

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

Criminal Case No. 27 of 2015

PUBLIC PROSECUTOR

-v-

HYPOLITE DAMROCK

Coram: V. Lunabek, CJ

Counsel: Mr Ken Massing for the Public Prosecutor
Ms Jane Tari for Defendant

Dates of Hearing: 2-3 July 2015

Date of Judgment: 8 July 2015

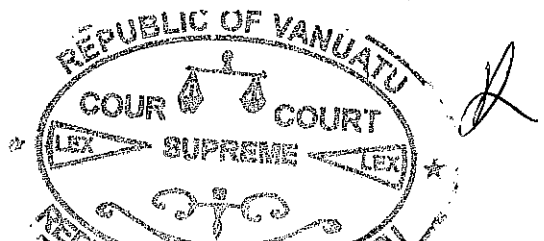
JUDGMENT ON VERDICT

INTRODUCTION

1. This is the judgment of the Defendant Hypolite Damrock. Hypolite Damrock is charged with one count of aiding, counselling or procuring the commission of the offence of unlawful sexual intercourse, contrary to sections 30 and 97(2) of Penal Code.
2. It is particularised that on 5 April 2015, at Sector 1 at Port Orly village, East Santo, Defendant Hypolite Damrock aided ([“helpem”] as stated in Bislama language in the information charge) one Simeon Markmoi to commit the offence of unlawful sexual intercourse with the complainant girl who is under 15 years of age.
3. On 30 June 2015, Defendant Hypolite Damrock pleaded not guilty to that offence. A trial is therefore required for the prosecution to prove the charge against the Defendant.

STANDARD AND BURDEN OF PROOF

4. This is a criminal trial and the law is for the prosecution to prove each and all essential elements of the offence of aiding the commission of the unlawful sexual intercourse beyond reasonable doubt (see section 8 Penal Code Act). There is no burden on the defendant whatsoever [s.81 Criminal Procedure Code Act [Cap 136] was read and explained to the Defendant before the start of the prosecution case). The burden which rests on the prosecution is a very heavy one. Before I can convict the Defendant of the charge brought against him, I must be sure of his guilt, nothing less will do. This is the same as saying that the prosecution must prove the Defendant’s guilt beyond reasonable doubt. If the prosecution fails to discharge the very heavy burden that rests upon him on the charge as against the Defendant, to the standard that I have stated,

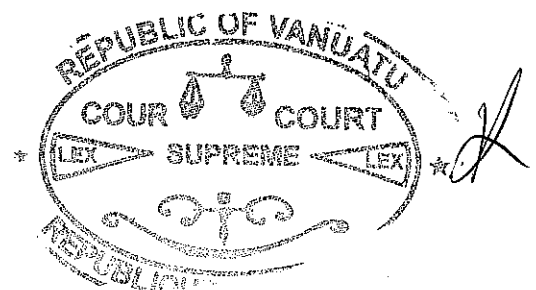


then the Defendant is entitled to be acquitted. In other words, if at the end of the trial, I am left with a reasonable doubt as to the guilt of the Defendant, then, he will be entitled to the benefit of that doubt and will be acquitted.

5. The Defendant Hypolite Damrock made a statement to the police and also elected to give evidence in this case. He does not need to do so. As in any, criminal case, there is no evidential burden at all on the Defendant.
6. The fact that he gave evidence does not mean that any burden whatsoever is casted upon him. He could have remained silent in the dock and simply allowed himself to be tried on the evidence called by the prosecution (see s.88 of the Criminal Procedure Code [Cap 136] which was read and explained to the defendant makes it clear to that effect). In any event, the Defendant gave evidence. This means that having given evidence, the court must assess his evidence in the same way as any other evidence given in this case by other witnesses. Because they came from the dock, his evidence is not less important in this case than that of other witnesses.

ESSENTIAL ELEMENTS OF OFFENCE

7. Before I set out the elements of the offence contained in the information charge, I understand the prosecution's invitation in the charge to confine the nature of liability to aiding ("helpem") aspect of these words. In that sense, I read the words "aid, counsel or procure" under s.30 of Penal Code Act, collectively to describe a person who assists or encourages someone to commit an offence. That is what the prosecution says of the allegations against the Defendant in this case and thus, the charge laid against him. I do not think there is a difficulty with that nor that I have a difficulty in understanding what the prosecution meant in the charge laid against the Defendant. I proceed with this case on that basis.
8. The prosecution must prove beyond reasonable doubt, each and all essential elements of the offence of aiding the commission of unlawful sexual intercourse before the court can convict the Defendant. In the case of Kilman v the Public Prosecutor [1997] VUCA 9, the Court of Appeal, first, discussed and confirmed the liability of the seven co-accuseds acting in concert in pursuit of a common design or joint enterprise referred persuasively to the Australian case of Mcliffe v The Queen[1995] HCA 37; (1995) 183CLR108 where the doctrine of common purpose was applied; second, the Court of Appeal also discussed and confirmed the liability of the secondary party being present in the scene and aided the principal offenders to commit the principal offence and the case on the point was the Australian case of Giorgianni v The Queen [1985] HCA 29; (1985) 156 CLR 47 which was mentioned with approval in Mcliffe v The queen]1995] referred to above.
9. In the present case, to secure the conviction of the Defendant, I agree and accept the submissions of the Defense Counsel (relying on the case of Giorgianni v The Queen [1985] HCA 29; (1985)156 CLR 47) that the prosecution must prove on the criminal standard required the following elements:
 1. That the principal offence was committed.
 2. That the Defendant was present at the time when the offence was committed; and

