

**PUBLIC PROSECUTOR**

- v -

**NAKOU SAM**

**Coram:** Vincent Lunabek - CJ

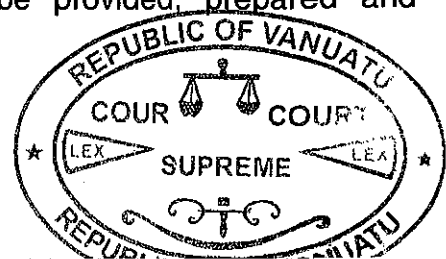
**Counsel:** Ms. Micheline Tasso for Public Prosecutor  
Mr. Gregory Takau for the Defendant

*Date of Verdict: 23<sup>rd</sup> October 2018*

**REASONS FOR VERDICT**

**I. Introduction**

1. Defendant Nakou Sam is charged with one count of sexual intercourse without consent and one count of abduction – contrary to sections 91 and 92 of the Penal Code Act [CAP 135] respectively.
2. Defendant Nakou pleaded not guilty to these two (2) counts. He was tried on both charges accordingly on 12 and 13 April 2018.
3. On the first charge of sexual intercourse without consent, the Defendant Nakou admitted that on 22 May 2017, he had sexual intercourse with the complainant as alleged in the Amended information dated 26 March 2018. The only issue before the trial and at the trial related to the issue of consent.
4. As to the second charge of the Amended Information – Abduction- the prosecution proceeded with it as if the offending section of s.92 has not been amended. At the end of the trial, it pointed out to the prosecution that a substantive amendment has been undertaken by the Parliament which substantively changes the requirements of proof of s.92. The new amendment came to effect on 29 February 2017. The alleged abduction occurred on 22<sup>nd</sup> May 2017. The offence of abduction should be provided, prepared and



evidence taken under the new provision of section 92 as amended. It was not done in such circumstance.

5. The prosecution applied for a Nolli Prosequi under section 29 of the Criminal Procedure Code Act. Defendant Nakou has been discharged for the offence of abduction under the new definition and provision of s.92 of the Penal Code Act.
6. The only charge under consideration in section 91 of the Penal Code and particular whether sexual intercourse on 22<sup>nd</sup> May 2017. Between the Defendant and the complainant was consensual.

## **II. Offence and Evidence**

### **A. Prosecution Case**

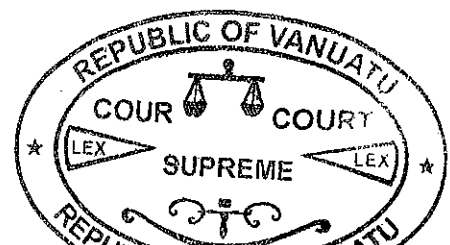
7. The prosecution case is that on 22<sup>nd</sup> May 2017, at Number Three (3) Area, at about 8.00pm in the night, at Petanque area, Defendant Nakou walked behind the complainant, blocked the mouth of the complainant, put a hand around her belly and carried her across to the other side and to an empty space near a trunk of a tree and had sexual intercourse with her in a "doggy" position without her consent.

### **B. Elements of Offence**

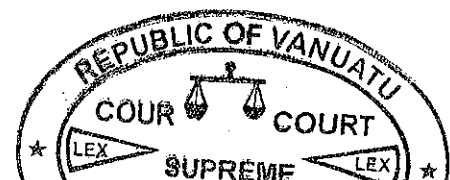
8. The prosecution has to prove the following elements of the offence beyond a reasonable doubt:-
  - I. That on 22<sup>nd</sup> May 2017, Defendant Nakou had sexual intercourse with the complainant in the night at about 8.00pm o'clock.
  - II. At the time, the complainant did not consent to have sexual intercourse with him (Defendant).
  - III. Defendant Nakou did not have reasonable belief that the complainant consented to have sexual intercourse with him (Nakou).

