

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

Criminal
Case No. 21/2271 SC/CRML

PUBLIC PROSECUTOR
v
JEAN ROBERT LITENMAL

Dates of Trial: 20 June 2022 & 9 August 2022
Before: Justice V.M. Trief
In Attendance: Public Prosecutor – Mr K. Massing
Defendant – Mr B. Livo
Date of Decision: 17 August 2022

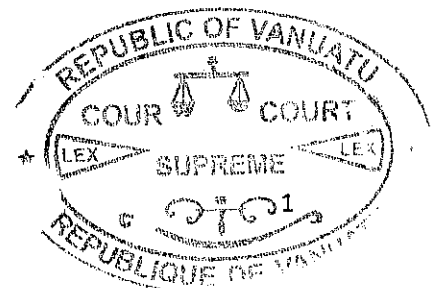
VERDICT

A. Introduction

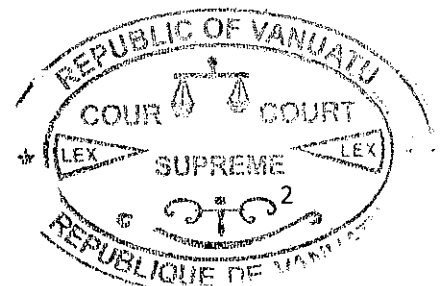
1. The accused Jean Robert Litenmal was charged with act of indecency without consent (Charges 1, 5 and 6), attempted act of indecency without consent (Charge 2), sexual intercourse without consent (Charge 3) and attempted sexual intercourse without consent (Charge 4).
2. At the conclusion of the evidence, counsel requested to file closing submissions. Having considered counsel's submissions, I now set out the verdicts.

B. Law

3. The charge of act of indecency without consent has 3 legal ingredients which must be proved in order for a conviction to be entered, namely that on the occasion alleged:
 - Mr Litenmal committed an act of indecency upon, or in the presence of the complainant Esly Bule; **and**
 - The act was without Ms Bule's consent; **and**



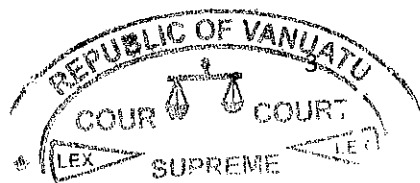
- That Mr Litenmal knew there was no consent or did **not** believe on reasonable grounds that Ms Bule consented.
4. The charge of attempted act of indecency without consent has 3 legal ingredients which must be proved in order for a conviction to be entered, namely that on the occasion alleged:
- Mr Litenmal attempted to commit an act of indecency upon, or in the presence of Ms Bule; **and**
 - The act was without Ms Bule's consent; **and**
 - That Mr Litenmal knew there was no consent or did **not** believe on reasonable grounds that Ms Bule consented.
5. The charge of sexual intercourse without consent has 3 legal ingredients which must be proved in order for a conviction to be entered, namely that on the particular occasion alleged:
- Sexual intercourse, as defined in section 89A of the *Penal Code*, took place between Mr Litenmal and Ms Bule; **and**
 - That Ms Bule did not consent; **and**
 - That Mr Litenmal knew there was no consent or did **not** believe on reasonable grounds that Ms Bule was consenting at the time that the sexual intercourse occurred.
6. The charge of attempted sexual intercourse without consent has 3 legal ingredients which must be proved in order for a conviction to be entered, namely that on the particular occasion alleged:
- Mr Litenmal attempted to have sexual intercourse with Ms Bule; **and**
 - That Ms Bule did not consent; **and**
 - That Mr Litenmal knew there was no consent or did **not** believe on reasonable grounds that Ms Bule was consenting at the time that the sexual intercourse occurred.
7. The issue of consent arises across all 6 charges. This is an issue of the facts.
8. As in all criminal cases, the Prosecution had the onus of proof and was required to establish the allegations beyond a 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 Litenmal was not required to establish anything.
9. I remind myself that if I were to draw inferences, they could not be guesses or speculation but had to be logical conclusions drawn from other properly established facts. Further, if more than one inference was available, the inference most favourable to the defence must be drawn.
10. This was also a matter of credibility.



