

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

CRIMINAL CASE NO: 128 OF 2012

PUBLIC PROSECUTOR

V

ISMAEL PETER LESS

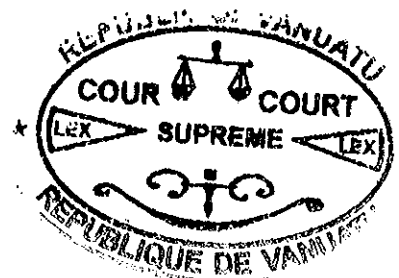
Coram: Justice Mary Sey

Counsel: Mrs Tabitha Harrison for the Public Prosecutor
Mr Andrew Bal for the Defendant

Date of Decision: 13 December 2012

JUDGMENT

1. The accused was arraigned before this Court on 6 November 2012 for the offence of **Sexual Intercourse without consent** contrary to **Section 91 of the Penal Code Act [CAP.135]**. The accused entered a not guilty plea to the Criminal Information dated the 22nd day of October 2012.



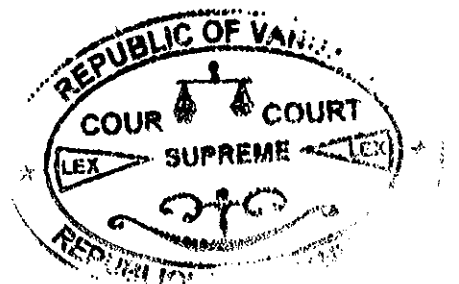
2. On 21 November 2012, at the beginning of the trial, the prosecution amended the particulars of the information to read as follows:

" ISMAEL PETER LESS: long namba 2 September 2012 long Tagabe Area, Port Vila, yu bin havem sex wetem girl ia Tara Pakoa Kaloris long taem ia hemi no givem consent blong hem".

3. The amended charge was put to the accused and his plea was re-taken. He again entered a not guilty plea. Before the prosecution case began, the Court ensured that the accused understood his right contained in Section 81 of the Criminal Procedure Code [CAP.136] as to the presumption of innocence in his favour.

4. At this nascent stage of the judgment, I deem it expedient to state the well established criminal trial requirements relating to the burden of proof. It is the State which brings this case and it is for the State to satisfy the Court so that it is sure of the accused person's guilt. To put it simply, the burden of proving the guilt of the accused remains with the prosecution and continues throughout. In **Woolmington v DPP [1935] A.C. 462 HL at pp 481-482, Viscount Sankey** clearly stated the position of the law as follows:

"Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt [subject to the qualification involving the defence of insanity and to any statutory exception]. If at the end of and on the whole of the case, there is reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether (the offence was committed by him), the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."

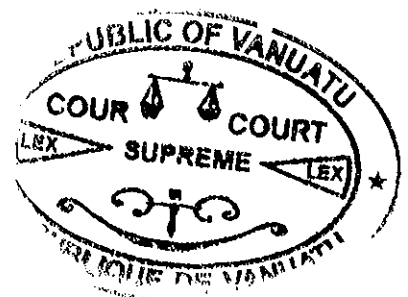


See also the case of ***R v Hunt (Richard)*** [1987] AC 352, 374 in which **Lord Griffiths** stated, inter alia, that:

".....Parliament can never lightly be taken to have intended to impose an onerous duty on a defendant to prove his innocence in a criminal case, and a court should be very slow to draw any such inference from the language of a statute".

