

IN THE SUPREME COURT
REPUBLIC OF VANUATU
(Criminal Jurisdiction)

Criminal Case No. 188 of 2014

PUBLIC PROSECUTOR
-v-
PIERRE SULU

Mr Massing for Prosecution
Ms Kalwatman for the Defendant

Hearing 6th and 7th May 2015

Judgment

1. The defendant accepts that he had sexual intercourse with the complainant. The particulars of the charge refer to two occasions, the defendant says in evidence that he had sexual intercourse with the complainant 4 times. He is charged with an offence under section 90(b)(vii) of the Penal Code. The section reads:

Any person who has sexual intercourse with another person,

- a) Without that persons consent; or*
- b) With that persons consent if the consent is obtained*

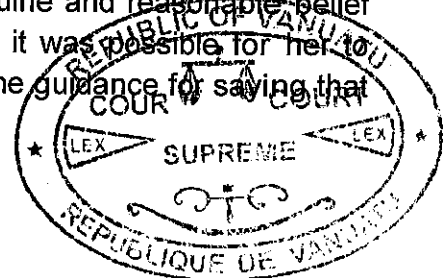
[(i) – (vi) Are not relevant in this case]

(vii) because of the physical or mental capacity of that person.

Commits the offence of sexual intercourse without consent.

2. The question for the court in this case is whether the complainant's mental state was such that she was unable to give consent. In practical terms it would first require deciding whether she was mentally incapacitated and then whether that mental incapacity was such that the law would deem it impossible for her to give consent. It is not a question of the complainant knowing right from wrong it is a question about the competence of the complainant to make reasoned decisions.

3. In this case, having reached a decision on those matters, the court must move on to the defence raised by the defendant. It was put to me in final submissions that the question raised by the defendant was whether he believed the complainant gave her consent. I do not accept that as the correct approach to a section 12 defence in this case. What the defendant has to show is that he had a genuine and reasonable belief that the complainant was not so mentally incapacitated that it was possible for her to give her consent. That must be the correct approach and some guidance for saying that



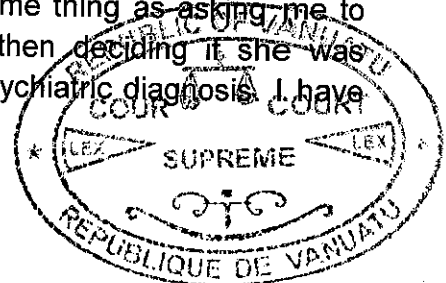
can be gleaned from the provisions of section 97 (3) of the Penal Code and from the Court of Appeal decision in Ishmael v. Public Prosecutor. Section 97 deals with under age sex and sub section 3 specifically negates any defence to a charge that a defendant believed the child consented or that the child was of age. Section 90 is not, of course, concerned with age it is concerned with the mental capacity of the complainant. There is no provision in the section which corresponds to section 97(3) which would indicate the issue in section 90 (b)(vii) is a belief about the mental capacity or mental state of a complainant not their consent.

4. Section 90(b)(vii) of the Act refers to mental incapacity and not incapacity through a disease of the mind or a psychosis. Some assistance as to what that might mean can perhaps be found in the Act when it deals with criminal responsibility. Section 20(2) of the Penal Code reads;

"It shall be a defence to a criminal charge that the accused was at the time in question suffering from a defect of reason, due to a disease of the mind which rendered him incapable of appreciating the probable effects of his conduct. Such a disease may consist of a mental disorder or deficiency which leads in relation to the criminal act a complete deprivation of the reasoning power of the accused"

Clearly it cannot simply be a case of determining the mental capacity of a complainant in exactly the same way as the court would approach the question of criminal responsibility. However if the law accepts mental deficiency deprives a person of their power of reason when deciding if they are criminally responsible for their action then a similar approach is relevant in deciding a person's mental competency to consent to a course of action in another context. If a mental state renders someone incapable of reasoning properly to the extent it negates their guilt then the lack of reasoning power, or the lack of ability to think for oneself, would surely negate any consent given by a person who is mentally deficient.