11. I assessed the credibility and accuracy of a witness' evidence not only by how the witness appeared in Court but also by the 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 witnesses' accounts with relevant exhibits.
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.

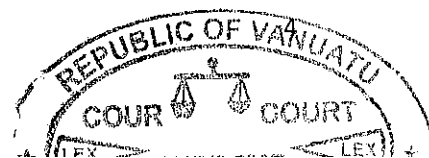
C. The Evidence

14. The **agreed facts memorandum** set out a number of matters as follows:
 - Mr Litenmal and Ms Bule are tenants in the same residential building and yard belonging to John Wai at Fresh Wota 4 area, Port Vila.
 - Ms Bule is 36 years old.
 - Ms Bule lives in room 2 and Mr Litenmal in room 3 in the same residential building and they share the same bathroom and toilet.
 - There was sexual intercourse between Mr Litenmal and Ms Bule. That intercourse occurred outside of the house.
 - On two different occasions, Mr Litenmal penetrated Ms Bule's vagina with his penis.
 - Between April and June 2021, Mr Litenmal touched Ms Bule's breasts.
 - On one occasion, Mr Litenmal exposed his penis to Ms Bule while she was washing dishes in front of Unit 2 and she told him, "*Karr samting blong yu bigwan we*".
 - The wall of the house between the cement wall and the iron roof wall is around 1 metre. Picture marked "**1B**" is close to the landlord's room.
15. The **agreed exhibit** was a Vanuatu Police Force Forensic Section bundle consisting of Police Constable Winshual Garae's police statement and photographs of John Wai's buildings and yard [**Exhibit P1**].
16. I **heard** evidence from **Ms Bule**. She is married to James Henry Hilau from Paama. They have 3 children. She sells mobile phone credit and data at a Vodafone umbrella stand.
17. In April 2021, she was washing clothes behind the bathroom and toilet block one afternoon when Robert (meaning Mr Litenmal) walked up to her from behind, pushed his hands inside her t-shirt and touched her left breast. She called out and he ran into the toilet. She went to her room. Her husband was lying down. She told her husband what had happened but he did not say anything. She did not agree with what Robert did to her.
18. One night in April 2021, she showered in the bathroom and then began walking back to her room. As she came round the corner of the house, she was shaken by Robert appearing and holding tightly to both her hands so that she could not move away from him. He touched



both her breasts. She called out his name and he let her go. She ran back to her room. Other people from the yard were out. She did not agree with what he did to her.

19. One evening in April 2021, she showered in the bathroom and then pushed the door open. She came out and was shaken to find Robert blocking her way in the door of the bathroom. He pushed her backwards to go back inside the bathroom. She said to him, "*Yu kranke? Mi mi jes finis swim*" ('Are you crazy? I have just finished showering.'). She pushed him away and walked quickly back to her room. Her husband had not come back yet. She did not agree with what Robert did to her.
20. On another evening in April 2021, Ms Bule went to shower in the bathroom. She left the bathroom and walked round the corner of the house when Robert appeared and held her hands tightly so that she could not escape from him. He bent her over the wall of the house, pulled her towel away from her backside and pushed his penis into her vagina from behind. When she called out, he shoved some of her towel into her mouth to stop her calling out. He grabbed her and had sex with her twice like this in April. She did not agree with him doing that.
21. There is no light in the bathroom. They use their mobile phone torches in the bathroom. There is no light at the corner of the house from the bathroom or from the house.
22. In June 2021, she awoke at about 9.30pm needing to go to the toilet. She walked round the corner of the house and was shaken by Robert appearing, holding both her hands and her body so that she could not escape. He pulled down her trousers and panty, took out his penis and she loudly called out his name. He let go of her and she ran back to her room. She did not agree with what he did.
23. On a Sunday morning in June 2021, on returning to her room from the bathroom, she heard a noise. She saw Robert standing at his room door, fondling his genitals with both hands (*hemi stap holem ol bol blo hem lo tufala han blo hem*). He said to her, "*Mi stap shoem lo yu se hemi blong yu*" ('I am showing it to you because it is yours'). She replied, "*Kas, yu kranke? Yu stap wetem woman blong yu ia*" ('Are you crazy? You have got a wife'). She did not agree with what he did.
24. She did not tell anyone what happened. Her husband had already gone to church.
25. On another morning in June 2021, she was washing plates and dishes outside her room door when she was shaken to see Robert stand at his door, remove his penis from his trousers and touching it with both his hands, was showing it to her. He said to her, "*Mi stap shoem lo yu se hemi blo yu*" ('I am showing it to you because it is yours'). But she said to him, "*Kas, samting blo yu l bigwan we*" ('Hey! Your private part is very big') and then she went back into her room. She did not agree with what Robert did. Her husband had already gone to work that morning.
26. There are 5 rent rooms where she lives. They use solar lighting. The other rooms are also occupied.
27. In June 2021, she was showering in the bathroom one morning when she felt goosebumps. When she looked up at the ceiling of the bathroom, she was shaken to see Robert's hand



