

PUBLIC PROSECUTOR

-v-

**KALO ROBIN KALTAVA AND
STEVE FRED**

Coram: Mr. Justice Oliver A. Saksak
Mrs. Anna Kasten – Clerk

Mrs. Heather Lini Leo – Public Prosecutor
Mr. George Nakou heard on behalf of the Defendant

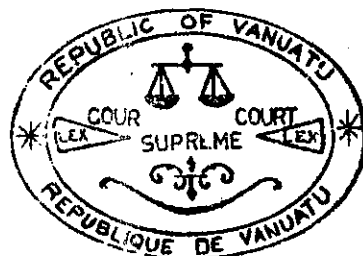
JUDGMENT

Charge

The Defendant appeared before this Court on committal by the Magistrate Court on 16th February 2000 when he pleaded not-guilty to a count of rape contrary to section 91 of the Penal Code Act CAP. 135 (the Act).

Trial

The case went to trial for three days from 15th to 17th March 2000. The trial concerned only with Kalo Robin Kaltava. Before the prosecution commenced, section 81 of the Criminal Procedure Code Act CAP.136 was read and explained to the Defendant.



Facts

The facts alleged by the Prosecution were that on or about 23rd November 1999 at No 2 Lagoon Port Vila, the defendant Kalo Robin Kaltava (the Defendant) had sexual intercourse with the prosecutrix by name of Elizabetha Rossi without her consent or with consent which was obtained by threats or fear of bodily harm. The Defendant admitted having sexual intercourse with the prosecutrix but denied that it was done without her consent.

Onus and Standard of Proof

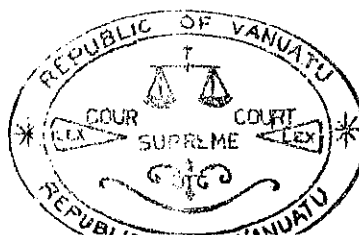
Under the provisions of Section 8 (1) of the Act it is the duty of the Prosecution to prove that the Defendant is guilty and must do so beyond reasonable doubt.

Evidence

In order to do this the prosecution adduced evidence from the prosecutrix and her fiancé and two police officers which is summarised below.

1. The Prosecutrix – Miss Elizabetha Rossi

She gave her evidence through an interpreter Mr. Zuchetto Marcello. She is Italian who came to Port Vila in October 1999 and living with her fiancé Mr. Rigmi Marcello at No 2 Lagoon. She testified that on 23rd November 1999 she was in the garden when a man came to ask her something. She had difficulty understanding the man. The man asked her where her fiancé had gone to and she told him that he had gone out into town. She then proceeded towards their house and the man followed her and entered the house with her. She asked him to write down what he wanted on paper and the man wrote these words "Did you know our, to do sex". The prosecutrix then said "no" and told the man to leave the premises. The man then hesitated to leave and she pushed him to the door but the man resisted and forced his way back into the house. The man told her to remove her swim suit.

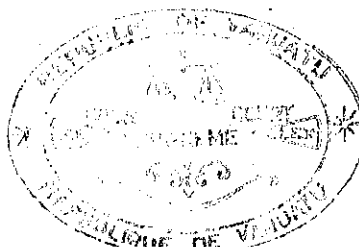


The man tried to hold on to her and to kiss her. She tried to get away by running around the house. She told the Court that the man had locked the door and she could not run outside. She said that the man had held the knife and told her that if she did not submit he would 'Kill' her. At that, the prosecutrix submitted to intercourse. She said although she did not agree to have sex, the man held her tight on the floor and forced himself upon her.

After they had had sexual intercourse the prosecutrix asked the man to leave as her fiancé was about to return to the house. Before leaving the man asked for some money. She again did not understand the request and asked the man to write it down on paper. The man wrote the following figure "VT 5000". At this, the prosecutrix told the man that she had no money but that he should return later that afternoon to receive it. She told the Court that she never knew the man. She identified the man in Court by pointing to the Defendant in the dock. She told the Court that she had seen another boy on the other side of the garden causing her to fear so that she locked the door and waited for her fiancé. The incident took place at around 11 O'clock in the morning. The paper on which the Defendant wrote down his requests and the knife were tendered into evidence as Exhibits P1 and P2.

