

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

Criminal case No.20/2512
SC/CRML

PUBLIC PROSECUTOR

V

NIXON MELTEKANI
Defendant

Before: Justice Oliver A. Saksak

In Attendance: Mr Christopher Shem for the Public Prosecutor
Mr Eric Molbaleh for the Accused

Date of Hearing: 18th and 20th October 2022
Date of Verdict: 21st October 2022

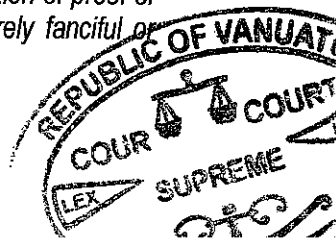
VERDICT

Introduction

1. The defendant was tried on one charge of sexual intercourse under sections 90 (b) (vi) and 91 of the Penal Code Act CAP [135]. It states:
" Any person who has sexual intercourse with a person-
(a), or
(b) With that person's consent if the consent is obtained by-
(vi) by the effects of alcohol or drugs, commits the offence of sexual intercourse without consent".
2. Section 91 of the Act provides that the maximum penalty for this offence is life imprisonment.

Duty and Standard of Proof

3. For the defendant to be found guilty of the offence, Prosecutions had the high duty of proof beyond reasonable doubt. Section 8 of the Penal Code Act states:
"8. General rule as to burden of proof
(1) No person shall be convicted of any criminal offence unless the prosecution shall prove his guilt according to the law beyond reasonable doubt by means of evidence properly admitted; the determination of proof of guilt beyond reasonable doubt shall exclude consideration of any possibility which is merely fanciful or



frivolous.

(2) In determining whether a person has committed a criminal offence, the court shall consider the particular circumstances of the case and shall not be legally bound to infer that he intended or foresaw the natural or probable consequences of his actions.

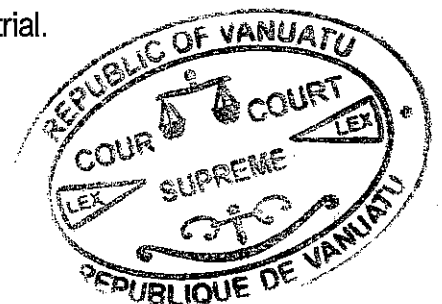
(3) If the prosecution has not so proved the guilt of the accused, he shall be deemed to be innocent of the charge and shall be acquitted forthwith."

Agreed Facts

4. The following facts were agreed by Counsel-
 - a) The complainant and defendant are both from Malekula and they know each other.
 - b) The complainant was 19 years old at the time of the offending and a student.
 - c) She attended a birthday party with friends on the evening of 4th September 2020.
 - d) The complainant drunk alcohol at the party with friends and then later drunk home brewed.
 - e) The alleged offending occurred in a short cut route to the complainant's home or her area of temporary residence.
 - f) The defendant penetrated the complainant's vagina with his penis.

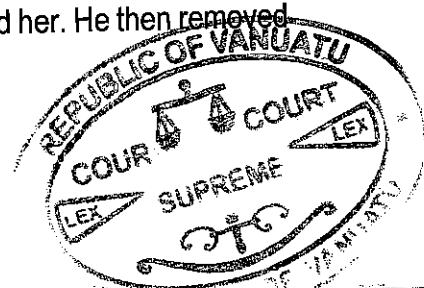
The Issue

5. The issue was not whether or not the complainant consented, rather it was whether sexual intercourse with her by the defendant was done under the effect of alcohol or drugs.
6. It was the duty of Prosecutions to the prove beyond reasonable doubt that the complainant was drunk and that she was affected by the effects of alcohol, such that she was not capable of giving her consent to the sexual activity that occurred between them that night.
7. The defendant did not have to prove his innocence. He was presumed to be innocent unless and until the prosecution proves his guilt beyond reasonable doubt. Section 81 of the Criminal Procedure Code Act was read and explained to him prior to his trial.



