IN THE SUPREME COURT
OF THE REPUBLIC OF VANUATU

CR No. 08 of 1999

PUBLIC PROSECUTOR

-v-

DANIEL NAIOU

Coram: Mr. Justice Reggett Marum

Public Prosecutor, Mrs. Heather Leo, for the State
Mr. Hilary Toa for the Defendant.

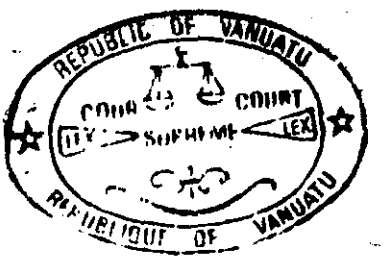
JUDGMENT

Nature

The Defendant was committed to stand trial on two (2) Counts as follows:-

1. That on the 8th of May 1999 Daniel Naiou had sexual intercourse with Hellak Naiou without her consent, an offence contravening Section 91 of the Penal Code.

2. That on the 8th of May 1999 he had sexual intercourse with Hellak Naiou a girl of 13 years old, an offence contravening Section 97 (2) of the Penal Code.



Committal

The Notice of Committal only refer to the offence under Section 97 (2) and not for Rape under Section 91. However, the decision of the Magistrate of the 2nd July 1999 confirmed that the Magistrate found a prima facie case against the defendant on both counts.

Plea

The Defendant pleaded not guilty to both counts.

Witnesses and procedure

The prosecutor called five witnesses. At the close of the prosecution case the Court ruled as a matter of law, on the no case application by the defence counsel, that the defendant has a case to answer on both counts. On the basis of the ruling the defendant gave evidence and elects not to call any witnesses and closed his case.

Undisputed evidence.

On the evidence of both the prosecution and the defence the undisputed facts being that on the morning of 8th of May 1999 the defendant and Hellak left the defendant's house to go to the store and than to the place of work of the defendant. They left the defendant's resident at Erakor at about 4.30 – 5.30 am that morning of the 8th of May 1999. When they reached the Seaside Police area it was raining a little or a shower and they went in to an unoccupied and uncompleted building to avoid being wet from the rain. At the time no one was inside the building only themselves.

Issue.

If that is so then the only issues of facts for this Court to decide on are:-

1- That did the defendant had sexual intercourse with Hellak
2- If he did then was it without her consent and
3- If he had sexual intercourse then was Hellak 13 years old.

Warning.

In this case the most relevant evidence is the evidence of the defendant and the victim. However, the interviewing officer Delphine's evidence is also relevant but only relevant to the extent of interviewing at the Police Station and what was admitted to her during the interview. Therefor, the Court warns itself of the danger of accepting uncorroborated evidence in sexual offence as such. Eventhough corroboration evidence is not required to prove sexual offence cases the Court must be more caution in considering uncorroborated evidence. This is to avoid the court being lead to wrongfully convicted and punished a defendant for an offence that he has not committed.

Evidence.

Hellak's evidence in chief was simply that when it rained a little the defendant pulled her into the uncompleted unoccupied house. There in he pulled her down, took off her pants. While he was pulling down her pants she asked him why he was doing that to her as he was a father. After pulling her pants down he also took off his short. After taking off his short he then lifted Hellak's legs up and had sexual intercourse with her. While he was having sexual intercourse with her she felt pain and at that time she bite his hand. But which hand she could not tell. By that time the defendant had effectually ejaculated already, as expressed by Helak that the area of her vagina was wet, and he stopped. When this was over she went back home, and never tell anybody of what has happened. She did not tell anyone for the reason that she was in fear of the defendant as he was a boxer. Furthermore, in re-examination she said Daniel told her not to tell anyone of what he did to her. Then about a week later she had her period which was heavily flowing and she was also concerned why this has happened. By then she was approached by Martha, who

she referred to as her cousin, about a week later of the incident of sexual intercourse. She only told Martha of this because she saw her as she was weak. And she later discovered blood on the bed sheet and inquired if she had any trouble. Hellak then told Martha of the incident and she then told the whole family of it and also put the matter before the chiefs. And thereafter, it was finally put to the police after failure of the defendant appearing before the chiefs.

