

PUBLIC PROSECUTOR
V.
STEWART MCEWEN

Coram: Justice D. V. Fatiaki

Counsels: Mr. B. Standish and Mr. G. Takau for the State
Mr. D. Thornburgh for the Accused

Date of Decision: 26 August 2011

VERDICT

1. On 7 September 2010 the accused Stewart McEwen was arraigned on an information of the Public Prosecutor which charged him with a single offence as follows:

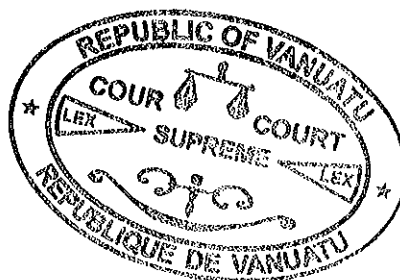
"Statement of Offence

**SEXUAL INTERCOURSE WITHOUT CONSENT CONTRARY TO
SECTION 90 (a) OF THE PENAL CODE ACT [CAP. 135]**

Particulars of Offence

That on or about the 30th day of July 2010 at Havannah Harbour, North Efate, STEWARD MCEWEN had sexual intercourse with Jules Aekins without the consent of the said Jules Aekins and knowing, or being reckless, that she did not consent to the said sexual intercourse".

2. The accused pleaded "**NOT GUILTY**" and the matter was fixed for trial from the 19th to the 22nd of October 2010. The trial formally ended with closing submissions on 28 October 2010. I regret that it has not been possible to deliver this verdict earlier owing to my absence in Fiji for the Christmas vacation last year and during the early part of this year.

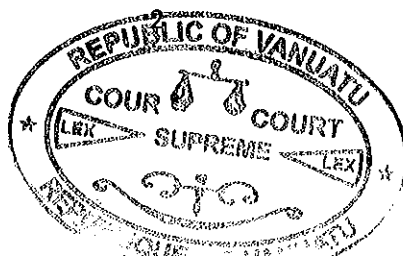


3. Before the prosecution case commenced, **Section 81** of the **Criminal Procedure Code [CAP. 136]** was read and explained to the accused. That sections reads:

"In every criminal trial in which a plea of not guilty has been entered, the judicial officer presiding shall, before the prosecution case is opened, read aloud to the accused the following statement of the presumption of innocence –

"In this trial you will be presumed to be innocent unless and until the prosecution has proved your guilt beyond reasonable doubt. It is not your task to prove your innocence. If at the end of the trial, any reasonable doubt exists as to your guilt, you will be deemed to be innocent of the charge and will be acquitted"

4. The above statement conveniently encapsulates several important features of criminal trials in this country including the following:
5. **Firstly**, that the prosecution alone has the burden of proof in a criminal trial. In other words the prosecution has the sole burden and duty to prove its case on the charges laid against the defendant i.e. to prove the guilt of the defendant. The corollary is that the defendant need not call any evidence or prove his innocence.
6. What this means is that the prosecution must produce evidence which establishes each and every element of the offences charged against the defendant beyond reasonable doubt and if, at the end of the trial, there is a reasonable doubt about an element or ingredient of the charge then the Court is bound to find the defendant not guilty of the charge even, if other elements of the particular charge has been established beyond reasonable doubt.
7. The **second** feature is that the standard of proof which the prosecution must attain in order to establish or prove the guilt of the defendant is proof beyond reasonable doubt. If at the end of the trial I have a reasonable doubt about the defendant's guilt then it will be my duty to give the benefit of the doubt to the defendant and acquit him of the charge.
8. Having said that it is important to bear in mind that the standard of proof is **NOT** proof beyond all doubt and furthermore, the doubt which the court must have or entertain must be a reasonable doubt and **NOT** a merely fanciful or frivolous doubt that would be unreasonable for the court to entertain.
9. The **third** feature of the presumption of innocence is that the defendant has **NO** onus or duty to prove his innocence or call any evidence. He is perfectly entitled



to plead "*not guilty*" and thereafter, remain mute, but, of course, in this case the Defendant elected to give sworn testimony and called a witness in his defence and I am obliged to consider that evidence with the same care that I apply to the prosecution's evidence.

10. In this particular case as already outlined the accused faces a single charge of **Sexual Intercourse Without Consent**. The elements or ingredients of the offence which the prosecution must establish beyond a reasonable doubt are:

(a) The accused **Steward McEwen** had sexual intercourse with the complainant **Jules Aekins**;

(b) Sexual intercourse took place without the consent of **Jules Aekins**; and

(c) The accused at the time knew that **Jules Aekins** did not consent to sexual intercourse with him or was reckless as to whether or not the complainant **Jules Aekins** was consenting to sexual intercourse with him.

11. As to the **first** of the elements or ingredients of the offence, the accused admitted as much in his sworn evidence, and at the commencement of the trial, stipulated through his counsel, that sexual intercourse did take place with the complainant Jules Aekins on the 30th of July 2010. In light of that admission I find and am satisfied beyond a reasonable doubt that the accused Stewart McEwen did have sexual intercourse with Jules Aekins on the night of 30th July 2010.

12. As for the **second element** or ingredient of the offence, there is little agreement in the evidence and is vigorously denied by the complainant who maintained that she had not consented to the accused Stewart McEwen having sexual intercourse with her on the night in question.

