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

Criminal Case No.15 of 2001

PUBLIC PROSECUTOR
–v-
GRAHAM KENOHO

Coram: ***R. Marum J. MBE***

Mrs. Heather Lini Leo for the Prosecution
Mr. Kiel Loughman for the Accused

DECISION ON NO CASE APPLICATION

In a no case submission, what the defendant counsel is saying is that the prosecution has not proved all the elements of the charge beyond all reasonable doubt at the close of the prosecution case, and invite the court to dismiss the charge or charges against the defendant. Section 164 (1) C.P.C 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 there upon pronounce a verdict of not guilty.

Subsection 2; in any other case, the court shall call upon the accused person for his defence…

By virtue of section 164(1) and (2) the court must decided as a matter of law either on a no case application or on its own motion to stop the case there if there is no evidence to call upon the accused person to answer the charge or charges laid against him.

In this case, sexual intercourse was admitted by the defendant and was with her consent. On this admission the prosecution was called upon to prove the element of consent as a mater of fact that it was not obtain. Her statement

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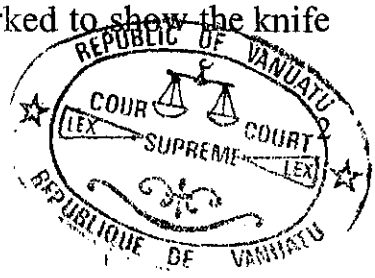
she made to police was admitted as evidence by consent, a part from her oral evidence.

The only evidence to prove the element of consent is the evidence from the victim herself and the defendant as there were no other witnesses present to witness what happened.

The simple fact of the case being that the defendant and the victim lived close to each other and knew each other's very well, and the defendant is the victim's uncle. She was sent to the garden by her mother to get some vegetables. At the garden the defendant came to her and they were talking. In their discussion the defendant asked her to have sex with her and she told him that she had her period, which she said she lied. The defendant said to her that it was all right. With these statements at least they have both used sexual words to each other's, which are not matters to openly talk about. With that conversation the defendant than pulled her hands to the bamboo area to have sex with her, she had a knife with her at that time. It was not true that the defendant kicked her and she fell down as stated in her statement to the police, as in cross-examination the defendant made her set down and when she set down he than took off her short and they had sexual intercourse, and becomes conflicting evidence. In her statement to the police the defendant hold her hands and pulled her towards the bamboo area, even he assaulted her on her back for her not to shout, and after the event she went home and crying. With crying home, I was cautious as to its reliability, as to Issack's evidence he only heard somebody shouting, it could be somebody else or Esther who only saw her crying or the mother attacked by the victim. These are not very strong or total reliable evidence to prove consent or the act of sexual intercourse but to described what they saw or heard or did at that time.

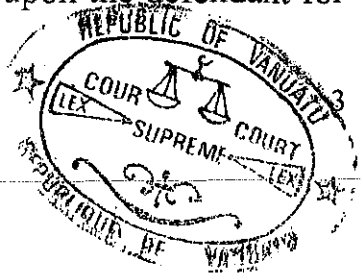
In rape cases, normally the victim defend with violent in resisting the rapist to rape her or even the rapist will also used violent force to rape the victim, unless such act of sexual intercourse was obtain by fraud. In this case in her evidence he pulled her hands to the bamboo area and this was force. Further no evidence to explain her act of resistance in the time of sexual intercourse. The only evidence was that the defendant pulled her short down and he also took off his short and had sex with her. In her statement to police and also in her evidence, she stated that she was resisting him and at this time the knife cut his finger. In evidence in court she was asked to identify the cut on the left finger of the defendant and there was no scar marked to show the knife



cut and again conflicting as to its reliability. At least for a period of up to three months there should be scar left, and mainly from a knife cut. Also in her statement to police she stated that when he made her fall down he also fell down with her and holds her on her chest and than pulled her trousers down and he had sex with her. However, in her evidence in chief and also in cross-examination she admitted that he made her set down and had sexual intercourse with her and again conflicting.

One other aspect was in my observation of the defendant and the victim, seems to smile at each other's when the victim was answering question. At one time I have to bring this to the attention of the counsels. This may not be a fact towards evidence in proving the case, nevertheless, it goes deeper to the attitude of the defendant and victim relationship, and mostly to credibility of the truth of her evidence for reliance by this court as to consent. I find it hard for a victim in rape case to repeatedly smile with the rapist in court.

I have stated earlier that consent is a question of fact. That is the court will judge from the facts of the case if consent was obtained or not. The relevant period that consent should be of reliability to prove consent is not from the time she pulled her to the bamboo area, but at the bamboo area where the admitted act of sexual intercourse took place. The evidence as it stands in the prosecution case is not heavy enough to rely upon to bring about the element of consent, as consent is a mental will of power of the brain and can change at any moment. The will of power can only be judge as a matter of fact at the bamboo area, and in the process just before the act of sexual intercourse took place, and even in the act of sexual intercourse, to establish consent. Consent can either be express or if not than to be judge from the manner of the victim and the defendant as a matter of fact. In judging, I accept her evidence in cross-examination, at the bamboo area, that when the defendant asked her to sit down, she did, and if there were any force than only the pulling down of her short, as consent moves and can change at any stage, the victim has not demonstrated in her evidence that she did not consented, and judging from her attitude at the bamboo area she did not resist when he had sexual intercourse with her. Therefore, as matter of common sense and reasonable inference, if no force was used than it follows that there was no resistance, and if there was no resistance than there was consent. I therefore, find that the evidence adduced at the close of the prosecution case fail to established beyond all reasonable doubt that sexual intercourse was obtained without her consent to call upon the defendant for



his defence, and accept the no case application by the defendant's counsel, and dismissed the charge of rape against the defendant.

On this finding his bail should be refunded.

Dated at Port Vila, this 20th day of August 2001.

R. MARUM MBE
JUDGE.