

(Criminal Jurisdiction)

**PUBLIC PROSECUTOR**

-V-

**ERICK KIKI**

**Coram: Mr Justice Oliver A Saksak  
Mr William Falau - Clerk**

**Counsel: Mr Bill Bani Tangwata for Public Prosecutor  
Mr Hillary Toa for the Defendant**

**SUMMARY OF PROCEEDINGS**

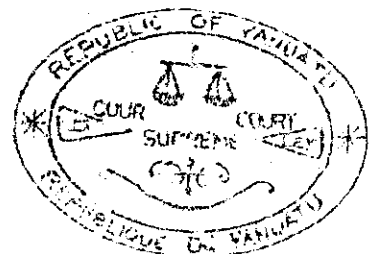
**Hearing Dates: 7 October 1998, morning only.  
9 October 1998, whole day.**

**Charges: Rape contrary to section 91 Penal Code Act [CAP.135]  
: Unlawful Sexual Intercourse contrary to section 97 (b)  
Penal Code Act [CAP.135] - (The Act)**

**Plea : The Defendant pleaded 'not guilty' to rape and he pleaded  
'guilty' to unlawful sexual intercourse.**

**Brief Facts:**

It was alleged by the Prosecution that on 7th August 1997 at BP Bon Area, Luganville, Santo the Defendant had forced Lusa Mael, a girl of 14 years old to have sexual intercourse with her without her consent. It was alleged that the Defendant had shone a torch at Lusa's face on the road while Lusa and two other girls Esther a girl of 14 years, and Alice a girl of 8 years were returning to Lusa's uncle's house after they had bought a tin of tuna from Rebecca's store. This incident took place at or about 6.30 O'clock in the evening. It was alleged that the Defendant had grabbed Lusa's hand and pulled her to his house where he had sexual intercourse with her. Lusa was a virgin and her hymen was ruptured by the Defendant. There was a flow of blood seen as a result on Lusa's body and clothes. Medical examination and report confirmed that there was rupture of the hymen caused as a result of penetration.



Section 81 Criminal Procedure Code Act [CAP.136] (the CPC Act):  
The statement of presumption of innocence under section 81 of the CPC Act was read to the Defendant in Bislama.

**Evidence:**

The Prosecution called 7 witnesses beginning with Lusa Mael, the Complainant on Wednesday 7th October. On 9th October the Court heard oral evidence from Esther, Alice, Madelaine Mael, Susan Bani, a nurse Practitioner, Corporal Alick Walter and Mael Yaken, Lusa's father.

**No Case Submission:**

At the end of the Prosecution case Counsel for the Defendant made submission that there was no case against the Defendant on the evidence produced to the Court by the Prosecution.

**Verdict:**

Having considered the submissions made by both Counsel with respect to the no-case submission, I reached the conclusion that the Prosecution had not made out a prima facie case against the Defendant. Under the provisions of section 135 of the CPC Act I dismissed the Defendant and acquitted him on the rape charge. I reserved reasons which I now publish.

**REASONS FOR VERDICT**

**The Law**

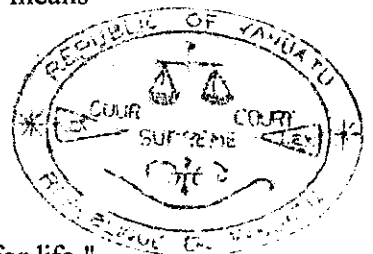
The relevant sections of the law for consideration are sections 90-91 of the Penal Code Act.

Section 90 reads:

"Any person who has sexual intercourse with a woman or a girl without her consent, or with her consent if the consent is obtained by force or by means of threats or intimidation of any kind, or by fear of bodily harm, or by means of false representation as to the nature of the act, or, in the case of a married woman by impersonating her husband, commits the offence of rape. The offence is complete upon penetration."

Section 91 reads:

"No person shall commit rape. Penalty: Imprisonment for life."



