

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

Criminal
Case No. 20/498 SC/CRML

BETWEEN: Public Prosecutor

AND: Jean Batist Napipi
Defendant

Date of Trial: 3 and 4 March 2021
By: Justice G.A. Andrée Wiltens
Counsel: Mr T. Karae for Public Prosecutor
Mr B. Livo for the Defendant
Date of Publication of Reasons: 12 March 2021

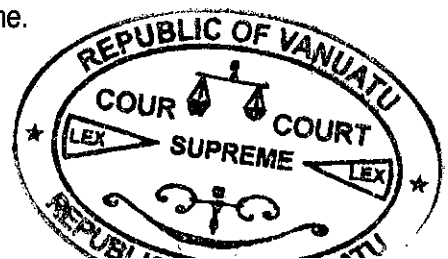
Verdict

A. Introduction

1. Mr Napipi was found guilty after trial in respect of five charges of sexual intercourse without consent with his daughter ("AP") in the period October to December 2019.
2. At the conclusion of the evidence and submissions, I recorded guilty verdicts in respect of all five charges and gave short oral reasons for those verdicts. I indicated fuller written reasons would be provided in due course. These are they.

B. Law

3. The allegations were that on each of 5 separate occasions Mr Napipi had digitally penetrated 18-year-old AP's vagina. The issue of lack of consent was not raised, and in respect of each charge AP stated that she had not consented to what had occurred and had attempted to physically extricate herself from what was happening. She maintained that she had made her lack of consent very obvious at the time.



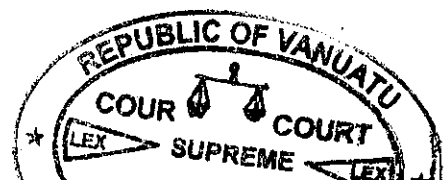
4. There was also no challenge to the fact that digital penetration amounts to sexual intercourse.
5. Accordingly, the trial centred solely on whether it was proved that what was alleged had actually occurred.
6. The prosecution had the onus of proof and was required to establish the allegations beyond reasonable doubt before a finding of guilt could be made in respect of any of the charges. Each charge was to be considered as a distinct exercise. Mr Napipi was not required to establish anything.

C. The Issue

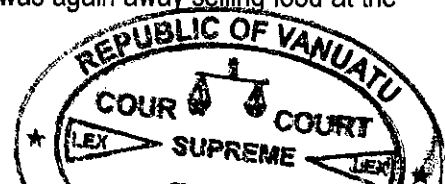
7. This was a matter purely of credibility.
8. The credibility and accuracy of a witness' evidence is not to be assessed solely by how the witness appears in Court. The clues that might be relied on to gauge such matters are not readily gleaned simply based on appearance or conduct. Of course those observations are a part of the process of evaluation, but they play only a small part.
9. What is of more significance is to look for consistency of accounts. I looked firstly for consistency within a witness' account. Secondly, I looked for consistency when comparing that account with the accounts of other witnesses, and also when comparing the accounts of witnesses with relevant exhibits.
10. I further had due regard to the passage of time, bearing in mind that the events were not recent, and recognising the effects of lapse of time on a person's memory.
11. On that basis I formed certain views as to the reliability and veracity of each of the witnesses.
12. I also had regard to the inherent likelihoods of the various situations then prevailing.
13. These factors all impacted on my findings of facts.

D. The Evidence

14. I heard evidence from AP as the complainant, and from her aunt as a supporting witness. I further heard from Mr Napipi, a witness (known as Fabi) he called effectively to support an alibi he had raised, and his second wife.
15. AP. She now resides with her auntie Ms Mylene Tehei at Bladiniere. She is in year 11 at St Antoine School. She is currently 20 years old. AP's parents have split and her mother resides at Freshwota; her father has re-married.
16. In 2019, AP went to live with her father at her uncle's house at Blacksands. Her father's elder brother and his wife slept in one of the rooms of the house, and their children slept in a second room. AP slept in the third room with her half-siblings. AP's father slept in the kitchen with his current wife.

