

**IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU**

(Criminal Jurisdiction)

Criminal Case No. 32 of 2015

PUBLIC PROSECUTOR

V

KAKAE ISHMAEL MARANGO

Coram: Judge Aru

Counsel: Ms. M. Tabi for the Public Prosecutor

Ms. K. Bakeo for the Defendant

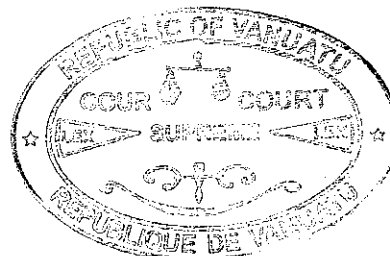
ORAL RULING

1. At the close of the Prosecution case, I heard oral submissions from both counsels on a submission of no case to answer by the accused. This is my ruling. Section 164 of the Criminal Procedure Code [CAP 136] provides:-

"164. Procedure after close of prosecution

- (1) If, when the case for the prosecution has been concluded, the judge rules, as a matter of law that there is no evidence on which the accused person could be convicted, he shall thereupon pronounce a verdict of not guilty.
- (2) In any other case, the court shall call upon the accused person for his defence and shall comply with the requirements of section 88."

2. The general approach when dealing with no case submissions is as set out in Regina v Galbraight (CA) (1981) 1 WLR 1039 and applied in Public Prosecutor v Samson Kilman & Ors Criminal Case No 5 of 1997. In this case, I need to be.



satisfied whether on the strength of the Prosecution evidence a reasonable court could convict the accused as a matter of law.

3. The accused Mr. Marango is charged with three counts of sexual intercourse without consent contrary to section 90 and 91 of the Penal Code [CAP 135]. Sexual intercourse as defined under section 89A states as follows:-

"Sexual intercourse defined

89A. For the purposes of this part sexual intercourse means any of the following activities, between any male upon a female, any male upon a male, any female upon a female or any female upon a male:

- a) the penetration, to any extent, of the vagina or anus of a person by any part of the body of another person, except if that penetration is carried out for a proper medical purpose or is otherwise authorised by law; or
- b) the penetration, to any extent, of the vagina or anus of a person by an object , being penetration carried out by another person , except if that penetration is carried out a proper medical purpose or is otherwise authorised by law; or
- c) the introduction of any part of the penis of a person into the mouth of another person ; or
- d) the licking , sucking, or kissing , to any extent , of the vulva , vagina,, penis, or anus of a person ; or
- e) the continuation of sexual intercourse as defined in paragraph a), b), c), or d); or
- f) the causing, or permitting, of a person to perform any of the activities defined in paragraph a), b), c) or d) upon the body of another person."

4. Relevantly section 90 provides:-

"Sexual intercourse without consent

90. Any person who has sexual intercourse with another person;

- a) without that person's consent; or
- b) with that person's consent if the consent is obtained :
 - i) by force ; or
 - ii) by means of threats of intimidation of any kind ; or
 - iii) by fear of bodily harm ; or
 - iv) by means of false representations as to the nature of the act ; or



- v) in the case of a married person , by impersonating that person's husband or wife ; or
 - vi) by the effects of alcohol or drugs ; or
 - vii) because of the physical or mental incapacity of that person.
- Commits the offence of sexual intercourse without consent."

5. And section 91 states:-

"Punishment of sexual intercourse without consent

91. No person shall commit sexual intercourse without consent.
Penalty: Imprisonment for life.

6. This is a criminal case and the general rule of proof as set out in section 8 of the Penal Code is that the burden of proof rests with the prosecution. The prosecution must prove guilt beyond reasonable doubt in order to secure a conviction. The essential elements of the offence which the prosecution must prove are that:-

- The accused had sexual intercourse with the complainant;
- The complainant did not agree or consent to having sexual intercourse with the accused;
- The accused knew that the complainant did not consent;

7. In this case the allegations against the accused are said to have occurred at a time when only the accused and the complainant were together. The prosecution called 4 witnesses. The complainant, Corporal Willie Daniel Obed, Susan Vano Ishmael and Mark Willie.

