

PUBLIC PROSECUTOR

vs.

VOY KALO

Coram: Chief Justice Lunabek

Counsel: Mr. D. Boe for the Public Prosecutor
Mr. E. Molbaleh for the Defendant

Date of Trial: 4th and 5th June 2018

Date of Verdict: 7th June 2018

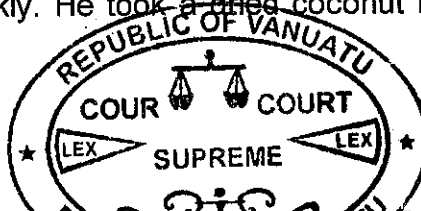
VERDICT

Introduction

1. Defendant Voy Kalo is initially charged with one count of Sexual Intercourse without consent, contrary to sections 90 (b) (ii) and 91 of Penal Code (Count 1); and one count of Threats to Kill a person, contrary to section 115 of Penal Code (Count 2).
2. The prosecution enters a nolle prosequi in respect to the offence of threats to kill, contrary to section 115 of Penal Code in count 2. Defendant Voy Kalo is then only charged with the offence under sections 90 and 91 of the Penal Code in Count 1.
3. On Monday 4th June 2018, he entered a not guilty plea in respect to the offence of sexual intercourse without consent contrary to section 91 of Penal Code. The offence is particularized in this way: Accused Voy Kalo is from the island of Santo and he is 24 years old. On or about 28th October 2017 at Wailapa area south Santo, he had sexual intercourse with the complainant without her consent.

Prosecution Case

4. On 28 October 2017 in the morning, the complainant was accompanied by one Wells Henry to go to the garden. When they arrived at the coconut plantation at Wailapa Village, South Santo, defendant Voy Kalo run to them, told Wells Henry to return home quickly. He took a dried coconut bean and



threatened to throw it at Wells Henry if he did not go home. Wells Henry was afraid he run back to Charlot's house.

5. Then defendant Voy Kalo grabbed the t-shirt of the Complainant and held her hands and pulled her into a bush area near the coconut plantation.
6. He had sex with the complainant without her consent. On the same day after the sexual intercourse, the complainant met one Elsie at the garden and told Elsie that defendant Voy Kalo had forced her and had sexual intercourse with her.
7. Elsie then took the complainant to one John Vanua, an assistant Chief of the village who helped the complainant to lodge a complaint to the police.
8. When the defendant pulled the hands of the complainant to the bush area, two (2) witnesses witnessed what he did to the complainant.

Burden of proof

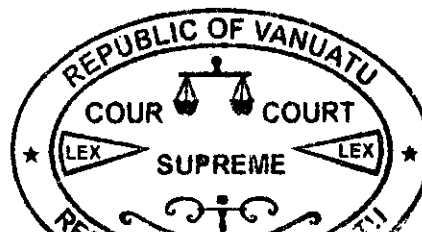
9. This is a criminal trial. The law is for the prosecution to prove each and all essential elements of the offence beyond a reasonable doubt. If at the end of the trial, there is a reasonable doubt on the evidence presented by the prosecution. I should interpret it to the benefit of the defendant and acquit him of this offence accordingly.

Elements of offence

10. The prosecution has to prove the following three elements of the offence of sexual intercourse without consent beyond reasonable doubt before I can convict the defendant on the offence:-
 - 1) The defendant had sex with the complainant on 28 October 2017 at Wailapa Village area;
 - 2) The Complainant did not consent for sexual intercourse with the defendant on 28 October 2017 at Wailapa Village area;
 - 3) The defendant did not have a reasonable belief that the complainant has consent to sexual intercourse with him at Wailapa Village area on 28 October 2017.

Issue

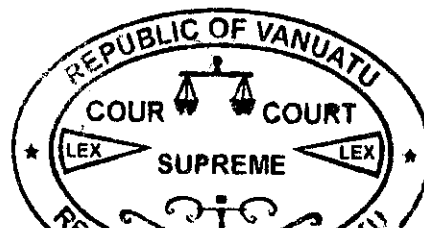
11. Before the prosecution started, Counsel for the Defendant informed the Court and the prosecution that the Defendant admitted that he had sexual intercourse with the complainant on 28 October 2017 in a bush area at Wailapa Village, South Santo.



However, the only issue is that of consent.

