

PUBLIC PROSECUTOR

-v-

TOMA RALE

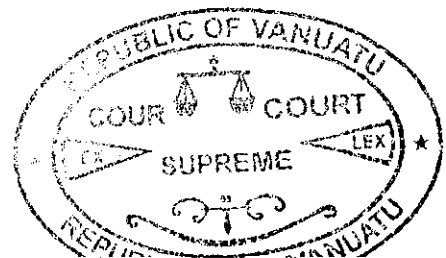
Coram: V. Lunabek- CJ

Counsels: Mr Simcha Blessing for Public Prosecutor
Mr Henzler Vira for the Defendant

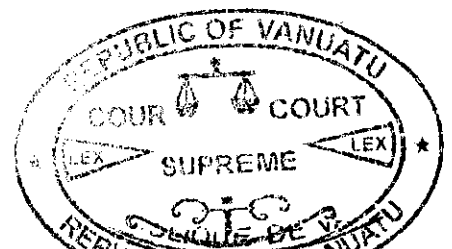
Date of Delivery: 13th September 2017

REASONS FOR VERDICT

1. Accused Toma Rale, this is the judgment in your case. You are charged with two offences of sexual intercourse without consent, contrary to ss.90 and 91 of Penal Code Act [Cap 135].
2. The first offence is said to have happened on 29 May 2014 in the roof house. The second offence is said to have occurred after the first one on the same month of May 2014 but in the kitchen house.
3. You came from Peterbu Village, North of Malekula. The complainant in this case is also from Peterbu Village. She is your cousin sister. Your grandfather and the grandfather of the complainant are brothers.
4. As a result of the sex between you and the complainant, the complainant got pregnant.



5. A complaint was lodged by the complainant against you on 11 August 2014.
6. On 19th October 2016, you entered not guilty pleas on the two counts of sexual intercourse without consent charged against you.
7. After several attempts, the Court listed your trial on Wednesday 30 August 2017 at 2.00pm o'clock after a warrant of arrest was issued against you. You attended and you maintained your initial pleas
8. This is a criminal trial. The law is that the prosecution who brings the charges against you must prove each and all essential elements of the two offences charged against you beyond reasonable doubt.
9. In this case, the prosecution must prove on the standard of beyond reasonable doubt the following elements in respect to the counts of sexual intercourse without consent:-
 1. That on 29 May 2014, and on another date in the month of May 2014, Defendant Toma Rale had sexual intercourse with the complainant at Peterbu Village.
 2. That on 29 May 2014 and on another date in the month of May 2014, at the time of sexual intercourse, the complainant did not consent to have sexual intercourse with Defendant Toma Rale on the two said occasions on May 2014.
 3. That on both occasions of sexual intercourse in the month of May 2014, Defendant Toma Rale, had reasonable belief that



the complainant did not consent to have sexual intercourse with him.

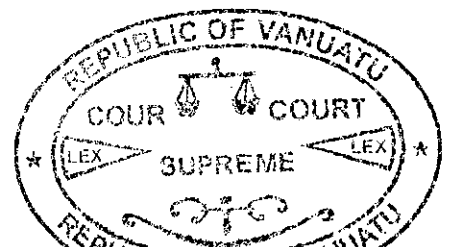
10. Before the prosecution case started the Court read and explained to the accused his right of innocence to him pursuant to s.81 of the Criminal Procedure Code (CPC) Act [Cap 135]. The Accused Toma Rale informed the Court he understood the rights explained to him by the Court.

The Prosecution Case

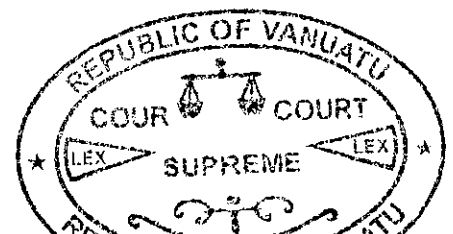
11. The thrust of the prosecution case is that the Accused Toma Rale had sexual intercourse with the complainant on two occasions in the year 2014 and the complainant did not consent for sex with the accused on these two occasions.

