

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

Criminal Appeal
Case No. 19/597 CoA/CRMA

BETWEEN: PROSPER BULETARE
Appellant

AND: PUBLIC PROSECUTOR
Respondent

Coram: Hon. Justice John von Doussa
Hon. Justice Ronald Young
Hon. Justice Oliver A. Saksak
Hon. Justice Daniel V. Fatiaki
Hon. Justice Dudley Aru
Hon. Justice Stephen Felix

Counsel: E. Molbaleh for the Appellant
K. Massing for the Respondent

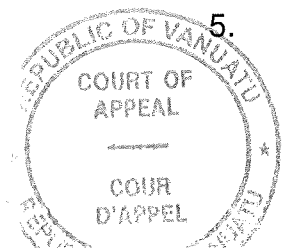
Date of Hearing: 30th April 2019

Date of Judgment: 10th May 2019

JUDGMENT

Introduction

1. Mr. Buletare was convicted after trial in the Supreme Court of two charges of committing indecent acts without consent. The first charge involved Mr Buletare forcing the victim to masturbate his penis. The second charge involved Mr Buletare touching the victim's breasts. Mr Buletare was sentenced to three years imprisonment.
2. Mr Buletare applies for leave to appeal his conviction. He was one day late. The application was opposed. Leave was granted at the hearing of this appeal.
3. Mr Buletare also appeals his sentence. He submits the three years imprisonment sentence should have been wholly suspended.
4. With respect to the appeal against conviction Mr Buletare filed an Application for Discovery of Documents and Introduction of New Evidence.
5. The two applications were related and concerned an alleged text sent by the complainant to Mr Buletare before he was charged. After discussion with Mr



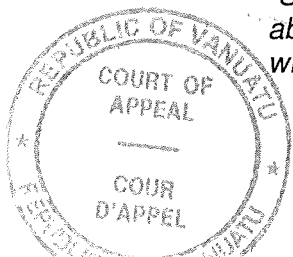
Buletare's counsel he elected not to pursue the applications. We formally dismiss both.

6. The victim and Mr Buletare worked in the same offices. The prosecution's case was that Mr Buletare would enter the victim's office, lock the door, touch the victim's breasts and force her to masturbate him. The two charges reflected the two different types of indecent acts that were alleged to have occurred on a number of occasions in 2015.
7. Apart from the complainant, the prosecution called two other witnesses who could both be described as recent-complaint witnesses. The victim had complained to both these witnesses during 2015 with respect to Mr Buletare's conduct.
8. Mr Buletare gave evidence denying all the allegations of indecency.
9. The judge accepted the evidence of the victim and rejected the evidence of Mr Buletare as untrue and convicted Mr Buletare.

The Appellant's case – Conviction Appeal

10. Counsel for Mr Buletare filed extensive submissions alleging failure by the trial judge relating to the issue of consent. After discussion between Mr Buletare's counsel and the Court, counsel accepted that on the facts of this case the only unchallenged evidence at trial relating to consent was from the victim denying consent. In those circumstances the appellant's counsel did not proceed further with those submissions relating to consent.
11. The appellant's challenge to the conviction was that the trial judge had been wrong to find the victim's evidence overall credible and reliable. The appellant submitted the judge should have taken the following factors into account when assessing the victim's credibility. If he had done so he would not have found the victim's evidence credible and would have acquitted the appellant.
12. First the appellant submitted the delay in making a complaint to police from 2015 until August 2018 (the date of a formal complaint) illustrated the victim's evidence should not have been relied upon by the Court. Further counsel stressed the victim was a mature educated woman who was well capable of making a complaint to the police. The office in which the assaults occurred were said to be near the local police station.
13. As to delay the trial judge said:

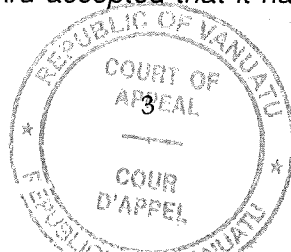
"She did not report the matter to the police until late 2018. She was closely questioned about why it took her so long to complain officially. She provided a string of explanations which ranged from embarrassment, concern for her job as she had a large loan to pay



off, concern for public reaction and her reputation, doubts about whether there was sufficient evidence to be able to make a case, and doubts about her legal rights. DN told me her husband was a violent man, that the defendant lived close to her family, that her husband and the defendant were friends who drank kava together, that both families were community leaders and on the Board of the Catholic Church. DN was concerned people would not understand that this was sexual abuse, and would merely think she was in a relationship with Mr Buletare”.