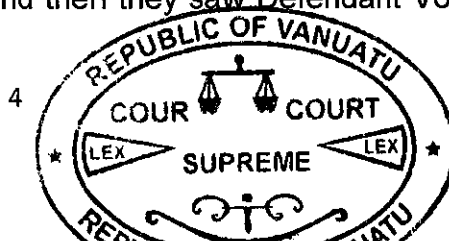
Prosecution evidence

12. The only direct evidence about the consent comes from the complainant herself. I remind myself that I am dealing with a complainant that is slow in thinking, but she is able to carry out most of chores at home, except these that required intellectual capacity where she needs much assistance. She was assessed as a woman of mild mental retardation that also makes her vulnerable in her judgment (Exhibit P3). I spoke to her in Court. She responded. I assess the situation. I direct the Court followed the complainant's pace, slow thinking motion. She gave evidence. There is no difficulty understanding her evidence and also cross-examination. It must be said that the prosecution and defence counsel acted in an entirely appropriate manner when dealing with her.
13. Her evidence is to the following effect. On 28 October 2017, she was afraid to walk alone to her garden. She and Wells Henry walked together on the road to the garden. On their way to the garden, they saw Defendant Voy Kalo running toward them. It was on the main road. He took a dried coconut bean (fruit) and wanted to throw it at Wells and Wells run away back home. Defendant held her T-shirt. She called it "*singlet blong mi.*" "*Mo pulum hand blo mi igo lo bush.*" "*Hemi holem hand blo mi mo forcem mi gogo after mi se mi no wantem mi wantem go lo garden nao.*" "*After hemi mekem trabol lo mi.*" "*Hemi karemout trousers blong mi, mi no wantem be hemi force. I makem mi slip down mo hemi slip antap.*" By her trousers she meant "*panties.*" Then "*mi go talemout lo Elsie lo garden blo Elsie.*" Then she and Elsie went down to the village and told the people of what had happened. She went after to her garden and got food back to her house. Then the truck arrived and she was taken to the hospital. Defendant Voy Kalo wanted to throw the dried coconut bean at Wells at the plantation. Kalo asked for sex. "*Hemi force, force, force.*" She told Kalo "*you wantem you wan nomo you go.*" She said Defendant had sex with her underneath the *local tree burao.* Defendant removed her panties. Defendant is Voy Kalo.
14. She was cross-examined. She gave her name. She is from Wailapa Village, South Santo. She knows Defendant Voy Kalo but she is from a different village. She was asked that Voy Kalo said he did not hold her hands. She answered: "*Hemi Kiaman.*" Voy Kalo never forced you. She answered: "*Kiaman.*" She was told that Voy Kalo did not force her. She answered: "*Kiaman. Voy i pullum hand blo mi.*" She was asked Voy Kalo did not remove her panties. She answered: "*Kiaman.*" She was asked Voy Kalo said she agreed to have sex with him. She answered: "*No, mi no wantem.*" She was asked she said she knows Wells Henry; she knows Elsie. She was asked: "*Elsie hemi wanem blo Henry Wells?*" She answered: "*Pikinini blo Elsie*



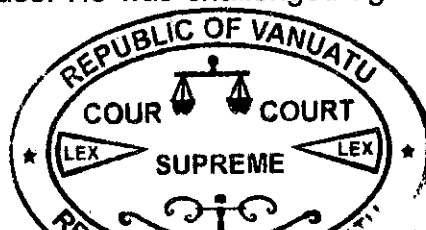
hemi Wells, yes. She said after the sex with Voy Kalo she went to see Elsie. After sex with Kalo, she took Island Cabbage and went home. When Voy Kalo held her hands, she called out the name of Wells. She said: *"Wells you come hurry up."* She did not call Elsie. Elsie reported the incident to the Assistant Chief she went home. She told her mother and daddy about what had happened to her. It was suggested to her Voy Kalo asked her for sex and she followed him. She answered: *"Shshii kiaman."* She wore a T-shirt and a skirt. It was suggested she removed her T-shirt at the time of sex. She said no. She did not remove her skirt. She was asked: *"Panties nomo?"* She answered: *"Yes panty nomo hem I karemout."*

