

PUBLIC PROSECUTOR

- v -

MANUEL RICHARD

Coram: V. Lunabek CJ

Counsel: Mr Tristan Karae for Public Prosecutor
Mr Brian Livo for Defendant

Date of Trial: 7th April 2014 at Dumbeka, Port Vila
8-9 April 2014 at Isangel, Tanna

Date of Verdict: 11th April 2014

REASONS FOR VERDICT

I. INTRODUCTION

1. Choice of Language

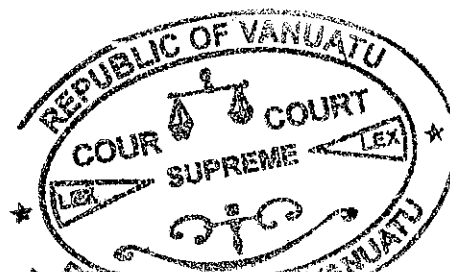
This is the judgment of the court in this case. The trial took place at Port Vila, Efate and at Isangel, Tanna. The proceedings are conducted in Bislama. The Verdict was explained to the Defendant in Bislama. The Judgment is written in English.

2. Nature of the charge

The Defendant Manuel Richard was committed to this court, charged with one count of sexual intercourse without consent, contrary to section 91 of Penal Code Act [Cap 135]. The charge is particularised as follows:

That on or about 25 December 2013, Manuel Richard had sexual intercourse with the complainant on the Island of Tanna and that at the time of intercourse, the complainant did not consent to have sex with the Defendant.

3. Pleas and right under s.81 of the CPC [Cap 136]



The Defendant entered a not guilty plea. It was noted and the trial proceeded on that count.

The court read and explained to the Accused his right under s.81 before the prosecution case begins.

II. STANDARD OF PROOF AND ESSENTIAL ELEMENTS OF OFFENCE TO BE PROVED BY PROSECUTION

1. Standard of Proof

This is a criminal trial and as in every criminal trial, it is for the prosecution who brings the charge to prove each essential elements of the offence. The onus rests on the prosecution from beginning to end. The defendant does not need to give evidence. In this case, the defendant has done so. But that does not affect the onus of proof. The law is that the prosecution must prove each element of the charge beyond reasonable doubt before the accused is found guilty of the charge. That test must be applied separately in respect to each count.

If at the end of the trial, I am left with a reasonable doubt as to the Defendant's guilt, then the Defendant will be entitled to the benefit of that doubt and be acquitted.

2. The Essential Elements of the Offence as charged.

In the present case, Defendant Manuel Richard is charged with one count of sexual intercourse without consent, contrary to section 91 of Penal Code Act.

Sexual intercourse without consent is defined under s.90 of Penal Code Act as follow:

"SEXUAL INTERCOURSE WITHOUT CONSENT

90. Any person who has sexual intercourse with another person:

(a) Without that person's consent; or

(b) With that person's consent if the consent is obtained:

(i) by force; or

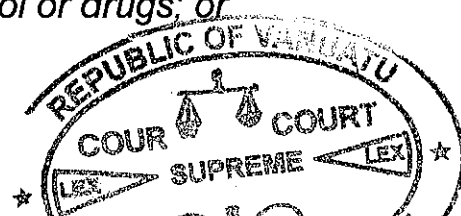
(ii) by means of threats of intimidation of any kind; or

(iii) by fear of bodily harm; or

(iv) by means of false representations as to the nature of the act; or

(v)

(vi) by the effect of alcohol or drugs; or



(vii) because of the physical or mental incapacity of that person, commits the offence of sexual intercourse without consent"

The prosecution must prove beyond reasonable doubt the following essential elements of the offence of sexual intercourse without consent, before Defendant Manuel Richard can be convicted of the charge laid against him [see *McEwen -v- Public Prosecutor [2011] VUCA32*]:

1. That on 25 December 2013, the Defendant Manuel Richard had sexual intercourse with the complainant girl on Tanna, Island.
2. That the complainant girl did not consent for Defendant Manuel Richard to have sexual intercourse with her on 25 December 2013.
3. That the defendant Manuel Richard did not believe on reasonable grounds that the complainant was consenting at the time that the intercourse occurred.

III. FACTUAL ISSUE AND CONCESSIONS

The Defence conceded that on 25 December 2013 at Tanna, Defendant Manuel Richard had sexual intercourse with the complainant girl as charged. However, the Defence says that the sexual intercourse between the Defendant and the complainant on 25 December 2013 was a consensual one. The issue in this case is that of consent.

IV. SUMMARY OF EVIDENCE

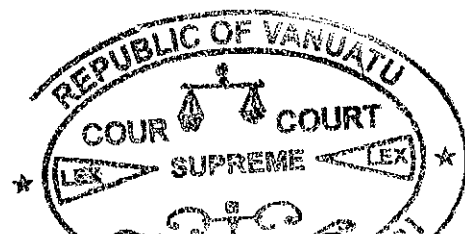
1. The Prosecution Evidence

The prosecution called 5 Witnesses

The complainant girl is the first prosecution witness. I will not use the name of the complainant. I will designate her by (TC).

- The complainant (TC)

TC gave evidence to the following effect. She was born on 5 February 1998, she is now 16 years of age. She gave the names of her parents. She has two brothers. She is from Tanna Island, she lives with her parents at Blacksands, Efate. She is now a student at



R

Lycee Louis Antoine de Bougainville, Port Vila. She is a year 10 student at that school in 2014.

On 22 December 2013, she went with her parents on Tanna Island to spend Christmas holidays in Enumake Village. She returned with her parents back to Port Vila on 17 January 2014.

On 24 December 2013, her big daddy (brother of her Father) slaughtered a buluk and in the evening they cooked the buluk at Break Through Church compound situated at Ipekanien village. She is a member of that church.

