IN THE SUPREME COURT
REPUBLIC OF VANUATU
(Criminal Jurisdiction)

Criminal Case No. 100 of 2014

PUBLIC PROSECUTOR

-v-

MANU KOMBE

Mr Boe for Prosecution
Mr Vira for the Defendant

Hearing 19th May 2015 at Lakatoro

Judgment

1. The defendant Manu Kombe is charged with two counts. They are alleged to have occurred on the same day, 16th May 2014. One count alleges sexual intercourse without consent and the other, incest. Both offences relate to the same facts and I did have some concerns as to whether the two counts were bad for duplicity. As it turns out I need not have concerned myself because it appears to be accepted that although the complainant and the defendant are related they are not within the degrees of consanguinity proscribed by section 95 of the Penal Code. In the circumstances the defendant must be acquitted of the charge of incest.

2. The brief facts of the case are that the defendant and Miss M, the complainant, met at a fund raising event for the Church. Ms M had gone with her mother who had prepared food to be sold as part of the fund raising. The defendant arrived at the event later in the evening. Ms M and the defendant together with a young boy left the area where the fund raising was taking place. They went to see the defendant's father in law. He was not at home and they went to a nakamal to see if he was there. This was some distance from where the fundraising was taking place and the young boy had already left them to go back to the fund raising. In any event Ms M and the defendant started on the return journey and reached the main road. She said she wanted to go back to the fund raising where she thought her mother would be waiting for her. The defendant said he would take Ms M home. She says the defendant slapped her face grabbed her hand and then dragged her into the bush. There was a struggle and the rape occurred. Ms M was subsequently able to run away although she was half naked. She ran back to the road where she eventually met her mother. She was distressed and told her mother what had happened. At some stage it is said the defendant appeared and told the

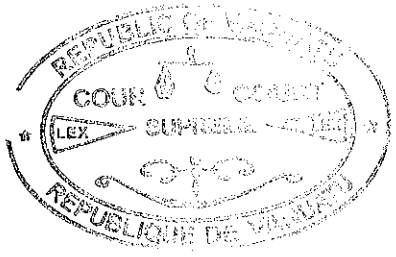
mother to keep quiet as he didn't want people to know what was going on. The matter was reported to the Police the next day and some days later (the medical report is dated 20th May 2014) Ms M was examined by a doctor at Norsup hospital. The defendant was interviewed and charged. When he was interviewed the defendant, as he was perfectly entitled to do, remained silent simply saying he would tell his story in court.

3. The defendant elected not to give evidence at the trial. Again, he is perfectly entitled to remain silent he has that right and cannot be criticised, and I will not criticise him, for exercising it. However on his behalf it was said in submissions the issue was consent. There was no formal admission as such but it was said the defendant agreed he had sex with Ms M but that it was consensual.

4. The law in relation to sexual intercourse without consent is quite straightforward. A person is guilty of sexual intercourse without consent if they have sexual intercourse with another person without that other persons consent, or if that other persons consent is obtained by reason of the matters referred to in section 90(b)(i) to (vii) of the Penal Code [Cap 135]. In this case we are not concerned with those matters, the allegation is that Ms M did not consent. In accordance with the submissions for the defendant the only question I have to deal with is did Ms M consent to the sexual intercourse with the defendant. There is a third element involved but as we have heard no evidence from the defendant and as there was no suggestion in cross examination that the defendant honestly and reasonably believed consent to sexual intercourse had been given by Ms M it is difficult to see how that third element could be relied on by the defendant. Nevertheless it will be considered in due course.

5. Section 89A of the Penal Code defines sexual intercourse as being, *"..penetration, to any extent of the vagina or anus of a person by any part of the body of another person".*

6. In this as in any other case, the burden of proof is on the prosecution. The prosecution must prove sexual intercourse and they must prove lack of consent on the part of Ms M. As I said earlier, the defence have not positively raised the issue of honest and reasonable mistake but the tenor of the questions put in cross examination and the general denial of guilt seems to me to leave the question open. In all the circumstances the prosecution should also prove the defendant did not have a reasonable and honest belief Ms M had consented to having sexual intercourse. The standard of proof is beyond reasonable doubt. Before looking in detail at the evidence I turn to the question of corroboration. I was referred to the case of PP v. Tom Bethuel and Ronald Pripri Criminal Case 45 of 2014 and the decision of Fatiaki J dated 16th October 2014. If it was put to me as a case establishing that I ***must*** have corroboration in a case involving a



complaint of a sexual nature I would have to disagree. I do not believe that is what Fatiaki J says in his judgment. It is quite clear from the judgment that he found the complainant to, "...*have exaggerated important parts of her evidence....*" He also said he found part of the complainant's evidence untrustworthy and later he said he disbelieved her denials. I do not think Fatiaki J was saying anything more than was said in the English case of DPP v. Kilbourne [1],

