

CF

PUBLIC PROSECUTOR -v- LAU NUARAU

Coram: Chief Justice, Vincent Lunabek

Counsel: Mr Leon Malantugun for Public Prosecutor
Mr Henzler Vira for the Defendant

Date of hearing: 25-26 February 2010

Date of verdict: 26 February 2010 (Oral)

Date of written reasons for verdict: 31 March 2010

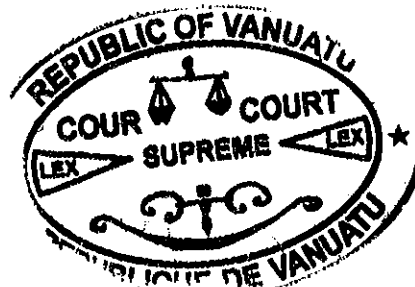
JUDGMENT ON VERDICT

This is the verdict in this case. The Defendant, Lau Nuarau was charged with one count of sexual intercourse without consent, contrary to sections 90 and 91 of the Penal Code Act [CAP.135]. On 25 February 2010, the Defendant, pleaded not guilty to the charge.

Section 81 of the Criminal Procedure Code Act [CAP.136] was read and explained to the Defendant. The Defendant understood his rights thereunder. The trial progressed on that basis.

The prosecution case is that on 18 December 2007 at night, the Defendant had sexual intercourse with the complainant woman without her consent. The prosecution provides the following brief of facts at the opening of the prosecution case:

The accused was the cousin brother of the complainant's husband and both of them are from Iapkapen Village at Port Resolution Tanna Island. The complainant's husband was in prison in Vila during the alleged incident.



1

On the 18th December 2007 at night in the village of Iapkapen Port Resolution Tanna, the complainant took her 2 years old baby to a custom ceremony in regards to the shaving of the beard of a young man.

Gifts were offered to that young man at that time and a musician group from the John Frum were entertaining the participants.

The complainant then decided to go and watch the musical band that was performing. And so she asked the accused if she could have her baby slept at the accused's house so that she could attend to the music performance. The accused agreed and the complainant put her 2 years old child slept in the Defendant's house and she attended the music group performance.

While watching the group performing, the complainant also kept on checking her baby who was sleeping at the house of the accused in case he might woke up. So, she checked her baby two times and the third time she again went with a girl but the girl left the house first before the incident could occurred.

While coming out from the house, the complainant was surprised about the accused who confronted her in front of the door. Then there were conversations between the two in the following manner:

- Complainant asked: "Who ia?"
- Accused answered: "Mi ia Lao?"
- Complainant asked: "Olsem wanem?"
- Accused answered: "You karem out ol clos blong you."
- Complainant asked: "Wanem fashion ia Lao? You wetem Noah I brata nomo?"
- Accused answered: "Hemia blong tedei nomo."

During the discussion, the complainant used her torch light, shined the accused and recognised that it was in fact the accused because he was just standing close to her. The complainant also recognised him by his voice while talking to him and also by the fact that he was wearing army trousers. The complainant also



understood that it was in fact the accused because earlier that night, the accused had sent Sylvie Willie to go and to tell her that he wanted to see her.

The accused then turned off the hurricane light, closed the door and it was dark inside the house. The accused got hold of the T-shirt of the complainant from her neck and pulled it behind while he was also squizzing strongly her neck which prevented her from calling out for help.

The complainant was struggling to call out for help but without success as the accused squizzed her neck strongly, continued to push the complainant down and continued to punch from her back with his elbow.

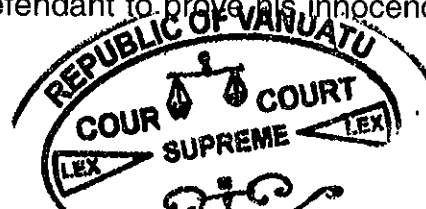
While the accused has finished his sexual activities, complainant was crying and got dressed up again while the accused was trying to make his way out. And at that same time, Selina Kopiken and Sylvie Willie came into the scene because they heard the complainant who was crying and they wanted to go and help her with her baby.

They were running towards the accused house and from two (2) or three (3) metres from his door, Selina Kopiken used her torch light, shined the door of the accused and they both saw very clearly the accused (Lao Nuarau) who was running out of the door and went directly to the bush. They recognised the accused because he was wearing army trousers, took off his T-shirt and fastened around his head.

When the complainant came out from the house, the accused already gone and she met Selina Kopiken and Sylvie Willie on the door and related them the story.

The complainant thereafter reported the matter to the police and the accused denied the allegations put against him when he was interviewed and cautioned by the police.

This is a criminal trial. The law is for the prosecution to prove each and all essential elements of the offence charged against the Defendant beyond reasonable doubt. It is not the task of the Defendant to prove his innocence. If at



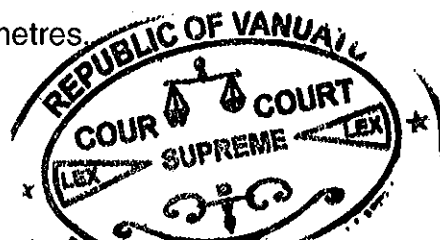
the end of the trial, there is a reasonable doubt as to the guilt of the accused on the charge laid against him, I must interpret that doubt in favour of the accused and acquit him from the charge. But if I believe the prosecution witness and satisfied beyond reasonable doubt of the guilt of the Defendant, I must convict the Defendant and find him guilty of the offence charged against him.

Before I convict the Defendant, Lau Nuarau, I must be satisfied beyond reasonable doubt that the prosecution has proved on the above standard the following elements of sexual intercourse without consent, contrary to section 90 of the Penal Code Act [CAP.135]:

1. The Defendant committed an act of sexual intercourse with the complainant woman on the night of 18 December 2007 at the Defendant's house at Iapkapen village, Port-Resolution, Tanna Island.
2. The complainant woman did not consent to have sexual intercourse with the Defendant on 28 December 2007.
3. The Defendant committed the act of sexual intercourse with the complainant woman by force or intimidation of any kind.

