

BETWEEN: Public Prosecutor

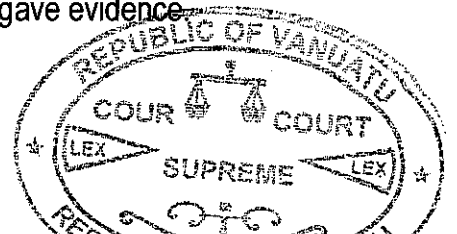
AND: Timothy Kaukare
Defendant

Date: 11th 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

JUDGMENT AND VERDICT

Introduction

1. The accused is charged that on 31 December 2022 he had sexual intercourse without consent with the complainant "AN" contrary to ss 90(a) and 91 of the Penal Code Cap 135. He has pleaded not guilty.
2. At the time of the alleged offending, AN was 15 and the accused was 19. The prosecution alleges that AN and the accused were part of a group singing bonne année on 31 December 2022. They sang bonne année at Teouma and then took two buses to return to the Club Hippique area to continue singing bonne année. When they arrived, the prosecution alleges that the accused pulled AN by the hand across a road into a bushy area and told her to undress. The prosecution alleges when she refused, the accused undressed her, pushed her to the ground, undressed himself and penetrated her vagina with his penis without her consent and without having reasonable grounds to believe she was consenting.
3. The accused says AN consented to the sex which did not, in any event, involve penetration of AN's vagina.
4. The prosecution produced three witnesses, the complainant AN, her father, and the investigating police officer. At the end of the prosecution's case, I declined an application by the defence for a ruling that there was no case to answer. The accused was given the direction required by s 88 of the Criminal Procedure Code Cap. 136 and elected to give and call evidence. The accused and Claudine Samany, who was with the accused and the complainant on the night in question, gave evidence.



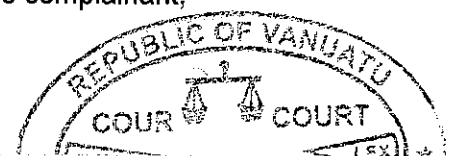
5. The complainant gave evidence from behind a screen to make her more comfortable giving evidence in the presence of the accused. A screen was placed between Claudine Samany and the accused because she appeared unable to speak while looking at the accused. The screen improved her evidence. The use of a screen of course says nothing about the guilt or innocence of the accused.

The burden and standard of proof

6. The charge of having sexual intercourse without consent requires the prosecution to prove each element of the offence beyond reasonable doubt. Proof beyond reasonable doubt means that the court must be sure the accused is guilty before a guilty verdict is entered. It is not enough for the prosecution to persuade the court that the accused is probably guilty or even that he is very likely guilty. Each of those would leave the court with reasonable doubt. On the other hand, it is virtually impossible to prove anything to an absolute certainty when dealing with the reconstruction of past events, and the prosecution does not have to do so. The prosecution must, however, bring the court to the point where a reasonable doubt with respect to each element of the offence does not exist.
7. The accused does not have to prove anything. It was explained to him that he was entitled not to give evidence or call anybody else to give evidence. The burden is on the prosecution to prove his guilt, there is no burden on the accused to prove his innocence. The fact that he chose to give evidence in this trial, and to call evidence from Claudine, does not change the burden of proof on the prosecution to prove his guilt beyond reasonable doubt.
8. If the court accepts what he says, then obviously the proper verdict is acquittal because he will not have done what the prosecution says he did, which is to penetrate the complainant's vagina without her consent and without having reasonable grounds to believe that she was consenting. If what he says leaves the court unsure, then again the proper verdict is acquittal, because the court will have been left with a reasonable doubt. In other words, if what the accused says seems a reasonable possibility, the prosecution will not have discharged its task. If the court does not believe the accused's evidence that the complainant consented and that there were reasonable grounds to believe she consented, the court must not leap from that assessment to guilt, because to do that would be to forget who has to prove the case. Instead, the court must assess all the remaining evidence that it accepts as credible and reliable and decide whether that evidence satisfies the court of the accused's guilt to the required standard.
9. It is not a case of choosing whose account the court prefers or whose account is more likely. To do that would be to ignore who has the burden of proof and it would also ignore the standard of proof beyond a reasonable doubt. The issue is always whether the prosecution has proved beyond a reasonable doubt its allegation that the accused had sexual intercourse with the complainant without her consent and without having reasonable grounds to believe that she was consenting.