> *"There is nothing technical in the idea of corroboration. When in the ordinary affairs of life one is doubtful whether or not to believe a particular statement one naturally looks to see whether it fits in with the statements or circumstances relating to the particular matter; the better it fits in the more one is inclined to believe it. The doubted statement is corroborated to a greater or lesser extent by the other statements or circumstances with which it fits in."*

7 The case of PP v. Benny[2] dealt with the question of corroboration at length and it in turn cited the older case of Walker.[3] The Court of Appeal in Walker referred to the extensive treatise of D'Imecourt CJ in Mereka [4]. The court then went on to say,

> *15. Applying the common law as part of the law in Vanuatu the position may be summarized as follows:-*
>
> *(a) There is no requirement of law that there must be corroborative evidence of a vital witness's evidence before a judge can be satisfied beyond reasonable doubt an offence has been proven.*
>
> *(b) For some particular circumstances (eg. child complainants, accomplices and sexual crimes) trial judges may need to warn themselves of the danger of convicting an accused person on the uncorroborated evidence of the complainant. However the judge may do so conscious of this warning.*
>
> *(c) Where the offence is one which requires the judge to consider the corroboration warning the judge must firstly decide if the evidence in law is capable of being corroborative evidence and it is then for the judge to decide its value in the particular case.*

8. Leaving aside the statutory obligation imposed by section 83(3) of the Criminal Procedure Code in my humble and respectful view the Court of Appeal was only acknowledging the plain fact that the common law has been overtaken in many "common law" jurisdictions by legislative provisions. For example in Australia, in New Zealand and in England and Wales there has been legislation which substantially

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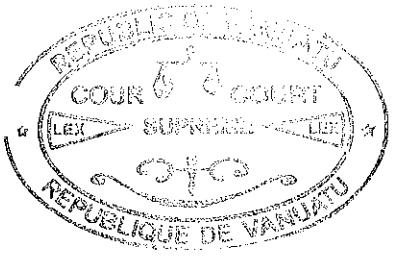
[1] D.P.P. v Kilbourne (1973) A.C. 729; 57 Cr.App.R. 381, H.L per Lord Reid
[2] Public Prosecutor v Benny [2009] VUSC 99; Criminal Case 103 of 2009 (17 September 2009)
[3] Walker v Public Prosecutor [2007] VUCA 12
[4] Public Prosecutor v Mereka [1992] VUSC 10; [1980-1994] Van LR 613 (30 December 1992)



affects or removes totally the obligation on judges to give what is commonly known as the corroboration warning. The reasons for this change in approach were dealt with by the Privy Council [5] in a 2002 case. I do not know if the Court of Appeal was referred to the Gilbert case, all I can say is there is no citation mentioning the Privy Council decision. Their Lordships on the Committee are well acquainted with dealing with jurisdictions such as exits in Vanuatu, which are common law jurisdictions but which perhaps have not quite kept pace with developments, particularly legislative developments affecting common law principles, in other jurisdictions. The Gilbert case was a Caribbean case and I make no apologies for quoting extensively from it. The appeal was from the Eastern Caribbean Court of Appeal which had relied on its judgment in *Pivotte v The Queen* (1995) 50 WIR 114. The Privy Council said this about corroboration:-