15. Wells Henry gave evidence that he is 15 years old. His mother's name is Elsie. He is in Class 6. 28 October 2017 was a Saturday. He and the complainant were on the road to the garden. They were surprised Voy Kalo run towards them. He held on the complainant's hand, took a dried coconut bean and threatened to throw it at him (Wells). Defendant told him *"Wells bai you go sipos no bai mi stonem ded you wetem coconut ia."* He was afraid he ran to Charlot's house. This was at the plantation of Charlot's father, Moise. He did not know of the reason why the Defendant wanted to throw the dried coconut bean at him.
16. He was cross-examined. He confirmed his evidence in chief. He accepted that Defendant Kalo did not throw the dried coconut bean at him but that he took a dried coconut bean and threatened to stone at him if he did not go home. He denied Voy Kalo and the Complainant met him on his way back from the garden. He specified he was on his way to the garden with the complainant. It was put to him but he said he was with the complainant. He was asked and he confirmed that the place where Voy Kalo met him and the complainant was near Elsie's garden. He did not call out when Voy Kalo wanted to throw the coconut at him. He had just run away. He and Charlot came back but Defendant Voy Kalo and the complainant have gone already. Then he walked to his mother in the garden and Charlot returned to his house. He confirmed Defendant Voy Kalo met him and the complainant in the morning of that day. He arrived to his mother in the garden at about lunch time. He returned home with his mother and the complainant. He followed his mother when his mother reported the incident to the Assistant Chief - John Vanua. They returned again to the garden about 4-5pm. He clarified that he run to Charlot's house because Voy Kalo wanted to throw the dried coconut bean (fruit) at him.
17. Arnold Matavusi testified he is from Paraisa Village, South Santo. He is 19 years old. He does not attend school anymore. He does gardening. On 28 October 2017, he went to Lestue and Frank's house. They decided to go to a group of people who did some work on the road ("putum slap"). They went there at the main road and they went to the plantation. They followed the road and they met the complainant and Wells Henry. They were on their way to the garden. They said hello to them and then they saw Defendant Voy Kalo was



running behind the two of them. Voy Kalo came to them and they said good morning to him. Voy Kalo told them he was going to a group of men "putting slap" on the road. They walked on. He said they talked to themselves, they observed that "Walkabout blo hem ino stret." They saw Defendant run up to a creek and down. They watched him. He explained he said that because Defendant Voy Kalo was drunk overnight. It seemed he was going to do some problem. They followed the creek further down and they saw Voy Kalo took a dried coconut bean (fruit) and said he was going to throw it at Wells Henry. He said then the place was not quite clear as there were trees. They moved to a clear space. They saw Voy Kalo pulled the hands of the complainant to a road into the garden. They followed them to the river. They were not there. They went to Michael's plantation. Voy Kalo and the complainant were not there. They climbed the hill back and they saw Voy Kalo was coming out of a small bush area. Voy Kalo was wearing a blue trousers and he was "dried chest" (no shirt or T-shirt). When he came "hemi sweat we hemi sweat." Voy Kalo stood there as if he was ashamed. Voy Kalo told them: "Hey (complainant) istap wan lo ufala igo mekem sex wetem hem." This witness testified he told the Defendant: "Hey mifala ino kranky man blo makem sex wetem wan disability. You no save lukoatem wan gudfala woman blo makem sex wetem?" Then they run away from him and they run to Charlots house. When they were at Charlot's house, they saw Voy Kalo walking back bending his head. He explained he said these words to Voy Kalo because they saw he pulled the hands of the complainant following a small road leading to the bush. He said at that time Wells Henry had gone already to Charlot's house. He estimated the distance between the place they were and saw Voy Kalo pulled the hands of the complainant to the bushy area was equivalent to that of the Court room to the church over there(about 80 meters).

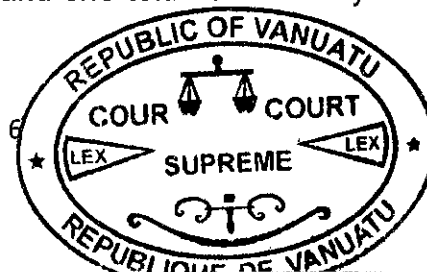
18. Under cross-examination, he said he knew Voy Kalo as they were from the same village. He confirmed his evidence in chief. He was specifically asked: "Yufala I wantem look se man ia bae I makem wanem?" He answered: "Yes." He was asked: "Time ia nao you talem se hemi wantem stonem Wells wetem fruit blo coconut?" He answered: "Yes." He was asked: "You talem se time ia now yufala I luk se hemi holem hand blo (complainant)?" He answered: "Yes." He was then asked: "You decide blo go lo house blo Charlot?" "No mifala igo look hem after we hemi mekem trouble finish." He answered. It was put to him that he lied. He denied. He said he did not do anything to stop the Defendant. He accepted he was standing there watching the Defendant. The other two also watched the Defendant. He did not call out to the Defendant. The complainant called the Defendant "brother". He called the complainant "aunty." He was challenged he maintained his version of facts. It was put to him he accepted he and the two others met Elsie in her garden. It was about 9.00am. He said they reported to Elsie that Voy Kalo pulled the hands of the complainant. He was specifically asked when he met Elsie where was Wells? He answered: "Wells istap lo house blo Charlot." He and the other two saw Wells when they run to Charlot's house. He was challenged again, the three



of you stayed with Elsie? He answered: "No mifala igo look Voy afta mifla igo lo house blo Charlot. After Voy Kalo I come." He also said he saw the complainant coming out of the bushy area "mo ground stap lo backside blo hem."

