

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

Criminal
Case No. 24/2697 SC/CRML

BETWEEN: PUBLIC PROSECUTOR

AND: SPENLY SALEMUMU
Defendant

Date of Trial: 18 - 20 February 2025
Submissions: 27 February 2025 (Prosecution), 10 March 2025 (Defence)
Date of Verdict: 26 March 2025
Before: Justice M A MacKenzie
Counsel: Ms R Siri for the Public Prosecutor
Mr R Willie for the Defendant (Via AVL in Santo)

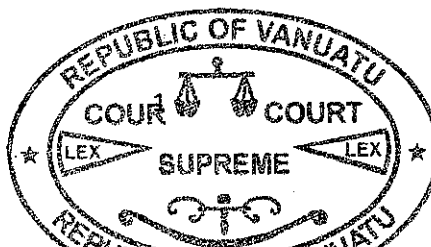
VERDICT

Introduction

1. Mr Salemumu faces two charges of sexual intercourse without consent contrary to ss 90(a) and 91 of the Penal Code [CAP 135].
2. Mr Salemumu was initially charged with one count of sexual intercourse without consent.¹ During the prosecutor's opening, two alleged incidents of rape were detailed. At the conclusion of her opening statement, I raised with the prosecutor that she had opened the case on the basis that there were two alleged discrete incidents of rape, but there was only one count of rape in the Information. I asked the prosecutor which alleged incident formed the basis of the charge. Initially, Ms Siri advised that the charge related to the alleged "cyclone incident" at the Lakatoro school. Shortly thereafter, she advised that in fact, the charge related to the first alleged incident which took place at her daughter's house. Mr Willie confirmed that was also his understanding.
3. I asked Ms Siri what, if anything, she wished the Court to do about the fact that there are two alleged incidents.² I said that the case could continue with one charge or

¹ As set out in the Information filed on 15 November 2024

² I also explained to Ms Siri that it is not the Court's role to give advice as to how to proceed with the prosecution case



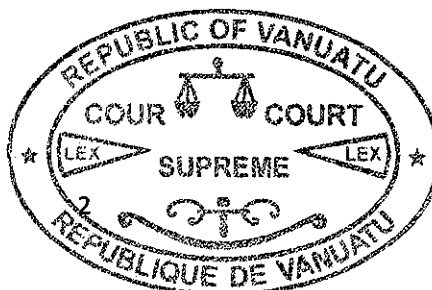
alternatively, if she did not know how to proceed, the Court could adjourn briefly for her to seek advice. Ms Siri elected to continue with the one charge, but when I expressed my reservation as to whether the latter incident was admissible as background evidence for the earlier incident, Ms Siri sought an adjournment.

4. Following the adjournment Ms Siri advised that she intended to file a new Information containing two charges. After the lunch break, Ms Siri filed an amended Information which included a second charge of sexual intercourse without consent. This related to the alleged events at the Lakatoro school. Mr Willie confirmed to the Court that he had no objection to a new or amended Information being filed.
5. Pursuant to s 146(4) of the Criminal Procedure Code ("CPC"), an Information may be amended with the leave of the Supreme Court. There is no explicit provision in the CPC relating to adding a charge, but amending an Information must include adding a charge. Factors relevant to whether to grant leave to amend an Information by adding a charge will include matters such as the charges fitting the proof, the nature and seriousness of the charge, any delay that might result, the interests of the complainant and the public interest, and very importantly, procedural fairness, which includes in this case, Mr Salemumu's right to a fair trial.³
6. The interests of justice point towards the granting of leave. This is a serious charge, and all along RD had said there was a second incident at the Lakatoro school. Mr Salemumu was aware right from the outset that there were two discrete alleged incidents of rape. They were detailed in RD's statement to police, and he was asked about both incidents when spoken to by police under caution. So, in that sense there was no prejudice to Mr Salemumu.
7. In terms of procedural fairness, and Mr Salemumu's right to offer an effective defence, Mr Willie needed some time to take updated instructions from Mr Salemumu. I offered an adjournment until Wednesday morning as another charge could impact on the defence. However, Mr Willie said he would be ready by 2pm, and did not seek an adjournment until the next day. When the matter was recalled at 2pm, Mr Salemumu was arraigned in relation to the second charge and entered a plea of not guilty.

Elements of sexual intercourse without consent (rape)

8. There are three essential elements of rape: *McEwen v Public Prosecutor* [2011] VUCA 32. They are:
 - a. That there was sexual intercourse. Sexual intercourse is defined in s89A of the Penal Code:

³ This is a non-exhaustive list



"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

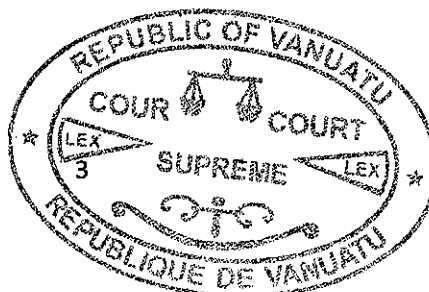
(d) the licking, sucking or kissing, to any extent, of the vulva, vagina, penis or anus of a person; or

(e) the continuation of sexual intercourse as defined in paragraph (a), (b), (c) or

(f) (d); or

(g) 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.

- b. That JD did not consent to the sexual intercourse. Consent means true consent, freely given by a person who is in a position to make a rational decision. Consent may be conveyed by words, by conduct, or by a combination of both. The material time to consider consent is when the sexual act takes place. RD's behaviour and attitude before or after the act may assist in deciding that, but it is not decisive. A person does not consent to sexual activity just because she or he does not protest or offer physical resistance to the activity. Consent cannot be inferred only from the fact that the person does not protest or offer physical resistance. There must be something more in the words used, conduct or circumstances (or both) for it to be legitimate to infer consent.
- c. That Mr Saleumu did not believe on reasonable grounds that RD was consenting at the time that the intercourse occurred. The critical question is whether at that time and in the particular circumstances I am sure that Mr Saleumu did not genuinely



believe that RD consented or that a reasonable person standing in his shoes would not have believed that RD consented? ⁴

Separate charges

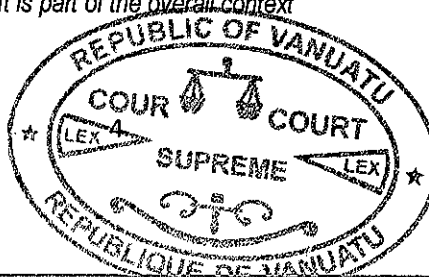
9. I must determine each charge on the basis of the evidence that relates to that charge. I must consider each charge separately and come to a separate decision on each. I may reach different verdicts on different charges.

Brief background

10. RD and Mr Salemumu are related and are neighbours. According to RD, Mr Salemumu calls RD "aunt". Mr Salemumu is also her chief. In 2023, RD was aged 54 years. She is now 55 years. Mr Salemumu is aged 65 years, lives at Malwa Bay and is the chief of the area. Prior to the alleged events in late 2023, Mr Salemumu regularly gave RD massages.
11. The prosecution case is that Mr Salemumu had nonconsensual sexual intercourse with RD on two separate occasions in the latter part of 2023. The first time was when Mr Salemumu gave RD a massage at her daughter Annie's home in Lakatoro. The second time was at the Lakatoro school where people had taken shelter because of a cyclone.
12. There was a third time when Mr Salemumu asked to have sex with RD when she was in the toilet at her daughter's home. But she pushed him away and ran off.⁵ For the sake of completeness, Mr Salemumu denies asking RD to have sex.
13. The defence case is that RD and Mr Salemumu did engage in sexual intercourse when Mr Salemumu massaged her at her daughter's home, but that it was consensual. In relation to the incident alleged to have taken place at the Lakatoro School, Mr Salemumu's position is that he did not have sexual intercourse with RD. That it could not have occurred because he had drunk kava, returned to the school and went to sleep. Further, there were a lot of people in close proximity and there were lights on.
14. When Mr Albert Delay, RD's husband came to Lakatoro, RD told Mr Delay about the issues with Mr Salemumu. They then went to North West Malekula. While there, Mr Salemumu visited them and apologised to Mr Delay. He also gave Mr Delay VT 5000 and RD VT 2000. Rd, Mr Delay and Mr Salemumu all agree that Mr Salemumu apologised to Mr Delay for having sex with RD. However, the prosecutor and Mr Willie place different emphases on the reason and significance of the apology.

