

PUBLIC PROSECUTOR -v- AMSEN PAKOA SONGI

Coram: *Chief Justice Vincent Lunabek*

Counsel: *Mr Tristan Karae for the Public Prosecutor
Mr Andrew Bal for the Defendant*

JUDGMENT ON VERDICT

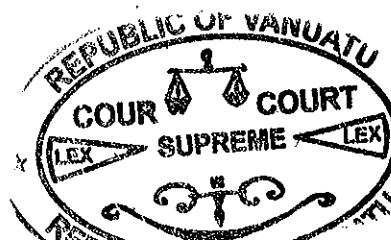
The Defendant Amsen Pakoasongi is charged with six (6) counts of sexual intercourse without consent, contrary to Section 91 of the Penal Code (Amendment) Act [CAP.135] and two (2) counts of unlawful sexual intercourse, contrary to Section 97(1) of the Penal Code Act [CAP.135].

The Defendant pleaded not guilty as charged on the abovementioned 8 counts. The trial proceeded on that basis on 11 and 12 February 2010.

Before the prosecution case began, Section 81 of the Criminal Procedure Code [CAP.136] was read and explained to the Defendant. The Defendant understood his right contained hereunder.

The law is for the prosecution to prove each and all essential elements of the offences of sexual intercourse without consent, contrary to Section 91 of the Penal Code (Amendments) Act No.17 of 2003 and 25 of 2006 beyond reasonable doubt. If there is a reasonable doubt, it will be interpreted in favour of the Defendant and he will be discharged and acquitted of the said offences.

The prosecution case is summarized in the prosecution brief of facts as follows:

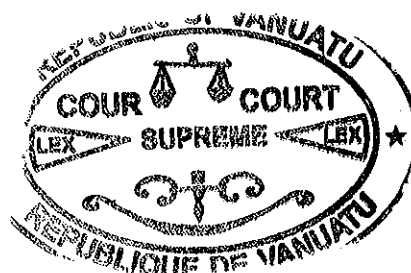


The complainant is a student attending Hiwello Primary School in Tongoa. Sometimes in 2003 the Defendant, on four occasions, had sexual intercourse with the complainant. On the first occasion the Defendant held the complainant tightly under a nambaga tree and penetrated her vagina using his finger. The second time the Defendant held the complainant again tightly and forced her to sleep on the ground. He then slept on top of the complainant and had sexual intercourse with the complainant. The third time the Defendant forces the complainant and makes her slept on the ground before he sucks her vagina. On the fourth occasion the Defendant again forces the complainant and makes her slept on the ground while he sucks her vagina.

Sometimes in March 2006, the Defendant took the victim back to the place where he had been having sex with her in 2003 and forces the complainant to sleep on the ground and had sexual intercourse with her before giving her some money. Sometimes in April 2006 the Defendant had sexual intercourse with the complainant on two separate occasions. On the first occasion the Defendant had forced the complainant to sleep on the ground before he had sexual intercourse with her. On the second occasion the Defendant again forced the complainant to sleep on the ground whereupon he sucks her vagina.

The prosecution called 5 witnesses.

The first prosecution witness is Leisave Morris. She is a senior and experienced nurse of more than 30 years and 21 years as a senior mid-wife. She began her practice of nurse since 1974. She gave evidence that she examined the complainant girl in May 2006. She said she observed that there were no bruises or scar on the vagina of the girl. But she said she saw that the vagina of the girl complainant was open. It was enlarged and it was not normal for a child under 13 years of age. The enlargement is an indication that there was penetration of the vagina. The complainant girl was 11 years of age when she examined her. She was attending primary school of Hiwello on Tongoa Island. She said she saw the enlargement of the vagina and she thought there was a penetration of the vagina.



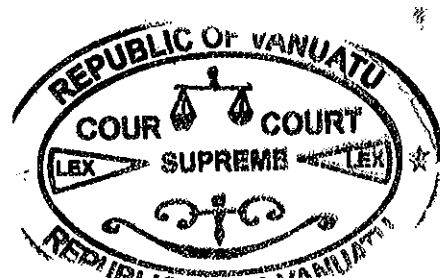
She also gave evidence that the complainant girl told her that the Defendant Amsen pushed his finger inside her vagina. She said he tried to penetrate her vagina but it is too small so she said the girl told her the Defendant used his finger and his tongue to penetrate the vagina of the girl. Her medical report containing her findings was exhibited P1 and confirmed what she said in her evidence.

She was cross-examined and she confirmed her evidence in chief.

