

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

Criminal
Case No. 25/1316 SC/CRML

PUBLIC PROSECUTOR

v

TUTA KAI

Date of Trial: 8 December 2025
Submissions: 9 December 2025 and 10 December 2025
Before: Justice M A MacKenzie
Counsel: Public Prosecutor – Mr C Shem
Defendant – Mr H Vira

VERDICT

Introduction

1. Mr Kai faces 5 charges in relation to two incidents.

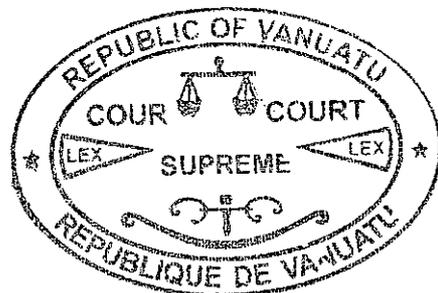
Incident One at Erakor – November 2024

- a. Charge 1- unlawful entry of a dwelling house.¹
- b. Charges 2 and 3 - two charges of sexual intercourse without consent.²
- c. Charge 4 - threat to kill.³

¹ contrary to s 143 of the Penal Code [CAP 135]

² contrary to ss 89A, 90(a) and 91 of the Penal Code [CAP 135]

³ contrary to s 115 of the Penal Code [CAP 135]



Incident Two at Agatis– December 2024

a. Charge 5 - threat to kill

Brief background

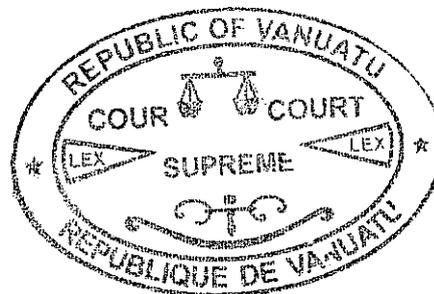
2. It is common ground that the complainant, MJ and the defendant, Mr Kai were in a relationship, which ended after Mr Kai allegedly raped and threatened to kill MJ at her home in November 2024.
3. The charges arise out of two separate alleged incidents, about a month apart. The first incident is alleged to have occurred sometime in November 2024 at MJ's home in Erakor. The prosecution case is that while MJ was asleep, Mr Kai went into her home. MJ woke up, and without discussion, Mr Kai put his penis into MJ's mouth, then inserted his hand into her vagina. After that, Mr Kai penetrated MJ's vagina with his penis. The prosecution case is that these sexual acts were nonconsensual. During the incident, it is alleged that Mr Kai made multiple threats to kill MJ to overcome resistance to the sexual activity. MJ was fearful so the next morning she left moved to another area. The prosecution case is that a few weeks later, Mr Kai went to where MJ was staying at Agatis, and made an indirect threat to kill her.
4. The defence case is that MJ and Mr Kai loved each other and that all the sexual activity was consensual. Mr Kai's position is that MJ was a willing participant that night, initiated oral sexual activity and then they had sexual intercourse. He denied making any threats and said that things went wrong the next morning when they had a quarrel over VT 10,000 that led MJ to leave and go to Agatis. Mr Kai acknowledged going to Agatis but to apologise to MJ, not threaten her.

Elements of the offences

Charge 1 – Unlawful entry of a dwelling house

5. For a charge of burglary, the elements are:
 - a. That Mr Kai entered or was in MJ's home; and
 - b. That he did so with the intent to commit an imprisonable offence – rape.⁴
6. An offence is committed even if Mr Kai entered the home with lawful authority, as per s 143(2) of the Penal Code.

⁴ See *PP v Tabinok* [2017] VUSC 110



Charges 2 and 3 - Sexual intercourse without consent

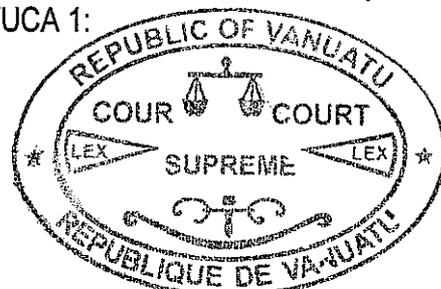
7. There are three essential elements of rape: *McEwen v Public Prosecutor* [2011] VUCA 32. They are:
- That there was sexual intercourse.
 - That MJ did not consent to the sexual intercourse.
 - That Mr Kai did not believe on reasonable grounds that MJ was consenting at the time the intercourse occurred.

8. Sexual intercourse is defined in s89A of the Penal Code:

"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:

- 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*
- 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*
- the introduction of any part of the penis of a person into the mouth of another person; or*
- the licking, sucking or kissing, to any extent, of the vulva, vagina, penis or anus of a person; or*
- the continuation of sexual intercourse as defined in paragraph (a), (b), (c) or (f) (d); or*
- 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.*

9. 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. The behaviour and attitude of MJ 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. As was said in *Ishmael v Public Prosecutor* [2005] VUCA 1:



"a woman does not have to kick or scream or push someone away. She is entitled to be treated with courtesy and respect."⁵

10. A person does not consent to sexual activity if there is force used or a threat or fear of force, or intimidation. Submission to sexual activity because of fear of what might happen if a person does not give in, is not true consent.⁶ 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.
11. The prosecution must prove beyond reasonable doubt that Mr Kai did not believe on reasonable grounds that MJ 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 Kai did not genuinely believe that MJ consented or that a reasonable person standing in his shoes would not have believed that MJ consented?⁷ When assessing the reasonableness and honesty of Mr Kai's belief, it must be looked at within its total context.

Charges 4 and 5 – Threats to kill

12. For a charge of threat to kill contrary to section 115 of the Penal Code, the elements are:
 - a. Mr Kai directly or indirectly caused MJ to receive oral threats to kill her.
 - b. Mr Kai knew the contents of the threats.
 - c. Mr Kai intended the threats to be taken as real.
13. A review of cases tends to suggest some divergence as to the elements of threat to kill. I have derived the elements from *Public Prosecutor v Ahelmalahlah* [2021] VUSC 329. On appeal, the nature of the threat was in issue (rather than the elements). But there was no issue raised about the elements, so respectfully I adopt the elements identified by the primary Judge in that case.