As for the meeting with the chiefs over the matter it is evidence that the defendant did not attend to any of those meeting. The reason being that he was working and he could not attend the meeting. Nevertheless, he still paid 25kg rice, 2 chicken, 1000VT for kava and 5000VT pure cash to Chief John and Marie. He was told by Chief Marie that he was to make a big feast for what he did. Eventhough the defendant made those payments he still denied having sexual intercourse with Hellak. What he said was that he only touched her private part. On touching her private part he said she did not resist.

General Assessment in assessment as to credibility of the two witnesses.

Hellak spoke with confidence in giving of her evidence. The Court finds at time with some difficulties in obtaining information from her. But the Court realizes later that she required an interpreter of which one was arranged. And only after that she talked much better. Even at her youth age she talked with confidence and her evidence were quite strong to explain what actually happened on the 08th of May 1999. Even in cross-examination she still maintained that the defendant had sexual intercourse with her. I was satisfied that she could not just make up such stories and come and tell the court. Likewise, the defendant spoke with maturity and maintaining that he only touches her private part but did not had sexual intercourse with her.

Circumstances.

When Hellak told Martha of what the defendant did to her it was immediately reported to the chiefs. And the defendant was asked to come to the meeting which he failed to turn up for the meeting but yet later paid to the chiefs 25Kg rice, 2 chicken, 1000VT worth of Kava and 5000VT. The Court should not draw a conclusion that this was an admission to the matter. Even though silent too cannot mean admission. However, he gave reason that the chiefs said because he had sex with Hellak he has to pay the chiefs for what he has done. I do not accept this reason as satisfactory explanation why he paid such goods and money to the chiefs. In my view at least a person of his age and status would want to argue or inquire or get angry before the meeting of the chiefs to defend the truth of what occurred on that day. The allegation is such of a serious nature and he should defend himself from there on. The circumstances shows that the defendant was trying to hide the truth of what occurred on the 8th of May 1999 at Seaside Police Station.

Admission.

Delphine gave evidence, which I accept that she interviewed the defendant on the 14th June 1999 at Port Vila Police Station. At the close of her evidence the record interview was not tended to confirm the interview between Delphine and the defendant: Because of this than was the admission by the defendant to Delphine was admission properly administered and obtain in law?: And secondly, whether that admission can be accepted by this Court as admission of truth?. Even in cross-examination she still maintained that the defendant had sexual intercourse with her. In my view if a confessional statement when rejected by the court because of breach of the law in obtaining the confession than the said confessional statement is bad and cannot be used by the Court as evidence against the defendant in the trial. No evidence to say that the interview between the defendant and Delfin was conducted contrary to any laws. I find that the interview was conducted within the law and was done in a fair manner before a person is actually charge for an offence. And this

was in compliance with Article 5 (2) (c) of the constitution. Article 5 (2) (c) states;

> *Every person charge shall be informed promptly in a language he understands of the offence with which he is being charge;*

Article 5 (2) (c) confers the right only to a person who has been arrested for an offence and detained. It does not refer to those other person who volunteer to give statement to police. Even, Article 5 (2) (c) does not give right to a person to see a lawyer before an interview is conducted with the person. The only time a person right to see a lawyer is when he has been charge for a serious offence and provided for under Article 5 (2) (a) which states;

> *Everyone charge with an offence shall have a fair hearing, within a reasonable time, by an independent and impartial court and afford a lawyer if it is a serious offence;*

However , the requirement under Article 5 (2) (c) is for the police to give right to the defendant to either remain silent or give an explanation to the police. If he chooses to remain silent than the only option available to the police is to base their power on information they have received as referred to as complaint and other witnesses statement before them as to whether to charge the person or not. However, if the defendant chooses to give an explanation than it can be conducted by way of interview in the language of his choice. And to be recorded in writing and be treated as record of interview. And the guiding rule in conducting an interview is that the information obtain from the person must be obtained without force in forcing the defendant to give information or done for any favor tricks or ill will or in any other manner that the court thinks that such information obtain were obtain unfairly. The court has the discretion whether to admit in evidence or not the record of interview.

Now in this case there were no reasons as to why the record of interview was not tendered eventhough the record of interview was put in evidence and the witness was cross-examined on. I can only conclude that the prosecutor may have forgotten to tender the record of interview to the Court to prove the interview that took place

between Delphine and the defendant. In coming to say this than can the evidence of Dalfine be admissible evidence in testifying the admission by the accuse person to her or not. In my view the non tendering of the record of interview does not remove away the right of Delfin to come and give evidence of what the defendant admitted to her. However, that evidence only going as far as proving the truth that there was a statement made at a particular time to Delfine by the defendant. And it is up to the Court whether to accept the truth of the statement or not.

