IN THE COURT OF APPEAL OF THE REPUBLIC OF VANUATU
(Criminal Appellate jurisdiction)

Criminal Appeal Case No. 02 of 2011

IN THE MATTER OF: an appeal by Steward McEwen from the decision in Criminal Case No.80 of 2010 in the Supreme Court of Vanuatu being:

BETWEEN: **STEWART McEWEN**
Appellant

AND: **PUBLIC PROSECUTOR**
Respondent

Coram: *Hon. Vincent Lunabek, Chief Justice*
Hon. J. B. Robertson J
Hon. J. W. von Doussa J
Hon. O. A. Saksak J
Hon. R. L.B. Spear J

Counsel: *Mr Dane Thornburgh for the Appellant*
Mr Leon Malantugun for the Respondent

Date of hearing: *15th November 2011*
Date of decision: *25th November 2011*

JUDGMENT

1. Following a hearing in late October 2010, on the 26th August 2011 Fatiaki J found the appellant guilty of a single charge of sexual intercourse without consent contrary to section 91 of the Penal Code Act [CAP.135]. On 9th September 2011 Mr McEwen was sentenced to 3 years imprisonment, half of which was to be served in prison. The remaining 18 months was thereafter suspended for 2 years.

2. Mr McEwen has appealed against conviction on the total of 12 grounds a number of which were repetitive and a number of which were not pursued.

with any vigour at the hearing before us. But the substantive grounds were enumerated as follows:

1) The time between the hearing of the evidence at trial and the delivery of the verdict of a period of 11 months has seen a miscarriage of justice as the passage of time has led to an inaccurate recollection of the evidence to the Defendants prejudice.

2) The Learned Trial Judge has erred at law by finding the Defendant guilty of a charge he was not charged or arraigned upon.

3) The Learned Trial Judge has erred at law in relying on the particulars of the charge and arraignment that are unable to be read into s.90(a) of the Penal Code and are not allowed for.

4) The Learned Trial Judge has erred at Law in implying recklessness, knowingly reckless or by means of false representation as to the nature of the act and or implied consent into the definition of consent in s 90(a) of the Penal Code, when it is already allowed for in s.90(a)(v) in the disjunctive as an alternate offence.

5) The Learned Trial Judge has erred at Law in applying section 6 of the penal Code in determining that the Defendant was reckless, as the Defendant was not charged with being reckless or arraigned with being reckless.

6) The Learned Trial Judge in not correcting the opening address of the prosecution Counsel which was inaccurate, not factual and misleading, lead to actual bias and prejudice on the basis of extraneous matters calculated to influence the tribunal of fact improperly in arriving at a determination.

7) The Learned Trial Judge erred at law in relying on the Defendants statement to police when it was inadmissible at law.

8) The Learned Trial Judge erred at Law in accepting the Prosecution submission, and subsequent finding that the Defendant held no reasonable grounds for holding the belief that the complainant was Donna Jeffrey or that even if it were Donna Jeffrey, that she would consent to having sexual intercourse with the Defendant. This question was not asked of the witness Ms Jeffrey by the Prosecution or Defence counsel and remained unanswered with no evidence to support such a proposition.

9) The Learned Trial Judge erred in finding that there was no evidence that the complainant has not initiated the act of sexual intercourse as the weight of the evidence was to the contrary.

10) The Learned Trial Judge erred in his finding of fact that the Defendant had by passed an empty bedroom as the evidence was not the supportive of this finding.

11) The Learned Trial Judge erred in his finding that the complainant and the Defendant only engaged in oral sex, doggy style, and sex with the complainant facing away from the Defendant when the weight of the evidence was to the contrary.

12) The Learned Trial Judge erred at Law in his reliance on the evidence of Senior Sgt Saravana and his record of interview as it was inadmissible.

3. In essence the substantive challenge was that there was no proper evidential foundation to convict Mr McEwen on the one count.

4. The State cross-appealed contending that the sentence imposed was manifestly inadequate.

5. It is clear that at the trial hearing there was substantial inquiry into matters which do not go to the heart of the case. The discipline and focus which should have attended the hearing were not always apparent.

6. There is in fact little conflict or dispute as to precisely what occurred at the relevant time. The appellant and the complainant were each present at an uninhibited social gathering at Havanna Harbour over a weekend at the end of July 2010. On the evening of the 30th July 2010, the complainant went to bed having consumed a significant amount of alcohol. She was naked and lay under a sheet.

7. Later the appellant decided to go to bed also. He looked into one room and found it was occupied. He looked into the second room which although unoccupied had personal belongings in it. The appellant then went to the room where the complainant was sleeping. The uncontradicted evidence is that with his clothes on he lay on top of the double bed in which she was lying and fully dressed he turned towards the wall to sleep.

8. Almost immediately she turned and put her arm across his torso.

9. She then engaged with him more directly and commenced sensual kissing to which he responded. She helped remove his shirt and together they removed his shorts.

10. It is undisputed that they then provided oral sex the one to the other. She then placed herself on his erect penis facing away from him. This was followed by a vaginal intercourse in the doggy position. There is a possibility of some missionary position intercourse also.

