

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

Criminal \_  
Case No. 23/1251 SC/CRML

PUBLIC PROSECUTOR

v

DAVID JURIN WELWEL

Date of Trial: 11 October 2023  
Before: Justice V.M. Trief  
In Attendance: Public Prosecutor – Ms M. Meltebury  
Defendant – Mr K.S. Amos  
Date of Decision: 12 October 2023

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VERDICT

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A. Introduction

1. The accused David Jurin Welwel pleaded guilty to escape (Charge 3) and a *nolle prosequi* was entered as to the abduction charge (Charge 2). This matter proceeded to trial as to the charge of sexual intercourse without consent (Charge 1).
2. Without opposition to the Prosecution's application, the Court was closed to enable its main witness the complainant to give evidence as she is very shy and did not feel secure enough to give her evidence otherwise.
3. This is the verdict.

B. Law

4. The charge of sexual intercourse without consent has the following 3 legal ingredients which must be proved in order for a conviction to be entered:



- That on 13 May 2023, sexual intercourse, as defined in section 89A of the *Penal Code* [CAP. 135], took place between Mr Welwel and the complainant Frenda Johnwell; **and**
- That Ms Johnwell did not consent; **and**
- That Mr Welwel knew there was no consent or did **not** believe on reasonable grounds that Ms Johnwell was consenting at the time that the intercourse occurred.

5. Section 89A of the *Penal Code* provides as follows:

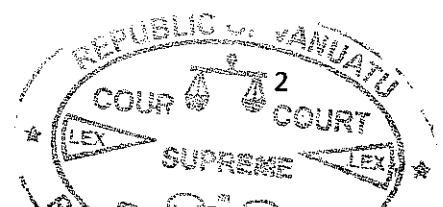
89A. For the purposes of this Act, **sexual intercourse** means any of the following activities, between any male upon a female, any male upon a male, any female upon a female or any female upon a male:

- (a) the penetration, to any extent, of the vagina or anus of a person by any part of the body of another 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 by another person, except if that penetration is 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 of the activities defined in paragraph (a), (b), (c) or (d) upon the body of the person who caused or permitted the activity.

6. The Prosecution had the onus of proof and was required to establish the allegations beyond a reasonable doubt before a finding of guilt could be made in respect of the charge. Mr Welwel was not required to establish anything.

7. I reminded myself that if I were to draw inferences, they could not be guesses or speculation but had to be logical conclusions drawn from other properly established facts. Further, if more than one inference was available, the inference most favourable to the defence must be drawn.

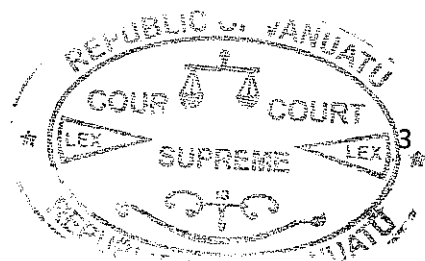
8. I assessed the credibility and accuracy of a witness' evidence not only by how the witness appeared in Court but also by the consistency of accounts. I looked firstly for consistency within a witness' account. Secondly, I looked for consistency when comparing that account with the accounts of other witnesses, and also when comparing witnesses' accounts with relevant exhibits. I also had regard to the inherent likelihoods of the various situations then prevailing.



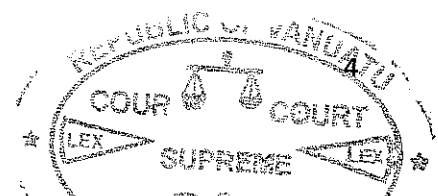
9. These factors all impacted on my findings of facts.

