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

Criminal Case No.45 of 2014

PUBLIC PROSECUTOR

-V-

1. TOM BETHUEL

2. RONALD PRIPRI

Coram: ***Justice D. V. Fatiaki***

Counsel: *Mr. L. Malantugun and Mr. D. Boe for the State*
Mr. G. Takau for Bethuel
Mr. B. Livo for Pripri

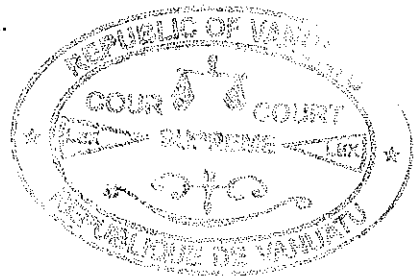
Date of Verdict: *16 October 2014*

VERDICT

1. The defendants are jointly charged with having Sexual Intercourse Without Consent with the complainant ("*Eta*") at Erakor Bridge area in the early morning hours of Saturday 19th April 2014. The lead up to the incident commenced however on Friday evening (18th April) at about 7.00 p.m. when the complainant and a girlfriend (Shirley) attended 2 venues where several buckets of homebrew *("yeast")* was consumed in the company of the defendants and other young men and women. The complainant became intoxicated and was seen dancing provocatively and kissing some of the boys during the course of the evening.

2. Shortly after midnight the complainant who had had enough drinks was returning home when she was accosted by the first defendant who insisted for her to stay until the drinks was finished. Upon her refusal the complainant says the first defendant held her t-shirt tightly and tore it as he pushed her into a manioc patch beside the track she was following. Despite her resistance and her threat to report the first defendant to the police, he tore her panty and had forcible sexual intercourse with her.

3. When the first defendant finished and got up the complainant also got up, but, before she could dress herself, the second defendant appeared and pushed her back onto the ground and also had forcible sexual intercourse with her despite her threat to also report him to the police. The complainant claims that during both incidents there were other unidentified young men nearby egging on both defendants to "*make her pregnant*". She was also crying throughout.



4. After intercourse with the second defendant the complainant gathered her clothes and immediately went to a nearby house where she related the incident to an elderly woman. With the elderly woman's help they went to the house of a police officer nearby and, again, the complainant related the incident to the officer's wife and to the police officer who immediately called the police station.

5. The elderly woman (**Renna Siri**); the officer's wife (**Collette Toa**) and the police officer (**Sgt. Kami Toa**) all broadly confirm that the complainant had come to their homes in the early hours of Saturday morning 19 April 2014 in a distressed and dirty state, crying with torn clothes and claiming that she had been raped by some boys. All of them were also united in saying that the complainant was *"a little drunk"* at the time or "*smelt of alcohol*". I accept their evidence which is supportive of "*recent complaint*" which is admissible to show consistency and to rebut any suggestion of recent fabrication on the part of the complainant. Having said that, I also accept that such evidence of "*recent complaint*" is <u>not</u> independent of the complainant, and therefore is incapable, in law, of providing corroboration of her evidence.

6. Continuing with the narrative, upon receiving the call, the police attended at the scene and escorted the complainant home. Later that day the complainant was examined at the Vila Central Hospital at the request of the police and the examining doctor found evidence of recent sexual intercourse ("*pain in the perineum*") and her cheeks were red and tender. The doctor was unable to say if intercourse was non-consensual and attributed the pain to a lack of lubrication during intercourse.

7. After the prosecution closed its case, <u>both</u> defendants were read their rights under **Section 88** of the **Criminal Procedure Code** ("*CPC*"). Both defendants elected to give sworn evidence and were extensively cross-examined by prosecuting counsel. I am also grateful for the oral closing addresses from all counsels that I have found of considerable assistance in my preparation of this verdict.

8. **<u>Tom Bethuel</u>** testified that on the early evening of Friday 18 April 2014 at about 6pm he started drinking homebrew with some boys and girls at his home, later, Shirley and the complainant joined them and the drinking continued.

9. While they were drinking the complainant took his mobile phone and was listening to the music on it. The first defendant testified that the complainant started "*doing sexy dance*" (she sat on his laps and wriggled her bottom on his genitals). The complainant also kissed him ("*pullum tongue*"). The drinking group then moved from his home to an open area nearby because of the noise and the complainant left with Shirley.

