

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

Criminal Appeal
Case No. 18/976 CoA/CRMA

BETWEEN: HARRIET YATIPU

Appellant

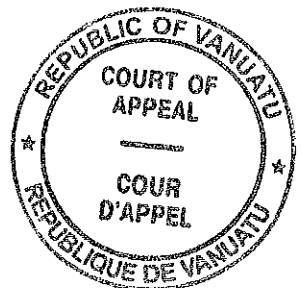
AND: PUBLIC PROSECUTOR

Respondent

Coram: *Hon. Chief Justice Vincent Lunabek
Hon. Justice John von Doussa
Hon. Justice Raynor Asher
Hon. Justice Oliver A. Saksak
Hon. Justice Dudley Aru
Hon. Justice Gus Andrée Wiltens*

Counsel: *R. Sugden for the Appellant
M. Taiki for the Respondent*

Date of Hearing: *Wednesday 25th April, 20 18*
Date of Judgment: *Wednesday 25th April, 2018*

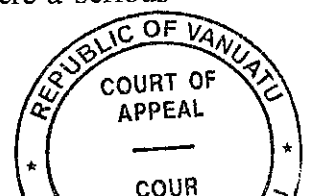


ORAL JUDGMENT

1. The court has received further sworn statements and submissions this morning, and had the benefit of argument from counsel.
2. Even though this is an appeal from a sentence imposed following a plea of guilty, we have decided that the appeal should be allowed, the conviction and the sentence set aside and the matter remitted to the Supreme Court for retrial. We do so conscious that it is only in exceptional circumstances that a conviction appeal will be allowed after a guilty plea. It must be shown that a miscarriage of justice will result if the conviction is not overturned. A failure by a lawyer to act on advice from a defendant disclosing an arguable defence can constitute such a miscarriage.
3. Two matters have led us to this conclusion. The first is the concession made by the respondent in submissions filed this morning. The respondent has identified facts which on the appellant's instructions should have been put to the trial judge in the presentation

of her case by her lawyer, but were not. As those instructions were not conveyed to the trial judge, the respondent supports the appellant's submissions that the appeal should be allowed, and a retrial ordered.

4. The second matter, upon which we place most reliance is our satisfaction that the appellant's lawyer in the Supreme Court was guilty of serious material omissions in the presentation of the appellant's case. He concedes that he did not bring to the attention of the trial judge his instruction that the appellant was not drunk at the time of the collision which gave rise to the criminal charge against her, and did not make it sufficiently clear to the judge that the appellant denied driving on the wrong side of the road. Further, the lawyer made another serious omission when he did not take up on the appellant's behalf an invitation from the trial judge that there should be a Newton hearing if the appellant did not accept the prosecution allegation that she was drunk at the time of the accident. The appellant's lawyer unreasonably assumed that the prosecutor would arrange the necessary witnesses for the Newton hearing. When the matter came on for sentence it would have been quite obvious that these arrangements had not been made, yet the lawyer took no steps to further pursue a Newton hearing. Moreover when the lawyer realised during the sentencing submissions that the prosecutor was not intending to inform the judge that the appellant denied that she was drunk, he did not himself bring his instructions on that matter to the attention of the judge.
5. Whilst we are conscious that there is significant evidence from witnesses that the appellant was drunk at the time of the accident, the issue which we are required to consider is whether the appellant's instructions to her lawyer were that she was not drunk. There is corroboration for her assertion that she was denying drunkenness to be found in the pre-sentence report. When interviewed by the probation officer she conveyed to him that she disputed the allegation of drunkenness.
6. We consider that the omissions on the part of the appellant's lawyer to clearly place her instructions that she was not drunk before the court, and his failure to pursue a Newton hearing when it became obvious that the prosecution was not intending to do so constitute a serious professional error amounting to incompetence on the part of the lawyer. Our system of justice is heavily dependent upon lawyers fulfilling their professional duties by accurately and fully putting their clients' instructions to the court. Where a serious



failure on the part of a lawyer to meet the professional standards expected of him is detected, the court will consider whether that failure should be reported to the Disciplinary Committee of the Law Council. In this case, we consider the matter should be so reported, and the court will do so. The court will not direct that the Disciplinary Committee take any particular action, but will simply draw to its attention that this a matter which the court considers warrants its attention.

7. The appeal is allowed. The conviction and sentence recorded against the appellant are quashed. The matter will be returned to the Supreme Court for trial. The trial should take place as soon as convenient to the court and the parties. The appellant will be released on bail on conditions which have been ordered by the court.

DATED at Port Vila, this 27th day of April, 2018.

BY THE COURT



Hon. Vincent LUNABEK

Chief Justice.

