

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

Criminal
Case No. 23/1038 SC/CRML

PUBLIC PROSECUTOR

v

MICHELLE DANIEL

Date of Trial: 7 May 2024
Before: Justice V.M. Trief
In Attendance: Public Prosecutor – Mr S. Blessing
Defendant – Mr B. Livo
Interpreter: Ms J. Nicol
Date of Decision: 4 June 2024

VERDICT

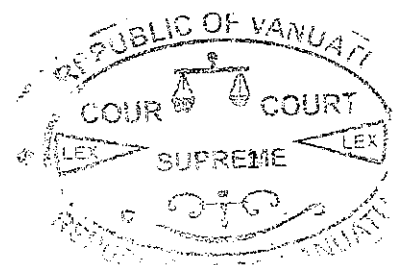
A. Introduction

1. This matter proceeded to trial on a charge of attempted sexual intercourse without consent (Charge 1) and two charges of act of indecency without consent (Charges 2 and 3) against the accused Mr Michelle Daniel.

2. This is the verdict.

B. Law

3. The charge of attempted unlawful sexual intercourse without consent alleges offending contrary to ss 28, 89A(a), 90 and 91 of the *Penal Code* [CAP. 135]. Section 28 of the *Penal Code* provides as follows:



28. (1) *An attempt to commit a criminal offence is committed if any act is done or omitted with intent to commit that crime and such act or omission is a step towards the commission of that crime which is immediately connected with it, or would have been had the facts been as the offender supposed them to be.*
- (2) *An attempt shall be committed notwithstanding that complete commission of the offence was impossible by reason of a circumstance unknown to the offender.*
- (3) *Acts committed in mere preparation of an offence shall not constitute an offence.*
- (4) *The commission of an attempted offence shall constitute an offence punishable in the same manner as the offence concerned.*
- (5) *The criminal responsibility of a person committing an attempted offence who voluntarily withdraws from the attempt before the offence has been committed shall be diminished.*

4. Section 89A(a) 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*

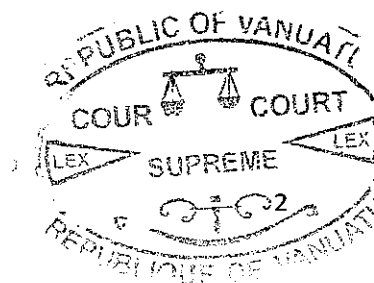
5. Sections 90 and 91 of the *Penal Code* provide as follows:

90. *Any person who has sexual intercourse with another person –*
- (a) *without that person's consent; or*
- (b) *with that person's consent if the consent is obtained –*
- (i) *by force; or*
- (ii) *by means of threats of intimidation of any kind; or*
- (iii) *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; or*
- (vi) *by the effects of alcohol or drugs; or*
- (vii) *because of the physical or mental incapacity of that person;*

commits the offence of sexual intercourse without consent.

91. *No person shall commit sexual intercourse without consent.*

Penalty: Imprisonment for life.



6. The charge of attempted sexual intercourse without consent therefore has the following elements which must be proved in order for a conviction to be entered:

- That on 23 December 2022, Mr Daniel deliberately committed an act on the person of the complainant; **and**
- With intent to commit the crime of sexual intercourse without consent; **and**
- That act was a step towards the commission of that crime which is immediately connected with it; **and**
- Without the complainant's consent; **and**
- That Mr Daniel could not have had a reasonable belief at the time of the alleged offending that the complainant consented to the act.

7. Mr Daniel is also charged, in the alternative, with act of indecency without consent contrary to para. 98(a) of the *Penal Code*:

98. *A person must not commit an act of indecency on, or in the presence of another person:*

(a) *without that person's consent; or*

...

Penalty: Imprisonment for 7 years.

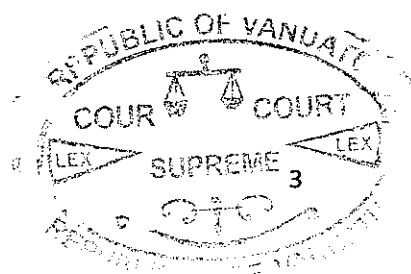
8. The elements of the charge of act of indecency without consent are that on 23 December 2022:

- Mr Daniel deliberately committed an act of indecency upon the complainant; **and**
- The act was without the complainant's consent; **and**
- That Mr Daniel could not have had a reasonable belief at the time of the alleged offending that the complainant consented to the act.