The Prosecution evidence

12. The prosecution called two witnesses (PW). The PW1 is the complainant. She lives with her family at Peterbu Village. She is now 21 years old. She was 18 years old at the time of offending. She lives in the village and she does gardening. She has four (4) brothers and four (4) sisters. She has a son as the result of the sexual intercourses she had with the complainant. Tom Rale is the father of her son. She does not live with the defendant. She says Toma Rale is a member of her family. She is directly related to him. Her grandfather and his grandfather were brothers. She and the accused are straight cousins.

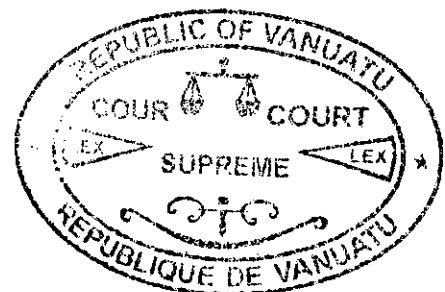


13. She says she came in Court because of the problem Toma Rale did to her. She said Toma Rale had sexual intercourse with her twice in 2014. She did not consent for him to have sex with her.
14. She says the first time that Toma Rale had sex with her was on 29 May 2014. This happened in her house. The house of the Defendant was near her house in the village (some 15 - 20 meters apart). On 29 May 2014, she was at their house with her little brother of 2 years old and her 4 years old sister. Her parents went to the gardens which were far away from the house. One could not hear people talking or calling from the house or from the gardens.
15. The complainant testified she was in the big house (copper house) with her little brother and sister. Toma Rale came to the house. He sent away her little sister and brother to the house of her grandmother which was a distance but in the village. At the time, her grandmother was not in the house. She did not know where her grandmother was.
16. Toma Rale then asked her for sex. She refused. She said he did force her. Toma said he will give money to her in return for sex with her. She said her heart was bumping. Toma Rale asked her again for sex. She refused again. He forced her until he removed her cloth. He made her laying on the mattress inside the house copper. He then had sexual intercourse with her. She explained that when Toma Rale offered her money, she refused whatever the amount whether small or big.
17. The second time he had sex with her was in the kitchen house. Her parents were not at home at the time. It was on the month of May

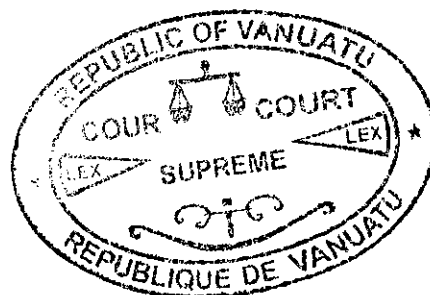


2014. She could not remember the date but it was in May 2014 after the first sex occurring on 29 May 2014.

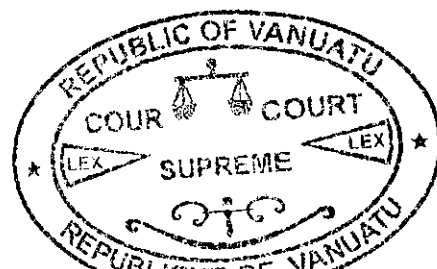
18. She was in the kitchen house with her little brother and sister. She prepared food. She peeled bananas in the kitchen when Toma Rale came in the kitchen. He came in the kitchen with a knife and forced her for sex. She said she refused. He forced her again and she refused again. "Hem I forcem mi blo karemout cloth blo mi mi no wantem. Mo hemi forcem mi again blo tekemout nomo culot blo mi" "Time we mi look knife we hemi karem mi fraet mo karemout panty blo mi." He forced her to sleep down. She laid down. He had sexual intercourse with her. At the time of sex, Toma Rale did not say anything. She could not recall of any.
19. The complainant was cross-examined. She could not recall the time between the first and second occasion of sex with the Defendant. After the first incident, her parents came back from the gardens, she accepted she did not mention the incident to her parents. She did not mention to her parents about the second incident either. She accepted she was pregnant in the month of June 2014. She did not tell anyone of what happened to her on the first occasion of sex nor in the second incident of sex. She accepted she did not tell anyone until her family found out of her pregnancy. Her mother found out that she was pregnant. Her mother was not happy with her and she was angry with her.
20. When the family found out about the incidents, the father of the defendant said the matter must be reported to the police.