2. Rigmi Marcello

He is the fiancé of the prosecutrix also from Italy but working in a manufacturing trade in Port Vila. He told the Court that the prosecutrix had arrived in Vila on 8th October 1999. He testified that on the morning of 23rd November 1999 he had woken up early. It was a windy morning and he decided to wind-surf. He said that he went out to the front yard facing the sea with Miss Rossi and that whilst he went out to wind-surf, Miss Rossi stayed back on the shore and watched, he did so for about 30 minutes and then returned to shore. In doing so he said that he met some kids who live next to their house. He said he saw a particular boy just sitting and watching him while he was surfing. He identified the boy by pointing to the Defendant sitting in the dock. After surfing Mr. Marcello said he went into town where he took about one hour. He said that on his return he noticed that all the curtains and windows were closed and thought this was unusual. He said that he had noticed Miss Rossi sitting on the couch and that she was crying. She related to him what the boy who was sitting outside whole morning had done to her. He said that Miss Rossi was



shocked and "could not talk straight". He went looking for the boy in the front yard but he was not there. He asked someone whom he thought must have been Steve Fred as to the whereabouts of the Defendant but was only told that the Defendant had gone somewhere else. Later he returned to Miss Rossi and they both went to a friend's who later took them to the police station.

3. Police Sargent Meryline George

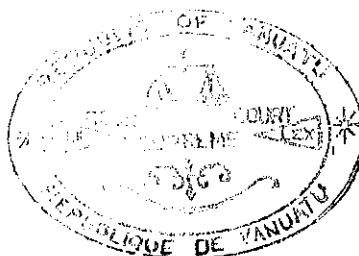
First she identified the Defendant as the person she saw at the Police Station on Tuesday 23rd November 1999 together with the prosecutrix, her fiancé and Steve Fred, the other Defendant. She said that the prosecutrix was in a state of shock and she was crying a little and that she saw Senior Sargent Delphine Vuti trying to comfort her. She said that the Defendant was also frightened from the expressions on his face. She confirmed that the Senior Sargent was in charge of the case and that it was she who had obtained statements from the other witnesses including the prosecutrix and the Defendant.

4. Senior Sargent Delphine Vuti

She is an officer of 21 years experience in the Police Force. She identified the person sitting in the Dock as the Defendant she interviewed in relation to the allegation of rape on 23rd November 1999. She said that the prosecutrix was accompanied to the Station by her fiancé and Mrs. Goiset. She said that the prosecutrix had been crying and feeling bad. She said that she had visited the scene of the incident at a house at No 2 Lagoon. She identified a bush knife tendered as Exhibit P2 as the knife which the prosecutrix has referred to and with which the Defendant had threatened to "kill" the prosecutrix if she did not submit to him. She said that the knife was taken from the house in which the alleged rape was committed.

No-case Submission

At the end of the evidence for the prosecution Mr. Nakou submitted that there was insufficient evidence on which the Court could convict the Defendant. In support of the submission Mr. Nakou argued as follows:-

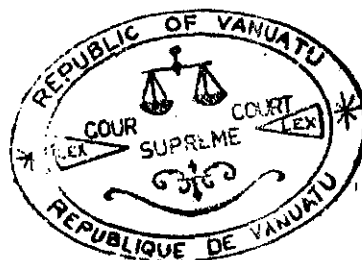


- (a) That mere words or threatening gestures were not sufficient to bring the victim to a level depriving her of self-control. He relied on the principle of provocation in section 27 of the Act.
- (b) That the prosecution had failed to produce a medical report to show injuries or bruises to the prosecutrix's private part, to show that she was forcefully penetrated.
- (c) That the Defendant being a boy of 12 years old but under 14 years of age could not be criminally liable for his actions unless the prosecution proves that he intended to rape and that he was capable of knowing or telling the difference between right and wrong. He relied on section 17 of the Act.
- (d) That the prosecutrix had fabricated the evidence. The knife in question had conflicting dates as the Court found out and asked the Police Officer to clarify. Further that it was not the usual practice of Europeans to keep knives in their living rooms.