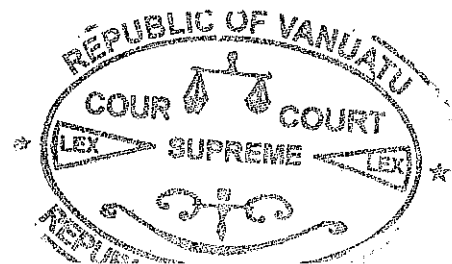


3. That the Defendant knew the essential circumstances that establish the principal offence; and
4. That, with that knowledge, the Defendant intentionally assisted or encouraged the Principal offender to commit that offence.

THE CASE AND EVIDENCE OF PROSECUTION

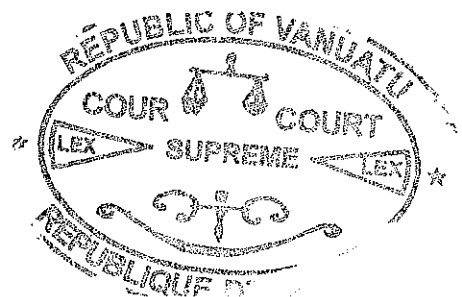
10. The prosecution case is that on 5 April 2015 at Sector 1 at Port Orly village, East Santo, Defendant Hypolite Damrock aided or procured the commission of the offence of unlawful sexual intercourse by Simeon Markmoi. It occurred during a feast organized at Sector 1 that night. Defendant Hypolite and Simeon Markmol both attended the feast that night. The complainant also attended the feast that night with her friend Juliana Borey.
11. It is the prosecution case that Simeon Markmoi sent Defendant Hypolite Damrock to tell the complainant girl to come and see him. Defendant Hypolite approached the complainant girl twice. On the first occasion, the Defendant Hypolite approached the complainant and told her of what Simeon asked him to convey to her. The complainant girl refused. The Defendant Hypolite Damrock approached the complainant girl again and told her that Simeon Markmoi wanted to see her. Again the complainant refused.
12. It is the prosecution case, that the Defendant Hypolite Damrock hold on the hands of the complainant girl, pulled her and gave her to Simeon Markmoi. Simeon Markmoi had sexual intercourse with the complainant girl in an empty house belonging to Chrislyne. It is part of the prosecution case that when Simeon Markmoi had sexual intercourse with the complainant, Defendant Hypolite Damrock locked the door and waited outside.
13. The prosecution called three witnesses. The complainant girl is the first prosecution witness. She gave evidence to the following effect. She is 14 years of age. She is from Port-Orly village, Santo. She attended school at 8 year in her village. She testified that in the night of 5 April 2015, she and Juliana were watching people dancing. She said Simeon sent Hypolite to tell her to go and see him. She refused. Hypolite went and Simeon sent him back to her. Hypolite told her that Simeon wanted her to go and see him. She said that after she said no to him again, Hypolite forced her by holding her left hand with his right hand and pulled her to Simeon. She was asked how Hypolite forced her. She answered: Hypolite i talem: "you go you go luk hem". She confirmed Hypolite, pulled her to Simeon. She said she did not want. She kicked but Hypolite pulled her to Simeon.
14. She said Simeon held her left and right hands with his left hand and he held her neck with his right hand. Then she said Simeon and Hypolite forced her to go inside Chrislyne's house. She said Hypolite opened the door and pushed her and Simeon inside the house. Then she said Hypolite locked them inside the house and stayed outside the door of the house. She said Simeon made problem to her. She described the problem Simeon made to her in this way:

"right hand blo hem i holem neck blo mi. Hemi carem out trousers blo mi lo left hand blo hem. Afta hemi holem ass blo mi. Holem titi blo mi. Hem pushum cock blo hem igo inside cunt blo mi, after hemi stap move movem body blo hem igo antap mo daon lo mi"

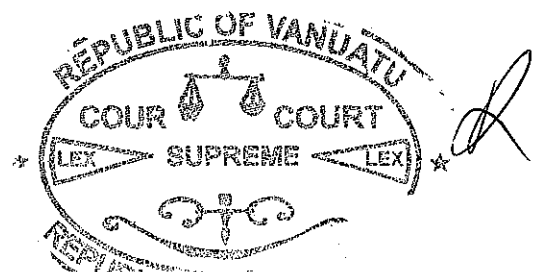


(translation – Simeon held my neck with his right hand and with his left hand, he removed my trousers. He then held my buttocks, held my breasts. He pushed his penis inside my vagina. He moved his body up and down on me).

