

**IN THE COURT OF APPEAL OF  
THE REPUBLIC OF VANUATU**  
*(Appellate Jurisdiction)*

**Criminal Appeal Case No. 17/496**

**BETWEEN: KATIPA KEIMIT**  
Appellant

**AND: PUBLIC PROSECUTOR**  
Respondent

**Coram:** *Hon. Justice Ronald Young*  
*Hon. Justice Oliver Saksak*  
*Hon. Justice Dudley Aru*  
*Hon. Justice Mary Sey*  
*Hon. Justice Paul Geoghegan*  
*Hon. Justice David Chetwynd*

**Counsel:** *Pauline Kalwatman for the Appellant*  
*Losana Matariki for the Respondent*

**Date of Hearing:** 28<sup>th</sup> March 2017  
**Date of Judgment:** 7<sup>th</sup> April 2017

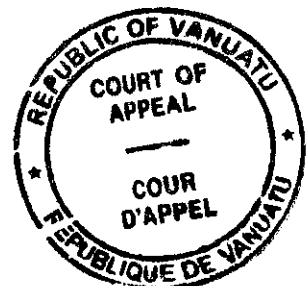
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**JUDGMENT**

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**Introduction**

1. Kapita Keimit (KK), the appellant, knew a young woman, RM, as they lived in the same village. On 11 April 2016 at about 7pm the two met on the road near their village.
2. KK blocked RM's way. He had a knife and a piece of wood. He forced RM into the bush near a local school and, she said, raped her twice.
3. KK pleaded not guilty and faced trial in the Supreme Court on one count of sexual intercourse without consent ( S90, 91 (a) Penal Code [ CAP



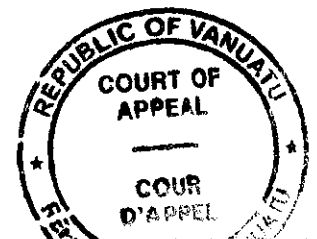
135]) KK at trial agreed he had sexual intercourse on two occasions with RM on 11 April but said RM consented.

4. The Judge after trial found KK guilty.
5. KK appeals against his conviction on the following grounds.

- a) The prosecution failed to produce a record of interview of KK taken by the Police. This failure meant the trial was unfair and a miscarriage of justice occurred.
- b) The Judge when considering KK's evidence at trial failed to consider whether his evidence might reasonably be true. If the Judge had done so he would have acquitted KK.
- c) The guilty verdict was not supported by the evidence. This ground of appeal included claims of insufficient evidence to support a conviction, failure to acknowledge and apply the corroboration rule, conflicts in RM's evidence which should have cast doubt on her credibility, and a failure by the Trial Judge to recognise the defence case was believable.

### **Background Facts**

6. RM and KK knew each other before the events of 11 April. KK was a married man. His evidence was that they were boyfriend and girlfriend. He said they had sexual intercourse on six occasions prior to 11 April. RM in her initial police interview agreed that KK had asked for sex and had offered her money but she had refused. At trial she accepted that she had had intercourse with KK on two occasions when he had paid her 1000vt.
7. On 11 April about 7pm RM was on a road going home. KK blocked her way. As she went to the left he blocked her as he did when she went to the right of the road. KK was holding a knife and a piece of wood. RM was scared. KK then grabbed RM's tee-shirt pushed her head with the



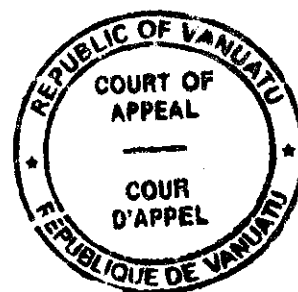
piece of wood he was carrying and pulled her into the bush. After he had done so KK asked RM for sex. She refused.

8. KK told her to remove her clothing. When she didn't respond he said he would do so. She then removed her dress and intercourse took place. RM told KK that she would report what he had done. She said that after the first intercourse KK stopped for a short while and then had sex with her again. RM returned home about 9pm and the following morning told a friend, Sophie, what had happened. The following day she told the Chief of the village and a complaint to the police followed.
9. KK gave evidence at trial. He accepted there had been a confrontation with RM on the road outside the village. He was upset because he believed RM had had an affair with his younger brother while he had been away from the village. KK accepted he had a knife and a piece of wood and that he had pushed RM into the bush. However he said they had reconciled and the sexual intercourse was consensual.

