecution the absence of reasonable belief in consent by the appellant. It is of course possible that a complainant does not consent to intercourse but the defendant nevertheless has, or cannot be proved not to have had, a reasonable belief that she was consenting. That this is an element of the charge of sexual intercourse without consent in Vanuatu despite it not being expressly mentioned in the legislation is confirmed by the judgment of this court in McEwen v. Public Prosecutor [2011] VUCA 32. Although this was not an issue raised by Mr.

Tevi, we are satisfied that it has no impact on the safety of the convictions entered. It is obvious from the circumstances of the offending as found by the trial judge that the appellant could not possibly have believed the victim was consenting. Further, the victim's insistence that they would not have intercourse until after marriage meant the appellant knew in advance she would not be consenting.

32. As to the victim's failure to shout out during either of the incidents of sexual intercourse, she was cross-examined about this and explained that she was shocked and unable to resist what was happening and, by inference, to call out.

33. The ground of appeal complaining of receipt of hearsay evidence is without substance. The evidence identified as hearsay was the complaint made by the victim to the witness who spoke with her at the school the following Monday. This evidence was plainly admissible, and no objection was taken to it at trial.

34. We reject each of the grounds of appeal advanced first by Mr Tevi and then by Mr Kapalu. We are satisfied that the convictions were supported by the evidence accepted by the judge and that the conclusions and inferences he drew were available.

35. The appeal against the convictions is dismissed.

The appeal against sentence

36. Justice Saksak referred to the leading sentencing authorities on sexual intercourse without consent namely Public Prosecutor v. Ali August [2000] VUSC 73, Public

Prosecutor v. Scott Tula [2002] VUCA 29 and Public Prosecutor v. Kevin Gideon [2002] VUCA 7. He described the victim as being weak and vulnerable from the decision to break up the relationship, the effect of the alcoholic drinks she had consumed and the appellant's persistence in getting what he wanted. He noted the appellant had taken away from her what she held so dear: the preservation of her virginity for her future husband in marriage. He referred to the victim's impact statement attached to the pre-sentence report which showed the physical and mental effects on her to be substantial.

37. The judge cited the following aggravating features:

(a) serious breach of trust with the victim having been a fellow teacher and ex-girlfriend;

(b) In fact there have been two occasions of rape on the same night;

(c) During the course of the rape there were acts of sexual indignity and perversion as reflected in count 2;

(d) The enormous impact, physically and mentally, on the victim; and

(e) The appellant's past criminal record.

38. The judge, properly in our view, decided to treat the indecency merely as an aggravating feature and did not impose an additional sentence on that count.

39. The judge decided that taking all the aggravating features into account an overall starting point of eight years imprisonment was appropriate.

40. His Lordship then noted the matters of mitigation which Mr. Tevi had raised in his submissions. He noted that the appellant was a teacher and sole breadwinner for his

family. He had a wife and four children, two of whom were in school and that he was responsible to pay for their school fees. His wife was also recovering from an operation in 2013. He was the chairman of his village community on Tanna and his chief had spoken well of his contribution to the community and his leadership. As a result the judge reduced the sentence by 18 months down to six years and six months.

41. As noted, the end sentence of 8 years and 6 months included the activation of the two-year suspended sentence which had been imposed on 1 March 2013 for unlawful entry into a dwelling house. (see: Public Prosecutor v. Philip [2013] VUSC 24.

42. It appears that the previous conviction and the suspended sentence were not brought to the judge's attention or that of counsel prior to the preparation of the pre-sentence report and that no submissions were made by counsel as to the question of whether and if so to what extent that suspended sentence should be put into effect. The judge's sentencing decision does not contain any reasoning on the point.

43. Mr. Tevi challenged the starting point as being far too high. He submitted that at most the starting point should have been six years and that a greater discount for the mitigating factors of up to 2 ½ years should have been applied. Mr. Tevi did not pursue his written submission that the court had had no power to put the suspended sentence into effect.

44. Mrs. Matariki submitted that the sentence imposed for the sexual offending was within range on the basis of previous authorities. She also submitted that the judge was justified in activating in full the two-year suspended prison sentence.

