

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

Criminal Case No. 111 of 2014/
Criminal Case No. 741 of 2015

PUBLIC PROSECUTOR

V.

JANSEN FRAZER WELEGTABIT

Dates of Hearing: 1, 2, 3, 4 and 5 December 2015 at Naveto, Gaua; 2 March 2016 at Luganville, Santo.

Dates of Submissions: 6 December 2015; 2 March 2016

Before: Justice S M Harrop

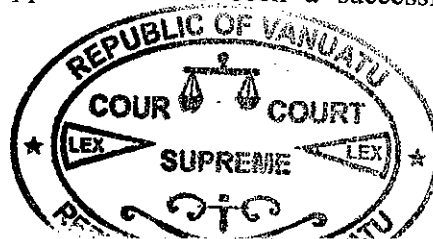
Counsel : Mr Damien Boe for the Public Prosecutor
Ms Jane Tari (PSO) for the Defendant

Date of Verdict: 10 March 2016 at 11.30am

JUDGMENT OF JUSTICE S M HARROP ON VERDICTS

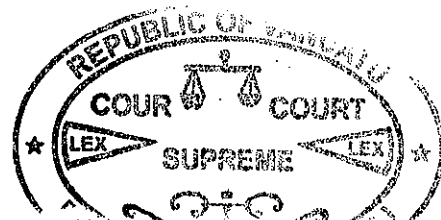
Introduction

1. As in most communities around the world, in Vanuatu the nuclear family (mother, father and children) is the fundamental social unit within which children grow and develop. It is a strong feature of Vanuatu's society incorporating love, respect and support with Christian values. Extended family, including children adopted in custom, typically also have a close relationship with the nuclear family.
2. The nuclear analogy is appropriate because it highlights the strong bonds which children, or "electrons", have to their parents who form the "nucleus" of the "family cell". It is a corollary of the strength of those bonds that there is great sadness and distress for all concerned when they are broken. Until at least 2012 the defendant's family, including seven biological children, appears to have been a successful



example of a Vanuatu nuclear family. There is no doubt that subsequently the bond between the 28-year old complainant, Franita Frazer, and her father, the defendant Jansen Frazer Welegtabit, (and other family members) has been shattered, perhaps irretrievably.

3. The question that arises in this case, albeit in the context of a criminal trial, is what is the cause of the family breakdown? The prosecution says the defendant is solely responsible by means of his serious sexual offending against the complainant on three occasions, on 21 December 2012, 27 April 2013 and in June 2013. The defence says there are other reasons for the family disharmony and that these have led the complainant to make scurrilous and entirely false allegations against her father.
4. The determination of this issue is at the heart of resolving this case but, because it is a criminal case, it is not a question of my deciding which version I prefer. Rather the onus and standard of proof mandate that I may only convict the defendant if I am satisfied beyond reasonable doubt, i.e. sure, that the complainant is telling the truth. Any lesser standard of persuasion such as likelihood or strong probability would be insufficient and acquittals must follow.
5. As this is essentially a family dispute I will refer to the parties throughout by their Christian names. The defendant (Jansen) and his wife Lily have seven children. The complainant (Franita), born in October 1987 is the eldest. The others are: Lenny, Asneth, Shedrack, Alison, Mory and Alissa. The family home is in Naveto village on the island of Gaua. Lily's sister, Hilda Vavak, lives with her husband Kamuel in the village of Tolo, some 15 minutes' walk from Naveto.
6. Jansen faces two charges of sexual intercourse with Franita without consent, on 27 April 2013 and during June 2013, and one of committing an act of indecency on her without consent on 21 December 2012. These are respectively counts 1, 3 and 5. Counts 2 and 4 are alternative counts of incest relating to the first two alleged incidents. Verdicts need only be returned on them in the event that counts 1 and 3 are not proved. Realistically if that is the position then verdicts of not guilty on the incest counts are also inevitable because the defence in both cases is that no intercourse occurred rather than one of consent or reasonable belief in consent.



Result

7. Having reflected carefully on all the evidence and submissions I have concluded that counts 1, 3 and 5 are each proved beyond reasonable doubt. Jansen is accordingly convicted on each of those counts. That conclusion is reached because I am sure that Franita told the truth in her evidence about the three incidents. I reject all the defence evidence to the contrary, in particular all of Jansen's denials.

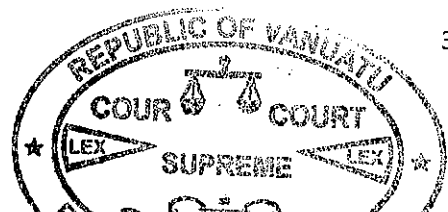
8. In the balance of this judgment I will set out the elements of the charges, the essential framework of self-direction within which they have been considered and summarise the main points of the evidence and submissions in the course of providing my reasons for the verdicts. With no disrespect to any of the witnesses or to counsel, it is not necessary to recount everything that was said during the lengthy trial and I will not do so.

Elements of the Charges

9. In relation to the charges of sexual intercourse without consent contrary to sections 90 and 91 of the Penal Code, the prosecution must prove beyond reasonable doubt that sexual intercourse occurred between Jansen and Franita, respectively on 27 April 2013 and on a day in June 2013, that she did not consent to such sexual intercourse and that he did not reasonably believe that she did consent. As already noted, the defence is that neither incident of intercourse occurred and so questions of consent and belief in consent are not raised by the defence. However, they must still be proved to the criminal standard. Having found these two incidents of intercourse to have occurred, I must consider the other two elements. Given the circumstances of each incident described by Franita, which I accept, there is no doubt in relation to both incidents, that she did not consent and that the defendant did not reasonably believe that she was consenting.

10. Having found counts 1 and 3 proved there is no need to consider the elements of the alternative counts, 2 and 4, of incest or to return verdicts on them.

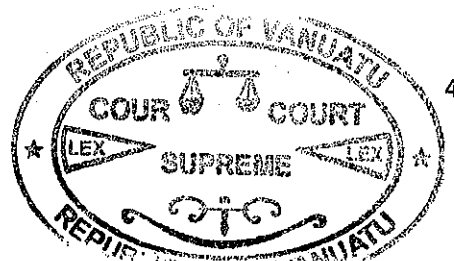
11. As to count 5, the prosecution must prove beyond reasonable doubt that Jansen intentionally indecently touched Franita's breasts and vagina on 21 December 2012,



that she did not consent to either touching and that Jansen did not reasonably believe she was consenting. Having concluded that both intentional indecent touchings occurred, I readily conclude on the basis of Franita's evidence, which I accept, that this was done without her consent and without Jansen reasonably believing that she was consenting.

