

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

Criminal
Case No. 22/163 SC/CRML

BETWEEN: Public Prosecutor

AND: Willie Clement Alfred
Defendant

Coram: *Justice Aru*
Counsel: *Ms. M. Taikie for the Public Prosecutor*
Mr. J. Garae for the Defendant

VERDICT

Introduction

1. This is a case involving allegations of sexual abuse by a father. The prosecution alleges that the accused had sexual intercourse with the complainant who is his own daughter. She was married with 2 children and was around 22 years of age at time of the alleged offending. The underlying issue is whether the sex occurred as alleged.

Charges

2. The accused was charged under an information filed on 16 February 2022 which contains the following five (5) counts: -

Count 1

Statement blong wrong

Sexual intercourse without consent-Contrary to section 90 (a) and 91 of the Penal Code Act [CAP135]

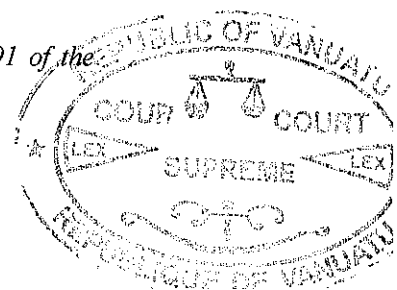
Particulars blong wrong

Willie Clement Alfred, yu blong karebeta Village long Vanuala. Long 21 November 2021 insaed long haos blong yufala yu bin kat sexual intercourse wetem kel ia Smaila Alfred olsem yu bin pusum two finger blong yu I go insaed long vagina blong hem long taem ia hemi eno long ting ting blong hem.

Count 2

Statement blong wrong

Sexual intercourse without consent-contrary to section 90 (a) and 91 of the Penal Code Act [135]



Particulars blong wrong

Willie Clement Alfred, long 22 November 2021 insaed long haos blong yufala yu bin kat sexual intercourse wetem jel ia Smaila Alfred weh long taem ia hemi eno long ting ting blong hem.

Count 3

Statement blong wrong

Sexual intercourse without consent-contrary to section 90 (a) and 91 of the Penal Code Act [CAP 135]

Particulars blong wrong

Willie Clement Alfred, long 23 November 2021 insaed long haos blong yufala yu bin kat sexual intercourse wetem kel ia Smaila Alfred weh long taem ia hemi eno long ting ting blong hem.

Count 4

Statement blong wrong

Incest- Contrary to section 95(1) (a) of the Penal Code Act [CAP 135].

Particulars blong wrong

Willie Clement Alfred, long 22 November 2021 insaed long haos blong yufala yu bin kat sexual intercourse wetem kel ia Smaila Alfred weh long taem ia hemi stret gel blong yu.

Count 5

Statement blong wrong

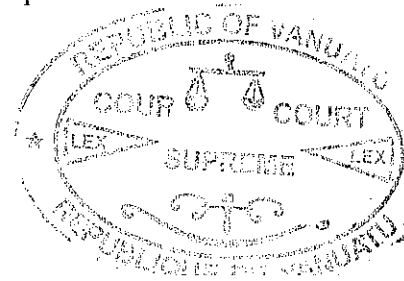
Incest- Contrary to section 95 (1) (a) of the Penal Code Act [CAP 135]

Particulars blong wrong

Willie Clement Alfred, long 23 November 2021 insaed logn haos blong yufala yu bin kat sexual intercourse wetem kel ia Smaila Alfred weh long taem ia hemi stret gel blong yu.

3. In relation to the three (3) charges of sexual intercourse without consent the prosecution must prove the following elements: -

- (1) The accused had sexual intercourse with the complainant;
- (2) The complainant did not consent;
- (3) The accused did not belief on reasonable grounds that the complainant was consenting at the time sexual intercourse occurred.