5. The burden of proof is on the prosecution and any doubt should benefit the accused. This principle applies in all criminal cases and in Vanuatu it has been confirmed in several cases such as **Public Prosecutor v Tom Black Criminal Case No. 57 of 2008; Public Prosecutor v Songi Criminal Case 90 of 2009; Public Prosecutor v Brian Michel & Ors Criminal Case No. 106 of 2012**. All of these cases confirm that the legal burden of proof in a criminal case always rests on the prosecution and that it never shifts. The onus lies on the prosecution to prove every element of the offence with which an accused person has been charged beyond reasonable doubt. The accused is not required to prove his innocence. If at the end of the trial, there is any reasonable doubt as to the guilt of the accused on the charge laid against him, I must interpret that doubt in favour of the accused and acquit him accordingly. However, if I believe the prosecution witnesses and I am satisfied beyond reasonable doubt of the guilt of the accused, I must convict him and find him guilty of the offence charged against him.
6. The overriding standard of proof that must apply is that of whether the charge has been proved beyond reasonable doubt. The standard is the very high standard of proving the case beyond reasonable doubt. In ***Miller v Minister of Pensions*** [1947] 2 All ER 372. **Denning J. At pp. 373-374** had this to say:

"Proof beyond reasonable doubt does not mean proof beyond a shadow of a doubt. The law would fail to protect the community if it permitted fanciful possibilities to deflect the course of justice. If the evidence is so strong



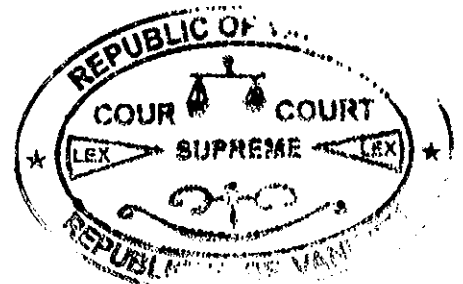
against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence 'of course it is possible but not in the least probable', the case is proved beyond reasonable doubt; nothing short will suffice."

7. **RELEVANT LAW**

Sexual intercourse is defined under **Section 89A of the Penal Code Act [CAP.135]** in the following language:

"For the purpose 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 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 or a person; or*
- (e) the continuation of sexual intercourse as defined in paragraph (a), (b), (c) or (d); or*
- (f) the causing, or permitting or 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. Sexual intercourse without consent is defined under **Section 90 of the Penal Code Act [CAP.135]**. It provides as follows:

"Any person who has sexual intercourse with another person:

(a) without that person's consent; or

(b) with that person's consent if the consent is obtained:

(i) by force; or

(ii) by means of threats of intimidation of any kind; or

(iii) by fear of bodily harm; or

(iv) by means of false representation as to the nature of the act; or

(v) in the case of a married person, by impersonating that person's husband or wife;

(vi) by the effects of alcohol or drugs; or

(vii) because of the physical or mental incapacity of that person;

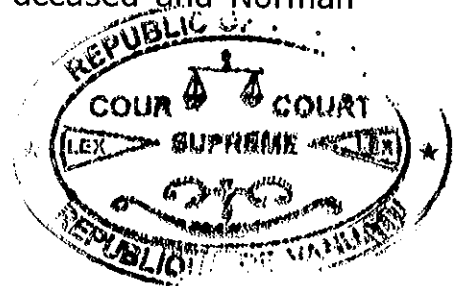
commits the offence of sexual intercourse without consent."

Section 91 prohibits the offence of sexual intercourse without consent and sanctions it with a life imprisonment sentence.

The Prosecution Case

9. The brief facts as stated by the prosecution are as follows:

On 13th September, 2012 the complainant Tara Pakoa Kaloris submitted a report against the accused Ismael Peter Less for sexual intercourse without consent. The alleged sexual intercourse occurred on 2nd September 2012 after the accused and the complainant left Shakers' night club in Port Vila. The accused and the complainant caught a bus together and got off at Tagabe bridge. They crossed the road and walked towards the house where the complainant's boyfriend, Norman, lives with the accused. The accused and Norman

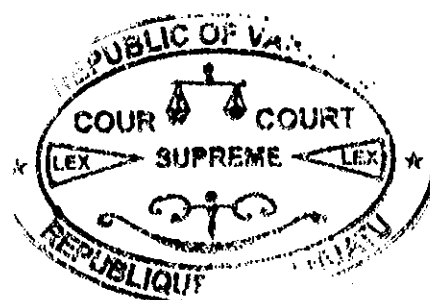


are brothers. As the complainant and the accused walked towards the house, the accused pulled the complainant by her hand and dragged her to the bush where he removed her clothes and then pushed her down to the ground. The accused pushed his penis into the complainant's vagina and proceeded to have sex with her without her consent. The complainant screamed at the time but the accused blocked her mouth with his hand and dipped her face in the soil. After he had finished raping her, he handed the complainant's clothes back to her and told her not to tell his brother Norman. The accused was arrested and questioned by the police. He denied having sex with the complainant.

