

PUBLIC PROSECUTOR -v- JACK SAM

Coram: *Chief Justice Vincent Lunabek*

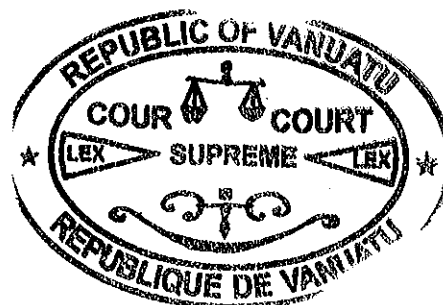
Counsel: *Mr Tristan Karae for the Public Prosecutor
Mr Jacob Kausiama for the Defendant*

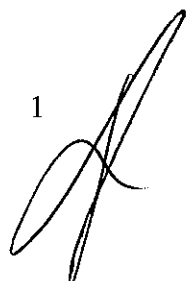
JUDGMENT ON VERDICT

This is the Judgment of this case. The Defendant, Jack Sam, is a young man of 21 years of age. Jack Sam was charged with one count of sexual intercourse without consent, contrary to section 91 of the Penal Code Act [CAP.135]. It is particularized that on 24 December 2009 at Fresh Wota 4, the Defendant, Jack Sam, had sexual intercourse with the complainant, without her consent. The complainant of this case is a girl of 21 years of age. She will not be called by her name but she will called (C) for obvious reasons. The Defendant pleaded not guilty to that count. A trial proceeded on that basis. The law is that the prosecution must prove each and all essential elements of the offence beyond reasonable doubt. Before the Defendant, Jack Sam, could be convicted, the prosecution must prove the followings elements of the offence of sexual intercourse without consent beyond reasonable doubt:

1. That the Defendant, Jack Sam, had sexual intercourse with the complainant (C) on 24 December 2009 as alleged.
2. That there was no consent or the consent was obtained by force or the complainant could not give consent because of her state of drunkenness.

In this trial, the prosecution has called six (6) witnesses. The prosecution evidence can be summarized in this way:

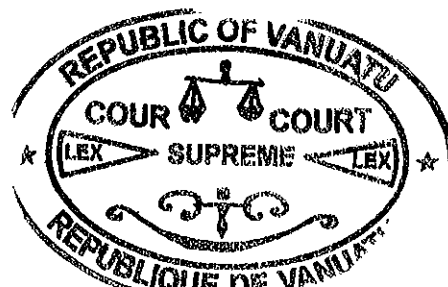


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The incident is alleged to occur on 24 December 2009 at Fresh Wota 4, where the Defendant, Jack Sam, had sexual intercourse with the complainant girl, without her consent. The complainant (C) was drunk. She did not know that the Defendant had sexual intercourse with her. She did not know how and who removed her trousers and panties on her and how and who put them back on her. Before the incident on 24 December 2009, (C) was at Ohlen eating pineapple mixed with alcohol with Larisha Kapalu, Roy Sam, Philip Tupas and the Defendant, Jack Sam. At 8.00PM, (C) and Larisha decided to go to her older sister's house at Fresh Wota 4 to collect a secret friend present. On their way to Fresh Wota 4, the Defendant, Jack Sam, followed them with the thinking that they were going to Trader Vic' night club. They met Tom Kalo on the road going towards Simbolo area. Tom Kalo got them another bottle of alcohol drink. Larisha did not drink. (C) drank the bottle of alcohol with Jack and Tom Kalo. (C) got very drunk. She remembered they crossed the soccer field at Fresh Wota 4 area. Going further in Fresh Wota area, she could not remember anything else.

Larisha and the Defendant went to (C)'s older sister's house for a short time. After they return, Larisha saw (C) was too drunk and was naked. She only has a top on. She saw (C) was lying on her back underneath a road market table at Fresh Wota 4 while the Defendant, Jack Sam, had his trousers half way down and was lying on top of (C) and had sexual intercourse with her. (C) did not know that Jack Sam had removed her clothes. (C) did not know that she was naked lying underneath the road market table.

The police arrested the Defendant and put him in the police cell. On the afternoon of the next date, the Defendant was cautioned and he made a statement at the police station. The Defendant, Jack Sam, admitted he had sexual intercourse with the complainant (C). Police officer Davis Saravanu was the interviewing officer. Police Officer Gloria Charlie was present during the interview. Police Officer Saravanu gave evidence that the Defendant, Jack Sam, admitted the offence charged against him. He gave evidence that there was no force and that the Defendant willfully admitted the offence during his interview and taking of statement. Officer Saravanu Davis was cross-examined but he maintained his evidence that he did not force the Defendant,



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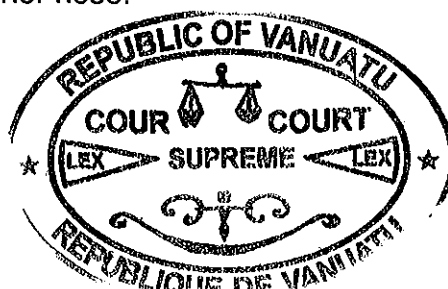
Jack Sam, to make his statement. He maintained his evidence that Jack Sam made his statement orally to him and Jack Sam admitted he had sexual intercourse with the complainant without her consent because he was too drunk.