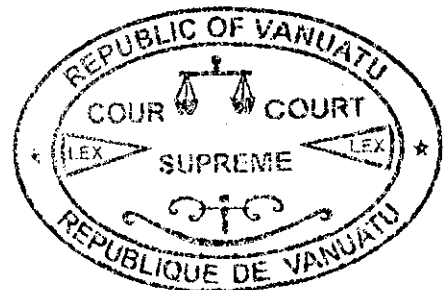
21. She accepted she made a statement to the police. The statement was referred to her. She stated in the statement the following:
- “....manis blo May 2014, lo Peterbu - hemi gat sex wetem mi two taem mekem mi gat bel...”
22. It was put to her and she accepted what she tried to say was that she wanted to report Toma Rale because she was pregnant from him.
23. She accepted she reported the incidents to the police after her father and the Defendant’s father told her to go and reported the matter to the police. She made her report to the police on the month of August 2014. She stated that it was her thinking to report the matter to the police. She made her report (complaint) to the police on 11 August 2014.
24. It was suggested to her that the reason for her to lodge the complaint to the police was because she was pregnant from him. She accepted when it was put to her that if she was not pregnant, she would not have ever lodged the complaint. It was put to her that her version of the incidents was not true. She answered it was true. Her mother found out she was pregnant from Toma Rale in August 2014. She came at the police station with her mother and Chief Ariman.
25. It was suggested to her that if her mother was not angry with her, she would not come to lodge the complaint to the police. She answered: “Si bai mi come.”



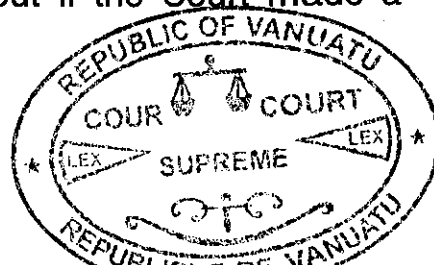
26. She confirmed her evidence in chief that Toma Rale came with a big knife on the second occasion in the kitchen house. It was a bush knife.
27. It was suggested to her that the reason for the Defendant to be dealt with by the Court was because she got pregnant after the sex she had with him. She answered yes. She said she never got sexual intercourse with the Defendant before those two (2) incidents. It was put to her and she accepted that she reported Toma Rale because he got her pregnant.
28. It was put to her that if he did not make her pregnant, she would not complain. She answered no.
29. She confirmed the first incident of sex occurred in the Copper House. The second incident of sex happened in the kitchen house. She confirmed she did not tell anyone of the two incidents. They found out she was pregnant. Because Defendant Toma and her are cousins, the news of these reached their parents. She confirmed. It was suggested she was afraid because they got the news of these. She answered yes. It was suggested to her she made a report which was not true. She answered no – hemi true.
30. The complainant was re-examined. She confirmed her evidence in chief that she made a complaint against Toma Rale because he made problem to her. She explained the problem was that he had sexual intercourse with her. She clarified she put the complaint against the Defendant and it was her own thinking to put the complaint against him.



31. She clarified that she lodged a complaint against Toma Rale because he made her pregnant. She answered yes to that question. Then she was asked whether what she told the Court of Toma Rale was not true. She answered "Hemi true."
32. The second prosecution witness is police officer Krenly Gema. He is currently working in the police station at Port Vila. He served in the police force for 24 years as a police officer. He worked and served as a police man at the Lakatoro Police Station for 20 years. He worked for 7 years at the Family Protection Unit (FPU). He is the only police officer working at FPU at Lakatoro. No one else worked with him there. He is a corporal officer.
33. In 2014, he worked at Lakatoro police station. He was served in FPU and he was the only officer there. He dealt with many cases including the case of the present defendant.
34. He was involved in the investigation of the case against the Defendant Toma Rale. He had received the complaint of this case on 11 August 2014. He was in contact with the Defendant Toma Rale on 30 August 2014.
35. Toma Rale came to the police station at Lakatoro following a written note he made and addressed to the Defendant at Peterbu Village. In the note, he invited the Defendant to the police station at Lakatoro to tell the police of his side version of allegations that the complainant in this case made against him.