The prosecution called three witnesses.

The first prosecution witness is the complainant woman. She will be called (C). The complainant (C) was a married woman. Her husband was in custody in Port-Vila at the time of the alleged incident on 18 December 2007. She is a gardener she gave evidence to the effect that on 18 December 2007, at night, she took her two year old son and her sister in law to watch a John Frum Music Group performance. It was a festive night to mark the passage of a young man to adulthood by having him shaved for the first time. They left their house and go to the Defendant's village where the musical group was performing (at Iapkapen village) about 200 metres distance from their house. She said her sister in law (Nawilin) asked the Defendant the permission for the complainant to leave her 2 year old child in the Defendant's house. The Defendant agreed for the complainant to leave her son to his house. The baby was sleeping. She left her baby in the Defendant's house. She described the distance between the house and the performing stage to be about 10-15 metres.



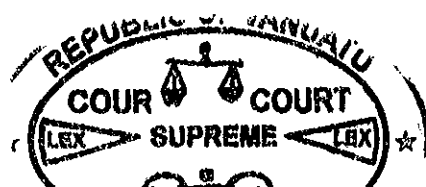
She gave evidence also that during the night, she went to check her baby on three different occasions. She said on the first and second occasions, she said when she went to check her child, her baby was still sleeping and she went back watching the musical group performing.


She said on the 3rd occasion, when she went to check her baby, she went with three girls namely Celina Kopiken, Janet Kopiken and Sylvie Willie. She said the girl were outside the house. She had a torch light of 3 shells batteries. She could recognise people shined wither torch at 20 metres from her. She said the three girls were outside about 15 meters. The musical group used a generator to perform during that night. They used also 2 bulbs to shine the stage and the play ground and the people around.

She said the bulbs shined the house her baby was sleeping in. She said if she stood at the staging place when the musical were performing, she would recognise a person from the house her baby was sleeping.

She described she saw the Defendant Lau Nuarau that night wearing a black shirt and an army trousers. She said she saw the Defendant earlier in the day wearing the black shirt and the army trousers. She said on 3rd check of her baby, something happened to her. She described she went in the house. She walked toward the door. She past the door she was just outside the door. She turned herself to close the door of the house. She was surprised someone was hanging on her T-shirt from her neck. She was pushed strongly to the door and another hand pushed her from her back to go inside the house. She said she turned her head she recognised Defendant Lau Nuarau was standing there. She recognised the Defendant's face. She recognised the Defendant was wearing the same clothes he was wearing on the day – a black shirt and an army trousers. She said the light from the 2 bulbs of the musical stage was shining the door of the house.

She said when the Defendant pushed her with the door inside the house, the Defendant closed the door again once he was inside with her. She identifies Defendant Lau Nuarau as the person she described was holding and pulling on her shirt and pushed her inside the house on 18 December 2007.



5 

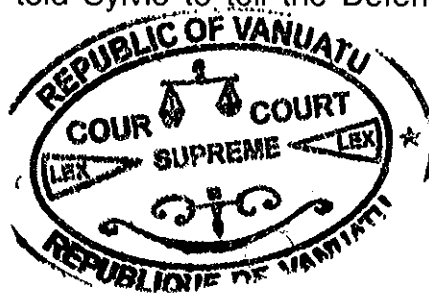
She said inside the house, there was a hurricane light. It was on. She was struggling at the time with the Defendant. She said one of the Defendant's hand held her T-shirt strongly by her neck and the Defendant used his elbow pushing her down by her back side. The Defendant pushed, pulled and hit her back side with his elbow and pulled her T-shirt with the hand to have her on the ground. She could not stand on her feet. She said she asked: "who ia ia?" The person answered: "Mi ia Lau". She told him "Lau, what are you doing, I know you and Noah are brothers." She said he replied to her: "this is just for today."

She said she recognised Lau Nuarau in the corner and he told her to take out her cloths. She said when he held her head down, she took her torch and shined down part of his body. She said she recognised the army trousers the Defendant was wearing at that time. She also said she recognised the Defendant Lau Nuarau's voice because when her husband Noah was not yet imprisoned, Lau used to come and visit him in her house. She cooked meals and they ate. They told stories and they drunk kava in her kitchen.

She said she cooked meals in the kitchen and twice a week the Defendant Lau Nuarau came to their house. She also said the Defendant Lau has a truck and he used to drive her husband around. She said when the Defendant want to eat fish, he came to her house. He husband took tome fishes. She cooked them and they would eat together.

She said the Defendant Lau Nuarau is related to her husband Noah. She called the Defendant Lau Nuarau, her brother in law.

She gave evidence also that on the day before 18 December 2007, the Defendant Lau Nuarau sent a girl named Sylvie to tell her that he wanted to see her. She said the Defendant Lau sent Sylvie three (3) times on the same day once in the morning, once in the lunch time, and once in the evening. She said on the three (3) occasions, she did not go to see the Defendant Lau Nuarau. She said she refused to go and see Lau. She said she told Sylvie to tell the Defendant Lau Nuarau that Lau and Noah are brothers.



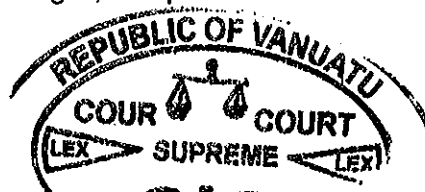
She further gave detailed evidence about the hurricane light which was in the house. She said it was on. When she was struggling from the Defendant, the hurricane light felt and was off. It was dark inside the house. She could not call out because Lau held and squizzed her neck. The Defendant bent her in a corner of the house. He tried to remove her skirt, trousers and panties. She said she was trying to put them back on. She attempted 3 times to put back her clothes on her but it was unsuccessful. The Defendant Lau Nuarau was too strong. She said the Defendant Lau Nuarau pulled out her clothes half way and penetrated her vagina while her head was pushed in a corner of the house, and her body was bent and she was in that position when the Defendant had sexual intercourse with her. She said after the sex, the Defendant came outside and took off his black shirt and fastened his head with it.

