IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU **Criminal Case No 17/3481 SC/CRM**
(Criminal Jurisdiction)

PUBLIC PROSECUTOR
V
GUY DEROIN

Before: Chetwynd J
Hearing: 8th and 9th August 2018
Counsel: Ms Mackenzie and Ms Ngwele for the Prosecution
Mr Kapalu for the Defendant

JUDGMENT

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1. The first issue that I need to consider is whether the complainant's statement to the police should be accepted as tendered. In other words, the prosecution are asking me if the complainant's evidence can be given in the form of her statement to the police without the need for her to be in court and be cross examined. The complainant, whom I shall refer to as HS, is 10 years old at the moment but was aged nine at the time of the alleged offending. She gave a statement to the police on the 7th of July, 2017. I granted the prosecution application and said I would give detailed reasons later. These are those reasons.

2. The statement HS gave to the police on the 7th of July, 2017 is a detailed statement of what she says happened. Whilst there are difficulties with dates, she says she does not know the exact dates, the statement appears to be an accurate and detailed recollection of fairly recent events. The dates could be problematic for the prosecution because HS has the offences occurring in March. That is some 3 to 4 months prior to the statement being made. It is an avowal of the obvious to say the more distant in time the offences being described are said to have occurred the less they can be styled as recent events.

3. When this case was initially called on some weeks ago now, HS was going to give evidence in court. There were some safeguards to be provided, such as screens between HS and the defendant, clearing of the Court and the removal of legal garb. However when examination in chief started after confirming her name HS would not say anything else. As a result the case was adjourned for the prosecution to make further inquiries and to enable discussions to take place between HS and the prosecutor and so build up some kind of rapport her. Unfortunately that process clearly did not lessen the anxiety HS was feeling and the application was made by the prosecutor for HS's evidence to be tendered in the form of the statement made to the police. I was concerned about granting the application without further professional medical or psychological evidence.

4. The prosecution was able to arrange for HS to be seen by a psychologist and a report prepared. It is clear from that report that HS was finding the whole situation extremely traumatic. She simply could not face the prospect of telling her story again and certainly not in a court situation. The conclusion by the psychologist is unequivocal. Immense psychological harm would more than likely be caused to HS if she were made to give evidence in court. Effectively it means HS is an unavailable witness.

5. In other jurisdictions the law on evidence is codified and provides for a way of dealing with unavailable witnesses. Under English law the process of codification really began with the Police and Criminal Evidence Act (PACE) in the early 1980's.The most recent codification of the law is in the Criminal Justice Act 2003. The 2003 act sets out the circumstances when a court can receive evidence from an unavailable witness and the law deals with the situation by reference to the exceptions against the hearsay rule. The New Zealand Evidence Act of 2006 has similar provisions based on exceptions to the hearsay rule. The same and can be said for the Australian Evidence Act.

6. These provisions are required because of the presumption that an accused has the right to confront his accuser. The exceptions to the hearsay rule in the common law were an attempt to mollify that strict presumption. However, it has to be

said that many judges regarded the state of the hearsay rules as being absurd (see Lord Reid in *Myers v DPP* [1965] AC 1001 and Lord Diplock in *Jones v Metcalf* [1967] 1 WLR 1286). In many respects in Vanuatu we are faced with the "*absurd state*" referred to because there is no Evidence Act in this jurisdiction. Fortunately the courts are entitled to rely on Article 47 of the Constitution which provides that, "*... if there is no rule of law or applicable to a matter before it, a Court shall determine the matter according to substantial justice ...*" This brings us back to the exceptions to the hearsay rule in that they are generally premised on the basis they exist to provide an opportunity for the evidence to be put before the court in the interests of justice. In other words, the exceptions allow courts to determine issues according to substantial justice.

7. In this case, would it be in the interests of justice to allow the statement of HS to be tendered rather than have her called to give her evidence in court. When HS appeared in court on the 15th of May this year it was clear from her answers to my questions to her prior to examination in chief commencing that she understood the difference between truth and lies and she knew what a court was. She knew the purpose of the court and that she had to tell the truth in court. It was only when she was asked to relate her story that she froze. I have no doubt that when she spoke to the police in July 2017 and gave them her statement she was well aware the officers asking her questions were persons in authority and that she had to tell them the truth. The events she described were relatively recent and the statement contained considerable detail about what happened. The reason why HS is unavailable to give her evidence in court is because of her tender years and because her mental state is such that she would come to harm if forced to tell her story in person. This is clearly not a situation of someone intentionally refusing to come to court and deliberately avoiding having to give evidence in court. Accordingly, it would be in the interests of justice to allow her story to be told through her statement to the police.

