

PUBLIC PROSECUTOR

-v-

OBED KALWATMAN

Coram: V. Lunabek – CJ

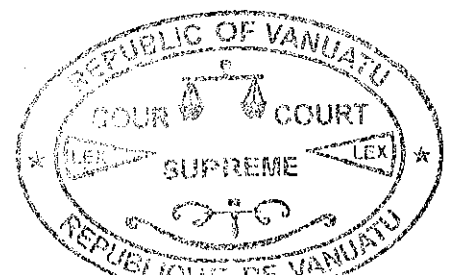
Counsels: Ms Micheline Tasso and Ms Marie Taki for Public Prosecutor
Mr Wilson lauma for Defendant

Date of trial: 17- 18 October 2017

Date of Delivery: 23rd October 2017

JUDGMENT

1. Accused Obed Kalwatman is charged with two counts of intentional assault and indecency without consent, contrary to ss. 107 (b) and 98 (a) of Penal Code respectively. He pleaded not guilty on these charges. A two days trial is required. It is held on 17 and 18 October 2017.
2. Before the prosecution case started the court read and explained the rights of the accused in section 81 of the Criminal Procedure Code and its effect to the accused.
3. The law is for the prosecution to prove each and all essential elements of the offences beyond reasonable doubt. If there is a reasonable doubt in the evidence provided by the prosecution, I should acquit the accused on the basis of that doubt. If the evidence is so that I am not sure of the guilt of the accused, I must acquit him. But if on the strength of the evidence, I am sure of the guilt of the accused on any or all of the charges, I should convict the accused on that charge or all of the charges.



4. The offence of intentional assault is defined in section 107 (b) of the Penal Code Act. It provides:

"No person shall commit intentional assault on the body of another person.

*Penalty: (b) if damage of a temporary nature is caused,
imprisonment for 5 year;*

5. Indecency without consent is defined in s.98 (a) as follows:

"A person must not commit an act of indecency on, or in the presence of another person

(a) without that person's consent.....

Penalty: Imprisonment for 10 years.

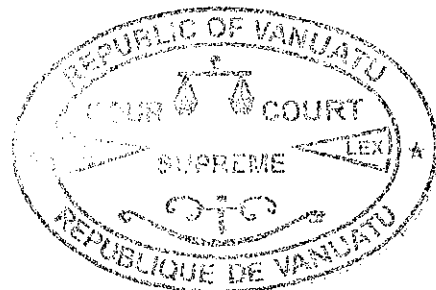
6. The prosecution must prove each and all **essential elements** of the above offences beyond reasonable doubt before I could convict him of each or all of them. They are set out below:

Intentional Assault

- i) Accused assaulted the body of the complainant on 14 April 2017.
- ii) Accused intended to assault the body of the complainant on 14 April 2017.
- iii) Accused caused injuries or damages to the body of the complainant.
- iv) The injuries or damages caused are of temporary nature.

Indecency without Consent

- i) Accused committed acts of indecency by removing the trousers of the complainant with his hands on 14 April 2017.
- ii) Accused committed acts of indecency by touching the private parts of the complainant with his hands.
- iii) Acts of indecency were committed by the accused on the complainant without the complainant's consent.

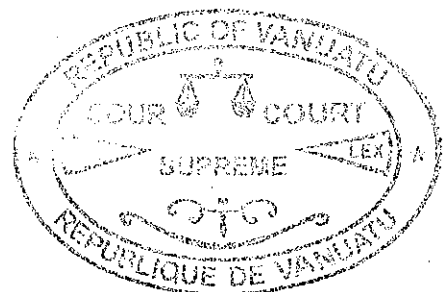


The Prosecution case

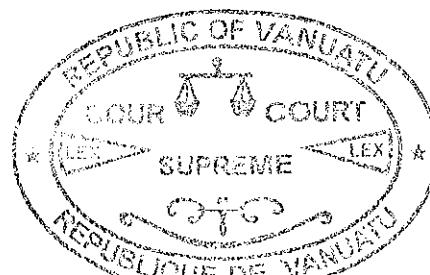
7. The thrust of the prosecution case is that on 14 April 2017 at about 3.00am to 3.30am, accused assaulted the complainant. The complainant got injuries on his body as a result. He spent some time in hospital. Accused also committed indecent assault on the complainant on the same date. The accused cannot use the effect of intoxication as an excuse of defence. The accused has to accept the consequence of his actions.

