

PUBLIC PROSECUTOR

v

WILLIE KALO IAN

Dates of Trial: 5 June 2024, 7 June 2024, 10 June 2024 & 12 June 2024
Before: Justice V.M. Trief
In Attendance: Public Prosecutor – Ms M. Tasso
Defendant – Mrs P. Malites; Defendant present
Date of Decision: 12 June 2024

VERDICT

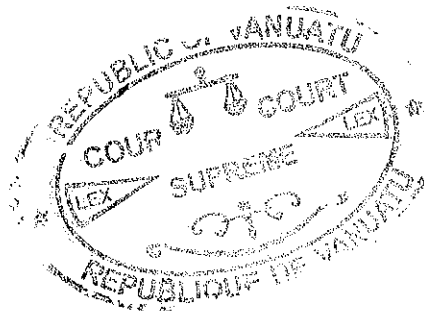
A. Introduction

1. The Defendant Willie Kalo Ian pleaded not guilty to the charge of sexual intercourse without consent contrary to para. 90(a) and s. 91 of the *Penal Code* therefore this matter proceeded to trial on that charge (Charge 1).
2. He had pleaded guilty to a charge of escape contrary to s. 84 of the *Penal Code* [CAP. 135] (Charge 2).
3. This is the verdict as to Charge 1.

B. Law

4. Paragraph 89A(a) of the *Penal Code* provides as follows:

89A. For the purposes of this Act, **sexual intercourse** means any of the following activities, between any male upon a female, any male upon a male, any female upon a female or any female upon a male:



- (a) *the penetration, to any extent, of the vagina or anus of a person by any part of the body of another person, except if that penetration is carried out for a proper medical purpose or is otherwise authorized by law; or*

5. Sections 90 and 91 of the *Penal Code* provide as follows:

90. *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; or*
- (vi) *by the effects of alcohol or drugs; or*
- (vii) *because of the physical or mental incapacity of that person;*

commits the offence of sexual intercourse without consent.

91. *No person shall commit sexual intercourse without consent.*

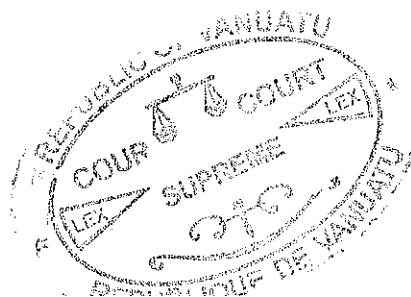
Penalty: Imprisonment for life.

6. The charge of sexual intercourse without consent has the following 3 elements or legal ingredients which must be proved in order for a conviction to be entered:

- That on 30 September 2023, sexual intercourse took place between the defendant and the complainant; **and**
- Without the complainant's consent; **and**
- That the defendant knew there was no consent or could not have had a reasonable belief that the complainant was consenting at the time that the intercourse occurred.

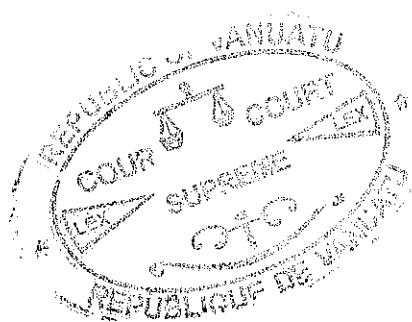
7. The Prosecution had the onus of proof and was required to establish the allegations beyond a reasonable doubt before a finding of guilt could be made in respect of the charges. The defendant was not required to establish anything.

8. As this was a case of alleged sexual offending, I warned myself of the danger of convicting the defendant on the uncorroborated evidence of the complainant.

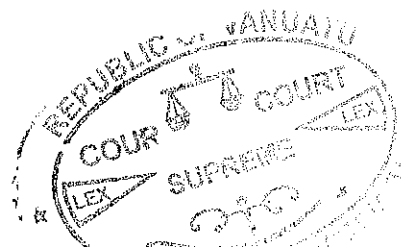


C. The Evidence

9. The witnesses' demeanour was a small part of my assessment of the witness. I also looked for consistency within the witness' account; consistency when comparing the witness' account with relevant exhibits; and considered the inherent likelihood, or not, of the witness' account.
10. I reminded myself that if I were to draw inferences, they could not be guesses or speculation but had to be logical conclusions drawn from other properly established facts. Adverse inferences are to be drawn only if they are the only available inference to be drawn. Further, if more than one inference was available, the inference most favourable to the defendant must be drawn.
11. The Prosecution called one witness – the complainant. The defence in turn called one witness – the defendant.
12. The complainant **Jessica Malverset** gave evidence that she is 22 years old and has lived in Port Vila since 2015. She is from Malekula. Her child lives with his father on Malekula – she is not with the father. She currently lives with her adoptive mother. She said that in September 2023, a friend called her after work to collect a shopping bag at the BSP bus stop. She said that Mr Ian was sitting at the front of the bus that she received the shopping bag from. She knows Mr Ian as her boyfriend Bill David's uncle. She said that later that afternoon, he called her and said that her boyfriend Bill David had left a large amount of money with him and for her to go and see him to get a share of that money. She said that she told him that she was scared to go and see him; he told her not to be scared and to come and see him.
13. Ms Malverset said that on another day, Mr Ian called her again and said that he had a large sum of money from her boyfriend Bill David and for her to go and see him to share the money. Then she told him to give her VT20,000 as she had advanced that amount of money to Bill but he had not given it back. She told him to bring it to her but he said that the amount of money with him was too large so she had to go and see him. He told her that with her share, she could set up a business on Malekula and with his share, he would buy two 'box' buses. She said that she told him that she was scared of Bill and how they would answer him when he came out of prison and asked about his money. She said that Mr Ian told her to leave Bill and that if she came and got the money, he could pay for her wedding to her new partner. She said that then she said she would bring her sister with her to see him and get the money but he told her not to bring anyone with her. She told him that she was scared to go and see him but he said not to treat him like a devil, to not be frightened and to go and see him. He told her that if she did not go to see him, he would call another girlfriend of Bill David to go and see him to share the money.