The evidence for the Prosecution

8. The following witness statements were tendered by agreement-
 - a) Reginold Rep dated 9/9/20
 - b) John Batick dated 14/09/20
 - c) Watson Ngwele dated 12/09/20
 - d) Patricia Pakoa dated 9/09/20, 14/09/20 and 15/09/2020
9. The medical report dated 7/09/20 and the crime scene album dated 4/09/20 were also tendered by agreement.
10. Prosecutions called two witnesses only instead of three as indicated earlier by Mr Shem.
11. Galina Malala said that on 4th September 2020 she was invited to a birthday party at small Tautu area somewhere around 7-8pm at Jeffline's house. They had "smol whisky" then wanted to take a walk on the public road with other girls. They drank 2 bottles of whisky and she had 2 glasses. On the road they met Silo, Graig, Jesse and others. Then they went to Esrome's house and had some home brewed stuff. She thought she had 2 home brewed, she could not remember.
12. It was at Esrome's residence that Jeffline and the other girls left Galina. She tried returning to Jeffline's house by herself. She met some boys on the road. She met Silo and asked about Jeffline and Silo told her Jeffline had gone back to her house. Silo then offered to take her home but it was at that point the defendant came and took her by the right hand and they followed the small road. The defendant told her he would walk her home.
13. As they walked along, the defendant pushed her and she fell to the ground and he tried to remove her clothes. She was struggling and shouting but no one heard her. He then removed



her clothes and had sex with her. He blocked her mouth and overpowered her. She passed out and did not wake up until the next morning. She noticed she had slept out in a coconut plantation. Her clothes were dirty. And her panty was missing.

14. She was weak but she walked back to Jeffline's house. She called but Jeffline was still sleeping. She stayed there until her boyfriend Thoma Asial arrived and they called up her mum and dad to come over. She did not tell her boyfriend what happened to her that night as he appeared uninterested.

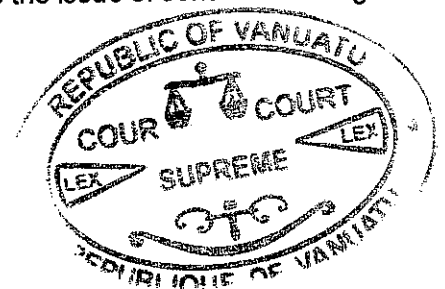
15. Silo Malapa told the Court he had drunk together with the girls that night. Galina was staying with Jeffline at the time. They drank home-brewed as well. Jeffline was too drunk and they went to drop her off. Galina asked them to drop her off as well. As he was about to, the defendant came by and asked to take her home as they live close by. He could not say how much Galina had drunk.

Defendant's evidence

16. The defendant opted to give evidence in his defence after his no-case submissions was declined and dismissed. Section 88 of the CPC Act was read and explained.

17. The defendant said he met Galina with Silo and asked to take her home. Silo agreed and they were to follow the main road but Galina told him they should follow the short cut route. As they headed off the main road, she hanged onto him and kissed him. That aroused him and sex took place. He denied any pushing, any struggling or blocking of her mouth. He accepted Galina was drunk but said she knew what she was doing. He said they had had sex on past occasions and it was their secret plan.

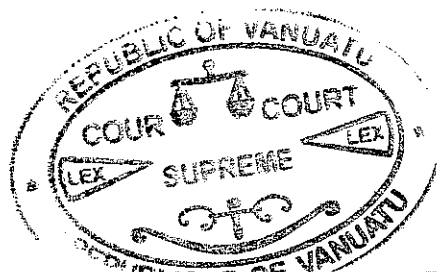
18. The defendant's wife Valdina gave evidence but not relevant to the issue of consent or being drunk.



