

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

Criminal
Case No. 21/489 SC/CRML

BETWEEN: Public Prosecutor

AND: Tari Malon Hory
Defendant

Date of Hearing: 12 March 2021
By: Justice G.A. Andrée Wiltens
Counsel: Ms M. Tasso for the Public Prosecutor
Mr A. Bal for the Defendant
Date of Decision: 30 March 2021

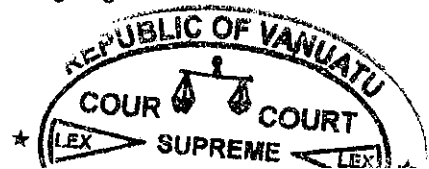
Verdict

A. Introduction

1. This criminal trial was of short duration, lasting less than a day. However, I felt unable to give a decision at the conclusion of the case due to my concerns that Mr Hory may not have had the benefit of his fair trial rights. I was equally concerned regarding the complainant's position having not been fairly dealt with.
2. Accordingly, I deferred publishing my verdict until I had time to consider those concerns.
3. What follows is my decision and the reasons for it.

B. Background

4. Mr Hory pleaded not guilty to intentional assault (x 2) and threat to kill.
5. Mr Hory is married with two children and gainfully employed. All 3 charges relate to conduct on the part of Mr Hory towards his mistress, Ms Janet Matai, who is 28 years old and fully aware of Mr Hory's marital status. Their affair has been on-going since 2016.



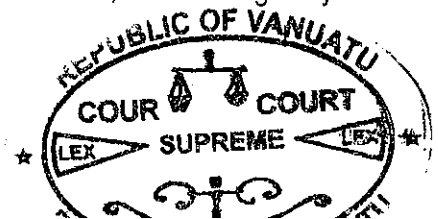
6. There is no dispute that the events in question occurred in the early hours of 1 January 2021, firstly at the Hibiscus Motel where Mr Hory and Ms Matai met up to spend New Year's Eve together; and later at his parent's home at Bladiniere Estates, Port Vila. The reasons for going to Bladiniere differ according to which version is preferred.

C. Concerns

7. There are 2 main areas of concern.
8. Firstly, Mr Bal was apparently aware of a recording made by Mr Hory's sister-in-law of at least part of the incident outside Mr Hory's parents' home in Bladiniere. Mr Bal made no mention of this particular piece of evidence during cross-examination of the prosecution witnesses, nor during his leading of his client's evidence. At a very late point in the trial, while leading the final defence witness, Mr Bal wanted to play the clip as an exhibit as it was helpful to the defence case. However, he then changed his mind.
9. I have not seen the recording. I do not know if it supports the complainant's version of events, or undermines it. I do not know if the police who investigated this matter are aware of the recording and/or have sighted it. However, it seems to be that it may well be helpful in determining whether two of the charges can be proved or not.
10. Admissible versions of this recording should be made available to the Court – by one side or the other so that the Court has available to it all the relevant evidence to fairly decide this case.
11. Secondly, there is a rule in criminal trials known as the Rule in Browne v Dunn. In New Zealand this old (1894) common law rule has now been codified in the Evidence Act 2006. The codification has made it clear what the rationale behind the rule is and what can/should be done when the rule is breached.

"92. Cross-examination duties

- (1) In any proceeding, a party must cross-examine a witness on significant matters that are relevant and in issue and that contradict the evidence of the witness, if the witness could reasonably be expected to be in a position to give admissible evidence on those matters.
- (2) If a party fails to comply with this section, the Judge may –
- (a) grant permission for the witness to be recalled and questioned about the contradictory evidence; or
 - (b) admit the contradictory evidence on the basis that the weight to be given to it may be affected by the fact that the witness, who may have been able to explain the contradiction, was not questioned about the evidence; or
 - (c) exclude the contradictory evidence; or
 - (d) make any other order that the Judge considers just."
12. Essentially, what must be done is to put contradictory matters to all witnesses, so that they have the opportunity to respond. That is not only fair to the witness, but it can greatly



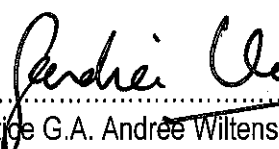
assist the fact-finder in determining which version is to be accepted. The obligation is mandatory.

13. Unfortunately, throughout the prosecution case, this rule was observed in the breach. Numerous material factual allegations were simply not put to the complainant by Mr Bal. They ought to have been.
14. Mr Bal attempted to lay the blame for this on his lack of knowledge of what his client was to say in his evidence. This of course cannot be accepted. Part of trial preparation is to properly brief one's client as to the evidence he/she is to give. Some of the proposed evidence may be inadvisable, irrelevant or otherwise inadmissible. The one thing that competent counsel would never do is permit a client to give evidence not previously made known to his counsel.
15. The breaching of the rule in this instance is difficult to rectify. In my view, there was little to be gained by allowing the witness to be recalled at the time for the purpose of further cross-examination. Once she had completed her evidence, she sat in Court and observed the balance of the evidence being led. Accordingly, she was fully aware of what Mr Hory alleged had occurred and would not be in the position of a witness who was unsure about what questions were to come and possibly be unable to answer questions put to her without considering the consequences. One of the real benefits of cross-examination is the element of surprise. That was no longer possible.
16. Given that this was a criminal trial, with individual liberty at risk, I am loathe to simply exclude the later contradictory evidence given by Mr Hory. That is unfair to him.

D. Decision

17. I consider the fairest solution to the two conundrums is for the matter to be re-tried before a different Judge. I consider that fair to both the complainant and the defendant, and that any other decision would be doing an injustice to one of them. I acknowledge there is a cost involved – both financial and emotional. However, to make a determination on the material presented would be an injustice.
18. Accordingly, this matter is to be re-tried. Mr Hory's bail is to continue until a new trial date is scheduled by the Supreme Court Chief Registrar.

Dated at Port Vila this 30th day of March 2021
BY THE COURT


Justice G.A. Andree Wiltens