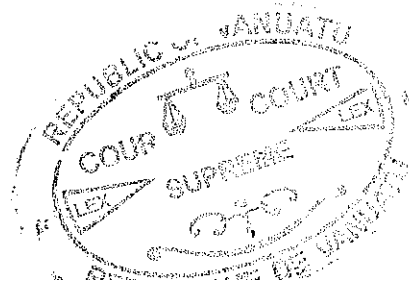


14. She said that Mr Ian called her on 28-30 September 2023 and spoke so much about the money that at about 6.30pm on Saturday 30 September 2023, she left her house to go and see him. The bus dropped her off at Tebakor then she walked to Malapoa Whitewood area and met Mr Ian at the '*sik mun*' tree. They walked to his house and it did not have any lights on. She sat on the chair and he on the mattress outside his house. She said that she thought he would talk about the money which is what he spoke about when he was calling her but now his mind changed and he spoke against her boyfriend Bill, telling her that Bill had too many girlfriends. She said that she was scared and her heart raced because it was dark and she was alone. She said that he told her to forget Bill and that he (Mr Ian) would have sex with her.
15. Ms Malverset said that Mr Ian pulled her right hand three times and pulled her onto the mattress. He kissed her then she told him that she could smell alcohol in his mouth. He denied it and made to kiss her again. She again told him that he smelt of alcohol and he said that he had drunk alcohol. Then he put his hand on her chest to push her against the mattress. The second time he pushed her chest, she fell back and then he tried to remove her pants but she was wearing tight pants so after he pulled and pulled at her pants, she told him to stop and that she would remove her pants and for him to remove his pants. She sat up to remove her pants and he spoke harshly at her to remove her pants quickly. She was scared that he would do something. She was removing her pants when he grabbed them and pulled them off her. He told her to lie back and open up her legs and put saliva on his penis then put his penis inside her vagina.
16. She said that during the sexual intercourse, he told her that he would feel what her boyfriend felt in sex with her, and did she think only her boyfriend should enjoy sex with her. She thought to herself that when he called, he spoke about money but not about having sex. She tried to push him off during the sex but he was too heavy. He was lying on her and told her to leave her boyfriend and stay with him. He told her that after sex, they would share the money. He ejaculated and when they put their clothes back on, he said they would leave. She said that she was crying in her heart and thinking that he just wanted to spoil her.
17. They left with her walking in front and him behind. It was raining a little. When they reached the *sik mun* tree, he did not tell her but when she looked behind her, he had already gone into the *nakamal* beside the tree. She kept walking, crying in her heart and called his phone but he did not answer. She walked to the bus stop at Tebakor, caught a bus and went home. After a while, he called her. She asked him why he didn't answer her call. He said that he did not hear the phone ring. She told him that it looked like he just wanted to spoil her relationship with her boyfriend, and she would call her boyfriend and report Mr Ian to her boyfriend and to the Police. He told her to tell her boyfriend and that he was not afraid of the Police so to report to the Police if she wanted to. The next day (Sunday), she told her boyfriend what Mr Ian had done and then on Monday, she reported Mr Ian to the Police and also blocked



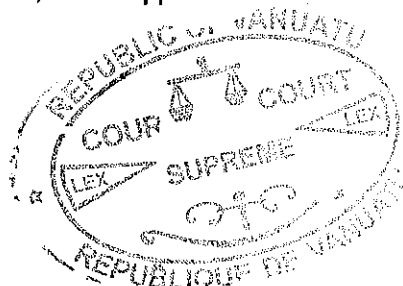
his phone number so that she stopped receiving his calls. After that, she received messages on her phone when he called her phone and his calls were blocked.

18. She came to know Mr Ian when her boyfriend Bill David took her on 2 occasions to Mr Ian's house at Malapoa. She said that after the sex and Mr Ian left, and she was walking along the road, she called Mr Ian's phone because she was scared, the weather was bad and as it was the weekend.
19. In cross-examination, Ms Malverset agreed that her date of birth recorded on her Police statement makes her 28 years old – she said that was because the date of birth on her I.D. card is wrong – she will turn 23 this year. She agreed that Bill David is her boyfriend, that she and Bill do not live together but meet once in a while. She said that she did not know that Bill has a domestic partner and children because Bill lied to her. She agreed that in September 2023, she was living at Simbolo area but said it was not for long – not even 1 month. She denied that when she went to see Mr Ian, her landlord wanted to evict her and her sister for failing to pay rent, and that is why she was looking for money.
20. She did not deny that the shopping bag she received at the BSP bus stop was to be given to Alto Akuma. She denied calling Mr Ian because she needed money as her landlord wanted to evict her. She agreed that Bill told her he had left some money with Mr Ian. She stated that Mr Ian called her about the money so she told him to give her the money that she had lent to Bill. She agreed that in her Police statement, she said that already in her and Mr Ian's phone conversation on 28 September 2023, he spoke against Bill, saying that he had many girlfriends. It was put to her that knowing Mr Ian was already against Bill, still she went to see him on 30 September 2023? She answered that he spoke against Bill perhaps thinking that she would stay with him (Mr Ian). She agreed that Mr Ian had already spoken against Bill to her but still she went to see him on that Saturday night.
21. She agreed that she walked from Tebakor to the *sik mun* tree where Mr Ian was waiting for her. She agreed that she sat on the chair and he on the bed outside his house. She said that they had not spoken for long when he asked her for sex and spoke against Bill. She agreed that he told her that he had separated from his wife. She denied that Mr Ian told her that he was available and that they could start up a relationship. She denied that Mr Ian told her that he was willing to look after her baby, and that she told Mr Ian that she had lied about being pregnant with Bill's baby. She said that Bill already knew before he went to prison that she had had a miscarriage. She agreed that when Mr Ian spoke against Bill, that she said she too was tired of having an unsettled life. She denied that while she and Mr Ian were talking outside his house, that she agreed to have a girlfriend/boyfriend relationship with him. She denied that he told her that she could come and live with him in his house. She denied that they spoke for some time about the relationship that they would have;



