

**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 Verdict: 31 March 2026  
Before: Justice M A MacKenzie  
Counsel: Mrs M T Silememea for the Public Prosecutor  
Mrs MG Nari for the Defendant

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**VERDICT**

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**Introduction**

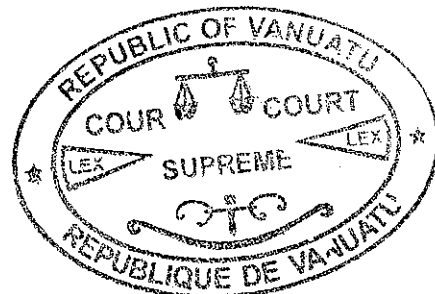
1. Mr Kaltonga faces one charge of sexual intercourse without consent.<sup>1</sup>

**Brief background**

2. The complainant, FN and Mr Kaltonga are related. At the time of the alleged incident, FN was living with Mr Kaltonga's family at Siviri village, North Efate. On 28 September 2024, FN and Mr Kaltonga attended a bridal event in Port Vila with relatives. The festivities continued when the group returned to Siviri.

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<sup>1</sup> contrary to ss89A, 90(a) and 91 of the Penal Code [CAP 135]

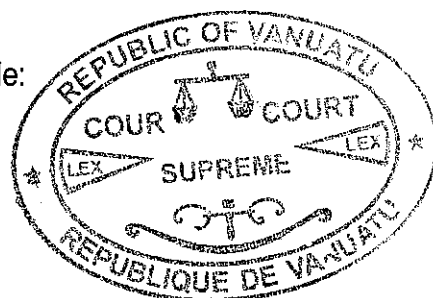


3. FN and Mr Kaltonga returned to Mr Kaltonga's family home the next morning at about 5am. Normally, FN slept on a couch. She did not have a bedroom. Mr Kaltonga did. It is common ground that when they went into the house, FN went and sat on the couch.
4. The prosecution case is that Mr Kaltonga then suggested she sleep in his room. She and Mr Kaltonga are close so she did not think there was anything untoward about the suggestion. She went into the room and initially, lay on some clothes on the bed, which did not have a mattress. Mr Kaltonga then told her she could lie on the mattress on the floor, which she did. Mr Kaltonga started to touch her leg up to her bottom and FN pushed him away, telling him they were all related. FN was very tired, had been drinking and so went to sleep on the mattress. When she woke up, she felt as though things were not normal and she was not wearing her trousers or underpants. She believed she and Mr Kaltonga had sexual intercourse. She knew nothing about it. The prosecution contend that the sexual intercourse was nonconsensual as FN was incapable of consenting as she was asleep.
5. The defence case is that FN and Mr Kaltonga had sexual intercourse in the bedroom which was consensual. On the return trip to Siviri, FN lay against him in the back of a truck and made various comments to him. When they got back to the house, and FN was sitting on the couch, Mr Kaltonga asked her if she wanted to go out with him. From his perspective, he was asking her to have sex with him. FN got up, and then went into Mr Kaltonga's bedroom. While FN first lay on the bedframe, Mr Kaltonga asked her to sleep with him on his bed on the floor. They then had sexual intercourse. She was not asleep. He then left her to sleep in the bedroom and he slept on the couch.

#### **Elements of sexual intercourse without consent (rape)**

6. 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.

7. 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.*

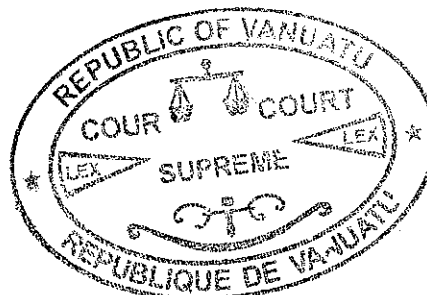
8. Consent means true consent, freely given by a person who is in a position to make a rational decision. What is essential for valid consent is that a complainant had an understanding of her situation and was capable of making up her mind when she agreed to sexual acts.<sup>2</sup>

9. 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".*

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<sup>2</sup> R v Isherwood, CA 182/04, 14 March 2005



10. 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.
11. 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?<sup>3</sup>

### **Procedural matters**

12. At the request of the prosecutor, the trial was part heard. That was because two prosecution witnesses were unavailable. They were recent complaint witnesses. One was unable to be located at the time, and the other had already left Efate to go to one of the islands for the Christmas break. There can be no criticism of either witness for not being available, as witness summonses had not been served on them in a timely manner. There was no objection to the trial being part heard.
13. The trial resumed on 17 February 2026. One of the recent complaint witnesses, Mrs Kanas was available and gave evidence. The other witness could not be located. The prosecution continued with its case without that witness, Miss Steele.
14. At the conclusion of the evidence, counsel asked to file written submissions. I allowed them to do so.<sup>4</sup> I have taken the submissions into account in considering the verdict.

### **Burden and standard of proof**

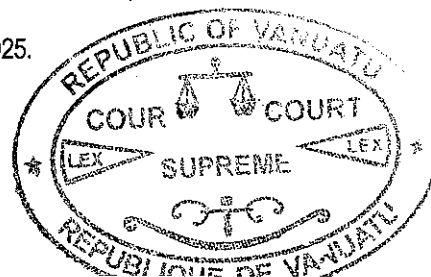
15. The prosecution has the onus of proof and is required to establish the elements of each charge beyond reasonable doubt before a finding of guilt can be made in respect of the charges. This excludes consideration of any possibility which is merely fanciful or frivolous.<sup>5</sup>

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<sup>3</sup> See *Ishmael v Public Prosecutor* [2005] VUCA 1 and *McEwen v Public Prosecutor* [2011] VUCA 32

<sup>4</sup> The prosecutor was to file submissions by 24 February 2026. She did not do so. The prosecution submissions were filed on 2 March 2026. Our defence submissions were filed on

<sup>5</sup> Section 8 of the Penal Code [CAP 135] and s 11(1) of the Evidence Act 2025.



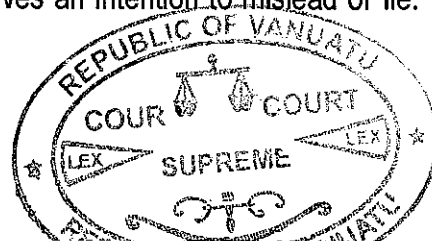
16. Proof beyond reasonable doubt is a very high standard of proof which the Prosecution will have met only if, at the end of case, I am sure that Mr Kaltonga is guilty. What then is reasonable doubt? Reasonable doubt is an honest and reasonable uncertainty about Mr Kaltonga's guilt after giving careful and impartial consideration to all the evidence.
17. Mr Kaltonga is not required to establish anything. He is presumed innocent. The presumption of innocence means that he does not have to give or call any evidence and does not have to establish his innocence. If at the end of the trial, any reasonable doubt exists as to his guilt, he will be deemed to be innocent of the charge and will be acquitted.
18. This was confirmed to Mr Kaltonga prior to the prosecution opening its case. I read the statement required by s 81 of the Criminal Procedure Code aloud to Mr Kaltonga in English. It was not translated into Bislama because Mrs Nari said that Mr Kaltonga did not need a translation as his English was good.

### **Prejudice and sympathy**

19. This is a case involving an alleged rape of a vulnerable family member. The allegation is serious and might give rise to feelings of sympathy for FN and prejudice against Mr Kaltonga. These or any other feelings must be put to one side and must not influence the verdicts. I am required to carefully and objectively and carefully consider all the evidence in reaching a verdict.

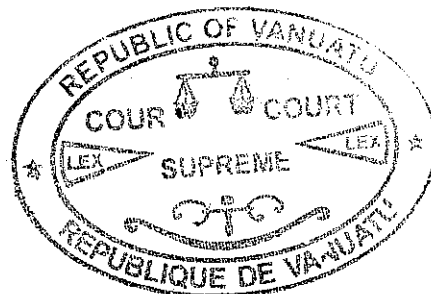
### **Approach to assessing the evidence**

20. This case turns on the credibility and reliability of the witnesses, and in particular FN who is the key prosecution witness. The prosecution case stands or falls on FN's evidence. While Mr Kaltonga had no obligation to give or call evidence, he chose to do so. So, the defence evidence will need to be assessed, but he does not have to prove anything.
21. The prosecution case is that FN is telling the truth. The defence case is that FN is not telling the truth, and that her evidence is unreliable. It is therefore important to distinguish between credibility and reliability. Credibility is about truthfulness. So, credibility is about whether a witness can be believed? Reliability is about the accuracy of evidence which is honestly given. The first involves an intention to mislead or lie.



