

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

**Criminal
Case No. 20/1292 SC/CIVL**

BETWEEN: Public Prosecutor

AND: Dominique Sam

Defendant

Date of Trial: 1st October, 16th October and 7th November 2020
Date of Verdict: 14th December 2020
Before: Justice Oliver.A.Saksak
In Attendance: Mr Paul Sarai for Public Prosecutor
Ms Kylie B Karu for Defendant

VERDICT

Introduction

1. The defendant was charged with 2 counts of sexual intercourse without consent contrary to sections 90 and 91 of the Penal Code Act. The Prosecution alleged that on 15th April 2020 at about 8:30pm the defendant had sex with the complainant Roselyn Navirok when he pushed his 2 fingers and his penis into the complainant's vagina. Prosecution alleged sexual intercourse was done without consent.
2. The defendant admitted sexual intercourse took place but denied the allegation that there was no consent.

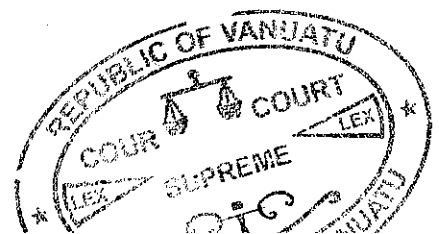
The Law

3. Section 8 of the Penal Code Act (the PC Act) provides:

“ General rule as to bundle of proof

“8. General rule as to burden of proof

- (1) *No person shall be convicted of any criminal offence unless the prosecution shall prove his guilt according to the law beyond reasonable doubt by means of evidence properly admitted; the determination of proof of guilt beyond reasonable doubt shall exclude consideration of any possibility which is merely fanciful or frivolous.*
- (2) *In determining whether a person has committed a criminal offence, the court shall consider the particular circumstances of the case and shall not be legally bound to infer that he intended or foresaw the natural or probable consequences of his actions.*
- (3) *If the prosecution has not so proved the guilt of the accused, he shall be deemed to be innocent of the charge and shall be acquitted forthwith.”*



4. Section 81 of the Criminal Procedure code Act provides:

“ Statement of presumption to be read to accused

“ **STATEMENT OF PRESUMPTION TO BE READ TO ACCUSED**

81. In every criminal trial in which a plea of not guilty has been entered, the judicial officer presiding shall, before the prosecution case is opened, read aloud to the accused the following statement of the presumption of innocence –

"In this trial you will be presumed to be innocent unless and until the prosecution has proved your guilt beyond reasonable doubt. It is not your task to prove your innocence. If at the end of the trial, any reasonable doubt exists as to your guilt, you will be deemed to be innocent of the charge and will be acquitted"

and shall record such step in the proceedings."

5. Section 90 of the Penal Code Act provides:

“ Sexual Intercourse without consent

“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;

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

6. Section 91 of the Penal Code Act provides:

“91. Punishment of rape

No person shall commit rape.

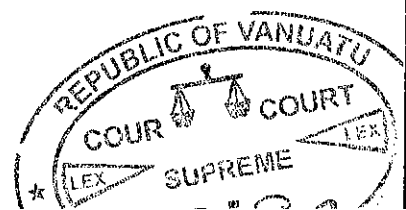
Penalty: Imprisonment for life."

7. **Trial**

Prosecutions led evidence at trial on 1st and 16th October 2020 from 6 witnesses. I summarise their relevant evidence only in brief as follows:

A. Roselyn Navirok, the complainant. She said she went to have her bath that night.

She had her bath and had dried herself with a towel. She had put on her clothes.



At that point she felt some one grab her tight on the belly and blocked her mouth and told her “ Don’t move, I converted you for a long time.” She recognised the voice to be the defendant’s voice. He told her not to move or he would kill her. He told her to move to his room and she followed him. They entered the room. He put her on his bed and switched on his phone. Her heart was pumping, she was afraid. He removed her skirt and told her to sleep on her side. He faced upwards. He touched her private part using 2 fingers. He sucked on her left breast. She did not like it. He pushed his penis into her vagina. She did not like it. She struggled but he was bigger and stronger. He pushed his penis into her vagina the second time but removed it shortly after ejaculating outside of her legs. She felt very wet. She felt weak. He took his jacket, place it on her and carried her back to her house. They went past the bathroom. He then removed his jacket and returned to his house.

- B. Noel George. He lives in the same area. His father is the landlord of the houses occupied by the defendant and the complainant. He said the complainant met him in the morning of 16th April 2020 and was trying to tell him what happened to her the previous night. He said she was afraid. He said he did not want to hear the story because of customary relationship existing between him and the complainant. He told her to go and see Chief David at Teouma.
- C. David Mann- He is the Chief. He was organising his birthday party on 17th April 2020. In the afternoon the complainant went and joined in the preparations of food for the party. She only told him about the incident on Sunday 19th April 2020. She told him that on Wednesday night, Dominique Sam grabbed her in the bathroom, blocked her mouth and took her to his room and had sex with her. She told the chief so he could handle the case. She had cried when she told her story. Elsie, the Chief’s wife was present.
- D. Elsie Mann. She said the complainant went to see them at Teouma on Friday afternoon, 17th April 2020. She indicated to her on Saturday afternoon that she wanted to speak to her husband, Chief Mann about something. She said she was present on Sunday when the complainant told her story to her husband, chief



David Mann. After giving her story to the chief, she was advised to attend to the women's office to give her report.