Discussion and decision

45. As to the aggravating features of the offending, we differ somewhat from those identified by the judge. Certainly the fact that there were two occasions of rape is aggravating but we do not accept that the ejaculation on the victim's stomach amounts to an aggravating factor; on the contrary it can be seen as a step taken to avoid a more serious aggravating factor of ejaculation inside her. However the appellant's failure to use a condom is certainly an aggravating feature. This was not mentioned by the judge but was highlighted by the victim in her victim impact statement.

46. We accept there was an aspect of breach of trust arising from the previous relationship. There was also the unusual aggravating factor of the victim's wish, known to the appellant, not to have sex before marriage. For the appellant against that background to have raped the victim twice and attempt to force her to perform oral sex afterwards was clearly, to his full knowledge, particularly hurtful to her mentally. Nor was the harm done capable of remedy.

47. The defendant's previous criminal record is not an aggravating feature of the offending and is therefore irrelevant in the assessment of the starting point for sentencing. It is a matter which is properly considered at the second stage of the sentencing process set out in Public Prosecutor v. Andy [2011] VUCA 14. It is a

personal aggravating factor which may, if thought to be of a relevant type, lead to an increase in the starting point.

48. Based on the earlier Court of Appeal authorities we are of the view that the starting point of eight years imprisonment is near the top of the range properly imposed for this kind of offending but is within that range. On that basis we see no justification to interfere with it.

49. We also accept that the judge's reduction of 18 months for the mitigating factors was appropriate.

50. While the end sentence of 6 years and 6 months may be seen as stern it is in our view within the range open to the judge. This court may not interfere with a sentence unless it is manifestly excessive. We are not satisfied that the sentence for the sexual offending is in that category.

51. As we have noted, it appears that the judge in activating the suspended sentence gave no consideration and sought no submissions from counsel as to the alternatives available to him.

52. Section 57 of the Penal Code provides:

"PROVISION FOR SUSPENSION OF SENTENCES OF IMPRISONMENT

(1) The execution of any sentence imposed for an offence against any Act, Regulation, Rule or Order may, by decision of the court having jurisdiction in the matter, be suspended subject to the following conditions:

(a) if the court which has convicted a person of an offence considers that:

(i) in view of the circumstances; and

(ii) in particular the nature of the crime; and

(iii) the character of the offender,

it is not appropriate to make him or her suffer an immediate imprisonment, it may in its discretion order the suspension of the execution of imprisonment sentence it has imposed upon him or her, on the condition that the person sentenced commits no further offence against any Act, Regulation, Rule or Order within a period fixed by the court, which must not exceed 3 years; and

(b) if, at the end of such period, the person the execution of whose sentence has been suspended in accordance with this section has not been convicted of any further offence against any Act, Regulation, Rule or Order, the sentence is deemed to have expired; and

(c) if, before the end of such period, the person the execution of whose sentence has been suspended in accordance with this section is further convicted of any offence against any Act, Regulation, Rule or Order, the court shall order that the suspended sentence shall take effect for the period specified in the order made under paragraph (1) (a) of this section unless it is of the opinion that it would be unjust to do so in view of all the circumstances which have arisen since the suspended sentence was imposed, including the circumstances of any further offending, in no case concurrently with any subsequent sentence.

(d) Where a court decides under paragraph (1) (c) that a suspended sentence is not to take effect for the period specified in the order, then, subject to this Act, the court must either:

(i) order that the suspended sentence:

(ia) take effect with the substitution of a lesser term of imprisonment; or

(ib) be cancelled and replaced any non-custodial sentence that could have been imposed on the offender at the time when the offender was convicted of the offence for which the suspended sentence was imposed; or

(ic) be cancelled; or

(ii) decline to make any order referred to in subparagraph (i) concerning the suspended sentence.

(2) The court must, when ordering the suspension of the execution of the sentence of imprisonment, explain clearly to the person sentenced the nature of the Order and must ascertain that he or she has understood its meaning."

