

PUBLIC PROSECUTOR

V

FATY JIMMY

*Trial: 21-22 August 2012 at Isangel on Tanna*

*Before: Justice Robert Spear*

*Appearances: Gregory Takau for the State  
Bryan Livo for the Accused*

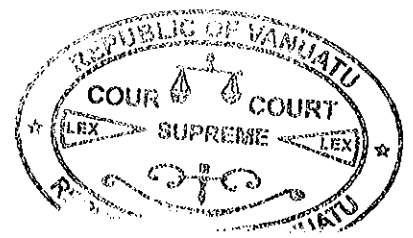
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VERDICT AND REASONS FOR VERDICT

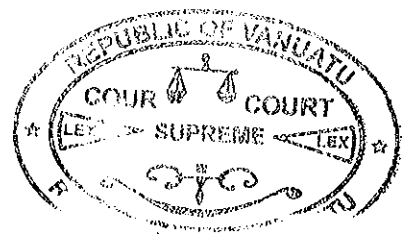
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**VERDICT: GUILTY of count 1 – sexual intercourse without consent.**

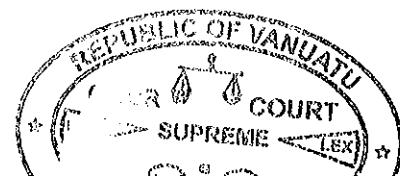
**CONVICTED and remanded in Custody to appear in the Supreme Court at Port Vila on Wednesday 19 September 2012 at 9 am for sentence. A pre-sentence report and a victim impact statement are called for.**



1. The defendant faced trial on 1 charge of having sexual intercourse without consent being a crime under section 91 of the Penal Code Act [CAP.135]. The defendant pleaded not guilty to this charge on 5 June 2012.
2. The offending is alleged to have occurred back on 18 January 2010. The trial was not reached before this week notwithstanding that the defendant was committed for trial on 28 May 2010. The defendant did not appear in this Court as required until earlier this year. His non-appearance is, of course, irrelevant to the question as to whether he is guilty or not of the charge but explains why it has taken this long for this case to come to trial.
3. It is necessary in every criminal case for the Court to remind itself that a criminal charge must be determined solely on the admissible evidence that is placed before the Court. Furthermore, it is for the prosecution to prove each essential element of a charge to the high criminal standard of *beyond reasonable doubt* before a defendant can be found guilty. Proof beyond reasonable doubt simply means that the Court is left sure of guilt. It is not required for the Court to be brought into a state of absolute certainty. What is required is that the Court is left sure of guilt which is a much higher standard than proof on the balance of probabilities, whether the accused is more likely than not to have committed the offence, or indeed even whether it is more probable that he has committed the offence. What is required is proof beyond reasonable doubt.
4. In this case the charge is one of having sexual intercourse with a girl without consent on 18 January 2010. That is an offence that has 3 essential elements that must be proven to the required high criminal standard. Those elements are:
  - a. First, that the defendant had sexual intercourse with the complainant;
  - b. Second, that it was without the complainant's consent; and,
  - c. Third, that the defendant did not believe on reasonable grounds that the complainant was consenting at the time he had sexual intercourse with her.

