

PUBLIC PROSECUTOR VS- YANO TABI

Coram: Mr. Justice Oliver A. Saksak

Counsel: Ken Massing for Public Prosecutor
Andrew Bal for Defendant

Date of Hearing: 18-19th June 2018

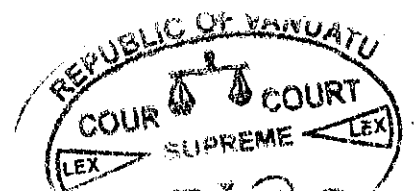
RULING

1. This Ruling is made pursuant to section 135 of the Criminal Procedure Code Act [CAP. 136] which states:

“ Acquittal of accused person when no case to answer.

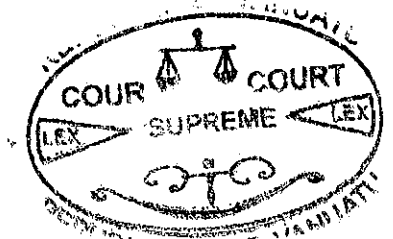
If at the close of evidence in support of the charge, it appears to the Court that a prima facie case is not made out against the accused person so as to require him to make a defence, the Court shall dismiss the case and shall forthwith acquit him.”

2. The accused, Yano Tabi was charged with one count of sexual intercourse without consent contrary to sections 90 and 91 of the Penal Code [CAP.135]. It is alleged that on 5th January 2018 the accused had sexual intercourse with Sandra Kakasi without her consent. The accused denied the charge and the case was tried by the Prosecution calling evidence from 2 witnesses namely (a) Sandra Kakasi and (b) Jimmy Anthony.
3. The burden of proof rests on the prosecution to prove the guilt of the accused beyond reasonable doubt. Section 8 of the Penal Code Act lays down this general rule as to



burden of proof. Further section 81 of the Criminal Procedure Code Act also places this burden clearly on the prosecution.

4. The accused admitted sexual intercourse took place however his defence was that sexual intercourse was consensual.
5. In the circumstances, the prosecution had 2 elements to prove beyond reasonable doubt-
 - a. Whether the accused had sexual intercourse without the consent of the complainant, and
 - b. The accused did not believe on reasonable grounds the complainant was consenting at the time of sexual intercourse.
6. The evidence by Sandra Kakasi was that the accused picked her up at the PWD area to drop her off at Mango station. He however swung around and headed back into town, past the bridge, the market and drove along the main road towards Airport and taking the first turn on the left towards Show Ground. At Palms Estate they drove past a man trimming hibiscus hedges and went into the bushes. The accused scouted the area and then opened the door for her to get out of the taxi. They went 6 metres away from the car where the accused kissed the complainant for a short time. Then he removed her trousers down to her knees and stooped down to lick her vagina. Then the complainant removed her trousers completely and the accused pushed his penis into her vagina. He ejaculated and spilled some sperm over her legs. He then wiped his penis with young manioc leaves. She put her clothes back on and they both went back into the car and drove back into town. The accused asked the complaint where



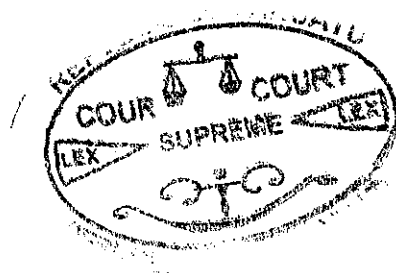
she wanted to be dropped off and she wanted to be dropped off where she was picked up.

Eventually he dropped her off at the round about at Mango. She went back to her house, hanged up her bag and went straight to the bathroom to have a bath. After bathing she then went into her bedroom where Anthony Jimmy, her defecto husband joined her and interrogated her about what had happened. After that they went to her mother at Chapius and then to the Police Station and then on the hospital for a medical report.

7. In cross-examination the complainant was inconsistent with herself. She said things which she did not include in her statements made to the police on 6th January 2018. This put her credibility at risk and questionable.

8. Anthony Jimmy gave evidence that on 5th January 2018 he waited in the house. When Sandra did not return in time he phoned up to Chuan store to ask for her. He was told she had finished work and had left. She did not arrive until 3:45pm. It was unusually late for her. He noticed her attitude was different, her hair was in disorder and her eyes were red. He was in the other room watching TV when Sandra arrived. She did not call out to him. He heard her and came out to meet her and asked her why she was late. He persisted in asking her questions. She asked to go and see her mother at Chapius so she could accompany her to the police. They went down to the police station and then to the hospital for a medical report.

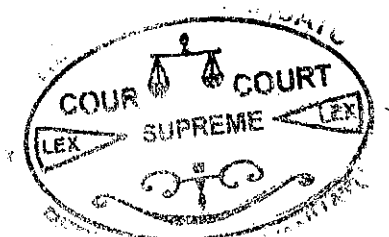
9. This witness too said things he did not say to the police when he was interviewed. His credibility also was questionable and at risk.



10. This offence occurred between 2:30 and 3:30pm. The distance between the point the victim was taken to the place sex occurred is too great. The road taken was and is the main highway through Luganville town. It was a Friday afternoon. Most people were walking the street at the time. They drove across the Sarakata Bridge, past the Market House through the main street past the Police station and the Public Solicitor's office. There is no single evidence that the victim resisted the accused in anyway. There is no evidence she tried to open the car window and shout for help. There is no evidence she asked the accused to stop or threaten to jump out of the car. There is evidence she just at there and remained silent all the way. They drove past a gardener at Palms Estate who saw them. The victim looked back at him and saw him laugh. There is no evidence she tried to struggle or call for help at that point in time. These are factors which made the accused believe the victim had consented to being taken. He had made gestures clearly indicating his intention to have sex with her, but there is no evidence from her that she resisted those gestures.

11. In the bush where sex took place she performed oral sex on the accused at his invitation. She did not struggle or tried getting away or calling for help. He performed oral sex on her. There was no struggle. Her clothes were removed down to her knees. After the oral sex, she removed her clothes fully and full penile intercourse took place. She did not resist or struggle. She did not feel depressed or cried at the time.

12. On her return she wanted to be dropped off where she was picked up so she could walk back home and not be noticed. She was dropped off instead at a Roundabout. Contrary to what she said she did not go directly home. She went to Anthony's aunt's



house where she washed her feet clean. Then she went to the house, hanged her bag and went straight to the bath.


13. Anthony Jimmy therefore did not see her enter the house. His description of her hair and eyes therefore is in doubt. He was clearly watching TV in the other room. She had already washed and changed her clothes before she came into their bedroom and then Anthony approached her and asked her about her lateness. Had he not asked, it was highly likely she would have told on the accused.

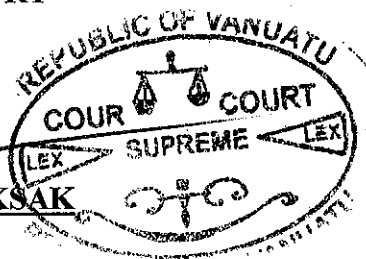
14. With those evidence, a reasonable tribunal could not safely convict the accused of the charge as laid.

15. Accordingly the trial must end at this point. I rule therefore that there is no prima facie case made out against the accused. I therefore dismiss the charge against him and accordingly acquit him.

DATED at Luganville this 19th day of June 2018

BY THE COURT


OLIVER.A.SAKSAK



Judge