

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

Criminal Case No.658 of 2015

BETWEEN: Public Prosecutor

**AND: Marcel Tabigerian
Evelyn Matanlala
Accuseds**

Date of SENTENCE: 28 October 2016 at 9.00AM
Before: Justice D. V. Fatiaki
In Attendance: Counsel – S. Blessings for the State
Counsel – E. Molbaleh for the Defendant

JUDGMENT ON NEWTON HEARING AND SENTENCE

1. On 11 December 2015 the defendants who are husband and wife each pleaded guilty to two counts of Sexual Intercourse Without Consent involving two different victims.
2. Upon their convictions the defendants were sentenced to concurrent sentences of 7 years imprisonment for the husband and 4 years imprisonment for the wife.
3. The wife successfully appealed against her sentences to the Court of Appeal on the ground that this Court "*had not made sufficient allowance for the fact that (the wife) had been forced or coerced by her husband to take part in the offending*". The Court of Appeal granted the wife leave to file a sworn statement.
4. In her sworn statement the wife deposed inter alia:
 - "2. I was born on the 5th June 1979 and I am 37 years old.
 4. I went to primary school until class (grade) 4 and left school as I did not want to continue with my school.
 5. I left school and was living with my parents in our village until I was married to my husband when I was only 15 years old because I was then pregnant to our first born child.



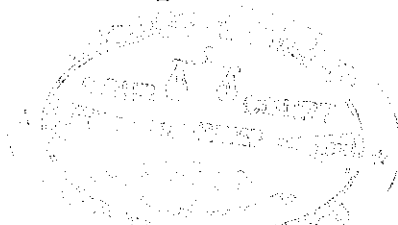
7. *My husband does not respect me and whenever he wants to have sex with me he will do so whether I consent to it or not.*
8. *When I refuse to have sex with him he would normally get very angry and assault me sometimes.*
9. ***He is very dominant and I have less to say at home, I always do what he says, he always does what he wants to and I just do not have the power to stop him from doing anything.***

Concerning the incident involving the first victim (DM) the wife deposed:

22. *I woke up somewhere between 1am and 2am o'clock and noticed that my husband was not in our bedroom and I wondered where he was.*
23. *I then got up and noticed that his slippers were not at our door and so I came out and went to look for him at the nakamal where men normally have kava.*
24. *On my way to the nakamal I was so surprised to hear him calling out to me and said what I was looking for. I asked him where he had been. He shouted at me and told me be quiet. He said he was with (DM) watching movies on the mobile phone. I then got very angry as I suspected they were having sex so I entered into a bitter argument with my husband. **So he squeezed my neck and threatened me to be quiet or he will drown me in the sea like my father who was found death in the sea. We are living by the sea.** So he told me to come back to the house to follow his command or he will assault me. He was so aggressive that night and was afraid. **I could not do anything to defend myself as I was nine months pregnant. I was very heavy with my belly.** He then threatened me to go and see (DM) in the room where she was sleeping and made assault threatened and we continued with our bitter argument. I refused to see (DM) but he continued make assault threatening to me.*
26. *I was shivering as I was being threatened very badly already that night by my husband and it is night time our children were sleeping and **he threatened to cut me into two pieces if I call out for our children to wake up. He said to me "are you not afraid that I cut your head with my axe?"** I mean if I do not go and see (DM) and do what he instructed me to do, he will cut my head with an axe. **I was then very afraid, under pressure and force so I did what he wanted me to do with (DM).**"*

And, concerning the second victim (MR), the wife deposed:

29. *On the evening of the incident involving (MR) happened I did not know of any arrangement if any with my husband and the victim. I was at home went my husband and the victim turned up. My husband suggested to me that the victim sleeps in the same room in our bedroom. **I refused his idea and had a bitter argument with my husband.** I told my husband that if I had known I would have gone to my parents village in the day time while it was still day*



light. It was hard for me to walk in the dark with my little baby girl who is only 2 or 3 months at that time. My husband then told me that if I leave the house he would assault me to the extent that I would be admitted in the hospital.

