

PUBLIC PROSECUTOR -v- OKO SILAS LANNY

JUDGMENT

Prosecutor. Daniel Evans

Defence. Hilary Toa

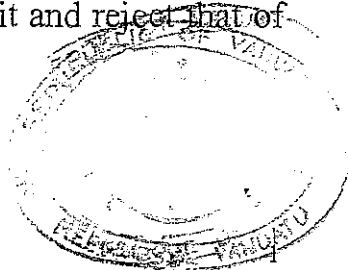
The defendant was charged that on 25th April 2002 he raped then indecently assaulted the complainant.

The prosecution case is that they were together with others at a house in their village watching a video. The defendant asked her to come with him. They went some distance away to near a breadfruit tree. When she realised what he wanted she said no. He took her clothes off, then his, and had sex with her against her consent. She was saying 'no' and trying to push him away. After intercourse he then took a stick and pushed it up inside her vagina. He took it out and he left. She started to go home but was bleeding. The bleeding increased, she was taken by canoe to the clinic and then by plane to Port Vila.

~~There was a 3 centimetre tear of the posterior fornix which required stitching under anaesthetic. She had lost a lot of blood and required a transfusion. In interview with the police the defendant said they had sex, but it was entirely consensual. He denied using a stick.~~

The defendant denied the charges. In evidence he said the complainant came with him willingly and sexual intercourse was entirely by consent. He denied any use of a stick. He was not aware she was bleeding until the next day, when he was told that.

This is a criminal prosecution. The defendant is presumed innocent unless and until the prosecution have proved their case beyond reasonable doubt. Anything less and the defendant is entitled to an acquittal. These are sexual allegations. I look for corroboration of the complainant, although I can convict on the complainant's evidence if I accept it and reject that of the defendant.



There is an important feature of this case. The complainant is of relatively low intellect and has difficulty in communication. She can only speak Pa'ama language and needs the assistance of a member of her family to understand questions and to communicate.

The complainant's sister carried out this task. By reason of the complainant's difficulties it necessarily had to be a close member of her family. Further, bearing in mind the complaints it is right the complainant should communicate with and through someone she knows well and can trust.

The sister was instructed by the Court to ensure that she did nothing more than translate and relay questions and answers. She was specifically instructed not to help with answers, or suggest answers. Whatever the complainant said had to be relayed and translated. I kept a careful watch to ensure, as far as possible, this was being done.

The Court was cleared for the hearing of the complainant's evidence, counsel remained seated and I removed my wig. I also observed the complainant to ensure she was not distressed or upset, beyond what one would expect in a case of this kind, and also to ensure she comprehended what was happening and what she was being asked. This necessarily was done by watching facial expression, hand and body movement and attitude and listening to voice intonation.

~~There were occasions when questions were not understood. They were repeated and answers obtained which related to the question.~~

~~Examination in chief and cross-examination were necessarily limited to the essential matters and the immediate facts surrounding them. It was not possible for either counsel to embark upon series of questions about peripheral detail, whether to establish the case or test credibility. This was done on essential matters. The examinations of the complainant were akin to those conducted when the witness is a child who is old enough to give sworn evidence. The communication difficulty had also to be borne in mind.~~

At the close of the prosecution I dismissed the charge of rape. The complainant did say that she had told the defendant 'no' and tried to push him away. In cross-examination it was put that she did consent. She agreed with that. There was a look of surprise on her sister's face and the question was again put with the same answer. I took this into account when making my overall assessment of the credibility of the complainant.

It must also be pointed out that because the complainant has the difficulties which she has, that in itself does not make her more likely to tell untruths or be unreliable than any other person.

There was a statement of agreed facts dated 8th October and signed by counsel for the defence.

The age of the complainant was not known. It was placed somewhere between 20 and 30 years. She has a four year old child.

The prosecution also called Dr. Thomas Sala and Dr. Warren Brooks both of Vila Central Hospital. Dr. Sala gave evidence of the medical examination of the complainant and her treatment. There was a 3 centimetre transverse tear in the posterior fornix of the vagina. Her haemoglobin count was low and she required a blood transfusion. He stated the tear was "consistent with forceful penetrative sexual intercourse". In cross-examination he stated he'd seen something similar four times before, three times were married women. He could not give detail as to how those injuries had been sustained.