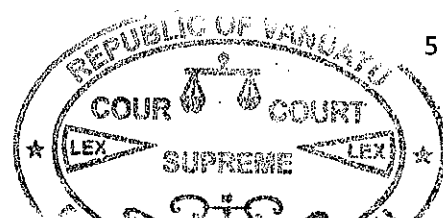
Self-Direction

12. This was a criminal trial and the prosecution having brought the charges against Jansen was obliged to prove them and each of their essential elements to a very high standard of proof, that of beyond reasonable doubt. That means that I was required to be sure of Jansen's guilt before I could convict him.
13. I record that the formalities of sections 81 and 88 of the Criminal Procedure Code, the statements of presumption of innocence and in relation to the right to give or not give evidence, were complied with. Jansen elected to give evidence and to call three other witnesses his wife Lily and his children Lenny (24) and Asneth (21). His election did not shift the burden and standard of proof from the prosecution in any way. Jansen had the presumption of innocence unless and until found guilty. He had no onus to prove anything.
14. As the Court of Appeal recently reaffirmed in *Apia v. PP* [2015] VUCA 30, there are three possibilities when a defendant gives evidence:
 - a) The Court may accept the defendant's account and denials in which case of course he must be acquitted;
 - b) The Court may be unsure whether or not the defendant's explanation or account is true and ought to be accepted. If so, he again must be acquitted because by definition the Court must have a reasonable doubt as to his guilt.
 - c) The Court may reject the defendant's explanation. Even then a finding of guilt does not necessarily follow. The Court must put aside the defendant's evidence and carefully assess the prosecution evidence, or the parts of it which it accepts. A determination must then be made as to whether or not that evidence leaves the Court sure of guilt i.e.



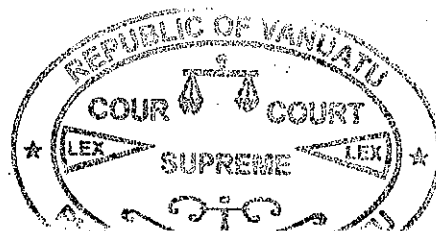
satisfied beyond reasonable doubt that each of the requisite elements of the charge being considered is proved.

15. For convenience the three counts relating to the separate allegations were tried together but I was required to consider each of them separately. In effect three trials were being conducted at once. The outcome on one charge does not necessarily inform the outcome on another. However, the Court is entitled to consider all of the evidence and decisions about acceptance of evidence, whether total or partial, reliability and credibility, may be applied to more than one charge. A conclusion of guilt on one count may be taken into account in assessing the others.
16. As sexual crimes were alleged, this was one of the types of cases where a trial Judge must be conscious of the danger of convicting a defendant based on the uncorroborated evidence of the complainant, though a Judge may nevertheless properly do so as long as that danger is borne in mind: *Walker v. PP* [2007] VUCA 12. I kept this in mind accordingly.
17. In this case the incidents occurred on 21 December 2012, 27 April 2013 and in June 2013. It was not until April 2014 that Franita complained. Sometimes such delays are indicative of the falsity of a complaint and of a motivation arising at around the time of the complaint. Accordingly, caution is required but it also needs to be remembered that there may be good reasons for a rape complainant to delay a complaint, even for a substantial period. In this case I am entirely satisfied that the delay has no impact on the credibility of Franita and her complaints. She deposed as to the threats, reinforced by the wielding of a knife by Jansen on the two occasions of rape. She was undoubtedly both fearful and ashamed (because he is her father) of complaining.
18. Aside from Franita, the prosecution called three other witnesses, Chief Tom Moses and Hilda and Kamuel Vavak. These three were present at the Vavak home in April 2014 when Franita first disclosed the offending. In addition, an agreed statement of facts was submitted by counsel recording that Franita told Dr. Mark Turnbull on 30 April 2014 about Jansen having sexually assaulted her twice, once in April 2013 and again in June 2013. During the first of those incidents she claimed that Jansen had



used a knife to make threats and had applied physical force including a blow to her head. But none of those four witnesses can prove, or contribute to the truth of Franita's allegations. At most they support her credibility in the sense of consistency and they are admissible as an exception to the rule against self-corroborating statements and hearsay to counter the allegation effectively made by Jansen that in giving evidence at trial Franita fabricated all the allegations.

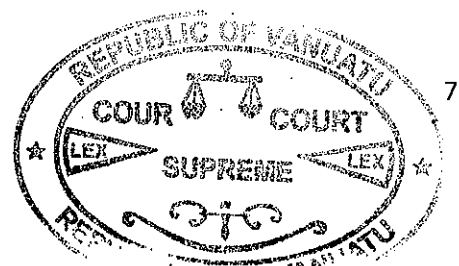
19. In this case, the defence contended there were motives to lie arising from the disharmony in the family around the time of the first disclosure in April 2014. The prosecution submitted that because it was her father that Franita was complaining about, she would certainly not have fabricated these events. For reasons I will explain I rejected the defence contention and upheld that of the prosecution. That conclusion was something I was entitled to weigh in the mix in assessing her credibility and that of Jansen, but only on a cautious basis. That alone could not justify the conclusion that Franita was telling the truth or that Jansen was not. In this context, it is always important to bear in mind that the onus and standard of proof never shifts from the prosecution. In particular, there is no obligation on a defendant to provide or to prove a motive to lie, that if one is proffered but rejected that cannot be held against the defendant, and that there may be motives to lie which did not emerge during the evidence. See the recent New Zealand Court of Appeal judgment in *Tuhaka v R* [2015] NZCA 540, and the authorities cited in it.
20. This was a retrial. Jansen was found guilty on counts 1, 3 and 5 by the Chief Justice in a judgment delivered in September 2015 but that was overturned by the Court of Appeal in a judgment issued on 20 November 2015 for two reasons. See *Welegtabit v PP* [2015] VUCA 42. The first was the improper rejection of a letter from Digicel dated 26 August 2015, the second was the improper admission of prejudicial evidence about alleged earlier offending by Jansen against Franita. Those two matters were remedied in the trial before me: The Digicel letter was admitted by consent and no evidence was led of any alleged prior offending by Jansen.
21. Through sitting on the Court of Appeal I was aware of the Chief Justice's verdicts and the reasons for them. However, I have of course put this entirely to one side and made



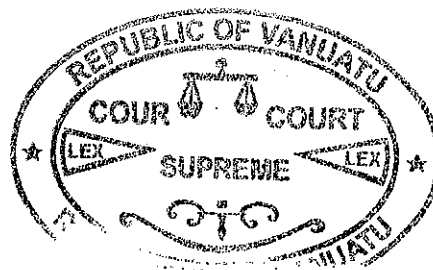
my own assessment of the evidence adduced before me, which in any event has been different in some important respects.