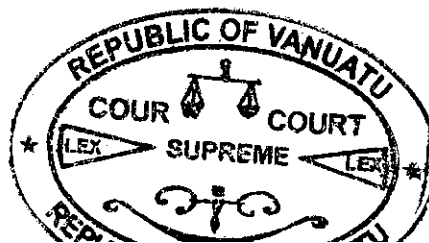


17. AP related that certain events occurred with her father which caused her to move back in with Aunt Mylene.
18. The first of those events was described as follows. AP told me her father called her into the kitchen at some stage in the morning on a Friday in October 2019, and he asked her to lie down on the bed next to him. He started to touch her in various places, including her private part. He told her to go and sleep with him; that he was pleased she was now grown up and a mature woman. AP did what he asked as he was her biological father and she didn't know what he was going to do.
19. While AP was on the bed, her father's hand went under her shirt and he touched her. His hand moved down to her private part and he lifted up her shirt and touched her breasts. She said he pushed his finger up her vagina.
20. AP's stepmother then away from the home selling food at a nakamal near her grandfather's home at Bladiniere. There was no one else nearby either.
21. AP was unhappy at what occurred; not comfortable. She tried to push his hand away, but he was strong and kept on going. Her father told her that he did this so she would become a fully mature woman. AP did not call out. She was told that she should not report what had occurred, that she shouldn't say anything. AP told him to stop, but he continued to touch her until he allowed her to leave.
22. AP told her uncle, Henry Napipi, her father's younger brother what had occurred in about November 2019, but he did nothing about it. She also text aunt Mylene. In cross-examination it was put to AP that she had not told her uncle Henry about the first incident and had only made up that account at trial, but she remained unshaken on that point. This part of her account was supported by the evidence of Mylene.
23. The second event complained of occurred perhaps a week later, around lunchtime. Her father did the same things to her, lifted up her clothes and touched her private part. AP had gone into the kitchen to do something while her father slept. When she entered, her father told her to lie down next to him. AP did as asked because she was afraid of him. She was wearing jeans and a shirt.
24. He father touched her breasts, sucked one of her breasts, opened up her jeans and pushed his hand down into her private part.
25. AP did not think he would do this again – she thought he just wanted to speak with her. AP tried to make an excuse, that she had things to do outside, but her father responded that her step-mother could do them.
26. While her father touched her, AP did not feel good. She was not happy about it. AP tried to stop him and cried. He told her to be quiet and that AP should not make any noise. In cross-examination it was put that AP had embellished her evidence by adding in the fact that she had been crying to give the story greater credibility. AP denied that, convincingly.
27. The second incident lasted quite some time. AP was crying before her father let her go outside. She went and took a shower. AP's stepmother was again away selling food at the

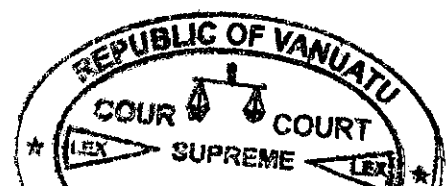


nakamal during the second incident. AP wanted to tell her what had occurred but her father told her that if she reported him he would go to jail for life.

