

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

Criminal Appeal Case No. 06 of 2015

BETWEEN: **EILON MASS**
Appellant

AND: **PUBLIC PROSECUTOR**
Respondent

Coram: **Hon. Chief Justice Vincent Lunabek**
Hon. Justice von Doussa
Hon. Justice Raynor Asher
Hon. Justice Oliver Saksak
Hon. Justice Daniel Fatiaki
Hon. Justice Dudley Aru

Counsel: **Appellant in person**
Ken Massing and Betina Ngwele for the Respondent

Date of Hearing: **Tuesday 17th, Wednesday 18th November 2015**

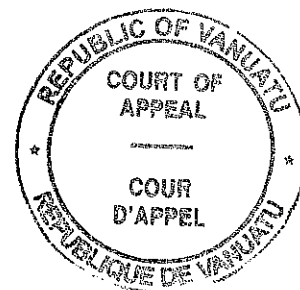
Date of Judgment: **Friday 20th November 2015**

JUDGMENT

Introduction

[1] After a seven day trial spread over three months the appellant was convicted of an offence of sexual intercourse without consent (we will refer to this type of offending as “rape” in this judgment) and was sentenced to five years and three months’ imprisonment. He appeals against his conviction and sentence.

[2] To prove its case the prosecution called five witnesses and the appellant gave evidence and called eight witnesses in his defence. The appellant had denied having sexual intercourse with the complainant so there was no issue of consent or an honest belief on the appellant’s part that the complainant had consented to sexual intercourse. Nevertheless the prosecution was still obliged to establish all elements of its case beyond a reasonable doubt.



[3] The prosecution's case was relatively straight forward, and based on the evidence of the complainant that she was raped, and the evidence of three men who were involved with the complainant immediately before and after the incident.

[4] The defence case was a denial of sexual intercourse by the defendant. Mr Mass gave evidence, and called a number of witnesses in an unsuccessful attempt to establish a reasonable doubt that there was no rape, and that the complaint was false.

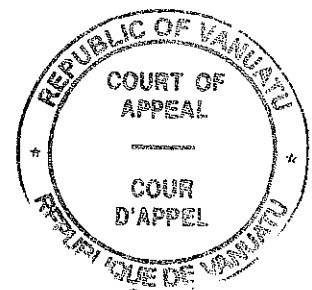
[5] In a lengthy and careful judgment the trial Judge found the complainant was a truthful and credible witness as to the events that occurred on the day of the alleged rape. He also found that the complainant's evidence was corroborated in material respects by the evidence of three prosecution witness, the driver who dropped the complainant at the defendant's house prior to the incident occurring and two other witnesses who arrived at the scene shortly after the incident had occurred.

[6] This is a very fact specific appeal, and indeed the appeal ran over two days, with lengthy reference to a body of material of unusual complexity for a criminal trial of this nature.

Summary of the facts of the complaint and the conspiracy

[7] The facts in short were as follows. The complainant is 17 years old, and like the Judge, we will refer to her as "LH". Mr Mass, who the Judge refers to as "EM", was the boyfriend of a friend of LH of similar age, who like the Judge we will call "BF". Mr Mass knew LH through BF, but not well. On the day of the alleged rape, 24 July 2014, he allegedly rang LH and said that BF needed to see her, and that she should come to his home. She agreed. A bus then arrived and picked her up, and the bus driver says that this was arranged by a call to him from Mr Mass. The bus driver brought her to Mr Mass' home. Mr Mass denies that the calls ever happened.

[8] We will refer to the driver as the bus driver. He dropped LH off, and there is a difference between them as to whether as she says she made her own way to the door or, as the bus driver says, Mr Mass met her at the gate. At his home Mr Mass allegedly asked LH for sex. He offered her cannabis. He then threatened her with a small knife to her throat, and when she resisted used the knife to cut off her clothes, and raped her. He then allegedly left her naked and locked in the



house. She called out for help. Eventually two men appeared who claim they came to visit Mr Mass, who the Judge and we refer to as “BK” and “CC”, and got into the house and let LH out. LH says that she had to wrap herself in a curtain because she had no useable clothes. These two men confirmed that she was wearing a curtain when they came in. They saw her onto a bus.

