IN THE SUPREME COURT OF THE REPUBLIC OF VANUATU
(Criminal Jurisdiction)

Criminal Case No. 103 of 2009

PUBLIC PROSECUTOR
-v-
SIMON BENNY

Mr. Molbaleh for the Prosecution
Mr. Bal for the Defendant

VERDICT

The defendant is charged as follows:

COUNT 1

STATEMENT BLONG WRONG

ACT OF INDECENCY WITH A YOUNG PERSON C/S 98 A OF THE PENAL CODE ACT [CAP 135]

PARTICULARS BLONG WRONG

SIMO BENNY yu stap liv long Maritau Station, Sunai Village long Mosso Landing. Samtaem long namba 16th July, yu bin committim act blong indecency, olsem pusum finger blong yu mo stap touchem mo titi long vagina blong wan young girl nem blong hem OLIVE JACK we hemi gat seven (7) year nomo. Mo yu bin stap forcem hem blong i titi long penis blong yu. Mo tu yu bin forcem OLIVE JACK blong i titi long ass blong sista blong hem LEIMAU JACK.

COUNT 2

STATEMENT BLOLNG WRONG

ACT OF INDECENCY WITH A YOUNG PERSON C/S 98 A OF THE PENAL CODE ACT [CAP 135]

PARTICULARS BLONG WRONG

SIMO BENNY yu stap liv long Maritau Station, Sunai Village long Mosso Landing. Samtaem long namba 16th July, 2009, yu committim act blong indecency, olsem pusum finger blong yu mo stap touchem mo titi long vagina blong smol girl ia LEIMAU JACK

we hemi gat eight (8) years nomo. Mo yu bin stap forcem hem blong i titi long penis blong yu. Mo tu yu bin forcem LEIMAU JACK blong i titi long ass blong sista blong hem OLIVE JACK.

The burden of proof is on the prosecution, the standard of proof to be attained is beyond reasonable doubt there is no obligation on a defendant to prove anything, even in giving evidence he uplifts no burden.

A number of procedural matters arose during this Trial and were dealt with as follows.

The two complainant aged 8 and 6 years are very young and very very shy.

There were clearly intimidated by their surroundings, no doubt the formal dress, the presence of a white French person as translator, and a white New Zealand Judge contributed to that intimidation.

1- I made an order that a screen be used to shield the young witnesses from the Accused. This was of modest size. I ordered that the accused leave the Court room until the witnesses were sitting behind the screen. At which time he returned. I also ordered that Counsel, if they wished, could be unrobed. I ordered that the Complainant's names be suppressed and any details leading to their identity.
2- I was advised by my Associate that the defendant was unhappy with this procedure and felt his status had been demeaned.

I explained to the defendant (translated to him) that the purpose was to reduce the impact on the children. It had nothing to do with the value to be placed on their evidence; there was no adverse inference against him.

The first witness Leimau, took some time to respond to my questions but I satisfied myself she had promised to tell the truth and understood the concept of truth.

She was behind the screen with the translator on her right. By her actions it became clear she wished to converse or speak to my Ni-Vanuatu Secretary. Accordingly as if in the role of a support person she sat near the witness and the witness was able to speak. Quietly and hesitantly at first, but at some point she was able to raise her voice above a whisper. This evidence was translated by the translator from Bislama to English for the benefit of myself and Counsel. The evidence when it could not be heard was spoken loudly by the translator in Bislama, for the accused's benefit.

At the conclusion of her evidence I enquired from the State as to their next witness. I was told...it was the second complainant.

I was alarmed at this and requested the state to call the children's mother next. Thus to make her available to sit behind the second younger complainant in the role of the support person.
Counsel for the defendant did not object.

The younger of the two girls is extremely shy. It is not evidence before me but I note that the examining doctor found the same.

In due course she promised to tell the truth. And in my view understood the concept of truth.

3- At an earlier time, the prosecution (anticipating this problem) made an application to have the recorded statements of the complainants produced as their evidence in chief.

After hearing from both counsel I granted this application.

