

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

**Criminal
Case No. 17/3609SC/CRML**

BETWEEN: PUBLIC PROSECUTOR
Prosecutor

AND: TUKA LIU SUMPE
Defendant

Before: *Justice Oliver A. Saksak*

Counsel: *Damien Boe for Public Prosecutor
Jane Tari for Defendant*

Date of Trial Hearing: *4th September 2018*

Date of Verdict: *5th September 2018*

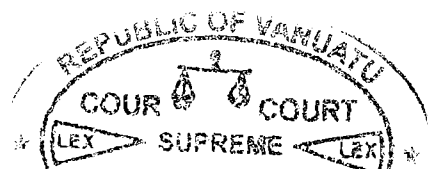
VERDICT

Introduction

1. The defendant Tuka Liu Sumpe is charged under sections 90 and 91 of the Penal Code Act [CAP 135] with one charge of Sexual Intercourse Without Consent.
2. It is charged that he had sexual intercourse without consent with the victim and complainant Teva Triflus on 24 September 2017.

Agreed Facts and Issue

3. The agreed facts are that –
 - (a) The incident occurred on 24 September 2017 around 4 am in the early hours of the morning.
 - (b) The incident occurred at Pepsi area in Luganville.
 - (c) The victim was a student at St Michel School at the time of offending.



(d) On 24 September 2017 the defendant had sexual intercourse with the victim and complainant Teva Triflus.

4. The only issue is one of consent.

Burden of Proof and Standard

5. The Prosecution has the duty to prove beyond reasonable doubt that the complainant did not consent to sexual intercourse with the defendant or that the defendant did not have any reasonable belief that the complainant had consented to sexual intercourse taking place.

Evidence for Prosecution

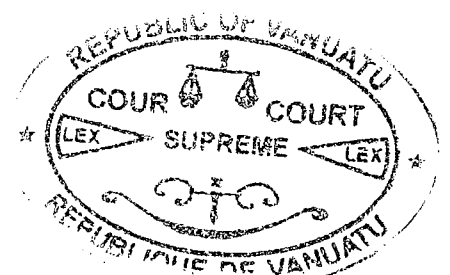
6. The Prosecution called three witnesses namely Teva Triflus, the complainant and victim, Norbert Almeli and Ana Edwin. The witness statements of Gideon Garae, Charles Narae, Jimmy Remo (Police Officer), Noelline Stephen (Police Officer) and Peter Dini (Police Officer) and Serahlyn Tabi (Crime Scene Officer) were agreed into evidence without cross-examination.

7. The Medical Report dated 24 September 2017, 7 photographs taken by the crime scene officer and the Record of Interview recorded by Noelline Stephen were agreed by Counsels to be the exhibits tendered into evidence. Defence took issue with the conclusion of the Report stated as "Victim of Rape". This part was excluded by the Court.

Presumption of Innocence Read

8. The Court read and explained statement of presumption of innocence in section 81 of the Criminal Procedure Code Act [CAP 136] (the CPC Act) prior to the Prosecution making its opening address.

Prima Facie Case Finding



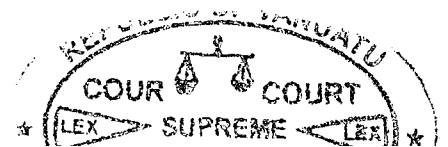
9. After the prosecution had closed its case, the Court ruled there was prima facie evidence established by the prosecution to require the defendant to make a defence.

Defence Case and Evidence

10. The Court then read and explained section 88 of the CPC Act. The defendant gave evidence on oath, and was cross-examined by the prosecutor. There was no other independent defence witness.

