

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

Criminal Case No 133 of 2009

PUBLIC PROSECUTOR

**-V-
NOCLAM SAWE**

Mr. Lent for the Prosecutor
Mr. Loughman for the Defendant

VERDICT

1. At the commencement of this Trial the Accused was charged with 4 Counts of Sexual Intercourse without Consent contrary to Section 90 and 91 of the Penal Code. At the close of the Prosecution's evidence, defence counsel made a no-case to answer submission which was upheld in respect of Counts 2 and 3 and the accused was pronounced "*not guilty*" on those 2 Counts. The Court found however that there was a case to answer on Counts 1 and 4 which reads as follows:

Count 1

STATEMENT BLONG RONG

Sexual Intercourse Without Consent – Agensem Section 90 mo 91 blong Penal Code Act CAP 135

PARTICULARS BLONG RONG

Noclam Sawe, samtaem long manis December 2008, long Lamkail Village, West Tanna, yu bin minim blong havem Sexual Intercourse wetem gel ia Diana Fred, osem yu bin havem sex wetem hem long ass blong hem, hemi long kitjin blong yu, wei long taem ia hemi no stap long tingting blong hem.

Count 4

STATEMENT BLONG RONG

Sexual Intercourse Without Consent – Agensem Section 90 mo 91
blong Penal Code Act CAP 135

PARTICULARS BLONG RONG

Noclam Sawe, samtaem long 16 August 2009, long Lamkail Village, West Tanna, yu bin minim blong havem Sexual Intercourse wetem gel ia Diana Fred, osem yu bin minim blong pusum finger blong yu I go insaet long vagina blong hem, afta wei yu singaotem hem blong kakai nafara, wei long taem ia hemi no long tingting blong hem.

2. It is plain from the particulars provided in Count 1 that the allegation against the accused is that sometime in December 2008 he had anal Intercourse with the complainant without her consent. In respect of Count 4 however the allegation is that on the 16th of August 2009 the accused had digital Intercourse with the complainant without her consent after he had invited her to have some navara.
3. I remind myself that this is a criminal Trial and the Prosecution bears the burden of proving its case against the accused by calling admissible evidence which proves each and every element of the offence alleged against the accused beyond reasonable doubt. The accused does not have to prove his innocence or indeed prove anything. He could have remained mute and said nothing in his defence but in this case the accused elected to give sworn testimony and this Court is obliged to consider his evidence as carefully as it does the testimony of the Prosecution's witnesses.
4. In order to discharge its burden the Prosecution must produce evidence that satisfies the Court so that it is sure of the accused guilt of the offence charged before the accused can be found guilty. If after considering all of the evidence in the case including the evidence of the accused, the Court is not satisfied of the accused's guilt or the Court has a reasonable doubt about his guilt then it will be the duty of the Court to give the accused the benefit of that doubt and find him not guilty. If however, after considering all of the evidence the Court is sure and satisfied of the accused's guilt beyond reasonable doubt then equally, it will be the duty of the Court to find the accused guilty of the offence as charged.

5. The ingredients or elements that the prosecution must established in respect of each charge are:

- 1) That the accused had Sexual Intercourse in the specific manner alleged in each Count with the complainant, namely in Count 1: by penetrating the complainant's anus with his penis and in Count 4: by penetrating the complainant's vagina with his finger;

the second common element to both offences is:

- 2) That Sexual Intercourse occurred without the complainant's consent or as a result of threats made by the accused or fear of bodily harm on the part of the complainant;

and the final ingredient which the prosecution must establish is:

- 3) That the accused intended to have Sexual Intercourse with the complainant knowing that she did not consent to Intercourse with him.

6. Before setting out the prosecution case on each Count I remind myself that I must consider each Count separately. I must consider the evidence on each count separately as it relates to each Count and not use the evidence on one Count to bolster or diminish the evidence on another separate Count. Each Count is either established or fails on the basis of the evidence led in relation to that Count alone and there is no requirement that both Counts must necessarily be proved together or fail together.

7. In other words if after considering all of the evidence led on Count 1 I am not satisfied beyond a reasonable doubt that the accused's guilt has been established, then that does not mean that the accused must also be acquitted on Count 4 and vice versa. Equally, If I am satisfied with the accused's guilt on Count 4 after considering all the evidence then that does not mean that I must also be sure and satisfied of the accused's guilt on Count 1.

