

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

**Criminal
Case No. 23/733 SC/CRML**

BETWEEN: Public Prosecutor

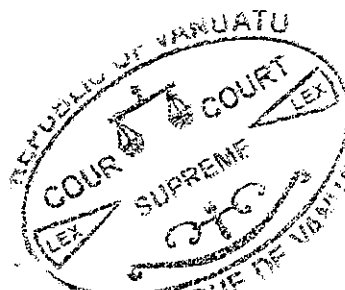
**AND: Tom Kleopas
Defendant**

Date of Trial: 1st September 2023
Date of Verdict: 6th September 2023
Before: Justice Oliver Saksak
In Attendance: Mr Christopher Shem for Public Prosecutor
Ms Jane Tari and Ms Barbara Taleo for the Defendant

VERDICT

Introduction and Background

1. The defendant was charged with 1 count of attempted unlawful sexual intercourse, sections 28 and 97 (2) of the Penal Code Act to which he pleaded guilty, and also to 1 count of unlawful sexual intercourse, to which he pleaded not guilty.
2. The first offence in Count 1 (the attempt charge) was committed in 2021 when the complainant was only 13 years old.
3. The second offence in Count 2 was committed in 2022 when the complainant was 14 years old but less than 15 years of age.
4. The complainant was a student at Vauleli Primary School. She is now in year 7 at the Survival School in Port Vila.
5. At trial Counsel agreed that the name of the complainant be suppressed and that she be referred to only by her initials as RA.
6. Also at trial the Prosecutor requested that the Court be closed and that it be screened so that the complainant should not be placed in the direct view of the defendant. Leave was granted and the Court was closed to the public.



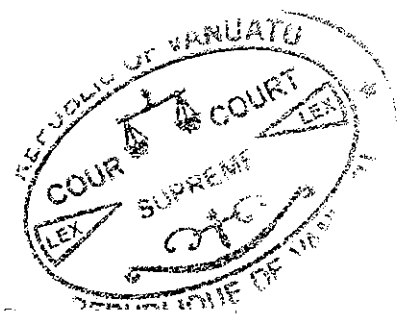
7. Prior to the trial being held, defence counsel sought leave to have a voir dire hearing to challenge the voluntariness of the defendant's statement where he made admissions. Leave was granted and a separate hearing was held for the purpose.

Voir Dire Hearing

8. Having heard evidence from Senior Sargent Ray Ansen and Corporal Saki Noel, I was satisfied that there were elements of oppression when the accused was interviewed in the presence of four police officers in a little office of 4 meters by 3 meters. Further I was satisfied that to bring the complainant physically during the interview for the purpose of identification prior to being cautioned was incriminatory to the accused. In my view these factors contributed to the accused's ability to think independently so as to render the admissions recorded by the Police on 16th March 2023 voluntary.
9. I therefore ruled the accused statement recorded on 16th March 2023 to be inadmissible.

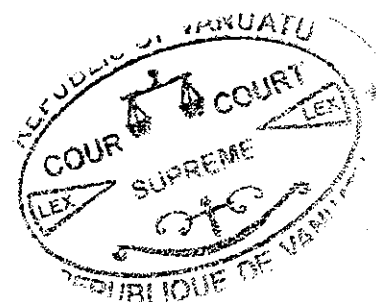
The Trial

10. The trial continued without the accused's statement and without the statements and evidence of the Police Officers.
11. The charge was unlawful sexual intercourse with a child under the age of 15 years but of or over the age of 13 years, laid under section 97 (2) of the Penal Code Act [CAP 135].
12. The charge was that during 2022 on Paama Island the defendant had on numerous times penetrated the complainant's vagina with his penis when "RA" was only 14 years of age.
13. The defendant denied the charge therefore pursuant to section 8 of the Act the Prosecution has the onus of proof beyond reasonable doubt to prove the defendant's guilt. This is the legal and evidential burden of proof.
14. Section 81 of the Criminal Procedure Code Act was read and explained to the defendant by the Court in Bislama before Prosecution opened its case and called the complainant to give her evidence.
15. The Court was closed to the public. The Judge and Counsel were robed only in bar jackets and a screen was placed in between the complainant and the defendant. Only the complainant's mother was granted permission to sit by her daughter in the witness box.
16. RA, the complainant and victim gave evidence on oath in Bislama. Relevantly in relation to the allegation of sexual intercourse with her, she said the reason for her being in Court was that the defendant was having sex with her. It happened to her in the defendant's garden. He had gone to ask permission from her grandfather to accompany him to the garden to dig wild yams and pick coconuts. There were just the two of them at the time. They had dug up some yams but the



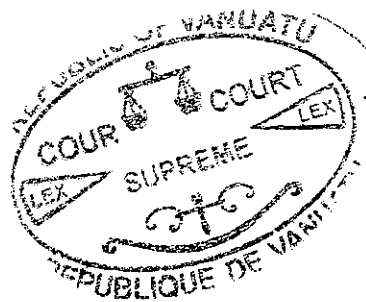
defendant called her into the bush to dig another yam. When she went over she saw the defendant naked. She wanted to run away but he held her tight and removed her clothes and made her lie down on a sack. She had called out but he stopped her saying there was no-one in the bush to hear her. Then she said he pushed his penis into he vagina and she felt sore and she cried. Then they returned to the defendant's house and ate some food which his wife had cooked. Then the defendant went to drop her back with her grandfather with some wild yams. She said this happened many times in 2021 and leading on to 2022. These often occurred in the garden even when his wife was with them, the defendant would lead her to another garden and have sex with her. She said she went to hospital to check after she felt pain in her vagina and saw blood. It was after her visit to the hospital that she reported the defendant to the police.