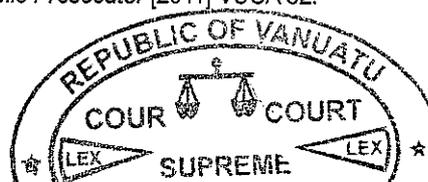
Submissions

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

⁵ see also *Public Prosecutor v Jack* [2013] VUSC 81 at [14]

⁶ *Public Prosecutor v Tor - Judgment* [2003] VUSC 101

⁷ See *Ishmael v Public Prosecutor* [2005] VUCA 1 and *McEwen v Public Prosecutor* [2011] VUCA 32.



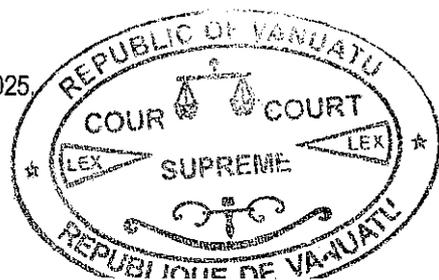
Burden and standard of proof

15. 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.⁸
16. 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 Kai is guilty. What then is reasonable doubt? Reasonable doubt is an honest and reasonable uncertainty about Mr Kai's guilt after giving careful and impartial consideration to all the evidence.
17. Mr Kai 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.
18. This was confirmed to Mr Kai prior to the prosecution opening its case. I read the statement required by s 81 of the Criminal Procedure Code aloud to Mr Kai in English. The statement was not translated into Bislama, as he did not require a translation.

Approach to assessing the evidence

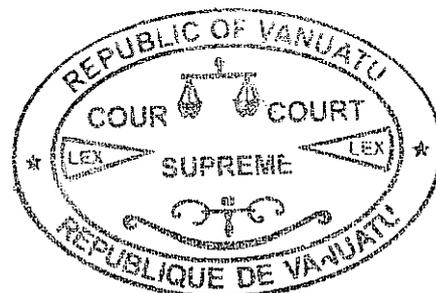
19. This case turns on the credibility and reliability of MJ, and her evidence. The prosecution case stands or falls on her evidence. While Mr Kai had no obligation to give evidence, he chose to do so. So, his evidence will also need to be assessed, but notably he does not have to prove anything.
20. The prosecution case is that MJ told the truth. The defence case is that MJ has lied about these incidents. 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 dishonest in some or all respects.

⁸ Section 8 of the Penal Code [CAP 135] and s 11 (1) of the Evidence Act 2025.



21. 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.
22. It is important that before relying on evidence, I am able to conclude that it was honestly given, but also that it is reliable.
23. 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.
24. Demeanour is a small part of my assessment of a 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. There does not have to be, but sometimes other evidence helps. Corroboration in relation to alleged sexual offending is no longer necessary in Vanuatu.⁹
 - e. the inherent plausibility and coherence, or not, of the witness' account. Does it make sense?
 - f. does the evidence have the ring of truth to it?

⁹ s 17 of the Evidence Act 2025



25. It is important that I consider the evidence of each witness 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.
26. 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 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.

Mode of evidence

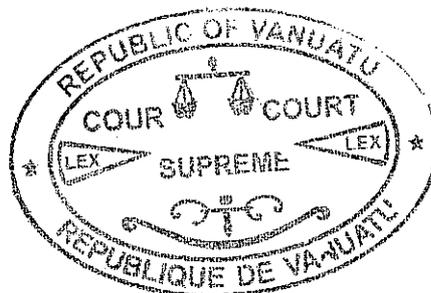
27. MJ gave her evidence in a closed Court and with a screen. There are various alternative ways for a witness to give evidence, including closing the Court. Others are the use of a screen or an AVL link.¹⁰ The purpose of these types of measures is to ensure that a vulnerable witness is able to give the best quality evidence they can. Such measures say nothing about a defendant and no adverse inference is to be drawn against Mr Kai because MJ gave her evidence in this manner.

Counter intuitive principles

28. 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. I will address counter intuitive principles because the evidence engaged counter-intuitive principles. Here, MJ and Mr Kai were in a relationship at the time of the alleged events at Erakor, and there was a delay in MJ reporting the rapes.
29. 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."

¹⁰ See s 51 of the Evidence Act 2025



30. 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."

31. In New Zealand, the Law Commission said in *The Justice Response to Victims of Sexual Violence: Criminal Trials and Alternative Processes*,^[24] 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 occurs, and when, where and against whom it occurs, are usually incorrect or do not reflect the reality of sexual violence.

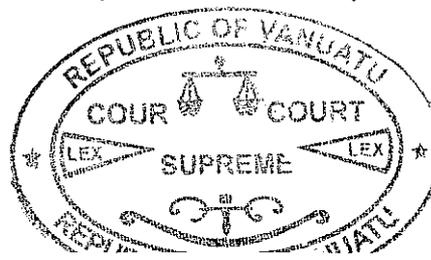
32. The purpose of counter-intuitive directions is to correct erroneous beliefs that a factfinder might otherwise hold. The purpose of such directions is to restore a complainant's credibility from a debit balance because of misconception, back to a zero or neutral balance. It says nothing about the credibility of a complainant; rather is educative in nature. They cannot be used to assess credibility.

33. 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."

34. 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.

35. 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.



36. 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. 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.

Prejudice and sympathy

37. This is a case involving rape and threats to kill a vulnerable woman because she lived in an isolated situation. These allegations are serious and might give rise to feelings of sympathy for the complainant and prejudice against the defendant. These or any other feelings must be put to one side and must not influence the verdicts. I am required to carefully and objectively and carefully consider all the evidence in reaching verdicts on each charge.