In that evening of 24 December 2013, the youth members of her church prepared and performed activities including singing and skit plays. She was present and took part in the activities of the church at Ipekanien village until the next morning on 25 December 2013.

She knows Manuel Richard. She attended the same school (Lauipen) with the Defendant. She says she knows the Defendant also when she attended the church she passed Manuel Richard on the road as the church is in Manuel Richard's village (Ipikanien). She is not related to the Defendant.

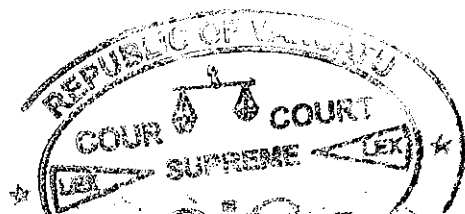
She knows also of one Ruth Tafoa and Ruth was with her that night during church activities.

She gave evidence that Ruth told her that Manuel Richard sent her to ask for her mobile phone number that night. She refused to give the Defendant her mobile phone number by saying "mi no gat time". Manuel Richard is friended with one of the complainant's tawi (sister in law).

Then she said Manuel Richard moved towards the table where the speaker was and told her that Ruth Tafoa wanted to see her near the "robinet" (water tap) outside.

She said she thought Manuel Richard was truthful. She ran to the robinet but Ruth was not there. Manuel Richard followed her there. She said she did not believe that Manuel Richard would follow her. When she reached the "robinet", Manuel Richard grabbed her and lifted her up. He removed her mobile phone from her and put it in the pocket of his trousers.

She describes that he lifted her up and took her in the bush. She said she felt that he was forcing her. She said she meant he was forcing her to have sexual intercourse.



[Handwritten signature]

She said she kicked out for the Defendant to let her go. She added that when she kicked out trying to go out from him, the Defendant blocked her mouth with his hand so that she could not shout and no one could hear her.

She said Manuel Richard took her to a distance she says between the court room (Dumbea) and the correctional centre (about 50-60 meters). There was no one on the road. Manuel Richard took her passed her sister's house she could not call her sister because the Defendant blocked her mouth with his hand. The Defendant carried her to a nakamal called Nelykanien. Then he put his hands on the buttons of her trousers and tore them. She described that he tore the buttons of her trousers and at the same time, he put her down on the ground.

At the time, she said she could smell alcohol drink on Manuel Richard. She explained that after the Defendant tore the buttons of her trousers, he removed her trousers, put her down and had sexual intercourse with her. She told Manuel Richard what did he do to her. She asked him to let her go. Manuel Richard answered her in reply: "you wantem pispis?" (Do you want to urinate?)

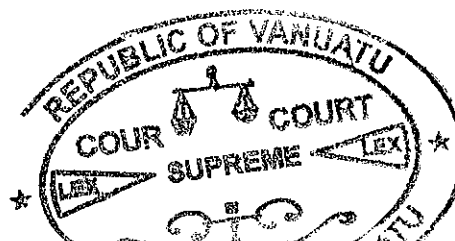
She said she was afraid and she then just followed what he did to her. She said she was afraid he will kill her. She had just followed the Defendant's wishes. She felt bad. She felt painful when the Defendant had sexual intercourse with her and she cried out and called her mother.

She saw Henry Kauna and called his name. She told Kauna: "traem luk Manuel ia" and she told him to go and tell her sister Manolu to come and see what Manuel Richard did to her.

Then Jelsen Numake shined his torch light in the direction where the Defendant and the Complainant were. Manuel Richard saw the shine

of the torch light and ran away. Numaka shined his torch light and called out "Hey who ia?" She was afraid of Numaka. She said Numaka did not shine his torch directly on her but on the Nabanga tree. She then stood up, took her trousers and run down and jumped over the gate of her sister's yard.

Her sister Manolu was sleeping with her baby in her house. She called Manolu, her sister opened the door. She went inside. She said she told her sister what happened to her. She said she cried and told



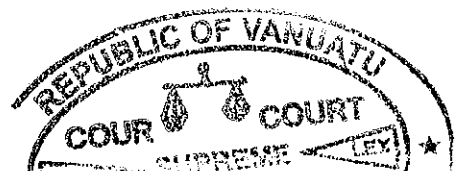
her sister that Manuel Richard did something wrong to her. Her sister told her husband.

The church Pastor heard of this and he sent a person to inform the complainant's parents in the village of what happened to her. She attended Whitesands Medical Clinic Centre for examination in the morning of 25 December 2013 and on 26 December, she gave a statement to the police.

She was cross-examined. She confirmed she knows Manuel Richard when they were at school. She confirmed that during the night of 24 December 2013, they were cooking the buluk and food. She has just joint the church youth. She knows Manuel Richard liked her as he asked for her mobile phone number. She confirmed that the robinet (water tap) is not far from the table where the speaker was. If she called out someone could hear her but she did not call out. She confirmed Manuel Richard carried her with his two hands around her body and one of his hand blocked her mouth. She confirmed that they passed the house of her sister she kicked to get out from Manuel Richard but she did not called out. It was put to her and she denied she was slow to take out her trousers and Manuel Richard pulled it out. It was put to her and she denied Manuel tried to take out the buttons of her trousers as it was dark he tore them. It was put to her and she denied she was laying on her trousers during intercourse. She did not call out when Manuel Richard tore the buttons of her trousers. It was put to her and she denied she called out the name of Manuel Richard when he had sexual intercourse with her.

She confirmed she spoke to Henry Kauna. She did not run behing Henry Kauna. She confirmed she told Henry Kauna to tell her sister of what happened to her. She confirmed that after Henry Kauna left Jelsen Numaka shined his torch light in the direction where they were at the time. She confirmed when she heard the voice of Jelsen Numaka she stood up and run. It was put to her and she denied she run with the Defendant on the road before she went to her sister's house. She said she run and jumped over the gate of her sister's yard. She said she cried at her sister's house because she was afraid of her father. She said after the incident in the morning, her family asked her to lodge a complaint to the police.