Summary of the evidence and submissions and reasons for finding the charges proved

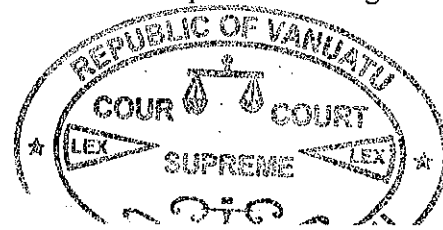
22. In any case involving allegations of sexual offending where the complainant's evidence is not corroborated by independent evidence, as is largely the case here, the prosecution case stands or falls on the credibility and reliability of the complainant. In short, in this case, unless I could be sure that Franita was telling the essential truth about the critical matters relating to each incident I could not possibly have found Jansen guilty regardless of whether he gave evidence. As he did give evidence, I could not possibly have found him guilty unless I was sure I could reject what he and other defence witnesses said on the critical matters.
23. I found Franita to be an entirely credible, persuasive and indeed impressive witness especially given that she was giving detailed evidence of sexual offending against, not just someone she knew or an "ordinary" family member, but her father. In the patriarchal culture of Vanuatu, for a daughter to give evidence of this kind against her father takes substantial courage. While of course it is possible, it is inherently unlikely that a daughter would fabricate not one but three detailed allegations of serious sexual offending against her father.
24. I am satisfied that Franita only made these allegations and followed them up with giving evidence (in two trials) because she was truly a victim of the offending. Before me she gave lengthy and unwavering evidence sitting within about four metres of her father. She was at times, when describing the two incidents of rape, clearly upset and tearful yet she provided a significant number of details which, especially in combination, had the strong ring of truth about them. I noted too that during much of her evidence Jansen refused to look at her and partially turned away from her. While I am very cautious about ascribing significance to this given that I am from a different culture, it may well have been an indication of embarrassment on Jansen's part at the truth being told.



25. Overall, it was not merely the detail of the evidence that Franita gave which I found compelling but the way she gave her evidence over a lengthy period, including being recalled three times. I remind myself that the demeanour of a witness may be misleading, that judges are not trained to detect this, and that an apparently credible witness may be lying, but in this case I have no qualms about accepting that what she said was the truth.
26. Franita is married to Joseph Tari and has two young daughters. At the time of the first two incidents she was living with her family in Naveto but her husband was living in Santo. I understand there was a degree of estrangement and a problem associated with him or his family not having provided the bride price to Jansen.
27. On the morning of 21 December 2012, Franita was lying asleep in her bed (she had her own bedroom). She was sleeping late because she had been to a Christmas carol service the previous night. She awoke to someone touching her breasts and when she lifted her blanket and looked she saw it was her father. He had his cellphone and showed her a pornographic image. He then touched her vagina. She responded by pushing him out and running out to the garden where her mother was. Before she left he gave her Vt 1,000 but she then put this back into his bag because she understood it was money belonging to the Mormon church, to which the family belongs. Franita said while some of the other children were at home, they were outside. There was nobody else in the house at the time of the incident. She described Jansen as wearing only trousers but no shirt. She said he did not say anything but did show her the pornographic images (a video).
28. Franita said she met her mother coming back from the garden but did not say anything to her because she was afraid of her father. For the same reason she did not shout out at the time of the indecent assaults. She said her father was the kind of man of whom all the children were afraid. Whenever he was angry he would swear at them and their mother, going back to their childhood. It is notable that even at the age of 25 and being married with children of her own, Franita did not feel able to shout out or complain at the time.

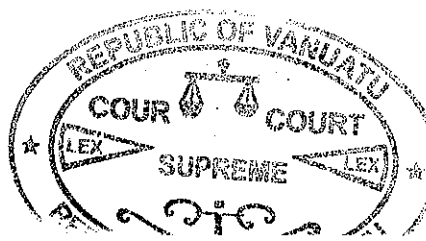


29. Jansen adamantly maintained that the incident did not occur. He neither touched Franita's breasts nor vagina nor did he show her any pornographic pictures or movies. He said, and Asneth confirmed, that he was not competent to operate his phone beyond making and receiving calls. Ms Tari elicited in cross-examination that at the previous trial Franita had said Lenny was present was in the house but sleeping, whereas before me she said he was not there at all. There does appear to have been some inconsistency in this regard but a possible explanation, as Franita noted in examination-in-chief, is that other children including Lenny were present but not inside the house. Any inconsistency there may be here does not impact on my overall assessment of Franita's credibility, giving evidence about the incident nearly three years later. She understandably was focused on the essential aspects of the incident rather than on whether or not a sibling was present, albeit asleep, in the house. In any event Lenny was not part of the incident.
30. The reference by Franita to being shown pornographic images or a movie on the phone has the ring of truth about it. It is a detail peripheral to the indecent touching itself which is unlikely to have been fabricated especially when disclosed so long afterwards in April 2014. It may – or may not – be that Asneth was telling the truth when she said that as a regular user of her father's phone she had never seen pornographic images or a movie on it, but the possibility remains it was there without her having seen it. The other possibility, as firmly stated by Franita in cross-examination, is that Asneth knows very well that the pornographic movie was on the phone and saw it herself but is defending her father and does not want to admit she knows about it. Franita was adamant that her father knows how to operate the phone beyond making and receiving calls and that some of the boys in the village had been sending movies to his phone. In cross-examination Franita accepted that it may have been that it was music that those boys had put on the phone rather than movies. This concession, and others like it, my view reinforced Franita's credibility. She accepted reasonable propositions that were put to her and did not appear to me to attempt at any stage to enhance her version of events improperly when she had the opportunity to do so.
31. In reaching my conclusion that I am sure that the indecent touchings (and the showing of the pornographic movie) occurred, I have taken into account positive findings as to



Franita's credibility arising from consideration of the evidence relating to the two incidents of sexual intercourse without consent and my overall rejection of contrary defence evidence.

