

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

Criminal
Case No. 25/926 SC/CRML

BETWEEN: PUBLIC PROSECUTOR

AND: JOHN KALTONGA
Defendant

Date of Trial: 1 December 2025, 17 and 18 February 2026
Submissions: 2 March 2026 and 6 March 2026
Date of Reasons: 31 March 2026
Before: Justice M A MacKenzie
Counsel: Mrs M T Silememea for the Public Prosecutor
Mrs MG Nari for the Defendant

REASONS FOR DECLINING NO CASE TO ANSWER APPLICATION

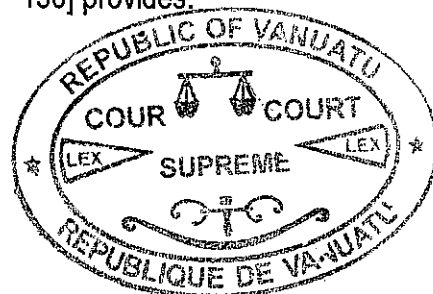
Introduction

1. Mr Kaltonga faces a charge of sexual intercourse without consent.¹
2. At the conclusion of the prosecution case, Mrs Nari made a no case to answer application. After hearing from both counsel, I gave a brief oral ruling.
3. I said there was a case to answer and that I would give written reasons. These are my reasons.

Legal framework

4. Section 164(1) of the Criminal Procedure Code [CAP 136] provides:

¹ Contrary to ss 89A, 90 (a) and 91 of the Penal Code [CAP 135].

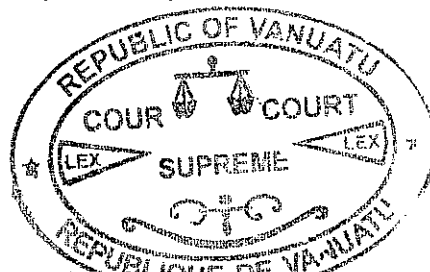


"If, when the case for the prosecution has been concluded, the judge rules, as a matter of law that there is no evidence on which the accused person could be convicted, he shall thereupon pronounce a verdict of not guilty."

5. The legal framework and the test to be applied was considered in detail in *Public Prosecutor v Suaki* [2018] VUCA 23. The test is set out at paragraphs 10 and 11:

10. *At this point we need to make a distinction between the determination made at the close of the prosecution case, and the ultimate decision on the guilt of the accused to be made at the end of the case. Whereas the latter test is whether there is evidence which satisfies the Court beyond a reasonable doubt of the guilt of the accused, we consider that the objective of a "no case to answer" assessment is to ascertain whether the Prosecution has led sufficient evidence to necessitate a defence case, failing which the accused is to be acquitted on one or more of the counts before commencing that stage of the trial. We therefore consider that the test to be applied for a 'no case to answer' determination is whether or not, on the basis of a prima facie assessment of the evidence, there is a case, in the sense of whether there is sufficient evidence introduced, on which, if accepted, a reasonable tribunal could convict the accused. The emphasis is on the word "could" and the exercise contemplated is thus not one which assesses the evidence to the standard for a conviction at the final stage of a trial.*

11. *The determination of "no case to answer" motion does not entail an evaluation of the strength of the evidence presented, especially as regards exhaustive questions of credibility or reliability. Such matters are to be weighed in the final deliberations in light of the entirety of the evidence presented. In our view therefore, the question which the judge has to consider at the close of the prosecution case in a trial on the indictment on information is whether the prosecution has given admissible evidence of the matters in respect of which it has the burden to prove. It is for him as a matter of law to determine whether the evidence adduced has reached that standard of proof prescribed by law. The standard of proof required by law here is not proof beyond reasonable doubt which only comes after the conclusion of the whole case. It seems to us therefore that a consideration of a "no case to answer" by the judge's own motion or a submission of "no case to answer" ought to be upheld in trials on indictment if the judge is of the view that the evidence adduced will not reasonably satisfy a jury (judge of fact), and this we think will be the case firstly, when the prosecution has not led any evidence to prove an essential element or ingredient in the offence charged and secondly, where the evidence adduced in support of the prosecution's case had been so discredited as a result of cross-examination, or so contradictory, or is so manifestly unreliable that no reasonable tribunal or jury might safely convict upon it. In our*



view, such evidence can hardly be said to be supportive of the offence charged in the indictment on the information or any other offence of which he might be convicted upon."

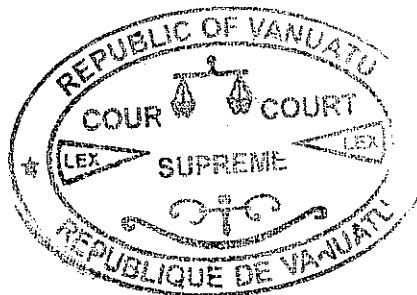
6. The Court of Appeal confirmed that in cases where the prosecutor has adduced evidence capable of supporting the essential elements of the prosecution case, Judges should only exercise the s164(1) discretion in the most unusual and extreme circumstances.