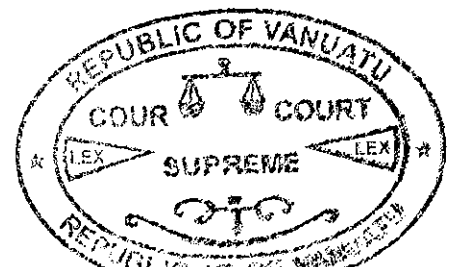


36. In the note, it was written that police wanted to talk to him pursuant to the complainant's complaint against him. If he could come to the police station at Lakatoro. He sent the note back to the Defendant on the date where the complainant made her complaint (11 August 2014). That was the only written note sent to the Defendant to come to the police station.
37. The Defendant Toma Rale came to the police station on 13 August 2014 pursuant to the note at about 9.00am o'clock in the morning. He came to the police station with some members of his family. He met with the Defendant at the police station and told him that the police wanted to talk to him about the complaint the complainant lodged against him of sexual intercourse without consent.
38. He sent the defendant's family member away and went with him inside FPU room. That is part of the procedure of work of police to talk only to the defendant. Then, he cautioned him. He explained he read to the Defendant the written caution which was in the form of written statement. He told him that he has the right to have a lawyer and if he made a statement, he will reduce his statement into writing and anything he said in the statement will be used in evidence. He asked the Defendant and he agreed to tell him his side of the story (allegations). He wrote it down.
39. After he cautioned him and he agreed to make a statement the Defendant signed the caution statement in the space therein.
40. The Defendant then told him of his version. He said he knew he was wrong to make a problem with his sister but if the Court made a

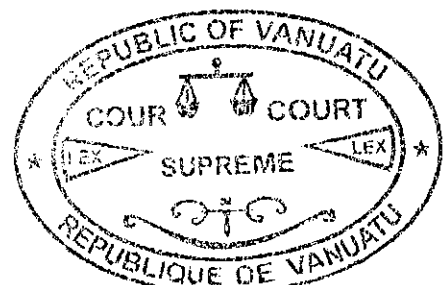


decision against him, the Court must take into consideration of his future because he is a young man. The Defendant said sorry for what he did to his sister.

41. He said he read back the content of the statement to him. He agreed to it and he signed the cautioned statement after his statement.
42. The statement of the Defendant Toma Rale was shown to this witness. He identified and recognised it. He confirmed he took that statement from the Defendant. He confirmed the signature on the caution was that of the Defendant Toma Rale. He confirmed the content of the Defendant story and he reduced it into writing. He confirmed the statement of the Defendant after the statement in the cautioned statement.
43. The cautioned statement was conditionally admitted and marked as FIP –P1. The Defence agrees with this process.
44. He confirmed the Defendant come at the Police station at 9.00am o'clock. He started asking him question at about 9.09am o'clock. He finished with the Defendant by 9.30am o'clock. The interview took about 20 minutes. The family members of the Defendant waited for him outside. They were not far from where the interview took place – about 2 and ½ meters.
45. During the interview of the Defendant, there were no officer in the interview room. While he questioned the defendant, he did not make anything else to him. He did not force him. He did not threatened him to make his statement.