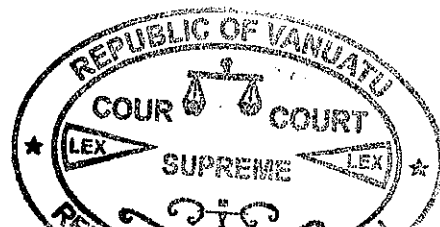
32. On the evening of 27 April 2013, Franita left the family home at Naveto to see her boyfriend Branly who lived nearby. She left her two daughters sleeping. She spent some time with Branly, had sex with him and on the way back she met her brother Lenny and, according to Franita but denied by him and others, Jansen. Lenny slapped her on the head apparently because he and other family members were annoyed that they had been woken by the crying of Franita's younger daughter and by finding that Franita had left without telling them where she was going. It was around 10 pm that Lenny slapped her and she said that he held her hand and pulled her back towards the home. Near the Mormon church she said that she saw her father standing there. She said he took her hand from Lenny's hand and told Lenny to go home and tell Lily that Franita had been found. Lenny did so, leaving Franita alone with Jansen.
33. Franita said that Jansen then pulled her over to a nearby burao tree, slapped her on the left side of her head and told her to lie down, take off her underwear and open her legs. She did not agree and shut her legs together strongly but he forced them open, pushed aside her underwear, pulled his trousers down to the knee, took of the buttons of his trousers and had sex with her. She described the trousers as being army trousers and his top as being a white tee shirt. She said the sex last 5 minutes or so and she did not scream out because he had slapped her and told her not to make a noise. She was wearing a skirt and a long-sleeved shirt. Franita said that Jansen ejaculated onto her thighs making her legs wet.
34. She then walked back to the house, crying, and her father followed her. She sat down and was still in tears. She said her father rubbed her back and asked her not to cry. He was telling her not to say anything; if she said anything he would kill her. He also said that if she told her mother anything he would send her back to her husband.
35. Franita said she did not tell her brothers, sisters or her mother because if she reported it Jansen would beat everyone up.



36. The next morning Franita left the home and went to stay with her stepfather and stepmother (in fact her uncle and aunt), Hilda and Kamuel Vavak, down in Tolo. She felt forced to leave because of what her father had done and she left her children behind when she did so, although she saw them again two days later.
37. Jansen strongly denied there was any incident of sexual offending on 27 April. He said that he did not go to look for Franita and stayed at home at all relevant times. He said he had consumed at least 10 shells of kava that evening and was not in a fit state to go looking for Franita, let alone to rape her. His presence at the home was confirmed by the other defence witnesses. Lenny agreed that he had slapped Franita when he found her but said he had taken her all the way home and there was no possibility of Jansen having had any time alone with her.
38. I reject all of the defence evidence where it conflicts with that of Franita. Again, the details she provided were entirely credible. She was distressed in recounting them even though this was a retrial. I am satisfied that Lily, Lenny and Asneth have all given false evidence in order to support Jansen's denials and his version of events. On one level I can understand why they have done so. Clearly the family has been in very difficult circumstances as a result of Jansen being charged with these offences. He himself explained, as will be discussed later, that the difficulties for the family led him to approach Chief Moses shortly before the trial (on Friday 27 November 2015) to see if some way could be found to avert those problems. Clearly there was a strong incentive for these witnesses to support Jansen. They will be much better off if he is acquitted than if he is convicted and goes to jail. There was also a strong disincentive for them, as subservient and dependent family members, to give evidence opposing what he said.
39. Although it is not strictly corroboration, in the sense of it being independent of Franita, I find it significant that she felt she had no choice but to leave home the next morning leaving behind her two young daughters then aged 2 and 5 and indeed her boyfriend Branly. She said she felt really bad about leaving her children behind. That was dramatic conduct entirely consistent with her having been raped by her father the night before and most unlikely to have occurred had there been no incident at all as the defence claims. Franita said, as well as having had sex with Branly that night, she

had been seeing him regularly since December 2012. Accordingly it was a significant step for her to hurriedly move to another village on the morning of 28 April. She agreed with Ms Tari that her family were not happy about her relationship with Branly. She did so readily. Again, in my assessment this enhanced her credibility. She did not disagree with everything put to her in cross-examination as a false complainant would likely have done.

40. Not only did Franita leave the home but she has never gone back (to stay). Again, that is conduct consistent with what she said her father did to her and unlikely to have occurred merely through some other form of family disharmony or any disagreement with Branly.
41. The third incident occurred in June 2013 when Franita was (still) staying at Tolo with Hilda and Kamuel. She said she was working with them in their garden near Tolo planting and harvesting peanuts. Around the middle of the day she said she received a call on her cell phone from Jansen. Franita had recognised her father's cell phone number come up on the screen of her phone – 5541076. He told her to go and see him and her mother in their garden. She told Hilda and Kamuel that Jansen had asked her to do that and she left them to go to her parents' garden. They told her if they were not still at the garden when she got back they would be at the house in Tolo.
42. Franita said she went straight to her parents' garden but when she got there she could not see anybody. Jansen then came up behind her, blocked her mouth with his hand and told her to go over to a small bush which he pointed out. He took his hand away from her mouth and she asked him where her mother was. He did not say anything except repeating that she must lie down and do what she was told. She refused and did not move. He was holding a knife and he then used it to cut a nearby banana tree. As he did so he told her to hurry up and go down or he would cut off her neck. In giving this evidence, she was clearly distressed.
43. Franita said she was afraid, so she held her hands on the back of her head, which she demonstrated to the Court, and walked down towards the bush; Jansen followed her holding the knife. He told her to lie down and she did so. She shut her legs together

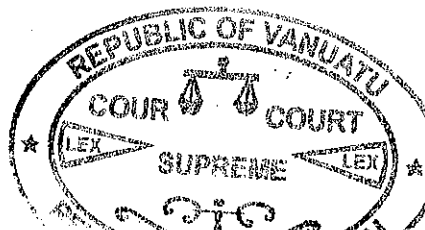


and pulled her shirt up over her face, which again she demonstrated to the Court. She said she was crying at that time. Again distressed in describing this, she said Jansen opened her legs, removed her panty, took off his trousers down to his knees and had sex with her. She said she was wearing a skirt and shirt. The tee shirt was dark blue and the skirt was green with flowers on it. Jansen was wearing a red billabong shirt and black trousers. The knife was right beside them when he had sex with her. She said it was a big knife, a long bush knife. The sex lasted somewhat more than 5 minutes and then he got up and used some leaves to wipe his penis. He had ejaculated outside her body, onto her thighs, making them wet. She was able to see her father's penis and described it as the size of two of her fingers. However she said she was crying at the time and did not have a good look.

