

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

Criminal Case No. 65 / 2012

PUBLIC PROSECUTOR

V

LUKE TASSO

Trial: 9 October, 2012 at Lakatoro

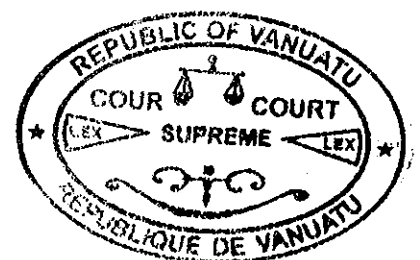
Before: Justice Robert Spear

*Appearances: Simcha Blessing for the Prosecution
Eric Molbaleh and Roger Tevi for the Defence*

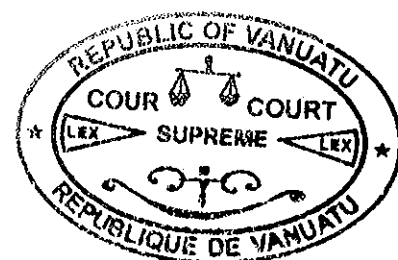
JUDGMENT

Verdict and Reasons for Verdict

VERDICT: NOT GUILTY

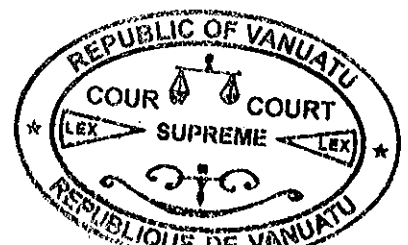


1. The accused is for trial on one representative count of having sexual intercourse without consent in September 2008 at Malekula.
2. I am unsure why it has taken so long for this case to reach this point. The complaint was made to the Police in December 2008 yet the defendant was not interviewed by the Police until 28 June 2011. It appears that the complaint was not acted upon until Inspector Terry Alick Wire became involved in 2011. That however is just a matter of historical interest and it can have no real bearing on the issue before me. That is whether the prosecution has proven the case against the defendant to the high criminal standard of beyond reasonable doubt.
3. This is presented as a representative charge relating to 5 separate occasions in which the defendant had sexual intercourse with the complainant. The complainant alleges that sexual intercourse took place on 5 separate occasions and the defendant has admitted that it did take place on 5 separate occasions although at slightly different locations than asserted by the complainant.
4. Mr Molbaleh informed me at the commencement of the case that the only issue was that of consent. Furthermore, the accused did not resile at all from his admissions to the Police when first interviewed that sexual intercourse took place between the defendant and himself in or about September 2008 on occasions.
5. The only evidence for the prosecution was the complainant who is a 42 year old married woman from a village in Malekula. The defendant is some 10 years older than her and resides nearby; still some reasonable walking distance from the complainant. It is clear that the complainant and the defendant knew each other and particularly through their respective senior and leading roles in their church.
6. During September 2008, the complainant was residing just with her children in the family home which was some distance away from other houses and, in particular, away from any village. Her husband was in Port Vila at the time.



The Prosecution Case

7. The case for the prosecution is based entirely upon the evidence for the complainant and the admissions, produced by consent, contained in the statement taken from the defendant by Inspector Alick on 28 June 2011
8. In short, the prosecution case is that the defendant came to the complainant's home one morning around 9 or 10 September 2008. He asked the complainant if she would have sex with him. She said No and remarked that she had never done anything like that. The defendant kept asking her for sex. He was carrying a bush knife with him at that time and he became angry when she refused to have sex with him which caused her to become frightened of him. At some stage, he forced her out of her home and into the bush where he took off her clothes, pushed her on to the ground, and had sex with her.
9. She said that this was repeated some 2 or 3 days later and, at that stage, he was carrying an axe the blade of which he placed against her throat and threatened to kill her if she did not comply with his demands or if she told anybody.
10. There was a third occasion few days after that when the defendant arrived in the morning at the complainant's home, demanded sex, and just took her into the bushes beside her house and had sex with her. That same afternoon he returned while she was preparing food and he forced her to have sex with him again in her home.
11. The fifth and final occasion occurred some days later, again in the morning, and again it occurred at her home. The defendant told the complainant that he would have sex with her whenever he came to see her and that she must not say no as he, "owned her body".
12. The complainant stated emphatically that she had never consented to having sexual intercourse with the defendant and that the defendant could not have been any doubt about this as she told him that repeatedly and, indeed, she was also crying at least on the first occasion when he had sex with her.
13. The complainant lives in a relatively remote area and there was no one who would have heard any cries for help from her.