In reply, Mrs. Leo submitted that there was prima facie evidence against the Defendant. She submitted that sexual intercourse or penetration was not in issue. As to the Defendant's age she submitted that there was circumstantial evidence that he knew about the rights and wrongs of life. As to the principle of provocation, that it did not apply in such a case as this. As regards the conflicting dates on the knife, the Police Officer had clarified that the date it bore was a mistake and stated that the correct date was 24th November 1999.

Court Ruling

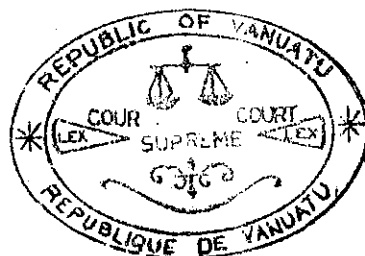
As regards the no-case submission I agreed with Mrs. Leo and ruled that there was a prima facie case against the Defendant. Mr. Nakou then indicated that he would have the Defendant give evidence and the Court read Section 88 of the Criminal Procedure Code Act to the Defendant before the Defendant opened his case.



Evidence For the Defence

The Defendant gave evidence of his age at 12 years that he attended class 5 at Fresh Wota Primary School at the time of the incident. He testified that on 23rd November 1999 he had gone to meet his aunt at No 2 Lagoon. He said that he went to the house of an expatriate woman whom he identified as the person sitting in Court being Elizabetha Rossi, the prosecutrix. He said that he asked her in these words "Do you know how to sex?", and that she replied, "No". After this the prosecutrix proceeded towards her house and he followed her. He said that he held the prosecutrix tight and removed her bra and that she removed her swim suit and that holding each other they had sex. He said that the prosecutrix took him down on the floor and actively had intercourse with him. He said that during the course of intercourse, the prosecutrix said words to this effect, "that's good, that's good". He then said that the prosecutrix had told him that her boyfriend would be returning soon so he pushed her out, put his trousers back on and walked out the door. He said that he had written the figure "VT500" on a piece of paper given him by the prosecutrix. He then said that as he was going through the door, the prosecutrix said to him "see you later". He returned to his aunt's house next door. He denied seeing a knife in the house and he denied hearing any mention of the knife by the prosecutrix. He said that the first time he saw the knife was at the Police Station and that it looked new. He said that the police officers had told him that he had taken the knife and had threatened the prosecutrix with it. He denied it all and alleged police brutality and abuses. He alleged that the police had detained him and his brother Steve Fred for one night and two days.

He clarified that after the incident he went to his aunt's and cooked rice. Later that he went to the garden and on return his aunt told him that a white man had gone looking for him. He said that after lunch they had a rest until about 1:30 to 2 O'clock p.m. that the police arrived and arrested him. He said that the police had told his aunt why he was being arrested and that they would detain him. He said that the police had arrested him and taken him to their office with a knife that he took to the garden. He confirmed that whilst at the Police Station they were met by Sgt. Meryline George who took them to her office and gave them juice and gateaux to eat. He said that on the next day they were taken to Sgt. Meryline George's office again where they were fed with pies and lemonade and then later detained. He said that it was in the afternoon between 3:30 p.m. and 4:00 p.m. that the police took him to his parents' house at Fresh Wota.



In cross-examination Mrs. Leo asked the Defendant a number of questions which I am of the view is important and therefore I set them out in full below. This is the translation of the questions asked by the Public Prosecutor (PP) and the answers given by the Defendant Kalo Robin Kaltava (KRK) in Bislama and translated into English in the closest possible terms with out trying to lose its meaning or context.

“PP: On 23rd November 1999 was Steve Fred in the same house as you were?”

KRK: Yes

PP: And white missus?

KRK: Yes

PP: You did not know her name?

KRK: No

PP: You did not talk to her before?

KRK: “Yes”

PP: You agree you talked to her outside when she was applying cream?

KRK: Yes

PP: You and Steve were already talking about her?

KRK: Yes

PP: She had a swim suit with bra?

KRK: Yes

PP: At that time you thought of having sex with her?

KRK: No

PP: But you asked her for sex?

KRK: Yes

PP: So it means you wanted to have sex with her?

KRK: Yes

PP: Missus was showing herself to you and Steve, true?

KRK: Yes

PP: Did you talk with Fred later?

KRK: Yes

PP: And did Fred advise you to ask her if she knew how to have sex?