In this case the matter was reported to Maryline George and Delphine conducted the interview. The defendant contested that the interview between himself and Delphine was of a black magic but in cross-examination he admitted that he was interviewed on both the black magic allegation and the complaint by Hellak over sexual intercourse by the defendant. Delphine knew the defendant. In the interview the defendant was sitted on a chair. No evidence of threat, ill will, favour, force or other actions by Delphine or any other person contrary to law in obtaining the admission from the defendant. And the admission was that he had sexual intercourse with Helak. The interview was not corroborated by any other person or police officer. I must tress here that there is a great danger in extracting admission or confession from the defendant without a witness witnessing the admission. Which means that in conducting an interview with a defendant there should be a corroborating Officer present as a witness. This is not a requirement but a safe guide to the defendants right in obtaining information from him in the cause of interview. Nevertheless, in this situation no evidence adduce to say or suggest that the confession or admission obtained from the defendant was obtain against any law or against his will. Therefore, I accept the evidence of Delphine that the defendant voluntarily admitted to her that he had sexual intercourse with Hellak was admission made to her by the defendant on his own free will. And satisfied that this was a true admission by the defendant to Delfin that he had sexual intercourse with Helak.

Submissions.

The Court could only refer to submissions that relate to the issues as the other facts were no longer disputed facts. Hilary referred to corroborated evidence to corroborate the evidence of Hellak of having sexual intercourse. In corroboration in this jurisdiction corroboration is not a requirement in sexual offences.Also he submitted that the girl should have told others of what actually happened straight away and not to wait for one week. In my view this not always the case as attitude of every person can be different, that submission is only an expectation to occur and it is not natural nor whether it is a duty imposed under the law for a person to report straight away or in this case for Hellak to report straight away of what has happened on the 08th of May 1999. In Hellak's case she's quite a very young girl and a villager who comes from Tanna and she doesn't speak fluent Bislama apart from her own language. Even the defendant is like a father and she stays with him. So situation as such fresh complaint as soon as possible is quite difficult given the circumstances as stated above. So immediate reporting is not a requirement or failure to report is not also a requirement.

Prosecution submissions.

The prosecution maintained that there was sexual intercourse took place between the defendant and Hellak. And that sexual intercourse was taken by force against the will of Hellak. Daniel having denied having sexual intercourse with Hellak and the only evidence for consideration in having sexual intercourse is the evidence of Hellak herself. What the prosecution submitted was that the defence counsel bases his submissions on two areas; one is that in examination in chief Hellak said Daniel put his penis into her vagina and in the second version in re-examination Hellak said; she hold Daniel's penis and put it into her vagina and forced by Daniel. In my view these two versions are quite important as it differentiate the area of consent of a willing partner which I will deliberate on later . On medical evidence as argued by both counsels is also not a requirement in law and the court has the discretion whether to proceed on medical evidence or not in confirming that actual sexual intercourse did take place. However, being about one week later the matter came into light makes it more difficult for better medical evidence to be made

available to the Court and for that reason it is unnecessary for such medical evidence at that interval and I will agree with the prosecutor that medical evidence is not required

Sexual Intercourse.

Now in this case being the defendant was in authority over Hellak as Hellak called him as her father. The evidence is quite clear that the defendant is not the father as her real father is Naiou Narima, who also gave evidence in this matter. And because he was like a father to her he will have easy access or authority over her. The defendant maintained that while they were inside he only touched her private part. And I accept that in evidence as evidence of truth. Now if he had touched her private part then what is left there to do after touching her private part. I cannot easily accept that the defendant only touched her private part but in touching her private part he may have gone further than that and that was by having sexual intercourse with her. As stated earlier that it is important that where there is only evidence of the complainant and the defendant and no others then the Court has a duty in law to decide who is telling the truth. I accept Hellak's evidence as the most probable evidence of truth in this matter in explaining what has occurred on the 08th of May 1999 between herself and the defendant. Hellak all along in her evidence I find that she was telling the truth. I find that she could not just make up such stories and come to this court and tell the court. Even though, there were some variation as to her evidence the variations are not significant at all in establishing what has occurred on the 08th of May 1999. And on her evidence I am satisfied beyond reasonable doubt that Denial Naiou had sexual intercourse with her.

