

BETWEEN: Public Prosecutor

AND: Timothy Kaukare
Defendant

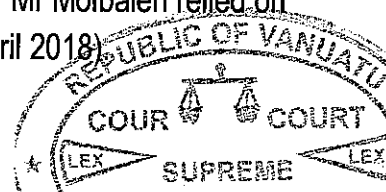
Date: 1st August 2023

By: Justice W.K. Hastings

Counsel: Ms M Tasso for the Public Prosecutor
Mr E Molbaleh and Ms Anna Sarisets for the Defendant

RULING ON NO CASE TO ANSWER

1. Timothy Kaukare is charged with having committed sexual intercourse with AN without her consent. He has pleaded not guilty.
2. The prosecution alleges that on 31 December 2022, Timothy and AN were part of a group singing Bonanie around Efate. When they finished singing Bonanie at Teouma, the group returned to the Club Hippique area where they lived. The prosecution alleges Timothy asked AN to follow him into a bushy area beside the road. The prosecution alleges he instructed her to undress but she refused. The prosecution alleges he then forced her to undress and pushed her to the ground. The prosecution alleges he then undressed and had sexual intercourse with her without her consent.
3. The prosecution has the burden of proving each element of the offence:
 - a. There was sexual intercourse between the defendant and the complainant;
 - b. The complainant did not consent to the sexual intercourse; and
 - c. The defendant had a reasonable belief that she did not consent.
4. At the end of the prosecution's case, Mr Molbaleh submitted there was no case to answer under s 164 of the Criminal Procedure Code [CAP 136]. Section 164(1) states, "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." Mr Molbaleh relied on *Public Prosecutor v Suaki* (Criminal Appeal Case 18/391, Court of Appeal, 27 April 2018)

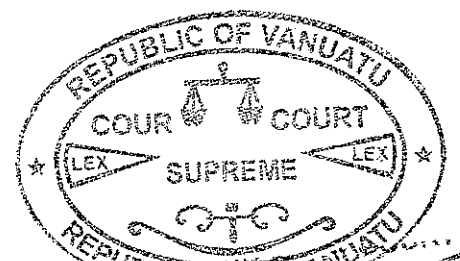


5. Mr Molbaleh's first submission was with respect to the complainant's credibility. He submitted that she admitted to having lied in her first statement to the police and to her father when she said Mr Kwau was involved, and then in her second statement to the police said he was not involved. Mr Molbaleh submitted this shows her evidence cannot be trusted.
6. Mr Molbaleh submitted secondly that I cannot be sure that sexual intercourse as defined in s 89A of the Penal Code actually occurred. Mr Molbaleh submitted that a medical certificate would have helped in this respect, but that neither the complainant nor her father took the medical form given to her by the police officer seriously, and that it is not credible that they went to the hospital three times and no doctor was available to see her.
7. Mr Molbaleh's third submission was with respect to consent. He submitted her behavior does not indicate a lack of consent. He submitted that she said nothing on both crowded buses when the defendant placed his hand on her breast, that she said nothing on the night of the alleged incident when the defendant pulled her by her hand from the crowd into the bushes, and she would not have gone later to the defendant's house to collect coconuts or with him to the beach if she had not consented on 31 December 2022.
8. Based on the evidence so far, Mr Molbaleh submitted there is no evidence on which the court could rely to convict the defendant.
9. Ms Tasso submitted that as a matter of law, there is evidence on which the defendant could be convicted. She submitted:
 - a. At line 6, second to last page of his caution statement, the defendant admitted he "pushed his penis but could not go into her private parts so I stopped and did not want to hurt her." Ms Tasso submitted this is an admission of sexual intercourse as defined in s 89A.
 - b. The complainant did not yell after she was pulled from the crowd on 31 December 2022 because she said was afraid and his hand was on her mouth.
 - c. She explained why she said Mr Kwau was involved. She said when she told her father, he questioned her and was becoming angry. She said she was afraid he would punish her.
 - d. The complainant's retraction of the complaint against Mr Kwau, far from indicating a lack of credibility, shows that she was courageous enough to go back to the police to tell the truth and remove his name from her complaint.
 - e. The complainant's silence on the bus when the defendant allegedly touched her breasts does not indicate consent.
 - f. The complainant and her father explained that there was no doctor to examine her on each of the three occasions they went to the hospital with the form given to them by the police officer,



and that it would have been of limited use anyway because the complaint was lodged about two months after the alleged incident on 31 December 2022.

