

BETWEEN: PUBLIC PROSECUTOR

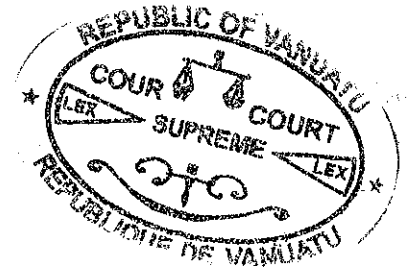
AND: KENCY TUI JOHNNY
Accused

Coram: Justice JP Geoghegan

In attendance: Counsel – M. Tasso for the Public Prosecutor
Counsel – G. Takau for the Defendant

Date of Trial: December 18th and 19th, 2017 and February 5th and 6th, 2018

Date of Judgment: February 9th, 2018



JUDGMENT

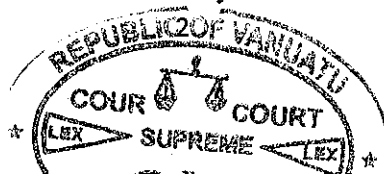
1. Mr. Kency is charged with four counts of Sexual Intercourse Without Consent contrary to Sections 89A(a), 90(a) and 91 of the Penal Code [CAP. 135] and one count Act of Indecency With a Young Person contrary to Section 98A of the Penal Code [CAP.135].
2. It is alleged that Mr. Kency engaged in sexual intercourse with the complainant, aged eleven, on the specific dates of August 9th, 2016 and August 11th, 2016 and that the other two incidents of sexual intercourse without consent took place sometime between December 30th, 2015 and January 1st, 2016. It is alleged that the act of indecency, which consisted of Mr. Kency forcing the complainant to hold his penis, also occurred sometime between December 30th, 2015 and January 1st, 2016.
3. Referring to the counts of sexual intercourse without consent, the particulars of count 1 refer to Mr. Kency removing the complainant's underwear and making her sit on top of his penis while he was sitting on a chair. The particulars of count 2 refer to Mr. Kency asking the complainant to lay down and then pushing his penis into her vagina. The particulars of counts 3 and 4 simply refer to Mr. Kency pushing his penis into the complainant's vagina.
4. Count 5 is a count of an act of indecency with a young person and alleges that Mr. Kency forced the complainant to hold his penis.
5. The Court heard prosecution evidence from the complainant, the complainant's mother and father, and two aunties of the complainant. In addition, the evidence of two police officers, Police Constable Brian George and Jimmy Sarout were tendered by consent while the statement of a third witness Mr. George Vali was tendered pursuant to

Section 162(3) of the Criminal Procedure Code [CAP. 136] as Mr. Vali had died prior to the trial. That was also tendered by consent.

6. At the outset of the trial the statement of presumption of innocence was read to Mr. Kency in English and translated in Bislama. At the end of the prosecution case a prima facie case was found and accordingly Mr. Kency was called upon for his defence and his statement of rights pursuant to Section 88 of the Criminal Procedure Code were read to him first in English and then translated in Bislama. The Court then heard evidence from the only defence witness, Mr. Kency himself.

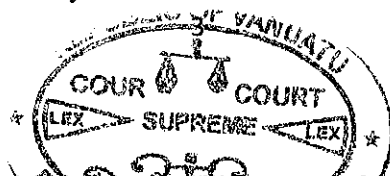
THE EVIDENCE

7. There is no dispute that the accused and the complainant live in the same part of Teouma. Their homes are not far from each other. They are related and the complainant who was aged 11 when these offences are alleged to have occurred refers to Mr. Kency as her grandfather.
8. The evidence of the complainant was that Mr. Kency had sex with her "*many time*". She stated that the first time that this occurred was when he asked her to cut his fingernails. She agreed to do so and when she finished he asked her if she could cut his toenails. She agreed to do so but stated that she was then very surprised when he pulled his trousers down and told her to "*touch him*". She stated that she did not wish to do this but that he took hold of her hand and "*put it on him*". He then drew her closer to him and held her tight asking her to touch his "*private part*" which the complainant clarified as meaning his testicles.
9. The complainant had called to Mr. Kency's home as she wanted to buy sweets. She stated that after this incident had occurred between she and Mr. Kency he got her the sweets but she did not "*feel very happy*". She did not tell anyone about the incident because he told her not to tell anyone. Her evidence was that Mr. Kency told her that she wasn't to tell anyone otherwise she would be punished and he would be cross with her and he would not give her any more sweets or money. She referred to that incident occurring in 2016 and that she was 11 years old at that time, her birthdate being July 6th, 2005. She stated that at that time she was attending Kawenu School.
10. The complainant gave evidence about a further incident between she and Mr. Kency which occurred after her father picked her up from school and then dropped her off at home. She explained in her evidence that she would finish school at approximately noon at which point her father, who was a bus driver, would pick her up and take her home. She stated that when she got home there was usually no one at home other than her grandfather and her grandmother, as her father would return to work and her mother worked in a shop. Her parents returned to their home sometimes at night and sometimes during the day depending on their work commitments. After her father had dropped her off she wanted to buy some sweets and accordingly she went to the "*shop*" which she stated was located at the front of Mr. Kency's house. It is clear from the evidence that