9. 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 charges. Mr Daniel was not required to establish anything.

C. Admitted Facts

10. The Prosecution and the Defendant filed Formal Admissions pursuant to s. 84 of the *Criminal Procedure Code* [CAP. 136] ('CPC') [**Exhibit P1**] thereby admitting the following facts:



Personal details of the complainant

- a) The complainant is KH (name suppressed).
- b) She is between 16 and 17 years old.
- c) Her mother is ST (name suppressed).
- d) She and her mother are from Australia.
- e) She currently resides with her mother in Queensland, Australia.

Personal Details of the Complainant's Family

- f) ST currently resides in Queensland, Australia.
- g) She is 44 years old.
- h) Her father is KT (name suppressed).
- i) KT is the grandfather of the complainant.
- j) In 2022, KT's place of residence was at Bellevue Estates, Port Vila, Efate. He has a swimming pool at his residence.
- k) KT is the Managing Director and owner of a farm business on Efate island.

Personal Details of Defendant

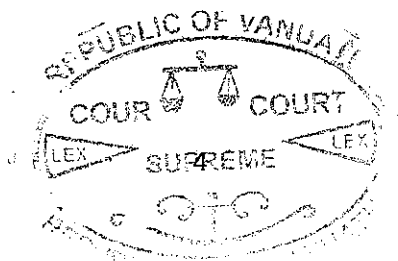
- l) The Defendant is Mr Michelle Daniel.
- m) He is 31 years old.
- n) He is from Toak, South East Ambrym.
- o) From 1 January 2022 to 23 December 2022, Mr Daniel was employed by KT.

The Farm business Employees

- p) In 2022, Mr Junior Bell was an employee of the farm business.
- q) In 2022, Ms Jennifer Charlie was an employee of farm business.

Events of 23 December 2022

- r) The complainant came to Vanuatu with her mother for the Christmas holidays.
- s) They arrived in Vanuatu on 13 December 2022 and left on 26 December 2022.
- t) In the evening of 23 December 2022, KT hosted a party at his Bellevue residence.
- u) KT invited his employees to the party, including Mr Junior Bell, Ms Jennifer Charlie and Mr Daniel.



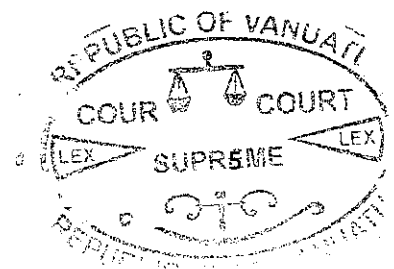
- v) Mr Bell, Ms Charlie and Mr Daniel arrived at KT's house while the complainant and KT were in town shopping.
- w) Sometime after the party started, Mr Daniel and other persons who were there started drinking alcohol.
- x) Sometime after the party started, Mr Daniel, Mr Bell, ST and the complainant were in the swimming pool and socializing.
- y) The complainant was wearing a white t-shirt with a logo on the front of it and black swimming shorts which were made from polyester and elastane.
- z) During that time, Ms Charlie took a photo of the defendant, Mr Bell, ST and the complainant in the swimming pool.
- aa) ST left the pool and went into the house.
- bb) Mr Bell also left the pool and went to the toilet.
- cc) Mr Daniel and the complainant remained in the pool near each other.
- dd) The complainant left the pool. She went to see her mother ST in the house.
- ee) The complainant became upset and was crying to her mother.
- ff) ST approached Mr Daniel.

Defendant's arrest and interview

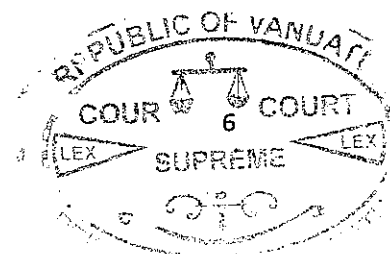
- gg) Mr Daniel was arrested on 23 March 2023 and interviewed under caution on the same day.

