

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

**Criminal
Case No. 18/1171 SC/CRML**

BETWEEN: Public Prosecutor

AND: NB
Defendant

Coram: Justice Aru

*Counsel: Ms. M. Tasso for the Public Prosecutor
Mr. F. Tasso for the Defendant*

VERDICT

Introduction

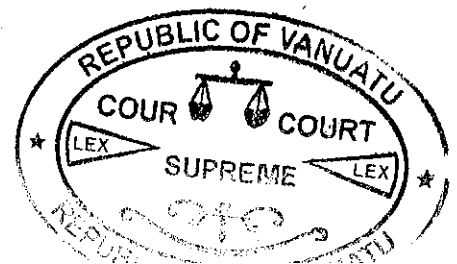
1. This is a criminal case involving two young people. At the time of the offending the defendant was 15 years of age and the victim was 5 years old. Counsels consented to an application by the prosecution that their names be suppressed from publication. I will therefore refer to the defendant as NB and the victim as the complainant.

Charges

2. NB is charged with a single count of sexual intercourse without consent. The prosecution alleges that on 19 February 2018 NB had sexual intercourse with the complainant by pushing his finger into her vagina and anus without her consent.
3. The burden of proving these allegations rests with the prosecution. NB does not have to prove his innocence. The prosecution has to prove each element of the offence beyond reasonable doubt, namely that NB had sexual intercourse with the complainant; that the complainant did not consent and that NB did not believe on reasonable grounds that the complainant consented.

Undisputed facts

4. Some of the evidence were not disputed and were tendered by the prosecution. The complainant's birth certificate giving her date of birth as 16 April 2012 was tendered as **Exhibit P1**. Two days after the alleged offending occurred the complainant was taken to Vaemali Hospital for examination. The medical report tendered as **Exhibit P2** identified a laceration/trauma on the right vaginal area and the anal area of her body.

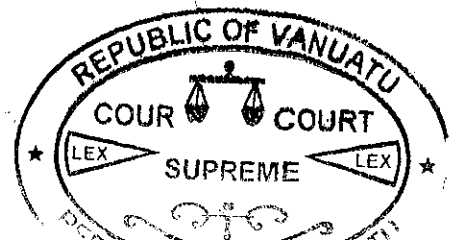


The defendant was informed of his rights both before the trial begun and before the defence case opened.

5. Initially on 12 August when the trial begun the prosecution called 5 witnesses. They were unable to conclude their case as the complainant was unable to give evidence. The prosecution then applied for an adjournment to have her assessed by a psychologist to determine her fitness to give evidence. On 7 November 2019 a final assessment was done and it was recommended that it would be in her best interest not to call her given her tender age. The assessment report was tendered as **Exhibit P3**.
6. The trial resumed on 21 November with the prosecution calling the Police Officer who interviewed the defendant as their final witness. His statements were tendered as **Exhibits 4, 5 and 6**.

Analysis of the evidence

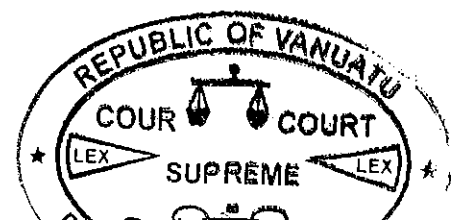
7. At trial, the first witness called by the prosecution was the complainant's maternal grandmother. Her evidence is that on the day of the alleged offending, the complainant walked some distance from her home to see them. When she arrived, the complainant's grandfather was still in the gardens. When he returned he gave the complainant some navel (nuts) which she cut and ate. Her grandmother later got some water and gave her a bath in the bath room. The complainant then went to sleep. Later that night the complainant's father came looking for her and took her back that same night.
8. When this witness was cross examined, it was put to her that whilst bathing the complainant if something had happened to her, the complainant would have told her that her "pis pis" (vagina) was sore. She agreed but said the complainant did not tell her anything when she was washing her. She said if something had happened the complainant would have told her.
9. The complainant's grandfather said that the complainant stayed overnight with them.
10. The complainant's mother said the next day in the morning she brought the complainant's school uniform to her grandparent's house. The complainant then went to school as usual. After school her father picked her up from school and they went home. This witness said that when they got home both herself and the father spoke to the complainant to enquire why she went to see her grandparents. She said the complainant told them nothing. Under cross examination she agreed that what the complainant said about the defendant was all lies. She was not re-examined.
11. Her husband, the complainant's father said he spoke to the complainant by himself as the complainant's mother would always beat her. After speaking with the complainant she told him NB took her to the beach, removed her clothes and had sex with her.



12. Nathalie Kalo is a Women's Centre advocate for women against violence. She said the complainant's father took the complainant to see her to report the incident. At that time she observed that the complainant was crying and had swollen legs. Upon enquiring, the complainant told her that her mother beat her up because she didn't talk. After she was beaten she said NB had sex with her.
13. Sergeant Willie Daniel's evidence is that when he first interviewed the defendant he denied the offending. On the second occasion, the defendant changed his mind and admitted the offending.
14. The defendant gave evidence himself. He denied holding the complainant's hand or even taking the complainant down to the beach and having sexual intercourse with her. He maintained his evidence under cross examination. He said the Police went to see him four times. On the first three occasions he denied the offending. The fourth time the Police went to see him he admitted the offending because his mother told him to do so.
15. The defendant's mother admitted in her evidence that she told her son to admit the offending. Her reason being that the complainant's father never liked her son as he was considered an outsider who should return to his uncles on Ambrym. The defendant's father was from Ambrym and had died some time ago.
16. When considering all the evidence called by the prosecution, there is no direct eye witness account of the offending. The complainant's grand mother gave the complainant a bath but she told her nothing and showed no sign of pain or discomfort whilst having her bath.
17. The complainant's mother under oath said the complainant told her nothing. The complainant's father on the other hand said the complainant told him. When he took her to Nathalie, the complainant told Nathalie that her legs were swollen as a result of being beaten by her mother who whipped her for not talking. After being beaten she mentioned the defendant's name.

Application of the law

18. In order to secure a conviction, the prosecution must prove all the elements of the offence beyond reasonable doubt. Noting that the complainant did not give evidence due to her age the only evidence linking NB to the offending is what the complainant told Nathalie that she was whipped by her mother for not talking and after being whipped which resulted in her swollen legs she named the defendant. There is no other evidence of the complainant complaining to any one if the defendant did something to her. The allegation against the defendant is that he penetrated the complainant's vagina and anus with his fingers. This is a very serious charge. Considering what the



complainant told Nathalie, the question remains whether she was coerced or forced into naming the defendant.

19. For these reasons I am not satisfied that the prosecution has proved its case beyond reasonable doubt.

Verdict

20. On the single charge of sexual intercourse without consent I find the defendant no guilty and he is acquitted accordingly.

DATED at Rovo Bay this 21st day of November, 2019

BY THE COURT

D. Aru
Judge