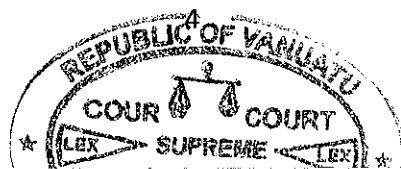
there is no "shop" as such but that Mr. Kency's daughter-in-law had a number of boxes located at the front of the house which contained sweets and other items. The complainant occasionally bought sweets from Mr. Kency which were contained in those boxes.

11. When she went to Mr. Kency's home Mr. Kency was present and asked her to come and sit on his lap. She stated that when she did so he pulled down his pants and pushed his "testicles" inside her. The complainant explained in her evidence that she did not know the difference between a penis and vagina and described Mr. Kency as pushing his testicles into the area where "I wee". The complainant was asked to draw testicles on a piece of paper. When she did so she drew a penis and testicles. She was asked to circle the part of these "testicles" which Mr. Kency pushed inside her and she circled the penis. The drawing was tendered as prosecution's exhibit "1". The complainant stated that when Mr. Kency pushed his penis inside her he started "moving around". She stated that it did not go on for very long and that he said nothing to her and she said nothing to him. She referred to this event occurring the day after the first incident had happened. The complainant stated that Mr. Kency repeated the warnings he had given earlier about not saying anything about what had happened and told her that if she said anything she would be whipped and he would no longer give her "sweets or anything".
12. The complainant referred to a third occasion when intercourse occurred between she and Mr. Kency. At that time she had returned from school and again wanted to buy sweets. Mr. Kency told her to clean his house, which it appeared she did from time to time. She stated that she brushed the floor and brushed outside when Mr. Kency then closed the only door to the house. She stated that Mr. Kency came and sat down on his chair and he then pulled her down and lay on top of her. She gave evidence that he removed her pants and pushed his "genitals" inside her and started "moving" her. She stated that he put his hands either side of her and lay on top of her. Again, this was not for very long and again he said nothing to her nor she to him. The complainant was asked to draw the layout of the house on a piece of paper which she did and which was tendered as prosecution exhibit "2". Again, the complainant did not say anything about the incident to any other person for the same reasons she had not spoken of the earlier incidents. She referred to this occurring "the day after the second time". She referred to the fact that she did not "feel good at all after this".
13. The complainant referred to the final incident between she and Mr. Kency which occurred when her mother and father were due to go to the funeral of an uncle of the complainant who had been a police officer. Her parents had requested her to get some rice from grandfather Kency's shop. When she went to get the rice Mr. Kency told her that she was to come and clean his house. She took the rice back to her parents and then went back to Mr. Kency's home to clean it. She stated that she was wearing a skirt and he was wearing sports trousers. She was also wearing underwear. When she came to the house Mr. Kency closed the door and laid her down and pushed his "genitals" inside her. She stated that Mr. Kency did not "go in" entirely because he could see blood on her which was coming from her "private part". The complainant stated that the blood had come out before Mr. Kency "went inside me". She also stated however that she did



not see the blood until she went to wash and accordingly there is some contradiction in her evidence particularly regarding the reasons why Mr. Kency allegedly ceased to carry on with the intercourse which occurred.

