

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

**Criminal
Case No. 20/221 SC/CRML**

PUBLIC PROSECUTOR V. SAUL JUDAH

Coram: *Justice Oliver A. Saksak*

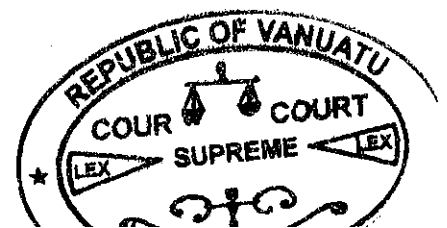
Counsel: *Ken Massing for Public Prosecutor
Francis Tasso for the Defendant*

Date of Trial: *29th October 2020*
Date of Decision: *29th October 2020*
Issued: *11th November 2020*

DECISION ON NO CASE TO ANSWER

Introduction

1. This case was adjourned for trial on Monday 26 October 2020 because Ms Christina Thyna who acted for the defendant initially did not attend the Court. The case was called for trial at Lamén Bay, Epi.
2. On Wednesday 28 October 2020 when the case was called again, Ms Thyna had filed a Notice of Ceasing to Act. The Court then directed Mr Tasso to take instructions. The case was adjourned to 29 October 2020. The adjournment allowed opportunity for the Prosecution and the Police to effect service on the complainant of the case at Alak Village.
3. When the case was called on 29 October 2020 for trial Mr Massing informed the Court the attempt for service was not successful. Mr Massing sought an adjournment to another date in 2021. Mr Tasso did not object but the Court ultimately decided against granting an adjournment and, Mr Massing after taking some instructions, decided to proceed with the trial without the complainant's evidence.
4. Trial proceeded. Prosecution produced evidence from 7 witnesses. These were John Tokorua, Mary Abel, Kausea John, Lenase Robson, Leman Kausea, Sussie John and the nurse who made a Medical report concerning the examination of the complainant.



5. Mr Massing and Mr Tasso agreed that all witness statements, including the Medical Report dated 11th October 2019 be admitted into evidence without cross-examination.

Application For No Case Submission

6. After Mr Massing closed the prosecution case, Mr Tasso made an application under section 135 of the Criminal Procedure Code Act [CAP. 136] (The Act).
7. The application was successful and allowed. And the Court acquitted the defendant of the charge made against him. The decision was made orally.

The Reasons

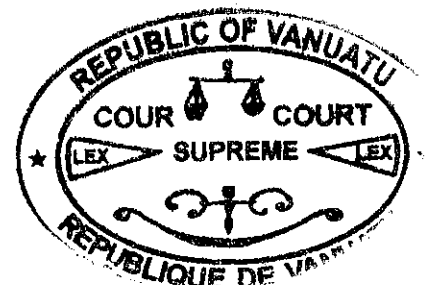
8. I now provide the reasons.
9. Section 135 of the Act provides:

*"Acquittal of accused person when no case to answer.
If at the close of the 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."*

10. The defendant was charged with sexual intercourse without consent under sections 90 and 91 of the Penal Code Act [CAP 135] that in September 2019 at Alak Village, by the sea he had sexual intercourse with Leinavo Obed against her consent.
11. The defendant in his brief statement to the police made on 17 December 2019 bluntly denied the first allegations in September 2019 and also the second allegation in October 2019. He admitted meeting the complainant by the sea at the time but categorily denied any contacts with her whatsoever.
12. Section 90 of the PC Act provides:

"Sexual Intercourse Without Consent.

- "Any person who has sexual intercourse with another person –*
(a) *Without 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 representation as to the nature of the act; or*
- (v) *In the case of a named person by in person acting that person's husband or wife; or*
- (vi) *By the effects of alcohol or drugs; or*
- (vii) *Because of the physical or mental capacity of that person committing the offence of sexual intercourse without consent."*

13. Section 91 of the PC Act simply provides that the penalty for an offence under section 90 is imprisonment for life.

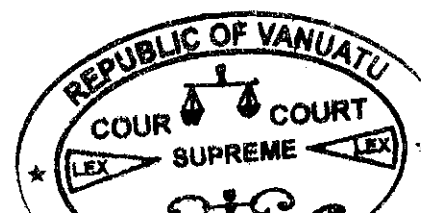
14. The elements required to be proven by the Prosecution under section 90 of the PC Act are: -

- (i) that the defendant had sexual intercourse with the complainant, Leinavo Obed;
- (ii) that there was penile penetration; and
- (iii) that the complainant did not consent.