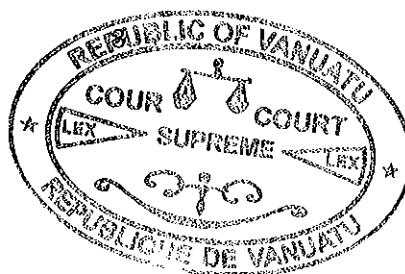
13. In this regard the complainant's evidence in chief was as follows:

"I came to Vanuatu on 28 July on a Wednesday flight. I received a call from my sisters a Fijian lady married to my dad had a brain tumour and so I came to see her. I have friends from school also.

I stayed with my friends at Pacific Lagoon Resort on Pango road. Samantha Johnson manages the resort.

On Thursday 29 July I was at Hospital with my 2 sisters. We went out that night to the Waterfront with Samantha Johnson and her husband Tony Robinson. Met Donna Jeffrey and Andrew Colautti. I remember seeing Peter Davies there with his wife and a dentist, don't know his name. That was the second night I was here.

Samantha said we had been invited to a party at Havana Bay at Andrew Colautti's property. I went to Havana Harbour.



People were swimming on the beach and eating and drinking. I went on Friday morning at 11am and stayed there for 2 nights.

First night everyone talking having a good time and talked with Andrew Colautti and we agreed to spend the night together.

Talked from 7pm and spent the night together in a guest room. I had a nice time. I liked him. I slept there.

Next day I got up came back to town with Samantha to get some supplies Samantha drove. I remember we had to get to town before groceries shop closed so it was about 10am. Spent two hours in town and drove back to Havana.

Everyone still drinking, talking and swimming. I can't be exact but about twenty people were there. I knew four or five people there who I'd met the night before.

Everyone having a good time a nice vibe. My relationship with Andrew was I liked him and wanted to spend the night again with him.

We were drinking a lot of mixed drinks, wine, vodka, beers. I did not take any other drugs or stimulants.

The party went to about 10pm. I was intoxicated but happy.

I didn't know the accused. Had no conversation with him and was not aware of his presence.

I went to bed at 10pm. I was very drunk but Andrew and I had agreed to meet and spend the night together.

Bedroom I was in was to the left of the entrance of the house. A single storey house. Same room I slept in the previous night.

I went into room jumped into bed and passed out.

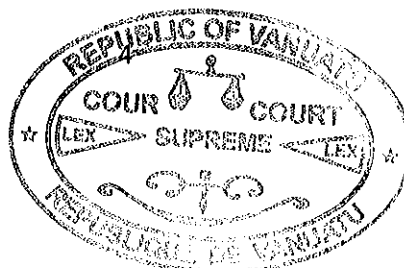
Q: Recall dressed or undressed?

A: I went to bed naked.

Q: Recall stayed awake?

A: I went to sleep straight away.

Q: Next recollection?



A: I kinda came to and I rolled over and "Andrew" was next to me and we started having sex ... It was Andrew (**witness gestured 2 raised fingers' on each hand**) until I found out it wasn't.

Q: Any conversation?

A: No

Q: What happened?

A: We had oral sex and we had intercourse penetration from behind. Penetrated of my vagina.

There was no conversation at all till the end. I said to "Andrew": **"I've been waiting to be with you all night"**. He said **"just a glance across the room"**. I was horrified as I did not recognise the voice.

My blood was cold. I froze. Then he got up and I put the light on to see who the person was it was pitch black. I had a sheet on and I sat on the bed to see this stranger I was so disgusted because I didn't know who he was.

I screamed at him **"you bastard, you fucking bastard, get out of here"** and he said **"I'm going, I'm going"** and he ran out.

The man having sex with me was naked. He grabbed his clothes by the door and ran out of room naked.

I put on my dress and went to the party to see my friend Samantha and I said to her "I need to talk to you something bad has happened".

I told her **"I just had sex with someone I didn't know I thought it was Andrew"**.

I couldn't identify the person who had sex with me but he was tall had sandy hair and a big belly.

I had a shower cause I felt disgusting and wanted to get clean. I stayed at Havana Harbour.

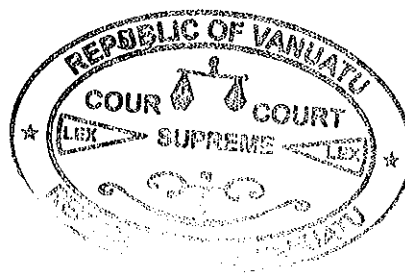
The following day we returned to Vila. It was Sunday and I made a complaint on Monday or Tuesday.

Q: Give consent to the man who had sex with you that night?

A: No

Q: Have any conversation with **Stewart McEwen** at the party?

A: No."



14. In cross-examination the complainant admitted drinking a lot of alcohol before going to bed on the night of 30th July. She was sure that before going to bed she and Andrew Colautti had agreed to spend the night together as they had done the previous night.
15. She did not consume any illicit or prescription drugs nor did she see the diet drug Duramine at the party that night. She agreed that the room in which intercourse took place was 'pitch black' and that a person would not have been able to see his or her own hand held up at arms length. She confirmed that the room was the same room that she had spent the night in with Andrew Colautti the previous night. She agreed that Andrew Colautti is lean, slim built and quite small.
16. When questioned about her relations with Andrew Colautti on the previous night, she said:

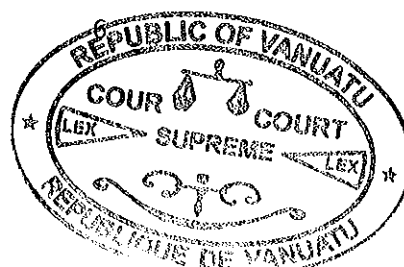
"I was in Andrew's company for 7 hours and had sex for about 1 hour.