15. She wanted to call out, she said she could not because Simeon held her neck. When Simeon finished with her, she opened the door to go outside she saw Hypolite standing and blocking the door. She said Hypolite told her he also wanted to go with her. She said Hypolite wanted to make problem with her. She said the problem similar to the one Simeon did to her. She said she refused. She wanted to run away to her house but she said Simeon and Hypolite told her if she was asked where she was she will say that she was eating local potatos (kumala) to the place they were cooking.
16. At home, her father asked where she was. She told her father that Simeon and Hypolite pulled her to go inside Chrislyne's house. Her father went and looked for Simeon.
17. She also said when Hypolite came the second time to tell her what Simeon told him to tell her, Juliana was there. Juliana saw what happened to her but she was afraid. The distance Juliana and her stood to watch the dancing was close. She saw some ladies sitting and watching the dancing but they were far from where both of them were standing. The distance between the place she was with Juliana and Chrislyne's house is about the distance between the court room to the entry gate (estimated about 15–20 meters).
18. The complainant girl was cross-examined. She confirmed there was a feast. It was the feast of her uncle's son. The feast was inside a yard. There were lots of people at the feast. They are members of her family. Not all of them know her. She was standing and she watched the dancing. She was standing on the post of a gate. There was a stool there but she said the stool was far away to the place she was standing. She could see people sitting on the stool. There was a house "Navalval" on the otherside of the dancing place. There was no person in that house as all people are at the dancing place. She saw people drunk. Her father and mother were not taking part of the dancing. At that time, there was light shining at the dancing place but surrounding it the place was dark. She confirmed she saw the women sitting on the stool but they were not close to her. She could see people dancing at the dancing place but people who were in the dark she could not see them.
19. She confirmed Hypolite came to her twice and Juliana was with her on the two occasions when Hypolite came to her. She confirmed Hypolite came to see her first and told her that Simeon wanted to see her. It was put to her she did not say anything. She refused that she did not say anything. She said she told Hypolite no and Hypolite went away. She said Hypolite came back the second time, Hypolite forced her. She said she refused. He pulled her hands. She confirmed she kicked when Hypolite pulled her. She was asked if the women who sat on the stool saw them. She answered the woman who sat there were not standing with them. Juliana was there at the time. She did not ask Juliana to her help. Julian was afraid. She said she called out but the music was loud. She confirmed Hypolite pulled her to Simeon. She said Simeon was inside Navalval house. She said when they were standing, Simeon went inside Navalval house and sent Hypolite to her.



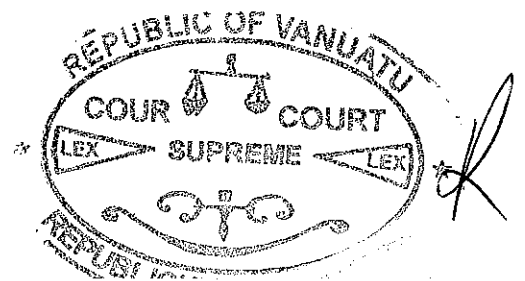
20. The Navalval house is close to the dancing place. She said there was no light in the Navalval. She was challenged as to how she knew Simeon was in the Navalval house. She answered that because when Hypolite came and talked to her, Hypolite told her that Simeon was inside Navalval house. She confirmed that Hypolite held her left hand with his right hand. She also said that Simeon held her left hand with his right hand. She said both of them held her hands at that time. She said Chrislyne's house is a new house. It was just built. She was asked that Chrislyne's house has no lock on the door and the door will remain close if it is closed firmly. The house is open inside. It was dark in the house, she could not see if there were any other person in the house. The floor of the house is half ciment and half is ground. Hypolite did not follow Simeon and her in the house.
21. It was put to her and she confirmed she could not see a person who was outside the house. She could see Hypolite standing outside the door from outside as the door was made of bamboo. Then she said she could not see Hypolite when he was outside of the house. She confirmed her evidence that when Simeon finished with her, she opened the door and saw Hypolite standing in front of the door of the house. It was put to her and she answered that Hypolite did not tell her that her father was looking for her. She denied seeing her father dancing, drunk and swore at the dancing place. She said her father asked her of where she was after she returned to her house at home. She said her father wipped her and also assaulted Simeon that night. She told her father that Simeon pulled her. She said she reported this case to the police after the Chief rang the police and informed the police of this incident. The Police said they will deal with it. It was also her intention to report this incident to the police. Her father did not look for Hypolite that night. She knew that the person who did wrong to her was Simeon.
22. The complainant was re-examined. She confirmed that when Hypolite pulled her, Juliana was there with her but Juliana too was afraid. She did not open the door when they got inside. She did not see whether there is a pin or lock. She did not know if there was a lock on the door or not.
23. I consider the evidence of this witness although there are inconsistencies in respect to some detailed aspect of her evidence, I consider that they are of degree but not to on element of the offence. She is a trustworthy and a credible witness.
24. Juliana Borey is the second prosecution witness. She is 16 years old girl of Port-Orly village, Santo. She attended school at Saint Anne Port-Orly. She testified that on 5 April 2015 at 9.00pm o'clock, she and the complainant went to a feast organized in the Honour of some boys who shaved for the first time. She and the complainant stood in the yard where the feast took place. The feast took place in the house of one Rolland Tofor. Hypolite and Simeon walked in toward them. Hypolite came and talked to the complainant. Hypolite came the second time and talked to the complainant. She did not know what Hypolite told the complainant about. Hypolite came back and talked to the complainant and then pulled the hand of the complainant to the house of Marie Paule. She said she saw when Hypolite held the complainant's hand and pulled her the complainant also kicked. The complainant did not want to go. When the complainant kicked Juliana said she returned to her house because she was afraid that her mother will find out that she was there and what she was doing there.