14. In her evidence the complainant stated that before the alleged sexual offending by Mr. Kency, she would help him to clean his house because he was an old man and she felt sorry for him. She said that she wanted to help him. This was the reason why she called to his home to help him clean it and why she agreed to do so upon request by him.
15. The last occasion on which the accused allegedly had intercourse with the complainant was the trigger for the offending coming to light. The complainant said that because of the blood that was coming from her vagina she told her mother about it. She said that her mother asked her whether she had got her period and she replied that she had. Her mother then talked about it with an aunty and they started asking questions. She stated that she "*told them everything*". She stated that two aunts were told about what had happened, those aunts being EP and KY.
16. The complainant said that after telling her mother "*those*" (presumably one or other of the aunts and the complainant's mother) called her father and he hit her with a piece of wood. "*They*" then called Mr. Kency to come and see them. The complainant was present when Mr. Kency came and she said that "*they*" asked Mr. Kency if it was true or not. Her evidence was that he said it was not true at which point he then went back to his home. The complainant then said that there was a meeting and that the meeting was held at Mr. Kency's home and that family on Mr. Kency's side came as well as her family which included her father, mother, uncles and aunts and grandparents. She said that she did not go to that meeting. She said that she was then called to attend a meeting and was asked questions by the Chief. She said that she told the meeting everything that she had just said in evidence. She stated that a fine was imposed on both she and Mr. Kency and that her family did not pay and accordingly the matter went to the police.
17. Under cross-examination the complainant was asked to confirm that the first time Mr. Kency allegedly sexually abused her was on August 11th, 2016. She confirmed that it was. That answer was clearly incorrect as she had given clear evidence of previous occasions on which the offending had taken place. She confirmed that in 2015 Mr. Kency had not done anything to her and that "*he just went out with me*". When asked to clarify what that meant she said that Mr. Kency would walk with her and whenever he needed something such as lighting a fire or cooking she would do that for him. Mr. Takau put to the complainant her previous statement that she had made to the police dated September 28th, 2016 in which she had referred to the incident which occurred after she had cut Mr. Kency's fingernails and toenails as occurring in 2015. When she was asked to confirm whether the first event had occurred in 2015 or 2016, the complainant confirmed that what she had told the Court was correct and that there had been a mistake in the statement. She acknowledged being not so clear on events that happened in 2015 and stated that she was clear about what had happened in 2016. The complainant acknowledged that she had gone back to Mr. Kency's home the day following the first alleged incident of sexual offending and said that she has done so

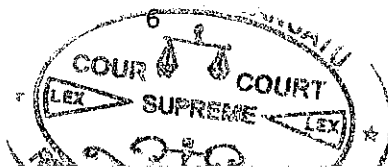


because he told her to go and see him. When asked whether he had cried out at the time of the first alleged offending she said she had, but Mr. Kency had stopped her.

18. The complainant also acknowledged referring to the second incident in her statement to the police as occurring in 2015 and provided the explanation that at the time she spoke with the police she was scared and shy of them. She confirmed that all of the alleged offending occurred in 2016 and not 2015.
19. The complainant struck me as a very mature 11 year old girl. She gave her evidence in a confident and clear manner and quickly acknowledged inconsistencies in her evidence when they were put to her. My assessment of her was that she was a very strong and clear witness.
20. The complainant's mother gave evidence that on August 11th, 2016 she learned that her daughter was bleeding from her vagina and she provided her with instructions on what to do as she thought that the complainant was experiencing her first period. She told the complainant's father but he suggested that given the age of the complainant that would not be possible and that there must be some other explanation.
21. Both parents confirmed that at that time they had attended a funeral. After returning from the funeral the mother was advised by her son that he overheard the complainant speaking with her younger sister and that there was something which the complainant wanted to tell her parents. At that point the complainant's father began to speak to her quite strongly in an endeavour to understand what might have occurred. The complainant's mother intervened and suggested that she talk to the complainant about the matter. The complainant's mother gave evidence that the "next day" she talked about the matter with the complainant, that discussion including the complainant's grandmother. It appears that an aunty may also have been present. The complainant's mother stated she and the aunty kept asking the complainant what had happened and insisted that she tell the truth. She stated that she knew when the complainant wasn't being truthful and it was apparent that that was the situation. She said that the aunt present during the conversation was KY. She acknowledged being quite forceful with the complainant as a result of which an aunty ("EP") took the complainant to her home which was when the complainant made the disclosure of the sexual offending by Mr. Kency. The aunty then told the complainant's mother of the sexual offending as a result of which the complainant's father went to see Mr. Kency to ascertain whether or not it was true. She stated that her husband (the complainant's father) and KY's husband went to find Mr. Kency. The complainant's mother also went to find Mr. Kency's son Amos and asked him to have Mr. Kency go to their home.
22. Mr. Kency came to their home and was asked whether the allegations were true. The evidence of the complainant's mother was that Mr. Kency acknowledged that it was true as a result of which the complainant's father told him that he had been tainted by Mr. Kency and that he had broken his heart. Subsequently the matter was referred to the Chiefs and the meeting referred to earlier took place with Mr. Kency denying any wrong doing.