> *"Sexual Offences: corroboration*
>
> *8. The rule in question is a special rule requiring the judge to give the jury a specific direction and warning in respect of the evidence of the complainant in a sexual offence case, that is to say, the evidence of the person who says that he or she has been the victim of a sexual offence. It does not apply to the evidence of any other person, only to the evidence of the victim. It potentially applies to male as well as female victims. Its effect is that in any sexual case the jury must be directed that it is dangerous to convict the defendant upon the uncorroborated evidence of the complainant alone; the judge must tell the jury which evidence would, if they accept it, be capable of amounting to corroborating evidence; but he can go on to tell them that they can convict on uncorroborated evidence if, having paid due heed to the warning, they are nevertheless convinced of the defendant's guilt. The trial judge is also required to explain to the jury why the warning is necessary. Thus the classic version of the explanation was given by Salmon LJ in Reg v Henry (1968) 53 Cr App Rep 150 at 153, in these terms:*
> *""... because human experience has shown that in these courts girls and women do sometimes tell an entirely false story which is very easy to fabricate, but extremely difficult to refute. Such stories are fabricated for all sorts of reasons, which I need not now enumerate, and sometimes for no reason at all.""*
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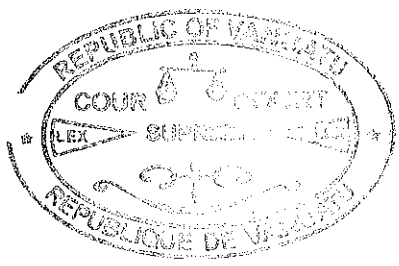
> *It will be noticed that this explanation is expressly based upon a suggested special propensity of girls and women to lie. In Pivotte at p.118, Satrohan Singh JA referred (as had others before him) to examples of such reasons as being sexual neurosis, fantasy, spite and refusal to admit consent because of shame.*
>
> *9 In James v The Queen (1970) 55 Cr App Rep 299, a rape case, the Privy Council held that the complainant's evidence of sexual intercourse, her lack of consent and the identity of the man concerned all needed to be corroborated and the jury should be warned that in all these respects it was dangerous to*

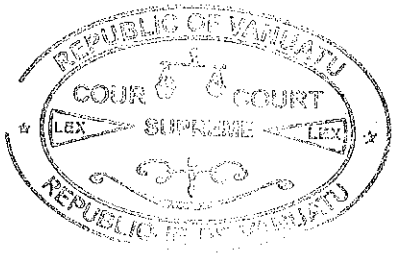
[5] R v. Gilbert (Grenada) [2002] UKPC 17 (21 March 2002)



convict upon uncorroborated evidence. The breadth of that requirement gave rise to practical difficulties. The defendant may admit that he had had intercourse with the complainant; he may not dispute anything except lack of consent. He may, as the defendant did in the present case, simply say that it was not him and rely upon the assertion of an alibi without challenging her evidence in any other respect. Is the judge to tell the jury that the defendant's acceptance or admission of those parts of the complainant's evidence corroborates her evidence? Or should the judge adapt his summing-up to the actual issues raised by the evidence given at the trial? The English Court of Appeal in Chance adopted the latter approach which avoids the artificialities of the former. But either approach leaves an area of middle ground where the judge has to make an assessment (unless he is in all such cases to adopt the unqualified James approach). The defendant will have pleaded not guilty thereby putting the whole of the prosecution case formally in issue. He is unlikely, particularly when representing himself, to have made any formal admissions. Similarly, his cross-examination may not have taken advantage of opportunities to probe other aspects of the complainant's evidence.

10. Chance was a case decided at a time before the English law had been altered by statute and before the whole question of corroboration in criminal cases had been considered by the Law Commission. The facts of that case were such that it would have been extremely foolish of the defendant to have challenged the complainant's evidence that she had been forcibly raped. Swabs showed that sexual intercourse had occurred. She had suffered, among other injuries, two black eyes, chipped teeth and bruises on her right upper arm. No formal admissions had been made by the defence but the defendant's case was conducted solely on the basis that her assailant was not the defendant. He relied upon an alibi and called supporting witnesses. In his summing-up the judge had given a full Turnbull direction. The defendant appealed on the ground that he should also have warned the jury of the dangers of convicting on the uncorroborated evidence of a complainant. His appeal was dismissed. The court reviewed the authorities. In the earlier authorities, it had been said that the full warning must be given even though no issue other than identification was relied upon by the defence. In the later cases, with one exception, the court had held or proceeded on the basis that in an identification only case the full warning need not be given.