8. Against that I have to balance the interests of the defendant. Even though he would not be able to cross examine HS all the other prosecution witnesses would be available for cross examination. I would be able to weigh her evidence against what was said to by the other prosecution witnesses and by the witnesses for the defendant. In opposing this application defence counsel stated that the defendant

disputed the facts as set out in the statement dated 7th of July 2017. When pressed counsel indicated that the central issue in dispute was whether or not sexual intercourse took place. The defendant says it did not and HS in her statement says it did. This is the typical he said she said situation found in this type of case and it is unlikely that cross-examination of HS would result in a different answer from her to the central question of did sexual intercourse take place. The veracity and reliability of HS's evidence can be tested against other evidence in this case and of course I will bear in mind the disputation of facts and consider the evidence accordingly. I will keep well in mind that it is not simply a question of accepting what HS says in her statement.

9. In all the circumstances and in the interests of justice I said I would allow HS's evidence to be tendered in the form of her statement made to the police on the 7th of July, 2017.

10. I now turn to the evidence and to the question of guilt or innocence. The prosecution called three witnesses to give oral evidence, HS's brother and her biological mother and father. Previously, and by agreement with defence counsel, some evidence was tendered, namely Detective Inspector Saravanu's statement about the arrest and interview of the defendant, WPC Rantes's statement as witnessing officer, the medical report of Dr. Bador and excerpts from the official birth records of the children. Prior to closing the prosecution case there were applications to amend the Information and further documents were tendered being the sworn statement of the HS's sister and the record of the defendants interview under caution. The amendment to the Information was in respect of the dates the offences are alleged to have occurred and the particulars in the several counts were amended to show that the offences were said to have occurred during the period 1st of January, 2017 and 7th of July 2017.

11. In her statement to the Police HS says that the defendant had sexual intercourse with her on 4 occasions. Twice during the night and twice during the day. She says that the sexual intercourse took place in a "*roten car*". She says at one point in her statement the car was blue. She describes in some detail what went on. As indicated earlier, HS is a little vague on the dates. She says she doesn't know the

exact date of the first incident, she says it occurred at the end of February or sometime in March. The defendant called her out onto the veranda and she went to him. He told her they were going to the wrecked car in the yard. She did not think anything bad was going to happen. She got into the car and the defendant asked her to take off her clothes and he took off his.

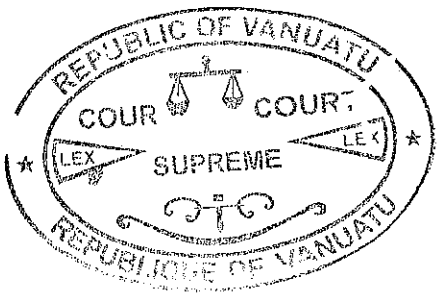
12. When they were both naked he started to kiss her on the lips. He then made her sit down and perform fellatio on him for some time until his penis became erect. He then performed cunnilingus on her for a short time. The defendant then had full penile intercourse with her until he ejaculated.

13. Afterwards the defendant took HS, still naked, into the house where her mother and sister were sleeping. They went to the bathroom and washed and the defendant started to kiss her again. HS was then allowed to get dressed and she went to sleep in her own bed. She remembered that when the defendant was having intercourse with her she started to bleed and she felt pain. She also mentions that whilst they were washing she saw his penis which was then flaccid, his pubic hair and *"ol string long bolbol"*.

14. Even allowing for the fact that it was written down by a police officer at her dictation the description in the statement is detailed and quite sophisticated for a nine year old.

15. The statement then goes on to describe a second time when the defendant had sexual intercourse with her. She did not know the date but it was at lunchtime. She mentions for the first time the wrecked or *roten car* was blue. Again there is a description of cunnilingus and full penile intercourse to ejaculation. Afterwards HS says her vagina was very sore.

16. The third incident was during the night. HS did not know the date. Again it happened in the car after the defendant made her take her clothes off. There was oral sex and full intercourse to ejaculation. They went back into the house and HS washed herself then went to bed to sleep.



17. The final time occurred during the daytime on some unknown date. HS once more mentions the *roten blue car* and describes oral sex and full penile intercourse to ejaculation. The statement concludes by HS saying she was too frightened to tell her father what had happened in case he beat her. She felt unable to tell her mother too. In the end she told her big brother what had happened.

18. The fact that nowhere in HS's statement does she say she protested or did not agree with what the defendant was doing is irrelevant. Silence does not constitute consent. In any event a 9 year old child cannot give consent to sexual activity of the kind described.

19. I bear in mind that the defendant has had no chance to cross examine HS. Her evidence should not just be taken at face value and I should look for corroboration of what she says. Of course the only person who can corroborate the detail she provides about the sexual abuse is the defendant. However, there is other evidence which is relevant and which should be considered in light of what HS says.