The prosecution then proceeded to lead evidence from Leimanu the elder of the two complainants. I rely on the oral evidence of Leiman

Similarly evidence from the other complainant, Olive, was led. I rely on her evidence that her statement was correct. No translation was provided to me of these written statements in Bislama. And this was provided to me by my associate
These statements were the subject of criticism in respect of leading questions.

I return to the trial.

The prosecution alleges as follows;

Leimau (her first name is spelled variously) Jack is eight years of age. She is currently a student at Tagara Primary School. She is residing with both her parents at Maritau Station, Sunai Villlage, Mosso Landing in Efate.

Olive Jack is seven (7) years of age. She is Leimau's little sister. She also lives with both her parents at Maritau Station, Sunai Village, Mosso Landing in Efate Island.

Simo Benny is 56 years of age. Both Leimau and Olive called Simo, grandfather. Simo lives at Maritau Station, Sunai Village, Mosso Landing in Efate Island.

On the 16th night of July, 2009, both Olive and Leimau were getting ready to go to sleep. Both their parents were out in Port Vila town. Simo entered their house and told them to go outside. Outside the house close to a pamplemous tree, Simo forced Olive to lick Leimau's ass and Leimau to lick Olive's ass. They did

not want to but he forced them to do so. He pushed Olive's head to Leimau's ass and she licked it. He then did the same to Leimau. Both girls were threatened by Simo that if they do not lick each other's ass, he will report them to the Police. They were frightened of the Police so they did what Simo told them to do instead. He removed both Olive and Leimau's trousers and pushed small finger on the right hand into Leimau's vagina. He then pushed her head to his penis and forced her to suck it but she did not want to. He then did the same to Olive. Both girls did not want to suck Simo's penis but he forced them to do so. He then got some water from the well for the two girls to wash their mouth with. Olive stated that she felt pain on her vagina when Simo pushed his fingers into her vagina.

Leimau told her mother on her arrival from Port Vila town. This matter was then reported to the Police on 21st July, 2009.

The evidence from Leimau was as follows:

Leimau said:

On Thursday night 13th July, her father had gone fishing, they ate, then went to bed.

There is a hole in the wall to keep them awake Abuman (the grandfather) would [ruffle their hair].

Leimau said this, then when they woke up, there is another door, the grandfather came out of his door to theirs. When he came to the room where the girls sleep, Leimau told Olive not to open up but Olive got up and opened the door.

When Olive opened the door, the grandfather called out to them and took them behind the house.

Leimau said the grandfather took them.... (Told them?)....

When they did, he did too. He told Leimau and Olive to suck him. When they had done it, he told Leimau to suck her little sister's private parts.

Leimau obeyed, when she had finished, he told Olive to do the same to Leimau. Olive was afraid so the grandfather held her head and put it to Leimau.

When it was over the grandfather told them to go and drink water.

Then what?

Leimau said he played with them.

Because of a torrent of words from this witness at this point the following evidence was agreed by counsel with the translator.

She and her sister had eaten, then gone to bed. Their father had gone fishing. They heard a knock on the door of their room. Leimau told Olive not to open it, but Olive got up and opened it. They grandfather called out to them, took Olive outside. The hurricane lamp was blown out, by Olive. Leimau looked for some matches and lit it again. She followed her sister outside.

There were baskets hanging on the wall outside. The grandfather led them to the grapefruit tree. He put his hand down Olive's pant and did the same to Leimau, touching their private parts (pispis). Leimau also said that their grandfather told them to lick each other's bottom (ass in Bislama). Their father called out to Leimau to go and clean the fish, whereupon the grandfather left them alone.

Olive in her evidence; could hardly be heard. She agreed her statement was correct. I rely on that for her evidence.

It is as follows:

"I don't like apu Simon (Grandpa Simon) because he's touching my pipi (virgina). That's why I told my mummy and my daddy, and then they call the police, and the (police) took apu Simon (Grandpa Simon).

Grandpa Simon is a bad person he's always hit my grandma, and then he say that we (mitufala) all go to the well so he (Simon Benny) will suck our private pat.