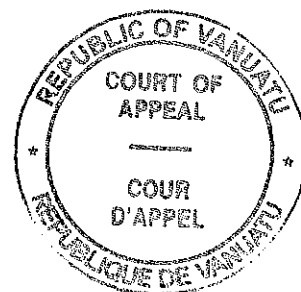
[9] Mr Mass denies that he arranged for the bus, or that LH came to his home, and he denies have any sexual contact with her at any time.

[10] LH made no complaint at this point, going to the Police six months later on 22 January 2015.

[11] The concern we developed as the appeal progressed, concerned the evidence of a conspiracy to falsely establish rape against Mr Mass. We will attempt to briefly summarise the conspiracy alleged by Mr Mass

[12] By 2014 he had had a failed business relationship with a very wealthy European “RN” had investments in Vanuatu, and the dispute was becoming increasingly bitter and angry. Mr Mass had complained to the Police about RN, and the Police were investigating. In the latter part of 2014 RN commenced a campaign to have Mr Mass imprisoned and deported from Vanuatu back to his home country of Israel.

[13] As part of that campaign RN proceeded to arrange for a number of rape complaints to be made against Mr Mass. He arranged for two such false complaints, both of which involved the payment of money to the false complainants. The first such complainant was Mr Mass’ girlfriend, BF. There is no doubt that in fact BF did make a false complaint to the Police on absent 3 August 2014 about an alleged rape by Mr Mass, and was paid for that. The false complaint was produced and BF gave evidence for the defence. Her false statement had been contrived with MK who it is said worked for RN. It involved multiple alleged rapes over a long period where she was held captive, and there were similarities to that of the complaint of LH, including the use of a knife to the throat and being held captive after sex. There was also reference to being offered cannabis.



[14] The second false complainant, Mr Mass alleges, was by the complainant LH. Under cross-examination she admitted being offered money by BK who was working for RN. She indicated initially in her evidence that she accepted the payment, but later said she did not.

[15] We propose setting out key parts of the Supreme Court decision, concerning the alleged unlawful sexual intercourse, and that alleged conspiracy:

[2] The defence however is not merely one of denial but includes an assertion that the complaint and the evidence given by LH have been not merely fabricated but orchestrated and paid for by or on behalf of a businessman, [RH], with who EM has fallen out. As well as giving detailed evidence himself EM called nine other witnesses. While there was some evidence given about the circumstances surrounding the alleged rape, the majority of it was directed at providing a basis for the assertion of a conspiracy against EM.

[8] Where, in addition to a denial of offending, there is an assertion of fabrication of the complaint it is particularly important for the Court constantly to keep in mind that there is no onus on a defendant to put forward such a motive, let alone to prove it (to any standard). Especially where there is a good deal of evidence called to support such a contention there is a real danger that the focus of the case shifts to an examination of the truth or otherwise of that assertion. There is a risk that if it is doubted or rejected by the Court that this, even subconsciously, may wrongly be held against the defendant.

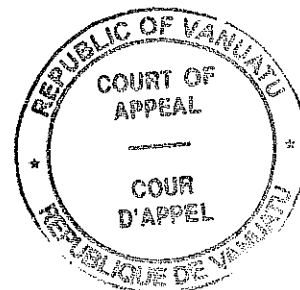
[74] EM said that on 20 July 2014, RH was arrested for threatening him and in connection with the cannabis oil; the incident that happened on 3 August was somehow in connection with this. While there was no rape allegation in respect of LH at that time, EM was aware of an alleged sexual assault by him on BF. BF told him (and she later confirmed in her evidence) that MK and [BK] had come to pick her up to get her to make a false complaint of rape against him. BF did not admit to EM at that time that she had indeed made one. Apparently she and MK are from the same island.

[84] Overall, EM was adamant that the complaint is false and solely the result of the conspiracy against him by RH and MK.

[98] The next witness was George Twomey, a Chief Inspector of police and officer-in-charge of the Criminal Investigation Department (CID). He knows EM because of complaints which have been lodged by him, notably the complaint against RH alleging cannabis offending on Santo. This was investigated and RH was arrested and charged, but ultimately the case was withdrawn.

[99] He was aware of a complaint by BF of rape by EM which had been supported by MK. That was lodged when the case between EM and RH was current and he said MK had "switched sides" to supporting RH after he had been arrested.