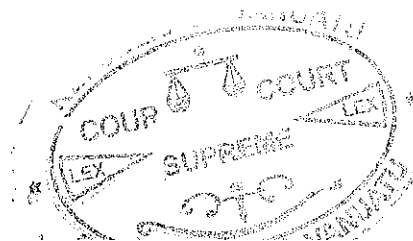
she said that she went, they did not talk about money but he spoke only about having sex.

22. She denied that after they had agreed to have a relationship, that he asked her that how he could trust her. She denied that she replied that she agreed and she promised. She denied that she agreed to look after his children. She denied that their agreement was that after her sister left for Malekula on Monday, then she would move in with him on Tuesday. She denied that she agreed to come and live with him also because she could not pay her rent at Simbolo. She denied that he asked her about their 'first night love' and she responded by asking him what he would like her to do. She denied that when she said this, he kissed her saying that he forced her! She denied that when Mr Ian hugged her, she kissed him. She denied that they hugged and kissed each other, saying that he forced her to. She denied that when he touched the lower part of her body, that she said that she would remove her clothes. She denied removing her own clothes saying that he removed them. She said that he was pulling at her tight jeans but she was concerned the button of her jeans would pop off so she said that she would remove them and told him to remove his pants, but then he pulled her pants off her. She denied that she removed her pants and lay down on the bed.
23. She denied that to the defendant, after their conversation agreeing to start a relationship and their hugging and kissing, that he thought she agreed to have sex with him. She denied that after she removed her clothes and lay on the bed, she told him to hurry up. She denied that he was standing there looking at her lying on the bed with her legs open, and that she told him to remove his pants and have sex with her. She denied that after Mr Ian removed his pants, he came down to the bed and asked to put his mouth to her vagina. She denied that she replied with a no and told him to hurry up and that he could do that next time. She said that what she said in her Police statement was true that Mr Ian held her legs tightly and inserted his penis in her vagina. She denied that he asked to put his mouth to her vagina but she said no, do that next time and after that he put his penis in her vagina. She denied that she told him to hurry up while they were having sex, and to hurry up because she would meet 2 friends at a kava bar at Namburu area.
24. It was put to her that she did not try to push him away during sex. She said that she did try to push him away but could not because he is heavy and that he held her hands tightly. She said that her heart was beating fast. She stated that she had not called out or called for help because she was alone and scared.
25. It was put to her that she was cross because Mr Ian did not share money with her. She said that she was not cross about the money but because Mr Ian knew that her boyfriend is Bill but wanted to spoil her and Bill's relationship. She agreed that she went to see Mr Ian to refund her the VT20,000 that she lent to Bill, but that he did not give her any money, saying that she went, sex happened and then he left. She



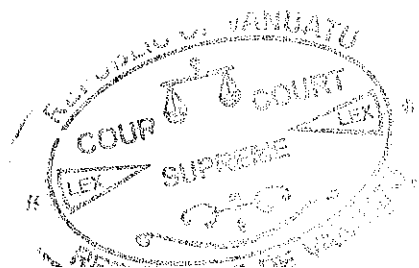
denied that she was angry when Mr Ian did not give her the money; she said that she cried in her heart because Mr Ian knew that Bill is her boyfriend. She denied that after sex, Mr Ian gave her a calico to wipe herself with.

26. She denied that after sex, they spoke about Mr Ian going with her to Simbolo to pay her rent. She denied that when they walked from Mr Ian's house to the *sik mun* tree, he went to the shop there to get change from a VT5,000 note to take to Simbolo to pay her rent. She denied that he told her to wait while he went to the shop, saying that he lied – he did not tell her where he was going. She denied that there was a fundraising event happening next to that shop, saying that she looked back, he was gone and she called and called him on the phone but no answer so she kept walking away. She said that he was lying saying he bought them takeaway food and searched for her along the road past Malapoa College and down to Kawenu area because she stood on the road for some time calling and calling him on the phone.
27. She denied that Mr Ian searched for her as far as Peter Chan store and that he did not answer her calls because his phone battery died. She denied that she stood on the road waiting for some time for him to go with her to pay her rent, saying that she waited for him to come and see her to stop a bus because there were drunk people on the road. It was put to her that she was alleging that she had just been raped yet wanted to contact Mr Ian because there were drunk people on the road. She replied that she feared for her safety because the weather was bad, there were drunk people and it was starting to rain more. It was put to her that she lied about waiting for Mr Ian because she was scared of drunk people because if she had just been raped, she would have taken the chance to get away from him. She replied that she was scared of the drunk people!
28. Ms Malverset agreed that Mr Ian called her on Sunday morning. It was put to her that he was calling as a result of what happened the previous night. She replied that he called her and she told him that because he wanted to spoil her relationship with Bill, she would report him to Bill and to the Police and that he replied that he was not scared of the Police. She said that Mr Ian tried to talk more but she hung up on him and also blocked his number at the same time. She denied that he called and said he had her rent money and could he come and give it to her. She agreed that her concern is her relationship with Bill and that that relationship continue. It was put to her that she had agreed to have sex with Mr Ian. She replied that he forced her to. It was put to her that after Mr Ian left her on Saturday night, she was so cross that she alleged that he raped her. She replied that she was not cross but that Mr Ian spoiled her and Bill's relationship knowing full well that she is in a relationship with Bill.
29. She denied that she changed the story to allege rape so that Bill would not hear that she had consensual sex with his uncle Mr Ian. She agreed that she was not happy because Bill told her he left money with Mr Ian, but when she went to see Mr Ian, he (Mr Ian) did not have money from Bill. She agreed that that is why she told Mr Ian