Prosecution evidence

8. The prosecution has called four (4) witnesses. Manoah Kalotiti is the first prosecution witness. He is the complainant in this case. His evidence is to the following effect:- He is 27 years of age. He lives at Pango village. He is a single man and a carpenter. On 14 April 2017, he was in a Saloon Bar drinking alcohol (Kale). He drunk Tuskers and Tekila. He was in the bar until it closed and then came outside on the road. A car driven by one of his relatives picked him up and dropped him at Pango village near surf side. He followed the main road to go to his grandparents house. He saw accused Obed Kalwatman. The accused talked to him of the saddened passing away of his brother. He knew the accused since birth and recognised his voice. There were light on the road. He did not realize what happened to him. He was, unconscious and recovered when he was admitted in the hospital. He felt his face and head were swollen up and injured. His eyes were full of blood. He spent 4 days in the Hospital. When he recovered consciousness his relatives were there. They told him Obed Kalwatman and Nolan Albert assaulted him. When he first got up from hospital, he was still feeling drunk.
9. In cross-examination, he confirmed that the car dropped him at Pango village. He recalled the accused Obed Kalwatman talked to him. He did not know who assaulted him. He recovered consciousness in the hospital.



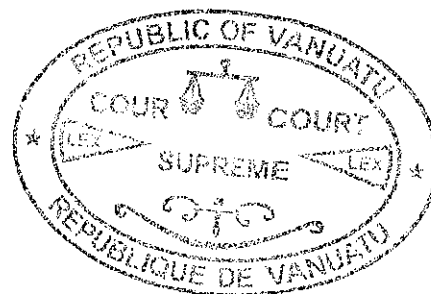
10. ~~Kiki Noath is the second prosecution witness. He is from Tanna Island and lives at Pango French School. He is married. He works at Surf Side as a security officer for 10 months. He works 6 to 6. On Friday 14 April 2017, he was on duty. He started work on 6.00pm on Thursday to Friday and finished at 6.00am o'clock in the morning. On Friday 14 October 2017, at 3.00am o'clock he heard a noise coming out from where the truck of his boss was. He went and saw an incident happening. He saw accused Obed Kalwatman and Nolan Albert assaulted the complainant (Manoah Kalotiti). The complainant felt on the tar road. They assaulted him. They assaulted the complainant's head. While Manoah was laying down on the road, he saw accused Obed Kalwatman took 4 bottle tuskers and smashed them on the head of the complainant (Manoah) – He was about 3 meters from where the incident occurred. He was trying to take the complainant on the side of the road. He talked to the accused and the co-accused to stop assaulting the complainant. He said Nolan Albert understood him but accused Obed Kalwatman did not. He saw Obed Kalwatman assaulted the head of the complainant, pulled out the trousers of the complainant and pulled on the private parts of the complainants with his hands. At that time, he said the complainant was laying unconscious on the road. He said Nolan Albert was trying his best to save the complainant from the accused. He saw the accused touched and pulled the penis and the groins of the complainant Manoah.~~
11. Nolan Albert tried to removed Obed Kalwatman from the complainant. Nolan tried to removed Obed Kalwatman's hands from the body of the complainant while the complainant was laying on the tar-road. When Nolan removed Obed Kalwatman's hands from the complainant (Manoah), the complainant run across the road to his house. He described the injuries of the complainant – "*swim lo blood olsem big weh oli kilim.*" Most of the injuries were on the complainant's head. He said he felt sorry for the complainant as he never saw anything like that before.
12. In cross-examination, he was asked and he explained the incident occurred in a Public Road near surf side area where he works. He confirmed his evidence in