44. Franita then said that her father gave her some leaves and told her to bury them on the road on the way back to his stepfather's house. Her understanding of his reason for this was it would stop her step-parents talking about her and Jansen and thinking badly of them.

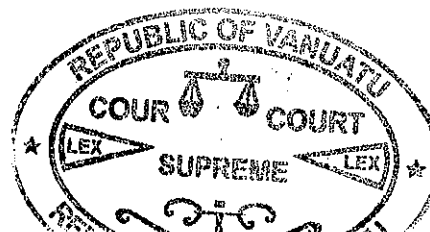
45. On the way back to Tolo she did not do as Jansen had asked but instead threw the leaves away. She did not know the name of the leaves but said they were "for the devil". She said it was apparently the type of leaf which is used during a funeral ceremony and fastened to the corpse. She said she decided not to bury the leaves because if she did that "*my daddy would still come for me*". She threw the leaves away because she wanted people to know what he was doing to her.

46. Hilda and Kamuel each corroborated the receipt by Franita of a phone call when she was working at the garden with them. They were sitting close to her at that time although neither of them could hear what she was saying to the caller, nor of course what was said to her. However they both said that when the call finished Franita told them that her daddy had called her and had asked her to go and see him and her mother in their garden. Immediately after that she left to go to her parents' garden. I accept the evidence of Hilda and Kamuel on this point. They provide important corroboration, independent of Franita, that there was a phone call received by her and that she left them in consequence of the call. Of course, they did not hear the contents of the call so they cannot corroborate that it was from her father, or that he had asked



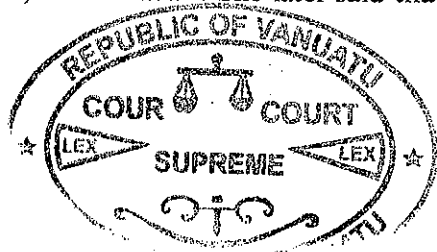
her to go to see him and her mother, but her immediate statement as to the contents is confirmed by both of them.

47. Of course it is conceivable that Franita misrepresented to Hilda and Kamuel the content of what she had been told by the caller and who the caller was. However, that is most unlikely on the spur of the moment, especially when there was nothing inherently significant about it. This was merely evidence about what led to her going to the garden rather than evidence as to what happened after she was there.
48. It is also conceivable that Franita could have arranged for someone else to call her but that is completely far-fetched. I have no hesitation in accepting her evidence, supported in material respects by Hilda and Kamuel and by Franita's immediate statements and conduct on the spur of the moment, that Jansen did call her and that he did ask her to go to visit him and/or Lily at their garden. Against this, Jansen's denial that he made such a call and any such request is unbelievable and I reject it.
49. I note too that Franita says she was asked to go and meet her mother and that the first thing she asked Jansen when she arrived at the garden was where was her mother. Jansen would have known after the earlier incidents of sexual offending Franita would never have agreed to meet him alone so this was a necessary deception to get her alone in an isolated place. That detail is consistent both with the earlier incidents having occurred and with Franita's description of what she was asked by her father in the phone call being true.
50. In relation to the incident itself, the level of detail provided by Franita, especially several particular and unusual aspects before and after it, make her account entirely credible. First, there is the description of putting her hands on her head as if to surrender which she demonstrated in Court. Second, there is the pulling up of her tee shirt over her face, an action entirely consistent with her shame and shock and with her resignation, under serious threat, to the reality that Jansen was going to rape her again. Indirectly, this corroborates Franita's evidence about the two earlier incidents.
51. Then there is the description of Jansen wiping his penis with leaves and most significantly the handing to her of the leaves that he wanted her to bury on the way



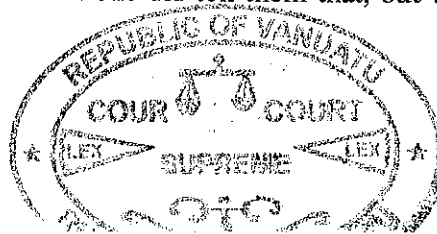
back to Tolo. Each one of these unusual features of the incident would be compelling on its own but in combination they leave me in no doubt whatsoever that Franita was telling the truth about the incident in June.

52. Although Ms Tari pointed out that Franita would be familiar with the garden and with both Jansen's clothes and her own, making it easy for her to make a false account appear credible, which I accept, I still consider her recollection of what both were wearing at the garden as consistent with the dramatic events having occurred so as to sear those details into her memory.
53. Further enhancing my conclusion was her request for a site visit in the course of her cross-examination. Ms Tari put to her that Jansen would say that there was no sex between them, no phone call and no meeting in the garden. Franita's answer was that Jansen would be lying if he said that. She turned to me and said she would like to show me the place where he did those things to her. Ultimately I declined Mr Boe's application for a site visit because in all the circumstances (set out in my Trial Ruling No.4) I did not consider it was "*expedient*" in terms of section 174 of the Criminal Procedure Code. However, Franita's request for a site visit was in my view a form of plea to the Court for a chance to show that she was telling the truth. She wanted the opportunity to go to the site to point out where things happened, including where the banana tree was that was slashed by Jansen. While of course that could be seen as merely attempting to perpetuate her fabricated story, I take the opposite view, namely that it was a genuine request from a complainant being accused of fabrication for an opportunity to reinforce to me in a tangible way, at the scene of the crime, that she was telling the truth.
54. Jansen's defence in relation to the June charge and indeed the April one was not only that the incidents did not occur but that through a degree of impotence they simply could not have occurred.
55. Jansen said that since about 2010 he has had difficulty obtaining an erection, typically it takes him 25 to 30 minutes. He said he had seen a custom doctor about the problem and that was some help but not much. On this issue Lily supported Jansen and said initially that his private part no longer functioned, it was "*ded*". She later said that it



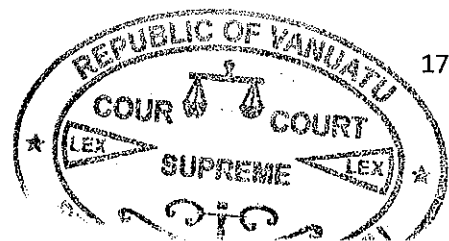
had improved but only recently, since 2013. She clarified this evidence to confirm that Jansen could still obtain an erection in 2013 but it took a long time before they could have sex.

