

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

**Criminal  
Case No. 22/306 SC/CRML**

**BETWEEN: Public Prosecutor**

**AND: Malao Jeajea  
Defendant**

*Dates of hearing:* 16 May 2022 and 2 June 2022  
*By:* Justice G.A. Andrée Wiltens  
*Counsel:* Ms M. Talki for the Public Prosecutor  
Mr R. Willie for the Defendant  
*Date of Decision:* 3 June 2022

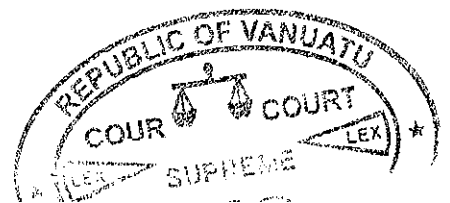
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**Verdict**

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**A. Introduction**

1. Mr Malao was charged with sexual intercourse without consent (Charge 1); or in the alternative, sexual intercourse where consent was obtained by false representation as to the nature of the act (Charge 2). Additionally, there was representative charge of sexual intercourse where consent was obtained by means of threats of intimidation (Charge 3).
2. Mr Malao denied all three allegations.
3. This was a matter that commenced during a judicial tour at Espiritu Santo. Unfortunately, due to inclement weather, it was not possible for all the prosecution witnesses to be present. Accordingly, with the agreement of counsel, it was decided that the matter proceed part-heard; with the complainant giving her evidence first with everyone present in the Luganville Supreme

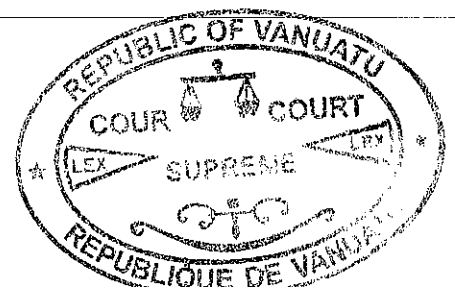


Court, and subsequently the other witnesses giving their evidence in the same Court but with Judge and interpreter participating from Port Vila via TrueConf.

4. At the conclusion of the prosecution case, there was no submission of no case to answer. Following the explanation of section 88 of the Criminal Procedure Code, and the taking of final instructions, Mr Malao decided to neither give nor call evidence. That was his right, and no adverse finding can follow from that decision.

B. Law

5. The prosecution held the burden of proof in respect of each separate charge. To succeed, the prosecution was required to prove each charge beyond reasonable doubt.
6. The charge of sexual intercourse without consent has certain legal ingredients, each 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 Malao and Ms Magiro; **and**
  - Ms Magiro did not consent to that act; **and**
  - Mr Malao did not, on reasonable grounds, believe that Ms Magiro was truly consenting.
7. The charge of sexual intercourse where consent was obtained by false representation as to the nature of the act requires the following elements to be proved, namely that on the particular occasion alleged:
  - sexual intercourse, as defined in section 89A of the Penal Code, took place between Mr Malao and Ms Magiro; **and**
  - Ms Magiro consented to that act as a result of a false representation by Mr Malao as to the nature of the act; **and**
  - Mr Malao knew that Ms Magiro's consent was so obtained and was therefore not true consent.
8. The charge of sexual intercourse where consent was obtained by means of threats of intimidation requires the following matters to be proved, namely that on the particular occasion alleged:
  - sexual intercourse, as defined in section 89A of the Penal Code, took place between Mr Malao and Ms Magiro; **and**



- Ms Magiro consented to that act as a result of threats of intimidation and by fear of bodily harm; and
  - Mr Malao knew that Ms Magiro's consent was so obtained and was therefore not true consent.
9. In relation to the third charge, as it was a representative charge, the prosecution was required to prove that the alleged offending had occurred on at least one occasion.
  10. Three witnesses were called: Ms Naomi Magiro (the complainant), her aunt Ms Aglet Rongo (recent complaint evidence) and Mr Oscar Jacob (witness to some of the allegations). This case involved assessing the veracity and accuracy of those witnesses.
  11. Rather than focus on how the witnesses appeared in the witness box, I looked for consistency within their evidence, and also when comparing their evidence with that of others. I also had regard to the inherent probabilities of the situation. In this manner I concluded what parts of the evidence to accept and what to not accept.