11. Mr McEwen got cramp and left the bed put on his shorts and went to get two glasses of water. When he returned and the complainant had turned on the light she saw who her lover had been, she let out a howl of anguish. She immediately asserted that she believed that she was being sexually intimate with another man with whom she had had a passionate encounter the previous evening. She was outraged that her activity had been with Mr McEwen. He likewise said he thought his partner had been another woman.

12. The complainant and the Defendant were previously virtually unknown to each other.

13. There are three essential elements of any count of rape. First, that there was intercourse (which is very widely defined) and there is no question that each of the activities which occurred constitute sexual intercourse in law.

14. Secondly, there was no consent by the complainant. In this case, the judge found as a fact that the complainant did not consent because she was mistaken as to the identity of the man she was involving herself with.

15. It is an interesting concept that a woman can actively, willingly and enthusiastically involve herself in sexual activity, but if she believes a different person is involved it can be said to be without consent. The law recognises that that can occur and we see no reason to differ from the judge's assessment that what occurred was not consensual because she was mistaken as to the identity of her lover.

16. Where we part company with the trial judge is on the fundamental plank that the charge is against this man and the third element requires proof beyond reasonable doubt that he had a guilty mind.

17. Although the law in Vanuatu does not statutorily identify this third element, as is the case in some jurisdictions, it is a fundamental matter. It is of profound importance that the prosecution proves beyond reasonable doubt that the man did not believe on reasonable grounds that the complainant was consenting at the time that the intercourse occurred.

18. This aspect was introduced tangentially into the particulars of the charge (and into the way the case was conducted), by references to sections 6 and 12 of the Penal Code Act. We do not find that to be helpful in the fundamental inquiry which needed to be undertaken.

19. The critical issue is whether the State has proven on the particular facts that anything said or done by Mr. McEwen led to the complainant's mistaken belief as to his identity. Equally whether anything was said or done which would have put a reasonable person in the place of Mr. McEwen on notice that the complainant was mistaken as to who he was. The fact that in retrospect a Court finds that her apparent consent was not valid is only relevant to the second factor and does not address the third.

20. It was essential that the State proves that Mr McEwen did not believe on reasonable grounds that the complainant was consenting as and when the sexual activity was occurring.

21. The Court commenced the appeal hearing with an interactive dialogue with counsel to identify factually what was not in dispute and what was established on the evidence.

22. On the basis of this we were able to direct our attention to the critical third element with regard to the appellant's state of mind.

23. Mr. Thornburgh submitted that there was no evidence which in any way suggested that the mistake as to identity suffered by the complainant was as a result of any act or omission on the part of Mr. McEwen. Counsel stressed a total absence of any evidence which would have suggested in any way that the appellant had any idea throughout the sexual encounter, that what was occurring was other than enthusiastic willing and consensual activity between two adult persons.

24. In response Mr Malantugun submitted that this third element "*was silently proved*". He pointed to six factors which in combination he said established

beyond reasonable doubt that Mr McEwen did not have reasonable grounds for believing that the complainant was consenting.

25. These were:

1. That Mr McEwen went to various rooms prior to going to the room which was occupied by the complainant and when he found rooms occupied he had not simply gone to sleep in his truck.

2. When the appellant entered the room where the intercourse occurred he knew there was someone in it.

3. Notwithstanding that knowledge he still entered.

4. Mr McEwen closed the door after he went in.

5. It was pitch black in the room.

6. The appellant failed to disclose his identity to the person lying on the bed at the time that he lay down.

26. Counsel submitted that these matters led to the inevitable conclusion that he was trying to hide himself and his true identity from the person who was on the bed.

27. We are not satisfied that any of those matters separately or in conjunction lead to that conclusion.

28. Mr McEwen lay down full dressed on the bed. He turned his back on the other sleeping person who was under sheet. He had opened the door when he went in so it was not unusual that he closed it again.

29. The notion of identifying himself to a person on the bed whether sleeping naturally or as a result of the liberal consumption of alcohol lacks reality in this context.

30. There was a great deal of time taken at the trial about who Mr McEwen thought he was having sex with and whether she would have consented. This was a futile and irrelevant exercise in the circumstances of this case.

31. Further if one were looking at matters from which conclusions could be drawn equal weight would need to be given to the fact that when the mutual mistakes as to identity were discovered after the light went on, Mr McEwen removed himself from the room and went and slept for the rest of the night in his truck parked on the property. He did not go back to Port Vila or try to hide himself.

32. Consistently in his interview with the police he took the position that what had occurred in the room he believed to be willing, mutual and enthusiastic sexual activity which had been initiated by the woman and to which he responded in like manner.

33. The fact that by an after-the-event analysis a court concludes the woman had made a mistake (and therefore her consent was not real or valid) tells us nothing as to his state of mind at the time which is the third vital factor in this charge.

34. The way in which the sexual encounter was treated at trial as being a risky activity undertaken recklessly lacks reality. Consensual sexual behaviour between adults is not a criminal activity. To try to utilize a section which is directed at quite different and unrelated human activity, to bolster a case of sexual abuse, was inappropriate.