Summary of the Prosecution Evidence

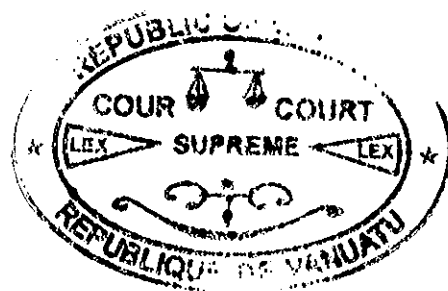
- 10 To prove their case the prosecution called four (4) witnesses. The salient features of the prosecution's evidence are to be found in the testimony of the complainant Tara Pakoa Kaloris who testified as the first prosecution witness. She told the Court that she is 17 years old. She said that on the night of 1st September 2012 she had gone to Shakers night club with her friend Lily with whom she drank a whole bottle of whisky which they had mixed with coca cola. She said the accused was inside the night club and that he walked up to her and kissed her forehead. She asked him for her boyfriend Norman and the accused told her that Norman was at home. The accused is Norman's big brother. The complainant said that she asked the accused to take her to Norman's house. She told the Court that the accused knew that she was having a relationship with his brother Norman.

11. Testifying further, the complainant gave evidence that she and the accused boarded a bus outside Shaker's nightclub in the early hours of 2nd September, 2012 to go and see her boyfriend Norman. She remembered no other passengers apart from herself, the accused and the driver. She said that after they hopped off the bus at Tagabe bridge, they followed the route to the house and as they walked towards the house the accused pulled her by her hand and dragged her. She said she told the accused not to pull her hand but he



continued to pull her and he dragged her to the bush and then pushed her down to the ground. She said she pushed him back but he was too strong and that he pulled off her trousers, took off her panty and she was having her monthly period at the time. The complainant further testified that after the accused had removed her panty he pushed his penis inside her vagina and that she felt his penis entering her vagina. She said that he blocked her mouth with his hands to stop her from screaming and he raped her. She said that she remembered three rounds and after that he pulled her to her feet and put back her clothes and they walked back to Norman's house. The complainant said that when they were about to reach Norman's house, the accused told her that she should not tell Norman what had happened. She said the accused told her that Norman had done something to his girlfriend.

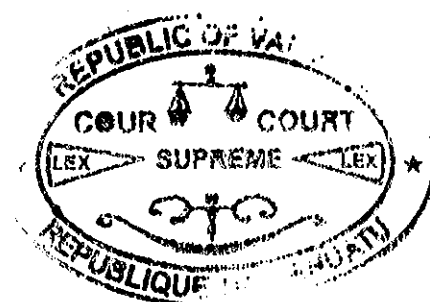
12. Under cross examination the complainant agreed that she was too drunk to remember whether she caught a taxi or a bus after she left the night club. The complainant said *"I was drunk and I didn't know that it was a taxi. I thought it was a bus."* When it was put to her that the accused never assaulted her on the night of the incident, she replied that he did assault her on her ribs and that she had felt pain which had lasted until the next morning. She was questioned as to how many times the accused had raped her and her answer was *"wan taem"*. Defence counsel then put it to the complainant that the accused never penetrated her but she replied that *"hemi stap kiaman....I felt his private part inside my vagina."* Then defence counsel posed this question to the complainant: *"Would you agree that Ismael was only rubbing his private part against your private part?"* In response the complainant said *"I felt his private part entering my body."* She then went on to deny that she had consented to have sex with the accused. She said that she had screamed and that she had told the accused that she did not want to have sex. She also denied the allegation that she had removed her clothes by herself before the sexual act. She said after the accused had raped her she was not happy and that she was crying and she did not know what to do and so the accused put back her clothes. It was also put to the complainant that she had never told the accused that Norman was her



boyfriend but she maintained that the accused knew that fact. The complainant was also cross examined regarding what she had told the doctor and she said she had told him that the accused had pushed her to the ground and raped her.