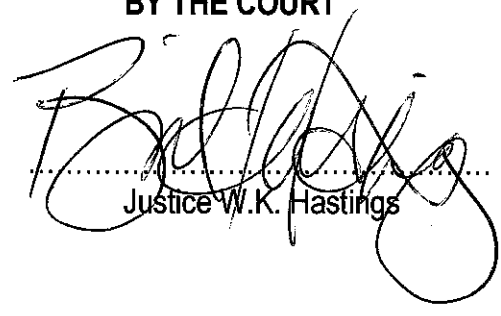
10. At this stage of the trial, the test is whether the prosecution has led sufficient admissible evidence of the matters in respect of which it has the burden of proof, to necessitate a defence case. In other words, has sufficient evidence been introduced on which, if accepted, a reasonable tribunal could convict. This does not require an evaluation of the strength of the evidence presented, particularly as regards issues of credibility and reliability. Examples given by the Court of Appeal in *Suaki* of when a no case to answer will be upheld are, first, when the prosecution has not led any evidence to prove an essential element of the offence charged, and second, when the prosecution case has been so discredited as a result of cross-examination, or contradictory, or is so manifestly unreliable that no reasonable tribunal might safely convict.
11. In this case, with respect to the first element of the offence, the complainant has given evidence that the defendant's penis went into her private parts, and the defendant has admitted in his caution statement that he pushed his penis there but stopped. In cross-examination, she said the defendant pushed his penis into her private parts, but she also said he pushed his penis into where she urinates, not where the blood comes out once a month. Given her age and my impression of her understanding of the questions, there is evidence of this element of the offence. The strength of this evidence will depend on my credibility findings at the end of the trial, but at this stage I do not think the prosecution case with respect to the first element has been sufficiently discredited as a result of cross-examination that the trial should stop.
12. With respect to the second element, that of consent, the complainant said she started crying when he took her hand and crossed the road. She said she did not call out because his hand was over her mouth. The incidents afterwards, of getting coconuts from his house and of the sex on the beach, do not necessarily indicate anything about consent on the night in question. The way she acted during the later incidents, and the incident on the bus immediately before, are as consistent with her being frightened as they are with her consenting, and of course, it is possible to consent to some acts but not others. She told her father close in time to the incident, an account her father essentially corroborated (although corroboration is not necessary).
13. Mr Molbaleh submits this evidence goes to the complainant's credibility with respect to her consent to the alleged incident that forms the basis of the charge. The Court of Appeal in *Suaki* said that issues of credibility and reliability "are to be weighed in the final deliberations in light of the entirety of the evidence presented." As the issue of consent is a question of credibility in face of evidence from the complainant and her father about her conduct on the night in question and afterwards, I consider there is enough evidence to necessitate the defence case on this point.
14. Finally, with respect to whether or not the defendant had a reasonable belief that she was not consenting on the night in question, evidence from the complainant that she was crying, that he had to pull her hand to cross the road and that he had to pull down her trousers is prima facie evidence that he must have had a reasonable belief that she was not consenting.



15. I find therefore that there is sufficient prima facie evidence with respect to each element of the offence on which, if accepted, a reasonable tribunal could convict. Mr Molbaleh's application is declined, and it is now up to the defence to elect whether to give or call evidence.

Dated at Port Vila this 1st day of August 2023

BY THE COURT


Justice W.K. Hastings