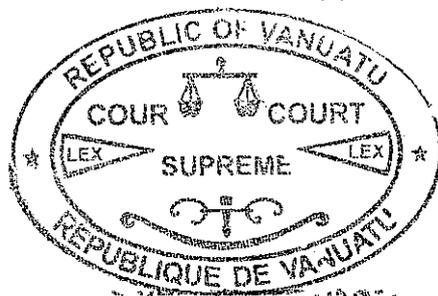
Section 60 of the Evidence Act 2025

38. During the trial, both counsel wanted to ask questions which engaged s 60 of the Evidence Act 2025. Section 60(2) is the applicable provision and provides:

60 Evidence in relation to sexual experience in offences against morality

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- (2) *In a case of an offence against morality, no evidence can be given and no question can be put to a witness relating directly or indirectly to the sexual experience of the complainant with the accused unless the evidence or question:*
- (a) *relates directly to the acts, events, or circumstances which constitute the offence for which the accused is being tried; or*
 - (b) *is of such direct relevance to facts in issue in the proceeding or the issue of the appropriate sentence that it would be contrary to the interest of justice to exclude it.*

39. New Zealand has a very similar provision. That is section 44 of Evidence Act 2006, which provides that no evidence can be given and no question can be put to a witness that relates directly or indirectly to the sexual experience of the complainant with the defendant. Evidence or questions are only permissible if they are of such direct relevance to facts and issue in the proceeding that it would be contrary to the interest of justice to exclude it. Section 44 is virtually identical to section 60 (2) of the Evidence Act 2025.



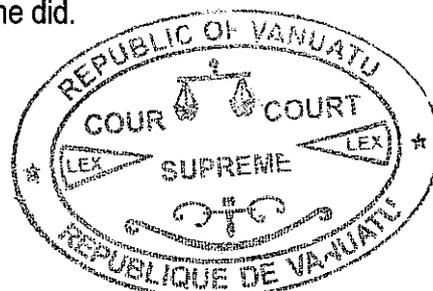
40. Section 60 (2) contains a heightened relevance test, as does s 44 of the New Zealand Evidence Act. The rationale for a heightened relevance test was set out in a New Zealand Supreme Court case *B v R* [2013] NZSC 151 at 53:

"Rape shield provisions control the extent to which complainants in sexual cases may be questioned about their previous sexual history. Such provisions are intended to reduce the humiliation and embarrassment faced by complainants and to prevent the use of reasoning based on erroneous assumptions arising from a complainant's previous sexual history...."

41. The purpose of section 60 (2) is to avert the general preconception that consent can acceptably be inferred from passed conduct. Of course, questions or evidence will be permissible if it does meet the heightened relevance test. In a New Zealand case *Hopkinson v R* [2014] NZCA 536, the Court of Appeal said that past consent to sexual activity does not make future consent more likely, whether the activity was with the defendant or with anyone else.
42. I permitted limited questioning and evidence about the past sexual relationship between MJ and Mr Kai. The tenor of that evidence was that MJ and Mr Kai had sexual intercourse frequently, which was consensual. Simply because there had been past consensual sexual intercourse, it does not follow that the night of the incident, MJ consented. Past consent to sexual activity does not make future consent more likely.
43. Counsel in Vanuatu need to familiarise themselves with Section 60 and the heightened relevance test. Counsel can no longer ask any question they want in relation to a complainant's sexual experience with either a defendant or another person.

Mr Kai's position

44. Once the prosecution case concluded, the s 88 statement was read aloud to Mr Kai in English. It was not translated into Bislama. Mr Kai elected to give evidence. His choice was to give evidence in English.
45. The fact that Mr Kai gave evidence does not change who must prove the allegations. The prosecution has that task, and Mr Kai does not have to prove that he is not guilty. The question remains the 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 Kai 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 Kai'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 Kai's guilt to the required standard?

Separate verdicts

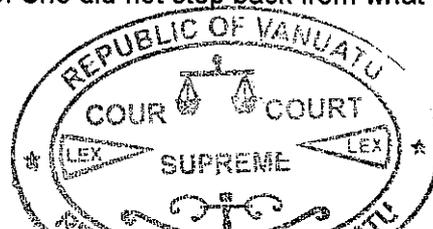
49. I must determine each charge on the basis of the evidence that relates to that charge. I must consider each charge separately and come to a separate decision on each. I may reach different verdicts on different charges.

Credibility and reliability

50. I will assess the overall credibility and reliability of MJ's evidence and Mr Kai's evidence.

MJ's evidence

51. MJ is not a confident person. She was not an overly articulate witness but gave her evidence in a straightforward manner. I assess that she gave a plausible, matter of fact narrative about what happened to her at Erakor and Agatis. It was not embellished or exaggerated. For example, when she gave evidence about what happened at Agatis, she was upfront about the fact that Mr Kai did not directly threaten her. Rather, he told her to remember what he had said to her at Erakor. If she was really out to get Mr Kai, she could have embellished the events at Agatis and said that he did repeat the threat. MJ was also candid. She said that she loved Mr Kai and took him to her home at Erakor because she wanted him to be her husband.
52. MJ's evidence about what took place at her home in Erakor was detailed and was clear and cogent. MJ was specific about what happened, which had personal significance to her, including the threats that were made. MJ's evidence was internally consistent. She remained firm when challenged in cross examination that the threats to take her life were made. She confirmed in re-examination that she did not agree to any of the sexual activity that night at Erakor, although there were many other occasions of consensual sexual intercourse. She did not step back from what



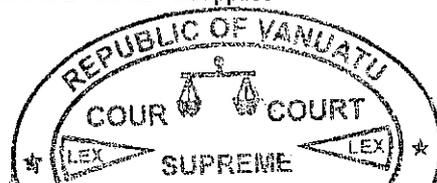
she said in evidence in chief about the threats and that she did not agree to the sexual activity. I will discuss this in more detail when considering charges 2 and 3.