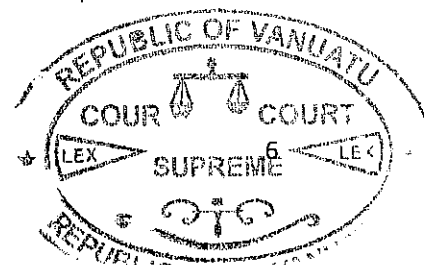
pushing his large mobile phone along the ceiling and taking photos of her showering naked. She called out, "*Shee, whu i stap kranke olsem?*" ("What? Who is being crazy like this?") Robert pulled back his hand and the mobile phone and ran back to his and his partner's room. When she got to her room door, Robert was standing at his door and said, "*Yu stap fraet? Mi stap toktok lo yu oltaem be yu stap fraet?*" ("Why are you being scared? I always talk to you so so why are you being scared?") So she went into her room.

28. She recognised Robert's hand and his large mobile phone.
29. She went to work that morning but was unsettled in her heart because she saw the mobile phone taking photos of her. She was scared that he would post nude photos of her on Facebook. So when she returned home that evening, she told the landlord what happened about her seeing the mobile phone. The landlord went to see Robert and his wife and told them 3 times to attend a meeting with them to talk about what Robert had done. But Robert and his wife did not attend. So the landlord told her and her husband to put the case with the Police. Robert did his actions towards her when he could see that other yard occupants had gone out. She did not agree with his actions towards her.
30. Ms Bule confirmed that Picture 5 in **Exhibit P1** shows the corner of the house where Robert had sex with her. There is a spot marked "**1B**" in Picture 5 in the middle of the pathway that they walk along to go to the bathroom and toilet which are located behind the house.
31. In cross-examination, Ms Bule agreed that one night she and her husband had a row inside their room about her husband having sex with her niece. She said she did not talk about it outside but the house walls are made of iron roofing so Robert heard the row from his room. She agreed that the next (Sunday) morning, Robert asked her about the row. She said he asked her from his room door while she was washing plates outside her own room door. She denied that Robert asked her about the row in the kitchen that they all use to cook over an open fire. Her husband and small daughter had already gone to church.
32. Ms Bule denied that she was cross with her husband and wanted to do the same back to her husband. Robert asked her if she would do the same thing to her husband? She replied that she already had a long time ago so she would not give it back to him now. It was put to Ms Bule that out of this conversation, she and Robert agreed to have sex for the first time on 19 February 2021. She stated that when Robert had sex with her it was by force – he forced her. She was asked again that they had sex on 19 February. She said not in February but in April. She could not recall the exact date in April.
33. She denied agreeing with Robert to meet at the corner of the house and have sex. She said when she rounded the corner, Robert was already there and grabbed her tight. She denied ever telling Robert to see if there was anybody else around. She said she never made an agreement with Robert ("*Mi neva promise wetem hem.*") She vehemently denied telling him to have sex with her quickly in case there were other people nearby ("*No! Mi neva talem toktok ia.*") It was put to her that she planned with Robert to have sex when her husband was out. She replied, "*Sori, mi no plan wetem hem blo mi gat sex*" ('Sorry, I did not plan with him to have sex').
34. She said she told Robert's wife in April to speak with Robert but he continued his actions into June. She called Robert's wife to sit with her in the kitchen one morning and told her

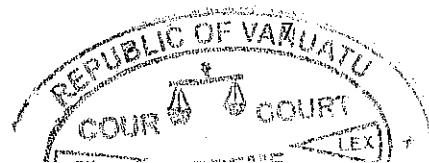


that Robert had done things to her that were not right. So she wanted Robert's wife to tell Robert to stop. She did not know what Robert's wife did.