The second involves error or mistake. Even the most honest witnesses capable of being mistaken. There is evidence that FN had consumed a lot of alcohol during the hen's night festivities. Alcohol is a factor which can impact on memory or recall. Alcohol has an ability to impair recollection and recall and alter a person's perception of what is going on around them. So that is a factor to be taken into account in assessing the reliability of FN's evidence.

22. But a witness who sets out to give false evidence is an entirely different position. All of what is said may be called into question if the witness is setting out to be dishonesty in some or all respects.
23. I may accept everything a witness has said. On the other hand, I may reject everything a witness has said. There is a middle ground, which is that I can accept some parts of what a witness has said and reject other parts.
24. It is important that before relying on evidence, I am able to conclude that it was honestly given, but also that it is reliable.
25. In assessing the evidence given by the witnesses, there are a number of factors which assist with considering whether the witnesses gave truthful and accurate evidence. In considering the evidence of all the witnesses who gave evidence during the trial, I have considered the reasonableness, probability and coherence of the evidence. Sometimes conflicts or differences in the evidence can be caused by mistakes and misinterpretation; sometimes witnesses can see and hear things that were not seen and heard by other witnesses. This does not mean one of the witnesses is necessarily not telling the truth. But sometimes conflicts are not able to be explained away.
26. The witness' demeanour is a small part of my assessment of the witness. I prefer though to look at what the witness actually said, and take into account;
  - a. consistency within the witness' account and over time? If there is an inconsistency, it does not necessarily mean that the evidence in court cannot be relied on. The mere fact that a witness is inconsistent on a particular topic does not mean that person is generally untruthful or inaccurate. Inconsistencies can happen even when someone is telling the truth. I must consider whether that inconsistency is a significant one or a minor one and any explanation given for the inconsistency;



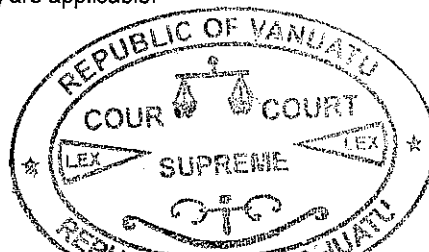
- b. consistency when comparing the witness' account with relevant exhibits;
  - c. consistency with the evidence of other witnesses whose evidence I have accepted.
  - d. whether there is supporting evidence. Other evidence is not necessary but can help.<sup>6</sup>
  - e. the inherent plausibility and coherence, or not, of the witness' account. Does it make sense?
27. It is important that I consider each witness' evidence in the context of all the evidence in the case. Also, witnesses can be inaccurate or may not remember secondary, marginal or unimportant facts for various reasons, including that they were not seen as important at the time. However, their evidence may be accurate about essential matters, but not about details. Essential matters are matters which relate to the elements of the charges.
28. I reminded myself that if I am to draw inferences, they cannot be guesses or speculation but had to be logical conclusions drawn from reliably accepted or properly established facts. As was said by the Court of Appeal in *Swanson v Public Prosecutor* [1998] VUCA 9, inferences may be drawn from proved facts if they follow logically from them. If they do not, then the drawing of any conclusion speculation not proof. Speculation in aid of an accused is no more permissible than speculation in aid of the prosecution. Inferences need not be irresistible.

### Mode of evidence

29. FN gave her evidence in a closed Court. There are various alternative ways for a witness to give evidence, including closing the Court.<sup>7</sup> The purpose of these types of measures is to ensure that a vulnerable witness is able to give the best quality evidence

<sup>6</sup> the corroboration rule in relation to crimes against morality no longer exists. See s 17 of the Evidence Act No 18 of 2025. The Evidence Act came into effect on 17 September 2025. The trial commenced after the Act came into force, so s 220(1) applies. Section 220(1) says the Act applies to all proceedings in all Courts commenced before the commencement of the Act. None of the exceptions in s 220(1) are applicable.

<sup>7</sup> See ss 40 and 51 of the Evidence Act



they can. Such measures say nothing about a defendant and no adverse inference is to be drawn against Mr Kaltonga because FN gave her evidence in this manner.

### Counter intuitive principles in sexual cases

30. In a number of overseas jurisdictions, counter-intuitive principles in sexual cases are well understood, and particularly in the context of jury trials. The purpose of such directions are educative in nature.

31. The English Court of Appeal in *Miller v R* [2010] EWCA Crim 1578 said:

*“Judges have, as a result of their experience, in recent years adopted the course of cautioning juries against applying stereotypical images of how an alleged victim or an alleged perpetrator of a sexual offence ought to have behaved at the time, or ought to appear while giving evidence, and to judge the evidence on its intrinsic merits. This is not to invite juries to suspend their own judgement but to approach the evidence without prejudice.”*

32. The Supreme Court of Canada acknowledged in *R v Barton* [2019] 2 SCR 579 at [1] that:

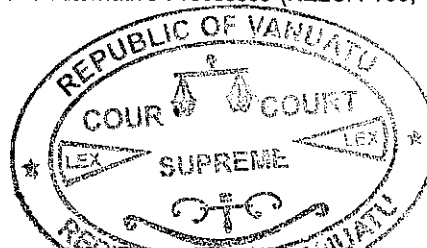
*“We live in a time where myths, stereotypes, and sexual violence against women — particularly Indigenous women and sex workers — are tragically common. Our society has yet to come to grips with just how deep-rooted these issues truly are and just how devastating their consequences can be. Without a doubt, eliminating myths, stereotypes, and sexual violence against women is one of the more pressing challenges we face as a society.”*

33. In New Zealand, the Law Commission said in *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes*,<sup>8</sup> stated:

*The field of sexual violence is one that is commonly misunderstood by people without training or education in the area. Research has revealed that widely held assumptions about how frequently sexual violence occurs, and when, where and against whom it occurs, are usually incorrect or do not reflect the reality of sexual violence.*

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<sup>8</sup> The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes (NZLCR 136, 215) at [6.12].



34. The purpose of counter-intuitive directions is to correct erroneous beliefs that a factfinder might otherwise hold. The purpose of such directions is to restore a complainant's credibility from a debit balance because of misconception, back to a zero or neutral balance. It says nothing about the credibility of a complainant. Rather, it is educative in nature.

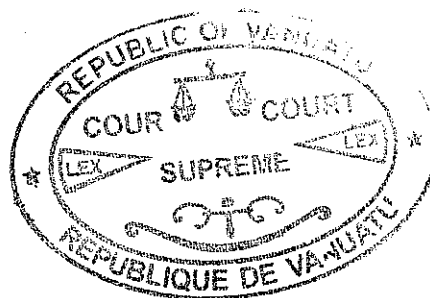
35. In terms of a judge alone trial, the New Zealand Court of Appeal has said that counter-intuitive evidence is not required. In *Keats v R*, the Court of Appeal said:

"[25] *It is now generally accepted that juries can be instructed about counter-intuitive principles without calling an expert witness on that topic. It is axiomatic that, if juries can be properly directed on counter-intuitive principles, then there is even less need for evidence on those principles when the trial is being conducted by a judge sitting without a jury.*"

36. Research shows that widely held assumptions about how frequently sexual offending occurs, and when, where and against whom it occurs, are usually incorrect and do not reflect the reality of sexual offending. It is therefore important to note that there is no such thing as "typical" sexual offending.

37. There is also no classic or "typical" response to sexual offending. Research shows that victims of sexual offending can react in different ways. It might be expected that a complainant of sexual offending would complain immediately, but it is not uncommon for complainants to delay making a complaint, to make a partial disclosure, or not say anything at all. Also, some complainants of sexual offending maintain contact with someone who has offended against them. There may be good reason for these things.

38. Research shows that alleged sexual offending can occur in a wide variety of circumstances, including when people know each other, when other people are around, and in the home, including busy households. Finally, research establishes that stress and trauma can compromise a person's account of events. But others may try to avoid thinking about an event at all, and they may then have difficulty in recalling the event accurately.