Q: *What activities?*

A: *Sexual intercourse not oral sex, missionary position. Me on my back with Colautti on top of me. Yes he kissed me. I remember I had tears because he was so good kind and gentle.*

Andrew had me in his arms for 6 hours whilst I was asleep."

17. The complainant admitted that she had apologised to Andrew Colautti the next day about being teary during the night before because *"I felt so nice to be held because I had been celibate for a long time."* She maintained under cross-examination that she had agreed to spend the night again with Andrew Colautti although she couldn't be sure at what time during the night they had agreed. In this belief the complainant is supported by Andrew Colautti who, although seemingly distancing himself from the complainant on the day of the incident, nevertheless admitted that she expected him to come to the room that evening.
18. The complainant was questioned closely about how sexual intercourse took place on Saturday night. She denied that she had fondled or touched the man's genitals or initiated sexual intercourse. She admitted waking up aroused, turned over and started having sex. She admitted she kissed the man because *"I am a tactile person"* but couldn't remember more details as she was floating in and out of a drunken comatose state.
19. She recalls that the man penetrated her vagina and performed oral sex on her and likewise she on him. She accepted that the accused and Andrew Colautti were *"nothing alike in physique"* and that the sex on Saturday night was *"a bit rougher but it didn't occur to me I would have a stranger in my bed"*.



20. In conclusion the complainant was asked a series of questions in cross-examination which she answered as follows:

*"Q: Night before you had sex with lean man
A: I wasn't thinking a lot that night.*

*Q: If Colautti behind you your actions would have been consensual?
A: Yes.*

*Q: Every action you made that night would have been consensual if it was Colautti?
A: Yes.*

Q: What was accused's thinking at the time?

**BS: Object how can witness know accused's thought?
Ct: Upheld rephrase.**

A: I consented to Andrew. I thought it was Andrew. Why would I consent to accused?

*Q: There was nothing you did that night that would give accused any idea that you weren't consenting.
A: Yes.*

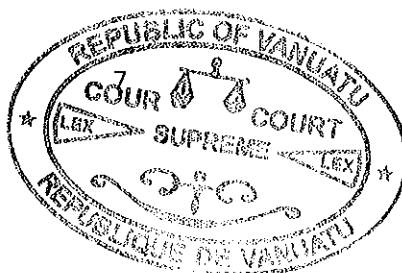
*Q: Would you agree that an ordinary person could have honestly been mistaken?
A: No no man with integrity would think that walking into a stranger's room. Yes I agree.*

*Q: Suggest to you that is exactly what happened. Accused went into the room thought it was someone else and lay down on the bed beside you.
A: If he thought it was Donna he would have apologised to me. I say no he didn't think it was Donna Jeffrey.*

*Q: Put when he lay beside you, you rolled over and initiated sex?
A: No.*

*Q: Put to you that when you rolled over there was no indication to the accused you weren't consenting?
A: Yes with Mr. Colautti.*

Q: When you turned the light on you were ...



A: It was both. I heard his voice and he got up to leave the room. I think he got up to go to the toilet and I got up and turned on the light.

Q: At time you screamed at him the accused did nothing more?

A: Yes the accused at that point grabbed his clothes and left saying "I'm going, I'm going", left quickly.

I went down and got my friend Samantha and went to her room. She put me in the shower and we went to my room.

Q: The man did not force you in anyway?

A: Slightly rougher I had bruises on my arms the next day.

Not in my statements I was in shock. The police saw it and photographed it.

Q: Put bruises on your arm were not the result of accused's sex with you?

A: No not from night before sex with Mr. Colautti.

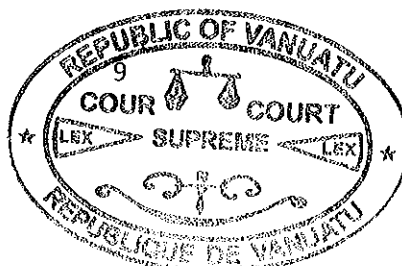
Q: Seen Mr. Colautti since the incident?

A: Yes, I have the following Friday at Pacific Lagoon."

21. Noticeable by its absence, is any questioning of the complainant as to the accused's state of dress or undress at the commencement of or during their sexual relations that evening nor was there any suggestion to the complainant that she had either initiated or helped in any way in undressing the accused. On her evidence, which I accept, "the man having sex with me was naked".
22. I confess to having considerable difficulty with this second element of the offence and, in particular, with the complainant's answers in cross-examination which clearly establish that she was a willing participant to all of the sexual activities that occurred on the bed on the evening of 30 July 2010, but, she claims, she was mistaken as to the identity of the person with whom she had performed those very intimate sexual acts.
23. Is her claim credible? And is it even feasible to consent to the act and not the actor? In other words is the act of sexual intercourse so plainly one which inevitably involves a second person such that it would be unreal or pure sophistry to attempt to separate the act from the actor?
24. In summary, the prosecution submits that to establish absence of consent it is only necessary to consider the complainant's evidence, and, in this regard, the complainant's evidence is clear and unequivocal that she did not consent to the accused Stewart McEwen having intercourse with her.