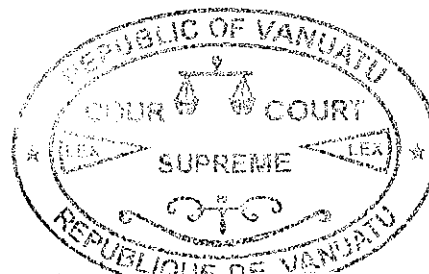
~~Chief that he saw Nolan Albert assaulted the complainant first. He was about 3 meters from them. The place was not totally dark. When Nolan assaulted the complainant he called on them to stop. But they could not hear him. He could not directly approach the complainant while laying on the road as Nolan and Obed Kalwatman were armed also with stones. He was concerned for his own safety. He saw the complainant running crossing the road but he was unstable in his run.~~

13. Meriam Kalwat is the third witness. She is from Pango village. She is a single woman. She is unemployed. On 14 April 2017, she was in her house. She heard voices, swearing. She also saw the security officer Kiki Noah. The noises and swearing came out from the Surf side area. She saw Kiki, Obed Kalwatman and Nolan and a man was laying on the road. She was about 4-5 meters from them. There were lights from surf side at the time. She knows Obed Kalwatman and Nolan Albert. Obed Kalwatman is one of his cousin brothers.

14. The man laying on the road was Manoah Kalotiti, the complainant. She heard Obed Kalwatman shouting his name. Obed Kalwatman and Nolan Albert were standing very close to Manoah Kalotiti. She saw that Nolan Albert talked to Obed Kalwatman trying to stop him from assaulting Manoah Kalotiti. She saw Obed Kalwatman taking off the trousers of Manoah Kalotiti and held and pulled Manoah's penis. She demonstrated how Obed Kaltwatman did this. Kiki Noah was close to them. Kiki tried his best to stop them assaulting Manoah while he was laying on the road. She said Nolan stopped while Obed Kalwatman did not. Manoah at that time was wearing a brown trousers. She was afraid to go closer to them. She saw Manoah got up and ran to his house. She saw Manoah felt down again. Manoah's face was damaged and was covered with blood. She followed Manoah to hospital. She was cross-examined. She did not know why Manoah Kalotiti was laying on the road. She did not see who assaulted Manoah Kalotiti and causing him to fall on the road. Her house was on a distance between the Court room and the tropical market (estimated at 20-30 meters). She knew and recognised the voices of Obed Kalwatman and Nolan Albert.



15. ~~She did not recognised the voice of Manoah nor Kiki Noah's. At the time it was half day light. The time was 3.30am in the morning when Manoah Kalotiti got up and run to his house. She followed him. She saw blood covered his face and eyes. There was blood on his head. She confirmed she was in the hospital with the complainant. She confirmed Manoah could not remember her at the hospital she was there with Ata and Banga at the hospital.~~
16. Police Officer Mark Willie is the last prosecution witness. He is a police officer appointed since 2011. He is a police officer for 6 years. He was the investigating officer in the case. He cautioned the accused Obed Kalwatman and Nolan and obtained statements from each of them. Accused Obed Kalwatman admitted he assaulted Manoah Kalotiti on the road. He also admitted he removed his trousers but he denied indecently assaulting the complainant (Manoah). He obtained a cautioned statement from accused Obed Kalwatman on 15 April 2017. There was no force applied to the accused before his admissions. He cautioned and obtained a statement from Nolan Albert on 15 April 2017. Nolan Albert admitted he assaulted the complainant. He cautioned and obtained a statement from Juliette Wora on 14 April 2017. The statements of Obed Kalwatman, Allan Albert and Juliette Wora were marked for identification (MFI) for cross examination purposes.
17. Police officer Mark Willie was cross-examined. He confirmed he took the statement of Obed Kalwatman, Nolan Albert and Juliette Wora and reduced them into writing. On 14 April 2017, he was on duty. He worked until 4.30pm. He came back to work on the next day at 7.00am o'clock. He was questioned but he confirmed the statements obtained by him from Obed Kalwatman, Nolan Albert and Juliette Wora were all true. He read the statements to each of them. Each of them agreed to the content of their respective statements. He confirmed he took the statement of Juliette Wora on Friday 14 April 2017 in the afternoon but not on Saturday as suggested by the Defence. He testified when he took the statement of Obed Kalwatman, he was already sober. He talked straight to him. His mind was clear. He confirmed the incident happened on Friday 14 April 2017 at about 3.00-3.30am o'clock in the morning. He took Juliette's statement on



