

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

Criminal
Case No. 20/1886 SC/CRML

BETWEEN: Public Prosecutor

AND: Kati Sam Katena
Defendant

Coram: Justice Aru
Counsel: Ms. M. Tasso for Public Prosecutor
Mr. W. Kapalu for the Defendant

VERDICT

Introduction

1. The accused Mr Kati Sam Katena was charged with one count of sexual intercourse without consent contrary to s 90 (a) and s91 of the Penal Code [CAP 135].

The charge

2. The charge is contained in an information filed by the Public Prosecutor on 9 April 2021.
Count 1

Statement of offence

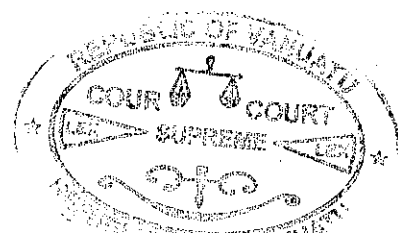
Sexual intercourse without consent contrary to sections 90 (a) and s91 of the Penal Code

Particulars of the offence

Kati Sam Katena sometimes between 1 December 2011 to 31 December 2011 hemia long area blong freshwater long Port Vila, you bin kat sexual intercourse wetem woman ia Jaqueline Sinker Towbah time weh you bin pushum penis blo u e go long anus blong hem weh long time ia tingting blong hem e no stret blong kat sex wetem you.

Elements

3. The Public Prosecutor is required to prove the following elements of the offence:-



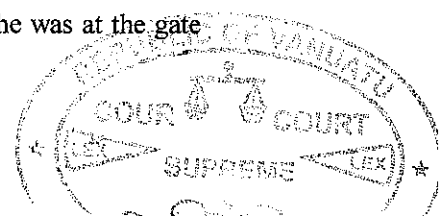
- a) That the accused had sexual intercourse with the complainant;
- b) That the complainant did not consent to the sexual intercourse; and
- c) The accused did not reasonably believe that the complainant consented.

Burden of Proof

4. Section 8 of the Penal Code stipulates that the burden of proof rests with the prosecution. It has the onus of proving all elements of the charge beyond reasonable doubt. The accused is not required to prove anything.

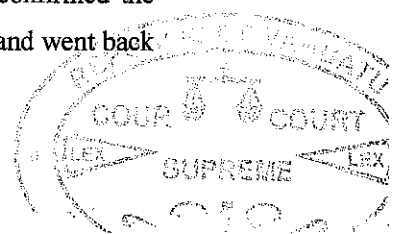
The Evidence

5. The facts which were undisputed and tendered by consent were three (3) medical reports produced by the Medical Centre following physical examination of the complainant on each occasion. The first being **Exhibit PP1** which was prepared on 13 April 2015, **Exhibit PP2** was prepared on 23 June 2016 and **Exhibit PP3** was prepared on 3 May 2018.
6. The prosecution called the complainant as their only witness. Her evidence is that her father is from Motalava banks, in TORBA province and her mother is from Tanna, TAFEA province. As per Tanna custom she said the accused is her '*custom man*' the person she is required to marry in custom. She left Tanna and eventually married someone from Ambae then went back to Motalava. They had two children a boy and a girl. In the years 2000 and 2003 she had a stroke. On both occasions she was treated at the Northern District Hospital (NDH) in Luganville, Santo. She recovered and returned to Motalava. Her husband left her in 2001. In 2010 her son had an injury to his jaw and they sought treatment in Santo where they were referred by the NDH to Vila treatment. They came to Vila and resided with a Mary Kaukare and her family at freswota 4 area. Her daughter had been residing with Mrs Kaukare's family since 2009. Following her son's treatment, she did not return to Motalava as Mrs Kaukare asked her to be her house girl and she accepted the offer. She lived with Mrs Kaukare from 2010 to 2011.
7. Sometime in 2011 she received a call from the accused that he was coming to Vila for a conference to be held at Blue Wota Resort. When the accused called her again he told her he had arrived with his delegation from Tanna and they were at the Blue Wota Resort. He called around 10 pm to say they had arrived late and their food was delayed so he enquired of her if they had some left over food as he was hungry. She agreed they had some left over food and he told her he was on his way. After he arrived he called her by phone that he was at the gate



around 11.00 pm. She then went to the gate to find out from the accused whether he will take his food as take away or eat inside the house. He indicated he was not going to enter the house.