### **C. Prosecution Evidence**

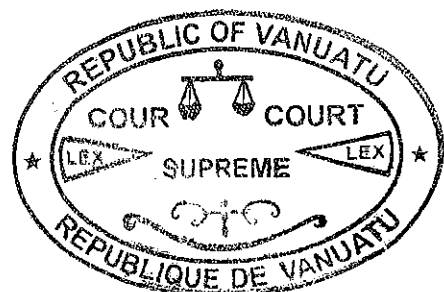
9. The following statements and exhibits are tendered by the consent of the prosecution and Defence:



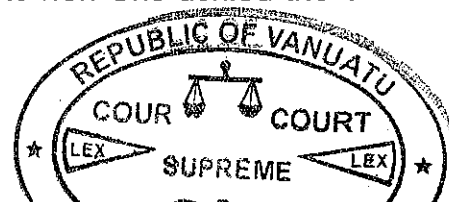
- Statement of Police officer - Sergeant Jimmy Alick (Exhibit P1);
  - Statement of Police Officer Fabien Maoung, arresting officer (Exhibit P2);
  - Statement of Peter Takaney, working mate of Defendant Nakou (Exhibit P3);
  - Report of interview by Police officer – Athim Rantes (Exhibit P4);
  - Photographs to crime scenes and sketches taken by police officer Sandy Terry (Exhibit P5).
10. The complainant is the first prosecution witness (PW1). She is from Tanna Island. She was 14 years of age at the time of offence. Her date of birth is 29 May 2002. She attended class 6 at Pango French School. She was 15 years of age when she gave evidence at the trial. Her father's name is Joel Busai and her mother is Joel Martha. She has one brother and three (3) sisters. She said she came to Court to witness the rape case against her by Defendant Nakou Sam. She pointed to the Defendant Nakou Sam. She knows Defendant Nakou. Defendant Nakou lives with the complainant and her families at Number Three area in the same yard. Defendant Nakou married with the complainant's sister. Nakou is the complainant's brother in law.
11. She explained that the Defendant Nakou started to talk to her in 2013 with her sister. Defendant Nakou made or showed her and her other sister signs by showing his tongue to her. Sometimes the sign were accompanied by some actions bending his hands or making gestures of in and out with his fingers. She felt bad about what Defendant Nakou did to her she said the tongue, the signs and the actions meant rubbish thoughts to her. Mostly when Defendant Nakou made those gestures or signs and actions, she was with her sister. Sometimes they answered him by swearing at him. Sometimes they answered back to him and he answered back to them.
12. On 22<sup>nd</sup> May 2017, it was during night time, she was with Lissy at Petanque playground which is near Number 3 station area. She was carrying a baby at that time. At that time, there was a small dark corner and that was the place Defendant Nakou was at that time. At that time. Lissy wanted to go on



Facebook. They tried to get enough credit to allow Lissy to go on Facebook. They walked passed Defendant Nakou who said *"here is some vatu for credit."* She said they walked passed him and ignored him. They walked from the Petanque playground back to the house of Lissy to leave the baby. Lissy told her to go and see a sister of her to get money for credit. When Lissy went to get money for the credit, she returned back to her house and has some water. She then returned to Lissy's house to check if Lissy was back there. She did not see Lissy. She thought Lissy went to the shop to purchase credit. She went to the shop. She passed the Petanque playground, there was nobody there. She walked to the end of Au Bon Marche and looked toward the fuel station. When she walked back she was surprised that a man held her by her belly and hand, he blocked her mouth and lifted her up and walked and looked and went across the road to the other side. She saw the face of that man, she recognised him. It was Defendant Nakou Sam. He took her to the other side of the road, walked to a space toward a truck of a Christmas tree but there was a fence – it was broken at that place. Defendant Nakou tried to push her or to have her getting through the hole in the fence. She refused to go through the hole in the fence. She was afraid. She was so frighten, she passed underneath the wire of the fence. Then she said Defendant Nakou forced her to remove her trousers. He lifted his hand to slap or assault her. He removed her trousers and he removed also her panty. He took off his own trousers. He made her bend herself when he inserted his penis inside her vagina (*"place blo pispis blo mi"*). She cried when he was inside her and went in and out. She felt very painful inside her vagina. He also held her breasts and held her tightly and then he released the pressure on her. She could remove herself from him, dressed back and tried to run away through the hole in the fence. He called her and asked her to check on his wife, he will kill her. She went and saw Defendant's wife was working at the fuel station. When she came to mention to him that his wife was working at the station, she saw the Defendant followed the road toward her. She mentioned to him that his wife was working in the station and she walked passed, she went back to the place the Defendant had sex with her. She felt her body was painful. She came back on the road and sat waiting for a bus. A bus arrived and took her to her house.

