

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

Criminal Case No. 122 / 2011

PUBLIC PROSECUTOR

V

KALPAT TASERE

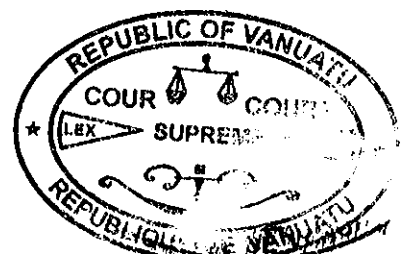
Hearing: 1 - 3 November 2011
Before: Justice Robert Spear
Appearances: Simcha Blessing for the State
Eric Molbaleh and Francis Tasso for the Accused

VERDICTS and REASONS FOR VERDICTS

(3 November 2011)

VERDICTS

| | |
|-----------------|---------------------------------|
| <i>Count 1:</i> | <i>Guilty</i> |
| <i>Count 2:</i> | <i>Guilty</i> |
| <i>Count 3:</i> | <i>(alternative to Count 5)</i> |
| <i>Count 4:</i> | <i>Guilty</i> |
| <i>Count 5:</i> | <i>Guilty</i> |



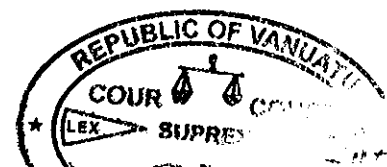
1. The accused faced trial on an indictment charging him with a total of 5 separate charges as follows:
 - Count 1: Kidnapping
 - Count 2: Indecent Act with a Young person
 - Count 3: Unlawful Sexual Intercourse
 - Count 4: Sexual Intercourse Without Consent – Digital Penetration
 - Count 5: Sexual Intercourse Without Consent - Rape

2. The indictment was initially presented in a slightly different form. The accused pleaded not guilty to all charges except for the charge of unlawful sexual intercourse to which he pleaded guilty. On the 1 November 2011, at the commencement of the case, an amended indictment was proffered by the prosecutor. The only difference was that the charges were put in a more comprehensible and conventional form. There was no amendment to the substance of the charges.

3. While there was no objection to the amendments, as a matter of good practice the accused was arraigned again. He pleaded not guilty to counts 1, 2, 4 and 5 but guilty again to count 3 - the charge of unlawful sexual intercourse.

4. At the commencement of the trial, Mr Blessing confirmed that count 3: unlawful sexual intercourse, was an alternative to count 5: sexual intercourse without consent / Rape - and the trial proceeded on that basis. No conviction has been entered against the accused on count 3 for unlawful sexual intercourse.

5. There were a number of admissions made at the commencement of the case or in the early stages of it. In particular, the age of the complainant was admitted as being 12 years of age as at 7 July 2011 - the date of the alleged offending. Furthermore, the issue of identity was admitted in relation to the complainant's evidence that it was the accused who committed these offences against her. Of course, that admission as to identity and the plea to count 3 (unlawful sexual intercourse) was really in line or consistent with the accused's admission to the Police of committing unlawful sexual intercourse that day with this complainant.