Closing Address and Submissions

11. I heard oral addresses and submissions from both Mr Boe and Mrs Aru. Mr Boe invited the Court to find the defendant guilty of the charge submitting the Prosecution had proved the defendants' guilt beyond reasonable doubt that (a) he had had sexual intercourse with Teva Triflus (b) that sexual intercourse was not consensual and (c) the defendant had no reasonable belief the complainant had consented to sexual intercourse. Prosecution relied on the case authorities of Ishmael v. Public Prosecutor [2015] VUCA 4 and the Samoan Case of Attorney General v. Ferreti [1994] WSCA 13 in support of circumstances which supported the lack of consent by the complainant. Mr Boe also relied on Public Prosecutor v. Voy Kalo [2018] VUSC 86 in which the Chief Justice applied the cases of Ishmael v. PP, Attorney General v. Ferreti, PP v. Kua [2016] VUSC 146, PP v. Jack Polo [2013] VUSC 81 and PP v. Tor [2003] VUSC 101. Counsel also relied on the Court of Appeal Case of Keimit v. PP [2017] VUCA 12 in support of the inconsistencies which became apparent in the complainant and the witnesses oral evidence and their statements but that the inconsistencies were such that they did not affect the elements of the charge not being proved beyond reasonable doubt.
12. Mrs Aru on the other hand argued and submitted that the Prosecution had not proved beyond reasonable doubt that the complainant did not consent to sexual intercourse with the defendant on 24 September 2017 at 4.00am because of the evidence. Mrs Aru relied on the cases of Koroka v. PP [2007] VUCA 3, PP v. Tugu Crc 46/2012 VUSC and PP v. Hortial [2004] VUSC 27 to submit that if the Court has any suspicion as to



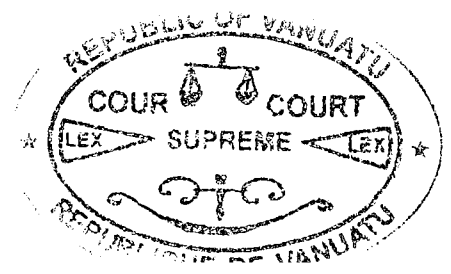
the guilt of the defendant, the benefit of the doubt should be given or afforded to the defendant. Further that if there are 2 competing stories as there are in this case, then the case is evenly balanced, meaning that the Prosecution has not proved its case beyond reasonable doubt. Finally for the inconsistencies and the shortfall in the medical report, the defendant it was submitted, has given adequate and sufficient explanations in rebuttal, therefore the Court should find the case not proved beyond reasonable doubt and to return a verdict of not guilty on the defendant.

The Law

13. "Sexual Intercourse" is defined in Section 89 A of the Penal Code Act [CAP 135] (the Act) as follows –

"For the purposes of this Act, 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 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 for 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 the person who caused or permitted the activity.”

(emphasis by underlining)

14. Section 90 of the Act provides for Sexual Intercourse without consent and states –

“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) be fear of bodily harm; or
 - (iv) by means of false representation 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. The offence is complete upon penetration.” (Underlining for emphasis)

15. Section 91 of the Act provides for the punishment of sexual intercourse without consent and states –

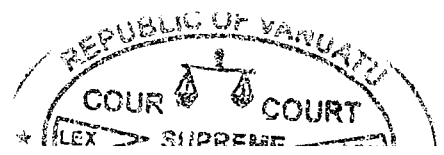
“No person shall commit sexual intercourse without consent.

Penalty: Imprisonment for life”

Discussions

16. It is an agreed fact that on 24 September 2017 at around 4.00am in the early hours of the morning at Pepsi area, the defendant had sexual intercourse with Tevo Triflus, the complainant and victim.

17. From the evidence and admission by the defendant there was penetration of his penis into the complainant’s vagina and into her mouth. These activities amount to sexual intercourse under section 89 A(a), (c) and (d) of the Act. The extent to which the

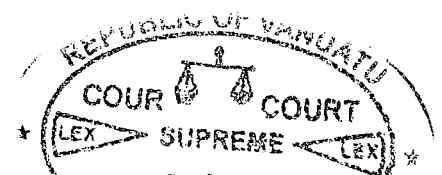


penetration of the defendant's penis into the complainant's vagina and mouth, whether for long or short duration, or deep or shallow is immaterial or whether the defendant was satisfied or not is equally immaterial. It suffices that the penis must have entered into the vagina and the mouth.

