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

Criminal Appeal
Case No 18/2114

BETWEEN	Christian Vahirua Appellant
AND	Public Prosecutor Respondent
CORAM:	Justice J W Hansen Justice D Fatiaki Justice O Saksak Justice S Felix
COUNSEL:	M P Vire — Counsel for Appellant K Mackenzie — Counsel for Respondent
DATE OF HEARING:	12th February 2019
DATE OF DECISION:	22nd February 2019

JUDGMENT OF THE COURT

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[1] On 5 July 2018, following a two-day trial, the appellant was convicted of seven charges of aggravated sexual assault of a child under 15 years, laid under s 97A(2)(d) of the Penal Code Act [Cap 135].

[2] On 6 August 2018 he was sentenced to 15 and a half years' imprisonment.

[3] For the sake of completeness we note that the Suppression Order made in the Supreme Court equally applies to these appellate proceedings.

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Background

[4] The victim, MS, was born on 1 October 2010. The appellant was her stepfather. The offending occurred between 1 January 2017 and 31 March 2018. The various allegations that were found proven by the Judge included the digital penetration of the vagina ; the sucking and licking of her vagina and vulva; the insertion of his penis inside her mouth; sexual intercourse, with the allegation being partial penetration of the vagina by the appellant's penis, on four occasions. It was essentially a case of prolonged sexual abuse of a young child over a 15-month period.

[5] The complainant, MS, gave evidence, as did her mother, M, and her sister, F. The appellant gave evidence. The Judge considered the appellant's evidence and the defences he advanced, and rejected them. He then turned to consider the evidence of MS, M and F. While noting inconsistencies, he was clearly satisfied on the basis of their evidence that the charges had been proved beyond reasonable doubt.

Procedural matters

[6] The first directions conference occurred on 11 October 2018. Mrs Vire was ordered to serve her grounds of appeal and appeal book by 4 p.m. on 15 October 2018; the respondent's submissions by 4 p.m. on 28 October 2018. There was a call over on 5 November, the last session of this Court. The matter could not proceed because Mrs Vire had not filed her appeal book until 2 November 2018.

[7] A further directions conference occurred on 23 January 2019. Ms Vire was ordered to serve her grounds of appeal, the appeal book and her submissions by 4 p.m. on 31 January 2019. The respondent was to file submissions by 4 p.m. on 8 February 2019.

[8] Earlier on 2 November 2018, despite the absence of the appellant's submissions, the respondent filed submissions. Despite the order at the second directions conference, the appellant's submissions were not filed until 10.50 a.m. on 12 February 2019. This continuous flouting of Court orders by Mrs Vire is unfortunate and does not assist the appellant or this Court. Notwithstanding this late filing, the respondent filed supplementary submissions in time for the hearing at 2 p.m. on 12 February 2019. We are indebted to the respondent for this.

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The appeal

[9] The notice of appeal against conviction was filed on 19 July 2018. It says grounds will be filed at a later date. These were not received until November 2018. The notice of appeal against sentence was filed on 19 August 2018 on the grounds the sentence pronounced was excessive. We note it does not say 'manifestly' excessive. No submissions have been filed in relation to the sentence appeal, although a brief submission was made which we will return to.

[10] Essentially the appeal against conviction is on the grounds that the evidence before the Judge was such that no reasonable finder of fact could have accepted it as guilt beyond reasonable doubt.[1]

[11] Before turning to that, there is another matter that needs to be dealt with. It is submitted by Mrs Vire that the trial Judge did not preside independently. It is submitted that the Judge considered the evidence of the prosecution and suggested to counsel for the appellant to advise the appellant to enter a guilty plea based on the materials before His Honour. There are two points in relation to this submission.

[12] The first is that apparently, the respondent offered to accept a plea on lesser charges or fewer charges. We understand that all the Judge did was to request counsel to ensure that the appellant was aware of the sentencing benefits that flow from guilty pleas. It was in no way, nor could it be considered as, plea bargaining. It is sensible for a judge, in the circumstances pertaining in this case, to ensure that an accused person was fully aware of such matters to enable him to make a fully informed decision. It does not demonstrate any bias on the part of the judge.

[13] The second point is that at no stage in chambers when this occurred, or at the start of this trial, did counsel for the appellant submit that the Judge was biased, to enable him to respond to it, nor did she ask him to recuse himself. The proper time to challenge a judge by requesting he recuses himself for bias, or perceived bias, is at the start of the trial not after a failed defence. What is most telling is that when a member of this bench asked Ms Vire when the bias point occurred to her she replied in effect that it was after the guilty verdict. There is nothing in this point.

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1 *M v The Queen* (1994) 181 CLR 487.

Defences raised

[14] The judge first considered the evidence of MS, M and F. He found their evidence true and reliable. He then considered the defences advanced by the appellant. It is appropriate we mention that part of the verdict before we consider the submissions of Mrs Vire.

[15] The judge was confronted with three defences advanced by the appellant :

(i) MS's complaint and evidence was a complete fabrication initiated by M;

(ii) Because of tiny penile marbles the appellant had inserted in his penis the penetration described by MS must have caused injury yet her medical report revealed no injury;

(iii) M did not want the appellant to work and when the appellant got a job she invented this story to prevent him working.