53. There was a delay in the matter being reported to police. 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. While the delay in making the complaint is a factor relevant to assessing MJ's credibility, in the circumstances, the delay is explicable. MJ fled her home at Erakor the next morning because she was scared of being on her own and went to stay with a man from PNG. She did not return to her home at Erakor. What prompted her to make a police report was the fact that Mr Kai turned up at Agatis where she was staying uninvited, and without warning, and spoke to her in a way that she took to be a repeat of the threats to kill her made at Erakor.
54. A factor in my assessment that MJ's evidence was plausible and authentic is that MJ said she loved Mr Kai. She wanted him to live with her and be her husband. They were in a relationship and had been since late 2023/early 2024. She said they were happy, and the sexual intercourse had always been consensual. The relationship ended after that night in November 2024. The next morning MJ fled from her home at Erakor and went to Agatis, and did not return. So, despite being in a loving relationship, something upset MJ to the extent that she fled from Mr Kai and never went back. She stayed away from her home and the relationship ended. Mr Kai said that was over a quarrel about VT 10,000 for materials for her property was not asked about a quarrel over the VT 10,000, and should have been because the defence case is that MJ's motive for leaving her home was the quarrel over the money.¹¹ I will discuss this further but that seems improbable. MJ was scared and reacted accordingly. The more plausible explanation is that events unfolded as described by MJ.
55. I accept the essential parts of MJ's evidence as an authentic and plausible account of what took place at Erakor. Her evidence was internally consistent, and in particular she gave a matter of fact and detailed account of what she says happened, without embellishment. Although MJ is not a very articulate person, she was very clear that threats were made to end her life, which she took seriously, and that she did not agree to the sexual activity.
56. Therefore, I assess that overall, MJ's evidence is both credible and reliable.

Mr Kai's evidence

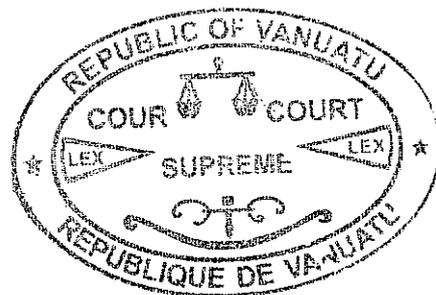
57. Mr Kai does not have to prove anything. But he chose to provide the Court with his narrative. He is a confident man, who gave his evidence in a forthright manner. He said he and MJ loved each other and had a good relationship. Mr Kai was adamant

¹¹ This was a substantial matter from the defence perspective, so s 59 of the Evidence Act applies



that he never made any threats and that the sexual activity that night was consensual. He remained firm in cross examination. He said they would go crazy for each other and that it was MJ who insisted on sucking his penis and who fucked him. In light of subsequent events, I find that evidence to be implausible. Whatever happened that night led MJ to flee from her home and end what had been a happy relationship. Mr Kai agreed that the relationship ended after that night. She had every reason to stay at her home and in the relationship with Mr Kai, who said he was helping her to improve her home, and they were in love. Mr Kai's narrative that the sexual activity was consensual is incongruent with MJ's immediate reaction to leave her home at Erakor, and so as I have said, I assess his evidence about that to be implausible and unconvincing.

58. Mr Kai described in some detail the specifics of the consensual sexual activity.¹² MJ was not asked about Mr kai's narrative when she was cross examined. She should have been asked questions as that detail was a substantial matter relating to the issue of consent and belief on reasonable grounds in consent. MJ should have been given an opportunity to comment on Mr Kai's narrative. The common law position is that the essence of contradictory material normally has to be put to a witness so they might have an opportunity to explain the contradiction.¹³ This is to ensure fairness. Section 59 of the Evidence Act now addresses a failure to cross examine on contradictory matters. The Court has a discretion as to how to deal with this issue. I consider that Mr Kai's evidence is admissible, but it is a matter of the weight to be attached to the evidence, given MJ was not questioned about Mr Kai's evidence about what he says happened.¹⁴ My impression was that his evidence evolved.
59. While Mr Kai did not have to give any explanation as to why MJ fled to Agatis, he chose to do so. He said they quarrelled over him taking back VT 10,000 for material for her house. MJ was not asked about the fact they argued the next morning over the money. She was asked about the VT 10,000 and said it had not been given to her, and she seemed to be unaware of the exact circumstances. That an argument over money led to MJ leaving and ending the relationship, in the context of them being in love with each other, seems improbable and far-fetched. I do not believe Mr Kai is telling the truth about that.
60. I do not reject all of Mr Kai's evidence. I accept his evidence if it is consistent with MJ's evidence.



¹² These matters are discussed at paragraph 75

¹³ *Browne v Dunn* 1893 6 R 67 HL

¹⁴ Section 59(b) of the Evidence Act

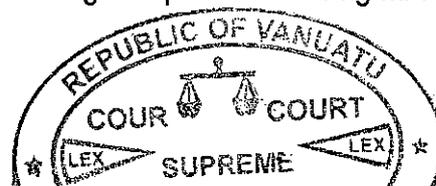
Charge One - Unlawful entry into a dwelling house

Am I sure that Mr Kai entered MJ's dwelling house in November 2024?

61. While MJ and Mr Kai's evidence differs as to how Mr Kai came into the house, it is not in dispute that he did so on the night of the alleged rape and threats in November 2024. They were in a relationship, and according to MJ, Mr Kai visited frequently. Mr Kai's evidence is that he was living there. But there is no doubt that Mr Kai entered MJ's dwelling house late at night of the alleged rape.
62. I am sure that Mr Kai entered MJ's dwelling house in November 2024.

Am I sure that Mr Kai entered MJ's dwelling house with the intent to commit a crime?