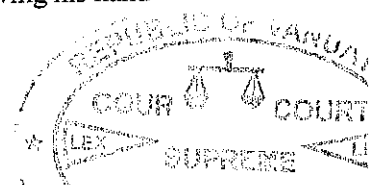
4. With regards to the two counts of incest the prosecution must prove the following elements:-
 - (1) That the accused had sexual intercourse with the complainant;
 - (2) The sexual intercourse was between a parent and child in this case the accused father and is biological daughter;
 - (3) The complainant was over 16 years old.
5. The accused is not required to prove anything. He was informed of his rights under section 81 of the Criminal Procedure Code [CAP 136] before the prosecution opened its case. The prosecution has the burden of proof and must prove all the elements of the offences charged beyond reasonable doubt (s8 Penal Code).

Evidence

6. The prosecution case is that the accused had sexual intercourse without consent with the complainant on 21, 22 and 23 November 2021. In doing so, he committed incest as the complainant was his own biological daughter.
7. The prosecution called two witnesses the complainant Smaila Alfred and her husband Mandela Jones also known as Nelson Mandela.

Smaila Alfred

8. She does not recall the exact date but recalls November 2021. On a Tuesday at night at her parents' house at Kerebeta village she was with her parents. She slept on a bed with her two children. Her mother and father the accused slept on the ground. She woke up but did not have any clothes on. She asked her mother and the accused where her clothes were – they did not know. She found her clothes under the mattress. She wore them then went outside and came back again and slept. When she moved her hand to hug her children, she felt there was not a child but a man beside her. She saw that it was the accused. She heard her mother tell her to be quiet that someone might come behind the house and hear them. Her mother told her that she had to accept the accused. That her needs and that of her children will be met by her father. Her mother told her to take her mother's place "bai mi changem mummy". Her mother told her that "mi kat sik lo bel blo mi mo mifala no mekem maret life blo 10 manis". She told her mother she cannot do it because they were her parents. The accused was present but her parents did not listen to her. Her mother told her she had to accept it. She said no but her mother forced her. The accused removed her clothes and climbed on top of her on the bed and pushed his penis into her vagina. She tried to push the accused but he laid on top of her strongly and had sex with her. She did not want to have sex with him. After the sexual intercourse she got up, the accused went back down to her mother on the floor. She went outside as she felt upset. She only recalls the accused having sexual intercourse with her once. On an occasion before the Tuesday, she recalls on a Sunday her stomach was sore. Her mother told her the accused will massage her. She was asleep when her mother called her and told her the accused was ready and that he will massage her. The accused told her to remove her shirt then massaged her with his hands she felt his hands move down to her vagina and touched her vagina before moving his hand



back up her body. She felt upset, she made a sound saying “Sh Sh” to the accused and he pulled his hand back up to her body. She recalls that she told her husband Mandela. Mandela told her he saw the accused having sex with her and she said yes. She told him what he saw was true that everything was true.

9. She was cross examined.

Mandela Jones

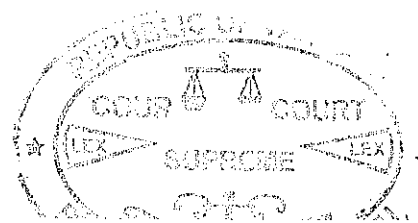
10. He is the complainant’s husband. He recalls in November he went to Kerebeta village to see the complainant and their children. It was night time so he followed the walling of the house they were sleeping in it was made of bamboo and he heard the noise of someone moving on the bed. The house had a solar light but was very weak so he shone his torch into the house thought the walling and saw the accused naked asleep on the bed with the complainant next to him. His mother-in-law slept on the floor. After seeing his he left the house. In the morning he called the complainant and she admitted everything that her father had sex with her. After that they came and reported the matter to the Police. On another occasion he saw the accused shining his touch at the complainant and gesturing to her.

11. He was cross examined.

12. The defence case was a general denial. That the accused never had sex with the complainant. The accused opted to remain silent and not to give evidence in accordance with his rights under s88 of the Criminal Procedure Code which were read and explained to him before he opened his defence. The only witness for the defence was his wife, Merelin Alfred.

