

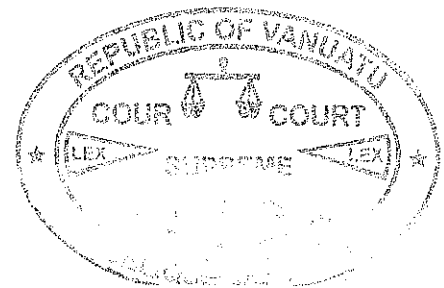
BETWEEN: Public Prosecutor

AND: Henry Crowby
Respondent

Date of Hearing: 6th, 7th and 8th February 2023
Submissions: 9th and 10th February 2023
Date of judgment: 14th February 2023
By: Justice JP Geoghegan
Counsel: Ms J. Tete for the Public Prosecutor
Mr C. Leo for the Defendant

JUDGMENT

1. The defendant Mr Crowby is charged with two charges of sexual intercourse without consent contrary to sections 90 and 91 of the Penal Code [CAP 135].
2. It is alleged that he committed the first offence sometime in February 2022, at the Vanuatu Holiday Motel in Port Vila and then sometime in March 2022, at his home at the Smet area.
3. Mr Crowby pleaded not guilty to both charges and elected to give evidence on his own behalf and to call evidence from three other witnesses namely his wife, his daughter and his son. Prosecution evidence was given by the complainant, her uncle, her step-mother and a Police Constable, Henry Shem.
4. The starting point in any criminal trial is the presumption of innocence. Mr Crowby must be treated as innocent until the Public Prosecutor has proved his guilt. The onus of proving Mr Crowby's guilt is on the Public Prosecutor and rests on the Public Prosecutor from beginning to end. There is no onus to Mr Crowby at any stage to prove his innocence.



5. It is for the Public Prosecutor to prove that Mr Crowby is guilty beyond reasonable doubt. That is a very high standard of prove which will have met only if, at the end of the trial, I can be sure that Mr Crowby is guilty. It is not sufficient for the Public Prosecutor to persuade me that Mr Crowby is probably guilty or even that he is very likely guilty. If I am left with a reasonable doubt as to Mr Crowby's guilt then the appropriate course is an acquittal. A reasonable doubt is an honest and reasonable uncertainty about the guilt of a defendant after careful and a partial consideration of all the evidence.
6. In this case, I must be satisfied beyond reasonable doubt that on the occasions alleged Mr Crowby inserted his penis into the genitalia of the complainant. Secondly, I must be satisfied beyond reasonable doubt that the complainant did not consent to that. Thirdly, I must be satisfied that at the time of the alleged offence there were no reasonable grounds for Mr Crowby to believe that the complainant was consenting.
7. The evidence of the complainant ("A") is that she is currently 16 years old. She has a familiar relationship with Mr Crowby and they know each other well. She refers to Mr Crowby as "Daddy Henry."
8. A said that on a Friday in February 2022, when it was a half-day in school, she was walking towards the school gate and saw Mr Crowby's Landcruiser parked there with Mr Crowby in the driver's seat. She was walking with a friend who left when she started speaking with Mr Crowby. She asked Mr Crowby if he was waiting for anyone and he told her to get into the car and they would go and get something to eat. She got into the car and they then drove along past the Golden Port and into the Kaiviti Motel area and into some kind of guest house (the Vanuatu Holiday Motel). They got out of the vehicle and Mr Crowby walked ahead of her. She stayed outside while he went and spoke to the receptionist and then he came out and told her that they would both go inside. She followed him and at that time expected to see some other members of the family such as Mr Crowby's wife. She entered a room in the Motel and dropped her bag near the bed and went to the toilet. When she came out she asked Mr Crowby about his wife Denise and their daughter M and where they were. Mr Crowby said that they would be coming and that both were on their way. She said that as they were talking he removed his shirt and he then pushed her down on to the bed by pushing her head. He then lay down on top of her and pulled off her skirt. She said that she tried sitting up and wriggled but he put his hand on her chest saying to her "stay like that." He then had sexual intercourse with her, pushing his penis into her vagina. He also pushed his finger into her vagina. While having sex with her, he touched her breasts and when he was finished what he was doing he gave her VT1,000. She was wearing underwear but no bra. She clarified that when she was pushed on to the bed she was lying along, rather than across the bed, and Mr Crowby straddled her with one knee on each side of her. Mr Crowby pulled her pants down to her knees and put his finger inside her and then his penis. She stated that she was surprised, shocked and was shaking and did not say anything to him as she was afraid. She said that after Mr Crowby had had sex with her he then left the motel, and she stayed in the room. He then came and picked her up in his truck and went back to his home. It was around 2pm. She also stated that Mr Crowby, Denise and M then came to the motel around 4pm at which time they then walked to ABM where Mr Crowby bought some pizzas, soft drink and sweets and they then walked back to the motel. Later that evening, at around 9.30pm, Mr Crowby left the motel to go