She was re-examined. She explained that she could not run behind Henry Kauna because at that time Manuel Richard was on top of her and held her firmly. She explained that when Manuel Richard had sexual intercourse with her, he blocked her mouth and when she turned herself, she saw Kauna and she called him and told him to tell her sister Manolu of what Manuel Richard did to her. She confirmed



[Handwritten signature]

again that she did not run with Manuel Richard to the road. She confirmed again she run down and jumped over the gate of her sister's house and told her sister what happened to her.

I have observed the complainant and her demeanour during her evidence in court. She is a creditworthy and trustworthy witness.

- Manolu John Semu.

She is the second prosecution witness. She gave evidence to the following effect. Her name is Manolu John Semu. She is married in custom. She knows the complainant who is the daughter of the younger brother of her father. The complainant is her small sister. On 24 December 2013, she was present and took part in the church activities with others until mid-night. She went to sleep at mid night. She took part in the cooking.

During the night of 24 December 2013, she saw the complainant there. She went back to her house after 12.00AM o'clock. She saw the complainant again in the early morning of 25 December 2013. She was still sleeping when she heard the complainant cried, called her and knocked at her door. She opened the door she saw her crying. She said the complainant told her that Manuel Richard forced her to have sex with him. She said the complainant was crying and she could not speak much. She described her physical appearance that the complainant cried and that she was afraid and she was dirty. She said there were no buttons on the complainant's trousers.

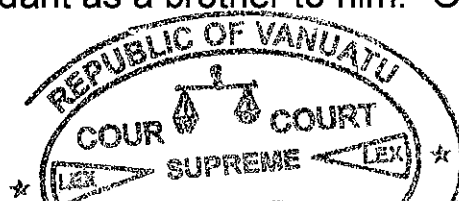
In cross-examination, she confirmed that on 25 December 2013, she heard the complainant cried and called her about 5.00AM in the morning. She did not see what happened to her in the night. She denied that the complainant cried to her because she was afraid that the church pastor and her father will find out of what happened to her. She denied that the complainant cried because the boys found them. She did not hear the complainant cried out in the place where the intercourse occurred.

She denied she was afraid of telling the Pastor and the father of the complainant of what happened to the complainant. She was worried of what happened to her sister, the complainant.

I find that this witness is trustworthy and reliable witness.

- Henry Kauna

He is the third prosecution witness. He is 19 years old. He works in a garage at Lowiaru village and he lives at Iapanginu village. He knows Manuel Richard. He describes the defendant as a brother to him. On



Handwritten signature or mark.

24 December 2013, he was at Whitesands, Tanna. In the evening he hid a bottle of wine at a place and he drunk that bottle of wine. He says there is a church near that area. He remembered he saw the complainant that night. He said he hid his wine in a place and he did not know that Manuel Richard and the complainant were also at that location. He says he remembered a person called him by his name at the location where he hid his wine. He said the complainant called him and told him to go and tell her sista Manolu to come and see what Manuel Richard did to her.

Then he said one Jelsen Numaka shined his torch light and he run away. He said he could not see the complainant and the Defendant. He did not hear any noise on that location when he went to drink his wine. But he heard that the complainant called his name. He did not mention to anyone of what he heard.

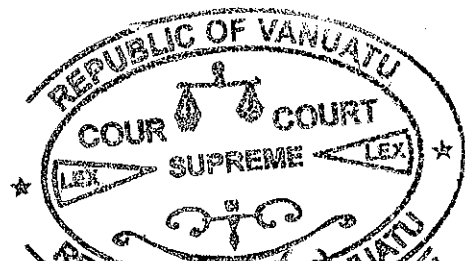
In cross-examination, he said he was drunk. It was put to him and he denied that he knew that Manuel Richard liked the complainant. He confirmed he did not see the complainant and the defendant but he heard the complainant called him by his name. He was asked if the complainant told him something. He confirmed his evidence that the complainant told him to tell her sister Manolu to come and see what happened to her.

It was put to him that the complainant told him "you traem luk Manuel Richard ia" he responded: "May be she said that but I did not hear that". He confirmed he did not tell anyone what the complainant told her. It was put to him that he did not tell anyone because the complainant did not ask him to help her. He answered: "No. Hemi talem se bae mi go talem long Manolu blo go luk wanem Manuel Richard i mekem lo hem".

It was put to him again, he said he did not see the complainant and Manuel Richard that night. But he said he only heard that the complainant called him and talked to him.

It was put to him if he was with some boys when he heard the complainant called him. He denied that by saying: "No. Mi nomo." He confirmed he run away when one Jelsen Numake shined his torch light.

It was put to him that he run away because he was afraid that people will find out about Manuel Richard and the complainant. He replied: "Mi no save hemia mi luk torch nomo after mi aot mo came back lo place blo activities."



A handwritten signature or mark, possibly a stylized letter 'K', is located in the bottom right corner of the page.

This witness is a shy but a creditworthy witness.

- Napuati John Roel

He is the second last prosecution witness. He is a police officer of corporal rank. He works in the police force for 26 years and spent most of his time in the investigation department at Tafea Province. He was involved in serious offences including sexual offences.

In the present case, he was in his village with his family on 25 December 2013 when a complaint was lodged by the complainant. He said the complainant was afraid. She came with a trousers without buttons. She said the accused had sexual intercourse with her but without her consent. He was taking the statement of the complainant and her parents at his house.

