

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

Criminal Case No. 73 of 2016

**PUBLIC PROSECUTOR**

-v-

**STEWART (STUART) BANI**

*Mr Massing for Prosecution  
Ms Tari for the Defendants  
Hearing 3<sup>rd</sup> March 2016*

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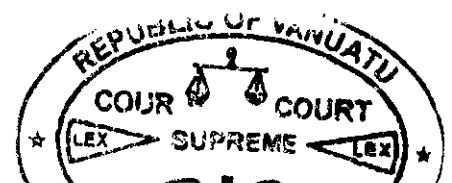
## **SENTENCE**

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1. The Defendant Stuart Bani was charged with the intentional homicide of Jimmy Frank who was his uncle or small daddy. He has pleaded guilty. The Defendant has killed someone. When stated in that bland way no one can be left in any doubt that the court is dealing with a very serious offence. However, the background to the offence and the facts of the offence itself will both have a marked effect on what punishment or sentence the Defendant should face. The matter came before Harrop J in early February and he deferred sentence, as is set out in his Minute of 5<sup>th</sup> February 2016, to allow that background information in mitigation to be put forward and proved.

2. The basic facts were set out by Harrop Jin his Minute but I shall repeat them here. The Defendant and a Mr Jimmy Frank travelled to the island of Malo on 15<sup>th</sup> December 2015. They were related because Mr Frank was the Cousin Brother of Mr Bani's father. During the night of 18<sup>th</sup> Mr Frank was at the water pump near to where they were staying. He was naked except for a towel which he had wrapped around himself. He called out to the Defendant to come to the pump. When the Defendant approached Mr Frank, at the time the Defendant was carrying a bush knife which he had been using to cut coconuts, Mr Frank remonstrated with him about a door being locked. As Harrop J then put it, there was some tension and an argument. Mr Frank then leant towards the Defendant and started to shake his fist in the Defendant's face. The Defendant thought he was going to punch him or otherwise attack him and he jumped up and swung the bush knife. He did not aim the blow at any particular part of Mr Frank's body but the knife actually hit the victim on the head. He caused a deep laceration to the right side of the victims head. The wound bled so much that it proved, in a relatively short time, to be a fatal one.

3. When he was interviewed by the police the Defendant said that Mr Frank had been abusing him since they had met in Vila before travelling to Malo. In particular he said that Mr Frank had forced him to have sex, in effect raped him, the previous night of



17<sup>th</sup> December when they were both sleeping in a relative's house at Aravita. Before Harrop J it was submitted that the sexual assaults should be taken into account. His Lordship was of the view that this was raising a factor which could justify a reduction in the sentence but that at that time the Prosecution were in no position to accept or reject what the Defendant was saying. His Lordship went on to say that the Defendant should produce evidence about his claims because the Prosecutor was in no position to prove or otherwise a matter which was not part of the incident in question. The onus was on the Defendant to establish, on the balance of probabilities the facts which he was putting forward in mitigation. That does seem to be the effect of section 10 of the Penal Code although the word exculpate perhaps means more than providing facts in mitigation;

10. *Discharge of burden of proof by accused*

*If a person charged with the commission of a crime pleads any defence by which he may exculpate himself if he proves certain facts, it shall be sufficient for such person to prove the same on the balance of probabilities*

However, if the issue is diminution of criminal responsibility, the requirement, set out in section 9 of the Penal Code, is for the prosecution to disprove beyond reasonable doubt what is put forward by the Defendant;

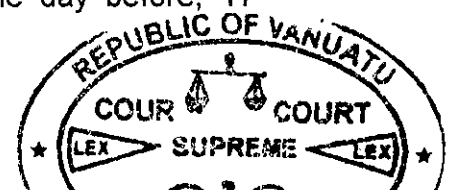
9. *Burden of proof in certain cases*

*Unless otherwise expressly provided by law, the burden shall rest upon the prosecution to disprove beyond reasonable doubt any plea of provocation, compulsion, coercion, self-defence, necessity, consent, accident or mistake of fact which has been sufficiently raised by the defence as an issue.*

4. When the matter came before me there were sworn statements from the Defendant's mother and father and one from the Defendant himself. The Prosecution did not challenge what the parents said. With regard to the Defendant's statement the Prosecutor took the opportunity to cross examine the Defendant on what he said in it.