### **This Appeal**

#### **(a) KK's interview**

10. KK was interviewed by the police on 17 April 2016. He gave a statement of about two pages denying the rape and emphasising he had a previous sexual relationship with RM. This statement was not produced in evidence at trial. It should have been.
11. KK relied upon this Court's observations about the importance of producing in Court a defendant's statement to the police (see: Yercet v Police Prosecutor 2015 VUCA 19) KK submits that because the record of interview was not before the trial Judge he was not aware of important evidence which supported KK's evidence. He says this statement, if admitted in evidence, could have raised a reasonable doubt about the RM's evidence and therefore the verdict.



12. In this case counsel for KK had a copy of the record of interview well before trial. The constable who took the statement gave evidence at trial. When he did not produce the record of interview in evidence in chief he was not asked to do so by counsel for KK.

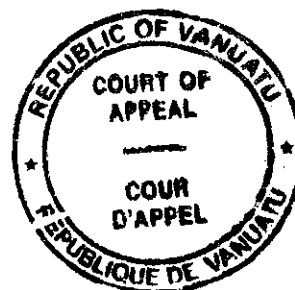
13. In any event RM was extensively cross examined about the content of KK's record of interview. Before us KK's counsel accepted that the trial Judge knew that KK had made a statement to the police and that through cross-examination of RM full details of his record of interview was before the trial Judge.

14. In those circumstances, although we again stress the importance of the prosecution producing in evidence a record of interview of an accused person, no prejudice to KK resulted. We therefore reject this ground of appeal.

**b) Standard of Proof**

15. KK submits that in the Judge's consideration of his evidence the Judge failed to acknowledge that if his evidence might reasonably have been true he should have been acquitted. This submission is based on this court's observation in Apia .v. Public Prosecutor [2015] VUCA. Where we said:

*"Where, as here, the defendant elects to give evidence, a Judge may not convict the defendant if his account might reasonably be true. That is simply a reflection of the burden and high standard of proof resting on the prosecution. If the defendant's account might reasonably be true then there is by definition a reasonable doubt about whether the prosecution case has been established. The corollary is that a trial judge may only convict a defendant who gives evidence if satisfied that the defendant's account is not reasonably capable of belief and must therefore be rejected."*



16. The trial Judge in his general observations as to the standard of proof said:

*“the standard of proof beyond reasonable doubt does not mean certainty. If I am not sure about your guilt I must acquit you of the offense, if I have a doubt on your guilt and that doubt is a reasonable one, I must acquit you”*

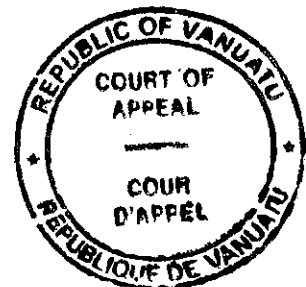
17. The Judge repeated that notion when he said that if after assessing the whole of the evidence he was not sure he must acquit. When considering the evidence of KK the Judge said that he rejected KK's version of the facts. The Judge said he did not *“believe the defendant's evidence that on 11 April 2016 the complainant consented to have sex with him”* The Judge said he believed RM's evidence and was therefore satisfied beyond reasonable doubt there was no consent.

18. The Judge therefore unequivocally rejected KK's evidence on the question of consent as untrue. It was therefore unnecessary for the Judge to then consider whether KK's evidence on consent might reasonably be true. He did not believe KK's evidence. Nothing further was required of the Judge. We reject this ground of appeal.

### **C) Evidential and other grounds of challenge**

20. RM's evidence at trial was that the day after the rape she told her friend Sophie. Sophie was not called to give evidence as a recent complaint witness. KK says the trial Judge should have inferred from Sophie's absence that her evidence would not have helped the prosecution case.

21. If Sophie had given evidence that RM had complained to her that evidence could have been used to support the credibility of RM's evidence. The fact that no such evidence was given simply meant there was no recent complaint evidence. In his reasons for judgment the Judge did not rely upon any recent complaint and so no error was made. We reject this ground of appeal.