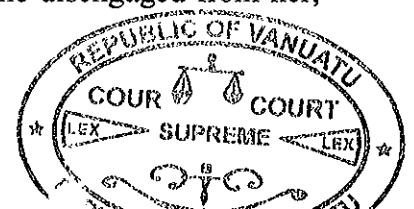


5. The defendant gave evidence in this case and he said that he intended to have sexual intercourse with the complainant and this was to be consensual. However after the complainant lay on the ground and lifted up her skirt, the defendant said that he lost interest particularly as he also heard her sister calling out for her at that time and so he ran away. In other words, he denied having sexual intercourse with her.
6. When a defendant gives evidence that, if accepted, amounts to a complete answer to the charge, one of three situations can arise. First, the Court might accept his evidence as being credible in which case it will quickly find the defendant not guilty. Second, the Court may be uncertain whether to accept the defendant's evidence in that respect. In that event, the defendant would also be found not guilty on the basis that he has at least raised a reasonable doubt in the Court's mind as to his guilt. The third possible outcome is that the Court does not accept the accused's account of events, his evidence, and rejects it as being incredible or unacceptable. In that event, the Court does not simply move to find the accused guilty. All that has happened is that the Court has rejected his evidence, that it does not accept his evidence as credible evidence in the case.
7. By the term *credible evidence*, I am of course referring to evidence from a witness that the Court accepts has been given honestly and sincerely but also evidence that the Court can rely upon as being accurate or correct. Even the most honest witness can make mistakes. There is that two-fold aspect to a determination of credibility.
8. If the Court reaches the position that the defendant's evidence on the vital issue cannot be accepted as credible, the Court simply puts that evidence to one side. It is then necessary for the Court to have regard to evidence that it does accept as credible to see whether the prosecution has proven its case to that high criminal standard of beyond reasonable doubt.
9. If the defendant's evidence is not accepted in this case, the case comes down to the assessment of the complainant's credibility. If the Court does not accept that the complainant's evidence brings it to the point of proof of the crime beyond reasonable doubt, then the defendant is to be found not guilty.
10. The case for the prosecution is in complete line with the evidence given by the complainant. She explained that she was walking with her younger brother and a small male cousin along the main road from Ielkis village to Imahl village. They had gone passed a football ground



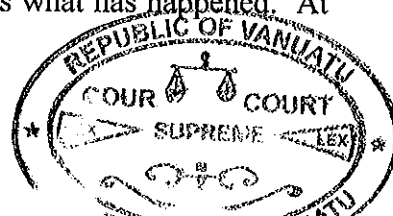
where some boys were playing football. The complainant was 18 at the time. This was mid-afternoon on 18 January 2010. The complainant and the two little boys took a short cut off the main road. They were on their way to the complainant's sister who lived close by.

11. The complainant noticed two or three boys had been following them while they were on the main road. When they turned off on to the short but, one of the boys followed them and caught up with them. Both the complainant and her young brother say that this was the defendant, Faty Jimmy. Neither the complainant nor her young brother knew the defendant although the complainant did recognise as one of the young men in the district. The defendant was about 16 or 17 years of age at that time.
12. The complainant says that when the defendant caught up with them, he engaged them in conversation and enquired where they were going. The complainant explained that they were going to visit her sister. The complainant says that the defendant then told the 2 boys to go on ahead and he then blocked the complainant's way and hetried to kiss her. She indicated that she did not want to kiss him but he held her hand and pulled her into the bushes. She says that she noticed that, when she was being pulled into the bushes, her young brother saw what was happening and ran off.
13. The complainant says that she told the defendant to let her go but that he told her that if she ran away he would cut her with his knife. He was carrying a bush knife at that time. She said that she wanted to shout but he put his hand over her mouth. She indicated that she was scared of the knife and asked him to give her knife. It appears that at some stage she did indeed gain hold of the knife.
14. The defendant then forced the complainant to lie on the ground. She says that he lifted her dress and removed her panties. He then had full sexual intercourse with her. She says that he ripped her tee shirt and her skirt while he was pulling her down on to the ground as she was resisting him. The tee shirt and the skirt were produced as evidence and they show a large tear under the armpit on one side of the tee shirt and also tears in the skirt all consistent with this aspect of the complainant's evidence.
15. The complainant says that full sexual intercourse took place involving the penetration of her genitalia by his penis. She said that it was in the course of this sexual intercourse that the defendant heard the complainant's big sister calling out for her and he disengaged from her,



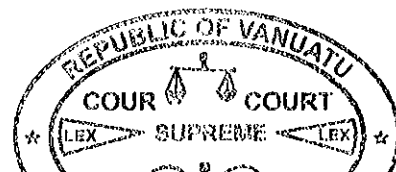
pulled up his pants and ran away. She then made her way to the main road where she met up with her sister. She went to the police later that day.