[100] The officer confirmed meeting EM and BF in September 2014 at the Chinese restaurant. EM was very scared and said MK was after him. He confirmed MK had interrupted the meeting and EM and BF got up and walked out. There is no reason not to accept his evidence.

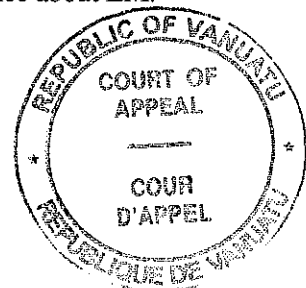


[114] EM's defence is both a complete denial of any sexual contact with LH and an affirmative allegation of a conspiracy, involving at least RH and MK, to see him falsely convicted of this charge.

[115] The starting point of the analysis of the evidence must be an assessment of the "conspiracy evidence". As to that it is important to record the basis on which I proceed to comment on the conduct of RH and MK. I am acutely conscious that neither of them has appeared as a witness and that neither has been convicted of any offence. I have only heard EM's side of the story and RH and MK may be, have a very different view. Indeed it would be surprising if they did not, given the extent of the mutual animosity. RH and MK are not on trial and I do not know what they might say about EM's evidence and that of other defence witnesses.

[117] The evidence given by EM and other defence witness about the conduct of RH and MK is unchallenged. The Public Prosecutor might have sought to bring rebuttal evidence under Section 169 of the Criminal Procedure Code but had no obligation to and did not do so. I therefore proceed on the basis that for present purposes the following is accepted to be correct:

- (a) That EM and RH had a serious falling out in connection with their businesses operated at Velit Bay, Santo in the latter part of 2013. A good deal of mutual antipathy arose and remains.
- (b) EM has made both a civil claim and two criminal complaints against RH (the latter leading to his being arrested and charged giving RH a particular incentive to get back to EM).
- (c) RH is a wealthy man with the means to pay people substantial sums in an attempt to influence them and to achieve his goals.
- (d) MK, whether as agent for RH or personally, also has antipathy towards EM demonstrated for example by his various threatening conduct towards him at the Christmas party at Velit Bay in December 2013.
- (e) EM has made a complaint to the Police about the threatening conduct thereby giving MK also a reason for retribution towards him.
- (f) Although veiled and general, RH made a threat to EM in his email of 8 January 2015.
- (g) There were further indications of threats in an email RH sent to EM's brother.
- (h) MK and Mr Dalley were present at the time of EM's apprehension (he was not in fact arrested) by the police at Bauerfield Airport in March 2015 on his return from Santo.
- (i) MK arranged for a false rape complaint against EM to be made by BF and he paid her Vt,5000 (which she accepted) to make a false statement, the contents of which he provided. He also paid the two young men Vt2,000 for supporting statements. There are indications that at the time he was in immediate contact with RH.
- (j) MK offered [FP], Vt500,000 to make a false statement to the Police about EM.



- (k) LH herself was placed under pressure to make a statement to the police complaining of rape by "Annie" and by MK. However, I note that, by contrast with BF's false complaint, there is no evidence that LH was told what to say other than that she should tell the truth to the police. Nor was LH asked to make a statement to MK himself, only to the police.
- (l) When LH declined to make a statement she was further encouraged to do so by an offer of Vt100,000 made by MK, which she declined.
- (m) EM's belief that this whole case is a conspiracy against him orchestrated by RH using MK as his agent may be seen as corroborated by Chief Inspector Twomey's observation that he was scared and he stated that MK was "after him".
- (n) Although no details were given, EM also says that RH has twice attempted to have him killed.

Having noted that the fabrication evidence was "unchallenged" and "accepted to be correct" by the prosecution, the trial judge then dealt with various defence counsel's closing submissions and finally in rejecting the fabrication defence and finding LH to be a truthful witness, the trial judge said:

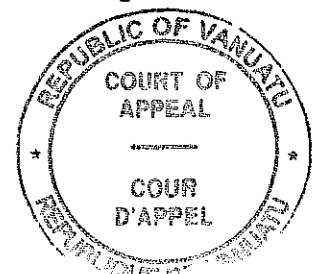
[151] The question on which my decision turns is whether or not it is reasonably possible that that conclusion may be wrong given the "conspiracy" evidence which I also accept and EM's adamant denials.

