

Public Prosecutor -V- SANO ALVEA

Coram: LUNABEK J
Prosecutor: Ms Kayleen TAVOA
Defence: Ms Stacy COWELL

JUDGEMENT OF THE COURT

I PRELIMINARY POINTS

1. Choice of Language.

This is the judgement of the Court in this case. It is written in English and is translated into Bislama (if need be) so that the Defendant and all the people who have come to hear the case may be able to know what the Court had decided, and the reasons for its decision.

2. Nature of Charges.

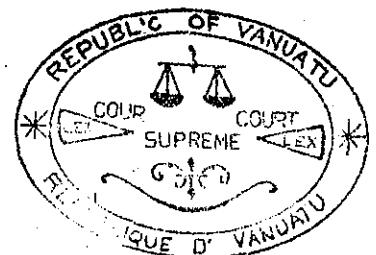
The accused Sano Alvea was committed to this Court charged with the following offences:

In Count 1: That on or about May 1994 in Vila he did have sexual intercourse with his daughter Rose Alvea, without her consent, contrary to section 91 of the Penal Code Act CAP 135

and in the alternative:-

In Count 2: That on or about May 1994 in Vila, he did unlawfully have sexual intercourse with Rose Alvea who was at that time 13 years old, contrary to section 97 (2) of the Penal Code Act CAP 135.

and in the alternative:-



In Count 3: That on or about May 1994 in Port Vila he did have sexual intercourse with Rose Alvea and at that time he knew the complainant is his daughter contrary to section 95 (1)(a) of the Penal Code Act CAP 135.

In Count 4: That on or about August 1994 in Vila the Defendant did unlawfully have sexual intercourse with Rose Alvea and at that time she was 14 years old contrary to section 97 (2) of the Penal Code Act CAP 135.

In Count 5: That on or about August 1994 in Vila, the Defendant did have sexual intercourse with Rose Alvea and at that time the Defendant knew that the complainant is his daughter, contrary to section 95 (1) (a) of the Penal Code Act CAP 135.

and in the alternative:-

In Count 6: That on or about respectively November 1994 and January 1995 in Vila the Defendant did unlawfully have sexual intercourse with Rose Alvea who was at that time 14 years old, contrary to Section 97 (2) of the Penal Code Act CAP 135.

and in the alternative:-

In Count 7: That on or about respectively November 1994 and January 1995 in Vila, the Defendant did have sexual intercourse with Rose Alvea and at that time, he knew she is his daughter, contrary to section 95 (1) (a) of the Penal Code Act CAP 135.

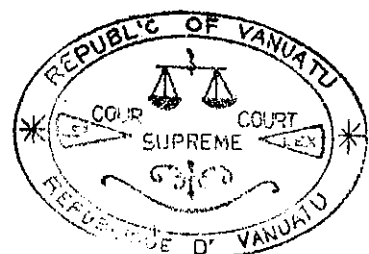
and in the alternative:-

In Count 8: That on or about February 1995 in Vila, the Defendant did unlawfully have sexual intercourse with Rose Alvea who was at that time 14 years old contrary to section 97 (2) of the Penal Code Act CAP 135.

and in the alternative:-

In Count 9: That on or about February 1995 in Vila, the Defendant had sexual Intercourse with his daughter Rose Alvea, contrary to section 95 (1) (a) of the Penal Code Act CAP 135.

and in the alternative:-



In Count 10: That on or about May 1995 in Vila, the Defendant did unlawfully have sexual intercourse with Rose Alvea and at that time she was 14 years old, contrary to section 97 (2) CAP 135.

and in the alternative:-

In Count 11: That on or about May 1995 in Vila, the Defendant had sexual intercourse with his daughter Rose Alvea, contrary to section 95 (1) (a) of the Penal Code Act CAP 135.

In Count 12: That on or about August 1995 in Vila, the Defendant had sexual intercourse with his daughter, Rose Alvea, contrary to section 95 (1)(a) of the Penal Code Act CAP 135.

It is to be noted that Count 13 relating to the charge of Incest against the Defendant was struck out on the application of the prosecution.

In Count 14: That on or about 14 March 1996 in Vila, the Defendant had sexual intercourse with his daughter , Rose Alvea, contrary to section 95 (1) (a) of the Penal Code Act CAP 135.

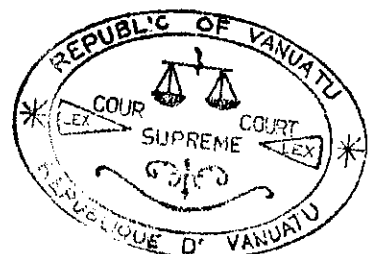
In Count 15: That on or about 28 March 1996 in Vila, the Defendant had sexual intercourse with his daughter, Rose Alvea, contrary to section 95 (1) (a) of the Penal Code Act CAP 135.

In Count 16: That on or about 2 April 1996, in Vila, the Defendant had sexual intercourse with his daughter, Rose Alvea, contrary to section 95 (1) (a) of the Penal Code Act CAP 135.

3. Pleas

The Defendant pleaded "Not Guilty" to all the Counts. These pleas were noted and the trial proceeded on all the Counts.

4. Statement of Presumption of Innocence was read out to the Defendant. (See Section 81 of the Criminal Procedure Code Act CAP 136.)



II STANDARD OF PROOF AND ESSENTIAL ELEMENTS OF OFFENCES.

This is a criminal jurisdiction in which the Judge is both the Judge of law and the Judge of fact. It is the duty of the judge to apply the law in full so that the Defendant should know exactly what he has been tried on and so that if the Court has misdirected itself on any points of law, the Defendant would be able to appeal. It is also the duty of the Judge to sum up the evidence, that is, to give a resume of the facts, again so that the Defendant should know what evidence has been considered by the Court in coming to the verdict eventually.

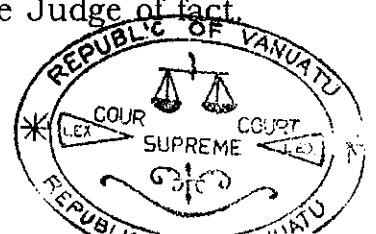
The function of a Judge as a judge of fact is to consider the evidence with care and to apply the law as the Court stated it to be, to these facts and eventually to come to the verdict.

This is a criminal trial and as in every criminal trial, it is for the prosecution who brings the charges to prove them. It is for the prosecution to prove each and every allegation of facts in this case. There is no burden on the defence whatsoever. Furthermore, the burden which rests upon the prosecution is a very heavy one.

