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

Criminal Appeal Case No. 23/2014 COA/CRMA

BETWEEN: ANNETH OWE
First Appellant

AND: EDWIN HARRY
Second Appellant

AND: PUBLIC PROSECUTOR
Respondent

Date of Hearing:	***6 November 2023***
Coram:	***Hon Acting Chief Justice, Oliver A Saksak*** ***Hon Justice Dudley Aru*** ***Hon Justice Viran M Trief*** ***Hon Justice Mark O'Regan*** ***Hon Justice Richard White*** ***Hon Justice William K Hastings***
Counsel:	***H Vira appearing with JS Garae for the First Appellant*** ***RT Willie for Second Appellant*** ***J Naigulevu, Public Prosecutor, for the Respondent***
Date of Judgment:	***17 November 2023***

JUDGMENT OF THE COURT

Reasons

1. The appellants were convicted on their pleas of guilty of the offence of killing an unborn child, contrary to s.113 of the Penal Code. This is an offence for which the maximum penalty is life imprisonment.

2. On 18th July 2023, the appellant Mr Harry was sentenced, after allowance had been made for 42 days spent in custody, to imprisonment for 7 years, 9 months and 6 days, with that sentence ordered to commence on 29th May 2023. The appellant Ms Owe was sentenced on the same date to imprisonment of 5 years, 1 month and 6 days, again after allowing for 42 days already served in custody, with that sentence to commence on 1st August 2023.

3. The appellants launched appeals against the severity of the sentence. However, following a change of Counsel, the appellant Ms Owe filed, on 12th September 2023, an amended notice of

appeal against both the conviction and sentence. Mr Harry did not file such an amended notice of appeal.

4. As the authorities to which we refer later indicate, an appeal against conviction following a plea of guilty will be allowed only in exceptional circumstances. Counsel for Ms Owe argued that such circumstances exist in the present case.

5. At the hearing, Counsel agreed that the Court should address the question of whether such exceptional circumstances exist as part of its consideration of the substantive merits of Ms Owe's appeal. The parties also agreed that the Court should consider Ms Owe's application for an extension of time in which to appeal against the conviction in the same way.

6. For the reasons which follow, we consider that the appeal against conviction should be allowed and the convictions of both appellants set aside.

Statutory Provisions

7. Section 113 of the Penal Code provides:

> ***113. Killing unborn child***
> *No person shall, when a woman is about to be delivered of a child, prevent the child from being born alive by any act or omission of such a nature that, if the child had been born alive and had then died, he would be deemed to have unlawfully killed a child."*
> *Penalty: Imprisonment for life*

8. Section 117 of the Penal Code is also relevant as it establishes the offence of abortion:

> ***117. Abortion***
> *(1) No woman shall intentionally procure her own miscarriage.*
> *Penalty: Imprisonment for 2 years.*
>
> *(2) No person shall intentionally procure the miscarriage of a woman.*
> *Penalty: Imprisonment for 2 years.*
>
> *(3) It shall be a defence to any charge under subsections (1) and (2) if the person charged shall show that the miscarriage procured constituted a termination of pregnancy for good medical reasons.*
>
> *(4) No prosecution shall be commenced under subsection (1) or (2) without the consent in writing of the Public Prosecutor.*

Factual Circumstances

9. Ms Owe was in a de facto relationship with Mr Harry's older brother Steven. However, while Steven was working in Australia in late 2021 under the Regional Scheme of Employment, a relationship developed between Ms Owe and Mr Harry, as a result of which she became

pregnant. This pregnancy being inconvenient to both, Ms Owe, with Mr Harry's encouragement, sought an abortion using custom leaf medicine. That course of action being unsuccessful, the couple resorted to the crude method of Mr Harry bouncing on Ms Owe's belly. This was tried on several occasions. The last such occasion was on 5th May 2022. It resulted in Ms Owe giving birth that day to a stillborn child. In ordinary parlance, this was a miscarriage.

10. A pathologist who later examined the deceased foetus assessed that it had died after 24-28 weeks gestation.

11. It was common ground that the gestation period for a human foetus is approximately 36 weeks.

Ms Owe's submissions

12. Counsel for Ms Owe submitted that she could not have been lawfully convicted of the s.113 offence because, as at 5th May 2022, she was not a woman "about to be delivered of a child" within the meaning of s.113. He submitted that the phrase "when a woman is about to be delivered of a child" in section s.113 refers to the time of childbirth itself or, at least, a time very closely antecedent to it. As Ms Owe was no more than 28 weeks pregnant, that stage had not been reached in her case. Thus, counsel contended, Ms Owe could not have committed the offence created by s.113.

