

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

Criminal
Case No. 18/2480 SC/CRML

PUBLIC PROSECUTOR V BALDWIN KALSAU

Coram: *Mr Justice Oliver A. Saksak*
Counsel: *Simcha Blessing for Public Prosecutor*
Kylie B. Karu for Defendant
Date: *30th September 2019*

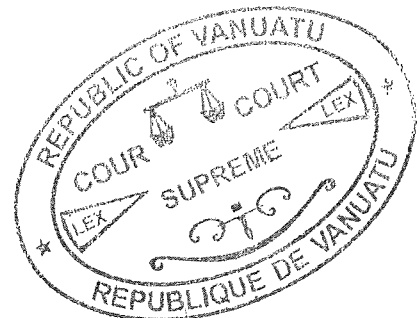
VERDICT

1. After having heard oral summaries and closing submissions from counsel, I am satisfied that the prosecution has discharged its legal and evidential burden of proof beyond reasonable doubt that –
 - (a) the defendant did have sexual intercourse in the form of oral sex with the complainant;
 - (b) the intercourse was performed without her consent; and
 - (c) the defendant did not have reasonable belief the complainant was consenting.

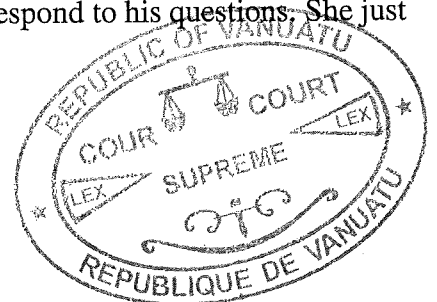
2. The defendant was charged with 2 charges of –
 - (a) Sexual intercourse without consent – Sections 90 and 91 of the Penal Code Act; and
 - (b) Act of indecency without consent – Section 98.

3. The defendant pleaded not guilty to both charges and the case was tried on 7 and 9 August 2019, and 30 September 2019 when the Court heard evidence from the defendant's witness.

4. To discharge its duty of proof the prosecution called evidence from 5 witnesses namely the complainant herself, Kaiser Alilee, Rita Malili, Esau Samson and George Japeth.

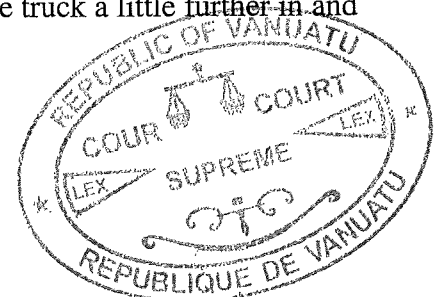


5. As the only issue was consent, the relevant evidence were those given by the complainant herself, Kaiser Alilee, Rita Malili and George Japeth.
6. First the complainant said she was waiting for her friend in the early hours of 20 July 2018. It was about 4.30 to 5.00am. A truck came to stop. The driver called to her and summoned her to come over. She went over and the driver asked if he could drop her off at her work place. First she told him she could not do so as she was waiting for her friend. He asked her a second time, still she said no. He called the third time and still she said she would wait for her friend. He insisted further and thinking he was a good man, she finally agreed that she would accept a ride on the condition she be dropped off at her work place. Having got on the defendant's truck he drove off past the Lycée to Socapor, to Tana Russet Complex then on to Champagne Estate, past the Intra Co then to Joint Court area. Past the Prosecution Office the defendant slowed down and asked to kiss her. She told him she did not want to but if he wanted to, that he should stop at the turn off to the old President's House and do it there. But the defendant did not stop. He proceeded further into the bushes and she told him again that she did not want to engage, and that if he wanted they would meet the next day. She said she was too frightened. But when he stopped the truck in the bushes, he came over to her side and wanted to kiss her. She pushed him away but he advanced again. Being frightened she stayed calm. The defendant went back to his driver's seat and unzipped and made her suck on the tip of his penis for only a short while. She then masturbated him with her left hand until he ejaculated. She accepted to do all these because it was still dark, in an isolated place and being afraid of being hurt or harmed. After all these had occurred the defendant drove on and dropped her at the Reserve Bank. She jumped off and was frightened. She called up her cousin brother Kaiser who came to meet her. She was crying at the time but she did not say anything to him. She wanted to go to the Police Station to see her aunt. Kaiser took her down and she reported all these to her aunt Rita.
7. Kaiser Alilee gave evidence confirming that the complainant had called him on the phone between 5.00 to 5.15am. He went down quickly and saw the complainant sitting on the steps. She was crying and did not say anything to him or respond to his questions. She just



wanted to go and see her aunt Rita at the Police Station, so he accompanied her to the Police Station.