19. Lestue Mura testified next. He is from Parisa Village. He attended school at year 6. On 28 October 2017, they walked following the plantation. They saw Wells and the complainant on their way to the garden. They then met Voy Kalo. They asked him where he was going. Defendant told them he was going to a squad "we oli stap tekem slap." They saw Wells and the complainant following the road to the garden. He saw Voy Kalo running to the two of them. They were asking themselves why Voy Kalo run following the two of them. He and the two others followed the creek to see what Voy Kalo was going to do to Wells and the complainant. They saw Voy Kalo took a dried coconut and wanted to throw it at Wells. Wells runaway. Voy Kalo then held the hands of the complainant. They watched them until they disappeared. They tried to find out what Voy Kalo did to the complainant. They followed the river down. They climbed the hill. They went to a small bush area and they saw Voy Kalo coming out from that bush. Voy was surprised to see them. Voy was sweating. Defendant Voy was surprised to see hem and told them: "Bai one lo ufala tri go makem trouble lo (complainant)." Arnold told him: "You no save go faenem wan gudfala woman blo gat sex wetem hem?" They left him and they went to Charlot's house. Voy Kalo did not say anything. He followed them to his house.
20. Lestua Mura was cross-examined. He confirmed his evidence in chief. His evidence was not disturbed. He saw Elsie he did not talk to her. He was at Charlot's house. He saw Elsie and the complainant coming back from the garden.
21. Elsie Akirio is the last prosecution witness. She is from Wailapa Village, South Santo. 28 October 2017, a Saturday morning she was in her garden. The complainant came and told her Defendant Voy Kalo pulled her under the burao tree and had sex with her. She said the burao tree was in the area of her garden. She said when the complainant told her of that she could see Voy Kalo standing there and he did not say a word. She took the complainant to Voy Kalo's parents to tell them of what he did to the complainant. Voy Kalo's parents were not at their house. She took the complainant back to Wailapa Village and she went to report the incident to Assistant Chief John Vanua.

Elsie Akirio was cross-examined. She confirmed her evidence in chief. Wells is her son. The complainant is her cousin sister. At the garden she saw the complainant in her garden. She saw the Defendant after that. The complainant came to see her in her garden. She did not cry. She wore her clothes. She talked to her (Elsie) and she told her that Voy Kalo had sexual intercourse with her.



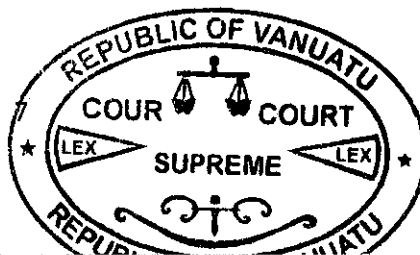
22. That is the end of the prosecution case and evidence. A case was made out against Defendant Voy Kalo under section 164 (1) of the Criminal Procedure Code Act [CAP 136]. Defendant' rights under section 88 was read and explained to him.

Defence Case

23. Defendant pleaded not guilty to sexual intercourse without consent. Sex occurred between him and the complainant. But the complainant consented to have sex with him on 28 October 2017. It is the Defence case that sex was consensual.