Merelin Alfred

13. She is the accused’s wife. In November 2021 she was at Kerepeta at that time the complainant had obtained a protection order against her husband Mandela Jones and came to reside with her and the accused as her parents at Kerepeta. She denied she forced the complainant to have sex with her father as the complainant was their biological daughter. She denied the accused massaged the complainant stomach and denied telling Smaila to have sex with her father so that he will be responsible for her and her children. She also denied telling Smaila that she and the accused did not have sex for 10 months because she was sick. She described her house as an open room with no dividing rooms. That it has new walling and was not broken. She denied that someone could shine a torch through the walling and see what’s inside. She described how they slept on the night in question. The accused was the first, herself, a grandchild, the complainant, another grandchild (Ben), another grandchild (Joseph) and another grandchild (Mereuthoh). They were all sleeping next to each other and one could touch another next to them. She said when the complainant was living with them her husband would come and see her at night and she would go out and see him. She said if the sex happened, she will hear it. She said the complainant and her husband made up the story that the accused had sex with the complainant. She said Smaila was under a protection order but was still seeing her husband without their

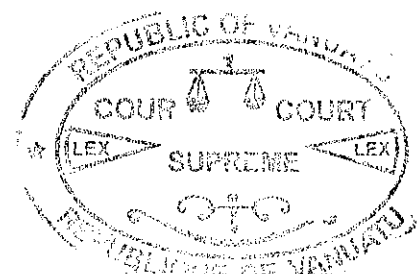


knowledge and when she became pregnant, they made up the story against the accused to remove Smaila from them.

14. She was cross examined.

Submissions

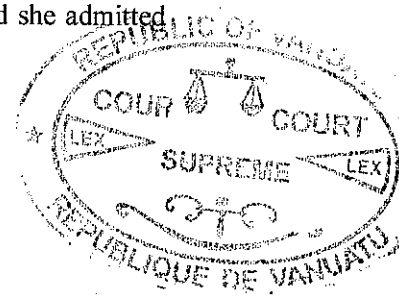
15. The Prosecutor made a number of submissions. In summary, she submitted that the complainant is a credible witness and her evidence is corroborated by her husband Mandela Jones who saw the accused naked and lying on the bed with the complainant. The Medical Report also corroborated the complainant's evidence as it was reported that the complainant had a high vaginal swab and there were bacteria detected and the midwife's opinion was the complainant was sexually abused and was physically affected.
16. Secondly, that Mandela Jones evidence is one of recent complaint as he was the first person the complainant admitted the offending to. His evidence was consistent with the complainant's evidence. He told the complainant to report the matter as it was wrong for a father to have sex with his own daughter. It was therefore submitted that the medical report is consistent with the complainant's and her husband's evidence.
17. It was also submitted that prosecution witnesses maintained their evidence in chief when cross examined. The complainant maintained that parts of her police statement were true and maintained that her mother told her to have sex with her father. That she did not consent to the sex as she told her mother with the accused present who heard her refusal to have sex with him yet proceeded to have sex with her.
18. It was submitted that if I should find the accused not guilty of sexual intercourse then I should find him guilty of the lesser charge act of indecency without consent pursuant to s98 of the Penal Code.
19. In defence Mr Garae submitted that there were a number of inconsistencies with the complainant's evidence in Court and her statement given to the police regarding when exactly the sex occurred and her description of how sexual intercourse occurred.
20. In respect of Mandela Jones, it was submitted that it was impossible to stand outside at night and shine a torch through a bamboo wall to see clearly what's inside. It was submitted that this evidence was contradicted by Merelin Alfred who during cross examination said that their house was rebuilt in 2016 with strong bamboo walls which were not broken.
21. It was submitted that Mandela Jones did not see the accused having sex with the complainant. He left as soon as he saw the accused lying on the bed. He breached the protection order and spoke to the complainant. It was submitted that if the complainant had lied to him, he would not know as he did not see any sex taking place.



22. Regarding the medical report, it was submitted that the midwife was not an expert to give a medical opinion that the complainant was sexually abused by her father.
23. As to whether the prosecution proved the elements of the offences charged it was submitted that the prosecution evidence is full of inconsistencies that the Court should not accept the complainant's evidence.
24. It was submitted that in this case the scale is equally balanced. The Court could not prefer one story to the other and in such case the Court must find that the prosecution had failed to prove its case beyond reasonable doubt and must acquit the accused.