56. Because I am sure that Franita is telling the truth about what happened and I accept that she saw Jansen's erect penis during the rape in the garden, I reject the defence evidence of impotence. That kind of evidence is all too easy to give and there is no independent medical evidence supporting it. The custom doctor was not called. Of course the defence has no obligation to call any evidence and has nothing to prove. However, I am left in the position where the assertions by Jansen and Lily are untenable when I accept what the Franita has said about the two rapes. In these circumstances I reject the defence evidence because it can only have been the result of collusion between Jansen and Lily to try to add weight to his denials and to add another layer of impossibility in respect of the April incident, in addition to the effects of his substantial kava consumption on the night in question.
57. Jansen said Franita could be proved to be lying by the fact that she could not have seen his phone number 5541076 come up on her screen as he did not use that phone until 17 September 2013. On that date at a meeting at the Mormon church the phone was given to him by one Ian Mahit. The phone belongs to the church.
58. At the first trial Franita said that the call was on 25 June and that was in line with the allegation in the relevant counts. At the trial before me, when she was confronted with the letter from Digicel confirming that there was no phone call between the relevant phone numbers on 25 June 2013, she said it may have been the 24th or the 26th. In answer to questions from me when she was recalled to give evidence about this issue, she accepted that she did not tell anyone about the incident in the garden until some time in April or May 2014. When I asked her how she could then be sure about the date so long afterwards, she said that perhaps she was wrong about the date but she remembered that Jansen had sex with her in June. I asked her why then she had selected 25 June. She said maybe the police put in the wrong date. Ultimately it became clear that Franita could not provide the particular date but she knew it was in June. I suggested to her that she ought to have told the police that the incident was in June but that she could not recall the date. She said she did tell them that, but they



pressed her to nominate a particular date and that was when she nominated the 25th; she knew it was in the latter part of June. She was also able to say that it was on a day when she went to the bank and one on which an Air Vanuatu plane came to Gaua. There was evidence that this meant it was a Monday, Wednesday or Friday but that did not advance the isolation of *which* Monday, Wednesday or Friday in June.

59. At the close of the prosecution case, I granted Mr Boe's application to amend counts 3 and 4 so as to refer to the month of June 2013 rather than a particular date or dates in June. In order to ensure so far as possible there was no prejudice to Jansen arising from this amendment, I gave Ms Tari the opportunity after the evidence finished on 5 December 2015 to investigate through Digicel whether there were any calls between the relevant phone numbers during the month of June 2013. I gave leave for either party to request that Franita be recalled.
60. The evidence obtained from Digicel after the trial, put before the court by joint memorandum of counsel, confirmed there had been no calls during the month of June 2013 from Jansen's phone number (5541076) to Franita's phone number (5489704). Mr Boe applied for Franita to be recalled. This was opposed by Ms Tari but on 17 February 2016 I granted the application. Reasons were given in my judgment of 23 February 2016.
61. In her further evidence, given at Luganville on 2 March 2016, Franita was confronted with the new Digicel evidence but remained adamant there was a call from Jansen using that number because she recognised it on her phone screen and then answered and spoke to him, which led to the rape in the garden. As she put it in re-examination when asked why she said there was a call from her father: "*Because my father had sex with me and he wouldn't have if I didn't get the call*". She said there must have been some mistake in her number and suggested it may have been because she was using several sim cards (she cannot now recall their numbers) at the time; it must have been a different one from 5489704 that she received the call on. She said when the police asked her in May 2014 what her number was she could only recall the 5489704 one. She accepted she had not told the police of any possibility she had been using another number at the relevant time.

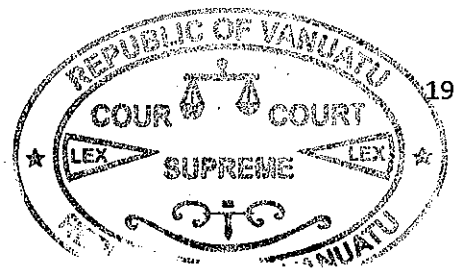


62. Franita also remained very confident the call was in the latter part of June; she recalled that preparations for Independence Day (of course 30 July) began in the first week of July and that was shortly after the incident. When I asked her further about this, she said if it was not in June it would have been in the first week of July.
63. On the evidence as it stood at the end of the trial, it is clear a particular date in June should never have been selected and having heard from Franita about how that happened (admittedly without the benefit of any police officer commenting on that) I do not find her credibility harmed. I accept that, unsurprisingly, Franita could not remember what particular day in June it was when asked to recall it by the police in making her statement in May 2014. While at the first trial there appears to have been no suggestion from the prosecutor or from Franita that there was any doubt about the date, that may simply be because nobody challenged her about it. Even at the trial before me it was only my own questioning which elicited the relevant details.
64. In the end, the real issue on counts 3 and 4 is whether the incident occurred, not what the date was. What the prosecution must prove beyond reasonable doubt are each of the elements of the charge of sexual intercourse without consent. The date or period of time when the incident occurred is not an element of the charge, but a particular. It may in some cases be important for the defence to know exactly when the offence is said to have occurred so that evidence rebutting it, such as alibi evidence, can be sought and called. This is not one of those cases because Jansen says there was never such an incident and that he was not using that phone number until 17 September 2013. Accordingly, uncertainty about the date in June 2013 did not affect his defence.
65. Where the undisputed and independent evidence from Digicel is potentially highly relevant is in assessing the credibility and reliability of Franita's evidence as a whole. Ms Tari submitted that she had kept changing her evidence when she was "caught out" by independent Digicel records, first by the letter saying there were no calls on 25 June then by the proof there were none in the whole month of June. She had been adamant about the evidence, not allowing the possibility it might be wrong, but was forced to change it, more than once. Miss Tari added that even now Franita is making assumptions or speculating about how the records might be explained and this meant her evidence was not a safe basis for conviction on any of the counts. The Digicel



evidence had exposed her as unreliable and not credible and at the same time had supported Jansen's denials both of any phone call and of any offending.