6. I will now deal in a general way with the case against the accused. On 7 July 2011, this 35 year old man was working as a public bus driver in Port Vila. He picked up the 12 year old complainant outside the New Covenant Church at Anamburu and he did so forcefully by pushing her into the bus. He then drove his bus to a deserted area at the top of the Ellouk Plateau where he not only masturbated in front of her but also inserted his fingers into her vagina and raped her. The complainant as I have mentioned is 12 years of age, there was no prior knowledge by one of the other prior to 7 July 2011. They were complete strangers to each other.
7. The prosecution case is that the accused kidnapped the complainant. He ordered her to get into the bus and, when she would not get in, that he pushed her into the bus. That is disputed by the accused. So that is the essence of the charge of kidnapping supplemented of course by the evidence that the accused then drove the bus up to the Ellouk Plateau.
8. Similarly, count 2 (committing an indecent act with a young person) relates to the allegation that the accused masturbated or at least held his penis in front of the complainant and tried to get her to hold on to it.
9. The case on count 4 is that the accused inserting his fingers into the complainant's vagina and count 5 asserts that he then raped her.
10. It is for the prosecution to prove the essential elements of a criminal charge to the high criminal standard of beyond reasonable doubt before an accused can be found guilty of it. Proof beyond reasonable doubt simply means that the Court is left sure of guilt - that the Court does not have a reasonable doubt. If the Court considers that there is a reasonable doubt then the proper verdict is one of not guilty. If the Court is highly suspicious as to whether the accused committed the offence or not, whether all the elements of the offence have been proven or not, then the accused is still not guilty because that will not amount to proof beyond reasonable doubt. It is a high standard, the criminal standard of proof beyond reasonable doubt, although it does not reach the point where certainty is required.
11. One issue that remains is the issue of corroboration. That has helpfully been addressed by counsel in their closing submissions. I record now that I am

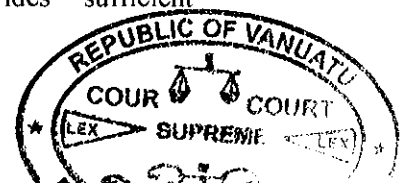


grateful to counsel for the care with which they have prepared their closing submissions which are in writing and contain references to legal authorities.

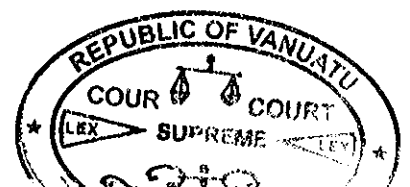
12. The complainant's evidence does not have to be corroborated although the Court must be careful and indeed warn itself as to the dangers of relying upon the uncorroborated evidence of a complainant in a sexual case or the unsworn testimony of a child. While the evidence of the complainant, a 12 year old girl was sworn testimony, she is obviously a complainant in a sexual offence and so it necessary to recognise that the Court must be cautious, it must be careful about relying on the evidence of the complainant unless it corroborated in some material particular. This is well explained in a decision of the Court of Appeal of Vanuatu *PP v Koilo [2009] VUSA 45, Criminal Appeal Case 17 of 2008, 30 April 2009* when the Court of Appeal said this in relation corroboration:

"The law of Vanuatu for the moment remains that an appropriate warning should be given where there is no independent evidence which confirms or supports in a material particular the complainant's evidence that the accused has committed the crime alleged."

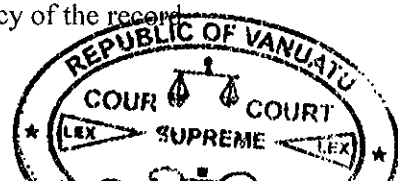
13. In this case, there is corroboration of the complainant's account to a material degree that arises from 3 separate sources. First and second, there is the evidence from 2 workmen who happened along and saw what might be generally described as sexual activity being undertaken between the complainant and the accused in the bus while it was up on the Ellouk Plateau, I will return to that evidence in due course. The third corroborative piece of evidence is the statement given by the accused to the police in which he made a full and uncomplicated admission that he had sexual intercourse with this 12 year old girl in his bus up on the Ellouk Plateau on the afternoon of the 7 July 2011.
14. The corroboration does not have to be to every particular relating to the offences. It is a question of corroboration to assist in the assessment of the credibility of the complainant. In this respect the evidence of the 2 workmen (Robert Manua and Victor Timothy) as well as the admission by the accused that he had sexual intercourse with the complainant that afternoon, both independently and collectively most certainly provides sufficient corroboration of the evidence of the complainant.



