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

Criminal
Case No. 18/959 SC/CRML

PUBLIC PROSECUTOR
v
PHILIP HURI
BARRY BATI
RADOL HURI

Date of Ruling: *12 October 2018*
Before: *Justice D. V. Fatiaki*
Attendance: *Mr. K. Massing for the State*
Mrs. J. Aru for the 1st Defendant
Mr. L. Tevi for the 2nd and 3rd Defendants

RULING

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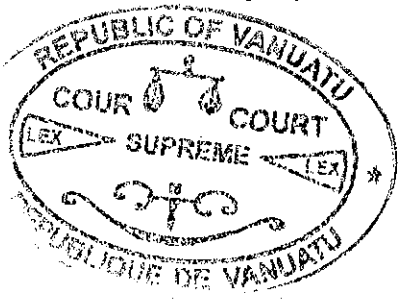
1. At the close of the prosecution's case counsel for the first defendant, Philip Huri, made a submission invoking Section 164(1) of the Criminal Procedure Code on the basis that "*... as a matter of law ... there is no evidence on which the accused person could be convicted*". In short form, the application is a "*no case*" submission.

2. Defence counsel relies on the case of Public Prosecutor v Samson Kilman [1997] VUSC 21 as to the test to be applied on a "*no case*" to answer submission. In that case the former Chief Justice adopted the pronouncement of Lord Lane CJ in R v Galbraith (1981) 1 WLR 1039 where his lordship propounded a 2-tier test as follows:

> *"Firstly, if there is no evidence that the crime alleged has been committed by the defendant there is no difficulty, the judge should stop the case;*
>
> *Secondly, if there is some evidence but it is tenuous character because of weakenss or vagueness or because of inconsistency with other evidence then –*
>
> *(a) If the judge concludes that the prosecution case taken at its highest is such that a jury properly directed could not properly convict on it, then it is the judge's duty to stop it on a no case submission;*
>
> (b) *If however the strength or weakness of the prosecution's case depends on the view to be taken of a witness' reliability and where on one view there is evidence on which a jury could conclude that the defendant is guilty then the judge should allow the matter to be tried."*



3. Prosecuting counsel on the other hand cites the case of Public Prosecutor v Koroka [2006] VUSC 89 wherein the present Chief Justice said of the relevant test on a "*no case*" submission:

"*In essence the test to be applied is as follows: on the strength of the evidence so far laid before the Court, whether a reasonable could convict the accused person, as a matter of law, on the strength of such evidence*".

4. Earlier, in the case of Public Prosecutor v Bernard [2006] VUSC 44 Bulu J. after referring to Kilman's case (ibid) summarised the requisite test in the following terms (at paras. 37 and 38):

"Bearing in mind section 164 of the Criminal Procedure Code Act the test is not proof beyond reasonable doubt but rather as a matter of law whether the accused could be convicted on the evidence presented thus far. I am satisfied that the test is whether a finding of guilt could be made by a reasonable judicial officer sitting alone on the evidence thus far presented. I adopt the test as stated by Speight J. in Auckland City Council v. Jenkins.

The submission of no case to answer requires the Court to refer to the evidence adduced by the Prosecution, more particularly, the evidence relating to the elements of the crime the Defendants have been charged with."

5. In the present case the defendants are jointly charged with Unlawful Sexual Intercourse with a child under 13 years of age. The two elements of the offence which the prosecution must establish are:

(1) Each named defendant had sexual intercourse with the complainant; and
(2) The complainant was under 13 years of age at the time of the sexual intercourse .

6. The prosecution's evidence thus far on the second element is the complainant's birth certificate which was admitted by consent [**Exhibit P(1)**] and records her date of birth as being: "*07 August 2005*" and her sworn testimony that penile sexual intercourse with the three defendants occurred in the first week of October 2017 when the complainant would have been 12 years and 2 months old, in other words, she was "*... under the age of 13 years*".