The Complainant

8. She is 18 years old. First she told the court that she came back from school with a sore chest then the accused her step father, gave her some panadol which she took before going to bed. Her bedroom was upstairs in their one story house .Later



on her chest was still sore so she went down stairs to the accused's bedroom and asked him to rub her chest.

9. After rubbing her chest she asked to suck the accused's penis but he said no. She said it was her own idea to ask him. She said that it was her mother Susan who wanted her to make her statement to the Police as her mother wanted their father the accused to come back to her. She said her statement was her own thoughts ("hemi own tingting blo mi").
10. After a short adjournment when the court resumed she said the accused put his finger and penis into her vagina and she agreed to suck the accused's penis for a mobile phone. She said she felt sore and went outside. Under cross examination she agreed that the accused held her vagina when they were all in a room with her small brother and sister. She was sharing a mattress with her small brother but did not scream or wake him up and did not attempt to wake her small sister who was also sleeping in the same room but had her headphones on. She did not resist or scratch the accused but then went outside to check her panty. There were no stains on her panty and the next day she went to school but did not tell the nurse.
11. She agreed that there was no proof that the accused did anything to her and she agreed that everything in her statement to the Police were all lies.

Willie Daniel Obed

12. He is a police officer with the rank of corporal. He said he spoke to the accused who was on Tanna over the phone. That the accused wanted to do a reconciliation but did not tell him why he wanted to reconcile. Under cross examination he said after speaking to the accused he waited until he received the statements from the complainant and her mother before preparing his statement. He agreed that the accused did not admit any offending to him.

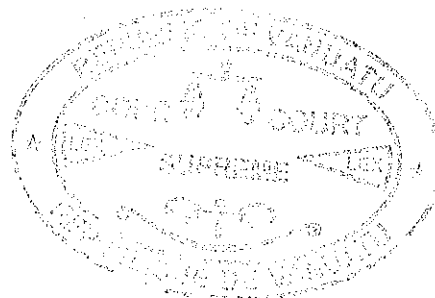


Susan Vano Harry

13. She is the complainant's mother. She told the court that she only saw the complainant holding hands with the accused and had bad thoughts "rabis tingting" because the children were always afraid of their father, the accused. She said that's why she wanted the chiefs to deal with the matter not the police but the police persisted. As a result she wrote a letter to the prosecutions to withdraw the case which she referred to . Under cross examination she said the complainant told her that the accused rubbed her chest and private part but did not tell her that the accused put his finger and penis into her vagina or that the accused asked her (the complainant) to suck his penis. She agreed that other parts of her statement to the police were made due to pressure as the accused took the other children to Tanna and she wanted him to come back.
14. Under re-examination she confirmed that she made her statement to the Police in order to get the accused to come back to her.

Mark Willie

15. He said he took the accused's cautioned statement. Under cross examination he said the accused never admitted to the allegations against him.
16. As this is a criminal case, it is not for the accused to prove his innocence but for the prosecution to prove guilt beyond reasonable doubt. The state of the prosecution evidence is that the complainant gave evidence which was inconsistent and contradicted herself therefore making her evidence unreliable. In addition, no medical evidence was called by the prosecution although a medical certificate provided to the police by Dr Thomas Sala stated that the complainant's genitalia was intact.



17. Furthermore the complainant made her Police statement because her mother wanted her to make the statement so that the accused will return to her. This is confirmed by Susan Vano in her evidence that she made her statement to the Police so that her husband the accused will return to her.
18. I have considered the evidence and as a judge of fact and law, I come to the conclusion that the prosecution evidence taken at its highest is such that I could not properly convict upon it. It is therefore my duty to stop the case. This is not to say the events did not happen. They may have happened, but the prosecution has not proved its case to the required standard.

Verdict

19. I therefore return the following verdicts:

- Count 1 – not guilty
- Count 2 – not guilty
- Count 3 – not guilty

20. Mr. Kakae Ishmael Marango you are free to go home.

DATED at Rovo Bay this 8 day of December, 2016

BY THE COURT

D. ARU
Judge

