

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

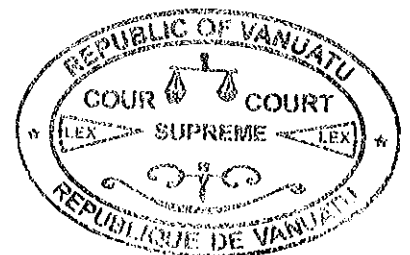
Criminal Case No. 88 of 2010

**PUBLIC PROSECUTOR
-V-
EDISON ELMAN**

Hearing : 3 March 2011
Before : Justice R L B SPEAR
Counsel: Mr G Takau Public Prosecutor
Mr E Molbaleh for Accused

DECISION AND VERDICT
3 MARCH 2011

1. The accused is charged that on the 21 August 2010, on a ship, he had sexual intercourse with a woman without her consent. To this charge the accused has pleaded not guilty and the case has come before me for trial.
2. The Public Prosecutor called the complainant and six other witnesses. The doctor's evidence was accepted. The accused also gave evidence in his defence.
3. This charge of having sexual intercourse without consent requires proof beyond doubt. Proof beyond reasonable doubt simply means that the court is left sure of guilt. It does not require proof to an absolute certainty. It simply requires the court to be brought to the point where a reasonable doubt does not exist.
4. The accused has to prove nothing at all. He was entitled (and this was explained to him as required) not to give evidence or call anybody else to give evidence but he chose to give evidence. He elected to give evidence in his defence. The fact that he gave evidence does not of course mean that he



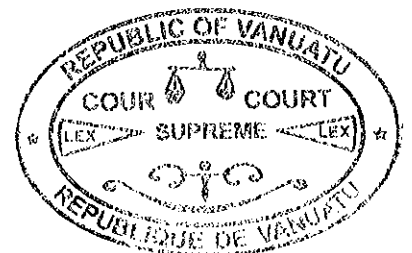
changed the burden of proof which remained on the prosecution throughout the course of the trial.

5. The elements to be proven by the Republic to that standard are:
 - a. that sexual intercourse took place that night between the two people involved
 - b. that the complainant did not consent
 - c. that the accused at that time did not have a honest and reasonable belief that she was consenting.

6. What is meant by that term, consent? It means a true consent. It means that (in this case) the complainant has freely and voluntarily decided that she would have sexual intercourse with the accused. A true consent does not arise if the decision is a result of force or threats used to overcome resistance. The fact that a woman or girl does not physically resist does not, by itself, mean that she is consenting. It is also significant that true consensual sexual activity that is subsequently regretted still remains consensual sexual activity. These are all conventional and applicable legal principles in relation to this crime.

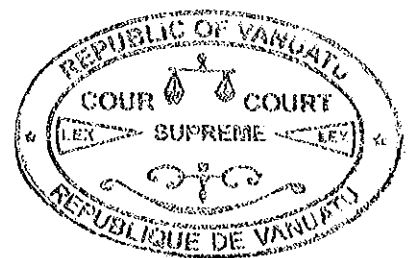
7. In the end, this case has come down, like so many others of its type, to an assessment of credibility. As I have indicated, the complainant gave evidence and she said that when she was on the accused's ship that night, he threatened her with violence if she did not have sex with him. She said that she was scared what he might do to her and so she removed her clothes and allowed him to have sex with her. She stated that this occurred on three separate occasions. She said it took place twice in the engine room and once in the kitchen. If her evidence is accepted, without reservation, the accused must be found guilty.

8. The accused gave evidence. He said that the complainant wanted to come on to the ship with him. He was going on to the ship, moored just off shore, to collect a bottle of drink so that the party could continue. When the two of them



were on the ship, they drank some beer and talked. He became interested in having sexual intercourse with her. He eventually asked her if she wanted to have sex with him and she said that she did not want to. A short time later, after they had continued talking and drinking, he asked her again. She asked if he had a condom and he said that he would ejaculate outside her. He said that it then swiftly progressed to sexual intercourse between the two of them in his bedroom which was down beside the engine room and that this occurred on two separate occasions. They then moved up to the galley where he prepared some chicken and rice for the two of them as it was starting to get light. They then had sexual intercourse again in the galley.