Before I can convict the Defendant of any of the charges brought against him by the prosecution, I must be sure of his guilt, nothing less will do. That is the same as saying that the prosecution must prove the Defendant's guilt beyond reasonable doubt. If the prosecution fails to discharge the very heavy burden that rests upon him on any or all of the Counts as against the Defendant, to the standard that I have stated, then the Defendant as against whom any of those charges have not been proved is entitled to be acquitted. In other words, if at the end of the day I am left with a reasonable doubt as to the Defendant's guilt, then he would be entitled to the benefit of that doubt and to be acquitted.

I bear in mind that the Defendant, Mr Sano Alvea faces charges upon fifteen (15) counts in this indictment, and that I have the duty to look at the evidence upon each of those charges quite separately in order to return quite separate verdicts on each of them as against him. It may be that the prosecution would have proved his guilt to the required standard upon one or more of the counts, or upon none at all. It does not follow that if this Defendant is guilty on one count that he is guilty of all of them, not more than that if he is innocent of one Count that he is innocent of all.

I bear also in mind that most of the counts against the Defendant are alternative counts. The proper course will be to allow both charges whether principal or alternative counts to proceed and be decided ultimately by me as the Judge of fact.



Clearly as the Judge of Fact, I must be satisfied that each ingredient of an offence be proved by the prosecution. If the prosecution fails to establish the principal count, the Defendant will be acquitted on this count, and if the prosecution can prove the alternative count, the Defendant would be convicted on that alternative Count but if there is any doubt then I would have no alternative but to acquit on the second count also.

The Defendant made no statement in this case. But he did, however, elect to give evidence in this case. He did not need to do so. As in any criminal case, there is no evidential burden at all on the Defendant. The fact that he has given evidence does not mean that any burden whatsoever is cast upon him. He could have remained silent in the dock and simply allowed himself to be tried on the evidence called by the prosecution as Section 88 of the Criminal Procedure Code Act CAP 136 which was read to the Defendant makes it clear to that effect. In any event, he gave evidence. This means that having given evidence, the Court must assess his evidence in the same way as any other evidence given in this case by other witnesses. Because he comes from the dock, his evidence is not less important in this case than anyone else's.

In this case, the Defendant is charged with:

-1 count for Rape, contrary to section 91 of the Penal Code Act CAP 135;

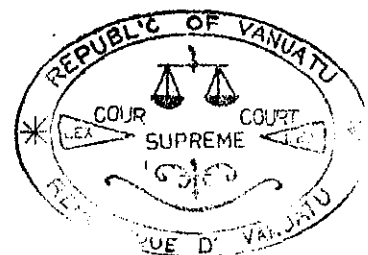
-5 counts for Unlawful Sexual Intercourse, contrary to section 97 (2) of the Penal Code Act CAP 135;

-9 counts for Incest, contrary to section 95 (1) (a) of the Penal Code Act CAP 135.

The essential elements of the offence charged in count 1 for Rape, the matters which the prosecution must prove beyond reasonable doubt before the accused can be convicted on that charge, are:

- 1- That the Defendant had sexual intercourse with the complainant,
- 2- which is unlawful and,
- 3- without the consent of the girl-complainant.

The essential elements of the offence charged in 5 counts for Unlawful Sexual Intercourse, the matters for the prosecution to prove beyond reasonable doubt before the accused can be convicted on the charge, are:



- 1- That the act of sexual intercourse did take place between the Defendant and the complainant.
- 2- That at the time of the incident, the complainant is 13 years or under 15 years old.

The essential elements of the offence charged in 9 counts for Incest, the matters for the prosecution to prove beyond reasonable doubt before the accused can be convicted on the charge, are:

- 1- That the Defendant had sexual intercourse with the complainant;
- 2- That the Defendant is related to the complainant, that means family relationship;
- 3- That the Defendant had knowledge about the relationship.

III ISSUES

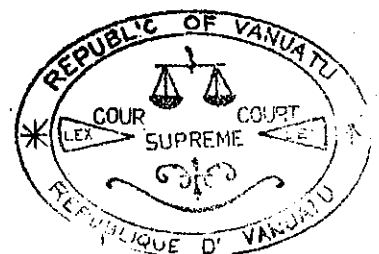
The basic facts of the case as it was put by the prosecution were that the Defendant committed the offences charged against him since May 1994 until April 1996. The victim/complainant is the Defendant's daughter. She decided to leave home because she thought it is no longer a safe place for her and she gave her mother a note explaining why she wished to leave home.

The defence challenged the truthfulness of all allegations against the Defendant, saying that, the complainant had just made up these allegations against her father because 3 days earlier, the Defendant did establish a "blockage" on the complainant not to go out from home and because of the blockage, the complainant/daughter could no longer see her boyfriends and thus, made up these allegations against her father.

IV SUMMARY OF EVIDENCE

The evidence in this case has been recorded on tape and the tapes will be the primary record of what was said. What I now do is just give a summary of those parts of the evidence which are important to the decision.

The Prosecution called 2 witnesses.



The first witness was the complainant, Rose Alvea. She is 16 years old and she is from Malo island. She said the Defendant herein is her father and he is a member of Vanuatu Mobile Force. She said her father worked and then got 2 days off. She said they live at Manples Area which is on the opposite side of "Argentina Building" at Manples Tebakor, Port Vila. In 1994, she said she attended school on Epi and her parents rented a room at Manples Tebakor area in Port Vila. She said the bathroom is situated outside and is about 20 meters away from their room. In 1995, whilst she was still at Epi school, her parents moved into another rented room and she described it as a "red house" which is about 100 metres away from their first room at Manples area and again the bathroom is situated outside and is about 6 to 7 metres away from their room.

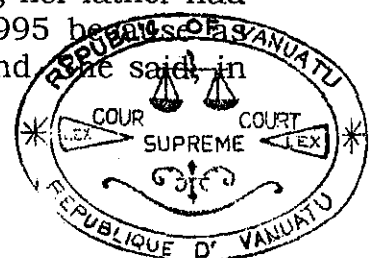
She said, in May 1994, during her holidays with her parents in Vila, her mother went to work. Her father took his 2 days off and was with her at home and she said her father called her in and told her:

"Rose, yu kam, mi shoem yu hao ol parents oli mekem pikinini" which can be translated in this way:

"Rose, come in I show you how parents do to have children".