The second prosecution witness is Harry Lorren of Meriu village, Tongoa. He gave evidence he is the uncle of the girl complainant. The girl lived with him and his wife when she attended Hiwello primary school on Tongoa. The girl's parents were living on the Island of Efate. Sometime on 4 April 2006, he come back to his house, he saw the Defendant was with the girl complainant at his house. The Defendant used to come and eat in his house. On that date, he saw the girl was sitting on the table and she then moved toward the end of the table. He went to his kitchen and came back to the place the Defendant and the girl were. He called on the girl and asked her if the Defendant asked her something. He said the girl told him that "Apu Amsen told her to go wait for him in the toilet". He said he told the girl not to see the Defendant. He took the girl to the police few days after. The girl is her niece (daughter of her sister). He said the girl stayed with him in 2003 and 2006 when she attended the primary school there.

He was not aware of any relationship between the Defendant and the girl in 2003. He was aware only of the incident in 2006. He gave evidence that he asked the girl of what Amsen did to her and she told him what Amsen did to her. He said the girl did not describe in details what the Defendant did to her but she said the Defendant made trouble to her.

He was cross-examined. He confirmed his evidence in chief. He said he observed the talking between the Defendant and the girl is not about family matters: He suspected the Defendant of doing trouble to the girl. He said he went to see the Defendant's chief before he took the girl to the police on Tongoa Island. He said he



went to see the Defendant's Chief whose name is Pakoa Timataso. Chief Timataso told him to go to the police.

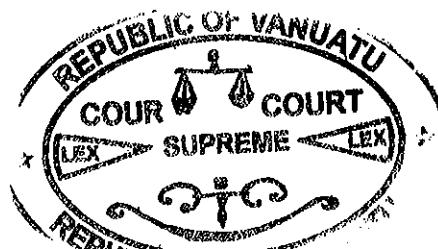
The third prosecution witness is the girl complainant (C). She is now living with her parents at Turtle Bay on Efate Island. She said she is now 15 years of age. In 2003 and 2006 she attended Hiwello Primary School on the Island of Tongoa and lived with her uncle Harry and her aunty Mary. She knows the Defendant. She calls him "Apu".

She said in 2003, she might be 6-7 years. Her Apu Amsen took her to a nambaga tree. He took off her clothes from her. He told her to lay on the ground. She refused. He forced her until she laid on the ground. The Defendant sucked her vagina and then pushed his finger into her vagina. She then went back home.

She gave evidence that on another occasion in 2003, the Defendant touched her indecently on her private part with his hands and this on the same place of the first incident. She returned home without telling anybody. She said these were the only times the Defendant did those things to her in 2003.

She gave evidence that in 2006 she stayed with her uncle Harry Lorren in the village of Meriu on Tongoa. The Defendant came in the house of her uncle. The Defendant drunk kava at her uncle's house. She could not remember the month or date. The Defendant slept in her uncle's house. She said during the night the Defendant touched her indecently. She described that the defendant touched her breasts. He kissed her mouth and he touched her vagina. She also said that in 2006, the Defendant took her again in the same place of the first incident. He sucked her vagina and kissed her on her month. That was all she could remember.

In 2006, she said she told Dora and Leiwia of what the Defendant did to her. She also said she told her uncle Harry Lorren of what the Defendant did to her. She said she told her uncle because she was concerned she might be pregnant. She said she told her uncle when they drink kava in the afternoon. She confirmed she told her uncle that Apu Amsen came to the house and did rubbish thing to her. She said her

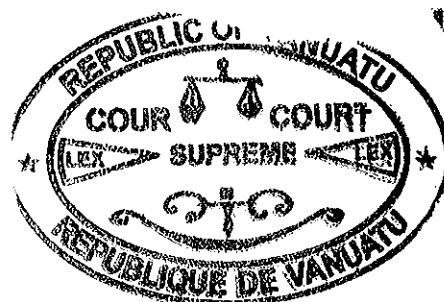


uncle went to see her teacher one morning. She also said her uncle went and saw one of his daddies and the Chief and finally to the police. She said after she went to the police, they went to hospital and nurse Leisave examined her. She said he told nurse Leisave what Amsen did to her. She was then sent to Vila.

She was cross-examined. She said she was born on 1994, June 6th. In 2003, she was in class 1 and stayed with her uncle Harry and aunty Mary. She confirmed she called the Defendant "Apu Amsen". Amsen is from a different village. She confirmed that in 2003, the Defendant forced her to sleep on the ground at the nambaga tree. He sucked her vagina and also Amsen pushed his finger in her vagina. She did not tell anyone. She confirmed in 2006, she was 12 years of age. It was put to her that in her statement to the police she stated that Defendant Amsen made trouble to her 4 times in 2003 but in her oral testimony she said the Defendant did trouble to her 2 times only in 2003 and whether she told lies to the Court. She replied "Si hemi true". She said she forget some. She remembered some. She confirmed that in 2006, the Defendant Amsen was on Tongoa. She saw him on Tongoa in the village.