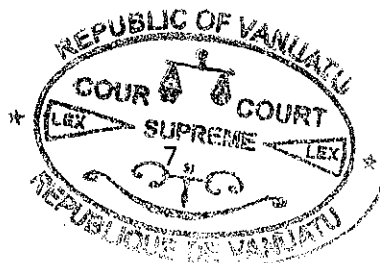


23. The complainant's father confirmed that he became aware of the problem with the complainant and possible abuse on August 11th. He confirmed that that day he had been at a family funeral and had returned to their home and had gone inside to lie down after which the complainant's mother had approached him and told him that there was a problem. He stated that he said nothing but told his wife to find out what happened. He also said that he did not consider the complainant to have reached the age for getting her period and that there may be some other explanation for the discharge of blood. He said that a number of family members had spoken with the complainant and had endeavoured to find out what had occurred. The complainant had told KY what had occurred between she and Mr. Kency. His wife then came and spoke to him about the matter and he sent his father to go and ask Mr. Kency whether it was true. He said that it was his father that went and called out to Mr. Kency's son Amos and that Amos and Mr. Kency then both came to the complainant's home. He stated he asked Mr. Kency "if it was true" and Mr. Kency confirmed that it was. The complainant's father said that he had put it to Mr. Kency that the complainant had seen blood and was it true that that was because of his [Mr. Kency's] actions. Mr. Kency confirmed that it was. He said that Mr. Kency told him that he "had taken her" to which the complainant's father told Mr. Kency that he had ruined him and hurt him badly.
24. Because of the family connections and the age of Mr. Kency the matter was referred to the Chiefs and the meeting previously referred to had taken place. The complainant's father said that as a result of the Chiefs' meeting the Chiefs imposed a fine on Mr. Kency but that the complainant's family was also fined, the complainant being fined VT1,000, her mother VT2,000 and her father VT2,000. Mr. Kency was fined a pig and a mat. He confirmed that as no one paid the fines the Chiefs referred the matter to the police.
25. The complainant's father confirmed that during the course of trying to get the complainant to reveal what had happened he had struck her with the long leaf of a pawpaw tree, something which he now regrets.
26. The complainant's father was cross-examined about exactly what he had put to Mr. Kency when Mr. Kency had been asked to come to their home on August 11th. He said that he had asked Mr. Kency whether or not it was true that he had caused problems with the complainant. He confirmed that he told Mr. Kency that the young girl had "found blood" and asked Mr. Kency whether it was him that did that to her. Mr. Kency said "I went with her once".
27. The complainant's two aunts EP and KY both gave evidence regarding what had occurred on August 11th. EP said that she had already gone to sleep that night when they heard the complainant's parents beating her. They live right next door to the complainant's home. EP got up and went over to see them as did her husband. She said that the complainant was being asked questions but wasn't revealing anything to her parents and they asked EP to take her aside and ask her what had happened. EP became aware that there was an allegation that Mr. Kency had sexually abused the complainant



so took the complainant over to her home and asked her whether the allegation was true. She said that the complainant said to her “*yes it is true – he has seen my body*”. EP was reluctant to detail exactly what the complainant had told her, and explained to the Court that it was difficult to talk about, as Mr. Kency was her “*father*” and she respected him.

28. EP was advised by the Court that as uncomfortable as the situation was for her the Court needed to hear the evidence in as much detail as possible. EP then stated that what the complainant told her is that Mr. Kency had undressed her and made her lie down on the mat and had also used his finger which he pushed inside her “*private part*”. EP stated that she then hit the complainant with a belt because she felt that it was not right that the complainant had gone to Mr. Kency’s home. She stated “*it’s not as if he came to hers*”, but acknowledged that she did not ask the complainant why she had gone to Mr. Kency’s home.
29. EP stated that the following day she took the complainant to the Neil Thomas Ministry Clinic which is a small clinic in Agathis in order to be “*checked out*”, but when they got to the clinic the nurse’s advised her that the clinic could not handle this type of case and they would have to go to Vila Central Hospital. That was on a Saturday. She stated that the meeting convened by the Chiefs had occurred the following Monday. She confirmed the content of the meeting as per previous witnesses’ evidences. She confirmed also that when she returned the complainant to her home she had told the complainant’s parents what the complainant had revealed.
30. KY is another of the complainant’s aunties who was involved in the matter on August 11th. She said she was at her home when the complainant’s mother came and told her that the complainant had blood coming from her “*private part*”. The two homes are adjacent to each other. In her evidence in chief KY also said that she was sitting with the complainant and her mother when the complainant’s mother told her that the complainant was losing blood. She said that both she and the complainant’s mother began asking questions however the complainant remained quiet. She said that they continued asking the complainant questions and that the complainant eventually said that Mr. Kency had used unpleasant or dirty language towards her. She said that her mother then asked her what she meant at which point the complainant said “*the old man took me*”. KY took that to mean that the complainant had been sexually abused by Mr. Kency. KY said that the complainant’s mother woke the complainant’s father up and EP then came and took the complainant aside and then to her home to ask her questions. She confirmed that people then went to Mr. Kency’s home to bring him down to the complainant’s home. She confirmed that Mr. Kency was asked whether what the complainant had revealed was true and that he confirmed that he was. She confirmed the exchange between the complainant’s father and Mr. Kency that other witnesses had referred to. She confirmed also the meeting that the Chiefs convened and said it occurred on August 15th.



