

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

**Criminal**  
**Case No. 24/2149 SC/CRML**

**PUBLIC PROSECUTOR**

**v**

**SAM MARIAWA**

Date of Trial: 13 March 2026  
Date of Verdict: 1 April 2026  
Before: Justice M A MacKenzie  
Counsel: Public Prosecutor – Mr M Kalwatong  
Defendant – Mr R Melsul

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**VERDICT**

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**Introduction**

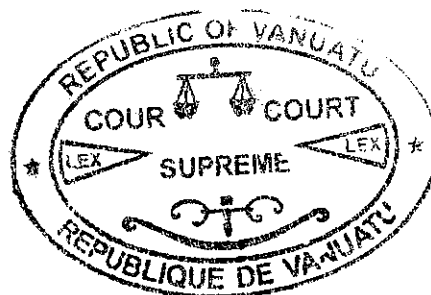
1. Mr Mariawa faces a charge of sexual intercourse without consent.<sup>1</sup>

**Brief background**

2. The complainant, MR and the defendant, Mr Mariawa were married, and lived in Loutapus village, Tanna. Mr Mariawa left MR and started a new relationship with another woman.
3. The prosecution case is that on 4 April 2020, Mr Mariawa visited MR at her garden at Loutapus village and forced her to have sexual intercourse.

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<sup>1</sup> contrary to ss 89A, 90(a) and 91 of the Penal Code [CAP 135]



4. The defence case is that Mr Mariawa was elsewhere that day. In advance of the trial, he gave notice of an alibi. Mr Mariawa's position is that between February and September 2020, he was living at Iapkasip village, some distance from Loutapus, and did not return at all during that period of time.

#### **What is the prosecution required to prove in this case?**

5. Because there is an alibi defence, in this case, the prosecution is required to prove the following:
  - a. That Mr Mariawa was present at the garden at Loutapus on 4 April 2020.
  - b. That there was sexual intercourse.
  - c. That MR did not consent to the sexual intercourse.
  - d. That Mr Mariawa did not believe on reasonable grounds that MR was consenting at the time the intercourse occurred.<sup>2</sup>
6. An alibi defence means that Mr Mariawa asserts he was not in Loutapus at the time, and so did not rape MR. The prosecution must prove Mr Mariawa's guilt beyond reasonable doubt. That means I must be sure of his guilt. Mr Mariawa does not have to prove he was elsewhere at the time. On the contrary, the prosecution must disprove the alibi. And even if I decide the alibi is false, that does not of itself mean that Mr Mariawa is to be convicted. The prosecution evidence must be considered independently and if there is reasonable doubt as to Mr Mariawa's whereabouts, he must be acquitted of the charge.<sup>3</sup> I must be sure that Mr Mariawa was at the garden in Loutapus on 4 April 2020.
7. If I am not sure that Mr Mariawa was at the garden at Loutapus that day, then I must find Mr Mariawa not guilty. But if I am sure of Mr Mariawa's presence at Loutapus, then I must then consider the elements of rape to decide if the charge is proved.

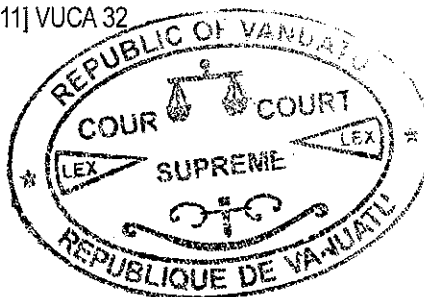
#### **Submissions**

8. At the conclusion of the evidence, I gave counsel an opportunity to file written submissions, which I have considered and taken into account.