When further asked, she clarified that in 2006, the Defendant slept with them in her uncle's house and made trouble to her in a house side down which is a different house. She said he touched her and kissed her. She was asked she confirmed the Defendant sucked her vagina, touched her and kissed her. She confirmed she told what the Defendant did to her to Dora and Lewia. She also told her uncle Harry. She confirmed when asked that she decided to tell what the Defendant did to her because she was afraid she could be pregnant. She said when she made her report to the police, the Defendant was in Tongoa. She confirmed he uncle went to see the chief. She was asked and she said the nurse asked her of what happened to her and she said she told her that APu Amsen did bad things to her.

She was re-examined. She reconfirmed the Defendant hold her breasts, touched her vagina and pushed his fingers into her vagina.



She also reconfirmed that some other incidents that the Defendant did to her she could not remember all because of the passage of time. She said what she told the Court are what she could remember the Defendant did to her.

The fourth prosecution witness is Chief Pakoa Timataso. He gave evidence that he is the chief of Meriu village, Tongoa. He knows the Defendant and the girl complainant. He gave evidence of similar incidents occurring involving the Defendant. After he attended the police awareness of how to deal with such matters, he said he told Harry to report the matter to the police.

The last prosecution witness was Leirip Pakoa. She is the mother of the girl complainant. She gave evidence that the date of birth of her daughter was 6 June 1994.

That is the end of the prosecution evidence and the end of the prosecution case.

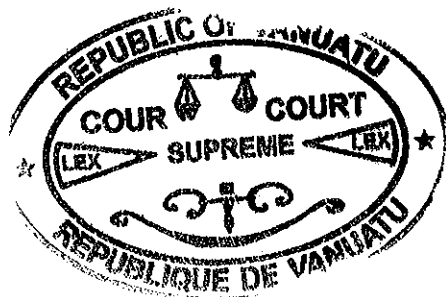
Section 88 of Criminal Procedure Code [CAP.136] was read and explained to the Defendant. The Defendant understood his rights under that section.

The defence case is that he generally denied the charges laid against him. He has exercised his right to remain silent and not to call evidence.

The law is spelt out in case of **Sheddrack Joseph** in Criminal Case No.4 of 1999.

DISCUSSION ON EVIDENCE

I have listened and considered the evidence of all prosecution witnesses and in particular that of the girl complainant. I accept the evidence of the girl complainant that in 2003, the Defendant Amsen Pakoa Songi on 2 occasions sucked her vagina and inserted his finger into her vagina.



I accept also the complainant girl's evidence that in 2006, on 2 different occasions, the Defendant held the girl breast, sucked her vagina and penetrated her vagina with his fingers.

The evidence of the girl complainant is corroborated by the evidence of nurse of the enlargement of the vagina of the girl complainant which was unusual for a girl under the age of 13. It is rational to draw such inference.

Despite the fact that some part of her evidence in particular the number of incidents to the extent of her recollection was less than what was alleged in her police statement, her evidence in substance can be sustained. She is a reliable and creditworthy witness. Her evidence is consistent with the evidence of her uncle and the nurse.

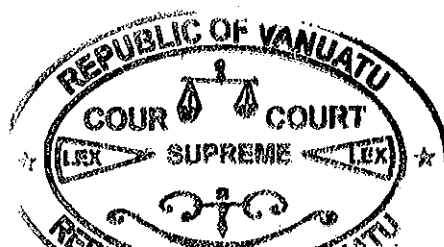
The evidence of the Chief is consistent with the evidence of Harry Lorren, the girl's uncle. They are reliable witnesses.

LEGAL SUBMISSIONS

In his final submissions on the verdict, the prosecuting counsel conceded that the Defendant, Amsen Pakoa Songi cannot be convicted for the offences of sexual intercourse without consent, contrary to section 91 of the Penal Code (Amendment) Act No.25 of 2006. The reason being, the incidents occurred before the coming into force of the Penal Code (Amendment) Act which widened the definition of Rape to sexual intercourse without consent as defined in Section 89A of the Penal Code (Amendment) Act.

Equally, the prosecution conceded that the Defendant cannot be convicted of the charges of Unlawful Sexual Intercourse because the incident in 2003 occurred before the coming into force of the new section 97(1) of the Penal Code Act [CAP.135].

The prosecution stated then that his concession is based on the authority of **Vere v. Public Prosecutor** [2006] VUCA 15. In that case, the Court of Appeal held:



"Whether there should be statutory amendment to cover other forms of sexual violation is a matter for Parliament. But in the absence of any specific definition to the contrary, we are satisfied that the offence of rape at the relevant time, necessitated proof of penile penetration of the vagina. There is no evidence of that occurring in this case so the conviction cannot be sustained."