31. The statement of Chief George Vali contained nothing of significance other than confirming that the chiefs arranged the meeting after the complainant's disclosure on August 11th and that he chaired the meeting.

32. Mr. Kency provided a written statement to the police as a result of an interview conducted by Police Officer George and witnessed by Police Officer Alick. Mr. Kency's statement was also tendered in evidence. The statements of the police officers and of Mr. Kency were translated into English and Mr. Kency's counsel Mr. Takau confirmed that they were an accurate translation of the original Bislama statements. In his statement to the police Mr. Kency denied engaging in intercourse with the complainant but I set out the following series of questions and answers which have some significance:

*"22. Can you tell the police that sometimes in 2015 during a midday [complainant] came to your house, who else was there during that time?
[complainant] and other children*

*23. Did you ask [complainant] to cut to finger and toe nails?
Yes I asked her to cut my finger and toe nails because I have eye sight problem*

*24. On that time you seated on a chair and you removed your pant and asked [complainant] to touch you penis, what can you say about that?
At that time I was inside my room and I removed my pant and at the same time [complainant] came in, I did not asked her to touched my private part.*

*25. On that time [complainant] said you hold her hands and make her touched you penis, what can you say about that?
I did not made her touched my penis and I did not asked her to touched my penis.*

*26. Can you recalled another time when [complainant] came to your house and you asked to seat on you penis?
I never asked her to seat on my penis.*

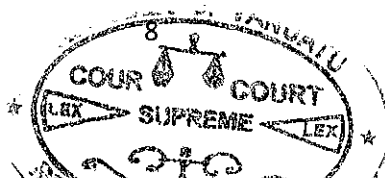
*27. It is true that you removed [complainant's] pant and you make her seated on your penis?
No I did not remove her cloths, I only held her with her cloths on.*

*28. Can you explain why you held her and you wanted to see her vagina?
I held her we went down, I wanted to remove her underwear to see her vagina but she resisted and pushed my hands away*

*29. Can you tell what cloths she wore at that time?
Short pant and a t-shirt.*

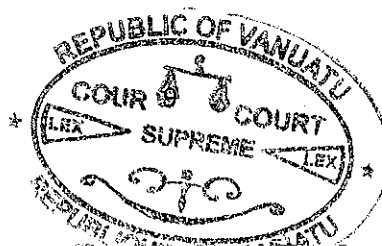
*30. In those time [complainant] said you made her seated on your penis and penetrated her, what can you tell about that?
My penis is not strong anymore.*

31. Is it true that sometimes [complainant] came to you house to clear it?



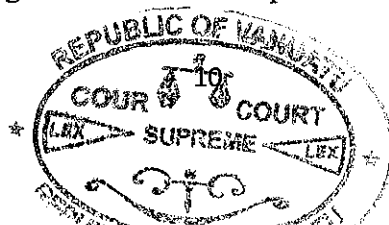
Yes sometimes she came and clean it. Sometimes her father send her to come and clean and sometimes I would asked her to come and clean then I will give her money or lollies.

32. *Is it true that when [complainant] came to clean you house, did you made her laydown and on the bed and have sex with her?*
No.
33. *Is it true that at that time you asked her to have sex with you but she refused?*
Not it is not true. I only kissed her."
34. Further in Mr. Kency's statement he stated that he held the complainant and kissed and that she kissed him back.
35. Mr. Takau opened Mr. Kency's defence on the basis that the defendant's evidence would be that on August 11th, 2016 the complainant came to Mr. Kency's home and approached him for VT500. When he gave that money to her the complainant was happy and hugged him and both of them fell on the floor. Mr. Kency then tried to stand up and somehow touched the "*private part*" of the complainant in attempting to do so. Accordingly it was clear that Mr. Kency denied any intercourse with the complainant but acknowledged one occasion where he had accidentally touched the complainant's "*private part*".
36. When Mr. Kency gave evidence regarding this matter he stated that on August 11th, the complainant had come to his house, had cleaned his room and had asked him for VT500 which he provided to her. He said the complainant was so pleased she hugged him but there was nothing to hold him up and they fell over. He stated that after that "*I tried to hold on to something of hers and she pushed my hand away*". He stated they then both got up and she walked away. He stated that he wanted to hold on to her pants and then she pushed his hand away. None of this evidence was put to the complainant. He gave evidence that the complainant's parents did not come to see him that night and that no Chief came and saw him. He confirmed that he had not engaged in sexual intercourse with the complainant.
37. Under cross-examination Mr. Kency initially denied having been asked by the complainant's father to go to his home on the evening of August 11th. He was not cross-examined on whether or not he accepted that there had been a meeting organised by the Chiefs. After cross-examination, there having being no re-examination of Mr. Kency, I asked him whether he had been able to hear what witnesses in the case had said.
38. Mr. Kency advised that he had heard some of it but not all of it as he had poor hearing. This is a matter which had already been canvassed earlier in the hearing shortly after the complainant had commenced giving her evidence. At that time I had stopped the complainant giving evidence to check whether Mr. Kency could hear what she was saying. At that time he confirmed that he could and advised me that he would notify



