

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

Criminal
Case No. 21/2122 SC/CRML

BETWEEN: PUBLIC PROSECUTOR

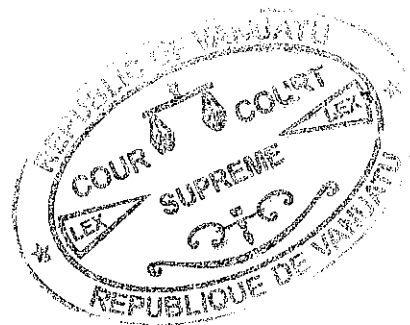
AND: HILAIRE MULONTURALA
Defendant

Date of Plea : 11th day of August 2021
Date of Deision: 11th August 2021
Date Issued: 11th August 2021
Before: Justice Oliver Saksak
In Attendance: Mr Damien Boe for Public Prosecutor
Mr Mary Grace Nari for Accused

REASONS FOR DECISION

Introduction

1. I heard arguments and submissions from counsel yesterday (10/08/21) in relation to an application for dismissal of charges by the Accused.
2. I gave oral decision allowing the application and dismissing the two charges of incest and sexual intercourse without consent against the Accused.
3. I now provide reasons for that decision.



Background

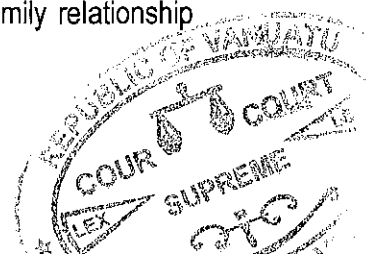
4. The complainant and victim Gorethy Sammy.
5. She made a complaint to the Police on 11 April 2019 alleging that in 2018 the accused, who she alleged was her 'uncle' whilst administering custom medicine to her, also had sexual intercourse with her without her consent.
6. Subsequent to her complaint, the complainant passed away. This fact is not disputed and not in issue.
7. The accused gave his statement to the police on 8th April 2019.
8. his followed the complaint of Lorance Sammy, the mother of the complainant dated 4th February 2019.
9. The accused was remanded in custody on 11th December 2020.
10. He was committed in the Magistrates Court on 8th July 2021 and released on bail on the same date.
11. An Information and Charge sheet was filed by Prosecutions on 10th August 2021 containing two charges of Incest and Sexual Intercourse without consent.

Plea

12. The case was fixed for plea on 10th August 2021. The accused entered pleas of not-guilty to both charges.
13. The charges were dismissed.

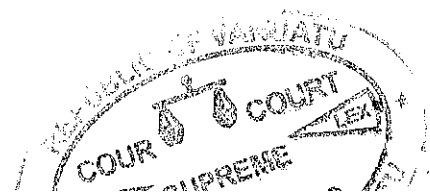
Discussion

14. It is not disputed that the complainant is now deceased. Despite the accused's statement contains admissions of sexual intercourse, he denies (a) he stood in any family relationship



with the deceased complainant as "abu" or grandfather as alleged in regard to the incest charge and (b) that sex was returned for payments of moneys.

15. It is trite law that the Prosecutions has the burden of proof of the accused's guilt on the balance of proof beyond reasonable doubt (see sect.8, PCA and sect.81 CPC Act). And where the complainant is deceased, the Prosecutions could not read her statement into evidence pursuant to section 162 (3) of the CPC Act where the facts alleged are clearly in dispute and issue. the discretion available in that provision is simply not available to the Prosecution. That is one major bundle for the Prosecutions they cannot get over.
16. It is regrettable that the complainant could not have been investigated in time. There was a delay between the complaints of the mother on 8th April 2019 the accused's statement having been obtained also on the same date, he was only committed to the Supreme Court on 8th July 2021, some 2 years later. Further proper charges were only filed on 10th August 2021, a day before the plea date.
17. Article 5 (1) (d) of the Constitution affords to the accused a fundamental right to protection of the law. Sub article (2) of Article 5 defines what protection of the law means and entails. It includes a fair hearing, within a reasonable time, by an independent and impartial Court and be afforded a lawyer if the offence charged is serious one, and that a person remains innocent until his guilt is established according to law.
18. For the Prosecutions to proceed with a trial of this case after the complainant has died and where allegations are denied, such a trial would not be a fair hearing without the accused's having the opportunity to cross-examine the complainant on the facts, and for the Court to assess credibility.
These factors amounted to another major hurdle of the Prosecutions.
19. The other hurdle was the defective charged filed by the Prosecutions on 10th August 2021. In the particular it is stated the offendings occurred in January 2018. Prosecutions sought leave prior to the charge being read ad plea entered to insert "2018" upon Mrs Nari raising the issue. But even then that year would be disputed because in Lorange Sammy's statement of 4/02/2019 she makes reference to January 2019 and not 2018. This is inconsistent with the



statement of the deceased complainant of 11/04/2019. The accused said in his statement of 8/04/19 that it was in August 2017. With those conflicting dates, the Prosecutions would face difficulty in a trial where the complainant is deceased.

20. Without the complainant's evidence, the evidence of Lorance Sammy standing alone would not be enough to prove the accused's guilt beyond reasonable doubt.
21. The option available to the Prosecutions under the circumstances was to have opted for a nolle prosequi but the Prosecutions chose to proceed to trial and sought to read into evidence the statement of the complainant under section 162 (3) of the CPC Act.
22. The Court declined the exercise of that discretion for the given reasons. To save time and costs to all parties, the application to dismiss the charges against the accused was allowed. The charges of incest and sexual intercourse without consent were dismissed and the accused acquitted.

**Dated at Port Vila this 11th day of August 2021
BY THE COURT**


Oliver Saksak
Judge