18. In this case the defendant denied there was lack of consent by the complainant to him penetrating her vagina and to her sucking his penis.

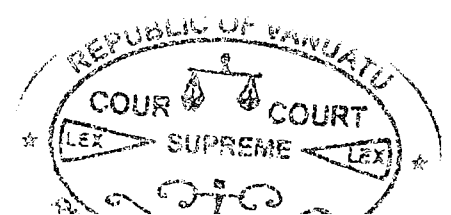
19. What evidence is there by the prosecution to prove there was no consent by the complainant to the activities of the defendant? First the complainant Teva Triflus gave evidence under oath that in the early hours of the morning of 24 September 2017 she and other students were sleeping in Posevena's house at Pepsi are. These students were Adel, Anna, Fidel, Marie Rose, Gideon, Norbert and Mackleen. The defendant came and banged on the door of the house. He was drunk. He kicked the door and demanded they open it or he would break it down. They opened the door and ran out but the defendant went after them, caught her by her singlet and pulled her down. He held both of her hands tightly and pulled her down to a mango tree. She yelled out but the defendant told her not to yell or he would break her hands. Then he pulled her to the kitchen house. She tried calling out but he stopped her. Then he pulled her to the banana trees. He stood up, pulled down his trousers, held her head towards his penis and made her suck on it. He forced her to do it. Later he told her to remove her clothes so he could have sex with her. She refused but he threatened to fasten her hands and pull her to the river to drown her. This made her afraid and she gave in to his demands. She said her friends watched them have sex after which she held her panty and trousers and ran off to her brother Norbert and cried to him telling him about what the defendant had done to her. Then they called up the police who came and took her to the police station.

20. In cross-examination by Mrs Aru the complainant confirmed the defendant entered into their house in a riotous and disorderly manner causing her and all the others to flee through the door. That the defendant caught her by her T-Shirt and stopped her running away. She denied the defendant demanded for her 2 brothers. That he pulled the 2 brothers out of the house to the mango tree and assaulted them there. She stood by and watched feeling sorry for her 2 brothers. The others were running around in



fright. The 2 brothers escaped too and she was left alone facing the defendant. Someone shone a flashlight and the defendant pulled her hand and ran. She denied going to the natangura house. That he asked her for sex there, that she removed her own clothes and that she had sex with him willingly. She denied she asked the defendant to stop having sex with her. She denied the suggestion she held the defendant's penis in her hand, giggled and agreed to his demand to put it in her mouth. She agreed to the suggestion that someone had been watching them in the act. She denied she fled the scene with her panty and trousers as a result of that realisation. She confirmed she ran to her brother Norbert and cried to him telling him all about the defendant and what he did to her. After that the police came and took her to the Station to make a report.

21. Anna Edwin gave evidence on oath confirming the defendant went to their house and kicked the door threatening to break it down if they did not open it. Gideon was afraid and opened the door. The defendant grabbed him, pulled him outside and assaulted him together with Norbert. They all ran away with Teva too but the defendant held Teva by her T-Shirt and pulled her to the banana trees. She saw the defendant holding tightly onto Teva. 2 boys from Jonah's yard, Daniel and another came to look for Teva. Not long after that Teva came back running and crying to them, They asked her and she said the defendant had caused "problem" to her. She was crying to her brother Norbert. Then Jonah called the police who came and took her to the police station.
22. Norbert Almelie confirmed on oath he heard the gate open. He heard noises by drunken persons. He heard the defendant kick on their door. He grabbed him and Gideon by their shirts and pulled them outside then pushed them back into the house saying "Yu save mi" meaning "Don't you know who I am?" They were crying. Japeth, next door neighbour came and held the defendant. He ran outside and heard his sister cry. She came back holding her clothes and crying. He asked her why she was crying and she told him the defendant had had sex with her. Later the Police came and took her to the Police Station. He confirmed Marie Rose, Fidel, Gideon, Adel, Mackleen, Teva and Anna were in the house at that time. He said the defendant assaulted him and Gideon over dried coconuts which they took to cook their vegetables with. In cross, he said he did see anything that happened to Teva.