5. The mother's evidence is helpful in the sense it describes a rather shy young man who is very respectful to his family, especially his older relatives. He had given up the opportunity to study to assist his elderly Grandparents in their village. Mrs Bani described her son as not being a particularly forceful character. Mrs Bani also describes the Defendant as being unwell for the past year because he was suffering from a heart condition where his heart would suddenly beat very fast. With her original submissions Ms Tari included a medical chart which mentions sinus tachycardia and although there is no formal medical report that is a condition which would fit the symptoms Mrs Bani describes in her sworn statement, a sudden racing of the heart.

6. The father's sworn statement contains details of text messages he received from the Defendant and the subsequent telephone conversation he had on 18<sup>th</sup> December. During that call the Defendant told him about the incident on the day before, 17<sup>th</sup>



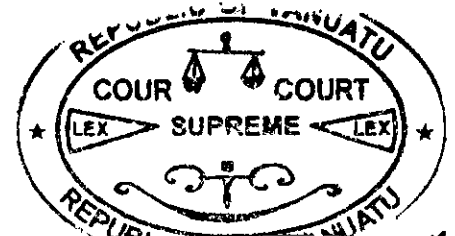
December. Mr Bani senior thought his son was clearly upset during the call and had made it clear he was not a willing participant in the sexual activity. The telephone conversation took place about 5 minutes past 7 in the evening. Mr Bani senior advised the Defendant to go and stay with another cousin and added that he should also tell Mr Frank to stop the sexual abuse or he, Mr Bani senior, would call the police in Luganville. The father then called the son of the "other" cousin and told him to expect the Defendant.

7. Some 20 or 30 minutes later the father received another call when he was told that the Defendant had injured Mr Frank. Shortly after, there was yet another call when he was told that Mr Frank had passed away.

8. The Prosecution has not challenged this evidence and so it must be accepted that the Defendant has established that he had told his father about the sexual abuse before the incident on 18<sup>th</sup> December. He had told his father during the telephone call that the sexual activity was non consensual and that at the time of the call his father could tell he was he was very upset.

9. The Defendant was cross examined on his sworn statement. He was asked why he had not reported the sexual abuse to the police before the 18<sup>th</sup> December. He said that he was afraid to. His sworn statement refers to threats made by Mr Frank after one incident of abuse. He maintained that position in cross examination. He also said that he did not really know anyone in Malo and so was unsure who else could help him. Taken together with the father's evidence his evidence paints a portrait of him being raped by Mr Jimmy Frank on at least one occasion, that being 17<sup>th</sup> December. It also shows that he was subjected to threats by his abuser, words to the effect; I'll kill you if you tell anyone about this. He believed those threats and he said he was frightened of Mr Frank. The Defendant says he was deeply affected by the abuse but had been too frightened to report the incidents to the authorities. He says in his sworn statement he was ashamed, he was frightened and he was cross. He sums his confused feelings up by saying, "*mi gat tumas tingting insaed lo mi*" However, he did contact his father by telephone to seek advice and help. That advice was to tell Jimmy Frank to stop the abuse and to also tell him that if he did not then Mr Bani senior would contact the Police. Mr Bani senior also told his son to move and go and stay with another relative. The unchallenged evidence from Mr Bani senior shows that he was very concerned about what was happening and clearly did not consider his son's appeal for advice and help as insignificant.

10. I note and repeat, the parents' evidence was unchallenged. The Defendant was questioned as to why he had not reported the abuse to authorities but otherwise his evidence was unchallenged. I find that the situation leading up and including the 18<sup>th</sup> December was as set out in the sworn statements filed on the Defendant's behalf. There is no doubt the facts as now established by the Defendant and as previously set out by the prosecution in the "Brief Facts" attached to the information could affect any sentence. There is no allegation by the prosecution that the actions of the Defendant were premeditated and therefore the maximum sentence in this case is, in any event,



20 years<sup>1</sup>. In addition it is submitted by the Defendant's counsel that there are sufficient significant mitigating factors which would enable the court to reduce any sentence which otherwise would be imposed.

11. This is not a case where self defence is being pleaded. If that were so and the Defendant succeeded in that plea he would be entitled to be acquitted. This is, as Harrop J opined, a case where there is either bare mitigation or the law relating to diminished responsibility is being invoked.