⁴ See *Ishmael v Public Prosecutor* [2005] VUCA 1 and *McEwen v Public Prosecutor* [2011] VUCA 32

⁵ There is no charge relating to this incident. It is part of the overall context



15. Both RD and Mr Delay disavow reporting the incidents to the police. As I will explain, Mr Delay articulated why that was so during his evidence.

Submissions

16. At the conclusion of the evidence, I gave counsel an opportunity to file written submissions, which I have considered and taken into account.

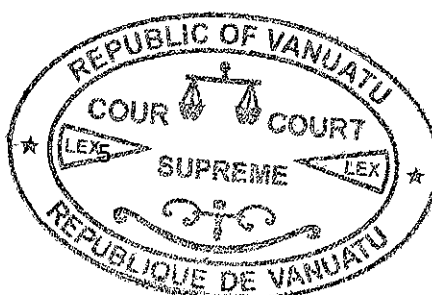
Burden and standard of proof

17. The Prosecution has the onus of proof and is required to establish the elements of each charge beyond reasonable doubt before a finding of guilt can be made in respect of the charges. This excludes consideration of any possibility which is merely fanciful or frivolous.⁶
18. Proof beyond reasonable doubt is a very high standard of proof which the Prosecution will have met only if, at the end of case, I am sure that Mr Salemumu is guilty. What then is reasonable doubt? Reasonable doubt is an honest and reasonable uncertainty about Mr Sandy's guilt after giving careful and impartial consideration to all the evidence.
19. Mr Salemumu is not required to establish anything. He is presumed innocent. The presumption of innocence means that he does not have to give or call any evidence and does not have to establish his innocence. If at the end of the trial, any reasonable doubt exists as to his guilt, he will be deemed to be innocent of the charge and will be acquitted.
20. This was confirmed to Mr Salemumu prior to the prosecution opening its case. I read the statement required by s 81 of the Criminal Procedure Code out to Mr Salemumu in English. It was translated into Bislama.

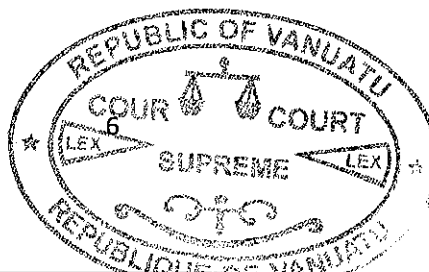
Approach to assessing the evidence

21. This case turns on the credibility and reliability of the witnesses, and in particular RD who is the key prosecution witness. Two prosecution witnesses gave evidence in person; RD and her husband, Albert Delay. Mr Salemumu's interview with police under caution on 10 August 2024 was produced by consent. The prosecutor sought to produce a medical report as to the fact that RD has some form of intellectual disability. However, Mr Willie objected to the report being produced. As such, it was not tendered as evidence.

⁶ s 8 of the Penal Code [CAP 135]



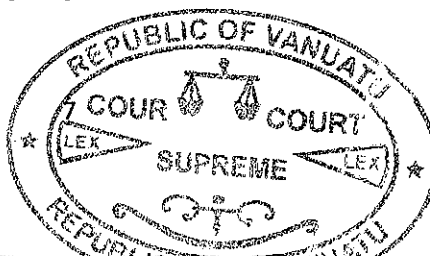
22. The prosecution case stands or falls on RD's evidence. Prior to the trial, I made directions that RD's evidence would be given via a screen, and that there would be a closed Court while she gave evidence. RD also had a support person, her daughter, during her evidence in chief.
23. There are various alternative ways for a witness to give evidence, including closing the Court. Others are the use of a screen or an AVL link. The purpose of these types of measures is to ensure that a vulnerable witness is able to give the best quality evidence they can. Such measures say nothing about a defendant and no adverse inference is to be drawn against Mr Salemu because RD gave her evidence in this manner.
24. Currently the Civil Procedure Rules provide for alternative ways of giving evidence. Yet the Criminal Procedure Code does not. That is curious given that vulnerable complainants in criminal trials are required to give evidence re-living traumatic experiences often of a very personal nature. In making the direction to close the Court during JP's evidence, and for her to be screened, pursuant to s 28(1)(b) and s 65(1) of the Judicial Services and Courts Act [Cap 270], the Supreme Court has jurisdiction to administer justice in Vanuatu, and such inherent powers as are necessary to carry out its functions.
25. I considered that alternate means of giving evidence were appropriate, given the personal nature of the evidence RD would be giving.
26. The prosecution case is that RD is telling the truth. The defence case is that RD is lying. It is therefore important to distinguish between credibility and reliability. Credibility is about truthfulness. So, credibility is about whether a witness can be believed? Reliability is about the accuracy of evidence which is honestly given. The first involves an intention to mislead or lie. The second involves error or mistake. Even the most honest witnesses capable of being mistaken, particularly when being asked to recall events which occurred many years ago. But a witness who sets out to give false evidence is an entirely different position. All of what is said may be called into question if the witness is setting out to be dishonesty in some or all respects.
27. I may accept everything a witness has said. On the other hand, I may reject everything a witness has said. There is a middle ground, which is that I can accept some parts of what a witness has said and reject other parts.
28. It is important that before relying on evidence, I am able to conclude that it was honestly given, but also that it is reliable.
29. In assessing the evidence given by the witnesses, there are a number of factors which assist with considering whether the witnesses gave truthful and accurate evidence. In considering the evidence of all the witnesses who gave evidence during the trial, I have considered the reasonableness, probability and coherence of the evidence. Sometimes



conflicts or differences in the evidence can be caused by mistakes and misinterpretation; sometimes witnesses can see and hear things that were not seen and heard by other witnesses. This does not mean one of the witnesses is necessarily not telling the truth. But sometimes conflicts are not able to be explained away.