20. The medical evidence of Dr Bador carries the finding that HS had a *"deteriorated hymen membrane"* which was *"painful to the touch".* He was of the opinion HS was sexually active. He also records that HS was "*Afraid of speaking*". The doctor's evidence corroborates HS's evidence that there had been sexual intercourse. It also shows how anxious and reluctant HS was about describing what had happened to the Doctor.

21. The first witness I heard evidence from was HS's elder brother whom we will call AS. He said that in March 2017 he noticed his sister HS was wearing small diapers. He asked why and she told him it was because she "*pispis blood*". He also said he saw blood in the toilet after HS had used it. He spoke about a time in April 2017, he was not sure of the exact date, when he and HS were waiting for a bus. She told him that the defendant had taken her to some place in the yard and had taken off her clothes. He then tried to push his penis into her private parts. His sister told him she was sore afterwards and that the defendant had done it three or four times. She had not mentioned any particular dates.

22. AS said that when his sister was telling him all this she looked frightened. He thought HS was frightened of the defendant because he had told her not to tell anyone. After HS told AS what had happened he went and spoke to his father and told him what HS had said. He never returned to the defendant's house after that.

23. He was asked about an old car in the yard. He confirmed there was a blue car about 15 metres from the house. He had walked past it, quite close to it, but had never touched it or gone inside it.

24. He was asked about the blood he saw in the toilet. He said that he was sure it was HS's blood because he had been quite close to the bathroom in the yard and had gone to use the toilet straight after her. He had not told anyone about what he had seen.

25. He said that the defendant was "quite kind" to him and had given him money on some occasions. The defendant had never struck him or either of his sisters.

26. He was cross examined and confirmed his sister HS told him her story at the bus stop. He said it was true that neither of them had told their mother. He confirmed that he did not know where exactly the sexual activity had gone on. He was asked if his mother used the toilet at the property and he said yes she did. He told the Court he had gone to stay at the defendant's house in March 2017. It was put to him that he had never looked inside the truck and he said that was true. He was asked about the toilet at the defendant's house and he confirmed he had used it, it was in the small bathroom.

27. He was asked how long it was between hearing HS's story and going to the police. AS said it was less than one week. It was sometime in April 2017.

28. The Court then heard evidence from the mother. It was clear from what she said that she was conflicted in giving evidence for her daughter against the defendant. I did not find her evidence particularly helpful. She did confirm some evidence from her son about not wearing much clothing when in the house. She said because they were Tahitian she, the girls and the defendant did not wear much in the

house. Her son was ashamed to wear very little and he would wear trousers. She also confirmed that her daughter was not menstruating, had not started to menstruate, at the relevant time.

29. The mother also confirmed there were only two vehicles at the property, a white one and an older grey one. She also confirmed the general time line when the children came to stay.

30. She did not notice anything untoward during the time the children were there staying with her and the defendant. The first she knew of the allegations was when the defendant was arrested. She was of the opinion that the allegations were false. In cross examination she said that HS had spoken to her after the defendant's arrest and HS told her nothing happened and that the former husband had made her tell the story to the police.

31. The former husband, the children's father, was the next witness. His evidence was the children went to live with their mother in January 2017. He heard the story from his son. He did not go to the police immediately because he was very troubled by what he had been told. He did have concerns at first that AS had got HS's story wrong or that he was being told lies. However, after talking to HS he decided what he had been told was the truth and went to the police. He did not force HS to go with him to the police station. He was not so much cross with the defendant as feeling betrayed. He was not with HS when she spoke to the police, he waited outside whilst the police officer questioned her.

32. The only other evidence for the prosecution came from the record of the interview under caution of the defendant and the statement of HS's older sister. The record of interview shows it was basically a "no comment" interview.

33. The sister's statement tells of a time when they were living with their mother in the defendant's house. She was going to the bathroom to wash and HS said she wanted to wash as well. The elder sister then followed HS into the bathroom and HS used the toilet. The sister saw that there was blood stained toilet paper in the bowl.

HS said to her that she had been bleeding from the vagina. She had used the toilet paper as a kind of pad.

34. Following the close of the prosecution case a submission was made that there was no case to answer. It was made on the basis that there was no direct evidence to show there had been sexual intercourse. The only evidence (from HS) was said to be hearsay. I did not accept the submission because the statement by HS was, for the reasons set out at the beginning of this judgment, evidence. In addition the medical evidence corroborated the evidence of sexual activity. There ***was*** evidence which had not been discredited which required the defendant to make his defence.