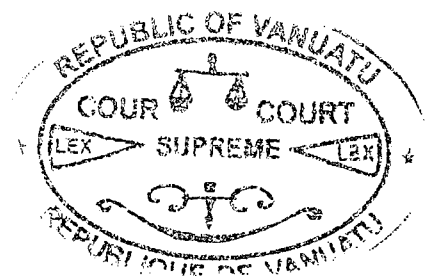
23. Gideon Garae's witness statement was agreed into evidence. He confirmed that in the early morning of 24 September 2017 a drunken man went and banged on their door and threatened that if they did not open the door he would go in and kill them dead. The 6 girls in the house with them were afraid and told him not to open the door, but he opened the door and recognised Tuka, the defendant from Malo and another boy. They held him by his T-Shirt, pulled him outside and assaulted him. It was at this time the girls ran outside. The defendant and the other boy then assaulted him and Norbert over dried coconuts. Then he put them back inside and locked them up inside. Japeth came and talked with the defendant and they opened the door again. At the same time they fled from the house and the defendant chased the girls around the yard. He confirmed the defendant had threatened to kill them all and throw them into the river. This made him afraid so he ran away and did not see him hold onto Teva. He just saw later how Teva came back and cried to her brother Norbert and told him what the defendant did to her.

24. Charles Narae's witness statement was agreed into evidence without cross-examination. His evidence is simply that on Saturday night he had drunk some alcohol. He was on the road when the defendant and another boy from Ambae met him and asked him for a charger to charge a speaker (blue tooth). He gave it to them and followed them to their house by the river. He overheard the defendant telling them he would go and assault the Big Bay boys. Then he followed the defendant with the speaker to the road with Toa to the yard and the defendant entered it. He too entered the yard and saw the defendant slapping the 2 boys. Then he tried stopping him but could not. He saw Japeth come too. Then he asked the defendant to return his speaker and asked Japeth to try and calm him down. And he left the yard to return to his house as he did not want to get into problem or be involved.

Findings

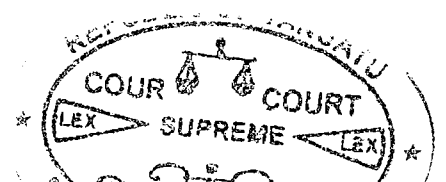
25. From those evidence I find that the defendant –

(a) Was drunk.



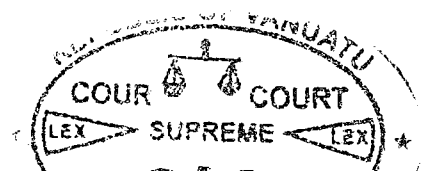
- (b) Entered the yard with a clear intention to assault the boys.
- (c) Acted in a riotous and disorderly manner, by
 - (i) Kicking the door of the house
 - (ii) Threatened and intimidated the occupants of the house including the complainant.
 - (iii) Assaulted the 2 boys.
 - (iv) Caused fear of physical bodily harm and to safety of the occupants of the house.
- (d) Grabbed the complainant by her T-Shirt and held onto her.
- (e) She yelled out but the defendant stopped her and threatened her.
- (f) Pulled her against her will to the banana trees passing by the natangura house.
- (g) There was recent complaint made by the complainant immediately after the incident.
- (h) The complainant was seen crying holding onto her trousers, showing she was in distress over what was done to her by the defendant.

