

IN THE SUPREME COURT
REPUBLIC OF VANUATU
(Criminal Jurisdiction)

Criminal Case No. 17 of 2015

PUBLIC PROSECUTOR

-v-

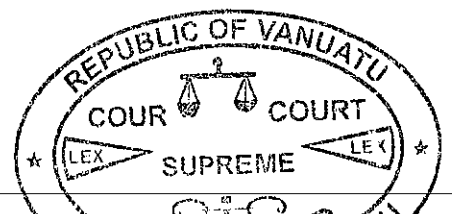
STEVE BUTU

Before Chetwynd J
Mr Blessing for Prosecution
Mr Kausiama for the Defendant

Hearing 21st and 22nd October 2015 at Saratamata, East Ambae

Judgment

1. The defendant has been charged with an offence of sexual intercourse without consent. The required elements of the offence are that there was sexual intercourse and that it occurred without consent. What constitutes sexual intercourse is set out in detail in section 89A of the Penal Code [Cap 135]. Consent bears its natural meaning.
2. The alleged facts are that during the evening of Christmas Day 2014 the Complainant (Ms T), a young woman who was 19 years old at the time, went to a dance. Unfortunately she had a lot to drink. She was encouraged to go and sleep off the effects of the alcohol. She went to sleep on a bed in the kitchen of a relative's house. At about 8 or 9 o'clock on the morning of 26th December whilst she was sleeping, her condition was described as dead drunk, one Remy Tari dragged and carried her from the kitchen to an area of bush about 25 metres away and there he raped her. Later the same morning the Defendant Steve Butu saw her and he too is alleged to have had sexual intercourse with the unfortunate Ms T without her consent.
3. Remy Tari has been dealt with by another Judge. Tari pleaded guilty. Butu has entered a plea of not guilty. There are two eye witnesses, Dominique Mera and his wife Margaret Kuku. They both say they saw Butu lifting up Ms T's legs and having sexual intercourse. They watched what was happening for a short time and then returned to their kitchen. When Butu appeared in the kitchen a while later they questioned him about what they had seen and he replied with words, to the effect, "Remy was the first one".
4. The Defendant Steve Butu gave evidence. He agreed with the evidence of Dominique Mera and Margaret Kuku up to a point. He agrees he went with them to look for Ms T. He agrees he went into the bush to relieve himself. However he says that after he had finishing relieving himself he was coming out of the bush adjusting his clothing when he saw Dominique Mera talking to another older woman. He was embarrassed



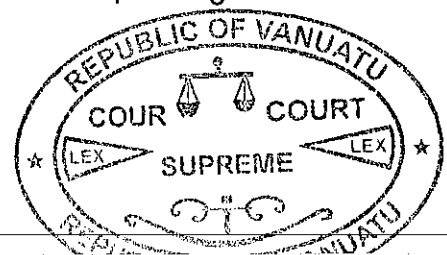
that he might accidentally expose himself and took a different route to avoid being seen further by the woman Dominique Mera was talking to. He denies he had sexual intercourse with Ms T.

5. Dominique Mera and Margaret Kuku say that after Butu disappeared into the bush to relieve himself they walked on and came to a place where the path divided. Margaret Kuku went one way to Ms T's home to see if she had gone there and Dominique Mera went to a store to buy some beer so for a short period they were separated. Margaret Kuku met the mother of Ms T's and was told Ms T had not returned home. Margaret Kuku walked back to her own home and came across what she described as tracks made by someone's legs being dragged along the ground. She followed them and saw movement in the grass. She called out to her husband who was following her and that is when they say they both saw the Defendant having sexual intercourse with Ms T.

6. It is for the prosecution to prove, beyond reasonable doubt, the existence of all the elements necessary to constitute the offence. That is the burden of proof here just as it is in any other criminal case. In this case the issue of consent is perhaps the easiest element of the offence to deal with. There is no dispute the Complainant Ms T was "dead drunk". She was insensible through drink. There is no possible way she could have given consent because she was totally unaware of what was going on. She simply could not have given or signified her consent in the cataleptic state she was in. It is also impossible for anyone to have arrived at a reasonable belief that, in that state, she was capable of giving her consent. I can be sure beyond any reasonable doubt that she was unable to consent to sexual intercourse.

7. The prosecution has also to prove that sexual intercourse took place between the Defendant and Ms T. He denies that he had sex with her. The two eye witnesses are adamant they saw him having sexual intercourse. The Defendant has not put forward any cogent argument as to why they would lie. That is what it boils down to, either they are lying or the Defendant is lying. There can be no question, given the close family relationship between the witnesses and the Defendant, that this is a case of mistaken identity. This is not identification from a distance or in poor light. The witnesses say they were 5 or 6 metres away and it was daylight, between 8 and 9 o'clock in the morning. It can only be one side or the other is not being truthful.