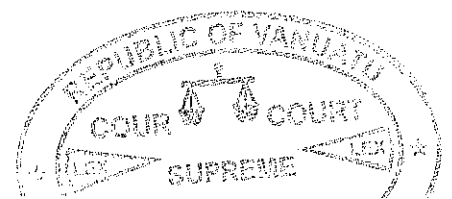
and close the car wash which he either operated or managed (it was not clear which). He then returned to the motel with all four staying in the motel until the next morning. A, stated that she and M slept in one bed.

9. Referring to the incident in March 2022, the complainant said that at that time the country was “under Covid” meaning that there was a lockdown and curfew. Mr Crowby’s daughter had been in quarantine, as a result of contracting Covid and the day she returned home A, called to Mr Crowby’s home to see her. A’s home is some 100 metres from the Crowby home so she could see when M returned home. She called around there at approximately 3pm and chatted to M, who she referred to as her sister, until 9pm. At around 9.30pm Mr Crowby left the house to go to close the car wash. When he left, A stayed on and then decided to stay the night. She said that she slept in her sister’s room and that they were sleeping and she suddenly felt that there was someone lying next to her. She turned over and saw Mr Crowby who was lying next to her. She asked him what he was doing, and he got up and wrapped a white towel around his waist. He said to her that he was “just standing up – looking out the window.” He turned around and went to his own room. A turned over and went back to sleep. She said that this was possibly 11pm or midnight. In her evidence, she repeated this stating that she was sleeping and that it was getting on to early morning and that “he had sex with me while I was sleeping.” She stated that she was sleeping and turned over and felt that there was someone sleeping there. She then saw that it was Mr Crowby and again asked what he was doing. She said that he was wearing a towel and again said “nothing am just looking out of the window.” A, then said that she “had the impression that he had had sex with me and then the next morning when I got up my vagina was sore.” She said she had been fast asleep. When she got up, she folded up the mattress and that is when she noticed there was blood on the sheet that she was sleeping on. She said that she took the sheet away and soaked it and then went and showered and got her clothes on and found VT1,000 in her blue trousers. When asked whether she knew who had had sex with her she stated, “I suspected it would have been Daddy.” A, subsequently told her uncle, Mr Donald what had happened, and Mr Donald took her to the police station. A, was asked whether she cried or screamed out and she said she did not because she was scared.
10. In answering questions under cross-examination by Mr Leo, A, gave evidence of an occasion on 31 December 2021, when she went to the Crowby house and became very drunk resulting in her sleeping the night in her sister’s room. It was apparent from her evidence that she was talking of an occasion that occurred on New Year’s Eve. Her evidence regarding this incident appeared either to be alleging that a separate incident had occurred between she and Mr Crowby or that she was confused as to what had actually happened. It did not assist the prosecution and that confusion was also evident from the evidence of Constable Shem.
11. Mr Donald gave evidence that A had told him about the alleged incidents on 1st August 2022. His evidence was that A, told him that on New Year’s Eve 2021 she had been drinking with her “sister” and then went to sleep at Mr and Mr Crowby’s home in the early hours of January 1st, 2022. She said that she woke up and realised that she was naked and saw that there were some “dampness” in her private parts. A, told him that Mr Crowby made an impromptu visit to the school in February, when he picked her up in his vehicle and took her to a room at the Vanuatu Holiday Motel. A, told him that they went into a room where Mr Crowby started “harassing” her and used a finger to



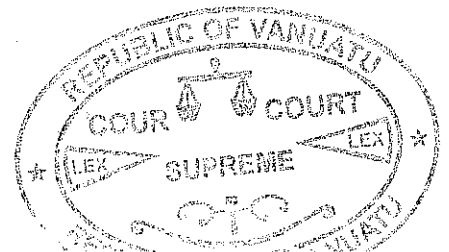
penetrate her vagina. A, told Mr Donald that she did not want to do it and cried, but nonetheless Mr Crowby went ahead and undressed her and forced her to suck his penis. After that, he had sexual intercourse with her without her consent. A, said that after that they had both got dressed and left the Motel and got into the car. While they were driving along and before he "dropped her off," Mr Crowby gave her VT1,000 and told her that if she needed anything or wanted anything he would provide it. He then dropped her off at the Smet area. A, told Mr Donald that Mr Crowby had already had sexual intercourse with her over five times.

