

IN THE MAGISTRATE'S COURT
OF THE REPUBLIC OF VANUATU

(Criminal Jurisdiction)

Criminal Case No. 134 of 2002

PUBLIC PROSECUTOR -V- JOE HARRY

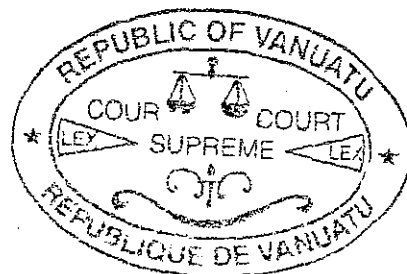
JUDGMENT

The accused Joe Harry this case is charged for threatening gestures contrary to section 121 of the Penal Code. The complainant Marie Noelle F. Patterson alleged that she was threatened by the gestures of the defendant, which happened on the 6th of November 2001. The accused pleaded not guilty to the charge at first instance. For purposes of clarity I have investigated the scene of the incident relating to each individual's evidence.

The Evidence

The prosecution called 3 witnesses for its case on trial on the 14/08/02. PW1 (the complainant) gave evidence that as soon as she parked her car between Healthwise pharmacy and Fantasy Shop, the defendant walked straight to her car. She knew the defendant would act in an unpleasant manner before her because she had received a call that morning from the defendant concerning the Commission of Enquiry on MV Kimbe. She was still inside her car when the defendant approached her. She described the defendant's reaction as "*knocking his hands against the window of the car, looked angry, talking loudly and punching his hand*" while asking for the report. She remained inside her car for about 1-2 minutes to avoid any assault or harm.

As she tried to avoid hearing anything about the report or communicate with defendant she came out of her car and tried to overtake the defendant. However, she was unfortunately obstructed from her walk about 2-3 times whilst repeatedly punching his hand, and demanding the report in an angry and loud voice manner. During the course of the threats, PW3 grabbed him by the hands from behind enabling her to gain her way to the Lingerie shop which is Fantasy Shop to cool herself. On cross-examination I find her evidence undiscredited as most question posed relate to irrelevant issues not in question.



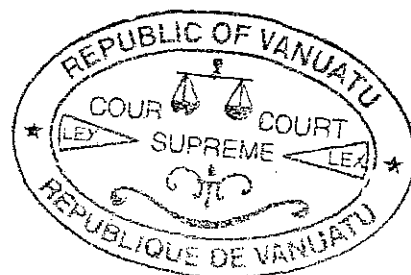
PW2 (Silvie Theora) gave evidence that at about 4.00 - 4.15 pm she watched the incident from her shop at a distance of 6 - 7 metres. She could not hear what the defendant said but did heard loud voices. She described the defendant's action as "*talk loudly, mo stap punchem hand blong hem mo preventem complainant long walkabaot blong hem*". She further stated that during the course of the event she saw a whiteman (identified as Gregory) held the defendant by the hands from the back and Marie Noelle nevertheless, walked into her Lingerie shop.

She gave a description of the look or appearance of the complainant's face as "*afraid tumas , seksek mo stap pulum nogud wind*" in which she quickly offered her a chair to cool herself and recover. When cross-examined she admitted that she did not hear what Joe was saying. Upon questioning about time she was unsure about the actual timing of the event because there were customers inside her shop soon after the event had occurred .She guessed that it may have lasted less than 13 minutes. Although her statements seems contradictory with the complainant evidence, such time to this court still fall within the range of minutes sworn by the complainant.

PW3 (Gregory Whitford) told this Court that approximately about 4.15 he was returning to his car parked next to Healthwise, he saw the defendant in a red shirt approached the complainant's car and was saying something to her. The complainant shoke her head in a *No fashion*. The man moved slightly and Marie Noelle exited her car and as he was approaching the defendant, he continued to block her working path about 2 times. By that time, he was right behind the defendant and he grabbed both shoulders of the man and said "*let her go*". In doing so, the complainant was free to walk her way into the Lingerie shop. He stated that the incident lasted for about 3 - 4 minutes. On cross-examination he could not describe what was said or the reaction of the defendant as he was at the back.

The defendant called 2 witnesses to testify on his behalf.

DW1 (Johnny Albert) told the Court that he was in front of Goodies shop when he waved and crossed the road to the defendant. He suddenly realised that the defendant was asking a report from the complainant. He referred to the conversation as normal. He also saw a whiteman (PW3) standing behind the defendant. He emphasized that The defendant was never grabbed by the hands or shoulders neither she was obstructed from her way .