30. The witness' demeanour is a small part of my assessment of the witness. I prefer though to look at what the witness actually said, and take into account;
- a. consistency within the witness' account and over time? If there is an inconsistency, it does not necessarily mean that the evidence in court cannot be relied on. The mere fact that a witness is inconsistent on a particular topic does not mean that person is generally untruthful or inaccurate. Inconsistencies can happen even when someone is telling the truth. I must consider whether that inconsistency is a significant one or a minor one and any explanation given for the inconsistency;
 - b. consistency when comparing the witness' account with relevant exhibits;
 - c. consistency with the evidence of other witnesses whose evidence I have accepted.
 - d. whether there is supporting evidence. As this was a case of alleged sexual offending, I warned myself of the danger of convicting Mr Salemumu on the uncorroborated evidence of JD.⁷
 - e. the inherent plausibility and coherence, or not, of the witness' account. Does it make sense?
31. It is important that I consider each witness' evidence in the context of all the evidence in the case. Also, witnesses can be inaccurate or may not remember secondary, marginal or unimportant facts for various reasons, including that they were not seen as important at the time. However, their evidence may be accurate about essential matters, but not about details. Essential matters are matters which relate to the elements of the charges.
32. I reminded myself that if I am to draw inferences, they cannot be guesses or speculation but had to be logical conclusions drawn from reliably accepted or properly established facts. As was said by the Court of Appeal in *Swanson v Public Prosecutor* [1998] VUCA 9, inferences may be drawn from proved facts if they follow logically from them. If they

⁷ As was held in *Tabeva v Public Prosecutor* [2018] VUCA 55 at 34 "...The corroboration rule does not prohibit a Judge from accepting the evidence of a complainant in a case of alleged sexual assault without corroboration. It simply requires Judges to remind themselves of the dangers of convicting on the uncorroborated evidence of a complainant". See also *Keimit v Public Prosecutor* [2017] VUCA 12.



do not, then the drawing of any conclusion speculation not proof. Speculation in aid of an accused is no more permissible than speculation in aid of the prosecution. Inferences need not be irresistible.

Counter intuitive principles

33. In a number of overseas jurisdictions, counter-intuitive principles are well understood, and particularly in the context of jury trials. The purpose of such directions are educative in nature.

34. The English Court of Appeal in *Miller v R* [2010] EWCA Crim 1578 said:

"Judges have, as a result of their experience, in recent years adopted the course of cautioning juries against applying stereotypical images of how an alleged victim or an alleged perpetrator of a sexual offence ought to have behaved at the time, or ought to appear while giving evidence, and to judge the evidence on its intrinsic merits. This is not to invite juries to suspend their own judgement but to approach the evidence without prejudice."

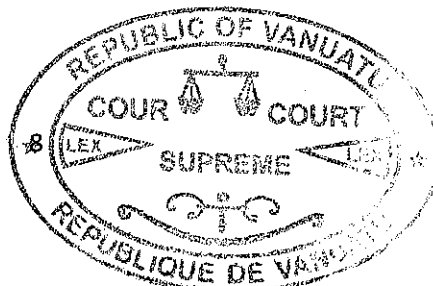
35. The Supreme Court of Canada acknowledged in *R v Barton* [2019] 2 SCR 579 at [1] that:

"We live in a time where myths, stereotypes, and sexual violence against women — particularly Indigenous women and sex workers — are tragically common. Our society has yet to come to grips with just how deep-rooted these issues truly are and just how devastating their consequences can be. Without a doubt, eliminating myths, stereotypes, and sexual violence against women is one of the more pressing challenges we face as a society."

36. In New Zealand, the Law Commission said in *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes*,⁸ stated:

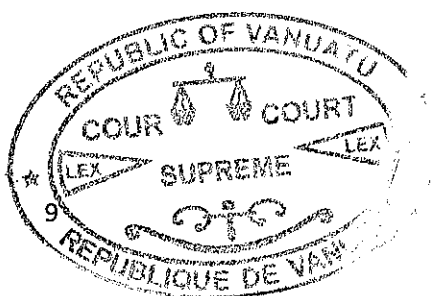
The field of sexual violence is one that is commonly misunderstood by people without training or education in the area. Research has revealed that widely held assumptions about how frequently sexual violence

⁸ *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes* (NZLCR 136, 215) at [6.12].



occurs, and when, where and against whom it occurs, are usually incorrect or do not reflect the reality of sexual violence.

37. The purpose of counter-intuitive directions is to correct erroneous beliefs that a factfinder might otherwise hold. The purpose of such directions is to restore a complainant's credibility from a debit balance because of misconception, back to a zero or neutral balance. It says nothing about the credibility of a complainant, rather is educative in nature.
38. In terms of a judge alone trial, the New Zealand Court of Appeal has said that counter-intuitive evidence is not required. In *Keats v R*, the Court of Appeal said:
- "[25] *It is now generally accepted that juries can be instructed about counter-intuitive principles without calling an expert witness on that topic. It is axiomatic that, if juries can be properly directed on counter-intuitive principles, then there is even less need for evidence on those principles when the trial is being conducted by a judge sitting without a jury.*"
39. Research shows that widely held assumptions about how frequently sexual offending occurs, and when, where and against whom it occurs, are usually incorrect and do not reflect the reality of sexual offending. It is therefore important to note that there is no such thing as "typical" sexual offending.
40. There is also no classic or "typical" response to sexual offending. Research shows that victims of sexual offending can react in different ways. It might be expected that a complainant of sexual offending would complain immediately, but it is not uncommon for complainants to delay making a complaint, to make a partial disclosure, or not say anything at all. Also, some complainants of sexual offending maintain contact with someone who has offended against them. There may be good reason for these things.
41. Research shows that alleged sexual offending can occur in a wide variety of circumstances, including when people know each other, when other people are around, and in the home, including busy households. Finally, research establishes that stress and trauma can compromise a person's account of events. But others may try to avoid thinking about an event at all, and they may then have difficulty in recalling the event accurately.



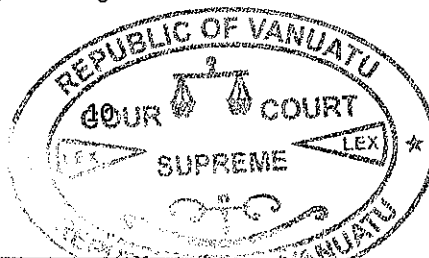
Mr Salemumu's position

42. While Mr Salemumu made two statements to police under caution, only the first caution statement dated 10 August 2024 was produced by consent.⁹ The statement was taken in Bislama but was translated into English. Counsel agreed that the second caution statement dated 22 August 2024 would not be produced.¹⁰
43. Once the prosecution case concluded, the s 88 statement was read to Mr Salemumu in English and then translated into Bislama. Mr Willie confirmed that Mr Salemumu elected to give evidence. In opening the defence case, Mr Willie submitted that the case was straightforward and that in relation to the "house" incident, the defence was that there was sexual intercourse but that it was consensual. In relation to the Lakatoro School incident, the defence was that there was no sexual intercourse. However, as I pointed out to Mr Willie, he did not put the defence in relation to the Lakatoro School incident to RD. She did not have an opportunity to comment on the contradictory evidence to be given. Instead, the cross examination focused on the issue of consent. A fundamental cross examination duty of counsel is to cross examine on significant matters. Mr Salemumu's position that he and RD did not have sexual intercourse and why it could not have happened are significant matters.
44. Mr Salemumu should not be penalised because of an error made by trial counsel. Accordingly, I confirmed that Mr Salemumu could give evidence in accordance with his defence and that RD was to be recalled and questioned about the contradictory evidence in relation to the Lakatoro school incident. She was to be cross examined by Mr Willie and then Ms Siri could ask questions in re-examination if she wished. It is in the interests of justice to take such an approach, balancing Mr Salemumu's right to a fair trial and RD's right to be able to comment on contradictory evidence.¹¹
45. Mr Salemumu gave evidence. His narrative about the two incidents described by RD is diametrically opposed to RD's narrative. The fact that Mr Salemumu gave evidence does not change who must prove the allegations. The prosecution has that task, and Mr Salemumu does not have to prove that he is not guilty. The question remains the

⁹ Exhibit P1

¹⁰ At the outset of the trial, I raised with counsel the fact that Mr Salemumu was not properly given his rights when he was spoken to by police under caution on 22 August 2024, as he was not told that he had a right to consult a lawyer. It may be that for tactical reasons, Mr Willie wanted that statement before the Court, but it was important to raise it so that counsel could think about it

¹¹ When RD was recalled to answer questions in relation to the defence to the Lakatoro school incident, Mr Willie sought leave to also ask RD about the incident at her daughter's house, and in particular Mr Salemumu's evidence that he licked RD vagina. I did not permit Mr Willie to ask RD about this. First, the purpose of recalling RD was in relation to the Lakatoro school incident because she was not asked about Mr Salemumu's contradictory position that the sexual intercourse did not and could not have taken place due to various factors. It was not another opportunity to cross examine RD about other matters. Second, the defence in relation to the house incident was that the sexual intercourse was consensual and RD was cross examined about Mr Salemumu's position. Mr Willie had the opportunity to ask RD about the licking of the vagina but did not.



same - has the prosecution proved his guilt beyond reasonable doubt. That means – am I sure?