25. When she and the complainant watched the people dancing, she could see that different people danced. She gave evidence of the place they were and the dancing place to be between the court room to the road at the next corner. (estimated about 5-10 meters). When she saw Hypolite holding and pulling the complainant, she saw the complainant was kicking but she could not hear anything because the sound of the music that night was loud.
26. In cross-examination, she confirmed her evidence that Hypolite came to the place she and the complainant were standing, Hypolite talked to the complainant. She confirmed she did not hear what Hypolite told the complainant. She confirmed Hypolite came talking to the complainant the second time. She did not hear what Hypolite told the complainant. She confirmed she saw Hypolite pulled the hand of the complainant, she saw the complainant kicked but she did not know why Hypolite pulled the hands of the complainant. She said she saw Hypolite and Simeon walked in toward them. Juliana is a trustworthy and credible witness.
27. Constable Noelline Stephens is the third and last prosecution witness. She is 32 years of age. She is an investigating officer within the Criminal Investigation Department at the sexual office unit of Police Office in Luganville. She is doing this work for 6 years. She describes her work, the process of the complaints and investigation. She investigated 20 cases. She recalled of the complaint of the complainant of this case of an incident occurring on 5 April 2015. The complainant came and reported the matter to the police, she investigated the case. She talked to the complainant. She was afraid. She tried to cool her down and she obtained her statement.
28. They were two defendants in the case of the complainant namely Simeon Markmoi and Hypolite Damrock. She obtained the statement of Defendant Hypolite on 14 April 2015. She described the process of her taking Hypolite evidence. Hypolite told her that he was watching the dance at the house of the brothers who shaved. The complainant also was there. After Simeon sent him to tell the complainant to come and see him. Hypolite said he did not want but Simeon forced him to do this. Hypolite went and told the complainant: "Simeon i wantem you go look hem". She said Hypolite told her the complainant did not answer. Then Hypolite went away. She said this was the statement of Hypolite which he signed it. I believe the constable police officer in her evidence.

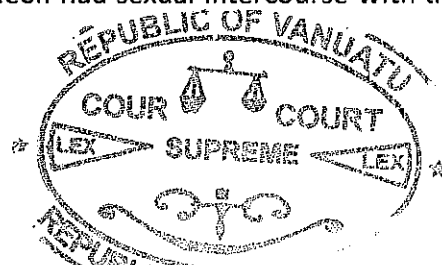
THE DEFENCE CASE AND EVIDENCE

29. The Defendant elected to give evidence after his rights under s.88 of CPC [Cap 136] were read and explained to him.
30. The defence case is that Simeon told Hypolite to tell the complainant to come and see him. Defendant Hypolite was a messenger that night of 5 April 2015. He did approach the complainant only once.
31. On the 5th April 2015, these young persons, Hypolite Damrock and the complainant, involved into one usual attitude of youth flirting. A message was passed but nothing more. The Defence will call two witnesses. Hypolite Damrock will gave evidence himself. His evidence will be to the effect that he was just a messenger that night. That he did not do any other actions apart from being the messenger. The second witness is



Chrislyne Damrock. She will testify on what she saw and did on the night of the feast of 5 April 2015.