counsel if he could not hear. There was no such notification during the course of the trial.

39. In any event, I revisited the issue of the meeting on August 11th and told Mr. Kency that the complainant's mother, father and aunties had all spoken of that meeting and had all said that he attended that meeting. Mr. Kency replied that there was no such meeting. I told Mr. Kency that there had also been evidence about a meeting held by the Chiefs where he was fined a pig. He said he remembered that meeting but did not know why he was fined a pig.
40. I told Mr. Kency the complainant's parents and aunties had said that at the meeting outside their home he had admitted having sex with the complainant. I asked him whether he remembered that. By way of reply Mr. Kency said that it was very late that night when he was woken up. He stated that the only thing that was said to him was that he had ruined the reputation of the family and that no one had asked him questions other than that.
41. Accordingly, Mr. Kency appeared to recollect the meeting outside the complainant's house on the evening of August 11th and acknowledged having gone there. He stated that he sat down on a chair with the complainant's grandmother and the complainant on his left and the complainant's grandfather and uncle on his right. Mr. Kency stated that *"he said I had spoiled his name and the reputation of his family"* and that the complainant's mother got very angry with him. I asked Mr. Kency whether he could remember being told by the complainant's father that blood had been found on the complainant and being asked whether he [Mr. Kency] had caused that problem. Mr. Kency stated that that is not what was said to him and the only thing said to him was that he had spoiled the family reputation. He denied having said that to the complainant's father that he had *"been with"* the complainant on one occasion. He recalled that his son Amos was sitting with him at the meeting.
42. Mr. Kency's evidence was in stark contrast to the evidence of other witnesses who spoke about the meeting on August 11th.
43. Mr. Kency acknowledged that the complainant came to his home from time to time to clean it. He denied that he would give the complainant money or sweets at those times but then acknowledged that he had asked her to cut his toenails and fingernails and said that he would give her VT100 for doing so. In every other respect Mr. Kency steadfastly denied engaging in sexual intercourse with the complainant or acting improperly with her.
44. It is necessary to refer to evidence which was given during the hearing which indicated that there may have been other sexual abuse of the complainant. During the course of her evidence the complainant's mother was asked whether or not she had heard the complainant state at the meeting organised by the Chiefs that someone by the name of *"Mike"* had been sleeping with her. The complainant's mother confirmed that she had heard her say that.

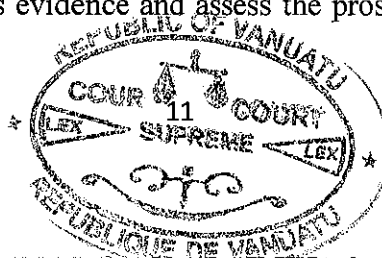


45. No further reference was made to that matter during her cross-examination and I sought clarification on that matter from the complainant's mother after she had been re-examined. She referred to someone by the name of "Mael" and when asked how Mael's name came up at the meeting she said she did not know anything about the background to the matter. She said that she thought that the complainant may have told another aunty about Mael but that that aunty had not spoken to the mother about it. She did not know Mael although she knew that he was her husband's brother-in-law and she had not spoken with the complainant about Mael.
46. The complainant's father was also asked about Mael. He confirmed that during the course of the meeting he had heard the name Mael mentioned as having been "with" the complainant. He did not consider there to be any truth in that however, so he had not asked the complainant anything further about it. He confirmed that Mael was a cousin of his, he lived in the same house as the complainant and her parents. TH said that he did not talk to Mael about the matter at that time as Mael was in Malekula. By the time he returned to Malekula TH and his wife and the complainant were moving to Fiji where they now live. While the reference to Mael is concerning I consider it to be a peripheral matter only which can be disregarded in terms of determining the charges against Mr. Kency.