46. After he cautioned the Defendant he told Defendant Toma Rale to go back to the village and wait until the court will call on him to attend.
47. He said Defendant Toma Rale returned back to his village at Peterbu. There was no holding cell at Lakatoro. The old cell at Lakatoro is no longer functional, did not work. When they kept people in remand, Police Officers have to feed the person with their pocket money. To his understanding, the remandees waiting for the trial are under the responsibility of the correctional services. The remandees under the police investigation are not under the responsibilities of the correctional services.
48. He said this case is not the first case of this type. There were many cases that the police at Lakatoro dealt with their situations the same way in the case of this Defendant in this case. He said Defendant Toma Rale was never arrested. He was never detained. He was never remanded.
49. At the time of interview, he assessed the behaviour of the Defendant to be quiet. He saw his face he recognised the face of someone who is sorry for what he did.
50. Police corporal Krenly Gema was cross-examined. He confirmed his evidence of the time he served in the police force. He was asked he said he explained that the Defendant himself signed his cautioned statement. The Defendant also wrote his name on top.



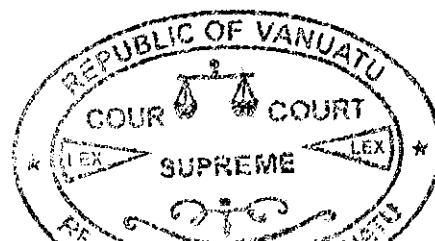
51. He was asked he said he wrote the name of the Defendant in the cautioned statement. He read and explained the caution. He informed the Defendant of the nature of the charge against him. He confirmed the interview took 20 minutes. He confirmed he took the personal details of the Defendant which were in the cautioned statement within 20 minutes. He was asked he said he knew that sexual intercourse without consent is a serious offence. He was asked he confirmed when he prepared the cautioned statement, there was no police witness during the time.
52. That is the end of the prosecution evidence and the end of the prosecution case.
53. The Court ruled that there was a prima facie case made out against Defendant Toma Rale and he was required to put forward his defence pursuant to s.164 (1) of the Criminal Procedure Code (CPC) Act [CAP 136].
54. The Court read and explained the rights of the Defendant as contained in section 88 of CPC. The Defendant understood it.

The Defendant Case

55. The Defendant Toma Rale pleaded not guilty to two (2) counts of Sexual Intercourse without consent. He elected to remain silent. He decided also not to call any other person to give evidence on his behalf. That is the end of the defence.

Discussion on evidence

56. The defendant exercised his rights to remain silent and not give evidence. The Court acknowledged and is right respects the Defendant of doing that and not to be criticized of doing so. Any adverse findings based on circumstantial facts, should be inferred only on proven facts. The case of *Swanson –v- Public Prosecutor [1997] VUCA* is the authority for the above proposition.
57. I consider the evidence of the police corporal Krenly Gema. He is a trustworthy witness. I accept that he was the only one working in the Family Protection Unit (FPU). There is no one else working with him therein. He conducted the interview alone with the Defendant on 30 August 2014. I accept his evidence that there was no force used on the Defendant when he cautioned him. I accept his evidence that there was no threats applied on the Defendant when he made his cautioned statement. I accept the fact that the procedure was simple. The defendant was called into the FPU. He was cautioned. I accept his explanation of how he cautioned the Defendant and his explanation of the rights including the fact that if he wanted to say something or make a statement what he said or stated could be used in the Court as evidence against him. I accept the Defendant understood that. I accept he asked the Defendant to make a statement. The Defendant agreed to make a statement on his own free will.
58. I take the point that there may be risk where there was no other police officer to witness the conduct of the interview of the defendant. I noted that there was no risk or any danger that is shown through the

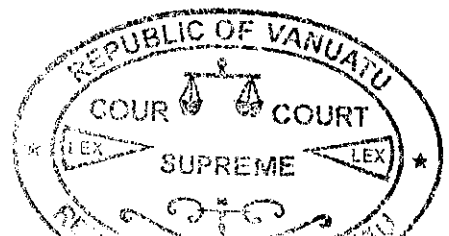


cross-examination of the police officer cautioning the Defendant and conducting the interview of the defendant in this case. I am satisfied beyond reasonable doubt the admissions of the Defendant contained in his own cautioned statement were made without force or threat or advantage of any kind. I therefore accept the evidence of Police Corporal Krenly Gema and I admit the cautioned statement of Defendant Toma Rale and marked it as Exhibit P1. The defence says there was challenge in respect to the cautioned statement of the Defendant and the admissions contained therein. The questions or challenge made, were on matters related to the weight of evidence and to be considered at the end of the trial. On the overall assessment of evidence, the Court accepts the evidence of Police Corporal, Krenly Gema and admitted the caution statement of the Defendant as made without force or threat. It was made on the basis of his free will.