46. If I accept what he says, then obviously the proper verdicts are not guilty because he will not have done what the prosecution says he did.
47. If what he says leaves me unsure, then again, the proper verdict is not guilty, because I will have been left with a reasonable doubt. If what Mr Salemumu says seems a reasonable possibility, the prosecution will not have discharged its task, and I must find him not guilty.
48. If I disbelieve Mr Salemumu's evidence on key issues, then I cannot not leap from that assessment to guilt, because to do that would be to forget who has to prove the case. Instead, I must assess all the evidence that I accept as reliable. This includes any part of the defence evidence I accept. Does that evidence satisfy me of Mr Salemumu's guilt to the required standard?

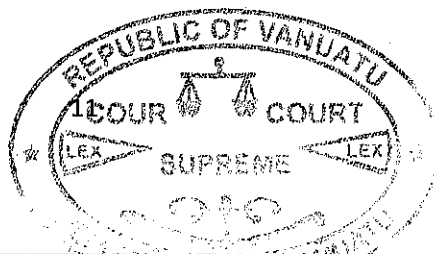
Credibility and reliability

49. I will assess the overall credibility and reliability of RD's evidence and Mr Salemumu's evidence.

RD's evidence

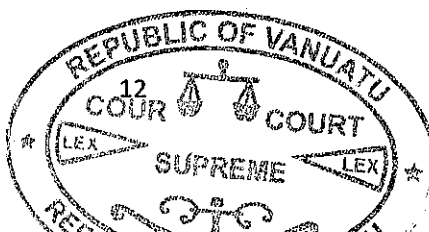
50. I acknowledge that RD's evidence is uncorroborated and so remind myself of the dangers of convicting Mr Salemumu on the uncorroborated evidence of RD.
51. RD was not a particularly confident or articulate witness but gave her evidence in a straightforward manner. Rd was clearly embarrassed about discussing personal matters. RD had difficulty in giving evidence about the details of the sexual intercourse. Initially when she was asked about the incident at her daughter's home, she said that Mr Salemumu "*caused her a problem.*" Then she said that he interfered with her after telling her to lie down, removing her clothes and lying on top of her. She confirmed that when she talked about Mr Salemumu causing her a problem / interfering with her, she meant that he had sex with her. She was asked a number of questions to clarify what body parts were involved.¹²

¹² For example, RD said that Mr Salemumu pulled his balls out and put them in her. When asked to clarify what she meant, RD said the balls of the man and then he put them on her and interfered with her/caused a problem with her. RD was then asked to describe the balls of a man, and said it was the penis of a man; the private part of a man. She also described Mr Salemumu having sex with her. She said he grabbed his private parts and put his private parts in her private parts. Ms Siri proposed that given RD's issue with giving personal evidence, that either a psychiatric report and her statement could be tendered, or alternatively, that her daughter (support person) could translate in the local dialect. I did not permit either of those options.

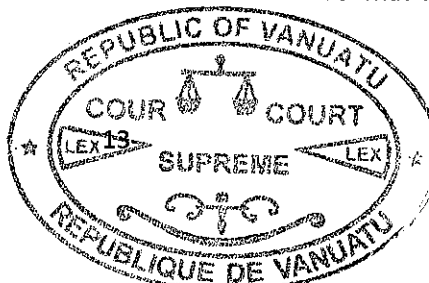


52. I do not think that RD's reluctance and difficulty in discussing very personal evidence impacts on the truthfulness of her evidence. Rather, it is a reflection of her embarrassment about talking in public about private matters.
53. I assess that overall RD's evidence is both credible and reliable. Credibility is about the truthfulness of evidence. Reliability is about the accuracy of evidence honestly given. RD's evidence was a plausible, matter of fact narrative about what happened to her. It was not embellished or exaggerated. RD was candid. For example, she readily accepted that she did not call out on either occasion.
54. RD's evidence was internally consistent. She was clear and firm in her evidence when challenged in cross examination about whether the sexual intercourse at her daughter's house was consensual or not, and whether there was sexual intercourse at Lakatoro school. She did not step back from what she said in evidence in chief.
55. RD spoke to her husband Mr Albert Delay about her interactions with Mr Salemumu. Mr Delay's evidence is relevant because as soon as she saw her husband, RD said she told him everything. He confirmed that RD spoke to him about having sexual intercourse with Mr Salemumu.
56. The reason for Mr Delay's evidence is to show that RD had said that she and Mr Salemumu had nonconsensual sex some time ago so has been consistent over time. The prosecution case is that Mr Delay's evidence provides corroboration. I remind myself that repeating something does not necessarily make it true. An untruthful person might continue to repeat the same lie, and a mistaken person, believing themselves to be correct, might repeat the error. Of course, a truthful person might also repeat their complaints. It is a matter for me to decide whether what RD told her husband assists in assessing the credibility of RD's evidence.
57. When he gave evidence Mr Delay¹³ said that RD told him that she and Mr Salemumu had sex three times. The first time was at the house, when he forced himself on her. The second time was outside the toilet, and the third time was at the Lakatoro school. Mr Delay gave detailed evidence about what RD says happened at their daughter's home but not in relation to the other incidents- because he was not asked.
58. In relation to the house incident, Mr Delay said he was told that Mr Salemumu told RD to remove her clothes, and that she said "no" to removing her pants. RD told him she was told to remove her pants because the sickness was there. Mr Salemumu then pushed his hand inside her and said her uterus had fallen down and should be taken out. After that, Mr Salemumu pushed his penis inside.

¹³ Mr Delay, aged 91 years, has a hearing problem. The prosecutor was not aware of this until Mr Delay started giving evidence. Mr Delay was at the Santo Courthouse so gave evidence via AVL. Because of that the hearing issue was all the more difficult to deal with. During evidence in chief questions were asked in English, translated into Bislama and then the Assistant Sheriff in Santo repeated the question again for Mr Delay to answer. Cross examination was not as problematic as Mr Willie was also appearing via AVL from the Santo Courthouse