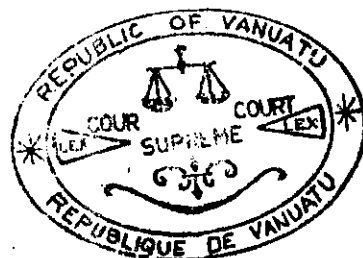
KRK: Yes

PP: Did she give you water?

KRK: No

PP: You followed her into the house?

KRK: No



PP: *You asked for sex inside?*

KRK: *Yes, inside.*

PP: *How many times you went into the house?*

KRK: *2 times. I went in and had sex and came out again.*

PP: *So it is not true you went in 2 times.*

KRK: *Only once.*

PP: *She was inside and pushing you to go outside?*

KRK: *No.*

PP: *She pushed you outside?*

KRK: *No. I asked her if she knew how to have sex. She said "no", and went into the kitchen.*

PP: *You were the last to get through the door?*

KRK: *Yes*

PP: *She was running around the kitchen?*

KRK: *Yes.*

PP: *Before the kitchen there is a small room?*

KRK: *Yes*

PP: *In that room there was a knife?*

KRK: *No*

PP: *Missus and you were running around in the house?*

KRK: *No, she went to the kitchen and I followed her.*

PP: *She said no to you?*

KRK: *Yes*

PP: *In the kitchen you removed her bra?*

KRK: *Yes*

PP: *You wanted to have sex with her?*

KRK: *Yes*

PP: *She did not talk?*

KRK: *Yes*

PP: *You pushed her against the wall?*

KRK: *Yes*

PP: *Which happen first?*

KRK: *I removed her bra.*

PP: *You agree she had her back to the wall?*

KRK: *Yes*

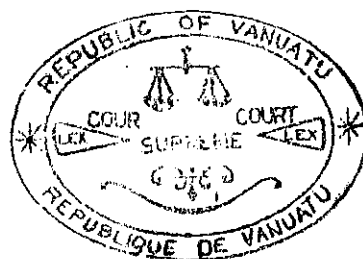
PP: *You tried to kiss her with your tongue?*

KRK: *No*

PP: *She struggled but you proceeded to have sex with her?*

KRK: *No*

PP: *Did you touch her private part?*



KRK: Yes

PP: You agree that you had sex when she had her back to the wall?

KRK: Yes

PP: So it is not true that she was holding you and you were holding her?

KRK: [No response but indicates that he had his hands around her.]

PP: You pushed her down to the floor?

KRK: No

PP: You sat on her or slept on her?

KRK: No

PP: You had sex with her standing up?

KRK: Yes

PP: Why did she ask you to write down words on paper?

KRK: Because she did not understand spoken English.

PP: The amount you wrote did she understand?

KRK: Yes

PP: When did you know her name?

KRK: Inside. She ask for my name.

PP: You spoke about knife. Where did Police take it from?

KRK: I brought it to the garden and on return I left it at the door. It is ours.

PP: Did you remove every clothes from yourself?

KRK: I had only trousers.

PP: Missus did not come outside?

KRK: She came to the door.

PP: That she said "see you later" is not true as she does not understand English?

KRK: No

PP: You believe she liked sex with you?

KRK: Yes

PP: When you watched her boyfriend windsurfing, you saw him leave?

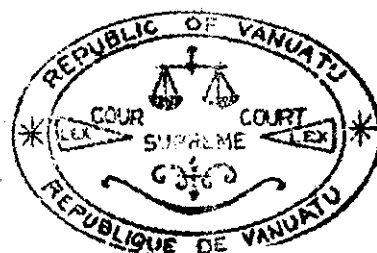
KRK: No. Steve told me to go and ask her for sex.

When I walked in sex was in my mind.

PP: But you knew that her boyfriend was out because someone told you?

KRK: Yes

PP: You come out of her quickly because she told you that her boyfriend was coming?



KRK: Yes

PP: You were frightened that her boyfriend might find you?

KRK: Yes

PP: What class were you in last year?

KRK: Class 5

PP: This year?

KRK: I should be in class 6

PP: Because she had all the small clothes on you thought of sex?

KRK: No

PP: But you agree that you asked her for sex?

KRK: Yes

PP: And you agree that you and Steve wanted to have sex with her?