C. The Evidence

10. The **agreed exhibits** were Mr Welwel's Police statement [**Exhibit P1**] and the arresting Police officer's statement [**Exhibit P2**].
11. I **heard** evidence from the complainant **Ms Johnwell**. She lives with her mum at Pankumu River at Tisman area on Malekula. She does not go to school; she stays with her mum and helps her mum at home.
12. On Friday 12 May 2023, she stayed at a big sister's house. Early the next morning, she left to go to her house to get her clothes to go to church as it was the Sabbath. She walked past Mr Welwel's house and did not see anyone. She got to the place called "Rodnasurr" when she heard someone call out. It was Mr Welwel who is a father of hers. From her sister's house to Rodnasurr is about from the Lakatoro Court House to the Lakatoro Market House. Mr Welwel told her that he would walk with her to the Mormon Church, which is about from the Lakatoro Court House to the corner before the road tracks downhill to Wilkins Stadium.
13. She did not say anything to Mr Welwel. When they got to the Mormon Church, he told her to follow him to fetch palm tree leaves. She replied that she could not follow him as it was her Sabbath so she must hurry to get her clothes for church. He insisted that she must follow him to go get palm leaves. He said, "Please you must follow me to get palm leaves" (*'Plis, yu mas folem mi yumi go from leaf blo palm tree ia'*). She felt forced to follow him.
14. They went down a path into some bush where lots of palm trees grow. He was walking first and she behind. She pointed out a palm tree leaf on the ground to Mr Welwel but he said it was not good but to look for one that had just recently fallen. He was walking towards a banyan tree (*'stamba blo nabanga'*) and she turned back to return to the main road. As she was walking back, he walked up behind her, took off her clothes, pulled his lower clothing down halfway and put his private part into her, which was painful, and he did so halfway (she was visibly distressed when she said this and then started biting on her knuckles). She said that Mr Welwel put his private part into *'kok blo mi'*. Mr Welwel did not say anything to her when he did this. She did not call out; she was frightened he would do something even worse to her.
15. This was the first time for this to happen to her. After Mr Welwel removed himself from her, she put her clothes back on, then he held onto her arms and legs, and threw her onto the road (*'stonem mi I go lo rod'*). He told her that she must not tell her family what he had done. Then he left.

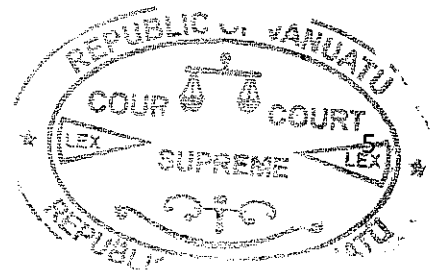


16. She went to her mum's house at Pankumu River. She did not say anything to her mum, but swam in the river, changed and went to church. It was too hard to tell her mum so she told her big sister Priscilla. At lunchtime her sister served lunch but she could not eat as she did not feel good in her body. At night, she told Priscilla that when she left the house that morning, she came across Mr Welwel on the road. She thought he would walk her only to the Mormon Church but when they got there, he said the two of them would go and get palm leaves. They went down a path into the bush. She pointed out a palm leaf to him but he said it was not good; to look for one that was recently fallen. He was walking on but she turned around to come back but he followed her, took off her clothes, pulled his clothes down halfway and put his private part into 'kok blo mi.' Even after she told her sister Priscilla, she could not fall asleep.
17. In cross-examination, Ms Johnwell agreed that she left her sister's house in the morning to return home to get her clothes for church, that Mr Welwel called out to her on the road, that he walked with her to the Mormon Church then forced her to follow him to fetch palm leaves. She stated that Mr Welwel is a father of hers therefore she never thought he would do this kind of thing to her. It was her first time – she did not think something like this would happen to her. She said that she told him she could not follow him as it was her Sabbath but he forced her to follow him to go get palm leaves. He was heading for a banyan tree and she turned back because she knew it was her Sabbath and she was hurrying to get to church for the Youth and Pathfinders Open Day.
18. She agreed that then Mr Welwel walked up behind her, took hold of her and took off her clothes. She said that she did not call out as she was scared of what he would do to her. It was put to her that Mr Welwel did not remove her clothes. She replied, "No! He removed my clothes" (*No! Lo time ia, hemi karem aot klos blo mi.*) She repeated that Mr Welwel was heading towards the banyan tree and she hurried back towards the road, but Mr Welwel came up behind her, took hold of her hands, took off her skirt and her panty and pushed his lower clothing down halfway. She denied stopping to urinate on their way to find palm leaves. She denied saying anything to Mr Welwel. There are houses in that church area but there was no one around as it was too early in the morning. She stated that Mr Welwel is not her brother-in-law or uncle, he is a father of hers and she did not think he would do something like this to her. It was put to her that this was not the first time she had sex with Mr Welwel. She replied, "No, it was first time!" (*No, hemia fes time!*). She repeated that Mr Welwel is not her brother-in-law or uncle, she calls him her father. It was her first time and she did not agree with what he did to her.
19. There was no re-examination.
20. I accepted Ms Johnwell as a truthful and accurate witness and accept her evidence. Her evidence did not deviate in cross-examination from her original account. She referred throughout her evidence to Mr Welwel's penis as his 'private part'. She

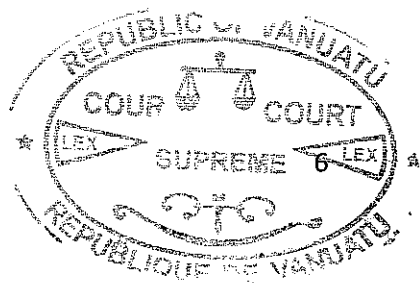


referred twice in her evidence to her vagina as 'kok blo mi'. Ms Johnwell has not attended school therefore I consider that that was the extent of her vocabulary to describe their body parts and the sexual act that she was subjected to. She was not challenged on either description of Mr Welwel's penis or her own vagina. It was obviously a harrowing experience recounting what had happened but Ms Johnwell took time when she needed to and gave her evidence. Her evidence had the ring of truth to it.