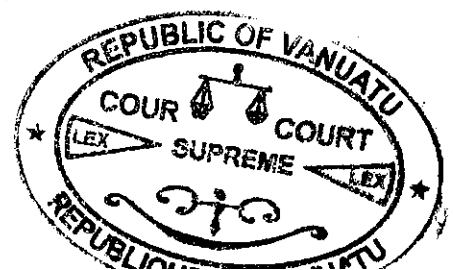
28. The third event complained of followed a request by AP to her father for some money perhaps 2 or 3 days after the second incident. He responded that he could not give AP money in the house as it would make her step-mother cross. AP had to go to town to meet her father in order to get any money. That Friday morning AP went to school. After the school day had ended at lunchtime, AP returned home and showered. She then caught a bus into town.
29. AP went to the Tafea Guesthouse, where she was to meet her father. She telephoned him and he told her he was in Room 4. AP went there and entered to find her father lying on the bed. AP asked for some money and stated that she would then go and help her step-mother prepare some food. Her father told her she couldn't go. He pulled AP down onto the bed and started touching her body and her breasts. He pushed his hand down into her trousers and down into her private part. He pushed his finger inside her vagina.
30. AP did not want her father to do that. She tried to fight him off, but he was stronger. He said he just wanted to hold her, to enjoy her and then she could leave. AP did not agree to that.
31. AP's father gave her VT 7,000, which AP used to buy some clothes before returning home.
32. AP did not tell anyone about the third incident.
33. It was put to AP that her father had a woman by the name of Fabi in the room with him and that he did not allow AP to enter the room. Instead he met her at the doorway and gave her VT 7,000 cash. AP did not accept these propositions put to her and insisted she had entered the room and that what she alleged had actually occurred in the room.
34. The fourth event complained of occurred after AP again asked her father for money, this time to buy a new telephone. Her father told AP she would have to meet him in town again, and he said he would ring her. He called her and told her to meet him at the Tafea Guesthouse. AP replied she had no money to pay the bus fare, and her father said he would pay when she arrived.
35. AP took a bus to the Tafea Guesthouse and went to Room 6, where her father had told her he would be. She entered and took the bus fare from some cash on a table inside the room and paid the driver.
36. When she returned to Room 6 she wanted to just get the money from her father and leave. However, her father did not want her to leave and he pulled her onto the bed. He took off her clothes and started to suck her breasts and her vagina. He used his tongue to lick her private part.
37. AP's father tried to force her to touch his private part, but AP did not want to. He was wearing boxer shorts. He did not take them off but did remove his shirt.



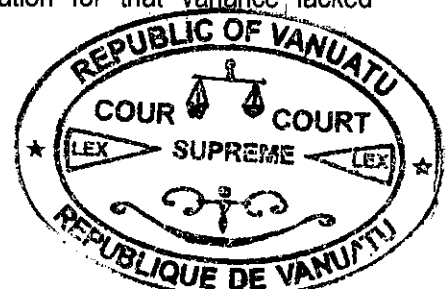
38. AP did not agree with what her father was doing. She told him she did not want him doing this, to stop. She cried and said she wanted to leave. She was there for about an hour. She was crying and asking to leave. He gave AP VT 17,000.
39. After this second incident at the Tafea Guesthouse, AP sent a text to Aunt Mylene. Aunt Mylene replied and told AP to go and see her at her place of work. When she got there AP told her everything that had happened, and AP made up her mind to report the matter to the police.
40. In cross-examination it was suggested again that her father did not allow AP to enter the room he was occupying, that he gave her the bus fare outside the room and handed over the VT 17,000 in the corridor. AP denied these suggestions. She was adamant that she had entered the room and that the things she complained of had occurred there.
41. It was suggested in cross-examination that AP had not texted Aunt Mylene. AP maintained that she had forwarded texts sent to her by her father regarding collecting the condoms onto Aunt Mylene. AP maintained the texts were still on Aunt Mylene's phone. This line of questioning was surprising, as counsel had not asked to see the phone. The trial was suspended over lunch so that could be attended to.
42. It was then suggested to AP that she had not forwarded on messages received, but simply sent texts of her own to Aunt Mylene. She denied that. Subsequently it was contended even more surprisingly that there were no such text messages as they had not been included in AP's police statement. AP denied that. AP's evidence was confirmed to be accurate subsequently when Aunt Mylene gave evidence and showed the Court one of the text messages.
43. The fifth event complained of occurred at night time on 23 December 2019. AP and her father had been at AP's friend's nakamal, her father drinking kava with others. Her father went next door to a building site and sent AP's step-mother away to join others so that he could speak with AP. He then took AP onto his lap and started talking in a kindly way "about school stuff" before beginning to touch AP. He opened her trousers and pushed his hand into AP's private part. He told AP that the next day she was to go to Wan Smol Bag theatre and collect some condoms which she was to bring to her father at the Tafea Guesthouse and sleep with him. AP was told she would be able to go home on December 25th.
44. AP was crying and wanting to be left alone. In the end her father allowed AP to go. AP then attempted to telephone Aunt Mylene, but there was no answer. AP sent a text instead.
45. On December 24th AP did not go to Wan Smol Bag – she went to Aunt Mylene's place of work instead and recounted what had occurred and told her she was going to formally report the offending.
46. It was suggested in cross-examination that AP's father had discussed her relationship with Alick on this fifth occasion. AP disagreed. She agreed that she wanted to smoke a cigarette, but she disagreed that there were many people around where she and her father were as well as the suggestion that the area was well lit.