Police Officer Gloria Charlie gave evidence that she was present during the interview of the Defendant, Jack Sam, and his taking of statement. Her evidence was that Police Officer Saravanu did not force the Defendant to make a statement and that Saravanu did not force the Defendant to admit the offence. She said the Defendant, Jack Sam, willingly admitted he had sexual intercourse with the complainant (C) because he was too drunk.

Police officer Tarimas Pakoa gave evidence he arrested the Defendant, Jack Sam at Fresh Wota 4. When the police truck arrived at the scene, he saw the Defendant, Jack Sam, Larisha and the complainant at the scene. Larisha did not look too drunk. The complainant (C) looked drunk and undressed. When he arrived he saw part of the clothes of the Defendant was half way down his thigh and knee. This was about 12.30AM. He said the cousin brother of (C) tried to make her wore back her panty. He said on the scene he saw the Defendant, Jack Sam, another boy and 2 girls.

The complainant gave evidence that she was too drunk on the night of 24 December 2009. She did not consent to have sexual intercourse with the Defendant, Jack Sam.

She said Larisha told her just after the incident that night that Jack Sam had sex with her. She said she was crying and she called her sister. She remembered it was dark. The pulpe of the police truck shined and she saw the police truck stopped to take the Defendant Jack. She then said she knew something happened to her as she recovered a little bit. She also gave evidence that before the incident at Fresh Wota 4, when they came on the road, Jack Sam asked her for sex but she refused. She also said that Jack asked her to tell Larisha that he wanted to have sexual intercourse with her but she did not tell Larisha of it. She also said it is not the first time that the Defendant Jack did this to her because when she was in the Island, she said Defendant Jack did this to her. She said further that during that night she felt she was assaulted and there was blood coming from her nose.



At the end of the prosecution case, the Defendant, Jack Sam, exercised his right to remain silent and he did not call any witness after his right under s.88 of the Criminal Procedure Code Act [CAP.136] was read and explained to him.

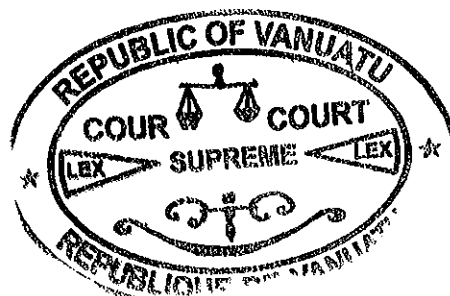
On assessment of evidence, I accept the evidence of the prosecution witnesses. The prosecution evidence, that Defendant Jack Sam had sexual intercourse with the complainant (C) underneath a road market table at Fresh Wota 4, on the night of 24 December 2009, is accepted. Further I accept the evidence of police officers Saravanu Davis and Gloria Charlie that the Defendant had admitted willingly that he had sexual intercourse with the complainant (C) because he was too drunk.

In this case, the Defendant decided to exercise his rights to remain silent. I am not and must not criticize him for that.

The evidence are overwhelmingly against the Defendant, Jack Sam. He is the only person who can provide some light. No such light was given by the Defendant. The defence counsel in his written submissions, filed 25 May 2010, said: ***"The Accused made some admissions to the police on the allegation against him... If the Court accepts the admission, then the Accused will be rendered guilty."*** This was confirmed by the defence counsel during submissions on verdict when he was asked by the Court to clarify what he meant. Counsel for the Defendant informed the Court that the sentence means what it means.

In this case, despite the submissions of the Defendant's counsel on the issue of identity, the presence of the Defendant and his involvement in the sexual intercourse with the complainant (C) on 24 December 2009 is not in dispute. There is no evidence of alibi made by the Defendant Jack Sam, that he was not the person identified or that he was not at Fresh Wota 4 at the crime scene at that time.

The defence submitted that Rex was another boy who was present that night at the scene and because it was dark and Larisha was drunk, she could not see it was the



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Defendant Jack Sam who had sexual intercourse with the complainant (C) as alleged on 24 December 2009.

I reject this submission. Larisha's evidence is that she saw Jack Sam had his trousers half way; He was lying on top of the complainant (C) and had sex with her. Police Officer Tarimas arrived at the scene and saw the Defendant's trousers half way between his thigh and knee. This was amplified by the Defendant's own admission of his sexual intercourse with the complainant because he was too drunk.

I am satisfied beyond reasonable doubt that the prosecution has proved each and all essential elements of the offence of sexual intercourse without consent, contrary to section 91 of the Penal Code Act [CAP.135] against the Defendant, Jack Sam.

It is important to note that under Section 90 of the Penal Code Act [CAP.135], the effect of alcohol is not a defence when sexual intercourse without consent is committed.

Thus, in the present case, the fact that the Defendant Jack Sam admitted he had sexual intercourse without the consent of the complainant (C) on 24 December 2009 because he was too drunk is not a defence.

VERDICT

The Defendant Jack Sam is found guilty of the offence of sexual intercourse without consent, contrary to section 91 of the Penal Code Act [CAP.135]. He is accordingly convicted of such an offence.

DATED at Port-Vila this 3rd day of June 2010

BY THE COURT

**Vincent LUNABEK
Chief Justice**