25. Although the submission is unobjectionable as far as it goes, I am not obliged to accept the complainant's evidence uncritically or in isolation from the factual matrix and context in which the question is being considered.
26. Additionally, the Court is required to be satisfied beyond a reasonable doubt as to the absence of consent which necessarily entails a consideration of all of the evidence including the accused's testimony before arriving at a conclusion on this essential element or ingredient.
27. Defence counsel submits that in the absence of a definition, "*consent*" should be given its ordinary, natural meaning of "*acquiescence, agreement*".
28. In considering this second element or ingredient of the offence I have carefully considered the competing written and oral submissions of both prosecuting and defence counsel and all of the evidence. I have also considered the cases referred to in counsels submissions and provided to the Court and I am persuaded and prefer the prosecution's submissions.
29. In my view what is required by **section 90(a)** of the **Penal Code** under which the accused is charged is proof beyond reasonable doubt that the sexual intercourse that occurred between the accused and Jules Aekins was without Jules Aekin's consent in the sense that she was a willing participant in the sexual activity that took place **and**, most importantly, in the particular circumstances of this case, that she knew the identity of the man actually having intercourse with her. In other words that she consented to the accused Stewart McEwen having sexual intercourse with her.
30. In my view, it is **not** enough to say that the complainant willingly took part in sexual intercourse, in addition, she must know and agree to the identity of the person with whom sexual intercourse is taking place. Consenting to one and not the other is **not** enough for the purposes of the section.
31. I accept that the complainant was genuinely mistaken as to the identity of the man having sexual intercourse with her on the night in question at the time that it occurred and it was only after intercourse had finished and she heard his voice that she realised her mistake.
32. I accept that the accused and Andrew Colautti are visibly different both in physical stature and in appearance but, given the very limited visibility in the room during the relevant time; the absence of any conversation during the course of the incident; the fact that the parties were lying on a bed most of the time; the particular nature of the sexual acts which were mainly performed with the complainant either on top of the accused or facing away from him; and finally, the inebriated sleepy state of the complainant, I remain firmly of the view that the complainant was genuinely mistaken as to the identity of the man who was having sexual intercourse with her on the night of 30 July 2010.



33. I accept the complainant's evidence that she did not consent to the accused Stewart McEwen having sexual intercourse with her on the night of 30 July 2010 and I find that the prosecution have established beyond a reasonable doubt that Stewart McEwen had sexual intercourse with Jules Aekins without her consent.
34. In this regard I note the distress of the complainant immediately after the incident which was clearly described by Samantha Johnson in the following terms:

"At about 2 am I was talking with Irma and Rick when Julie came down in a state of heightened emotion and called out my name. She was crying. She beckoned me out of the bar area and she was quite hysterical and she just said to me: 'I just had sex with a complete stranger'. I said 'talk me through what happened'. ... she sensed someone was in bed with her and started having sex with the person and part way through she realised it wasn't who she thought it was.

She said it was a man. The description she gave me was a large man, sandy coloured hair and big belly. I eventually guessed it was the accused by elimination ...

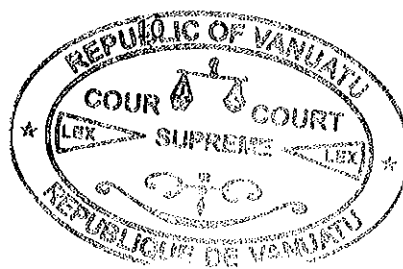
Next day 9 am Jules woke me and she was very distressed so I suggested we should return to Vila."

35. In similar vein Donna Jeffrey who was also awake at the time said:

"I went to bed at 4.30 am. 3 others still up, Irma, Lance, Rick Byrnes. Samantha went to bed not long before me. About 1 – 2 am Jules came down to where we were sitting and she was visibly crying. At the time Sam and I were having a video interview."

Earlier Donna Jeffrey had admitted being a friend of the accused and having often massaged him for an injury on a "purely professional" basis. She only briefly spoke to the accused during the evening and she was quite sure that she had not displayed any closeness towards anyone else at the party other than her boyfriend Lance. She was not questioned about whether she would have agreed to sexual intercourse with the accused that night.

36. In cross-examination Donna said that she wouldn't be alarmed if the accused lay next to her on a bed at a party and, even if he were naked, it wouldn't have bothered her. However, she was in a close intimate relationship with Lance at the time which they publicly displayed and which "was common knowledge". She spent the night with Lance at Havana.
37. I am satisfied from the foregoing evidence which I accept, that the complainant's distressed condition observed immediately after the incident in the bedroom with the accused, was genuinely held and not the result of her emotional nature nor

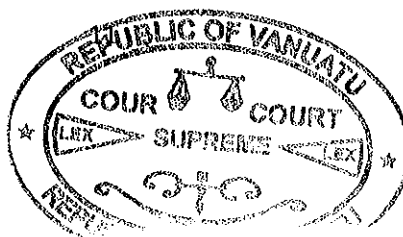


was it contrived to gain sympathy, or simulated as a result of any guilt or shame on her part. It constitutes, in my view, significant corroboration of the absence of consent on her part to the sexual activity that occurred with the accused.