Discussion

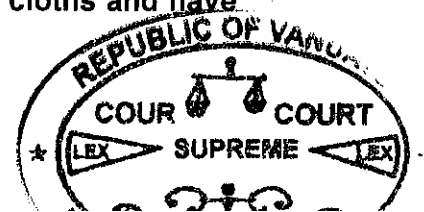
15. Leinavo Obed the complainant was not present at the trial to give her evidence in support of the charge. The Prosecutor and the police went to Alak Village by boat to serve her and bring her to Court. Unfortunately, she had left Alak Village and was at a village on South Epi. The police and prosecution had tried contacting her by telephone but to no avail.

16. There had been more than ample time for service of the notice of trial and summons for the complainant to attend the Court on Monday 26th October 2020. The Court, with the prosecutor, defence counsel and the Probation Officer had arrived on Epi on Friday 23 October 2020 as Air Vanuatu flights to Lamenu Bay are once weekly and only on Fridays. There was the weekend before the trial date on Monday 26th October. It appears no efforts were made for service on Friday 23 October or over the weekend. There was therefore no valid excuse for non-service to warrant a valid request for an adjournment to 2021. It would simply cost the State a double expense if an adjournment was allowed. For those



reasons a request by Mr Massing for an adjournment of trial was refused.

17. Without the complainant's evidence, there was no evidence showing the defendant had sex with the complainant. And neither was there any evidence showing there was penile penetration and lack of consent. That was sufficient for the Court to be satisfied under section 135 of the Act that no prima facie case was made out against the accused to require him to put up a defence.
18. But the prosecution produced into evidence the statements of witnesses John Tokorua, Mary Abel, Kausea John, Lenase Robson, Lemaou Kausea, Sussie John and the medical report by the examining nurse.
19. I analyze their evidence as follows; first Lenase Robson. She said in her statement that she and Mary Abel were fishing on a canoe in October 2019 when she saw the complainant and the defendant being together. But her statements fall short of seeing them in the act of sexual intercourse. Her statement is simply based on suspicion.
20. Mary Abel confirmed Lenase Robson's statement but again fall short of seeing any act of sexual intercourse between the defendant and the complainant. And neither of them gave any statement about the complainant being in distress at the time. Again, her statement is based purely on suspicion.
21. John Tokorua's statement is hearsay and is inadmissible and does not assist the prosecution case.
22. Kausea John's statement is also hearsay. It is irrelevant and inadmissible and does not assist the prosecution case.
23. Lenase Kausea's statement is also hearsay. It is irrelevant and inadmissible. It does not assist the prosecution case.
24. Sussie John's statement is also hearsay evidence. It is irrelevant and inadmissible. It does not assist the prosecution case.
25. Finally, the medical report dated 11 October 2019. The examining nurse says in her report that the complainant had been seeing the defendant two weeks prior to the second incident which she records as "29/09/18)". She records "**he forces her, remove her cloths and have**



sex with her. She came late on 11/10/19 seeking medical report, I can't find any evidence for penetration". And she concluded "I cannot write any results, but relate her story of how she had been forced to have sex with Saul on the 28/09/19."


26. This statement contains only hearsay evidence. And it also confirms there was no evidence of penetration. The report does not help the prosecution case.

27. From these findings, I concluded that the application for a no case to answer made by Mr Tasso was appropriate. I was satisfied on the evidence produced by the prosecution; no prima facie case had been made out against the accused.

28. Accordingly, the Court acquitted the accused of the charge.

DATED at Port Vila this 11th day of November, 2020.

BY THE COURT


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OLIVER A. SAKS
Judge