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<sup>2</sup> The elements of rape are set out in *McEwen v Public Prosecutor* [2011] VUCA 32

<sup>3</sup> See *R v Lucas* CA 141/01, 23 August 2001 at [9] and [11]



## **Burden and standard of proof**

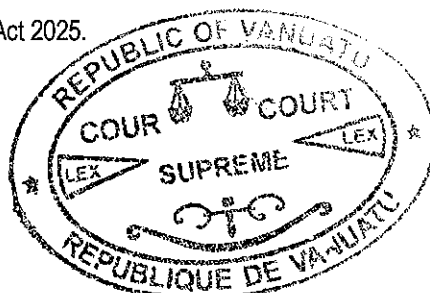
9. The prosecution has the onus of proof and is required to establish the elements of each charge beyond reasonable doubt before a finding of guilt can be made in respect of the charges. This excludes consideration of any possibility which is merely fanciful or frivolous.<sup>4</sup>
10. Proof beyond 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 Mariawa is guilty. What then is reasonable doubt? Reasonable doubt is an honest and reasonable uncertainty about Mr Mariawa's guilt after giving careful and impartial consideration to all the evidence.
11. Mr Mariawa 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.
12. This was confirmed to Mr Mariawa prior to the prosecution opening its case. I read the statement required by s 81 of the Criminal Procedure Code aloud to Mr Mariawa in English. The statement was then translated into Bislama.

## **Approach to assessing the evidence**

13. This case turns on the credibility and reliability of MR, and her evidence. The prosecution case stands or falls on her evidence. While Mr Mariawa had no obligation to give evidence, he chose to do so. So, his evidence will also need to be assessed, but notably he does not have to prove anything.
14. The prosecution case is that MR told the truth about Mr Mariawa having nonconsensual sexual intercourse with her in her garden. The defence case is that MR has not told the truth about this incident. 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, particularly when being asked to recall events which occurred many years ago. 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.

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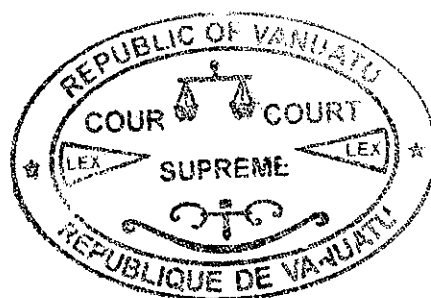
<sup>4</sup> Section 8 of the Penal Code [CAP 135] and s 11 (1) of the Evidence Act 2025.



15. 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.
16. It is important that before relying on evidence, I am able to conclude that it was honestly given, but also that it is reliable.
17. 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.
18. Demeanour is a small part of my assessment of a 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. There does not have to be, but sometimes other evidence helps. Corroboration in relation to alleged sexual offending is no longer necessary in Vanuatu.<sup>5</sup>
  - e. the inherent plausibility and coherence, or not, of the witness' account. Does it make sense?
  - f. does the evidence have the ring of truth to it?

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<sup>5</sup> s 17 of the Evidence Act 2025



19. It is important that I consider the evidence of each witness 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.
20. 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**

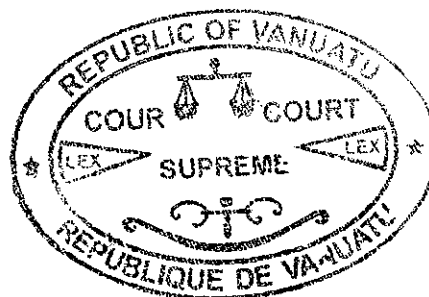
21. MR gave her evidence in a closed Court. The trial took place at the Court in Tanna. The Court is an open air building, so there is no practical means of closing the Court. I had also made a direction for a screen. Because KJ's evidence was given in the Magistrate's office, to ensure there was a closed Court, a screen was impracticable. So, Mr Mariawa was seated just outside the door, but close enough to hear the evidence. There are various alternative ways for a witness to give evidence, including closing the Court. Others are the use of a screen or an AVL link.<sup>6</sup> The purpose of these types of measures is to ensure that a vulnerable witness is able to give the best quality evidence they can. Such measures say nothing about a defendant and no adverse inference is to be drawn against Mr Mariawa because MR gave her evidence in this manner.