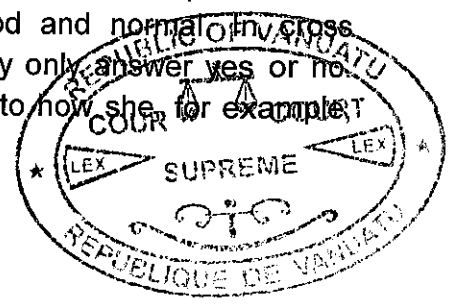
5. In the circumstances of this case the relevant evidence would be about the complainant's mental capacity. The court heard from Ms Doreen Naliupis, Dr Obed and the complainant's mother. I declined to hear evidence from the complainant on the grounds of relevancy. What would the complainant be able to say about this offence? There was no dispute that sexual intercourse between her and the defendant took place. There would be no need for her to confirm that fact. There would be no need for her to give evidence about consent. That is not an issue. The suggestion was that I should see the complainant's demeanour in the witness box and reach a conclusion about her mental capacity. That would be asking me to make a decision about something which is beyond my competency. It is not the same thing as asking me to hear evidence about the complainant's mental state and then deciding if she was mentally incapable. It was asking me to give a medical or psychiatric diagnosis. I have



no expertise in those areas and it would be totally wrong to make a clinical decision based on what was seen for a limited time in the witness box. Having heard from the witnesses mentioned earlier it would have been wrong to have placed a vulnerable young woman in the witness box when nothing could be gained from doing so.

6. Turning now to the evidence, I am satisfied that the evidence I heard from Ms Naliupis could be regarded as expert evidence. She is the Disability Officer for Sanma Province and has over 20 years experience interacting with and assisting persons who have physical or mental disabilities. She has known and worked with the complainant for 7 or 8 years. There is no doubt in my mind that expertise can be acquired through experience as well as by formal education. With her experience and knowledge of the complainant I have no doubt Ms Naliupis was an expert when it came to the complainant's mental state. Ms Naliupis described how the complainant's attention span was very limited. She said the complainant was very slow to memorise things and she was unable to reason for herself, when she was faced with a choice she needed assistance to make a decision. She spoke of only being able to elicit monosyllabic answers or even just smiles from the complainant and having to use pictures pinned to a board (she called it her communication board) to obtain a narrative from her. She described the complainant as being childlike in her day to day activities. The complainant did not interact easily with others, including children, although it seemed she preferred the company of youngsters. Ms Naliupis agreed that the complainant could carry out everyday functions but only under supervision if they were to be done correctly. She also agreed the complainant was receptive to instructions about day to day tasks but added the complainant would need constant reminders on how to carry them out properly. In answer to my question she opined that the complainant had the mental age of a 10 year old.

7. The mother's evidence was also helpful but must be treated with a degree of caution for the simple reason it is a mother's evidence. However, whilst the witness was clearly upset she gave her evidence without rancour or exaggeration. She confirmed the complainant did not start speaking until she was 9 years old. The complainant was unable to cope with school, the teachers eventually having to admit they could not teach her. After she stopped going to school the complainant spent much of her time in the house and whilst she could do simple tasks much of what she would try and do was done badly or incorrectly. The mother described having to be very patient and having to repeat things. She said if you spoke strongly to the complainant she would run away. The mother considered the complainant to be very childlike and someone who needed lots of help to even do something like getting dressed. Often the complainant would not know her clothes were on back to front. With some passion the mother explained that she had to try very hard to make her daughter look good and normal. In cross examination the mother said that the complainant could really only answer yes or no. She referred again to the childlike state of her daughter and to how she, for example,



knew how to wash clothes but couldn't do so very well. She said she was concerned about letting the complainant go out on her own and tried to avoid doing so.

