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

Criminal Case No. 20/3367
SC/CRML

PUBLIC PROSECUTOR

V

WILLIE HARRY

Defendant

Date of Trial:	***24th February 2021***
Date of Judgment:	***4th March 2021***
Before:	***Justice Oliver Saksak***
In Attendance:	***Ms Georgina Kanegai for Public Prosecutor***
	Mr Eric Molbaleh for Defendant

JUDGMENT

Introduction

1. On 24th February 2021 the Court accepted and allowed a no case application made orally by Mr Molbaleh after the prosecution had called its 2 witnesses and closed its case.

2. The Court was satisfied from the evidence produced that there was no prima facie case made out against the defendant to require him to make a defence. Further, that on the evidence thus far produced by Prosecution, the Court could not safely convict the defendant, even if trial continued.

Reasons

3. This judgment provides reasons for that decision or ruling.

The Law

4. This oral application was made under section 135 of the Criminal Procedure Code Act [CAP 136] (the Act) which states:

"ACQUITTAL OF ACCUSED PERSON WHEN NO CASE TO ANSWER

135. *If at the close of the evidence in support of the charge, it appears to the court that a prima facie case is not made out against the accused person so as to require him to make a defence, the court shall dismiss the case and shall forthwith acquit him."*

5. Section 164 of the Act provides for procedure after close of prosecution. It states:

*"**PROCEDURE AFTER CLOSE OF PROSECUTION***

***164.** (1) If, when the case for the prosecution has been concluded, the judge rules, as a matter of law that there is no evidence on which the accused person could be convicted, he shall thereupon pronounce a verdict of not guilty.*

(2) In any other case, the court shall call upon the accused person for his defence and shall comply with the requirements of section 88."

Arguments and submissions

6. Mr Molbaleh's primary argument was that from the evidence of the complainant there was consent. Mr Molbaleh submitted the evidence of the second prosecution witness Ms Emmie Livo did not assist the complainant's evidence that there was no consent. Mr Molbaleh submitted the charge should be dismissed and the defendant acquitted.

7. Ms Kanegai argued and submitted to the contrary; that there was evidence showing no consent. Counsel relied on the test in the case of PP vs Suaki [2018] VUCA 18 in particular paragraph 11.

Discussion

8. Suaki's case differs from this case in that there the Judge exercised his discretion on his own motion. In this case an oral application was made. The appropriate provision is section 135 of the Act. The objective of that no case to answer submission was to ascertain whether the Prosecution had led sufficient evidence to necessitate the defence case. The Court concluded that Prosecution had had insufficient evidence as regards consent, or lack of it.

9. Before examining the evidence it is necessary to examine the charge. Count 1 states:

" STATEMENT OF WRONG
Sexual Intercourse without consent contrary to section 90 and 91 of the Penal Code Act [CAP.135].

PARTICULARS OF WRONG

WILLIE HARRY, sometimes on the 29th of March 2017 at Fres Wota 5 area you had sexual intercourse with Annie Marie Bong Bong by penetrating her vagina with your penis without her consent."

10. Section 90 of the Penal Code Act provides for sexual intercourse without consent. It is separated into two parts. It states:

"90. Rape defined
Any person who has sexual intercourse with another person –
(a) without that person's consent; or
(This being the first part)

(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."
(This being the second part).

11. Section 91 simply provides for the penalty of sexual intercourse without consent. It is not relevant for the issue of consent.

12. The allegation was sexual intercourse without consent. Therefore this should have been specifically stated in the statement of wrong as section 90 (a). This did not occur. Therefore in the first place the charge was wrong and therefore ineffective.

13. The particulars of wrong only contains the allegation of sexual intercourse. There was no allegation that consent was obtained by force, or by means of threats of intimidation of any kind, or by fear of bodily harm or the like as stipulated in section 90 (b) of the Act.

14. In her opening the Prosecutor referred to the charge in Count 1 and stated two elements of the charge prosecution had to prove being, (a) that on 29 March 2017 the defendant had sexual intercourse with the complainant, and (b) that the complainant did not consent. Counsel identified the issue to be whether or not Willie Harry had sex with the complainant and whether or not it was done without her consent.

15. The evidence led by Prosecution went beyond the issue of sexual intercourse without consent. The complainant's evidence was that she was taken by force on a bus by the defendant from her work place to the house at Fresh Wota 5. In the house she was assaulted by the defendant. She fainted as a result. It was at that point sex had taken place. Before sex took place the defendant removed her outer clothes but she removed her own panty.

16. The defendant was not charged with sexual intercourse without consent because the consent was obtained by force or threats or fear of bodily harm. Therefore the

evidence about being forced or physically assaulted or being detained inside the defendant's house against her will were irrelevant.

17. In effect the defendant was neither charged with an offence under section 90 (a) or 90 (b) (iv), (ii) (iii) or (iv). The charge and particulars were invalid in any case.

18. But returning to the issue of consent, that was according to the Prosecution, the only element they had to prove by admissible evidence.

19. The evidence of the complaint stood alone. The evidence of Emmie Livo did not assist her with the issue of consent or lack of it.

20. The complainant's evidence about the sexual intercourse was that the defendant removed her outer garments and she removed her own panty, then sex took place. Her evidence did not include any action on her part that she did not want sex, or that she pushed the defendant away from her as her notice to him that she did not want sex. By her acts and omissions the defendant had reasonable belief the complainant who was his partner and still is, was consenting to sex at the time.

21. In her evidence in chief the complainant told the Court she felt pain in her body and that was why she did not want sex. She also said the defendant forced himself on her but did not specify what she did to show she was not consenting to sex. She was evasive when answering questions asked by the Prosecutor.

22. As indicated earlier, all the evidence about force was irrelevant because the charge was not laid under section 90(b). The charge or allegation was sexual intercourse without consent under section 90 (a) but that was not specified in the charge itself.

23. In any event on the evidence led by the Prosecution, it was insufficient to require the defendant to put up a defence. His defence would have been that sex was consensual or that he believed by her actions the complainant had consented to sex. There was nothing in the complainant's evidence to contradict that position of the defendant.

24. For those reasons the Court came to the conclusion there was no prima facie case made out against the defendant. Accordingly the charge was dismissed and the defendant acquitted.

DATED at Port Vila this 4th day of March 2021.

BY THE COURT

OLIVER.A.SAKSAK

COUR SUPREME COURT LEX LEX REPUBLIQUE DE VANUATU

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Judge