### **Prejudice and sympathy**

22. This is a case involving rape of a vulnerable woman who had been married to the defendant. These allegations are serious and might give rise to feelings of sympathy for the complainant and prejudice against the defendant. 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 verdicts on each charge.

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<sup>6</sup> See s 51 of the Evidence Act 2025

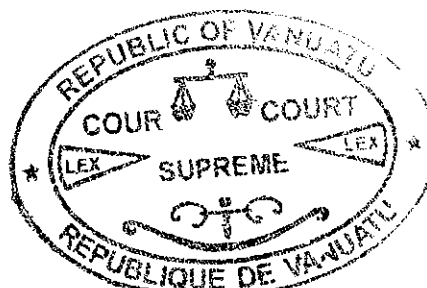


### **Mr Mariawa's position**

23. Once the prosecution case concluded, the s 88 statement was read aloud to Mr Mariawa in English. It was translated into Bislama. Mr Mariawa elected to give and call evidence.
24. The fact that Mr Mariawa gave and called evidence does not change who must prove the allegations. The prosecution has that task, and Mr Mariawa 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?
25. If I accept what he says, then obviously the proper verdict is not guilty because he will not have done what the prosecution says he did.
26. 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 Mariawa says seems a reasonable possibility, the prosecution will not have discharged its task, and I must find him not guilty. If I disbelieve Mr Mariawa'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 Mariawa's guilt to the required standard?

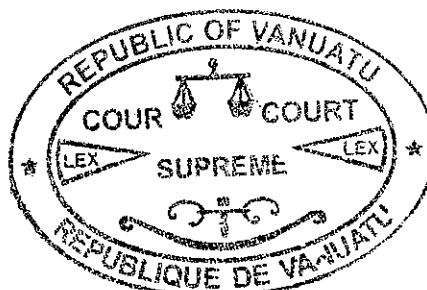
### **Was Mr Mariawa present in the garden at Loutapus with MR on 4 April 2020?**

27. MR and Mr Mariawa had been married and have 8 children, but as at April 2020 were no longer together. Mr Mariawa left the marriage and started living with another woman. This has distressed MR.
28. I start with the defence evidence. As I have said, Mr Mariawa is not required to prove anything. He is not required to prove that he was elsewhere on the day in question. However he chose to give and call evidence, and that evidence must be assessed. Mr Mariawa is a confident, controlling man. He is educated and articulate. He is the chief in his community and took over that responsibility when the head chief in the community died.
29. Mr Mariawa said that he and his new wife moved to lapkasip village in February 2020 and remained there until September 2020. The purpose of moving to lapkasip was for a big custom ceremony. Mr Mariawa's new wife comes from lapkasip village. Between March and September 2020, Mr Mariawa said he and his wife were busy with practicing for a toka dance ceremony. He explained that toka dance is for the men and that the ladies perform nabanaban. They built a house and during those seven months, Mr



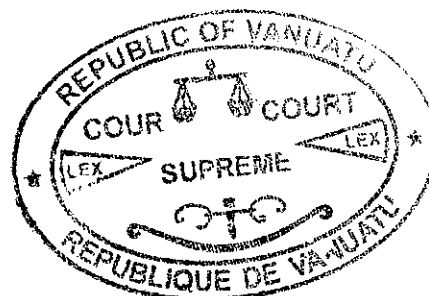
Mariawa said he did not set foot in Loutapus until they moved back to Loutapus in October 2020.

