IN THE SUPREME COURT OF
THE REPUBLIC OF VANUATU Criminal Case No. 17 of 2006

(Criminal Jurisdiction)

PUBLIC PROSECUTOR

VS.

CLAUDE ATUARY

Mr Justice Oliver A. Saksak
Mrs Anita Vinabit – Clerk

Mr Allain F. Obed for the Public Prosecutor
Mr Jacob Kausiama for the Defendant

18th August 2006, Lakatoro, Malekula

JUDGMENT

The defendant pleaded not-guilty to two charges in Santo on 28th June 2006. The first was rape contrary to section 91 of the Penal Code Act Cap 135 (the Act). The second was indecent act in a public place contrary to section 94 of the Act. Rape carries a maximum of life imprisonment. Indecent act in a public place carries a maximum imprisonment of two years. The matter was transferred to Lakatoro for trial.

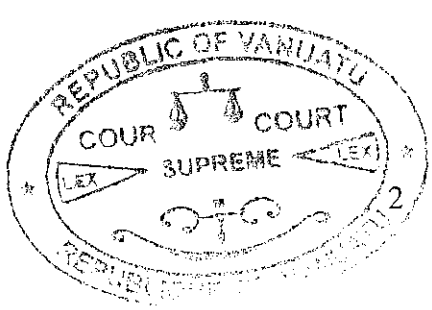
It was alleged by the prosecutrix that in August 2005 at Erakor Village, Efate the defendant had forced her to have sexual intercourse against her will and consent. Secondly it was alleged that on or about 8th May 2006 at Atchin, Malekula the defendant had

exposed his private part to the prosecutrix and her sister in a public place.

The prosecution had the burden of proof. The standard required by law is proof beyond reasonable doubt. Section 81 of the Criminal Procedure Code Act Cap 136 was read and explained to the defendant prior to the prosecutions opening their case.

The defendant did not deny that sexual intercourse took place between him and the complainant who is her niece or in customary relation, his daughter. He denied using any form of threats or force and claimed all sexual activities had were consensual and sometimes at the complainant's request or advances. As regards the second charge he had no real defence and freely conceded in his examination-in-chief and in cross-examination that he had acted indecently in an area accessible to the public, and was seen by the complainant and her little sister.

The prosecution had therefore to prove beyond reasonable doubt that the defendant had obtained consent by threats or fear of bodily harm. They called three witnesses. Sargeant David Bong who interviewed the defendant on 16th May 2006. As regards rape, he admitted having sexual intercourse but denied all the other allegations and indicated that he would explain it all in Court at trial. As regards the indecency charge he admitted the allegation as true.



Moise Atuary, the complainant's father gave evidence that it was he who reported these matters to the police at Lakatoro on 10th May 2006. He said both the defendant and the complainant had returned to Atchin in December 2005. He said the complainant had told him about the defendant's behaviour at Erakor in August. He said he would like to see some evidence before he reported the matter. Then he said he noticed some behaviour and advances made by the defendant towards his daughter had told him were true. It was not until 8th May 2006 when his daughter and her sister ran to tell him about seeing the defendant indecently exposing himself to them. The matter was brought to the village chief's who held a meeting. The defendant was fined VT10.000 and he killed a pig as a reconciliatory ceremony to restore peace between them as a family. The complainant, Claudine Atuary (C.A) a 19 years old girl was 18 at the time of the alleged incidents at Erakor gave oral evidence. C.A said the defendant, Claude Atuary had had sexual intercourse with her 6 times. But she only disclosed three occasions in which she was forced or threatened by the defendant. As to the first occasion she was alone in the house whilst her mum and the children went to church. The defendant asked her to follow him. He asked her for sex and she refused him. He had a knife. He forced her to go with him or he would used the knife and cut her. Then she went in with him. He removed her clothes and made her lie down. She had her eyes closed in fear. He penetrated her and she felt sore. Then he left.