8. It was dark as there was no light. He was standing close to her when he quickly approached and grabbed her right hand and pulled her inside an empty container sitting near the gate. She tried calling for help but he held her tightly to him then removed her skirt and panty and bend her over and inserted his penis into her anus. He continued having sex with her through her anus until she excreted and faeces and blood started flowing out. He continued for about 30 minutes or half an hour. She said during the act her anus was sore. He then turned her over pushed her down to lie on her back then had vaginal intercourse with her. Meanwhile blocking her mouth. They were both covered in faeces and blood and after he finished he told her *'yu save road now mi jas mek save gud yu from yu givim yu long man Ambae.'*
9. She told him she will report the matter to Mrs Kaukare and her husband. The accused replied that if she did she will be killed like her two deceased mothers and that her family will die like dogs. After saying that he took a piece of calico and wiped the faeces and blood from his body then returned to Blue Water Resort. She said everybody in the house was asleep when the incident happened. She had a shower and cleaned herself but the flow of faeces continued uncontrollably. She said this is continuing to the present day and now has to use napkins or toilet paper each day to trap the faeces.
10. She saw the accused again after the conference when the accused and his family attended Mrs Kaukare's house for dinner. On that occasion the accused told her that he will take her daughter Donna Towbah to replace her and to live with his family on Tanna. She did not agree to let her go but the accused threaten to kill her like her two deceased mothers. She was afraid and angry but reluctantly accepted a calico and a mat in exchange for her daughter whom the accused renamed Donna Kati. She did not report the matter earlier out of fear of being killed. In 2013 she wanted Donna to come and assist her but was told by the accused's family that Donna was not coming back and she will be given a piece of land instead and they assaulted her. The land was never given. In 2014 she made a Police report and gave it to one Lily Joel. When she followed up in 2016 she found out that the report was lost and she made another report. She said the accused never said sorry. When the accused was served with the Police complaint he used her daughter to tell her to withdraw the report but she refused saying justice must be done. She was cross examined on her evidence.
11. The accused opted to give evidence and was called. He is from Tanna. He confirmed the complainant is his 'custom wife' but came to Vila and married an Ambae man and went back



to the Banks islands. In 2009 he said the complainant called him to buy her a mobile phone which he did and sent it to her. In 2010 he led a group of pathfinder youth from Tanna to attend a camporee at Blue Water Resort on Efate. They arrived by ship at around 7.00 pm at night. He saw the complainant and her daughter at the wharf there to welcome them. They all caught the same bus and went to freshwater first to drop the complainant and her daughter before going to the campsite at Blue Water Resort. On arrival their food was ready for them. They had strict rules which did not permit him to leave camp that night. His wife flew in by plane at midday the same day of their arrival and was waiting for him at the campsite. After the program ended he took his family to Mrs Kaukare's house for a meal. There the complainant performed a small custom ceremony by giving the accused a fowl, a mat and calico in order for the accused to accept her daughter Donna in her place. That same night they left with Donna then returned to Tanna with her. He said in 2012 the complainant went to Tanna. She was there for some time and they celebrated Donna's birthday, Christmas and New Year together before the complainant returned to Vila. He was cross examined on his evidence.

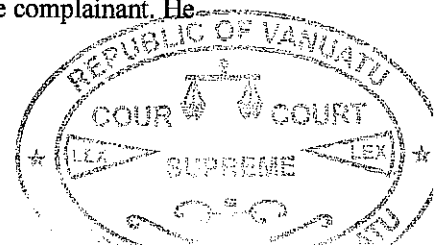
12. The next witness for the defence was Donna Kati. She was brought up with her little brother by her mother the complainant at Motalava when their father left them. She said her mother's sickness started in 2003 and she went to the hospital in Santo after being paralysed. She cared for her everyday and washed her clothes. She had the stroke two times and doctors could not diagnose the cause. In 2009 the complainant said she will send her (Donna) to Tanna to replace her and she (Donna) accepted the complainant's idea for a 'swap'. In 2010 the complainant sent her to Vila to continue her education and she stayed with Mrs Kaukare and her family. Later the same year the complainant and her little brother joined her. She was still caring for her mother at that time.