[152] The "Conspiracy" evidence is troubling indeed and on the face of it amounts to serious criminal offending on the part of at least MK if not RH. MK's conduct involved persistent attempts to pervert the course of justice, arguably both in relation to the complaint by BF and the one by LH. In the one case money was paid and in the other a substantial sum was offered if not accepted to procure what MK knew or believed, at least in relation to BF's complaint, to be false testimony. If MK was indeed, as EM says he strongly suspects, acting as RH's agent in these matters then both of them ought to be charged with conspiracy to defeat justice contrary to section 79 of the Penal Code and/or with wrongfully attempting to interfere with or influence a witness in a judicial proceeding contrary to section 82 (1) (f), those offences respectively carrying maximum terms of imprisonment of seven and five years.

[153] But the existence of the conspiracy and pressuring LH go to the police does not mean that her complaint was false. It is perfectly possible that, on learning in January what had happened to LH in July, MK and RH seized on this as a way of achieving their wish for retribution against EM. I find that this is what happened. MK and Annie were trying to ensure LH's true complaint was made, not arranging for her to make a false one.

[154] I find therefore that the facts she had to be forced to go the police about the matter in January 2015 and the fact that she was offered a substantial sum of money to do so, do not mean that her complaint as made and her evidence in Court are not true. She has explained why she delayed and was reluctant to make any complaint. I accept that explanation and her denial of receiving money to give her statement.

[158] Standing back and looking at the evidence overall, while the conspiracy evidence is troubling, it does not give rise to a reasonable doubt in my mind that LH was telling the



truth. Nor do EM's repeated denials. I am sure that EM had sexual intercourse with LH in his room at Nambatri on 24 July 2014. I further find, based on my acceptance of her evidence, that LH did not consent and the circumstances she described mean EM cannot have had a reasonable belief in her consent; on the contrary he knew very well she was not consenting and had to threaten her with a knife to achieve intercourse.

Approach

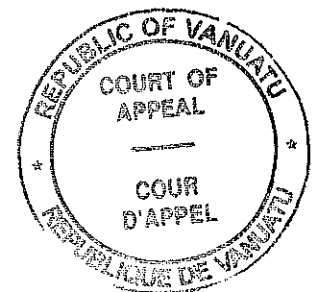
[16] The appellant who represented himself at the appeal hearing advanced numerous grounds of appeal which we have considered. The grounds included quite improperly, personal assertions directed at the trial Judge, the court interpreter, the prosecutor and even his own counsel. We have considered those allegations and reject them. They are indeed entirely unjustified, as all those involved have conducted themselves in accordance with their duties. The Judge in particular was thorough and accurate, and his summary of his approach and the various legal tests and safeguards was exemplary.

[17] We have confined our deliberations on the one aspect of the appeal which has caused us concern, which is the proven conspiracy, and whether it left open a reasonable possibility that the complainant's evidence was false.

[18] As was said by Viscount Cave L.C in *Mersey Docks and Harbour Board v Proctor* [1923] AC 253 at 258/259:

The duty of a Court hearing an appeal from the decision of a judge without a jury was clearly defined by Sir Nathaniel Lindley M.R. in *Coghan v. Cumberland* (7), and by Lord Halsbury in *Montgomerie & Co. v. Wallace-James* (8), and is no longer in doubt. The procedure on an appeal from a judge sitting without a jury is not governed by the rules applicable to a motion for a new trial after a verdict of a jury. In such a case it is the duty of the Court of Appeal to make up its own mind, not disregarding the judgment appealed from and giving special weight to that judgment in cases where the credibility of witnesses comes into question, but with full liberty to draw its own inference from the facts proved or admitted, and to decide accordingly. In the present case there is no question of the credibility of witnesses. The material facts, so far as they are known, are undisputed; and the Court or Appeal was at liberty, and indeed was bound, to draw its own inference from them.

[19] If on our analysis of the evidence we are left with the view that there is a reasonable possibility that as part of the undoubted conspiracy to damage Mr Mass, LH gave false evidence against him, we must allow the appeal, as the verdict is unsafe and there has been a miscarriage of justice.



