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

Criminal Appeal
Case No. 20/647 CoA/CRMA

BETWEEN: STEPHEN KALO
Appellant

AND: PUBLIC PROSECUTOR
Respondent

Coram:	***Hon. Chief Justice V. Lunabek***
	Hon. Justice B. Robertson
	Hon. Justice J. Mansfield
	Hon. Justice D. Aru
	Hon Justice G. Andrée Wiltens
	Hon. Justice V. M. Trief
Counsel:	*Mr. Gregory Takau for the Appellant*
	Mr. Philip Toaliu for the Respondent
Date of Hearing:	*15th July 2020*
Date of Judgment:	*17th July 2020*

JUDGMENT

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1. This appeal against conviction and sentence arises in a case which throughout its litigation history has suffered from too many words and insufficient professional focus.

2. On 19 December 2019 Mr Kalo was convicted of one charge of Domestic Violence and one of Unintentional Harm. On 28 February 2020 he was sentenced to an effective sentence of 16 months imprisonment suspended for 2 years.

3. There was an immediate appeal. Despite various directions given over the months and a number of adjournment applications the matter was quite unprepared at the beginning of the session. There was a document which enumerated 23 grounds of complaint. We began hearing an adjournment application on 6 July but counsel advised that new focused grounds were prepared and that the matter could proceed in the current session.

4. The appeal went to hearing on these grounds:

   (i) The learned Judge had erred in law to consider and accepted the fact that this matter was directly transferred to the Supreme Court for plea hearing without a PI hearing and issuance of a Committal Order.

(ii) The learned Judge had erred in law in convicting the Appellant in trial by considering the unpaid, not receipted and unstamped medical reports from the Northern District Hospital.

(iii) The learned Judge had erred in law to convict the Appellant in trial without an independent, physical and exhibit evidence of the assault weapon.

(iv) The learned Judge had erred in law to convict the Appellant in trial by accepting the private interference and involvement of Mrs. Hannaline Ilo in this matter other than formal independent Police enquiry.

(v) The learned Judge had erred in law in convicting the Appellant in trial without first hand oral evidences from the original Complainant.

(vi) The sentence is manifestly excessive.

5. We turn to the grounds. The first relates to the fact that the trial was held in the Supreme Court which it is argued was illegal, a miscarriage of justice and an abuse of legal process and procedure.

6. Mr Kalo is a magistrate. Clearly it was essential that Mr Kalo was not tried in the Magistrates' Court by one of his professional colleagues. That would have been wrong in principle and practice. There had to be an arrangement which was fair to Mr Kalo and avoided any perception of his not being tried in an independent, objective and disinterested forum. There was a clear duty to avoid bias or the perception thereof.

7. The appellant placed substantial reliance on the absence of a Preliminary Inquiry as required under section 143 of the Criminal Procedure Code. That provision applies only to offences triable in the Supreme Court and neither of the charges fell into that category because of the maximum penalties attaching to them.

8. The acting Chief Magistrate under Section 19 of the Judicial Services and Courts Act had duties and responsibilities to ensure the proper fair and just disposition of cases. There can be no argument that in all the circumstances transferring the matter to the Supreme Court was the principled and practical way of responding.

9. The Supreme Court under the Constitution has unlimited jurisdiction and powers. The decision of this Court in Moti [1999] VUCA 5 is not helpful to the appellant as that involved a case where Section 143 did apply.

10. In any event as the trial Judge noted the same effect occurred in the manner in which he considered the eventual application of no case to answer which was dealt with expansively. This ground cannot succeed.

11. The second ground relates to the admissibility of a medical certificate but has no substance as the Doctor in fact attended at the Supreme Court hearing and gave oral evidence. In any event the point would be covered by section 86 of the Criminal Procedure Code. Reference was made during the appeal hearing to the decision of this court in Pakoa v Public Prosecutor [2019] VUCA 179. It contains advice as to counsel duty to object to challenged evidence at the time of its tendered [or earlier] and certainly not in a closing address In Pakoa the evidence was in any event as in this present case admissible. Pakoa should not be read as suggesting that somehow inadmissible evidence becomes admissible because of a timely failure to object. It is always important that counsel object to evidence which is submitted to be inadmissible before it is adduced so the trial Judge can rule on its admissibility before reception. This ground has no merit.