She said she felt bad. She said Defendant Lau treated her like an animal. She cried. She got up and dressed herself. Lau came outside the house running. When she came outside she saw Celina, Janet and Sylvie and she cried and told them of what Lau Nuarau did to her. She repeated Lau Nuarau had sexual intercourse with her without her consent as she did not agree to have sex with him at that time. She said the Defendant Lau Nuarau succeeded to have sexual intercourse with her by force.

The complainant (C) was cross-examined on 26 February 2010 at 10.00AM. She confirmed she lives at Port-Resolution. She confirmed that on the night of 18 December 2007, she took her baby and with her sister in law, she sent to watch the John Frum Group performing their musical display. She confirmed they went there on the day and night of 18 December 2007. She confirmed she put her baby in the Defendant's house. She denied there was another baby sleeping in the same house.

She confirmed the distance between the musical stage ground and the house her baby was sleeping in was about 10-15 metres and she checked on her baby on 3 different occasions during that night.

It was put to her that she did not hold a torch on the night of 18 December 2008, she denied that and confirmed she had a torch light, despite the fact that she did



7

not mentioned it in her statement to the police. She gave evidence that they all have torches and there was raining on that night.

It was put to her and she denied a girl was with her inside the house. She confirmed the three (3) other girls were outside.

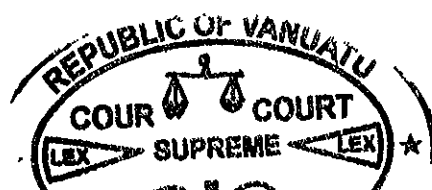
She confirmed Lau Naurua blocked her from the door of the house. She was outside the house but in front of the door and was trying to close the door when the Defendant Lau pushed her with the door inside the house. She said she turned herself and saw the Defendant with his black shirt and army trousers.

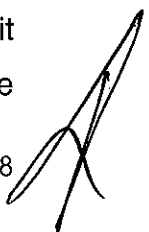
She was asked and she admitted that not all what she said was put in writing in her statement but her oral evidence in Court were the true recollection of what happened to her. She confirmed Defendant Lau pushed her inside the house and closed the door. She was asked she confirmed once she was inside with the Defendant, she was struggling from the Defendant. The hurricane light fell and got off. It was dark inside. She confirmed the Defendant held her T-shirt strongly from her neck with one hand and he pushed and hit her backside with his elbow down. She said her body was bent when the Defendant had sexual intercourse with her. She confirmed when she was bent she touched his trousers and recognised the Defendant's trousers and she also said she recognised the Defendant's voice.

She was asked again and he confirmed, she recognised him also at the door and she applied her torch on his army trousers inside the house and she said she recognised his voice.

She confirmed her evidence that the Defendant tried to remove her skirt and panties and she said she pulled them back 3 times. She said the Defendant succeeded while her head was held down and her back was bent down by the elbow of the Defendant. She was challenged and she confirmed her evidence that the Defendant Lau Nuarau had sexual intercourse with her without her consent.

In her re-examination, she said the Defendant pushed her head holding strongly her T-shirt from her neck. She confirmed also that the Defendant pushed and hit (kicking) her backside with the elbow of his other hand. So she said because the



8 

Defendant did not remove his elbow from her backside, and kept holding her in that position, her head was held looking down. She did not manage to come up. He forced her body to remain in that position when he had sex with her. During the struggle, she said she saw the Defendant's army trousers he wore on the same day. She confirmed again she was struggling inside. She repeated the sex that occurred on that night was not consensual. She said he had sex with her against her consent and by force.

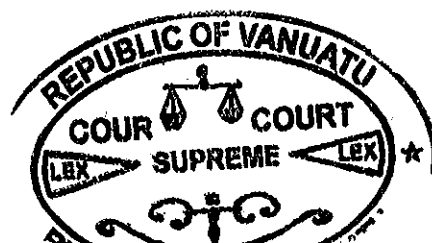
She confirmed that part of what she said she told the police during the taking of her statement was not in her written statement.

Celina Kopiken is the next prosecution witness. She gave evidence she is from Ekapen village, Tanna. She is 18 years of age and she is a student and she is in year 11.

She said on 18 December 2007, she and two (2) other girls (Janet and Sylvie) went to check the complainant's baby. She said she held a torch light of 2 batteries and the batteries were new ones and one of the two other girls had also a torch light. She gave the distance estimation between the place of musical group was performing and the house the baby was sleeping in was the main road and the Court house (Tanna) which is about 15 metres.

There was a generator using 2 bulbs. The bulbs were very bright and they shined the house and the door of the house the baby was sleeping in.

She described when she and the two (2) others went to check the baby. She said she went in the forehead. Janet and Sylvie were behind her. She said they came about 2-3 metres from the door of the house she had a torch light on and she shined with her torch the Defendant Lau Nuarau. She said she shined the Defendant's whole body. She said Defendant Lau was wearing his army trousers and had fastened his head with his black shirt. She said she had her torch light on the Defendant for about 3 seconds. She said she recognised the Defendant Lau Nuarau with his army trousers and his black shirt. She said during the day time she saw the Defendant was wearing the same army trousers and black shirt.



9

A handwritten signature in black ink, consisting of a large, stylized letter 'A' with a long, sweeping tail that extends upwards and to the right.

She said when she shined the Defendant with her torch light, the Defendant did not follow the road they followed to come to the house but he was running on the right side of the house and went into the bush.

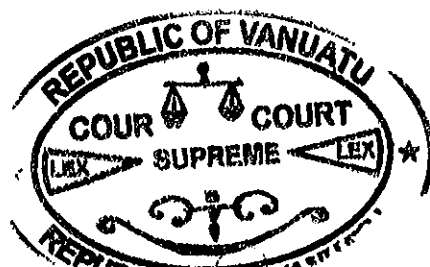
She repeated she recognised the Defendant Lau Nuarau who was in the defence dock and she identified the Defendant in Court.

