

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

**Criminal  
Case No. 24/2768 SC/CRML**

**BETWEEN: Public Prosecutor**

**AND: Tari Talkalnamal  
Defendant**

**Coram: Justice Dudley Aru**

**Coram: Mrs. B. Tamau for the Public Prosecutor  
Mrs. K. Karu for Defendant**

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**JUDGMENT ON VERDICT**

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**Introduction**

1. The defendant was charged under an Information filed on 24 September 2024 that contained two charges, one count of sexual intercourse without consent contrary to s 89(A), 90 (b) (vi) and s91 of the Penal Code (Count 1) and one count of intentional assault causing temporary injuries contrary to s 107 (b) of the Penal Code (Count 2).
2. The defendant pleaded not guilty to both charges and a trial was had. This is the verdict following the hearing.

**Charges**

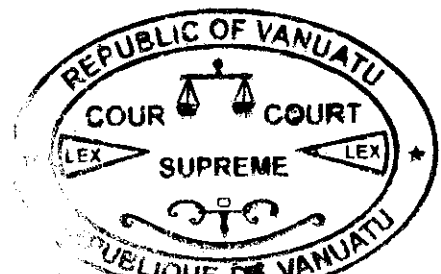
3. The particulars of both charges are as follows:

*Count 1*

Tari Talkalnamal on 30 July 2024 you intentionally commit the offence of sexual intercourse against Alice Shem when you inserted your penis into her vagina knowing at that time she was not consenting

*Count 2*

Tari Talkalnamal on 30 July 2024 you committed an act of intentional assault against Yatika Kamisak when you intentionally grabbed him by his jacket and directly pushed him onto the road causing the complainant to sustain a cut to his forehead, a cut to the left side of his eyebrow, a cut to his lip and bruising of his nose causing an injury of a temporary nature.

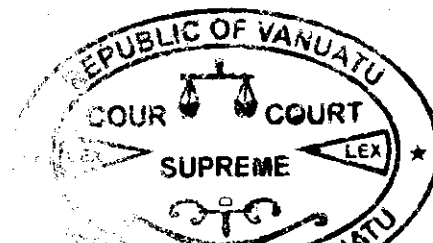


### Burden and standard of proof and elements of the charge

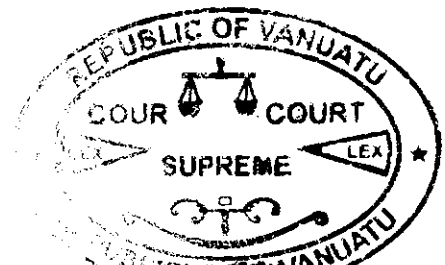
4. The burden of proof rests with the prosecution as provided under s 8 of the Penal Code [CAP 135]. To establish the defendant's guilt the prosecution must prove all the elements of the offences charged beyond reasonable doubt. The defendant does not have to prove anything.
5. The elements of the offence of sexual intercourse without consent are:-
  - The defendant had sexual intercourse with the victim
  - The victim consented due to the effects of alcohol as she was highly intoxicated
  - The defendant did not have a reasonable believe that the victim consented to the sex.
6. Sexual intercourse was not disputed. The only issue for the trial was consent: whether the victim consented and whether the defendant had a reasonable believe that the victim consented.
7. The elements of the offence of intentional assault causing injuries of a temporary nature are:
  - The defendant committed intentional assault
  - On the body of the victim (Mr Yatika)
  - Causing damage of a temporary nature

### The evidence

8. Prior to the trial the parties tendered the defendant's record of interview and Mr Yatika's medical report by consent marked as **Exhibit PP 1** and **Exhibit PP2** respectively.
9. The prosecution called two witnesses the complainant, Alice Shem and Yatika Kamissak.
10. The complainant's evidence in chief was that on the 29 July 2024 at Black sands area in Port Vila, she was in her stall at the celebration site selling food and shots of Hanabia liquor. She had stopped selling around 8 pm that night and started drinking herself. She drank over 10 shots. She then went for a dance but her big sister Ruth told her to go and sleep as she was very drunk. She had been sleeping in the stall by herself since the children's Day, 24 July 2024. She returned to her stall and laid out her blanket and went to sleep. She spoke briefly to Rex one her brothers before going to bed.
11. The stall had bamboo walling at the front and surrounded by black tarpaulin as its walls. The entrance was at the back of the stall and in front was a table. There was lighting in front and at the back of the stall and when she slept, she blocked the door with a short piece of 'kapa' sheet. She was still asleep in the morning on 30 July 2024 when her big sister Ruth came and woke her up and told her that Yatika was assaulted because of her. She enquired why and was told that Yatika found the defendant having sex with her during the night. When she got up, she felt pain in her stomach and her vagina was sore and felt as if someone had had sex with her. She felt that her vagina was wet and a black tights she wore that night was pulled down and she had to pull it up. She stated that she had never known the defendant and he had never asked her for sex and she had never agreed to have sex with him. She noticed that someone had pulled a calico blocking the light at the front of the stall and did not know who did it. She reported the incident to the Police the day after.