Defence evidence

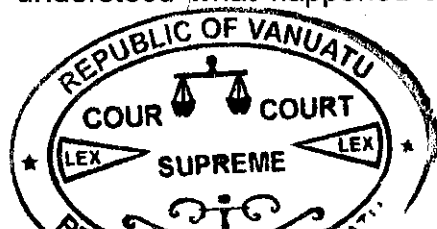
24. Defendant Voy Kalo gave evidence on his own behalf. His evidence is to the following effect. He is from Parisa Village, South Santo. He knows the complainant since he was a child. He called the complainant "mama." He did not force her for sex. If he had forced her she would have injuries on her body. He denied he pulled her. He denied he removed her panty. She removed her panty herself. He denied Henry Wells was with the complainant when he arrived. He denied he threatened to throw a dried coconut fruit at Henry Wells. He said the complainant's garden was different from Elsie's. The complainant walked to her garden. Her daughter walked after her. Her daughter followed her but not Henry Wells. Her daughter attended school at Year 9. He said he met Arnold, Lestue and Frank in the plantation. He passed them at bout lunch time. He went with the complainant he had sex with her then he saw these boys coming out. They did not tell him anything. They left and he followed them home. He remembered they laughed. He did not hear anything said by them. He said he met the complainant he walked in front and she walked behind him. Three (3) meters behind him. Wells saw them at the gate at the plantation. Wells asked them where they were going. He did not respond to Wells. Then Wells told him: "*You wantem blo gat sex wetem hem?*" He told Wells: "*You wantem blo save from?*" Wells said these words then he ran to Charlot's house. He went ahead and the complainant followed him. He was asked that the complainant called Wells when he held her hands. He answered: "*Hemi no callem hem hemi speed go lo house blo Charlot.*" He denied he wanted to throw a dried coconut bean at Wells. He and the complainant went to have sex but he did not pull her hands. They went and had sex outside the plantation. They had sex at the garden area of Elsie. The complainant just followed him. At the time of sex, the complainant laid quietly. She did not move, she did not call out. After sex, he went out first and the complainant followed him. After he had sex with the complainant, he came on the road, he saw the three boys who laughed and went. He saw Elsie coming. The complainant just followed Elsie. They were just the two of them.



25. Defendant Voy Kalo was cross-examined. He was aware the complainant was a disabled woman. It was suggested to him that it was not proper to have sex with a disabled person. He answered- when he asked for her she agreed. He was asked he admitted making a statement to the police. He had difficulties to recognize his signatures on his own statement to the police. He recognized one signature at the back but then he accepted that the signatures were similar. "Yes I same mark nomo." It was put to him and he accepted that in his statement to the police, he stated that he did not have sex with the complainant on 28 October 2017. He was asked and he accepted that in Court he admitted that he had sex with the complainant on 28 October 2017. He was asked and he admitted he has two different stories. He denied that Wells was present with the complainant on the road to the garden. He denied he took a dried coconut bean and threatened to throw it at Wells. He was asked about his actions causing Wells running away to Charlot's house. He said: "Yes hemi ron igo lo house blo Charlot." He denied Wells run away because he wanted to throw a dried coconut bean at him. It was put to him Arnold saw him. He answered he did not see Arnold because they were at a far distance from him. It was put to him Lestue saw him when he wanted to throw a coconut at Wells. He said he did not see him. It was put to him and he denied he pulled the hands of the complainant. He said if he had pulled her there would have been injuries on her body. It was put to him he denied removing the complainant's panty. He said he did not push her or pull her. He did not force her. It was put to him that the complainant told Elsie that he forced her to have sex. He said he was not aware of that. He denied telling the three boys to have sex with the complainant. He denied Arnold never told him anything. It was put to him that he did not tell the truth when he said he did not force the complainant for sex. He said: "Ino true." He said it was not true that he chased Wells to return home. It was put to him that the complainant said he forced her and had sex with her. He denied. He was asked he made two versions of statements or versions of facts. He denied.

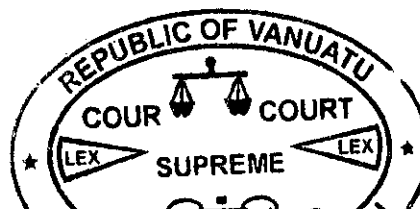
Discussion on Evidence

26. Before I assess the evidence in this trial, I note a list of agreed material statements admitted as reliable including the medical report of the examination of the complainant (Exhibit P1), the record of interview of the Defendant (Exhibit P2), the medical report on medical examination of the complainant's mental health and other statements.
27. I listen to the witnesses. I observe and consider their demeanour in the witness box. The following facts are found:
28. On the totality of evidence presented, coupled with the oral testimonies of the witnesses, the complainant woman, although slow in thinking and described as a woman of mild mental retardation which makes her vulnerable in her judgment, understood what she said, understood what happened to her on



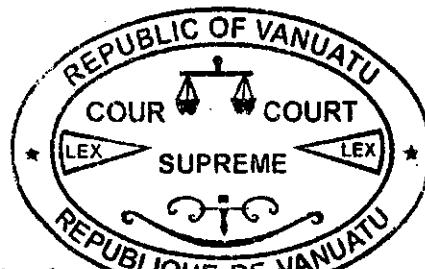
that Saturday 28 October 2017 at Wailapa Village, South Santo. She understood and answered to the questions of both prosecution and Defence counsel. Her evidence is not challenged. I am impressed by her as a truthful witness and credible witness.

