



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

Criminal  
Case No. 21/3065 SC/CRML

**BETWEEN: Public Prosecutor**

**AND: Thomas Nawam**  
**Defendant**

*Date of JUDGMENT: 10th day of June, 2022 at 2:00 PM*  
*Before: Justice Oliver Saksak*  
*In Attendance: Ms Micheline Tasso for Public Prosecutor*  
*Mr Francis Tasso for Defendant*

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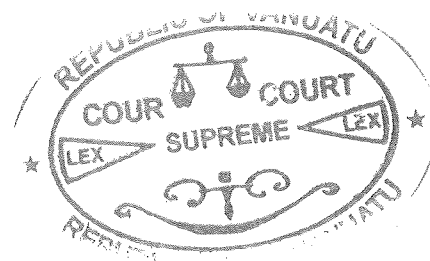
**VERDICT**

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1. The Court returns its verdict of not guilty and acquits the accused, Thomas Nawam of the charge of sexual intercourse without consent.

**Reasons for the Verdict**

2. The accused was charged with one count of sexual intercourse without consent contrary to sections 90 and 91 of the Penal Code Act Cap.135. ( the Act).
3. Prosecution alleged that on 6<sup>th</sup> July 2021 at Teouma Bush area the accused had sexual intercourse with MJ without her consent.
4. The victim is a 17 year old girl currently attending at Year 10C at the Malapoa College. As such I order the suppression of her full name, only her initials MJ will be used throughout this verdict. At the time of the offending, she was 16 years old and was attending Year 9C.
5. The accused accepted that sex took place however he denied the lack of consent by MJ.



6. Section 90 of the Act states:

*“Sexual Intercourse without consent  
Any person who has sexual intercourse with another person-  
a) without that person’s consent..... commits the offence of sexual intercourse  
without consent.”*

7. Section 91 of the Act states:

*“ Punishment of sexual intercourse without consent. No person shall commit  
sexual intercourse without consent.  
Penalty: Imprisonment for life.”*

8. The particular of the charge read:

*“ Thomas Nawam, on 6<sup>th</sup> July 2021 at Teouma Bush area you did have  
sexual intercourse with MJ without her consent by penetrating her vagina  
with your penis.”*

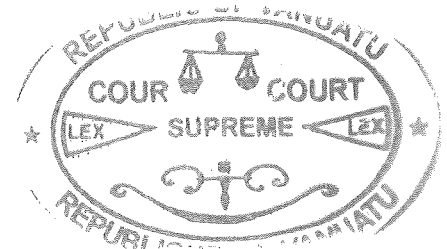
9. Section 8 of the Act and section 81 of the Criminal Procedure Code Act [ Cap 136] place a high duty of proof on the Prosecution, to prove the guilt of the accused beyond reasonable doubt.

10. The only element Prosecution was required to prove beyond reasonable doubt was whether or not the complainant MJ consented to sexual intercourse.

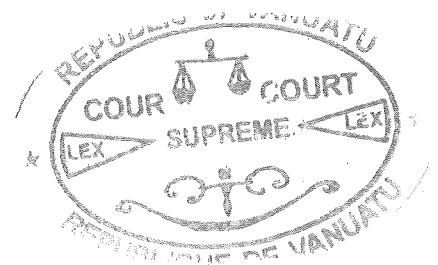
11. The charge did not allege that consent was obtained by force, threats of intimidation of any kind or fear of bodily harm (as required by section 90 (b) (i), ( ii) and ( iv) of the Act.

12. Prosecution was therefore required to prove beyond reasonable doubt that MJ did not consent to sexual intercourse on 6<sup>th</sup> July 2021.

13. For that purpose prosecution called the complainant to give evidence. Further evidence was given by the father of MJ. And Prosecution tendered the statement of the accused into evidence as Exhibit PI with Mr Tasso’s consent.