12. Section 24 of the Penal Code deals with diminished responsibility. It clearly affects only the sentence to be imposed and is effective at the discretion of the Court. The section reads:

*24. Effect of diminished responsibility*

*Wherever criminal responsibility is diminished by law, the punishment shall be mitigated at the discretion of the Court.*

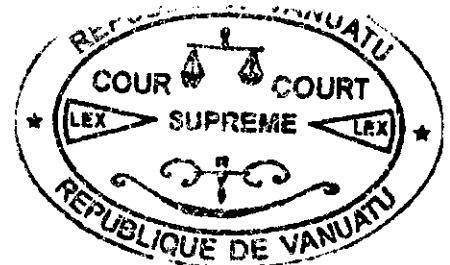
The question then is how in law can there be a diminution of criminal responsibility? There are specific mentions in the Penal Code of diminished responsibility and under the heading of Diminution of Responsibility; section 26 deals with compulsion and coercion and section 27 refers to provocation. In sections 28 and 29 dealing with offences involving attempts and conspiracy, it is stated voluntary withdrawal from an attempt or conspiracy can diminish responsibility. Of course there is also the interplay between sections 20 (defining and setting out the consequences of a finding of insanity) and section 25 which deals with the situation where an accused is found not to be, "insane within the meaning of section 20" but who is found to be, "suffering from such abnormality of mind, ....., as diminished his responsibility for his acts". It is not put forward in this case that the Defendant was suffering from an abnormality of the mind. Neither is it said the Defendant was coerced or compelled to murder Jimmy Frank. Nor are we looking at conspiracy or attempted murder.

13. The only legislative provision which could apply to this case, given the facts as now established, is that under section 27, provocation. The section reads:

*27. Provocation*

*(1) Criminal responsibility shall be diminished in the case of an offence immediately provoked by the unlawful act of another against the offender or, in his presence, his spouse, descendant, ascendant, brother, sister, master or servant, or any minor or incapable person in his charge, provided that the reaction constituting the offence be not disproportionate to the degree of provocation.*

<sup>1</sup> Section 106 (1)(b) Penal Code [Cap 135]



(2) *Without prejudice to the generality of subsection (1), the intentional killing or wounding of another shall be deemed to be not disproportionate to provocation caused by violent blows or injuries.*

(3) *In order that criminal responsibility be diminished, provocation must be of such degree as to deprive a normal person of his self-control.*

14. I am obliged to consider the question of whether there was provocation in this case. In two English cases<sup>2</sup> it was said the judge was bound to direct the jury on the question of provocation if there was sufficient evidence of an act of provocation resulting in a loss of self control even when the question is not raised by counsel or even when counsel agree a direction is not necessary. I do not sit with a jury, I am both judge of facts and law, but I must still conduct the trial as if there was a jury. Sufficient evidence has been raised and so I now consider the question.

15. Looking at section 27, the first issue is the reaction of the Defendant. Was he "immediately provoked" by the unlawful sexual abuse and threats made the victim; that is to say was the abuse by the victim sufficiently proximate in time to what the Defendant did in supposed reaction to it? Provocation is seen by the law as a sudden loss of control in the heat of passion. In one of the older English cases<sup>3</sup> Lord Devlin set out the dynamic of provocation, "*as a sudden and temporary loss of control rendering the accused so subject to passion as to make him or her, for the moment, no master of their own mind*". The view taken was that the provocation and reaction should be almost simultaneous. Clearly there could be no element of premeditation or planning in such dynamic. However that view has moderated over time and now it has been accepted that there can be a build-up of emotions over time and a separate incident triggering the loss of control<sup>4</sup>. The Court of Appeal in *Ahluwalia* said that the jury need not confine itself to the night of the killing but should take into account the history of the parties' relationship. In New Zealand the courts have accepted the concept of the slow burn rather than an instant explosion of passion and have accepted that initial provocation can be revived at a meeting as much as 13 days later<sup>5</sup>.