26. The defendant gave evidence on oath. He said he went in quietly. That he knocked on the door with a finger. That he asked for the boys from their sister the complainant. That he told her he did not come for her but for her brothers. That they all fled and left the complainant alone. He agreed he threatened to break their necks but he said this to the boys. He asked her what then? Someone shone a torch light. He pulled her hand and they ran to the natangura house. He asked her for sex there 2 times. At first she did not answer. The second time she agreed. They then went to the banana trees. She removed her clothes. He had sex with her for a short time only because she no longer wanted him to. He withdrew from her. He pushed his penis into her vagina several times, only and did not threaten her. He said she just sat there and then he asked her to suck his penis and she just giggled and laughed. He stood up. She knelt down and held his penis then opened her mouth and sucked on it for a short time. She did it willingly. Someone came by and saw them. He stopped and pulled up his trousers. The complainant had not seen the person. He told her to pick up her clothes. When she saw the person she took her clothes and ran off. Did not see her cry at the time. Denied forcing her, had he forced her he would have finished his intention and be satisfied. He went there knowing what he was doing. The other girls were by the gate



at the time. He held onto Teva's shirt but never held her 2 hands together. Teva was outside the house.

27. In cross-examination Mr Boe asked whether he agreed he was not satisfied and he said yes. Counsel proposed that the reason for that was because Teva had pushed him out. The defendant said "yes, because she did not want it anymore." Counsel asked whether that was the reason he was not satisfied and he said "yes". Counsel asked him whether he was aware the complainant cried that night and he said "only when I held her T-Shirt that she screamed loudly."
28. I watched the defendant's demeanour in the witness box. He was evasive at times to answer the questions put to him in cross. He pretended he did not understand the questions which had to be repeated by counsel and yet no answers were given. He painted a picture that he went into the yard at the time as an innocent person. That he knocked on the door with one finger and asked for the boys. That he did not pull the complainant by her two hands. That he ran with her to the natangura house and asked sex from her there. That she went with him to the banana trees and participated willingly in the sex acts with him there. However there is overwhelming evidence to the contrary from the complainant, Norbert, Charles, Anna, and Gideon that none of what the defendant said in his defence could possibly be believed as the truth. His version of the story lacks credibility. I prefer rather the evidence given by the complainant as credible and accept them as the truth.
29. The defendant admitted in evidence the complainant yelled and screamed. By that he could have known she was not agreeing to anything being done to her at that stage. Yet despite this he held her and ran with her down to the banana trees. She denied knowing the defendant or having any prior relationship of any sort with him prior to 24 September 2017. To say that the complainant became a willing participant in sexual activities with the defendant who was a total stranger to her is beyond comprehension and is an untenable submission which is rejected.
30. From the evidence, I am satisfied that the defendant had threatened the complainant and forced her by causing her fear of bodily harm through the effect of alcohol, to bring about her consent to sexual activities which took place at 4.00am on 24



September 2017. I am satisfied from the evidence there was nothing on which the defendant could say was available to make him believe the complainant was consenting. I am satisfied on the evidence that penetration of her vagina at the time were done through force and fear of bodily harm and were therefore done against her will.

31. I accept the Prosecution submissions on the basis of the case law and authorities cited and referred that there was a recent complaint by the complainant and that her participation in the sexual acts with the defendant were obtained by force and were not voluntary on her part. I accept that there were inconsistencies in some part of the evidence for the prosecution but I accept these inconsistencies did not affect the essential elements of consent being obtained by force, threats or intimidation of any kind, fear of bodily harm and through the effect of alcohol.
32. I am therefore satisfied the prosecution has proved the guilt of the defendant beyond reasonable doubt.
33. Accordingly I return the verdict of guilty against the defendant on the charge of sexual intercourse without consent contrary to sections 89 A, 90 and 91 of the Penal Code Act.
34. Accordingly I convict the defendant of the charge.

DATED at Luganville this 5th day of September, 2018.

BY THE COURT


OLIVER A. SAKSAK
 Judge