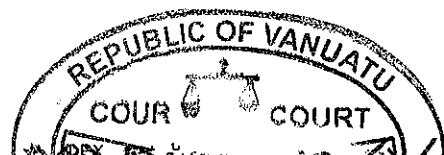


13. At some stage, after the sexual intercourse, after she returned home, she met with Nicole and Jerry. They saw her and asked her of what happened to her, she told them of what Defendant Nakou did to her that night after they insisted based on some factual situations. They assisted to tell her father of what Defendant did to her that night. She then went back to the toilet. She felt she was wet. She could see some white liquid underneath or inside her coming out. She came outside her house and she could feel her head was spinning. Her father told her mother of what happened to her that night and her mother took her to the hospital.
14. She estimated the distance of the place the incident took place. She said from the Court room to the chinses store, LCC store, after the Tropical Market nut just before the Saralana area.
15. She was cross-examined. She was asked how many times she had sex with Defendant Nakou Sam. She answered no. It was the first time for her. On 22<sup>nd</sup> May 2017, she saw Defendant Nakou Sam at the Petanque playground. It was about 8.00pm o'clock in the night. Nakou did not talk to her or Lissy on the phone. Nakou did not give them money for credit card. She went looking for Lissy at her house and at the Petanque playground. She was not there. There was nobody at the Petanque playground. At that night, her mother sent her to go to the store. She went to the store and Defendant Nakou was behind her. He told her that he found a place. She did not answer him. He followed her on the road and called her. He called her and told her to go and see a cousin brother of her – Yoyo. She went to see Yoyo but she did not tell Yoyo that Nakou told her he found a place. She went to Petanque playground. When she returned to their house, she did not mention to her mother that Defendant Nakou told her he found a place. At the time, there were people at the fuel station. There were cars on the road.
16. It was put to her again that it was not the first time that Nakou had sex with her. She answered she never had sex with Defendant before. It was the first time she had sex and she saw her menstrual period. It was suggested to her she had sex with Defendant Nakou Sam before at the white road to Le Flamingo and on another place. She denied she did not have sex with him. The first time she had sex with him and she told what he did to her. She denied the sex on



22<sup>nd</sup> May 2017 was planned action. She denied she carried out her cloth herself. She accepted that told Jerry Mafe and another that Defendant Nakou had sex with her. He forced her to have sexual intercourse. At that time, she was 14 years of age and she did not have a boyfriend yet.

17. Nicole Joe is the second prosecution witness (PW2). He is from Tanna Island. He is married and has a son. On 22<sup>nd</sup> May 2017, he was at the fuel station at Number Three. He was at the station with Alick and other who worked at the station. Alick showed him the complainant who was walking and was watching toward them. The complainant was the daughter of his uncle (Joel Busai). He said they tried to find out who was her boyfriend. The complainant came watched and run down the road. When they decided to find out more, they saw Defendant Nakou following the road upwards. The complainant run down the road and she never came back to them at the station. Later on, he saw the complainant at the store near the station. She was bathing before she came. He and Jerry went and met her and asked her of what happened to her. They asked her why she run down the road and she never came back. They saw again she went back home. He specified that they asked the complainant why she was standing at the fence and watched back into the fuel station. The complainant told them that she was watching Defendant Nakou's wife if she was at the station. They went on questioning her and she started crying and found difficult to mention the name of the Defendant Nakou. She finally told them that Nakou fastened her hand with a white piece of calico, took her to the other side and have sex with her. He did not see any injury. After the complainant told them of what Defendant Nakou did to her, they helped the complainant to tell her father of what Defendant Nakou did to her that night.
18. He was cross-examined. The station was closed at 10.00pm. Between 7-9.00pm he was at Punjas on the other side of the station. He was questioned he made a statement to the police. He mentioned of what he and the other saw but he did no mention in his statement of what the complainant told her that night. He had just mentioned it in Court. He was small and lived at and lived at Number Three since. He gave evidence of his observation. Between 6-7.00pm there were fewer buses or cars on the road. The complainant told them Defendant Nakou forced her for sexual intercourse. She mentioned he fastened her with a piece of white calico, under re-examination, he clarified that between



9-10.00pm there were no longer any man on the road. There were fewer cars or buses on the road.