And then he (Simon Benny) touched my vagina and push is hand (shows both right and left pointer) to my vagina, and he (Simon Benny) rubbed my Vagina, he rubbed my vagina for sometime and I felled pain in my vagina and I cry.

And then Grandpa Simon did not pull off my trousers but he pushed is hand (shows right hand) into my trousers (point to her front) and then he touched my vagina for a while (long time).

And one night (talking about one night date unknown) apu (Simon Benny) pulled my hand to go and drink water. And he says we (me and Simon Benny) we got o the well and he will suck my vagina.

And I don't like apu Simon Benny, he's with the police he's not coming back home".

The mother gave evidence of returning to their home on Sunday. A complainant was made to her by Leimau and as I grasped it supported by Olive. Some criticism was made of the paucity of complaint from Olive. Having seen and heard these witnesses this is unsurprising. She is a very shy young girl. She would clearly let her older sister tell her mother.

The evidence adduced satisfies me that the defendant was in sole charge of the children. The Mother was away and the Father fishing. I have not overlooked the claim in the summary that the Father was away as well. I have not over looked a date variation.

The defendant gave evidence, he agreed he was there at the time, he was in sole charge the children, when the father called for the children on his return from fishing he i.e the defendant, left.

The evidence from the children satisfies me to the requisite standard that the defendant forced these children to do his bidding and behave in the way instructed.

The conduct itself of licking asses or vaginas as specified, is clearly indecent. These particulars are sufficiently proved.

There are further particulars alleged. Each particular if established is sufficient to found the charge. Clearly there is no issue as to consent these are very young children.
The defendants evidence
Confirms:
1- He was there
2- He was in sole charge
3- He left upon their Father's return.
4- The only thing he denies is the alleged criminal activity.

I having had the opportunity to see and hear these complainant witnesses I accept them as credible and reliable. Where the defendants evidence conflicts with theirs I choose to accept their evidence. These children lack guile.

S 83 (3) of the Penal Code Procedure is as follows:

"*Where evidence admitted by virtue of subsection (2) any is given on behalf of the prosecution in any proceedings, the accused shall not be liable to be convicted of the offence unless that evidence is corroborated by other material evidence*".

This section is clearly a safeguard it came into effect on with the Criminal Procedure Code on the 1st of October 1981 [Cap136]. My reference is to the Consolidated Edition 2006.

Is an unsworn witness able to give evidence and her evidence be corroborative of the complainant made by the other sister. Similarly, for the other sister. The factual situation I find is an unusual one.

In respect of corroboration usually a warning of the danger to convict is sufficient.

Does 83 (3) accept or change this approach?

The defence submits (inter alia):

"*Corroboration is required under s 83(3)*

Section 83(3) of the Criminal Procedure Code requires corroboration of evidence of a young person.

The defence submits that due to the differences in the evidence given by the complainants to that given by the mother the evidence of the mother cannot corroborate their evidence.

A question has therefore been posed as to whether the evidence of one young person can be used to corroborate the evidence of another young person.

The reason evidence of a young person is required to be corroborated is as a result of the danger of the young person's evidence not being as accurate as that of a normal competent witness. The law seeks to alleviate any prejudice to a defendant by requiring corroboration.

If the evidence of one young person is relied on to corroborate the evidence of another young person similar considerations arise. The danger of the unreliability as a result of the first witness's age is also a factor in respect of the second witness.

The defence submits therefore that the evidence of another young person who gives unsworn evidence pursuant to section 83(3) cannot be relied on as corroboration for the evidence of another young person.