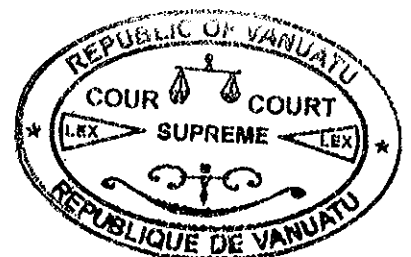


The Defendant's evidence

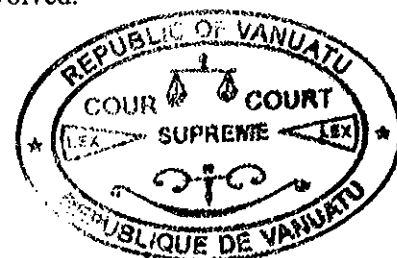
14. The defendant's explanation to the Police, and his evidence in Court today, is that this was an entirely consensual arrangement and that sexual intercourse took place on each occasion in his garden which is some distance from the complainant's home. The defendant stated that he had helped the complainant out on occasions with the cutting copra and that he had also lent her money. Essentially, the defendant asserts that he was attracted to the complainant and it appeared to him that she was also attracted to him. Eventually, their mutual affection developed to the point where he asked her one night, while cutting copra with her, whether she would have sex with him. The defendant says that the complainant indicated that she would have sex with him and it was agreed between the two of them that they would meet up the next day in his garden and have sex. That indeed is what occurred according to the defendant.
15. The defendant said that, on occasions thereafter, they would come across each other and make the time then to disappear through to his garden where they would have sex.

Consideration

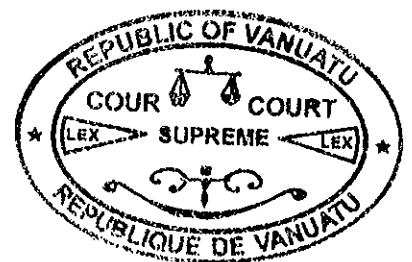
16. If the complainant's evidence is accepted and the defendant's evidence is rejected then there can be no doubt at all that the accused is guilty of the charge. However, if the defendant's explanation is accepted as credible, even to the point where it might possibly be correct, then he is still entitled to the benefit of the doubt and he must be found not guilty.
17. I have mentioned that this is one representative count of committing sexual intercourse without consent but it spans 5 separate occasions. This trial has been able to be conducted without any prejudice to the defendant in that respect although it would have been preferable for each of the 5 occasions to have been individually charged. This was addressed with counsel at the commencement of the trial and it was agreed that the trial would proceed on the basis that each of the 5 separate occasions would be dealt with separately by this Court.



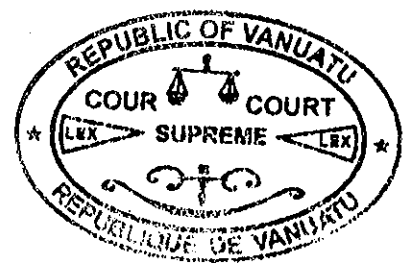
18. A representative charge of course is one that requires proof beyond reasonable doubt that the offending occurred on at least one occasion. I am satisfied that no prejudice has been suffered by the defendant in respect of the way in which the charge has been presented in this trial.
19. So, the evidence on which case is to be determined is the evidence of the complainant, the statement of the defendant taken on 28 June 2011, and the evidence of the defendant. This charge must be dealt with solely on the evidence that has been presented in this Court.
20. It is for the prosecution to prove the essential elements of the offence to the high criminal standard of beyond reasonable doubt before the defendant can be found guilty of this charge. Proof beyond reasonable doubt simply means that the Court is left sure of guilt; that is it does not have a reasonable doubt.
21. When an accused gives evidence which is to the effect that no criminal wrongdoing occurred, the Court has one of three available options. First, it can conclude that the defendant's evidence is credible in which case the defendant will be found not guilty without any difficulty. Secondly, it might be unsure whether the defendant's evidence is credible or not in which case the defendant is entitled to the benefit of the doubt and he is to be found not guilty. The third option arises only if the evidence from the defendant is rejected by the Court as being unreliable and otherwise incredible. The Court then must consider whether there is other evidence that proves the charge beyond reasonable doubt. In this case that could only be the evidence of the complainant and the admissions contained in the statement taken from the defendant on 28 June 2011. Just because the Court rejects a defendant's evidence does not mean that the defendant is guilty of the charge.
22. The essential elements of the offence that must be proven beyond reasonable doubt are: first, that sexual intercourse took place (and that is not disputed); second, that sexual intercourse took place without the complainant consenting to it; and third, that sexual intercourse took place at a time when the defendant did not have a reasonable belief that the complainant was consenting to the sexual act involved.