10. He next saw the complainant crying with her T-shirt torn and blood coming from her mouth and, when he asked her about it, the complainant said her brother "*Albert*" had assaulted her. Thereafter they all went and joined a group of boys who were also drinking homebrew nearby. The complainant joined in the drinking and was dancing to the tune: "*shake baby shake*". Again the complainant danced with him and kissed him and was heard daring the boys calling them "*cowards*" and openly saying: "*I want to fuck*" (repeatedly). The first defendant and the complainant then went and had consensual sexual intercourse on a "*smooth level ground*". After sex he invited the complainant to leave with him but she declined saying she was afraid of her father as she had lied to him about going to church.

11. In cross-examination he denied any knowledge of how the complainants' panty ("*kilot*") was torn or tearing her T-shirt. He was unaware of whether the complainant had sex with anyone either before of after him but he admits having sex with her. He denied running after the complainant, grabbing her arm and telling her to return and finish the drinks. He denied holding her tightly, pulling her T-shirt or pushing the complainant into a manioc bush. He denied holding, slapping, or squeezing her mouth or telling her not to report him to the police. He denied there were others watching them during intercourse and saying "*make her pregnant*".

12. Finally in re-examination **Tom Bethuel** said he believed the complainant agreed to sexual intercourse because she didn't resist or scream out or do any other thing to show she was not consenting and she had been kissing him and asking for a "*fuck*".

13. The first defendant called one witness **Albert Seule**, who confirmed that the complainant calls him "*brother*" as their mothers are cousins. He recalled the evening of Friday 18 April 2014 at about 6pm he learnt that his wife, Shirley, and the complainant were going to a nightclub. He pursued them and when he caught up with them in the Erakor area he assaulted his wife "*strong*" and when he tried to slap Shirley she ran away. He managed however to slap the complainant on the cheek and mouth ("*strong*") and she flew and landed on a barbwire fence a metre away and tore her t-shirt. The complainant was drunk at the time.

14. For his part the second defendant **Ronald Pripri** testified that on the evening of Friday 18 April 2014 he drank about 20 shells of kava and on returning home near Erakor bridge he was invited to have some "*yeast*" (homebrew). He joined the drinking party of 5 boys and 2 girls where they drank 1 bucket of homebrew before Shirley and the complainant arrived at about 11.30 p.m.

15. The drinking continued with a second bucket of homebrew and the complainant danced provocatively to the tune: "*shake baby shake*". She also danced with all the boys in the group and kissed the first defendant as well as himself. The second bucket was finished within an hour and the complainant called the boys: "*cowards*" and openly said: "*I want to fuck*".

Later the complainant left with the first defendant leaving him behind at the drinking party. He was the last to leave the drinking party.

16. The second defendant said as he was on his way home, the complainant grabbed him by his collar and offered to fuck him as he had been giving her money. He obliged and they had consensual sexual intercourse. After intercourse he helped the complainant get dressed as she was drunk. He left her resting at a burao tree.

17. **Ronald Pripri** related that the complainant had come to his home the previous day Thursday 17th April 2014 and invited him to go out with her to the nightclub but he was not keen so he put her alone on a bus with VT500 for her fare and entry fee. He also testified that he first met the complainant in December 2013 when they had consensual sexual intercourse at Freshwota field after a few drinks.

18. In cross-examination the second defendant agreed (after some elaboration) to several self-evident hypothetical propositions including, that consensual sexual intercourse on one occasion is no guarantee of consent to intercourse on any subsequent occasion. In other words, each instance of sexual intercourse requires consent of the parties. He agreed that the complainant was not his wife and that there was no police report about the incident in December 2013 because it was consensual. He denied however that sexual intercourse with complainant at Erakor bridge area on 19 April 2014 was by force even though there had been a police report.

19. He denied pushing the complainant down after she had sex with the first defendant. He denied that the complainant threatened to report him to the police, or that she struggled or cried nor did she run away after they had sex. He denied the presence of "*on-lookers*" while they were having sex or the digital penetration of the complainant's anus by an unknown person. He denied that the complainant's panty was torn when he helped her dress after intercourse and had seen that her t-shirt was already torn when the complainant joined the drinking party earlier that evening. He denies any knowledge of where the complainant went or what she did after he left her.