38. I turn next to consider the third and final ingredient or element of the offence namely, that Stewart McEwen knew that Jules Aekins did not consent to sexual intercourse with him or was reckless as to whether or not she was consenting to intercourse with him.
39. After the Court decided that the accused had a case to answer, **Section 88** of the **Criminal Procedure Code [CAP. 136]** was read aloud to the accused as follows:

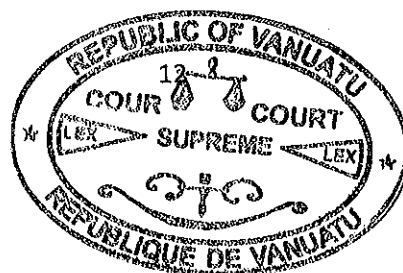
"In making your defence in this trial, you are entitled, in addition to calling other persons as witnesses, to give evidence yourself on your own behalf, upon oath or affirmation and subject to cross-examination by the prosecution. However you are not obliged to give evidence and may elect instead to remain silent. If you do not choose to give evidence, this will not or itself lead to an inference of guilt against you."

40. The accused elected to give evidence on oath on his behalf and called Andrew Colautti as a witness.
41. In his evidence-in-chief the accused testified that he did not know the complainant Jules Aekins but thought that he may have been introduced to her a year ago by Samantha Johnson when he had visited her to talk about refurbishing the Pacific Lagoon Apartments. He knew Donna Jeffrey from his home town of Lake Taupo where she was a real estate agent and he met up with her again in Port Vila 8 or 9 months ago.
42. He confirmed that he had a ni-Vanuatu partner Kathy Kalo and they had been living together for about 18 months and in July 2010 they were still together and very strong.
43. He admitted hearing Kathleen Lawlor's evidence and accepts that he had a fairly lengthy discussion with her about his partner's problem with having lengthy periods of bleeding imbalance but, he firmly denies telling Kathleen Lawlor that he had not had sex with his partner for 3 months. He states that he had told Kathleen Lawlor that his partner had been having her bleeding problems for 3 months. He testified that sex was an important part of his relationship with his partner and that they had had sex 2 days before him going to Havana.
44. The accused testified that he knew Andrew Colautti very well, that he first got to know him 2 years ago when he did some design work for a lodge Andrew was planning to build. He had managed the project for 1 year and the lodge was now built and was called "El Dorado". He was still doing some work for Andrew and

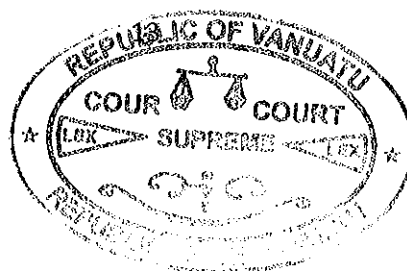


on Saturday the 30 July 2010 he had gone to Andrew's place at Havana to discuss the location and siting of a toilet block that he had designed for him and to attend a party being held there. He arrived at between 4 to 5 p.m. with his business partner Doug and his foreman Louis. Their discussions with Andrew lasted for over an hour and ended at about 6.30 p.m. The accused testified that he had brought a case of 24 Tusker beers and a ¼ litre bottle of Bourbon and some coke. During the meeting he had consumed 4 – 5 tusker beers and after the meeting he returned to the restaurant area where the party was in progress,

45. The accused described the various people he recognised at the party including Tony who runs Fresh Cargo and Samantha Johnson who runs Pacific Lagoon Apartments. Irene or Irma Clifford who was like a sister to him and John Patterson for whom he had built a display home 4 years ago. There was Rick Byrnes a local musical acquaintance of his that he had known for 3 years.
46. The accused also testified that Donna Jeffrey who was also at the party, had given him 5 – 6 professional massages, out of a suite set-up at Breakas Resort. He would go to her every 2 – 3 months as he had hurt his back in a waterskiing accident. He described Donna Jeffrey as 5'6" – 5'7" tall about 70kg in weight of medium build with collar length hair.
47. In his evidence the accused testified about his movements and actions during the course of the evening, including, having a roast lamb dinner and going to Andrew's house to watch an All Blacks v. Wallabies rugby match only to realise that it was not on and so he returned to the party. At one point he recalls seeing the complainant Jules Aekins sitting on a long table across from him.
48. On returning to the party the accused had a couple of drinks of bourbon and coke during a fairly lengthy discussion about the arrangements for the Music Fest 2011. Then there was a bit of singing with John Patterson and Rick Byrnes. By then people had started drifting off. The accused eventually left the party at about 11.45 p.m. after he had drunk a total of 8 tuskers and 5 bourbon and cokes.
49. The accused went up to Andrew's house to get some sleep. He tried one room and heard someone say "**room taken**". Then he checked in another room but it had someone's towels and belongings already in it. Eventually he looked inside the front left room and saw the outline of someone in the bed. He had no idea who it was.
50. The accused said he entered the room, shut the door and went and lay down beside the person in the bed and was facing the wall. He had no thoughts of who it was, he just wanted to sleep. As he was dozing-off an arm came over his upper torso. He thought the unknown person "**wanted a cuddle**". He rolled over on his back and the person came towards him and started touching and kissing him sensually on the mouth. At this stage he thought the person was Donna Jeffrey. He removed his shirt and the kissing continued then the person started to push his trousers down and he helped in removing his shorts with his right hand.