19. Joel Busai is the third prosecution witness (PW3). He has five (5) children with his wife (Martha Joel). The complainant is their last child. On 22<sup>nd</sup> May 2017, he was drinking kava in the nakamal. On his way back home, he was Nicole, and Jerry talking to his daughter (complainant) at the station. He thought things were alright. He passed them and went home. Once at home, the complainant came with Jerry and Nicole and she informed him of what Defendant Nakou did to her that night.
20. That is the end of the prosecution case and evidence.

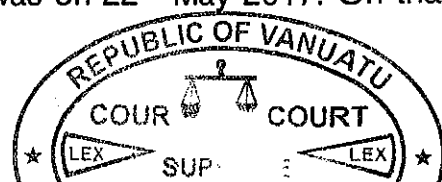
### III. Defence case and evidence

#### A. Defence case

21. Defendant Nakou resides at Number Three (3) area. He works at Punjas Company Limited. On 22<sup>nd</sup> May 2017, Defendant Nakou has sexual intercourse with the complainant. The complainant lives also in the same yard at Number Three (3) area. On 22<sup>nd</sup> May 2017, Defendant Nakou met with the complainant and they planned to meet in a yard near the Chinese Embassy at Number three (3). It was an empty yard. Defendant Nakou went and waited for the complainant in that yard. The complainant did not come. Defendant came back home and met the complainant near the gate of the house. The complainant asked the Defendant to go back to the same place and waited for her. Defendant Nakou went back to the same place waited for the complainant. She came to that the place. She removed her clothes and the Defendant too removed his clothes and they both have sexual intercourse.

#### B. Defence evidence

22. Defendant gave evidence on his own behalf. Defendant Nakou Sam said he is 30 years of age. He lives at Number Three (3) area since 2006. He works at Punjas. He knows the complainant. He is married to the complainant's sister.
23. He had sexual intercourse with the complainant before 22<sup>nd</sup> May 2017. He had sex with the complainant 3 times before:- at the road to Le Flamingo in 2016; on the road to Digicel tower in 2016 and 3<sup>rd</sup> time was on 22<sup>nd</sup> May 2017. On that

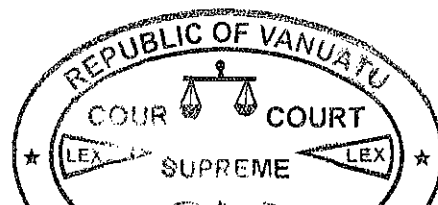


date, he finished work at 5.00pm and came at Petanque playground. At 6.00pm he met the complainant but she was with Lissy. He said he talked to the complainant and asked to have sexual intercourse with her. What her response was? He answered: "*Hemi talem lo mi se bae hemi faenem 1 place blo mitufala igo lo hem.*" (She said she would find a place for us to go). She mentioned the name of that empty space. He said he waited for her until 8.30pm but she did not come. He went back home and met her at the gate of the house. She called him and told him to go back to that empty space and she would be there. He said he went back and waits for her at the same place. He waited for her and she came. They went through the hole in the fence. They went to a coconut trunk. She removed her clothes and he also removed his clothes. They had sexual intercourse. He told her to sit on top of him. After the sex, he followed her on the road. She said she was afraid of the boys working at the station (Nicole, Jerry and Alick). She saw them, she was afraid and she came back behind. She decided to go and take a bus. He followed the road ahead. He met her again at about 10.00pm o'clock when the station was closed down. Police arrested him on 22<sup>nd</sup> May 2017. He was also interviewed.

24. Defendant Nakou Sam was cross-examined. He confirmed that on 22<sup>nd</sup> May 2017, he was at Petanque playground area at 8.00pm o'clock. The complainant was with Lissy. He denied he held the complainant's body and blocked her mouth. He said he had sex with the complainant before 22<sup>nd</sup> May 2017. He denied the complainant cried at the time of sexual intercourse. He denied he forced her to go through the hole in the fence. He denied he told her to check at his wife at the station. After sex, he went back home. Changed and came back to the station.