21. The second Prosecution witness I **heard** from was **Priscilla Susurup**, who is from Tisman area. She deposed that on Friday 12 May 2023, Ms Johnwell stayed overnight with her. Her clothes are too big for Ms Johnwell to wear; Ms Johnwell told her that when she woke the next morning, she would walk home to get her clothes for church. The next morning, she (Ms Susurup) had already woken although it was not yet fully daylight and she heard Ms Johnwell open the door and leave.
22. When Ms Johnwell returned around 9am, they were already at Sabbath School at church. Ms Johnwell did not come and sit with them but sat on her own outside. They went home to bring food to share at the combined lunch at church but Ms Johnwell and Ms Susurup's elder son said they did not want to eat lunch at church. So she (Ms Susurup) said they would just eat lunch at home. After they had eaten, Ms Johnwell lay down on the mat but could not settle and said that her stomach was sore. She gave Ms Johnwell some Panadol, she swallowed the Panadol then slept. In the afternoon, they all went back to church. Around 4pm, they came home, had dinner, and again Ms Johnwell was not settled. That night, Ms Johnson looked like she was worrying about something and could not fall asleep on the mat and said that her stomach was sore (*'hem olsem se I no settle – tingting blo hem I wok, I wok afta I silip ia I tantanem hemo nomo lo mat, I talem se bel blo hem I sore lo naet ia.'*) Ms Susurup took Ms Johnwell to a woman across the road to massage her. After the massage, they returned home and Ms Johnwell went to sleep in the sitting room even though Ms Susurup told her to sleep in the bedroom.
23. Later on when Ms Susurup went to go to sleep, she could hear that Ms Johnwell's breathing was loud. She saw that Ms Johnwell was holding onto her chest (demonstrating by holding onto the front of her tshirt) and was gasping as if winded. She asked Ms Johnwell what was wrong. Ms Johnwell's breathing continued like this so she asked her if something had happened to her in the morning when she left? She asked this because she saw how Ms Johnwell had behaved when she returned, she was unsettled and seemed frightened. Ms Johnwell that night looked very frightened and shaken. This was now around 9pm and Ms Johnwell just could not fall asleep. She was gasping for breath. She asked Ms Johnwell if a man had done something to her? She said, "No" but seemed very frightened so she (Ms Susurup) continued asking her if a man had done something to her and to not be frightened to tell her (Ms Susurup).



24. She asked Ms Johnwell 3 or 4 times and then Ms Johnwell started to cry. She cried and then said, "Yes". Ms Susurup asked her who the man was and Ms Johnwell said it was Mr Welwel. She asked her what Mr Welwel did to her. Ms Johnwell stayed quiet awhile, as if she was frightened, so Ms Susurup told her not to be frightened because she (Ms Susurup) was the right person to help her. She told Ms Johnwell that if a man had forced himself on her that she did not agree with, she had to say it out ('*Mi se, "Spos wan man I forcem yu we yu no agri lo hem, yu mas talem aot"*').
25. Then Ms Johnwell told her that that morning, she was hurrying along the road, Mr Welwel called out to her from his house but when she got to the Mormon Church, she saw that Mr Welwel was behind her. Then Mr Welwel said that the two of them would go and get palm leaves. They followed a path into the bush, Ms Johnwell saw palm leaves on the ground but Mr Welwel headed towards a banyan tree. She did not want to follow him but he broke a piece of wood and said if she did not follow him, he would beat her with the wood. He started walking again for the banyan tree and she turned back towards the road. She was walking quickly but heard someone behind her. She looked back and it was Mr Welwel. He held her off the ground (demonstrating with her hands outstretched), removed her clothes then had sex with her ('*mekem trabol lo hem*'). After he finished with Ms Johnwell, he told her not to tell anyone what he had done or he would kill her with black magic ('*Spos yu talem aot mi, bae mi kilim yu lo poison.*') After Ms Johnwell said this, she continued to be shaken, as if her breath would stop. Ms Susurup was so scared that they called Ms Johnwell's dad that night and then accompanied Ms Johnwell back to her mum and dad's house.
26. In cross-examination, Ms Susurup agreed that early in the morning on 13 May 2023, Ms Johnwell left Ms Susurup's house to get her clothes for church from her house, and that when she got to church she sat on her own outside. Then at lunchtime Ms Johnwell and her elder son did not want to eat lunch at church so they ate at home. She agreed that that lunchtime she noticed that Ms Johnwell was unsettled. And that later on, she asked Ms Johnwell many times what happened to her because Ms Johnwell seemed agitated. She agreed that Ms Johnwell told her then that Mr Welwel forced her (Ms Johnwell) to have sex with him. She also agreed that she was not present with Mr Welwel and Ms Johnwell, and she did not see anything that Mr Welwel did to Ms Johnwell.
27. In re-examination, Ms Susurup stated that she did not see what happened between Mr Welwel and Ms Johnwell but she saw that Ms Johnwell was unsettled when she arrived at the church and stayed away from them. Then she did not want to eat lunch at church even though she likes going to church to spend time with the Minister's wife. She did not know why Ms Johnwell did not want to eat lunch at the church but Ms Johnwell kept sighing out loud. Then at night, she questioned Ms Johnwell repeatedly when she saw that Ms Johnwell could not fall asleep.