The relevant and applicable definition of Rape is that which existed prior to the Penal Code (Amendment) Act Nos.17 of 2003 and 25 of 2006.

Article 5(2) of the Constitution also expressly provides:

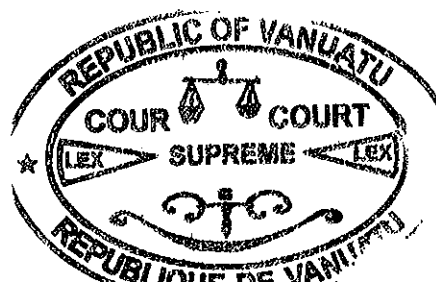
"(f) no-one shall be convicted in respect of an act or omission which did not constitute an offence known to written or custom law at the time it was committed."

This Article shall not prejudice the trial and punishment of any person for any act omission which, at the time it was committed, was criminal according to the general principles of law recognized by civilized nations.

The defence counsel agrees with the above prosecution submissions.

The prosecution submits and invites the Court to consider alternative verdicts and to return a guilty verdict to a lesser charge, if the Court is satisfied beyond reasonable doubt that all of the elements of the lesser charge are proved beyond reasonable doubt based on section 109 of the Criminal Procedure Code [CAP.136] which provided:

*"109. Conviction when offence proved is included in offence charged
(1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constituted a complete lesser offence, and such combination is proved but the remaining*



particulars are not proved, he may be convicted of the lesser offence although he was not charged with it.

- (2) *When a person is charged with an offence, and facts are proved which reduce it to a lesser offence, he may be convicted of the lesser offence although he was not charged with it."*

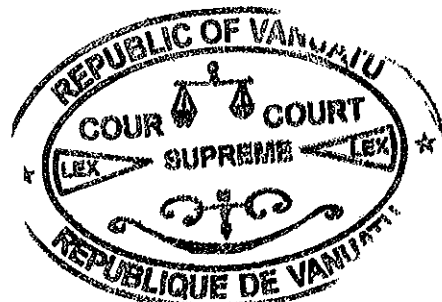
The prosecution submits that if the Court is satisfied beyond reasonable doubt that the Defendant inserted his fingers into the vagina of the complainant and is satisfied beyond reasonable doubt that the Defendant sucked the girl vagina, the Court could convict the Defendant of indecent assaults for each of those acts, contrary to section 98(1) of the Penal Code Act [CAP.135].

Upon considering and assessing the evidence, the Court is satisfied beyond reasonable doubt that the Defendant committed the offence of Indecent Assaults on the girl complainant in the year 2003 on the Island of Tongoa on 2 separate occasions and the Court is satisfied that the Defendant committed the offence of Indecent Assault on the girl complainant in 2006 on 2 separate occasions.

Upon application of section 109 of the Criminal Procedure Code [CAP.136] the following verdicts are given:

VERDICTS

1. Defendant Amsen Pakoa Songi is found not guilty of the offences of sexual intercourse without consent, contrary to section 91 of the Penal Code Act [CAP.135], charged against him in counts 1, 2, 3, 4, 5, 6 of the information dated 14 October 2009.
2. Defendant Amsen Pakoa Songi is found not guilty of Unlawful Sexual Intercourse, contrary to section 97(1) of the Penal Code (Amendment) Act charged against him in counts 7 and 8 of the Information dated 14 October 2009.




3. **Alternative verdicts:**

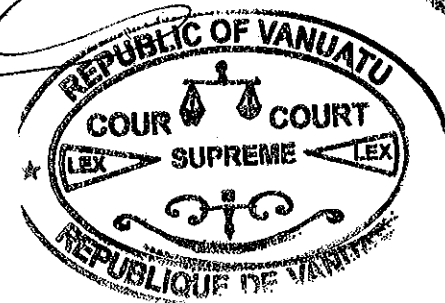
Defendant Amsen Pakoa Songi is found guilty of Indecent Assaults, contrary to section 98(1) of the Penal Code Act [CAP.135] on 2 occasions in 2003 and 2 other occasions in 2006.

DATED at Port-Vila this 18th day of February 2010

BY THE COURT



Vincent LUNABEK
Chief Justice



The seal of the Supreme Court of Vanuatu is circular. The outer ring contains the text "REPUBLIC OF VANUATU" at the top and "REPUBLIQUE DE VANUATU" at the bottom. Inside the ring, the words "COUR" and "COURT" are positioned on either side of a central scale of justice. Below the scale, the word "SUPREME" is written in a larger font. On either side of "SUPREME", the word "LEX" is written in smaller letters. A small star is visible on the left side of the seal.