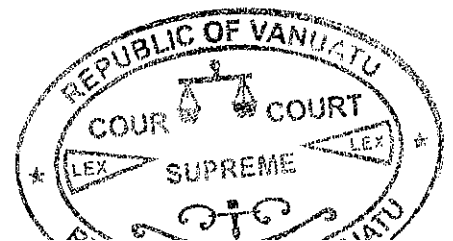
C. Evidence

12. The scenario presented to the Court was highly unusual. Ms Magiro stated that she was eventually persuaded by her father-in-law, Mr Malao, to allow Mr Jacob to firstly rub oil all over her naked body, while he was naked; and secondly, to allow Mr Jacob to then have sexual intercourse with her. Mr Malao had persuaded Ms Magiro that if she permitted this, then she would obtain employment with the Correctional Services Department. He claimed to have first-hand knowledge of this due to his recent release from imprisonment.
13. Mr Malao's entreaties had also involved an assertion that the oil had been especially provided to him for this purpose by one Claudio, an employee of the Deputy Prime Minister, Mr Ishmael Kalsakau. The first approach by Mr Malao, in early October 2021, met with resistance and a refusal to allow Mr Malao to rub the oil over Ms Magiro's entire naked body. She permitted him to rub it only onto her face, hands, stomach and her legs. Ms Magiro alleged that Mr Malao had over-stepped the permission given by also removing her lower clothing and rubbing oil over her private parts before she stopped him and left. There was no charge laid in respect of this conduct.
14. Ms Magiro alleged there was a further approach in the last week of October 2021, where water was to replace the oil, but it would serve precisely the same function, namely enable her to obtain employment. Ms Magiro enquired why her husband could not rub the water onto her body, rather than Mr Malao. She was told it had to be somebody else, or it would not work. However, Ms Magiro did not permit Mr Malao to proceed.
15. Mr Malao then suggested an alternative, where he would get another person to rub the special potion over her body, prior to having sexual intercourse with her. This was the first time sexual



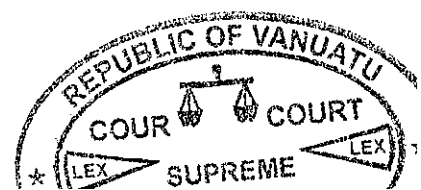
intercourse was mentioned as part of the process to obtain employment. Ms Magiro agreed to this third proposal as she was anxious to find employment.

16. Soon thereafter, Mr Jacob was contacted by his grandfather, Mr Malao with a request that he come to see him. Mr Jacob was unable to respond immediately, but went to meet with Mr Malao a few days later. He met up with Mr Malao and Ms Magiro on the road. Mr Jacob recognised Ms Magiro as Mr Malao's daughter-in-law; and confirmed her identity with Mr Malao.
17. Mr Malao then escorted Mr Jacob and Ms Magiro to a clearing in the bush he had earlier prepared. There he explained what was to occur, namely that Mr Jacob was to be naked while rubbing oil all over Ms Magiro's naked body prior to having sexual intercourse with her. This was to ensure that Ms Magiro would get the employment with Corrections that she sought. Mr Jacob asked Mr Malao whether Ms Magiro agreed with the plan, and was assured that she did. He then turned and asked Ms Magiro herself, who confirmed that she was in agreement. Mr Jacob then carried out his instructions.
18. After Mr Jacob had completed sexual intercourse with Ms Magiro, he intended to leave and return home. However, Mr Malao then announced that he too wanted to have sexual intercourse with Ms Magiro. Ms Magiro pointed out that she had agreed to the plan only involving Mr Jacob having intercourse with her. She stated that she did not want to have intercourse with Mr Malao. She was crying at that point in time. Mr Malao, however, insisted and proceeded to have sexual intercourse with Ms Magiro. She asked Mr Jacob to remain so that he could accompany her home afterwards, so Mr Jacob was a witness to the sexual intercourse that occurred between Ms Magiro and Mr Malao.
19. Mr Jacob duly escorted Ms Magiro home subsequently. He advised that he later admitted what had occurred, firstly to an uncle and then to Ms Magiro's husband. A custom reconciliation ceremony followed at which Mr Jacob was fined and made to apologise for having sexual intercourse with Ms Magiro.
20. Ms Magiro related to the Court that over the course of the next two weeks or so, Mr Malao demanded sex from her on a number of occasions. Ms Magiro advised that she did not want to have sexual intercourse with Mr Malao but she was scared of what he might do to her. On one such occasion, while at the garden, Mr Malao requested sexual intercourse from Ms Magiro while holding a bush knife. She was afraid, and accordingly agreed. She also mentioned that she believed what Mr Malao had been saying about finding work for her as another reason she allowed him to have sexual intercourse with her. She related further that if she refused him, he would force her, and stated that she was afraid of him. So, she said, in the end she would agree to have sexual intercourse.
21. Ms Magiro eventually told her husband, but he did not believe her account and became angry. Accordingly, Ms Magiro went to see her aunt and she told her part of the story, as there were other people around at the time. She was embarrassed.