51. The accused then described in some detail the sexual acts that took place between him and the person including mutual oral sex and sexual intercourse with the person sitting astride his penis and facing away from him and finally "**doggy style**". He suffered cramps on both occasions and eventually stopped to get a glass of water. He put on his shorts and left the room and went to the kitchen where he drank 2 glasses of water and returned to the room with a glass of water for his still unknown sexual partner. By then, the light in the bedroom had been turned on and when he entered and saw the person in the room he was in "**shock horror**". It was the complainant who said to him "**get out you bastard**" and he replied "**holy shit you were not who I thought you were**". The accused testified that all along he had thought that the person he was having sex with was Donna Jeffrey. He thought this from the person's body shape and size.
52. When he was told to get out he grabbed his shirt beside the door and went to his truck parked outside and spent the rest of night in it. He woke up the next morning at about 6.30 a.m. and went to the bar area to collect his esky and he helped in cleaning up the tables, bottles and glasses. He left at about 7 a.m. and drove back to Port Vila.
53. **Section 12** of the **Penal Code** states:
- "a mistake of fact shall be a defence to a criminal charge if it consists of a genuine and reasonable belief in any fact or circumstance which, had it existed, would have rendered the conduct of the accused innocent"*.
54. and **section 10** of the **Penal Code** relevantly provides:
- "If a person charged with the commission of a crime pleads any defence by which he may exculpate himself if he proves certain facts, it shall be sufficient for such person to prove the same on the balance of probabilities"*.
55. and finally **Section 9** of the **Penal Code** reinforces the burden and standard of proof imposed on the prosecution in any criminal trial which is:
- "... the burden shall rest upon the prosecution to disprove beyond reasonable doubt any plea of mistake of fact which has been sufficiently raised by the defence as an issue"*.
56. The Vanuatu Court of Appeal had occasion to discuss the above provisions in **Ishmael v. PP** [2005] VUCA1 and the Court endorsed the process by which section 12 operates as follows:
- "(a) the accused must satisfy the Court that the defence of honest and reasonable mistake is 'sufficiently raised' then, if so;*



(b) *the prosecution must negative the defence by proving beyond a reasonable doubt that either:*

(i) *the accused did not genuinely believe [that the complainant consented]; or*

(ii) *the belief of the accused [that the complainant consented] [ie a reasonable man standing in the shoes of the accused would not have believed that the complainant consented]."*

57. In summary, the Court of Appeal said:

"The critical question is whether at that time and under those circumstances (when sexual intercourse occurred with the complainant) the prosecution has proved beyond reasonable doubt that (the accused) did not genuinely believe that the complainant consented or that a reasonable man standing in his shoes would not have believed that the complainant consented"

58. and later the Court said:

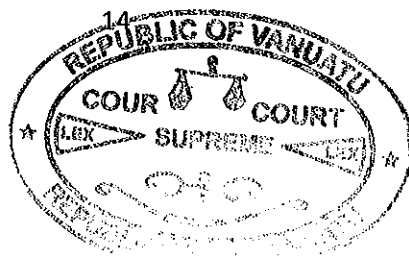
"When assessing the reasonableness and honesty of the belief of [the accused] it must be looked at within its total context."

59. Defence counsel forcefully submits that there can be no doubt in the Court's mind that **Section 12** of the **Penal Code** was sufficiently raised by the defence not only in the cross-examination of the complainant, but also, directly, in the accused's own evidence in chief.

60. Prosecuting counsel, from a close examination of the particular fact about which the accused claims he was mistaken, namely, that the woman with whom he was engaged in sexual intercourse was Donna Jeffrey, submits, equally forcefully, that a mistake as to the identity of the woman was not a mistake which necessarily would have rendered sexual intercourse with the woman "*innocent*".

61. In other words even if the woman with whom the accused had sexual intercourse that evening turned out to be Donna Jeffrey, that would still not make intercourse with her consensual given the nature of the undisputed evidence before the Court about Donna's "*seriously loved-up*" relationship with Lance and the very public display of that relationship when compared with her purely platonic/professional friendship with the accused.

62. While there is much force in prosecuting counsel's submission, after careful consideration I am satisfied, on a balance of probabilities, that the accused has sufficiently raised the defence of honest and reasonable mistake as an issue and



I turn next to consider whether the prosecution has discharged its burden in terms of **Section 9** of the **Penal Code** (op. cit).

63. In this regard defence counsel's forthright submission is:

"... for the prosecution to succeed in disproving mistake of fact they need to prove beyond reasonable doubt that Ms. Jeffrey would not have had sex with Mr. McEwen on the 30th of July in the circumstances before the Court. If this evidence is not adduced then the prosecution must fail in proving of the elements. The question was not asked by the prosecution and definitely not asked by the defence".

64. Prosecuting counsel submits however:

"... that the accused (when he left the party to sleep) knew full well that Ms. Jeffrey was still in attendance at the party and was not therefore the woman who was asleep in the bed in the guest room he entered immediately before engaging in sexual intercourse".

and later,

"... the accused had no reasonable grounds for holding a belief that the complainant was Donna Jeffrey or that, even if it was Ms. Jeffrey, that she would consent to having sexual intercourse with him without knowing his identity. It is further submitted that no reasonable man standing in the shoes of the accused would have believed that the complainant was Ms. Jeffrey or that, if it was, she would consent to having sex with him without knowing his identity. Both tests of reasonableness have been negative by the prosecution".

65. I turn next to consider some of the accused cross-examination answers recorded as follows:

Q: *This claim you thought it was Donna in the bed is false?*

A: No

Q: *You had no basis to conclude it was Donna Jefferies?*

A: Yes I did.

Ms. Lawlor said she saw Jules in the bed. Barely could see who was on the bed.

Q: *Suggest you knew full well it wasn't Donna?*

A: No.

Q: *You targeted a visitor to Vanuatu?*



A: No.

Q: *By closing door it was pitch black?*

A: *Yes it is very dark.*

Q: *You took no steps to identify yourself to this person?*

A: *Neither did she to me.*

Q: *You had no conversation with any female or with Donna to have sex that evening?*

A: No.