Dr. Sala has been at Port Vila Central Hospital since 1995 practising in obstetrics and gynaecology. He has a diploma in that field.

Dr. Brooks qualified in 1971, obtained his Membership of the Royal College of Obstetricians and Gynaecologists in 1979 and became a Fellow of the Royal College. He has equivalent qualifications from Australia and has practised in the field since 1975.

He stated "It is theoretically possible for such a tear to be caused by a penis. It is very rare. I have only seen it on one occasion... The most likely cause would be a foreign object that would cause the tear. The reason is the depth of penetration". He agreed in cross-examination it was possible an erect penis could cause the injury.

I accept the evidence of both doctors. Doctor Brooks is clearly the more qualified and experienced and I use his evidence for the assessment of the injury to the complainant. This is strong supporting evidence for that of the complainant.

I consider the evidence of the complainant. There was not the opportunity to assess her evidence concerning peripheral detail. There were difficulties in communication and understanding. Both prosecution

and defence counsel had to frame their questions in a simple form. There was no possibility of putting two or three different points for consideration. In his closing speech defence counsel suggested that may be the idea of rape and possibly the use of a stick had come from the complainant's family. I reject this. I found the complainant to be guileless. Her answers were simple and straight forward. On occasion she would answer a question about one matter with a full recounting of the incident.

When asked about the stick, on three occasions she not only answered the question but each time demonstrated with her hand the idea of a stick going in to a hole. When it was put to her in cross- examination there was no stick she looked puzzled for several seconds. Then said there was, and redemonstrated with her hands.

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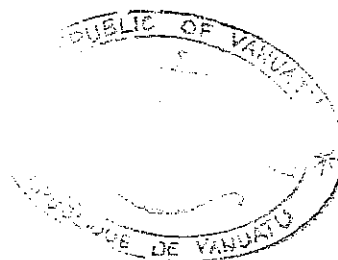
I accept her evidence. I found her to be truthful and reliable.

I have carefully assessed the defendant's evidence. There is little difference between his account and that of the complainant, save for the stick. When interviewed by police he admitted sexual intercourse, but denied the stick.

I did not believe him about the length and depth of conversation he says ~~he had with the complainant. It was apparent that only someone as close~~ as her sister could manage any degree of communication. I do not believe ~~him when he says there was no use of a stick. I find the complainant did~~ willingly follow him, although she probably did not know what was going to happen at first. I cannot say there was a lack of consent, although ~~given the complainant's difficulties it is open to question how full an~~ understanding that consent was. The defendant accepted he ejaculated and intercourse then finished. I am satisfied beyond reasonable doubt that, in those few moments after he did push a stick into her vagina and that caused the tear. There is nothing in the defendant's evidence to suggest the tear came about in any other way.

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I am satisfied, even given the warning about convicting on the uncorroborated evidence of a complainant, that I could convict on her evidence. However, I find the evidence of Dr. Brooks lends strong support to that of the complainant. I find the defendant is guilty of indecent assault and convict.



SENTENCE.

Credit for no previous conviction. No credit for plea guilty. Difficult for woman to give evidence. Central consideration is complainant is of low intellect, vulnerable and has difficulty communicating.

How much she understood when she went with you, I do not know. For sentence, I accept sexual intercourse was by consent.

In the few moments after intercourse, you pushed a stick in her vagina. That was very insulting and painful. You caused serious injury and bleeding.

Men must learn to respect women. You are young, I think you regret this and it will be difficult for you in the village. I particularly take into account that you are young.

But this was a demeaning, insulting and nasty assault.

I find sentence is 6 months. I consider if I should suspend or not. I cannot suspend it. This is a case where deterrence tips the balance to not suspending. Many people will say the sentence should be longer. I have reduced it because of your youth.

Informed of Right of Appeal.

Dated at Port Vila this, 10th day of October 2002.