63. MJ's evidence is that one night in November 2024, Mr Kai came into her home late at night, somewhere between midnight and one am. MJ's home is at Erakor. MJ's evidence was that she was not expecting Mr Kai that night. She said she did not know Mr Kai was going to come to her home that night. Her home is a tent like structure, with a canvas roof and walls. It is isolated and there are bushes and trees between MJ's home and the nearest property. MJ was asleep. She woke to a light shining her eyes. She said Mr Kai was using a lighter as a light. As I will explain in more detail when considering charges 2 and 3, MJ's evidence was that he grabbed her hand, lay on top of her and then performed sexual acts on her. He made threats to her on numerous occasions that he would end her life and go to prison.
64. Mr Kai's evidence was that he was living at MJ's home, came home late after kava, as he usually did. When he got to the house, MJ enthusiastically initiated sexual intercourse with him.
65. As I have said in assessing generally the credibility and reliability of MJ's evidence, I accept her evidence. I do not accept Mr Kai's evidence generally as I assess it to be implausible and unconvincing. This is discussed both in the general credibility and reliability section and when considering charges 2 and 3.
66. It is a matter of assessing whether Mr Kai came to MJ's home with the intent to commit a crime. The prosecution case is that he intended to rape MJ. Mr Kai denies that. There is no direct evidence of whether Mr Kai intended to rape MJ. That is because Mr Kai denies entering her home with such an intention. It is a matter of assessing what inferences can be drawn from the evidence as a whole. Intention is to be assessed taking into account all relevant circumstances and including Mr Kai's words and actions. His actions should not be considered in isolation from what he said and did.
67. I have found Mr Kai guilty of both rape charges. But that does not necessarily mean that I am sure that he entered MJ's dwelling intending to rape MJ. In finding Mr Kai



guilty of the rape charges, I have accepted MJ's evidence. MJ was woken by Mr Kai, who grabbed her hand, climbed on top of her and pushed his penis into her mouth. There was no discussion and when she tried to get away from him by shaking her head from side to side, Mr Kai said he would end her life and go to prison. He continued to make threats to ensure she complied, he put his hand in her vagina and then had sexual intercourse with her.

68. I infer that Mr Kai entered MJ's home with the intention of raping her when I consider all relevant circumstances. The circumstances are discussed in detail in my assessment of charges 2 and 3 (the rape charges). It was late at night. MJ did not know he was coming to her home and was asleep in her bed. Mr Kai's words and actions show that he went to MJ's house intending to rape her. There was no discussion and Mr Kai immediately grabbed MJ's hand, got on top of her, pushed his penis into her mouth, threatened to kill MJ and continued with the sexual acts even though there was no indication from MJ that she wanted the sexual activity.
69. I am sure that Mr Kai entered MJ's house with the intent to commit a crime, being rape

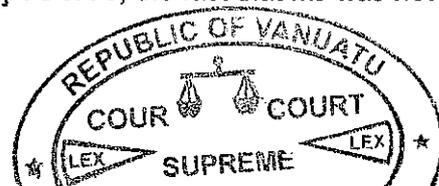
Result

70. Charge 1 is proved beyond reasonable doubt. I find Mr Kai guilty of charge 1. One observation I wish to make is that this charge seems unnecessary. The real issues here are the rape allegations and the threat to kill at Erakor. It does not add anything to the prosecution case.

Charge 2 – sexual intercourse without consent

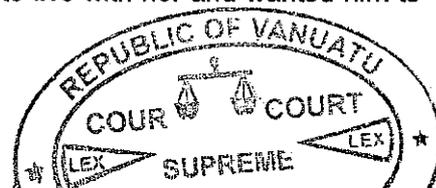
Am I sure that Mr Kai penetrated MJ's mouth with his penis and penetrated her vagina with his finger?

71. The particulars of charge 2 include two separate sexual acts. Ordinarily, there should be two separate charges for these sexual acts of oral sexual activity and digital penetration. During Mr Shem's opening, I asked him if the prosecution case was that it was a continuing course of conduct. Mr Shem confirmed that it was and so it was unnecessary to direct that charge 2 be split into two separate charges to reflect each separate alleged sexual act.
72. There is no dispute that there was oral sexual activity between MJ and Mr Kai that night. Although there is a factual dispute as to how the oral sexual activity happened, as discussed below. MJ's evidence was that after Mr Kai removed her trousers and panties, he put his hand in her vagina. She was not challenged about that evidence in cross examination. MJ's evidence was the only evidence about the digital penetration. As was held in *Fisher v Wylie* [2021] VUCA 5, the fact that MJ was not



cross examined on that evidence leaves it specifically unchallenged, and so in the normal course it would be accepted. Mr Kai did not give any evidence at all about the digital penetration.

73. As I have said, MJ was at her home at Erakor one night in November 2024. She and Mr Kai were in a relationship, but her evidence was that she did not know he was going to come to her home that night. She was not expecting him. MJ said she was at home and in bed asleep. Late at night, around midnight or one am, she woke to a light shining in her eyes. She said Mr Kai used a lighter as a light. He immediately grabbed her hand and climbed on top of her. Mr Kai did not say anything to MJ. He lay on her and pushed his penis into her mouth. She did not like it, so shook her head from side to side to try and get away from him. She said she tried to get his penis from her mouth and said she was upset and scared. When she shook her head, Mr Kai told her that if she did not like it, he would end her life and go to prison.
74. Then he held her hands tightly with one hand and used the other to remove her trousers and panties. She said she moved around to try and stop him, but he was strong. MJ said that Mr Kai then pushed his hand into her vagina. She said she was afraid of him and did not like him touching her. MJ's evidence was that Mr Kai made a number of threats to end her life in the house at Erakor that night.
75. Mr Kai said that he and MJ would go crazy for each other. He said he loved MJ. There was no time he could recall when he forced her to suck his penis. He said there was no forcing. There was no such thing as getting on top of her. Mr Kai's evidence is that MJ agreed to the sexual activity. He said they started kissing each other and then she sucked his penis and sat on top of him. He said she loved sucking him. He said that she insisted on sucking his penis. He asked her to give him some time because he still had kava in him, which meant it took time for him to become erect. And so, she kept sucking him. He denied threatening to take her life and go to jail, said he never forced her. He loved her. Mr Kai denied removing MJ's clothes. His evidence was that she removed his trousers and started sucking his penis. He said that MJ removed her own clothes
76. Both MJ and Mr Kai agreed that Mr Kai's penis was in MJ's mouth. Therefore, however it was achieved, there was penetration of MJ's mouth with Mr Kai's penis. As I have said, I have generally accepted MJ's evidence, and I accept her evidence as to how Mr Kai's penis came to be in her mouth. MJ was clear in her description that Mr Kai grabbed her hand, got on top of her, and put his penis in her mouth, without saying anything. Then he removed her trousers and panties and put his hand in her vagina. Her evidence was genuine, and matter of act. As I have said, this is the only evidence about digital penetration, and MJ was not challenged about that evidence in cross examination, so I accept it. She did not embellish and her evidence was authentic. As I have said in assessing her credibility generally, a very telling factor is that the events of the night in November 2024 ended the relationship, and MJ fled from Erakor. That was an important piece of evidence, because MJ's candid evidence was that she loved Mr Kai, wanted him to live with her and wanted him to