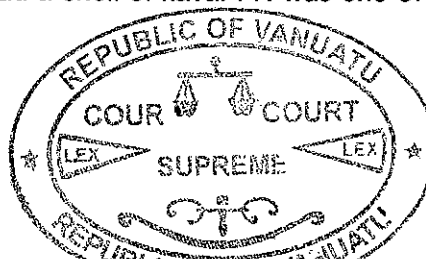
## Mr Kaltonga's position

39. Mr Kaltonga was spoken to by police under caution. He told police he elected to speak in Court, which was his absolute right.
40. Once the prosecution case concluded, the s 88 statement was read to Mr Kaltonga in English, and was translated into Bislama. Ms Nari confirmed that Mr Kaltonga elected to give evidence.
41. Mr Kaltonga gave evidence. He also called evidence. His mother, Marie Kaltonga gave evidence, as did a relative, Ray Steel. The fact that Mr Kaltonga gave evidence and called evidence does not change who must prove the allegations. The prosecution has that task, and Mr Kaltonga does not have to prove that he is not guilty. The question remains the same - has the prosecution proved his guilt beyond reasonable doubt. That means – am I sure?
42. If I accept what he says, then obviously the proper verdicts are not guilty because he will not have done what the prosecution says he did.
43. If what he says leaves me unsure, then again, the proper verdict is not guilty, because I will have been left with a reasonable doubt. If what Mr Kaltonga says seems a reasonable possibility, the prosecution will not have discharged its task, and I must find him not guilty.
44. If I disbelieve Mr Kaltonga's evidence on key issues, then I cannot not leap from that assessment to guilt, because to do that would be to forget who has to prove the case. Instead, I must assess all the evidence that I accept as reliable. This includes any part of the defence evidence I accept. Does that evidence satisfy me of Mr Kaltonga's guilt to the required standard?

## The evidence

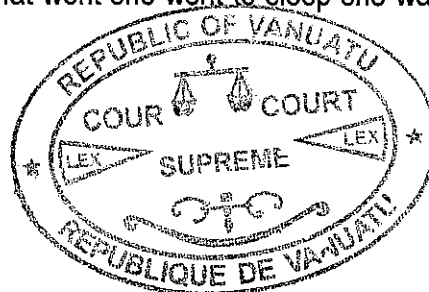
### *Prosecution evidence*

45. FN's evidence was that she was very tired when she went to sleep on the mattress in Mr Kaltonga's room. She had been drinking alcohol at the hen's party in Port Vila and when they returned to Siviri from Port Vila, she had a shell of kava. FN was one of a

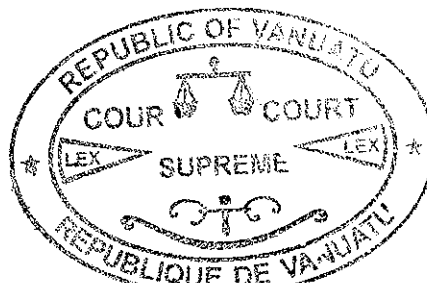


group of relatives who travelled from Siviri into Port Vila to celebrate her cousin's hens party. They had dinner at the Golden Port Hotel, where FN drank three glasses of wine. Then the group went to the War Horse Saloon and FN said she drank out of a jug of whisky and cola. When asked more about this, she said she had bought that for herself, and that her other cousins were drinking other drinks. On the way back to Siviri, FN travelled in the tray of a truck. Mr Kaltonga was also in the tray of that vehicle. She consumed alcohol and then went to sleep. When the group got back to Siviri, they carried on the celebrations at what FN described as the bridal or wedding shelter. This is the place where couples get married. Others continued drinking. FN had a shell of kava, went and sat down and watched others dancing. FN did not say she was dancing.

46. FN's evidence was that somewhere between 4am and 5am, she, Mr Kaltonga and another cousin walked from the wedding shelter to Mr Kaltonga's family home. As at September 2024, FN was living there. She did not have a bedroom, but rather usually slept on a couch. Sometimes, she slept in another relative's bedroom if he was not there. The house has three bedrooms. Mr Kaltonga's parents have one bedroom, Mr Kaltonga has another bedroom, and his brother and nephew have the third bedroom.
47. When Mr Kaltonga and FN got to the house, she went and lay on the couch in the sitting room. She said Mr Kaltonga's parents were up getting ready to go to morning devotion. She spoke to them and she got ready to go to sleep. Mr Kaltonga then called out to her and told her to come and sleep properly in his room. So, FN went into the room. She was asked why she did so. She said that they grew up together. They knew each other very well and she went in there to sleep. She did not expect anything to happen.
48. She said that there a single bed in the room. There was no mattress on the bed, just some of Mr Kaltonga's clothes. She laid down on the clothes. She knew Mr Kaltonga's bed was the mattress on the floor. Mr Kaltonga then told her to go and lay comfortably on the mattress. She said she lay down on the mattress and closed her eyes to go to sleep, but she could feel Mr Kaltonga's hand crawling up her leg to her bottom. She pushed him off or hit him and then she talked to him. FN explained that she told him everyone was related – Mr Kaltonga's father is her uncle, Mr Kaltonga's older brother Nikki is her best friend and Gibson is her husband. She said "*we are a family*". She wanted to remind him that she was his big brother's wife and that she looked on him not only as her brother-in-law but also her cousin. She said that Mr Kaltonga could see that his actions were wrong, and he sat down. She was tired as she had been drinking and had kava. She then went to sleep. FN said that went she went to sleep she was wearing an island dress with trousers underneath.



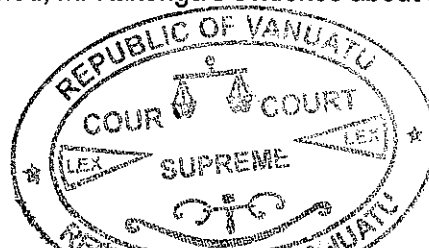
49. She went to sleep about 5am and woke up around 8am. When she woke up, she could feel in herself that something was not normal. She also realised that she was not wearing any trousers or undies under her dress. She thought about what was happening when she spoke to Mr Kaltonga so she knew they had sexual intercourse without her consent. She said she was sure Mr Kaltonga had sex with her. When she realised this, she was angry and upset. She cried, picked up her clothes put on her pants and went outside.
50. She did not tell anyone immediately. She said that there was one person she was comfortable enough to speak to about what had happened, Mr Kaltonga's mother, Marie Kaltonga. She did not speak to her immediately as she was very busy with wedding preparations and Mr Kaltonga's father was leaving for RSE work on the 2<sup>nd</sup> of October. She tried to talk to her on the 6<sup>th</sup> of October as the only time she could be alone with her was when Mrs Kaltonga was going to morning devotion. So she went from where she was staying at the wedding shelter down to speak to Mrs Kaltonga, but a neighbour came along and walked with them into the village, so she lost the opportunity to speak to Mrs Kaltonga.
51. She did though speak to her cousin Jessie Steele on the 1<sup>st</sup> of October because she could not hold it in. Then after the wedding on the 8<sup>th</sup> of October, she told another aunty of hers, Erika Kanas. FN told Mrs Kanas that Mr Kaltonga asked her to go into the bedroom, he started sliding his hand up her leg to her bottom until she spoke to him. In the morning, she discovered she was no longer wearing pants and undies and that when she went to have a shower, the water felt painful. Mrs Kanas said she had to speak to her husband, which she did.
52. After that, FN returned to Port Vila, spoke to her parents and went to the Police. Fn was medically examined on 8 October 2024. The examination was normal. She said that what happened really affected her and that she could no longer go to the Kaltonga home at Siviri. She said they were close, but she was staying away as the fact that she reported Mr Kaltonga had upset a lot of the family and people at Siviri.
53. Mrs Kanas gave evidence about what she was told by FN. FN is Mrs Kanas' niece. FN came to see her a week after the incident. As soon as FN came in and sat down, FN started tearing up. FN told her that John did something really bad to her. This was after the hen's party. In the bedroom, she felt John touching her leg. She told him off. John apologised and they went back to sleep. She woke up with her dress on, but not her



shorts and underwear. As she was telling her this, FN was talking and crying. FN talked about going to the police. Mrs Kanas told her she was to talk to her husband first.