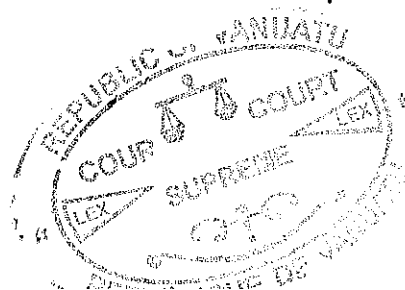
that she is from Malekula. It was put to her that she lied to the Police. She replied that she reported Mr Ian to the Police because he spoiled her. She agreed that she was cross when he left her on Saturday night. She agreed that she was also not happy because if her boyfriend heard about what happened between her and Mr Ian that night, it would spoil her relationship with her boyfriend. She agreed that she went to Mr Ian's house, they spoke about starting a relationship, then had sex but after sex, he left her so she felt that he had lied to her.

30. In re-examination, she stated that her mum had told her off so she left home and found the rental place at Simbolo and stayed at Simbolo for less than a week before her mum came and took her back to Bladiniere Estate area. When asked to clarify her answer agreeing that if her boyfriend heard about what happened between her and Mr Ian that night, it would spoil her relationship with her boyfriend, she said that she did not understand the question.
31. The defendant **Willie Kalo Ian** gave evidence that he is 43 years old and is from South Epi. He and his wife separated in 2021. Their 2 children live with his wife; on Santo since March this year. He stated that Alto Akuma, another boyfriend of Jessica's was in custody and Alto called him and asked him to buy some food and pass it to his girlfriend. Alto gave his phone number to Jessica who called him (Mr Ian) to tell him that she was the girlfriend waiting to receive the food. When he saw that it was Jessica who came to get the shopping bag of food, he was surprised because he knew Jessica as Bill David's girlfriend. After that, Alto and Bill wanted to fight over Jessica in prison but they did not fight because they were separated – one to the container and the other in the remand unit.
32. He said that after giving the shopping bag of food, he left. That afternoon, Jessica called him and asked about the VT7 million that Bill left with Mr Ian. He said that she kept on calling him and asking if it was true that he had that money because her landlord wanted to evict her and Bill had borrowed VT20,000 from her and said that he would give it back to her on Monday. He said that Jessica called him every day on 28, 29 and 30 September 2023 and he told her to come and see him on Sunday, and he did not really confirm that he had VT7 million with him. But then on Saturday, she called that they were about to evict her, he felt sorry for her and told her to come and see him. He said that every call, Jessica called him for the money and for him to help her with her rent. He had met Jessica before when Bill brought her twice to his (Mr Ian's) house. Bill had no place to go so he and Jessica slept at Mr Ian's house and Mr Ian slept next door at his uncle's house. He had not met Jessica anywhere else.
33. Mr Ian said that Jessica came to see him on Saturday after she finished work. She called him and he met her on the road then they walked to his house. They sat outside his house on two plastic chairs. She asked where his wife was and he told her that they had separated and that he lived by himself at his house. He asked her how much her rent was and she said VT12,000. He said that he told her – although



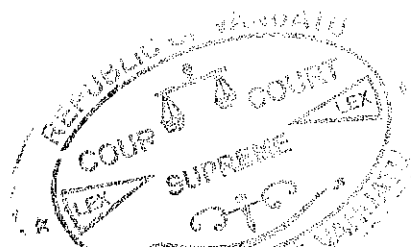
she already knew – that Bill has a domestic partner and children. He told her that Bill could not have two women as domestic partners, but he (Mr Ian) was single and if she agreed, she could stay with him and he would help look after the baby she was pregnant with. She replied that she wanted to settle down and was tired of a life of drinking and night clubbing, and that she had lied to Bill that she was pregnant when she took money from Bill.

34. He said that he told her that if she agreed to stay with him, then his two children would stay with their mum as well as come and stay with him and Jessica. He said that she agreed to have a relationship with him. He told her that he was by himself so if she stayed with him, they would live in his house. He said that she replied that on Monday, her sister would leave for Malekula and then on Tuesday, he would get a truck to come and get her things from Simbolo and she would move into his house.
35. He said that she told him that she agreed to have a relationship with him, and that she agreed to look after his children and that they would have a child together and she also already had a child who lives at Malekula. He said that he told her that if their relationship was stable, that they could get her child to come and live with them. He asked her if she was sure she agreed and how could he trust her. She told him that she agreed and promised to stay with him and for them to be together. He said that she was happy and he was happy that he would have a partner.
36. He said that Jessica had promised to everything with him so he thought that everything was fine then he asked to 'go out with her' (have sex with her). He said that he asked her what about our 'first night love' and if they could touch each other. He asked her how he could trust her and she replied by asking him what he wanted her to do. He reached out to her and she came to him, hugged him and they kissed. As they kissed, he hugged her and touched her down her body. He touched her hips/buttocks and she was wearing tight picnic trousers which tie up in the front. He held her waistband and she told him to wait and she would remove her pants. He took a step back and she removed her pants on her own and sat down then lay down on the bed. He said that he did not push her as she said in her evidence.
37. He said that she lay back on the bed and opened her legs. She saw that he was standing there looking at her and she said what are you looking at, remove your pants and come and have sex with me. He said that she was not scared, did not scream or call out for help as if she thought he was trying to rape her. He thought it was a bit funny that she was rushing for them to have sex. He lay beside her legs but his penis was not erect so he had to take a few minutes to get an erection before he could go out with her (have sex with her). While he was trying to get an erection, he asked her if he could put his mouth to her vagina. She replied saying no to that – that he could do that next time. When he was ready, he lay on top of her and had sex with her but did not feel that she had a fast heartbeat and she did not say no to him for putting his penis in her vagina. He said that she did not even push him away



or try to call out or call for help if she was scared. When he was ready to have sex with her, he asked her how she felt and she said that she felt good and called him her man. He said that after she said that she felt good, she told him to hurry up and have sex with her quickly, that she wanted him to have sex with her quickly.