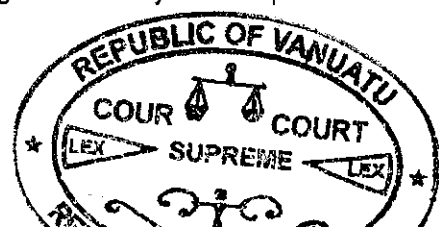
47. AP made a formal complaint to the police on 25 December 2019. AP was not forced to make the complaint, and only gave one statement.
48. During 2019, AP was in a relationship with Alick Nola, her father's godson. AP told me they were friends, going together. When the family discovered this, it had to stop because of the family relationship. There was a custom reconciliation ceremony involving fines in the presence of Chiefs, following which AP and Alick ceased to see each other. In cross-examination, AP accepted that Alick was her cousin, and that they had continued to see each other after the custom reconciliation meeting. She accepted also that her father disapproved of her seeing Alick, but denied that she had invented the allegations due to this. AP denied also that she wanted her father to be incarcerated so that she could continue to see Alick.
49. There was cross-examination of the sleeping arrangements at the house at Blacksands, where and when AP's step-mother prepared the food she sold at nakamals, and how and when AP went to school. The purpose behind these questions was to eliminate the opportunity for AP's father to have committed the acts complained of at the home. In my assessment, these lines of questioning were ineffective in undermining AP's credibility.
50. AP wrote a letter to the Public Prosecutor dated 3 April 2020. She wanted to withdraw the complaints against her father, even though the complaints were true. She explained that she had written the letter to forgive her father. He was the sole-bread winner in the family and he paid for the school fees for her small brothers and sisters. Also, he was apparently unwell at that time, and AP felt sorry for her father, regardless of the wrongs he'd done.
51. I accepted AP as a truthful and accurate witness. I noted that she withstood cross-examination without deviating from her original account; and also that she made reasonable concessions when appropriate. I considered also that her allegations were not materially different to what she included in her statement to the police. There was strong support for parts of her account in the evidence of Mylene. In particular, the evidence relating to reporting the defendant's conduct to Uncle Henry and Aunt Mylene. Further, the text message shown in Court dovetailed with her evidence and that of Mylene.
52. Aunt Mylene. Mylene is the defendant's first born sister. She told the Court that AP had resided with her at Bladiniere since late 2011. She confirmed that AP and Alick had been in a relationship in 2019, and that the defendant had told her about that. She confirmed there had been a custom reconciliation meeting in about October 2019, which she did not attend due to the shame involved.
53. Mylene confirmed receiving a text from AP on 23 December 2019. She already knew from AP in about October 2019 about the defendant's touching AP's body in her private area. Mylene did not broach the subject with the defendant as in her custom is taboo for females to speak of such matters. Mylene asked AP to tell Uncle Henry and for him to then speak to the defendant.
54. Mylene did not advise or tell AP to report these matters to the police. She considered that AP was sufficiently old and mature to make her own decisions.