12. The Court of Appeal therefore considered what must be the justification for a rule which requires the judge to warn the jury in sexual cases. They said, at pp.941-2:
""The aim of any direction to a jury must be to provide realistic, comprehensible and common sense guidance to enable them to avoid pitfalls and to come to a fair and just conclusion as to the guilt or innocence of the defendant. This involves the necessity of the judge tailoring his direction to the facts of the particular case. If he is required to apply rigid rules, there will inevitably be occasions when the direction will be inappropriate to the facts. Juries are quick to



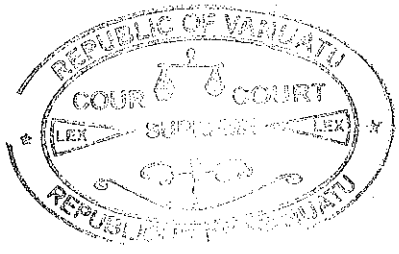
spot such anomalies, and will understandably view the anomaly, and often, as a result, the rest of the directions, with suspicion, thus undermining the judge's purpose. Directions on corroboration are particularly subject to this danger: see Reg v O'Reilly [1967] 2 QB 722, 727, per Salmon L.J.""

They adopted what had been said by Barwick CJ in the High Court of Australia in Kelleher v The Queen (1974) 131 CLR 534, at 543:
"The rule of practice as to the warning to be given to the jury is related to the reasons which have prompted it. In my opinion, it does not require a warning where those reasons have no play ... The issue whether or not she was honestly mistaken in her identification of the applicant did not involve any of those elements upon which the need for caution arises."

The Court of Appeal concluded that what if any warning the judge should give depended upon what were the live factual issues on the evidence given at the trial. They considered that what had been said in James must be read subject to this implicit qualification. Thus they said at pages 942-943:
""What is the judge to do in the much more usual case where there has been no formal admission but equally there has been no suggestion by the defence that there is any doubt as to the commission of the offence and no cross-examination of the complainant to that effect? If, as in the instant case for example, it could not sensibly be suggested that no rape had occurred, it is absurd and gratuitously offensive to the complainant to insist that the usual warning should nevertheless be given.""

They pointed out two important advantages of their approach. First, where the defendant is charged with both a non-sexual and a sexual offence committed in relation to the same woman, say a burglary and a rape, it is not necessary for the judge to make the suggestion, not advanced by the defence and (in the absence of evidence to support it) patently absurd, that the woman householder may have been giving her evidence out of fantasy spite or neurosis. Secondly, it will not be necessary for the judge to give directions to the jury which will be seen by them to be totally inappropriate and therefore detract from the important and relevant directions which he has to give them, similarly saving a court of appeal from saying that such a direction ought formally to have been given but it would not have affected the decision of the jury and that the proviso should be applied.

13. In 1991, the view of the Court of Appeal in Chance (at pp.941-2) was expressly endorsed by the Law Commission in its Report Law Com. No. 202 (section 2.7). The working paper which had preceded this Report had criticised the existing rules as being inflexible, complex, productive of anomalies and inappropriate for the purpose they were intended to serve; it also expressed the view that the automatic application of the rule to (inter alia) complainants in sexual cases could not be justified. The Report pointed out (paragraph 2.9):
"The danger of injustice is increased by the irrational terms of the required direction itself. The judge is obliged to start by saying that it is dangerous to convict on the basis of certain evidence, but then to go on and tell the jury that it is possible for them to do exactly that. Those formulae can lead, according to the



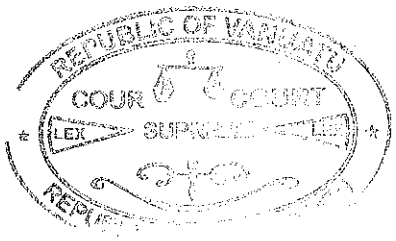
circumstances of the case, either to the placing of an unfair handicap on the prosecution or to confusion that may be positively detrimental to the accused. Far from protecting the accused, the rules, by requiring the jury to be given a complicated and technical discourse about the evidence to be corroborated, may 'have the contrary effect [on the jury] to a sensible warning ... directed to the facts of the particular case'."

The responses which the Commission had received to their working paper had confirmed these criticisms. The direction was "nonsensical at worst and contradictory at best to most juries"; in relation to sexual cases, it was "patronising" (see paragraphs 2.16 and 2.19): the Commission recommended that the requirement for a corroboration warning in sexual and certain other cases should be abrogated and proposed a draft bill in the form that was enacted in 1994. However they also recommended judges "should not be prohibited from giving the jury a warning, or a warning in any particular terms, about the evidence of any particular type or category of witness". (paragraph 5.4)