30. Mr Mariawa said he was at lapkasi on 4 April 2020. Specifically that Moses Nauka and the other people performed a toka dance. Mr Mariawa and his wife and others were teaching the woman the nabanaban dance. Practice took place between 8am and 2pm. Then usually at the end of every practice, they had kava at lapkasi nakamal. He said he did not go anywhere else that day. He made the point that the distance from southwest Tanna to Loutapus is quite a long distance away. Mr Mariawa denied meeting with MR that day, so there is no chance he was at Loutapus.
31. Mr Mariawa also called evidence. His wife Mary Kautah gave evidence. Consistent with Mr Mariawa, she said she was in lapkasi village in April 2020. However, in contrast to Mr Mariawa, she said that on 4 April 2020 she was at their home in the village. She said she was there with Moses Nauka, the children and Mr Mariawa. They were preparing food to take to the toka ceremony. She said it took two days to prepare food for the toka ceremony. She said she stayed home on 4 April 2020. She confirmed that Mr Mariawa was with her all the time. She also confirmed that they lived in lapkasi village between February and September 2020. She said he did not return to Loutapus during that time.
32. Mr Mariawa's daughter in law Sana Tavo Patanamil also gave evidence. In April 2020 she was at Loutapus. She was at home with her husband. She said that no one came and visited them in April 2020. She said that Mr Mariawa was at lapkasi on 4 April 2020 as they went there for nabanaban. Sana said she stayed at home the whole day on 4 April 2020. She did not see Mr Mariawa that day because she was at home. MR was at home with them that day too. She said that MR went to the garden and then came back home. When Sana was asked if she agreed that she would not know if Mr Mariawa approached MR at the garden, Sana backtracked. She said that maybe she made a mistake that MR went to the garden. She said she was at home with her and her partner. In re-examination, Sana said that she had lied when she said MR went to the garden on 4 April 2020. She said she did not go to the garden. She was also asked about her evidence that she had made a mistake about MR going to the garden. She was asked why she said that? Sana was unable to answer that question, simply saying she made a mistake.
33. I reject that the defence evidence. All three witnesses told lies. Mr Mariawa and his wife could not get their stories straight. Mr Mariawa said they were out practising all day, whereas his wife said that they were home all day and that Mr Mariawa was with her. They cannot have been in both places at once.
34. Mr Mariawa and Ms Kautah's evidence about the responsibilities of a chief was unconvincing. It is implausible that having taken on the role of a chief, that Mr Mariawa left his community for seven months and did not return. Mr Mariawa said when cross-



examined that his role as a chief in the village is to make sure there is no dispute in the village and that peace and unity prevails at all times. He was asked if he agreed that a chief must always be with his people and his community. Mr Mariawa did agree but said *"that was in times when there is an issue. In other times, a chief is free to go anywhere you wished"*. That might be so, but not for seven months and completely leave the community alone. Without being present in person, he could not fulfill the very responsibilities he told the Court about.

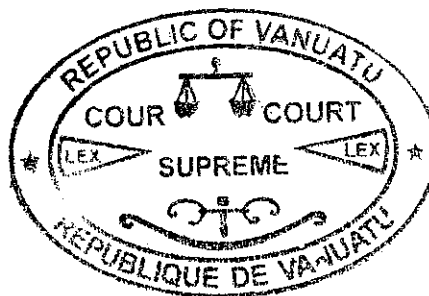
35. Neither Ms Kautah and Sana are independent witnesses. Ms Kautah is his wife and Sana is his daughter in law. They both clearly came to Court to support Mr Mariawa, and were prepared to be untruthful. While Sana was giving evidence, I was alerted to the fact that she kept looking to Mr Mariawa for guidance. I reject Sanna's evidence given her conflicting and confusing evidence about whether MR was in fact in the garden on 4 April 2020. Firstly, she said she was, and then she walked back on that, presumably when she realised that would not assist Mr Mariawa. She then said she lied and or was mistaken. A mistake is one thing but a lie is a completely different thing.
36. For the reasons set out above, Mr Mariawa and the defence witnesses are liars. I put their evidence to one side.
37. I must now return to the prosecution case, and whether I am sure about Mr Mariawa's presence in the garden at Loutapus on 4 April 2020?
38. MR confirmed in cross examination that Mr Mariawa and his new partner moved to lapkasip village in February 2020 and were no longer living in Loutapus. MR said she knew Mr Mariawa was staying at his wife's place at lapkasip village at that time. She agreed that Mr Mariawa lived continuously at lapkasip village between February and September 2020. She went on to add that although he was living at lapkasip village, he sometimes stayed in Fetukai, sometimes for a couple of days. When he leaves his wife at lapkasip, she said he lied to her that he is coming back to her and the children.
39. MR said that on 4 April 2020, Mr Mariawa approached her in her garden in Loutapus village. Her name for the village is Fetukai. She said Fetukai and Loutapus are the same village. At the garden, Mr Mariawa started removing her clothes in the garden. She was wearing trousers, a skirt and a shirt. After he removed her clothes, Mr Mariawa had sexual intercourse with MR. She felt afraid and had a lot of pain in her body. MR confirmed he inserted his penis into her vagina.
40. MR was asked about reporting the incident to the police. She was candid when she agreed she made the police report because she was unhappy and jealous, and the reason she said Mr Mariawa raped her on 4 April 2020.



