

PUBLIC PROSECUTOR -v- MARK KATIPA & PETER ROY

Coram: *Chief Justice Lunabek*

Counsel: *Collin Leo for the Public Prosecutor*
Hillary Toa for the Defendants

JUDGMENT

The two (2) Defendants: Mark Katipa and Peter Roy are both charged with the offence of rape, contrary to Section 91 of the Penal Code Act [CAP.135]. It was alleged and particularised that both defendants are from Tanna Island and live at Black Sands Area on the Island of Efate. On or about 4 May 2002 at the area of Imperial Night Club, Port-Vila, the two (2) defendants had sexual intercourse with the prosecutrix L. J. without her consent.

It is not disputed that sex occurred on that night of 4 May 2002 at the Area of Imperial Night Club between the two (2) defendants and the complainants/prosecutrix. The critical challenge before the Court is the question of consent by the complainant at the date and time of the sexual intercourse and the circumstances surrounding the sexual intercourse on the night of 4 May 2002 at the Imperial Night Club.

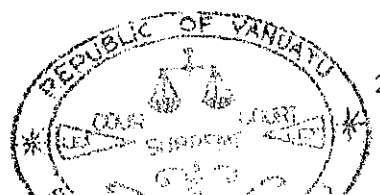
The thrust of the prosecution case is that on 4 May 2002, outside the Imperial Night Club, the defendants came and told the complainant and her friend that Richard Iwai who is a work mate and a good friend of hers wanted to see the complainant at the backyard of the Imperial Night Club. The complainant went there with her friend but could not see Richard Iwai because he was not there.



This was an excuse from the two (2) defendants. The two (2) defendants followed the complainant and her friend at the back yard of the Night Club. At the back yard of the Night Club, then, Peter Roy pushed the girl/prosecutrix and she fell on the ground and he tore the complainant's cloth. Katipa held on the victim's hand and block her mouth so that she could not call out for help. Then Peter Roy opened the victim's legs and had sex with her. Then, Mark Katipa had sexual intercourse with the girl complainant while Peter Roy held on the victim's hands and blocked her mouth. After a while, Mark Katipa told Peter Roy to leave her free. The girl complainant struggled and got out of Mark Katipa. She ran away naked toward the Imperial Night Club.

The defence case is that the victim consented to have sexual intercourse with the two (2) defendant on 4 May 2002 but separately and not at the same time. Peter Roy had sex with the victim on the night of 4 May 2002 first, without the knowledge of the second defendant, Mark Katipa. Mark Katipa had then sex with the victim on 4 May 2002 at the area of the Imperial Night Club but separately without the knowledge of Peter Roy. The consensual sexual intercourse between the victim and the two (2) defendants although on the same 4 May 2002 but separately is alleged to become rape because after Mark Katipa started to have sex with the girl complainant, the employees of the Imperial Night Club chased him. He took off his underwear, taking also the girl's trousers with him in his haste and ran away from the chasers. Mark Katipa returned to give back the girl's trousers. Katipa saw a lot of people around the girl. He was embarrassed of being seen by others, he then stopped a taxi and went home and brought with him the girl's trousers.

The law is that in a criminal trial, it is the duty of the prosecution to prove each and all essential elements of the offence as charged against the defendants beyond reasonable doubt. It is not for the defendants to prove their innocence. If there is any reasonable doubt, and accepted by the Court as a reasonable doubt but not a fanciful one, then, it must be interpreted in favour or for the benefit of the defendants and the defendants shall be then acquitted of the charge. Section



81 of the Criminal Procedure Code (C.P.C.) Act [CAP.135] was read and explained to the Defendants to this effect.

In this case, the defendants elect to give evidence. Their evidence is to be assessed on equal basis as any evidence given by any other witnesses. Section 88 of the Criminal Procedure Code was read and explained to the defendants to this effect.

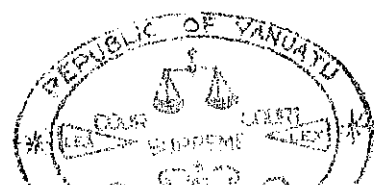
For the defendants to be found guilty of the offence of rape, the prosecution must prove each and all essential elements of the offence of rape as set out below:

1. A person has sexual intercourse with a girl or woman.
2. The woman or girl did not consent to sexual intercourse but the sex occurred by:
 - (a) force; or
 - (b) by means of threats or intimidation of any kind; or
 - (c) by fear of bodily harm; or
 - (d) by means of false representation; or the person impersonating the woman's husband (if married or lives in a defacto relationship).
3. The offence is complete upon penetration.

In the present case, sexual intercourse occurred between the girl complainant and the two defendants on 4 May 2002 at the area of the Imperial Night Club. These are not in dispute. The only challenge is about whether or not the girl/complainant consented to have sexual intercourse with the two (2) defendants. In *PP v. Joseph Nasamal*, CR. 27 of 2000, the consent is summarised as:

"whether before the sexual intercourse between the defendant and the girl complainant, the girl said "yes" to have sexual intercourse with the defendant".

