

IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU
HELD AT LUGANVILLE/SANTO

Criminal Case No.22 of 1998
File No.009 of 1998

(Criminal Jurisdiction)

PUBLIC PROSECUTOR

-VS-

MORRIS JOHN

Coram: Mr Justice Oliver A Saksak
Mr William Falau, Clerk of Court

Counsel: Mr Willie Daniel, Prosecutor for Public Prosecutor
Mr Hillary Toa, Counsel for the Defendant

JUDGMENT

History:

The defendant was committed to the Supreme Court on 12th March 1998 by the Senior Magistrates Court and was remanded in custody pending arraignment.

Charge

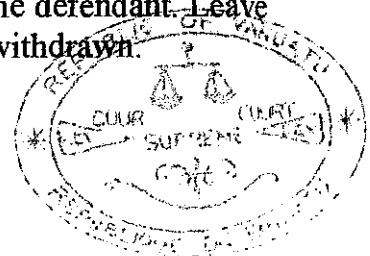
Initially the defendant was charged with rape contrary to section 91 and with incest contrary to section 95 of the Penal Code Act [Cape. 135]

Plea

The defendant first appeared before his Lordship, Mr Justice Vincent Lunabek, Acting Chief Justice on 18th August 1998. On his arraignment the defendant pleaded not guilty to both charges. He was granted bail on conditions pending trial.

Trial

The trial commenced on 5th November 1998. At the time Mr Bill Bani Tangwata was prosecuting. Before trial commenced the Prosecutor sought leave to withdraw the charge of rape against the defendant. Leave was granted and the charge of rape was accordingly withdrawn.



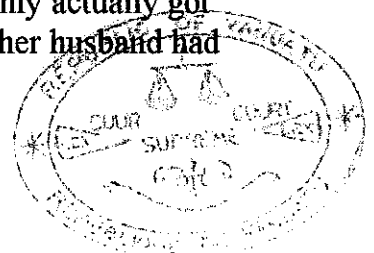
Prosecution Case

The Prosecution led evidence from three witnesses. I give brief summary of their relevant evidence only as follows:

- (a) Sergeant Allan Aitas, a police officer of some 18 years standing was the husband and complainant of the case. He testified that he married Emma John in 1985 and they have 5 children. He testified that Emma John and the defendant have the same father by the name of John Fred. He testified that John Fred had 2 wives, one was called Lissis. John Fred had 2 sons by her, one was called Piro (deceased) the other Morris John, the defendant. John Fred's second wife was called Martha who bore him 4 children, one of whom is Emma John, the Complainant's wife and victim. John Fred is now dead. Lissis is the complainant's sister and by that relationship the defendant calls the complainant as his uncle. He testified that the defendant had been living all his childhood life with the complainant's family for some 12 years. He testified about the suspicions that he had about the defendant having an affair with his wife. This he said started in or about 1986. He testified that at one time on 10th September, 1990 at the house at Lakatoro he caught the defendant and his wife lying down on the same bed. It was at this time that he told the defendant that his wife was the defendant's sister and that if they were having an affair, it was improper. Then he testified about the incident that occurred between his wife and the defendant on 22 July 1997 in their house at Unua on their married bed. The complainant actually saw the defendant in the act of sexual intercourse with his wife. He saw them both half naked having sexual intercourse on their bed under a mosquito net. He therefore lodged a formal complaint against the defendant.

- (b) Emma John.

She is the Complainant's wife, a woman of 42 years old, some 4 years older than her husband. She testified that John Fred her father was originally from Maewo who had gone to live on Malekula. That her mothers name was Martha and she had one brother and two sisters. She testified that John Fred had two wives, his other wife's name is Lissis and one of her son's name is Morris John, the defendant. She told the Court that John Fred died in 1973. That they had been living in a defacto relationship with Sgt. Aitas since 1978 and only actually got married in 1985. She testified that on 22 July 1998 her husband had been with the



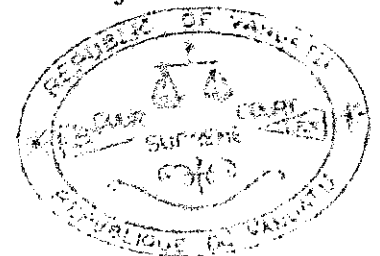
family on holidays and was going back to Lakatoro. The defendant had returned from Santo the previous day and was drinking all night. She confirmed that when her husband waited for transport on the road, the defendant got hold of her and made her lie down and eventually had sexual intercourse with her. She confirmed that in the act of intercourse her husband discovered them and the defendant retreated. She said she felt really bad because the defendant is her brother and she had been looking after him since his childhood days.