35. Ms Bule did not tell her husband because she was afraid he would beat her ("*mi fraet se bae hemi kilim mi*"). She confirmed twice more that she did not tell her husband because she was scared he would beat her. She confirmed having sex with Robert twice in April and in that whole month, she did not tell her husband because she was afraid he would beat her. She only told the landlord after the mobile phone incident. She did not tell the landlord that she and Robert had sex. When Robert touched her breast, she told her husband who was lying down inside the house. Robert had sex with her a few days after that. It was put to her that Robert saw her washing so he hugged her and then touched her breast. She replied, "No!" She said Robert did his actions to her when the other yard occupants were out. She confirmed that when they returned, she never told them what Robert had done.
36. She denied that Robert exposed his penis to her after they had sex the night before. She said no, they had sex at another time. It was put to her that she had asked him, "Mi traem luk kok blo yu?" She replied with a loud, "No!" It was put to her that she asked him to show her his penis. She said, "Sori, mi no bin talem". She confirmed that she said "Kas, samting blo yu I bigwan we!" then she went into her room. It was put to her that she was surprised to see how big his penis was. She replied that he showed it to me! She said what she said and then turned into her room. It was put to her that she did not call out because she wanted to see Robert's penis. She replied, "Kas!" She was asked if that meant 'yes' or 'no'. She replied firmly, "No!"
37. Her husband found out that Robert had sex with her when she reported Robert to the landlord. She was scared that Robert would post her pictures on Facebook so she reported what he had done. She told her husband in June that Robert had sex with her. Her husband rowed at her and slapped her. It was put to her that the reason she did not tell anyone in April, May and June that Robert raped her was because she agreed to the sex. She replied that Robert had sex with her only by force. She told her husband about Robert touching her breast, about the mobile phone incident and the third time about Robert holding her breast was when he told her to tell the landlord. She agreed she hid from her husband that Robert had sex with her.
38. Ms Bule was challenged about saying that Robert did things to her when everyone in the yard was out. She replied that she could not see the yard occupants which is why she said when the yard occupants were out, he did his actions towards her. It was put to her that sometimes there would be some occupants inside the 9 rooms in the yard. She answered that she could not check them in their rooms! It was put to her that if there were yard occupants in their rooms, when she called out they would hear her. She answered that Robert would block her mouth so she could not call out, so how could anyone in the yard hear her? It was put to her that Robert blocked her mouth up to her door? She answered that he blocked her mouth where he attacked her so how could another person hear her?
39. To the last question in cross-examination, Ms Bule answered that Robert's actions towards her happened in April and June. When photos were taken with the mobile phone was when she reported Robert to the Police (in July).