D. The Evidence

- 11. Only admissible relevant evidence should be taken into account in determining the outcome of the trial. The Prosecution and defence witnesses have equal value, and each witness is to be considered on his or her own merits.
- 12. Witnesses' demeanour was a small part of my assessment of the witnesses. I also looked for consistency within the witness' account; consistency with other witnesses' accounts; consistency when comparing the witness' account with relevant exhibits; and considered the inherent likelihood, or not, of the witness' account.
- 13. 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. Adverse inferences are to be drawn only if they are the only available inference to be drawn. Further, if more than one inference was available, the inference most favourable to the defence must be drawn.

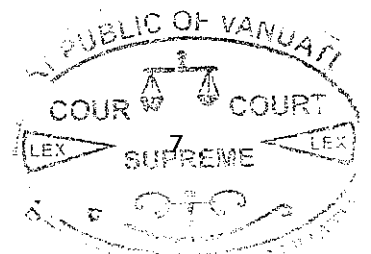


14. These factors impacted on my findings of facts.
15. The Police witness statements of the following were tendered by consent:
 - a) Junior Bell dated 17 May 2023 [Exhibit P2];
 - b) Jennifer Charlie dated 17 May 2023 [Exhibit P3]; and
 - c) Mr Daniel's Record of Interview dated 23 March 2023 [Exhibit P4].
16. The following photographs were tendered by the Prosecution without objection:
 - a) A photograph showing Mr Daniel, Mr Bell, ST and the complainant in the swimming pool at KT's residence on 23 December 2022 [Exhibit P5];
 - b) A photograph of the swimming pool with a excavator on the left hand side [Exhibit P6];
 - c) A photograph of the swimming pool with the white wall of the house on the right hand side [Exhibit P7]; and
 - d) A photograph of the swimming pool with very low water level and a water hose pipe towards the front of the photograph [Exhibit P8].
17. The Prosecution called two witnesses – the complainant and her mother. They appeared by video link from Queensland, Australia. The latter apologised in advance for the bad language that she would relate to the Court.
18. The complainant **KH** was 16 years old at the time of the alleged offending. She stated that on 23 December 2022, she and some of the adults Michelle Daniel, Junior Bell, a man named William and her mum went into the swimming pool. They were all swimming and talking around the pool. Her mum and Junior got out of the pool. Junior went to the shallow end of the pool. It was just her and Michelle at the deep end of the pool. He grabbed her right wrist and said, "Go and steal beer." She laughed at him because she thought he was joking. Then he slid his left hand under her right buttock cheek and squeezed her right buttock cheek, then slid his hand under her vagina and used his middle finger and his ring finger to try to penetrate her vagina. She moved away and swam to the shallow end of the pool. She got out of the pool and went to find her mother to tell her what happened.
19. She told her mum that Michelle had just touched her inappropriately. She did not have any type of relationship with Michelle prior to 23 December 2022. Her mum told her to go inside and that she would deal with it. KH went into her bedroom and she could hear yelling outside but she couldn't make out what was being said.
20. In cross-examination, KH stated that in the pool, she and her mum talked with Michelle about what life was like in Australia. She stated that Junior got out of the



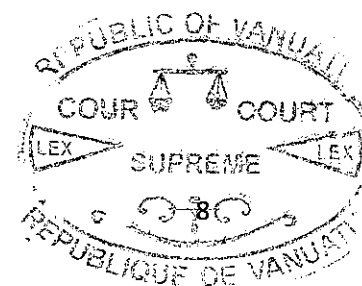
pool and then dived back in so he was nowhere near the incident. She agreed that when Michelle grabbed her right wrist, that he was still in the pool. KH denied (shaking her head) that after that, she left the pool to go get a beer. She did not agree that Michelle only touched her right wrist – she stated that he did touch other parts of her body. She denied that if Junior was in the pool, that he would have seen what Michelle did to her. She stated that Junior dived into the pool and she saw him dive in, but he would not have seen the incident. She denied that the pool was just a small pool, not a big pool. She denied that Junior would have heard her call out if Michelle had touched her buttock.