12. A's, step-mother S gave evidence that on 29th July 2022, she saw an entry in a Facebook account. A, had used her step-mother's phone to log into her Facebook account and had not logged out. She became suspicious because there were exchanges between Mr Crowby and A. She could not read the exchanges because they had been deleted. She asked A why she had sent Mr Crowby messages and then deleted them and she did not reply. As a result, she went to speak with her uncle Chief JB, although the contents of that discussion are not known.
13. Constable Shem's evidence related to his duties as a crime scene officer and the actions he took when he received a report from the Family Protection Unit regarding the alleged offending on 8th August 2022. Constable Shem visited both the Vanuatu Holiday Motel and the Crowby residence and took photographs of the two properties. Constable Shem was asked about a three page hand written statement taken by him from A, on 8th August 2022 in which A, stated that the incident occurred in the early hours of the 1st January 2022. Constable Shem confirmed that that was what A, had told him. Constable Shem was asked whether or not the photos he took at the Vanuatu Holiday Motel and the Crowby residence related to an incident on 31st December 2021. Constable replied that they did. Clearly, they did not. This confusion did not assist the prosecution case.
14. That was the evidence for the prosecution, however during the course of Mr Crowby's evidence it became plain that Mr Leo had failed in his duty to put the defendant's case fairly and directly to A. Mr Leo's failure in his duty to do so is deeply concerning and led to a situation where the prosecution were granted leave to recall the complainant at the close of the defence case so that the matters which should have been put to her by Mr Leo, could be. Mr Leo's failure to do so, particularly in the light of the defence put forward for Mr Crowby, constituted a concerning dereliction in his duty to his client.
15. Mr Crowby's evidence regarding the events of February 2022 was that A, had come to his home after she had finished school. He denied that he had picked her up at school and said that he could not have done so because he did not have his landcruiser at that time. That was because the vehicle was being used by his eldest son Bruno Crowby who invariably took the vehicle for the afternoon so that could tend to a farm property which he had by the airport. Mr Crowby said he and his wife had decided to go and stay at a motel and before leaving were waiting for their daughter M to return home from school. When M arrived at home his wife told the girls that they (Mr and Mrs Crowby, A and M) would be taking the bus to Au Bon Marche ("ABM") at Nambatu. They duly took a bus to ABM, bought some pizzas and food for themselves and approximately 30 minutes later walked to the Vanuatu Holiday Motel where Mrs Crowby then paid for a room. The girls said that they wanted to have a look at the room Mr and Mrs Crowby were staying in so they went to the room and the girls had a look around. After they had done so, Mrs Crowby gave

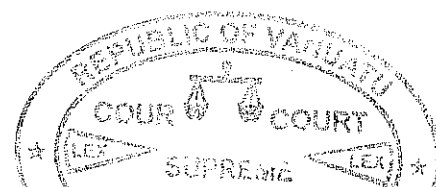


the girls the bus fare to go home but they made a decision to walk. Once the girls left, Mr and Mrs Crowby spent the night at the motel and left the following day.