*Defence evidence*

54. Mr Kaltonga's narrative about consent is in stark contrast. He was also at the hen's party in Port Vila. At the Golden Port, Mr Kaltonga primarily drank kava, did not have much to eat, and had 1-2 glasses of wine, although initially said he did not drink any wine. He said he drank whiskey and cola at the Warhorse Saloon. The group travelled back to Siviri in trucks. The men were drinking tequila from a bottle on the way back. He and FN were in the tray of one of the trucks. His evidence is that FN was leaning back against him and then started making comments to him that he was her baby dad and that he was her man. He said they talked and laughed. FN was cross examined about allegedly pulling Mr Kaltonga towards her and pulling his head. She denied either of those actions. Mr Kaltonga did not give any evidence about those actions.
55. The celebration continued at the festive area when they got back to Siviri. Mr Kaltonga said that FN was around, but he did not see her, as they were all busy dancing and joining in the festivities.
56. FN and Mr Kaltonga walked back to the house at about 4.30-5am. Mr Kaltonga's mother was up when they went into the house. FN went and sat on the couch where she usually sleeps. He said he went to her and asked her to go out with him. FN then went into the room. This was Mr Kaltonga's way of asking FN to have sex with him. In fact, he said in his evidence that he asked her to have sex with him. When I asked him to clarify what he had said to her, he confirmed he asked her to go out with him.
57. FN went into the bedroom before Mr Kaltonga did. His evidence was that when he went into the bedroom, FN was lying on the bed frame. He asked her to sleep with him on his bed on the floor, which she did. He said that is when everything happened. They had sex, and then he went out to the veranda to lie on the couch. He denies touching FN inappropriately.
58. In his evidence in chief, Mr Kaltonga was asked if he said anything to FN before they had sex. He said he asked if he could have sex with her. Her response was to say "*what about our relatives*". She mentioned their names. He told her it would be between them and no one will know about it. When cross examined, Mr Kaltonga's evidence about the

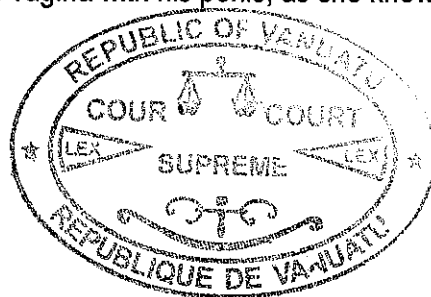


timing of that conversation changed. He said the discussion about relatives took place when they were having sexual intercourse, and then later on in the cross examination, said the discussion took place when they were nearly finished having sexual intercourse.

59. He confirmed he saw FN later that day at the wedding venue, and that they had talked after the events in the bedroom, and everything was back to normal. Mr Kaltonga also said that FN continued to live at the house until she left Siviri.
60. Mrs Kaltonga was up getting ready for morning devotion when FN and Mr Kaltonga came into the house. She said her husband was in bed. Mrs Kaltonga went about getting ready and then saw Mr Kaltonga in the sitting room. She did not speak to him at that stage. When she came out to the sitting room with her church bag Mr Kaltonga told her that FN was in his room and will sleep there. FN was not in the sitting room. She then went to morning devotion. When she returned, she saw Mr Kaltonga asleep on the couch. She did not see FN. Mrs Kaltonga said she next saw FN at the wedding venue later in the morning, and that until she left Siviri, she was living at the house. She confirmed that she and FN were close. Mrs Kaltonga did not notice anything untoward with either FN or her son.
61. Mr Steel was also at the hen's party in Port Vila. He is related to both FN and Mr Kaltonga. He travelled back to Siviri in the back of the truck along with FN and Mr Kaltonga. He said FN was leaning against Mr Kaltonga and could see they were mumbling to each other. He did not know what was said because there was music playing which was loud. He was present at the festival area at Siviri and said the party continued until his father stopped the dancing at about 5am.

**Am I sure that Mr Kaltonga had sexual intercourse with FN?**

62. FN said she was sure that Mr Kaltonga had sexual intercourse with her. This was because of Mr Kaltonga's actions before she went to sleep, the fact that she woke up without her trousers and underpants, and that she felt something was not right.
63. Mr Kaltonga's position is that there was sexual intercourse, which was consensual. So it is not in dispute that Mr Kaltonga penetrated FN's vagina with his penis, as she knew to have occurred.



64. Therefore, I am sure that Kaltonga penetrated FN's vagina with his penis.

**Am I sure that FN did not consent to the sexual intercourse?**

65. Consent is the key issue. Consent to sexual intercourse means consent freely given by a person who is in a position to make a rational decision. As I have said, what is essential for valid consent is that a complainant has understood her situation and was capable of making up her mind when she agreed to sexual acts.<sup>9</sup> The material time when consent is considered is at the time the sexual intercourse took place.

66. The prosecution case is that FN did not consent to sexual intercourse because she had been drinking, was tired and went to sleep. She does not remember having sexual intercourse.

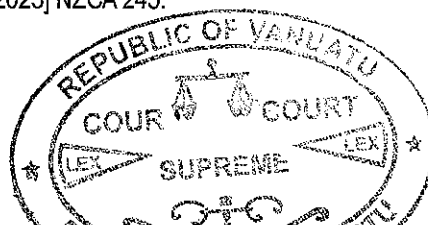
67. The defence case is that she was awake and did consent to the sexual intercourse. It is contended that FN's evidence that Mr Kaltonga had sex with her while she was asleep is unbelievable. That she would have woken up. In her written submissions, Mrs Nari referred to a medical "*opinion*" in relation to FN not being aware of a sexual assault because of a blackout. The opinion was that "*the vagina being a delicate organ, and the victim would be aware they are being interfered with*". In reaching a verdict, the Court can only take evidence adduced during the trial into account. This report was not produced and the doctor who provided the report did not give evidence. It is not evidence and cannot be taken into account. As was said in *Kal v Public Prosecutor* [2016] VUCA 56 at [29], Judges make their decisions based on the evidence before them. I put Mrs Nari's submission relying on that opinion to one side.<sup>10</sup>

68. If a person is asleep, they are not in a position to freely consent to sexual intercourse. This has been recognised in other jurisdictions.<sup>11</sup> So, there is nothing inherently unreliable or unbelievable about a person saying he or she was asleep when sexual intercourse occurred. It will always be fact specific.

<sup>9</sup> See *R v Isherwood* [2005] NZCA

<sup>10</sup> Mrs Nari is well aware about the issues relating to this report. She relied on the report to make a no case to answer submission. It could not be taken into account because the report was not part of the evidence. Further, Mrs Nari was advised that if she intended to call the doctor who wrote the report as part of the defence case, there may be an issue as to the admissibility of the evidence as there was nothing in the report to show that the doctor had specialised knowledge area of sexual assaults or sleep. See s 165 of the Evidence Act.

<sup>11</sup> See *The State v Tarogi, High Court of Fiji*, case no. HAC 19 of 2023. In *Tarogi*, the victim was very intoxicated and went to sleep. She did not recall anything while she was asleep. When she woke up, she did not have her tights on. She was raped while asleep. See also *Arroyo-Munoz* [2023] NZCA 245.

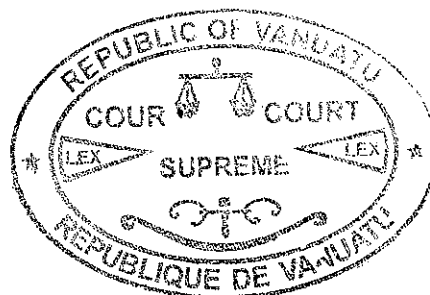


69. Assessing whether FN did not consent to the sexual intercourse requires an assessment of the credibility and reliability of FN's evidence about her lack of knowledge that she and Mr Kaltonga has sexual intercourse, because she was asleep. As I have said, the prosecution case stands or falls on her evidence.
70. I assess that FN's evidence was an authentic recounting of what happened to her. She was correct in her thinking that she and Mr Kaltonga had had sexual intercourse. That is because Mr Kaltonga agrees that they did. For reasons which follow, I accept FN's evidence that she was tired, drunk and went to sleep, and so the sexual intercourse took place when she was asleep. Her evidence about why she went into the bedroom and what happened there was plausible, had personal significance to her, matter of fact and coherent. Her evidence was internally consistent, and consistent with other evidence I have accepted. Where there are inconsistencies, they are not material. While FN did not make an immediate complaint, there are good reasons for the delay.
71. The key focus is on what happened in the bedroom, as the material time for consent to be assessed is at the time of the sexual intercourse. While FN's actions before and after may be relevant, I do not think they demonstrate that FN wanted to have sex with Mr Kaltonga. There is considerable emphasis in the defence closing submissions on the fact that FN went into the bedroom in the first place, and then did not remove herself from the situation given her evidence that when she lay down on the mattress, Mr Kaltonga touched her in a way she did not want, and she told him to think about the fact they were related. The submissions engage in "*victim blaming*" reasoning, given the contentions, amongst others, that:
- FN went into the bedroom voluntarily.
  - When invited into the bedroom, FN did not say it was inappropriate.
  - FN should not have been in the bedroom. They are relatives, she is a mother, and she had never slept in the room before.
  - If touched, as an adult, FN would have left the bedroom.
72. FN did voluntarily go into Mr Kaltonga's bedroom. It is common ground that FN ordinarily slept on the couch, or on occasion, another bedroom, if it was available. It was not her initial intention to go into Mr Kaltonga's bedroom. She went straight to the couch where she usually slept. It was Mr Kaltonga who issued the invitation. It was not her idea. FN explained why she went into the bedroom. She said Mr Kaltonga suggested she come and sleep properly in his bedroom. While Mr Kaltonga denied that is what he said to



FN, she was not challenged in cross examination about that evidence. She should have been, as FN's reason for going into the bedroom became a substantial matter of debate during the trial. Given that, s 59 of the Evidence Act applies. Under s 59 the Court has a discretion as to how to deal with a failure to cross examine about a substantial matter, including the weight to be applied to the evidence.