The defence further submits that the fact that the complainants mother had spoken to Olive prior to her making a statement and the manner in which the statement was taken by the police cast doubt whether the statement and the evidence is an independent memory or has been induced. Taking this into account the evidence of Olive is in the

defence submission tainted ad should not be relied onto corroborate the evidence of Leiman"

The Prosecution (inter alia) made the following submissions:

"The issue of corroboration

In Vanuatu, a judge must give himself a warning on the dangers of convicting a defendant on the uncorroborated evidence of a complainant in several distinct situations. In Walker v Public Prosecutor [2007] VUCA 12, the Court of Appeal held (at paragraphs 10-13):

> *10. The legal position at common law with regard to corroboration is that generally one witness is sufficient in all cases at trial. See DPP v. Hester (1972) 57 Cr. he then was. (page 14). App. R.212, H.L per Lord Diplock at p.24. see also Public Prosecutor v. Sano Alvea [1996] VUSC 18; (Cr. 10 of 1996) per Lunabek, J as he then was . (page 14).*
>
> *11. In any event judges are required to heed the warning of the danger of convicting on uncorroborated evidence of witnesses who fall into one of the following categories:*
>
> *(a) accomplices; or*
> *(b) complainants in sexual offences; or*
> *(c) the unsworn testimony of a child.*
>
> *See Davies v. DPP [1954] A.C 378 Cr. App. R. 11 for accomplices and R v. Trigg (1963) 47 Cr. App. R. 94 for sexual offences, and also Public Prosecutor v. Sano Alvea (Supra) at page 13.*
>
> *12. The present case clearly does not fall within any of the above categories. That being so, Aru v. Salmon (Cr Case 13 of 1998) is clearly distinguishable on its facts and the learned Chief Justice was correct in distinguishing it.*
>
> *13. The legal position as regards corroboration in Vanuatu was discussed at length in Public Prosecutor v. Mareka [1992] VUSC.10 [1980-1994] V.L.R.613 by the then Chief Justice Charles Vaudin d'Imecourt. His Lordship made a thorough review of numerous English authorities, including those referred to in paragraphs 10 and 11 of this judgment.*

In Public Prosecutor v Mereka [1992] VUSC 10 (referred to by the Court of Appeal in Walker), vaudin D'Imecourt CJ gave an extensive treatise on the corroboration rule. His Lordship held:

Corroboration

At Common Law, one witness is sufficient in all cases (with the exception of perjury) at the trial: see 2 Hawk C. 46, Section 2, 10; Fost. 233 and see D.P.P v Hester (1972) 57 Cr.App.R. 212, H.L., Per Lord Diplock at p.242. There may be certain statutory exceptions but these are not relevant here, as there are none that apply in the present case. Even though a case does not fall within a statutory category, judges are required to heed the warning of the danger of convicting on the uncorroborated evidence of witnesses who fall into one of the following categories: (i) accomplices or (ii) complainant in sexual offences or (iii) the unsown testimony of a child. The requirement that one should warn oneself in respect of evidence given by witnesses falling into one of these categories is a rule of law: see Davies v DPP. [1954] A.C. 378; Cr.App.R. 11 (accomplices) R v Trigg (1963) 47 Cr.App.R. 94 (sexual offences); The danger sought to be obviated by the Common Law rule in each of these three categories of witnesses is that the story told by the witness may be inaccurate for reasons not applicable to other competent witnesses: Whether the risk be of deliberate inaccuracy, as in the case of accomplices, or unintentional inaccuracy as in the case of children and some complainants in cases of sexual offences.

What is looked for under the Common Law rule is confirmation from some other source that the suspect witness is telling the truth in some part of his story which goes to show that the accused committed the offence with which he is charged, per Lord Diplock in DPP v Hester [1973] A.C. 296, 57 Cr.App.R.122.

"It is for [the tribunal of facts] to decide whether witnesses are creditworthy. If a witness is not, then the testimony of the witness must be rejected. The essence of corroborative evidence is that one creditworthy witness confirms what another creditworthy witness has said .... The purpose of corroboration is not to give validity or credence to evidence which is deficient or suspect or incredible but only to confirm and support that which as evidence is sufficient and satisfactory and credible; and corroborative evidence will only fill its role if it itself is completely credible evidence," per Lord Morris in DPP. v Hester (1973) 57 Cr.App.R. 212 at p.229.