35. The defendant elected to give evidence under oath. He told me that he did not understand why HS had made these stories up. He had taken the children into his home and had fed them. He had looked after them and their mother. He said he was a religious man and had talked to the children about God. He accepted that the children were under his care when they were living with him. He had gone overseas in April for medical reasons but agreed the children had effectively been in his care in February March of 2017. He denied he had had sexual intercourse with HS.

36. Under cross examination he confirmed the children had been living with him and he repeated that he provided for them. He stated that he liked them. He denied that his house rules required them to walk around the house almost naked. He said he worked long hours sometimes late into the night and over the weekends. He had given money to the mother and to the children and even to the father for school fees. He portrayed himself as a good, hardworking Christian man.

37. He denied that he had made AS watch pornographic movies. He said he used to watch pornography but that was 20 years ago. He then said he had not watched any pornography since 2014 although he accepted that there was pornography on his laptop. He denied that he had told the mother he was going to give HS sex education.

38. The detail of each allegation was put to him and he denied emphatically that he had had sexual intercourse with HS. He said none of the allegations against him were true and no part of HS's evidence about his abuse of her was true either.

39. The defendant did not call any other witnesses.

40. I remind myself at this point it is for the prosecution to prove their case beyond reasonable doubt. The defendant has nothing to prove. If I have any doubt about the guilt of the defendant I must acquit him. I must come to a decision by looking at the evidence. My decision cannot be based on suspicion, vague theories or supposition, it must be based on properly admitted evidence.

41. The defendant is charged under section 97A of the Penal Code with aggravated sexual intercourse with a child. The prosecution must prove in this case that the defendant had sexual intercourse with HS when she was under the age of 15 and that when he did so he was in a position of authority over her. I cannot assume any facet of this case, as I have said, it must be proved beyond reasonable doubt.

42. So far as age is concerned, there is evidence from official records that HS was born in October 20107. That would mean she was aged 9 at the beginning of 2017 when the offences are said to have been committed. I am sure beyond any reasonable doubt that HS was under the age of 15 when the defendant is alleged to have had sexual intercourse with her.

43. Turning to the question of authority, there is no real dispute that when HS (and her siblings) were living with their mother in the defendant's home she was under the authority of the defendant. That was part of the mother's evidence and appears in any event to be accepted by the defendant.

44. The only real question in this case is did sexual intercourse take place between the defendant and HS. We know for sure that HS was, in the words of the doctor, "sexually active". The only real issue is was this with the defendant or someone else.

45. At this point I will deal with consent. It is not argued by the defendant but I should make it clear that a child of HS's age cannot consent to sexual activity of any kind. It would not matter if she was an entirely willing partner the law dictates that she cannot consent. That is the effect of section 97(3) of the Penal Code. Section 97 deals with the "lesser" offence of unlawful sexual intercourse but it would be very strange if consent was a defence to aggravated sexual intercourse with a child but not to unlawful sexual intercourse. In any even any sexual intercourse with a child under the age of 13 attracts a maximum sentence of life imprisonment since February 2016.

46. The only direct evidence supporting the allegation that the defendant had sexual intercourse with HS is from HS. I have ruled that her statement to the police in July 2017 is admitted as evidence. How credible is it ? As indicated earlier, I should, in the circumstances of this case, look for corroboration. Of course, there are no eye witnesses to the alleged sexual intercourse apart from the defendant and HS. However, I can look for corroboration in respect of other aspects of her evidence.

47. It is partly corroborated by the brother's evidence. He saw his sister wearing diapers and he noticed traces of blood in the toilet. This is consistent with HS's description of the pain she felt during and after the offences are said to have taken place. His evidence is in turn corroborated by the elder sister's evidence. The brother talks of the bus stop conversation when HS told him what had been going on. That in itself is not compelling but it does corroborate what she said. His account of what was said is an account of a summary of what went on. I would find the evidence far less convincing if he said his sister went into great detail.

48. There is no suggestion that either HS or AS had an ulterior motives for making the allegations. Nothing is said about HS's relationship with the defendant. AS actually said in evidence he *"quite liked"* the defendant. There is no reason for him to lie. I accept that there is some laxity in the evidence about dates but it does not diminish what otherwise is said. I also accept there is contrary evidence about the colour of the car. Both HS and AS say the car was blue. Both the defendant's and the mother's evidence was that there are two old vehicles in the yard, one grey and

one white. I do not think this slight discrepancy in the description of the colours renders the evidence of the brother and sister as totally unreliable.

49. Looking at all the evidence on the whole I find HS's evidence to be credible and compelling. I have no doubt that she was telling the truth about what happened when she gave her statement to the police.

50. Accordingly I find the defendant guilty of aggravated sexual intercourse with a child on 4 occasions between February and July 2017.

Dated at Port Vila this 17th August 2018

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D. CHETWYND
Judge

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