During cross-examination he said knew the defendant very well as a school mate. When questioned as to when and where the complainant was after he crossed the road, he testified that the complainant was already outside her car. Having recorded his statements I find DW1 evidence to be truthful . However, it is apparent that DW1 did not fully witness the event. I take into account his capacity to fully observe the event, in particular time and traffic. There is possibility that the surrounding environment could affect the credibility of his evidence. For instance, traffic could have delayed his crossing and I also note the fact that the defendant is a friend of DW1 .Thus, there is a risk that evidence could have been fabricated in favour of the accused.

DW2 (Samson Kilman) gave evidence that he witnessed the incident while eating ice cream a EL Kego some 20 metres away from the scene. He was notified when he got the attention of by passers pointing and looking across the road. He described the defendant's actions as "*sakem hand blong hem down*" while talking and "*pointem hand down*". He interpreted the defendant's action as saying "*now or today*". He added that during the conversation, Marie Noelle came out of the car and walked directly into the Lingerie shop followed by Joe. He also confirmed seeing a whiteman (PW3) talking to Joe but not seizing or holding the defendant's hands or shoulders as evidenced by the prosecution witnesses.

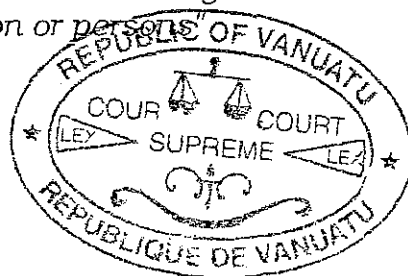
On cross-examination, he confirmed that when DW1 crossed the road from Snoopy Stationary to Healthwise pharmacy, the complainant had already exited her car. His testimony seems fair enough but I conclude that he is not placed in a better position and lacks capacity to accurately witness the incident without interference. He had stated that there was traffic but not so busy at this pointing time. Traffic, noise and by passers could have effected his sight from carefully viewing and observing the particulars of the action. It is therefore, in the view of the court that he did not witness all that happened.

Given the privilege at the close of his defence case, the accused had elected not to give evidence himself on his own behalf nor be crossed examined .

The Law

Section 121 of the Penal Code stipulates

"No person shall in a public place use threatening or abusive words or threatening gestures towards any other person or persons"



The onus of the burden proof rests upon the shoulders of the prosecution. The following elements must be proved beyond reasonable doubt.

- There must be a person
- That the incident occurred in a public place
- That there is use of threatening gestures towards another person.

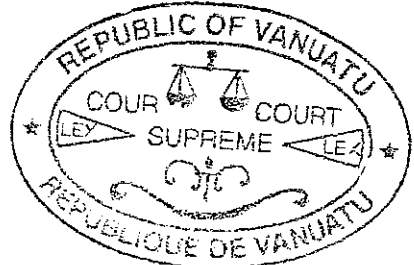
Application of Law

From the evidence gathered I note the following findings. Firstly that the defendant has been easily identified by all witnesses from both sides as the person alleged to have committed the offence. The incident happened between Healthwise and Fantasy shop.

The evidence of PW1, PW2 & DW2 revealed that the motion or physical attitude of the defendant's hand or body accompanied with the loud talking constitutes threatening gestures such as punching the hands. Equally the evidence from the prosecution collaborates and are in sequence of event. Whereas the evidence adduced by the defence seems obscure to arrive a clear conclusion. DW1 arrived towards the end of the incident whereas DW2 watched the incident from a distance of 20 metres in a busy environment as mentioned earlier on. The movement of the traffic and people passing by and would undoubtedly distort his viewing of the incident.

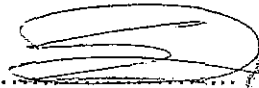
Having said so, this Court furthermore, noted issues raised by the defence regarding contradictory statements made during cross-examination. In particulars whether PW3 grabbed the defendant's shoulder or hands. The other issue is that PW1, PW3 & DW2 ^{heard} loud talking but could not hear what was said. Despite of their shaky evidence as such, it does not weaken the credibility and quality of the prosecution witnesses evidence. The defence has not discredited the evidence proving the essential elements of the offence aforesaid.

Having so ruled, this court is satisfied that the prosecution has proved its case. The defendant is therefore found guilty as charged for threatening gestures. As a first offender I sentence him to a fine of VT 8,000 plus VT 2,000 as prosecution cost payable on the 30th August, 2002. In default of such payment the defendant will be arrested and immediately imprisoned for 2 months.



Dated at PORT VILA this 21st day August 2002.

BY THE COURT


EDWIN MACREVETH
Magistrate