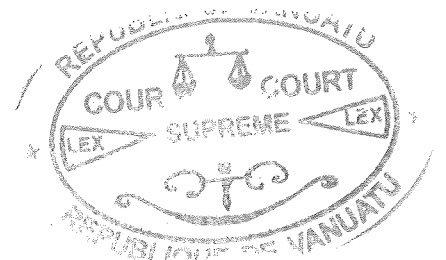
14. The complainant made 2 statements to the Police the first on 15<sup>th</sup> July 2021 and the second and additional are on 7<sup>th</sup> August 2021. She told the Court in examination in chief that her first statement was incomplete because her father was standing close by her side and she was afraid to disclose everything to the Police in her father's presence. She said that report was made on 12<sup>th</sup> July 2021.
15. She said in examination in chief that she befriended the accused since 27<sup>th</sup> July 2019 and that she had sex with him twice. The first time was under a Nangalat tree after which she told him she did not want him to see her again because she is still at school. And she said the second time sex took place in the house on 6<sup>th</sup> July 2021 which was a Tuesday.
16. She said that on that date her father and mother were not at home, only her younger brother and sister who were playing outside in front of the house. It was then the accused approached her and asked her for sex. She refused and he held her on her left shoulder and led her into her room. There he removed her clothes and had sex with her. She said she was afraid the accused would do something to her so she did not call out. She said she had sex with the accused sometimes in the past. She said she told her father about it on Sunday 12 July 2021 when he enquired if she was okay.
17. Mr. Tasso cross- examined the victim about the reports to the police. She confirmed making 2 reports, on 12<sup>th</sup> July 2021. She accepted she could have been wrong about the date of the first statement when it was put to her that the statement is actually dated 15<sup>th</sup> July 2021. She accepted she knew the accused for some time but denied having sex with him 5 times as asserted by the accused. She said she was correct about the sex on 6<sup>th</sup> July 2021 being in the house and not under the Nangalat tree as asserted by the accused. She accepted she was not threatened by the accused with a knife. She accepted sex lasted only for a short time, less than 5 minutes. And she accepted this was not the first time she had sex with the accused.



18. The victim's father gave evidence. He confirmed he asked the victim if she was okay on Sunday 12<sup>th</sup> July 2021 after they had returned from church. It was then the victim cried and told her father about what the accused did to her on 6<sup>th</sup> July 2021. He then accompanied her to the Police station.
19. He was cross-examined in relation to the first report about the victim's evidence that he was standing close by her causing her to be afraid of disclosing everything to the Police resulting in the second report. Mr John said that was not true as he was made to wait outside.
20. Prosecution tendered the accused's statement dated 6<sup>th</sup> August 2021 as exhibit P1.
21. The accused elected to remain silent and gave no evidence in his defence.
22. Relevantly he stated in his statement that he had befriended the victim "*since last yia finis mo mitufala stap havem sex mo hemia emi namba five time nao we mi havem sex wetem hem (MJ) mo mi ting se every samting I orate nomo.*" He stated this was the time they had sex by the Nangalat tree.

### Discussion

23. The accused's statement is evidence as to his belief that on 6<sup>th</sup> July 2021 the victim had consented to sexual intercourse. He held that belief because as he stated the incident on 6<sup>th</sup> July 2021 was the fifth time he had had sex with the victim and that it was all consensual. There were no complaints.
24. Whether it was five times is immaterial. What the victim admitted contrary to her statement to the police on 15<sup>th</sup> July 2021 the incident of 6<sup>th</sup> July 2021 was the first time she'd had sex with the accused was a lie. She admitted at least sex occurred 2 times, the first was under the Nangalat tree and the second was at the house on 6<sup>th</sup> July 2021.




25. Further the victim was not truthful when she told the Court she did not complete her story to the police on 12<sup>th</sup> July 2021 because her father was standing close by her and she was afraid. Her father confirmed that was not correct, as he waited for her outside while she gave her statement to the police.
26. Then she got the date of her first statement wrong saying it was 12<sup>th</sup> July 2021 when it was infact 15<sup>th</sup> July 2021.
27. Then in her first statement she stated feeling good after sex with the accused, but despite having some physical effects on her body she only told her father about what occurred on Sunday 12<sup>th</sup> July 2021, some 6 days later. And that was only after her father had enquired. Had he not done so, I doubt she would have made the report. .Why? Because it was all consensual sex and she fabricated it to make it appear as if she did not consent.
28. There was no force, threats of intimidation or fear of bodily harm involved although the victim did try to suggest the accused held her on her left shoulder and pushed her into her room and bed before sex occurred. The particulars of the offence charged did not include force, threats or fear of bodily harm therefore no evidence was necessary to prove those elements.
29. The issue for the prosecution was purely consent or lack of it, and the accused's belief.
30. Due to the many inconsistencies in the victims' evidence, so much doubt is created in my mind as to lack consent. It is trite law that when such doubts exist, the accused must be given the benefit of those doubts.
31. As regards the accused's belief about the victim's consent, I am satisfied from the past sexual encounters with the victim, whether it be 5 times or 2 times that led the accused to believe the victim was consenting to sexual intercourse on 6<sup>th</sup> July 2021.

32. For those reasons the Court returns a verdict of not guilty and the accused is acquitted of the charge.

**DATED at Port Vila this 10<sup>th</sup> day of June, 2022.**

**BY THE COURT**

  
.....  
**Oliver Saksak**  
**Judge**