12. She was cross examined and maintained her evidence in chief but corrected that she had some kava and smoked cigarettes. She maintained that the only person she spoke to before going to sleep was Rex. The program was still ongoing when she went to sleep. Under re-examination she confirmed she had forgotten to mention that she had some kava as well that night. She again confirmed that she slept before 300am as the program was still ongoing when she went to sleep. I accept Alice Shem as a truthful and accurate witness.
13. Yatika Kamissak gave evidence that during the July independence celebrations he was among a number boys chosen to provide security for the celebrations and for the stall holders. The defendant was a member of the people in charge of security during the celebrations. Mr Kamissak said he refers to the complainant as mother and she also held a stall during the celebrations. On the 29 July he saw the complainant at the celebrations and she was dancing. He could tell that she was very drunk or had too much drink as she was tearing out coconut leaves from the stalls. He saw her around 12 midnight. The celebrations closed around 300am in the morning.
14. At around 3.00 am he was sitting close to the complainant's stall with his friend Jason and some others drinking kava when he heard the complainant talking in her sleep. When he walked over to the stall to check he saw the complainant lying down with both legs open and the defendant lying between her open legs and pushing his penis into the complainant's vagina and having sexual intercourse with her. At that time the complainant was fast asleep. He stood behind the door and lifted the calico and saw them. He did not call the complainant as it was taboo in custom to see his mother naked. He called the defendant. Jason also saw the defendant having sex with the complainant. He told Jason that he will assault the defendant. He could tell it was the defendant as they live in the same area and he knows the defendant.
15. At the same time the defendant stood up and put on his jacket to cover his face and left the stall. They followed him and shown a torch on him and asked him what he was doing. The defendant replied it was none of his business. He got angry and threw a torch at the defendant's face. The defendant then grabbed him by his jacket and spun him around twice and threw him against a cement wall. The defendant then fled the scene. As a result, he suffered cuts to his forehead, a broken nose and cuts to his mouth. The Police took him to the hospital around 5.00 am.
16. He was cross examined on his evidence. He maintained his evidence that when he saw the complainant she was very drunk and when he went to check her in her stall, he saw the defendant having sex with her while she was dead asleep. I accept Mr Yamak as a truthful and accurate witness of what he saw that night.
17. The defendant opted to remain silent and called Kano Gordon and David William to give evidence on his behalf. Kano gave evidence that he knew the complainant as they all live within the black sand's community. During the celebrations he saw the complainant at her stall when he came to check for beers. Then later he walked her to her stall and waited as the complainant prepared her mattress to sleep. They told stories a bit then he left. He said the state of the complainant's drunkenness was average as she walked straight to her stall with a clear mind.
18. Under cross examination he said he heard about the incident in the morning. When he saw the complainant, he agreed that she was drunk but he did not hear her swearing or see her pulling coconut leaves from the stalls. He denied that he saw the complainant asleep as he was having a smoke with her before he left. He was not re-examined.