21. She stated that after Michelle touched her inappropriately, she left the pool. She was crying when she left the pool. She vehemently denied that she had made up the story that Michelle had touched her buttock (“No!”). She denied that she, her mum and her grandfather made up the story to have Michelle arrested and in trouble. She stated that she has not heard anything about her grandfather arguing with Michelle over a parcel of land near the farm business because she has not spoken to her grandfather since September 2023.
22. She agreed that her statement to the Police is dated 1 February 2023. It was put to her that that was a whole month after the alleged incident. She said no, she made a statement on 26 December 2022 then they flew back to Australia; the Police contacted them afterwards to make a more detailed statement. She stated that she does not know what happened to her first statement – all she knows is that she had to write another statement on 1 February 2023. In February 2023, she was still talking to her grandfather. She denied that it was a made-up story that Michelle touched her buttock and wanted to touch her vagina. She denied that those were stories made up in February 2023. It was suggested that those were stories made up after her grandfather spoke to her. She replied that they were not made up – it happened.
23. In re-examination, KH explained that Junior would not have seen what happened because he was facing away from her and Michelle. He was about 5-7 metres away from them. They were at the deep end of the pool and Junior was at the shallow end.
24. The complainant KH's account remained unchanged in cross-examination. It was put to her that she made up the story that Mr Daniel had touched her buttock and tried to touch her vagina. She firmly denied this. It was put to her that Mr Bell would have seen if Mr Daniel touched her in the manner she described. She denied that he would have; she said in re-examination that Mr Bell was facing away from them and was 5-7 metres away at the shallow end of the pool. I consider that even if Mr Bell was diving and underwater at the time, that it is inherently unlikely that he could see underwater for 5-7 metres' distance that Mr Daniel's hand was under KH's right buttock cheek. In any event, Mr Bell's whereabouts and whether or not he saw what KH alleged occurred is irrelevant. KH gave her evidence clearly and was consistent in her account. Her description that it was just her and Mr Daniel at the deep end of

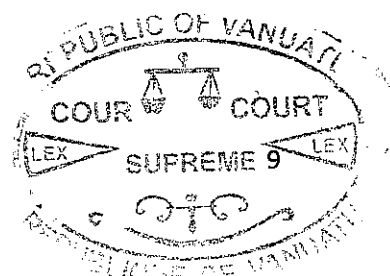


the pool is consistent with the admitted fact that she and Mr Daniel remained in the pool near each other and is consistent with the photographs in Exhibits P5-P8. I accepted KH as a truthful and accurate witness and accept her evidence.

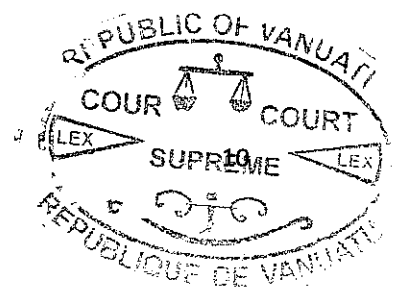
25. The complainant's mother **ST** stated that on 23 December 2022, she, her daughter KH, Junior Bell, Michelle Daniel and a man named William were all at the deep end of the pool. She left the pool and KH, Michelle and Junior were still at the deep end. She went to the bathroom and then to get more beers for herself, Junior, Michelle and William. She came outside onto the patio with the beers and KH came in crying hysterically. She asked KH what was wrong and KH replied that Michelle tried to touch her vagina, so she took KH inside. She put the beers down on the coffee table and asked KH to tell her exactly what happened.
26. ST stated that KH said to her that when she (ST) got out of the pool, Junior stood up and dived, to go to the shallow end of the pool. KH then said, "Michelle grabbed my wrist and asked me to steal a beer." She said she just laughed that off because she thought he was joking. Then she said that Michelle put his hand under her bum and squeezed her bum cheek then tried to put his fingers in her vagina. She (ST) then told KH to wait inside and she would deal with it.
27. She went back outside and Lorina was coming towards her and she told Lorina what happened. Then she kept walking and Junior was walking towards her so she told him what happened. She asked him where Michelle was because she couldn't see him in the pool. Junior told her to take Lorina with her to go and find Michelle.
28. They went down the side of the pool, near the house and then walked down the driveway towards the back yard. She could see Michelle and William smoking in the back yard. She and Lorina walked under the house, under the patio area and she asked Lorina to call Michelle up.
29. ST stated that Michelle and William came up to where she and Lorina were standing and straight away, Michelle put his hands up like he was praying (demonstrating with her hands the positioning of his hands) and said, "*Mi sori Ma'am, mi sori we mi sori Ma'am*" ('I am sorry Ma'am, I am very sorry Ma'am'). She started yelling at Michelle, saying, "I don't give a **** how sorry you are," (ST starting crying at this point), "What gives you the right to touch my daughter?" and he just kept saying with his hands up as if he was praying, "*Mi sori Ma'am, mi sori Ma'am*" ('I am sorry Ma'am, I am sorry Ma'am'). She told him to get the **** out of the house before she killed him and he just kept saying, "*Mi sori Ma'am, mi sori Ma'am*" with his hands up as if he was praying. He just kept standing there so she kept yelling at him to get the **** out of the property before she killed him. She also told him that he was fired from the farm business.