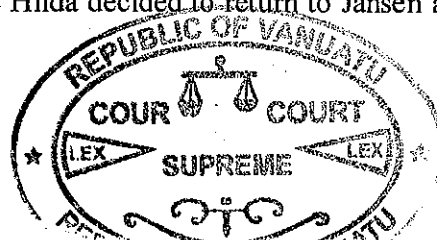
66. There is considerable force in Ms Tari's submissions on this issue and I have given careful thought to the impact of the Digicel evidence on the credibility and reliability of Franita. I accept her evidence about the dates has been unreliable and changeable but I nevertheless consider her evidence, both on this topic and overall, is both credible and a safe basis for convictions. The Digicel evidence is important but it is only part of the extensive evidence I heard and needs to be considered in the light of all the evidence I accept.
67. It needs to be remembered that Franita was being asked to recall the dates and phone numbers almost a year after the garden incident. She initially nominated 25 June but only because she was apparently (and, if so, quite improperly) pressed to nominate a date by the police. She really did not know in May 2014, nor does she now, what date it was and she had no reason to. She can only say it was on a day she went to the bank and the plane arrived and that it was in the latter part of June 2013 by reference to the Independence Day preparations.
68. Franita would therefore genuinely have expected the Digicel records to have shown a call in late June between the two numbers. When they did not, she accepted she must have made a mistake and has had to search for a possible explanation. Rather than this being a case of a liar being caught out, I think it is one of a truthful witness realising there must have been a mistake and there must be another explanation. She has not in my view "dreamed up" or fabricated the "other sim card" explanation, but rather she has suggested it after having to think hard about why the Digicel records have not supported her genuine belief as to the timing of the call and as to the phone she was using.
69. Franita has always been absolutely adamant about receiving the call from her father and about what followed. Detailed evidence from her about the whole incident supports that. The fact of that call and of her response to it are corroborated by both Hilda and Kamuel. Whatever the truth may be as to why the Digicel records do not show there being a call in June 2013 to her phone number 5489704, I am in no doubt



at all that Jansen did call her in the latter part of June 2013 and that he deliberately lured her to the garden and raped her. I am sure Franita has told the truth about the call and what followed. I reject Jansen's denial of the call, the incident and his use of phone number 5541076 at that time.

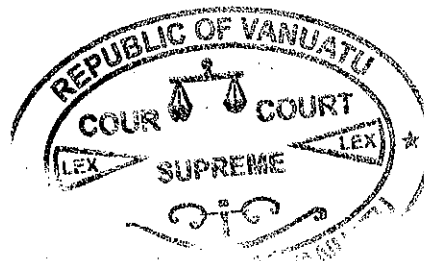
Motive to lie?

70. Although the date is unclear there is no doubt that around April 2014 the offending was disclosed to Chief Moses and to Hilda and Kamuel at Tolo. The defence says the timing is no coincidence and that there was disharmony in the family at that time which explains why an entirely false disclosure was made then. Ms Tari submitted that the allegations were made in respect of locations with which Franita was familiar and that it was easy for her to describe them even though no such incidents occurred. The same point was made in relation to her ability to describe the clothing she and Jansen were wearing at the relevant times.
71. I accept that caution is always required when considering the making of a complaint many months after the incidents are alleged to have occurred. As I have already noted, it is important to look at what was going on at or around the time the complaints are made to see whether the relevant events may have led to a false complaint. On the other hand, as I have also noted, there may be good reasons for delay in complaint of sexual offending especially where a threat has allegedly been made, by a person having the apparent ability to carry it out, that if there is disclosure violence or death will result.
72. I therefore turn to consider the evidence of what was happening at around the time of the disclosure. Because of uncertainty about dates and the order of events, frankly the evidence is vague and somewhat confusing. When cross-examined Franita accepted that she had made the disclosure about what her father had done at around the time when she heard the rumour that she had been having sex with her step-father (uncle) Kamuel. She says that is not true and that she was hurt and ashamed about it, as Ms Tari highlighted in her submissions. She also agreed that while she was in Tolo a conflict had arisen between her and her parents about her daughters coming to stay with her in Tolo. Jansen and Lily would not allow it. They wanted her to return to Naveto but she refused. As part of this picture Hilda decided to return to Jansen and



Lily their daughter Mory, who had earlier been informally adopted by Hilda and Kamuel. Ultimately it seems that Jansen and Lily allowed Franita's children to go down to Tolo and they were taken there by someone called Thomas. Franita agreed that this occurred because of the return of Mory.

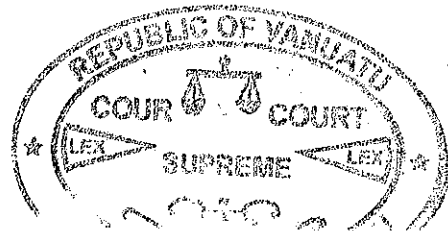
73. Accordingly, Ms Tari put to Franita that there were at that time the two significant conflicts, or "rowrows", with her father and mother and that the families were in disharmony. Franita said however that the quarrels were between the two couples and, leaving aside the involvement of her own children, there was no particular disharmony or lack of communication between *her* and her parents.
74. There was confusing evidence about what happened when Chief Moses was asked to go to Jansen and Lily's house to collect Franita's belongings and take them back to Tolo. This was in connection with other evidence of a request by Jansen for Chief Moses to go down to Tolo to bring Franita back.
75. Frankly, it is impossible to make sense of all of this evidence and to make safe inferences from it. Looking at the matter as favourably as I can from the defence perspective, as I must, I can accept that the reason for the disclosure of the offending did have *something* to do, at least with the circulating rumour, strongly denied by both Franita and Kamuel, that they had been having sex, if not with other issues between the families. Franita accepted that she was cross when she found out about this rumour and that Jansen had sent someone called Diana (her cousin) to tell her husband in Santo about her and Kamuel having sex.
76. On this basis I can accept that the surrounding events, and the rumour of sex with Kamuel in particular, did cause Franita finally to reveal what her father had done. But that does not mean that what she then revealed was not the truth. Although she was not clearly asked to explain her motivation for disclosure at that time, having heard all of the evidence I infer that Franita had decided not to disclose the incidents earlier because of her shame and fear. I infer she thought the best thing to do after the 27 April incident was to get away from Jansen, to go down to Tolo and to stay away, even if it meant not being with her children and her boyfriend Branly.