On 30 December 2013, he had interviewed Manuel Richard. He said he cautioned him about his rights. Defendant Manuel Richard asked him to take down in writing his statement. The Defendant admitted he had sexual intercourse with the complainant. He said the Defendant admitted he lied to the complainant and grabbed her and carried her to a place about 60 meters away from where activities of that night took place.

In cross-examination, he confirmed that at the time of interview, the complainant came at his house at whitesands but not at the police station. He was on holiday when the incident happened. He was at his home. He said the complainant brought the button and the broken cloth at the police station.

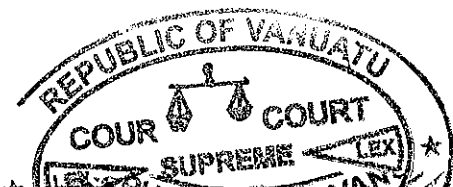
It was put to him that he related to the complainant. He said he is related to the complainant and he is also related to the Defendant Manuel Richard who is his Apu.

It was put to him that there was other police officers on Tanna and he replied he did his best. It will be difficult for another Police officer to be there as there was no fuel for police truck.

This witness is a reliable and honest witness.

- Joycelin Peter

She is the last prosecution witness. She is a mid-wife at whitesands medical centre. She is a mid-wife since 1992. She works at Lenakel Hospital, Paunagisu and Vila Central Hospital and whitesands clinic centre. There are Four (4) nurses working at that clinic. She was involved with mothers who deliver babies. She also said that when nurse practitioners are not in the clinic she deals with outpatients who



A handwritten signature or mark, possibly initials, located in the bottom right corner of the page. It appears to be a stylized letter 'A' or a similar character.

come in. Since 1992, she dealt with one case of sexual intercourse without consent. The present case is her second. She said she is qualified to examine the complainant. On 25 December 2013, she examined the complainant. She saw her. She was working normally inside the clinic. She said the complainant told her that a boy had sex with her by Force. She examined the complainant and she provided a medical report (Exhibit P1). She said she saw the left side of the complainant's face was slightly swollen. The blood pressure was normal. She examined the complainant's genital area as contained in her report and findings. As a result of her findings, she said that the complainant was forced to sexual intercourse without her consent.

In her cross-examination, she confirmed that this case is her second case for sexual offences. It was put to her and she confirmed that she can also deal with outpatients if one of her colleagues was not in office at that time. That was the case on 25 December 2013. She confirmed the complainant told her of the full accounts of what happened to her before she examined her and made her report.

This witness is a reliable and trustworthy witness.

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

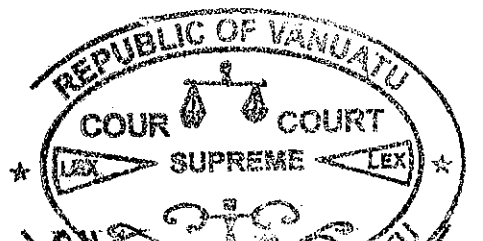
2. Ruling under section 164(2) of CPC [Cap 136].

The Court calls upon the accused Manuel Richard for his defence under s.164(2) and the court complies with the requirements of section 88 of the CPC [CAP 136].

3. The Defence Evidence

Defendant Manuel Richard elected to give evidence. He gave evidence to the effect that he is 19 years of age. He is from Tanna Island. Ipekanian is his village. He attended school at Louiapen school at year 10. He gives the names of his father and his mother. He is not employed but he works in the garden. He knows the complainant when they were at school. He was at year 10 and she was at year 8. They talk to each other during school days.

He said on 24 December 2013, in the night they were drinking alcohol drinks. They arrived at the place where church activities took place. There were music and they used his speaker. They started playing music at about 1.00AM in the morning. They were dancing. He said he felt he was too drunk. He slept on a table. He saw the complainant danced with one of his friends.



[Handwritten signature]

He was 2 meters from them. He said he told Ruth to tell the complainant to come and see him. He said Ruth told him that the complainant told her that "Hemi no gat time". He continued to sleep on the table.

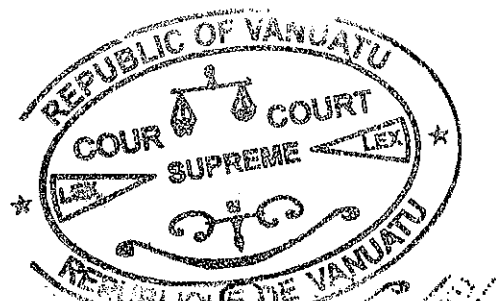
He said the complainant came and woked him up and she told him about women he went out with on Tanna when she was in Vila. She went back dancing. She came back. She woked him up and she told him: "you forgetem mi" and she went back dancing.

He said he remembered when they were at school and when she came to his house once and he talked to her.

He said the complainant came back and saw him and told him if he wanted she could give him her phone number. He said he said no. But he said he told her if she could follow Ruth to come and see him at the Robinet (water tap). He said after he did not see Ruth. So he said he told the complainant to go down to the tap water and she must not be afraid. He said the complainant went down to the robinet (water tap) and he followed her.

He said an old man shined his torch light on him but he said he was not afraid as he followed the complainant. He said he was too drunk. The complainant held him and he held the complainant and they walked. He said he held the complainant by putting his hand around her shoulders and the complainant held him on his shoulder and then both walked normally. He said they walked to the nakamal. He told her to wait as he was too drunk. He said he asked her to give him her mobile phone to use it and shined the way. They arrived at the nakamal which is 50 meters away from the activities (court house and christmas tree in evidence). He said they walked a further distance of 50 meters away to the place they had sexual intercourse. He said at the place of intercourse, he pulled her tongue (kissed her on her tongue). He said he told her to remove her trousers. She told him "you wait". He told her "you hurry up. It is almost day light". He said she said okey and she put her hands on her trousers to remove and he had his hands on the buttons to unbutton her trousers and the buttons were removed from the trousers as a result of that pressure. He had then sexual intercourse with her.