38. He said that after sex, he gave her a calico to clean herself with and then they talked over what they had agreed about having a relationship and living together. He said that she did not mention the money that she had been calling for but told him that they would go and he pay for her rent. Then they left to go to Simbolo where he would pay her rent, and they walked along talking, with her in front and him walking behind her.
39. He said that when they got to the main road, the mothers in the community were holding a fundraising event, the weather was fine, a live band was playing and there were many people about. He told her to wait there while he went to the shop. He had three VT5,000 notes in his wallet and wanted to get change from one of the VT5,000 notes to get VT2,000 to put with the VT10,000 so that he had VT12,000 to take to Simbolo to pay her rent. When he got out of the shop, some of the mothers called him to support their fundraising so he bought two takeaway containers of food then came back to where Jessica was standing but she was not there. He said that he looked for her, there were many people there but he thought that she was afraid because it was his community and he would stay with his wife, so he kept walking along the road looking for her in the crowd down to Kawenu. His phone battery had died so they could not communicate and she walked out on him. He walked past Kawenu and walked fast all the way to Peter Chan to find her, and along that road to Cellovila, the passing vehicles' headlights lit up the road to Cellovila but he could not see anyone walking along the road that was her. There were people walking along the road but he could not see her. So he turned back and returned to his house.
40. He said that he charged his phone and the next morning (Sunday), he called her. He said sorry for his phone and them not communicating the night before, and he had her rent that he could bring over. She told him that they had sex and he lied to her? She told him that she was from Malekula and that she had told her boyfriend and would report him to the Police. He told her that they had had an agreement and there was no talk of the Police but she did not agree anymore – she said that she would report him to the Police. He said that if he had just given her the rent money, they would not have an issue and she would be at his house. He said that he is surprised that she has come to Court and denied everything. She reported him and he was remanded until today for the Court to deal with him.
41. He said that his uncle lives next door about 30 metres away from his house – only a security fence separates their yards. At the time, all his family were home. He said that he did not believe that Jessica would report him because he lives by himself in his own house and yard, and he thought everything was fine because she had



agreed to be his partner and to stay with him and help him, and that they would be together in a relationship.

42. In cross-examination, Mr Ian agreed that before he and Jessica's phone communications, she met him and his friends to collect a shopping bag. He denied that he called her on 28, 29 and 30 September 2023. He agreed that he knew her before when Bill brought her to his house on two occasions. He said that they got drunk together one night on one of those occasions. He agreed that at the bus stop was the first time for him to see Jessica again. He said that his friends gave his phone number to Jessica to call him to meet for the shopping bag. He confirmed that is how they got each other's phone numbers. He said that both Alto and Jessica called him then to direct him to the bus stop where Jessica was. He denied that he was lying that he did not call Jessica on 28, 29 and 30 September 2023.
43. He denied that during their phone calls, that he told Jessica about money that Bill had given him; he said that he does not know about such money but Bill told her that he had left some money with him (Mr Ian). He denied asking Jessica to come and see him to share that money, saying that she believed Bill's lies that he had left money with Mr Ian but there was no such money with him. He denied that he called Jessica over those 3 days to convince her to come and see him at Malapoa; he said that Jessica called him over the 3 days and kept talking about the landlord evicting her and for him to help her with her rent. He denied that he told her that the amount of money with him was so large that she could go to Malekula and he would buy two 'box' buses. He denied telling her that when she came to see him at Malapa, she must come alone.
44. He agreed that in their phone conversations over the 3 days, he did not talk about them having an intimate relationship. It was put to him that their conversations were about the money that Bill left with him. He replied that Jessica talked about money because the landlord wanted to evict her so she needed money but he does not know about any money from Bill. He agreed that he only spoke with Jessica about having an intimate relationship with her when she came to his house at Malapoa. He said that he told her to come over on Sunday during the day but she came over on Saturday after nightfall. She told him that she was scared to walk to his house so he walked to the road and waited for her. He said that she arrived by foot.
45. He agreed that he had put a plastic chair and a single mattress outside his house, saying that there were 2 plastic chairs and a bed. He agreed that there was no one else at his house but that his family next door were all at home. He agreed that he did not have lights on at his house, saying that his solar lights battery was low. He said that when he and Jessica talked, they were both seated in the plastic chairs. He denied speaking against Bill – he said that he told Jessica that Bill had a domestic partner and children. He denied that that night he did not talk about the money that she came for – he said that he did not know about that money, but he agreed to pay



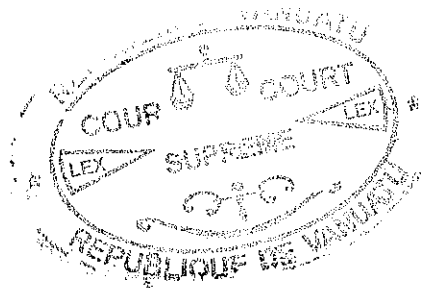
her rent. It was put to him that only he spoke against Bill but Jessica never did that. He replied that Jessica told him that she wanted to settle down and have a good life.