29. The circumstances of what she said happened to her on 28 October 2017 was directly witnessed by Arnold Matavusi and Lestue Mura who consistently gave evidence of the circumstances and actions of the Defendant before the sexual intercourse with the complainant. They saw Defendant Voy Kalo run behind the complainant and Henry Wells took a dried coconut bean and threatened to throw it at Henry Wells if he did not go home. Henry Wells got frightened and run away to Charlot's house nearby. Defendant held and pulled the complainant on her hands to a bush area outside the plantation and had sexual intercourse with her. I believe the complainant when she said repeatedly the Defendant – forced, forced, forced her for sex.
30. Another consistent aspect of the evidence of what happened to the complainant was what Elsie told the Court of what the complainant told her just after the sexual intercourse happened on the same day.
31. The Defendant held the hands of the complainant and pulled her underneath the buroa tree and had sexual intercourse with her in the area of her garden (Elsie's). It is the evidence of its consistency with what the complainant said the defendant did to her on 28 October 2017 at the bush area at Wailapa Village and it is also evidence to negative the complainant's consent of the sexual intercourse on 28 October 2017. (See **PP –v- Mereka [1992] VUSC 20: [1980-1994] Van LR 613; R –V- Lillyman [1896] 2QB. 167; R –v- Osborne [1905] 1 K.B 551** and applied also in **PP –v- Telukluk [2017] VUSC 135**).
32. Witnesses Arnold and Lestue are also truthful witnesses and they gave credible and reliable evidence. The Defendant gave account of their testimonial evidence on what he did as "*oli stap longway mi no look olgeta.*" The evidence given by Arnold and Lestue are not challenged in great details.
33. Wells Henry evidence was that on 28 October 2017, he walked along with the complainant on the road to the garden. They arrived at the coconut plantation. Defendant Voy Kalo run behind them and reached them. Defendant Voy Kalo took a dried coconut bean and threatened to throw it at him if he did not go home. Wells got frightened of the Defendant and runaway to Charlot's house. Defendant Voy Kalo gave evidence on the contrary that Henry Wells did not walk with the complainant on the road to the garden. He and the complainant walked some distance and met Henry Wells at the gate. A discussion took place between Wells and Defendant Voy Kalo and Wells runaway to Charlot's house. He walked in front and the complainant walked behind him to the place where the sexual intercourse happened on 28 October 2017. Contrary to what



Defendant Voy Kalo said, the evidence of Henry Wells is corroborating and consistent with the evidence of the complainant. The complainant said she was afraid to go to her garden alone, she asked Henry Wells and Wells accompanied her on the road to the garden. Wells and the complainant were seen walking on the road to the garden at the coconut plantation of Moise (Charlot's father) by Arnold and Lestue. The complainant confirmed that in her evidence. Wells also confirmed that in his evidence.

34. Defendant Voy Kalo seemed to say that the complainant's garden is different from Elsie's and the complainant walked alone on the road to her garden. When he reached her on the road and walked some distance with her. The complainant's daughter followed her mother behind. If this piece of evidence from the Defendant is to be believed, then sexual intercourse would not take place as the daughter was walking behind her mother (complainant). I do not believe the Defendant when he said that. I believe witness Henry Wells as a truthful witness. Wells evidence is accepted as credible and truthful.
35. Another reason, I say I could not believe Defendant Voy Kalo as a truthful witness was because Defendant Voy Kalo gave two different versions of his stories. The first version was what he told the police interviewing officer when he stated he did not have sex with the complainant as alleged in 28 October 2017 at Wailapa Village. The second version was what he told the Court in his testimony that on 28 October 2017, he actually had sexual intercourse with the complainant and the sex was consensual. He is not a trustworthy witness. His testimony could not be believed. I reject his evidence as not truthful. On top of this he accepted he had two versions of facts (one in his police statement and the other in his testimony in Court) but at the end of his testimony he refused to accept that the made two versions of his stories.
36. On the totality of evidence, there may be one or two inconsistencies in the evidence of Wells Henry as to where he went after Defendant Voy Kalo chased him on the road with a dried coconut bean. I take these inconsistencies to be minor types and do not go to the substantial element of the offence charged against the Defendant. It may be that these inconsistencies are relevant for the credit assessment but I find the complainant's evidence as truthful in all the essential elements of the offence charged in Count 1. The complainant's evidence was corroborated and supported by the evidence of the prosecution witnesses.
37. I reject the Defence submissions to the contrary as based on hypothetical questions or theory without facts.
38. I now apply the law the law to the facts as found by the Court.