55. Mylene confirmed AP coming to see her at her place of work on 24 December. AP told her that she was going to report the defendant to the police. Mylene was very upset and felt sorry for her brother, although she also acknowledged that AP had rights. It was AP's decision. Mylene went to the police station with AP on 24 December 2019 to make the report and again on 26 December when AP gave her statement. Mylene did not give a statement herself at that time, but 2 weeks later the police came to her place of work and took a statement. There was no mention of texts in her statement as the police were unable to print them off her phone. Mylene was adamant she had told the police about the texts.
56. In cross-examination Mylene denied it was her idea that AP give a statement to the police as she had previously had arguments with the defendant. She stated that she had a good relationship with the defendant. Mylene confirmed that she too did not want AP to be with Alick. She confirmed also that AP had not only sent her texts but also forwarded texts from the defendant. She was able to tell they were from him by reading the content of the texts. One text she showed the Court read in part:
- "Remember, don't forget what daddy told you, to go and take at the Smol Bag tomorrow morning before you go and see your friend"
57. Mylene was then challenged as to whether it was possible to edit texts before it was forwarded. She did not accept that just anyone could have sent it. She explained that the text went on to discuss meeting the defendant at the Guesthouse later that day.
58. Mylene was also a truthful and accurate witness in my assessment. Her account remained constant, and it was consistent with that of AP as well as the text message.
59. Mr Napipi. He was married for 2 years, before leaving his first wife. AP was the only child of the union. He has now re-married to Melody and they have 5 young children together and they all reside at Blacksands.
60. Mr Napipi explained that where he lived was his older brother's house. There were 4 rooms to the house, one of which was for his older brother and his wife. A second room was occupied by their sons, and a third was for their daughters. There was then one remaining room, where his young children slept. He and Melody slept in the kitchen, which is a grass house with an open doorway, which is blocked at night by a sliding sheet of iron.
61. He confirmed that AP had resided with him for the first 10 years of her life, and then she went to reside with his sister Mylene at Bladiniere until 2019.
62. Mr Napipi was working as a security officer for the Port Vila Municipality in 2019. His working hours at the Market house involved the afternoon shift, finishing at 5-6pm. On most days he would go to the 24-hour nakamal at Namburu, and take some kava home to have while the children had their tea at about 6.30-7am. He was cross-examined about his work and working hours. It appears that even though he told the Court he worked as a security officer, he told the police something else in his interview, namely that he was a collector at the Municipal Market house. His explanation for that variance lacked conviction.

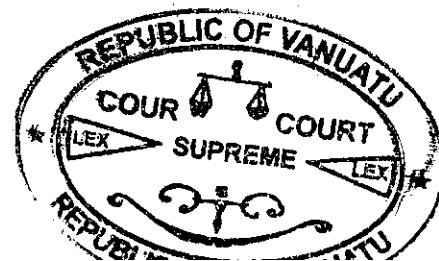


63. He maintained he got to sleep only by having Melody lying next to him, and this explained why she was always at home in the mornings and not preparing food at the grandfather's house. After Mr Napipi is asleep, Melody would get up again and attend to household chores and see to the children. This evidence was led to reduce the possible opportunity for Mr Napipi to have offended as alleged. It lacked authenticity.
64. Mr Napipi clearly recalled the events of 18 October 2019. That day he stated that he had found Alick in the children's room with AP and another of his daughters Geraline. Mr Napipi was very angry with them and what they had been doing, although there was no explanation of what they had allegedly been doing. Mr Napipi stated that his older brother apologised on behalf of his son Alick. This aspect of the evidence had not been put to AP, as required by the rule in *Browne v Dunn*. Counsel stated that he had been unaware of the evidence when cross-examining AP. I determined that this evidence simply be put to one side and not considered. It was not central to the issues the Court had to determine.
65. Mr Napipi went on to deny the various allegations made by AP. He stated that he had no knowledge of what she was talking about. He denied inappropriately touching her in any way at any location at any time.
66. He then explained again the sleeping arrangements at the house. Inconsistently, he stated that Melody's younger sister, her 2 small children and all his 5 children slept in the kitchen with Mr Napipi and Melody. This evidence was at odds with he had said earlier and is also at odds with what AP described.
67. He was also cross-examined about this aspect. A third version of the sleeping arrangements was then revealed. This time, Mr Napipi, his wife and their 2 youngest children were said to have slept in the kitchen. When challenged on this different account, he insisted he had not been asked this in his evidence in-chief. The reality is that he was asked and gave the first version. He then volunteered the second scenario, and when challenged came out with the third version. His evidence as to this was inconsistent and accordingly unreliable.
68. Mr Napipi recalled the occasion when AP wanted a phone. He was staying at Room 4 of the Tafea Guesthouse with another woman by the name of Fabi when AP called him and said she needed money to buy a phone. AP told him she had no bus fare money and that he agreed to pay that when she arrived. He stated that he gave AP VT 200 for the bus fare, and later when she returned from paying the driver VT 17,000 for the phone.
69. Mr Napipi explained that the rooms at the Guesthouse are small, with the bed taking up most of the space. He stated that Fabi had been sitting at the far end of the bed, and that AP came "sort of half way through the door" to get the money. AP was said to have been in the room for only a short while, and Mr Napipi did not touch her at that time as she alleged.
70. In cross-examination Mr Napipi advised that he had stayed at the Tafea Guesthouse with Fabi on a number of occasions. He stated that he had deliberately wanted AP to see Fabi when she came for her phone money. He then retracted that and said he did not mean for that to occur – it's just that she came along then to get the money. It was put to him that