16. Mr Crowby said that he had never picked A up from school at any time as he left at approximately 6am in the morning to go to his farm accompanied by his son Bruno. He did acknowledge however that on the way back from the farm he had sometimes stopped on the way home and given A, money for bus fare or for her lunch as her parents could not afford that. He stated that he would do that approximately two to three times per week and that each time his son Bruno would be with him. He said that A would wait on a road near her house. He did not know if her parents knew about the fact that he gave her that money but he said that his wife knew and that if A, did not ask him for money she would ask Mrs Crowby. If Mr Crowby had no money he would tell her to go and see Mrs Crowby. He said that during the hot season he and Bruno only worked at the farm in the mornings and around lunch time he would give Bruno the keys to the landcruiser so that Bruno could go and tend to his own farm.
17. As to the events of March 2022, Mr Crowby stated that on the day in question, their daughter M who had contracted Covid had been released from Korman Stadium where she had been in quarantine. He and Mrs Crowby picked M up to their home at approximately 3pm. At that time Vanuatu was in lock down and curfew applied. He said A, had seen M return home and came to have a chat with her. A lot of the conversation was around M's experience in quarantine. There were other family members present with Mr Crowby referring to his daughter P. Mr Crowby said he left his home to close his car wash which closed at approximately 10pm and he then drove staff home before returning to his home between 10.30pm and 11pm. When he returned home he saw that A, had left their home but M was busy studying. He said that when he returned home Mrs Crowby was waiting for him. As to the suggestion that he stood by A, wearing a towel and telling her that he was looking out of the window he said that it was impossible to look out of the window because the window was above the top bunk in M's room and that there were mattresses on the top bunk which blocked the view. Mr Crowby also referred to mistakes in the summary of facts and while his references to those errors seemed to be reasonable and considered, the summary of facts does not form part of the evidence in this case and I take no account of them.
18. Mr Crowby completely denied having had sexual intercourse with A, on that occasion. He described the allegations of A, as a fabrication. I found his evidence to be adamant, straightforward and consistent.
19. Bruno Crowby confirmed his father's evidence relating to the use of the landcruiser. Bruno Crowby stated that he could remember February 2022, because it was when Covid came into Vanuatu and it was not a good time for growing crops, the off-season being between September and April. He confirmed that he and his father would do farm work for half the day finishing up at lunch time, namely 11.30am when he would drop Mr Crowby off and he would then go to his own farm. Bruno Crowby stated that he went to his own farm every day and for that he used the landcruiser. He was adamant that he would have done so every afternoon in February 2022, and that the timing of the return of the truck would depend on the circumstances but generally he would return the truck at around 5pm.



20. I found Mr Bruno Crowby's evidence to be clear and straightforward and not compromised under cross-examination.
21. Mr Crowby's daughter M, gave evidence. Her evidence also supported the account of events provided by Mr Crowby. She gave a clear account of the occasions in February and March which were the centre of this trial. M referred to A as being a "sister or cousin of mine."
22. M, said that on the day her family went to the Vanuatu Holiday Motel she had finished school early because it was only a half-day. She finished school at approximately 10.30am and then took the bus home arriving at her home approximately thirty minutes later at around 11am. When she got home, her father was there but she did not see his car. She said that A, came over to the house and Mrs Crowby suggested that they should all get something to eat at ABM, Nambatu and that she, her parents and A, all went there where she and A, got pizzas and Mr and Mrs Crowby got some fried rice and other food. From there, they walked across to the Vanuatu Holiday Motel where her parents had decided to stay. She said that her mother went to pay for a room. She and A, went and looked at the room and then came back. Her mother gave them money for the bus fare home but she and A, decided to walk because they wanted to save the money which had been given to them. M, said it took approximately an hour to walk home. Under cross-examination it was put to M, that before they left for ABM Mr Crowby came to pick her and her mother up in the landcruiser. It was also put to her that she had slept the night with A, at the motel. M denied both assertions and stated that she had slept the night at home in her house with A.
23. As to the events of March 2022, M, confirmed that she had been quarantined and that her parents had picked her up from Korman Stadium and taken her home. She said at home with her was her sister Pauline, her brother Bruno, Bruno's wife Freda and their two children and Mr and Mrs Crowby along with A. They had all talked about various things including quarantine and after the talking then finished, everyone went back to their homes. She stayed to study, her mother went to watch TV and her father then went to close up the car wash. She denied that A, had stayed the night and returned to her house the following day.
24. Mrs Denise Crowby also gave evidence about both occasions.
25. She said that at the end of February 2022, she and Mr Crowby had decided to go for a weekend at the Vanuatu Holiday Motel. On the day they went to the motel, they waited for their daughter to come back from school, being a Friday, so that they could all go together. She confirmed that her daughter had a half-day at school that day and that she returned home at lunch time. Mrs Crowby told M, that she and Mr Crowby had decided to stay a weekend at the motel and suggested that if M wished to, she could come with them to get some pizza and then go to the motel. Mrs Crowby said that as they were talking about that, A, arrived and accordingly the invitation was extended to her to come with everyone to ABM to get pizza. They got to ABM on a bus and pizzas were purchased for the girls with other food being purchased for Mr and Mrs Crowby. They then walked to the motel and Mrs Crowby went to the reception of the motel and paid for a room. She said that when the two girls saw her holding the key to the room they asked if they could go and have a look inside and that the girls then went to the room and opened the