~~Frida 14 April 2017 in the afternoon. He was asked and he said he could not recall if the hand of Obed Kalwatman was injured. That is the end of the prosecution evidence and case.~~

18. Pursuant to s.164 of Criminal Procedure Code (CPC) (Cap 136), a case is made out against accused Obed Kalwatman. He is required to put forward his defence.

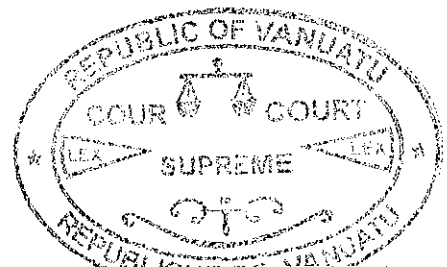
The rights of the accused under s.88 of (CPC) (Cap 136) were read and explained to him.

The Defence case

19. It is the defence case that there is no intention to commit the offences. It is said the offences are committed as a result of the complainant's own malice behaviour and taking the risk when acting under the influence of intoxication. The defence pleaded voluntary intoxication under section 21 of Penal Code Act [Cap 135].

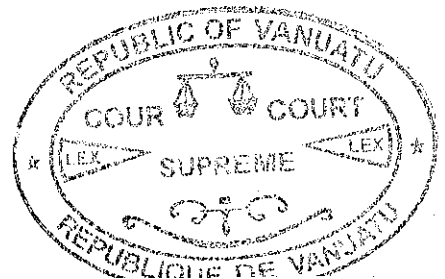
The Defence evidence

20. The defence calls 3 witnesses. Accused Obed Kalwatman gave evidence on his own behalf. He gave evidence to the following effect. He is from Pango village. He lives at Pango. He is married and had a child. He is the State House Chef. On 14 April 2017, he was with Nolan Albert, Sano Reeman drinking alcohol in the nakamal. He joined them on Friday night. On Wednesday to Thursday he consumed alcohol. He decided to go and paid his account to the nakamal owner. That was where he met Nolan and Sano and they invited him to join them. They drink alcohol. They had a carton of tuskers (beer) and 4-5 bottles of wine. They started drinking from 8.30-9.00pm o'clock to Friday 14 April 2017 in the early morning. He and Nolan decided to go to sleep. They followed the main road. A car was coming in full speed. He threw a bottle on the road behind the car. The car stopped the driver came out of the car. He swore and asked who threw the bottle on the road. He was about 20 meters were the car stopped. (Court room – mango three outside).
21. The owner of the car and Manoah Kalotiti came out of the car. He walked toward them to apologize. He talked to the driver of the car. Manoah was swearing on



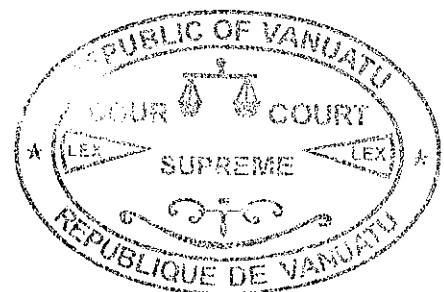
~~the other side of the car. The driver of the car took off. Manoah stood up. He told him sorry for throwing the bottle. Manoah still was not happy. He said he shared with Manoah his condolences about the passing away of his brother. He said when he talked to the owner of the truck, Manoah came from the other side. He watched on Manoah. He told the driver of the car to leave. Manoah held his cart as if he wanted to fight. Manoah swear at him: "Fuck you Obed... Tipskin ..."~~ At the same time, Nolan Albert run towards Manoah and bum! (meaning assaulted Manoah). When Manoah swore at him people heard the abusive words. His wife Juliette run to him and told him to go home with her. Obed refused. In the morning he was arrested by the police. He spent 2 weeks in the correctional services. He said he made a statement. The story that he assaulted Manoah and took off his trousers and pulled his private parts, he said he did not know. The police told him so and he answered them by guessing.