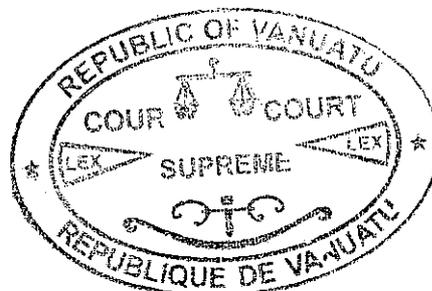


be her husband. She also acknowledged that previously the sexual intercourse had been consensual.

77. Aspects of Mr Kai's evidence about the consensual nature of the sexual activity were not put to MJ for her comment. These matters include that they were kissing each other, she initiated the sexual acts, that she removed Mr Kai's trousers and that she insisted on sucking his penis, and then sat on top of him. Mr Kai also said that after the sexual intercourse, MJ wanted to orgasm, which she did. That is a very different narrative to MJ's evidence. These were substantial matters which MJ should have been given the opportunity to comment on when she gave evidence, as the evidence is very relevant to consent and belief on reasonable grounds in consent, as I have said. Pursuant to s 59(2) of the Evidence Act, Mr Kai's evidence is admissible but I do not place much weight on it given that MJ was not given an opportunity to comment on it. While this is more relevant to the issue of consent, the very different narratives about the nature of the oral sexual activity requires factual findings. I reject Mr Kai's evidence about how the oral sexual activity took place. Mr Kai's evidence is improbable and unconvincing for the reasons discussed. Further, I place limited weight on his narrative about the oral sexual activity as noted. Viewed in context, this was not loving intimacy initiated by MJ who insisted on sucking Mr Kai's penis. I prefer and accept MJ's evidence that without saying anything, Mr Kai put his penis into MJ's mouth. I have generally accepted MJ's evidence. I assess her evidence about the sexual activity to be an authentic account of what happened, for the reasons given.
78. I am sure that Mr Kai penetrated MJ's mouth with his penis in the manner described by MJ and inserted his hand into her vagina.

Am I sure that MJ did not consent to those sexual acts.

79. Consent is to be assessed at the time the sexual act takes place. MJ's behaviour and attitude before or after the sexual acts may assist in deciding that, but it is not decisive. MJ's evidence is that Mr Kai came into the house without warning, grabbed her hand, got on top of her and put his penis into her mouth. Mr Kai did not speak to MJ. MJ did not want the sexual activity and tried to resist by shaking her head from side to side when Mr Kai put his penis in her mouth. But then he threatened to end her life. He then removed her trousers and panties and put his hand into her vagina, while he was holding her hands tightly and continuing the threats. If sexual acts occur because there is force or threats or intimidation, or fear of bodily harm, that is not a true consent freely given. MJ may not have verbalised a protest to the sexual activity, but that is hardly surprising given that she was threatened and was scared and upset. MJ did try to physically resist when she was shaking her head from side to side when Mr Kai's penis was in her mouth. She also tried to resist her trousers and underwear being removed by moving around.

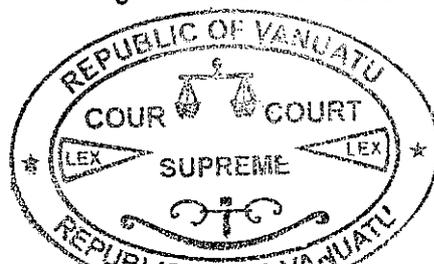


80. It seems rather implausible that MJ fled to Agatis the next morning, which ended the relationship, if it was a mutually satisfying encounter, as Mr Kai asserted. Mr Kai was not required to give evidence, and not required to give any explanation. But he chose to do so. His evidence was that she left for Agatis the following morning because they had had an argument about VT 10,000. MJ was asked about the VT 10,000, and the fact that Mr Kai took it back. MJ's evidence was that the VT 10,000 was not given to her personally but was given to someone else. She did not know anything about Mr Kai taking the money back. However, MJ was not asked about an argument over the money being taken back and it was not put to her that was the catalyst for her to leave her home at Erakor and end the relationship. MJ should have been asked about this because Mr Kai's evidence was that her motivation to leave her home was because of the argument, and not because she was scared and had been raped. In accordance with s 59(2) of the Evidence Act, the evidence is admissible, but I place limited weight on it, as MJ was not given an opportunity to comment on it.
81. Mr Kai had proved some financial assistance to MJ towards improvements to her home. He had paid for a toilet and was going to provide VT 10,000 for materials for the house. For reasons that never really emerged in the evidence, Mr Kai took the VT 10,000 back. MJ's evidence was that she was happy with Mr Kai and loved him. While she clearly lived in poverty, it seems odd that she would suddenly flee and end the relationship because he decided for whatever reason to take back the VT 10,000 for materials.¹⁵ I find that evidence to be implausible and unconvincing. She left her home because she was scared of Mr Kai.
82. As noted, I do not accept Mr Kai's evidence about the consensual nature of the sexual activity, so I put it to one side. I have accepted MJ's evidence generally. I accept her evidence in relation to the issue of consent. Her evidence was detailed, and clear about what took place. Her evidence was consistent, and genuine. She did not want the sexual activity. I am sure MJ did not consent to the either sexual act. There was no discussion, MJ tried to resist both the oral sexual activity and her trousers being removed. She was threatened by Mr Kai to overcome resistance to the sexual activity. This was not a true consent in all the circumstances.
83. Therefore, I am sure that MJ did not consent to the sexual acts. And simply because MJ and Mr Kai had consensual sex on other occasions, does not make it more likely that she consented on this occasion. MJ did not consent this time.

