

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

Criminal Case No. 125 of 2010

PUBLIC PROSECUTOR
V
MICHAEL HANSEL

Hearing: 20th April 2011

Coram: Judge James Weir

Counsels: Mr. T. Karae for the Public Prosecutor
Mr. J. Kausiama for the Defendant

RESERVED DECISION

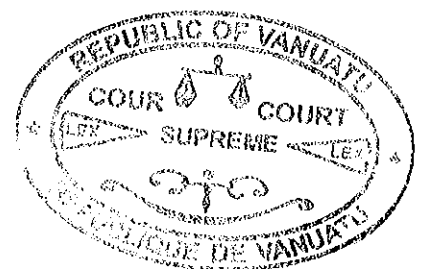
The Accused faces 2 charges namely

- 1) Sexual Intercourse without consent contrary pursuant to section 90-91 of the Penal Code Act.
- 2) Threats to Kill contrary to section 115 Penal Code Act.

They arise out of an incident which it is alleged occurred between this complainant and the accused in the Simbolo area at about lunch time on 5th November 2010.

The Accused denies that he threatened to kill the complainant, and says that he did have sexual intercourse with her but he says that it was with her consent.

Consent in this context means true consent given by a person who is in a position to make a rational decision. Lack of protest or physical resistance does not of itself amount to consent. On the other hand, consent given reluctantly, and later regretted, is,



nonetheless, true consent. The Prosecution must also prove that the accused did not believe on reasonable grounds that the complainant was consenting.

The material time when consent and belief in consent is to be considered is at the time the sexual connection took place.

The Prosecution must prove therefore, beyond reasonable doubt that the complainant did not consent.

THREATS TO KILL

In order to prove this charge the prosecution must prove beyond reasonable doubt that.

- a) the accused threatened to kill the complainant.
- b) the accused intended that the threat be taken seriously by the complainant.

THE PROSECUTION CASE

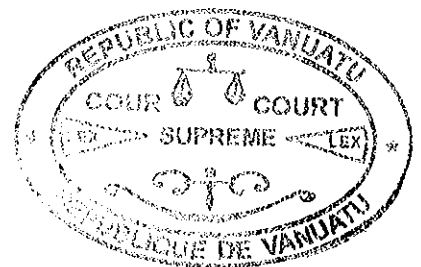
The prosecution case is based principally on the evidence of the complainant Flora Nasse, and that of one other witness, George Belam.

THE EVIDENCE OF FLORA NASSE

The Complainant, who was aged 16 at the time, gave evidence to the effect that she had previously seen the accused on a number of occasions when she was walking to and from school. She said that on a number of occasions previously he had tried to talk to her but she wouldn't listen. However on the morning in question, she encountered him again on her way to school and he asked her for her cell phone number which she gave to him.

It would appear that the accused rang her at lunch time after school that day and asked to meet her. The accused in his evidence gave evidence to this effect, and was not challenged on that evidence. The complainant's evidence in this respect was equivocal.

What is clear is that the complainant and the accused met on top of the hill in the Simbolo area at around about lunch time that day. What is unclear is what happened next. The complainant says that the accused called out to her to go and see him, and that whilst previously she had ignored him, this time she decided she would try and find out what he wanted to say and she went over to him.



She said that he suggested they should go into the shade because it was hot in the sun and they went into the bush a fair way from the road. In her evidence in chief she said that she didn't want to follow him but he forced her. In cross-examination it was put to her that she agreed to go into the shade with him. She denied this but said that it was very hot in the sun and there was no shade apart from an area in the bush which was shaded. She said that she told the accused she couldn't go inside the bush because she was scared but he pulled her along. She denied that she went freely with him and repeated that he forced her to go with him.

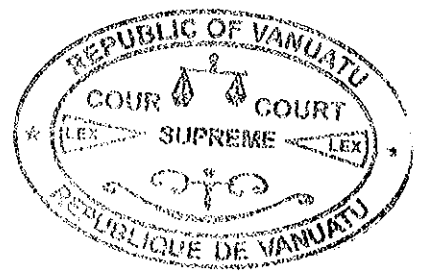
However, that aspect of her evidence is not supported by the only other prosecution witness who gave oral evidence, Mr George Belam. He said that on the day in question he saw the complainant and the accused walk into the bush, and he did not know who went into the bush first. There was no mention in his evidence of him seeing the accused forcing the complainant into the bush.