She said she told her father:

"Mi no wantem samting ia" which means that she refused. But she said the Defendant held on her hands and forced her to sit on the bed. She said her father took off her skirt and panty and then he took off himself his own clothes, laid down on her and then pushed his penis as she said *"inside long mi"* (which means *into her vagina*) and she said he had sexual intercourse with her. She said her father was the first man to have sexual intercourse with her. She said she felt very painful. She said when he finished, he wiped up his sperm with a piece of calico. She did not remember the colour of the calico her father used to wipe up his sperm but during the recent occasions when her father had sexual intercourse with her, she said he did use one of her mother's skirts coloured white and blue strips. she also said, apart from May 1994, every time she came home for holidays and her father took his 2 days off, he had sexual intercourse with her. She said her father had sexual intercourse with her during May holidays 1994, August holidays 1994, and end of year 1994 holidays. She said she did told her brother Samy Alvea about what her father did to her after they moved from the first room to the "red house". She said after they moved to the "red house", her father continued to have sex with her. She said in 1995, every time she came home for holidays, her father had sexual intercourse with her, save December 1995 he said, in she said they spent their holidays on Malo island.



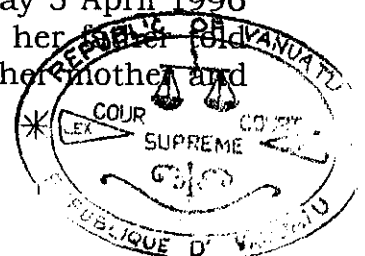
1996, her parents decided not to send her back to Epi school so she stayed at home and her father continued to have sex with her. She said sometimes, her father did not have sex with her because her brothers and sisters were at home but she said her father waited until all went to school and then he had sex with her. She said her father had sex with her on January 1996, and on 14 March 1996 when her mother went to Westpac Bank and again on 28 March 1996 when her mother went to Public Solicitor's office and she said the last incident occurred on 2 April 1996 when her mother went to Labour Office. She further said she never told her mother about the incidents because as she said, since the first time her father had sex with her, he told her not to tell her mother about these incidents otherwise he did not know what to do and she also said since the first incident, her father whipped her so hard when she made a minor mistake at home. She said also that sometimes when her father asked her for sex and if she resisted or she took longer time to come to him, and her mother happened to come home before her father had sex with her (Rose), her father will take the advantage of a minor mistake at home and whipped her so hard on her back and around her body with an electric cord. She further said sometimes, she refused to have sex with him but her father forced her and said:

"Harriap, kolosap mammy i kam nao" which means (Hurry up, your mother will arrive soon).

She said further that every time, when her father wanted to have sex with her and if she refused, her father was angry and she was scared of him and she did not know what to do, so he had sex with her inside the house because every time there is nobody inside the house and because her brothers and sisters went to school and every time he closed the door. She also said that she never talked about these incidents to anyone else apart from her brother Samy because the Defendant's children including herself were afraid of him because he used to whip them so hard.

On Thursday 4 April 1996, she said, after she come home from church services with her mother, she wrote a note to her mother (Exhibit 1). She said after her mother read the note, they both went to Malapoa area about 12. 00am o'clock. She said she did not want to leave home but she said every time she stayed at home, something happened to her so she said she felt that her home is no longer a safe place for her. She said she made a statement to a female police officer on 11th April 1996 in the presence of five male police officers.

After she left home, her father sent her mother to have her back at home so that they can talk. She said on Friday 5 April 1996 and before she lodged her complaint to police, her mother told her to say to police that she wrote the note to her mother and

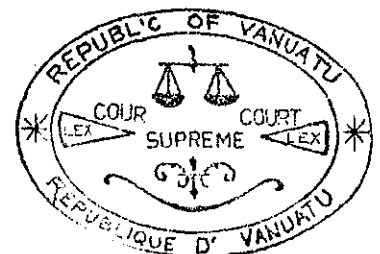


decided to leave home because of the system of blockage he put on her not to go out from home yard or go out for shopping. But, she said she told her parents that she made the note and decided to leave home because of those sexual offences her father committed on her but not about the system of blockage. She repeated that every sexual allegations she made against her father were true. She said further that sometimes, her father sucked her vagina and sometimes he forced her to suck his penis. She repeated also that every time her father had sex with her, he told her not to tell anybody about the incidents.

Under cross-examination, she maintained she did tell her brother Samy Alvea about what her father did to her. She also maintained that her father told her not to tell anybody and she said because he whipped her so hard, she was afraid of him. When she was asked why she kept on coming home on holidays instead of leaving, she said every holidays she must come home because her mother is at home. She said she did not know why her parents decided to stop her schooling. She said she had poor marks in school but she said her father had sex with her before she had poor marks. She said her father started to have sexual intercourse with her when she was in Form 1 (Year 7) in May 1994. She further said when she was in class 6 in 1993, Natuka was her boyfriend but she said she never had sex with Natuka. In 1995, when she was in Form 2 (Year 8), she said she had a boyfriend, Frank George, at Epi School but she denied having any sexual intercourse with him. She said their relationships were limited to talking to each other and further on Christmas 1995, on the Island of Malo, she denied having any sexual intercourse with a boy named Wilson. She said when she attended Epi School in 1994, she was in Form 1 (Year 7) and she had no boyfriend. She admitted she wrote letters to Natuka and gave them to her sister Cyndie to pass on to Natuka. She also said that her mother was not with her when she made her statement to police. She said also that when her father had sex with her for the first time, she cried and her father told her not to make noise and she said that is why her voice was lowered.

When she was questioned about the reason why it took her 2 years to find a safe place, she said she decided to lodge a complaint against her father because she had attended some Bible Studies with some of the members of Jehovah Witnesses Faith and she said she discovered that what her father did to her is not in line with Christian principles. So she said:

*"Voice blong heart bong mi i stikim mi blong mi mas talemaot" which can be translated as follows:
("The voice of my heart pushes me to speak out the truth".)*



She said during the period her father had sex with her, he prohibited her to go out to see her friends and not even going to shops. She further said that when she wrote the letter she had no boyfriend and she said she leaved home not because of the blockage put on her by her father but she said she leaved home because what her father did to her, as she termed "*hemi no stret*" (which means "*blamable*").

She further revealed that some of those sexual offences happened sometimes when her mother was having her shower as she said, her father looked through the window to see whether or not her mother was back from the shower so that he could finish what he was doing to her. She said he could do that because the window is situated on the same side where the bathroom is located. She further said that during a custom ceremony, her father paid custom compensation to her mother and to herself to clear their home.

