

PUBLIC PROSECUTOR

V

JONATHAN KALSEI

LULU KALSEI

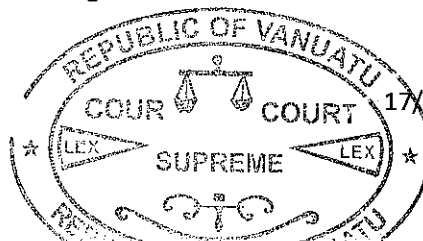
Coram: *Justice Chetwynd*
Ms Tasso: *for the Public Prosecutor*
Mr Takau: *for the Defendants*
Date of Hearing: *8th February 2018 at 9:00am*

JUDGMENT

1. The 2 defendants were charged with rape. As it closed its case the prosecution asked for the charges to be amended to rape contrary to sections 90(b)(vi) and 91 of the Penal Code. This acknowledged that the issue was about consent. The prosecution case was that consent had been obtained by the effects of alcohol on the complainant. Mr Takau for the defendants did not object to the amendment.

2. I heard evidence from the complainant and from 1 other witness. The second prosecution witness was of limited assistance. She confirmed that she had seen the complainant on 1st July 2017 when the offence was alleged to have taken place. She was of the firm opinion the complainant was drunk.

3. The complainant gave somewhat confusing and contradictory evidence. She said she had been drinking wine (approximately ½ a bottle) and then had gone to the nakamal where she had consumed an unknown quantity of yeast or home brew. She was drunk. However, nowhere in her evidence did she say her reasoning was so impaired by alcohol that she did not know what she was doing. She confirmed that she agreed to have sex with both defendants. She had known one of them previously and had had "an affair" with him. In evidence in chief she said the sex was not consensual. Under cross-examination she said she had agreed to have sex but was surprised



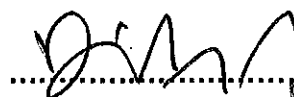
when one of the brothers actually had sex with her. She did not allege the defendants plied her with drink to ensure she was drunk. At no time did the complaint say in her evidence she would not have consented to have sex if she had not drunk the alcohol she did drink that night and early morning. In short it was not her evidence that her consent was obtained by the effects of alcohol.

4. At the close of the case for the prosecution Section 164 of the Criminal Procedure Code requires me to consider whether, as a matter of law, there is no evidence on which the accused can be convicted. This is another way of asking whether there is a prima facie case against the accused. I am not required at this stage to consider the likelihood of conviction on the basis of matters proved beyond reasonable doubt but there must be some evidence against the defendants.

5. At this point there is simply no evidence. There *is* evidence from the complainant of consent. There *is* evidence the complainant was drunk. The effects of alcohol on a person's inhibitions are well known. It might be said a person who is drunk or inebriated is more easily persuaded to do things they might not do when sober but that is not the same as saying a person is so effected by alcohol that they have been robbed of their senses and reason and that they are unable to give consent. There is sometimes a very thin line between those two states of mind but there is no evidence that line was crossed on this occasion. In all the circumstances I find there is no evidence on which the defendants can be convicted. Accordingly they are not guilty. That is the verdict I will enter. The defendants should be released from custody forthwith.

DATED at Port Vila, this 8th day of February, 2018.

BY THE COURT



D. CHETWYND

Judge

