

BETWEEN: Public Prosecutor

AND: David Zethrick Noel
Defendant

Before: Justice Oliver A Saksak
Counsel: Marie Taiki for Public Prosecutor
Andrew Bal for the Defendant
Date of Trial: 10th – 11th August 2021
Date of Oral Decision: 11th August 2021
Date Decision was issued: 20th August 2021

VERDICT

Introduction

1. On 11th August 2021 after hearing the evidence from the witnesses for the prosecution and for the defendant, I returned an oral verdict of not guilty, and acquitted the defendant of the charge against him.
2. The Prosecution charged the defendant with one count of sexual intercourse without consent under sections 90 and 91 of the Penal Code Act Cap. 135.
3. It was alleged the defendant had had sexual intercourse with the complainant, an 18 year old school girl without her consent, on 15 January 2021.

Defence

4. The defendant admitted sexual intercourse had taken place but denied lack of consent.



Standard of Burden of Proof

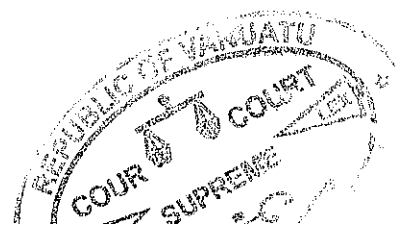
5. The Prosecutions have the legal and evidential burden of proof on the standard of proof beyond reasonable doubt. See Section 8 of the Penal Code Act and Section 81 of the Criminal Procedure Code Act.

The Elements

6. The elements for sexual intercourse without consent are –
 - (a) that the defendant had sex with the complainant;
 - (b) that there was no consent; or
 - (c) such consent was obtained by force, intimidation or threats of bodily harm, and
 - (d) that the defendant knew or believed the complainant was not consenting.

The Evidence

7. The Prosecutions called three witnesses. First the complainant who said she was drinking a bottle of Annabeer with the defendant and his wife. She left them to go to sleep in a room. She then felt someone touch her buttock, then her breasts. Then she said she was dragged down from the bed to the floor. She recognised it was the defendant. He had sex with her and then wore his clothes and left. She then left the house to go to her aunt's house. It was about 2.45 am in the early hours of the morning. She told her aunt that here uncle had made problem to her.
8. The complainant's aunt Katty Olegon gave evidence that she did not see or hear anything. She was awoken only at 2.45 am when the complainant arrived at her house and told her uncle, the defendant had made problem to her. She was crying and shaking. She slept until morning when the witness and she went to the defendant's wife and told her the complainant had asked her for bills and that she should not tell her mother about it.
9. The third witness, Dr Robinson confirmed the Medical Report he made and issued in the afternoon of 16 January 2021. He said although she looked normal, she was ashamed. On

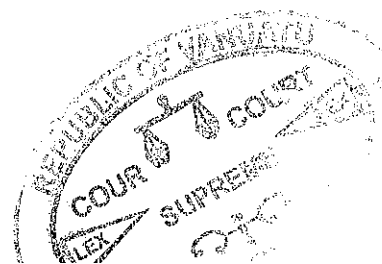


physical examination of the vagina he found bruises and laceration at 1 O'clock position and blood in the vagina. His opinion was that sexual intercourse had occurred.