20. In re-examination Pripri said he believed that the complainant consented to sexual intercourse with him because she had kissed him and offered to fuck him. So much for the evidence in the case.

21. To establish an offence of Sexual Intercourse Without Consent in the present case, the prosecution must establish beyond reasonable doubt three (3) essential elements or ingredients as follows:

    (i) That each named defendant had sexual intercourse with the complainant;

(ii) That the complainant did not consent to sexual intercourse with the named defendant; and

(iii) That neither named defendant believed on reasonable grounds that the complainant was consenting at the time that intercourse was taking place.

22. Although the defendants are jointly charged, the prosecution must nevertheless, establish the above 3 ingredients separately against each defendant personally. It should be pointed out that there is no clear suggestion in the prosecution's evidence that both defendants were present and helping each other during intercourse with the complainant and therefore strictly, they should not have been jointly charged in the same count. No prejudice has occurred however so that technical defect can be overlooked on this occasion.

23. Be that as it may, I am required as a matter of law to consider the evidence against each defendant separately and I warn myself that satisfaction of the prosecution's case against one defendant does not automatically mean I must or would be equally satisfied of the prosecution's case against the other defendant and vica versa. The conviction or acquittal of each defendant depends entirely on the nature and quality of the prosecution's evidence against that particular defendant.

24. Furthermore, just as I am required to carefully consider and evaluate the prosecution's evidence, I am also equally required to weigh and assess the defendants' evidence whilst always bearing in mind that the legal burden of proof in this criminal trial remains throughout on the prosecution alone to establish its case against each defendant beyond a reasonable doubt. The defendants have no equivalent burden to disprove the prosecutor's case or to establish their innocence.

25. Having said that, if at the end of my consideration of all of the evidence both for and against each defendant, I am satisfied and feel sure of that defendant's guilt then it will be my duty to convict him, but, if I am left in some doubt about the guilt of either or both defendants then, equally, it would be my duty to acquit. Furthermore even if, I reject the evidence of a defendant, I would still have to be satisfied beyond a reasonable doubt by the prosecution's evidence of that defendant's guilt.

26. I am also conscious that this case largely comes down to the complainant's word against the word of each defendant and in such a situation it is necessary that I warn myself against convicting on the complainant's uncorroborated evidence alone. Experience shows that crimes of sexual assault occur in private and complaints are therefore easily made and difficult to rebut. It is prudent therefore that I look for corroboration in the event that I believe the complainant's evidence.

27. Equally I must put aside any feelings of sympathy that I may have for the complainant or any prejudice I may entertain against the defendants. This is not a court of morals but a court of law which demands a fair, objective and impartial consideration of all of the evidence in the case.

28. For example in this case, it is tempting to ask why would a complainant immediately complain about sexual intercourse to a complete stranger shortly after it had occurred if intercourse was consensual? and to infer from that, that intercourse must have taken place without her consent. Equally, given the complainant's graphic description of being pulled, thrown ("*slingem*") onto the ground and then physically overpowered despite her resistance, the absence of any detectable physical injury(ies) on her naked body and back which was in direct contact with the ground may support the opposite inference.

29. In either event, it is solely the prosecution's duty to prove beyond a reasonable doubt not only that the complainant did not consent to sexual intercourse with both defendants but, additionally, that neither defendants reasonably believed that the complainant was consenting when he had sexual intercourse with her.

30. In the present case, it is common ground that sexual intercourse did take place between the complainant and each of the defendants. That much is admitted by each defendant under oath. This first ingredient or element of the offence may thus be taken to be conclusively established. The remaining two (2) elements however, namely, the absence of consent by the complainant to the act of sexual intercourse and the absence of any reasonable grounds on each defendant's part for believing that the complainant was consenting to the act, are both seriously in dispute and requires close and careful scrutiny.

31. As for the second element, absence of consent, the complainant's evidence is that she was overpowered by each defendant, in turn, immediately before intercourse occurred and that her mouth was covered or squeezed to muffle and prevent her from calling out for assistance. She also claims that she was crying throughout and had even warned each defendant, that she would report him to the police if he did anything to her but with no success. In short, she did not consent to having sexual intercourse with either defendant.

32. In cross examination however, she admitted kissing two (2) unidentified boys during the drinking party and dancing at the second venue in the presence of both defendants. She denied kissing the defendants or knowing the names of the defendants at the time of making her police statement.