41. MR said that Mr Mariawa was in the garden at Loutapus on 4 April 2020, both in evidence in chief and cross examination. But during cross examination, MR also gave contradictory evidence. Firstly, she agreed it was true that Mr Mariawa was not in Loutapus that day, when that proposition was directly put to her. Secondly, it was also put to MR that Mr Mariawa was at lapkasip village on 4 April 2020. She also agreed with that proposition. Her evidence was "Yes, Sam was at lapkasip". MR's evidence that Mr Mariawa was not in Loutapus that day and was in lapkasip is in contradiction to her evidence given before and after that he was in Loutapus and had sexual intercourse with her.
42. Giving evidence was challenging for MR. She is an unconfident woman who was embarrassed. She struggled to articulate herself when asked to talk about the sexual intercourse. She does not speak Bislama and gave her evidence in her local dialect. She did not know how old she was. My impression is that MR probably had no to limited education, but there was no evidence about this. Mr Kalwatong tried to ask MR about the contradictory evidence in re-examination. He asked MR why she agreed that Mr Mariawa was not at Loutapus on 4 April. She was unable to explain the contradiction. Her response was that Mr Mariawa was at Loutapus because of the incident.
43. In re-examination, MR was asked about making her statement to police. It was given in her local dialect and translated by a person who was with her. MR confirmed she had a problem understanding Bislama, and said she had a sickness that affected her. She said she did not understand hearing or speaking. Unfortunately, it was not clarified with MR as to whether this related to hearing and speaking Bislama or generally. MR's statement does not form part of the evidence so the relevance of the difficulty in speaking Bislama is unclear, as MR gave her evidence in a local dialect. Counsel asked questions in English, which were translated into MR's local dialect.
44. There was other prosecution evidence relevant to the question of whether Mr Mariawa was in Loutapus on 4 April 2020. Mr Moses Nauka gave evidence. He is from lapkasip. He said that in 2020, he was in lapkasip and he did not see Mr Mariawa. He was in lapkasip in April 2020. He also said he did not know Mr Mariawa because he is from Middle Bush and neither recognised his face nor had met him before. Mr Nauka was singularly unhelpful to the prosecution. It was contradictory in the sense that first of Mr Nauka said that he did not see Mr Mariawa in lapkasip and then went on to say that he did not know Mr Mariawa and had never met him before.
45. Two statements were admitted by consent. Mr Willie Iauwimam said in his statement that in April 2020, Mr Mariawa was not at lapkasip village at that time, which he clearly remembers.<sup>7</sup> The statement also contradicts MR's evidence that Mr Mariawa left Loutapus village in February 2020 and went to live in lapkasip village. So, it does not

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<sup>7</sup> This statement was tendered as Exhibit P1.