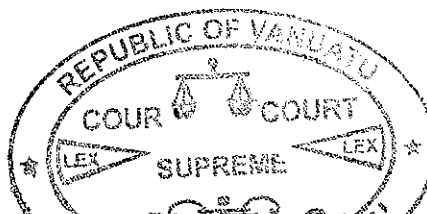
73. FN's evidence that Mr Kaltonga told her to come and sleep properly in the room specifically unchallenged, and so ordinarily, the Court is entitled to accept that evidence. As was held in *Fisher v Wylie* [2021] VUCA 5, the fact that FN was not cross examined on that evidence leaves it specifically unchallenged, and so in the normal course it would be accepted. Her reason for doing so is plausible - they grew up together, she was tired went in there to sleep and did not expect anything to happen.
74. Mr Kaltonga agrees that he asked FN to go into the bedroom when she was sitting on the couch in the sitting room, where she usually slept. He said FN went into the bedroom immediately after he had asked her in the sitting room if she wanted to go out with him. To him, it meant he asked FN to have sex with him. By way of clarification, Mr Kaltonga confirmed that he did not ask her to have sex with him, but it is obvious that is what he meant. He said she immediately got up and went into his bedroom. Notably, this was another substantial matter which not put to FN in cross examination. It should have been, because that is a key aspect of the defence case. Section 59 of the Evidence Act applies. I do not exclude Mr Kaltonga's evidence about why FN went into the bedroom, which I could do under s 59. I consider it is a matter of weight to be given to the evidence. I place little if any weight on Mr Kaltonga's denial that he told FN to go and sleep properly in his room, and that he asked her to go out with him. These are substantial matters not raised with FN in cross examination and should have been.
75. I make another point about the discussion in the sitting room. Mr Kaltonga was clear in his evidence that if FN had scolded him in the bedroom, his uncle would have heard from the opposite room. Mr Kaltonga's father was also in the house. It was about 5 am. Given that Mr Kaltonga was concerned that his father did not find out about the sex, I am unconvinced such a conversation would have taken place in the sitting room, where there was the potential for the conversation to be heard. And there is no evidence that Mr Kaltonga whispered to FN. So, I have difficulty believing Mr Kaltonga's evidence he asked FN to go out with him.



76. FN's evidence about what happened in the bedroom had a ring of truth to it. FN is an articulate person who gave a detailed and straight forward narrative about what she said happened. There was no sense at all that she had any axe to grind against Mr Kaltonga or his family. Her evidence was to the contrary. Her sense of sadness about the fractured relationships was palpable. She spoke respectfully about Mr Kaltonga's parents. When cross examined, FN also said she looked up to Mr Kaltonga. FN's evidence was very clear that family relationships are very important to her, in particularly her relationship with the Kaltonga family. In fact, the person she wanted to confide was Mr Kaltonga's mother, as she was very close to her. This was confirmed by Mrs Kaltonga. Of note, it was not FN's idea to go into the bedroom. She went straight to the couch. Then when she did go into the bedroom, she lay on the bedframe on some clothes. She did not lie on Mr Kaltonga's bed, the mattress on the floor. These things point FN away from going into the bedroom wanting to have sex with Mr Kaltonga.
77. FN was candid that after Mr Kaltonga had touched her, she did not leave the room. FN denied that she did not leave the room because she wanted to have sex with Mr Kaltonga. She made it clear to him that his actions were unwanted. She did push him away or punch him. She said they were like brother and sister, and she stayed in the room and talked to him about the fact they are related.<sup>12</sup> Her evidence about this discussion and timing of the conversation about the relatives was unchallenged, as FN was not asked about the conversation in cross examination. She said that they had been through a lot together. His parents were there for her parents. Not only that they were there for her and her sister. She that even when she was separated from her husband and returned to live in Port Vila, their home was what she called her home. In her mind, she was sure he would not do anything. It was her safe place. FN reiterated that when she was cross examined about why she stayed in the room after Mr Kaltonga touched her. She said they were like brother and sister. She regarded the Kaltonga house as her home and safe place. FN then went to sleep and knew nothing about the sexual intercourse. She remained firm in cross examination that Mr Kaltonga did not ask her to have sex and she did not agree to have sex with him.
78. In his evidence in chief, Mr Kaltonga was asked what happened in the bedroom. He was adamant FN consented to the sexual intercourse. For reasons which follow, I do not accept Mr Kaltonga's evidence about consent. Mr Kaltonga confirmed that when he went into the bedroom, FN went was lying on the bedframe, and he told her to sleep with him on his bed on the floor. She came down to him, and that is when they had sex. He said he asked if he could have sex with her and her responses was "*what about the*

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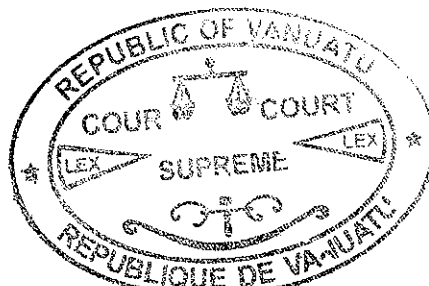
<sup>12</sup> See paragraph 48 above which details FN's evidence about the conversation with the relatives.



*relatives*". He said FN mentioned their names and his response was that it would be between them, and no one will know about it.

79. When cross examined, Mr Kaltonga's evidence about the timing of this conversation was different. In cross examination, Mr Kaltonga said that when she was questioning him, they were actually having sex. He reiterated that when FN questioned him, they were in the middle of having sex and if she wanted, she should have said that before it happened. But that was precisely Mr Kaltonga's evidence in chief. He then changed his evidence and said that at the point that FN raised family relationships with him, they were "*ready to finish everything*". Mrs Silememea did not explore with Mr Kaltonga what he took that conversation to mean in terms of consent.
80. Further, FN was not cross examined about Mr Kaltonga's narrative about the relatives conversation and should have been, as it was a substantial matter relevant to consent, so again s 59 of the Evidence Act applies. Thus, I place little, if any weight on Mr Kaltonga's evidence that the conversation about the relatives took place either before or during sex, given that FN was not cross examined about the timing of the conversation, and that Mr Kaltonga's evidence about the timing was internally inconsistent. There is no evidence there were two conversations, so it cannot have taken place both before sex and during sex.
81. I accept FN's evidence that the conversation happened after Mr Kaltonga touched her in a way she did not want. Firstly, as I have said, her evidence about the conversation and its timing was unchallenged. Secondly, her evidence had an air of reality. She was very concerned because they were related. That was the reason she did not want anything sexual to happen. Adding weight to that, was her evidence of her close relationship with Mr Kaltonga's mother, and the sense of sadness about the fallout since.
82. As well as the conversation in the sitting room, another key aspect of the defence case in relation to consent was that in the bedroom, Mr Kaltonga asked FN to "sleep with him" on his bed on the floor. FN then came down to the mattress on the floor which is when everything happened. This proposition was not put to FN in cross examination, and again should have been.
83. The cross examination of FN about consent was relatively brief. It was put to her that Mr Kaltonga asked her to go and lie on the mattress with him on the floor.<sup>13</sup> She denied

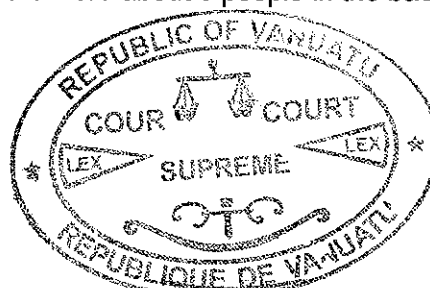
<sup>13</sup> Not sleep with him on the floor which was Mr Kaltonga's evidence



that. She said that was not what happened. She reiterated that Mr Kaltonga has called her inside to sleep comfortably on the bed. She said she had lay down to go to sleep on the bedframe when he told her to go and sleep comfortably on the mattress on the floor. Then it was put to FN that the defence case was that she did not leave the bedroom because she wanted to have sex with Mr Kaltonga. FN rejected that proposition and said that he did not ask her. Finally, it was put to her that the defence position was that she agreed to have sex with Mr Kaltonga, and that is when he undressed her. She rejected that proposition. As she said, she did not recall having sex with him, as she was asleep.