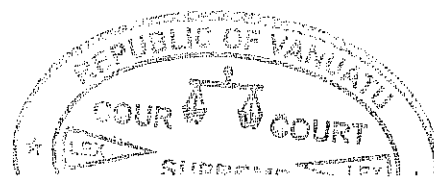
door, having a look inside the room but not actually going inside it. Mrs Crowby then gave the girls bus fare so that they could go home. Mrs Crowby said that the girls did not stay the night with her and Mr Crowby. Under cross examination, Mrs Crowby denied that Mr Crowby had come home earlier to pick her up in his landcruiser and reiterated that she and her husband were home and were subsequently joined by their daughter. She was also firm in her evidence that she had paid for the room.

26. As to the incident in March, she said that her daughter had gone into quarantine on 16 March and come out of quarantine on 23 March 2022. M, had called her parents to tell them that she had been released from quarantine and Mr and Mrs Crowby went to pick her up. When they got home, they talked about M's experience in quarantine. Present in the house were Mr and Mrs Crowby, M, Bruno Crowby and his wife Freda and Pauline, another of Mr and Mrs Crowby's daughters. A, subsequently came to join them. She living approximately 100 meters away from Mr and Mrs Crowby's home. Mrs Crowby stated that when everyone had finished talking, they went back to their respective rooms or home, while A, stayed talking with M until approximately 9 pm when she went home. Mrs Crowby said that Mr Crowby was at home but then had to go and close up his car wash and drop off his staff, getting back to the house at between 10:30 and 11 pm. By then, A, had already left the home, M was doing homework and Mrs Crowby was watching TV. Mrs Crowby was adamant that A, had not stayed the night and when I asked her why she was so confident about that she said that when Mr Crowby had returned to their home, it was her habit to check where everyone in the house was and she saw that M was on her own and studying.

27. A, was recalled.

28. It was put to A, that the evidence of all of the defence witnesses was that Mr Crowby did not have his landcruiser and could not have picked A up from her school as she had alleged. A, maintained that Mr Crowby had picked her up in his landcruiser. It was then put to her that Mrs Crowby and M, had said that A, had come up from her school and went to their house. Was that true? A, confirmed that it was true. I then put it to A, that in her earlier evidence she said that she had stayed behind at the motel and slept. A, then said that Mr Crowby had not picked her up from school that day. She said that she could not remember whether Mr Crowby rang her or "came to her". She then said that she could remember that it was in his landcruiser and that he picked her up at her house. When A, was asked why she had said earlier that Mr Crowby had picked her up from school, there was a long and concerning silence. A, was reassured that if she was going to give different evidence from that that she had given earlier then she would not be in trouble as what was important was that the Court heard the truth. A's presentation was such as to cause me considerable concern and accordingly I took the lunch adjournment and gave Ms Tete leave to speak with A as it appeared clear that she was in some difficulty in explaining her contradictory evidence.

29. When the afternoon session commenced, Ms Tete confirmed that A wished to continue. A, confirmed that the earlier evidence which she had given was not correct. When asked why she had said something different she said that after she had given evidence earlier in the trial she went through her statement again after she had got home. She said that some of the statement was true and some of it was not. She then said that the only parts that were not true was the part where she said Mr Crowby had picked her up from school. When asked why she had suddenly



remembered the correct version of events she could not answer that question. She then said that Mr Crowby had picked her up at his house. She said that when she finished school she walked to Mr and Crowby's house, a walk which would have taken her half an hour after having finished school at noon. She said that when she got to the house, Romano (one of Mr Crowby's sons), Romano's wife Roseen and their four children were there but that Mrs Crowby was not there and M was still at school. She said that soon after she got to the Crowby's house Mr Crowby came back from the garden. When it was put to her that she had just stated that Mr Crowby was already at the home, she stated that she had not said that and that Romano, his wife and their four children were at the home. After approximately half an hour, she and Mr Crowby then went to the motel. A, said that after she and Mr Crowby had gone to the motel, she, Mr Crowby, Mrs Crowby and M had all gone to ABM. She maintained that she had spent the night at the motel with Mr and Mrs Crowby and denied that Mr Crowby had given them money for a bus fare. Her evidence was at considerable odds with her previous account of events.