[16] He stated in his verdict :

> *[22] These explanations are arrant nonsense, and inherently incredible. I dismiss all three defence scenarios as being either plausible or even possible explanations for the wrongs perpetrated on Mr Vahirua by his step-daughters, and his former partner who told me she was still on good terms with him.*
>
> *[23] I am satisfied that Christian's evidence is unreliable and incredible. I reject it, in its entirety; and I set it aside. There was no other defence witness.*

[17] Having done that he properly returned to his findings based on him finding MS, M and F truthful and reliable witnesses.

[18] We will turn to consider submissions arising from the defences and the appellant's evidence in due course.

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Inconsistency

[19] The respondent referred us to *R v Connell* [1985] 2 NZLR 233 (CA) at 237–238, where Cooke J, delivering the judgment of the Court, stated:

> *... what the Judge sitting alone delivers is intended to be a verdict. It need not be supported by elaborate reasons. To require the Judge to set out in writing all the matters that he has taken into account and to deal with every factual argument would be to prolong and complicate the criminal process to a degree which Parliament cannot have contemplated. There are cases where a point or argument is of such importance that a Judge's failure to deal expressly with it in his reasons will lead this Court to hold that there has been a miscarriage of Justice. A demonstrably faulty chain of reasoning may be put in the same category.*

[20] Part of the complaint here seems to be that the judge did not go through all of the evidence in detail. The citation above shows why that is unnecessary but in any event we are completely satisfied that the judge has properly considered and not overlooked relevant evidence, including the inconsistencies.

[21] Turning now to the inconsistency submissions. We do not need to consider this in great detail but will deal with the main matters raised by counsel. The first relates to F, who was an eye-witness. She and two other young children slept in the same room as the victim. MS was seven, two of the children were younger, and F was 17. The complaint is that F said in her police statement that she saw the appellant touching the complainant's private parts on one occasion, while she said in evidence in chief that the appellant was pushing his fingers in and out of the complainant's vagina. She also said in her evidence that this was on two occasions. It was open to counsel to challenge this in cross examination. We take it she did. It was before the judge and we have no doubt he kept it in mind.

[22] F also said that after the appellant left, she went to check MS who was asleep with her legs opened, and she covered her with a blanket. She said on the second occasion when she went across to see if MS was OK, MS was wanting to cry and she was covered with the blanket and F went back to bed. This is said to be inconsistent with MS's version, who said her siblings were all asleep when her stepfather entered the room.

[23] We find the second of these two submissions quite extraordinary. In a dark room there are four siblings. A sibling lying still could appear to be asleep although they were in fact

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awake. We see no inconsistency in this. It is simply a matter of placing it in the proper context. There is nothing in the inconsistency complaint.

[24] The next complaint is the evidence of MS is said to be lacking in reliability. This was effectively an extension of the inconsistency submissions. A number of issues are raised in relation to various matters which it is unnecessary for us to detail here. The other thing that is stated is that there is uncertainty as to the dates. All that needs to be proved is that the offending occurred within the period alleged in the amended information. Again there is nothing in this.

[25] In any event, all of the inconsistencies complained of are apparent on the evidence and were carefully considered by the Judge. He accepted there were inconsistencies but noted they were minor discrepancies which were easily understood when taking into account MS's tender age. He continued:

> *If anything, the fact that there are discrepancies enhances the prosecution case and demonstrates the witnesses have not simply got their heads together to recite the same story.*

We agree.

[26] Such circumstances as Ms Vire pointed to are insufficient to demonstrate either a lack of veracity or unreliability on MS's part. Before reaching those conclusions the judge carefully considered the evidence, as we have said, and made his findings. He does not need to mention every single matter raised. He accepted MS's account as true and correct. They are clearly findings that were available to the Judge and could not be said to be findings that no reasonable decider of fact could reach. Indeed, on our reading of this case such findings were almost inevitable.

Fabrication

[27] The next complaint is that M fabricated the entire story because she had a motive, that being the animosity between her and the appellant. Mrs Vire said the evidence showed that M and the appellant were no longer on good terms and had fought a lot; the appellant stated that there were arguments, but the fighting started from a date that happened to coincide in his version with the date during which the offending occurred; the appellant also stated that M was

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the boss, not him; that M did not want him to work and fabricated all these allegations and used the children to achieve these means. M said in examination in chief that she and the appellant were still on good terms, when witnesses said otherwise (F and the appellant). Mrs Vire submitted that M fabricated the story about the complainant holding the appellant's penis one night that she discovered in September 20 on the basis that, had this really occurred, the mother would have taken steps to leave him immediately.

[28] The submission then goes on that MS came to Court to say these things because she was fearful of M, and that M had fabricated the entire story for her to recite in Court, which resulted in flaws *in the recital and undated occurrences*. She sets out a passage of cross-examination in her submission at paragraph 3.2.