The next witness is Sergeant Willie Alick Pakoa, a member of Police Force. He gave evidence to the effect that the Defendant refused to make any statement and answer to any allegations. He further said he had an exhibit, a calico which was mentioned by the complainant and her mother when they went to the police station they alleged that after the Defendant had sexual intercourse with the complainant he used that piece of calico to wipe up his male substance (sperm). He said he asked them to bring the said piece of calico to police in order to tender it in Court as an exhibit in this case. But he said they did not bring to police quickly as requested and the file concerning this case was already placed before the Public Prosecutor's Office and the exhibit was brought afterward to the Public Prosecutor's Office. He described the piece of calico as a piece of calico with "white and blue strips colours".

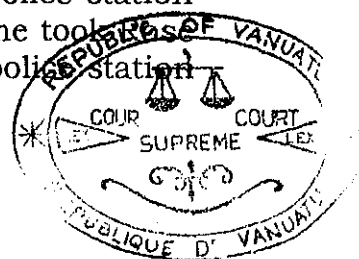
It is to be noted that when the piece of calico was tendered to Court as an exhibit, the Defence's counsel objected on the basis that it was submitted to late in the Public Prosecutor's office. However, I did accept the said piece of calico as an exhibit in this case (Exhibit 2).

That is the end of the prosecution case.

Section 88 of the Criminal Procedure Code Act CAP 136 was read and explained to the Defendant.

The defence called 4 witnesses.

The first defence witness was Mrs Susan Alvea, the Defendant's wife. She advised the Court that on 4 April 1996, her daughter Rose Alvea wrote her a note saying that her father had sexual intercourse with her that is why she took Rose to police station to make a complaint. She said on 4th April 1996, she took Rose to her mother's sister at Malapoa and she went to police station

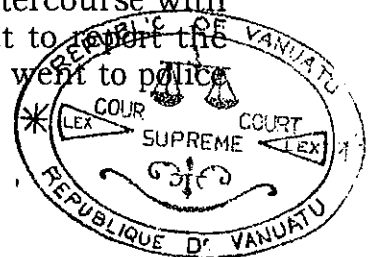


and brought some police officers with her to talk to her husband at the V.M.F. Camp, Fire Section. On the 5th April 1996, he sent her to go and bring Rose back home so that they could talk. She said she made a statement to the police and she was not in the same room with Rose when she made her statement. She said she first heard the details of all allegations on 19th April 1996 (presumably before the Magistrate's Court during the preliminary hearing).

She then said, after she heard that statement she felt that the statement was not true. But she said that after she received the note from her daughter she was very angry so she went to police but after the first hearing that is, during the Preliminary Hearing she thought Rose made quite a few unfounded allegations. So she did not want to support these unfounded allegations. She said in May 1994 they lived in a small room and if something happen next room, one can hear from the other room. During May 1994, she said she was working at Asco Motors and she said she never noticed any sign or anything unusual or any unusual behaviour of Rose. She said Rose never said anything to her. Her husband never acting in a unusual behaviour. She confirmed the bathroom is outside and about 2 to 3 metres; she indicated from the witness box from where she gave evidence to the main entrance of the Supreme Court Room (which is more than 10 metres).

She said if some of those incidents happened when she was in the bathroom Rose should have shouted so that she could help. She said also that on Christmas holidays in 1995, Rose establish friendly relationship with Wilson. She said Rose never told her about her friendship with Wilson. During the night she went out to see him and when they discovered the truth her father whipped her. She said when Rose had boyfriend they asked her if it is true or not and she denied and if they discovered that it is true, her father whipped her. She said also that it is their wish that Rose improved her school marks, if not she would stop her schooling. She said she wanted to stop her but her father wanted her to go on. She said she and her husband/Defendant decided to stop her because she had boyfriends. She said Rose never told her about any of these allegations until she received the note she wrote to her on 4th April 1996. She said her husband works 24 hours and took 2 days-off. She said she saw a letter written by Rose to Natuka through her sister Cindy. She said nothing was mentioned about the Defendant. She said Rose was placed on blockage with her sister. She said the last time she was placed on blockage was 3 days before she wrote the note to her (mother).

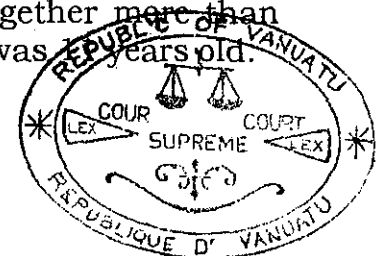
Under cross-examination, she confirmed she received her daughter's letter on 4th April 1996. She said she felt sad because she thought her husband had sexual intercourse with her daughter too. She confirmed that she thought to report the matter to police and she confirmed that when she went to police



to lodge the complaint her daughter was just behind her to confirm to police that all these allegations are true. She said today when she is in the witness box, she thought what Rose said is not true. After she heard Rose's statement, she said some of those are not true that is why she refused to support her daughter. It was put on her (mother) that she was not in the house when these allegations were taken place and she said she did not see anything and she said because Rose is a type of girl who always told them lies, she said when she heard these allegations against her husband, she could not believe her daughter. It was again put on her why a girl made sexual allegation against her own father. Rose said when she had boyfriend, she could not told her parents about it until such time, they discovered and she would then admitted it. She said Rose had every chance to tell her about these allegations when she was at Epi, she could write or telephone her to speak out the truth. It was also put on her that her daughter could not talk to her because she was afraid her father will whip her. She answered no. She confirmed that sometimes, her husband whipped Rose with other children of the couple with stripes, sticks and sometimes electric cord. And when she was further asked about the fact that Rose could not told her because if she told her (mother), her husband did not know what to do then, she replied: "Yes", this is what Rose said. It is true for her. She confirmed also that the bathroom of their second home is outside and when she was under shower, it makes noise and then said the noise is very small and she confirmed the window is facing the bathroom.

Further when she was asked if a man had sexual intercourse with a woman in the next room, could she hear it or not. She said "No" but if there is any struggling, one can hear the noise of struggling from the other room. When she was asked whether Rose was afraid of his father or not, she said "... sometimes they are playing and talking" but she said that it seemed to her that Rose was a bit afraid of her father.

