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

Criminal Case No.20/1282 SC/CIVL

BETWEEN: Public Prosecutor

AND: Kevin Lilior and Belona Lilior

Defendants

Date of Trial :	***13th August 2020, 24th September 2020***
Date of Oral Judgment:	***24th September 2020***
Date of Written Judgment:	***25th September 2020***
Before:	***Justice Oliver.A.Saksak***
In Attendance:	***Mr Damien Boe for Public Prosecutor***
	Mrs Marisan P Vire for the Defendants

RULING ON NO CASE SUBMISSION- THE REASONS

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1. The trial of this part-heard case resumed this afternoon. (24/09/2020) Prosecution called its last witness, Winshual Garae, the Crime Scene Officer. He was sworn on oath and gave his evidence via video link from the conference Room at the Supreme Court premises in Port Vila.

2. Prosecution then tendered the police statements of the other prosecution witnesses into evidence by consent. These were statements from Police Officer Kathleen Alick, teachers George Reuben Songi and Paul Meltelum, Jean Yves Atpatun, Violette Harry (Police Officer) and Betty Butu (Police Officer).

3. Mrs Vire then applied under section 164 of the Criminal Procedure Code Act for a no case to answer. Section 164 states:

"PROCEDURE AFTER CLOSE OF PROSECUTION
164. *(1) If, when the case for the prosecution has been concluded, the judge rules, as a matter of law that there is no evidence on which the accused person could be convicted, he shall thereupon pronounce a verdict of not guilty.*
(2) In any other case, the court shall call upon the accused person for his defence and shall comply with the requirements of section 88"

4. Mrs Vire relied on the case of **PP v Philip Huri** and 2 others in which the former Chief Justice applied the tests established in the English case of **R. v Galbraith** (1981) 1WLR 1039 which establishes a 2-tier test. The first is that " *if there is no evidence that the crime alleged has been committed by the defendant there is no difficulty, the judge should stop the case. The second is that if there is some evidence but it is of a tenuous character because of weakness or vagueness or because of inconsistency with other evidence then-*

   (a) If the judge concludes that the prosecution case taken at its highest is such that a jury properly directed could not properly convict on it, then it is the judge's duty to stop it on a no case submission.

   (b) If however the strength or weakness of the prosecution's case depends on the view to be taken of a witness reliability and where on one view there is evidence on which a jury could conclude that the defendant is guilty then the judge should allow the matter to be tried."

5. In **PP v Koroka** [2006] VUSC 89 Chief Justice Lunabek set the test in a no case submission to be ***" In essence the test to be applied is as follows: on the strength of the evidence so far laid before the Court, whether a reasonable tribunal could convict the accused person, as a matter of law, on the strength of such evidence."***

6. In the earlier case of **PP v Bernard** [2006] VUSC 44 Bulu J after referring to **PP v Kilman** [1997] VUSC 21 summarised the requisite test as follows:
   " Bearing in mind section 164 of the Criminal Procedure Code Act, the test is not proof beyond reasonable doubt but rather as a matter of law whether the accused could be convicted on the evidence presented thus far, I am satisfied that the test is whether a finding of guilt could be made by a reasonable judicial officer sitting alone on the evidence thus far presented". Bulu J then adopted the test stated by Speight J in Auckland **City Council v Jenkins** which is that the submission of no case to answer requires the Court to refer to the evidence adduced by the Prosecution, more particularly, the evidence relating to the elements of the crime the Defendants have been charged with."

7. That position is consistent with **DPP v Thirpathi Gounder and Another** (1971) 17 FLR 118 where the Fijian Supreme Court held that in Criminal trials " **prima facie case**" means that ***" If a***

reasonable tribunal might convict on the evidence thus far laid before it, there is a case to answer".

8. From those pronouncements it appears that even if there was some evidence against the accused but no so much as a reasonable tribunal might convict, under the above test the accused should be discharged.