On the second occasion when her mum and the children had gone to church the defendant went to their house and again asked her for

sex. Again she refused him but he opened the door, entered the house and forced her to go outside with him. She did not want to go but the defendant insisted and she went along and they had sexual intercourse.

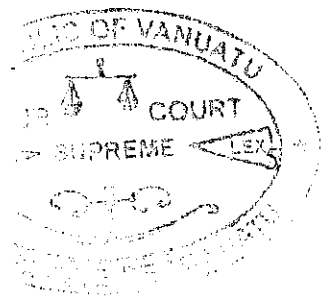
Then in December 2005 C.A left Erakor to return to Atchin. At one time she and her sister Elois want to fetch some water. They saw the defendant who had removed his trousers and was standing naked exposing himself to them. He ran away and they reported the incident to their father. A village meeting was held and the defendant was fined VT10.000. He killed a pig to reconcile with families and relatives.

In cross-examination she said that sex took place 6 times. She said she did cry out and no one could hear her as they had gone a long way to a cave. She said the knife she referred to had a heavy handle and that it was white. She said sex took place each time her mum and the children would leave the house and go to church. She said the defendant had stopped her not to call out. She agreed sex took place two times in the house and that at other times it happened in the bushes when mum and the other children were at home. She insisted she did not agree to have sex with the defendant. She conceded it was her father who made her lodge a report with the police and agreed it was not her intention to do so. She said she had known the defendant for 7 years. She said she did not go to hospital for a medical check and report after the instances of sexual intercourse. It was put to her by Mr Kausiama that the only reason

she did not go to hospital in Vila was because she had agreed to have sex with the defendant and that it was okay for her. CA answered in the affirmative.

In re-examination she clarified that her answer was in fact in the negative as she did not understand Mr Kausiama's question. When asked again about the knife she said the handle was black. She accepted sex had taken place between them 6 times and that he had forced her each time.

The defendant gave evidence in his defence after the Court had indicated that a prima facie case had been established and the Court needed to hear him. Section 88 of the CPC Act was applied and the defendant testified. He said sex had taken place between them 8 times and that on all occasions sex was consensual. He said on the first occasion it was C.A who approached him and told him to go and meet her at their house as her mum and the children would be going to church. He said he went along and did not have the knife alleged that he had. He said she accepted him. They kissed and then she removed her own clothes and laid down. Sex then took place. It was during the day and some men were playing outside the house. The other time he threw coral at her to wake her up. He told her they would meet only at night at the Lagoon. As regards the incident at Atchin the defendant conceded that he had removed his trousers. He said there was a plan that she would go and meet him for some sexual activities. He thought she would go alone. He was shocked



when C.A's sister also went along and both saw him and he ran away.

In cross-examination he agreed that he had paid a fine of VT10.000 and a pig to reconcile with families. He agreed he remained silent in the meeting because he was afraid of being assaulted by his relatives. He simply followed orders. He maintained he did not force CA in any way. He maintained that he did not remove her clothes but it was CA who did it willingly. He maintained he did not have a knife as alleged.

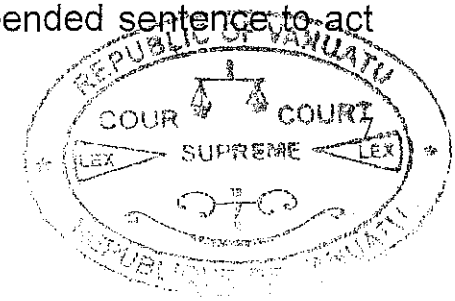
Section 90 of the Act defines rape and the elements that ought to be proven. These are:-
(a) sexual intercourse (b) without consent or (c) if consent but such consent obtained by force, threats or intimidation (d) penetration.
Sexual intercourse and penetration are not in issue. Consent and the use of threats, force or intimidation are.