84. The defence case is that Mr Kaltonga asked FN twice to have sex with him – once in the sitting room and then in the bedroom when he asked her to sleep with him on the mattress on the floor. As I have said, neither of these matters were raised with FN in cross examination and should have been as they are substantial matters. Thus, I place little, if any weight, on Mr Kaltonga's evidence about these matters, given their importance to the issue of consent.
85. I assess FN's evidence that she was tired and went to sleep to have the ring of truth to it. In the defence closing submissions, Mrs Nari contended that FN's evidence that she was tired is implausible because she was, according to the defence evidence, talking loudly in the back of the ute, and continued with the festivities back at Siviri, and was still dancing at 5am, according to Mr Steel. It was Mr Kaltonga's evidence that FN was taking loudly in the back of the ute. That is not supported by Mr Steel, who said they were mumbling. FN's evidence was that she watched the dancing and was not challenged about that. Mr Kaltonga did not see her at the festive area as everyone was busy dancing and joining in the festivities. While I generally accept Mr Steel's evidence, his evidence about FN dancing was simply gratuitous and irrelevant to the essential elements of rape. If the dancing was relevant to the submission criticising FN's claim to be tired, then she should have been asked about it.<sup>14</sup>
86. FN's evidence was that when she got back to the house at about 5 am, she was tired. That evidence has a ring of truth to it. FN and Mr Kaltonga were part of a group that had been out socialising all night, so it is uncontroversial and explicable she would be tired.
87. The trip back to Siviri assumed significance during the trial. I have already set out the evidence given by FN, Mr Kaltonga and Mr Steel about the trip back. The three of them were in the tray of the vehicle. It was crowded. There were about 6 people in the back.

<sup>14</sup> See *Tui UK Ltd v Griffiths* [2023] UKSC 48 at 7



As FN said, she was sitting next to Mr Kaltonga, and did not know if they sat back-to-back because she went to sleep. She did not recall the conversation about Mr Kaltonga being her baby daddy or man, which was Mr Kaltonga's evidence.<sup>15</sup> Mr Steel did not hear the conversation, because the music was loud. He said they were mumbling and that he was not concentrating on them.

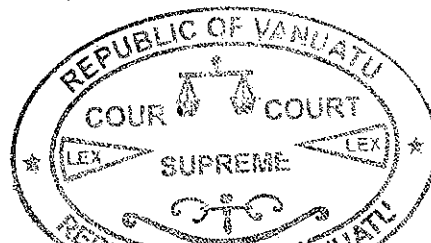
88. While the defence made a lot out of that asserted conversation, Mr Kaltonga's evidence about what he made of that was internally inconsistent. Initially in cross examination, Mr Kaltonga said that he knew that if FN was not interested in him, she would not say those things to him in the truck. Then further on in the cross examination, he said that "*all that talk was nothing*", when it was put to him that he only assumed from the conversation in the back of the vehicle that FN was interested in him.
89. Where there is a dispute between FN's evidence and Mr Kaltonga's evidence about material issues, I prefer FN's evidence for reasons given in assessing generally the credibility and reliability of FN and Mr Kaltonga's evidence. So, I do not accept Mr Kaltonga's evidence about the conversation. At most, the evidence shows that FN leant back on Mr Kaltonga, which FN said she did not know about because she went to sleep. I accept Mr Steel's evidence that FN lay back on Mr Kaltonga. But he did not hear what was said. And he was not asked if FN went to sleep or not on the way back. Whether or not FN lay back on Mr Kaltonga is not a material inconsistency. It is immaterial to either consent or belief on reasonable grounds in consent. Consent to sexual intercourse which took place 4 or 5 hours later, cannot be inferred merely from the fact that FN lay back on Mr Kaltonga during the trip home.

*FN's evidence generally*

90. FN's evidence was both internally consistent and consistent with other evidence. FN remained firm in cross examination that she did not consent to the sexual intercourse. Other evidence is not required to support FN's evidence, but it can help. The next morning, FN was sure that she and Mr Kaltonga had sexual intercourse. She was right about that, as Mr Kaltonga said they had sexual intercourse. FN's evidence is consistent with Mr Kaltonga's evidence in other respects- the hen's party, that the celebrations continued back at Siviri, that FN, he and another cousin walked back to the house, that FN went to the couch in the sitting room when they got back to the house, that Mr

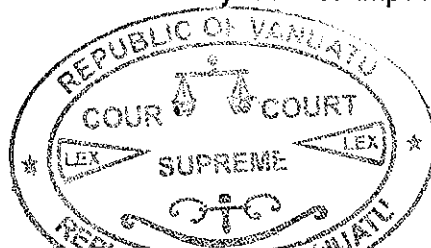
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<sup>15</sup> It is accepted that Mr Kaltonga is not the father of her children. This question was to demonstrate their close personal connection.



Kaltonga issued the invitation for FN to go into his bedroom ( although they differ as to why), that FN lay on the bedframe initially, that Mr Kaltonga was the one to tell her to move to the mattress, and that there was a conversation about them being related in the bedroom, and this was something FN was concerned about.

91. FN's evidence is consistent with Mrs Kanas's evidence that FN came to her and told her that Mr Kaltonga had touched her leg and that she woke up the next morning with her dress on, but not her shorts and panties. Her evidence is consistent with Mrs Kaltonga's evidence that she and FN had a close relationship. Mrs Kaltonga also confirmed that FN accompanied her one morning to morning devotion after the incident and that another person also joined them.
92. I accept that that there are some inconsistencies between FN's evidence and other witnesses. The obvious example being FN's evidence that she did not live at the Kaltonga home after the incident and until she left Siviri, which is inconsistent with other evidence. Both Mr Kaltonga and Mrs Kaltonga say that FN came and went from the house but was living there. I accept Mrs Kaltonga's evidence about that. FN says that she stayed up at the wedding area after that night, but did come and go from the house. It is a matter of assessing whether that inconsistency impacts on the credibility and reliability of FN's evidence. Sometimes inconsistencies can make a difference. It depends on whether it is a material inconsistency or not. Where or not FN stayed at the Kaltonga house after the incident is not a significant inconsistency. It is not relevant to the essential ingredients of the offence. It has no bearing on consent or belief on reasonable grounds in consent, which must be assessed at the time of the alleged events. I accept it could impact on the credibility of her evidence. Inconsistencies can happen even when a person is telling the truth. Mrs Nari contended that "*for someone who was assaulted, she remained in the same house for over a week*". What she is in effect submitting, is that FN remaining at the house is inconsistent with rape. I do not accept that inference. FN gave a very plausible explanation for her actions post the incident, as discussed at paragraphs 98 to 102.
93. There are other minor inconsistencies between FN's evidence and Mrs Kaltonga's evidence. For example, FN said she said hello to Mrs Kaltonga when she was sitting on the couch. Mrs Kaltonga agrees that FN greeted her but did not see her on the couch. It is irrelevant as to where FN was when she greeted Mrs Kaltonga that morning- but there is no dispute she did so. FN also said that Mr Kaltonga senior went to morning devotion whereas Mrs Kaltonga said that only she went. These are minor inconsistencies which are of no consequence whatsoever. They do not impact



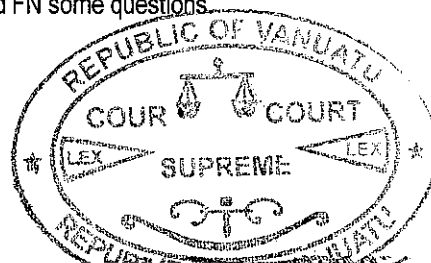
negatively on my assessment of the credibility and reliability of FN's evidence as these matters are not relevant to any of the essential elements of the offence.