Then he said he was surprised that the complainant called out the name of Kauna. He said she called Kauna: "Kauna traem luk man ia hemi stap mekem wanem fashion ia long mi". He said he told Kauna to go away as he was with his woman.



[Handwritten signature]

He was asked as to where his hands were. He replied he held her. He said during intercourse the complainant called his name by saying: "Awe Awe Manuel".

He said after Henry Kauna left, they saw a shine of a torch light he wore his trousers and she wore her trousers and they both run to the road by passing an old store building and they ended up in the road about 60 meters. He said he gave her mobile phone back to her and she went to her sister's house.

He said in the morning, he did not know that the case will take this dimension as he went to purchase alcohol drinks in Enumake village – being the village of the complainant. It was about 7.00am. Then two relatives of the complainant tried to assault him in his village at his house. He said the boys chased them. The two relatives told him not to go back to the complainant's house otherwise they will cut him with a bush knife.

Defendant Manuel Richard was cross-examined. He was asked and he denied that he was a difficult young man ("strong head") in the village.

He was asked if his father is a former police officer and he said he does not know. He was asked and he confirmed he has a lengthy relationship with a woman. The woman is one of the complainant's sister. He confirmed the complainant is his tawi (sister in law). He was asked and he confirmed that he could not have sex with his tawi. He confirmed he attended the same school with the complainant in 2012. It was put to him and he denied he developed rubbish thoughts on the complainant but he talked to her. He did not know that the complainant came for holiday on 22 December 2013 until he saw her in the night of 24 December 2013. It was put to him and he accepted that on 24 December 2013, he drunk home brew drinks. He confirmed he could drink home brew drinks. It was put to him and he denied that when he consumed home brew drinks he could be in a state of "blackout" meaning not be able to recall what happened.

It was put to him and he confirmed his evidence he felt asleep on the table. It was put to him and he said the complainant and one of his friends danced that night.

He confirmed he made a statement to the police on 30 December 2013. He was asked of his oral testimony that he said he told Ruth to ask the complainant's phone number. He denied that and said he asked Ruth to tell the complainant to come and he said Ruth told him



A handwritten signature or mark, possibly initials, located in the bottom right corner of the page.

the complainant said "Hemi no gat time". He said he told Ruth to leave it.

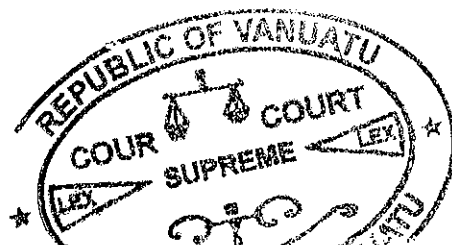
He was questioned on his written statement to the police. It was put to him that in his statement at line 5, he said: "i true hemi bin kiaman lo (complainant) mo iko long place blong robinet blo water..." which is different from his evidence in court. He replied that he signed the statement but he did not say that he lied to the complainant. He said he did not agree with the content of his statement because he did not lie to the complainant. It was put to him and he confirmed he wanted to have sexual intercourse with the complainant. It was put to him since Ruth could not help him, he told lies to the complainant. He denied that and said he told the complainant to go down to the water tap and she must not be afraid. He was asked and he confirmed that he sent the complainant to go down to the Robinet (Water tap). It was put to him it was dark. He said there was light. It was put to him he run following her. He denied and said he walked following her down to the water tap. It was put to him and he denied that he grabbed her.

It was put to him and he confirmed that if the complainant did not find Ruth at the water tap, she would have returned back to the place where the activities occurred.

He was challenged on his evidence in court that when he took the complainant to the nakamal he made the complainant stand up while he told her to remove her trousers. He answered yes. He was also challenged that in his statement he stated "you hurry up". He confirmed this and said this was their agreement. He was again challenged on his evidence when he said the complainant told him to wait. It was put to him that the complainant did not want to have sexual intercourse with him but he was the only one who told the complainant: "Hurry up". He answered because it was day light and he told her so. It was put to him that he forced her to have sexual intercourse. He denied by saying no. It was put to him he was so forceful to have sex with the complainant that he broke the buttons of her trousers. He denied that. He was referred to his statement and it

was put to him that he stated he broke the complainant's trousers. He denied he had broken the complainant's trousers.

It was put to him that he was so forceful to have sex with the complainant that was why when Kauna came the complainant called out to him for help and told him to tell her sister to come and see what he did to her. He answered that the complainant was afraid of Kauna.



[Handwritten signature]

He was challenged that Kauna did not know what happened. The complainant did not want to have sexual intercourse with him (Defendant) that is why she called out for help. He kept silence and he did not provide an answer. He was challenged when he said during the sexual intercourse the complainant called out: "Awe Awe Manuel, but the complainant said she called out for her mother "Awe mamy" several times. He denied this. It was put to him and he denied he broke her trousers. He confirmed that when the shine of the torch light was on their direction, they run and he gave her mobile phone. The complainant went to her sister's house. It was put to him that the complainant went to her sister and cried and told her of what happened to her. He said he did not know. It was again put to him that he told her to hurry and forced her to have sex with her. He denied this. It was put to him the complainant cried to her sister. He said he did not know.

Manuel Richard was re-examined. He said he sent Ruth Tafoa one time only. The complainant talked to him three times.

He confirmed his evidence that she asked to give him her phone number. He said the police officer wrote his statement but he did not read it back to him but he asked him to sign it. He said he did not know what was in his statement. He was asked and he said in the night he was dead sleep because he was drunk.

He explained that he put his hands on the buttons but at the same time the complainant thought he unbuttoned her trousers so she pulled her trousers down. The buttons of her trousers were removed.