15. Be that as it may, in this particular case it will still be necessary for me to accept the complainant's evidence that the sexual activity that took place between the complainant and the accused that afternoon was without her consent. It requires me to accept that the complainant was a witness of the truth in respect of the matters to which she has attested. I will return to that issue as I address the evidence that is being given in this case.
16. The charges as I have mentioned are of 4 different types of criminal offending. The first is of kidnapping by section 105 (b). It is an offence for a person to compel another one by force to go from one place to another place. Of course, by section 5 of the Penal Code, that must be an intentional act on the part of the accused and indeed it must be an intentional act in respect of each of these charges. The accused, for the purposes of section 105, the charge of kidnapping, must deliberately use force for the purpose of taking away the free will of the other person to go about their own business and by force require that person to go to another place.
17. Count 2 is a charge brought under section 98 (A) of the Penal Code. That section makes it an offence for a person to commit an act of indecency upon or in the presence of another person under the age of 15 years. Again, as I have mentioned, that must be an intentional act but of course the issue of indecency is to be measured on the contemporary community standard as to what would be considered decent or indecent by right thinking members of the community. It is significant that, in contrast, the preceding offence under section 98 (committing an act of indecency without consent) is significantly different to that of section 98 (A) - an act of indecency with a young person; that is, a person under 15 years of age. Section 98 makes it an offence to commit an act of indecency without that person's consent or out that person's consent but where it has been obtained in certain ways. However, when the act of indecency is upon or committed in the presence of a young person then the issue of consent does not arise and does not have to be disproven by the prosecution. That, of course, is in line with comparable penal provisions in other jurisdictions.

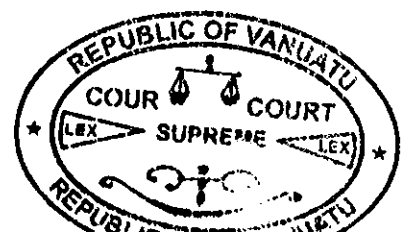


18. The counts 4 and 5 are specifically for the offence of committing sexual intercourse without consent which is an offence under section 90 of the Penal Code. To prove that charge, it is necessary for the prosecution to prove beyond reasonable doubt the specific physical act of sexual intercourse, that that act occurred without the complainant's consent or with the complainant's consent but where it was obtained by force, by means of threats or intimidation, by fear of bodily harm, or such like - as set out in section 19 (B) of the act. Sexual intercourse is defined by section 89 (a) as including the penetration to any extent of the vagina of a woman or girl by the penis or another other part of the body of a man. There are other ways in which the physical element of sexual intercourse can be established but it is sufficient to confine it here simply to what is alleged in this case as being digital penetration and penal penetration.
19. Of course, there are 3 elements to a charge of sexual intercourse without consent that must be proven. The first is the physical act, the second is that it was with or without the consent of the complainant and the third is that it was an intentional act upon the part of the accused. In other words, that he did not have an honest belief or genuine belief based on reasonable grounds that the complainant was consenting to the physical act involved.
20. The accused did not give evidence. It was his right to remain sitting where he is and say to the prosecution- you brought these charges, you prove them. That is his right. And, it is a right that must be respected. He has the right to give evidence or call evidence if he so wishes but there is no requirement on him to do so. In particular, no adverse inferences can be drawn or should be drawn against him for remaining silent and not give any evidence in the case.
21. As I have mentioned, the onus of proving each of the essential elements of each charge remains on the prosecution from the beginning of the case through to the end of the case. The accused has to prove nothing at all. Be that as it may, he has given a detailed statement to the police and that was given on 18 July 2011 so 11 days after the offending alleged against him. That statement was taken after he was given a full caution. The police officer who took the statement from him was not required to give evidence. Mr Molbaleh confirmed that there was no challenge to the accuracy of the record

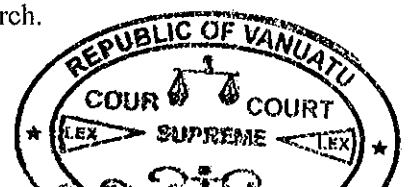


of the interview nor was there any suggestion that it was other than a voluntary statement on the part of the accused made at a time when he was fully aware of his right to remain silent. Accordingly, that statement was produced by consent and, of course, remains evidence in the case.