Discussion

13. Section 113 has not previously been the subject of judicial consideration in Vanuatu. Its counterparts in other jurisdictions have also received relatively little judicial attention. However, in *Martin (No2) v The Queen* (1996) 86 A Crim R 133, Murray J, in the principal judgment of the Court of Criminal Appeal in Western Australia, said at 138 of the counterpart provision in s 290 of the Criminal Code (WA):

> *The meaning of the phrase "when a woman is about to be delivered of a child" is uncertain. Does it mean at or about the time of birth? If so, why is it so limited, or is it a case that a woman is regarded as being about to be delivered of a child at any time while she is pregnant and carrying a live foetus?"*

Later, Murray J answered his own questions by saying:

> *[I]t is sufficient for present purposes to conclude that there is nothing in the wording of that section which would necessarily require it to be applied to conduct of the accused person which is closely connected in time with the birth of a dead child.*

We note, however that these views of Murray J were not necessary for the decision in **Martin**.

14. In *State against Manwau* [2009] PGNC 198, Cannings J at [5] considered that the New Guinean counterpart of s.113 did not put any limit on the period before the end of the term of pregnancy to which it applies and, accordingly, regarded it as open to the prosecution to allege that it had been contravened by a doctor procuring an abortion on a girl who was approximately 20 weeks pregnant.

15. In *State v Kamup* [2000] PGNC 21, it was accepted, without discussion, that the counterpart of s.113 could be contravened by the murder of a pregnant woman which resulted in the death of her child who was then close to full gestation.

16. Despite these authorities, our view is that a number of matters indicate that the phrase "when a woman is about to be delivered of a child" refers to the time of childbirth or at least a time very shortly before childbirth.

17. First, the expression "*when a woman is about to be delivered of a child*" seems more apt as a description of this time. In contrast, the expression does not seem an apt way of referring to the pregnancy of a woman throughout its duration.

18. Secondly, if the section had been intended to encompass the whole duration of a pregnancy, it would have been simpler for the Parliament to have used an expression such as "*when a woman is pregnant*", and it did not.

19. Thirdly, s.113 should be construed in the context of the Penal Code as a whole. That context includes s.117 which, subject to some qualifications, proscribes abortions, that is, the intentional procuring of a miscarriage whether by the pregnant woman or by another. The maximum penalty for a contravention of s.117 is 2 years imprisonment. It is not readily to be supposed that the Parliament intended to proscribe by two provisions the same conduct, but with markedly different maximum penalties.

20. Instead, it is much more natural to understand the Penal Code as establishing a scheme of provisions dealing with the infliction of intentional harm from the commencement of the pregnancy until the infant has emerged completely from its mother's body. That scheme consists of s.117, which proscribes the procuring of a miscarriage during a pregnancy; s.113 which proscribes acts at the conclusion of a pregnancy which cause the unborn child to be not born alive and, finally, s.106 which proscribes intentional homicide and which would encompass the killing of a child after its complete emergence from the mother's body.

21. Section 110 complements these provisions. It provides for when a child is deemed to be a person and, therefore, a person to whom section 106 will be applicable. It provides:

> ***110. When child deemed to be a person***
> *A child becomes a person capable of being killed when it has completely proceeded in a living state from the body of its mother whether it has breathed or not, and whether it has an independent circulation or not, and whether the umbilical cord is severed or not.*

22. Section 110 is in the nature of a statutory version of the old common law "born alive" rule, which had the effect that an infant had to be born alive for deliberate conduct resulting in its death to be treated as homicide - see the discussion of the common law rule in *R v Iby* [2005] NSWCCA 178 at [25]- [67]. It means that until an infant has been completely delivered from its mother, acts causing its death are not punishable as homicide. This being so, s.113 of the Penal Code can be understood naturally as providing that if a foetus has reached full gestation and would have been born alive and thereby subject to the law of homicide, a deliberate act causing its death so as to prevent that occurring is to be punishable in the same way as would have been the case had the child been alive when completely delivered from the mother.

23. Counsel for the prosecution submitted that s.113 should be construed as applicable in any case in which the foetus has reached 28 weeks gestation. We understood the figure of 28 weeks to have been selected on the basis that, after 28 weeks gestation, a foetus is capable of surviving outside its mother's womb. The figure of 28 weeks has also been mentioned in other statutory contexts.

24. We do not accept this submission. It is inconsistent with the reasoning set out above. It would also require this Court to read into s.113 additional words, for example:

> *When a woman has reached reached 28 weeks gestation and is about to be delivered of a child.*

It would not be appropriate for this Court to rewrite s.113 in this way.

25. For those reasons, we conclude that, in the circumstances of this case, neither Ms Owe nor Mr Harry could have committed the offence created by s.113 and that they should not, despite their pleas of guilty have been convicted of those offences. In saying that, we are not being critical of the primary Judge. The proper construction of s.113 is not straightforward and the fact of the matter is that neither prosecution nor defence counsel at first instance adverted to the matters we have discussed above.