30. ST stated that Michelle then said something in Bislama and Lorina said to her that he needs to get his belongings out of the room that is under the house. She told him to hurry the **** up and get out and she walked upstairs and into where her father was asleep. She woke her father up and asked him if he had a handgun that she could use. He asked her what was going on and she told him that Michelle touched KH and he replied to get him off the property now. Then she walked out the front door and Michelle was standing by the excavator and she yelled at him again to get the **** off the property. Again he said, "*Mi sori Ma'am, mi sori Ma'am*" and she saw Lorina come out of the house. Lorina told her that she had his final pay for work, then Lorina gave it to Michelle. She yelled at him again and he eventually left after saying again, "*Mi sori Ma'am, mi sori Ma'am.*"
31. At 7.30am on 26 December 2022, she and her father went to the Police Station. One of the officers said he was going to get a female officer to talk to her. She told the female officer about the incident and that they were flying home that afternoon, and the officer said that she would come over to her father's house later that morning, before they left. The officer gave her a statement form and asked her to get KH to fill it in and she would complete it with KH when she came over to the house.
32. The female officer did not come to the house so at about 11.30am in the morning, she, KH and her father went to the Police Station again. They spoke to a different officer who was upstairs in the Station and he said he would contact them again. She and KH flew home that afternoon and then they did not hear back from the Police. On 1 February 2024, she contacted a Mr Robertson who emailed back copied to the Director CID and Commander South and then she emailed through new statements. They had to change it a few times to add in the words "This is true and correct" and sign it. Up until May, nothing had been done so then she contacted the Department of Foreign Affairs in Australia.
33. In cross-examination, ST stated that KH made a statement to the Police on 26 December 2022, they both did one on 1 February 2023 and after speaking to a prosecutor who wanted a statement with more detail, KH did one on 19 April 2024 and she did one on 22 April 2024. It was put to her that the only statement before the Court was the one dated 1 February 2023 which was around a month after the alleged incident. She said she could not agree as she couldn't see what was in Court today but the first statement to the Police was on 26 December 2022; she does not know what happened to that statement after they gave it to the Police.
34. She denied that her father told her about an argument that he had with Michelle in January 2023 at his farm. It was suggested to her that Michelle was saying, "*Mi sori Ma'am, mi sori Ma'am*" because she was shouting at him. She replied that he said that before she even said one word to him.
35. There was no re-examination.