35. The learned trial judge in his verdict said:-

> *"22. I confess to having considerable difficulty with this second element of the offence and, in particular, with the complainant's answers in cross-examination which clearly establish that she was a willing participant to all of the sexual activities that occurred o*

the bed on the evening of 30 July 2010, but, she claims, she was mistaken as to the identity of the person with whom she had performed those very intimate sexual acts.

23. *Is her claim credible? And is it even feasible to consent to the act and not the actor? In other words is the act of sexual intercourse so plainly one which inevitably involves a second person such that it would be unreal or pure sophistry to attempt to separate the act from the actor?*

24. *In summary, the prosecution submits that to establish absence of consent it is only necessary to consider the complainant's evidence, and, in this regard, the complainant's evidence is clear and unequivocal that she did not consent to the accused Stewart McEwen having intercourse with her."*

36. Both in these passages, and later, there is no sufficient engagement with the state of mind of Mr McEwen. It is his actions which are claimed to create criminal liability and his perception must be additionally and independently evaluated:

37. In keeping with the manner in which the charge had been presented by the prosecution, the judge not surprisingly returned to the issue of mistaken fact under section 12 under various defences which can arise. That was a misapplication of the appropriate law. It involves a narrow reading of our decision in **Ishmael v. Public Prosecutor** [2005] VUCA 1. The correct position is as noted by Fatiaki J in paragraphs 57 and 58 of his verdict when he said:

"57. In summary, the Court of Appeal said:

"The critical question is whether at that time and under those circumstances (when sexual intercourse occurred with the complainant) *the prosecution has proved beyond reasonable doubt that (the accused) did not genuinely believe that the complainant consented or that a reasonable man standing in his shoes would not have believed that the complainant consented'*

58. and later the Court said:

"When assessing the reasonableness and honesty of the belief of [the accused] *it must be looked at within its total context."*

38. That is the correct test but it was not applied. Instead of it being accepted that an essential ingredient of the offence was the prosecution proving beyond reasonable doubt that the accused person did not believe that what was occurring was consensual, this aspect somehow turned into being a defence initiated matter, and attention became diverted back to the complainant's appreciation.

39. We are satisfied that there was not an evidential basis to satisfy the third limb of criminal liability to enable a conviction to be entered and the appeal must be allowed.

40. We are dismayed at the time which elapsed between the hearing of this matter and the delivery of the verdict. We spoke of the consequences which can flow from such delay in **Dawson v. Public Prosecutor** [2010] VUCA 10. The time in the present case was even longer.

41. In the event it has not created actual prejudice in this case but the integrity of the judicial system and public confidence in the administration of justice demand that when serious allegations are made they should be heard speedily and a verdict delivered within days or at most weeks. The parties themselves and the wider community can expect this of all courts.

42. The only other matter to which we should avert is the unchallenged allegation that the prosecution opened this case on the basis that the complainant was awaken from her sleep to find the accused having sex with her.

43. That is not the evidence which emerged. If it had been, the outcome may well have been different. The misrepresentation was raised at trial by Mr McEwen's counsel but not altered by the prosecutor. That should have

occurred immediately it was apparent that there was no evidence to support it. Apparently it was a bone of contention between counsel throughout the hearing.

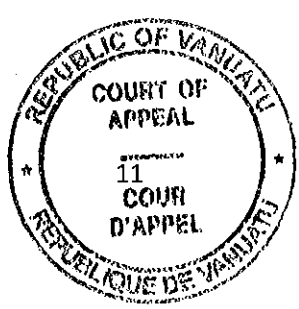
44. Whenever a statement is made in opening which is not later sustained by the evidence, the prosecution has a clear duty to make the appropriate concession and withdraw the allegation. It appears not to have done so in this case.

45. There is no utility in our discussing other points of appeal. Many matters raised were specifically issues on the facts of the case and are overtaken by our conclusion that the appeal must succeed because of the lack of proof on an essential ingredient.

46. It follows as a matter of law that the sentence falls, so the appeal against its adequacy is not a live issue. For future clarity, we note our concern that the form of the sentence may have created problems because of its interrelationship with the statutory provisions relating to parole. On a 3 year sentence of imprisonment a right to apply for parole exists under Section 51 of the Correctional Service Act 2006 after 18 months. Parole would continue from release to the end of the three year sentence.

47. The suspended sentence of 18 months imprisonment running during that period (and for 6 months beyond it) appears to be a recipe for administrative problem.

48. Alternatively it might be argued that the term of imprisonment was only the 18 months he was required to serve. Then he could apply for parole after 9 months. Either way there were potential difficulties.



49. The appeal is allowed and the conviction is quashed. The cross appeal is dismissed.

DATED at Port Vila, this 25th day of November 2011

BY THE COURT

REPUBLIC OF VANUATU COURT OF APPEAL COUR D'APPEL REPUBLIQUE DE VANUATU

Hon. Vincent Lunabek, Chief Justice **Hon. J. B. Robertson, J**

Hon. J. W. von Doussa, J **Hon. O. A. Saksak, J** **Hon. R. L. B. Spear, J**