

IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU

(Criminal Jurisdiction)

Criminal Case No. 50 of 2014

PUBLIC PROSECUTOR

-V-

JAY SEREL ARIS

Coram: Judge Aru

Counsel: Mr. K. Massing for the Prosecutor

Mrs. J. Tari for the Defence

ORAL RULING

SUBMISSION ON NO CASE

1. Following the closing of the prosecution case defence counsel applied to make a no case submission. Section 164 of the Penal Code [CAP 135] provides :

"(1) If, when the case for the prosecution has been concluded, the judge rules, as a matter of law that there is no evidence on which the accused person could be convicted, he shall thereupon pronounce a verdict of not guilty.

(2) In any other case, the court shall call upon the accused person for his defence and shall comply with the requirements of section 88.

2. Similarly s 135 of the Criminal Procedure Code [CPA 136] provides:-

"If at the close of the evidence in support of the charge, it appears to the court that a prima facie case is not made out against the accused person so as to require him to make a defence, the court shall dismiss the case and shall forthwith acquit him."

3. The defendant Jay Serel Aris was charged with 1 count of sexual intercourse without consent contrary to s 90 a) and 91 of the Penal Code. He pleaded not guilty to the charge. Section 91 provides:

"No person shall commit sexual intercourse without consent.

Penalty: Imprisonment for life."

4. The burden of proof rests on the prosecution to prove the defendant's guilt beyond reasonable doubt.
5. On 11 June 2014 Agreed Facts were provided to the Court by counsels indicating that there was sexual intercourse and the only issue is that of consent.
6. Three grounds are raised by the defence counsel as a basis for their submission of no case to answer. Inconsistencies in the evidence of prosecution witnesses , lack of corroboration and medical evidence to support the prosecution case. Defence counsel submits that in making its ruling this Court should consider and take into account the decision in Public Prosecutor v. Ahmed [2003] VUSC 116.
7. It was firstly submitted that the following witnesses the complainant, Lenis Tari and Johnny Vavak gave conflicting evidence. Their oral evidence in court which they rely on is inconsistent with what they told the Police in their statements.
8. Defence counsel submits that the inconsistencies in the prosecution evidence puts into question the credibility of these witnesses. That it renders the evidence of these witnesses unreliable and this Court cannot properly convict the defendant upon such evidence.
9. The Prosecution in response conceded and acknowledged the inconsistencies in the evidence of these witnesses.

10. Secondly, defence counsel submits that in addition to inconsistencies in the prosecution evidence, what the witnesses said could not be corroborated. Lenis Tari, Johnny Vavak and Cynthia Rovani gave conflicting evidence. Furthermore, it was submitted that the complainant admitted during cross examination that:-

- there were no verbal threats or weapons used by the defendant to cause her fear;
- the defendant let her hands free when they reached the main road. The complainant confirmed that the distance between the main road and where they went to have sex was far away.
- during the three phases of sex between the defendant and the complainant there were no verbal threats and no weapons were used to create fear in the complainant.

11. Although the Complainant made a fresh report to her father he was not called upon to give evidence for reasons unknown. It was submitted that these factors should raise questions in the mind of the Court and because of that the Court could not safely convict the defendant on the evidence called.

12. The prosecution argued that whether threats or weapons were used against the complainant that night does not mean that the complainant consented to sex. To support this submission the prosecution relies on what the Court said in *Public Prosecutor v. Nasamal* [2000] VUSC 55, *Public Prosecutor v. Katipa* [2002] VUSC 80 and *Public Prosecutor v. Jack* [2013] VUSC 81.

13. This case is clearly distinguishable from the above three cases as no weapons or threats of violence or force were used on the complainant to engage her in the three phases of sex.
14. The final ground raised by defence counsel is that there was no medical evidence called to support the charge of sexual intercourse without consent. Without this evidence, the prosecution case is very weak.
15. Defence Counsel finally submits that the defendant is charged with a very serious offence which carries a maximum penalty of life imprisonment therefore based on the grounds raised , the Court should consider the evidence called by the prosecution unreliable or if relied upon they raise questions which are left unanswered and the defendant should be given the benefit of the doubt .
16. It is for the prosecutions to prove its case beyond reasonable doubt that the complainant did not consent to sexual intercourse and the defendant knew that the complainant did not consent.
17. Having heard counsels on their submissions, I am satisfied that the prosecution has not proved its case to the required standard and I find the defendant not guilty. The case is therefore dismissed and the defendant Jay Serel Aris is acquitted.

DATED at Gaua the 16th day of June 2014

BY THE COURT

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D. Aru
Judge