33. *I know my husband is a danger to me because he has been assaulting me badly in the past and he has been threatening me over these two incidents and so it was very hard for me to say anything against his instructions and I could not cry out on those nights otherwise he would badly assault me (annex EM1) shows the scar of the cut on my left hand that my husband cut me once in the past that was before the incident involving this present case."*

And finally and generally, about her life with her husband the wife deposes:

- "36. *I have been facing all sorts of violence from my husband and I am really tired of it, sometimes I am thinking of running away from him but I think about and sorry for my children as they are still too young to be living by themselves.*
37. *Even if I run away and go back to my parents' village, he will come and badly assault me there as he did it before when I was suspecting that he had sexual affairs with my real sister. He denied it, we had argument and I went back to stay with my mother. I was sitting on a bamboo stool with my mother, he did care that my mother was there with me, he came and badly assaulted me in front of my mother.*
39. *It is not and was never my intention to commit offences I am in jail for but I was badly forced and threatened by my husband.*
40. *My children are on the island I do not know what they eat, wear and do, they live with my mother who is old and could not and will not look after them properly."*

(my highlighting)

10. In the absence of expert evidence the Court is unable to accept that this is a case that falls within the category of cases commonly referred to as "*the battered wife syndrome*". However there are features of the wife's evidence that are characteristic of victims of abusive relationships and domestic violence, such as, being constantly fearful and acutely aware of any threats or signal of danger from her partner; staying in an abusive relationship because of fear of a partner's revenge should she leave; and believing that she will one day be killed by her partner [see: Osland v. The Queen (1998) HCA 75].



11. Having said that the Court of Appeal in Picchi v. Public Prosecutor [1996] VUCA relevantly observed:

*"The issue of whether the "Battered Wife Syndrome" can have application in a case where there is denial has not been determined (note: in this case the wife admitted the offences) The expert's evidence suggested that from a scientific point of view a person who is affected by this syndrome can be in denial **but on sentencing the Court should take that condition into account ... (the evidence) was presented to address the personal aspect of the appellant and her position on sentencing**". [see: State v. Wati (2001) FJHC 16]*

(my highlighting)

12. The Court of Appeal in quashing the wife's sentence in the present case and remitting the case to the Supreme Court for re-sentencing said (at para. 13):

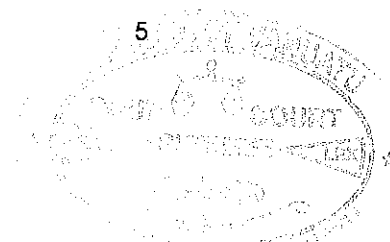
"It would be quite inappropriate for this Court to endeavor to determine the truth or otherwise of the matters referred to in Ms Matanlala's sworn statement. For these reasons the appropriate course is to remit the matter to the Supreme Court for resentencing. Given that Ms Matanlala has filed her sworn statement it will be for the Public Prosecutor to call any evidence which is relevant to the issue of her claimed diminished responsibility. No doubt a conference will enable counsel to identify the mitigating and aggravating factors they wish the Court to rely on in sentencing and for the prosecutor to identify the witnesses the prosecutor wishes to call."

13. On 19 July 2016 the prosecution filed a response sworn statement from the husband who deposed that he had had an opportunity to consider his wife's sworn statement filed in the Appeal Court and he can confirm that the contents of paras. 7 to 43 are not true and are all lies ("*keaman everyone*") and furthermore the husband deposes that the sex with the two girls was agreed with his wife beforehand and was not his intention alone ("*hemi no tingting blong mi wan*").
14. Given the diametrically opposed depositions the Court on 18 August 2016 fixed a "*newton hearing*" for 30 September 2016 to deal with the question of whether or not the wife had been coerced by her husband to commit the offences she was charged with.
15. On 30 September 2016 Prosecuting counsel sought an adjournment of the hearing which was opposed by defence counsel and refused by the Court. The hearing proceeded with the wife's cross-examination



on the basis of her sworn statement which was marked – **Exhibit D(1)**.