7. The prosecution's evidence in support of the first element is less secure and is solely comprised of the complainant's description under oath that each defendant had inserted his penis ("*bolbol*") into her vagina ("*kawale*") not once, but at least 3 times each in the following order – **Philip Huri** first, then **Barry Bati** and las was **Radol Huri**. This sequence of intercourse was repeated three times.

8. This evidence was vigorously challenged in defence counsel's cross-examination of the complainant and is emphatically denied in the caution interview records of each defendant which was also admitted by consent as part of the prosecution's evidence [**Exhibits P(3)(A); (B) & (C)**].

9. Defence counsel submits that the prosecution's evidence on this second element so far, taken at its highest, there could not be a conviction because the

complainant's evidence is riddled with inconsistencies, and is unreliable and unsupported by any independent corroborative evidence.

10. In this latter regard the complainant's sworn testimony is that whilst one of the defendants was having sexual intercourse with her the other two defendants were taking photos on a mobile phone belonging to the third defendant Radol.

11. The said mobile phone was not seized by the police during investigations (as it should have been) nor was there an attempt to seize it and/or to conduct a forensic audit and analysis of the mobile phone with a view to recovering photos of the defendants' sexual abuse of the complainant that were allegedly taken using the phone. Indeed, the prosecution's office never directed the investigating officer to seize and/or conduct such a forensic audit as might be expected in the circumstances where corroboration of the complainant's evidence was necessary and highly desirable.

12. Given that missed opportunity, I carefully listened to and closely observed, the complainant throughout her testimony both in chief and under cross-examination. I was left with the distinctly unfavourable impression that the complainant's evidence was highly improbable and was exaggerated in parts and in other aspects, contained numerous inconsistencies.

13. For instance, in her police statement she clearly stated that each of the defendants had sexual intercourse with her four times ("*olgeta ia oli mekem sex wetem mi 4 round we every wan oli makem fes round finis ale namba 2 taem kasem 4 round*") but under cross-examination she admitted being "*hafded*" (unconscious) and unaware or unsure of whether the defendants had had a fourth and last round of sexual intercourse with her.

14. Again on Thursday of the first week of October 2017 when Asoii had sent her to fetch her (Asoii's) mobile phone from her (Asoii's) husband Barry, the complainant said when she got to Radol's home he called out to her and she became frightened ("*mi fraet*") and she left without getting the phone ("*mi runway mi nomo karem phone*"). Yet, the very next day, Friday, when Joylyne sent her to fetch her phone from Radol's house, the complainant had lost her fear and went and entered Radol's house and asked his wife for Joylyne's phone.

15. Then there was her evidence about crawling to a nearby freshwater spring after recovering consciousness and bathing in it before heading home. When it was pointed out to her that she had earlier said in her police statement that **Lavatbala Village** had no natural water ("*ino gat water*") and they had to walk a long way to fetch water from the two neighbouring villages of **Labwatgungu** and **Amatbobo**, she was forced to admit that after her terrible ordeal she had crawled a distance of 300 – 400 metres to the neighbouring village to "*swim*".

16. A further example of the complainant's exaggeration is when she claims that she told the police that she asked Radol's wife for Joylyne's phone and also that Radol had told her to lie on the bed before he slapped her on her right ear. When it was pointed out that neither statement was in her police statement the complainant could offer no explanation and fell silent for three minutes.

17. Similarly she denied telling the police in her statement that Radol had used a "*frangipani branch*" to whip her and when the entry was pointed out to her in her police statement, she remained silent again.

18. Indeed the court's record of the complainant's testimony records no less than nine (9) separate occasions during her cross-examination when the complainant refused to answer counsel's question and instead remained stubbornly silent including, in at least two instances, re-examination questions from prosecuting counsel During these occasions I duly noted that the complainant's eyes were darting up and down and side to side whenever she felt cornered.