46. It was put to him that during their conversation that night, he asked her for sex. He agreed and said that he asked to have a relationship with her before he had sex with her. It was put to him that her answer that night was, "No". He replied that she said yes to him that night and promised him that she would have a relationship with him. It was put to him that Jessica told him that she did not agree to have a relationship with him. He said that Jessica did not say that to him – she told him that she agreed and she promised to have a relationship with him and that she wanted to settle down.
47. It was put to Mr Ian that he told her to lie down on the bed for them to have sex. He agreed saying that in their conversation, she agreed with her words before the sex (*'bifo bae mi mekem trabol lo hem'*) but that if she had said, "No", that he would not have touched her. He denied pushing her onto the bed. He denied that she wore tight pants – he said that she wore picnic trousers that tied in the front. It was put to him that when Jessica fell onto the bed, that he forcefully removed her pants. He denied that, and said that Jessica herself removed her pants and told him to remove his pants which he did before having sex with her. He denied removing her pants saying that the prosecutor was not there and did not see what happened! It was put to him that he lied, that she was removing her pants when he pulled them off her. He said that she removed her pants and that he did not force her – they had talked and in their conversation, she agreed before they had sex.
48. It was put to him that Jessica did not remove her pants because she agreed but out of fear that night. He replied that if she was scared of him she would call for help or say, "No" to him but everything was consensual and without force. He denied talking harshly at Jessica to remove her pants. He denied insisting many times that she remove her pants. He agreed that he removed his own pants. It was put to him that when he insisted that she remove her pants, she told him that she would remove them herself. He replied that he did not want to remove her pants but only hugged her and she decided to remove her pants. He denied speaking harshly at Jessica – he said when he said for her to stay overnight, she said no because her 2 friends were waiting for her at a kava bar so he did not force her but went along with what she wanted. It was put to him that that night he did not realise that she was scared of him. He denied that, saying that if she was scared, she would say "No" or would say next time or her heart beat fast or he would tell from how she looked but she just agreed to them having a relationship and sex. He denied that he pulled her pants off her.
49. Mr Ian denied that after Jessica removed her clothes, that he opened her legs with his hands. He denied putting saliva on his penis. He agreed that after that they had sex. He denied that during sex, Jessica tried to push him away, saying that she held him tight and when he asked her how she felt, she said that she felt good. He denied



saying to her during sex that he wanted to enjoy what her boyfriend enjoyed, and did she think that only her boyfriend would enjoy sex with her. He denied a second time that Jessica tried to push him away, saying that she did not and she felt good and held onto him. It was put to him that during the sex, Jessica did not call for help because she was scared. He replied that she did not call out and she did not need help and she was not scared of him – everything was by agreement.

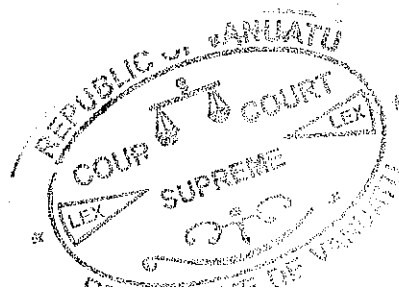
50. He was asked if he noticed that night that Jessica cried. He said that she never cried and if she did, he would have seen her cry or heard in her voice that she cried or was scared, but she was not scared and spoke with him fine. He denied telling her that after sex, they would share the money. He agreed that he ejaculated. He agreed that after sex, he passed her a calico to wipe herself with. He agreed that after sex, they walked to the road – he said that they talked as they went and did not keep a distance from each other. He denied leaving Jessica when they got to the main road – he said that he told her to wait for him but when he returned, she had left. It was put to him that after Jessica left, that she called him. He replied that his phone was off and he called her the next morning. It was put to him that that night he turned off his phone on Jessica. He replied that he uses a solar power system at his house and had not charged his phone so the phone battery was flat. He agreed that he called Jessica the next day, saying that he apologized to her for their communication problem and asked to take her rent to her and that on Tuesday, he would help her move her things to his house.
51. It was put to him that she told him in that conversation that she would report him to the Police. He agreed and said that she ignored all the conversation that they had had, and he thinks that she wanted to use his money like she does with Bill, and then turned their conversation into a rape case. He denied saying to her that he was not afraid of the Police.
52. It was put to him that she told him that night at his house at Malapoa that she did not agree to have sex with him. He said no, she agreed to have sex with him because she removed her own pants and told him to remove his pants. It was put to him that she removed her pants because he demanded that she remove his pants. He said no, he just held her and touched her body and he thinks that she came to have sex for money. He denied that she was scared that night. It was put to him that he could tell that she has sex for money but could not tell that she was scared of him. He replied that she was not scared as she came for him at his house. It was put to him that when he met Jessica that night, he knew that she did not want to have sex with him but he forced her to have sex. He replied that she was not even scared like the Prosecution suggested – he said that he was there and in their conversation, they talked about and knew and agreed so he does not know why she then changed the story so that now he is being prosecuted based on her allegations which are not true.



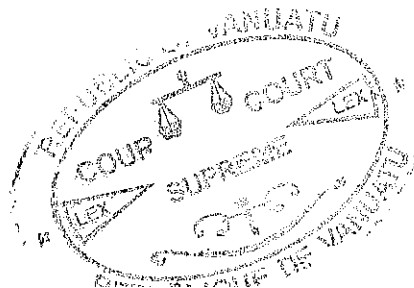
53. In re-examination, Mr Ian explained his answer in cross-examination that he thinks Jessica had sex for money because what they spoke about and agreed on and that she promised then they had sex, she has denied all of that in Court. He added that she would get money from Bill and she thought that Bill had left money with him so perhaps she thought that she would have sex with him then they would share the money, but there is no money with him! And after sex, he asked her to stay overnight but she said that she must go back so he has realised that she tricked him and bullied him.
54. He clarified that Jessica came to see him that Saturday for money for her rent. He said the waterproof bed is always there outside his house and is sitting up on 4 bricks, off the ground. He explained that he meant by "*mekem trabol lo hem*" that they had sex, not that he committed a crime. He said that after she removed her pants and he removed his pants, she lay on the bed with her legs opened and told him to hurry up and that she had 2 friends waiting for her.