Am I sure that Mr Kai did not believe on reasonable grounds that MJ was consenting at the time that the sexual acts occurred?

84. I will consider whether Mr Kai could not reasonably have believed MJ was consenting. If I am sure that a reasonably person standing in MJ's shoes would not

¹⁵ Mr Kai said it was for natangura for the roof of MJ's home.



have believed that MJ was consenting, that would be enough. This is to be assessed at the time of the sexual acts.

85. The evidence in relation to consent is relevant and applicable to this issue. I have accepted MJ's evidence that the oral and digital sexual acts were non-consensual. On that basis, no reasonable person in Mr Kai's shoes would have believed MJ was consenting. I refer to the factual narrative at paragraph 79 above which is equally applicable to this issue. Mr Kai had grabbed MJ's hand, got on top of her. There was no discussion between them before Mr Kai put his penis in her mouth, and MJ shook her head from side to side to try and get away from him. When she did that, Mr Kai told her that if she did not like it, he would end her life and go to prison. When he was removing her trousers and panties, MJ moved around to stop him, but she said he was strong. At that time he held her hands tightly as well. Mr Kai did not ask her whether the sexual acts were something she wanted. While MJ did not verbally protest, she did try to physically resist as I have noted. Mr Kai's response was to threaten her life and carry on regardless.
86. Therefore, I am sure that a reasonable person standing in Mr Kai's shoes would not have believed that MJ was consenting at the time the sexual acts occurred, given the matters discussed above.

Verdict

87. Charge 2 is proved beyond reasonable doubt. I find Mr Kai guilty of charge 2.

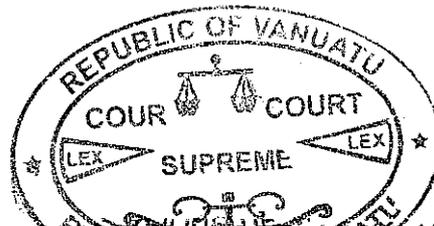
Charge 3 - sexual intercourse without consent.

Am I sure that there was sexual intercourse between MJ and Mr Kai?

88. There was sexual intercourse is not in dispute. But MJ and Mr Kai said that Mr Kai penetrated MJ's vagina with his penis.
89. Therefore, I am sure that there was sexual intercourse between MJ and Mr Kai.

Am I sure that MJ did not consent to the sexual intercourse?

90. MJ's evidence was that after Mr Kai had put his penis into her mouth, penetrated her vagina with his hand and threatened to end her life, he said she must let him have sex with her, so she did. In her evidence, she explained that she did so because she was afraid of him, so she let him have sex with her. He had told her he would take her life, that she was not to give her body to anyone. That only he would have sex with her, and she was not to have sex with any other man. MJ submitted to the sexual



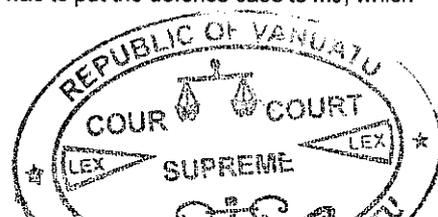
intercourse because she was fearful of what might happen to her. That is not a consent freely given.

91. In cross examination, it was put to MJ that on the night in November 2024 they had sex with each other with mutual consent because Mr Kai had been living with her as her husband. MJ's response was "yes" they would have sex together because he was her husband, and she wanted to stay with him. MJ clarified that answer in re-examination. She confirmed that on the night in November 2024, she did not agree to have sex with Mr Kai. She confirmed that before that night, there were no issues with the sex and she was happy. She clarified that when she said "yes", she meant the prior occasions but not for the reason she was in Court today. That is entirely consistent with her evidence in chief. Of note, that was the only question asked in cross examination about the issue of consent.¹⁶ It seemed obvious that MJ was talking about sexual intercourse during the relationship and not the alleged rapes.
92. As noted, I do not accept Mr Kai's evidence about the consensual nature of the sexual activity, so I put it to one side. I have accepted MJ's evidence generally. I accept her evidence in relation to the issue of consent. Her evidence was detailed, and clear about what took place. It was matter of fact, and there was a genuine air of resignation to her submission to the sexual intercourse. She did not want the sexual activity. I am sure that MJ did not consent to the sexual intercourse. She gave in to Mr Kai because she was afraid of him as she said. In such circumstances, it was not a consent freely given. And simply because MJ and Mr Kai had consensual sex on other occasions, does not make it more likely that she consented on this occasion. MJ did not consent this time.

Am I sure that Mr Kai did not believe on reasonable grounds that MJ was consenting at the time that the sexual intercourse occurred?

93. I will consider whether Mr Kai could not reasonably have believed MJ was consenting. If I am sure that a reasonable person standing in Mr Kai's shoes would not have believed MJ was consenting, that would be enough. This is to be assessed at the time of the sexual intercourse.
94. The evidence in relation to consent is relevant and applicable to this issue. I have accepted MJ's evidence that the sexual intercourse was non contextual. On that basis, no reasonable person in Mr Kai's shoes would have believed MJ was consenting. According to MJ's evidence, he had threatened to end her life, told her she must let him have sex with her, so she did and did so because she was afraid. No reasonable person would have thought MJ was consenting given the circumstances where prior to the sexual intercourse she had tried to resist other

¹⁶ Mr Vira initially said he had finished cross examination of MJ. However, he had not put the defence case to MJ in relation to any of the charges. I directed that after the lunch break he was to put the defence case to MJ, which he did, albeit relatively briefly



sexual acts, and direct threats to kill MJ had been made. No person would reasonably believe that MJ was consenting at that time and in those time circumstances.