77. The general family disharmony and even the allegation of Franita having sex with Kamuel are in my view spurious grounds for suggesting Franita would make up and pursue in detail at two trials such serious allegations against her father. I reject the defence contention that the timing of the complaints and the circumstances surrounding it give rise to doubt about the truth of Franita's allegations.
78. When it was put to Franita that Jansen would say he had never touched her private parts her response was that he did touch her breasts and her vagina and she added, tellingly in my view, "*I would not report this if he had not done it, because he is my Daddy*". This highlights the point that carries considerable weight with me: the mere fact of Franita's making such very serious allegations, three of them, against her father (whom she always referred to as her Daddy), the leader of her family, indicates they are likely to be true. I am sure she would never have made such allegations against her father if he had done nothing.
79. I formed that clear impression at the trial but Franita reinforced it when she gave evidence on 2 March. Ms Tari put it to her that the Digicel records proved she was lying and that there was no call from her father in June and no incident in the garden. Franita said: "I have told the truth. He is my father and I came into this world through him, so how can I tell lies about him?"

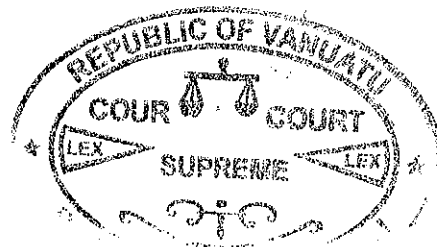
The proposed custom reconciliation ceremony

80. As detailed in a bench note and ruling made during the trial, on Friday 27 November 2015, immediately before the trial, Jansen approached Chief Tom Moses in his capacity as paramount chief of Naveto village. In his words what he was doing was asking the chief if he could find some way to resolve the problems his family was having as a result of his involvement in this Court case. It had been hanging over him for a lengthy period, he had spent time in custody, his wife was unwell and the children were not attending school because he was unable to pay school fees. Jansen says he did not propose a custom reconciliation ceremony but asked the chief to look into ways of resolving the problem.
81. When the chief returned he told Jansen he had seen Kamuel and Hilda and also John Standnenit, who is Franita's "*big uncle*", and that they had agreed to undergo a



custom reconciliation ceremony with the offering proposed being Vt 10,000 and one pig.

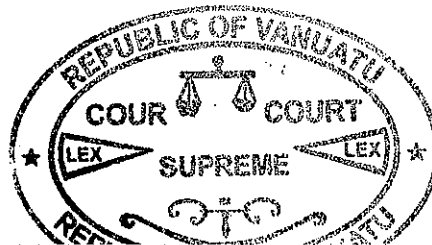
82. Jansen agreed to this and as a result Chief Tom and John Standnenit told him that they needed to first discuss the situation with Franita before any custom reconciliation could go ahead. Her response was that she would agree to custom reconciliation, but regardless of that the Court case would still go ahead.
83. Jansen says he understood from this that Franita (and others) still thought he was guilty and for that reason he did not proceed with the custom reconciliation ceremony.
84. Jansen's evidence was that the purpose of a custom reconciliation ceremony would have been to repair the broken bonds in the family and that it was possible to do this without his admitting guilt. Taking part in such a ceremony should not be seen as any form of admission on his part that he was guilty.
85. Jansen was adamant that he had never told Chief Moses or John Standnenit that he was guilty or that he would apologise for what he had done to Franita.
86. Evidence was given by Chief Moses that custom reconciliation ceremonies have two purposes. The first is to make a statement of apology for the wrong done to the victim and to acknowledge that what was done was wrong. The second is to restore peace between disputing families and/or the community.
87. Mr Boe submits that Jansen's agreement to undertake a custom reconciliation ceremony can only be seen as an acknowledgment of his guilt and that it should be treated by the Court as a form of confession or at least his denials on oath should be taken into account in light of it.
88. For Jansen, Ms Tari submitted that the Court would be wrong to draw such an inference and emphasised that Jansen did not ultimately perform the custom reconciliation ceremony and so has not apologised publicly.



89. There is a strong argument that in agreeing to undertake a custom reconciliation ceremony Jansen ought to be taken to have acknowledged guilt because it is a fundamental part of any custom reconciliation ceremony undertaken against the background of a dispute that there is an apology by the wrongdoer. In this case there is only one suggestion of any wrongdoing and that is (on three occasions) by Jansen against Franita. That said, this is a case where the defendant gave evidence that this was not his intention and I further acknowledge that no ceremony has taken place and therefore there has been no apology. At its highest, Jansen could be said to have agreed to apologise but he has not actually apologised.
90. In a situation where competing inferences are proposed, I may only infer guilt where the adverse inference is the only rational conclusion on the facts established: see for example *R v. Ramage* [1985] 1 NZLR 392, a judgment of the New Zealand Court of Appeal. Further, if more than one inference is available on the facts i.e. drawing either of them would be logical and not speculation or guesswork, the proper approach is to adopt the inference more favourable to the defendant: see *R v. Ming* [2012] NZHC 1205 at [30].
91. As Ms Tari emphasised in her submissions generally, Jansen has been entirely consistent in his denials of any wrongdoing whatsoever. He has consistently said that Franita has fabricated these allegations, right from the time when he was spoken to by the police, at the first trial when he gave evidence and again at this trial when he gave evidence. I accept the possibility that his agreement to a custom reconciliation ceremony, in his mind at least, was not inconsistent with his adamant denials of any offending. In these circumstances I am not prepared to draw the adverse inference against him which Mr Boe submits I should. I therefore put the evidence about the custom reconciliation ceremony to one side.

Summary and Conclusion

92. For these reasons I was satisfied that counts 1, 3 and 5 (respectively, sexual intercourse without consent on 27 April 2013, sexual intercourse without consent in June 2013 and act of indecency without consent on 21 December 2012) were each proved beyond reasonable doubt as to all their requisite elements and I have convicted Jansen accordingly.



93. In compliance with section 94 of the Criminal Procedure Code, I advise Jansen that he may appeal against these verdicts within 14 days.

DATED at Port Vila this 10th day of March 2016 at 11.30am.

BY THE COURT

Spencer M. Harrop

Justice SM Harrop