14 This discretion left open to the trial judge was considered by the Court of Appeal in R v Makanjuola [1995] 1 WLR 1348. The court provided guidance on the application of the 1994 Act and how the judge should make use of this discretion in his summing-up. The judgment of the Court was given by Lord Taylor of Gosforth LCJ. At pp. 1351-1352, he said:
""The circumstances and evidence in criminal cases are infinitely variable and it is impossible to categorise how a judge should deal with them. But it is clear that to carry on giving 'discretionary' warnings generally and in the same terms as were previously obligatory would be contrary to the policy and purpose of the Act. Whether, as a matter of discretion, a judge should give any warning and if so its strength and terms must depend upon the content and manner of the witness's evidence, the circumstances of the case and the issues raised. The judge will often consider that no special warning is required at all. Where, however the witness has been shown to be unreliable, he or she may consider it necessary to urge caution. In a more extreme case, if the witness is shown to have lied, to have made previous false complaints, or to bear the defendant some grudge, a stronger warning may be thought appropriate and the judge may suggest it would be wise to look for some supporting material before acting on the impugned witness's evidence. We stress that these observations are merely illustrative of some, not all, of the factors which judges may take into account in measuring where a witness stands in the scale of reliability and what response they should make at that level in their directions to the jury. We also stress that judges are not required to conform to any formula and this court would be slow to interfere with the exercise of discretion by a trial judge who has the advantage of assessing the manner of a witness's evidence as well as its content.""

To summarise.

(2) It is a matter for the judge's discretion what, if any warning, he considers appropriate in respect of such a witness as indeed in respect of any other witness in whatever type of case. Whether he chooses to give a warning and in



what terms will depend on the circumstances of the case, the issues raised and the content and quality of the witness's evidence.

(3) In some cases, it may be appropriate for the judge to warn the jury to exercise caution before acting upon the unsupported evidence of a witness. This will not be so simply because the witness is a complainant of a sexual offence nor will it necessarily be so because a witness is alleged to be an accomplice. There will need to be an evidential basis for suggesting that the evidence of the witness may be unreliable. An evidential basis does not include mere suggestion by cross-examining counsel.

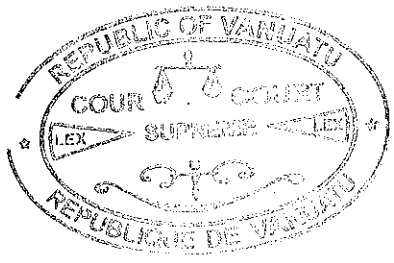
(4) If any question arises as to whether the judge should give a special warning in respect of a witness, it is desirable that the question be resolved by discussion with counsel in the absence of the jury before final speeches.

(5) Where the judge does decide to give some warning in respect of a witness, it will be appropriate to do so as part of the judge's review of the evidence and his comments as to how the jury should evaluate it rather than as a set-piece legal direction.

(6) Where some warning is required, it will be for the judge to decide the strength and terms of the warning. It does not have to be invested with the whole florid regime of the old corroboration rules.

15. Their Lordships consider that this quotation from the judgment of Lord Taylor appropriately gives effect to the purpose for which the rule regarding the corroboration warning in sexual cases existed. The purpose was and still is to give juries the appropriate directions to assist them to arrive at a safe verdict as part of a fair trial. The former rule of practice had not been conducive to achieving that result. It had led to inappropriate and indiscriminate directions being given which confused juries and created unfairness as between the prosecution and the defence and undermined rather than supported the safety of the juries' verdicts.

16. More recently the question of the need for corroboration in sexual cases has been reviewed in a judgment of the Supreme Court of Namibia in State v K [2000] 4 LRC 129 in the context of a constitutional requirement of a fair trial in conjunction with the victim's right to be protected. The judgment quoted fully from contrasting judgments of South African judges, Kriegler J and Oliver JA, and preferred the latter. The view favouring the giving of the warning, although biblically derived from the experiences of Joseph in Egypt, was not supported by the absence of any modern empirical data that in sexual cases more false charges are laid than in any other category of crime (p.139). The judgment agreed with Oliver JA in expressly endorsing and adopting what had been said by Lord Taylor in Makanjuola (sup): see pp.143-4 and 146. The conclusion of the court was that the rule had outlived its usefulness and there were no convincing reasons for its continued application (p.145). The court was also of the view that it had been duty bound to consider the issue since it was a reasonable possibility

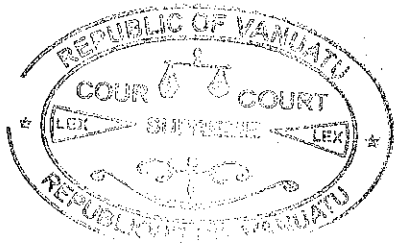


that the application of the existing rule of procedure or evidence might adversely affect the fairness of the trial (p.135).