8. Rita Malili gave evidence confirming the complainant attended her office at 7.30am with Kaiser. She saw her and noticed she was crying. She took her into office, had her seated but could not talk for some time. She then stopped crying and spoke more freely. She told the same story as she told in her evidence in chief stated in paragraph 6.
9. George Japeth, a Police Corporal gave evidence relevant to where the defendant lives at Paama Community, Seaside. The Police went over to his parents' residence on 2 occasions but the defendant was not at home. They checked with his wife at Tradewinds but he was not home. He was only brought over by his mother some 2-3 days later.
10. The defendant gave evidence in his defence. Relevantly he said he started picking up boys at 3.30am from Ohlen, Simbolo and Freshwota. He had gone to Simbolo to pick up Rene Malep but he was not home. He was retuning when he saw the complainant sitting down with a jumper over her head. He stopped and asked her what she was doing. She told him she was awaiting for a friend residing at Simbolo area to join her so they could walk to work. He told her he was picking up boys for work and asked her if he could drop her off at work. But she turned away and did not talk. He asked her again and she in turn asked if it was okay for him to drop her off. He answered saying "*stret*" (okay). Then she walked up and got in the truck with him. And he took the route described by the complainant. Along the way some conversation took place between them. He asked her if she had a "*man*". She told him he had left her with a child. He said he did not recognize her since he picked her up until they get to Tana Russet when lights shown on her and he recognized her as the same girl he had picked up last week at USP dropping her off at Au Bon Marche No. 2 Shop. That made him turn off to take the Champagne Estate Route. Near Intra Co he said the complainant told him she was now working at Down Town Shop. That made him drive up the Joint Court Road. Going up he told her he liked her and she replied likewise. Past the Public Prosecutor's Office she asked him if he had a "woman" and he lied he had to her and told her he liked both her and her child. He pulled over on the white road where she told him to stop for a kiss (pulum tongue). He reversed the truck a little further in and



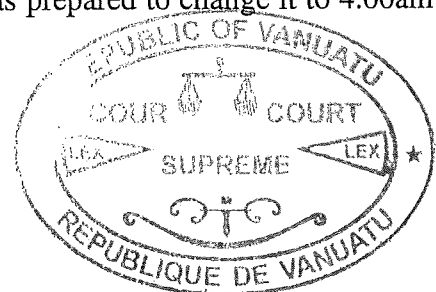
stopped for the kissing. They remained in the truck. She told him to hurry as it was getting close to working hours. They kissed then he asked her for sex. She told him time was too short and that she asked him for his phone number to arrange for “tomorrow” or the “afternoon”. Then he said she agreed only to suck on his penis. He unzipped and she sucked on his penis only for a short time then she retreated and masturbated him to the point of ejaculation. Then he drove on to drop her off at the cross-road near the CNS and Public Solicitor’s Offices. Then he drove on to pick up some workers at Freshwota.

11. Rene Malep gave evidence in support of the defendant. His evidence of any relevance relates to picking up the same girl a week earlier at Korman in the early hours of the morning. He said it was from 7.00 to 8.00am when they had dropped off a boy at Korman and were returning when they picked up the girl and dropped her off at No.2.

Discussion

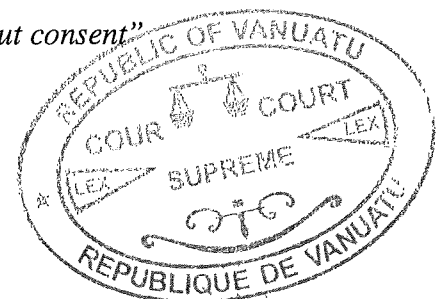
On Credibility

12. The Court believes the evidence of the complainant as the truth. The defendant confirmed the complainant had told him she was waiting for a friend. Whoever that friend was is immaterial. She could have been using that as an excuse or reason not to accept the defendant’s offer of a lift at 3.30am, an indication she was concern for her security at the time.
13. In the defendant’s evidence the complainant had a jumper on and he did not recognize her at first at the place he picked her up. If therefore it was true he had picked her up a week earlier and had spoken with her, she in turn would have recognized him when he was making his offers for a lift and accepted the offer at once. But she refused him three times. Only when he insisted and she asked if it was okay he dropped her at her work place, he said “stret”.
14. His witness evidence was not credible either. It was inconsistent in most parts. Mr Melep gave the time of pick up as 7.00 to 8.00am and then was prepared to change it to 4.00am



in cross examination. He was unsure. He was evasive at times. He gave evidence inconsistent with the defendant who said he picked up the girl at USP at 9-10 O'clock am. Mr Melep's evidence is not credible and cannot be relied upon.