19. Kelep Diana gave evidence but her evidence was not relevant to the issue of consent or drunkenness.
20. Mary Anas gave evidence. She was a 17 year old student who attended and drunk at the birthday party on the night to 4th September 2020. She confirmed they left the house and went to walk along the main road to TVET. They met some boys and Galina was hanging onto them and she told her not to do so, but Galina said “No, *hemia blong tedei nomo*” (This is just for today). That they went to Esrome's house where they had some home-brewed stuff. It was around 10:30pm.
21. Finally Jeffline Meltekani. She confirmed Galina was staying with her on 4th September 2020. They attended her son's birthday party at Grandpa's house starting at around 5:30pm. She confirmed they were drunk and went along the road to TVET around 9:00pm. They met some boys on the road and Galina was hanging onto them. She confirmed Mary had stopped her but she said “No, *hemia blong tedei nomo.*”
22. That they went to Esrome's house to have home-brewed. At 11:00pm Silo went to drop her off at home. Galina stayed behind.

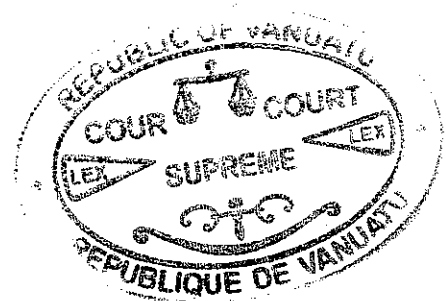
Discussion

23. Prosecutions have high duty to prove guilt beyond reasonable doubt. That means there must be no room for doubt or questions in my mind about the guilt of the defendant.
24. The questions I have in my mind are-
- Why a 19 year old girl and student be drinking whisky and home-brewed at a birthday party?



- Why would a 19 year old student be flirting by hanging onto boys on a public road at 9:00pm?
- Why would she not stay close to Jeffline and return with her but chose to remain at Esrome's until 11:00pm?
- If it was not true as she asserted that she never had sex previously with the defendant, why did she willingly agree to follow him instead of insisting that Silo should drop her off?
- How could she have shouted and not be heard when they there were boys still around on the road at the time?
- If she had passed out during sex as she asserted, how is it that in her evidence she said she woke up under a coconut tree close to a "Navenue" tree the next day?
- And why did she not cry when she returned to Jeffline's house the next morning and did not complain or make a recent complaint to her about what her cousin brother did to her last night?
- And why did she not tell her boyfriend Thoma Assial?
- Could it have been that after the defendant had finished and left Galina, another boy took advantage and had his way with her to explain why she awoke the next morning and found herself sleeping in another spot other than the place sex had occurred?

25. I find that the guilt of the defendant is not clear cut. There are doubts in my mind as to the element of consent and drunkenness to affect Galina's mind and ability to give her consent to sexual intercourse.




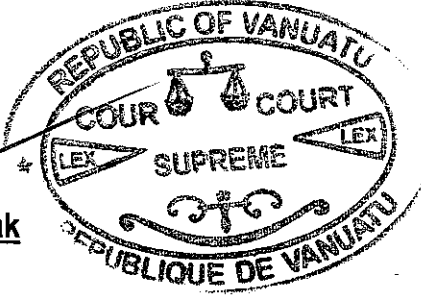
26. It is therefore trite law that in such circumstances the defendant must be given the benefit of the doubt.

27. Accordingly I return the verdict of not-guilty. The accused is acquitted of the charge against him and is free to go home, but this acquittal cannot be an excuse to him to continue to have sexual affairs with Galina or any other women or girls. He must stop and concentrate on his wife and children.

DATED at Lakatoro this 21st day of October 2022

BY THE COURT


Oliver A. Saksak
Judge.



The seal of the Supreme Court of Vanuatu is circular. The outer ring contains the text "REPUBLIC OF VANUATU" at the top and "REPUBLIQUE DE VANUATU" at the bottom. Inside the ring, there is a central emblem featuring a pair of scales of justice. Above the scales, the word "COUR" is written on the left and "COURT" on the right. Below the scales, the word "SUPREME" is written in the center. On either side of "SUPREME", the word "LEX" is written inside a small triangle.