

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

**Criminal**  
**Case No. 17/3212 SC/CRML**

**PUBLIC PROSECUTOR VS KISEL KENCY**

**Before:** *Justice Aru*

**In Attendance:** *Mr. P. Toaliu and Ms. T. J for the Public Prosecutor  
Ms. P. Kalwatman for the Defendant*

**Date of Trial:** *21<sup>st</sup>-22<sup>nd</sup> March 2019*  
**Date of Verdict:** *23<sup>rd</sup> April 2019*

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**VERDICT**

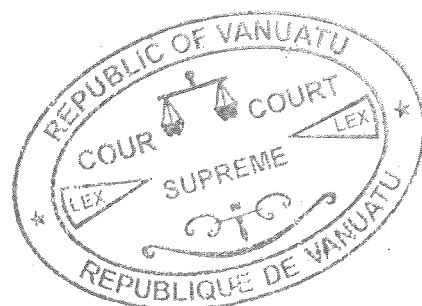
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Introduction

1. Prior to the incident, the complainant was living at Pango, South Efate. Mr Kisel who was in a defacto relationship was also living at Pango with his wife Diana and their two children. They were all living in the same yard and occupied separate rooms at each end of a building made mostly of corrugated iron sheets. Mr Kisel and his family occupied one end of that building and the complainant and her boyfriend occupied the other end. They lived together as family. The complainant regarded Diana as her sister and admired the way her sister was treated by her husband , Mr Kisel.
2. On 20 September 2017, it is alleged that Mr Kisel had sexual intercourse with the complainant without her consent . At that time the complainant's boyfriend had left to work on a fishing boat and the complainant was occupying their room by herself .The room had a single window opening outwards and an entry door with a bed inside opposite the window.

Charges

3. Mr Kisel is charged with one count of sexual intercourse without consent contrary to section 90 and 91 of the Penal Code [CAP 135]. This is a very serious charge as the maximum penalty is life imprisonment.

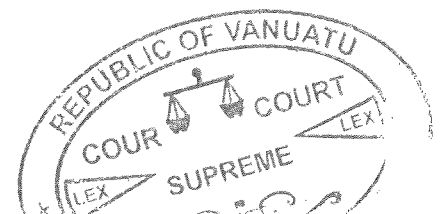


## Law

4. The onus is on the prosecution to prove its case beyond reasonable doubt. The parties agree that there was sexual intercourse. The only issue in dispute is consent. The prosecution must prove that sexual intercourse occurred without the complainant's consent. In addition it must prove that Mr Kisel did not have a reasonable belief that the complainant was consenting to sexual intercourse.
5. It is not for Mr Kisel to prove his innocence.

## Analysis of evidence

6. The main witness for the prosecution is the complainant. This case turns on whether her evidence is reliable in order to convict Mr Kisel.
7. Readily apparent from her evidence are a number of inconsistencies which arise from her oral evidence in court as opposed to what she told the Police in her cautioned statement. These relate to the clothes she wore on the night of the offending, the time of the offending and Mr Kisel holding her hand with the mobile phone.
8. The most telling is the fact that she told Police that Mr Kisel held her mouth thus preventing her from calling for help. In her oral evidence in Court the complainant said Mr Kisel did not hold or block her mouth with his hand but instead laid on top of her and because he was heavy this prevented her from calling for help.
9. She told the Court that after using the phone, when Mr Kisel came back to return the phone, he called her. She opened the window and he then held the window open and told her he wanted to sleep with her. She told him to go back to his wife and went back to bed leaving him at the window. Mr Kisel had clearly made his intentions known to her that he wanted to sleep with her. At that point she did nothing to scream for help if she was afraid of Mr Kisel. There were people living in the same yard as her who could have heard her call for help. These were Therese and David and the boys living with them and Mr Kisel's father. No attempt was either made to escape through the door. There was also no evidence of any threats or weapons used to force consent.
10. After the incident the first person the complainant spoke to about the matter was Therese. The complainant told Therese after she got back from work the next day. She said Therese then told the boys who were living with them. Therese was not called by the prosecution to give evidence. Johnson Nangia said he was one of those boys living with Therese and David. He told the Court that he was with the boys in the yard that whole day but Therese did not tell them anything. He and the others all learnt of the incident when the complainant was assaulted by Diana. His evidence was not challenged.
11. Mr Kisel's father also told the Court that following the incident, the complainant asked him to call a roundtable meeting with everyone in the yard so that she could say

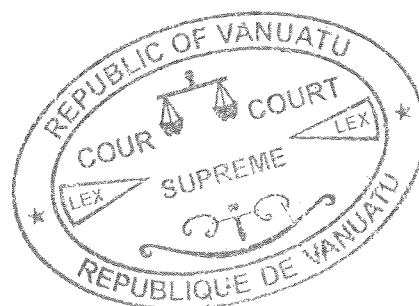


sorry to Diana. The complainant did not tell him why she wanted to say sorry . His evidence also remains unchallenged.

12. When the complainant saw Diana the next day, she took Diana to her room (the complainant's room) and said sorry to her for what happened between her and Mr Kisel whom she considered as her "tawi" (brother in law). An admission of guilt on her part perhaps to her sister for having sex with her husband . The complainant was then brutally assaulted by Diana and had to run away . After which she sought help from the Vanuatu Women's Centre (VWC). Following their advice the complainant was taken to the Police station and filed her complaint.
13. Mrs Serah Garae of the VWC said when she saw the complainant she was wearing a torn shirt with swollen face and bruises on her shoulder . This was not the result of the sexual intercourse without consent but rather a direct result of being assaulted by Diana .
14. Mr Kisel's evidence is that after asking to sleep with the complainant, she told him to check his wife. After doing so he came back but the window was still open and the complainant moved to one side to her bed and he climbed through the window and lied beside her. They hugged and kissed before he layed on top of her and had sex with her. His description of the sex was that she held him and crossed her legs around his back. When they finished she gave him a bucket to stand on to climb out of the window. That evidence was unchallenged.
15. For this reasons I am of the view that the complainant's evidence is not reliable.

### Findings

16. When I consider the prosecution case in total, I am not satisfied that the prosecution has proven its case beyond reasonable doubt. I find that on 20 September 2017, when Mr Kisel had sex with the complainant it was consensual. When Mr Kisel asked the complainant that he wanted to sleep with her , she told him to go and check his wife first . She left the window open after he left . When Mr Kisel returned the window was still open . He told the complainant that his wife was not at home and climbed inside through the open window and slept beside the complainant on her bed . After which they then had sex .
17. It was only after being assaulted very badly by Diana, that the complainant decided to make a complainant of sexual intercourse without consent .



Verdict

18. I find Mr Kisel not guilty of the charge of sexual intercourse without consent and he is hereby acquitted.

DATED at Port Vila this 23 day of April, 2019

BY THE COURT

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D. Aru  
Judge