Lord Hailsham. in D.P.P. v Kilbourne (1973) A.C. 729; 57 Cr.App.R. 381, H.L. at p. 402 said "corroboration is only required or afforded if the witness requiring corroboration or giving it is otherwise credible". Lord Reid (at p. 402) states: "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. The doubted statement is corroborated to a greater or lesser extent by the other statements or circumstances with which it fits in."

Lord Hailsham in D.P.P. v Boardman (1975) A.C. 421; 60 Cr.App.R 165, 183, accepted that approach and 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 in Kilbourn was not that to give or require corroboration a witness must be believed without doubt. 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. In such cases, the witness's evidence is rejected before the question of corroboration arises. Of course, a conviction in such a case can sometimes result if, notwithstanding the unreliable testimony, the independent evidence is strong enough. But this is because the independent evidence has proved the case independently of the unreliable witness, and not because the unreliable witness is corroborated."

The leading case on what constitute corroboration is R v Baskerville [1916] 2 K.B. 658, 12 Cr.App.R. 81 in which Lord Reading C.J. defines what evidence constituted corroborative evidence for the purpose of the Statutory and Common Law rules:

"..... evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed but also that the defendant committed it. The test applicable to determine the nature and extent of the corroboration is thus the same whether the case falls within the rule of practice at Common Law or within that class of offences for which corroboration is required by statute .... The nature of the corroboration will necessarily vary according to the particular circumstances of the offence charged. It would be in a high degree dangerous to attempt to formulate the kind of evidence which would be regarded as that corroboration except to say that corroborative evidence is evidence which shows or tends to show that the story of [the witness] that the accused committed the crime is true, not merely that the crime has been committed; but that it was committed by the accused."

Lord Hailsham L.C. in D.P.P. v. Kilbourne, at p395 stated:

"In my opinion, evidence which is (a) admissible and (b) relevant to the evidence requiring corroboration, and, if believed confirming it in the required particulars, is capable of being corroboration of that evidence and, when believed is in fact such corroboration."

See also Lord Reid's observations in the same case:

"We must be astute to see that the apparently corroborative statement is truly independent of the doubted statement. If there is any real chance that there has been collusion between the makers of the two statements, we should not accept them as corroborative."

The corroboration need not be direct evidence that the defendant committed the crime see R v Baskerville ante, it is not a consequence of the principles laid down in Baskerville that there should be independent evidence of everything which the witness relates, or his testimony would be unnecessary. Indeed, if it were required that the witness should be confirmed in every detail of the crime, his evidence would not be essential to the case, it would merely be confirmatory of other independent evidence.

As a matter of law, injuries sustained by a complainant is capable of corroborating her evidence in relation to an alleged rape R v Pountney [1989] Crim.L.R. 216, C.A. The evaluation of the effect of the evidence is for the tribunal of fact, as to whether or not it does in fact amount to corroboration. It does not follow that what is capable of being regarded in law as being corroboration, will necessarily be held as a matter of fact to be corroboration. It is the duty of the tribunal of fact having directed itself [or having been properly directed] in law as to what may amount to corroboration to assess the evidence and to determine whether or not in the particular circumstances it accepts the evidence to be corroborative in fact.

It follows from the requirement that the corroborative evidence must come from a source which is independent of the witness whose evidence is to be corroborated, that evidence of recent complaint in a sexual case cannot be corroborative: see R v Coulthread (1934) 24 Cr.App.R. 44. Evidence of recent complaint is only admissible to show consistency of the victims' story [or to rebut allegation of recent fabrication] see R v Lillyman [1896] 2 Q.B. 167. It follows too that the physical appearance of a defendant, however singular, and however closely it corresponds with a description given by a victim, cannot, without more, amount to corroboration of her evidence see R v Willoughby (1989) 88 Cr.App.R. 91.

It is desirable in any event, in every case where corroboration is required, to hear submissions from counsel, at the close of the evidence, on the aspects of the ingredients of the offences in respect of which the tribunal of fact should direct itself to look for corroboration and what evidence there was which was capable of amounting to corroboration.