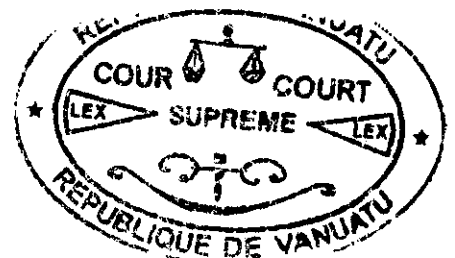
16. The evidence in this case is of serious and violent sexual abuse on the Defendant by the victim Mr Jimmy Frank. The most serious incident, the rape, occurred on 17<sup>th</sup> December the night before the day of the incident and the death. The reaction by the Defendant occurred a day after the most provocative episode. Even so it can be accepted that the Defendant has shown he was "immediately provoked" for the following reason. Early the next morning on the day of the killing (the unchallenged evidence is at 7:45 am) the Defendant sent a text message to his father asking him to call. Another message was sent in the evening. The father responded to that message

<sup>2</sup> *R v Dhillon* [1997] 2 Cr App R 104; *R v Acott* [1997] 2 Cr App R 94

<sup>3</sup> *R v Duffy* [1949] 1 QB 63

<sup>4</sup> *R v. Ahluwalia* [1992] 4 All ER 889

<sup>5</sup> *R v Taaka* [1982] 2 NZLR 198



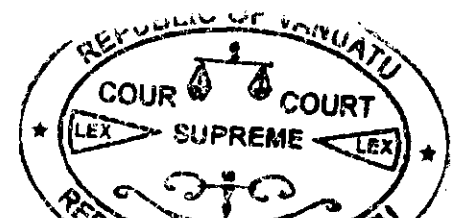
and spoke to the Defendant. The father believes this call to have been made just after 7 pm. The Defendant was upset. Mr Bani senior says in his statement, "*I could clearly hear from our conversations that Stuart was not feeling well and had been traumatized by the actions that the late Jimmy had done to him. I did hear Stuart swore by saying "Fuck, Daddy mi les long Daddy Jimmy finis fasin we hemi stap mekem long mi".* Whilst Mr Bani senior did try to calm the situation by telling the Defendant to move, it is not difficult to accept that the re-telling of the events had caused the Defendant to become agitated. Other evidence points to the reaction by the Defendant occurring very shortly after the telephone call from his father. Prosecution witnesses tell of hearing a man cry out around 7 to 7:30 pm. The cry came from the victim Jimmy Frank and so the blow that killed him is in the rough time frame of 7 to 7:30 pm. This time frame is very close to the time that Mr Bani senior was speaking to the Defendant on the telephone.

17. There is no challenge to the Defendants version of events of there being angry words spoken by the victim and a lunge towards the Defendant. From all the evidence there can be no doubt this obviously happened between the time of the telephone call and the time other witness heard a man cry out. The situation as described by the Defendant allows a finding to be made that the provocation of the sexual abuse the night before, the threats made by Mr Frank and then the angry words between him and the Defendant coming immediately after the telephone call between father and son where the son relived the abuse and threats and became agitated, satisfies the requirement in section 27(1) that the intentional homicide of Jimmy Frank was *immediately provoked by the unlawful act of another against the offender.*

18. The second issue is also set out in section 27(1) which is the requirement that, *the reaction constituting the offence be not disproportionate to the degree of provocation.* The evidence plainly shows that there was one blow and one blow only, albeit with a bush knife, and that the Defendant fled the scene through fear of the victim immediately after delivering it. There was no frenzied attack, no delivery of multiple blows, no follow up attack once the victim fell to the ground. It appears to me that the reaction of the Defendant as described in all the evidence is covered by the proviso set out in section 27(2);

(2) *Without prejudice to the generality of subsection (1), the intentional killing or wounding of another shall be deemed to be not disproportionate to provocation caused by violent blows or injuries.*

Whilst it must be accepted that there is no evidence the victim struck the Defendant before the fatal blow from the bush knife on the 18<sup>th</sup> December, the evidence of rape is evidence of violence. Rape is an inherently violent crime. It seems strange to me if the law was to intend that the exception set out in section 27(2) should not apply to a reaction to a rape where there are no actual physical violent blows. Whilst I have to accept the criminal law in Vanuatu is codified, the common law is, and has been for a



number of years <sup>6</sup>, quite clear that provocation was not limited to reactions to physical attacks. In my view, and given that in Vanuatu provocation is not limited to intentional homicide, all that 27(2) is saying is that if the court accepts there was provocation and the reaction to it results in an intentional killing or wounding the intentional killing or wounding would not in themselves be considered disproportionate. In other words the reaction does not have to match the unlawful act which provokes. Of course it should also be noted that section 27(1) refers to unlawful acts against a spouse or other relative or person being provocative. For example, section 27(2) would come into play if the accused has reacting to his or spouse being raped.