I accept the observations of Jackson CJ in *Holman v. R.* (1970) WAR 2 at 6 that:



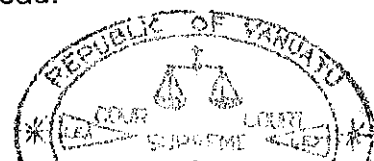
"a woman's consent to intercourse may be hesitant, reluctant, grudging or tearful, but if she consciously permits it (provided her permission is not obtained by force, threats, fear or fraud) it is not rape."

The test of consent in *Holmen v. R.* is not relevant for the basis of deciding the present case. From the way the defence is presented in the case before this Court, the test for the consent to apply is that in *PP v. Joseph Nasamal*.

In this case, I am satisfied that elements 1 and 3 of the offence of rape as charged against the two (2) Defendants: Mark Katipa and Peter Roy are proved beyond reasonable doubt as they are not in dispute. They are admitted by the Defendants.

The records of the evidence of the trial are in the Court file, what I do here is to make a brief summary of the evidence relevant to the issue of consent of the complainant and the surrounding circumstances:

The prosecution evidence relevant to the issue of consent is that of the complainant. She gave evidence to the effect that on 4 May 2002 in the evening, she and her friend Evana and others bought a bottle of vodka. They drank the vodka at sea front. Her uncle was with them. Her uncle gave her 200 Vatu for taxi and a bottle of rum cola. The complainant and her friend Evana took the taxi to Imperial Night Club. They went outside the Imperial Club, near a Natapoa Tree. The two (2) defendants approached the two (2) girls and told them that Richard Iwai and Napat wanted to see them at the back of the Imperial. The girls went at the back of the Imperial, Richard Iwai was not there. Napat was there but under a shelter. At the back of the Imperial, they saw two boys – one is from Ambrym and the other is from Aneityum. They sat and talked with the complainant. Evana went to see Napat. Then, the complainant's head spun. She mentioned to Evana about this. The two (2) boys of Ambrym and Aneityum helped the complainant. The boy from Ambrym took water from his mouth and poured on the head of the girl. The other boy (of Aneityum) went to get more water in the bottle after he drank the rest of the rum cola and washed the girl's head.



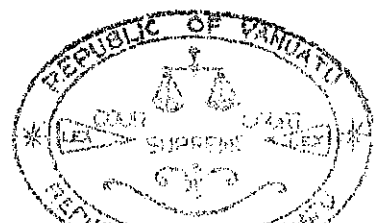
The two (2) Defendants arrived and chased and assaulted the boys from Ambrym and Aneityum. They run away. Evana too run away and did not return.

Peter Roy pushed the victim girl and she fell on the ground. He tore her cloth. Mark Katipa held the girl's hands and blocked her mouth while Peter Roy opened her legs and had sexual intercourse with her. When Mark Katipa had sex with the girl, Peter Roy held on her hands firmly and blocked her mouth. At a point in time, when Mark Katipa had sex with her, he asked Peter Roy to let the victim's hands free. The girl said she, then, managed to get out from Mark Katipa and run away toward the Imperial yard. She said she run naked without her panty nor trousers. She stood there crying and a security officer took off his shirt and cover the girl with it. She was then taken to the police station on the same night.

She went through lengthy and detailed cross-examination. She maintained her evidence. She maintained her evidence that she did not consent to have sexual intercourse with the two (2) defendants. She denied all suggestions put to her by the defence.

The defence evidence in essence is that on 4 May 2002, the two (2) defendants: Mark Katipa and Peter Roy had sexual intercourse with the girl complainant but separately. Peter Roy was the first to have sex with the complainant on the night of 4 May 2002 at the area of the Imperial Night Club. Mark Katipa did not know that Peter Roy had sex with the girl. After Peter had sex with the girl, he went inside the night club. Mark Katipa, then, came outside and went to see the victim/girl. After short time talking, then he asked her for sex. She consented. They started to have sex when the employees of the Imperial night club chased him. He ran away with the girl's trousers. He tried to bring back the girl's trousers the same night but was embarrassed because there were lots of people surrounding her. He took a taxi and went home.

I have had opportunity of hearing all the evidence and observed the witnesses and their demeanour in the witness box.



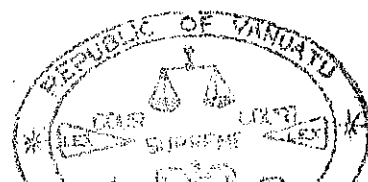
I accept the victim accounts of what happened to her. She is a young girl of 17 years. The way she gave her accounts of what happened to her that night cannot be discredited. I believe her after observing her demeanour in the witness box and how difficult a young girl like her tells what happened to her in Court. This is more so during her cross-examination. She was not detracted from what she said in her evidence.