KRK: Yes

PP: Steve is older than you?

KRK: Yes"

In re-examination Mr. Nakou asked only this one question:

"Q: How did she put you down?

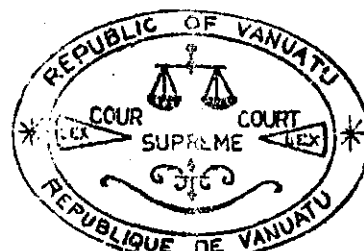
A: She pulled me put me down and pushed my penis into her vagina and she was saying "That's good, that's good"

There being no other witnesses, the Defence closed its case.

Submissions

1. By the Prosecution

- (a) Mrs. Leo submitted basically that on the evidence by adduced by witnesses for the prosecutions that they had proved their case beyond reasonable doubt against the Defendant, and therefore that they had discharged their duty under section 8 of the Act. She submitted that to prove a case beyond reasonable doubt requires a very high standard of proof but that it does not require absolute proof. She relied on the judgment of Denning J in Miller -v- The Minister of Pensions [1947] 2 All ER 372.
- (b) That the Defendant not denying that sexual intercourse had taken place the only issue for the Court is whether or not the victim



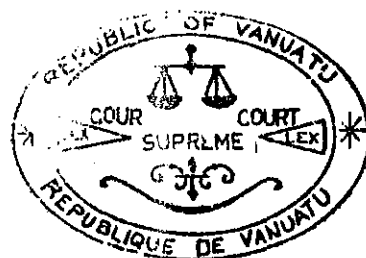
consented or if the Court finds that there was consent, whether that consent was obtained by

- (i) force, or
 - (ii) means of threats or intimidation of any kind, or
 - (iii) fear of bodily harm on the part of the victim.
- (c) That in regard to the Defendant's age which is given as 12 years and whether or not he could be presumed to be incapable of committing a criminal offence unless it was proved by evidence that he was to distinguish between right and wrong, Mrs. Leo submitted that there is evidence that there was a plan which in itself shows an intention as means rea on the part of the Defendant.
- (d) In the alternative, Mrs. Leo submitted that the defence did not prove to the satisfaction of the Court that the Defendant was 12 years old because they had failed to call an officer from the Civil Status Office to give evidence to substantiate the Birth Certificate. They had failed to call the Defendant's father to give evidence showing the actual age of the Defendant. In absence of such evidence therefore it was submitted that Section 17 of the Act was not applicable. She relied on C [Minor] -v- DPP [1996] A. C. 1.
- (e) It was submitted that the Defendant had given inconsistent evidence which bears on his credibility as a reliable witness.
- (f) It was submitted that there was sufficient evidence to show that consent was obtained by threats or by fear of bodily harm. Further that there was sufficient corroboration of witnesses evidence showing a knife and that the prosecutrix was seen crying and in a state of shock sometime after the incident.

2. By the Defence.

Mr. Nakou submitted to the Court as follows:-

- (a) Relying on the principle of provocation under Section 9 of the Act, it was submitted that where the defence denied force or coercion, it was the duty of the prosecution to disprove beyond reasonable doubt. And that the prosecution had failed to do that here.

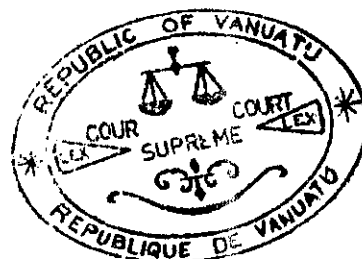


- Further that under the provision of Section 27 (3) of the Act it was required that prosecution should prove to the Court that the threats received by the prosecutrix should have been such as to deprive her of self-control. He submitted that mere words were not sufficient to achieve that purpose.
- (b) Mr. Nakou submitted that there were conflicting evidence by the prosecution witnesses in respect of the knife alleged to have been referred to by the Defendant in executing or communicating his threats to the prosecutrix.
 - (c) Mr. Nakou submitted that the act of sexual intercourse was achieved by the Defendant through a mistaken belief that she was consenting. He referred the Court to Section 12 of the Criminal Procedure Code Act [CAP. 136] and submitted that a mistaken belief in any fact or circumstance, if it is genuine, though not reasonable, should be a defence to the Defendant.
 - (d) It was further submitted by Mr. Nakou that the prosecution had failed to adduce independent evidence from the examining doctor to show semen and bruises to prove forceable penetration.
 - (e) Mr. Nakou also submitted that Section 17 of the Act requires that the prosecution should prove mens rea on the part of the Defendant. Taking his age into account which is given as 12 years, he could not be criminally liable for his action unless it was proved by evidence that he was capable of distinguishing between right and wrong with respect to the offence for which he is charged.