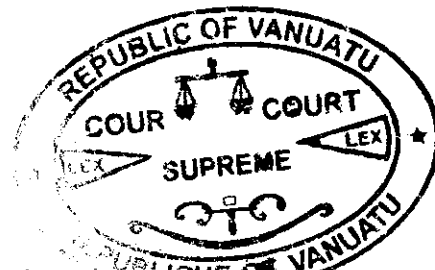
19. David William gave evidence that he saw the fight between Yatika and the defendant as on the 30 July, Yatika's relatives from Tanna came looking for him so he stayed at home.
20. That night he went to get his jacket and saw Yatika and another person whom he did not know his name following the defendant. They took his torch and shone it on the defendant then Yatika and his friend started assaulting him. The assault went on for a while and he called out to Yatika's friend to stop and Yatika's friend left. He did not know what caused the fighting. He saw the defendant assaulting Yatika then the defendant fled and the fighting stopped. The defendant had a swollen face as a result of the fight.
21. Under cross examination he agreed that he witnessed the fight between the defendant and Yatika. He agreed during the celebrations some Police Officers were present but he did not report the matter to the Police as the fighting occurred after the program had closed. The fighting happened around 3.00 am in the morning. After the fight he saw the defendant's face was swollen but denied it resulted from Yatika stoning him with the torch.
22. Under re-examination he confirmed that Yatika took the torch from him. I accept his evidence as accurate as he witnessed the fighting at close range.

### Submissions

23. At the end of the trial both counsels indicated that they intended to file written submissions for consideration by the Court. I have taken into account those submissions.

### Discussions

24. The complainant's evidence is that she had over 10 shots of Hanabia drink which is a strong alcohol drink. She drank the shots without any mix. After drinking she went dancing. She was very drunk as she was seen by her sister Ruth who told her to go and sleep. Yatika also noticed that she was very drunk as he saw her tearing down coconut leaves used in the stalls. The complainant returned to her stall and before she slept, the only person she spoke to was Rex. Given the effect of alcohol on her she did not know what happened to her that night.
25. Kano's evidence that he walked the complainant back to her stall and remained with while she prepared her bed before leaving is rejected as this was never put to the complainant in cross examination.
26. When the complainant was woken up in the morning by her sister Ruth, she felt pain in her stomach and her vagina was sore and wet as if someone had had sex with her and her black tight was pulled down. Ruth woke her up to tell her that Yatika was assaulted because he saw the defendant having sex with her that night. Yatika's evidence is consistent with the complainant's evidence because he saw the defendant having sex with her. Her legs were wide open when the defendant was having his way with her. Yatika was standing close to them when he called the defendant.
27. As she had succumbed to the effects of alcohol, there was no reaction from the complainant to cover herself from being seen naked by Yatika who she relates to as his mother. She had never known the defendant before and had not spoken to him that night or agreed to have sex with him that night.



28. The defendant as confirmed by Yatika was part of the team organising security for the celebrations and he knew the complainant had a stall and that she slept in the stall . When the complainant returned to her stall that night, the defendant later went and took advantage of her knowing full well that she was overcome by alcohol.
29. I am satisfied that the prosecution has proved beyond reasonable doubt both elements of count 1 namely that consent was obtained through the effects of alcohol and the defendant did not have a reasonable believe that the complainant consented to the sexual intercourse.
30. In relation to count 2 Yatika and Jason both saw the defendant having sexual intercourse with the complainant. When the defendant left the complainant's stall, they both followed him. When Yatika confronted the defendant about what he was doing in the complainant's stall, he responded by saying it was none of his business. Yatika reacted angrily by throwing a torch into the defendant's face. Thereafter Yatika said the defendant called to someone in his language who shone a torch in his face blinding him. It was then that the defendant grabbed him and spun him around then threw him against a cement wall. Jason who was with Yatika that night was not called to give evidence.
31. David William who was also one of the security that night gave evidence contradicting Yatika as he witnessed the fight and Yatika took the torch from him which he threw at the defendant. He saw Yatika and his friend which is confirmed by Yatika to be Jason following the defendant. He saw both of them assaulting the defendant as he was standing next to them. He called out to the younger person whom he didn't know was Jason to stop and he left. At that same instant the defendant grabbed Yatika and threw against the wall and fled. It is quite evident that the defendant was defending himself against two people who were attacking him and he responded in the heat of the moment in defending himself before fleeing. The evidence is clear that the defendant did not start the fighting. After seeing the defendant having sex with the complainant, Yatika told Jason that he will assault the defendant which they did.
32. I am not satisfied that the prosecution has proved the elements of count 2 beyond reasonable doubt.

### Verdict

33. I find the defendant guilty in relation to count 1. In relation to count 2, I find the defendant not guilty.

DATED at Port Vila this 10<sup>th</sup> day of October, 2025.

BY THE COURT

Dudley Aru  
Judge

