

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

Criminal Case No. 153 / 2012

PUBLIC PROSECUTOR

V

POLO JACK

Hearing: 18 - 19 June, 2013

Before: Justice Robert Spear

Appearances: Tabisa Harrison for the Prosecution
Andrew Bal for the Defence

VERDICT AND REASONS FOR VERDICT

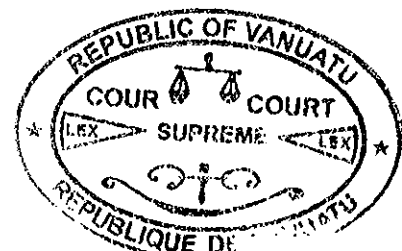
Delivered orally 19 June 2013

Count 1: Sexual Intercourse without Consent

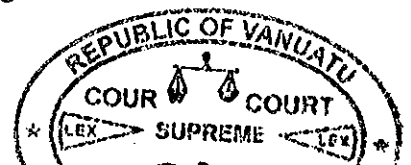
Verdict: GUILTY

Count 2: Intentional Assault

Plea: GUILTY

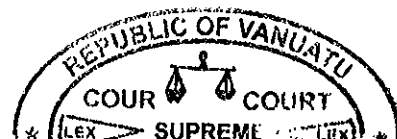


1. The defendant Jack Polo faced trial on an indictment charging him with 2 counts:-
 - a) Count 1: sexual intercourse without consent;
 - b) Count 2: intentional assault (s.107 (b) of the Penal Code).
2. At the commencement of this trial, the defendant entered a plea of guilty to the charge of intentional assault. However, he maintained his earlier plea of not guilty to the charge of sexual intercourse without consent.
3. The complainant and the defendant have been married for a number of years. They have four children. Difficulties arose between them which saw the complainant leave the home at Teouma to live with her sister at Ohlen Area. It appears that she had been living away from home for about a month.
4. The prosecution case is essentially that on 22 October 2012, the defendant found the complainant in Port Vila Town and took her against her will to Shark Bay near Teouma. He then subjected her to a severe beating. Afterwards, he had sexual intercourse with her without her consent.
5. The defendant admitted to the Police that he took the complainant to Shark Bay and that he subjected her to a beating with his fists. He also admitted that he had sex with her although he contended that it was consensual.
6. It is important for any Court to remind itself at the commencement of a case that each charge before the Court is to be determined solely on the evidence that is properly admitted. There were questions put to the complainant in relation to the defendant's infidelity and also questions put to her that she had been unfaithful to him. None of that is relevant to the issues before the Court. Indeed, in other countries (e.g. New Zealand) such questions put to a complainant, are specifically prohibited by statute and that has long been the case.
7. The Court is of course required to try this case unemotionally and objectively. It must do so having regard to the onus and standard of proof that applies at all stages of this trial. In this



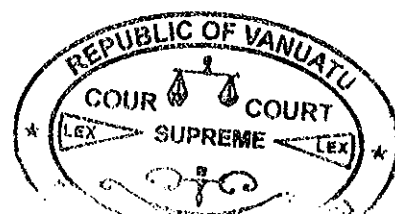
case, the prosecution is required to prove the essential elements of the charge in count 1 of the indictment - a charge of sexual intercourse without consent - and it must do so to the high criminal standard of beyond reasonable doubt. At no stage does the onus of proof shift to the defendant. He did not give evidence in this case and that was his right. Indeed, it is a right that he is required to be reminded about by the reading of the s. 88 statement at the conclusion of the prosecution case; which of course occurred. The defendant chose not to give evidence in this case and nothing adverse to him can be taken from his silence in this respect. Of course, he gave a statement to the police and I will say something about that in due course.

8. The defendant has admitted that he subjected the complainant, his wife, to a beating on this particular day and he has pleaded guilty to count 2. It is unnecessary to deal further with that charge except to the extent that it relates to count 1.
9. The essential elements required to be proven by the prosecution for count 1, the charge of sexual intercourse without consent, are as follows:
 - i) There was sexual intercourse between the complainant and the defendant. Sexual intercourse is defined in section 89 (A) of the Penal Code. Without question, sexual intercourse took place that afternoon or that evening and that was admitted by the defendant to the Police.
 - ii) The sexual intercourse took place but that the complainant did not consent to it.
 - iii) That at the time the sexual intercourse took place the defendant did not have an honest belief based on reasonable grounds that the complainant was consenting to the act.
10. It is in respect of the issue of consent that this case rises and falls having particular regard of course to the onus of proof and the standard of proof required. As I have mentioned, some of the questions put suggested that there had been infidelity on the part of both the complainant and the defendant. Whether or not there is any substance to those accusations is, of course, quite irrelevant to the issues before me and I would not allow those questions to be answered.
11. What is clear and proven beyond doubt on the evidence is that the defendant approached the complainant outside the Daily Post Office at about 4.00 pm on 22 October 2012. She got into