[29] Again, we are satisfied this takes the matter no further. The Judge was well aware of it, considered the allegation of fabrication and the evidence relating to it, but, notwithstanding, and was satisfied with the veracity of the complainant's evidence.

[30] In any event we are satisfied the submission of fabrication to be unsound. In this case seven-year-old MS gave evidence in chief for two and a half hours and was cross-examined for approximately the same amount of time. We find it inconceivable that if the case had been fabricated by the mother, complete with drawings, that a seven year old child could maintain that position over effectively a five-hour period. Again there is nothing in this point.

The marbles

[31] The next matter is an allegation that the Judge failed to consider the evidence of the appellant concerning the insertion of two very small marbles into his penis. The submission is if there had been penile penetration it would have been serious enough to have hospitalised the complainant.

[32] It is apparent this issue did not come up until late in the trial. Presumably it was something the appellant must have told counsel. The appellant was referred to a Dr Maurice Jolly, who examined him, but this was not until 5 July 2018. This was the last day of the trial.

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The doctor noted two beads beneath the penile skin of approximately 9–10mm in diameter, and provided a diagram showing they were approximately 35mm from the head of the penis. It is, therefore, said that this shows there could have been no penetration, which is supported by the medical report on the complainant which shows no injuries.

[33] In relation to the medical report on MS, she described the penetration as *about halfway*. She is a seven-year-old, and clearly had no previous experience of sexual matters. She was doing her best to say what occurred to her. It is not for the Crown to prove there were injuries, but what this young girl was adamant about, and this was accepted quite properly by the Judge, was that there was penetration of. The defence does not require anything other than the smallest degree of penetration. The evidence regarding the marbles, despite Mrs Vire's submission was considered by the judge. Notwithstanding that he was satisfied penetration occurred and he gave cogent reasons why this was not inconsistent with the "marble" evidence. We accept that evidence. There is nothing in the point. We also note it is not uncommon in cases of sexual assault for the medical report on a victim to be neutral as to whether sexual assault had occurred.

M did not want the appellant to work

[34] This is simply another version of the fabrication claim. For the same reason it is rejected. The judge was right to reject the defences advance by the appellant as "arrant nonsense". We agree.

[35] As we noted earlier the judge rejected the evidence of the appellant and the defences arising from it. The judge then properly returned to his findings based on his conclusion that the complainant, her mother and sister where he had found:

> [14] I am satisfied that MS's account is true and correct. I am comforted in that assessment by the supporting consistent evidence of MS's mother [M] and her elder sister [F]. I also believed those latter 2 witnesses were telling me the truth, and that each was reliable.

[34] He then made his findings, at para [24], which satisfied all the elements of the offence and that they occurred within the relevant period. Accordingly, he inevitably found the prosecution had proved beyond a reasonable doubt all of the ingredients necessary, and

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convicted the appellant on counts 1, 3, 5, 7, 9, 11 and 13. He correctly, and obviously, then stated he had no need to deliver verdicts on the alternative charges.

[35] None of the grounds of the appeal against conviction have been made out. It is really a challenge against factual findings that were clearly available to the Judge at trial. The appeal against conviction is dismissed.

Sentence

[36] We noted earlier that there was an appeal against sentence, but that no submissions had been filed. Ms Vire, at the start of the hearing said she had only two brief points to make in relation to sentence.

[37] The first of these was that the appellant had co-operated with the police. We are unsure what is meant by this when this man denied to the police he committed the offences, yet was found guilty at trial on all counts.

[38] The second is mitigation on the basis that this was a man who was a first offender, in relation to sexual offending, and who was otherwise of unblemished character. (That of course is not correct as he had one previous relatively minor conviction). The point of an allowance by way of mitigation for being a first offender is that the offender has been of good character up until the date of the offence. It has little place to play in sexual offending, particularly in the case of sexual offending that demonstrates a long period of sustained and serious sexual abuse against a young child.

[39] The sentence was clearly within range; (*Public Prosecutor* v *Boesaleana* [2011] VUSC 321 and *Public Prosecutor v Dalili* [2016] VUSC 181). In the first case, the starting point of 18 years was not considered excessive when there were eight counts of sexual intercourse without consent against daughters who were eight and 13. That offending has similarities to the present. In *Dalili*, the starting point was 15 years for three representative counts for children aged nine and 14. In the present case the long list of serious aggravating factors can be seen at

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paragraph 8 of the sentence, when the Judge went on to say there were no mitigating factors relating to the offending.

[40] We agree with the judge there were no mitigating factors relating to the offending and that the aggravating features were lengthy and serious. The Judge reached a starting point of 16 years. We agree with that starting point. The Judge noted that in the PSR the appellant maintained that the allegations were fabrications, so there could be no discount for remorse. The fact there were no previous similar convictions is, as we have said, of little relevance, but he had been in custody for a period of approximately six months between arrest and trial. The Judge correctly arrived at a sentence of 15 and a half years. It is appropriate for what is a case of very serious and prolonged sexual abuse of a child. The appeal against sentence is dismissed.

DATED at Port Vila, this 22nd February, 2019

BY THE COURT

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The Hon. Justice John Hansen