22. Obed Kalwatman was cross-examined. He confirmed he was drunk on Wednesday and Thursday. He stopped on Thursday. He admitted his mind was clear when he went to pay his account to the owners of the nakamal. He confirmed he joined Nolan and Sano and they drunk until Friday morning. He confirmed a car was in full speed passing them on the road. They swore and he threw a bottle on the road. He confirmed Manoah wanted to assault him but Manoah did not assault him. He confirmed Manoah felt on the tar road because Nolan assaulted him. He was asked and he said when Manoah felt on the road, he did not know what happened to him. He was asked he assaulted Manoah he said he was drunk he did not know. He was asked he took 4 bottles of tusker and smashed them on Manoah's head. He said he did not know. He was asked when Manoah felt on the road, he was unconscious, he said he did not know. He was asked he removed Manoah's trousers, he said he did not know. He was asked he squeezed Manoah's penis and groins, he said he did not know. It was put to him he admitted to the police that he assaulted Manoah. He said he did not know. His hand was broken and the police took him to the hospital. It was put to him he admitted in his police statement that he took off Manoah's trousers. He said he was guessing only. He was talking "kranke". He was afraid he did not know anything. He was asked, it was his first time to the police making statement under oath. He was too frightened when he made his statement to the



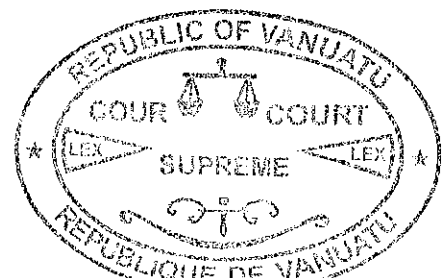
police. He read part of the statement he made to the police. The statement had his name and signature on it. He said the statement he made to the police was guessing only of what he was doing on 14 April 2017, when he walked with Nolan on the road at surf side area, he did not notice anyone. He was asked he said he did not notice a security officer was there. It was put to him the security officer saw him assaulting Manoah. He did not know. If the security saw that he did not know. It was put to him that the security officer saw him taking off the trousers of Manoah and touched his private parts. He said if he saw that, he did not know. It was put to him that Meriam Kaluat saw him taking off Manoah's trousers and touched and pulled the private parts of Manoah. He said he did not know. The only Man who was with him was Nolan Albert. He confirmed he did not see the security officer and Meriam Kalwat. It was put to him, he could not see them because he was too busy focusing on Manoah. He said he did not know. At the nakamal, he said just the 3 of them (him, Nolan and Sano Reeman) drunk. They shared the alcohol drinks. They drunk one bottle each and shared the rest. He denied his mind was clear.

23. In re-examination, he said when he was with the police, he missed his family. His heart was heavy. He was afraid. He was told Manoah was in the hospital. When the police took his statement, he said :*"mi nomo drunk nao. Mi sake sake tumas."*
24. Juliette Wora is the second last defence witness. She is from Makira Island. She lives with the Defendant. She is not married. She has a child with the Defendant. On 14 April 2017, she was in the house of her sister with her child. The house is close to surf side area. She heard shouting and abusive words calling the name of Obed Kalwatman. She came outside to see what happened. She saw Obed Kalwatman, Manoah Kalotiti and Nolan Albert. She was a far distance. She came to take Obed Kalwatman to the house. Obed Kalwatman was drunk. She also saw a security officer. Time was about 2-3.00 am o'clock. Place was still dark. She recalled she made a statement to the police. She was afraid when she made the statement. She said she did not see any assault at the time. She was cross-examined. On 14 April 2017, she confirmed she was in her sister's house. She was asked she said she did not hear the voice of her