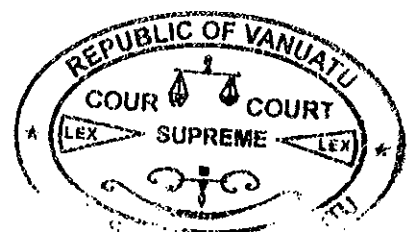


a taxi with him. She either got in under her own free will on the basis that they were going to Ohlen to see their children as the defendant suggested in his police statement or she was pushed in by defendant as the complainant asserts. However it came about that the defendant entered the taxi, it is clear that she believed that she was going to Ohlen with the defendant. However, as soon as she entered the taxi the defendant accepts that he directed the taxi driver to take them out towards Teouma and then to the beach at Shark Bay. That is simply part of the background.

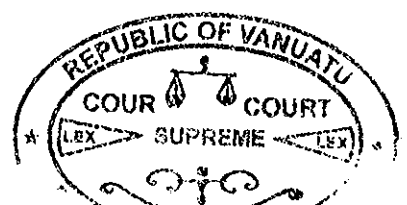
12. When the taxi arrived at Shark Bay, the complainant says that she was dragged outside the taxi by the defendant who then subjected her to a beating. In the course of his police interview, the defendant says that he assaulted the complainant because she had "run away" from the home. Essentially, he attempted to justify this assault as a form of punishment. Without question, however, it was a serious and severe beating.
13. The defendant pleaded guilty to the charge of intentional assault on the basis that he used both his fists and his heavy work boots in the course of the assault. However, there is no evidence before the Court that he used heavy work boots. Indeed, having regard to the injuries that the complainant received from the beating, it could be expected that the injuries would be more severe if she had been kicked with heavy work boots. That, of course, is not to minimise the extent of her injuries which were significant.
14. So, the complainant says that the defendant dragged her out of the taxi and he subjected her to a severe beating with his fists. He accepted that he told the taxi to leave and it left with the other man who was in the taxi leaving just the two of them at Shark Bay. He stated to the Police that after the beating, the two of them sat down on the beach and talked. He said that matters then developed to the point where they agreed to have sex, the complainant removed her clothing, he removed his and sexual intercourse took place perfectly consensually. That is the defendant's account of events given to the police when he was interviewed.
15. The complainant says, however, that after she was beaten the defendant either took off her clothes or she started to take them off herself because he told her to. He then had sex with her. She said that that was without her consent. In particular, and this statement resonated with me, she said "he did not ask me" if he could have sex.



16. The complainant then went on to say that this was typical of his behaviour in the past particularly when they were living on Tanna when he would have sex with her when he wanted and if she said no then he would beat her and then have sex with her. That evidence as to past events should have been included in the brief of evidence so that the defence could address it. It came out of the blue, as it were, and I do not take account of it.
17. The complainant says that she was in serious pain as a result of the beating, that she submitted herself to sexual intercourse because she knew that that is what he wanted, that the beating would continue if she refused, but she did not consent to it. In particular, as I have mentioned, she said that the defendant did not ask her if he could have sex with her. He simply assumed that that was his right.
18. It is essential to say something about consent. Consent in the context of the second and third elements of this offence means a true consent. That is, consent given voluntarily by someone who understands the nature and quality of the sexual act and who is able to make a rational and free decision about it. Consent can be conveyed orally or it can be indicated in other ways or it can be a mixture of both. There are a variety of ways in which consent can be conveyed to the other party and that is of course true about most dealings between people. What is clear, however, is that a true consent does not arise by submission to what is considered to be unavoidable or inevitable say to avoid a beating. A true consent is not one given as a result of violence or the threat of violence. Silence by itself does not constitute a true consent although of course the conduct of the complainant or the other party may well convey that impression in a realistic way. What is required is a clear and unequivocal indication, in this case by the complainant, that she is freely willing to have sexual intercourse with the defendant. The complainant's evidence is that no such indication or expression of consent was conveyed by her and this was more a submission to the inevitable following a severe beating and when she was realistically concerned that she would receive a further beating if she did not submit to him.
19. It does not really matter who took her clothes off - whether the defendant took her clothes off or whether she took her own clothes off at his request or otherwise. If the complainant is to be believed, she was submitting to what she considered to be the inevitability of sex given their isolation and that she had already been subjected a severe beating.