The complainant said that once they got inside the bush the accused asked her if he could touch her and kiss her. She said that she was scared and that he told her to shut up or otherwise he would hurt her. She said that he then pulled her to a place underneath an old broken down car and there he starting attempting to touch her. She said she rejected him but he held her strongly, pulled off her skirt and underpants and had sex with her. She said that she wanted to scream but he covered her mouth, there wasn't much space and they were half sitting down.

She said that during sexual intercourse she kicked out at him because she didn't want to have sex with him and that he again told her to stay quiet otherwise he would do something else nasty to her. She said that she was scared that he might hit her or harm her. She said that at the time that this was happening they heard some young men coming, that he pulled out of her, that she put her pants on and ran out and could feel that she was bleeding. She then ran to the house of some relatives but didn't say anything to them because she was scared that they might reproach her for having wanted to go with the accused. When she got to her own home later on, she told her sister in law.

THE EVDIENCE OF GEORGE BELAM

Apart from giving evidence that he saw the complainant and the accused go into the bush, Mr Belam said he subsequently returned to the area after having been told to go



back and check on them by some other young men. He said that he thought they must have heard them coming because they started getting dressed. He said that when the complainant came out there was blood running down her leg from her pants and that she was crying. He said that the accused laughed and said that he had been wooing her for some time and had succeeded in taking her virginity.

THE MEDICAL REPORT

This medical report was admitted into evidence by consent and itself is equivocal as to whether the accused raped the complainant. It simply confirms that the complainant's hymen is not intact and recounts briefly what the victim says happened. There is no other evidence of violence e.g. bruising on any other part of her body.

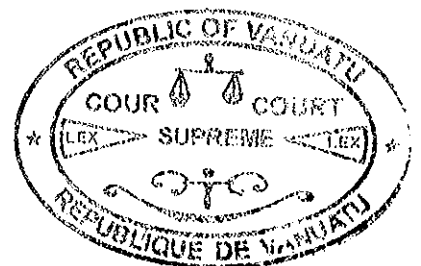
On the basis of the complainants evidence alone there is insufficient evidence to support the charge of threatening to kill and he is discharged on that charge accordingly.

There remains, therefore the charge of unlawful sexual intercourse without consent. The accused elected to give evidence and I turn now to consider his evidence.

THE EVIDENCE OF MICHAEL HANSEL

The accused gave evidence that he is 18 years of age and at the time of the incident, he had known the complainant about 1 week. In his evidence in chief he said that on the day in question he met her when she was on the way to school, asked her for her phone number and she gave it to him. He said that later on that morning he rang her and asked if he could see her. She said that if he wanted to go for a walk with her he could and she told him where she was. He then went to meet her and then told her to follow him to the small bush area in question where they had sexual intercourse. He said they both agreed to it.

In cross examination the accused confirmed that he had had seen the victim a number of times before, that he had spoken to her on some of those occasions and similarly she had spoken to him. He agreed that he liked the complainant and wanted to have sex with her and he had thought about having sex with her on that day. He did not agree that the complainant did not want to follow him into the bush. He said that she did not say that. He said that he went into the bush first and sat down and then she followed. He said that she was concerned if anyone saw them but that she was not scared.



He denied taking off her clothes and said she removed her skirt and pants. He denied forcing her to have sex but agreed that she felt pain during sex. He said he only made approximately 3 movements, but then she kicked and pushed and said it was painful and he then stopped and withdrew.


I am left, therefore with a direct conflict between the evidence of the complainant and that of the accused. I have already found that her evidence was somewhat unreliable about being pulled along by the accused into the Bush, having regard to the evidence of Mr Belam.

Whilst Mr Belams other evidence about what the accused said reflects poorly on his character, it does not establish that the accused had nonconsensual sex with this complainant. I place in the same category his evidence of seeing her crying after the event. She clearly had just suffered a painful experience. I am required, however to look at the evidence as a whole, and determine whether the prosecution has established the elements of this charge beyond reasonable doubt. I am not satisfied that in this case the prosecution has discharged that onus.

The accused is accordingly acquitted on this charge. The charge is formally dismissed. Mr. Hansel, you are free to go.

DATED at Port Vila this 29th day of April, 2011.

BY THE COURT


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J. WEIR
Judge

