

PUBLIC PROSECUTOR VS- STEPHEN KALO

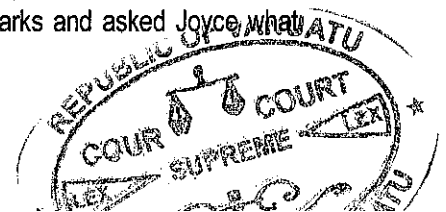
Coram: *Mr. Justice Oliver A. Saksak*

Counsel: *Philp Toaliu for Public Prosecutor
Marisan P Vire for Defendant*

Date of Trial and Ruling : 10th December 2019

RULING ON NO CASE SUBMISSIONS

1. The accused pleaded not guilty to one charge of domestic violence contrary to sections 4 (1) and 10(1) of the Family Protection Act No. 28 of 2008 and to one other charge of unintentional harm contrary to section 108 (a) of the Penal Code Act [CAP 135] on 9th December 2019.
2. Trial Hearing began today at 2:00pm. The Court read and explained section 81 of the Criminal Procedure Code Act which provides for the accused's right of presumption of innocence.
3. Mr Toaliu then made a brief opening address stating the charges, the allegation of assault by the accused on his defacto partner and complainant, Joyce Tari and her baby boy David with a belt buckle, the injuries sustained as result, the date and place the incidents alleged occurred, the burden of proof resting on the prosecution under sections 23 of the Family Protection Act and section 8 of the Penal Code Act, and the number of witnesses the prosecution would adduce evidence from in support of the charges.
4. Prosecutions then called 5 witnesses in the following Order-
 - a) Florida Lessa having been sworn on oath said in her evidence in chief that she is from Ambrym living at Show Ground with her parents at the rented property of Willie Samuel. She was at home on 20th October 2019 when the incident happened with her mother. Abu Stephen (Magistrate) and his family also live on the same property on the third room or apartment at the end. She and her mother heard Joyce Tari and her baby cry out on the other side and ran outside. Her mother carried the baby off while Joyce went back into their room to take their clothes out. They saw a scar on the baby's body. When Joyce came out to the laundry facing their house Abu Stephen came behind her and Joyce told him she would go to report him to the police. Stephen did not say anything. Her mother saw belt marks and asked Joyce what



happened. She heard Joyce told mum that Stephen had hit her with a strap (belt). She saw marks on her right forearm. On baby David she saw a mark on his leg and a scratch which is quite big. She was shown a photograph which she identified and confirmed as the scar on baby David's right knee. The photograph was marked P1 for identification by its maker. After speaking with Joyce, she carried her baby and they went through the gate and left. She said Stephen was wearing a white t-shirt and a green sports wear. She said the time was between 3-4:00pm.

Florida Lessa was cross-examined by Mrs Vire.

- b) Helena Lessa took her oath and said she is from Ambrym, of 41 year old. She is a teacher at Kamewa school living at Show Ground at Willie Samuel's rent house, confirming 3 people renting there. There are her family, Naviti's family and Stephen Kalo (accused). On 20th October 2019 she was at home. After lunch on Sunday afternoon she heard Joyce and David cry out aloud. The distance is about 8-10 meters away. She thought it was a normal cry. She said Florida Lessa went out first to the laundry area and saw Joyce and David come out. She explained that the cry she heard was not normal because it was not the first time she heard Joyce cry. Then Florida returned to call her. She then went out and saw Lati who lives with Joyce and asked her what was wrong but she said nothing to her. Joyce heard her and came forward carrying her baby to her. She asked her what was wrong. Joyce then told her Stephen Kalo hit her and got their baby on the knee causing him to bleed below his knee, the right knee. She was shown the photograph and confirmed it was the injury she saw at the time. She confirmed seeing strap (belt) marks on Joyce's hand on her right forearm. She saw bleeding. She told Florida to bring a bandage and she bandaged the baby's wound. The baby did not have any clothes on. She took the baby to their room to dress him up. Joyce returned from their house and took the baby and they together with Lati left the yard. She saw Stephen come and stood by the laundry and went back inside. He did not say anything. They did not say anything to him either. Only Joyce told him she would go and report Stephen Kalo to the police. She was cross-examined by Mrs Vire.
- c) Dr Michel Raymond took his oath and said it was he who examined Joyce and David at 9:00pm in the night of 20 October 2019. It had been a busy day from him. Joyce and the baby had attended on him earlier but he told them to return at 9:00pm. They did and he examined them. The injury was caused by blunt trauma. He was shown two documents which he identified and confirmed as the medical reports he issued after examining Joyce and David. These were tendered into evidence as exhibits P2A and P2B. For Joyce Dr Raymond confirmed and explained the medical terms used in the report. There was redness, colour change on the skin, sign of inflammation on the anterior forearm not swollen, or painful just



colour change making a difference. This means something had happened. On David's report he saw abrasion below the right knee with a partial skin loss meaning top layer of the skin not present. It was tender with some red skin around it.

He was cross-examined by Mrs Vire.