D. Findings and Consideration

55. It is accepted that at night on 30 September 2023, the defendant Mr Ian and the complainant Ms Malverset had sex at his house at Malapoa area.
56. The central issues were whether or not she consented at the time the act of sexual intercourse took place, and whether or not the defendant had a reasonably based belief in consent at the time the sexual intercourse took place: *Public Prosecutor v Kaukare* [2023] VUSC 126 at [12] per Hastings J; *R v Adams*, CA70/05 [2005] NZCA 360 at [48].
57. Both Mr Ian and Ms Malverset said that they met through her boyfriend Bill David bringing her to Mr Ian's house on 2 occasions. They both said that the next time they met was at a bus stop on 28 September 2023 when Mr Ian gave her a shopping bag of food. By then, they had each other's phone numbers and then spoke over the phone on 28, 29 and 30 September 2023.
58. Ms Malverset said that Mr Ian called her each day and said that her boyfriend Bill David had left a large sum of money with him and for her to go and see him to share the money. She said that she told Mr Ian to give her VT20,000 which she had lent to Bill but that he had not paid back. In cross-examination, she agreed that Bill told her he had left some money with Mr Ian. Mr Ian said that she called him each day asking about the VT7 million that Bill left with him and that her landlord at Simbolo area wanted to evict her and that she had lent Bill VT20,000. He said that every call, she called him for the money and for him to help her with her rent. Both of them mentioned VT20,000 that Ms Malverset had lent Bill. I find that they discussed money during their phone calls on 28, 29 and 30 September 2023 and that Ms Malverset told Mr Ian that she had lent VT20,000 to Bill and that she needed money for rent.

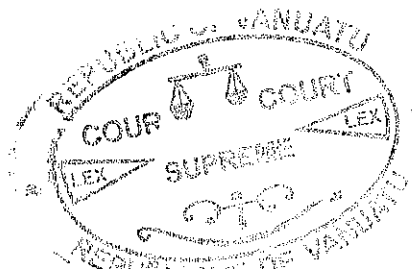


59. As a result of the calls, Ms Malverset went to Malapoa in the evening on Saturday 30 September 2023 to see Mr Ian. Ms Malverset said that Mr Ian spoke so much about the money that at about 6.30pm on Saturday 30 September 2023, she left her house to go and see him. I infer that Ms Malverset went to see Mr Ian to get money from him.
60. Mr Ian met Ms Malverset on the main road. Mr Ian said that he told her to come over on Sunday during the day but she came over on Saturday after nightfall. She said that when she got there, he was waiting for her. He said that she told him that she was scared to walk to his house so he walked to the road and waited for her.
61. Mr Ian and Ms Malverset walked from the main road to his house. They both said there were no lights on at his house and they sat outside. Ms Malverset said that he did not talk about money but spoke against her boyfriend Bill, telling her that Bill had too many girlfriends. Mr Ian denied that he spoke against Bill – he said that he told Ms Malverset that Bill already had a domestic partner and children but that he (Mr Ian) was single and if she agreed, she could stay with him and he would help look after the baby that she was pregnant with. He said that she told him that she had lied to Bill that she was pregnant. In her evidence, she said that Bill already knew before he went to prison that she had had a miscarriage. She agreed that Mr Ian told her that he had separated from his wife.
62. Mr Ian said that he asked Ms Malverset to have a relationship with her and for her to move into his house to live with him. He said that she agreed to have a relationship with him and that after her sister Rose went to Malekula on Monday, for Mr Ian to help her on Tuesday to move her things from Simbolo to his house at Malapoa. Ms Malverset denied agreeing to have a relationship with him and agreeing to move into his house to live with him. She agreed that when Mr Ian spoke against Bill, that she said that she too was tired of having an unsettled life. Mr Ian in his evidence said that Ms Malverset told him that she wanted to settle down and have a good life.
63. It was put to Mr Ian in cross-examination that during his and Ms Malverset's conversation that night, he asked her for sex. He agreed and said that he asked to have a relationship with her before he had sex with her. It was put to him that her answer that night was, "No". He replied that she said yes to him that night and promised him that she would have a relationship with him. It was put to him that Jessica told him that she did not agree to have a relationship with him. He said that Jessica did not say that to him – she told him that she agreed and that she promised to have a relationship with him and that she wanted to settle down.
64. First, Ms Malverset said in her Police statement that when Mr Ian said for them to have a relationship, she said, "No" [Exhibit P1]. However, when she gave her



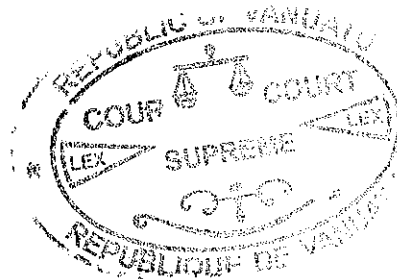
evidence in Court, she did not at any time say that she had said, "No" to Mr Ian that night.

