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

Criminal Appeal
Case No. 16/1776 CoA/CRMA

BETWEEN: ANDREW AUGUST
Appellant

AND: PUBLIC PROSECUTOR
Respondent

Coram: ***Hon. Chief Justice Vincent Lunabek***
Hon. Justice Bruce Robertson
Hon. Justice Daniel Fatiaki
Hon. Justice John Mansfield
Hon. Justice Dudley Aru
Hon. Justice David Chetwynd
Hon. Justice Paul Geoghegan

Counsel: *Ms. Jane Tari for the Appellant*
Mr. Ken Massing for the Respondent

Date of Hearing: *12 July 2016*

Date of Judgment: *22 July 2016*

JUDGMENT

Introduction

1. Andrew August was charged with one offence of Arson under Section 134(1) of the Penal Code Act [CAP. 135] which was alleged to have occurred on 16th July 2015 at Mataripu Village, Big Bay Bush, Santo. He faced trial on 17th March 2016 at Matalio Village and the hearing continued on 18th May 2016 at Luganville. In a verdict delivered on 19th May Justice Saksak found that the charge had been proved and a conviction was entered against him. On the 24th May at Luganville he was sentenced to an effective term of 1 year and 8 months imprisonment commencing from 17th May 2016.

2. He appealed against both conviction and sentence. Before us the appeal against conviction was advanced on the basis that the trial judge erred by finding the evidence of the prosecution was unchallenged and unrebutted; by admitting hearsay evidence of threats; by rejecting the appellant's evidence because he did not call supporting witnesses and failing to properly warn of the dangers of identification evidence.

The factual circumstances

3. There was a long standing dispute between the family of the appellant and his uncle Judah George whose house was burnt down.

4. On the 16th July 2015 there was a ceremony at Matalio Village. The appellant attended that ceremony but left at about 11.00 a.m. and went to a nearby village of Vunalevu to repay money he owed to a man called Mitoy but he was not at the village at that time. While he was there he asked a boy called Roger for matches. None of that was in dispute

5. The prosecution alleged that Andrew August then went to Matasori Village and burnt the houses in question. A pastor, Marc Elijard, with family connections to Judah George, had left the ceremony at Matalio early and while returning home to his village he had gone to visit the fish pond of Judah George. While there he smelt smoke and saw a fire. He said that he saw Andrew August standing near the burning properties with a can of petrol. He was about 35 meters away. On the other hand Andrew August said that he had returned to the ceremony at Matalio and stayed there until he went home later in the day and did never go near Matalio village.

6. As well as general evidence of bad blood between the father and family of the appellant and the victim, the prosecution led evidence that a man called Eric had visited Judah George in July 2015 and had told Judah George that he must leave the land or his house would be burnt down and he would be killed. Eric told Judah George this threat had been made by the appellant.

7. At the hearing, prosecution evidence was called from Judah George, Marc Elijard and Francise Lulu together with one police officer. There were 10 other witnesses in the PI bundle who were not called. The prosecutor simply advised the Court of this on the day of hearing of this. There was a failure to comply with Section 162(4) of the Criminal Procedure Code under which 7 days notice of an intention not to call an intended witness is required. This should have been given.

8. The appellant was interviewed by Corporal Berry Lakoli on 5 August 2015. This was particularly vigorous and at times had the quality of cross examination. The appellant throughout maintained that he had not gone to the village at all let alone lit the fires in the two buildings. Andrew August gave evidence in his own defence and was closely cross-examined but was not moved on the essential issues.

The applicable law

9. The only question in the case was whether the appellant was the person who lit the fires.

10. The first and fundamental question at trial was whether the appellants story that he did not do it could reasonably be true. If it could then a conviction could not be entered as the case would not be proved beyond reasonable doubt by the prosecution. His denials at the interview and in his evidence contradicted and rebutted the prosecution on the only critical point.

11. It is clear that the judge placed substantial reliance on the evidence of the threat which Judah George told the Court was relayed to him by a man called Eric as to what Eric said was conveyed to him by the appellant. Eric did not give evidence. This was classic hearsay. It had to be excluded unless one of the exceptions applied. None did. Judah George could not tell the Court what Eric told him August had said. It was not admissible evidence available for consideration by the judge.

12. Secondly the judge relied on the evidence of Marc Elijard as to what he saw from 35 metres away. This was not strictly identification evidence but rather recognition. Mr. Elijard has some sight problems but it appears to be more with reading. Strangely Mr. Elijard did not mention what he had seen for some 3 weeks. He said this was because no complaint had been made. We find this problematic. He was a mature man and we would have expected that as soon as the fire was discovered he would have been making his assertion as to what he thought he saw. There is nothing in the decision to assure us that the judge treated his evidence with caution and reserve as the circumstances required. The evidence of Francise Lulu is neutral as the appellant accepted he asked for matches and provided an innocent explanation as to why.

13. Thirdly on more than one occasion the judge intimated that the appellant could have called witnesses to support his oral testimony. These included people who were on the prosecution PI list. For example the judge said

> *"Those are the inconsistencies or some of them that cast doubt on the evidence of the defendant, as to their truth. His evidence that it was his brother-in-law John Garae who sent him for matches cannot be believed. John Garae was one of the prosecution witnesses who was not called. The defendant could have called him in his defence but did not. The defendant could have called Metoi in his defence but did not. The defendant could have called Eric in his defence but did not. The defendant could have called his father or Joel, his brother in his defence but did not. Those omissions left the prosecution evidence unchallenged and unrebutted by the defendant. The defendant simply had no evidence consistent with his innocence".*

14. Despite the careful submissions of Mr. Massing on the point we cannot avoid the conclusion that the judge ended up placing an onus on the appellant to establish he was not the culprit. This was not and never could be the correct position.

15. Finally the judge spoke of inconsistencies in the evidence of Mr. August generally and between the material in his ROI and in the witness box. We are not satisfied that there was anything of substance. His general thesis was consistent and unchanged. He was not there at all let alone lit the fires. The exact description of the clothing was not material.

16. The allegations put to him in cross examination (which he denied or in no way adopted) had no evidential value at all.

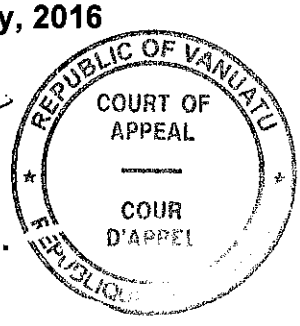
17. There is no question that the articulation of the law contained in the verdict is all correct. Our concern is the manner in which it was applied to the case and its particular evidence.

18. When the totality of the matters are assessed it is inevitable that we must conclude that the conviction is not safe and cannot be maintained. The appeal against conviction is allowed and the conviction is quashed. It is not a case where justice requires that we should order a retrial.

19. It accordingly follows that the appeal against sentence is not a live issue, and we refrain from commenting upon it.

DATED at Port Vila, this 22nd day of July, 2016

BY THE COURT



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Vincent LUNABEK
Chief Justice