32. Hypolite Damrock gave evidence to the following effect. He is 14 years old. He is from Port-Orly, Santo. He attends school at Port-Orly village. He knows why he is in court. On 5 April 2015 he was at the dancing place at Sector 1 in the house of the brothers who shaved their "moustache".
33. He was standing on the post of the Navalval house where the music was on. To the place where he was, there are two (2) Navalval houses. The music was inside one Navalval and people were in the other Navalval. They were sitting in the other navalval. There were lots of people in the dancing place at Sector 1. The owner of the house sat on the stool inside the navalval. He only saw Chrislyne's mother inside the house navalval. He knows the complainant. The complainant is a member of his family. He knows Simeon Markmoi; Simeon is an adopted son of one of his uncles (daddy in bislama). He saw Simeon that night at the feast. He saw the complainant also at the feast that night. He saw her she was standing at the gate. He said the complainant was standing on her own. He was at the dancing place. Simeon also was inside the navalval house where people danced. Simeon also danced. He said at that night he talked to the complainant but just once. He said he told the complainant that Simeon sent him to tell the complainant to go and see him. Simeon saw him at the dancing place. Then Simeon told him to tell the complainant to go and see him.
34. After Simeon told him this, he said he did not want to do this. He did not want to go and tell the complainant what Simeon told him to do. He said Simeon forced him so much so he was afraid of him because Simeon was drunk. Then he said sorry Simeon was not drunk. He walked to the complainant in the navalval where the music was not played in. He described. There is a gate. He walked to that gate and on the opposite side there is another yard. The complainant was standing at the gate of that yard. There were few people in the yard where the complainant was. There were Marie Paul, Chrislyne and Bubu Marie Estelle. They were sitting on a stool situated 4-5 meters. There were light. Chrislyne put a sola which shined the people who sat there. There were light to the place where the complainant was. He told the complainant that Simeon said he wanted her to go and see him. The complainant did not answer him. He said he did not do anything. He went back to the dancing place. He denied that at that night Simeon told him another thing. He said no. He denied he knew what Simeon told the complainant. He denied he knew of any plan of Simeon.
35. Hypolite Damrock was cross-examined. He denied he was drunk with Simeon on the night of 5 April 2015. He answered No. He denied he went to see the complainant twice. He answered no. The second time he denied he went to the complainant, she did not answer him. He pulled her hands to Simeon. He answered No.
36. It was put to him he approached the complainant the second time, he pulled the complainant's hands to Simeon, he said No. It was put to him he and Simeon pulled the complainant's hands inside Chrislyne's house. He said no. He denied that he pushed Simeon and the complainant inside Chrislyne's house. He said no -ino true. He denied he closed the door on Simeon and the complainant when they were inside Chrislyne's house. He said no. He denied during the time Simeon had sexual intercourse with the

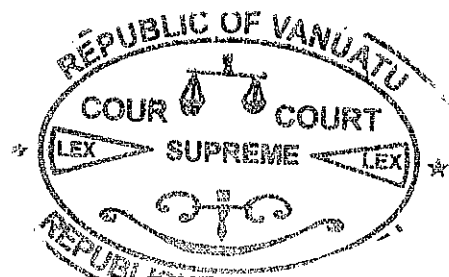


complainant he waited outside at the door. He said No. He denied during the sexual intercourse, he was outside Chrislyne's house. He said no. He denied that when Simeon finished sex with the complainant, he also wanted to have sex with her. He answered no – ino true. He denied he ever pulled the hands of the complainant that night. He denied the complainant called out. He denied the complainant kicked and called out.

37. He was asked at that night when he talked to the complainant, only the complainant and Juliana were there, there were no other people. He denied by saying no. He was asked at that night when he talked to the complainant there were no other persons when he talked to the complainant. He denied by saying it was not true. He denied that on 5 April 2015 the music was loud. He denied plenty men were drunk. He denied people making noises. He denied the place was dark because there were lights. He denied there were only lights at the dancing place. He was asked he denied Simeon is his friend. He said Simeon was living in the down and he came down to the village for the feast. He was asked that when Simeon sent him to talk to the complainant to see him whether he knew that Simeon will have sex with the complainant. He denied by saying no. He denied he had a plan with Simeon to have sex with the complainant. He denied that Chrislyne's sola shined a small place. He said Chrislyne's Sola was a big sola. It shined to the place where people are sitting. He confirmed his evidence that there are two navalval houses one at the dancing place and the Chrislyne's mother was inside the other one. He was at the navalval house where the music was played. He was asked and he said he could see people in the other navalval house when he was at the dancing place. Hypolite Damrock was not re-examined.

38. I consider the evidence of the Defendant Hypolite Damrock. I accept some part of his evidence but I do not accept some other parts of his evidence which are merely general denials whilst the evidence of the prosecution witnesses are more detailed and specific against him of talking to the complainant twice; of him holing the complainant's left hand with his right hand and of pulling her to Simeon; the complainant being kicked as she refused him pulling her to Simeon; of Simeon waiting in the other navalval house ; of pushing the complainant and Simeon inside Chrislyne's house and closing the door; of him waiting outside and guarded the house while Simeon had sexual intercourse with the complainant; of the complainant not opening the door to go inside the House before sex took place; of the complainant opening the door after sexual intercourse and seeing him in front of the door and blocking the door and asking the complainant for sex with her also.