28. Ms Susurup's evidence was supportive of Ms Johnwell's testimony, which added to her credibility and reliability. Her evidence constituted recent complaint evidence. I accepted Ms Susurup as a witness of truth and accept her evidence.
29. The final Prosecution witness I **heard** from was **Lynette Johnwell**, the complainant Ms Johnwell's mother. She lives at Demjen village at Pankumu River area. On 13 May 2023 morning, her daughter Ms Johnwell returned home, she spoke to her daughter but she did not respond to her. Her daughter went to swim in the river, changed, then went to church again without talking to them. That is not normal behaviour by her daughter; she will stand still and respond to her mother. But on that day, her daughter did not speak to her.
30. After church, Mrs Johnwell and her other 2 daughters waited for her daughter Ms Johnwell at Pankumu River, and she sent one of her daughters to tell Ms Johnwell to come but she did not. So Mrs Johnwell thought that Ms Johnwell would sleep again at Ms Susurup's house and they left Pankumu River and went home to Demjen. The next morning, a sister of hers told her that last night, Ms Susurup brought Ms Johnwell home and said what Mr Welwel did to Ms Johnwell. For Mrs Johnwell, this explained Ms Johnwell's behaviour the day before and that she was frightened so she stayed with Ms Susurup.
31. In cross-examination, Mrs Johnwell confirmed her account and that her sister told her what happened to Ms Johnwell. She agreed that she was not present and did not see anything that Mr Welwel did to her daughter Ms Johnwell. She stated that she was not with them but from her daughter's behaviour, she realised that something had happened to her daughter. She agreed that her daughter's reaction made her think that something had happened to her daughter. She stated that she was told that Mr Welwel raped her daughter but was not told more than that; it is for Ms Susurup to say.
32. There was no re-examination.
33. Mrs Johnwell's account was consistent with Ms Susurup's account in that they each related their observations of Ms Johnwell's uncharacteristic behaviour on 13 May 2023. I accepted her as a witness of truth and accept her evidence.
34. **Mr Welwel** elected to remain silent. I did not draw any adverse inference from that.
- D. Discussion
35. Ms Johnwell's evidence was that Mr Welwel inserted his penis into her vagina in the early morning on 13 May 2023 and that he did so halfway. She was not challenged as to her description of their body parts in recounting that harrowing experience. Mr Welwel called to her on the road, then insisted and forced her to follow him to find palm leaves even though she said that she could not follow him as it was her Sabbath

so she must hurry to get her clothes for church. He held her hands, removed her clothes and inserted his penis halfway into her vagina. After that, she put her clothes back on then he held her hands and legs and threw her onto the road. Then he told her not to tell her family what he had done. He did not ask Ms Johnwell to have sex with him. Her evidence was she did not consent to what Mr Welwel did to her. In the circumstances, Mr Welwel could not have believed on reasonable grounds that Ms Johnwell was consenting at the time that the intercourse occurred.

36. In Ms Susurup's evidence, she related how unsettled Ms Johnwell was on her return, sitting away from them at church, then saying at lunchtime and at night that her stomach was sore, gasping for breath, being very frightened until finally she told Ms Susurup what Mr Welwel did to her that morning. Mrs Johnwell's evidence was that her observation of her daughter's behaviour confirmed for her that something had happened to her daughter. I infer from Ms Susurup and Mrs Johnwell's evidence that Ms Johnwell was very frightened and traumatised as a result of what Mr Welwel did to her.

37. Charge 1 has been established beyond reasonable doubt.

E. Result

38. Mr Welwel is convicted as charged (Charge 1).

**DATED at Lakatoro, Malekula this 12<sup>th</sup> day of October 2023  
BY THE COURT**

  
.....  
Justice Viran Molisa Trief