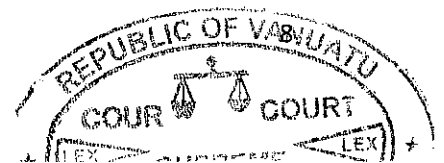


40. Ms Bule stated in re-examination that she did not tell her husband because she was scared that he would beat her.
41. I accepted Ms Bule as a truthful and accurate witness and accept her evidence. Her evidence was detailed. She was undeterred in cross-examination and did not deviate from her original account. She accepted that she had not told her husband about having sex with Mr Litenmal because she was afraid he would beat her. When she told him, he told her off and slapped her. It was suggested that Ms Bule's words to Mr Litenmal, "*Kas, samting blo yu I bigwan we*" ('Hey! Your private part is very big') encouraged him to show his penis to her. When it was then put to her that she did not call out because she wanted to see his penis, she replied with the same expression, "*Kas!*" I find that her use of that expression denotes surprise and is an instantaneous response when is taken aback by something she has seen or that has been said to her, rather than being used in a sexual or suggestive manner. Ms Bule's evidence had the ring of truth to it.
42. The second Prosecution witness I **heard** from was **James Henry Hilau**, Ms Bule's husband. They have 3 children. He works in a construction company.
43. In April 2021, Ms Bule told him that Robert had been touching her breasts. In his mind, Robert was a close friend of his so he felt bad as Robert was his friend. He did not do anything about what Ms Bule said because Robert is a friend of his.
44. It was when the mobile phone incident happened that he and Ms Bule went to see the landowner. The landowner told them to go to the Police. He (Mr Hilau) thought they would deal with Robert's actions and reconcile amongst the yard occupants only but when Robert and his wife did not attend 3 meetings then they went to the Police. He said the second time his wife told him about Robert was that Robert was exposing his penis to her from Robert's room.
45. In cross-examination, Mr Hilau stated that his wife told him that Robert touched her breast when she was washing. She also told him that Robert blocked her way at the corner of the house, covered her mouth with her towel so she could not call out, pushed her towel to one side and had sex with her there. He agreed that she did not tell him straight after it happened but days after because she was scared he would beat her. He agreed that Ms Bule only told him after they had been to the Police. He was asked several questions about when Ms Bule told him about the sex. He maintained that it was after they had been to the Police which is why that was not in the Police statement. She told him about the breast touching and the mobile phone in the bathroom and then they went to the Police.
46. Mr Hilau's evidence was supportive of parts of Ms Bule's testimony, which added to his credibility and reliability. I accepted his evidence.
47. **Mr Litenmal** elected to give evidence. He is 37 years old, from Malekula. He is married. He and his wife are the only two living in their room.
48. On Saturday 14 February 2021 night, he heard Esly Bule and her husband having an argument. The next morning he was cooking in the kitchen and spoke with her. He told her they had heard their row at night. He asked her why they argued. She said that she had



caught her husband having sex with his niece. He asked her if she would do the same to her husband. She said she had already done so with her ex-boyfriend and would now, in revenge, go with someone inside the yard (meaning with him, Mr Litenmal). He told her that he had things to do that Sunday so there wasn't time.

49. On Friday 19 February they met in the early evening and arranged that when Esly had showered, they would meet at the corner of the house. They met and she told him to see if there was anyone about. He looked and there wasn't. Then she told him to be quick. They had sex outside at the corner of the house. She told him not to tell his wife, and he too told her not to tell her husband. He chose that place to have sex because there is no light there.
50. The next morning Esly was washing plates outside. She said to him that you felt good yesterday didn't you. She said she would make him forget his own wife.
51. When he met Esly, he hugged her. He hugged her on the pathway and in the kitchen. She agreed to that. They would face each other and he would hug her, sometimes touching her breast. She never called out. She agreed with what he did.
52. They had sex 2 times, the second time on 5 March. He denied forcing her to have sex. He never blocked her mouth. Esly bent over by herself during sex and never called out. He had sex with Esly twice in the same place.
53. The second time they had sex, the following morning Esly was washing plates outside. She said to him, "*Mi traem luk, mi traem luk*" ('Let me see, let me see') referring to his penis. So he did what she wanted – he took out his penis and showed it to her. She said, "*Man, samting ia i bigwan we*" ('Man, your private part is very big'). He did this only once, not twice.
54. After that, he would touch her and she would touch him when they met. This was ongoing.
55. In June, he put his phone up near the bathroom window and brushed his teeth at the tap stand outside the bathroom. The phone vibrated and he answered it. When he put it back near the window, the woman inside the bathroom called out. He removed the phone and waited outside for her to tell her that he did not take pictures of her. She listened to him for only 10 seconds and left. He said sorry twice but does not think she heard him as sometimes her hearing is poor.
56. The landlord came to see him only once for a meeting. He came home late and by then nobody was around for a meeting.
57. In cross-examination, he stated that he touched her breasts many times. When she was washing, he would hug her and touch her breast; she never called out. When they met along the pathway, in the kitchen, at the place for washing clothes, he hugged her. He touched her breast, she touched his private part. It was their agreement to. She never called out as she agreed with everything.
58. He said that in April, he had touched and held Esly many times already. He agreed that if she said that he held her breast twice in April, that was correct. He denied forcing Esly to have sex in June. He denied calling Esly in June to show her his penis. He said that was a lie! He showed his private part to her only once, because she asked him to. He said it was



not true that he showed his penis to Esly in June and said the words, "Mi stap shoem ia from se hemi blo yu". The landlord came to see him and his wife one time only, for a meeting about using his mobile phone to take pictures of Esly Bule in the bathroom.