It was again put on her that if the Defendant had sexual intercourse with the complainant in the room, people cannot hear what was happening. She answered that if she was struggling, one can hear the noise of struggling. She confirmed also that the first house's bathroom was far from their room and it took five minutes for her to reach the bathroom and she said there is only one bathroom for one full rented house and four other rented room. So plenty people use the same bathroom. She admitted her husband can have sexual intercourse with her daughter when she was under the shower. She said she made a statement to police and she admitted she saw her husband whipping Rose sometimes without reason and she said she was angry when she made the statement against her husband which is without foundation. She said they lived together more than five years now. They were married when Rose was

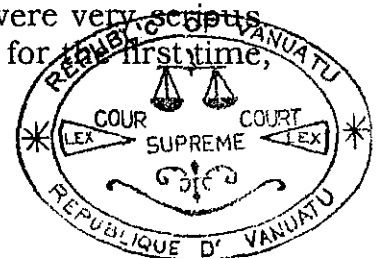


She said further that Rose pretended to go and see a baby girl in the same house where Natuka lives, and the excuse is to see Natuka. She admitted, she did not see but she just thought it was just an excuse for Rose to meet with Natuka. She said she could not believe about those allegations because these incidents happened on a long period of time and Rose never reported the matter until 1996. She said Rose should have told her quickly after and especially when she was at Epi and she would already refused to come home. She confirmed there was a custom ceremony. The Defendant paid 20, 000 vatu to her and 10, 000 vatu to Rose. She confirmed that the chiefs who witnessed the ceremony said the purpose for the custom ceremony was to clear/clean the Defendant's home. She denied that the Defendant told Rose to told police that she made allegations against him because of the blockage. She confirmed that she asked Rose to withdraw the complaint to police two or three times.

Under re-examination, she said she believed the reason why Rose put these allegations against her father is because of the blockage, Rose wants to be free to do what she wants but they were too strict on her. She said they were worried that Rose got pregnant. She said she wrote a letter to the Public Prosecutor to withdraw the case but she said they replied that it is not possible because the case is for Rose who is the victim.

The next witness is the Defendant Sano Alvea.

He said he works with V.M.F. (Fire services Section) for 19 years. On May 1994, he was employed with V.M.F.. He worked every 24 hours and took 48 hours off. He denied having at any time sexual intercourse with his daughter Rose. He said he whipped his daughter when he discovered she told lies to him about her boyfriends. He said on March 14, 1996 he was working. He was not at home. He said he put blockage on his daughter 3 days before she wrote the letter to her mother accusing him of having sexual intercourse with her. He said he put a blockage on his daughter because he found out that when he and his wife went to work, Rose went to meet with his boyfriends by pretending to go and see a baby-girl. He said it was not the first time he put blockage on her daughter. He said he put blockage on Rose because he did not want to see his daughter going through the trouble of having "*pikinini blong road*" (getting pregnant on the basis of illegitimate relationship). On the 4th April 1996, when his wife showed him the letter from Rose, he said because he knew that the allegations against him were serious, he told his wife to go and get Rose back home so that they must talk about these allegations because if Rose wanted to put complaint against him, she must tell the truth but not just told lies because the allegations were very serious. He said when he heard about these allegations for the first time,



his heart was painful because his daughter made these allegations against him. He said before she made these allegations, he said Rose told them when they were still on holiday on Malo Island, that she will leave home and he said Rose told them that he is not her father and his wife is not her mother.

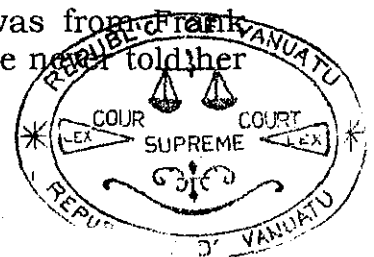
He said Rose made these allegations against him because she was angry that he and his wife removed her from school and they put blockage on her to see her friends so she wants to be free. And he further said that she is now free. She lives with one of his brother. He said the police began to question him one week after. He was put in custody since 23 July 1996. (5 weeks).

He categorically denied all allegations against him. He said he never had sexual intercourse with her daughter in 1994, in 1995, in 1996. He said No.

Under cross-examination, when he was asked because he denied having sexual intercourse with his daughter in 1994, 1995, 1996, why Rose made these allegations against him, he said as he already said Rose said he is not her father and Susan is not her mother so she is very capable of making such allegations against him. But later he said that it might be that the reason why Rose said that he is not her father is because when Rose was "*en ventre de sa mère*" he lived with a different woman. He said he whipped her daughter not because of boyfriend but because she lied to him. Then he said he whipped her because of boyfriend. He said when he was with her at home he never had sexual intercourse with her daughter. He said he whipped her daughter with anything including electric cord and he said he whipped her because she lied. He denied telling her daughter to say to police that she made these allegations against him because of the blockage put on her by him. Further he said when the incident happened his daughter and his wife were run away from home so he said they made custom ceremony. He said he paid 20, 000 vatu to his wife and 10, 000 vatu to Rose to clear the home in order to calm down the situation. He was then asked why he paid such customary compensation, he said because he did not want his children to be affected because as he said they were already affected by similar incidents at once so this time he paid customary compensation to avoid such situation. He was asked why he paid compensation to the daughter he said it is not his decision, it is the chief's decision to pay fine to the daughter.

The next witness is Cindy Alvea.

She is 13 years old. She is Rose little sister. She said she was close to her sister. She told her secrets. She said she showed her tracks of teeth on her breasts and that was from Frank George, a student from Epi school. She said Rose never told her



that her father had sexual intercourse with her. She said her father hit her before because of her disobediences.

Under cross-examination, she said she saw Rose with Natuka after they came back from shops. they were standing and talking together. She said further that her little brother took a letter and gave it to her father.

The next witness is Samy Alvea.

He is 16 years old. He said Rose never told him about his father having sexual intercourse with her. He said the first time he heard about these allegations was when he was in Santo and he said he did not believe it. He denied that her sister Rose told him that his father forced her to sleep with her. He said he never protect his sister Rose from his father. He said his father whipped him too before.

Under cross-examination, he said the shop is not far from his house. He said to go to the shop, it took three minutes and sometimes more when he met with his friends. He said he was in class, when Rose was in holidays, she was staying at home and his father too when he took his days-off. He said they were afraid of their father and he said his father whipped Rose because she did not respect their custom. If she had boyfriends, she must tell his father.

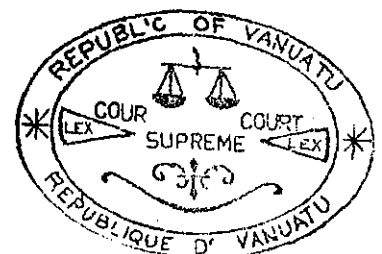
The last witness was Harold Namalas, a member of V.M.F. (Vanuatu Mobile Force). The intention of the defence is to call this witness so that he could give evidence on the Defendant's work schedule.

