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

Criminal Case No. 103 of 2014

PUBLIC PROSECUTOR – VS – KIKI CHILIA
KALO WILLIE
JOHN TURE

Hearing: ***23rd and 24th February 2016***
Before: ***Justice Chetwynd***
Counsel: ***Mr Boe for the Public Prosecutor***
Mr Stephens for First Defendant
Ms Tavoa for Second and Third Defendants

DECISION ON VOIR DIRE

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1. This case has been problematic from the beginning. Before Sey J there were difficulties getting the Complainant to court because she was not living on Efate. Eventually late last year the trial commenced. However, after the Complaint's evidence in chief one of the defendants indicated that his defence was not one of consent. His defence was one of denial that sexual intercourse had taken place between him and the Complainant. I published a Minute dated 6th October as a result of that development. At the case management conference on 11th February 2016 it was then stated that both Ms Tavoa's clients were denying sexual intercourse took place between them and the Complainant. Both those defendants had signed statements made under caution admitting sexual intercourse took place but saying the Complainant had consented to it. Both defendants wanted a *voir dire* to determine the admissibility of their statements under caution. The *voir dire* took place and over two days and I heard evidence from the Police officers involved in the investigation, the defendants and two other witnesses called by the defendants. I also heard from the Complainant's step-father.

2. It is necessary to set out the nature of a *voir dire* in this jurisdiction. In some other jurisdictions the admissibility of evidence is governed by legislation. For example the

UK has the Police and Criminal Evidence Act 1984 (commonly known as PACE) and in Australia there have been various Evidence Acts such as that in Queensland in 1977 and the Federal courts in 1995. In this jurisdiction there are no specific legislative provisions dealing with the admissibility of evidence and so we rely on common law principles. The basic tenet underpinning the common law is that any statement relied on by the prosecution must have been obtained voluntarily [1]. There must be no force used, no threats made, and no inducements offered to an accused by the officers taking the statements. The court must be satisfied that the statement was made of the accused's own free will. The onus is on the prosecution to show that a statement was obtained voluntarily. However, as I now understand the arguments put to me and the evidence led, the Defendants are also saying it would be unfair to allow the statements into evidence. I have presumed this is premised on the "threats" made by the step-father and by the belief that the men from Tana were waiting outside. They also point to procedural irregularities. The Defendants are saying in effect that it would be unfair to allow a statement made in those circumstances because but for those considerations they would not have said to the police what is recorded as being said.

3. This is different from allegations of coercion and/or force being used by the police or some other person in a position of authority to obtain a statement. The Court is being asked to use its discretion to rule whether it would be unfair to allow a statement made in those circumstances to be used. At its root it is still a basic question of voluntariness but different considerations apply. The burden of proof is not the *Woolmington* [2] beyond reasonable doubt burden that is required when the prosecution have to establish a statement was not obtained by dint of threats, force or tricks. If there is a burden, which is doubtful because the question of unfairness involves the exercise of a judicial discretion, the prosecution must show, on the balance of probabilities [3] the statements were obtained fairly.

4. In this case, the Defendants Kalo Willie and John Ture say that threats were made by a relative of the Complainant. They gave evidence, which was supported by evidence from the remaining Defendant Kiki Chilia. The evidence was that whilst they

[1] *R v Cornelius* [1936] 55 CLR 235, *McDermott v R* [1948] 26 CLR 501, *Cleland v R* [1981] 2 CLR 1
[2] *Woolmington v DPP* [1935] AC 462
[3] *R v Hagan* [1966] Qd R 219, *R v. Dally* [1990] 2 NZLR 184, *R v. Marsh* (1991) 7 CRNZ 465(CA)

were in the custody waiting to be interviewed they were approached by the Complainant's step-father. They say he approached the cell, swore at them and threatened them by saying they had better stay in the cell because the men from Tana were outside the police station waiting for them. The step-father also gave evidence. He agreed that he had approached the Defendants in the cells. He denied he had made threats. He said he was upset because he saw that the Defendant Kiki Chilia was someone he had helped in the past in a professional capacity. He was disappointed Kiki Chilia was involved in what he believed was his step-daughter's rape. One of the other Defendants he recognised as a distant relative and the step-father told that Defendant he was obliged to protect his step-daughter not cause her harm. He told the Defendants they should, "watch out", but he was adamant he did not say this in an aggressive manner as a threat. He explained that he was telling the Defendants to watch out because if they were convicted they would be in real trouble with the law. He denied he made any reference to men from Tana or swore at the Defendants.

5. Two other witnesses called by the Defendants were unable to cast any real light on the Defendants' evidence. They both saw many people outside the police station but neither gave any evidence of a group of men from Tana who were acting aggressively. Both did say that members of the complainant's family were around as were members of the Defendants' families.

6. The difficulty I have with the Defendants' evidence is that the police officers in particular were not cross examined in detail. They were asked if threats had been made but the specifics were not put to them. In their own evidence the Defendants were more specific about what they say went on. It appeared to me that detailed instructions had not been taken from them prior to the *voir dire* and because of that the specific details were not therefore apparent until the Defendants were on the stand. I informed Counsel that I would caution myself about the weight I could give to the Defendants' evidence because the detail had not been put to the Police Officers in cross examination.