13. The second witness was Peter Norman. He testified that the complainant is his girlfriend and that she had gone to see him at his house around 3.30am on 2nd September 2012 straight after she was raped. He said he was asleep on his bed at his house when he felt someone sleeping next to him. He said he pushed the complainant away from him because she was wet and he thought it was his brother, the accused, Ismael Peter Less. Norman told the court that when he pushed Tara away she burst into tears and told him that Ismael had raped her. The witness also told the court that he took Tara outside because she was crying and making noise in the bedroom which he shares with one of his cousins. He said they went outside and talked. He told the court that he instructed the complainant to tell her parents about the incident and that the parents should take her to the police to lodge a complaint against the accused. He also told the court that he told Tara to report to his parents about what Ismael had done to her as he was ashamed to tell them because Ismael is his brother. Norman also testified that the defendant is fully aware of his relationship with Tara and that sometimes they would go together to visit Tara. This witness also tendered his witness statement to the Court and it was admitted and marked as **Exhibit A**.

14. Atis Yosef testified as PW3 and he told the Court that he took photographs of the crime scene at Smet Area in Vila and that he prepared the photo album which was produced and tendered to the Court as **Exhibit C**. He said the first picture is a close up picture of Tara and the second picture shows Tara pointing to an area where she alleged Ismael had raped her. The third picture shows a small bush road leading to Tagabe bridge community from Smet mango nakamal and the fourth picture depicts Tara Kaloris pointing to a bushy area where she had been through with Ishmael Peter.



15. PW4 was Jean Kalo and he testified that he interviewed the accused on the 4th day of October 2012 in the presence of one Jacques Yaput. PW4 was asked questions pertaining to questions 32, 33 and 36 as contained in the interview record of the accused. He told the court that the accused had told him that he had had sex with Tara because Tara's boyfriend Norman had had sex with his former girlfriend and that was what made him to commit the offence against Tara. The witness tendered the interview report as **Exhibit D**.

In answer to questions put to PW4 under cross examination, he maintained that the accused had admitted to him that he had had sex with Tara.

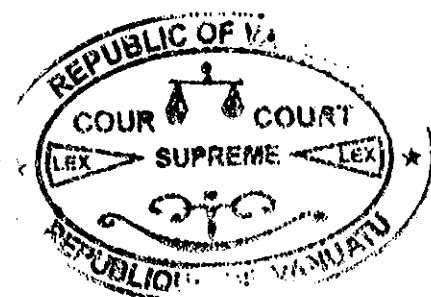
The Defence Case

16. I shall now turn to consider the defence put forward by the accused person who, having understood his rights under Section 88 of the Criminal Procedure Code [CAP. 136], elected to give evidence on oath. He called one witness who testified on his behalf.

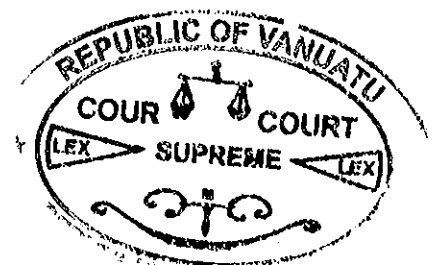
The accused denied raping the complainant on 2 September 2012 as alleged.