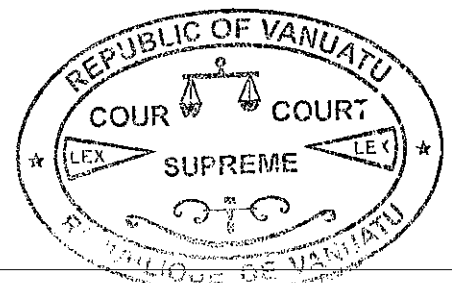
8. One explanation for the two different versions of events was implied in the questioning of Dominique Mera. He was asked if he had been arrested on suspicion he had raped Ms T. He admitted that he had been arrested and had been remanded in custody on Santo. He added that he had been released without charge. He was of the belief that his arrest was as a result of false statements being made implicating him in the rape of Ms T.



9. His evidence and that of his wife agree in many respects. Their statements agree in many respects. Margaret Kuku's statement was made whilst her husband was on remand on Santo. Dominique Mera's statement was made some days later. His arrest (and release without charge) does not diminish or damage his credibility as a witness. Nothing has been put forward as to why Margaret Kuku is not a credible witness. I accept the version of events as put forward by Margaret Kuku and Dominique Mera as being accurate and honest.

10. That, unfortunately, does not conclude the matter. Whilst I do not doubt the veracity of what both Dominique Mera and Margaret Kuku say in their evidence; that evidence does not prove, beyond a reasonable doubt, that the Defendant had sexual intercourse with the Complainant. I accept that what they say they saw is probably a description of someone having sexual intercourse. They saw the Defendant lifting the Complainant's legs and having sexual intercourse (Dominique Mera) or pulling up the Complainant's legs and having sex (Margaret Kuku). Unfortunately probable or possible is not good enough to establish an offence sexual intercourse without consent has been committed.

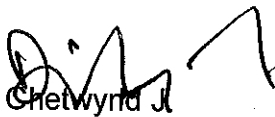
11. The prosecution have to prove that sexual intercourse took place and sexual intercourse in accordance with the definition set out in section 89A of the Penal Code. I shall not recite the whole of the definition, but basically sexual intercourse involves penetration. There is no evidence of penetration. Normally it would be the victim, the Complainant who gives evidence of penetration. In this case, as has been explained, the Complainant was insensible through drink or "dead drunk". She is unable to say what happened. The Doctor's evidence is inconclusive but even if he was 100% sure that there had been penetration the admission and subsequent conviction of Remy Tari would not enable the Court to say it was satisfied beyond reasonable doubt that the Defendant Steve Butu had penetrated the Complainant. As has been set out above the eye witnesses cannot provide evidence of sufficient force to confirm beyond reasonable doubt that penetration had taken place. Whilst I can accept their evidence as proving beyond reasonable doubt it looked to them as if the Defendant was having sexual intercourse with Ms T, it does not prove beyond reasonable doubt that he was. However, the description they give of what they saw does mean that I can be sure beyond reasonable doubt that the Defendant was attempting to have sexual intercourse with the Complainant Ms T. That being so I can properly and safely convict the Defendant of attempted sexual intercourse with the Complainant without her consent. Given the provisions of section 28 of the Penal Code and section 110 of the Criminal Procedure Code the end result is the same. The Defendant Steve Butu is convicted of attempting to have sexual intercourse with the Complainant without her consent.



12. In relation to sentencing, I was able to obtain a verbal report from the Probation Officer before sentence. Realistically I cannot treat this Defendant any different from his Co-Defendant Remy Tari. The only difference between the Defendant Tari and the Defendant before me is that Tari pleaded guilty and was given full credit for doing so. That reduced his total sentence from 6 years to 4 years. Tari was given credit for his young age and previous good character. He was ordered to serve a total of 3 years imprisonment. I give the Defendant Butu such credit as I can for his age and previous good character but I cannot give him any credit for a guilty plea. He will therefore be sentenced to 5 years imprisonment to be served immediately. There is no question at all of the sentence being suspended in whole or in part.

13. The Defendant should know that he has the right to appeal against this decision if he is dissatisfied with it, meaning the verdict or the sentence. He is best advised to discuss any appeal with his legal counsel before making any decision. The Defendant must file any appeal within 14 days.

22nd October 2015 at Saratamata, East Ambae


Chetwynd J