59. Mr Delay's evidence indicates that RD has been consistent over time in the sense that RD told him she had nonconsensual sex with Mr Salemumu at the time of the massage, and that they had sex at the school. I accept that there are inconsistencies between Mr Delay and RD's evidence as to the detail of what happened during the massage and the incident outside the toilet. However, I do not consider that those inconsistencies render RD's evidence untruthful, because RD was not asked about what she had told her husband. RD's evidence was that she told Mr Delay everything as soon as she saw him.
60. I have no reason to doubt Mr Delay's evidence that RD told him that Mr Salemumu forced himself onto her at the house and that they had sexual intercourse at the school. Mr Delay made it clear in his evidence that he did not want to talk and that he had forgiven his wife because he did not want a fuss. He certainly had no axe to grind in relation to Mr Salemumu.
61. There was a delay in the matter being reported to police. Both RD and Mr Delay disavow reporting the matter to police. Candidly, RD said that she did not make a complaint to police and said she was forced to, although there was no evidence as to who made the complaint or why she felt she was forced to make a statement. A complaint made some time after alleged offending does not of itself mean the complaint is untrue, just as an early complaint does not of itself mean it is true.
62. Mr Delay gave an entirely credible reason for leaving matters be, and not being angry with Mr Salemumu. As he said in re-examination, they live on Mr Salemumu's land. Mr Delay said that if Mr Salemumu expelled him, where would he go? Live in the bush? He said that's why he didn't want to talk. Mr Delay's evidence demonstrates that Mr Salemumu very much holds the power given that they live on his land. So, that would hardly incentivise RD to make a statement. While the delay in making the complaint is a factor relevant to assessing RD's credibility, in the circumstances, the delay is explicable.
63. Sometimes small details can help. One such detail here is that after RD said that she did not agree to the sexual intercourse at the Lakatoro school, she added that under their custom, she was not allowed to call for help from her daughter and her husband, and that if her husband had been present, she would have called out to him. Mr Delay was cross examined about whether or not it was custom in Malekula. Mr Delay confirmed that it was true but that RD should have turned to her children.
64. I accept the essential parts of JD's evidence as an authentic and plausible account of what took place both at her daughter's home and the school. JD's evidence was internally consistent, and in particular she gave a matter of fact account of what she says happened, without embellishment. She remained unshaken in cross examination. As confirmed by Mr Delay, she told him about the issues with Mr Salemumu at the



house and the school as soon as she saw him. Although RD is not a very articulate person, was very clear that sexual intercourse took place on both occasions and that she did not agree to it.

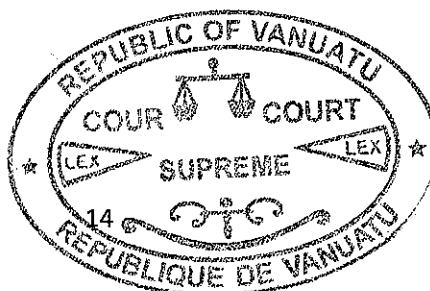
Mr Salemumu's evidence

65. Mr Salemumu is a confident, intelligent and articulate man. He gave a lengthy narrative about the allegations. He was forthright and was adamant that the sex at RD's daughter's home was consensual and that there was no sexual intercourse at Lakatoro school. He remained unshaken in cross examination. In a number of respects, Mr Salemumu's evidence about what happened in the house and at the Lakatoro school was not put to RD and should have been because they were significant matters. An available inference is that his evidence evolved as he gave it.
66. There were inconsistencies in Mr Salemumu's evidence. Inconsistencies do not necessarily mean that evidence is untruthful. A minor inconsistency may not be of any consequence at all. An inconsistency which is significant, and not put to RD, is that at RD's daughter's home, Mr Salemumu said that he sucked RD's vagina and that he did not put his penis inside her. After I asked Mr Willie why this was not put to RD, Mr Salemumu went on to say that he gave RD a massage and then he "fucked" her first and then penetrated her. That is a material inconsistency, which impacts on the believability of Mr Salemumu's evidence.
67. Mr Salemumu made a statement to police under caution on 10 August 2024. What he said to police about the incident at the daughter's house is inconsistent with his evidence during the trial. When spoken to by police, Mr Salemumu was asked about the massage incident. Because it has assumed significance, I set out the question and Mr Salemumu's response:

Q31. U bin massagem Rosineth long aos blong gel blong hem Anne long Lakatoro samtaem long manis blong August 2023 long wan holiday. Long taem ia u bin karemaot trousis blong Rosineth we hemi wan black sport wear we I no long tingting blong hem mo u leftemap traosis blo u long raet side leg blong yu mo pusem pennis blong yu I ko insaet lo vagina blong hem mo havem sex wetem hem kasem melek (sperm) blong you hemi ron mo u aot. Wanem nao u kat blong talem long police?

Mi stap massagem Rosineth be hemi no makem fasin ya

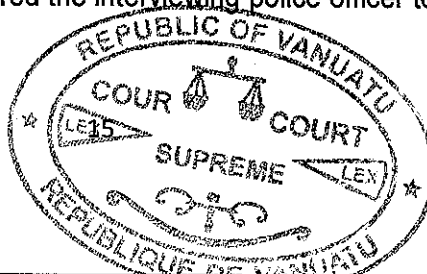
Translation:



Q31. You had massaged Rosineth at her daughter, Annie's house in Lakatoro sometime in the month of August, 2023 during a public holiday. At the time, you had removed Rosineth's trousers, which had been a black sports wear without her consent. You then lifted the right side of your trousers and pushed your penis inside her vagina and has sex with her until you ejaculated, then you left. What do you have to say to the police?

I just massaged Rosineth and I did not commit that act.

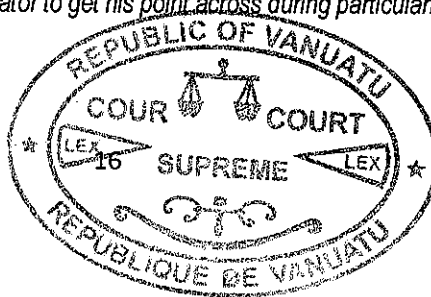
68. Mr Salemumu had a lot to say about his interactions with police on 10 August 2024. Mr Salemumu said the arrest process was upsetting and tarnished his reputation. He also described it as brutal. He said that two of his sons and some friends were also arrested and there was some talk of guns, and his gun and knife were taken.
69. Mr Salemumu also raised issues about how the statement was taken. He said that his statement was taken by three male officers and two women officers, he was handcuffed and that what he said was not accurately recorded, as I detail below. These are the reasons why he answered Q31 as he did.
70. Mr Salemumu gave a lengthy explanation for why he said something different to the police. He said that he was nervous and did not want to talk because he was nervous. Mr Salemumu also said that he gave the answer to Q31 under duress and was forced into saying that he did not commit that act. While he accepted that he signed each page and the statement, he said that what was read back to him was not what he told police. He said that he signed the statement because he was afraid and handcuffed at the time. When asked by Ms Siri why he gave the answer he did to Q31, he said he was afraid because he had been arrested brutally and was upset and scared.
71. In closing submissions, Mr Willie submitted that when Q31 of the police interview is read in whole, Mr Salemumu was asked if after massaging the complainant, he forced her to have sex with him. Mr Willie submitted that was wrongfully put which is why he was unable to answer, because he admitted to having sex with the complainant but it was not by force but consensual.
72. The first point to make about Mr Willie's submission is that there is no mention of force in the question. It was put to him that he removed her trousers without her consent, and had sex with RD. The second point is that even if the question was ambiguous, Mr Salemumu's answer was not. He said he "*just massaged Rosineth*".
73. The interview transcript itself does not support his evidence that he was overwhelmed by police officers. According to the transcript there were two police officers present. While Mr Salemumu does not have to prove anything, he could have challenged the statement, and could have required the interviewing police officer to give evidence and



be cross examined about the interview. However, despite this apparently appalling overreach by the police, Mr Salemumu did not make a complaint against the police. He said he had his reasons, which he did not divulge to the Court. He did not require the police officers to attend Court, and nor did he challenge the admissibility of the caution statement. Instead, it was tendered by consent.