She said she is closely related to the Defendant Lau Nuarau from her father's line. She said she called the Defendant Lau Nuarau "small daddy blong mi". She lives in the area with the Defendant about 200 metres distance. She said she saw Lau Nuarau everyday when she went to his gardens or sometimes he comes to her house before he went to the nakamal.

She said the Defendant Lau Nuarau came to her house 2 days a week and had food in her house. She said her grandfather and Lau's are brothers. Sometime the Defendant came to her house to get a stick tobacco before he went to the nakamal. She said the Defendant Lau talked to her at least twice a week. She said she also went to the Defendant's house 3 times a week. She talked to him and she had food at the Defendant's house. She repeated that on the night of 18 December 2007, she shined her torch on the Defendant Lau Nuarau and the two (2) bulbs also shined the house and the door of the house so she was sure she saw the Defendant and she recognised Lau Nuarau was the man she shined with her torch near the door of the Defendant's house.

Under her cross-examination, she confirmed that on 18 December 2007, she and the two other girls (Janet and Sylvie) wanted to check the baby. She confirmed she and Janet had each a torch light.

She said when she and the two other girls went to check the baby, the complainant woman was gone first to the house. They came after. She confirmed her evidence she saw the Defendant Lau Nuarau, she recognised him. He was running out of the house. He was wearing army trousers and a black shirt. She repeated and confirmed she shined the Defendant Lau Nuarua with her torch light about 2-3 metres.



She confirmed when she was re-examined that she and the two other girls came to the house. She shined her torch on the Defendant Lau Nuarau. She recognised him because of the brightness of her torch light and also she recognised Lau Nuarau was running to the right side of the road. She said at the same time the complainant woman came and hanged on her and cried and told them that the Defendant Lau Nuarau had sexual intercourse with her and she did not consent to the sex with him.

The last prosecution witness is police officer Julian Ben. She is working as police officer at Isangel, Tanna. She works in the CID section of the police there involving in the criminal investigation and collecting evidence. She is a constable officer and she was involved in the investigation of criminal cases for about 4 years and she was investigating plenty of sexual offences cases.

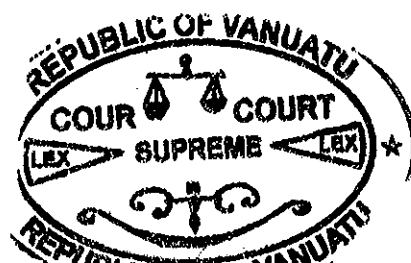
She remembered about the incident involving the Defendant Lau Nuarau. She said the complainant woman lodged her complaint on 7 July 2008. She said the complainant woman said sometime on 18 December 2007, the Defendant Lau Nuarau had sexual intercourse with her without her consent. She said she took her statements.

The witness was cross-examined. She explained before she took the complainant's statement, she read to her the caution statements and she understood it and signed it. She was asked and she denied that some part of her evidence was not recorded.

That is the last prosecution witness and the end of the prosecution case.

The Court ruled that a prima faciae case was made out against the Defendant, Lau Nuarau. He is therefore required to call in his defence under section 162 of the Criminal Procedure Code [CAP.136].

Before the defence case began, section 88 of the Criminal Procedure Code [CAP.136] was read and explained to the Defendant. The Defendant understood his right under that section.



The defence case is that the Defendant Lau Nuarau did not have sexual intercourse with the complainant woman.

It is the defence case that although, the Defendant was in the village at the night of the incident on 18 December 2007, he did not return to his house that night. Alibi witnesses will be called to testify that they slept in the Defendant's house that night but they did not see anything. Other witnesses will tell the court that the Defendant Lau Nuarau drunk kava in the nakamal during the night of the incident.

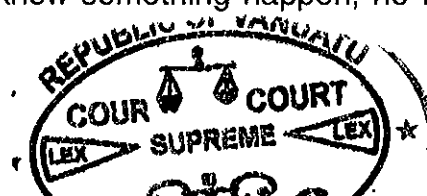
The Defendant Lau Nuarau give evidence himself on his behalf. He gave evidence to the effect that he is from Iapkapen village. He stated he came to Court because a woman reported to the police that he raped her. He stated it was not true. He did not rape the woman. He said on 18 December 2007, he was staying at a small house of his brother Sam Nuarau. He was preparing his bed in that house before he went to drink kava in the nakamal. He went to nakamal at 6.30PM o'clock. He drunk kava with Gregoire and Noel until 10.00PM o'clock and went to sleep. He said they drink 3 heads of kava. After kava, he went to sleep with his brother Moise and Nora. Moise and Nora slept in another room.


He stated the baby they asked permission for him to sleep in his house, slept in his house. He stated that Gregoire and Rosemary slept also in his house.

He denied he held the complainant woman's T-shirt by her neck, pushed her with the door inside his house on the night of 18 December 2007. He denied he pushed the complainant inside the house. He denied the woman was struggling. He denied the hurricane light had fallen and off as a result of the struggling. He denied he removed the woman's clothes. He denied he had sexual intercourse with her.

He denied that after sex, he ran outside the house. He stated all the allegations against him were false.

He denied the evidence of witness Celina that when the complainant cried and come to them, he ran outside and Celina applied her torch light on him than right. He stated that when he said he did not know something happen, he meant that

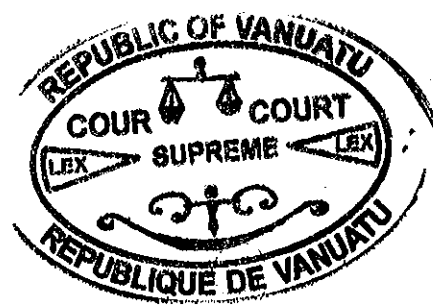


12 

when something happened he knew but the allegations against him he did not know. When the police arrested him, he said he did not know.

The Defendant Lau Nuarau was cross-examined. He said he is the cousin brother of Noah, the complainant's husband. When the incident occurred he said he thought the complainant's husband was in jail. He confirmed that on 18 December 2007, there was a custom ceremony. John Frum Music Group was performing that night. He confirmed one Marry asked him permission for the complainant to leave her baby in his house. He stated he agreed for the baby to sleep in his house that night.