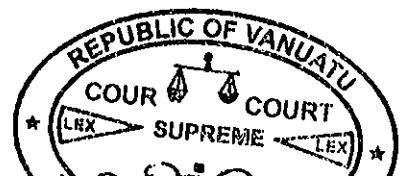
22. The accused's accounts of events as arising from that statement are to the effect that what occurred that afternoon of 7 July 2011 was wholly consensual or at least that was his belief from the beginning to the end of his encounter with the complainant.
23. I turn now to the evidence of the first witness in the case who was the complainant. As I have indicated, she was 12 years of age. She gave evidence that her brother dropped her off at the New Covenant Church at Anamburu and she was standing on the side of the road as she was waiting for her mother. A bus driven by the accused came and stopped beside her. This appears to be around mid afternoon on Thursday 7 July 2011. The complainant said that the driver, the accused, asked her to get into the bus to have a ride with him but she refused. Told the court that she did not know him and she was afraid of him. She told the accused that she had just returned from the river and she was needed to get to her house to see her mother. She said that the driver got out of the bus, walked towards her, held her by the hand and pushed her into the bus and she demonstrated the pushing motion with an outstretched hand with the fingers point upwards. She said that he pushed her into the front seat of the bus closed the door and locked it and then drove off.
24. She said that she was frightened of him. He asked her to move closer to him and when he did he kissed her on the cheek or attempted to do so. He said they went up passed the VMF barracks, down passed the market house into town and then up to Ellouk near the Digicel tower. She said that the accused told her that his name was *Peter* which, of course, it is not, although that may well be a name he uses for the purposes of his work. She said that on the way to Ellouk he talked to her but she really said nothing back to him, except to say that her name was Vanessa.



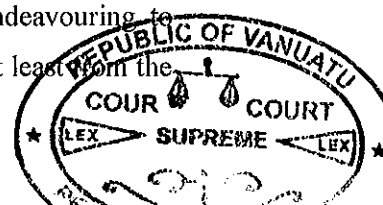
25. When they arrived at Ellouk, she said that the accused stopped the bus and told her to get into the back seat and that she did so by going through the small chair between the two main front seats. She said that the accused got out of the bus took off his lower clothing, his pants, leaving his shirt on. He told her to get out of her clothing. She said she was afraid and refused to do so. She said she saw the driver spit on his penis and he showed it to her, he managed to move inside the bus and he told her to hold on to his penis but she refused to do so. He then took off all her clothes except for her bra. He inserted his fingers into her vagina for a short time, then lay on top of her and had sexual intercourse with her by penetrating her vagina with his penis. She said that he did not ejaculate inside her but on the seat after he withdrew. About this time, some men came along she said and threw stones at the bus so they drove off. On the way back the accused told her that he would buy her a new mobile phone on Monday.
26. During the journey back into town, the accused's mobile phone rang. He answered it and it became clear to the complainant that he was talking to his wife.
27. The complainant said that she was not asked and did not say where she wanted to be dropped off. However, shortly after the phone call and as they came close to Angel Gate, the accused stopped the bus and told her to get off. He then reversed the bus towards a woman who was walking towards them.
28. The complainant said that she then walked back to the New Covenant Church area in Anamburu.
29. That is the complainant's evidence and I now contrast that with the accused's statement.
30. The accused stated that he was working that afternoon. He saw the complainant standing by the road and drove over to her. He asked her if she want to come for a short ride in the bus. She agreed and got into the bus. He asked her if he could have sex with her and he said she agreed. He then drove up to Ellouk where they had sex. He says he did not force her at anytime either to get in to the bus or to have sex. Afterwards, he said he dropped her back at Anamburu by the New Covenant Church.