36. ST's account was unchanged in cross-examination. It was consistent with KH's account in that she was the first person that her daughter told about what Mr Daniel (allegedly) did to her and what KH told her. Their accounts were consistent as to ST telling KH to stay indoors and she would deal with it, and then that ST yelled at Mr Daniel although KH could only hear yelling outside but could not make out what was being said. Their accounts were consistent that KH made a statement to the Police on 26 December 2022 then was asked later to make a more detailed statement. I accept ST as a witness of truth and accept her evidence.
37. The Defendant **Mr Daniel** was the sole witness for the defence. His boss asked him to go to the party at his house at Bellevue. He drank 2 lemon beers while in the swimming pool. He was in the pool with Junior, William, KH and her mum. It was the first time to meet KH and her mum. The mum was sitting on the edge of the pool with her legs in the water but she did not swim in the pool. The adults in the pool were drinking beer. He had only drunk half of his first bottle when KH told him that if he wanted another beer, to tell her and she would go and get it. He did not tell her to go for a beer, he just stayed quiet. She did not go for a beer for him. KH was just at the side of the pool, she did not swim in the pool.
38. Mr Daniel stated that KH told a story then her mum left and then William left. It was just him, Junior and KH left in the pool. He remembered her telling him to tell her if he wanted another beer, so he asked her to please get him another beer. She swam away and never came back. Then Junior's mum, which after the break he said was Lorina's mum, told them to get out of the pool – he does not know that woman's name. He went to look for his belongings but KH's mum came and yelled at him. She yelled at him that he must leave because her daughter was upset. He was asked, "Yu save from wanem hemi rao lo yu?" ("Do you know why she was yelling at you?") and he replied, "Yes". He said that he did not say anything to her.
39. He stated that in January 2023, KT organised a surveyor to survey the farm business boundary and they marked over into his (Mr Daniel's) yard. When he went to tell KT not to do that, KT said to him that you acted badly to my granddaughter so you must leave. He made a statement to the Police in March.
40. It was put to Mr Daniel in cross-examination that he said in Court that KH did not swim in the pool, that she did not leave the pool (only swam away) and that Junior's mum told him to leave the pool, but that he did not tell the Police any of these things. He replied, "No." It was put to him that the things that he told the Court but had not told the Police were all lies. He answered, "Mi no save" ("I don't know"). He agreed that after ST left and Junior swam to the shallow end of the pool, it was just him and KH at the deep end of the pool. He denied grabbing her right wrist and telling her to get him a beer. He agreed that he had taken an oath to tell the truth. He denied that after grabbing her right wrist and asking her to steal a beer, that he moved his hand

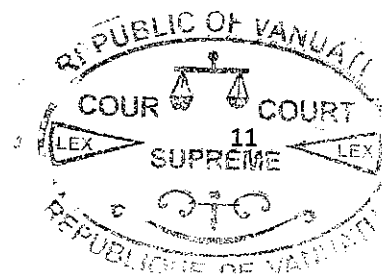


under her right bum cheek and squeezed it. He denied that he then moved his hand to her vagina and tried to penetrate it with his fingers. He denied that then he saw her cry. He agreed that after KH left the pool, he did not see her again before he left the premises.

41. He agreed that after he left the pool, sometime after that ST yelled at him. He denied that she had not even said a word to him yet when he put up his hands like he was praying and said, "*Mi sori Ma'am, mi sori Ma'am*". He did not remember her saying to him what the **** gives you the right to touch my daughter. He agreed she said to him that she would kill him. He agreed that his only response was, "*Mi sori Ma'am, mi sori Ma'am.*" He agreed that she yelled at him that he touched her daughter inappropriately. He agreed that he did not deny to her touching her daughter inappropriately. He agreed that she told him to leave the property. He agreed that he left without saying that he had not done anything wrong. He agreed that he was now saying to the Court that he was innocent but did not say that to ST at the time. He agreed that he and his family approached KT to say sorry, but denied that that was to apologise for touching KH inappropriately.
42. In re-examination, Mr Daniel confirmed that he did not understand the word, "innocent." He explained that he said, "*Mi sori Ma'am, mi sori Ma'am*" to ST because she was yelling at him. He explained his answer in cross-examination that he agreed that ST yelled at him that he touched her daughter inappropriately by saying that he agreed because she came over and yelled at him. He said that he said, "*Mi sori Ma'am, mi sori Ma'am*" because ST told him that her daughter was upset and crying.
43. Mr Daniel commenced his evidence saying that he was in the pool with Junior, William, KH and her mum but that ST did not swim in the pool, she was sitting on the edge with her legs in the water. Then later in his evidence, he said that KH was just at the side of the pool, she did not swim in the pool. However, when he related that he asked KH to please get him another beer, he said that she "swam away" and never came back. Then in cross-examination, he agreed that after ST left and Junior swam to the shallow end of the pool, it was just him and KH at the deep end of the pool. Mr Daniel was inconsistent within his own account whether KH swam in the pool or not, and his evidence that she did not swim in the pool was also contrary to the admitted facts which included that sometime after the party started, he, Junior Bell, KH and her mum were in the swimming pool and socializing. I conclude that Mr Daniel's evidence was contradictory and I cannot rely on it.