Our view of the conspiracy

[20] We have had the benefit of a much more exhausting traverse of the evidence of the conspiracy than in the submissions put to the trial judge. The essence of our judgment is that the evidence of the conspiracy is on its face sufficiently strong to show a reasonable possibility that the conspiracy existed, and that as part of it LH falsely alleged rape.

[21] The conspiracy allegation must be considered against a number of following background factors. As is often the case, this case turns on the complainant's word against that of the accused. There was no forensic or medical evidence, and no eye witness. The only material corroboration of the rape came from the bus driver and the two men who released LH from the house. However there are factors in their evidence that cause concern.

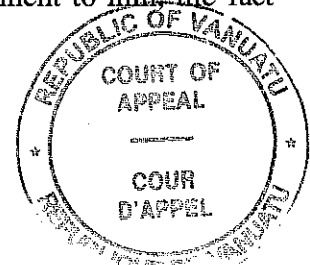
[22] The taxi driver oddly remembered the exact phone number of Mr Mass from a year before, but could not remember his own phone number. In any event, his evidence about what happened on one ride a year before could only go so far in corroborating LH's story.

[23] The first of the two men who came into the house, BK, denied being paid by MK to give his evidence, but admitted that MK was his uncle. It was the evidence of BF which the Judge appeared to accept at [117] of his judgment that BK was paid VT2,000 by MK to make a supporting statement. Thus the judge appeared to disbelieve BK on his claim that he was not paid by MK to give evidence.

[24] In addition BK was described by the Judge as a "somewhat unreliable and unimpressive witness", being inaccurate on timing. There were errors in his evidence, and differences in what he said and what the other of the man CC, said. He had convictions for theft and drug offending. He signed a statement withdrawing the complaint, although he later withdrew the withdrawal.

[25] The Judge found CC to be a more satisfactory witness. But he also was paid VT2000 to give evidence to support the false allegation of rape by BF. He was also related to MK, and from Tongoa.

[26] In our view there are real doubts about this corroborative evidence. Indeed we think that the evidence of BK should have been disregarded entirely, given the payment to him, the fact



that he denied that payment, his general unreliability, and his relationship to MK. The evidence of the bus driver and CC are not in that category as the Judge did not criticise the delivery of their evidence, but their evidence has to be treated at least with considerable caution.

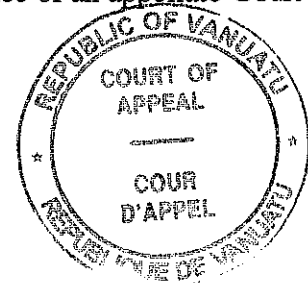
[27] The similarity between the prior admitted fabrication involving the appellant's girlfriend BF, and the nature of the complaint in the present case as evidenced by the police statements of BF and LH, is of great concern. There are differences, but the similarities are sufficient to raise the possibility of collusion.

[28] Of real concern to us, and not we think fully set out for the Judge, are the emails from RN showing an express intention to have persons bring rape complaints against Mr Mass, and the level of his hatred for Mr Mass. His extraordinarily abusive emails include one of 22 September 2014 to Mr Mass' brother. It recites that the brother should be aware of the "the charges being prepared against [Mr Mass]" and then lists "Aggravated rape of an under age girl", "imprisonment of an under age girl", and "supplying drugs to an under age girl". Needless to say these proposed charges reflect the allegations made later by LH, (although at the time of the alleged offending she was 16).

[29] The email at times appears to address Mr Mass. It says "You are next you dirty fucking Jew cunt.....and your sister.....you are all game!! I will annihilate your line...and [Mr Mass].....permanent.....But painful". In a later email of 8 January 2015, within a few days before LH make her complaint he calls Mr Mass "a fucking detestable cunt" and says that Tallis (who is MK) has something for you. He say he should know "..what is going to happen next.....but fuck it that would spoil all the fun and believe me we are gonna have some fun at your expense".

[30] Another 2014 email says that he "requires" Mr Mass to be in prison, and he refers to calling up a formidable number of persons in his campaign. There is evidence that RN got Mr Mass' former wife to sign a vituperative statement against him. This appeared to be a vengeful wish to have Mr Mass convicted of something, coupled with the means do it.