94. Before relying on FN's evidence, I must be sure that it is not only credible, but that is reliable. I asked FN about her level of intoxication on a scale of 1 to 10.<sup>16</sup> She said on a scale of 1 to 10<sup>17</sup>, she was about an 8. So, I asked her if there was a possibility that she had consented to having sex with Mr Kaltonga but simply did not remember it. After all, a drunken consent is still a consent. FN remained adamant that she would not have consented. Not only can alcohol have a disinhibiting effect on behaviour, but can impact on memory and recall, and therefore the reliability of evidence. The defence position is that FN claims to have been very tired and intoxicated but had a detailed recall of what happened leading up the events in the bedroom.
95. FN said she had been drinking and was intoxicated. A person's self-assessment of the level of intoxication is subjective. FN did not shy away from the fact that she was intoxicated. Yet other evidence demonstrates that her recall of events in the immediate lead up to the alleged rape is accurate. FN said the group returned to Siviri to the wedding area and continued the festivities for some hours. This was confirmed by both Mr Kaltonga and Mr Steel. She said they greeted Mr Kaltonga's mother when they got to the house. Mrs Kaltonga confirmed that but more importantly, FN's evidence that when they went into the house, she went to the couch where she normally slept. Mrs Kaltonga did not see her on the couch, however, Mr Kaltonga confirmed that is what happened. While they might be a factual dispute between FN and Mr Kaltonga's evidence about why she went into the bedroom, it is common ground that she did go into Mr Kaltonga's bedroom and initially lay down on the bedframe, which had some clothes on it. Both FN and Mr Kaltonga's evidence was consistent on that point. Mr Kaltonga's evidence that FN then moved to the mattress on the floor supports FN's evidence that that was the case.
96. Mr Kaltonga also confirmed there was a discussion between them about FN's concerns that they were related in the bedroom. FN said that occurred after she felt Mr Kaltonga's hand touching her. She remained firm about this. While Mr Kaltonga's evidence about the timing and context changed, they both agree there was a conversation.
97. So, in his evidence, Mr Kaltonga confirmed the accuracy of FN's recall about a number of matters in the lead up to the alleged rape, as I have detailed. Therefore, I assess

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<sup>16</sup> I gave Counsel the opportunity to ask questions after I had asked FN some questions.

<sup>17</sup> 1 being sober and 10 being very drunk.

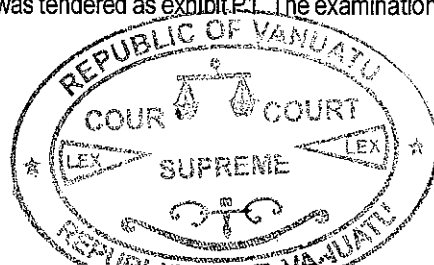


that while FN had been drinking, it did not affect her recall to the extent that her evidence is unreliable, and unable to be relied on.

98. FN did not make an immediate complaint either to someone she trusted or the police. Given the close family relationships, that is understandable. I assessed that she was genuine and authentic when she said that initially she did not have the courage to report Mr Kaltonga. FN was cross examined about the fact that she did not go for a medical check up immediately after the incident.<sup>18</sup> FN's response was compelling. She said she did not go because she was angry and confused. She also said she did not have the courage to go. This was because she did not know how a person she regarded as a brother do something like that to her.
99. FN also knew the one person she trusted, Mr Kaltonga's mother, was very busy as she explained. FN did however tell two people what happened, Ms Steel and her aunt Ericka Kanas. This is "*recent complaint*" evidence. However, I put to one side FN's evidence about her discussion with Ms Steel. That is because Ms Steel has been unable to be located, so did not give evidence.
100. As detailed at paragraph 53, Mrs Kanas about what she was told by FN about the incident - that Mr Kaltonga had touched her leg in the bedroom, and that when she woke up, she was not wearing her shorts and panties. It is important to remember that repeating something does not necessarily make it true. An untruthful person might continue to repeat the same lie, and a mistaken person, believing themselves to be correct, might repeat the error. Of course, a truthful person might also repeat their complaints. It is a matter of deciding whether the earlier statement to Mrs Kanas assists. I assess that what FN told Mrs Kanas shows consistency in her evidence, and I accept Mrs Kanas's evidence about that. Mrs Kanas demonstrated, as discussed below, that she did not come to Court to help the prosecution case. She had no empathy or concern at all about FN. While care needs to be taken about demeanour, Mrs Kanas's evidence was that FN was visibly upset when talking to her, congruent with it being a lived experience for FN.
101. Nothing turns on the fact that FN did not make an immediate complaint to a trusted family member, or that she subsequently saw Mr Kaltonga during this period of time after the incident. Mrs Kanas's evidence demonstrated how difficult it must have been for FN to tell someone and go to the police. In her evidence, Mrs Kanas showed no

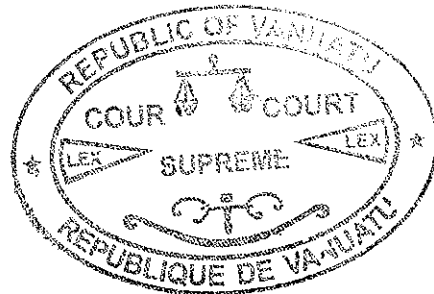
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<sup>18</sup> FN was medically examined on 8 October 2024. The medical report was tendered as exhibit P1. The examination was normal.



concern or empathy for FN, a family member who had come to her about a very personal matter. Her only concern was for Mr Kaltonga's mother. And then she told FN she had to tell her husband about what happened. FN had to repeat her narrative to another person, when she had not chosen to confide in, being Mrs Kanas's husband. Also, as FN said, here were practical considerations such as the wedding and that Mr Kaltonga senior was about to embark on RSE work overseas. If that was Mrs Kanas's reaction, it is hardly surprising FN delayed telling a trusted family member.

102. Mrs Kaltonga's evidence also sheds light on the fractured family relationships and the difficulties for FN in speaking up. Mrs Kaltonga said that with the incident that occurred, and being in Court, she could forgive FN, but the relationship will not be the same close relationship they previously had. Mrs Kaltonga, in her evidence, expressed her concern that she was not given the opportunity for the issue to be resolved by the chief in the village. She is entitled to that view, as under custom, such matters can be sorted out by the chief locally. That was an option for FN. However, it is a person's right also to report an alleged rape to police, and there can be no criticism of FN's decision to make a police report.
103. FN's narrative was plausible. She considered herself to be a part of the Kaltonga family. Previously, she enjoyed a close relationship with Mr Kaltonga's mother, confirmed by Mrs Kaltonga. She said she looked up to Mr Kaltonga. He was a family member. She went into the bedroom thinking nothing was going to happen. I accept her evidence that from her point of view, there was an innocuous reason for going into the bedroom. Her evidence about that is supported by the fact that it is common ground she went straight to the couch she usually slept on, and that it was Mr Kaltonga who suggested she go into his bedroom. It was not her idea.
104. FN's evidence that she did not want to have sex with Mr Kaltonga because they are related had the ring of truth to it. She was clear about that. Her concern that Mr Kaltonga had sexual intercourse with her while she was asleep is also plausible. She knew something was not right because she did not have her shorts or underwear on. But more importantly, Mr Kaltonga confirmed that they did have sexual intercourse.
105. As I have already said, while there are inconsistencies between FN's evidence and other evidence I have accepted, they are not material. They do not undermine either the credibility and reliability of FN's evidence overall, and are not material to the essential elements of the offence.

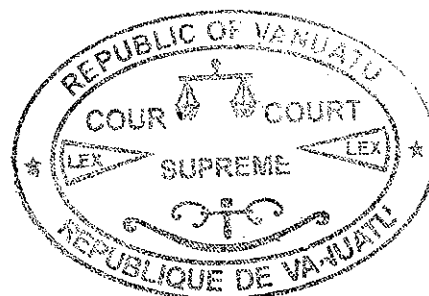


*Mr Kaltonga's evidence generally*

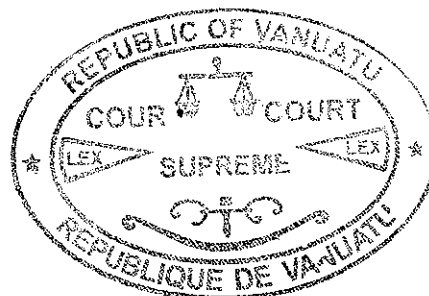
106. Mr Kaltonga chose to give evidence. He did not have to do so, or prove anything. It is for the prosecution to prove all elements of rape beyond reasonable doubt. However, Mr Kaltonga chose to give and call evidence. The defence evidence is to be put in the mix with all the other evidence, to be accepted or rejected, in whole or in part. If I accept Mr Kaltonga's evidence, then he must be acquitted. If there is a reasonable possibility that Mr Kaltonga's evidence is true, again he must be acquitted.<sup>19</sup>
107. Mr Kaltonga's evidence is consistent with FN's evidence in a number of respects as I have detailed. The issue though is whether I accept Mr Kaltonga's evidence that FN was awake when the sexual intercourse happened, which from Mr Kaltonga's perspective was mutually consensual. He said she did not protest or resist, which in the context of the factual disputes in this case, is irrelevant.
108. I have question marks about the credibility and reliability of key aspects of Mr Kaltonga's evidence, as I will now explain.
109. Firstly, there were a number of aspects of Mr Kaltonga's evidence about substantial matters relevant to consent, that FN was not asked about in cross examination, as I have detailed. To recap:
- a. Mr Kaltonga's evidence he asked FN to go out with him while she was sitting in the couch in the sitting room, and she immediately went to the bedroom. By that he meant that he asked her to have sex with him.
  - b. That he asked FN a second time in the bedroom to sleep with him on the floor which she did and then everything happened.
  - c. The conversation about the relatives in the bedroom, and in particular, the timing of the conversation.
  - d. That Mr Kaltonga in fact asked FN twice to have sex with him- in the sitting room and then again in the bedroom.