The elements of the offence of sexual intercourse without consent

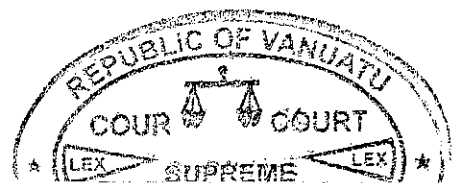
10. The elements of this offence which the prosecution must prove beyond reasonable doubt are:
 - a. that sexual intercourse took place between the accused and the complainant;
 - b. that the complainant did not consent; and



- c. that the accused at the time did not have an honest and reasonable belief that the complainant was consenting.
11. With respect to the first element, sexual intercourse is defined in s 89A(a) of the Penal Code cap. 135 as “the penetration, to any extent, of the vagina ... of a person by any part of the body of another person”. As s 89A(d) distinguishes between vagina and vulva, Parliament must have intended a distinction be made, and that the word “vagina” in s 89A(a) be given its precise scientific meaning which does not include “vulva.” The vulva refers to the external female genitalia that is visible from the outside, whereas the vagina is the internal canal that runs from the cervix to the vulva. The prosecution in this case must therefore prove beyond reasonable doubt that the accused's penis penetrated, to any extent, the vagina, which is beyond the vulva.
12. With respect to the second element, while there is no statutory definition of consent, there is a common law definition. Consent means true consent, freely given by a person who is in a position to make a rational decision. It is not true consent if the decision is the result of force. On the other hand, lack of protest or physical resistance does not, by itself, amount to consent. This does not mean there can be no consent in the absence of evidence of positive consent. There must be something more in the words used, conduct or circumstances, or a combination of these, for it to be legitimate to infer consent (*Christian v R* [2017] NZSC 145 at [45]). True consensual sexual activity that is subsequently regretted is still consensual sexual activity (*PP v Edison Elman*, Crim C No 88 of 2010, 3 March 2011, Vanuatu Supreme Court) and of course it is possible to consent to some acts but not others. The material time when consent, and a belief in consent, is to be considered is at the time the act that is the subject of the charge actually took place. The complainant's behaviour and attitude before and after the act may be relevant to that issue, but it is not decisive. The real point is whether there was true consent, or a reasonably-based belief in consent, at the time the act took place (*R v Adams* CA70/05, 5 September 2005 at [48]).
13. With respect to the third element, the prosecution can prove this in two ways. The first is to prove beyond reasonable doubt that the accused did not in fact believe the complainant was consenting at the time. The second is to prove beyond reasonable doubt that there were no reasonable grounds for the accused to believe that the complainant was consenting. The court must be sure that at the time the act took place no reasonable person in the accused's position could have believed that the complainant was consenting (*Warmenhoven v R* [2011] NZCA 391 at [294]).

The evidence

14. The accused and the complainant were part of a group singing *bonne année* at Teouma on the evening of 31 December 2022. The accused flagged down a bus so that the group could move on towards the Club Hippique area, specifically the late Harry Iauko's yard and the Ernem Church, to continue singing *bonne année*. The accused, the complainant and Claudine all said the complainant was standing close to the accused when he was trying to wave down a bus. The complainant denied saying anything to him. The accused said she told him she was alone at her house. He said he interpreted her statement as an invitation to spend the night with her and have sex, although he said she did not say that in so many words.