33. The complainant was extensively cross-examined by both defence counsels about the contents of her police statement with a view to establishing that she had made "*prior inconsistent statements*" from her

evidence in Court and therefore, presumably, should not be believed. The cross examination elicited a number of "*omissions*" in her police statement such as: her calling out to Shirley when the first defendant accosted and tightly held her; the digital penetration of her anus when the second defendant was having intercourse with her; the presence of several unidentified boys egging on the defendant during intercourse; and her prior familiarity with the second defendant.

34. If I may say so such "*omissions*" are not the same as clear contradictions nor do they constitute "*prior inconsistent statements*". Omissions in a witness's police statement can occur for any number of neutral reasons such as: carelessness on the part of the officer in not recording the omission or the witness may not have been asked about the omitted matter at all during the recording of the statement or because of unfamiliarity and nervousness on the witness' part in not recognizing and filling in the omission or simple forgetfulness in the witness' recollection of the events.

35. Equally, material variations between a witness' evidence and police statement may nevertheless indicate, a willingness or propensity for embellishment and exaggeration on the part of a witness.

36. Having heard and closely observed the complainant during her oral evidence, I am driven to the unfavorable conclusion that important parts of her evidence was exaggerated to reinforce her complaints against the defendants. For instance, she claimed that she was injured on her back by a stick when the first defendant threw her heavily onto the ground but the doctor who examined her the next day found no injury whatsoever to her back. She also claimed that both defendants had forcefully squeezed her mouth to prevent her from calling out but she makes no mention in chief, of her brother "*Albert*" slapping her on her mouth.

37. In two particular instances, I find the complainant's evidence untrustworthy. The first relates *when*? and *who*? tore her t-shirt. She claims it was the first defendant immediately prior to sexual intercourse taking place between them sometime after midnight on the 19th of April but, I prefer and accept the independent and direct evidence of her "*brother*" **Albert Seule** who testified that between 7 and 8 pm on Friday 18th April after assaulting his wife in the Erakor bridge area he "*slapped the complainant* (strong) *on her mouth and she flew and landed on a barbwire fence a metre away which tore her t-shirt*". The witness also unhesitatingly and correctly indicated where on the complainant's t-shirt it was torn (**ie**. on the right side under the arm pit) without being shown the t-shirt.

38. The second instance was her recorded denial of knowing either of the defendants' names in her police statement which was recorded on 20 April 2014 the day after the incident. In this regard, I prefer and accept the second defendant's evidence that he was well known to the complainant

since December 2013 and, indeed, the complainant considered him a "*friend*" who had helped her with money and whom the complainant had visited and invited to accompany her to the nightclub the day before the incident (**ie**. Thursday 17 April 2014).

39. Although the complainant testified that she did not consent to intercourse with either defendant, there can be no denying and I find that before intercourse had occurred, she had consumed about 8 to 10 cups of homebrew and was dancing (provocatively) and openly kissing and daring complete strangers during the drinking party. That is not, in my view, the behavior of a sober person who was in complete control of her senses utterances and actions and, despite the complainant's persistent denials, I accept that she was considerably under the influence of alcohol when she left the drinking party in the early hours of the morning of 19 April 2014.

40. Likewise the complainant's behavior in visiting and asking the second defendant to accompany her to the nightclub on 17 April 2014, knowing full well that he was a married man is an act of foolishness and suggests a level of familiarity existed between them.

41. I find that in her state of intoxication, the complainant's recollection of the events of the early morning hours of 19 April 2014 was vague, unconvincing and unreliable, and, I disbelieve her in her denials of kissing the defendants or daring the boys and saying to them "*I want to fuck*" and also when she claims that she left the drinking party with Shirley (who was not called by the prosecution). Instead, I prefer and accept the first defendant's evidence that he left the drinking party with the complainant as well as the evidence of the second defendant about their prior incident of consensual sexual intercourse in December 2013.

42. In the circumstances I am not satisfied that the prosecution has established either the second or third elements of the offence against each defendant to the required criminal standard beyond all reasonable doubt.

43. Accordingly I find each of the defendants not guilty of the offence charged and I acquit each defendant. You are both free to leave.

DATED at Port Vila, this 16th day of October, 2014.

BY THE COURT

D. V. FATIAKI
Judge.