

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

Criminal
Case No. 21/2018 SC/CRML

BETWEEN: Public Prosecutor

AND: Alban Kammy Dingley
Accused

Coram: Judge Aru
Counsel: Ms. M. Taiki for the Public Prosecutor
Mr. J. Garae for the Defendant

JUDGMENT
(ORAL VERDICT)

Introduction

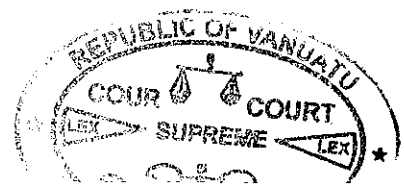
1. This case involves an allegation of sexual intercourse without consent. The defendant is alleged to have sexual intercourse with the complainant without her consent on the Island of Rah, around 18 November 2020.

Charge

2. Section 90 of the Penal Code [CAP 135] sets out what sexual intercourse without consent is and s 91 provides for the offence and states:-

*"No person shall commit sexual intercourse without consent.
Penalty: Imprisonment for life"*

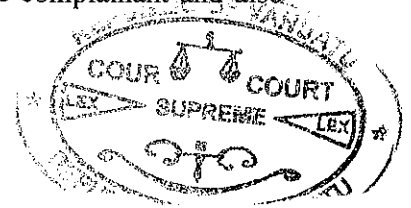
3. The elements of the charge that must be proved by the Prosecution are:-
 - (1) The defendant had sexual intercourse with the complainant.
 - (2) The complainant did not consent
 - (3) The defendant did not have a reasonable believe that the complainant consented.
4. The burden of proof rests with the Prosecution and it must prove all the elements of the offence beyond reasonable doubt.
5. The accused is presumed to be innocent unless and until his guilt is proven beyond reasonable doubt. If some doubt exists then I must acquit him of the charge. He is not required to prove his innocence. He was informed he was entitled to give evidence in addition to calling others as his witnesses and he could choose to remain silent but that



if he did that would not lead to an inference of guilt against him. The defendant understood his rights but opted to give evidence.

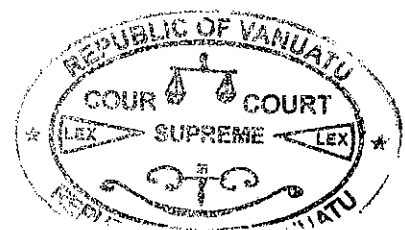
The evidence

6. A number of Prosecution witness statements were tendered by consent. These witnesses were not called and were not cross examined by Counsel. Mr Christopher Matriak [Exhibit PP1]. He said he followed the complainant and her mother to Sola when the defendant sent Hopkins to tell them they should go and see him.
7. Desley Bantuntun [Exhibit PP2] is the complainant's mother. She says Cynthia who is the complainant's guardian on Motalava called her on the island of Mota to go to Motalava as the complainant was very sick. On arrival she visited the complainant at the dispensary. She asked the nurse in charge as to the complainant's illness and was told the complainant was suffering from high blood pressure. Cynthia told her that the defendant told her to follow him. In December she took the complainant to Sola to the Women's Centre. Whilst in Sola the defendant sent Hopkins to tell her to go and see him at the Police station. They both went with the complainant and he apologised to her and gave her VT3000.
8. Fenny Wogsen [Exhibit PP3 and 4] said he was with the defendant and Joe and when the defendant pulled the complainant to follow them to the beach. There they met Ray the canoe owner. He said the complainant cried and told her in Mota language to take her home. He said he told the defendant but the defendant ignored him and said if the complainant did not follow them he will arrest her.
9. He said Ray took them in his canoe to Rah Island. Those who went were himself, Joe, Ray, the defendant and the complainant. At Rah Island the defendant, the complainant and Joe went up to the village. The complainant did not want to go and was crying. Before making their way back to Motalava the defendant told them to leave the complainant behind as he was not their blood. He stayed behind on Rah with the complainant.
10. Joe Din [Exhibit PP5 and 6]. He said he and the defendant and Fenny drank a bottle of strong drink and the defendant was very drunk. He said he drank half a bottle of Hanna beer and gave half to the defendant. The hanna beer was mixed with spirit soft drink .When they met the complainant the defendant held her hands and pulled her to the sea. The complainant cried .He and Fenny told the defendant to stop but he did not listen swore at them. The defendant told him to watch the complainant and that if she ran away he would damage her house. He said Ray the complainant and the defendant went to Rah first. When reaching Rah he saw the complainant crying on the beach and the defendant told them to leave her behind. They were afraid of the defendant. After returning to Motalava the defendant went and drank kava and he went home.
11. Bill Kalmatak [Exhibit PP7]. He is the Police officer who attended the scene. He produced photo album of places where the defendant met the complainant and also



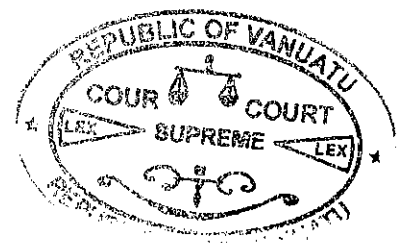
places on Rah Island where the offending is alleged to have occurred showing a nabanga tree behind the retail store.