19. If I am wrong then I would add that, alternatively, I find that the one blow from a bush knife swung in blind panic and fear would not be disproportionate bearing in mind what had very recently transpired between the Defendant and the victim.

20. The final requirement as set out in section 27(3) has caused endless difficulties in the law, or rather to lawyers;

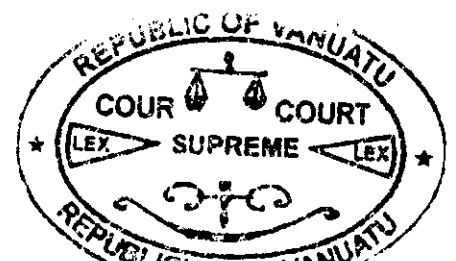
*In order that criminal responsibility be diminished, provocation must be of such degree as to deprive a normal person of his self-control.*

This is the Vanuatu version of what was commonly known as the reasonable man test. The original concept was based on the requirement that in order for provocation to succeed in diminishing criminal responsibility there must be a complete and sudden loss of control, as set out in *Duffy's* case and others <sup>7</sup>. However the question was never, could an accused rely on provocation by reference to the actual effect of the victims behaviour on him but rather what was the effect it would have had on the reasonable man. The concept of the reasonable man was borrowed from tort. If the reasonable man would not have lost his self control then there is no provocation even if the accused proves he actually lost his self control. As has been argued in many articles and has been said in several cases the concept of the reasonable man is not a, one size fits all jurisdictions, type of concept. It is not an easy concept to come to terms with within a jurisdiction let alone across jurisdictions. In Australia, it seems on the basis that a reasonable man would not lose self control, the reference is to the ordinary man. In New Zealand the reference is to an ordinary person. In Vanuatu the reference is to a normal person. Thus the requirement of section 27(3) means the provocation relied on must be such that it would cause a normal person having the power of self control of any normal person from Vanuatu, but otherwise having the characteristics of the Defendant, to lose self control.

21. In my view the normal person in Vanuatu would have lost his or her self control if he or she had been subjected to the same unlawful acts meted out by the victim to the Defendant. There is no characteristic peculiar to the Defendant alone which resulted in his loss of self control. In the circumstances as are evident in this case any normal person would have reacted, would have been provoked, would have been deprived of

<sup>6</sup> *Holmes v DPP* [1946] AC 588 (HL)

<sup>7</sup> *Mancini v DPP* [1942] AC 1; *Holmes v DPP* [1946] A.C. 588



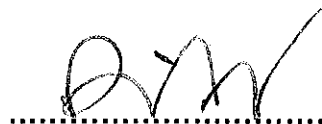
their self control just as the Defendant did and was on 18<sup>th</sup> December 2014. I find that the Defendant was provoked and that his criminal responsibility should be diminished and that any sentence passed upon him should reflect the diminution.

22. Having reached that conclusion I have no need to consider whether given the facts as found, and all the circumstances of the case, there can be situations other than those as set out sections 26 and 27 of the Penal (or indeed sections 25, 28 and 29) which can diminish criminal responsibility.

23. In regards to sentence, I accept the proposition that the sentence should be more than the sentence for an "unintentional" death but less than the maximum set out in section 106(1)(a). The starting point would normally be in the range 12 to 15 years but the diminution of criminal responsibility mitigates the sentence so that I am of the view the starting point should be 8 years. The Defendant has pleaded guilty at the earliest opportunity and so should be given the maximum credit. The sentence should be reduced accordingly by 32 months (or 2 years and 8 months). The Defendant is a young man who has led a blameless life so far. He should be given credit for his youth and good character. A further 6 months should be deducted from his sentence. It is also accepted that his family have arranged a significant reconciliation ceremony and provided substantial compensation. The ceremony involved the prominent Chiefs from Malo and Emau islands together with the Defendants family and that of the deceased. I am prepared to deduct a further 12 months from the sentence. The end sentence will be one of 3 years and 10 months. The sentence will be deemed to have commenced the day the Defendant was taken into custody, namely 20<sup>th</sup> December 2015.

**Dated at Luganville this 3<sup>rd</sup> day of March 2016**

**BY THE COURT**



**D. CHETWYND**  
Judge