Q: *That person had no chance of knowing your identity?*

A: *The room was pitch black yes.*

Q: *Even if Donna was in bed she would not consent to sex with you?*

A: *I can't answer that it's hearsay.*

Roughly body shape, form and size. I don't honestly know how many men or women were there.

Andrew was coupled-up off and on with Francheska. I don't recall her being there or seeing her. I played for her birthday party.

Q: *You knew relationship status of friends?*

A: *Most but I deny knowing about Donna and Lance.*

Seen Donna in company of other men at the Waterfront but I don't ask about their relationship status.

Q: *Are you insinuating Donna is promiscuous?*

A: *No she has...*

Q: *That's why you say that she would agree to have sex with you?*

A: *I can't know or say that nor I propositioned her to that effect or vica versa so no possibility of sex.*

Q: *How do you say the person asleep and woke in a pitch black room? How could she ...*

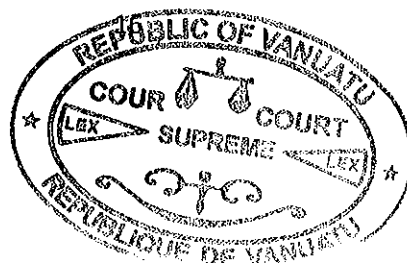
A: *Shape, size.*

Q: *Aekins gave you sexual signals?*

A: *No nor did we speak at all.*

Q: *Suggest you knew Jules on the bed?*

A: *If I did I would not have gone anywhere near her.*



Q: You did not identify yourself so you could have sex with woman and sneak out.

A: Absolutely false I deny.

I didn't know I did not have consent to have sex with the complainant.

Sgt. David Saravana treated me fairly. I had no complaints. There is nothing I recall was not said. He had pre-prepared questions and typed my answers as I gave them. He gave me an opportunity to read and sign the document.

Q: It is the same document. He did not create it?

A: I can't recall. He came with the document and said he had a problem.

Q: You didn't freshly sign each page or backdate the document you signed at the end?

A: Yes, all alterations were made on 9 August and dated then.

Q: You have the education, architect so when you answer and sign that is the answer you gave. Q56 on 6 August **your answer is recorded: 'I don't say anything ...'?**

A: Yes I said that.

No I wouldn't necessarily correct it on 6 August. I was in shock after being arrested. New experience. Didn't know what to do. I was given those rights I did not understand fully what was going on.

Have 1 university degree. I can read English. That is my signature beside the caution.

Q: On 9 August you were given chance to change your answers? Suggest the first conversation after sex was when Ms. Aekins said to you 'I've been waiting ...'

A: No, she didn't she said 'Get out! Get out!'

Yes I had my penis in her vagina in the room and no conversation.

Q: Suggest you never said do you want some water?

A: Not true.

Q: Put you never said?

A: I did.

Q: Suggest Ms. Aekins was first to speak?

A: Not said I disagree.

Q: You said in reply 'Just a glance across the room'?



A: Not correct.

Q: What did you do with the glasses?

A: I took one back to the room.

I returned to the room she told me get out. I didn't get a chance to say sorry. She told me to get out and I did.

I didn't speak to anyone else at the party because I was shocked.

Re: text messages sent to Sam Johnston because Andrew said there was talk of Sam and Jules going to police or New Zealand High Commission to lodge complaint and I text her for a meeting to clear things up.

I had in mind to do an airing. I don't sleep with strangers.

Q: You had no basis to conclude that person not waiting for someone else?

A: Thought had never crossed my mind.

Q: Accept person could have wanted to sleep alone or with an intended partner?

A: Don't know.

Q: Even if it was Donna she could be waiting for her partner?

A: Thought had not crossed my mind. No I could be sure.

Q: Before things got out of hand, penile penetration, you had many opportunities to identify yourself?

A: I suppose so.

Q: Why didn't you check to see who it was?

A: I don't know.

Q: Wouldn't it be reasonable to check who it was before things got out of hand?

A: I don't know.

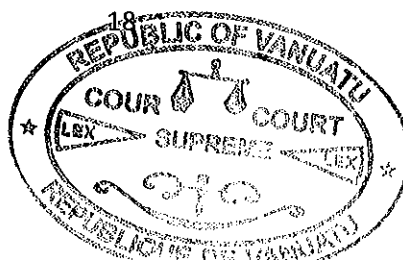
Q: Suggest that is what a reasonable person would have done?

A: Are you calling me unreasonable?

BS: "At this stage yes."

Big parties and things happen. Someone came on to me and I partook I was a victim, yes.

Q: You knew that person did not consent to sex with you?



A: No.

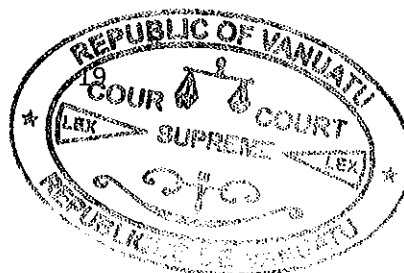
Q: You had no genuine belief that this person was Donna Jefferies?

A: I thought it was Donna.

Q: Even if you believe that it was still not reasonable to make that assumption?

A: Yes."