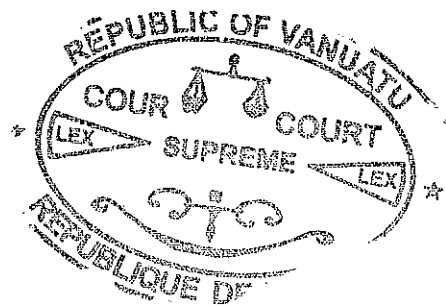
39. Chrislyne is the second and last Defence witness. She lives at Sector 1 at Port Orly village, Santo. She said on 5th April 2015 she was at the feast in her house. The feast took place at her yard. At the time of the feast, she was sitting on a stool close to the gate she saw the young boy talked to the girl. She said the stool was inside the yard and was at the right side of the fence. The gate was at the left side. She knows the complainant as a member of her family. She saw the complainant at the feast. She saw the complainant in the yard. On 5th April 2015, she was taking food for the boys. She said when she was sitting on the stool she saw the complainant was at the gate. She said she saw the complainant was on her own. She said she knows Hypolite Damrock. Hypolite Damrock is her brother. Her father and Hypolite's are brothers. When she saw the complainant that night, she saw that Hypolite talked to her. She said she saw



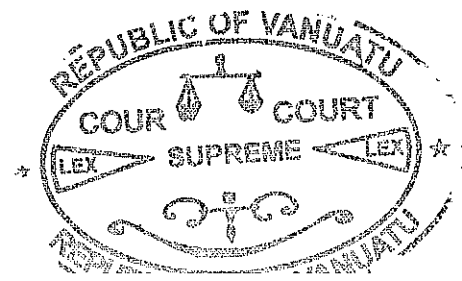
Hypolite talked to her and Hypolite went away. She said the sola provided light she saw Hypolite talked to her then she left. She said the sola light was in the back and the sola light shined the place in front of them. She saw Hypolite talking to the complainant and Hypolite left. She did not know what happened next. She did not see anything else that night. She was asked where she saw the complainant going. She said she followed the complainant when the complainant came and sat beside Simeon in her house. She was asked and she said she followed the complainant in her house to fetch the food for the boys. She said her house is the Navalval house. She said the door of her house was made with carton. She had no lock on the door of her house.

40. Chrislyne was cross-examined. She says at that night during the feast, the complainant's father came and looked for her. She denied the complainant's father asked her where the complainant was. But she said the complainant's mother came and look for her but she did not asked of the complainant's whereabouts to her. She said Hypolite is his brother because their fathers are brothers. She denied that if he is her brother she will do everything she wanted her to do to help him. It was put to her and she denied that she came to court to help his brother. It was put to her and she denied that she came to court to make up stories for helping her brother. She denied she knew the complainant was with Simeon that night.
41. She was then asked – in your answer to the question asked by your lawyer – you said you saw the complainant went and sat next to Simeon inside your house -Now you denied you knew where the complainant was that night. She answered there were lots of people. She was asked if she spent the night fetching food. She answered she followed the complainant and she went to the kitchen to fetch the food. She was asked when Hypolite talked to the complainant, she did not see him talking to the complainant. She agreed by saying yes. She was asked the place where the complainant was standing at that night, there were no light. She answered yes.
42. Chrislyne was re-examined. She was asked as to clarify her answers as to who came and asked the complainant to her – the father or the mother. She answered people starting looking for the complainant then she just knew.
43. As to the light and the place where the complainant was standing that night, she said the stool was close to the gate. The light was behind and shined in front. The complainant was standing in the light. The kitchen is close to navalval house. She said she fetched the food. She gave food to the boys. She saw Hypolite. She saw Hypolite talked to the complainant and then left. That is the end of the defence case and evidence.
44. I accept some part of the evidence of witness Chrislyne but I reject the major parts of her evidence as they are full of inconsistencies or internal contradictions with her own evidence in particular the evidence that she saw the complainant sitting beside Simeon Markmoi that night; that she followed the complainant when she came in the kitchen to get the food; her description of lightning at the place where the complainant was standing with Juliana at the night of incident.