74. While demeanour is not the best way of assessing credibility or reliability, Mr Salemumu is a forthright man. He had no difficulty at all in putting forward his narrative about the alleged incidents and standing up for himself when cross examined, in stark contrast to what he alleges happened during the caution interview.¹⁴ It is incredible to think that the interview process went so badly wrong as far as Mr Salemumu was concerned, yet he neither complained nor challenged the caution statement.
75. Even if I put to one side the difference between the police caution statement, and Mr Salemumu's evidence about the house incident, there is the implausibility of his evidence about both incidents, which I will discuss in more detail when I consider each charge. But briefly, I consider that for different reasons, Mr Salemumu's evidence about each incident is improbable and implausible.
76. I accept Ms Siri's submission that Mr Salemumu was evasive when he was cross examined about which cyclone he was sheltering from at the Lakatoro school. Initially, Mr Salemumu said that the cyclone warning was for cyclone Lola, but then later in his evidence said that he did not remember if cyclone Lola was in October 2023 as it was a long time ago. In and of itself that may not impact on the assessment of credibility, but the issue of the cyclone and its force assumed significance because Mr Salemumu's position at trial was that despite there being a cyclone, he was able to go out to a Nakamal for kava, and that there were lights on at the evacuation centre. While Mr Salemumu acknowledged there were strong winds and flooding, an available inference is that Mr Salemumu was downplaying the force of the cyclone, because of the possibility it undermined his evidence that he went out for kava and that there was lighting at the centre.
77. I do not think that the apology and fine paid by Mr Salemumu is necessarily an indicator of guilt. It is not in dispute that Mr Salemumu visited RD and Mr Delay at their home, apologised to Mr Delay and paid them money. Mr Salemumu said he remembered what he had done wrong and went to see them. He said it was because of the sexual relationship he had with Mr Delay's wife. It is plausible to infer that the fine was paid because Mr Salemumu had consensual sexual intercourse with a married person. It is also plausible to infer that it was paid because the sexual intercourse was nonconsensual. I place no weight on the payment of a fine as a sign of guilt.

¹⁴ Mr Salemumu started talking over the translator to get his point across during particularly cross examination. He spoke over the translator on 6 occasions



78. Overall, for the reasons set out above, I assess that Mr Salemumu's evidence was unconvincing and implausible. That is not to say that I reject all his evidence. I accept those parts of his evidence that are consistent with other evidence.

Charge one- the "house" incident

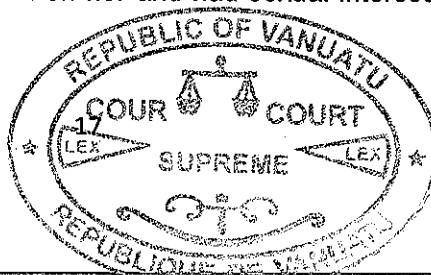
79. It is not in dispute that RD and Mr Salemumu had sexual intercourse at her daughter's house.
80. The issues are:
- a. Whether I am sure that RD did not consent to the sexual intercourse.
 - b. Whether I am sure that Mr Salemumu did not believe on reasonable grounds that RD was consenting at the time that the intercourse occurred.

Am I sure that RD and Mr Salemumu had sexual intercourse?

81. As noted, it is not in dispute that RD and Mr Salemumu had sexual intercourse at the home of RD's daughter. Both RD and Mr Salemumu were reluctant to give evidence about the sexual intercourse. As set out above, RD did not refer to Mr Salemumu's penis and her vagina by those names. It is unnecessary to discuss the evidence in detail because Mr Salemumu acknowledges that they had sexual intercourse at the house. He said he "*fucked*" RD before he penetrated her. In any event, in relation to this incident, RD agreed in cross examination that Mr Salemumu pulled out his penis and penetrated her vagina.
82. Therefore, I am sure that JD and Mr Salemumu had sexual intercourse at the home of RD's daughter.

Am I sure that RD did not consent to the sexual intercourse with Mr Salemumu?

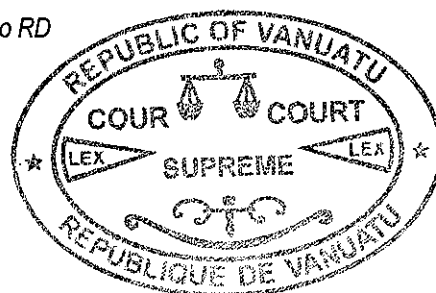
83. Consent is the key issue for this charge.
84. The backdrop to the incident at the house is that JD said she was sick and was receiving regular massages from Mr Salemumu. She said that Mr Salemumu had told her that she had a sickness inside her body. On this occasion, RD was in Lakatoro and Mr Salemumu had arrived there from an outlying island to arrange transport to Malwa Bay.
85. RD's evidence is that Mr Salemumu told her that she had a sickness and that they would go to her house, and he would massage her. At her daughter's house, they went into RD's room for the massage. Mr Salemumu massaged her, then removed her clothes, including her sportswear, laid down on her and had sexual intercourse with her. As I



said above, describing the physical act of sexual intercourse was difficult for RD. I assess that was because she was reluctant to talk about personal matters. She avoided using the words "*penis*" and "*vagina*", referring variously to Mr Salemumu's penis as his balls and private parts. She referred to her vagina as her private parts.

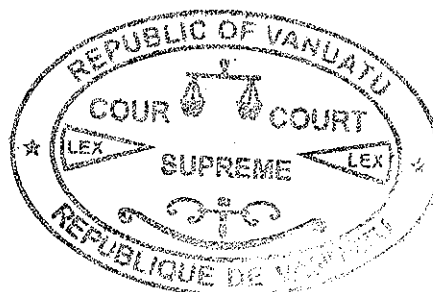
86. When cross examined, RD remained firm that she did not agree to have sexual intercourse with Mr Salemumu. RD rejected the proposition in cross examination that Mr Salemumu asked if he could have sex with her. She said more than once that she did not agree to the sex. RD said that he didn't ask and that he went straight to have sex with her. She also said that she tried to push him away, but he forced sex upon her. RD candidly accepted that she did not cry or call out. She said she was afraid to. In fact, she said she did not make any noise. She explained that she did not call out because she was afraid to. RD agreed that Mr Salemumu did not threaten her or have a knife, stone or any weapon.
87. RD said she was upset and had words with Mr Salemumu and accepted that the conversation was after the sexual intercourse. She told him what he had done was unacceptable, as he calls her aunty and is her chief. He told her that she was not to talk about it.
88. The defence case is that the sexual intercourse was consensual. Mr Salemumu described in detail what he says happened in the lead up to the incident at RD's daughter's home. He said that RD came to see him at a house where he was giving someone else a massage and asked for a massage. However, that house was not suitable as it was too small, which he told RD. He told her to go and wait for him at her daughter's house, which she did. After he finished massaging the woman at her house, he made his way to RD's daughter's house.
89. At the daughter's house, they went into RD's room for Mr Salemumu to give her a massage, as there was nowhere else to have the massage. Prior to this incident, Mr Salemumu said he massaged RD about every two weeks, and RD always kept her sportswear and her skirt on. On this occasion he says that he was surprised to see that RD had removed all her clothes. He said she had removed her skirt and her sportswear with it. She left her white panties on.
90. Mr Salemumu started massaging her under the mosquito net. As he was doing so, he saw her body with her white panties. This affected his mind; he was ashamed to say. Then, he says he asked her to have sex with him. And she said that was alright- it was fine. He said he then did something a bit strange, which he was ashamed to say in Court. He sucked her vagina. He said he didn't put his penis inside her.¹⁵ Mr Salemumu then went on to say that after that, RD rested there quietly. Then he gave her a massage, then slept for a while and then he said he "*fucked*" her. When asked to explain what he meant by that, Mr Salemumu said that he had a good time with her. He had

¹⁵ At that point, I indicated to Mr Willie that had not been put to RD



sex with her. All the while, she responded. Sex with her was comfortable and pleasant. He thought the sexual intercourse went on for about 45 minutes to an hour. He said he "fucked" her first before penetrating her. Mr Salemumu's evidence is that RD told him that she had been thinking about it for a long time and asked him if he had thought about it for a long time. But he said *"No, I have just thought about it now"*. After they had sex, RD told him to hurry up. RD went and chatted to some other people, and he had a meal with RD's daughter.