The Prosecution objected that this witness gave evidence unless the schedule is the original document or the officer who gave evidence is the one who is responsible for Fire Section with the V.M.F. Mr Harold said he is not the officer responsible for Fire Section and the document concerned is not the original. That is the end of his evidence and the Defence's case indeed.

V LEGAL ISSUES

Only one legal issue needs particular mention, that being the requirement for Judges to heed the warning of the danger of convicting on the uncorroborated evidence of witnesses who fall into the category of cases relating to the complaint in sexual offences. The requirement that one should warn oneself falling into that category is a rule of Law (See R.V. Trigg (1963) 47 App. R.94 (Sexual Offences)).

VI FINDINGS ON FACTUAL ISSUES.



In her final submission, Ms Stacy said that the Defence do not dispute the fact that the allegations against the Defendant are very serious indeed. But she put emphasis on the fact that the Defendant denied each and all allegations since the beginning of this case. She submitted also that the evidence showed that the complainant Rose had not told the truth. She was put on blockage and by writing that letter to her mother against her father, she will be able to go out of the house. She further submitted that Cyndie said Rose showed her "Titi" (breast) beaten by Frank George. She had given letter to Cyndie to pass on to her boyfriend. She told the Court that the only person she talked to about her father's sexual intercourse with her was Samy but Samy said "No" to that.

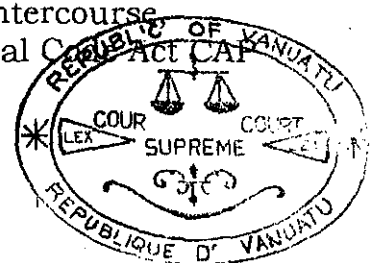
It was further said that there is no corroboration with regard to these allegations and it is a Rule of Law that a warning of convicting on sexual offences must be given in such a serious charge to solely based the judgement on evidence given by the victim alone without any corroboration.

It was also put for the Defence that Rose evidence was not credible. She said she did not have any boyfriend, the evidence shows that she had several. (It is to be noted that this is not exactly what the complainant said. There is a problem of language translation from bislama into english. The tapes are the best records of what she said.) It was indeed said that the Defendant believes in discipline and he was worried that Rose will be pregnant. The Defendant gave evidence that upon hearing the content of the letter (note) sent to his wife about the allegations against him, he was hurt and cried. It was also said that the result of these allegations is for the victim to go out from strict control of her parents and see boys when she wanted to.

Finally, it is submitted that the Defendant is innocent on all allegations and the prosecution fail to prove these allegations on beyond reasonable doubt. Therefore, the Defendant should be acquitted. It is said he spent five weeks in prison and he is anxious to return a normal life with his family.

The prosecution relied on the evidence of the complainant/daughter, alone to establish the following 15 counts of sexual allegations against the Defendant/ Father:

- ° One (1) count of Rape, contrary to Section 91 of the Penal Code Act CAP 135;
- ° Five (5) counts of Unlawful Sexual Intercourse contrary to Section 97 (2) of the Penal Code Act CAP 135.



Nine (9) counts for Incest, contrary to Section 95 (1) (a) of the Penal Code Act CAP 135.

It is to be noted that at Common Law, one witness is sufficient in all cases at the trial (with the exception in Perjury) (See D.P.P -v- Mester (1972) 57 CR. App. R. 212 H.L, per Lord Diplock at p. 242).

It must be remembered also that there is no Rule of Law that states that a person cannot be convicted of a sexual offence without there being corroboration evidence. (See Public Prosecutor -v- Michael Mereka Criminal Case (Appeal) No.7 of 1992. Van. L. R. 613).

However I agree with Ms Stacy that it is a rule of law that, as far as I am concerned as the Judge of Fact, I must warn myself that it is dangerous for this Court to convict on the evidence of the complainant/daughter alone unless there is corroboration.

It is to be noted that in D. P. P. -v- Kilbourne (1973) AC. 729; 57 Cr. App. R; 381, H. L. , Lord Hailsham said this:

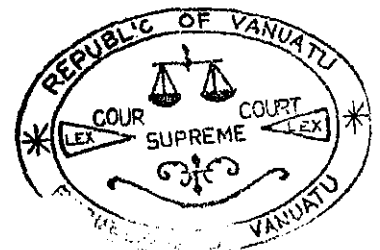
“ Corroboration is only required or afforded if the witness requiring corroboration or giving it is otherwise credible” (at p. 402) and in the same case, Lord Reid said:

“There is nothing technical in the idea of corroboration. When in the ordinary affairs of life one is doubtful whether or not to believe a particular statement one naturally looks to see whether it fits in with the statements or circumstances relating to the particular matter; the better it fits, in the more one is inclined to believe it ...”.

Furthermore in D. P. P. -v- Boardman (1975) AC 421; 60 Cr. App. R. 165, 183, Lord Hailsham went on to say:

“ When a (Tribunal of facts) is satisfied beyond doubt that a given witness is telling the truth, they can, after a suitable warning, convict without corroboration ... what I said (and meant) was that unless a witness evidence was intrinsically credible he could neither afford corroboration, nor be thought to require it”.

Bearing that warning in mind, I now look at the particular facts of the case with care.



The complainant gave evidence to the effect that she wrote the note to her mother to let her know that she wishes to leave home, not because of the blockage her father put on her but on the contrary because her father had sexual intercourse with her since May 1994 until April 1996. She said in her evidence that her home is no longer a safe place for her. Her evidence show further that in 1993, when she was in class 6, she had a boyfriend called Natuka. In 1994, when she was in Form 1 (Year 7) at Epi School, she had no boyfriend . In 1995, at Epi School, she had a boyfriend called Frank George when she was in Form 2 (Year 8) and their relationships were limited to talking to each other.

Her evidence shows that in May 1994, her father wanted to show her how parents do to have children. Because she refused, her father held on her hands and forced her to sit on the bed. He took off her skirt and panty and took off his own clothes, laid down on her and pushed his penis inside her vagina and had sex with her. She was a virgin, she felt painful, she cried but her father told her not to cry.

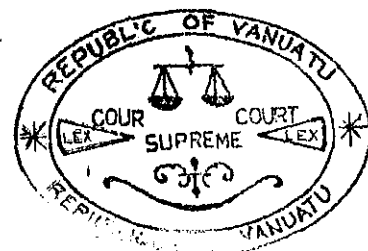
Her evidence shows also that her father used one of her mother's skirts coloured "*white and blue strips*" to wipe up his male substance after having sex with her. The skirt was tendered to Court as evidence, (Exhibit 2), and was accepted by the Court.