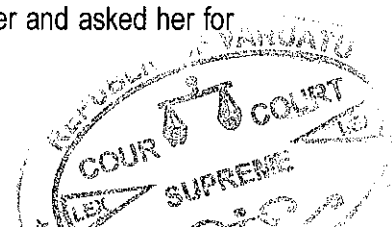
10. The defendant gave evidence in his defence after the court was satisfied the Prosecutions had established a prima facie case against him. He called evidence from his wife, Sandra in support of his defence.
11. The defendant said on the evening of 15 January 2021 the complainant, his wife Sandra and himself were drinking a bottle of Annabeer. Sometime later his wife left them and went to sleep because she was not feeling well. The defendant and the complainant continued drinking. They sat together on a chair and started to kill. He then asked the complainant to go into the room and wait for him. While he checked and close doors. He then approached the complainant and asked her for sex. She was standing when he approach her. He asked her to remove her clothes, and she did. He asked her to suck his penis and she willingly did. He then sucked her vagina and then proceeded to have sexual intercourse with her. She did not struggle or resist his actions. He did not remove her from the bed to the floor. He then put on his clothes and left her to sleep. He did not know she had left the house later that night. He confirmed the next morning Katty approached them and told them with Sandra that the complainant had gone to her in the morning and asked her for bills but warned that they should not tell her mother.
12. Sandra confirmed she had been drinking with her husband and the complainant in the evening of 15 January 2021. She said and she left her husband and the complainant and went to sleep earlier. She did not hear anything that went on later that night. In the morning Katty approached her and told her about the complainant going to her house and that her uncle had made problem to her and that she asked her for bills. She warned them not to tell her mother about it.

Discussion

13. In cross-examination Mr Bal discredited the complainant's stories to show that she was not a truthful witness. First she told three different and conflicting stories. On 16 January 2021 in her statement to the police she told one lot of story. 10 days later on 26 January 2021 she expanded her story to include the allegations the defendant had smoked marijuana. In her oral evidence and cross-examination she told inconsistent stories. She was shy and hesitant in telling the truth. She took a long time to answer very simple questions. From these, I had the impression she was not telling the truth.



14. First the complainant alleged the defendant had removed her from the bed and as a result she banged her head on the bed. However she did not disclose this to her doctor on 16 January. She said she did but the doctor denied this. Second the complainant lied that she had not drunk alcohol before. Third, she lied about going to bed first. Fourth, she did not detail any of the things her uncle had done to her to her aunt. Fifth, she never told the Police she was crying and shaking when she went to see her aunt at 2.45 am. Sixth, Katty never told the Police the complainant had asked for bills when she went to her house at 2.45 am. Seventh, Katty never told the Police Solange had had a bath before going to bed.
15. The defendant's evidence about the complainant's mother calling her to go home earlier in the night was undiscredited by Prosecutions. Indeed Solange admitted in cross-examination that her mother had called her. When challenged that it was his wife who went off first to sleep, he said when the mother called, the complainant went off and pretended to sleep. She returned when her mother had stopped calling. I do not accept the complainant's story that she went to sleep first.
16. From the Prosecution's evidence especially from the complainant and Katty, there were full of inconsistencies. Their evidence raised too many questions that put doubts in my mind. The questions that raised doubts are:
- a. Why the mother did not make a complaint statement and give evidence?
 - b. Why the complainant did not want to respond to her mother's call and go home, knowing the defendant has a wife and children?
 - c. Why did she not detail what the defendant did to her immediately when her aunt opened the door for her at 2.45 am?
 - d. Why would she continue to drink when the defendant's wife had left them?
17. Those questions, although not conclusive were sufficient to create doubt in my mind as to the issue of lack of consent. It is trite law that where doubts exist, the defendant must be given the benefits of those doubts.
18. The Court believed the evidence of the defendant. He was consistent and firm. He spoke with confidence. He spoke clearly and without hesitation unlike the complainant. His evidence was clear: the complainant drank alcohol freely with them, she sat in the same chair with him and they kissed. He sent her to the room. She went to wait. He approached her and asked her for



sex. Clothes were removed, they had oral sex and then sexual intercourse followed, then sleeping until 2.45 am. The complainant's willing participation made the defendant believe, she consented to sex. He did admit in cross examination that what he did with the complainant was wrong because he knows he has a wife and children, but that did not mean the complainant had not consented to sex that night.

19. It was for those reasons that Court returned its verdict of not-guilty and acquitted the defendant.

Dated at Port Vila this 20th day of August 2021

BY THE COURT



Oliver Saksak

Judge