65. Secondly, it was put to Mr Ian in cross-examination that Ms Malverset said "No" to him that night, however she had not said at any time in her evidence that she expressly said, "No" to Mr Ian about having a relationship with him. In cross-examination, she said that she did not say anything to Mr Ian.
66. Both of these matters diminished Ms Malverset's credibility on this aspect of her evidence and I considered that I could not rely on her evidence denying that she agreed to having a relationship with Mr Ian.
67. Accordingly, I accept and find that Mr Ian and Ms Malverset sat outside Mr Ian's house and before they had sex, had a conversation about starting a relationship. I find that Mr Ian as a result of that conversation formed the belief that Ms Malverset had agreed and promised to have a relationship with him and that she wanted to settle down, and that she would move into his house to live with him.
68. Ms Malverset said that Mr Ian pulled her down to the mattress and then kissed her before pushing her back onto the bed and trying to remove her pants. She said that she was afraid the button of her jeans would pop off so she told him that she would remove her pants and for him to remove his pants. She said that she was still removing her pants when he pulled them off her. Then he told her to lie back and open her legs and then he had sex with her. She said in cross-examination that he forced her to hug and kiss him, and to have sex. She denied that after Mr Ian removed his pants, that he came down to the bed and asked to put his mouth to her vagina but she said no and told him to hurry up and that he could do that next time. She said that after that, he put his penis in her vagina.
69. Mr Ian said that Ms Malverset had promised to everything with him so the thought everything was fine and then he asked to have sex with her. He said that he asked her what about their 'first night love' and if they could touch each other. He said that he reached out to her and she came to him, hugged him and they kissed. He touched her down her body to her hips/buttocks and when he touched her waistband, she told him that she would remove her pants. She lay back on the bed and opened her legs and told him to remove his pants and hurry up and have sex with her. He said that while he was trying to get an erection, he asked to put her mouth to her vagina but she said no, that he could do that next time. When he was ready, he lay on top of her and had sex with her. He said in his evidence that if she had said, "No", that he would not have touched her.
70. I find that Mr Ian and Ms Malverset hugged and kissed. In cross-examination, she said that he forced her to but earlier in her evidence-in-chief she related matter of factly that Mr Ian leaned forward to kiss her and that he did. He related touching her



down her body. She did not protest and she did not pull away from their kissing. I consider that the inherent likelihood of the situation was that Ms Malverset agreed with their hugging and kissing.

71. I find that Ms Malverset willingly told Mr Ian that she would remove her pants and for him to remove his pants. Ms Malverset said that Mr Ian was pulling and pulling her pants so she told him that she would remove her pants. He said that he touched her hips/buttocks and waistband, and she said that she would remove her pants. Both of them in their evidence said that she told him to remove his pants. He said that she told him to hurry up and have sex with her, and to have sex with her quickly.
72. Ms Malverset stated in her Police statement that Mr Ian held open her legs and told her that he would put his mouth to her vagina but she did not want that and pushed him away [Exhibit P1].
73. However, Ms Malverset did not say in her evidence in Court what she had said in her Police statement that Mr Ian told her that he would put his mouth to her vagina but she did not want that and pushed him away. When it was put to her that she had said that in her Police statement, she said only that what she said about Mr Ian holding her legs was true. She denied that Mr Ian asked to put his mouth to her vagina but she said no and told him to hurry up and that he could do that next time.
74. Ms Malverset was not consistent within her own account. Her evidence in Court was inconsistent with her Police statement [Exhibit P1]. Accordingly, I considered that I could not rely on Ms Malverset's evidence as to what occurred during the sexual intercourse. I do not accept her evidence that Mr Ian pulled her hand, that he pushed her, that he held her legs tightly then put his penis into her vagina and that he forced her to have sex with him.
75. I consider that the only inference available from Mr Ian and Ms Malverset's hugging and kissing, from her telling him that she would remove her pants and for him to remove his pants, and from her removing her pants is that she consented to sexual intercourse with Mr Ian. Accordingly, I find that the complainant Ms Malverset consented at the time that sexual intercourse took place.
76. I also find that the defendant Mr Ian had a reasonably based belief at the time that the sexual intercourse took place that Ms Malverset consented because of their hugging and kissing, she told him that she would remove her pants and for him to remove his pants, she removed her own pants and lay down on the bed, and she urged him to hurry and have sex with her. Put another way, I consider that a reasonable person in the defendant's position at the time sexual intercourse occurred could have believed that the complainant was consenting: *Warmenhoven v R* [2011] NZCA 391 at [294]; *Public Prosecutor v Kaukare* [2023] VUSC 126 at [13] per Hastings J.



77. Both Ms Malverset and Mr Ian in their evidence said that after sex, they walked from Mr Ian's house to the main road but then Mr Ian left Ms Malverset. She said that he did not tell her where he was going and did not answer any of her calls to his phone. He said that he told her to wait for him then he went to get change to pay her rent, but when he returned to where she had been standing, she was gone. He said that his phone battery was flat and he could not call her until the next morning. I consider that it is inherently unlikely that Ms Malverset would have called Mr Ian's phone multiple times if he had just raped her – I consider that she was annoyed that they had had consensual sex then he left her without any explanation, and that she wanted his company to feel safe amongst the people on the road and because he was meant to pay her rent at Simbolo area.
78. Ms Malverset's last answer in cross-examination was that she agreed that she went to Mr Ian's house, that they spoke about starting a relationship and had sex but after sex, he left her so she felt that he had lied to her. I was left with the distinct impression from Ms Malverset's evidence that she consented to sex with Mr Ian when that took place, but as a result of Mr Ian leaving her at the road on her own, then not answering her many calls to his phone and without having given her rent money, she left and felt that he had lied to her and she was concerned for her and Bill's relationship if Bill heard that she had consensual sex with his uncle Mr Ian, so she decided to report him to Bill and then to the Police. However, true consensual sexual activity that is subsequently regretted is still consensual sexual activity: *Public Prosecutor v Elman* [2011] VUSC 75 at [6] per Spear J.
79. For the reasons given, I find that the Prosecution has not proved the second and third elements of the offence beyond reasonable doubt.

E. Result

80. I return a verdict of not guilty. Mr Ian is deemed to be innocent of Charge 1 and is acquitted.
81. Mr Ian was remanded in custody on 16 October 2023. He has been in custody for nearly 8 months, an effective imprisonment sentence of 16 months. Accordingly, he has served the time required in respect of the charge of escape (Charge 2) therefore is to be immediately released from custody.

DATED at Port Vila this 12th day of June 2024
BY THE COURT


Justice Viran Molisa Trief