Discussion

25. To prove the allegations against the accused the prosecution relies on the evidence of the complainant and her husband, Mandela Jones.
26. When cross examined the complainant admitted that she obtained a protection order against her husband in November 2021 because he assaulted her. She feared him then obtained the order and left to stay with her parents at Kerepeta. Whilst there, Mandela came to see her despite the existence of the protection order stopping him from seeing her. She agreed that Mandela breached the protection order and came to see her.
27. She also agreed that Mandela told her he was angry because her parents stopped him from seeing her.
28. When the complainant was re-examined, she said it was her husband who reported the matter to the Police.
29. Mr Mandela under cross examination agreed that in November 2021 the complainant left him and stayed with her parents at Kerepeta because he assaulted her and she took out a protection order against him. The order prevented him from seeing the complainant but he agreed he continued to see her at night. When asked about his name he said his name was Mandela Nelson, Jones was his father's name. When he came to report the matter to the Police he used his father's name.
30. Mandela Jones did not see any sexual activity taking place. All he saw was someone lying on the bed next to his wife (the complainant) looking like the accused by the look of his back and back of the head. He was standing outside the bamboo wall at night and says the light inside was a solar light but very low and as the bamboo wall was broken and old, he could see by shining his torch into the house.
31. Mandela agreed under cross examination that as soon as he saw the accused lying on the bed, he felt bad that the accused must have had sex with the complainant so he left. In the morning he approached the complainant and asked her if they had sex and she admitted everything.



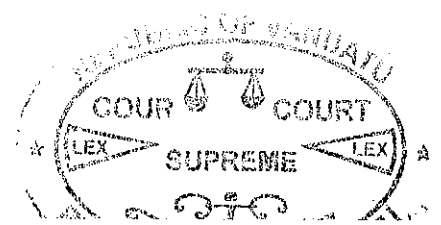
32. The house where the sex is alleged to have taken place belongs to the accused and his wife Merelin Alfred. There is no dispute that the house is an open room.
33. The complainant says she was sleeping on the married bed when the accused had sex with her. The bed had a mattress which she says she found her clothes under.
34. Mandela said the walling was old bamboo walling and broken and he could see inside using his torch.
35. Both their evidence are contradicted by Merelin Alfred the accused wife who says the house was rebuild in 2016 with new strong bamboo walling and would be difficult to see what's inside under a torch light at night.
36. Also, during cross examination Merelin Alfred said they had no married bed in the house and no mattress. They were all sleeping on the floor if sex occurred others could hear what is happening. There were four other grandchildren sleeping with them the night sex allegedly occurred.
37. There was no further evidence to rebut Merelin Alfred's evidence other than what the complainant and Mandela said. Merelin Alfred maintained her evidence under cross examination that there was no sex with the accused as the complainant was their daughter and she could not force her to have sex with her father. I believed she was telling the truth.

Inconsistencies

38. A number of inconsistencies arise concerning the evidence of the complainant in Court and what is in her police statement made on 2 December 2021 when her mind was still fresh. In her statement to the Police, she said that sexual intercourse occurred on 21, 22 and 23 November 2021. When giving her evidence in Court she said the accused touched her vagina when he massaged her belly on Sunday and on Tuesday sex occurred. When questioned whether sex occurred on any other time, she said no.
39. Second the complainant in her police statement told the police that on 22 November 2021 when she woke up all her cloths were removed and the accused was having sex with her. This is contrary to her evidence in Court that sex only happened on Tuesday and no other day.
40. Under cross examination she agreed that if someone removed her clothes or opened her legs or pushed his penis inside her vagina she would know and wake up. She maintained that what she told the Court was the truth and what she told the police in her statement when the incident would have been fresh in her mind only some parts are true.