Fabi had not been present that day, but he denied that. In effect, she was alibi witness to the fact that he had not offended against his daughter.

71. As will be later discussed, Fabi did not support Mr Napipi's version of events. Further, I consider it inherently unlikely that a father would intentionally put an 18-year old daughter in a situation where she would meet her father's mistress. This was no more than attempt to create a situation where Mr Napipi would be able to say the alleged offending could not have occurred because he was with his mistress and AP was never really in the room. I rejected this evidence.
72. On 23 December 2019 Mr Napipi related that he had a big argument with AP about her relationship with Alick, in the presence of AP's step-mother, and AP's uncle and aunt. This was also not put to AP in her evidence, and I disallowed Mr Napipi to elaborate on this evidence. Mr Napipi stated that he had not touched AP on this occasion; that he had not opened her trousers as she alleged. He agreed he was angry with AP regarding her relations with Alick, but that was not because he had sexual desires for AP.
73. Finally, Mr Napipi stated that he knew nothing about of any texts. In cross-examination, he told the Court he had never sent AP texts. He stated that he would telephone her if he wanted to contact her. Given the text shown in Court and the fact that contextually it can only have been sent by Mr Napipi I also rejected this evidence as a contrivance to attempt to extricate him from culpability.
74. Mr Napipi was a very unsatisfactory witness. On a number of occasions he was inconsistent within his evidence, as recorded earlier. On other occasions, there was credible and reliable evidence to the contrary of what he had testified. I determined that his evidence should be accepted only where was some independent credible support of it.
75. Fabi. Her real name was Jenny Ben. She was unwilling to tell the Court very much at all. There were lengthy pauses prior to her responses. She admitted that she knew Mr Napipi but would not tell me in what context. She first came to know him in 2002, when she came to Port Vila from Espiritu Santo. She stated that had not seen or spoken to Mr Napipi at all in 2019. She maintained they were just friends who no longer met.
76. This evidence did not assist the defence or the prosecution. Given that I paid little heed to it.
77. Melody Napipi. She told me that she had 5 children with Mr Napipi. They all live at Blacksands. She explained they lived with Mr Napipi's brother and his wife and their 4 children. She stated further that Mr Napipi had two other children prior to their meeting, one of whom was AP. She explained a little of the family's daily routine and what she did in the home. She stated the children would leave for school at 6.30am and that she would prepare food for sale at the nakamal. She did not accept preparing food at the grandfather's home.
78. Her evidence was relatively brief, and rather sketchy. I noted it was also littered with long pauses prior to responding to questions. In general, I found her evidence of little assistance to determining any of the factual disputes.



E. Discussion

79. I put to one side the evidence of Melody and Fabi as inconsequential, and that of Mr Napipi as unreliable and not credible except where supported by credible, independent evidence. That left only the evidence of AP and Mylene to consider.
80. I accepted Mylene's evidence. It was supportive of parts of AP's testimony, which added to her credibility and reliability.
81. I accepted AP's evidence. She was the only witness who gave direct evidence relating to the essential elements of the charges. She established that on the five occasions alleged her father had deliberately inserted his finger into her vagina without her consent. He could not have been under any illusion that she was consenting. All five charges were established beyond reasonable doubt.

F. Result

82. Mr Napipi is convicted as charged.

Dated at Port Vila this 12th day of March 2021

BY THE COURT

G.A. Andrée Wiltens
Justice G.A. Andrée Wiltens