D. Discussion

22. As improbable parts of this scenario are, I had no doubt that Ms Magiro was an honest and reliable witness, if extremely gullible. Considerable parts of her evidence were confirmed by her aunt and by Mr Jacob. I did not for a moment consider that all 3 of them had contrived to make up an account against Mr Malao – this was no apparent conspiracy. None of them appeared to have any particular animosity towards him. Further, it was not suggested that they were inventing their evidence.
23. This apparently preposterous scheme was sufficient to persuade Ms Magiro to allow herself to be abused. She was extremely keen to find employment and quite obviously was convinced by Mr Malao's assurances.
24. Ms Magiro's evidence is different in part to that Mr Jacob. It was her evidence that water was the special tonic used as part of the third variation of the plan, as opposed to oil. Mr Jacob made no mention of water. I concluded that Ms Magiro was in error as to this, and that it was in fact oil that was used -after all he was the one administering the potion. However, the difference was immaterial, in the sense that it matters not which potion was in fact used. This difference between their accounts did not diminish their credibility in my assessment. If anything, it demonstrated they had not collaborated prior to the trial and rehearsed their accounts.
25. Ms Magiro's evidence is also different to that of Ms Rongo. I noted that Ms Magiro indicated in her evidence that she had reported only part of her allegations to Ms Rongo, due to others being in the room at the time the revelations were made. That proved to be correct when Ms Rongo testified about what she had been told. However, Ms Rongo went on to raise a matter Ms Magiro had not given evidence about. Ms Rongo reported that Ms Magiro had told her about Mr Malao having said to Ms Magiro that he was going to use her to have sex with other men for money. Ms Magiro did not mention this in her evidence. Again, this was an indication of a lack of collaboration. Further, it strengthened my assessment of Ms Magiro's credibility in that she told me only what she could recall. The fact that she forgot a relatively important aspect of what had occurred indicated she had not rehearsed her evidence in order to avenge herself. In my view, this demonstrated merely that she is human and as forgetful as any other witness. Again, the difference in accounts is not significant.
26. I accept that Ms Magiro was an honest and accurate, if sometimes forgetful, witness. This was demonstrated during cross-examination, when she readily admitted that having sexual intercourse with Mr Malao, after Mr Jacob, was not part of the procedure outlined to her whereby she would be able to obtain employment with Corrections. That meant the alternative second charge could not be proved, as the deception practised had no effect on the sexual intercourse that occurred with Mr Malao. Further, Ms Magiro also readily admitted that prior to the subsequent occasions when she had sexual intercourse with Mr Malao, on each occasion he had first requested that such occur seeking her agreement. Ms Magiro then stated that she allowed Mr Malao to have sexual intercourse with her, as she was mindful that to do so might lead to employment. That admission had the effect of negating the third charge. Lastly, I noted



that at no stage did Ms Magiro allege threats or actual violence on the part of Mr Malao. Her fear was entirely of her own belief.

27. I also accepted Ms Rongo as reliable and credible. I noted she was not challenged on the basis that she was not telling the full truth.

28. Ms Jacob was a truly compelling witness. He was quick to fulsomely respond to every question asked of him, and his evidence was consistent and corroborative of the account given by Ms Magiro. There was no hesitation or prevarication. I had no hesitation in accepting his evidence as truthful and accurate.

E. Result

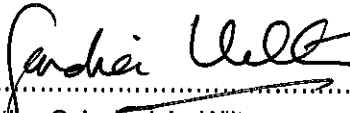
29. Ms Magiro was tricked into permitting oil to be rubbed all over her naked body prior to having sexual intercourse with Mr Jacob. Once that had occurred, as a separate course of conduct, Mr Malao then insisted on also having sexual intercourse with Ms Magiro, despite her tears and her saying to him that she did want that to occur. In the circumstances, there was no consent to sexual intercourse, and no reasonable belief on the part of Mr Malao that Ms Magiro was consenting. Mr Jacob's evidence as to his observations was highly probative and corroborative.

30. Accordingly, Mr Malao is found guilty of sexual intercourse without consent – charge 1.

31. Mr Malao is found not guilty of charges 2 and 3, and he is acquitted on those charges.

Dated at Port Vila this 3rd day of June 2022

BY THE COURT

  
Justice G.A. Andrée Wiltens