SUBMISSIONS OF COUNSELS



45. At the end of the defence case, I hear oral submissions from the Prosecution and the Defence Counsels.
46. Mr Massing submitted on behalf of the state to the following effect. The Defendant Hypolite Damrock was charged with one count of aiding, counseling or procuring the commission of unlawful sexual intercourse, contrary to ss.30 and 97 (2) of Penal Code Act. The standard and burden of proof is on the prosecution to prove the guilt of the Defendant beyond reasonable doubt.
47. There is evidence that Defendant Hypolite Damrock aided Simeon Markmoi to commit the offence of unlawful sexual intercourse on 5 April 2015. The evidence is through the complainant herself. She says Hypolite approached her twice. The second time he held her hands and pulled her to Simeon Markmoi. Hypolite pushed Simeon and the complainant inside the house. Hypolite closed the door while Simeon had sex with the complainant inside the house. Hypolite also wanted to have sex with the complainant but she said no. The prosecution submitted that Julian Borey was there present when Hypolite pulled the hands of the complainant. The complainant kicked. Defendant Hypolite does not deny that he talked to the complainant that night. Hypolite met the complainant that night. It is consistent with the evidence of the complainant. Prosecution submitted that the prosecution adduced evidence through the complainant that Defendant Hypolite was present at the time the sex took place inside Chrislyne's house. The Prosecution also submitted that all evidence before the court show that Defendant Hypolite has the knowledge of the facts and circumstances that Simeon Markmoi will have sex with the complainant. Mr. Massing submitted that the court draw inferences on the actions or conducts of Defendant Hypolite that night of 5 April 2015. The Defendant approached the complainant twice. He pulled her to Simeon and pushed her with Simeon inside the house for Simeon to have sex with her. He insisted to have sex with complainant. The Prosecution submitted that Defendant Hypolite has the intention to assist Simeon Markmoi to commit the offence of unlawful sexual intercourse with the complainant. He submitted the court can draw inferences from the evidence. He pulled the hands of the complainant. She kicked. He continued to pulled her and gave her to Simeon Markmoi. He also guarded at the door of Chrislyne's house until Simeon Markmoi finished sex with the complainant. The prosecution submitted that the evidences show that Defendant Hypolite assisted or encouraged Simeon Markmoi to commit the unlawful sexual intercourse with the complainant girl.
48. As to the evidence of the defence, the prosecution submitted that the court should be cautions before relying on the evidence of Chrislyne Damrock as she is related the Defendant Hypolite Damrock as a brother. Further, the prosecution submitted this witness did not witness the time when Defendant Hypolite pulled the complainant to Simeon Markmoi as she was busy taking food for the boys. It is also submitted that there are inconsistencies on the evidence of this witness with the Defendant Hypolite.
49. The prosecution says the evidence of Chrislyne in cross-examination says that there were different people inside the house navalval whereas Defendant Hypolite says in his evidence in chief that there was only one person inside the House navalval (Chrislyne's mother). The Prosecution submitted that the court must be cautions on the evidence of the witnesses of the Defence. The Prosecution submitted finally that there was no

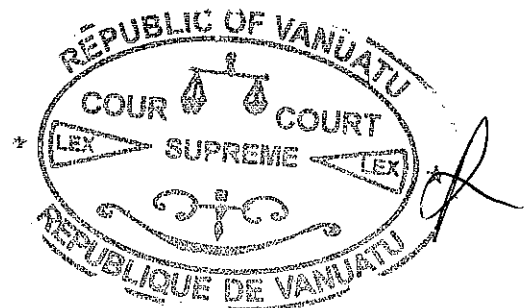


evidence which is consistent with innocence of Defendant Hypolite Damrock before this court.

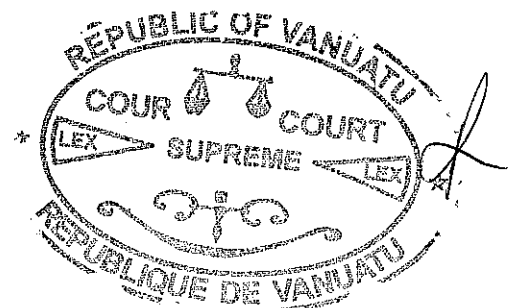
50. Ms Jane Tari submitted on behalf of the Defence to the following effect. The principal offender pleaded guilty to the principal offence of unlawful sexual intercourse. She says the issue is not of consent but it is of the age of the girl at the time of the offence. The Defence called two witnesses. Defendant Hypolite testified he took the message to the complainant. The message is Simeon says you go and see him. She says this message was confirmed by the prosecution witness (the complainant). She says these words are the only words that the Defendant told the complainant that night. She says the second prosecution witness no.2 (Juliana) gave evidence she did not know as to anything going on between Defendant Hypolite and the complainant. She submitted that if Defendant Hypolite says just that without knowing the intention, plan of the principal offender (Simeon Markmoi) then he should not be charged as an accomplice. She says during the examination in chief of Defendant Hypolite, she asked the Defendant this question – Do you know Simeon Markmoi planned to have sex with the complainant. Hypolite answered no. She says the second question is do you know any plan of Simeon Markmoi before you went to talk to the complainant – he answered no. She says this evidence was never challenged by the prosecution. She therefore submitted that the real issue is the element of whether Defendant Hypolite knew the facts or plans of the principal offender when he took the message to the complainant. The defence submitted that the prosecution failed to prove this essential element.
51. The Defence says the Defence second witness (Chrislyne) evidence is that she saw only once that Defendant Hypolite talked to the complainant. She sat close to the complainant at that material time. The complainant stood by her own. There was good lighting. The prosecution witness (complainant) confirmed that there are women sitting on the stool. This supports the evidence of the Defence.
52. In response to the submissions on the relationship between Defendant Hypolite and Chrislyne, the court should not place too much weight on this. There was evidence of Chrislyne that the door of her house was made of carton and there was no lock. This should raise doubt in the mind of this court as to the truth of the testimony of the complainant girl. In conclusion, the defence submitted the evidence of the prosecution so far is unsafe and could not be relied upon to secure a conviction against this 14 years old Defendant. The Defence submitted that the prosecution failed to prove two essential elements of aiding which are the knowledge and his intention. The defence submitted if there are any suspicion or doubt in the mind of this court, after considering all the evidence, the court must interpret the doubt to the benefit of the Defendant Hypolite Damrock who unfortunately was part of a teenage flirting.