Applying the law to the facts as shown in the evidence, the Court includes that the evidence of Sargeant David Bong and Moise Atuary had no assistance to the prosecution's case as to the issues of consent or force. The only remaining evidence is that of the complainant. It is her evidence against that of the defendant. Her evidence needed to be corroborated. But there was no such corroboration. I accept the submission by Mr Kausiama that there was need for corroboration of the complainant's evidence. I watched C.A's demeanour in the witness box. She was shy to the point of

being uncooperative. Her evidence was shattered in cross-examination. Her evidence was distorted and inconsistent. I came to the conclusion that she was not being honest as to her allegations of threats and the use of force. Her description of the colour of the knife was inconsistent. Her demeanour and the inconsistencies in her evidence cast doubt on my mind as trier of fact. And as long as that doubt exist, as a trier of law, the defendant is entitled to the benefit of that doubt. The defendant on the other hand was firm all along from the investigative stages through to plea and trial. He has maintained that no force or threats were used to obtain consent. His testimony is consistent so that the Court believes him to be an honest witness. He has conceded the second charge although he did plead not-guilty to it on his arraignment. But he was exercising his right to which he is legally entitled.

For the above reasons, analysis and findings, I return a verdict of not-guilty against Claude Atuary on the charge of rape. Accordingly I discharge him of that charge. However as regards the charge of indecent act, I return a verdict of guilty.

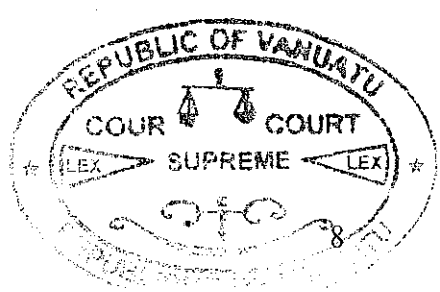
I now consider sentence in the light of the mitigating factors put forward on his behalf by Mr Kausiama. He is a young man of 22 years. A first offender with no previous criminal record. He has been fined in a village court in the sum of VT10.000 and had killed a pig to reconcile with his family, a sign of contrition and remorse. He has apologized to the Court for his actions. In the light of these factors Mr Kausiama urged the Court to consider a suspended sentence to act



as a deterrence to the defendant and to others. Mr Obed submitted that this was a case calling for a custodial sentence though he submitted a second preference to be a suspended sentence of 1 year for a period of two years.

I accept Mr Kausiama's submission for a suspended sentence. And I accept Mr Obed's submission for a period of 1 year suspended for 2 years. The maximum sentence for indecent act is 2 years imprisonment. Whilst 1 year imprisonment may be on the high side, the defendant must be made to understand that he cannot continue to behave in the way he had done towards C.A because she is his close relative. He has got to understand that this behaviour is unacceptable and cannot be tolerated. And the only way he can be made to understand that is to impose a custodial sentence and have it suspended to give him a chance to reflect and adjust. This punishment will also act as a deterrence to him and others.

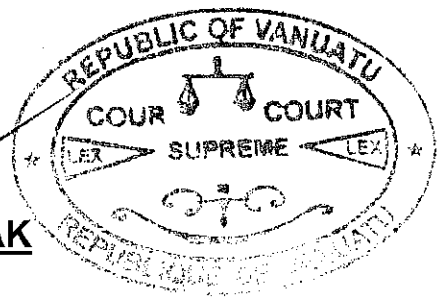
It cannot go without mention that girls or women who wish to complain against men or boys for rape or other sexual offences must act in "haste" and in the "heat or spur of the moment." If they are to be believed, they should report matters instantly and get medical reports. They should not wait days, weeks, months or even years. And they should not wait for their mums or dads to learn about it and do the reporting for them as it was in and with this case.



I now sentence you Claude Atuary to a term of imprisonment of 1 year (12 months) but suspending it for a period of 2 years on good behaviour from the date of this judgment.

DATED at Lakatoro this 18th day of August 2006.

BY THE COURT



OLIVER A. SAKSAK

Judge