13. In December there was a camporee at Blue Water Resort where her father, the accused came to Vila to attend. She went with the complainant to greet them at the wharf. They all left together and after dropping her and the complainant at freshwater, the accused went to Blue water Resort where they remained until the program ended. During that time she stayed with the complainant at freshwater. She described Mrs Kaukare's yard as a small one with a house with two rooms. She stayed in one room with her brother and the complainant and Mrs Kaukare and her family in the other. She never saw the accused at freshwater. After the camporee ended, the accused and his family came to Mrs Kaukare's house at freshwater for dinner. During that occasion, the complainant announced her 'swap'. Later that night she followed the accused and her family to Blue Water Resort and left for Tanna the next day. In 2012 the complainant and her little brother went to Tanna. They stayed until they celebrated her (Donna's) birthday and Christmas and New Year before returning to Vila. She was cross examined on her evidence.



Discussion

14. The medical evidence **Exhibit PP1, PP2 and PP3** which were tendered by consent show that the complainant was traumatised by an incident of anal sexual intercourse resulting in uncontrollable flow of faeces on a daily basis.
15. The complainant's evidence is that the accused forced her by pulling her hand into an old container near the gate to Mrs Kaukare's house. He then forcibly removed her clothes, bend her over and inserted his penis into her anus. She did not agree but the accused held her tightly and blocked her mouth. He continued having sexual intercourse until faeces and blood started flowing out from the complainant's anus. They were both covered in faeces and blood. After the sex the accused wiped himself with a piece of cloth. He threatened her with death if she reported the matter then left the scene and returned to Blue Water Resort.
16. I find the complainant's evidence to be credible. She is a witness of the truth of what happened to her. When giving her evidence, she was clear, loud and confident never hesitating in recounting the details of the incident. As her mother was also from Tanna, and as per Tannese custom she identified the accused as her 'custom man'. They grew up together on Tanna before she came to Vila and married another man.
17. Her evidence is consistent with and corroborated to a certain extent by her medical reports. Her medical examiners noted that the non-stop flow of faeces was the result of forced anal sex. Nevertheless, although corroboration is not required, I remind myself of the dangers of convicting the accused on uncorroborated evidence.
18. Under cross examination, the complainant's evidence remained the same and unchallenged.
19. Following the opening of the prosecution's case, Mr Kapalu informed the Court that the accused will be raising an alibi defence. The prosecution objected on the basis that they were not informed in advance and leave was not sought to raise this defence until late in the proceedings. On that basis leave was refused.
20. The accused relied on a bare denial of the incident. He denies going to freshwater after arriving from Tanna and having sex with the complainant saying that the rules of their camporee did not allow him to leave the campsite therefore, he could not have had sex with the complainant. He



confirmed in his evidence that the complainant is his 'custom wife' but left Tanna and came to Vila and married a man from Ambae.

21. After the camporee, the accused agreed that he took his family to Mrs Kaukare's home at freshwater for a dinner and at that time the complainant gave her daughter to him as a 'swap'. He denies threatening the complainant for her daughter's 'swap'.

22. I reject the accused's bare denials and accept the complainant's evidence as the truth. I also reject Donna Kati's evidence as it is irrelevant to the issue of whether the accused had sex with the complainant without her consent.

Findings

23. I find that on the night in question the accused left the campsite at Blue Water Resort and came to Mrs Kaukare's house at freshwater. He called the complainant to the gate and pulled her into an empty container and had anal sex with her as revenge for marrying another man from Ambae instead of marrying him as her 'custom man'. The complainant did not consent to having sex with the accused. The accused forcefully pulled her and held her tightly and had sex with her. He blocked her mouth and continued having sexual intercourse with the complainant. After finishing before leaving, he threatened the complainant with death if she reported the matter. This caused the complainant to fear for her life and did not report the matter immediately. The accused did not reasonably believe that the complainant consented.

Verdict

24. I find the defendant guilty as charged.

DATED at Port Vila this 2nd day of September, 2022

BY THE COURT

Dudley Aru
Judge