He did not know that the complainant kept on checking her baby because he was in the nakamal. He said he gave his house to them. He did not know what happened. It was put to him and he denied he held the woman by her T-shirt on the back of her neck. He denied the woman turned and saw him. He denied she recognised him. He denied there was light from the music show shining his house. He denied he held the woman and pushed her with the door inside the house. He denied once in the house, he closed the door. It was put to him that while inside the house there were talkings between him and the woman. He denied the woman questioned: "who is this?" He denied he answered: "Mi ia Lau." He denied the woman was questioning him: "olsem wanem Lau, you mo Noah, yutufala I brata nomo ia. Wanem fashion ia?" He denied he answered: "hemi blong tedei nomo ia." He denied he asked the woman to remove her clothes. He denied there was struggling inside. He denied he pushed her in a corner. He denied she applied her torch on his trousers. He denied she recognised the army trousers he was wearing on that day. He denied she had recognised his voice. It was put to him the woman knew him because he used to go to her house. He replied the woman knew him because he took tourists on his truck but not because he used to go to her house. He denied the complainant gave him food at her house. He denied she saw him in her house every time he came to her house. When asked if she knows him, he admitted she knows him. He said he is the small brother of Noah, the complainant's husband. But he maintained the allegations against him were not true.



It was put to him and he denied he sent Sylvie 3 times on the day to tell the complainant woman to go and see him. He denied the complainant told Sylvie to tell him that he and Noah are brothers.

He denied he held the T-shirt by the complainant's back of her neck and held it strongly and pulled it down. He denied she could not call out. He denied the T-shirt fastened strongly her neck and he denied also he pushed her to go down. He denied he hit the backside of the woman with his elbow and pushed her down with his other hand.

It was put to him and he denied that while he pushed and held the complainant's head down in a corner, he removed her skirt and parties half-way.

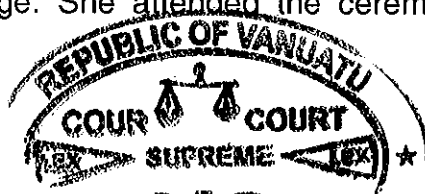
He denied he had sexual intercourse with her. He denied she tried to call out but could not. He denied she cried after sex. He denied after sex he ran outside.

He denied when he came outside, Celine, Janet and Sylvie saw him. He denied they were at 2-3 metres from him. He denied Celine applied her torch light on him. He denied the 3 girl recognised him. He denied he ran into the bush. He denied he went to Celine's house everyday. He admitted Celine called him "small daddy". He denied the 3 girls recognised the army trousers he was wearing on the day time. He denied he took off his shirt and fastened on his head. He denied the complainant cried and told the 3 girls about what he did to her inside his house. He denied he had sexual intercourse with the complainant without her consent. He denied he had used his physical power to have sex with the woman.

He admitted Celina came to his house once a month and he had conversations with Celina. He knows Celina. She is a member of his family. He denied he went to the complainant's house but when there was a custom ceremony, he and the rest of the family went to the complainant's house.

Rosemay Gregoire was the second defence witness.

She gave evidence that on 18 December 2007, she was at lapkopen village. There was a feast ceremony at the village. She attended the ceremony. The



ceremony and the music group were performing until early morning on the next day. She was watching the group performing until 7.00PM o'clock. She then went to the Defendant's house and waited for her husband from 7.00PM o'clock to 10.00PM o'clock. She stated her husband met her at the Defendant's house. They slept at 9.00PM and they got up at 5.30AM o'clock on the next day and went back to their house.

She stated they were the only person sleeping in the house. There was nobody else. She was cross-examined. She said before 7.00PM o'clock, she was not at the Defendant's house. She said she waited for her husband at the Defendant's house. Her husband was at the nakamal drinking kava. She stated she was at the Defendant's house she did not see anything happened in the night. She did not see anybody in the night. She did not see anybody and she said nothing happened. If something happened before 7 o'clock she said she would not know.

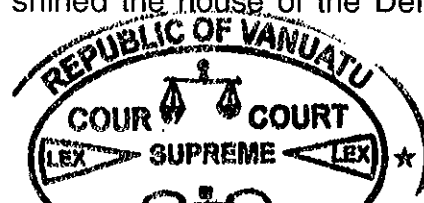
Gregoire Warsy is the third and defence last witness. He gave evidence that during the time the music group was performing he drunk kava in the nakamal with the Defendant, Lau Nuarau and Noel. They drunk kava from 5.00PM to 9.00PM. He said at 9.00PM he met his wife at the Defendant's house. He said when he arrived, his wife Rosemay gave him food. He got some food and got to sleep.

That is the end of this witness evidence and the end of the defence case.

DISCUSSIONS ON EVIDENCE

I have listened and observed the demeanour of each witness in the witness box. I consider and assess the evidence of each witness and I make the following findings:

The first prosecution witness, the complainant woman was calm and confident when she gave her evidence of what happened to her on 18 December 2007 in the night. She also gave very details information of the group performing music on the festive night. The music group used a generator. There were two bulbs shining. The bulbs had bright light and they shined the house of the Defendant,



that is the place of the incident and the door of the said house. She described the distance of between the performing group and the Defendant's house to be of about 10-15 metres. She gave details about how the Defendant confronted her that night. Her baby was sleeping in the house. The Defendant confronted her by holding her T-shirt on the back of her T-shirt as she was ready to close the door. She was outside and looking into the house. There was a hurricane light inside. It was on as her baby was sleeping in that house. She gave details of how the Defendant held her T-shirt and pushed her with the door inside. The Defendant closed the door. There was struggling. She gave detailed description about her visual recognition of the Defendant. When the Defendant pushed her with the door inside she turned her head and recognised the Defendant. She knows the Defendant. The Defendant knows her. The Defendant is the cousin brother of the complainant's husband (Noah). At the time of the incident, Noah was incarcerated. She knew the Defendant because she gave details evidence about the fact that the Defendant used to come to her house when her husband was at home with her. She cooked the food and they shared the food with the Defendant. When the Defendant wanted to eat some fishes he came to her house and her husband got some fishes. She cooked the fishes and shared with her husband and the Defendant. The Defendant came to her house and had kava with her husband. The Defendant used to take her husband on his truck. So she knew the physical and visual appearance of the Defendant.