She gave evidence also that every time she come home for holidays since May 1994 until November 1995, her father had sex with her when he took his two days-off. She gave evidence that her father had sex with her on May 1994, August 1994, end of year 1994, and again on May 1995, August 1995. She also said in her evidence that in 1996, her father continued to have sex with her on January 1996, 14 March 1996, 28 March 1996 and 2 April 1996.

It is very difficult for the complainant/daughter to give evidence of those sexual allegations against her own father. She was crying describing how her father done to her when she said for example that, sometimes, her father sucked her vagina and forced her to suck his penis.

I saw and heard all witnesses.

I do not believe the complainant/daughter was inventing her story and made unfounded sexual allegations against her father. I, therefore, reject the Defendant's denial of these allegations. I find it extraordinary that a girl of 16 years will make up stories of sexual allegations against her father just for her to go out from the house to see her boyfriend. Bearing in mind as she said in her evidence that when she made the note she had no boyfriend at that time.

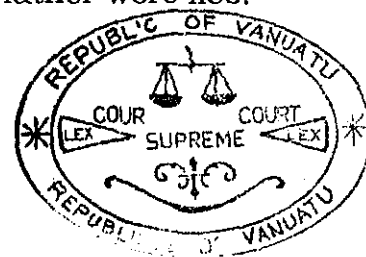


Furthermore, the Defendant/father admitted he paid custom compensation of vatu 20, 000 to his wife and vatu 10, 000 to the complainant/daughter to clean and/or to clear "inside his home". When he was asked why he paid 10, 000 vatu custom compensation to his daughter/complainant he said it was the decision of the chiefs but not his own. I could not believe the Defendant. He is a member of the Vanuatu Mobile Force. He knows what is wrong and right. He is a responsible person and he knows what is right for him to do and what is wrong for him not to do. If the allegations put against him by his own daughter are not true as he claimed, the Defendant should refuse to pay any customary compensation to her daughter. In the case before the Court, the Defendant admitted he paid custom compensation to his wife and his daughter Rose to clean and/or to clear inside his home. Thus, it is my view that if he accepted to pay any compensation to her daughter/complainant it is for the very reason that the allegations against him were founded, otherwise what is the purpose of clearing or cleaning his home then. I do not believe that it is just to calm down the situation as the defendant claimed.

I saw and heard Samy Alvea. I could not believe him. When he was asked whether Rose talked to him about the fact that his father had sexual intercourse with her, I observe the witness, he bent his head then turn his eyes on Rose and then to his father in the dock, hesitate a little bit and then said "No". it seems to me that his evidence is not creditworthy, he was not an independent witness, he told the Court what he was told to say.

Cyndie might be honest in her evidence when she said Rose showed her the tracks of teeth on her "titi" (breast) and she said Rose told her they were made by Frank George. In my view, this does not show that the complainant/daughter told lies when she accused her own father of having sexual intercourse with her on various occasions as from May 1994 until April 1996. Rose evidence shows that her father had sex with her for the first time in May holidays 1994 that is when she was in Form 1 (Year 7) at Epi School and at that time as she said, she had no boyfriend. The tracks might be made in 1995 because her evidence shows that in that year, Frank George was her boyfriend but however, she denied having any sexual intercourse with Frank George.

In any event, bearing in mind of the warning that it is dangerous to convict the Defendant on the basis of the complainant/daughter's evidence alone, I have to say that the said tracks of teeth (if there were true) do not create or constitute any doubt at all in my mind that the sexual allegations the daughter made against her own father were lies.



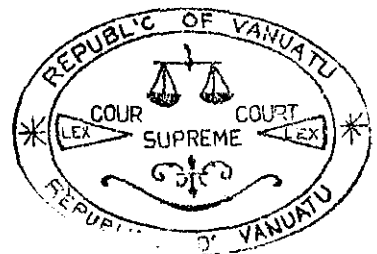
As far as the evidence of the mother is concerned, she was not at home when most of these sexual allegations took place . But Rose's evidence show that some of these incidents happened when her mother was in the bathroom. In my view, the mother too might be honest when she said that when she was swimming her daughter should have shouted to call for help. However it is difficult for the complainant to do so. She said in her evidence that her father told her not to tell anyone including her mother because, otherwise, he did not know what to do and as she said also in her evidence, she was scared/afraid of her father and further more as she said if her father requested to have sex with her and if she resisted or took time to accept and if by that time her mother arrived, the Defendant/father was angry and he would take the excuse that Rose did a minor mistake or something of that sort at home and whipped her so hard with sticks, stripes and electric cord. Therefore, it is difficult for her to call her mother when she was under the shower. It is only when she attended the Bible Studies with Jehovah Witnesses that *"the voice of her heart pushes her to speak out"* and she said in evidence when she wrote the note to her mother she had no boyfriend that is why she said she denied her parents' contention that she wrote the note to go out and see her boyfriend.

I have had the privilege of observing and listening to Mrs Susan Alvea, when she gave her evidence. She seemed to hesitate quite often before answering questions put on her by the prosecution. (the tapes will be the primary record of what she said and how she answered the questions put on her by the prosecution). In her evidence, she confirmed also that the window of their room is situated on the same side where the bathroom is located and furthermore she admitted indeed that, it is possible that her husband could have sexual intercourse with Rose when she was under the shower.

Having given full weight to the warning that it is dangerous for this Court to convict the Defendant solely on the evidence of the complainant/daughter without corroboration, I, as the Judge of Fact came to the conclusion that in the particular case the complainant/daughter is without any doubt speaking the truth.

I accordingly, believe that the evidence, taken as a whole, compels the following findings which I now make:

- 1- That I am satisfied beyond reasonable doubt that on or about May 1994 in Vila the Defendant/father had sexual intercourse with his daughter, without her consent, contrary to section 91 of the Penal Code Act CAP 135.