53. As far as we are aware this Court has not previously given detailed consideration to the exercise of the discretion available to the Court under Section 57 (1) (c). It clearly contains a presumption that the suspended sentence will be put into effect in full but there is a proviso that the Court may do otherwise if it is of the opinion that it would be unjust to do so "*in view of all the circumstances which have arisen since the suspended sentence was imposed, including the circumstances of any further offending ...*".

54. Under Section 57(1) (d) the Court is given wide power to decide what else to do. This includes going as far as cancelling the suspended sentence without replacement.

55. As this matter was not argued before the judge and it appears that he gave no consideration to the discretion provided in section 57(1) (c), we must undertake the exercise ourselves.

56. It is relevant that the offence for which the suspended sentence was imposed was of an entirely different character from the sexual offending with which the judge was dealing. It is also relevant that the defendant had served about 21 of the 36 months for which the sentence was suspended without committing any offence. It is appropriate that he be given credit for that, because that is a circumstance which arose after the imposition of the suspended sentence. If the sexual offending had occurred in say January or February 2016, there would be a strong argument that none of the suspended sentence should be activated.

57. There is nothing in the circumstances of the further offending, which of course is much more serious, which would make it unjust to apply the suspended sentence. However, the reality of a substantial extra prison sentence being imposed for that offending cannot be overlooked.

58. Aside from the sexual offending, there is evidence of some positive aspects to the appellant's character; these were reflected in the significant reduction applied for mitigating factors in the rape sentencing.

59. It is important that the force of a suspended sentence is not diminished by too ready an application of the exception in section 57 (1) (c). There is rightly a strong presumption that the suspended sentence should take effect in full.

60. We note that the appellant's suspended sentence was imposed in respect of an incident where there were 30 other defendants, all but one of whom also received such a sentence. It could be seen as sending the wrong message to them and to the victims of their offending if, having since committed a very serious sexual offence, the appellant was seen to have avoided much of the impact of the suspended sentence, while others who have not reoffended remain until 1 March 2016 at risk of being required to serve the full two years.

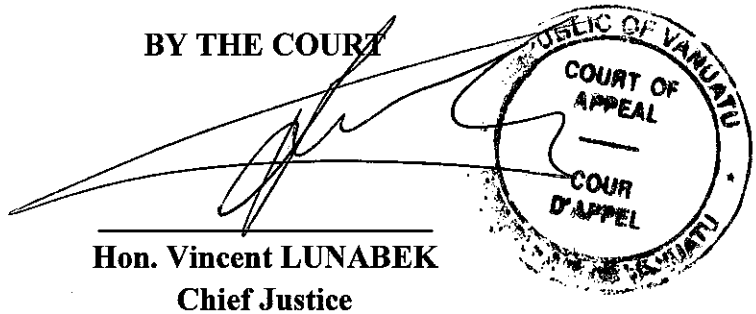
61. The reality is that on 21 November 2014 the appellant rendered himself liable to serve the full two-year prison sentence which was suspended for three years on 1 March 2013, though he was not formally exposed to that consequence until convicted on 25 August 2015. That is the starting point and there is a strong presumption that it should be the end point. However, if the appellant had been

sentenced afresh by Justice Saksak on both matters, as indeed was effectively required by s57, fairness and a totality approach would have meant the overall sentence would have been less than the cumulative total which was otherwise appropriate looking at each set of offences in isolation. In short, treating the rape sentence as very much the lead sentence, it is unlikely to have been appropriate to add more than say 12 months for the unlawful entry offending.

62. Weighing everything up, we have come to the view that, particularly having regard to the proportion of the period of suspension during which the appellant avoided any offending, the different nature of the later offending and the substantial sentence imposed for it, the appropriate course is to order that the suspended sentence take effect with the substitution of a lesser term of imprisonment, namely 12 months. This means that the overall sentence imposed on the appellant is reduced to seven years six months. To that extent only the appeal against sentence is allowed.

DATED at Port Vila this Friday 15th day of April 2016

BY THE COURT



Hon. Vincent LUNABEK
Chief Justice