She also provided detailed evidence of conversations taking place before the sexual intercourse.

At the time she was held by the T-shirt and pushed into the house, she must be taken by surprise. So she asked:

Q: "Who ia ia?"

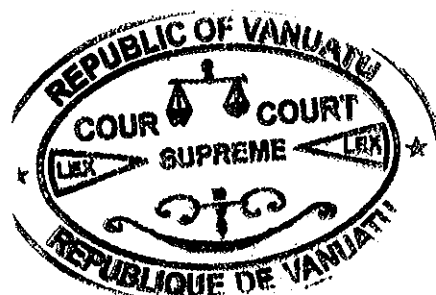
A: "Mi ia Lau."

Q: "Yu stap mekem wanem... wanem yu you wantem?"

A: "Yu tekemaot ol klos blong yu."

Q: "Mi ting se yu mo Noah I brata. Yu wantem mekem wanem ia?"

A: "Hemia blong tedei nomo."

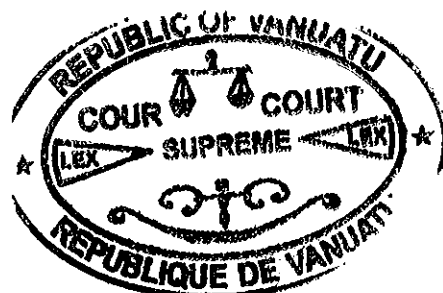


During the conversations she recognised the voice of the Defendant. She also gave details of the Defendant's dressing a black shirt and an army trousers. She saw the army trousers on the Defendant during the night and the Defendant took off his shirt and fastened with his head before he left the house. She also gave evidence that these were the clothing the Defendant was wearing on that day. She is familiar with the Defendant. She recognised the Defendant by his physical appearance. She recognised the Defendant's voice. She recognised the Defendant by his dressing of that day. The Defendant related to her husband.

Despite the fact that she was challenged in her cross-examination as to why some details of her oral testimony did not appear in her statement made to the police, her evidence was not shaken on its substance. Further some aspect of the question put to her in cross-examination was about matters contained in her additional statements.

Witness Celina Kopiken is related to the Defendant. The Defendant Lau Nuarau is the small daddy of this witness. She lives in the same village with the Defendant. She knows the Defendant well. The Defendant passed through this witness before he went to his garden. The Defendant came to her house to get stick tobacco to smoke in the nakamal. The Defendant came to her house at least twice a week. Celina went to the Defendant's house to eat frequently because they are related families.

The Defendant in his evidence confirmed this witness evidence that they are related and they had talkings or conversations. Celina saw the Defendant on 18 December 2007 was wearing his black shirt and his army trousers. She recognised the Defendant when she applied her torch on the whole of his body when the Defendant ran outside from inside the house. She was about 2-3 metres from the Defendant. Her torch had bright shinesshine because of new batteries. She and other two girls (Janet and Sylvie) saw the Defendant and recognised him.



Celina saw the Defendant when she torched him with her torch light and she saw the Defendant had his black shirt fastened on his head when she applied her torch on his whole body.

The complainant woman came outside and cried and laid her head on Celina's shoulders and told her and the other girls of what the Defendant did to her. The Defendant had sexual intercourse with her without her consent.

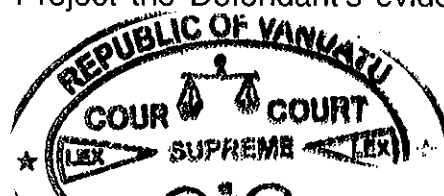
The evidence of Celina is very consistent with the evidence of the complainant woman. This witness is a student. She is young. It is difficult for a young girl to give evidence against a member of her immediate family like what witness Celina did in this case. Despite challenges on some minor aspects of her evidence, she is a competent, reliable and trustworthy witness.

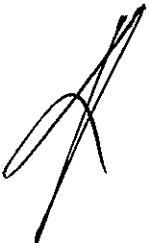
Police officer Julian Ben is also a reliable and trustworthy witness. The substance of the evidence of the witnesses called are contained in their police statement despite four minor details which are not critical to the evidence in the trial.

The Defendant's evidence is based entirely on the denial of the allegations made against him. He knows the complainant woman. He related to the complainant's husband. They are brothers. He denied he ever come to the complainant's house. He admitted he come to the complainant's house when a group or family ceremony occurred so he comes with the family.

The Defendant admitted he was in Iapkapen village on the night of 18 December 2007. He agreed for the complainant to put her baby in his house during that night. From his evidence, he did not come back to his house from 5.30PM to 9.00PM o'clock as he was drinking kava in the nakamal with Gregoire and Noel. He slept into his brother Sam's house that night after the nakamal. He was drunk with kava and went to sleep.

I reject his evidence that he did not come to the complainant's house. I accept the complainant's evidence that the Defendant used to come to her house. She cooked food and shared with her husband and the Defendant before the complainant's husband was incarcerated. I reject the Defendant's evidence that



18 

the complainant did not recognise him on the night of 18 December 2007; I reject the Defendant's evidence that Celina Kopiken and the two other girls (Janet and Sylvie) did not recognise him on the night of 18 December 2007. The Defendant admitted he knows the complainant and that he knows Celina. He admitted Celina was a member of his family. They used to talk together.

I reject the Defendant's evidence that the complainant and Celina did not recognise him with his army trousers and his black shirt fastened on his head.