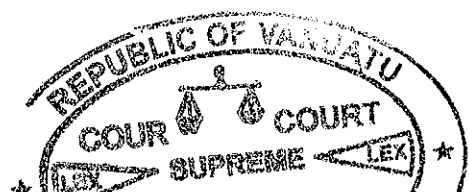
He was asked to explain how the complainant called out for help, he answered "small nomo". He confirmed he had rubbish thoughts toward the complainant but after she said she had no time, he left it there.

He said the complainant is not his tawi yet in custom as he must pay custom to the complainant's sister.

That is the end of the Defendant's evidence.

I observe the defendant through out the trial and his demeanour in the witness box. His behaviour and demeanour during the evidence of the complainant and the evidence of Henry Kauna were disturbing.

He would smile or made signs or expressions through his face and eyes toward the complainant during her oral testimony as if he wanted



to disturb her concentration in her evidence. I have also observed this conduct on the defendant when Henry Kauna gave his oral testimony at Isangel, Tanna. The defendant while in the witness box as a witness would take some time before giving an answer to a question. He also remained silent during some of questions put to him in cross-examination.

The defendant gave contradictory evidence to the statement that he signed in his witness statement. An example of this is when he stated that he admitted to lying to the complainant that Ruth was at the robinet [line 5 of statement] and during his examination in chief he gave a different version that he told the complainant to go to the robinet and wait for him. He gave his explanation that the police officer who took his statement in writing did not read his statement back to him but the police officer just asked him to sign the statement which he did. There are other aspects of contradictory evidence in his oral testimony. An example of this is when he accepted that he is in a lengthy relationship with a woman who is a sister to the complainant. He accepted that the complainant is his Tawi (sister in law). He accepted that in custom he could not have sexual intercourse with his tawi. He accepted that he had sexual intercourse with the complainant. In his re-examination, he stated the complainant is not his tawi as he has yet to pay custom to the complainant's sister.

The defendant also admitted in his evidence that he was surprised that the complainant called out the name of Kauna. He admitted he told Kauna to go away as he was with his woman. When he was asked that he was so forceful to have sexual intercourse with complainant and the complainant did not want to have sexual intercourse with him that is why she called out to Kauna for help, the Defendant answered that the complainant was afraid of Kauna.

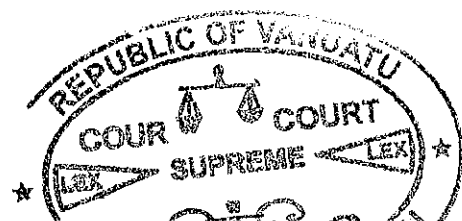
In his re-examination, he was asked to explain how the complainant called out Kauna for help, he said: "small nomo". This was an admission that the complainant called out for help.

The Defendant is not a trustworthy and reliable witness.

FINDINGS OF FACTS AND APPLICATION OF LAW

I have heard, observed and considered the evidence of each and all witnesses and their demeanour in the witness box.

At the end of the trial, I take the evidence together as a whole and after factual consideration, the following findings of facts are established:



It is common ground that on 24 December 2013, youth members of Break Through Church organised some activities in the compound of the church at Epigianen village.

The activities included singing and skit plays, music and dancing. They cooked meat (buluk) and food for the church members.

The complainant was present as she had joined the youth members of the church in these activities at the christmas eve 2013.

It is also common ground that the Defendant Manuel Richard was also present during the youth activities at the church compound on the night of the Christmas eve 2013.

He was drunk (in his evidence, "Mi drunk tumas"). He slept on a table near the speaker.

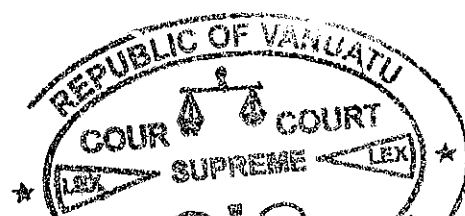
It is also accepted that there is a robinet (water tap) outside the table where the speaker was. The robinet is situated some distance from the table where the speaker was.

It is accepted that in the early morning of 25 December 2013, Defendant Manuel Richard had sexual intercourse with the complainant girl on Tanna at Nelykaniel nakamal.

On the issue of whether the sexual intercourse was consensual or not, I find and accept that the Defendant Manuel Richard had sexual intercourse with the complainant girl in the early morning of 25 December 2013 without her consent.

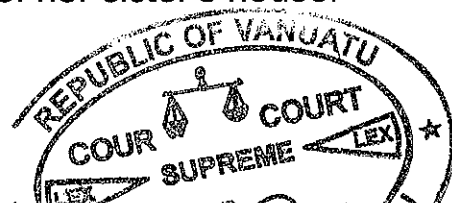
The evidence in support of this finding is the evidence of the complainant herself. The relevant part of which is as follows:

- The defendant sent Ruth to come over to ask for her phone number and she responded by saying "mi no gat time".
- The defendant lied to her to get the complainant to go down to the Robinet (water tap) to see Ruth.
- On her way, she took out her phone and used its torch light to make her way down to the robinet.
- The defendant came behind her and took her mobile phone from her and grabbed her and lifted her up.



[Handwritten signature]

- She did not see anyone else there.
- She kicked out for the defendant to let go of her.
- She could not call out as the Defendant blocked her mouth with his hands (she demonstrated the way the defendant held her that night with both his hands and able to cover her mouth also).
- She was still being carried by the Defendant when the Defendant broke the buttons of her trousers.
- The defendant smelt like alcohol that night.
- The Defendant took her to a nakamal called Nelykangien.
- She said she felt he was forcing her.
- She said she meant he was forcing her to have sexual intercourse with her.
- The Defendant put his hands on the buttons of her trousers and tore them and at the same time, the Defendant put her down on the ground and had sexual intercourse with her.
- She stated "you stap mekem wanem fasin ia long me" and in response, the defendant threatened her "you wantem pispis" (Do you want to urinate?).
- She felt scared when the Defendant threatened her.
- She stated that "mi fraet sei by hemi killim me" so she said she just let the Defendant have sex with her.
- She felt pain at the time.
- She screamed "awe mama" several times.
- She saw Henry Kauna and called out to him "Kauna go talem long Manolu come traem luk Manuel".
- Then a flashlight came in their direction and he defendant ran.
- She ran and jumped over the gate of her sister's house.