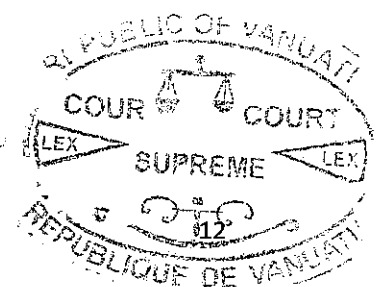
E. Discussion

44. It is proved from KH's evidence that on 23 December 2022, at Bellevue area, Mr Daniel pushed his hand under her right buttock and squeezed her right buttock cheek through her clothing, then moved his hand lower down and touched her vagina through her clothing using two of his fingers. I find that touching the underside of the



the underside of the complainant's right buttock and then squeezing her right buttock cheek through her clothing was an indecent act that Mr Daniel deliberately committed on her person.

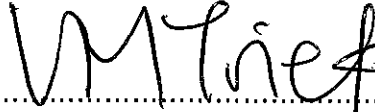
45. I also find on the complainant's evidence that she did not consent to these acts by Mr Daniel. She was a 16-year-old child that he had just met for the first time therefore Mr Daniel could not have had a reasonable belief at the time of the offending that the complainant consented to his indecent act on her person.
46. Charge 3 has been established beyond reasonable doubt.
47. I find on the evidence that Mr Daniel's act of touching the complainant's vagina through her clothing using two of his fingers was an indecent act that he deliberately committed on her person. She did not consent to this act by Mr Daniel. As she was a child who he had just met for the first time, Mr Daniel could not have had a reasonable belief at the time that she consented to his act.
48. Charge 2 has been established beyond reasonable doubt.
49. An act by a male upon a female, which is a step towards the penetration to any extent of the vagina of the female and which is immediately connected with it, is attempted sexual intercourse as defined in s. 28 and para. 89A(a) of the *Penal Code*.
50. Mr Daniel's acts in quick succession to touch the underside of the complainant's right buttock, to squeeze her right buttock cheek and then to move his hand lower down and touch her vagina through her clothing using two of his fingers were acts by Mr Daniel on her person.
51. Were these acts a step towards the penetration to any extent of the vagina of the female and which is immediately connected with it?
52. It is an admitted fact that the complainant was wearing a white t-shirt with a logo on the front of it and black swimming shorts which were made from polyester and elastane. I infer that by his acts, Mr Daniel touched the outside of the complainant's vagina but that her clothing prevented any possible *penetration* of her vagina. Accordingly, I consider that those acts by Mr Daniel were not a step towards the penetration to any extent of the complainant's vagina.
53. Mr Daniel's acts were intentional. I have found that he deliberately committed those indecent acts on the complainant's person. However, I am left with a doubt that he committed those acts with intent to commit the crime of sexual intercourse without consent as he could not have achieved penetration of her vagina by those acts.
54. Charge 1 has not been established beyond reasonable doubt.



F. Result

55. I return a verdict of guilty in respect of Charges 2 and 3, and Mr Daniel is convicted as charged.
56. I return a verdict of not guilty in respect of Charge 1. Mr Daniel is acquitted of that charge.
57. Mr Daniel has 14 days to appeal this decision.
58. All details leading to the identification of the complainant KH and/or her family members ST and KT are permanently suppressed.

**DATED at Port Vila this 4th day of June 2024
BY THE COURT**


.....
Justice Viran Molisa Trief