22. Corroboration

KK says this is a case where the trial judge should have warned himself of the danger of convicting on the uncorroborated evidence of RM. His failure to do so was an error, which meant the conviction should be quashed. The Judge in his Reasons for Verdict recognised that there was no corroboration of the sole trial issue, consent. He illustrated in his Reasons that he was aware of the need for a trial Judge to warn himself of the dangers of convicting based on uncorroborated evidence. As the Judge noted however he could convict in these circumstances. Here the Judge was satisfied that RM was telling the truth about consent and KK was not. The Judge in these circumstances was entitled to convict without corroborative evidence. We reject this ground of appeal.

23. Assessment of particular evidence.

- (i) There were two allegations of rape by RM but for reasons not explained only one information was proceeded with.

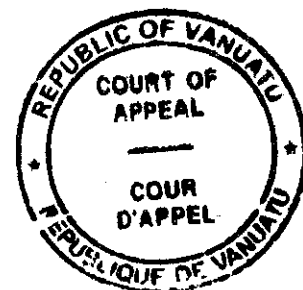
The trial Judge, we consider correctly proceeded on the basis that the information related to the first rape in time.

As to the second rape the Judge said:

*“if there was a separate count or charge I should hold that the status of the complainant after the first sexual intercourse with Defendant Kapita would be that she would be submissive but not consenting”*

KK submitted that if the Judge had doubt about the second rape then there must be doubt about RM’s evidence overall and therefore doubt about the conviction.

The Judge did not express doubt about RM’s evidence. On the contrary he believed she was telling the truth. And so no doubt was raised. We reject this ground of appeal.



- (ii) After the rape RM asked KK what she was going to tell her guardian when she arrived home. KK said "Tell her you were with me". KK's submission is that this conversation is consistent with consensual sex.

We reject this submission. It is speculative as to the meaning of the question and answer.

- (iii) RM's evidence was that during the incident her bra broke. The Judge said in his Judgement that KK "*admitted that he pulled her t-shirt and tore her bra*"

KK's submission is that the Judge erred when he said KK admitted breaking her bra. As it turned out who broke RM's bra was irrelevant to an assessment of consent or credibility. We reject this ground of appeal.

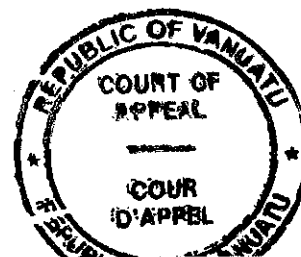
- (iv) KK's case was that the affair he claimed RM had with his younger brother occurred when KK went to Tanna Coffee, a building some distance from their village.

In cross examination RM was asked if she had talked to KK about him going to Tanna Coffee. She said Yes. In submissions KK claimed that because RM had agreed she had discussed that KK had gone to Tanna Coffee that somehow meant they must have discussed her affair with his younger brother. This proposition was never put to RM. It is speculative. We reject this ground of appeal.

### Inconsistencies

24. KK submits there were a number of inconsistencies in RM's evidence and her statement to the police.

25. In her police statement RM denied she had previously had sexual intercourse with KK. This was untrue. In her evidence RM accepted that she had sexual intercourse with KK on two occasions (although he claimed 6 times) when he paid her 1000vt. The Judge was aware of this inconsistency when he decided, that RM was telling the truth about the



issue of consent. He was entitled to do so even given this inconsistency. We reject this ground of appeal.

26. KK submits RM also gave inconsistent evidence about whether she fell asleep during part of the first rape. In her statement she said she was asleep during part of the rape. In her evidence she said she did not mean she was fast asleep but that she had her eyes closed. Again the trial Judge was aware of what RM said in her statement and at trial. Her explanation for the difference was believable and understandably did not lead the trial Judge to reject her evidence on the question of consent. We reject this ground of appeal.

27. During her evidence RM said her bra was broken. She said in cross-examination that occurred when she was pushed toward the road. In evidence in chief she said it occurred a few moments later when she was in the bush. This is a minor difference of no evidential importance in this case.

28. Finally KK says for a number of reasons the defence case was believable. These matters were all before the trial Judge. He rejected KK's evidence on the issue of consent as he was entitled to.

29. For the reasons given the appeal will be dismissed.

**DATED at Port Vila this 7<sup>th</sup> day of April 2017**

BY THE COURT

  
Ronald Young

(Judge)