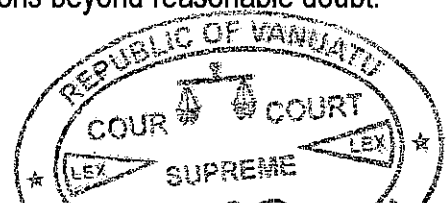
15. When they got on the bus, the accused said she followed him to the back seat. The accused sat in one corner, the complainant was beside him in the middle, and Claudine was beside her in the other corner. The accused said the complainant pressed up against him and put her arm around his shoulder. Claudine confirmed this, but the complainant denied this and said it was the accused who put his arm around her shoulder. The accused, the complainant and Claudine all agreed that he touched her breasts. All three witnesses said the complainant did not call out or complain to the others on the bus. All three witnesses said the accused did not ask her if he could touch her breasts.
16. When the bus driver told them to get off the bus at Teouma Bridge, the accused flagged down a second bus. The complainant got off the bus with him and remained close to him while they waited for the second bus. When it came, the same thing happened. She followed him to the back of the bus and she, the accused and Claudine sat in the same places. He said she put her arm around him again, and he touched her breasts again without her saying anything. He and Claudine said there was space on the bus to sit elsewhere.
17. The complainant did not mention the bus incidents in either of the two statements she made to the police, on 3 February 2023 and on 13 February 2023. She said she was only asked about the incident that is the subject of the charge.
18. When they arrived at their destination, they got off the bus and resumed singing *bonne année*. The accused asked Claudine to tell the complainant he wanted to see her. Claudine did as she was asked. Claudine agreed he did not tell her he wanted to have sex with the complainant and Claudine said she did not tell the complainant the accused wanted to have sex with her.
19. When the complainant came back to see him, she said he pulled her by the hand across the road and into the bush. She said she was crying. He said he did not pull her by the hand and she was not crying. She said he removed her clothes, although at one point in cross-examination she said she removed her own clothes. He said removed his, he lay down on top of her and pushed his penis in but it could not go inside her so he pulled it out because he did not want to damage her. She agreed this happened but said he pushed his penis into her private parts "where I urinate". She said she did not yell out because his hand was on her mouth. He denied his hand was on her mouth. Afterwards, they both got dressed, returned to the yard, and she said she did not immediately say anything to anyone.
20. About five weeks passed before she made a complaint to the police after her father saw her with the accused and she told him about the incident on 31 December 2022. During that time, there were other incidents.
21. The first incident occurred when the accused said the complainant came to his house at around 8am one day and asked him to come with her to collect coconuts. He said he told her to collect them herself and take them back to her house, which she did. He said when she came back at 11am, he slapped her because he did not want her coming to his house. She denied returning to his house. On another occasion he said they met, she went to her house to get a towel, and she then turned on the shower in the ablutions block. She denied turning on the shower so that her family would get the impression she was washing. Instead of having a shower, he said she came to see him. They crossed the road to the beach and he said he asked her for sex. She said she did not want to have sex but he said she agreed.

She said he removed her clothing, he said she removed it. They both said he removed his, he lay down on top of her, but once again he said after not being able to push his penis into her vagina he withdrew to avoid damaging her. He said they got dressed and she suggested meeting again by the road the next day, although this was not put to her. He said he did not want to do that so the next day he went to stay with his uncle in Beverly Hills. Neither of these incidents was reported to the police.

22. She gave her first statement to the police on 3 February 2023 alleging that the accused and another person were involved in the incident on 31 December 2022. She made a second statement on 13 February 2023 in which she withdrew the name of the other person and apologised for having named him. In court she said she named the other person because she was scared that her father would punish her. Her father said he became angry when she told him two men were involved. He said his daughter told him she lied about the other person and he told her to withdraw the other person's name because he was concerned for the other person's reputation. She went to the police a second time to do that.

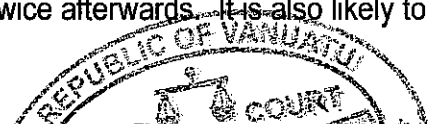
Submissions

23. The prosecution submitted that there was sexual intercourse, and there were indications she did not consent to the sex: she did not walk freely to the bush, she cried, he covered her mouth and he was the one who undressed her. The prosecution submitted that her silence cannot indicate consent, and the accused only assumed she consented without bothering to ask her. The prosecution submitted he did not explicitly ask to touch her breasts on the bus, and that she never explicitly said she wanted to have sex either in the bush on 31 December 2022 or at the beach later. The prosecution also submitted he had no reasonable grounds to believe she was consenting in circumstances where she was crying, he had to pull her by the hand to cross the road, and had to put his hand on her mouth to stop her crying out.
24. With respect to credibility, the prosecution submitted that although she lied about the involvement of another man, she returned to the police to tell the truth that he was not involved. The prosecution submitted this shows courageousness, not a lack of credibility. The prosecution submitted the accused should not be believed because he never verbally asked her for sex, he just assumed from her actions of following him around that she wanted him to have sex with her.
25. The defence submitted that there was no sexual intercourse as defined in the Penal Code on 31 December 2022. The defence also submitted that the circumstances before and after the incident on 31 December 2022 show that this was a developing consensual relationship, that it was the complainant who instigated the sexual encounters, and that the complainant only went to the police five weeks later because her father saw them together on the road.
26. With respect to credibility, the defence submitted the complainant was not a credible witness, having made allegations against another person with respect to the 31 December 2022 incident and then withdrawing them, and saying there were no doctors at the Port Vila hospital each of the three times she went to be medically examined. In light of the diminished credibility of the complainant and her father, the defence submitted the prosecution cannot prove its allegations beyond reasonable doubt.