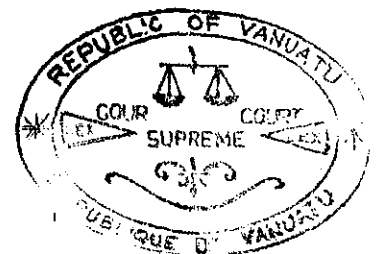


- 2- That I am satisfied beyond reasonable doubt that on or about August 1994 in Vila, the Defendant/father did unlawfully have sexual intercourse with his daughter and that at that time she was 14 years old, contrary to Section 97 (2) of the Penal Code Act CAP 135.
- 3- That I am satisfied beyond reasonable doubt that the Defendant/father on or about August 1994, in Vila, did unlawfully have sexual intercourse with the complainant and that at that time he knew that the complainant is his daughter, contrary to section 95 (1) (a) of the Penal Code Act CAP 135.
- 4- That I am satisfied beyond reasonable doubt that on or about August 1995, in Vila, the Defendant had sexual intercourse with his daughter, Rose Alvea, contrary to Section 95 (1) (a) of the Penal Code Act CAP 135.
- 5- That I am satisfied beyond reasonable doubt that on or about 14 March 1996, in Vila, the Defendant/father had sexual intercourse with his daughter, Rose Alvea, contrary to section 95 (1) (a) of the Penal Code Act CAP 135.
- 6- That I am satisfied beyond reasonable doubt that on or about 28 March 1996, in Vila, the Defendant/father had sexual intercourse with his daughter, Rose Alvea, contrary to section 95 (1)(a) of the Penal Code Act CAP 135.
- 7- That I am satisfied beyond reasonable doubt that on or about 2 April 1996, in Vila, the Defendant had sexual intercourse with his daughter , Rose Alvea, contrary to Section 95 (1) (a) of the Penal Code Act CAP 135.

VII VERDICT

I find the Defendant guilty of the offences charged in the following counts and convict him on these charges accordingly:

- 1- Count 1: Rape
- 2- Count 4: Unlawful Sexual Intercourse
- 3- Count 5: Incest
- 4- Count 12: Incest



- 5- Count 14: Incest
- 6- Count 15: Incest
- 7- Count 16: Incest

VIII SENTENCING

Before I pronounce the sentence to be imposed on the Defendant in relation to the charges upon which he is convicted, I am told that the Defendant cannot give mitigation and that he wishes to lodge an appeal in relation to these matters. I accordingly inform the Defendant of his right to do so within 14 days.

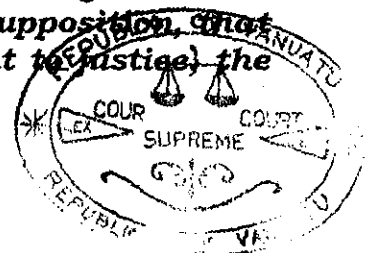
I am told also that the Defendant had previous conviction in 1993 that of importing obscene material inside the Republic of Vanuatu. I inform the Defendant that I do not take his previous conviction into account when I am considering the sentences to be imposed upon him.

I am further told that the Defendant is a private member within the Vanuatu Mobile Force. He has no problem in the past. Thus, he has been an ordinary citizen of Vanuatu. I am also asked to take into consideration the fact that the complainant in this case is now over the age to go about with her life. Therefore, It is submitted that a long custodial sentence is not helpful. In sentencing this Defendant I take all these matters into account.

The matter giving rise to these 15 Counts one in my view absolutely appalling. The Defendant/father has breached the very special position of care and trust that he was in. This is a case of the most blatant abuse by a father of his child. This is a behaviour which is totally repugnant and is not to be tolerated. It must in my view be severally punished.

When considering the principles which guide a Court of Appeal of the Court in Vanuatu, in the case of Ben Morris -v- Public Prosecutor, unreported 15th October 1993, followed R-v- Ball (1951) C.A.R 164 at 165 in which the Court there said:

" In deciding the appropriate sentence a Court should always be guided by certain considerations. The first and foremost is the public interest. The criminal law is publicly enforced, not only with the object of punishing crime, but also in the hope of ways. It may deter others who might be tempted to try crime as seeming to offer easy money on the supposition, that is the offender is caught and brought to justice, the



punishment will be negligible. Such a sentence may also deter the particular criminal from committing a crime again, so induce him to turn from a criminal to an honest life. The public interest is indeed served, and best served, if the offender is induced to turn from criminal ways to honest living. Our law does not, therefore, fix the sentence for a particular crime, but fixes a maximum sentence and leaves it to the Court to decide what is, within that maximum, the appropriate sentence for each criminal in particular circumstances of each case. Not only in regards to each crime, but in regard to each criminal, the Court has the right and the duty to decide whether to be lenient or severe"

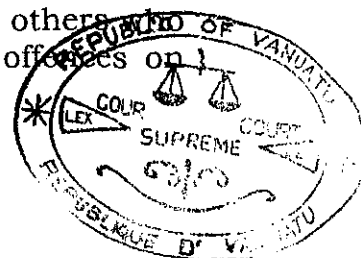
The sentence of the Court shall be as follows:

- ° Count 1: Rape - 10 years
- ° Count 4: Unlawful Sexual Intercourse - 4 years concurrent.
- ° Count 5: Incest - 7 years concurrent;
- ° Count 12: Incest - 7 years concurrent;
- ° Count 14: Incest - 7 years concurrent;
- ° Count 15: Incest - 7 years concurrent; and
- ° Count 16: Incest - 7 years concurrent.

It gives me no pleasure at all to therefore impose a total term of 10 years imprisonment. It is to be remembered that the maximum penalty for Rape is life imprisonment. In this case I gave serious consideration to its imposition. I have taken into consideration the fact that the allegations were disputed and you plead not guilty to each and all of the 15 counts of sexual offences lodged by your own daughter against you and therefore, you did not spare the prosecutrix the anguish of having to give evidence before the Court.

You are now 39 years old and will not be released from prison until you are 49 years old.

I hope that the sentence that you received will deter others also contemplate to behave in committing similar offences



girls and women in this country like you did on your own daughter.

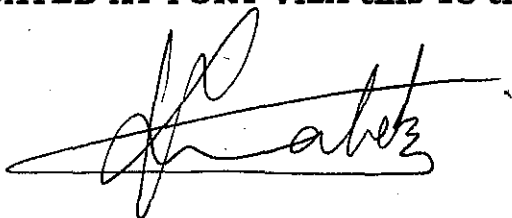
It must be remembered always that every woman and girl in Vanuatu has the constitutional right to be treated properly as a human being with self-respect and dignity and to be protected against sexual or other assaults.

Every child in Vanuatu has the right to be protected and properly treated by his or her father.

In the particular circumstances of this case, the following orders and directions are made under section 95 (3) of the Penal Code Act CAP 135:

- 1- That the Defendant, SANO ALVEA, is divested of all authority over his daughter/complainant, ROSE ALVEA, and his guardianship over the complainant/daughter is removed from him forthwith.
- 2- That the complainant's ant Mrs Via TSOTGOMI on Malekula, is, thus, appointed new guardian of the complainant.

DATED AT PORT VILA this 18 th Day of September 1996.



Mr Justice Vincent LUNABEK.
Judge.