The evidence of Doctor Tabisari of scratches on the back of the girl corroborates the prosecutrix's side of the evidence. The Doctor described the scratches as those caused by struggling. The evidence of the two defendants cannot be believed and are therefore rejected.

The reasons for rejecting the defence evidence are set out below.

If the allegations of rape are made because of the shameful situation of the victim when she was discovered having had sex with Mark Katipa and Katipa had run away, why Peter Roy was also alleged to have raped the victim? If intercourse happened between the victim and the two defendants on the same night but with each and both defendants separately and without one defendant knowing that each has sex with the same victim, why Peter Roy was charged? Mark Katipa should be the only one charged. There is no apparent reason why the victim girl would make such an allegation against Peter Roy. The evidence of the defendants is that Mark Katipa did not know that Peter has sex with the girl. Peter Roy did not know that Mark Katipa had sex with the girl. The evidence of the defendants are also that only sexual intercourse that was seen by other people outside the Imperial Night Club was the sex between the girl and Mark Katipa. The very reason why Peter Roy was charged is because he and Mark Katipa had together and at the same time sexual intercourse in the manner described by the victim girl. The evidence of the defendants are made up and are complete lies. Their evidence are therefore rejected.

The submission that the victim knows that Peter Roy is married is rejected as having no basis.



The defence submission that the Doctor was in Court during the prosecution case is of no basis and must be rejected. The Doctor was the first prosecution witness. The Doctor was called to give his evidence first as he has a busy schedule in the hospital. At the end of his evidence he left the Court and the prosecution called the victim/complainant.

The defence submitted that the two boys (one from Ambrym and the other from Aneityum) were never called by the prosecution to throw some more light as to what happened that night or to corroborate the complainant's story. The defence says the story about the two (2) boys is not true. It is a made up story to give weight to the prosecutrix's account of event.

Importantly, in any criminal trial, any witness, may be called (a) by the prosecution in the cause of proving the guilt of the accused; or (b) by the accused in his defence; or (c) by the prosecution, in the discharge of its duty to present fully to the jury all evidence relevant to the charge.

If a witness, not called, is within category (c), the proper course for the trial judge to adopt, in answer to questions such as were asked in the present case, would simply be to direct his/her mind as a Judge of fact that he/she should decide the case on the evidence actually before him/her, without speculating as to what evidence might have been given by other witnesses.

If a witness, not called, is within category (a) or (b), the opposing party is entitled to comment on the failure to call that witness, and to have the Judge informed as to what it may infer from such failure as the defence did in the present case.

The inference which a Court can properly draw in the absence of a witness, where such absence is not satisfactorily accounted for, is that nothing which the witness could say would assist the relevant party. Failure to call a witness will not support a positive inference that the witness would have in fact given evidence damaging to the case of the party who omitted to call him.



In this case, the only evidence for the prosecution is that of the girl/complainant. Can the court rely on the prosecutrix 's evidence alone to convict the Defendants of the offence of rape as charged?

My answer to that question is yes, although, I am conscious and aware about the danger of convicting a defendant where there is no corroboration. However, the test is as set out in the case of PP v. Mereka Van.L.R.2 (at 619) and I do apply it here. In this case, the evidence of the girl/victim is corroborated by the evidence of the Doctor.

On the basis of the whole evidence, I am satisfied that the victim did not consent to have sexual intercourse with the two (2) defendants: Peter Roy and Mark Katipa on the 4 May 2002 as charged. This was proved beyond reasonable doubt.

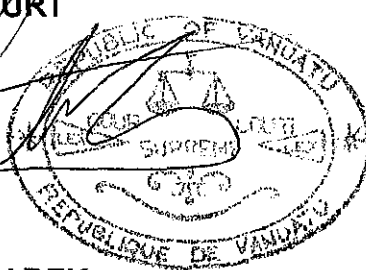
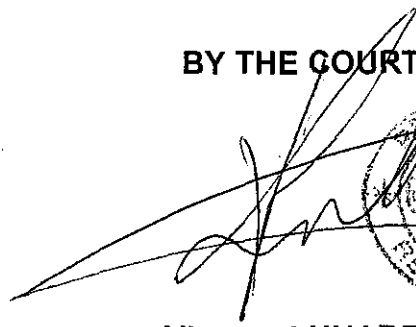
Verdict

Mark Katipa: guilty of rape as charged.

Peter Roy: guilty of rape as charged.

DATED at PORT-VILA, this 9th DAY of SEPTEMBER, 2002

BY THE COURT

The seal of the Supreme Court of Vanuatu is circular. It features a central emblem with a scale of justice and a book. The text around the perimeter of the seal reads "REPUBLIC OF VANUATU" at the top and "REPUBLIQUE DE VANUATU" at the bottom. In the center, it says "COUR SUPREME" and "SUPREME COURT".

**Vincent LUNABEK
Chief Justice**