95. Therefore, I am sure that a reasonable person standing in Mr Kai's shoes would not have believed that MJ was consenting at the time the sexual intercourse occurred.

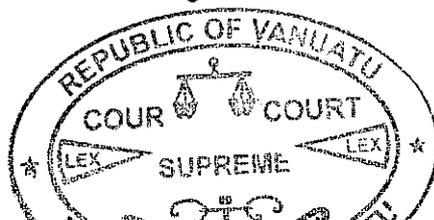
Verdict

96. Charge 3 is proved beyond reasonable doubt. I find Mr Kai guilty of charge 3.

Charge 4 – threats to kill

Am I sure that Mr Kai directly caused MJ to receive oral threats to kill her?

97. The prosecution case is that Mr Kai threatened to kill MJ when she was showing some signs of resistance to the sexual acts. MJ was clear and consistent both in her evidence in chief and cross-examination that Mr Kai threatened to kill her. That he told her that he would end her life and go to prison. The first time Mr Kai made a threat to kill MJ that night was when MJ was shaking her head after Mr Kai put his penis in her mouth. It made MJ feel scared. Mr Kai also said he would take MJ's life, and that she was not to give her body to anybody. That only he could have sex with her- she was not to have sex with any other/different men. MJ also said that when Mr Kai had sexual intercourse with MJ he repeated the threat that if she did not let him have her body, he would take her life.
98. The defence case is that this was a consensual encounter, and that Mr Kai did not threaten MJ at all. Rather, she was the instigator of the sexual activity, and it took him a while to get going because he had had kava. I do not accept Mr Kai's evidence that he did not make any threats for the reasons already given when assessing charges 2 and 3, and I put it to one side.
99. I do not intend to repeat my findings about the credibility and reliability of MJ's evidence and Mr Kai's evidence generally. I accept MJ's evidence that Mr Kai made repeated threats to end her life. Context is important. The threats were made to compel MJ's compliance and to overcome resistance to the sexual activity. I assess that the threats were made as described by MJ and that this was something actually experienced by MJ, who was fearful to the point she left her home at Erakor. As already said, a compelling piece of evidence is that the next morning MJ left her home at Erakor, which ended the relationship. Until then it had been a happy relationship, so I assess that adds weight to MJ's evidence that Mr Kai threatened to end her life. I infer she left home because she had both been raped and threatened. Her evidence about how she felt and that she was scared was genuine.



100. I am sure that Mr Kai made oral threats to kill MJ.

Am I sure that Mr Kai knew the contents of the threats?

101. Mr Kai must have known the contents of the threats. He threatened to end MJ's life on a number of occasions, so I infer that he knew the contents of the threats.

Am I sure that Mr Kai intended the threats to be taken as real?

102. As the defence case is that Mr Kai did not make any threat to kill, it is a matter of inferring Mr Kai's intention. The available inference is that he did intend the treats to be taken as real, given the nature and circumstances of the threat. Mr Kai consistently said that he would end MJ's life, to overcome her resistance to the sexual activity. In such circumstances, I infer that Mr Kai intended the treats to be taken as real.

Result

103. Charge 4 is proved beyond reasonable doubt. I find Mr Kai guilty of charge 4.

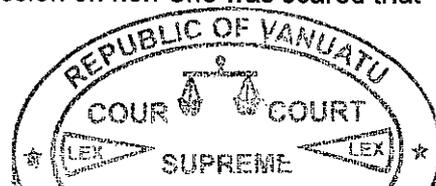
Charge 5 – threat to kill

Am I sure that Mr Kai indirectly caused MJ to receive oral threats to kill her?

104. Without opposition, the particulars of charge 5 were amended at the conclusion of the prosecution case. Mr Shem sought such an amendment to conform with the evidence. MJ's evidence was that sometime after she had fled from her home at Erakor, Mr Kai arrived one day at Agatis where she was staying with a man from PNG. Mr Kai acknowledges that he went to Agatis. He says he went to apologise about the VT 10,000. MJ said that when he arrived, he said to her "*do you remember what I said at Erakor?*". MJ was candid that Mr Kai did not repeat the threats that he had made at Erakor. She was candid about this. In re-examination she was asked what she thought that meant. MJ's answer was that what Mr Kai said to her at Erakor caused her to leave and go to Agatis. Then when he came to Agatis and said what he did, she got scared and that is why reported him to Police.

105. This was not a direct threat to kill. On the prosecution case, Mr Kai did not make an oral threat to kill MJ. As was said in *Public Prosecutor v Sam* [2014] VUSC 133, clear evidence of a threat to kill is fundamental to proving a threat to kill charge.

106. I accept that MJ clearly believed Mr Kai to be talking about the night at Erakor, as I infer it was something that had left a lasting impression on her. She was scared that



he turned up uninvited and unannounced at Agatis, and so that was the catalyst for the report to the police. But this element of the charge is not about what MJ believed but whether there was an oral threat to kill.

107. Usually, when a threat is indirectly made, it is via another person. The prosecution case is that the nature of the threat was indirect; a veiled reference to the earlier threats made at Erakor, but that relies on MJ's perception or interpretation of the comment made by Mr Kai. I do not consider that the comment is clear evidence of an oral threat to kill, and so the charge is not proved.

Result

108. Charge 5 is not proved. I find Mr Kai not guilty of charge 5.

DATED at Port Vila this 17th day of December 2025
BY THE COURT

Justice M A MacKenzie
Justice M A MacKenzie