The Summary of the Defence Evidence

17. The accused testified that on the night of 1st September 2012 he drank kava and after that he went to Shakers with some girls from Manples area and whilst he was inside Shakers he drank one cup of whiskey. He said he recognized Tara inside when she walked over to him and shook his hands. She spoke to him and asked him who he was with and he said he was alone. He did not say anything else to her and after he spoke to her he was still standing where he was and Tara went outside.



18. The accused further testified that he stayed in Shakers up to 3.00am. He said when he was standing inside Shakers he saw them throw Tara outside the club. He said Tara walked towards him and told him that they should go home. He spoke to a taxi driver and told him to take them to "Tagabe Bridge". He told the Court that when he was speaking to the taxi driver Tara was just hanging on to him because she was drunk. After he spoke to the driver they went inside the taxi and it dropped them off next to planet 107. He said he paid the driver and then Tara hung on to him because she could not walk because she was drunk.
19. Testifying further, the accused said as they were walking back to the house, he asked Tara if she "could go out" with him and she said "okay" and after that he pulled her hand and they crossed the road to another small bush. He said when they reached the bush she removed her clothes and he also removed his clothes. The accused then went on to state that after that he was just rubbing his penis over the complainant's vagina. He said she was lying down on the ground and he rubbed it for one round only. Defence counsel then asked the accused:
- "Q: How many times did you have sex?
- A: One time only".
20. The accused said he stopped because he felt good. He said he was satisfied and he ejaculated outside. He said after that they stood up and he put back her clothes. The accused said Tara told him that she wanted to go and see Norman and so he asked her if she was having a relationship with Norman and she said yes she was having a relationship with Norman. He said he told her not to tell Norman that he had gone out with her and in case Norman asked her she should tell Norman that he went out with her because Norman had gone out with his girl friend. Then they went down to the house and the complainant told him that she really wanted to see Norman so the accused put her in Norman's room.



21. Under cross examination, the prosecutor put it to the accused that the complainant had asked him to take her to Norman's house but instead he had taken her to the bush and raped her. In response the accused stated that he took her into the yard where the house was and then he asked her "to go out" with him and then they went to the bush.
22. The accused said he was not happy when he found out that Norman had gone out with his girlfriend because their relationship was not yet over and he said that Norman had spoilt his relationship with the other girl. When counsel put it to the accused that he did "that" to Tara because he did not like what Norman had done to his girlfriend, the accused responded in the affirmative and he said he did "that" to Tara out of revenge.

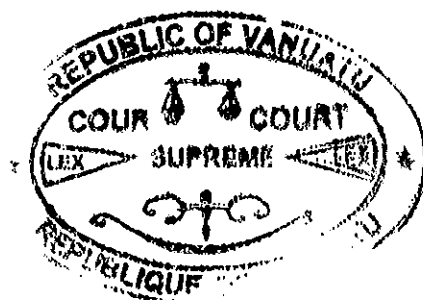
Analysis of the Evidence

23. It is common cause that on the night of 2 September 2012 both the complainant and the accused were together after they had left Shakers night club to go to Norman's house. They however differ in their narration regarding their mode of transportation. In her evidence in chief, the complainant testified that they had boarded a bus whereas the accused had stated that he had hired a taxi to take them to Tagabe bridge. However, in cross examination the complainant admitted that she was drunk and she did not know that it was a taxi they had boarded. She said she thought it was a bus.
24. In their closing submissions, the defence sought to challenge the evidence of the complainant on the grounds that it is inconsistent and unreliable. It is submitted by the defence that the complainant gave wholly inconsistent evidence about the number of times the accused had sex with her. In her evidence in chief, the complainant said that there were "three rounds" of sex whilst in re-examination, the complainant stated that there was only one round of sex "wan taem."