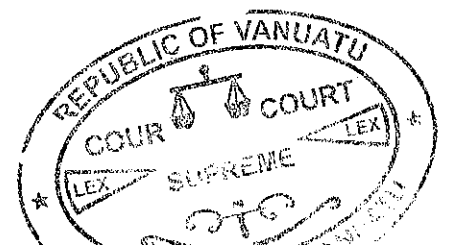
E. Atlin Rantes, a Police Officer who interviewed the complainant. She told the Court about the process of obtaining her statement and how she read the statement back to the complainant, she agreeing to it and signing it. She confirmed that what she wrote down was everything the complainant told her.

F. Terry Sandy. The Crime Scene officer who drew up a sketch map showing the complainant's house, defendant's house, the toilet, bathroom, the distances between them and the bedrooms where incidents occurred.

The Defendant's Evidence

8. The defendant gave evidence himself on 7th December 2020. He accepted he had sexual intercourse with the complainant. He said the complainant had first approached him on a Friday. They had communicated and fixed the time of their meeting to be 1:00am in the night. He slept early that night. At 1:00am he rang the complainant's phone. At the first tone, she answered. She left her house by the direction of the bathroom and toilet and approached him. He told her they would use his bedroom for sex. She said she was afraid so he went to switch off lights. Then she followed by flower hedges and went directly to his room. He followed her there she removed her clothes. He was excited and aroused he had sex with her and ejaculated outside. Then he went to leave her back at her house.

9. Sam Namanian, the defendant's brother. He said he knows the complainant well as they are living in the same area at Simbolo. He said he knew of the relationship between the defendant and the complainant. He said from the conversation of the complainant with the defendant, she had seduced the defendant by her words and actions leading to the sexual activities that occurred between them.



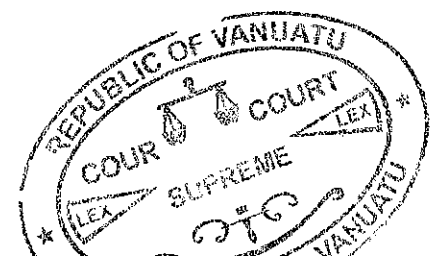
Discussion

10. The first element Prosecutions had to prove was whether sexual intercourse occurred between the complainant and the defendant. This element was admitted by the defendant and therefore is not an issue.
11. On the issue of consent, the complainant's evidence was that her consent was obtained by force or threats of intimidation or of fear of bodily harm.
12. Sadly the charges in Counts 1 and 2 did not particularise force, threats of intimidation of any kind, or fear of bodily harm. These are elements required by section 90 (b) (i), (iii) and (iii) of the Penal Code Act. The complainant's evidence about threats or fear she might be harmed was not relevant evidence.
13. All she said in evidence was the defendant grabbed her by the belly in the bathroom and that he blocked her mouth. She said she struggled but never once did she say she yelled out or shouted for help. Her evidence was that it occurred at around 8:30pm. This is an early time especially in an area where there are kava nakamals and people are active. I therefore do not accept her evidence.
14. It was her evidence also that she never knew the defendant or that she had had any person to person conversation with him. If that is correct then the person grabbing her whose voice she knew was Dominique Sam's voice, cannot be the truth. This was when the voice said "*mi stap kavetem yu long taem finis.*" Her credibility therefore is in question.
15. If indeed she did not consent to sexual activities occurring on 15th April 2020, why did not Noel George in a very important customary relationship as "son" of the complainant not help his "mother" by taking her to Chief Mann on the morning of 16th April 2020 when she met him and tried to tell him? Instead he said he should not hear her story.
16. Secondly why did she not go to report to Chief Mann straight a way on 16th April 2020 but waited until Sunday 19th April 2020. Her evidence as confirmed by Chief



Mann and Elsie Mann is that she did go to Teouma on Friday afternoon 17th April 2020. But the purpose of her going there was for the Chief's birthday party. She assisted in the preparations of food for the party instead of reporting there incident to the chief straight away upon her arrival on Friday 17th April. She did make indications to Elsie Mann she wanted to say something. But there was no seriousness on her part to see the Chief. These are attitudes and actions and behaviour that calls her lack of consent into doubt.

17. The complainant appeared to make some issue out for the statement "*Eh, igat man ia*" that she said should have been "*Eh, mi gat man ia*". Atlin Rantes the Police woman Corporal confirmed what she said to her was what she recorded. I do not think the Police Officer would be maintaining that position if it was not correct. Again the complainant's credibility is called into question and doubt. And even if she meant "*Eh, mi gat man ia*", it did not matter. There can be no doubt the defendant knows the complainant has a husband and the fact he was away on Tanna at the time.
18. Therefore in relation to the element of consent, from the above analysis of the evidence, I have doubts as to complainant's evidence about lack of consent.
19. Next, from the sketch plan we see the evidence of distance walked between the bathroom and the defendant's room is 50 meters or more. At 8:30pm in the night they could have been seen. And if she called out for help or tried to run away, she could have easily done so. But there is no evidence that she did any of that. That bears on her allegation she did not consent to sexual activities that night.
20. The final element is that of the defendant's belief the complainant had consented. This is supported by his evidence of her approaches to him to ask for money to buy kava. Sam Namanian's evidence is about seductive words used by the complainant to the defendant to lead him into sex, confirming there were conversations and agreement that sexual activities were planned for the night of 15th April 2020. All the those circumstances put the defendant to reasonable belief the complainant had agreed to sexual activities done to her on the night of 15th April 2020.



21. From these findings, the Prosecution has not discharged its onus of proof beyond reasonable doubt that (a) the complainant did not consent and (b) the defendant did not have reasonable belief the complainant consented to sex.

Verdicts

22. For those findings, I now return verdicts of not guilty on the defendant in relation to the charges in Counts 1 and 2.

23. Accordingly I acquit the defendant of the 2 charges.

DATED at Port Vila this 14th day of December 2020

BY THE COURT


OLIVER.A.SAKSAK

Judge

