

(Criminal Jurisdiction)

PUBLIC PROSECUTOR

VS.

LYNN JOE

Mr Justice Oliver A. Saksak
Mrs Anita Vinabit – Clerk

Mr P. Wirrick for Public Prosecutor
Ms J. Tari for Defendant

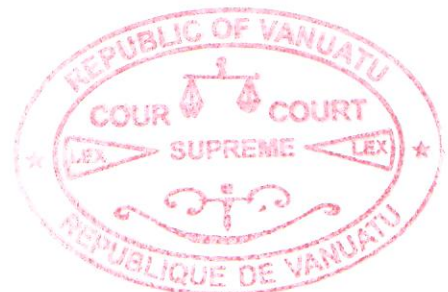
Date of Trial Hearing: 27th May 2011
Date of Oral Verdict: 28th May 2011
Date of Reasons: 31st May 2011

REASONS

1. This judgment provides written reasons for the oral verdict handed down on 28th May 2011.
2. The defendant was charged with one count of Indecency with Young Person contrary to Section 98A of the Penal Code Act Cap 135 (the Act). It states –

“A person must not commit an act of indecency upon, or in the presence of another person under the age of 15 years.

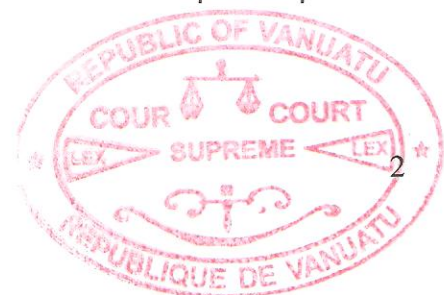
Penalty: Imprisonment for 10 years.”
3. The prosecution alleged that sometimes in 2009 the defendant had licked the victim’s vagina. This happened at night at the house of the defendant.



4. The matter was reported to the police only on 25th May 2011 when the victim, an eleven year old girl made a statement. When the defendant made a statement to the police on 31st March 2011, he denied having any knowledge of the allegation.
5. On 12th April 2011 he entered a Not-Guilty plea. And during the trial he consistently denied the allegations.
6. The prosecution has in all criminal matters the legal and evidential burden of proof. Section 8 of the Act requires that proof must be made beyond reasonable doubt.
7. The elements to be proven by the prosecution were –
 - (a) That the defendant committed act of indecency with the victim;
 - (b) That it was done in the presence of another person;
 - (c) That the victim was under the age of 15 years.
8. The prosecution adduced evidence from 5 witnesses namely:
 - (a) The victim; (b) Feles Lyn (defendant's wife); (c) Lina Jerry (victim's mother); (d) Rex Tinning (Chief); and (c) Noelline Stephen (Police Constable).
9. It is not necessary to restate the evidence. The Court merely records its observations, comments and conclusions in relation to each element as follows:

Element 1

The victim and Feles Lyn's evidence are considered. Firstly the victim. She did not see the defendant face to face. She thought and presumed it was the defendant because she felt his beard or mouchtache over her private part.



As for Feles Lyn she heard noises. She lifted her head to look and discovered that one of the girls on the double bed was missing. She did not get up to check on what was happening. Clearly, the identity of the offender was in doubt. And the prosecution had not discharged its duty of proof as required.

Element 2

The evidence of the victim and Feles Lyn are also considered. Firstly, Feles Lyn said her daughter Dorin and the victim slept together in one bed. She said that when she heard noises she looked and saw only one person on the bed. She thought it was Dorin.

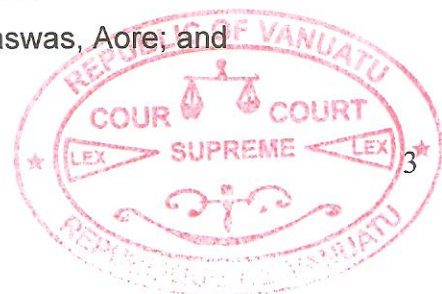
The victim on the other had said that when she woke up she did not see Dorin on the bed. She said she had left her to sleep somewhere else.

Dorin did not give a statement to the police and therefore she did not give oral evidence. If the Court believes the victim's evidence, it meant that if the offending took place, it was not done in the presence of another person. But as it is, again there is great doubt in my mind and therefore the defendant is entitled to the benefit of that doubt.

Element 3

This concerns proof of age of the victim. There appears to be no dispute over age. She was only about 10 years old at the time of offending and that was accepted by the defendant.

10. The evidence of Chief Rex Tining, Lina Jerry and the Police Constable did not assist the prosecution case in regards to proving the first and second elements.
11. The defendant opted to give evidence himself. He admitted only to three facts that –
 - (a) The victim was born on 11 August 1999;
 - (b) That in 2009 he was residing at Nawaswas, Aore; and



(c) During school holidays in 2009 the victim was residing at Nawaswas.

12. The defendant maintained his denials and remained firm in his examination in chief and in cross-examinations. The prosecution did not call any evidence in rebuttal although that opportunity was always open to them.
13. It was submitted by the prosecution that although there was no direct evidence, that circumstantial evidence were such that only the defendant could have committed the offence on the victim and that it was impossible for another man to do it. The Court reminded itself of the danger of convicting the defendant on circumstantial evidence especially when there was doubt as to his identity and further that the second element was never met in any event.
14. Under those circumstances, the defendant was entitled to the benefit of those doubts. And having reached those conclusions, the Court returned a verdict of Not-Guilty and made the orders issued on 28th May 2011.

DATED at Luganville this 31st day of May 2011.

BY THE COURT


OLIVER A. SAKSAK

Judge