In finding that sexual intercourse occurred then was sexual intercourse obtained by force as alleged against the defendant for the offence of rape or not?. Rape is a well known and old criminal offence which so much is written on either in a form of judgment or in books. However the simple analogy of rape is that having sexual intercourse without consent or in other way the woman is not a willing partner. Without consent under Section 90 refer to consents obtained by force or threat or intermediation of any kind or by fear of

bodily injury or by false pretence or in married woman by impersonating her husband. All this amount to rape. In the *House of Lords* in the case *TPP –v- Morgan (1975) 2ALL. ER,* it was held by the majority that *the crime of rape consist of having sexual intercourse with a woman with intend to do so without her consent or with indifferences or not she consented.*

Even though no element of intention under Section 91 of the Penal Code it would be proper to say that if a person has a bad or evil mind to have sex with another person and do so without her consent, he has done that with the intention to commit a very forbidden act that is not allowed by law and in this case under Section 90 and 91 of the Penal Code.

The question of consent is an essential issue of facts and the onus is on the prosecution to prove that consent was not obtained beyond reasonable doubt. It will not be correct to say as a matter of law a child of tender year cannot consent such as Hellak in this case. Now in this case the defendant had touched the private part of Hellak and he pulled down her pants and thereafter lifted her legs and had sexual intercourse with her. The only time that she resisted is when she asked why he was doing that to her as he is her father, and secondly, she bite his hand because she felt pain when the defendant was having sexual intercourse with her. If there were force then there must be evidence of actual resistance by Helak to be proven beyond reasonable doubt that there were force against the will of Hellak. I find that to ask the defendant that you are like a father does not amount to refusal to have sex. Even she only bite him when she felt pain this too can not be resistance in not having sex with the defendant or of the pulling down of her pants, she showed no resistance. What I assess on the evidence was that she was also a willing partner and only resisted because she felt pain. And on this finding of fact I find that the prosecution has failed to prove to this Court beyond reasonable doubts that the sexual intercourse took place without the consent of Hellak. And I find him not guilty on count 1 for rape under section 91 of the Penal Code and he is accquited.

Second Count.

In finding that there was sexual intercourse took place between the defendant and Helak, the only issue in the second count is whether Hellak was 13 years of age at the time the sexual intercourse took place. The offence under Section 97 (2) of the Penal Code prohibit a person to have sexual intercourse with a girl between the age of 13 to 15 years. This is a strict liability offence which offer no defence to a person charged under such section. Neither intention is an element. Hellak's in evidence in chief said she was 13 years old and born on the 21st May 1986. She completed grade 6 in 1998. This evidence was not contested in cross-examination. Martha Mary's evidence refer to her obtaining the birth certificate from the Civil Status Office. Again her evidence was not contested in cross-examination. Then Naiou Narima, Hellak's father, gave evidence that Hellak was born on the 21st May 1986 and his evidence of birth was contested in cross-examination and he maintain in cross-examination that Hellak was born on the 21st of May 1986. He could remember or recall making birthdays food to mark her birthdays. I agree with the defence counsel that the birth is an extract. However, the most important factor is that if it is an extract then the content of it must be proven as not to be true. If not then the extract of the birth certificate is admissible evidence in Court in stating the right birth date of a person. In this case Monica Silas gave evidence that she issued the birth certificate. Monica's profession is an officer in the Civil Status Office, she register birth, marriages, deaths, and also dissolution of marriage certificates and one of her duties is to issue birth certificates. Her evidence as to registration cannot be easily disputed because that is her function, therefore her evidence to the effect that she issued the birth certificate is evidence of truth. Nevertheless, if the date of birth is not correct then the defendant must put in evidence in the contrary to prove that the date is not the right date. I've stated earlier that the defendant has not called evidence to put to this Court to tell this Court that Hellak was not born on the 21st of May 1986. It is his responsibility to prove that on the balance of probability. And because he has fail to than the date remains a date that has not been proven by the defendant as not the right date. And therefore, I am satisfied beyond reasonable doubt that Hellak was born on 21st of

May 1986. And being born on the 21st of May 1986 she will be 13 years of age on the date when sexual intercourse took place, that is on the 08th of May 1999. For all these reasons I find the defendant guilty for the offence under section 97 (2) of the Penal Code; for having sexual intercourse with Helak Naiou who was 13 years old.

Dated at Port Vila this 15th day of February 2000.

BY THE COURT

Reggett MARUM MBE
Judge.