14. We agree with the judge’s assessment. There were many understandable reasons why the victim may have delayed making a complaint to the police. We also note the victim did complain about these assaults to the two recent-complaint witnesses who gave evidence. We consider this evidence later in the judgment.
15. We therefore reject this ground of appeal.
16. During her evidence the victim said the appellant blocked her mouth when she tried to scream. The judge rejected this evidence. He said he could not see how Mr Buletare could be touching the victim’s breasts, forcing her to masturbate him and at the same time blocking her mouth. The judge said that *“Out of her frustration, I consider DW (the victim) just added that piece of evidence”*.
17. The appellant submits that given the judge concluded this evidence was a lie he should have concluded the victim’s evidence generally was not credible.
18. It was open to the judge to reject this aspect of the victim’s evidence and accept the other parts. The judge identified a reason why the victim had said something he considered to be untrue. Further as we have noted there was other evidence which supported the consistency of the victim’s evidence. We reject this ground of appeal.
19. The next ground of appeal is based on the claim that the victim had a motive to lie about the sexual assaults and this motive undermined her credibility.
20. The appellant submitted that given the victim had been suspended from her employment about the time of her complaint to the police her false complaint was motivated by her anger at being suspended from her employment by the appellant.
21. This issue was dealt with by the trial judge in this way:

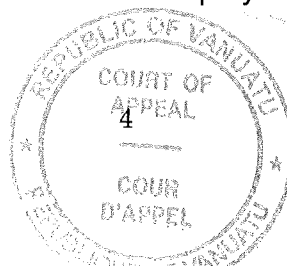
“The defence theory Mr Buletare and his counsel advanced, was that DN was seeking retribution for being suspended; but it was obvious that the Council had determined that approach. Further, DN was aware it was the Council’s doing as she presented her resignation to Mr Buletare for him to pass onto the Council. I challenged also the fact that Ms Aru had not put this theory to the only prosecution witness properly able to address it, namely DN. Ms Aru accepted that it had not been clearly put. I reject this theory of the case”.



22. We agree with this analysis. We note it was only after the victim was reinstated in her employment that she made the complaint to the police. We also stress that it was never put to the victim that the circumstances of her suspension were such that she had made a false complaint of sexual assault to the police. We reject this ground of appeal.
23. In this case the evidence of two witnesses to whom the victim complained during the various assaults was understandably important in supporting the victim's credibility.
24. The first of such witnesses, SD, was in a position of seniority within the organization of the victim and appellant. The victim complaint to SD about the appellant's sexual assaults on at least two occasions in 2015.
25. The second such witness was MM who worked with the victim. She told MM about the assaults in 2015 during the time when they were occurring. This witness' evidence was challenged as the evidence of a friend lying for her friend. MM denied this claim and the judge accepted her evidence as accurate.
26. MM confirmed the victim's evidence that the two women had an arrangement (after the first assaults) that if MM saw the appellant heading to the victim's office MM would warn the victim so the victim could lock her door. This apparently worked some but not all of the time.
27. We are satisfied therefore that the judge at trial undertook a careful assessment of the victim's credibility. There was ample evidence to support his conclusion that she was a credible witness who told the truth about the indecent acts.
28. We therefore reject the appeal against conviction.

Sentence Appeal

29. Mr Buletare was sentenced to three years imprisonment none of which was suspended. The only aspect of the sentence that was challenged on appeal was the judge's refusal to suspend the sentence.
30. Counsel submitted the judge should have, in whole or in part, suspended the sentence because:
 - (a) The appellant was a first time offender;
 - (b) The appellant had a good reputation in the community;
 - (c) He had already suffered a loss of employment;



- (d) He had a large dependent family to support including children, grandchildren, a wife and elderly parents. He was the only breadwinner.


31. As to suspension the judge said:

"In limited circumstances I have a discretion to suspend all or part of the sentence. Given that this is serious repeat sexual offending, the authorities make it plain that suspension would be inappropriate in Mr Buletare's case. I take into account also that he is unremorseful, and that he has not taken part in a custom ceremony. Accordingly, suspension is not available in this case".

32. We accept that the personal factors identified above are all relevant in considering whether a suspension of the sentence of imprisonment in whole or in part, was appropriate.
33. We must consider these personal circumstances of Mr Buletare as well as the facts of his offending.
34. This was serious offending. It was repetitive. The appellant made use of his superior position to offend. This was an abuse of power. There has been a serious effect on the victim.
35. We agree with the judge that the seriousness of the offending is such that taking into account the appellant's personal circumstances identified above, the offending requires a full time custodial sentence.
36. The appeal against sentence is also dismissed.

DATED at Port Vila, this 10th day of May, 2019.

BY THE COURT



Hon. John William von DOUSSA
Judge.

