

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

**Criminal Case No. 2316 of 2016**

**PUBLIC PROSECUTOR**

**-v-**

**JOHN NAKO**

*Before Chetwynd J*

*Mr Massing for Prosecution  
Mr Jnr Garae for the Defendant*

*Hearing 6<sup>th</sup> and 7<sup>th</sup> October 2016*

## **JUDGMENT**

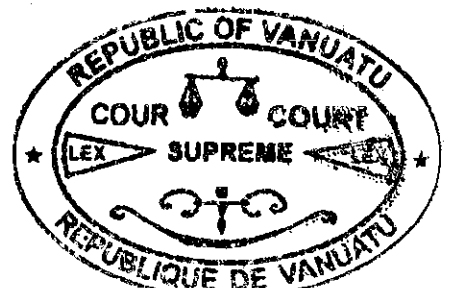
1. The Defendant faces one count of sexual intercourse without consent. As I indicated to him at the beginning of the trial, the Public Prosecutor must prove the case against him beyond reasonable doubt. If there is any reasonable doubt then in the words of section 81 of the Criminal Procedure Code, the Defendant, "...will be deemed to be innocent of the charge and acquitted".

2. The only issue in the case is consent. The Defendant does not deny he had sexual intercourse. He says, depending on which piece of evidence you look at, the Complainant agreed to have sex when they met outside the All in One shop or later when she and he had driven off to the wharf.

3. There is no independent evidence available which can assist with the issue of consent. That is more often than not the situation in a charge like that faced by the Defendant. This is a typical case of, "he said, she said".

4. So far as evidence is concerned, I can accept the evidence of the Complainant over that of the Defendant without corroboration if I accept her evidence was or is honest. It is not a case of whether I think the evidence is credible, that is something else. One thought I must put from my mind is that solely because she is a complainant in a case involving a sexual offence I must find evidence to corroborate what she says. On that basis, if the Complainant's evidence is not challenged as to honesty then I can convict the Defendant of rape because the Complainant says quite simply, she did not agree to have sex with him.

5. However, there are difficulties with the evidence. I cannot be sure but I am almost certain that those difficulties have arisen because of the custom reconciliation



ceremony which has taken place. Of course I accept reconciliation is an important part of custom and in itself it must be encouraged and welcomed. Unfortunately as appears to have occurred in this case, when reconciliation is conditional on complaints being withdrawn and cases cancelled then justice suffers. Custom may be satisfied but justice is not. Custom reconciliation should not be advanced on the basis that criminal charges must disappear.

6. Be that as it may, there are problems with the evidence. The defence points to inconsistencies such as the Complainant saying, in her statement to the police, the taxi windows were dark and then saying in oral evidence before the court that she could not remember if they were dark or not. It is possible for her to remember the glass being dark when in fact it was not. It does not necessarily mean she is a liar.

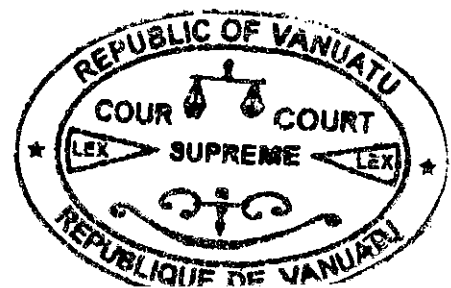
7. The defence also point to the Complainant accepting, in cross examination, that the meeting between her and the Defendant outside All in One shop was not the first time they met and spoke to one another. That was never contested, the evidence in chief went straight to the meeting where the Complainant got into the Defendant's taxi and he drove off. Then there was the issue of whether there was any conversation in the taxi on the way to the wharf. I would point out that it was the Defendant's story to the police in the interview under caution that the Complainant didn't say anything. It was his evidence to the Court as well as the Complainant's that there had been some conversation in the taxi on the way to the wharf. Then there is the suggestion that the Complainant cleared away some wood so she could lie down. It was never made clear why this signified consent, the implication was the Complainant by clearing away the wood, was agreeing to have sex. It did not seem to occur to the Defendant that she simply did not want to be forced to lie on a lump of wood.

8. The defendant relies heavily on the fact that the Defendant removed her panties. He says this indicates the consensual nature of the act. However the Prosecution case and the evidence from the Complainant was that the Defendant ordered her to do so. Whichever version is the truth I accept she removed her panties herself.

9. The Defendant also says that the evidence she gave was that she pushed the Defendant's penis into her vagina. Apart from being nigh on impossible physically, it also ignores the further evidence from the Complainant that the Defendant ordered her to do certain things. Her compliance does not in itself signify consent.

10. I accept that the Complainant says the Defendant had on dark trousers and he says he had red sportswear on. There is no independent evidence about what each was wearing.

11. The Defence also point to the fact that the prosecutor was unable to destroy the Defendant's evidence despite extensive cross examination. In my view that was because the Defendant gave every indication he was a practiced liar. For example he says the only reason why he was confused in his evidence about where he dropped off



his first passenger that morning was because he was new in town. However, he was not so new in town that he did not know where to go to have sex. He told the police officers in interview that he had a girlfriend and that they had a small son. Now he says the girlfriend left him even before he departed Port Vila for Luganville.

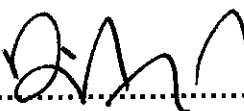
12. I suspect I cannot believe much of what the Defendant says. He is by all appearances a much practiced liar. A 30 year old liar who would have us believe that a young girl half his age would be interested in a relationship with him. I am suspicious of all his explanations and protestations that this naive young girl newly arrived in Luganville was a willing and compliant partner.

13. That is my difficulty. Whilst I suspect the Defendant took advantage of an unsophisticated girl "from the bush" when he lied to her and tricked her into getting into his taxi it is only a suspicion. I cannot convict on suspicions. Whilst I suspect the Defendant lied to the Complainant, then to the police and now to the court I cannot convict on those suspicions. There is the barest of reasonable doubt about the Complainant's evidence and therefore about the Defendant's guilt. As I said at the beginning, if there is any reasonable doubt the Defendant is entitled to it and he is to be deemed innocent of the charge and acquitted

14. The Defendant is acquitted of the charge of sexual intercourse without consent and is discharged.

Dated at Luganville this 7<sup>th</sup> day of October 2016.

BY THE COURT



D. CHETWYND  
Judge