59. I find the evidence of the complainant is creditworthy and I believe that she says the truth overall. I note she may misunderstand the questions asked of her in cross-examination, she may be disturbed when she was asked the questions and she may find the audience hostile, but after some control from the Court, by a short adjournment her evidence was creditworthy throughout her oral testimony.

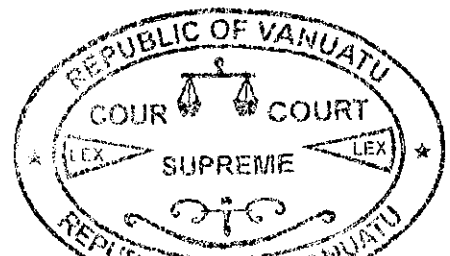
Application of law to facts

60. I now apply the law to the facts as found by the Court.
- I. On the first elements in both instances whether the prosecution has proved beyond reasonable doubt that Defendant Toma Rale



had sex with the complainant on 29 May 2014 and on another date in May 2014.

61. There is overwhelming evidence of this element from the prosecution evidence. The evidence of the complainant is that Defendant Toma Rale had sex with her in the Roof House on 29 May 2014. Before sex took place, the Defendant sent away the complainant's small brother (2 years) and her sister (4 years) to go to the complainant's grandmother's house. She asked the complainant for sex. She refused.
62. He then offered money to the complainant in return for sex with her. She refused. He insisted and forced to remove her clothes. She succumbed to his sexual advances. He made her lay on the mattress and had sexual intercourse with her. That was the incident of sex occurring on 29 May 2014.
63. On the second occasion in May 2014, the incident occurred in the kitchen house. The complainant was peeling bananas in the kitchen. She was with her little brother and sister. The Defendant came into the kitchen with a bush knife. He asked the complainant for sex.
64. She refused. He asked the complainant to remove her clothes. She refused. He asked her persistently for sex, the complainant refused. The defendant asked her just to remove her panty so that he could have sex with her. The complainant saw that the defendant had a bush knife. She was afraid after some resistance and she removed her panty. The defendant made her lay on the floor in the kitchen house and had sexual intercourse with her.



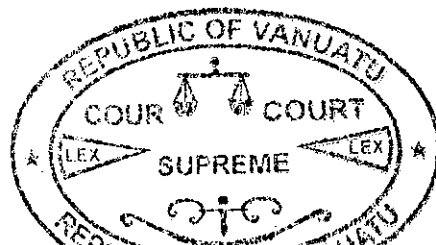
65. A child has been born out of the sexual intercourse between the Defendant and the complainant. That is the best evidence of the sexual intercourse between the Defendant and the complainant in May 2014.

66. Element 1 is proved beyond reasonable doubt in both instances.

II. On the second elements of the two offences whether on 29 May 2014 and on the other date in May 2014, whether the complainant did not consent to have sex with the Defendant.

67. The evidence is overwhelming in respect to this element. On 29 May 2014, the complainant was in the big house (Copper House) with his little brother and sister. After the Defendant sent the complainant's little brother and sister away to her grandmother's house he asked her for sex. She categorically refused to have sex with him. The complainant said the Defendant was her cousin brother. Her grandfather and the grandfather of the Defendant were brothers. It is rational to infer that she refused to have sex with the Defendant because of their biological connections. He offered her to pay money to her in return for sex with him. She refused. He forced her to remove her clothes, made her laid on the mattress and had sex with her. The evidence is overwhelmingly that the complainant did not consent to have sexual intercourse with the Defendant on 29 May 2014.