Medical report

41. The complainant was seen by a midwife at the Torba Mini Hospital on 2 December 2021, the date she made her statement to the police. Mr Garae submitted that I should reject that report. The medical report was tendered as exhibit "PP1". I accept the defence submissions.

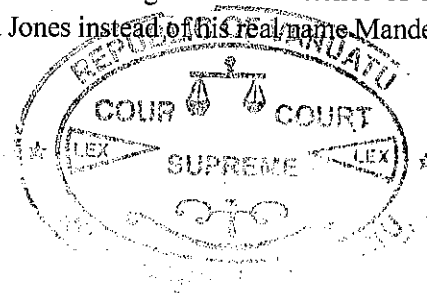


First the midwife was not an expert to give a medical opinion that the complainant was sexually abused by her father, second, she was not called as a witness.

42. Thirdly the complainant in cross examination agreed that after she left the house after the alleged incident, she had sex with her husband before going to the police which puts the finding of the medical report into question.

Conclusion

43. The incident is alleged to have occurred at Kerepeta Village Vanualava. The accused and his wife Merelin Alfred are simple villagers. He is 66 years old and his wife is 44. Their daughter Smaila Alfred is the complainant who alleges that her mother forced her to have sex with her father. This is a very serious allegation as sexual intercourse without consent is punishable by a maximum sentence of life imprisonment. Incest carries a maximum penalty of 15 years imprisonment.
44. At the relevant time the complainant who was married had obtained a protection order against her husband Mandela Jones and sought refuge with her children at her parent's house at Kerepeta. Under the Family Protection Act the penalty for any breach of a family protection order is a term of imprisonment not exceeding 2 years or a fine not exceeding VT50, 000 or both.
45. It is not disputed that despite the existence of the protection order Mandela and the complainant continued to see each other whenever Mandela Jones goes to Kerepeta. This is admitted by both witnesses in their evidence.
46. This puts into question their credibility as witnesses. The complainant in my view was not a reliable witness for reasons discussed above and the fact that she feared her husband which is the reason she obtained protection orders in the first place. Mandela did not see any sexual intercourse taking place. I find that out of fear the complainant admitted sexual intercourse with her father when it was put to her by Mandela. He only saw the accused sleeping on the bed but did not see them having sex. The complainant's evidence is after sex the accused returned to sleep on the floor. As for the first incident on Sunday the complainant said the accused touched her vagina. There was no evidence of penetration.
47. Secondly, I am inclined to conclude that Mandela wanted his wife back because the protection order prevented him from seeing her. He had a motive for alleging that the accused had sexual intercourse with the complainant.
48. He confirmed continuing to see the complainant in breach of the protection order, and was angry that the accused and the complainant's mother stopped the complainant from seeing him. Finally, Mandela reported the matter to the Police but given the existence of the protection order he used his father's name Mandela Jones instead of his real name Mandela Nelson to file the complaint.



49. For the foregoing reasons, in relation to all five (5) charges the element of sexual intercourse has not been proved to the required standard. In my view sexual intercourse may have occurred but the prosecution has not proved that element beyond reasonable doubt with the evidence put before the Court.

Verdict

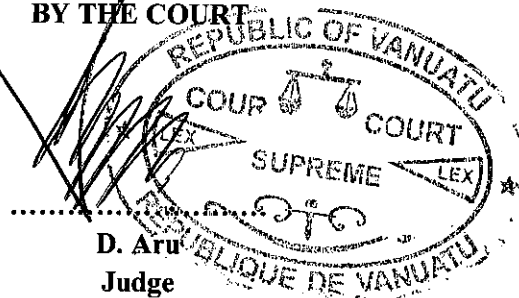
50. The verdict I return are as follows: -

- 1) On count 1 I find the defendant not guilty;
- 2) On count 2 I find the defendant not guilty;
- 3) On count 3 I find the defendant not guilty;
- 4) On count 4 I find the defendant not guilty;
- 5) On count 5 I find the defendant not guilty.

51. The accused is therefore acquitted on all the charges.

DATED at Sola Vanualava this 28th day of April, 2023

BY THE COURT



**D. Aru
Judge**