What are the elements of sexual intercourse without consent?

7. The elements of sexual intercourse without consent are well settled. There are three essential elements of rape: *McEwen v Public Prosecutor* [2011] VUCA 32. They are:
8. There are three essential elements of rape: *McEwen v Public Prosecutor* [2011] VUCA 32. They are:
 - a. That there was sexual intercourse.
 - b. That FN did not consent to the sexual intercourse.
 - c. That Mr Kaltonga did not believe on reasonable grounds that FN was consenting at the time that the sexual intercourse occurred.
9. Sexual intercourse is defined in s89A of the Penal Code:

"For the purposes of this Act, sexual intercourse means any of the following activities, between any male upon a female, any male upon a male, any female upon a female or any female upon a male:

- (a) the penetration, to any extent, of the vagina or anus of a person by any part of the body of another person, except if that penetration is carried out for a proper medical purpose or is otherwise authorized by law; or*
- (b) the penetration, to any extent, of the vagina or anus of a person by an object, being penetration carried out by another person, except if that penetration is carried out for a proper medical purpose or is otherwise authorized by law; or*
- (c) the introduction of any part of the penis of a person into the mouth of another person; or*



- (d) *the licking, sucking or kissing, to any extent, of the vulva, vagina, penis or anus of a person; or*
- (e) *the continuation of sexual intercourse as defined in paragraph (a), (b), (c) or (d); or*
- (f) *the causing or permitting of a person to perform any of the activities defined in paragraph (a), (b), (c) or (d) upon the body of the person who caused or permitted the activity.*

10. Consent means true consent, freely given by a person who is in a position to make a rational decision. What is essential for valid consent is that a complainant had an understanding of her situation and was capable of making up her mind when she agreed to sexual acts.²

11. Consent may be conveyed by words, by conduct, or by a combination of both. The material time to consider consent is when the sexual act takes place. FN's behaviour and attitude before or after the act may assist, but it is not decisive. As was said in *Ishmael v Public Prosecutor* [2005] VUCA 1:

"every man or woman has control over their own bodies and what they do with them in an intimate way with other people..... A woman does not have to kick or scream or push someone away. She is entitled to be treated with courtesy and respect".

12. Consent cannot be inferred only from the fact that the person does not protest or offer physical resistance. There must be something more in the words used, conduct or circumstances (or both) for it to be legitimate to infer consent.

13. The prosecution must prove beyond reasonable doubt that Mr Kaltonga did not believe on reasonable grounds FN was consenting at the time the intercourse occurred. The critical question is whether at that time and in the particular circumstances I am sure that Mr Kaltonga did not genuinely believe that FN consented or that a reasonable person standing in his shoes would not have believed that FN consented?³

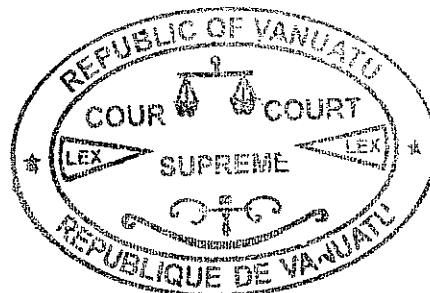
² *R v Isherwood*, CA 182/04, 14 March 2005

³ See *Ishmael v Public Prosecutor* [2005] VUCA 1 and *McEwen v Public Prosecutor* [2011] VUCA 32.