(c) Police Officer David Bong

He was the investigating officer. He testified that based on the Complainant's report he interviewed Emma John on two separate occasions. On the first occasion she only told him that she had denied the incident to her husband. After he had interviewed the defendant on 27th October 1997. He obtained another statement from Emma John who came to the police station by herself on 12th November 1997 and told him the whole and true story of what the defendant said to her and what she said to him and how the defendant got her to have sex with him. He told the Court that on receiving this statement the police officer destroyed the first statement of the victim. Further he testified that during interview he had cautioned the defendant and took statement of admission which he said was voluntary. The defendant admitted having sex with Emma John after the initially lied because he's mind was affected by alcoholic drinks at the time. He broke down after admitting the sexual intercourse. His statement was tendered and admitted into evidence.

No Case Submission

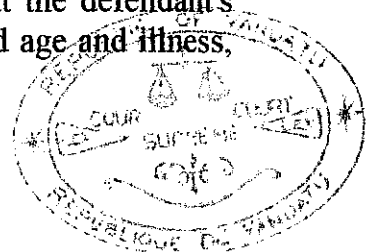
Defence Counsel made a no-case submission submitting that there was no case to answer because there was lack of real evidence from the parents of either the victim or the defendant. He submitted that this case required medical evidence and that was not done. He urged the Court to dismiss the charge of incest and acquit the defendant. I found to the contrary to ruled that there was prima facie evidence to convict the defendant of the charge. The trial was adjourned to 16th November 1998 for the Defence to present its case.



Defence Case

The defendant, Morris John denied that Emma John was his half-sister. He did not deny sexual intercourse. He testified that the name John was his christened name received on baptism. He gave his age as 27 years old. He told the Court that his father's name is Kamanser whose father was Rafun Larumphas, a high-ranking Chief attaining the No.10 step. He confirmed that his mother's name is Lissis whose brother Sgt Allan Aitas, the complainant. That her mother got married to Kamanser in 1950. This was told to him by a Pastor Ray who had performed the marriage. He said he did not know that his mother had married any other man previously. He said he knew about John Fred but that he did not see him. He told the Court that if it was true that Emma was his sister she should not have married Sgt Aitas as in custom he was her uncle. He told the Court that he never inherited any property from John Fred, only from Kamanser. He confirmed that on 22 July 1997 he had been drinking wine. About the affairs with Emma John he said it had been going on for about 4 years. About the sexual intercourse he said he only just tried to have intercourse when Sgt Aitas came in and saw them both. He said that the intercourse was consensual. After the incident the defendant said that Emma John said 'sorry' to her husband who went off again. He testified about a meeting held with the chiefs to solve the problem on 15th January 1998. That the defendant was made to pay the sum of vt15,000 to the chiefs and vt2,000 and one pig to Sgt Aitas. He tendered into evidence a document signed by the chiefs marked Exhibit D1. He said he was forced by the police to make an admission statement. He said while describing how the intercourse took place on 22 July 1997 that Emma John was his 'straight sister'. He was cross-examined on his evidence which did not complete and the Court adjourned the trial to 4th and 5th February 1999. The conditions of bail were varied to allow the defendant to travel to Malekula to spend Christmas with his family but that he had to return to Luganville by Wednesday 3rd February 1999. The defendant kept his bail conditions and came to Court on the fixed date but the Court was not able to sit on those dates and the hearing was simply vacated.

On 31st March 1999 when the trial resumed Counsel for the defendant requested time to allow the defendant to arrange for his mother to attend Court and give evidence on his behalf. The opportunity was granted and the Court completed the defendant's cross-examination now by Mr Willie Daniel. On 12th April 1999 the case appeared for mention and was adjourned to 13th April on which dated Counsel for the defendant told the Court that the defendant's mother was unable to attend Court to give evidence due to old age and illness, thereby closing the case for the defence.



On 14th April I heard submissions firstly from the Prosecutions that they had discharged the burden of proof beyond reasonable doubt on the evidence adduced from their witnesses that the defendant was the brother of the victim, Emma John. The evidence of that fact from Sgt Aitas was consistent with that of Emma John. That the defendant admitted that relationship in his statement dated 27th October, 1997. That sexual intercourse is not is issue. That the defendant knew of that relationship was not in doubt.

The Defence however submitted that there was no evidence showing that the defendant was the victim's sister. They argued that there was no medical evidence to that effect or in the absence thereof no chief or elderly person including the parents concerned have been called to testify to that fact. That it was unsafe to rely on the evidence of the prosecution witnesses. Counsel for the defendant suggested that there was a connivance existing between two people. He argued that according to Melanesian culture Sgt Aitas should not have married Emma John as she is his sister's daughter. He argued that the only reason the defendant broke down at the police station was he was forced or intimidated to make a confession statement. Counsel referred to Exhibit D1 and argued that nowhere on the document do the chiefs indicate that what they solved was an affair between a brother and sister but was because of an adulterous affair.