16. The complainant's small brother Sam gave evidence. He said that he was about 10 years of age at that time. He could not remember how long ago this particular incident happened although he said that he remembered the incident itself. It would appear that he was around 7 or 8 years of age at that time. Notwithstanding his tender age, this young lad was an impressive witness. His evidence was given in his local language which was then translated into Bislama. Sam confirmed his sister's account of events to the effect that they were walking along the road when they met up with the defendant. He said that he became frightened when he saw the defendant pulling his sister into the bushes and so he ran off to get help from his big sister. What was particularly impressive about Sam's evidence is that appeared absolutely no attempt by him to embellish his account of evidence in any way. What he described having occurred is all that he could have seen if his sister's evidence is correct. It is clear that Sam was sufficiently concerned for his sister that he ran to the home of his big sister and raised the alarm which resulted in the big sister and an uncle then coming to help. Clearly given the timeframes involved the big sister lived quite close by.
17. Both the complainant and her younger brother made a dock identification of the defendant. Of course, dock identification is a notoriously unreliable form of identification given that there is usually only one person who appears to have been charged with the offence who is in Court. By itself, it would be rare indeed for that to be sufficient to found a conviction.
18. At the commencement of the case, in his opening address, Mr Takau informed me that there would be 3 witnesses called for the prosecution. As it happened, only 2 witnesses were called; being the complainant and her brother. At the conclusion of Sam evidence, Mr Takau informed me that Constable Waka, who had taken the statement from the defendant, would not be called as he was in Port Vila. It appears that he was not aware of the arrangements for this trial and the need for him to be present. I have to say I find that extraordinary.
19. The defendant entered his plea of not guilty before the Chief Justice on 5 June 2012 and the case was then set down for trial for this week; being the week of the next scheduled Tanna tour. It is simply incredible, as I perceive matters, that it was not confirmed with Constable Waka that he would be required here this week; but that apparently is what has happened. At



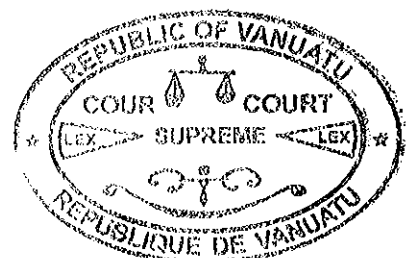
that stage, and after the prosecution had closed its case, I gave some consideration to whether there was a case to answer solely in respect of the sufficiency of evidence of identification. Without the defendant's statement (that was to be produced by Constable Waka), the only evidence that placed the defendant at the scene and as the offender was the dock identification evidence of the complainant and her young brother.

20. In the end, however, I considered that there was just sufficient evidence to warrant the case proceeding. I took notice that this is a small village community where people residing within reasonable walking distances would be known to each other if not by name then certainly by appearance. In say Port Vila, a person might live there all his life and never have met or seen a person living just around the corner. That is not likely to have happened in a small village community in this area of Tanna. The complainant's evidence that she recognise the defendant but did not know his name is perfectly understandable and enhances the dock identification just to the point where I considered that there was a case to answer.
21. Accordingly I did not stop the case at that time and instead read the section 88 statement out to the accused in both English and Bislama. I gave a copy of my prepared statement under section 88 to Mr Livo and requested that he go over it carefully with the defendant so that the defendant was in no doubt as to his right to elect whether to give evidence or not. After Mr Livo had had that discussion with the defendant, I called on Mr Livo to indicate whether the accused elected to call evidence or not. Mr Livo indicated that the accused elected to call evidence and that he would be the only witness. Mr Livo then opened the case and explained that the defence was that no sexual intercourse took place at all although the accused would admit to some involvement with the complainant.
22. The defendant then gave evidence. He said that after he had finished his football match that afternoon at Imahl, he was walking along the road with two of his football friends when he decided to take a short cut. While he was on that short cut, he came across the complainant and her two brothers. He said that he engaged them in conversation, he made jokes and the complainant appeared to respond to him in a positive way. It appeared to him that she was attracted to him. After a short time, he asked the complainant whether she wanted to have sex with him and he said that she indicated that she was willing although mentioned that it was difficult as she had her two brothers with her. The defendant stated that he told her that having sex was not as loud as a "can" and that it does not make a lot of noise. That was a