17. In the present case the Court of Appeal was bound by the previous decision of the court in Pivotte. In that case the court had pointed out correctly that the Turnbull direction is concerned with the reliability of the identifying witness's evidence and the possibility of mistake rather than the question of fabrication and lies which is the subject matter of the corroboration warning in sexual cases: see particularly Floissac CJ at pp.119-120. But in rejecting Chance the court failed to take account of the essential purpose of the rule of practice and its role in relation to the actual issues raised by the evidence given at the trial. It treats the plea of the defendant as conclusive giving rise to the absurdity and confusion of requiring a corroboration warning in relation to evidence of the complainant which is not challenged. Further, at p.118, Satrohan Singh JA says:
""... Chance seems to be removing from the jury, and giving to the judge in certain cases, the task of deciding whether or not a complainant's evidence in a sexual offence can be accepted without corroboration, a matter of credibility that is eminently for the jury.""

This is not correct. Credibility is always a question for the jury whether or not a corroboration warning is given. In an identification case the jury will still have to be directed that they must be satisfied so that they are sure that the prosecution has proved all the ingredients of the offence and that they can only convict if they are so satisfied. In a sexual case the position is no different. But what is under consideration in Chance is whether it is necessary to warn the jury that it is dangerous to convict when no question has been raised as to the honesty, as opposed to reliability, of the complainant's evidence. The decision in Pivotte is, as the leading judgment shows, based upon the discredited belief that regardless of the circumstances the evidence of female complainants must be regarded as particularly suspect and particularly likely to be fabricated. This belief is not conducive to the fairness of the trial nor to the safety of the verdict.

8. In the case before me therefore I need only be mindful of the need for corroboration to the extent Ms M's evidence is challenged as to its honesty. Looking at her evidence on oath in detail she says that after the young boy Simon left them to return to the fund raising she told the defendant she wanted to go back as well. The defendant said to her that she must go with him to see his father in law or he would give her a slap. She didn't refuse because she saw the defendant as her brother. Eventually and when they had been unsuccessful in meeting up with the father in law they returned to the main road. She then told the defendant she wanted to find her mother at the fund raising who was probably looking for her. The defendant said no he would take her home. They argued and the defendant grabbed her by the arm and started pulling her into the bush area. She asked the defendant where they were going. He did not reply. He then tried to force her to the ground and they struggled. Ms M fell to the ground and the defendant started to pull her trousers off. She then asked, "What do you want to do I am your sister ?" Again he made no reply. He managed to pull her trousers off and she started to cry. The defendant slapped her in the face and told her to keep quiet. The



defendant succeeded in pulling off her panties too and forced her legs open. He pushed two fingers inside her vagina. He then took out his penis and pushed it inside her. She started kicking the defendant and he stood up. She was able to get to her feet as well. She asked for her clothes but the defendant said he did not know where they were. She ran to the main road and then towards home. She called for her mother as she ran and she met her before she arrived home. She said she started to cry and told her what happened. Her mother then took her home. The next day the matter was reported. My note reads, "Next day went to the Chiefs and told them, at Lakatoro Police station".

9. Ms M told the court she then went to the hospital. She added the doctor told her to come back and see him the next day for a medical check up.

10. Ms M further explained in evidence in chief that the incident took place some distance from her home. It was not close to home and it was some way from the main road. She confirmed the defendant told her not to make a noise or else he would punch her. She was unable to run away in the beginning because the defendant had hold of her hand.

11. In cross examination Ms M said the defendant had taken hold of her hand. He smacked her with his other hand because she made a noise. It was put to Ms M that her statement to the police mentioned the defendant holding a hand over her mouth. She said that the defendant had not blocked her mouth. She was unable to say why her written statement said he had. She was adamant the defendant had not held a hand over her mouth but he had slapped her several times. The first time was when she started to "sing out". Ms M told the court she had been slapped twice on the road and once when she was dragged into the bush. She said the slaps were hard but in evidence was unable to say which side of the face she was slapped on because, "she was struggling". It was after the incident she realised the left side of her face was sore. It was sore for 2 days. It was sore when she saw the doctor.

12. These slapping incidents are not in the written statement taken by the police. Ms M did not know why and she said she had told the police about the slapping. The officer who wrote out the statement, in fact all the statements, was not called to give evidence and so could not be asked about the different accounts.