59. It was put to him that he did not have an affair with Esly. He asked what "affair" meant. It was put to him that he had a relationship with her outside of his married life. He replied, "Nogat" ('Not at all').
60. In re-examination, he stated that both he and Esly hid the sex that they had and the other sexual acts from their partners. So it was true that they had an affair outside their marriages.
61. When asked to explain his answer to a question about touching Esly's breasts twice in April which was that he hugged her, he repeated that when they passed each other he would hug her. They faced each other and he would hug her. Sometimes when he hugged her he would touch her breasts and she would touch his private parts.
62. Much of Mr Litenmal's evidence was that he after he and Ms Bule had sex in February 2021 he hugged her whenever they came across each other in the yard. However, there were no questions put to Ms Bule in cross-examination about Mr Litenmal hugging her whenever they came across each other. I also consider that is inherently unlikely that Mr Litenmal would do so given that the yard has 9 rooms in it, all occupied by families, and anyone in the yard who would see them hugging would consider it odd behaviour as they are not spouses. I consider it more likely that this was self-serving evidence that Mr Litenmal gave but which lacked credibility. I considered that Mr Litenmal was an unsatisfactory witness and determined that his evidence should be accepted only where there was some independent credible support of it.

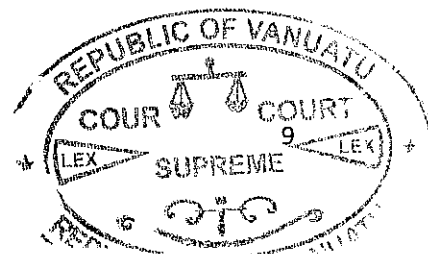
D. Discussion

Charges 1 and 2 – Act of indecency without consent and attempted act of indecency without consent

63. I reject Mr Litenmal's evidence that all his actions towards Ms Bule were consented to.
64. He accepted in his evidence that in April 2021, he intentionally touched Ms Bule's breasts twice. She was clear in her evidence that she did not consent to those acts. He could not believe on reasonable grounds that she consented as she immediately told her husband (after the first occasion) and she called out his name causing him to let her go (on the second occasion). Charges 1 and 2 have been established beyond reasonable doubt.

Charge 3 – Sexual intercourse without consent

65. Ms Bule's evidence was that Mr Litenmal had sex with her twice in April 2021 without her consent. He held her hands tightly so she could not escape from him, blocked her mouth with part of her towel so she could not call out and forcibly had sex with her. In the circumstances, he could not have believed on reasonable grounds that she consented. Charge 3 has been established beyond reasonable doubt.



Charge 4 – Attempted sexual intercourse without consent

66. Ms Bule's evidence was that at 9.30pm at night, when she returned from the bathroom Mr Litenmal appeared at the corner of the house, held both her hands and body tightly and pulled down her trousers and panty. He took out his penis and she loudly called out his name. He let go of her and she ran back to her room. I find that Mr Litenmal attempted to have sexual intercourse with Ms Bule and that she did not consent. In the circumstances, he could not have believed on reasonable grounds that she consented. Charge 4 has been established beyond reasonable doubt.

Charges 5 and 6 – Act of indecency without consent

67. Ms Bule's evidence was that on two occasions in June 2021, Mr Litenmal exposed his penis from the doorway of his room to her standing outside. She showed by her words, "Kas, yu kranke? Yu stap wetem woman blong yu ia" (on the first occasion) and, "Kas, samting blo yu I bigwan we" (on the second occasion) that she did not consent. He could not have believed on reasonable grounds that she consented. Charges 5 and 6 has been established beyond reasonable doubt.

E. Result

68. Mr Litenmal is convicted as charged.

**DATED at Port Vila this 17th day of August 2022
BY THE COURT**


Justice Viran Molisa Trief