9. Mrs Vire submitted the evidence adduced by the Prosecution was vague, weak and inconsistent.

10. Mr Boe on the other hand submitted there was overwhelming evidence against the defendants requiring them to make a defence. Counsel submitted the complainant's evidence was consistent and was corroborated by the evidence of two teachers Paul and George, Jean Yves and the Crime Scene Officer. Mr Boe relied on numerous cases such as **PP John Leona and 2 others**, [2018] VUSC 109, **PP v Vahirua** [2018] VUSC 141, **Ishmael v PP** [2005] VUCA 1, **PP v Manu Kombe** [2015] VUSC 51, **PP v Welegtebit** [2015] VUSC 157 and **PP v Welegtebit** [2016] VUSC 19 and **AG v Fereti** [1994] WSCA 13.

    I found those cases to be irrelevant and unhelpful.

11. The relevant and applicable tests are as established in **R v Galbraith** as adopted in **PP v Huri**, **PP v Koroka**, **PP vs Bernard** and **PP v Kilman** and **DPP v Thirpathi**. Indeed the Fijian case supports section 135 of the Penal Code Act CAP.135.

12. I accept Mrs Vire's submissions that the prosecution evidence thus far produced by the complainant herself is vague, weak and inconsistent. Where that is the position, her evidence warrants corroboration without which as a reasonable Judicial Officer I must warn myself of the danger of convicting the accuseds on uncorroborated evidence.

13. Both defendants denied categorily and generally sexual intercourse without consent (Counts 1 and 2) and complicity and act of indecency (Counts 3 and 4). As such the Prosecution has a high onus of proof beyond reasonable doubt all the elements of all the four charges.

14. Mr Boe submitted the evidence of the two teachers Paul and George were corroboration and amounted to **"recent complaint"**. With respect those submissions are flawed. First Paul's statement is different from George's statement. Paul said the complainant was holding some kava and was crying with her head hung down. He asked her what happened but the complainant did not reply and just went on by. George did not mention the kava and said her eyes were red like she just finished crying. And George said the opposite of what Paul said. He said they did not ask her what happened as she said nothing to them.

15. So if the complainant said nothing to the teachers, how could that silence amount to a recent complainant as submitted by Mr Boe. She had her best opportunity to make a recent complaint to the two teachers but said nothing. Therefore there was no recent complaint.

16. The evidence by the Crime Scene Officer shows only photographs but where there are general denials, those photographs do not assist. They are merely hearsay. The complainant was not present with the officer at the time of him inspecting the house and taking the photographs.

17. The dates given by the complainant were inconsistent and the date is even more confused when the Crime Scene Officer stated in his statements that the offendings alleged took place on 26th May 2020. The complainant herself was not sure whether it happened on 26th July 2019 or on 27 July 2019. She changed her story and date so it became vague and confused.

18. The statement of Jean Yves contains only hearsay evidence and does not assist the complainant's case. And the statements of Police Officers Kathleen Alick, Violette Harry and Betty Butu contain the general denials of the defendants to the alleged offendings and do not add anything helpful to the complainant's case.

19. No rifle and laptop were found by the Crime Scene Officer, bringing her credibility into questions. And having to await for some 9 months before making a formal complaint when it was her job to help women in similar situations. In addition her relationship with Ernest in return for cash and an

allegation of a " **Plan B"** which was not fully explored, are sufficient reasons raising caution in the mind of a reasonable tribunal of the danger of fabrication and of convicting the defendants on uncorroborated evidence.

20. For all those reasons and applying the test in **R v Galbraith** as adopted in **Huri**, **Koroka, Bernard** and **Kilman cases**, the prosecution evidence taken at its highest by a reasonable tribunal, I cannot possibly find guilt and to properly and safely convict these two defendants on the evidence thus far presented.

21. Accordingly, I conclude there is no case to answer and the case must stop here. I therefore discharge the defendant Kevin Lilior and Belona Lilior as charged. They are free to return to Malekula, their home Island.

DATED and ISSUED at Luganville this 25th day of September 2020
BY THE COURT

REPUBLIC OF VANUATU COUR SUPREME COURT LEX LEX

Oliver.A.Saksak
Judge