15. The defendant's evidence equally lacks credibility. He lied to the complainant that he does not have a wife. Corporal George Japeth's evidence confirmed that the defendant has a wife. The defendant admitted in cross he has a wife and 4 children.
16. From the evidence of the complainant the defendant asked her for a kiss. She said no but said if he wanted to that he should stop by the turn off to the old President's house and do it there. The defendant went beyond. By this time it should have been obvious to him that this girl was not giving her consent to anything other than a kiss. She was going to work that morning and was anxious to be there on time. Anything else beyond kissing but if done only at the road junction would be acceptable.
17. The defendant reversed further into the bushes against the complainant's instructions. Then kissing started. He said he felt good and so asked her for sex. She told him time was of essence. She proposed he gives her his phone number to call him for "tomorrow" or the "afternoon". The defendant insisted, therefore she agreed only to oral sex. Despite she may have agreed to have oral sex, she made it clear to him she was afraid because it was dark and the place was isolated, and she was anxious to get to her work. That implies she only wanted to get it over and done with. It did not mean she had consented to it all. She did it but it was against her freewill or consent.
18. That falls squarely within the ambit of sexual intercourse without consent in Section 90(a) and (b)(ii) and (iii) which 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 –*
- (ii) by means of threats of intimidation of any kind; or*
- (iii) by fear of bodily harm.....*
- Commits the offence of sexual intercourse without consent"*



19. Further it falls within the ambit of act of indecency without consent in Section 98(a) and (b)(ii) and (iii) which states –

“A person must not commit an act of indecency on, or in the presence of another person;

(a) without that person’s consent; or

(b) with that person’s consent if the consent is obtained:

(ii) by means of threats of intimidation of any kind; or

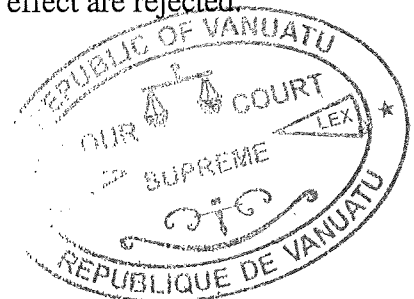
(iii) by fear of bodily harm”

20. It was submitted by defence counsel that all these took place as a result of the good conversation they both had en route to Joint Court area. That may have been, but the Court would believe that much of what was said by the defendant and they amounted to intimidations to lure and deceive the complainant to give her consent.

21. What the complainant consented to was the kissing but only if it happened at the entrance to the turn off to the old House. The defendant did not comply, he went beyond. The girl was afraid. It was dark. It was an isolated place. She was alone with a stranger. What could she do but to do it reluctantly? That could not be true consent or voluntary consent. It is no wonder she recollected it all shortly after being dropped off by the defendant and she could not stop crying.

22. The complainant refused the defendant’s offer three times at the place he first met her. He demanded for penile sexual intercourse and she said no. Despite, he unzipped and made her suck on his penis. That is not true consent. She was clearly intimidated into doing it.

23. I am therefore satisfied the prosecution had discharged its legal and evidential duty and have proved all the elements of the offences under Sections 90-91 and 98 of the Penal Code Act. I am also satisfied the Prosecution has disproved the defendant’s genuine and reasonable belief the defendant relies on under Section 12 of the Act. That Section does not afford him any defence and submissions made to that effect are rejected.



24. I find the defendant guilty of sexual intercourse without consent and also guilty of act of indecency without consent. I convict him on the two charges accordingly.

25. I direct that –

- (a) The Probation Service to prepare a pre-sentence report within 14 days (by 14 October).
- (b) Prosecution submissions be filed by 21 October 2019.
- (c) Defence submissions to be filed by 28 October 2019.
- (d) Bail is vacated and the defendant be remanded in custody pending sentence.
- (e) The defendant be brought up for Sentence on **Friday 1st November 2019 at 9.00am at Dumbea.**

DATED at Port Vila this 30th day of September, 2019.

BY THE COURT