8. I turn next to consider the evidence on Count 1. The prosecution's case on this Count is based entirely on the evidence of the complainant a

child of 10 years of age who was examined by the Court and permitted to give evidence on oath. She was also shielded from the accused.

9. The complainant testified that on the day in question as she was returning after swimming in the sea the accused had called out to her to fetch some fresh water for him and when she went to fetch water the accused had held her hand and led her to his house where the accused removed her clothes and told her to look away from him. The accused then penetrated her anus and when the accused finished the complainant said she felt wetness on her anus which she wiped with a cloth that the accused gave her to use. The accused had then given her a fish which she took and gave to her mother. The complainant said that the accused had told her not to tell her mother what happened or he would assault her with a knife.
10. The complainant's mother confirmed that had on 3 occasions her daughter had come home late after swimming and brought fish given to her by the accused. She said that she began to suspect that something was wrong when her daughter would not return with her brothers after swimming and she advised her sons to remain with their sister, the complainant and all go together if the accused called her again. She did not confront the accused with her suspicions.
11. The accused in his defence denied on oath that the incident ever happened. He acknowledged hearing the complainant's testimony in Court but he said she was lying. He could not explain why the complainant who called her "Uncle" would say those things against him in essence the accused's defence was a complete denial.
12. The resolution of this conflict in the evidence finally comes down to a determination of the credibility of the complainant's evidence against the accused's sworn denials. It is never an easy matter for the Court to determine credibility much less for the Court to describe in detail what factors are persuasive and what factors reduce a witness's credibility. Much of the Court's assessment is based on impressions and the demeanor of a witness in the witness box and under cross-examination. Whether there exists other supporting evidence from independent sources and the nature of an accused's defence where as here, he has elected to give sworn testimony.
13. The age and maturity of a witness can also influence his or her credibility and a witness may be more credible on one aspect of his/her evidence while less credible on another aspect. Credibility is not an immutable characteristic not is it indivisible. The presence or absence

of a motive to lie can be influential in an assessment of credibility and the Court is not obliged to ignore the common human experience that different witnesses may see and describe the same events in different ways without necessarily being untruthful and that even seemingly truthful witnesses can make mistakes.

14. Having carefully considered the evidence in respect of Count 1 and reminding myself that the burden of proof rests on the prosecution and mindful of the accused's sworn denial, I accept and believe the evidence of the complainant which was neither exaggerated or shaken under cross-examination. The complainant's evidence in its detail had a "*ring-of-truth*" to it when compared with the accused's bare and vague denial. I was unimpressed with the extraordinary lengths that the accused went to both in chief and in cross-examination to distance himself from the complainant so as to be never alone with her. He was evasive and uncomfortable under cross-examination unlike the complainant.
15. I am satisfied also that the complaint's evidence is corroborated by her mother's evidence about the complainant coming late home alone after swimming and bringing fish with her from the accused. In this regard too, the accused under intense questioning reluctantly admitted giving the complainant fish on some occasions but only when she was in the company of her brothers.
16. Defence counsel submits that there is no independent medical evidence to confirm anal penetration, which is correct, but the complainant's evidence in that regard was never seriously doubted and, in any event, I am more than satisfied that the complainant was sufficiently aware of the different parts of her body as to be able to distinguish between her anus and her vagina and I accept her evidence that the accused penetrated her anus with his penis and had ejaculated on her anus in the process.
17. In respect of Count 1, defence counsel also submits that if anal penetration did occur between the accused and the complainant then it was with the consent of the complainant. I reject the submission as being without any basis at all. In the first place the accused swore on oath that the incident did not occur, and, secondly, given the complainant's tender years and the accepted closeness of her relationship to the accused, I do not accept that the complainant was capable of giving informed consent to the accused penetrating her anally.