20. The other evidence for the prosecution does not assist the case in any material respect except to provide support as to the distressed state that the complainant was in when she eventually arrived that night at her sister's home. The injuries that she received were identified by the medical practitioner who gave evidence.
21. The defendant gave a statement to the police. Again, he did not have to do so. At the commencement of that statement, he was cautioned as to his rights not to answer questions. He stated that he had subjected his wife to a beating but they then had consensual sex.
22. I have not had the opportunity of seeing the defendant give evidence directly and particularly being subject to cross examination. The fact that he did not give evidence, however, is not something that can be held against him as it is his right to decline to go into the witness box and give evidence. The Court is constrained to deal with the case on the evidence it has before it.
23. However, what is revealing in this case is the way that the complainant conducted herself that day. From the evidence, it appears that she had been living apart from the defendant for about a month because she had been staying with his sister at Ohlen and away from the family home at Teouma.
24. It is clear that she was duped into getting into the taxi or forced into the taxi (whichever the case may be) and then driven out to Shark Bay where she was subjected to a severe beating.
25. The defence would ask me to accept that the account of events given by the defendant to the police at least raises the possibility that this was consensual sex. I have to say I have a great deal of difficulty with that as a possibility if it is looked at within the circumstances explained by the evidence. The complainant was clearly taken against her will to Shark Bay. She was subjected to a severe beating by him which appears to have left her bleeding and bloodied and in severe pain. The defendant stated to the police that they then talked and after a while they mutually moved on to have sex. The complainant says that sex did not happen like that. She says that he did not even ask her if he could have sex and just assumed that he could do so. If matters were left there, I would be in some slight difficulty. However, that is not the end of the matter.



26. The complainant also gave evidence, which was not challenged or contracted, that after they had sex, they walked back to the tar-sealed road - the main ring road which is a significant distance from Shark Bay, probably in the vicinity of 5 km or more. She said that she fell asleep twice on the way or at least that was the translation but it is more likely that that meant that she lost consciousness or became so weak that she had to stop for a rest because of the pain and exhaustion that she was experiencing. When they got to the tar-sealed road, the defendant hailed a bus which took them to their home at Teouma. When she got there, however, rather than going inside where the defendant's family were she says that she ran away down to the main road, hailed a bus, and had the bus take her back to her sister's place at Ohlen. Her sister describes her arriving in a distressed and bloodied state. She was then taken to hospital.
27. The conduct of the complainant is revealing and telling particularly when it is placed beside the statement of account given by the defendant to the police. If, as the defendant would have it, after the beating the two of them sat down and had a discussion which led to them having consensual sex, it could realistically be expected that they had done something to mend their relationship. If that were so then why would the complainant ran away at the very first opportunity she had when they got back to Teouma? The impression I am left with on the evidence is that the complainant remained scared of the defendant which is why she wanted to escape from him. That does not sit well with the defendant's contention that they had had consensual sex.
28. So this cuts across the defendant's account of events and it means that I am not prepared to accept his statement to the police as being sufficient even to raise the possibility of a doubt to the complainant's account of events.
29. In Vanuatu, the evidence of a woman who alleges that she was sexually violated is to be treated with particular care unless it is corroborated in some material respect. That is an old rule of evidence that certainly in New Zealand has been gone for many a year. In other jurisdictions, the Court is not constrained to exercise special care when dealing with the evidence of a woman who alleges that she was raped. The Court is entitled to accept her evidence just as it can accept any other witness's evidence. Be that as it may, there is corroboration provided by the defendant as he admitted both the beating and the sex. He states that he subjected her to a beating and then had sexual intercourse with her that



afternoon. I consider that to be sufficient corroboration of the complainant's account of events to satisfy this quite out-dated rule of evidence. Even without that corroboration, I would have had no difficulty accepting the complainant's evidence.

30. There is nothing that I have heard that causes me to doubt the complainant's account of events. She says that she did not give her consent, her true consent, to the defendant and I accept her evidence.
31. The third element of the offence, of course, is that the defendant did not have an honest belief based on reasonable grounds that she was consenting. How could he after subjecting her to such a beating? How could he believe that she was doing anything other than going along with his wishes given that he had just subjected her to a beating and given the fact that he must have appreciated she would be concerned that she would be beaten further if she did not submit herself to him. Submission to the inevitable, submission to sexual intercourse because of a fear of violence, is not a true consent and the defendant could have no reasonable grounds for believing otherwise.
32. This does not mean that the defendant has to prove that he had an honest belief. It is for the prosecution to prove that he did not have such a belief or, if he did, then it was not based on reasonable grounds. There is nothing to say that he had an honest belief that she was consenting except his simple assertion to that effect in the course of his police interview. As he did not give evidence, the basis for any belief that he might have had that she was consenting was not put before the court and could not be assessed as to reasonableness. In the absence of any explanation for a belief except that they talked and she consented to have sex, which I have rejected as quite unrealistic, this is simply where the evidence leaves the matter.
33. I am satisfied in all the circumstances that the three elements of this offence of sexual intercourse without consent have been proven beyond reasonable doubt on the admissible evidence presented to this Court. The verdict on count 1 is guilty.

BY THE COURT