The Law

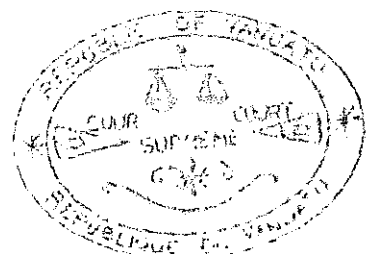
Section 95(1) of the Penal Code Act reads -

"Incest is sexual intercourse between -

- (a) parent and child (including an adopted child),*
 - (b) brother and sister, whether of the whole blood or of the half-blood, and whether the relationship is traced through lawful wedlock or not; or*
 - (c) grandparent and grand child, where the person charged knows of the relationship between the parties.*
- ✓(2) No person of or over the age of 16 years shall commit incest.*

Penalty: Imprisonment for 10 years.

(3)



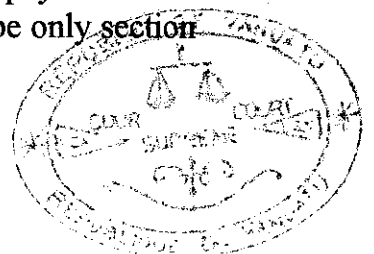
Issues

- (1) Are the defendant and the victim brother and sister?
If so, whether of the whole blood or half-blood?
And if so, whether or not traced through lawful wedlock?

On the evidence before the Court, I am satisfied beyond doubt that the defendant is the Victim's brother. That relationship is of half-blood. It is immaterial whether or not that relationship was traced through lawful wedlock.

Sgt Aitas is 39 years old. Emma John are 42 years old. The defendant is 27 years old. Sgt Aitas and Emma John are older and it is clear that their knowledge of history is more than that of the defendant. The defendant has admitted that relationship in his statement and yet has come before the Court to present a completely different picture. His evidence lacks credibility. Just as the Defence asks why the Prosecution did not call Lissis to testify, the Court asks why the Defence did not call her or even Karmanser? Infact on 5th November 1998 when Mr Tangwata sought leave to call Lissis, Defence Counsel objected vigorously because her statement was not obtained and included in the PI Bundle. When the Defence had the opportunity of calling her as their witness although the Court is told that she appeared on 4th February 1999, she did not appear the second time on 12th April 1999. The only reason given is that she is too old and that sickness binds her at this time. If the Court were to believe that, a medical certificate would have been more appropriate. Kamanser, the defendant's father could have been called by the Defence but he was not. I can only conclude that the defendant was making up a story in his evidence.

Defence Counsel referred to Exhibit D1 dated 15th January 1998 by the chiefs indicating a meeting in which the chiefs impose on the defendant a fine of vt5,000 'igo long loa mo 2,000vt mo wan pig iko long Alan Aitas? Defence Counsel submitted that the fine was for adultery and not incest. That submission is not accepted because adultery although at one time it was law in the penal provisions has now been repealed and is only a grounds for divorce. That being so, the only law existing is that of incest which is section 95. So if a fine of vt5,000 was payable in respect of a breach of law, that law in my opinion has to be only section 95 of the Act and no other.



(2) Did the Defendant know of the relationship?

From the evidence I have no doubt at all that the defendant a 27 year old man knew of the relationship. He knew that on 10th September 1990 and on 22 July 1997. He knew of it even before 1990.

Conviction

For those reasons I am satisfied that the Prosecution had proven their case to the required standard. I therefore find the defendant guilty of the charge of incest and accordingly enters a conviction.

Sentence

In sentencing the defendant I took into considerations what was said in his behalf by Defence Counsel in particular that the defendant had honoured his bail conditions and that he was a first offender with no previous convictions. Further that he had paid fines on the order of the village chiefs imposed on him at a meeting held on 15th January 1998. Further that the defendant had been in jail for some 9 months and 18 days from 27th October 1997 to 18th August 1998 after he was granted bail on conditions.

For those reasons, I considered that a custodial sentence of six (6) months was sufficient punishment to the defendant for his offence. Unless he chose to appeal that sentence became effective on 14th April 1999.

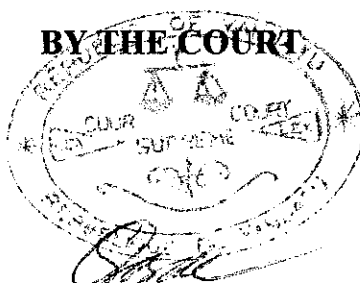
Costs

Prosecution applied for costs but was refused on the grounds that the trial was necessary due to the descendant's constitutional rights. The defendant had also incurred a lot of costs himself.

Dated at Luganville this 19th day of April, 1999.

Oral Verdict and Sentence Delivered: 14th April, 1999.

Sealed: 20 to April 1999



OLIVER A SAKSAK

Judge