The law

Section 90 of the Act defines rape in these terms:-

- *“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 of the Act provides:-

*“No person shall commit rape.
Penalty: Imprisonment for life.”*

Issues

The defence conceded that sexual intercourse is not in issue. The defence say that there was consent on the part of the prosecutrix and the defence denied that consent was obtained through the use of force or by means of threats or intimidation, or by fear of bodily harm.

Findings

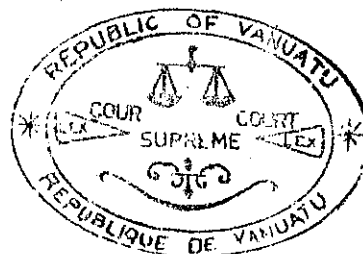
Applying the law to the facts, the Court makes the following findings –

1. In relation to the issue of **whether or not there was consent on the part of the prosecutrix**, that –

- (a) There was no consent by or from the prosecutrix. That she was seen crying and in a state of shock by all witnesses for the prosecution corroborate the fact and her state of mind as an unwilling party.
- (b) She communicated her state of mind and her unwillingness to the Defendant right at the beginning when the Defendant ask her whether she knew how to have sex and he was told in clear terms that “no” she did not.

2. **Whether or not force was used to obtain consent ?**

I find that force had been used against the prosecutrix firstly when he resisted her demands to leave the house and pushing his way back into



the house. Secondly the Defendant himself admitted that he had forced her against the wall during the act of sexual intercourse.

3. Whether or not consent was obtained by threats or intimidation of any kind, or by fear of bodily harm ?

I find there was clear evidence of threats or fear of bodily harm. I am satisfied that when the prosecutrix told the Court that she submitted because the Defendant told her he would use the knife against her if she did not submit, her fears were valid and reasonable. She being a tourist from Italy, a faraway country would in all probability have been clearly intimidated. She referred to the knife in her evidence during examination-in-chief as a "*Machete*" although she was not shown the knife. A machete is defined as "*a broad heavy knife used for cutting or as a weapon*". (See Collins Concise Dictionary)

That matches the description and size of the knife tendered as Exhibit P2.

The evidence of the prosecutrix and her fiancé about the knife are consistent. It does not matter where the knife was, the fact is that there was a knife in the house which the Defendant threatened to use against the prosecutrix if she did not submit to sexual intercourse. The knife is brand new but there are dents on its blade indicating that it has been used. I am satisfied that this was the knife referred to by the prosecutrix.

4. Whether or not the Defendant should be presumed not to be criminally liable because of his age and because it was submitted that the prosecution had not proved that he was able to distinguish between right and wrong ?

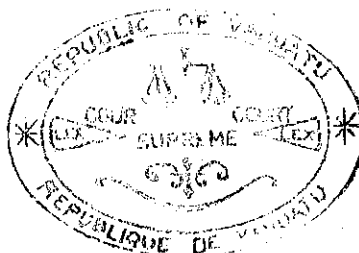
I find that the prosecution had produced or extracted clear evidence showing that the Defendant was able to distinguish between right and wrong. In cross-examination the Defendant was asked as follows:-

"Q: You came out of her quickly because she told you that her boyfriend was coming ?

A: Yes.

Q: You were frightened that her boyfriend might find you ?

A: Yes."



It is clear from this that the Defendant knew that what he was doing was wrong because he did not wish to be seen by the boyfriend of the prosecutrix.