7. The Defendants said they felt threatened by their treatment at the hands of the Police. They say that whilst they were being interviewed by Officers in the Family Protection Unit offices there was a lot of coming and going. Other police officers and

what were described as "clients" were walking in through the office space being used for interviews. There was no suggestion that these other persons (police officers or civilians) made threats. None of the persons coming and going through the office had weapons nor were any alleged to have been part of a group of men from Tana.

8. The Defendants also complain of the investigating officers' behaviour. The complaints are about their procedural incompetence. The Defendants say that statements made by the officers were not signed. They say that officers who were said to have witnessed the Defendants giving the statements did not sign them as witnesses. I was not entirely clear on what basis it was said this affected the admissibility of the statements.

9. The Defendants admitted that the signatures on the statements were theirs. I remind myself that the *voir dire* is not intended, except in very limited circumstances, to test the veracity if the statements [4]. The limited circumstances usually arise where there are issues of credibility but that was not the case here. If the statements are admitted into evidence the Defendants are entitled to challenge their veracity during the trial. If they are not admitted their veracity is not an issue. The distinction may be slightly artificial in a jurisdiction such as ours where the judge is judge of facts and law but the distinction is there.

10. I have no doubt the Defendants felt concerned or even intimidated. That is to be expected when someone attends a police station for questioning and is accused of a very serious offence. However I am unable to discern any evidence that the Defendants were so intimidated or concerned that the statements they undoubtedly made, were not made of their own free will. There is no evidence that the police officers or anyone in authority used threats, force, tricks or inducements of any kind to obtain statements. In that regard the prosecution have established beyond reasonable doubt that the Defendants gave their statements on 19th and 20th June 2014 voluntarily. The question remaining is would it be unfair to admit them into evidence.

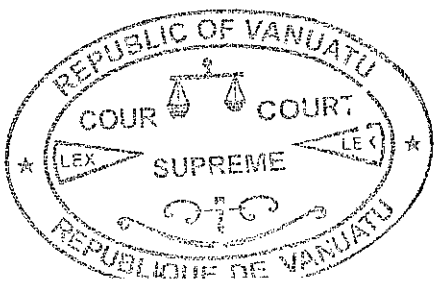
[4] *Wong Kam-ming v R* [1980] AC 247

11. Whilst I might say it was unfortunate that the Police allowed the step-father into the custody area to talk to the Defendants, the Prosecution have established that the visit was not such that it deprived the Defendants of their free will. Is it otherwise unfair to admit the statements because of that visit ? There was a time gap between the visit and the time of the statements. I accept the step-father's evidence he made no threats or in any way forced the Defendants to later make statements. There is nothing in the Defendants' evidence to suggest the visit affected their thinking about making statements except it may have heightened their anxiety about being in police custody. There was no evidence that the Defendants protested to the investigating officers about the visit or indeed mentioned the visit to them at all. There was no suggestion they asked the officers about the supposed group of Tana men. The Prosecution have shown that the visit had minimal impact on the Defendants' willingness to make statements or the content of those statements.

12. I might also say that it is regrettable that the Investigating Officers handling of paperwork perhaps fell below an acceptable standard. The Prosecution evidence was that the small Family Protection Unit was under pressure of work and lacked resources. In any event the Defendants could not explain why the procedural defects alleged impinged on their free will to such an extent that they were compelled to make statements except to say they felt threatened or uncomfortable. I repeat what I said earlier, the Defendants accept that they made statements and that those produced to the court bore their signatures. There is no suggestion that they are forgeries or figments of the investigating officer's imagination.

13. The only concern I do have is the existence of two possibly contradictory statements from PC Mark Willie. They may go to the veracity of what he recorded against what was said to him by Kalo Willie but they do not alter the fact that I am satisfied Kalo Willie voluntarily gave a statement. I say again, the admissibility and the veracity of the statements are two different issues. It may be open to Kalo Willie to challenge the accuracy of what the officer recorded when the trial resumes.

14. As I have already said, I am satisfied that Prosecution have proved beyond reasonable doubt no threats were made to the Defendants, force used against them or



inducements offered to them by the police. If there is a burden to do so on the prosecution I am also satisfied on the balance of probabilities that there are no circumstances where the Court can say it would be unfair to allow the statements to be admitted. However, I am not convinced in regard to the need for the prosecution to prove anything to any standard in that regard and would simply say that I can see no reason why I should exercise my discretion and say it would be unfair to allow the statements made by Kalo Willie and John Ture to be allowed into evidence. The combined effect is that the statements are admissible. I repeat, for the avoidance of any doubt that this is not a decision about whether these are true statements, it is a decision limited to whether they are admissible statements.

Note: This is a corrected copy of my decision. It would appear that in my haste to publish this decision before I left on tour to Santo I caused a draft copy to be sent to the parties. Unfortunately I only discovered my mistake when I tried to access the decision during the second week on tour.

DATED at Port Vila this 25th day of February 2016.

BY THE COURT

D. CHETWYND
Judge

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