31. The accused made a number of other comments taht have little bearing on the central issues in this case; including the statement that the complainant was not a virgin which, of course, is totally irrelevant. He specifically rejected any suggestion that he forced the complainant to get into the bus. His explanation was that he invited her to get in, to come for a ride with him, she accepted and got into the bus. He said that he never got out of the bus and he did not force her in.
32. This issue about whether or not the accused forced the complainant into the bus, is of particular significance. It the first allegation that force, threatening behaviour intimidation was shown to the complainant.
33. I accept the evidence of the complainant. Indeed, I find it unrealistic to contemplate that a 12 year old girl would get into a bus with a strange man any years older than she was particularly when she had just been dropped off by her brother and was waiting for her mother. I accept her evidence that she was frightened and that she did not know how to refuse the accused's insistence that she get into the bus.
34. The accused's statement to the police was remarkable in one significant respect in that respect. He said that the complainant did not speak at all during the journey to Ellouk. His statement is to the effect that the complainant was first approached by him, he asked her if she wanted to go for ride, she says yes without further ado and then gets into the bus. He asks her if she wants sex, she says yes, they drove up to Ellouk and they have sex. This is a 35 year old man and she is a 12 year old girl. His account is simply unrealistic even allowing for the most bizarre variations in the affairs of men and women or in this case men and girls. And all this at mid-afternoon on a week day.
35. The complainant's evidence is also far more realistic and credible than the accused's account of events. She was able to provide detail that he was uncertain about in his police statement. She said that during the course of the journey, the accused had his flashing lights on (which buses in Port Vila often do) and that he told her that he would not be stopping for anyone or to pick up any passengers.

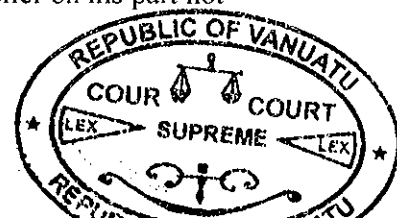


36. Similarly, the complainant's account as to how she came to be dropped off by the accused provides significant detail and ties in with a phone call from someone she understood to be the accused's wife. There is no evidence of what phone calls the accused received other than from the complainant.
37. I consider that it would be beyond the capacity of that particular young girl to provide this level of detail about extraneous matters through fabrication or invention. And why would she if the sex was consensual? For a young 12 year old girl to introduce this level of detail to an account of events relating to (what the accused would have us believe was) casual sex with a man in those circumstances appears extraordinary if it is suggested that that is by fabrication or invention. There would simply be no need for her to say such things.
38. Indeed, the accused in his statement said that he dropped the complainant back at the New Covenant Church in Anamburu. If that actually happened, why would the complainant, why would any person in that position, make up a story about being dropped off at Angel Gate after the accused had received a phone call from his wife. It simply is unrealistic. It does not fit in with any sense of what is credible in relation to the affairs of people.
39. When they were up at Ellouk, 4 construction workers came up to the area where the bus was parked. It is clear that, although these men said that they had come to get some fresh air (or at least the first man said that), it seemed to me that they went up to that area because they believed or knew that it was popular spot for bus drivers to take women up to and then have sex with them and they were going up to spy on them. That seems the probable reason what happened and why they were somewhat covert in their approach to the bus as they endeavoured to see what was happening inside it. Be that as it may, they both said, the 2 who gave evidence, that they got within 5 meters of the bus, the door was open, they saw the accused just with his shirt on and spitting on his penis and also that he was holding on, at same stage, to the complainant's head and appeared to be trying to force her head down towards his penis - but she was resisting. They gave evidence that is generally consistent with the complainant's evidence that she was endeavouring to resist the accused which is consistent with her evidence that, at least from the



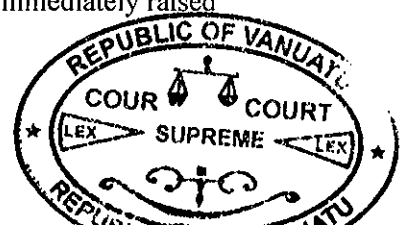
start of the sex, she tried to resist him by pushing him away but he was far too strong for her.