12. Paula Zebedee [Exhibit PP8] is the Police officer who interviewed the defendant. She said the defendant admitted taking the complainant to Rah but could not recall what happened as he was drunk.
13. The only witness called by the prosecution to give evidence was the complainant herself. She says the defendant pulled her and they went down to the sea with Fenny and Joe. She told the defendant to let her go but he refused. She says Ray took her and the defendant to Rah first. Joe and Fenny followed them later. She said the defendant asked her for sex but she refused and he pulled her to a nabanga tree near a nakamal. He held her hands and took off her skirt. He pushed her to the ground and layed on top of her and had sexual intercourse. She was ashamed that someone will see them as houses were nearby. She later pulled up her skirt and went down to the sea. Fenny and Joe were there but she did not tell them that the defendant had sex with her. She told them to return to the mainland. When the defendant followed her down to the sea, he told her to remain behind.
14. Fenny remained behind with her on Rah but she did not tell Fenny about the sex and did not tell anybody. She saw the defendant again when she went with her mother to see him at the Police station in Sola and he apologised and gave VT 3000 to her mother. She was cross examined.
15. The defendant denies that he had sex with the complainant. He admits drinking hanna beer with Joe on the boat to Motalava on 18 November 2020 in the afternoon. The first time they went to Rah was with Joe to get more drinks after arriving on Motalava from Sola. They got a bottle of vodka and a bottle of hanna beer. And mixed it with coca cola. After drinking they decided to get more drinks. It was around 5 to 6pm when they made their way to go to the beach when they met the complainant. He asked the complainant to follow them to rah to get drinks. He admits being drunk and saying that he will arrest her if she did not follow them. He hugged the complainant and they made their way to the beach with Fenny and Joe. On arriving at the beach he told them to wait while he went to see the canoe owner Ray. Ray took him and the complainant to Rah first and he heard the complainant telling Ray to take her home. After arriving on Rah he hugged the complainant and they walked up to the village to Allan's store. He went to call the store keeper but there was no answer. He said some people were still awake as it was around 10pm at night.
16. He came back then asked the complainant for sex. She refused and left making her way back to the beach and he followed her. When they arrived Joe and Fenny were there. He admits telling Fenny and Joe to leave the complainant behind as he wanted to go and look for drinks. He denies having sex with the complainant. When the complainant and her mother came to Sola he sent for them and met them at the Police station and apologised to the complainant's mother. He was cross examined.



Discussion

17. The issue is whether the defendant had sexual intercourse with the complainant and if he did whether the complainant consented. I remind myself that I am required to give a decision only on the evidence before me and I am entitled to draw inferences from facts which have been proved.
18. First, the evidence of Christopher Matriak is irrelevant to the issue as it only relates to him seeing Hopkins talking to the complainant and her mother at Sola. The evidence of Fenny and Joe cannot be given any weight as they had been drinking with the defendant all day. Ray who transported the defendant, the complainant and Fenny and Joe from Motalava to Rah and back to Motalava did not give any evidence. The complainant's evidence is before going to Rah she was telling stories with the defendant outside Cynthia's house who is her guardian.
19. Cynthia did not give any evidence. The complainant's mother Desley Bantuntun said Cynthia told her the complainant was very sick. When the complainant's mother went to Motalava and enquired with the nurse in charge she was told the complainant had high blood pressure. No medical evidence was tendered or called by the prosecution stating otherwise.
20. The complainant stated that the area where the alleged incident occurred was in the village on Rah with houses nearby and people were still awake. She agreed that if she called for help people would hear her. She said she did not call for help and there was no evidence she was threatened with violence or a weapon or that she suffered any injury as a result of the alleged incident. Bill Kalmatak's evidence confirms there are houses near the scene of the alleged incident.
21. The most telling aspect of the complainant's evidence is that she did not tell anybody about the alleged incident if it did happen. Before going to Rah she was telling Fenny in their local Mota language to take her home. Following the alleged incident when Fenny remained behind with her on Rah and they were by themselves she did not tell Fenny that the defendant allegedly had sex with her. Joe and Ray were there on Rah Island but she did not tell either of them. She did not tell her guardian when she got back to Motalava and did not tell her mother that the defendant had allegedly had sexual intercourse with her without her consent.
22. On 28 April 2021 after a period of five (5) months she made her statement to the police alleging that the defendant had sexual intercourse with her without her consent. On 28 May 2021 she made a further statement [Exhibit D1] to the Police to withdraw her complaint stating "*..no kat man I tretenem mi or forseem mi blo witroem case ia hemi tingting blo mi wan*". Under cross examination she agreed she wanted to withdraw her case and did not want to pursue it against the defendant. She later explained she made the statement after a custom reconciliation ceremony was done.



23. The defendant opted to give evidence himself and maintained his evidence when cross examined that he did not have sexual intercourse with the complainant.
24. I have considered a number a number of cases referred to me by Counsel namely: **Goroka v PP** [2007] VUCA 3; **PP v Tugu** [2012] VUSC 128 and **PP v Hortial** [2004] VUSC 27 .When I consider the totality of the prosecution evidence, there is some doubt in my mind as to whether sexual intercourse occurred and if it did whether it was without the complainant's consent. This does not mean that the offending did not happen. It may have happened as alleged but it simply means that the prosecution has not proved its case beyond reasonable doubt.

Verdict

25. I find the defendant not guilty on the single charge of sexual intercourse without consent and he is hereby acquitted accordingly.

DATED at Sola, Vanualava this 17 day of September, 2021

BY THE COURT

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D. Aru
Judge