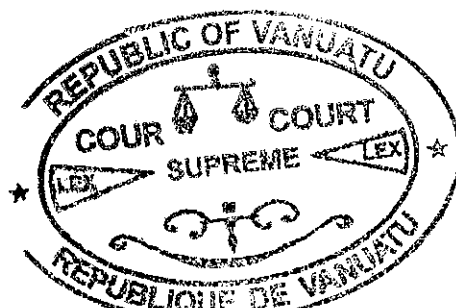
[Handwritten signature]

- She cried and told her sister what the defendant did to her at about 5.00am in the morning of 25 December 2013.

The complainant's evidence is supported and corroborated by the evidence of Henry Kauna as an independent witness. Kauna hid his wine in the bushes near Nelykangien Nakamal. Kauna did not know that the complainant and the Defendant were there. The complainant called out his name and said: "Kauna bae you go luk Manolu mo talem wanem Richard stap mekem long hem". Kauna said he did not see them but that the complainant called him out and told him to go and tell Manolu to come and see what Manuel Richard did to her.

The evidence of the Complainant is also supported and corroborated by the evidence of the Mid-Wife Jocelyn Peter which is not disputed. The complainant's left side of her face was slightly swollen. She gave specific description of her examination of the genital area as contained in her Medical Report to the effect that the complainant was menstruating on 22 December 2013 and she was still menstruating at the time of sexual intercourse. The complainant experienced pain when she (Mid-Wife) tried to examine with speculum. There was no perforation in the vagina (Exhibit P1) and her findings were that the victim (complainant) was being forced to sexual intercourse without her consent.

I accept the evidence of Manolu as evidence of recent complaint made by the complainant to Manolu at about 5.00am in the early morning of 25 December 2013 just after the sexual intercourse incident. Manolu gave account of what the complainant told her which was spontaneous, unassisted and unvarnished story of what happened. Manolu's evidence is that the complainant cried and called her and she opened the door of her house. There were just both of them. She said the complainant cried, she could not speak much. She told her of what happened to her that the Defendant Manuel Richard had forced her to have sexual intercourse with him. Manolu also gave evidence of her seeing the complainant's trousers' without the buttons. The complainant cried, could not speak much and she was dirty. I accept the evidence of Manolu not as being evidence of the facts complained of but as evidence of the consistency of the conduct of the complainant with the story told by her in witness box and tending to negative her consent. See [*Public Prosecutor –v- Mereka* [1992] VUSC10; [1980-994] Van LR 613 (30 December 1992)].



[Handwritten signature]

The defendant disputes the evidence of corporal Napuati John Roel in particular line 5 of his statement taken by this witness.

The court does not rely and does not need to rely on the evidence of police officer Napuati John Roel in this case as there are other evidence which are available which point to negative the consent of the complainant. The evidence of the complainant is consistent with the version of evidence of the witness Manolu. The evidence of the complainant is corroborated by the evidence of Henry Kauna and Jocelyn Peter.

I do not accept the evidence of the defendant Manuel Richard and reject them. He is not a creditworthy witness and his evidence cannot be believed on the issue of consensual sexual intercourse.

The submissions of the Defence counsel to the contrary are rejected and the authorities submitted in support of the defence do not assist.

I reject the Defendant's evidence that the complainant and the defendant hold each other's shoulder and walked to where the sexual intercourse took place. The evidence overwhelmingly pointed to the contrary.

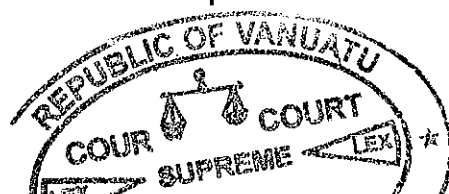
It is part of the evidence which is accepted that before the sexual intercourse, the Defendant took the mobile phone of the complainant.

There is evidence of the Defendant that stated that "hemi pullum tongue blong complainant" before the sexual intercourse. This might be the case as the complainant's evidence is to the effect that the defendant threatened her "you wantem pispis". She was scared. She was afraid that the Defendant will kill her. She said "mi just follem hem nomo nao. Hemi makem wanem hemi wantem." This is where the evidence of the defendant of kissing the complainant on her tongue at that stage before the sexual intercourse is taken to occur.

On the basis of evidence as found by the court, the prosecution has proved beyond reasonable doubt that the complainant girl in this case did not consent to have sexual intercourse with the Defendant in the early hours of 25 December 2013.

The next question is: Did the accused reasonably believe that the complainant was consenting to the sexual intercourse in the early morning of 25 December 2013?

The defendant's evidence to that effect is that he sent Ruth to tell the complainant to come and see him. The defendant accepted that the



A handwritten signature or mark, possibly initials, located in the bottom right corner of the page.

complainant told Ruth that: "Hemi no gat time". The Defendant said he told Ruth to leave it.

He said the complainant talked to him on three occasions when he was sleeping on a table near the speaker. First she told him about women He went out with in Tanna while she was in Vila. Then, she would told the Defendant "you forgetem mi" and the last occasion she would propose to give her mobile phone number and he said he refused. The Defendant said he would think of the time they were at school and one time that she came at his house with one of his sisters in 2012 and he talked to her.