91. Significant aspects of the defence case in relation to this charge were not put to RD for comment and should have been. It was not put to RD that she removed her skirt and sportswear and left her white panties on. It was not put to her that Mr Salemumu sucked her vagina, that the sexual intercourse was a pleasant experience for 45 minutes to an hour, and that RD told Mr Salemumu that she had been thinking about it for a long time. As I have noted, an available inference is that Mr Salemumu's evidence evolved as he was giving it.
92. In cross examination, Mr Salemumu remained firm that the sex at Annie's house was consensual. He did not accept that he forced RD to have sex with him. Mr Salemumu wants the Court to accept that despite the fact that he gave RD regular massages, which were uneventful, all of a sudden on this occasion and without any sort of discussion, RD decided to strip down to her white panties, which led Mr Salemumu to have lustful thoughts. Essentially, Mr Salemumu is asking the Court to infer that RD had been thinking about having sex with Mr Salemumu and so initiated the sexual encounter in her daughter's home and gave him a *"come on"* signal by removing her sportswear down to her white panties. I assess Mr Salemumu's narrative to be implausible given the following:
 - a. It is at odds with my assessment that RD is not particularly confident and was very embarrassed about talking about sexual matters. It does not ring true that she would be emboldened so as to be in her underpants and indicate to him that this was something she had been thinking about for a long time.
 - b. It is incongruent with the power imbalance between RD and Mr Salemumu. Mr Salemumu is RD's chief, and she and Mr Delay live on Mr Salemumu's land. As such, he is in a position of power. That was confirmed by Mr Delay when he said that they live on Mr Salemumu's land and that was why he did not want to talk. Consistent with that, on Mr Salemumu's evidence, he told RD to go and wait for him at her daughter's house, and she did.
 - c. As noted above, Mr Salemumu has a rule about what clothing items women leave on when he gives them massages. He confirmed that RD normally complied with this rule as she did not remove her clothes.



93. So, it seems implausible that all of a sudden and at her daughter's home that RD would not comply with the usual rules about keeping her clothes on. Rather, she removed her clothes down to her panties to give Mr Salemumu, her chief, a perceived "come on", which he gave into. I do not find Mr Salemumu's evidence about this incident to be plausible or convincing, so I put it to one side.
94. As I have said, I accept RD's evidence in an overall sense as being credible and reliable. In relation to this incident, RD's evidence about consent was matter of fact, straightforward and lacked embellishment. Her evidence was internally consistent and consistent with her evidence, she told Mr Delay that Mr Salemumu forced himself onto her. She was clear she did not agree to having sex with Mr Salemumu. She said he did not ask her to have sexual intercourse, he just removed her sportswear and panties and started having sex with her. While she did not cry out, she said she pushed him away. She tried to physically resist. Nothing turns on the fact that RD did not say anything until afterwards, when RD said she was upset and had words with Mr Salemumu. Consent cannot be inferred from the fact that she did not verbally protest, which I consider to be explicable given the dynamics discussed above. There must be something more in the words used, conduct or circumstances for it to be legitimate to infer consent. Mr Salemumu did not ask RD to have sex. He removed her sportswear and underwear. She pushed him away and had words with him immediately afterwards.
95. In all the circumstances detailed above, I am sure that RD did not consent to the sexual intercourse.

Am I sure that Mr Salemumu did not believe on reasonable grounds that JD was consenting at the time that the intercourse occurred?

96. I will consider whether Mr Salemumu could not reasonably have believed JD was consenting. If I am sure that a reasonable person standing in Mr Salemumu's shoes would not have believed JD was consenting, that would be enough. This is to be assessed at the time of the sexual intercourse.
97. The evidence in relation to consent is relevant and applicable to this issue. I have accepted JD's evidence that the sexual intercourse was nonconsensual. On that basis, no reasonable person in Mr Salemumu's shoes would have believed JD was consenting. According to JD's evidence, which I accept, there was no discussion about the sexual intercourse. Mr Salemumu did not ask her, but rather removed her sportswear and panties. While RD did not verbally protest, she tried to physically resist by pushing him away and Mr Salemumu continued to have sexual intercourse with her. No person could reasonably believe that JD was consenting at that time and in those circumstances.
98. Therefore, I am sure that a reasonable person standing in Mr Salemumu's shoes would not have believed that JD was consenting at the time the sexual intercourse occurred.



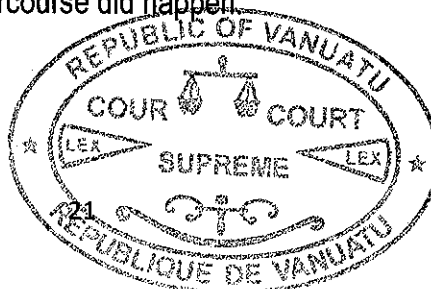
Verdict

99. Charge 1 is proved beyond reasonable doubt. I find Mr Salemumu guilty of sexual intercourse without consent.

Charge 2- the incident at Lakatoro School

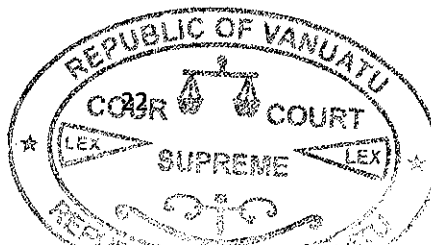
Am I sure that RD and Mr Salemumu had sexual intercourse at Lakatoro school?

100. Whether there was sexual intercourse at Lakatoro school is the key issue in relation to this charge?
101. It is common ground that RD, various family members and Mr Salemumu went to seek shelter at the Lakatoro evacuation centre due to a cyclone. Where RD and Mr Salemumu diverge is what, if anything, happened there. RD explained that her son in law is the security agent at the Lakatoro school, so they went and slept there. She accepted in cross examination that there were other family members around, including children. While they were there, RD says that Mr Salemumu removed her clothes, lay down on top of her and had sex with her. When Rd was asked to explain what sex was in relation to this incident, she said he pulled out his balls and put them in her private parts. During her evidence, perhaps somewhat reluctantly, RD confirmed that the balls were the private parts of a man and the private parts of a woman is the vagina. As I have already said, at an earlier point in her evidence RD was asked to describe the balls of a man, and said it was the penis of a man.
102. RD said that she pushed Mr Salemumu away, but it did not work. She said she was upset and was told not to tell anyone. RD said there was no way she could go outside. For one reason, her daughter's husband was sleeping by the window, and also because the hurricane was blowing strongly. RD said they stayed at the school for a day and then went home.
103. In cross examination, RD confirmed that everyone was sleeping in the one building. When asked if that was when Mr Salemumu had sex with her a second time, she said "yes". RD candidly said that she didn't cry out. She went on to say that under their custom, she was not able to call for help from her daughter and her husband. If her husband was present, she said she would have called out to him. Mr Albert Delay confirmed that was the custom, although said she should have called out to their daughter. She also agreed that Mr Salemumu had not forced her or used force but said that she did not agree to the sex. When she was recalled for cross examination, RD remained firm that the sexual intercourse did happen.