Law and its application

39. Sections 89A and 90 of the Penal Code Act are relevant and prohibiting provisions of the law.

S.89A defines and says what constitutes sexual intercourse.

"89 A SEXUAL INTERCOURSE

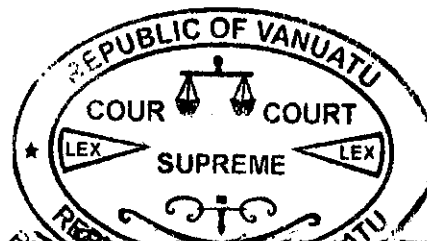
For the purposes of this Act, Sexual intercourse means any of the following activities, between any male upon a female, any male upon a male, any female upon a female or any female upon a male:

- a. the penetration, to any extent, of the vagina or anus of a person by any part of the body by any person, except if that penetration is carried out for a proper medical purpose or is otherwise authorized by law; or*
 - b. the penetration, to any extent, of the vagina or anus of a person by an object, being penetration carried out for a proper medical purpose or is otherwise authorized by law; or*
 - c. the introduction of any part of the penis of a person into the mouth of another person; or*
 - d. the licking, sucking or kissing, to any extent, of the vulva, vagina, penis or anus of a person; or*
 - e. the continuation of sexual intercourse as defined in paragraph (a) (b) (c) or (d); or*
 - f. the causing, or permitting of a person to perform any activities defined in paragraph (a) (b) (c) or (d) upon the body of the person who caused or permitted the activity."*
40. Section 90 (b) (ii) repeats that provision with regard to sexual intercourse by providing circumstances under which the offence occurs including when actual consent was given when the consent is obtained because of the physical or mental capacity of the person who gave "consent". It says"

"SEXUAL INTERCOURSE WITHOUT CONSENT

90. Any person who has sexual intercourse with another person –

- a. Without that persons consent; or*
- b. With that person's consent if the consent is obtains-*
 - (i) by force; or*
 - (ii) by means of threats of intimidation of any kind;*
 - (iii) or by fear of bodily harm; or*
 - (iv) by means of false representation as to the nature of the act; or*
 - (v) in the case of a married person, by impersonating that person's husband or wife;.*



commits the offence of rape the offence is complete upon penetration.

(vi) By the effects of alcohol or drugs; or

(vii) Because of the physical or mental capacity of that person;”

commits the offence of sexual intercourse without consent.

41. The only issue in this case is consent. Mr. Boe referred the Court to the Court of Appeal judgment in **Ishmael –v- Public Prosecutor [2015] VUCA; CAC 04 of 2004 (3 March 2004)** when the Court of Appeal stated:

“Every man or woman has control over their own bodies and what they do with them in an intimate way with other people. The fact that a woman has consented to a sexual encounter on one occasion provides no license for a man to assume that she consents on any subsequent occasion. A woman does not have to kick or scream or push someone away. She is entitled to be treated with courtesy and respect.”

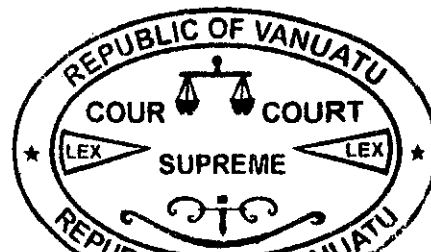
Mr. Boe also referred the Court to a judgment of the Court of Appeal of Samoa in **Attorney General –v-Ferreti [1994] WSCA 13; 05 1993 (31 March 1994)** where it was stated:

“True consent can only be given by a person in a position freely able to make a rational decision with full understanding of the situation. Mere submission, that is, lack of resistance is not to be taken as consent. It has been said in a number of cases that the age of the girl may itself be sufficient to negative the possibility of consent. In this case we do not regard this primary school girl of 13 years of age who was pulled into the respondent’s room, pulled on to the bed where he removed her panties as having cooperated or consented at all on those facts. Force was used by the respondent to have sexual intercourse with her”.