Whether certain evidence is capable of being corroborative is a question of law for the judge. If the judge holds as a matter of law that the evidence is so capable, then it is for him as the tribunal of fact to determine also whether or not that evidence is corroborative. In Vanuatu, there being no jury, the distinction can

easily be overlooked, but it should not be - see R v Farid (1945) 30 Cr.App.R 168. See also R v McInnes (1990) 90 Cr.App.R. 99 C.A.

The warning as to the danger of convicting upon uncorroborated evidence "must obviously be given (i) where there is no evidence of corroboration, [in such a case it is not sufficient to give the warning if the judge fails to take into consideration [to tell the jury] as the tribunal of fact, that there is no evidence capable of constituting corroboration; see R v Anslow (1962) Crim.L.R. 101, R v Evans [1964] 3 All E.R. 401 and R v Fisher (1965) 49 Cr.App.R 116] and (ii) where there is evidence capable of corroborating the complaint, but which the tribunal of fact might conclude does not amount to corroboration .... Where evidence is called which if accepted, indisputably must amount to corroboration, it is always necessary to remind oneself [to tell the jury] how dangerous it would have been to convict if there had been no such evidence [see R v Trigg (1963) 47 Cr.App.R. 94).

The judge must use clear and simple language that will without any doubt convey the warning that there is a danger of convicting on the complainant's evidence alone. Bearing that warning well in mind, the particular facts of the case must be looked at with care and if, having given full weight to the warning that it is dangerous to convict, the tribunal of fact comes to the conclusion that in the particular case the complainant is without any doubt speaking the truth, then the fact that there is no corroboration does not matter, and they are entitled to convict, see R v Henry and Manning (1969) 53 Cr.App.R 158 C.A. Whenever a direction on corroboration is required, it is the judge's duty to identify the evidence which is capable of corroborating the relevant witness(es) see R v Cullinane [1984] Crim.L.R. 420; C.A. R v Brennem [1990] Crim.L.R. 118, C.A. I go on further to say that in our jurisdiction a careful note of the summing up ought to be made and such a warning, including a note identifying the piece of evidence relied upon as being capable of being corroboration must be kept for future use if necessary by any appellate tribunal.

In this case I have reviewed with care the law regarding recent complaint and corroboration as applied for many years, if not centuries by the courts of the United Kingdom. I note, of course, that we are not here bound as a matter of law by any such cases, but they do serve as persuasive authorities, by the sheer wisdom that they contain. They are well tried and tested principles of the Common Law, and for the purpose of these courts, I adopt them entirely. The greatest care should always be exercise to ascertain what evidence if any can amount to corroboration. One should always be conscious of the real danger of convicting when there is no corroboration; but in a proper case, where one is sure beyond a reasonable doubt that the witness whose evidence should be corroborated is telling the truth, then having forewarned oneself of the danger of convicting without corroboration, one can and indeed, in those circumstance must convict, any other approach would be to fly in the face of the evidence.

To conclude, I would like to point out that there never has been a rule at common law that one cannot in an appropriate case, bearing in mind what I have already said above, convict in the absence of corroboration, however desirable it may be that there should be corroboration. The duty of investigating magistrates is to find out whether there is a prima facie case or not, if there is one, then they must commit for trial, if not they must discharge the defendant. They should not, in the course of a preliminary investigation, act as tribunals of fact determining the issue of guilt or innocence. That is the function of the tribunal which eventually tries the case".

By virtue of the Court of Appeal's reference to this judgment, the views expressed by Vaudin D'Imecourt CJ represent the position in Vanuatu.

It may be argued by the defendant that the allegations made by the complainants are uncorroborated and, therefore, a warning should be given. However, it is submitted that the evidence of each complainant corroborates the evidence of the other complainant. Each was present while the other was defiled by the defendant. Each testified in support of her sister's claims against the defendant. Due to their young ages, and the specifics of the allegations they have made, it is inherently improbable that they could have concocted the claims they have made. How would an 8 year old and a 7 year old know about cunnilingus or fellatio in order to make a concocted false allegation? As such, it is submitted that no such corroboration warning is necessary in this case.