40. The four men ran off to get help. Instead of seeing consensual adults having sex, they clearly believed that had seen a man with a young girl in circumstances that suggested that the young girl was not necessary a willing participant. In any event, they came back with others and they started shouting. They said that the accused quickly got dressed as did the young girl and he drove off. The men were shouting but denied throwing stones at the bus.
41. The effect of the evidence of the 2 workmen is of particular significance as it is clear evidence, from a totally independent source, that this young girl was resisting the accused as best she could. They said that they saw him insert his fingers into his vagina but they then ran away and came back with others about the time when he was just finishing having sex with her or was disturbed but their return and finished at that time.
42. It follows from this that I have serious concerns about the credibility of the accused in respect of his statement to the police and thus his assertion that this was a wholly consensual act and that he believed it was consensual. I am left in no doubt that that was not so.
43. I do not accept the accused's accounts of events as explained by him to the police. I accept the complainant's evidence in particular that the accused got out of the bus, after she'd indicated she did not wish to get into it, held her by the hand and pushed her into the bus and then he drove off. These were all deliberate acts by the accused. That amounts to the crime of kidnapping.
44. I accept the complainant's evidence that the accused exposed his penis to her and, indeed spat on it, and tried to get her to hold it. That was a deliberate act which I accept amounted to an indecent act committed upon or in the presence of a young person being this complainant. I accept the complainant's evidence that the accused inserted his fingers into her vagina, that this was without her consent and without an honest belief on his part not



based on reasonable grounds that she was consenting. And similarly, in respect of the sexual intercourse by penile penetration - rape.

45. The issue of consent is one that I need to focus on just for a short time. A consent of course must be a true and freely given consent, a consent given by someone who understands the nature and quality of the act proposed and is able to give an informed consent to it. Without question, this young 12 year old complainant was perfectly capable of giving consent to sexual activity such as what occurred here that day. However, I am satisfied that she did not give consent and that the accused knew that she was not consenting. I am satisfied and find accordingly that, from the time that the accused pushed her into the bus, this young girl was frightened out of her wits as to what might happen to her. She showed some resistant to him but in the end she was someone who was totally out of her depth and without any means obvious to her as to how to escape.
46. Some criticism was made off her evidence that she did not cry out at the time she was picked up at the bus but of course she is a 12 year old girl and she would have been confused and frightened at that time as she said. She cannot have her credibility damaged by an assessment of how she should have acted. No doubt, looking back on it now, she would know that that is exactly what she would have done. Similarly, she was criticized for not calling out to the men when she saw them up at Ellouk, for not running away and also not telling her mother straight away what had happened to her. Those are all observations that can be made but they fail to recognise her age and (what she said was) the intimidating presence of the accused.
47. However a young girl of that age, who has found herself involved in sexual abuse, could be expected to be confused, wondering what to do, wondering whom she can trust, uncertain how she should deal with the shame that she may have felt. Experience tells us that a complaint about sexual offending often emerges some time later when the complainant finds herself in a state of mind and with people with whom she feels sufficiently comfortable to disclose this offending. This complainant cannot be criticised and her credibility cannot be damaged simply because she has not immediately raised a hue and cry.



48. Accordingly, it follows that I find each of counts 1, 2, 4 and 5 proven beyond reasonable doubt and the accused is convicted of those offences. No conviction is entered in respect of count 3 which is an alternative to count 5.

Kalpat Tasere, you are remanded in custody to appear in this Court at 2 pm on Wednesday 14 December 2011 for sentence. I call for a pre-sentence report. The matter is left for the probation officer, in conjunction with Mr Molbaleh, to consider a custom reconciliation ceremony. If there is a need for further time for that to occur before sentencing then counsel can approach me accordingly.

BY THE COURT