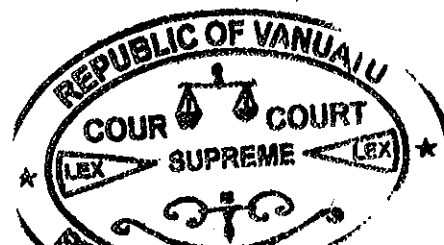
I reject the Defendant's evidence that the complainant did not recognise his voice on the night of 18 December 2007.


I reject all part of the Defendant's evidence consisting of general denials of the allegations made against him. The Defendant is not a trustworthy witness.

Rosemay Gregoire's evidence is to show that on 18 December 2007, she was at the Defendant's house from 7.00PM to 9.00AM until her husband joined her there and that she and her husband spent the night in that house from 9.00PM o'clock to 5.30AM o'clock the next day.

Witness Rosemay's evidence that she did not see anybody else in the Defendant's house that night from 7.00PM to 9.00PM is difficult to be believed. The Defendant himself confirmed in his evidence that he gave permission for the complainant to leave her baby sleeping in his house that night. It is an accepted fact that on 18 December 2007, the complainant's baby was sleeping in the Defendant's house that night. It is also accepted as fact that other people went to the Defendant's house on 18 December 2007 that night to check the baby of the complainant. The complainant herself went into the Defendant's house at least three (3) times to check her baby.

It is accepted as fact that Celina, Janet and Sylvie went to the Defendant's house on the night of 18 December 2007 to check the complainant's baby. It is rational to say that if witness Rosemary was at the Defendant's house from 7.00PM until 9.00PM when her husband joined her at he Defendant's house, she would have



19 

seen the complainant's baby in the Defendant's house or any of the other persons who went to the Defendant's house to check the complainant's baby.

She was unable to give details of her evidence. All she was saying was before 5.00PM she was at the music group performance. From 7.00PM to 9.00PM, she was at the Defendant's house waiting for her husband. Her husband arrived at 9.00PM and they slept at the Defendant's house from 9.00PM to 5.30AM the next day. She saw nobody else that night at the Defendant's house and nothing happened at the Defendant's house. I reject Rosemary's evidence as no telling the truth.

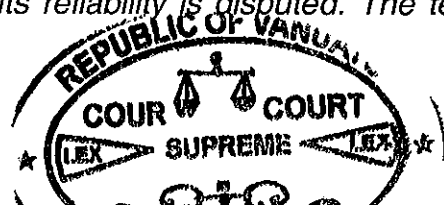
Gregoire's evidence was that he was drinking kava with the Defendant at the nakamal from 5.00PM to 9.00PM. At 9.00PM he joined his wife at the Defendant's house. His wife gave him some food and they slept at 10.00PM o'clock at the Defendant's house. Gregoire's evidence is rejected as part of fabricated evidence.

APPLICATION OF THE LAW

In the present case, two (2) issues are present. The first is whether or not the complainant woman was sexually abused on the night of 18 December 2007 as alleged in the information without her consent, contrary to section 91 of the Penal Code Act [CAP.135]. The second is about the identification by recognition of the Defendant as the person who sexually abused the complainant woman on 18 December 2007 without her consent. The two (2) issues will be dealt with in turn.

In the case of **Tom Tupun v. Public Prosecutor** [2003] 33; Criminal Appeal Case No.02 of 2003 (7th November 2003), the Court of Appeal (at page 4) adopted the following passage from the High Court of Australia in **Domican v. R** (1992) 173 CLR 555 where the Court discusses the need for warning and caution to be exercised by a trial court in considering identification evidence at p.561-562:

"Whatever the defence and however, the case is conducted where evidence as to identification represents any significant part of the proof of guilt of an offence, the Judge must warn the jury as to the dangers of convicting on such evidence where its reliability is disputed. The terms of



the warning need not follow any particular formula. But it must be cogent and effective. It must be appropriate to the circumstances of the case. Consequently, the jury must be instructed 'as to the factors which may affect the consideration of [the identification] evidence in the circumstances of the particular case'. A warning in general terms is insufficient. The attention of the jury 'should be drawn to any weaknesses in the identification evidence'. Reference to counsel's arguments is insufficient. The jury must have the benefit of a direction which has the authority of the Judge's office behind it. It follows that the trial judge should isolate and identify for the benefit of the jury any matter of significance which may reasonably be regarded as undermining the reliability of the identification evidence."

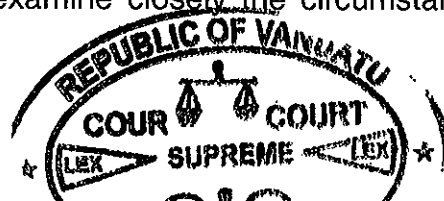
The Court of Appeal stated also that although that case was a visual identification case, they were satisfied that such approach is equally, if not more applicable, in a case concerning voice identification.

The Court of Appeal further accepted as accurate the statement of the law on the admissibility of voice recognition evidence in the following passage in the judgment of O'Brien CJ in **R v. Smith** (1984) 1 NSWLR 462 where his Honour said at p.447:-

"evidence of the voice of a person present at a crime as being the same as the voice of the accused can only amount to positive identification where the witness is very familiar with the voice before hearing it at the crime, or that the voice heard at the crime was very distinctive,..."

Applying the guideline judgment and rational of the Appeal Case of **Tupun v. Public Prosecutor** (2003), I warn myself as the judge of fact of the special need for caution before a conviction can be secured against the Defendant on the identification and recognition evidence of the complainant woman and that of witness Celina Kopiken.

The reason for the need for such a warning is because of the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. As the judge of fact, I examine closely the circumstances



under which the identification and recognition of the Defendant were made by the complainant's woman and witness Celina Kopiken. The complainant woman knows the Defendant. The Defendant knows the complainant. The Defendant is the cousin brother of the complainant's husband. The Defendant came to the complainant's house at least twice a month when the complainant's husband was at home. The complainant cooked and shared food with her husband and the Defendant. On 18 December 2007, the complainant was standing facing the door of the Defendant's house. Her son of 2 years of age was sleeping in the house. She was on the point to close the door. A hurricane light was on inside the house. The 2 bulbs of the music group shined the door of the house. She turned her head and recognised the Defendant before she was pushed with the door inside the house. Conversations took place between the complainant and the person she identified and recognised as the Defendant. She recognised the voice of the person she was struggling with in the Defendant's house before she was sexually abused by that person. The following conversations took place between the complainant and the person the complainant recognised as the Defendant:

Q: "Who ia ia?"