12. It was next argued that the Judge erred in convicting when the belt which was the alleged assault weapon was not produced at the trial. There is no rule of evidence which makes its production essential. The best evidence approach would suggest that if available it should be tendered but any Court must determine whether an allegation has been proved beyond reasonable doubt on the basis of the evidence which is produced. A knee jerk acquittal because of its absence is unsustainable.

13. Next it was submitted that the appeals against conviction should be allowed because Mrs Hannaline Ilo who happens to be a Senior Magistrate gave evidence as to matters of fact occurring on the relevant afternoon. The advice in the Magistrates Bench Book about appropriate acts or omissions by Magistrates is of no relevance or assistance in considering her ability to give evidence as she did in a criminal trial. Mrs Ilo was a routine witness of fact and her professional task was beside the point. She was "*an aunt*" to whom the person attacked went for succour and support. Nothing was done by Mrs Ilo whereby she asserted or abused her professional status with the police or otherwise.

14. The fifth ground of appeal was that in the absence of evidence from the complainant convictions could not be entered. This is totally misconceived. The prosecution must prove all essential elements of any offence beyond reasonable doubt. Often that will include the testimony of a complainant but it is not necessary or essential. The complainant was treated as a spouse under the Family Protection Act. She was competent but, even although she had laid a complaint with the police, she was not compellable. This is precisely what happened. The judge correctly noted the position in the Ruling on No Case to Answer when he said at [12] which is set out in [41] of the respondent's submissions.

15. The trial judge noted the available evidence and said:

> *"For that purpose the Prosecution called 6 witneses namely Florida Lessa, Helena Lessa, Dr Michel Raymond, Hannaline Ilo (Magistrate) and Joyce Tari (victim/complainant). The last witness chose not to give evidence against the defendant after having taken her oath."*

16. What she said in her complaint to the police was not available testimony but the evidence of the other 4 witnesses was sufficient to prove the essential ingredients of the two charges. The 2 neighbours had heard a commotion in the house, and saw the complainant emerge with the baby crying and distressed. The appellant was standing outside watching and made no comment when the complainant said that she was going to report him to the police.

17. The appellant was not required to give evidence. This is the path which the appellant chose to follow. He cannot claim on appeal a factual scenario which has absolutely no evidential foundation.

18. In the absence of evidence from the complainant we naturally were vigilant to ensure that there was in any event admissible proof of the elements of the offences. They all existed.

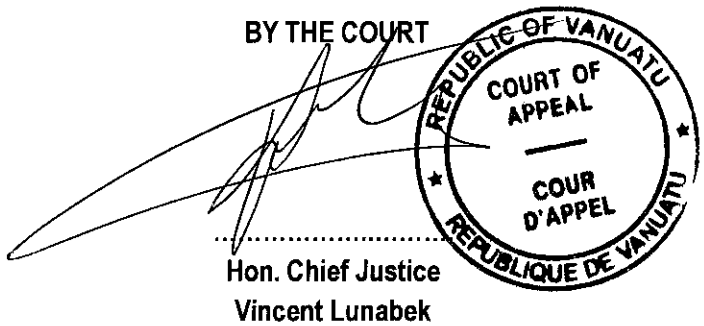
19. The final issue was the issue of sentence. There was extensive material advanced on this head but as the respondent properly submitted the majority of the Appellant's submissions on this ground of appeal are unsworn, untested, self-serving statements as to subjective matters such as the circumstances surrounding the offending. These are evidentiary matters which should have been, put properly before the sentencing court at first instance, via sworn statement, if the Appellant wished to rely on them.

20. There is nothing advanced which suggest that the Judge's starting point, the reductions he allowed or the suspension of the final effective sentence of imprisonment were not within the proper sentencing discretion. A term of imprisonment was inevitable for this sort of domestic violence. A home should be a safe place and a sanctuary. The infliction of physical force by a man on a woman is always to be condemned. Nothing has been identified as a mistake of principle, or as the Judge having regard to inappropriate factors. The allowances made were generous.

21. The appeals against conviction and sentence are dismissed accordingly.

DATED at Port Vila this 17th day of July, 2020

BY THE COURT



Hon. Chief Justice
Vincent Lunabek