curious observation by him, if it indeed was made, and I am still unable to understand what was meant by that unless, of course, they were very close to other people who might hear them having sex.

23. In any event, the defendant said that the two young boys then went on and he asked the complainant to show him a place where they could go to have sex. They went in to the bush and, while they were walking, he said that he was holding the bush knife and swinging it and it brushed against the complainant. She asked if she could hold it. And it would appear that he gave it to her. He said when they got to a suitable spot in the bush, she put the knife down, lay down on the ground and pulled up her skirt. He noticed that she was not wearing any panties. He said that it appeared that she had blood on her private parts and he could see that she was pregnant. He asked her if she was pregnant and she said she was. At about that time, the defendant said that he was in the process of lowering his trousers to have sex with her but he also heard, at that time, the complainant's sister calling out for her. The fact that she was pregnant, the fact that she had blood around her private parts and hearing the big sister call out all combined such that he lost interest, pulled up his pants and he ran off. He says the complainant ran after him and he had to tell her to go back. Later, he was asked to go to the police station.
24. The question of identification and what concerns there may have been in respect of the dock identification have of course been completely removed by the defendant's evidence. It is clear that he places himself at the scene and it is clear that this defendant is the young man whom the complainant and her young brother gave evidence about. Of course, he has given a completely different account of events compared to that given by the complainant and also in some respects to the young brother. In particular, the defendant says that the intention to have sex was common between both the complainant and himself and that she was perfectly willing to do so.
25. His evidence that the complainant was agreeable to have sex with him is in direct conflict with the evidence of the complainant where she says that she told him that she did not want to have sex. Furthermore, that she resisted his efforts to kiss her but that she was pulled into the pushes by the defendant who had hold of her hand and he had also threatened to cut her with the bush knife if she tried to ran away.



26. Her evidence is corroborated by her small brother in a particular and material aspect. He confirms that he saw his sister being pulled into the bushes by the defendant who had hold of her hand. Furthermore, he was sufficiently concerned for his sister and frightened as to what might become of her, that he ran off to find his big sister and to raise the alarm. His evidence provides some insight into exactly what happened that day as I have absolutely no hesitation in accepting his evidence. It provides the necessary support to the complainant's evidence that indicates that she was resistant to the defendant's attention to him. That cuts directly across the defendant's evidence that the complainant was a willing participant with a common intention to have sex.
27. I reject the defendant's evidence. I do not accept his account of events. I find it incredible. I consider that the complainant's account of events is credible particularly because of the support it received from her young brother. I accept that there was full sexual intercourse as defined under the Penal Code involving penetration of the complainant's genitalia by the penis of the defendant. I accept that this was without the complainant's consent. I accept that the defendant knew that the complainant was not consenting to the sexual act particularly given that he dragged her into the bushes, that he threatened her with a bush knife and that he blocked her way even when she had the bush knife in her possession.
28. Perhaps it is necessary to say something about consent. What is required is a true consent. That is not a consent that is given as a result of threats or the fear of violence but one given voluntarily by a woman (or young woman in this case) who understands the nature and quality of the intended sexual act and indicates her willingness to participate. That is not the case here. The complainant said that she did not want to have sex with the defendant and he had to resort to force and the threat of violence in order to remove her physical defence to his intention to have sex with her. Clearly, this demonstrates that the defendant did not have an belief on reasonable grounds that she was consenting.
29. Accordingly, I find the charge proven. The verdict is one of guilty.

**BY THE COURT**