DISCUSSION

47. The charges faced by the accused require proof beyond reasonable doubt. This simply means that the Court must be sure of guilt. It does not require proof to an absolute certainty and simply requires the Court to be satisfied that reasonable doubt does not exist.
48. The burden of proving each and every element of the charges to the appropriate standard rests with the prosecution and does not shift. The accused is presumed innocent unless and until found guilty and is not required to prove anything.
49. As per the Court of Appeal decision in Apia v. PP¹ there are three possibilities where the defendant gets evidence:
- (a) The Court makes separate offender's account and denials in which case he must be acquitted;
 - (b) The Court may be unsure as to whether or not the defendant's account is true or ought to be accepted. If so, he must be acquitted because by definition the Court must have a reasonable doubt as to his guilt;
 - (c) The Court may reject the defendant's explanation. Even then, the Court must put aside the defendant's evidence and assess the prosecution's evidence. The Court

¹ [2015] VUCA 30

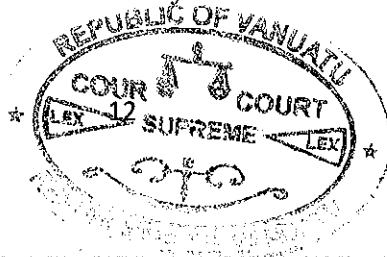


must then decide whether it is sure of the defendant's guilt having regard to the essential elements of the charge and the standard of burden of proof.

50. Where a case rests exclusively on the uncorroborated evidence of the complainant, as is the case here, I must be conscious of the danger of convicting the accused based on that uncorroborated evidence. It may nevertheless be proper to do so as long as that danger is borne in mind².
51. There is no dispute as to the essential elements involved in the offence of sexual intercourse without consent. It is for the prosecution to prove that intercourse occurred between the complainant and the accused, that the complainant did not consent to that intercourse and that the accused did not reasonably believe that the complainant consented. Consent means true consent, that is, that the complainant freely and voluntarily decided that she would have sexual intercourse with the accused.
52. In this case there can be no issue regarding the accused reasonably believing that the complainant consented, as the accused denies having engaged in any sexual intercourse or indecency with the complainant. Equally, it is absolutely clear from the evidence of the complainant that she did not consent to what took place and, in addition, given that the complainant was 11 years old it is difficult to see how she could give a true consent in any event.
53. With reference to the count of indecency the prosecution must prove that the accused committed an indecent act, in the presence of the complainant and that in this particular case the complainant was under the age of 15 years.
54. In this case there is no dispute that the complainant is under 15 years of age and I am satisfied that there has been proof beyond reasonable doubt of that. I am also satisfied that the act of forcing the complainant to hold the accused's penis is, if proved, an act of indecency.
55. In his submissions Mr. Takau submitted that I should dismiss counts 1, 2 and 5 of the information as those counts contain particulars alleging sexual intercourse without consent having occurred sometime between January 1st, 2016 and December 30th, 2015. While it is correct that the evidence given by the complainant clearly establishes that the incidents of sexual intercourse and indecency happened in a relatively short period of time in 2016, and, in my assessment in August 2016, the reference to the dates in the particulars of the counts do not have the effect of invalidating those counts. Section 139(3) of the Criminal Procedure Code provides that:

“(3) Variance between the charge and the evidence adduced in support of it with respect to the day upon which the alleged offence was committed is not material and the charge need not be amended for such variance. If it is proved that the

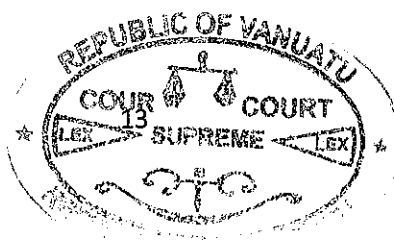
² Walker v. PP [2007] VUCA 12



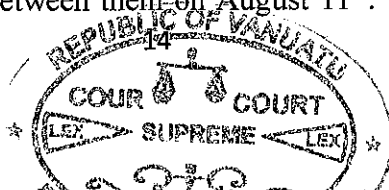
proceedings were in fact instituted within time (if any) limited by law for the institution thereof.