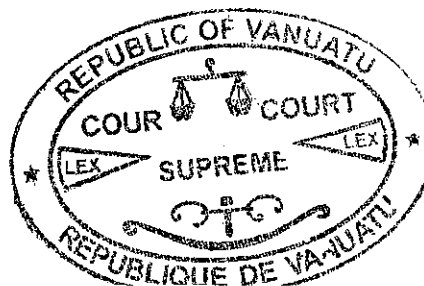


assist much either. There was also a statement of Wiang Mass tendered by consent.<sup>8</sup> Mr Mass said that Mr Mariawa came from Iapkasip and was looking for people to perform custom dance, but there were no people, so he went to the garden and raped his first wife. MR came and reported to him that Mr Mariawa raped her and told him to follow her to report the incident, but he did not. He said Mr Mariawa was at Loupukas at the time when he raped MR.<sup>9</sup> Mr Mass did not say in his statement whether he had actually seen Mr Mariawa or not or whether his presence was reported to him by MR. So, I am not sure from the statement if Mr Mass saw Mr Mariawa himself that day, or whether he was simply reporting as he was told by MR. His evidence then does not overly assist the prosecution.

46. In summary, the supporting prosecution evidence is not much help for the reasons explained.
47. I come back to MR's evidence. On the one hand, MR gave evidence that Mr Mariawa approached her in the garden at Loutapus on 4 April 2020. Then in cross examination, intentionally or otherwise, she walked back on that evidence and agreed that he was not there that day. She also agreed that he was at Iapkasip village at the time. While her evidence that Mr Mariawa was not at Loutapus is contradictory, it does not necessarily undermine the credibility and reliability of her evidence, particularly if there is an explanation for the contradictory evidence. For example, that MR was confused by the questions. Mr Kalwatong was unable to explore with MR why she said Mr Mariawa was in Loutapus, and then agreed that Mr Mariawa was not at Loutapus and that he was at Iapkasip that day. In making that observation, there is no criticism at all of Mr Kalwatong who did his best to try and clarify the evidence. MR did not explain, but rather simply said he was at Loutapus.
48. So, I am left with a rather unsatisfactory state of the evidence. And the evidence in re-examination about MR not understanding Bislama does not help. As I said, it was not clear whether MR's evidence about hearing and speaking relates to Bislama, or generally. Without an explanation as to why the evidence differed about Mr Mariawa's presence at Loutapus on 4 April 2020, I cannot speculate. While it is possible MR was simply confused, I am unable to draw such an inference. It was a straightforward question and I had no contextual evidence about MR's education, literacy levels or comprehension.
49. I am left in a position where I think it is highly likely or highly probable that Mr Mariawa was in the garden at Loutapus on 4 April 2020, and raped MR. I have rejected Mr Mariawa's evidence. But beyond reasonable doubt is a very high standard of proof, and

<sup>8</sup> This is Exhibit P2.

<sup>9</sup> Mr Melsul tried to suggest to the Court that Loupukas is a different village. Nothing turns on it, but it appears more likely that it is simply a typographical error and he was referring to Loutapus, given his evidence that MR came and reported the rape to him.



I must be sure. Given the conflicting state of the evidence about Mr Mariawa's presence that day, which was not satisfactorily explained, I cannot be sure of his presence at the garden at Loutapus.

50. Therefore, Mr Mariawa must be acquitted of the charge. It is unnecessary for me to consider the elements of rape given that I cannot be sure that he was at the garden at Loutapus on 4 April 2020. The prosecution was required to prove that beyond reasonable doubt.

### Result

51. Given that I cannot be sure about Mr Mariawa's presence in the garden at Loutapus that day, for the reasons given above, I find Mr Mariawa not guilty of the charge of sexual intercourse without consent.

**DATED at Port Vila this 1st day of April 2026  
BY THE COURT**

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Justice M A MacKenzie