Analysis

27. This case turns on consent and a reasonable belief in consent. The court's assessment of the credibility of the witnesses, in particular the complainant and the accused, is critical in this regard.
28. I found the defendant to be a credible witness. He made concessions against his interest when concessions were called for. For example, he admitted he did not explicitly ask the complainant for sex on 31 December 2022, he admitted he did not explicitly ask to touch her breasts, and he admitted slapping her when she came to his house. He freely admitted that he tried to have sexual intercourse with the complainant on 31 December 2022 and later at the beach. Although corroboration is not necessary and she did not witness the act itself, Claudine's evidence was consistent with his about what happened on the bus and immediately before the alleged offending.
29. I found the complainant to be less credible in some respects. She either lied about the other person's involvement in the alleged offending, or was persuaded to withdraw her accusation against him, perhaps by her father who said he was concerned for the other person's reputation. I find it incredible that no doctor could examine her at the Port Vila hospital each of the three times they went there. On occasion she changed her account of whether she or the accused removed her clothing. This is a small matter but it goes to consent. The prosecution did not exclude the defence's interpretation of the evidence, which was the possibility of a growing attraction on her part towards the accused that she wanted to keep from her father, based on what happened before and after the incident on 31 December 2022.
30. I turn now to assess the evidence in light of my credibility findings. The prosecution made much of the fact that the accused never explicitly asked the complainant if he could touch her breasts on the bus or if he could have sex with her on 31 December 2022. The prosecution submitted he just assumed he could. His assumption must, however, be tested in light of the surrounding circumstances, before, during, and after the alleged offending. Consent can be inferred not just from words, but also from conduct and circumstances, or a combination of these (*Christian v R* [2017] NZSC 145 at [45]). Those circumstances reveal that he had reasonable grounds to believe she was consenting, and that a reasonable person in his position would have believed she was consenting.
31. He did not explicitly ask to touch her breasts, but she did not explicitly say not to, or protest. She allowed his hand to stay there. She did not have to stand beside him waiting for the second bus, and it is unlikely she would have if she did not consent to him touching her breasts the first time. She did not have to follow him onto the second bus and sit beside him again when there were other empty seats available if she was upset with his actions on the first bus, but she did. This supports the defence narrative that the accused had reasonable grounds to believe she consented to the touching of her breasts on the bus. Although it is possible to consent to one act but not to another, her conduct when they got off the bus is consistent with her conduct on the bus. It is as possible that she did not yell out during sexual activity because his hand was on her mouth as it is because she was consenting. Having made credibility findings more favourable to the defendant, his account of not putting his hand over her mouth is also more consistent with someone who would stop because he did not want to damage her.
32. Turning to the circumstances after 31 December 2022, if he had done what she alleged on 31 December 2022, it is unlikely that she would have gone to his house at least twice afterwards. It is also likely to be



more than a coincidence that she went to the police five weeks later only after her father saw her with the accused.

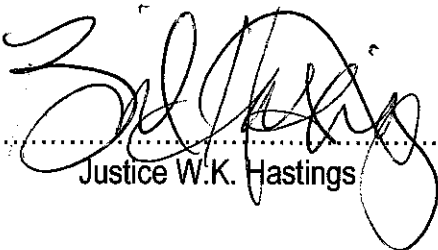
33. To my mind, the circumstances before, during, and after 31 December 2022, and her conduct towards the accused, create the possibility that she consented to the sexual activity on that night, and they create the possibility that the accused had reasonable grounds to believe she was consenting, neither of which the prosecution has disproved. For these reasons, I find the prosecution has not proved the second and third elements of the offence beyond reasonable doubt. There is therefore no need to discuss whether or not sexual intercourse as defined by s 89A(a) of the Penal Code took place.

Result

34. I return a verdict of not guilty.

Dated at Port Vila this 11th day of August 2023

BY THE COURT


Justice W.K. Hastings

