

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

Criminal Case No. 82 of 2011

PUBLIC PROSECUTOR
V.
JEAN PASCAL

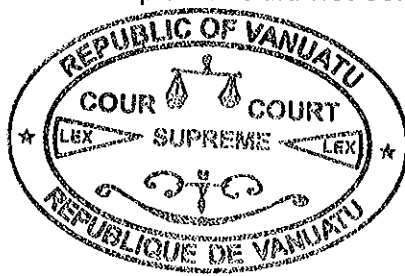
Coram: Justice D. V. Fatiaki

Counsel: Mr. T. Karae for the State
Mr. E. Molbaleh for the Defendant

Date of Decision: 19 January 2012.

VERDICT

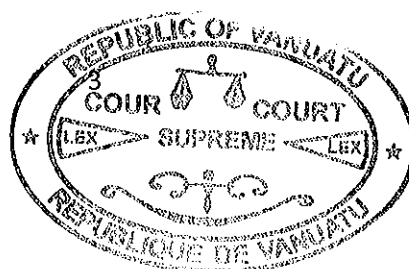
1. The accused **Jean Pascal** is charged with a single offence of Act of Indecency without Consent contrary to **Section 98 (c)** of the **Penal Code**. The particulars of the offence are that on the day in question the accused sucked the penis of the young male victim without his consent. The accused pleaded "*not guilty*" to the charge and the matter went to trial.
2. This being a criminal trial the prosecution bears the burden of proving the charge against the accused beyond a reasonable doubt. What this means is that the prosecution must lead and produce evidence that establishes each and every ingredient or element of the offence charged to the satisfaction of this Court beyond a reasonable doubt.
3. The accused need not prove his innocence nor does he have to say anything in his defence and indeed, the accused elected to remain silent and called no witnesses in his defence in this case as he was perfectly entitled to do and no adverse inference can be drawn against him for taking that stance.
4. The essential elements of the offence with which the accused is charged and which it is the sole duty of the prosecution to establish are:
 - (a) The accused committed an indecent act on the complainant;
 - (b) The act was committed without the consent of the complainant; and
 - (c) The accused knew that the complainant did not consent to his actions.



5. As to what is an "*indecent act*" is measured against current community standards of decency as considered by right-thinking members of the community. In this regard there is not the slightest doubt that a mature man fondling and then undressing and sucking the exposed penis of a young 15 year old boy is an "*indecent act*" even if committed with the boy's consent.
6. The prosecution's case which was principally based on the complainant's sworn testimony was that, on the evening of the relevant date (9 June 2011), the accused who was the boarding master at the school which the complainant attended as a student and boarder, called the complainant after dinner to his private room or quarters located in a separate part but close to the students' dormitory and within the same building.
7. When the complainant went to the accused's room the accused asked him for his mobile phone and the complainant went and retrieved it from his suitcase. The screen of the complainant's mobile was "*frozen*" so the accused gave the complainant his mobile phone to view a video clip of a musical band called "*Alpha Blondie*" whilst he left to send the rest of the boarders to attend the evening prep or study session.
8. Upon his return the accused locked the door to his room with the complainant inside and switched off the dormitory lights. He then put a pornographic video on his mobile phone for the complainant to view it and he covered the window of the room with a bed sheet and lay on his bed with the complainant seated at the foot of the bed.
9. The defendant then asked the complainant if he had already had sexual intercourse ("*yu fuck finis?*") and the complainant said: no and asked the defendant the same question to which, the defendant replied that he had a woman. The defendant then asked the complainant if he could keep a secret and when the complainant said: "yes" the defendant began to touch the complainant's penis over his clothes.
10. After a while the defendant got off the bed removed his trousers and also removed the complainant's trousers. The accused then got hold of the complainant's exposed penis and told him that he would show him how a woman performs oral and he began to suck the complainant's penis until the complainant ejaculated.
11. The complainant claims that he was very frightened and couldn't do anything to resist the defendant's advances and actions. He said that he never agreed to what the accused did to him.
12. After that, the complainant left the accused's room and was returning to his bed in the dormitory but found the main door was locked so he went up to the classroom where his fellow boarders and class mates were studying. He went inside the classroom and sat at a desk to recover and compose himself as he