13. Ms M described how she had been made to fall down. It was a hard fall on to her backside. Whilst on the ground and after the defendant had removed her trousers and her panties she was still struggling. It was then the defendant penetrated her first with his fingers and then with his penis. She was half naked when this was happening and she was struggling. She did not have any bruises or small injuries as result. She denied she was having a relationship with the defendant and did not agree to have sex with him. She denied she became frightened and embarrassed when she met her mother on the road and made up the story about the rape. She said her evidence to the court was the truth (a straight story).

14. Ms M's mother gave evidence next. She described the early part of the evening first when she was busy selling food for the fundraising. She saw Manu arrive. He bought some food. She saw her daughter with him but thought nothing of it because he was one of her relatives. As she put it, "Manu was my child". Later she realised they were still missing so she went home to see if her daughter was there. Her sister Rotha was at home and her sister said the daughter had not come home. The mother went off to search for the daughter. She took a torch with her. She was calling out her daughter's name. She saw her daughter in the torchlight and could see she was half naked and distressed. She was crying and said Manu had taken her to the bush. In her words, "She cried and cried and shake shake". She took the daughter back home and was discussing what next to do with her sister. Manu the defendant was there. They rowed and people began to gather.

15. The mothers evidence was not really challenged in cross examination. She agreed that she was not happy that her daughter was missing but did not accept she was angry. She explained her daughter was talking and starting to tell her what happened when they first met but that she started crying. She confirmed her daughter was half naked when she first saw her.

16. The balance of the evidence came from the tendered statements of the sister, one Olav Clement, the officer in the case Sgt Bong and the medical report. Olav confirms that the defendant and Ms M followed him when he left the fund raising. His evidence sheds no light on the issue of consent. The sister's evidence does not assist greatly in this case. She talks of the row between the mother and the defendant and how the defendant said they should keep quiet so not everyone heard the row and they could settle the matter.

17. Dealing with the medical report, it is true it could have been more comprehensive. For the defence it was said in submissions that the lack of detail or mention of bruising and other injuries was telling and indicative of the fact there had been no struggle, that the sex was consensual. I do not accept that is the only conclusion to be drawn from it or even that it must cast doubts on Ms M's evidence. The Doctor states his opinion that there was vaginal penetration with a finger and there were possibly semen remnants in the vagina. He confirms what has been accepted by the defence, there was sexual intercourse. From his notes of his findings he seems to have restricted his medical examination to Ms M's genitalia. He mentions the exterior of the genitalia, the introitus (or entrance of the vagina), the hymen, the vaginal vault and the vaginal fornices. As he does not mention any other part of Ms M's anatomy it is not known whether he examined the rest of her body for signs of violence. Without hearing from the doctor any suggestion that he did or did not examine Ms M for other injuries is pure speculation. No one else gives evidence about injuries they did or did not see and Ms M herself says there were none except for the sore face when she was slapped. She was challenged about that evidence but was steadfast in repeating it.

18. I am satisfied that nothing raised by the defence challenges the honesty of what the complainant says in her evidence. It has to be accepted that there is a discrepancy

in what is written in her statement and what she said in court, the hand over the mouth to keep her silent or the slapping of the face to ensure the same thing. I take into account that she did not write out the statement herself. One must assume, although there is no evidence to say one way or the other, that she was given the opportunity to read and correct it. What Ms M said in court was simply that she told the police officer taking the statement what happened. In any event the inconsistencies are not so major or glaring as to cast doubt on Ms M's honesty or reliability as a witness. The only issue in this case is consent or the lack of it. There is no doubt in my mind that the complainant's evidence in connection with that issue is an honest account of what happened. Her evidence is of the defendant using physical force to overcome her resistance. I am certain beyond any reasonable doubt that she did not consent to what he was doing and resisted him as best she could. Whilst it has not positively been put forward as a defence I am certain that, given the complainant's account is reliable and accurate, the prosecution have proved beyond reasonable doubt that the defendant could have been under no illusion that Ms M consented to sexual intercourse. Given her accepted account of events it would be impossible to conclude the defendant could have had an honest and reasonable belief that Ms M's struggles and her crying signified consent to sexual intercourse.

19. There is no doubt in my mind the defendant is guilty of the offence of having sexual intercourse with the complainant without her consent and I convict him accordingly.

Dated 20th May 2015

Chetwynd J