104. Mr Salemumu said he went to the Lakatoro school because a cyclone was coming, as there is an evacuation centre there. There were two cyclones which followed in quick succession. The first night he stayed at the Lakatoro school with RD's son in law. The next night there were lots of people staying there, including RD, her children, grandchildren and others he did not know.
105. In evidence in chief, Mr Salemumu said the cyclone warning was for Lola. In cross examination, Mr Salemumu said he did not remember if it was cyclone Lola that hit at the time of the events at Lakatoro school.¹⁶ While Mr Salemumu was unable to comment whether it was a category 5 cyclone because he did not have a radio, he said there were strong winds, rain and flooding. Yet his evidence was that he went out for kava as there was a nakamal open. He said that when he returned, he went to sleep with two children on top of him, or close by, and that they were like "sardines" in that place. Mr Salemumu said that everyone was close to one another, and that the lights stayed on because there were so many of them there- so as to prevent people stepping on others. Mr Salemumu would not accept that no one would be outside walking or that there would not have been power due to the weather conditions.
106. Mr Salemumu's case is that there was no opportunity for sexual intercourse at the school. He said that there was no sexual intercourse at the school as there were too many people around, he had drunk kava, and the lights were on. When RD was first cross examined, none of this was put to her, other than the fact that she had other family members around her sleeping. When RD was recalled for cross examination about whether they had sexual intercourse at the school, she was firm that they did have sexual intercourse, and said that no one had prepared kava and that there was no lighting.
107. It makes no sense that he and others would go to a Nakamal to drink kava and be outside walking around or that there would be lights on during a forceful cyclone. After all, the whole reason for people gathering at the school was because of the cyclone. People were sufficiently concerned to go to the evacuation centre. Further, as I have said, I accept the prosecutor's submission that Mr Salemumu was evasive about whether it was cyclone Lola. I assess that was to downplay the force of the cyclone. Therefore, I put Mr Salemumu's evidence aside, as I assess that his evidence as to this incident is implausible.
108. I accept RD's evidence about the sexual intercourse at the Lakatoro school. As I have said, RD's evidence was clear, matter of fact and straightforward. She did not embellish. Her evidence was internally consistent, and consistent with her evidence, she told her husband Mr Delay that Mr Salemumu had sex with her at the school. The fact that there were other people in close proximity does not mean that RD's evidence is lacking in credibility. She said that Mr Salemumu had sex with her when everyone else was

¹⁶ The Court is able to take judicial notice of the fact that it can only have been cyclone Lola and not the twin cyclones of Kevin and Judy which hit Vanuatu February/March 2023. And further that Lola was a category 5 cyclone



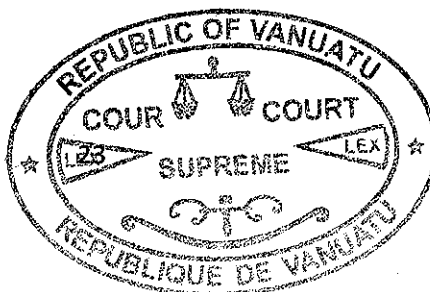
sleeping and that she did not call out. And after all, Mr Salemumu's evidence is that he and RD had sexual intercourse when RD's daughter was in close proximity in a small house. In those circumstances, it is explicable that sexual intercourse took place, as described by RD. I infer that Mr Salemumu took advantage of the weather conditions and the situation, to have sexual intercourse with RD.

109. I am sure that Mr Salemumu and RD had sexual intercourse, when Mr Salemumu penetrated RD's vagina with his penis.

Am I sure that RD did not consent to the sexual intercourse with Mr Salemumu?

110. As set out above, RD's evidence is that she did not agree to the sexual intercourse. She said that he removed her clothes, was on top of her and had sex with her. She tried to push him away, but it did not work. She candidly agreed that she did not call out, but said custom was that she could not call out to her daughter and son in law. It was put to RD that she didn't call out because she had agreed to have sex with Spenly. Her response was "no".
111. It was suggested to RD in cross examination that she had no difficulty in running away when she says that Mr Salemumu asked to have sex with her when she was in the toilet. What RD did on that occasion does not assist with assessing consent at the Lakatoro school. Consent is to be considered at the time of the sexual intercourse. I place no weight on the submission that the prosecution case is illogical in the sense that RD said she was unable to call for help or run away at the school, yet she was able to run away from Mr Salemumu subsequently when she saw him outside the toilet at her daughter's house. The fact that RD ran away at some point after the incident at the Lakatoro school does not assist with whether the sexual intercourse at the school was consensual (or took place). RD explained why she did not run away at the school and why she did so when she saw Mr Salemumu outside the toilet. Her evidence about the toilet incident had an air of authenticity to it. She said that she ran away because she was afraid he would try and have sex with her again.
112. Consent cannot be inferred from the fact that RD did not verbally protest, which I consider to be explicable given the dynamics already discussed above. There must be something more in the words used, conduct or circumstances for it to be legitimate to infer consent. Mr Salemumu did not ask RD to have sex, and he removed her clothes. She said she tried to push him away, but it did not work.
113. I am sure that RD did not consent to the sexual intercourse with Mr Salemumu.

Am I sure that Mr Salemumu did not believe on reasonable grounds that JD was consenting at the time that the intercourse occurred?



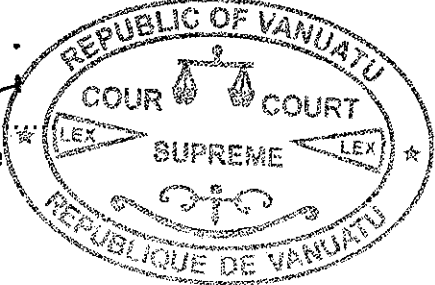
114. I will consider whether Mr Salemumu could not reasonably have believed JD was consenting. What Mr Salemumu thinks is reasonable is *not* the issue. If I am satisfied that Mr Salemumu had no reasonable grounds to believe JD was consenting, that would be enough. This is to be assessed at the time of the sexual intercourse.
115. The evidence in relation to consent is relevant and applicable to this issue. According to JD's evidence, which I accept, Mr Salemumu removed her clothes, lay down on top of her and had sex with her. She tried to physically resist by pushing him away, but it did not work. On RD's narrative, Mr Salemumu did not ask her, but rather removed her clothes. While RD did not verbally protest, she tried to physically resist by pushing him away and Mr Salemumu continued to have sexual intercourse with her. No person could reasonably believe that JD was consenting at that time and in those circumstances.
116. Therefore, I am sure that a reasonable person standing in Mr Salemumu's shoes would not have believed that JD was consenting at the time the sexual intercourse occurred.

Verdict

117. Therefore, charge 2 is proved beyond reasonable doubt. I find Mr Salemumu guilty of sexual intercourse without consent.

**DATED at Port Vila this 26th day of March 2025
BY THE COURT**

name waji
.....
Justice M A MacKenzie

The seal of the Supreme Court of the Republic of Vanuatu is an oval emblem. It features a central scale of justice. The words "REPUBLIC OF VANUATU" are written in an arc at the top, and "REPUBLIQUE DE VANUATU" is written in an arc at the bottom. Inside the oval, the words "COUR" and "COURT" are on either side of the scale, and "SUPREME" is written below it. Two small stars flank the word "SUPREME". The word "LEX" is written inside two small triangles on either side of the scale.