- was "very frightened and shaking". Eventually when he regained his "breadth", one of the students asked him: "what's wrong with you?" and he related what the defendant had done to him.
13. Soon after the incident the defendant left the school and has not returned.
 14. In cross-examination the complainant accepted that he had neither resisted the defendant's advances nor called out for help. He also accepted that the defendant had never threatened him with a knife whilst he was in his bedroom on that night. He confirmed that on the previous day (8 June 2011) he had received and viewed a pornographic video on his mobile phone that was sent by the defendant whilst he was in the defendant's room and he admitted making several omissions when giving his statement to the police.
 15. When it was put to him by defence counsel that he liked the pornographic video he saw in the defendant's room on the 8th and that's why he returned to the defendant's room on the 9th, the complainant shook his head and looked away.
 16. The last prosecution witness to be called was a year 13 student at the school who was amongst the students studying on the night of 9 June 2011 when the complainant came into the classroom and went and sat on a chair shaking. When he asked the complainant what happened the complainant complained about the defendant.
 17. In cross-examination the precise nature of the complainant's complaint which was recorded in the witnesses' police statement was confirmed and was to the effect that the defendant had shown the complainant "rubbish pictures". So much then for the prosecution's evidence which did not include the accused's police interview record.
 18. In the absence of any evidence whatsoever from the accused this case either stands or falls on whether I believe and accept the complainant's evidence in its material particulars beyond a reasonable doubt.
 19. If after considering all of the evidence including the complainant's testimony I am left with a reasonable doubt about the guilt of the accused then it will be my duty to find him not guilty. Equally, if I am satisfied of the defendant's guilt beyond a reasonable doubt then it will be my duty to find the defendant guilty.
 20. Defence counsel in his closing address highlighted the fact that on the day before the incident charged against the accused (i.e. 8 June), the complainant had gone to the accused's room and had viewed a pornographic video on the accused's mobile and counsel submits with some force, that if the complainant did not like or agree with what had happened on 8 June 2011, then he would not have returned to the accused's room the very next day at the accused's invitation. I cannot agree with this submission.




21. In the first place, there is not the slightest evidence or suggestion that what occurred in the defendant's room on 8 June involved any physical touching or contact between the defendant and the complainant **nor** was there any suggestion that the defendant had made verbal or sexual advances towards the complainant. It was simply a case of viewing a pornographic video on the accused's mobile in the privacy of his room.
22. Secondly, on the following day when the incident complained about occurred, the defendant had asked the complainant for his mobile phone presumably, for the purpose of again viewing a pornographic video similar to what occurred the day before on the 8th and the first inkling (if at all) that the complainant would have had that things would be different from the previous day, was when the defendant after sending the other boarders to study prep, returned to his room, locked the door, and covered the bedroom window with a sheet. The next and more direct indication that things would be different on the night of 9 June was when the defendant asked the complainant about his prior sexual experience and whether or not he could keep a secret immediately before touching the complainant's penis.
23. Up until then, the complainant had **no** reason or cause to believe or suspect that the defendant's invitation on 9 June would involve more than the passive viewing of a pornographic video or that the defendant intended to make any sexual advances towards him or physically touch him in any way.
24. Then defence counsel points to the lack of objection, complaint or resistance offered by the complainant when he was being touched, then undressed and finally, had his penis sucked by the defendant as somehow showing that the complainant consented to the defendant's actions on the night of the 9th of June. Again I cannot agree with this submission, which blithely ignores the differences in age, status/power and physique of the defendant and the complainant as well as the difference in their sexual experience.
25. As prosecuting counsel eloquently describes it: this was the complainant's first ever homosexual encounter which escalated rapidly and so suddenly that the young sexually inexperienced complainant didn't know how to react to the defendant's uninvited sexual advances.
26. I accept the complainant's evidence that he was very frightened by what the defendant his boarding master, was doing to him and the fact that he completely "froze" during the encounter is **no** indication at all that he consented to what the defendant was doing to him.
27. In this regard too, I am satisfied that independent observations by his fellow boarders, of the complainant's physical state shortly after leaving the defendant's bedroom – "breathless", "crying" and "shaking" provides some corroboration of the absence of consent on the part of the complainant.



28. As for the identified "omissions" in the complainant's police report or statement, I do not consider that they critically undermine the complainant's credibility or truthfulness as a witness nor do they raise a reasonable doubt in my mind.
29. In light of the foregoing I am satisfied that the prosecution have proved the charge against the defendant beyond a reasonable doubt and accordingly I find the defendant guilty and convict him of the charge of committing an Act of Indecency without Consent contrary to Section 98 (a) of the Penal Code.

DATED at Port Vila, this 19th day of January, 2012.

BY THE COURT


D. V. FATIAKI
Judge.