42. The issue of consent is also discussed in a number of cases in the Supreme Court. In **Public Prosecutor –v- Kuaa [2016] VUSC 46; CR 647 of 2016 (8 June 2016)**, Geoghegan J referred and agreed with the statements made by respective judges in those cases in this way:

In **PP v. Jack Polo [2013] VUSC 81** at paragraph 14, Spear J stated:

“It is essential to say something about consent. Consent in the context of the second and third elements of this offence meant a true consent. That is consent given voluntarily by someone who understands the nature and quality of the sexual act and was able to make a rational and free decision about it.



Consent can be conveyed orally or it can be indicated another ways or it can be a mixture of both. There are a variety of ways in which consent can be conveyed to the other party and that is of course true about most dealings between people.

What is clear, however, is that a true consent does not arise but submission to what is considered to be unavoidable or inevitable, say to avoid a beating. A true consent is not one given as a result of violence or the threat of violence. Silence by itself does not constitute a true consent although of course the conduct of the complainant or the other party may well convey that impression in a realistic way. What is required is a clear and unequivocal indication....."

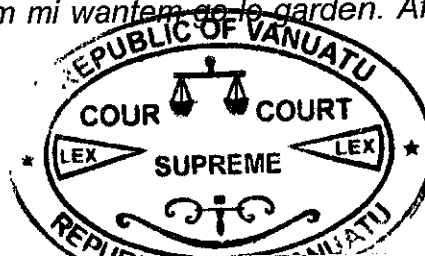
In **PP v. Tor [2003] VUSC 101**, Treston J stated:

"When I refer to the issue of consent, consent means of course agreement given by a person who is able to understand the significance of what is about to happen and who is able to make an informed and a rational decision as to whether to consent or not.

Any consent must be freely given. It is important to distinguish between a consent that is freely given and submission to what the complainant may regard as unwanted but unavoidable. For example, submission by the complainant because she was frightened of what might happen to her if she did not give in, is not true consent. Equally, submission because the complainant might feel powerless or threatened or exhausted is not true consent and the fact that a person does not protest or physically resist or ceases to do so, is not of itself to be taken as consent.

Such consent may be conveyed by words, by conduct or by combination of both, but of course those elements are already somewhat described in the definition under section 90 to which I have already referred."

43. I like other judges, agree with these statements made regarding the issue of consent.
44. In this case, I do not regard this disabled woman assessed with mild retarded mind causing her to be of slow thinking, who was held by her hands and pulled into the bush area where the Defendant removed her panties as having cooperated or consented at all on the facts. She said the Defendant force, force, force her for sex. She said she did not want. She said "hemi grabbem singlet blo mi. Mo pulum hand blo mi igo lo bush. Hemi holem hand blong mi mo forcem mi gogo after mi se mi no wantem mi wantem go lo garden. After



hemi mekem trabol lo mi. Hemi karemout trousers (panties) blong mi, mi no wantem be hemi force I makem mi slip daon mo hemi slip antap.”

45. In this case, the prosecution does not proceed on the basis of the mental capacity of the complainant although they could. However, the prosecution establishes that force was used by the Defendant to have sexual intercourse with the complainant on 28 October 2017 at Wailapa Village.
46. The evidence of the complainant of the circumstances of the sexual intercourse and how it happened on 28 October 2017, coupled with the corroborating aspects of these by the evidence of Wells, Arnold and Lestue constitute strong evidence that the Defendant could not have a reasonable belief that the complainant was consenting for sexual intercourse with him on 28 October 2017. This was consolidated further by the two different versions of stories advanced by the Defendant himself reflecting that he could not have a reasonable belief that the complainant consented for sex. This is overall confirmed and is consistent with the evidence of recent complaint given by Elsie Akirio.
47. The Defence submissions relying on the case of **Public Prosecutor –v- Waresul [2015] VUSC 110; Criminal Case 157 of 2014 (19 August 2015)** are considered but rejected. The dominant facts in that case and this case compared together are substantively different. I have the impression that the defence case is tailored on the basis of the above referred case. It cannot succeed and must fail as its case must be assessed on its own facts.
48. I am satisfied beyond a reasonable doubt that the prosecution has proved each and all the three essential elements of the offence of sexual intercourse without consent against Defendant Voy Kalo.

Verdict

49. Defendant Voy Kalo is found guilty and convicted of the offence of sexual intercourse without consent, contrary to s.90 and 91 of the Penal Code Act.

DATED at Luganville this 7th day of June, 2018

BY THE COURT



.....
Vincent Lunabek
Chief Justice