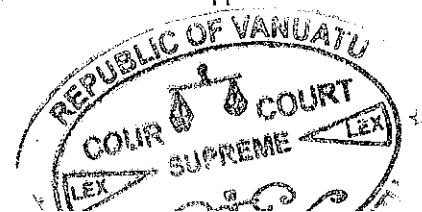
- d) Hannaline Ilo took her oath and said she was at her home at the Santo East Area on 20 October 2019. Her children told her there was a woman waiting to see her. She came out and saw Joyce and child David. She approached them at the gate. She never came home. Joyce was crying at this time. She then took a photograph of the injury to the baby's knee. She was shown this photograph which she identified and confirmed. It was tendered as exhibit P1. She saw blood on the leg. She felt sorry for this nice baby. Joyce calls her "mum" so she took the photo out of interest. She saw Joyce crying and suspected something had happened. She asked Joyce and Joyce told her and she said David 's Father (Stephen) had assaulted them. She asked her for details. Joyce went to her for assistance, she wanted to go and see the police as the accused had done this to her many times. So she took them and dropped them off at the police station and returned home.

Mrs Vire cross-examined Mrs Ilo about whether she made any statement to the police with the photograph and she said she did not. On that basis Mrs Vire objected to the tender of the photograph. I accepted the submission and disallowed the photograph and removed it as an exhibit despite its lateness and having heard responses from Mr Toaliu.

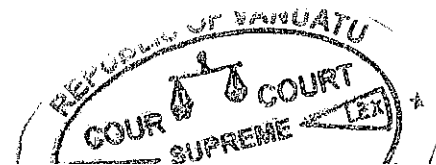
- e) Joyce Tari took her oath and then told the Court she did not wish to testify and asked that the case be stopped.

Court Ruling

5. The Court accepted her wishes and she did not testify against the accused. But the Court declined to stop the case at this stage when evidence had been received by four witnesses and the public interest of the case warranted that the trial must proceed to the end. When the complaint was made by the complainant out of her own choice and police investigated, took statements and laid charges, PI held and case was committed to the Supreme Court, pleas entered and trial having commenced with 4 prosecution witnesses giving evidence, it was no longer the complainant's individual case and interest to tell the Court to stop the case at this point. The case is now the matter for the State and it is in the public interest the trial must continue. And it is only the State through the Public Prosecutor who can make the decision not to continue with the prosecution by using section 29 of the Criminal Procedure Code Act. This is not the case. So the second part of Joyce Tari's request that the case be stopped is declined.



6. It is true that section 134 (1) of the Criminal Procedure Code Act provides for where a not guilty plea is entered the Court shall proceed to hear the complainant and other witnesses for the prosecution. That is the usual procedure where the complainant decides to give evidence.
7. But in this case the complainant was called last and all she said was she declined to give evidence. Whether she made up her mind in the first place before going into the witness box is not known. Technically when she took the witness box last, she did so as a witness and not as the complainant. In a legal technical sense, she was the complainant on 20 October 2019 when she made the complaint to the police. That was her own decision and choice. The complaint was received and investigated by the police. Once the police completed investigation and charges were laid and the case committed at PI, the State now through the Public Prosecutor is in the legal sense the complainant, and has charge and control of the case. And only the State through the Public Prosecutor has the authority to halt the case at any time thereafter by using section 29 of the Criminal Procedure Code Act. As such any prosecution witness could be called to give their evidence first where such a circumstances as here arises. And this Court in its criminal jurisdiction has a duty under the Constitution to hear this case to completion even though Joyce Tari has indicated to the Court her desire to stop the Proceeding. See DPP.v. Glass [1984] SILR 28.
8. Prosecution then rested its case. And Mrs Vire indicates she would make a no case submission. Counsel asked for an adjournment to Wednesday 11 December which I refused. I then heard oral submissions first from Mrs Vire.
9. First Mrs Vire submitted that for the offence of domestic violence the burden of proof should not be on the balance of probabilities as per section 23 of the Family Protection Act but it should be the Criminal standard proof beyond reasonable doubt.
10. As for unintentional harm it was for the complainant to given evidence first before the other witnesses to give evidence corroborating her evidence. This did not occur in this case. The complaint was called last but she declined to testify. None of the first four witnesses saw the strap (belt) allegedly used by the accused. Mrs Vire submitted that without corroboration the whole of the prosecution case collapsed and there was no case for the defendant to answer.
11. Mr Toaliu responded that although the complainant gave no evidence, the medical reports produced by Dr Michel Raymond were sufficient evidence that the offences charged occurred and injuries were sustained by the complainant and David, her baby. In addition the evidence of Senior Magistrate Hannaline Ilo confirmed recent complaints by the complainant that she was injured on the right forearm and baby David on the right knee. Further the evidence of Florida and Helena Lessa about the cries




they heard and the injuries they saw immediately after the incident is sufficient to show there is a case to answer by the accused.

12. I accepted Mr Toaliu's submissions. Clearly prosecutions had produced sufficient evidence establishing a prima facie case against the accused requiring him to put up a defence. The evidence of Florida is corroborated by the evidence of Helena Lessa. Their evidence showing injuries were corroborated by the evidence off Mrs Ilo showing injuries on the persons of Joyce Tari and baby David. And the evidence of Dr Raymond corroborates all the evidence of Florida, Helena and Mrs Ilo. Therefore there is overwhelming evidence showing there is a case to answer by the accused and it did not matter that Joyce Tari the victim and complainant did not want to testify and give evidence.
13. Accordingly based on those findings and conclusion, the no case submission is declined and is dismissed. The accused is required to put up a defence and answer the allegations as charged.
14. Section 88 of the Criminal Procedure Code Act is read and explained to the accused.
15. The trial is adjourned to 2:00pm on Wednesday 11 December 2019. Bail is extended on the same conditions.

DATED at Port Vila this 10th day of December 2019

BY THE COURT


OLIVER A. SAKSAK
Judge