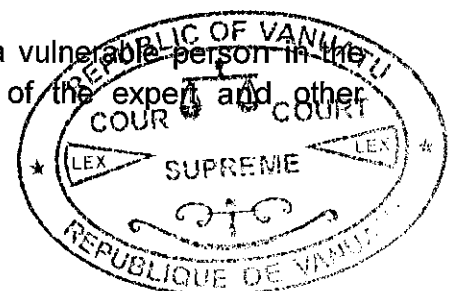
8. Dr Obed gave evidence. He confirmed his report, authored in November 2014, was based on his discussions with the mother and his meeting with the complainant. He accepted he had seen the complainant only the once and for a period of less than an hour. He agreed the complainant did not exhibit any psychotic symptoms. He assessed her as having mild mental retardation. The doctor explained the use of the word "mild" as part of a classification and that someone with severe retardation would need constant supervision and support and would not be able to look after themselves. He accepted that the complainant was not like that and with support could integrate into the community.

9. Dr Obed found the complainant slow to interact and that her behaviour was often inappropriate. She would respond with very few words and usually only after looking to her mother. He was of the opinion that the complainant's mental age was much lower than her physical age of 22. Later, in answer to my question he said he would not disagree with Ms Naliupis's view that the complainant had a mental age of a 10 year old. In cross examination Dr Obed said he was unable to get any information from the complainant. He had tried several methods but the complainant always deferred to her mother. The complainant was unable to construct a long sentence and could only answer with one or two words. The Doctor agreed he could give a more concise report, by which I understood him to mean a more detailed report, if he had more time with the complainant. However he said that the complainant lacked verbal skills and was very shy. Despite that the doctor was sure his assessment was accurate.

10. Counsel for the defence submitted that Dr Obed had only a post graduate Diploma in Mental Health and therefore could not be considered an expert. I reject that submission.

11. After listening to that evidence I have no doubt whatsoever about the complainant's has a mental capacity. She is retarded with a mental age much lower than her physical age. It may not be so severe as to require 24 hour supervision and support but it is such that her approach to life is childlike. She is unable to function as a normal 22 year old adult. She is vulnerable because her judgment is impaired. It is not a question of her knowing right from wrong it is a question of her established lack of capacity to act in her own best interests, her inability to make reasoned decisions. I have no doubt that she is someone who would be deemed unable to give consent to sexual intercourse because of her mental impairment or incapacity as described by the experts and vouched for by her mother.

12. It would not have assisted in any way to have such a vulnerable person in the witness box. It would not have affected my assessment of the expert and other



evidence. It would have been unsafe in the extreme to substitute my impression of the witness after 10 or 20 minutes in the witness box for that reached after careful consideration of the expert and other evidence.

13. The only issue left to consider is whether the defendant can rely on the statutory defence set out in section 12 of the Penal Code. The defendant gave evidence on oath. He explained he knew the complainant's father and he would go to the family home and they would stay together. The complainant would be present. The defendant's knowledge about the complainant was through the family connection and was over some time. Exactly how long he had known the complainant and her family was not possible to determine. He said he did not know the complainant had a problem with her mind. It was only after sexual intercourse had occurred that the mother told him the daughter had a problem with her mind. The defendant did not see the complainant as slow and thought she was alright.

14. It was clear from his own evidence that the defendant did not have just limited interaction with the complainant. He knew her and the family well. This was no chance and fleeting meeting between strangers. Given the description of the complainant's behaviour by her mother, by Ms Naliupis and by Dr Obed it is just not credible that the defendant was not aware of what everyone else was aware of, namely the complainant's mental capacity. He must have seen the complainant's behaviour and been aware that she was not a normal young lady. He must have recognised her problems in coping with life and that her development had been retarded. I do not accept the defendant could have had a genuine and reasonable belief that the complainant was not mentally incapacitated. Given his knowledge of the family I do not know how the defendant can possibly say he believed the complainant was "alright".

15. I am satisfied beyond reasonable doubt that the complainant was someone who was and is unable to give consent because of her mental capacity. I am satisfied that, the defendant having raised the defence of an honest and reasonable mistake, the prosecution have established beyond reasonable doubt that a reasonable man standing in the shoes of the accused would not have believed the complainant was suffering from a mental disability and that her mental capacity would render her consent meaningless.

16. The defendant is convicted of unlawful sexual intercourse contrary to section 90(b)(vii) of the Penal Code. I will hear from counsel on the question of sentence.

7th May 2015


Chetwynd