18. I accept that the complainant had some difficulty explaining why she had come to the accused a second time after he had Sexually assaulted her on the first occasion, but having seen the complainant's demeanour, I am satisfied that her difficulty was the result of her immaturity rather than a deliberate attempt to avoid telling the truth. In this regard I note she had the same difficulty when similar questions were posed to her by the prosecutor in re-examination.
19. I am satisfied after considering all the evidence relating to Count 1 that the prosecution has established beyond a reasonable doubt that the accused penetrated the complainant's anus with his penis without her consent and I find the accused Noclam Sawe guilty of the offence of Sexual Intercourse without Consent Contrary to Section 90 & 91 of the Penal Code Cap.135 as charged on Count 1 of the amended information.
20. I turn next to consider the evidence on Count 4. Again the prosecution relies principally on the evidence of the complainant but in this instance the prosecution also relies on the evidence of Ivan Kapalu and Jotham Yaput who claim to have seen the incident in question.
21. The complainant's evidence was that on the day in question she and her brother and uncle had gone to fetch fire wood and after they returned she was playing outside her home when the accused called her from his plantation across the road from her house to go to eat navara. She went to the accused and he gave her a navara and he told her to wait while he fetched another navara for her. He then held her hand and removed her dress and pushed his finger into her vagina (the place where I urinate from). The complainant said at this time it was dusk and some boys saw them. After the incident the accused gave her some corn and ripe banana which she took home to her mother.
22. With regards to this incident Ivan Kapalu and Jotham Iaput both testified on oath that on that Sunday the 16th August 2009, they had gone swimming in the sea and on their way home they passed near the accused plantation they saw the accused with the complainant in his plantation. The sun had set by that time and they had both greeted the accused saying "good night" to him.
23. They had then hid a little distance away to observe the accused and the complainant and they saw the accused remove his lava-lava and

then lift the complainant's dress and the accused and the complainant lay down on the ground and they next saw an "up and down (2)" movement and after sometime the accused and the complainant go up and the accused gave the complainant some corn and they left.

24. I note as defence counsel submits that the "up and down" movement described by this two eye witnesses is seeming inconsistent with the complainant's evidence that the accused had inserted his finger into her vagina but, in the absence of any elaboration by the eye witnesses of what they meant by that expression, I am unable to accept that there is an inevitable inconsistency between the complainant and the eye witnesses evidence as to render both accounts unreliable or render the eye witnesses evidence incapable of corroborating the complainant's evidence in other respects.
25. In his defence the accused denied that the incident ever happened. He denied seeing or meeting Ivan and Jotham at any time after they were returning from swimming and he denied they had said "good night" to him. He denied being with the complainant in his plantation and he denied calling to her and giving her navara. All three prosecution witnesses were lying but he couldn't explain why, although at one stage the accused suggested that Jotham might have been put up to it by his mother or father who told him what to say in the Court.
26. Similarly the accused appeared to suggested that relations between him and the complainant family began to deteriorate since 2008 over a land dispute that he had with them when he stopped them twice from building on a piece of his land.
27. Having carefully considered all of the evidence I have no hesitation in stating that I prefer and accept the evidence of the complainant as to what transpired between the accused and her on the evening of Sunday 16th August 2009 in the accused's plantation. Needless to say I reject the accused blanket assertion that the incident did not take place at all and that the complainant was lying.
28. I also accept as truthful the evidence of Ivan Kapalu and Jotham Iaput and find that it corroborates the complainant's evidence in several respects including, that on the evening of 16th August 2009 the accused and the complainant were seen together in his plantation and that the accused undressed the complainant and when he finished doing something to the complainant he gave her some corn.

29. Needless to say I do not accept the accused's blanket denials of the incident ever occurring or his professed inability to recall such an event occurring barely three months ago.

30. In the circumstances I am satisfied beyond reasonable doubt that the accused did digitally penetrate the complainant's vagina without her consent on the evening of Sunday the 16th of August 2009 and I find the accused Noclam Sawe guilty of the offence of Sexual Intercourse Without Consent Contrary to Sections 90 & 91 of the Penal Code CAP.135 as charged in Count 4 of the information.

31. Subject to what counsels wish to say on the matter I shall now consider the sentence to be imposed on the defendant in respect of his convictions.

27th
DATED this ~~26th~~ day of November 2009. *DJ*

BY THE COURT

D. Fatiaki

D.FATIAKI
JUDGE

