

**IN THE SUPREME COURT  
OF THE REPUBLIC OF VANUATU**  
*(Criminal Jurisdiction)*

**Criminal Appeal Case No. 03 of 2014**

**PUBLIC PROSECUTOR**

**V**

**DICKSON WARSAL**

*Hearing: Tuesday 9 September 2014 at 9 am*  
*Before: Justice Stephen Harrop*  
*Appearances: No appearance for the Appellant*  
*Robin Tom Kapapa for the Respondent*

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**JUDGMENT**

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1. On 30 January 2014 a Magistrate dismissed a charge of sexual intercourse without consent which had been laid against Mr Warsal. At the hearing that day there was no appearance by the State Prosecutor and it was the second time that the prosecution had failed to turn up without justification. The defendant had been in custody since 10 January 2014. The charge that he faced alleged that the offence occurred on 2 January 2014.
2. The Public Prosecutor filed an appeal against that decision on 6 February 2014. The notice said that the grounds of appeal would be filed within 14 days of that notice.
3. The grounds of appeal were not filed until 10 March 2014 and only after I had asked my Associate to point out this had not been done within the time allowed.
4. Unfortunately the file was not referred to me again for some months after the filing of the memorandum of appeal.
5. On 18 August, however, I issued a Minute in which I expressed the preliminary view that although in these circumstances the appeal was to be treated as having been withdrawn, by virtue of section 201 (5) of the Criminal Procedure Code, this was a case where the Court ought to extend

time pursuant to section 201 (5). However, that was a matter on which the respondent was entitled to be heard.

6. In order to avoid further delay I set the appeal down for hearing for this morning Tuesday 9 September 2014 at 9 am at Dumba.
7. I directed that the appellant file and serve submissions in support of the appeal including details of the facts of the case it wished to bring against the respondent if the appeal succeeded. I also directed that submissions in reply were to be filed by the respondent by 2 September 2014.
8. No submissions have been filed by the Public Prosecutor and, in what is an irony to say the least, there is no appearance by the Public Prosecutor this morning despite the Court having waited for some 15 minutes for someone to materialise and despite the Public Prosecutor having recently been chased up by my Associate in respect of the failure to file submissions.
9. I have ascertained from Court records that a representative of the Public Prosecutor's office uplifted my Minute of 18 August, which contained notice of today's hearing, on 19 August. So there has been plenty of notice provided to the Public Prosecutor of today's hearing.
10. The position is that strictly speaking there is no appeal to be dismissed for want of prosecution (or prosecutor) because in the absence of leave being granted to extend time for filing the memorandum, section 201 (5) says that the appeal is deemed to have been withdrawn. On that basis there is no judgment for me to make today. There is no application for leave nor any appearance in support of one.
11. Being deemed to be withdrawn, the appeal cannot proceed further. I cannot dismiss something that is not before me.
12. It is appropriate nonetheless that I comment on this situation in the hope, quite possibly vain, that it will not be repeated.
13. Regrettably this is not the first time since my arrival in Vanuatu in January that I have had cause to be gravely concerned about the matter in which the Public Prosecutor's office is discharging, or not discharging, its responsibilities.
14. Frankly, it would not have taken much to persuade me both that leave should be granted to extend the time for filing of the memorandum and indeed that the appeal should be allowed. That is because the way in which to address a

failure by a prosecutor to turn up, even if it is twice, is not usually to dismiss a very serious charge, recently laid and relating to recent alleged events, which carries a maximum penalty of life imprisonment.

15. This is not a situation of a civil dispute where the parties have only private interests at stake. Rather the Public Prosecutor represents the community in alleging a very serious criminal offence against the respondent. And it is not, if there has been an offence, a victimless one. The Court must take into account the interests of the complainant in a case like this, who in her view and that of the Public Prosecutor, has been raped. While Mr Warsal has the presumption of innocence, he may plead guilty or be found guilty after a trial.
16. It is very difficult to find enough to place in the scales of justice to justify depriving a rape complainant of her opportunity to explain what happened and to have her claim determined on its merits by the Court. That is especially so when one takes into account that if Mr Warsal was wrongly charged and has a defence then that would result in a not guilty verdict. Indeed, if he is innocent, he too has an interest in the case being determined on the merits rather than by a procedural knockout which leaves him as a person accused of rape and not acquitted.
17. In short, there is a very strong public interest in having cases involving such a serious charge determined on their merits and the Court will not lightly prevent that happening.
18. But in this case, the prosecution at both the State Prosecutor and the Public Prosecutor level, has repeatedly failed to serve the interests of the community and the complainant. There has been a failure to appear twice before the Magistrate. There has been a failure to file a memorandum of appeal within the required 14 days of the filing of the notice of appeal. There has been a failure to apply for leave to extend time to file that memorandum late. There has been a failure to file submissions in support of the appeal, despite an order of this Court to do so. And last, but certainly not least, there has been a failure to appear at the hearing of the appeal.
19. The result is that the interests of the complainant in having her complaint heard in Court and determined on the merits have been taken away from her solely by the several and frankly appalling derelictions of duty of the Prosecutors involved.
20. This kind of thing has wider consequences that bring into disrepute and distrust the whole of the criminal justice system and , it is not too dramatic to say, the rule of law itself.

21. This is because the result is that we have a woman who has made a rape complaint, which she no doubt claims to be legitimate, which “the system” has not addressed. She and her family members and supporters may conclude that they have no choice but to take the law into their own hands and to exact violent retribution on the person they believe is responsible or on his female family members. If they do, anarchy and lawlessness results.
22. Furthermore, other rape complainants may be inclined to think there is no point in even giving the system of proper legal resolution a chance to work and decide it is not worth complaining.
23. On the other hand, if Mr Warsal did indeed rape this complainant, he will not be held to account in any way and he, and perhaps other young men he knows, will be encouraged to think they can behave in that way without fear of consequence. Again, anarchy and lawlessness may result.
24. There is a consequence too for police morale. The officers who have taken the complaint and investigated it will conclude that their efforts have been a waste of time.
25. The criminal justice system in Vanuatu , and the safety and good order of the community itself, depend on having a competent and efficient public prosecution service. This case highlights the consequences if it does not.
26. I direct that a copy of this judgment be sent to the relevant Minister or Ministers who have responsibility for the Public Prosecutor’s office. The people of Vanuatu deserve much better than the service they are currently receiving from the Public Prosecutor as is graphically exemplified by this case.

**BY THE COURT**