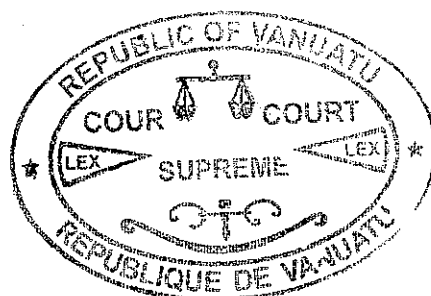
Discussion

14. A "no case to answer" submission will be upheld in two circumstances:
- a. When the prosecution has not led any evidence to prove an essential ingredient of the offence; or
 - b. When the prosecution evidence has been so discredited as a result of cross examination, or so contradictory, or is so manifestly unreliable that no reasonable tribunal could convict on it.
15. As the Court of Appeal said in *Suaki*, the objective of a "no case to answer" assessment is to ascertain whether the prosecution has led sufficient evidence to necessitate a defence case, failing which the accused is to be acquitted. It does not entail an evaluation of the strength of the evidence presented, especially as regards exhaust of questions of credibility or reliability.
16. Mrs Nari did not suggest the prosecution has failed to lead evidence to prove an essential element of the offence. The basis of the no case to answer submission is the reliability of FN's evidence. Mrs Nari contended that it was unjust for the trial to continue on discredited or unreliable evidence. Mrs Nari pointed to the fact that FN accepted the invitation to go into Mr Kaltonga's bedroom, there was no force or threats, her story had several discrepancies, and the medical report did not help her case. Mrs Nari contended FN's evidence about consent and belief in reasonable grounds in consent is therefore unreliable for a number of reasons, including:
- a. FN walked into the house without assistance at 5am in the morning.
 - b. As an adult she should have known better than to remain in the bedroom.
 - c. For someone who blacked out, FN remembered details of everything that had happened prior to the black out.
 - d. Notwithstanding the claim of sexual assault, FN remained at the Kaltonga family home for a week.
 - e. That the medical opinion showed that FN knew what she was doing when she entered Mr Kaltonga's bedroom. Further, the vagina is a very delicate organ so Mrs Nari cautioned to question FN's evidence that she did not know anything about what had happened to her.



17. Mrs Nari provided the Court with a copy of the medical opinion, seemingly prepared by a general practitioner. This report did not, and could not, have formed part of the prosecution case. It is not evidence and so cannot be taken into account in considering whether there is a case to answer. As was said in *Kal v Public Prosecutor* [2016] VUCA 56 at 29, Judges make their decision based on the evidence before them. The submissions based on this medical opinion must be put to one side.
18. Mrs Nari also contended in her written submissions that the black out story is unbelievable because she slept for three hours on 29 September 2024 and remembered every detail of what happened the previous evening.⁴
19. What Mrs Nari is asking the Court to do is to evaluate the strength of the evidence, which is not required at the no case to answer stage. The test is whether there is sufficient evidence, if accepted, for a reasonable tribunal to convict. FN gave her evidence in a clear fashion and her evidence was internally consistent. She stuck to her guns in cross examination. She remained firm that she knew nothing about what had happened in the bedroom and that sexual intercourse was not what she wanted. Thus, the evidence in support of the prosecution's case has not been so discredited as a result of cross examination or so contradictory that no reasonable tribunal or jury might safely convict.
20. Nor can it be said that the prosecution evidence is so manifestly unreliable that no reasonable tribunal or jury might safely convict. Whether FN's evidence is credible and reliable are matters to be weighed in light of all the evidence presented during the trial. What Mrs Nari was asking the Court to do at the no case to answer at the close of the Prosecution case was to make a reliability assessment and find that FN's evidence was unreliable. There is nothing inherently or manifestly unreliable about FN's evidence about consent or believe on reasonable grounds in consent. I do not accept FN's evidence that she walked to the house without any assistance at 5am and that she voluntarily went into the bedroom at Mr Kaltonga's invitation and remained there is manifestly unreliable. Mrs Nari is making assumptions that someone who is intoxicated should act in a certain way, and that the mere fact she went into the bedroom means that FN's evidence is unreliable. Based on the prosecution case, Mrs Kanas' evidence, which is recent complaint evidence, provides some support for FN's narrative. FN told Mrs Kanas what happened about a week later. What she told Mrs Kanas' is consistent with FN's evidence during the trial.
21. I reiterate that the Court of Appeal confirmed in *Suaki* that in cases where the prosecutor adduced evidence capable of supporting the essential elements of the prosecution case, Judges should only exercise the s 164 (1) discretion of the most usual and extreme circumstances. The circumstances in this case are not unusual or extreme.

⁴ Refer to Mrs Nari's written submissions dated 17 February 2026.



22. For the sake of completeness, I record there is evidence capable of supporting the three elements of the offence, being:
- a. FN said she felt sure that there had been sexual intercourse, given Mr Kaltonga's comments to her before she went to sleep and the fact that she woke up without her pants and underwear. She did not know what had happened. She was asleep.
 - b. That FN did not consent to the sexual intercourse because she was asleep at that time.
 - c. Therefore, a finding is open that no reasonable person in Mr Kaltonga's shoes could have believed FN was consenting at the time, because she was asleep, and not in position to make a rational choice about whether she had sexual intercourse with Mr Kaltonga or not.
23. FN's evidence, if accepted, could establish the essential elements of the charge. Further, the prosecution evidence has not been so discredited as a result of cross examination, or so contradictory, or is so manifestly unreliable that no reasonable tribunal could convict on it.
24. Therefore, for these reasons, I declined to exercise the discretion in s 164 (1) to pronounce a not guilty verdict in relation to the charge. There was a case to answer.

**DATED at Port Vila this 31st day of March, 2026
BY THE COURT**

name
.....
Justice M A MacKenzie