19. I found the complainant a wholly unsatisfactory and unreliable witness whose evidence of what occurred at Radol's home at "*lunch-time*" *ie*. in broad daylight on a Friday in the first week of October 2017 was internally inconsistent, highly improbable and in parts exaggerated to serve her own purposes even to the extent of suggesting that the police had fabricated those parts of her police statement which she claims she never told them about.

20. Then there is the quite unusual circumstance with the sequence of beatings the complainant received at the hands of the second and third defendants. The complainant claims the beatings occurred after the gang rape at Radol's house and, in fact, it happened the very next day Saturday in October 2017 after Asoii caught her and Philip in the act of having sexual intercourse at the house where they were living in at the time.

21. In the face of such clear evidence the prosecution, nevertheless, applied for and amended the date of the beatings charged in **Counts 5**, **6** and **7** to "*September 2017*" from "*October 2017*". This meant that the complainant's beatings occurred the month before she was gang-raped by her two assailants who it is common ground, had beaten her because she had been caught having sex with the first defendant Philip Huri. When asked in his police caution interview what his relationship was to the complainant Philip Huri answered: "*hemi singaot brata long mi*" (she calls me brother).

22. The improbability and implausibility of the complainant's evidence is starkly illustrated by three (3) startling facts:

    (1) That the brothers of Barry Bati's wife (Asoii) namely Philip and Radol Huri would gladly permit, watch, and indeed photograph their brother-in-law having sexual intercourse with the complainant thereby, grossly disrespecting their own sister who was pregnant at the time;

    (2) That whilst the gang-rape was proceeding in Radol's house with him as an active repeat participant, his (Radol's) wife was watching a movie on a tablet lying on a bed in an adjoining room separated only by a flimsy calico material; and

    (3) It was common ground and accepted by the complainant in her police statement and in her testimony that the reason she was beaten was because she was caught having sexual intercourse with Philip Huri who she called "*brata*". Yet, a month after the beatings both her assailants

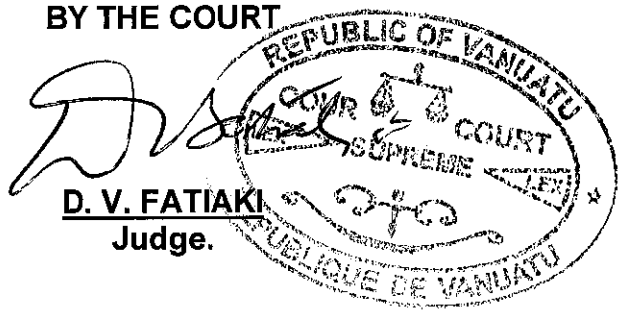
including Philip Huri each had sexual intercourse with her in each others company without any disagreement or dissension expressed by her assailants towards Philip, instead, her assailants had apparently in a show of support, taken photos while Philip was having intercourse with the complainant.

23. In a vain attempt to shore-up the complainant's testimony the prosecution called **Eliat Maho**, a chief of Atavtapanga Village who testified that the complainant had come and stayed with him on some unspecified date in October 2017 and had told him about what the defendants had allegedly done to her. Prosecuting counsel over defence counsel's objections, sought to tender the witness' police statement and when that was disallowed counsel asked no further questions of the witness. In the result the court ruled that the witness' evidence did not constitute "*recent complaint*" and was inadmissible hearsay. It was also plain from the complainant's own evidence that she had several opportunities before going to Eliat's house to complain but did not.

24. In light of the foregoing and in the words of Section 164 of the Criminal Procedure Code I rule "*as a matter of law that there is no evidence on which the accused persons Philip Huri, Barry Bati and Radol Huri could be convicted*" and I therefore uphold the "*no case*" submission and pronounce a verdict of "*not guilty*" in respect of each defendant on the charge in Count 3 of Unlawful Sexual Intercourse with the complainant contrary to Section 97(1) of the Penal Code.

DATED at Luganville, Santo, this 12th day of October, 2018.

BY THE COURT



D. V. FATIAKI
Judge.