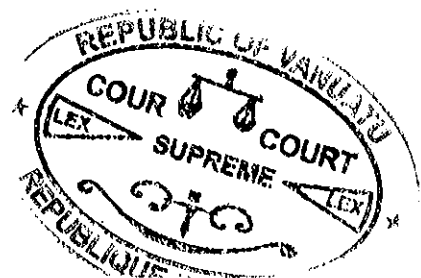
25. The defence has also submitted that there is no evidence to corroborate the evidence of the complainant and that there is no physical or medical evidence to support her story and that the case is an oath on oath case. Furthermore, that the actions of the accused after the incident are not consistent with an allegation of sexual intercourse without consent. Judging from the totality of the evidence adduced, the Court rejects defence counsel's submission in its entirety.
26. I must state that I find defence counsel's submissions on all the aforementioned issues untenable. It is rational to infer that the complainant's ability to recall events was reduced because of her very high level of intoxication. Moreover, it is in evidence that the complainant is 17 years old and that on the night of the incident she was under the influence of alcohol. The complainant gave evidence that she and Lily shared a large bottle of whisky on the evening of the incident. The two young women consumed the whole bottle of whisky mixed with coke. That, undoubtedly, made the complainant drunk. In fact she agreed that she was too drunk to remember whether she caught a taxi or bus after she left the night club. The complainant said "I was drunk and I didn't know." The evidence in chief of the accused also confirmed the drunken state the complainant was in. He said "Tara hung on to me because she could not walk because she was drunk."
27. I am not unmindful of the requirement that judges should heed the warning of the danger of convicting on uncorroborated evidence of witnesses who fall into one of the following categories:
- a) accomplices; or
 - b) complainants in sexual offences; or
 - c) the unsworn testimony of a child.

See **Davies v DPP [1954] A.C 378 Cr. App. R. 11** for accomplices, and **R v Trigg (1963) 47 Cr. App. R. 94** for sexual offences, and



also **Public Prosecutor v Sano Alvea [1996] VUSC 18; (Cr. 10 of 1996) per Lunabek, J** as he then was at page 14 thereof.

28. Be that as it may, judges must not lose sight of the fact that in offences involving unlawful sexual intercourse, it is not unusual for there to be only the complainant and the defendant present at the time and a lack of corroboration does not mean that the Court cannot come to a guilty verdict premised on the evidence adduced before the Court.
29. I find that the surrounding circumstances of what happened, prior to and during the acts of sexual intercourse, are indisputable. The complainant was very consistent in her evidence on the points that mattered. The Court also accepts the testimony of the complainant as credible and reliable when she stated that she felt "his private part entering" her body. I equally accept the prosecution's submissions that the accused made an admission during cross examination when he stated that what he did to the complainant was done out of revenge for what his brother Norman had done to his ex girlfriend.
30. The Court rejects the version of facts put forward by the accused that he was just rubbing his penis over the complainant's vagina and that he rubbed it for one round only whilst the complainant was lying down on the ground. The Court also rejects the defence case that the state has failed to prove "penetration" and that the intercourse was obtained by "consent".
31. I find that the essential elements the prosecution has proved in respect of this charge of Sexual Intercourse without consent are that:-



- a) on 2 September, 2012 the accused Ishmael Peter Less had sexual intercourse with the complainant Tara Pakoa Kaloris which involved the penetration of the vagina of the complainant by the penis of the accused; and
- b) The sexual intercourse took place without the consent of the complainant. Also, the defendant in his examination in chief admitted to dragging the complainant into the bush by force.
32. In the result, the Court is satisfied that the prosecution has proved beyond reasonable doubt all the essential elements of the offence of **Sexual Intercourse without consent** contrary to **Section 91 of the Penal Code Act [CAP.135]**. I find the accused Ismael Peter Less guilty accordingly.
33. Ismael Peter Less, you have the right to appeal this verdict. When you appeal you must lodge a Notice of Appeal within 14 days of today's date. You are hereby remanded in custody until Friday 21 December, 2012 at 2 pm for sentencing. A pre-sentence report is ordered to be prepared by the probation service within 5 days from today's date.

DATED at Port Vila, this 13th day of December, 2012.

BY THE COURT


M.M. SEY

Judge