(4) *Where an alteration of the charge is made under sub-section (1) or there is a variance between the charge and the evidence is described in sub-section (3), the court shall, if it is of the opinion that the accused person has been thereby misled, adjourn the trial for such period as may be reasonably necessary."*

56. Accordingly Section 139 would entitle the Court to consider the dismissal of those counts in the event that the evidence established that the charges were laid outside of an applicable limitation period or that the accused had been misled by the incorrect dates. Those considerations do not apply in this case and no prejudice or misleading of the accused was suggested by Mr. Takau. Accordingly, I consider all of the counts in the information.
57. I do not accept the evidence of the accused. I do not consider the accused to be a credible witness. His evidence was inconsistent when he was cross-examined regarding whether or not he attended the meeting outside the complainant's house on August 11th. While he eventually accepted that he had attended that meeting he then denied having acknowledged any wrongdoing towards the complainant. That denial stands in the face of what I consider to be the very clear evidence of a number of witnesses who stated that he acknowledged that the allegations of sexually abusing the complainant were true.
58. While there may be some debate as to precisely what was being put to the accused in terms of his actions against the complainant what was very clear is that he was being accused of sexually abusing her at the very least. Having heard the evidence however I accept that he would have been aware that what was being put to him was that he had had sex with the complainant and he acknowledged having done so. It is significant that the accused while being able to recall the fact that the complainant's father became upset with him and told him that he had spoiled the family reputation and the father's good name, denies that part of the evidence which incriminated him. I accept the evidence given by the complainant's parents and aunts about the admission made by the accused and regard the accused's denial of having acknowledged responsibility as simply being untruthful.
59. In his statement to the police the accused acknowledged that he had asked the complainant to cut his finger and toe nails. He also acknowledged that at that time he removed his pants at the same time that the complainant came into his room. While he denied that anything improper had occurred between them a reference by him to his taking off his trousers matches the evidence of the complainant who said that she was very surprised when she saw him pull his trousers down and that he then told her to touch his penis. I consider it wholly unlikely that the accused removed his pants in the co-incidental manner which he suggested.



60. In his statement to the Police the accused also acknowledged holding the complainant with her clothes on, that they fell to the floor and that he had wanted to remove the complainant's underwear to see her vagina but she resisted and pushed his hands away. In his evidence in chief he stated "*I wanted to hold on to her pants and then she pushed my hand away*". The complainant's evidence was that he closed the door and laid her down and then pushed his genitals inside her. I find that the accused is not telling the truth about that incident. Clearly he accepts that an incident occurred on August 11th between he and the complainant but would have the Court believe that while he wanted to remove her underwear to see her vagina nothing further happened. I reject his evidence and find not only that he wished to remove the complainant's underwear to see her vagina but that he removed her underwear and engaged in brief sexual intercourse with her. I would add that the accused's version of events was also never put to the complainant for her comment when she gave evidence.
61. The accused acknowledged kissing the complainant and her kissing him back. Given all of the evidence I am satisfied that the accused developed an unhealthy sexual attraction to the complainant which he simply does not or cannot acknowledge.
62. The accused's evidence is in stark contrast to the evidence given by not just the complainant but a number of other witnesses. I regard the evidence of those witnesses as reliable, honest and genuine despite some inconsistencies regarding times and dates. In all the circumstances, and given the number of people involved in the events of the evening when the complainant revealed the offending it is not surprising that there is some conflicting evidence as to what occurred.
63. For all of these reasons I reject the accused's evidence.
64. Having reached that stage I then must decide whether I am sure of the accused's guilt having regard to the essential elements of the charges and the standard and burden of proof. Again, having assessed the evidence not just of the complainant but also of the other witnesses who have given evidence in this trial I am satisfied that the accused is guilty on each count beyond reasonable doubt with one exception. That is that there are four counts of sexual intercourse without consent. The complainant gave evidence only of three incidents involving sexual intercourse without consent and one of indecent assault. Accordingly Mr. Kency can only be convicted of, at most, three counts of sexual intercourse without consent and one of an indecent act.
65. I have already remarked on what I consider to be the impressive maturity of the complainant who gave her evidence in a straight forward and ~~unfluted~~ ^{unflustered} manner. Although she acknowledged that there had been some inconsistencies in her evidence regarding dates and in particular the fact that there had been some confusion over whether or not the acts alleged had occurred in 2015 or 2016, I do not consider those inconsistencies to have rendered the complainant's evidence to be unreliable or not able to be believed. In respect of each count the complainant gave clear and concise evidence. Her evidence was corroborated in some respect by the accused who acknowledged an incident between them on August 11th. The offending came to light




almost immediately after the incident which occurred on August 11th. I regard the complainant as a truthful witness.

66. I also consider it wholly implausible that the complainant would have invented not just one but all five incidents referred to in the charges. The relative brevity of the description of the incidents described by the complainant does not, in my assessment, impact negatively on the truthfulness of the complainant.
67. For these reasons I find the defendant guilty on three counts of sexual intercourse without consent and the count of an act of indecency. He is accordingly convicted on counts 1, 2, 3 and 5 of the information dated May 2nd, 2017. He is found not guilty on count 4.

DATED at Port Vila, this 9th day of February, 2018.

BY THE COURT


JP GEOGHEGAN
Judge.