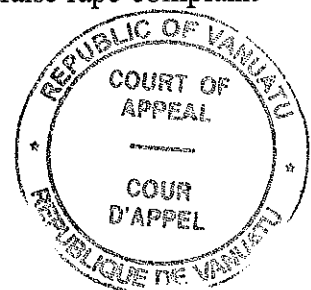
[31] Here we accept the premise of the Judge that a pressured or indeed a paid witness can nevertheless be a truthful witness. We are acutely mindful of the reluctance of an appellate Court



to interfere with factual findings of a trial court based on an assessment of credibility but where the essential facts of the fabrication defence are “unchallenged” and “accepted” then an appellate Court is in as good or position to draw inferences from such facts as a trial court.

[32] However there is strong evidence of the conspiracy, and there was no rebuttal evidence called. That evidence on its face casts doubt on whether there was indeed a rape. In summary there are the following factors:

- (a) the fact that it is the complainant’s word against the appellants;
- (b) the poor corroborative evidence, some of which in our view should have been rejected as too unreliable;
- (c) the indications that the two key corroborative witnesses were paid and are linked to Mr Mass’s enemy RN, through MK;
- (d) MK together with RN has shown animosity to Mr Mass, and significantly MK is a powerful local man with many connections, and direct relationships with witnesses called by the Prosecution;
- (e) The lack of any complaint by LH, even to her mother, until approached by MK in 22 January 2014;
- (f) The evidence that RN, the man who was endeavouring to destroy Mr Mass by the laying of criminal charges, knew that charges were being prepared against him in September 2014 long before they were laid;
- (g) The indications that RN may have had in mind a complaint by someone like LH before LH actually complained to the Police;
- (h) The offers of payment to LH and her initial willingness to take the money;
- (i) The proven payment of VT5,000 to BF to get her to make a false rape complaint against Mr Mass;



- (j) The payments by MK to BK and CC, the two key corroborative witnesses in relation to the false complaint by BF;
- (k) The similarities between BF's complaint and that of LH, in particular the knife to the throat and detention after sex.

[33] None of these factors was ignored by the trial Judge. He made his credibility finding accepting the fact of a conspiracy. But in our assessment, with the benefit of far more detailed submissions than he received, we are left with concerns that the verdict is unsafe. There may be an answer to it all, and it may be that the Judge was right in his overall assessment of LH's credibility. But we do not consider that the full weight of the conspiracy evidence was put to the Judge in the way it was to us, and we are left with a reasonable doubt on the evidence presented to date. We propose to allow the appeal and will direct a re-trial.

Other matters

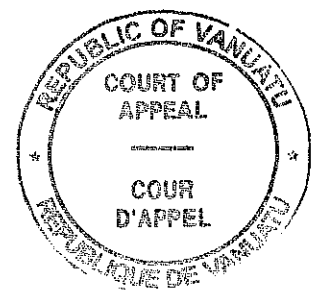
[34] There are a number of matters we need to refer to.

[35] There is no need to deal with the appeal against sentence as we will quash the conviction.

[36] We do not propose granting Mr Mass bail. He is awaiting ^{sentence} ~~trial~~ on other serious ^{sent} ~~charges~~, and there has to be a risk of him absconding, given that he has no visa and is an overstayer with citizenship overseas. He can always make application himself at a later date. ✓

[37] If Mr Mass represents himself at the trial, a friend of the Court must be appointed to cross-examine the complainant. It would not be right or fair for Mr Mass to do that.

[38] The Police should obtain a witness statement from MK in which they put to him the conspiracy allegations and the various emails and documents, and get his version of events. That statement should be made available to Mr Mass, and if he requires, MK should be called by the prosecution. If MK refuses to co-operate the prosecution should summons him to appear as a witness for the prosecution at the trial, so that Mr Mass can put his allegations to him.



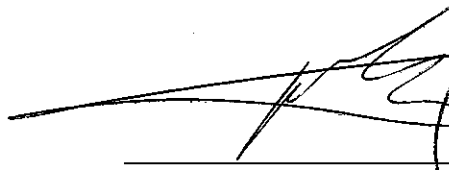
Result

[39] The appeal is allowed and the conviction is quashed.

[40] A re-trial is directed.

DATED at Port-Vila this 20th day of November, 2015

BY THE COURT



Vincent LUNABEK
Chief Justice