16. In cross-examination the wife stated that sometimes her husband forced her to have sexual intercourse and often threatened to kill her if she refused. She denied that her claim of being forced by her husband was a fabrication thought up after her conviction and she says she mentioned it to the probation officer and the junior lawyer assisting her counsel at the trial. She admitted not telling her defence counsel (who was also acting for her husband) because “... he wasn't receptive and only wanted “yes” answers”.
17. She identified a colour photo of a long scar on her left forearm which she says was caused by her husband when they were out cutting copra.
18. In cross-examination she also identified the record of her police caution interview which was marked and exhibited **Exhibit P(1)** – her answers concerning the victim (MR) and **Exhibit P(2)** – her answers concerning the second victim (DM).
19. In re-examination the wife maintained that her husband had forced her to commit the offences.
20. In closing submissions both counsel agreed that the Court should first determine the question of whether or not the husband had forced his wife to commit the offences, and thereafter sentencing could proceed.
21. Defence counsel relying on the wife's sworn statement submits that it portrays the life of a “*battered wife*” and the court should believe the wife's evidence because at the time of the offending she was heavily pregnant and, in that condition, would be unlikely to have voluntarily participated in extended lesbian sexual activity without actual coercion.
22. Prosecuting Counsel on the other hand, equally forcefully, submits that the wife's caution interview answers to the police nowhere claims or suggests that she had been forced to participate by her husband



and in respect of the victim (DM) her husband was not even present when she initially performed oral sex with her.

23. I remind myself that in this "*newton hearing*" the burden of proof is on the prosecution to satisfy me beyond reasonable doubt that their version is the correct one and if they fail to do that, then the wife is to be sentenced on her version.

Has the prosecution discharged its burden?

24. After considering all of the evidence placed before the Court and the submissions of both counsels and mindful that the prosecution who bears the burden of proof did not call any witnesses or produce any evidence in support of its version, I am not satisfied that the prosecution's version has been established to the required standard or that the wife's version is so discredited as to be rejected as unbelievable. Sentencing will therefore proceed on the basis of the wife's version which is to the effect she was co-erced and threatened by her husband to take part in the commission of the offences.

25. In this regard section 26(1) of the Penal Code relevantly states :

"Criminal responsibility shall be diminished in the case of an offence committed by a person acting –

(a) ...

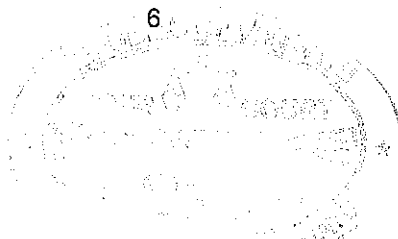
(b) ***Under the coercion of ... spouse."***

And section 24 expressly provides that:

"Whenever criminal responsibility is diminished by law, the punishment shall be mitigated at the discretion of the Court".

(my highlighting)

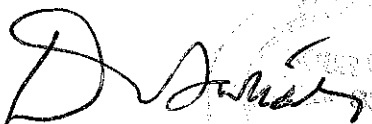
26. It is clear from the above provisions that "*coercion by a spouse*" diminishes the criminal responsibility of the coerced spouse and constitutes a discretionary mitigating factor in the sentencing of the coerced spouse as the Court considers fit.



27. The existence of this additional significant mitigating factor including the fact that the wife has been nursing her infant daughter in prison since her incarceration enables the court now, to impose a sentence of 2 years imprisonment on each count with which the wife is charged. Both sentences are ordered to be served concurrently making a total effective sentence of 2 years imprisonment.
28. The wife has been in custody since she was first sentenced on 11 December 2015 and, despite being successful in appealing her sentence to the Court of Appeal in April 2016, she has remained in custody on remand. This translates into an effective sentence of 2 years imprisonment given parole considerations. Accordingly given the time already spent in custody the wife should be immediately released.
29. The Defendant is advised that she may appeal this sentence if she does not agree with it.

DATED at Port Vila, this 28th day of October, 2016.

BY THE COURT



D. V. FATIAKI

Judge.