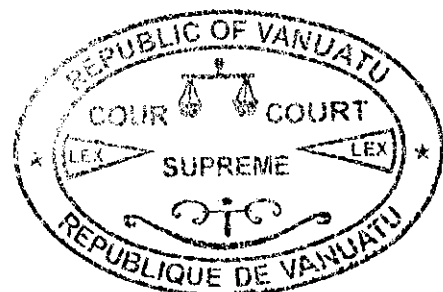
68. On the second occasion, the evidence is also overwhelming that the complainant did not consent to have sex with the Defendant on that



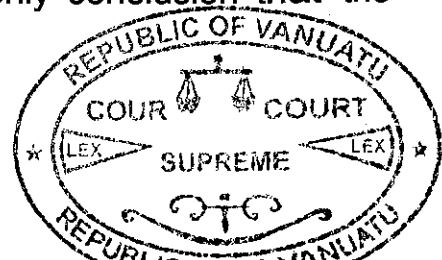
date in May 2014 after the first intercourse on 29 May 2014. There was not planning for sex between the Defendant and the complainant. The complainant was in the kitchen house. She did peel some bananas to prepare food. The Defendant came into the complainant's kitchen with a bush knife. He asked her for sex. She refused. He insisted. She refused. The complainant saw that he had a bush knife. She was afraid of him. She succumbed to the sexual advances of the complainant when he told her to remove only her panty so that he could have sex with her. He put her on the floor of the kitchen and had sex with her.

69. On the second element of the offences in both instances (29 May 2014 and the other date in May 2014), the evidence show that the house of the Defendant is near the complainant's. The Defendant must have known there was no one in the house that was where he chose to advance his sexual acts towards the complainant. These surrounding circumstantial evidence considered together with other evidence establish there was no consent by the complainant to have sex with the defendant on 29 May 2014 and on the other date in May 2014.
70. Element 2 is proved beyond reasonable doubt in both instances.

III. On the third element of the offences in both instances whether the Defendant on 29 May 2014 and on or about the other date in May 2014, the defendant had reasonable belief that the complainant did not consent for sex.



71. On 29 May 2014, the complainant refused to have sex with the Defendant but because of the force by the Defendant, the sex occurred after an attempt to offer money in return for sex was not successful. Defendant forced to remove the clothes of the complainant. Before the sex took place, he sent away the little brother and sisters of the complainant to the grandmother's house. It is rational to infer that the Defendant came to the house of the complainant to have sex with her whether or not she consented. It is also rational to infer that the complainant never new of this sex. It was only the Defendant's. It is rational that in such a circumstance, the complainant would ever had consented to sex with the defendant.
72. The Defendant could not have any reasonable belief that the complainant consented to sex with the defendant on May 29 2014.
73. On the second incident occurring in the kitchen in May 2014, it was again a random attack on the part of the Defendant. The Defendant came in the kitchen with a bush knife. He tried to have sex with the complainant she said no. She refused. He asked her to remove all of her clothes. She refused. She removed her panty only after he insisted and because of the sight of the bush knife she was afraid. These evidences show that the Defendant would never believe or know that the complainant consented to sex on the second occasion in May 2014. The third element is proved beyond reasonable doubt in the second incident on a date in May 2016 in the kitchen house.
74. On both occasions, the Defendant would not have a reasonable belief that her biological cousin sister consented to have sex with him. The evidence in both instances supported the only conclusion that the



Defendant did not have a reasonable belief that the complainant was consenting to sex in both circumstances.

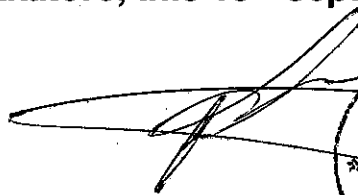
75. Ultimately in this case, the evidence of the admissions of the Defendant contained in his cautioned statement, (Exhibited P1) support the case for the prosecution against the Defendant Toma Rale that he had sexual intercourse without consent of the complainant on 29 May 2014 and on the other date in May 2014.
76. These elements are proved beyond reasonable doubt.

Verdict

Count 1: Guilty

Count 2: Guilty

DATED at Lakatoro, this 13th September, 2017


Vincent Lunabek
Chief Justice