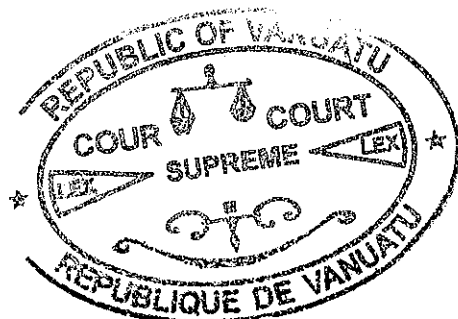
The defendant said he told the complainant to follow Ruth to the Robinet to see him. But then he said he did not see Ruth so he said he told the complainant to see him at the robinet and she should not be scared. He followed the complainant. He was too drunk. The complainant held him on his shoulders and he held her on her shoulders and they both walked normally to a distance of 50 meters away and a further distance of 50 meters at NelyKagien Nakamal where the sexual intercourse occurred.

There was no evidence of a discussion of having sexual intercourse between the Defendant and the complainant before the sexual intercourse between the Defendant and the complainant occurred.

The complainant testified that the Defendant told her that Ruth wanted to see her near the Robinet (water tap). That is the reason why she went down to the Robinet.

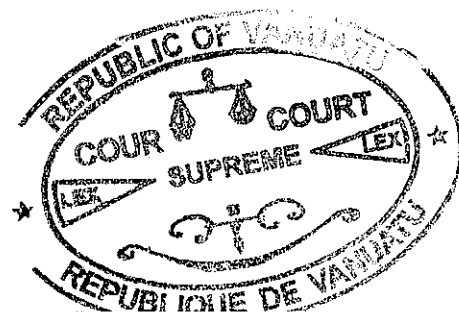
She went to the robinet using her mobile phone to shine her way thinking the Defendant was truthful to her. She did not see Ruth at the Robint. She saw the Defendant followed her to the robinet. She realised the Defendant lied to her. The Defendant took her mobile phone from her. He grabbed her and lifted her up near his chest and carried her to the bush (in her evidence a distance from the court at Dumbea to Correctional Centre) of about 50-60 meters away from the church activities.

I do not accept the version of evidence of the defendant. I find that what the complainant said to the defendant could not amount to grounds constituting reasonable belief that the complainant was consenting to sexual intercourse with the Defendant on 25 December 2013.



The following evidence are in support of the finding that the Defendant did not reasonably believe that the complainant was consenting to sexual intercourse on 25 December 2013.

- The evidence that the complainant did not respond to the defendant request through Ruth.
- The Defendant was insistent and forceful to have sexual intercourse with the complainant.
- The Defendant grabbed the complainant and carried her.
- The Defendant blocked the complainant's mouth to prevent her from shouting and calling out for help while the Defendant carried her into the bushes some 50-60 meters away from the robinet.
- The complainant kicked to go out of the Defendant
- The Defendant tore the buttons of the complainant's trousers while he carried her.
- The Defendant forced her to have sexual intercourse.
- The complainant told the Defendant what he was doing to her and asked him to let her go.
- The Defendant threatened the complainant "you wantem pispis" when the complainant asked of what he was doing to her that night.
- The complainant was afraid that the Defendant will kill her.
- The complainant left the Defendant did what he wanted as she was scared.
- Evidence of distress that night. During the sexual intercourse, the complainant called out to Henry Kauna to go and get her sister Manolu to come and see what the defendant was doing to her.
- Defendant admitted that the complainant called out "smol nomo" for help.



A handwritten signature or mark, possibly initials, located at the bottom right of the page. It consists of a stylized, cursive-like scribble.

- The complainant's left side of her face was slightly swollen and the other description of the genital area as contained in the Medical report (Exhibit P1) and findings that the complainant had been forced to sexual intercourse.

The Prosecution proves beyond reasonable doubt that the Defendant Manuel Richard did not believe on reasonable grounds that the complainant was consenting at the time that the intercourse occurred.

I accept the submissions and authorities provided by the Prosecution that on the strength of the evidence before the court the prosecution has proved beyond reasonable doubt the following elements of the offence of sexual intercourse without consent, contrary to s.91 of Penal Code Act:

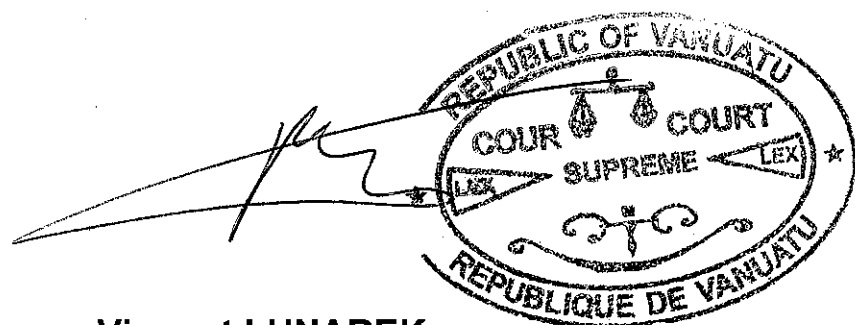
1. That on 25 December 2013, the Defendant had sexual intercourse with the complainant on Tanna at Nelykangien Nakamal.
2. That the complainant girl did not consent to have sexual intercourse with the Defendant on 25 December 2013 on Tanna at Nelykangien Nakamal.
3. That the Defendant could not reasonably believe that the complainant was consenting to have sexual intercourse with her on 25 December 2013 on Tanna at Nelykangien Nakamal.

VERDICT

The Defendant, Manuel Richard is found guilty of the offence of sexual intercourse without consent, contrary to s. 91 of the Penal Code Act.

DATED at Isangel, Tanna this 11th day of April 2014

BY THE COURT



**Vincent LUNABEK
Chief Justice**