9. If I accept the accused's evidence, or even if I consider that the accused's evidence might be true, then clearly I must find him not guilty of these charges. In those circumstances, it would be clear that he would have raised a reasonable doubt in my mind as to whether he is guilty of this offending; and, of course, he is entitled to the benefit of that doubt.
10. It is only if I reject his evidence that this was consensual sexual activity that I need to focus further on the evidence of the complainant. I would then need to be left sure, by her evidence, that the sexual intercourse that took place was in the circumstances that she described; that is, without her true consent and when he must have known that she was not consenting.
11. If I was to reject the accused's evidence, that does not, of course, mean that he is guilty only that he has given evidence that I do not accept. It would still be necessary for me to accept the complainant's evidence, virtually in its entirety in relation to the sexual activity, in order for me to find the accused guilty.
12. The connection between the accused and complainant occurred in the early hours of this particular morning. They had been with others at night clubs in Port Vila, moving over to Electro Bar (which they found closed) and then down to sea side. There were a significant number in the group and, indeed, there may well have been two distinct groups as the accused describes. He said he

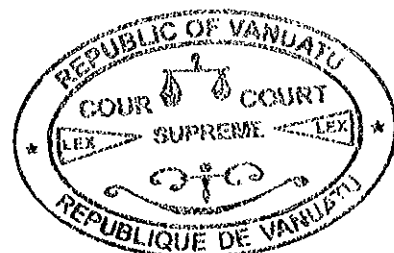


was principally with his work mates, Mary and Diana; both of whom gave evidence.

13. The complainant says that when they were down at sea side, Mary wanted to continue drinking but they had nothing more to drink. This was approaching 4 am. The accused indicated that he had some more drink on his boat which was moored some 30 meters off shore. It appears clear that he intended to go out to his ship to collect some more drink.
14. The complainant says the accused had been *after her* at the night clubs which was denied by the accused. The complainant said that the accused was making a nuisance of himself, bothering her, and attempting to come on to her. No other witness gave evidence to that effect.
15. At the time when the accused decided to go out to his ship get some more to drink, the complainant said that he asked her to go with him. Indeed, she stated that this invitation was really put on the basis that he was only interested in going out to the boat if she came with him. No other witness picked up on this. The complainant said that she wanted her brother to accompany them but he was talking to some sailors and appeared distracted. She said that while she was waiting for her brother, she got on to the dinghy with the accused, he then dropped the rope and they rowed out to his ship.
16. The complainant stated that she told the accused repeatedly that she did not want to go with him without her brother but he ignored her. She says that she was calling out to her friends on the shore for help and they were calling back to her inquiring what she was up to.
17. It is the complainant's evidence that, when they got onto the ship, the accused opened some beer and handed a bottle to her. She said that she drank about half a bottle. She said he told her that he had to check another mooring and the boat was then moved around to other side of Iririki Island. She acknowledges that she helped him move the boat. When they were around the back of Iririki Island, at that other mooring, she says that the engine was turned

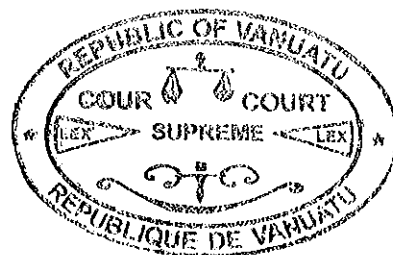


- off. She stated that eventually the accused agreed to take her back but said that she would have to help him start the engine and that she would have to come down with him to the engine room. She said that she went down with him because she felt that this was the only way that she was going to get back to the shore. Furthermore, that it was while they were in the engine room that he threatened her and make her appreciate that something bad could come of any resistance on her part to his stated desire to have sexual intercourse with her.
18. She stated that she submitted to sexual intercourse, which occurred twice in the engine room and then again back in the kitchen or galley of the ship but only because she was scared of the accused and scared what he would do if she resisted.
 19. The accused stated that they had a drink when they got onto the ship. They appeared to get on well and, indeed, ended up talking for a while about some family connection. Eventually, as I have already indicated, he popped the question to her as to whether she would like to have sexual intercourse with him. I have already explained the accused's explanation as to how sexual intercourse took place. He says that it occurred down in his bedroom which is by the engine room. And then, when they went upstairs to have something to eat, they had sex again.
 20. The accounts given by both complainant and accused on the essential features to this case are, of course, completely divergent. That raises the need for the Court to be particularly concerned as to who carries the burden of proving the charge. It is not simply a question as to who the court might consider to be the more credible between the complainant and the accused.
 21. There is no external evidence to support the complainant's evidence that this was rape.
 22. There is medical evidence that the complainant had a laceration, a superficial laceration and some tenderness in her genital area which, of course would be

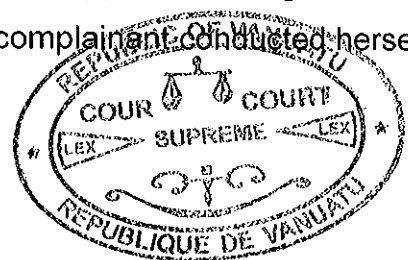


consistent with forced sexual intercourse. However, it would equally be consistent with vigorous consensual sexual intercourse. Not only is the evidence of the Doctor not able to support the complainant's account, her own evidence is that she submitted to the defendant's demands on her albeit in the face of threats of violence.