Even if the court took the view that a warning was required (which is not conceded) it is submitted that the court would still find the offences proved and convict the defendant based upon the testimony of the complainants. Both complainants:

- Gave clear, concise, credible and reliable evidence as to the acts the subject of the charges;

- Were unmoved by vigorous cross examination, remaining consistent throughout;

- Were consistent in their out of court statements (fresh complaint and statements to the examining doctor).

It is further noted that the defendant had the ***opportunity*** to commit the offences.

If the Court accepts the evidence of the two complainants beyond reasonable doubt, then all of the elements of the offences have been proved and the defendant must be found guilty."

For the purpose of Brevity. I accept I am bound by the above Decision and I particularly rely on the following passage that I repeat.

"One should always be conscious of the real danger of convicting when there is no corroboration; but in a proper case, where one is sure beyond a reasonable doubt that the witness whose evidence should be corroborated is telling the truth, then having forewarned oneself of the danger of convicting without corroboration, one can and indeed, in those circumstance must convict, any other approach would be to fly in the face of the evidence"

Section 83 (3) does not appear to have been considered.
This adds a requirement for corroboration in a material particular.
It is were not for the unsworn evidence of the complainants clearly it would have no application.
I proceed as follows:

1) I have warned myself of the danger of convicting on uncorroborated evidence
2) I have found the complainant, witnesses credible and reliable.
3) The act of complainant. The content of complaint to the mother is not corroboration.
4) I find the following is singularly and collectively corroboration in a material particular (adopting a collective higher test to ensure s. 83 (3) is met

    1- treat the evidence of one sister as corroborating that of the other, despite it being unsworn.
    2- The evidence from the defendant corroborated, presence, sole responsibility and departure.
    3- The departure alone in my view amounts to corroboration. The family waiting at home for the father to return with his catch. What untoward circumstance would overcome a natural tendency indeed excitement to see what (if any) had been caught?
    4- Evidence of the complainant itself.
    5- The conduct itself, required instruction from a third person.

In respect of the charges

I highlight the following:

1- The unusual sexual activity for an 8 year and a 7 year old.
2- The instructions that in my view must have been given by the only other person there, namely the defendant, and the physical force applied to achieved compliance.
3- The defendants sole charge and departure.
4- The fact of complaint to the Mother, not the content.
5- The defendant not in my view being a truthful witness.
6- My finding that the complainants are truthful and reliable witnesses.
7- The oral evidence of Leiman supporting the charge involving her sister Olive.
8- Olive's statement being confirmatory of the presence of the accused and sexual activity.

There is criticism of the changed or observed and conveyed detail of the indecencies.

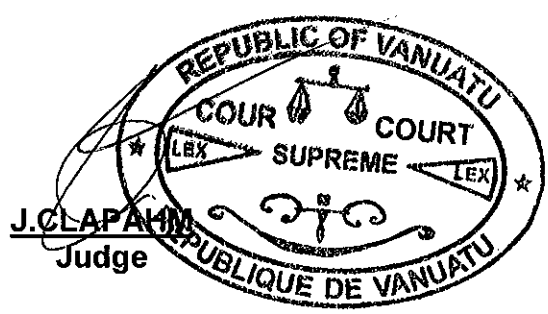
I record on the evidence adduced before me I am satisfied that at least the indecencies described to me in evidence by the complainants Leimau and Olive occurred. I do not as a the trial Judge consider the variations and words used by 7 and 8 year old complainants, need to be of the detail and explicitness of an adult or at the level of a medical practitioner. Licking ass (as translated) at the direction of the defendant is sufficient.
In my view, it is not necessary for me to amend the charges to fit with the evidence.

The defendant cannot have been prejudiced in any way as he claimed it didn't happen.

The charges are proved to the necessary standard of beyond reasonable doubt and he is convicted.

DATED at Port Vila, this 17th day of September, 2009

BY THE COURT



J.CLAPAM
Judge