23. So the real issues here are whether, at the time of sexual intercourse, the prosecution has proven that the complainant did not consent and that the accused did not believe on reasonable grounds that she was consenting. A consent means a true consent; that is, one that is given freely by someone who understands the nature and quality of the act involved.
24. As I have indicated, if this case was to be determined just on the complainant's evidence then the accused would have been found guilty. The complainant gave convincing evidence of sexual intercourse that was non-consensual in respect of both the second and the third elements of the offence. There were one to two matters that caused me some slight concern but, in the end, if her account of events was all that I had to determine this case on, I would have found the accused guilty.
25. However, as I have indicated, the Court must also look at the evidence of the defendant. He said that the complainant was a mature woman with whom he had been involved through church activities, whose husband was away in Port Vila and whom he had come to know through helping her cut copra for her family as well as lending her money. It is clear that he felt some attraction to her and the question of sex arose.
26. While some of the questions that were raised by Mr Blessing related to whether this was what someone in a senior church role should do, this is not a court of morality, it is a court of law. The issue here is whether a criminal charge is been proven beyond reasonable doubt.
27. The defendant says that this sexual intercourse was consensual. The observation can be made - what else could a person, in the position of the defendant, say if indeed he had had consensual sexual intercourse with the complainant. How could he prove that it was consensual, particularly some three years later, and of course it is not for him to do so. It is for the prosecution to prove that it was non-consensual and the accused is not required to prove anything at all even if he elects to give evidence.



28. As it happened, the complaint emerged in December 2008 when someone contacted the complainant's husband and told the husband that his wife was having sex with a local man. The husband returned and questioned the complainant about this. Some 3 of 4 days went by without her acknowledging that anything was amiss. However, she started bleeding from her genitalia which resulted in her being hospitalised for some 2 weeks in Norsup. It was then found that she was pregnant. As her husband had been away at the relevant time, clearly she was unable to deny the fact that she had had sexual intercourse with another. She then informed her husband that she had been raped. It was, however, it was her husband who insisted upon the complainant going to the Police and making formal complaint of rape against the defendant.
29. So, when I mentioned earlier that there were some slight concerns held by me about this matter, those concerns relate particularly to how this complaint emerged. That is only a slight concern as a delay at making a complaint can be a perfectly natural consequence to prevailing circumstances and they will be individual to each particular complainant. It might be that the complainant felt that as the sexual intercourse had not been repeated since September 2008, that she might be able to bluff her way through it without any difficulties that might arise laying a complaint against the senior member of the church community in the relatively small community in which they resided. That is certainly one possibility. Another possibility is that the complainant had had consensual sexual intercourse with the defendant and it was only when she found out that she was pregnant that she realised that she could not hide this from her husband any longer but chose to characterise this as rape rather than consensual sexual intercourse.
30. It is important to note, however, that this is not a competition between the complainant and the defendant as to whose evidence I find more credible. If the evidence from the defendant cannot be dismissed then it must raise a reasonable doubt as to his guilt.
31. I cannot dismiss the account of events of the defendant that the sexual intercourse that took place was consensual. I am not entirely convinced of this by him but I have not been brought to the point where I reject his evidence as unreliable or incredible.



Conclusion

32. For that reason I am left with a reasonable doubt and the defendant is entitled to the benefit of it. The verdict in respect of the charge is one of not guilty.

BY THE COURT

