

PUBLIC PROSECUTOR VS-HILSON LIU

Coram: *Mr. Justice Oliver A. Saksak*

Counsel: *Damien Boe for Public Prosecutor
Jane T Aru for the Defendants*

Date of Hearing: *25th and 26th March 2019*

Date of Verdict: *27th March 2019*

Date Issued: *2nd April 2019*

ORAL JUDGMENT AS TO VERDICT

1. The defendant was tried for one charge of Sexual Intercourse Without Consent under sections 90 and 91 of the Penal Code Act CAP 135 (the Act).

Section 90 states-

“90. Rape defined

Any person who has sexual intercourse with another person –

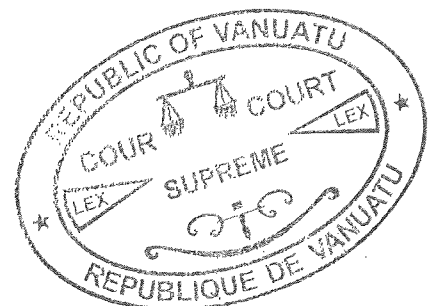
- (a) without that person’s consent; or*
- (b) with that person’s consent if the consent is obtained –*
 - (i) by force; or*
 - (ii) by means of threats of intimidation of any kind; or*
 - (iii) by fear of bodily harm; or*
 - (iv) by means of false representation as to the nature of the act; or*
 - (v) in the case of a married person, by impersonating that person’s husband or wife;*
 - (vi) by the effects of alcohol or drugs, or*
 - (vii) because of the physical or mental incapacity of that person.*

commits the offence of rape. The offence is complete upon penetration.

91. Punishment of rape

No person shall commit rape.

Penalty: Imprisonment for life.”

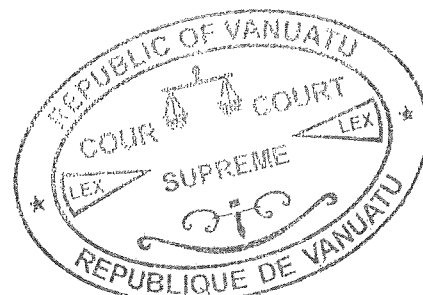


2. The prosecution has a high duty of proof beyond reasonable doubt. This duty is both a legal and evidential burden (section 8)
3. Intercourse is not a disputed element. The two remaining elements the prosecution must prove beyond reasonable doubt are (a) that the complainant did not consent, or that consent was obtained by force, means of threats, fear of bodily harm or false representation, and (b) that the defendant knew the complainant was not consenting to sex taking place.
4. The defence was that the complainant consented to sexual intercourse. There was no force or threats made to obtain that consent. The defendant believed from the complainant's behaviour, words and conduct both prior to and after sex had occurred, that she was consenting to sexual intercourse.
5. The complainant gave evidence on oath. Relevantly she said on Sunday 21st October 2018 she was returning to school. On the way she met the defendant and Banga. She walked with some students from Nasawa. The students stopped where the defendant and Banga were sitting. She continued on. The defendant followed her, stopped her and asked her to follow him but said she did not want to. They went up a hill. The defendant pulled her on her left hand by his right hand. She had her school bag with her. He pulled her to the bush, it was a garden. There he removed his trousers.
6. While still holding her hand the defendant removed her clothes, pushed her to the ground and had sex with her. He was afraid of him because he is bigger. She pushed him away. She got up, wore her clothes and came back to the road and went back to school where she spoke to Miona about what happened to her. She saw Banga on the road but did not speak with him.
7. The defendant gave evidence on oath in his defence. Relevantly he said he knew FS the complainant. He saw her at Austin's store and she smiled at him. He asked her for her phone number but she did not have one. Then he left on a truck. He saw again at Quatekwol and she smiled at him, he smiled back at her. On 19th October 2018 he saw her with 2 other students with Banga. They planned to meet at 3:00pm on Sunday afternoon at the place they were meeting. Then they left. On Sunday afternoon 21 October 2018 they followed their plan. While waiting with Banga they saw the children from Nasawa come around and F/S followed. She went on along the



road. He followed her and caught up with her. He asked her about her other friends. Then he grapped her left wrist but she told him to let go. He did and he started walking into the bush. She followed him. She was not afraid. About 20 metres from the road in a garden, he asked her for sex. She said nothing. She just stood there. He asked her to remove her clothes but she did not do so. He touched her but she said she would remove her own clothes. She sat down and removed her clothes. He removed his own clothes, opened her legs and went on top of her, penetrating her. He kissed her and she kissed him back. She held tightly onto him during sex. She told him not to ejaculate into her. Then he got off her, wore his clothes, she wore her clothes and told him to go and check if the road was clear so she could go off. He did. He told her no one was on the road and she left to go back to school. Banga came around at the time. They said good night to her, she just smiled and went off.

8. The Court heard two very competing and compelling stories. Which of the two is credible to be believed? The prosecution did not call any further evidence from Banga or Woina. Mr Boe said their evidence would not be relevant as to whether or not the complainant consented to sex. Clearly Mr Boe was wrong. When the Court is faced with two very compelling stories, I warn myself of the danger of convicting the accused on a stand alone evidence of the complainant without any corroborative or supporting evidence. Banga's evidence would have shown what expression or state the complainant was in when she came out of the bushes. Was she crying? What was the state of her face, hair, clothes etc? Moina's evidence would have assisted the prosecution case to show or confirm the state Banga saw her in when she came out of the bushes.
9. Sadly there is no such evidence. As it stands, there is the evidence of the complainant against the evidence of the accused. The Court cannot safely convict the accused on the evidence of the complainant standing alone. Clearly there are doubts in my mind as to the element of consent.
10. I arrive at the conclusion that the prosecution has not discharged its legal and evidential burden of proof beyond reasonable doubt.
11. Therefore I return the verdict of not-guilty. Accordingly I acquit the accused of the charge of sexual intercourse without consent.



DATED at Betarara this 27th day of March 2019

BY THE COURT

OLIVER.A.SAKSAK

Judge