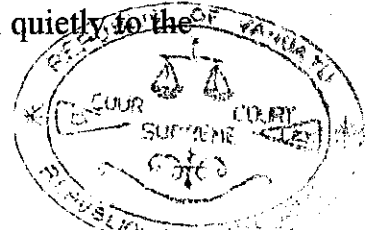
The elements of the offence of rape are:

- (i) Sexual intercourse, (with a woman or a girl)
- (ii) Without her consent, (Lack of) or
- (iii) If such consent is obtained in any the following ways:-
  - (a) by force; or
  - (b) by means of threats or intimidation of any kind; or
  - (c) by fear of bodily harm; or
  - (d) by means of false representation as to the nature of the act; or
  - (e) by impersonating the woman's husband in the case of a married woman.

These are the elements which have to be proved by the Prosecution. And the standard of proof is one beyond reasonable doubt. Section 8 of the Act lays down the general rule as to burden of proof. In my view the standard is a strict one. The Court has to be satisfied beyond reasonable doubt that all the elements required for the offence of rape are present before the court can convict a person so charged.

In this case I was satisfied that the element of sexual intercourse or penetration was proved. That is admitted by the Defendant and is therefore not in issue. The girl was 14 years of age and that has been proved beyond all doubt. But that is a separate offence under the provisions of section 97(2) of the Act. The Defendant was convicted and sentenced for that offence on 9th October, 1998.

But I was not satisfied that there was a lack of consent. The only evidence of any relevance to prove consent or lack of it came from the complainant, Lusa Mael. She is indeed a shy girl. Her physical appearance betrays her age and that is what deceived the Defendant into thinking or believing that she was of age. During her examination in chief she took time to respond. At times she was hesitant to answer. At times she would look at her relatives in the audience in the hope of getting answers. That indicates to me that it was not her wish that the matter should have been reported. The only reason why it was reported at all is due to the fact that the girl was a virgin and that during intercourse with the Defendant her hymen was ruptured and there was a lot of blood flowing from her. At the sight of all the blood, since it was her first experience, she was terrified. Further, adding to her fears was the fact that with the blood flowing, there was no way of concealment. She had to be found out as having sex with a boy and the thought of the consequences she would possibly face made her tremble with fear. It was not the fear of having sexual intercourse with the Defendant. She was not shaking before the intercourse took place. In fact she told the court in cross-examination that she was excited about it. The Defendant held her hand and she followed him quietly to the

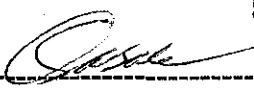


Defendant's house. Intercourse took place in the Defendant's house in the Defendant's room. There were relatives in the kitchen and this girl if she was intimidated or if she feared for her bodily harm, would have shouted for help even immediately after the Defendant had shone a torch at her face and held her hand. She did not shout at all. She pretended to fend the Defendant off because her cousin sisters were watching in the hope that they would run back and she would follow the Defendant. The torch being shone at her face was in my view a signal to her. At that point in time if she was really frighten she would have told her two sisters to run to the store or better still shout for help. She being the biggest of the three did nothing to help themselves in the situation apart from trying to struggle. She was only pretending. And I do not believe her evidence. There was there fore consent on her part and no force or intimidation was administered or caused to her by the Defendant to obtain her consent. The time at which consent is relevant is the moment of penetration or sexual intercourse. This according to evidence did not occur on the spot where the Defendant shone at the victim's face or held her hands. It happened in the Defendant's room in a residential house. It took quite a walk to get there. No rapist would do that. A rapist would get what he wants on the spot on the first available opportunity. There is nothing in evidence whatsoever to suggest or show that the complainant did not consent to the Defendant penetrating her. If there was, she would have screamed or shouted for help and those releatives in the Defendant's kitchen would have heard and assisted her. None of that occurred.

In my considered view the girl consented to the intercourse and there was no intimidation of any kind. Neither was there force used on her to obtain her consent. For those reasons I dismissed the charge of rape against the defendant.

**PUBLISHED at Luganville this 13th day of October, 1998.**

**BY THE COURT**

  
**OLIVER A SAKSAK**  
Judge of the Supreme