23. The medical evidence is, accordingly, neutral in this case.
24. Equally when the complainant got back to the shore, she went there with the mobile phone number of the accused which she acknowledged that he had given freely to her. This is of some slight significance as the complainant said in her evidence that she attempted to text her brother for help but that her phone did not have enough of a charge in it for her to make the text. The accused made the point that her phone must have had enough power for a text given that she was able to record his own phone number on it – which she admits occurred.
25. The accused eventually took the complainant back to shore. She then went immediately to see her friend Mary who was working at a nearby tourism business. Both Mary and Diana worked there in the office. The accused worked for the same business but as the Captain of a tourism ship. The complainant told Mary that the defendant had wanted to have sexual intercourse with her but that all that happened was that that she ended up *sucking his dick*; as she put it.
26. The complainant was questioned about this. She admitted that she told Mary that she had had oral sex rather full sexual intercourse. Her explanation for this disclosure is quite unsatisfactory. She said that she did not want the news to get out that she had sexual intercourse with someone else as apparently she had a boyfriend at the time. She claimed to be concerned about her reputation. It could, however, equally be argued that she was, by then, regretting her impulsive decision to go out to the boat with the accused and to have consensual sexual intercourse with him..



27. It is highly significant also that none of the witnesses called by the prosecution, all friends of the complainant who were down at the sea side that night, could recall the complainant calling out for her brother or calling out for help. They were reportedly well within earshot before the boat moved off its mooring. This notwithstanding that some of the group were taking a particular interest in what was happening between the complainant and accused.
28. In my view, the evidence of Diana readily provides the best insight to what occurred that night. While Diana is a work mate of the accused, she is also a long-standing friend of the complainant - of some several years standing. Diana said that she could distinctly recall the complainant saying that she and the defendant were going out to the ship with no mention of the brother accompanying them. Diana was at pains to point out that she was not on the ship and so she could obviously not say exactly what happened while the two of them were on the ship. However, she was adamant that no one forced the complainant to go out to the ship. Indeed, it was her recollection that the complainant followed the accused to the dinghy that they used to get out to the ship..
29. Diana stated further that, when the ship slipped its mooring, just off the sea side, it went closely passed the group on the shore. They all called out to the complainant and asked her to come back but she showed no signs at all of discomfort or concern and they all assume that all was okay.
30. Furthermore, when she heard that the complainant had alleged that the accused had raped her, she confronted him about this. He freely admitted that they had had sexual intercourse and, indeed, he volunteered the information that it happened on three occasions; twice downstairs and once in the kitchen, but that it was consensual.
31. The Complainant's account to Mary, just after she returned to the shore, cannot be taken as evidence of what occurred or even to support her allegation. It can only be taken as an indication as to how the complainant conducted herself



at that time. That can help in the assessment of the complainant's general credibility but it is not evidence of the account given which, of course, is different to the account that she gave to the police some time later that day.

32. I am left in this position that, while I have some concerns about the accused's credibility, I have serious concerns about the complainant's credibility. I could not possibly convict the defendant solely upon the evidence of the complainant. She gave differing answers to certain questions during cross-examination. Furthermore, the first person to whom she apparently went after she got off the boat was her friend Mary and she gave a completely different account to Mary than the one that she gave later that day to the police.
33. I suspect that this complainant got out of her social depth with this older and more experienced man and that her decision making was affected by what she had been drinking. Afterwards, in the cold sober light of day, she started to appreciate the implications of what had occurred and what her family and friends would think of her. I cannot ignore the possibility that she has endeavored to justify or explain her actions that night by a false accusation of rape. I consider that is at least possible.
34. For this reasons, I do not consider that the prosecution has proven this charge to the high criminal standard required of proof beyond reasonable doubt.
35. I return a verdict of not guilty.

BY THE COURT