30. With reference to the alleged March incident, A, acknowledged that a curfew had been in place for around one month prior to 23 March. That required everyone to be at home by 9 pm every night. A, acknowledged that she observed the curfew and stayed at home and that she obeyed the curfew because her father was very strict and didn't like she or her siblings walking around or going out. She said that her father smacked her when she had got home on March 24th having breached the curfew the night before by staying at the Crowby's house.
31. Having heard the evidence of all of the witnesses I am left with very significant reservations regarding A's credibility and reliability. The manner in which she gave her evidence when she was recalled, together with the inconsistencies which arose in that evidence lead me to have significant doubts about her version of events. She had been consistent both to the police and in her evidence before the Court regarding the fact that Mr Crowby had uplifted her from school in February 2022. Her altered version of events when recalled to give evidence is troubling. In addition, her evidence as to what happened in February 2022, is inconsistent with her account of events to Mr Donald, who had said that A, had told him that Mr Crowby had forced her to suck his penis and that after they had had sexual intercourse, they both got dressed, left the motel and got into the car. She told Mr Donald that as they were driving along and before Mr Crowby dropped her off, he gave her VT1,000. This is inconsistent with her own account of events in this Court. As against that, the evidence of Mr Crowby and the defence witnesses was firm and consistent.
32. With reference to the March incident, A, said that she "suspected" that it had been Mr Crowby who had had sex with her and that she "had the impression" that he had had sex with her. Quite apart from the uncertain nature of that evidence, A's own account of it would have involved Mr Crowby having entered the room where A and M were sleeping in very close proximity, and engaged in intercourse with A without waking either A or M. I find that to be inherently unlikely.
33. In this regard, I take into account that the defence witnesses are all members of Mr Crowby's family and accordingly one needs to exercise caution when assessing the credibility of that evidence. In her submissions, Ms Tete submitted that the fact that the defence witnesses were all family members meant that the "chances of not telling the truth is high". A lack of credibility cannot be assumed and the Court is required to consider the evidence of each witness to assess reliability and credibility. Ms tete also raised various inconsistencies between them such as a

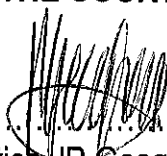


different recollection of who was in the house at the time M, returned from quarantine. If anything, this demonstrates a lack of collusion between the defence witnesses and strengthens rather than weakens their evidence. Ms Tete also pointed to Bruno Crowby's evidence as to his use of the land cruiser and the fact that that clashed with the evidence of Mr and Mrs Crowby that they had the vehicle on the afternoon they picked up M from quarantine. She submitted also that there was no evidence from Bruno Crowby that he was there that day. That is answered quite simply by the fact that his evidence in chief focused on the allegation in February. If Ms Tete wished to cross-examine him in respect of his presence on the day M was released from quarantine she should have done so. She did not.

34. Additionally, Ms Tete's submissions that Mr Crowby did not provide evidence from his workers that he dropped them off home after closing the car wash simply reverses the onus of proof which rests firmly on the prosecution. A competent police enquiry may have included an interview with Mr Crowby's workers. In addition, Mr Crowby was not cross-examined on this issue or another issue raised by Ms Tete in her submissions, namely, Mr Crowby's apparent breach of the curfew. There may well have been an exemption however, I do not intend to speculate on that. Ultimately, it is clear that there were a number of witnesses who could have been spoken to by the police but who were not. The Court deals with the evidence before it.
35. Ms Tete made other submissions regarding the failure of Mr Crowby to provide a receipt for the stay at the motel. I find that the explanation for that was reasonable and genuine. More importantly, there was never any dispute about the fact that Mr and Mrs Crowby had stayed there on the occasion in question. Equally, Ms Tete's submission that there was a conflict in the evidence of Mr and Mrs Crowby in that Mr Crowby had said that they spent the night there and left the next day while Mrs Crowby had said that they had booked the motel for the weekend, does not record the evidence correctly. Mrs Crowby had acknowledged booking the motel for the weekend but said in her evidence that they had, in fact, stayed for only one night.
36. In assessing the evidence, I found the defendant and all defence witnesses to be straight forward and consistent in the way in which they gave their evidence and I accept it. The inconsistencies of A's evidence, both during the course of her evidence and in respect of her account of events to others raises not only a reasonable doubt but a very significant doubt regarding Mr Crowby's guilt.
37. Accordingly, Mr Crowby is found not guilty on both charges and is acquitted in respect of them.

Dated at Port Vila this 14th day February 2023

BY THE COURT


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Justice JP Geoghegan