Appeals against conviction following pleas of guilty

26. Earlier we noted that the appeals against convictions following pleas of guilty are allowed only in exceptional circumstances. The reasoning of the Court of Appeal in New Zealand in *Le Page v The Queen* [2005] NZCA 67 indicates the position:

> *[16] [I]t is only in exceptional circumstances that an appeal against conviction will be entertained following entry of a plea of guilty. An appellant must show that a miscarriage of justice will result if his conviction is not overturned. Where the appellant fully appreciated the merits of his position, and made an informed decision to plead guilty, the conviction cannot be impugned. These principles find expression in numerous decisions of this Court, ...*

> *[17]* *A miscarriage of justice will be indicated in at least three broad situations .... The first is where the appellant did not appreciate the nature of, or did not intend to plead guilty to, a particular charge. These are situations where the plea is shown to be vitiated by genuine misunderstanding or mistake. Where an accused is represented by counsel at the time a plea is entered, it may be difficult indeed to establish a vitiating element....*
>
> *[18]* *A further category is where on the admitted facts the appellant could not in law have been convicted of the offence charged. Examples are where a charge required special leave and such was not obtained, a charge was out of time or where as a matter of law the facts are insufficient to establish an essential ingredient of the offence.....*
>
> *[19]* *The third category is where it can be shown that the plea was induced by a ruling which embodied a wrong decision on a question of law.....*

27. Justice Tuohy applied these principles in *Public Prosecutor v Rarua* [2008] VUSC 18 at [12]. We note that the circumstances in which a miscarriage of justice may be found are not confined to those discussed in *Le Page*. See for example *Merrilecs v R* [2009] NZCA 59; *Wilson v R* [2015] NZSC 89 and *R v Hura* [2001] NSWCCA 61. It is not necessary to discuss those circumstances presently.

28. The present case is in the second of the categories identified in **Le Page**, that is, it is a case in which, on the admitted facts, the appellants could not in law have been convicted of the offence with which they were charged.

29. We are accordingly satisfied that it is appropriate to allow Ms Owe's appeal against conviction, despite her plea of guilty at first instance. Mr Harry has not filed a notice of Appeal against his conviction but his counsel made in effect an oral application at the hearing. We permitted him to do so. That means that the lawfulness of his conviction is also before this Court and we are satisfied that it too should be set aside. This conclusion makes it unnecessary to consider the appeals against sentence.

Disposition of the Appeals

30. Counsel for Ms Owe accepted that in the event that the appeal against conviction was allowed, it would be proper for this Court to enter a conviction of his client for the offence of abortion under s.117 of the Penal Code. He submitted that, in that event, it would be appropriate for the Court to impose a sentence equivalent to the time Ms Owe has already served in custody. That would result in Ms Owe's immediate release from custody.

31. Counsel for Mr Harry submitted that, in the event that the Court quashed his client's conviction for the s.113 offence, it should make no further order and leave it to the prosecution to decide later whether he should be charged with the s.117 offence. Counsel accepted however that if this Court did not regard that course as appropriate, the charge could be "*amended*" to a

"*lesser*" charge and Mr Harry be re-sentenced on that basis. He too submitted that the Court should find that the time which Mr Harry has already served in custody is a sufficient penalty.

32. The prosecution submitted that the Court should substitute convictions under s.117 of the Penal Code.

33. It may be arguable that section 207 (1) of the Criminal Procedure Code, which sets out the powers of the Court on appeals of the present kind, does not authorise the Court to impose convictions for a lesser offence. However, it is not necessary to decide that question.

34. In hearing and determining an appeal from the Supreme Court, this Court has the powers and jurisdiction of the Supreme Court (s. 48 [3][b] of the Judicial Services and Courts Act). This means that this Court can exercise the power vested in the Supreme Court by section 111 [2] of the Criminal Procedure Code:

> ***111. Alternative verdicts in cases of homicide of children***
> *(2) When a person is charged with killing an unborn child and the court is of opinion that he is not guilty of that offence but that he is guilty of unlawful abortion, he may be convicted of that offence although he was not charged with it.*

35. We consider it appropriate to exercise that power and to record convictions of Ms Owe and Mr Harry of the offences established by s.117 (1) and (2) respectively. This makes it necessary for this Court to resentence.

36. Including the time in custody before being sentenced, Mr Harry has now served just on 32 weeks in prison. Ms Owe has now served just on 22 weeks in prison, again including time in custody before being sentenced.

37. In our view, these periods in custody constitute sufficient punishment for the respective offending so that it is not necessary to impose sentences, for imprisonment of longer duration.

38. The Orders of the Court are these:

a) The appellants are granted extensions of time in which to appeal against their convictions;

b) The convictions of both appellants for the offence in s.113 of the Penal Code are set aside;

c) In substitution for those convictions, the appellant Ms Owe is convicted of the offence of procuring her own miscarriage, contrary to s.117 (1) of the Penal Code and the appellant Mr Harry is convicted of the offence of intentionally procuring the miscarriage of a woman, contrary to s.117 (2) of the Penal Code;

d) In respect of those offences, each appellant is sentenced to imprisonment for a period equivalent to the total time that appellant has served in custody to date;

e) Accordingly each appellant is now to be released from custody.

39. Before leaving this matter, we wish to express the Court's appreciation to counsel for Ms Owe, Mr Vira, for his identification of the miscarriage of justice and for the quality of the submissions he presented in support of the appeal.

DATED at Port Vila this 17th day of November 2023

BY THE COURT

Hon. Acting Chief Justice Oliver A Saksak