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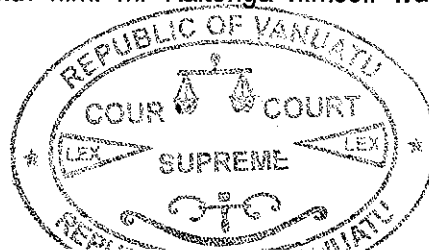
<sup>19</sup> See *Apia v Public Prosecutor* [2015] VUCA 30.



110. Therefore, I assess that Mr Kaltonga's evidence about FN going to the bedroom and what took place in the bedroom evolved. I place little, if any, weight on Mr Kaltonga's evidence about these matters, as FN should have been given the opportunity to comment on them, as they were substantial matters relating to the defence narrative about consent.
111. Where Mr Kaltonga's evidence is incongruent with unchallenged evidence given by FN, I reject it. For example, FN's evidence that Mr Kaltonga told her to go into the bedroom to sleep properly, and FN's evidence about the relatives' discussion, and when that took place.
112. I assess that a material inconsistency in Mr Kaltonga's evidence is the timing of the conversation about the fact they were related. In evidence in chief, Mr Kaltonga made it clear it was before they had sexual intercourse. In cross examination, Mr Kaltonga said that it was during the sexual intercourse and in fact, when they had nearly finished. As I have said, it had to be one or other time.
113. I do not find Mr Kaltonga's evidence that after FN raised the fact that they were related, he reassured her they would keep it between themselves to be believable. His evidence about that conversation does not have the ring of truth to it. I infer that Mr Kaltonga knew there should not have been sexual activity because they were related, which is why he left the bedroom. That is completely inconsistent with what I assess to be FN's genuine concern that nothing of a sexual nature should happen between them because they were related. For FN, the stakes were high. Not only was she living in the Kaltonga home, she had a close relationship with Mrs Kaltonga, which has now fractured. Mr Kaltonga himself, in my view knew it was wrong to have sexual intercourse with FN because of their close family ties. His evidence about why he left the bedroom was telling. In cross examination, it was put to him that he left the room because he knew what he had done to FN was wrong. He denied that. He said he left the room because he did not want his father and uncle to know he had sex with FN because she is a relative. That was precisely FN's rationale for not wanting anything sexual to happen between them.
114. What did ring true, is Mr Kaltonga's evidence that when FN got off the bedframe and laid down on the mattress on the floor, was that sexual feelings started to rise and he did touch her body.



115. It is true that Mr Kaltonga remained firm in his evidence that he asked FN for sex. It was put to him that he never asked FN for sex. His response was that that was not true. He said that if she had not agreed, she would have struggled and asked for help. He said that if she had not consented, other family members would have heard her. A lack of struggling or not calling out in and of itself does not mean that FN consented to the sexual intercourse, and is irrelevant, as this is not a case about whether FN struggled or not.
116. Overall, Mr Kaltonga's evidence that FN consented to the sexual intercourse is unconvincing for the following reasons:
- a. FN's actions, not in dispute, run counter to her going to the bedroom and wanting to have sex. She went to the couch in the sitting room, and when she went into the bedroom, she lay down on the bedframe, and not Mr Kaltonga's bed. She knew the mattress on the floor was his bed. It was Mr Kaltonga's idea for FN to go into the bedroom and to move from the bedframe to the mattress on the floor.
  - b. There is FN's unchallenged evidence Mr Kaltonga told her to go and sleep properly in the room, and FN's evidence about the timing of the discussion about the fact they were related.
  - c. I assess that Mr Kaltonga's evidence evolved, as I have said. Substantial matters were not put to FN and should have been. As I have said, I give his evidence about those matters, little if any, weight.
  - d. The internal inconsistency about the context and timing of the conversation in the bedroom about the relatives. There is the inconsistency between his evidence about FN being loud in the back of the truck, and Mr Steel's evidence about mumbling. These are not minor inconsistencies. They are material inconsistencies because they are relevant to the defence position about consent and belief on the reasonable grounds in consent.
  - e. I assess that aspects of Mr Kaltonga's evidence are not believable. One example is Mr Kaltonga's evidence about the discussion about being related in the bedroom, and FN's concern about that. There is the obvious point that his evidence about the timing changed. But also, given FN's concern about relatives having sex, I cannot accept that his assurance they would keep it to themselves, would have reassured FN, to go ahead and agree to have sex with him. Mr Kaltonga himself was



concerned about the family relationship. He left the bedroom to keep it hidden that he had sexual intercourse with FN. Another example is Mr Kaltonga's evidence he asked FN to go out with him (have sex) in the sitting room, where there was the possibility others in the house could have heard. This is based on Mr Kaltonga's evidence that others would have heard FN in the bedroom is she protested.

117. I put to one side the key aspects of Mr Kaltonga's evidence for the reasons given. Where it is consistent with other evidence I have accepted, I accept his evidence. But that does not mean that Mr Kaltonga is guilty.

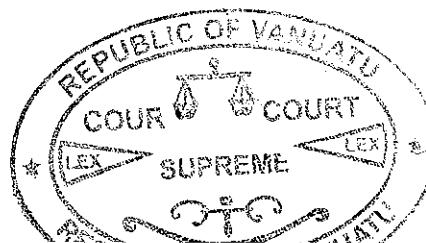
118. What I must do is to assess whether based on FN's evidence, I am sure that she did not consent. I have already set out in detail why I accept FN's evidence relevant to consent. FN had gone into the bedroom at Mr Kaltonga's bedroom at his invitation to sleep properly. Before that, she went straight to the couch where she usually slept. Then when she did go into the bedroom, she lay down on the bedframe rather than on Mr Kaltonga's mattress on the floor. When he touched her in a way she did not want, she told him off. FN's evidence about why she remained in the bedroom is plausible. But more importantly, I have accepted FN's evidence she was tired and went to sleep. They had been partying all night. She was asleep at the time of the sexual intercourse, and did not know Mr Kaltonga had sex with her. FN did not consent to the sexual intercourse in the bedroom, as she was asleep and knew nothing about it. She did not give a valid consent.

119. Therefore, I am sure FN did not consent to the sexual intercourse.

**I am sure that Mr Kaltonga did not believe on reasonable grounds that FN was consenting at the time he penetrated his vagina with his penis?**

120. As the Court of Appeal in *McEwen v Public Prosecutor* [2011] VUCA 32 said, when assessing the reasonableness and honesty of the belief of a defendant it must be looked at within its total context.

121. I will consider whether Mr Kaltonga could not reasonably have believed FN was consenting. If I am sure that a reasonable person standing in Mr Kaltonga's shoes would not have believed FN was consenting, that would be enough. This is to be assessed at the time of the sexual act. The evidence in relation to the consent is relevant and



applicable to this issue. It is a matter of considering all the relevant circumstances and seeing what inferences can be drawn from the evidence.

122. I have accepted FN's evidence that she did not consent because she was asleep. She did not give a valid consent. FN had gone into the bedroom at Mr Kaltonga's bedroom at his invitation to sleep properly. Before that, she went straight to the couch where she usually slept. Then when she did go into the bedroom, she lay down on the bedframe rather than on Mr Kaltonga's mattress on the floor. When he touched her in a way she did not want, she told him off. All of these things point away from a belief on reasonable grounds in consent.

123. Relevantly, I have accepted FN's evidence she was asleep at the time of the sexual intercourse, and did not know Mr Kaltonga had sex with her. In those circumstances, no reasonable person in Mr Kaltonga's shoes would have believed FN was consenting. There was nothing about her actions before she went into the bedroom or while she was in the bedroom that could lead to a reasonable belief in consent. For the sake of completeness, the fact that FN lay back on Mr Kaltonga in the truck on the way back to Siviri, some hours earlier, cannot inform a reasonable belief in consent, in and of itself. It is a long bow to infer a reasonable belief in consent from that .

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

*na*  
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Justice M A MacKenzie