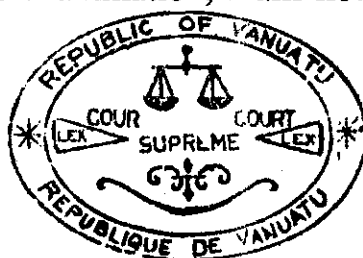
Regarding the Defendant's age Section 17 (3) states:-

"For the purposes of this section and any other provision of criminal law, the age of a person shall be determined, in the absence of official civil status records, by the Court upon the balance of probabilities, after hearing the evidence of a medical expert" (emphasis, mine)

The defence did not call a medical expert. This is necessary where there is no civil status records available. Here the Court was informed about a copy of the Defendant's Birth Certificate but the problem is that the defence did not formally produce it and tendered as evidence before this Court. That being so, it is not possible for this Court to rule as to age. Leaving age aside the Court finds that the Defendant was and is able to distinguish between right and wrong and therefore rules that the Defendant is criminally liable for his actions.

Comments and Ruling on other submissions by the Defence.

1. On the principle of provocation in Section 9 of the Act, it is misconceived. It is not applicable in a rape situation.
2. That Section 12 of the Criminal Procedure Code Act was applicable to the Defendant concerning the defence of mistaken belief. I have already found that there was no mistaken belief because the Defendant was told in clear terms by the prosecutrix that she did not want to have sex. Section 12 therefore cannot afford a defence to the Defendant.
3. That the prosecution failed to call evidence by a medical doctor to prove that the prosecutrix was forcibly dealt with. This was not necessary because the Defence had conceded that sex took place was not in issue.
4. As to credibility, due to inconsistencies in the Defendant's evidence both in examination-in-chief and in cross-examination, I am not prepared to



accept the Defendant's version as the truth of the matter. During the trial the Court had to order the Defendant's parents out of Court because they were making gestures to the Defendant whilst he was giving evidence. At one point they tried to put words into his mouth.

Verdict

Based on these findings, I am satisfied that the prosecution had discharged their burden of proof to the required standard.

I therefore return a verdict of guilty and accordingly enter a conviction against the Defendant for one only count of rape.

The verdict was entered on Friday 24th March, 2000. Sentence was adjourned to Monday 27th March.

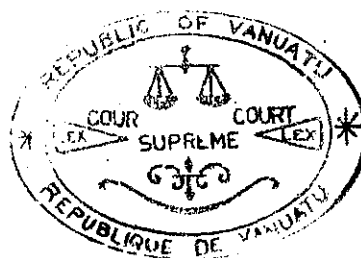
Submissions As To Sentence

Before considering sentence, the Court heard further submissions by Mr. Nakou in relation to sentencing.

Mr. Nakou submitted basically that under section 38(1) of the Act the Defendant could not be sentenced to imprisonment because he was a boy of less than 16 years. It was submitted that since there is no special institution whereby Minors can be kept, the Defendant could not be sentenced to imprisonment.

Regarding the Defendant's age Mr. Nakou invited the Court to form an opinion as to age. He referred the Court to the case of Public Prosecutor –v- Robert Jimmy CR.26 of 1998 (unreported) and invited the Court to adopt the sentencing principles used in that case where the Defendant was a minor and his age was not formally and definitely established by the Defence as in this case.

Mrs. Leo made submissions effectively in support of those made by Mr. Nakou emphasizing in particular the necessity to consider appropriate sentence whereby the Defendant is given an opportunity to reform rather than being punished. She submitted that the primary responsibility for this rests entirely on the parents, pastors of the church, the chiefs and the teachers of the school that he would be attending.



Sentence

Considering all the submissions made by both Mr. Nakou and Mrs. Leo the Court agrees that the appropriate way of dealing with the Defendant is to apply section 42 of the Act. Having formed an opinion as to his age which I hold to be 13, **IT IS ORDERED THAT –**

- (1) The Defendant appears for sentence when called upon by the Court within a period of 3 years from 24th March, 2000 on the following conditions:
 - (a) Within a period of 3 years the Defendant shall not commit any offence and be convicted for such offence.
 - (b) The Defendant shall not consume any liquor (which includes beer, wine, spirits or strong alcoholic liquor and Kava)
 - (c) The Defendant shall not visit or reside at his Aunt's house at No 2 Lagoon at anytime for a period of 3 years.
- (2) These conditions may be varied on application by the Defendant where circumstances demand.

DATED at Port Vila this 27th day of March, 2000

BY THE COURT


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OLIVER A. SAKSAK
Judge