THE LAW AND ITS APPLICATION

53. I now consider and apply the law to the facts as found and accepted by the court. I do this by going through the essential elements of the offence of aiding or encouraging the commission of the offence of unlawful sexual intercourse in the night of 5 April 2015 at Sector 1at Port Orly, Santo.



54. Element 1. That the principal offence was committed. The evidence establishes that the complainant was 14 years of age on 5 April 2015. On 5 April 2015, after the Defendant Hypolite Damrock pulled the complainant to Simeon Markmoi, pushed them in the house of Chrislyne and closed the door and stood outside guarding, Simeon Markmoi hold the neck of the complainant with his right hand and with his left hand Simeon removed the complainant's trousers, held her buttocks, held her breasts, pushed his penis inside her vagina, he moved his body ups and downs on her.
55. The evidence establishes this element beyond reasonable doubt.
56. Element 2. That the accused was present at the time when the offence was committed.
57. The evidence establishes that Defendant Hypolite Damrock approached the complainant twice. The second time, he held her hands and pulled her to Simeon Markmoi. Defendant Hypolite Damrock pushed Simeon Markmoi and the complainant inside Chrislyne's house. Defendant Hypolite closed the door while Simeon Markmoi had sexual intercourse with the complainant inside the house. Defendant Hypolite was outside and watched. When the complainant opened the door after Simeon Markmoi finished sexual intercourse with her, Defendant Hypolite was in front of the door, blocked the door and insisted to also have sex with the complainant. She refused.
58. The evidence establishes this element beyond reasonable doubt.
59. Element 3. That the Defendant knew the essential facts or circumstances that establish the principal offence.
60. The third element requires the prosecution to prove that the Defendant knew of, or believed in, the essential circumstances that establish the principal offence.
61. The "essential circumstances" of an offence are the facts that will go to satisfying the elements of the offence.
62. In this case, the principal offence is unlawful sexual intercourse. The essential facts that will go to satisfying the elements of this offence are: the act of sexual intercourse, the intention of the principal offender to commit the offence of sexual intercourse and the age of the complainant girl. The prosecution must prove that Defendant Hypolite Damrock had actual knowledge or belief of these essential circumstances of the offence of aiding unlawful sexual intercourse at the night of incident.
63. Here the evidence establishes that Defendant Hypolite Damrock approached the complainant twice. The second time, he held the complainant's hands and pulled her to Simeon Markmoi. Defendant Hypolite pushed Simeon Markmoi and the complainant inside Chrislyne's house. He closed the door and stayed outside watching while Simeon Markmoi had sexual intercourse with the complainant in the house. When Simeon Markmoi finished sex with the complainant, she opened the door. Defendant Hypolite was in front of the door and blocked the door. Defendant asked the complainant to also have sex with her. She refused.



64. On the basis of those established facts, it can be inferred that Defendant Hypolite knew that Simeon Markmoi is going to have sex with the complainant and Hypolite knew Simeon's intention to have sex with the complainant that night through his actions and conducts. The evidence establishes these.
65. The age of the complainant girl is also an essential circumstance of the principal offence. This fact will also go to satisfying the element of the offence of unlawful sexual intercourse.
66. In this case, there is no evidence adduced to the effect that Defendant Hypolite Damrock knew of the age of the complainant at the time of the commission of the offence (whether or not he knew that sexual intercourse with a girl under 15 years of age is a criminal offence).
67. In this case, the prosecution fails to prove on beyond reasonable doubt that Defendant Hypolite Damrock knew of the essential facts or circumstances that establish the principal offence.
68. Element 4. That, with that knowledge, Defendant Hypolite Damrock intentionally assisted the principal offender-(Simeon Markmoi)-to commit the offence of unlawful sexual intercourse.
69. In the present case, it is the case that without, that knowledge in element 3 above, the intention in element 4 cannot be established either on the criminal required standard. The prosecution also fails to prove the last element of this offence on the criminal standard of beyond reasonable doubt.

VERDICT

70. I find Defendant Hypolite Damrock not guilty of the offence of Aiding the commission of the offence of unlawful sexual intercourse. He is acquitted of that offence accordingly.

DATED at Luganville, Santo this 9th day of July 2015

BY THE COURT

**Vincent LUNABEK
Chief Justice**