#### IV. Facts findings: Discussion

25. On the evidence, it is not disputed that on 22<sup>nd</sup> May 2017, Defendant Nakou Sam had sexual intercourse with the complainant. The Defendant admitted that he had sexual intercourse with the complainant. That element of the offence has been proved on the criminal standard of proof of beyond reasonable doubt.
26. The second element is that the complainant gave evidence that she did not consent to have sexual intercourse with the Defendant on 22<sup>nd</sup> May 2017.





27. Below is a rationale for the complainant to say she did not consent for sexual intercourse with Defendant Nakou on the night of 22<sup>nd</sup> May 2017:-

She was looking for Lissy, she thought Lissy had money for credit and she might be in the shop to purchase the credit card. She went to check. She came to Petanque playground. There was no man there. She walked to the end of Au Bon Marche and looked over to the station. It was when she walked back she was surprised a man held her on her stomach and another hand held her mouth and blocked it and at the same time lifted her up, walked to the road, looked toward the station, carried her across the road, walked to the trunk of a Christmas tree. There was this hole in the fence. He was trying to push her inside the broken fence. She refused to go there. He insisted until she was afraid of him. She went underneath the wire. He removed her clothes and have sex with her in a doggy position.

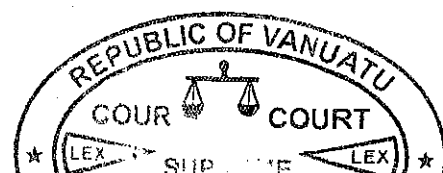
On the facts, he has shown motives for this. He started by making or using his tongue in specific ways towards the complainant and Lissy. The Defendant then used his hands by making gestures or signs suggesting to the complainant "rubbish thoughts" making his hands in and out. The Defendant by these figures, signs and his tongue, make suggestions to the complainant of sexual nature thoughts. The complainant said she could not understand as she respected him. He marries her sister.

In this case, the defendant was the one who wanted sex, he asked for sex, the complainant is to find a place. Defendant said the complainant sat on him. It was not disputed that the wife of the Defendant was working at the station. She was forced to check on the wife of the Defendant in the station.

There is evidence that the complainant did not consent to have sexual intercourse with the Defendant on 22<sup>nd</sup> May 2017. There is also evidence by the Defendant that sex was consensual.

The third element is whether or not the Defendant could not have a rational belief that the complainant consented to have sexual intercourse with the Defendant on 22<sup>nd</sup> May 2017.

The Defendant lives in the same yard with the complainant since 2006. Since 2013, he started to talk to the complainant and Lessy about rubbish thoughts.



He used his tongue (*Defendant istap kaikai tongue blo hem*). He used his hands. He places his hands and showed it to the complainant and Lissy figures and signs "in and out" suggesting sexual nature by his actions.

The Defendant's versions were also contained in the interview to the police. It was not something he had just made up in the Court. Further, the oral testimony of Nicole Joe is not going to assist the prosecution case. It is not corroboration. The complainant did not come voluntarily to provide information of what she alleged the Defendant did to her. After the sex with the Defendant, she went home, have shower and instead of complaining, she came and joined the Defendant and others at the station as if nothing happened to her. It may be said on the evidence of the Defendant that the complainant and the Defendant have relationship and this raises an inference they had an intimate relationship that the sexual intercourse between them may have been consensual on 22<sup>nd</sup> May 2017. That possibility exists on the evidence. It is a reasonable doubt. The prosecution failed to prove the second and third elements of the offence beyond a reasonable doubt. It is noted that in such circumstances a charge under section 97(2) of the Penal Code was not laid as an alternative charge based on the age of the complainant.

**Verdict:**

- Not guilty on count 1 of sexual intercourse without consent, contrary to section 90 and 91 of the Penal Code.
- Not guilty on count 2 of abduction, contrary to section 92 A of the Penal Code.

**Dated at Port Vila, this 23<sup>rd</sup> October 2018.**

**By the Court**



Vincent Lunabek  
Chief Justice