66. In considering the evidence on this final element or ingredient of the offence with which the accused is charged, I remind myself as did defence counsel in his submissions, that this is not a court of ethics or morals nor am I called upon to comment on the accused's sexual prowess or determine the level of his fidelity towards his partner.
67. I am satisfied and I accept that the evidence establishes the following contextual matters beyond a reasonable doubt:
- (a) That for all intents and purposes, the accused and the complainant were strangers to each other on the night of **30 July 2010**;
 - (b) That there had been no social interaction between the accused and the complainant at the party on the night of **30 July 2010** and most certainly **no** prior arrangement to sleep together or engage in sexual relations that evening;
 - (c) That the complainant was intoxicated when she left the party and went to sleep in a vacant guest room in Andrew Colautti's house;
 - (d) That the complainant was asleep naked on the bed and was expecting Andrew Colautti to later join her in bed that night;
 - (e) That on his own admission the accused by-passed an empty bedroom before approaching the bedroom in which the complainant was already asleep;
 - (f) That the accused saw the occupied bed, entered the bedroom, closed the door, and lay on the bed beside the complainant;
 - (g) That the bedroom with the door closed was pitch black with almost no visibility;
 - (h) That there was no conversation between the accused and the complainant until after sexual intercourse had finished;



- (i) That immediately after the accused left the bedroom, the complainant was seen at the bar area crying and in a distressed state;

68. The **Penal Code** also relevantly provides in **Section 6 (3)**:

"A person shall be considered to be reckless if –

(a) knowing that there is a risk that an event may result from his conduct or that a circumstance may exist, he takes that risk; and

(b) it is unreasonable for him to take it having regard to the degree and nature of the risk which he knows to be present."

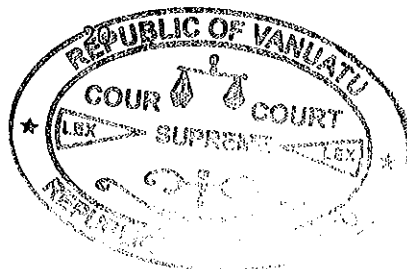
69. In the present case there is not the slightest doubt in my mind that the accused's conduct in knowingly and intentionally entering the occupied bedroom on the night of 30 July 2010 and lying down in an already occupied bed, was fraught with uncertainty and risks, including, that the sleeping occupant might be male and naked and might be expecting a partner to join him in bed for sexual relations.

70. Perhaps the best evidence of the "risks" involved was when the unknown occupant of the bed without saying anything to the accused placed a hand over his upper torso and began to make sexual advances towards him.

71. The accused's reactions, thoughts, and actions towards these uninvited sexual advances, as exemplified in his answers in cross-examination speaks volumes. They left me with the distinctly unfavourable impression about his sincerity and credibility. I found him to be evasive, argumentative, and cavalier in his demeanour and answers which struck me as untruthful in several respects. In matters of conflict between the accused and the complainant I have no hesitation in preferring the evidence of the complainant who I found a credible witness not given to evasiveness or embellishment.

72. I am satisfied beyond a reasonable doubt that it was entirely unreasonable for the accused to have taken the risk of lying uninvited, in an already occupied bed, and then, in allowing matters to escalate beyond a platonic "cuddle" into a heavily sexual encounter without ever identifying himself to the person making those uninvited sexual advances towards him.


73. I do not accept that the accused honestly and genuinely believed that the complainant Jules Aekins was consenting to sexual intercourse with him. Nor do I accept that the accused's actions, thoughts and reactions and especially his omissions were those of a reasonable man who believed the complainant was consenting to sexual intercourse with him.



74. Paraphrasing the Court of Appeal in **Ismael's** case, it defies common sense or logic for the accused to assert that, without a word or gesture, he could honestly believe that the complete stranger that he was lying beside, uninvited, on the same bed in a pitch dark room, would consent to lengthy sexual relations with him without even knowing his identity. Furthermore, had the accused turned his mind to the very real possibility that that person might have been expecting someone else in the bed that night, he could never have honestly believed that without identifying himself or making the briefest of inquiry, that the person would have and was consenting to sexual intercourse with him.
75. Needless to say I reject the accused's claim that he, too, "*was a victim*" of the events in the bedroom that night. Likewise I reject the appellation in his police caution interview that this was "... *a classic case of mistaken identities*". As prosecuting counsel submits "*It is not a situation where a woman sleeping in the privacy of her room, was obliged to make enquiries of the interloper. As the person who decided to lie down on an already occupied bed, and to engage in sexual intercourse with the person who was already there, the duty to enquire was that of the Accused*".
76. Much was made in defence counsel's submissions that it was the complainant who had initiated or instigated the sexual activities on the night and that the accused was, presumably, merely reacting to it albeit willingly. In my view in the particular circumstances of this case, even if that were the true position (upon which the evidence is equivocal) it would still not necessarily establish that the complainant consented to sexual intercourse **with the accused**.
77. In conclusion I am satisfied that the prosecution have proven each and every element of the charge brought against the accused beyond a reasonable doubt and, accordingly, I find the accused **Stewart McEwen** guilty of the offence of **Sexual Intercourse Without Consent** as charged in the information.
78. Pursuant to **Section 94** of the **Criminal Procedure Code** I am obliged to inform you that you have a right to appeal this verdict, which you may exercise by lodging a Notice of Appeal in the Court of Appeal within 14 days of today's date.
79. I shall now hear counsels on the matter of your sentencing and you are hereby remanded in custody to await the sentence of the Court.

DATED at Port Vila, this 26th day of August, 2011.

BY THE COURT


D. V. FATIAKI
Judge.