17. In cross-examination she confirmed the defendant had removed his clothes and was naked. That he also removed her clothes. She accepted the proposition that the defendant had only rubbed his penis against her vagina, she said "yes". When she was asked to clarify her statement at page 3 and the second paragraph whether the defendant rubbed his penis or pushed it, she said, he had pushed it. When asked about 2021, whether the defendant was only rubbing, she said yes, but only in 2022 when he pushed it in.
18. In re-examination when she was asked to clarify which year the defendant had rubbed his penis against her vagina, she said, in 2021. Further in what year the defendant had pushed his penis, she said it was in 2022. When asked to clarify what the defendant pushed, the complainant said in Bislama "**Hemi pusum kok blong hem iko long kan blong mi.**"
19. The defendant gave evidence on oath in his defence after the Court had read and explained section 88 of the Criminal Procedure Act [CAP 136].
20. Relevantly as to the allegation of sexual intercourse, the defendant said he remembered going to ask the girl's grandfather to take the complainant to the garden to get some food. He said on that date they went to dig wild yams. He said he had been watching her and noticed she was ready and having asked her, she agreed and he had sex with her. He said he had seen the girl go around with some boys and he asked her for sex and she agreed. He said she removed her own clothes except her shirt, laid down on a sack (bag). Then he said he tried to push his penis in but she was too small, therefore he only rubbed his penis on her vagina. He said this happened within 2 to 3 months apart and that the last time was in December 2022.
21. In cross, the defendant confirmed rubbing the girl's vagina with his penis in 2021 and continued into December 2022. As to the question whether he had put it into the vagina of the girl , he said it did not go inside. As to whether he knew the girl was pregnant, he said he did not know.




Discussion

22. The issue is whether or not the defendant had sexual intercourse with RA, the complainant in 2022?
23. Prosecution submitted from the complainant's evidence the act of sexual intercourse was proved beyond reasonable doubt.
24. Defence Counsel on the other hand submitted it was a case of word for word and that the Court should accept the defendant's version that he only rubbed his penis on the complainant's vagina and that there was lack of penetration.
25. Section 97 (2) of the Act states:
- "97. Unlawful sexual intercourse*
(1) Not applicable.....
(2) No person shall have sexual intercourse with any child under the age of 15 years but of or over the age of 13 years.
Penalty: Imprisonment for 15 years."
26. The age of the complainant was and is not in issue.
27. Defence argued and submitted that this is a credibility case and that the Court should put aside feelings of sympathy for the complainant but to consider carefully and objectively all the evidence before it. In doing so, it was submitted the Court will find many contradictions in the complainant's evidence to the extent that they create doubt as to the guilt of the defendant.
28. While I accept there were some inconsistencies and contradictions in the complainant's evidence, these did not affect or have any impact on her evidence that in 2022, the defendant did push his penis into her vagina. It was only in 2021 when she was 13 years old that the rubbing as accepted by the defendant occurred.
29. The defendant did not rebut the complainant's evidence that as a result of his sexual offending she got pregnant and went for a hospital checkup. What could have caused or resulted in a pregnancy but that there was sexual conduct and penetration.
30. The term "sexual intercourse" is defined in section 89A of the Penal Code to mean.....:-
" a) the penetration, to any extent, of the vagina or anus of a person by any part of the body of another person, except....." (my emphasis)



31. The defendant pleaded guilty to the attempted sexual intercourse charge in Count 1. In his own words in his evidence was that ***"I tried pushing but her vagina was too small so I only rubbed on it"***. That shows that the defendant had, to an extent, penetrated the complainant's vagina with his penis. Despite it did not go in because it was small, he had to an extent, albeit limited as it was, he had committed sexual intercourse.
32. As for credibility, I have no reason to disbelieve the complainant. Although 14 years of age she had good memory of what happened to her in 2021 when it was all rubbing but in 2022 , the defendant had gone in. she was not shy although she took time to answer some questions because of her immaturity. Unlike the defendant who scratched his head at times when he was trapped by the question and reacted through some body movements, as a very mature man, he was not an honest witness.
33. I therefore accept the complainant's version that in 2022 the defendant had penetrated her vagina unlawfully.
34. I therefore find the Prosecution has proved the charge beyond reasonable doubt and has discharged the onus of proof rested on them to prove the defendant's guilt.
35. I return the verdict of guilty on the defendant for unlawful sexual intercourse

**DATED at Port Vila this 6th day of September 2023
BY THE COURT**


.....
Oliver Saksak
Judge