A: "Mi ia Lau."

Q: "Yu stap mekem wanem... wanem yu you wantem?"

A: "Yu tekemaot ol klos blong yu."

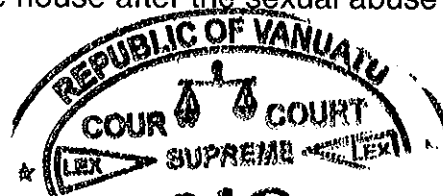
Q: "Mi ting se yu mo Noah I brata. Yu wantem mekem wanem ia?"

A: "Hemia blong tedei nomo."

She recognised the voice at the crime as the voice of the Defendant. During the struggle, she applied her torch on the clothes the person was wearing at the time, she recognised the army trousers the Defendant was wearing on that day.

Before that incident in the night at the Defendant's house, the Defendant during day time day time, had sent a girl named Sylvie to tell the complainant woman to go and see him. The complainant sent Sylvie 3 times. The complainant had refused to see the Defendant.

Celina Kopiken saw the Defendant earlier on the same date. The Defendant was wearing a black shirt and army trousers. Celina Kopiken recognised the Defendant that night when he ran outside the house after the sexual abuse on the

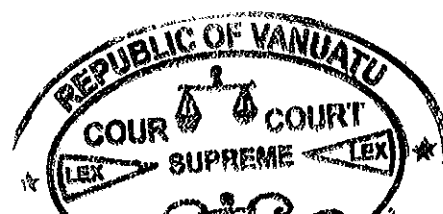


complainant/. She is related to the Defendant. She called him "small daddy". She applied her torch light on the body of the person she recognised as the Defendant who ran outside of the Defendant's house. She was about 2-3 metres from the person whom she applied her torch on him for about 2-3 seconds. She may be mistaken but she maintained her evidence. She saw and recognised the Defendant who ran outside the house and ran into the bush on the night of 18 December 2007. Celina said the two other girls also saw and recognised the Defendant, Lau Nuarau.

After the warning and caution, I am satisfied beyond reasonable doubt that the person the complainant woman and Celina Kopiken have identified and recognised on 18 December 2007 as they described in their respective evidence was the Defendant, Lau Nuarau. The witnesses had visually recognised the Defendant. Both witnesses know the Defendant and are familiar with him. They are related families. Both witnesses recognised the Defendant's clothes of that day. The complainant recognised the Defendant's voice at the time and scene of the crime.

The second issue is whether the evidence of the complainant that the Defendant had sexual intercourse with her on 18 December 2007, as described in her evidence is to be accepted and relied upon. The answer to this second issue is in the affirmative.

In this case, there is evidence from the complainant that after the Defendant had sexually abused her without her consent by penetrating her vagina in the manner she described in her evidence, she cried and came outside. She cried and hanged on the shoulder of Celina Kopiken outside the house and told her and other two girls of what the Defendant did to her. That was evidence of her recent complaint. It was just after the sexual abuse and it was spontaneous in the sense that it is an unsatisfied and unvarnished story of what happened. This evidence was confirmed and was consistent with the evidence of Celina Kopiken. Further the evidence of the complainant was corroborated by the evidence of Celina Kopiken. The most significant piece of corroborative evidence in this trial was the evidence of the complainant's distress, observed by witness Celina Kopiken.



I am satisfied beyond reasonable doubt that the Defendant had sexual intercourse with the complainant on the night of 18 December 2007 in his house as she described in her evidence, without her consent.

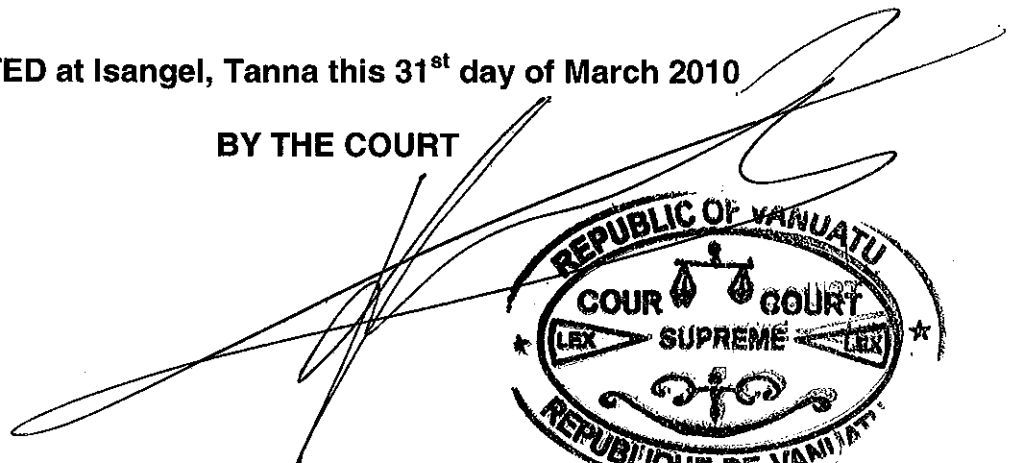
I am satisfied that the prosecution has satisfied the standard of proof beyond reasonable doubt against the Defendant, Lau Nuarau. The prosecution has proved each and all essential elements of the offence of sexual intercourse without consent, contrary to section 91 of the Penal Code Act [CAP.135].

VERDICT

The Defendant, Lau Nuarau, is found guilty of sexual intercourse without consent on the one count of sexual intercourse without consent, contrary to section 91 of the Penal Code Act [CAP.135].

DATED at Isangel, Tanna this 31st day of March 2010

BY THE COURT



**Vincent LUNABEK
Chief Justice**