husband. She confirmed she saw Obed Kalwatman, Nolan Albert and Manoah Kalotiti. She said she just talked to Obed Kalwatman. She wanted to take Obed Kalwatman back to the house. Obed refused. She called him the second time He refused to follow her. She returned to the house because the degree of Violence that happened at the time was high. She left because she was concerned of her safety. She did not see the security officer was trying to help Manoah. She saw Manoah was lying on the road. She agreed she made a statement to the police on 15 April 2017. She said the police forced her to make the statement. She then explained that Police asked her to make statement because she witnessed what happened. She confirmed her name and signature were in her statement. They fight she did not have a good look at it. She refused to see them. She was afraid.

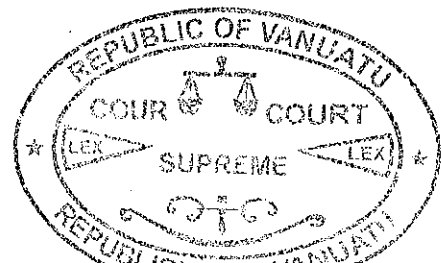
25. Nolan Albert is the Defence last witness. He is from Pango village, Efate. He is self employed. On 14 April 2017, he was in the nakamal drinking kava until 10-12.00am o'clock. He drunk Kava with friends. After Kava, they drank alcohol. Obed Kalwatman came and joined them. They drank alcohol and played card. Then they decided to go home. On the road, a car arrived speeding. They threw a bottle on the road. The bottle was broken behind the car on the road. Manoah came out of the car and swore at them. Obed Kalwatman tried to say sorry. Manoah took his cart to fight with Obed Kalwatman. Nolan assaulted Manoah and he fell on the tar road. He and Obed went home.
26. In cross-examination, he confirmed he drunk Kava with Sano. Obed Kalwatman joined them. Obed came at the nakamal to pay his account. Obed was walking normally. He paid he accounts. Obed talked normally. Obed did not shout or jump or did not behave as if he wanted to fight. They drunk tuskers. They drunk one bottle each. He denied they drunk 5 bottle of tusker. He went home with Obed Kalwatman. They walked on the road. The bottle was broken on the road. The car stopped. Manoah came out of the car. Manoah came out, jumped and swore. Manoah wanted to fight them. He assaulted Manoah. He threw the first punch. Manoah felt on the road. He said there was no person on the road until they went to their house. He admitted he was focusing on Manoah and Obed. He denied Obed Kalwatman also assaulted Manoah. He admitted there were



~~other people witnessing what happened. He made a statement to the police on 15 April 2017. He read the relevant part of that statement. That is the end of the Defence case.~~

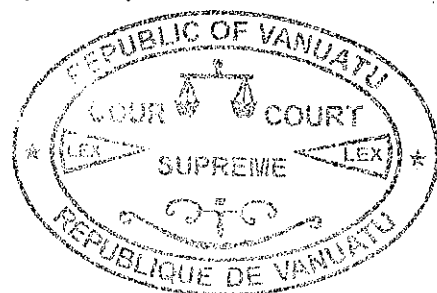
Discussion on evidence: Finding of facts and credibility.

27. On a careful consideration of the evidence and assessment, the following facts are found:-
28. On 14 April 2017, between 3.00am and 3.30am o'clock in the morning, the Defendant Obed Kalwatman, Nolan Albert and Manoah Kalotiti were involved in an incident on Pango road at surf side area.
29. Obed Kalwatman and Nolan Albert were drinking at the nakamal at Pango Village. They decided to go home. They followed the main road. The complainant Manoa Kalotiti decided to go home after drinking alcohol in a saloon bar. A car driven by one of his relatives dropped him at surfside area. Obed Kalwatman threw a bottle of tusker behind the car on the main road. The car stopped. There were shouting and swearing coming out from the driver of the car and Manoah as they were not happy of the throwing of the bottle on the road.
30. They started and proffered abusive words. The driver of the car left. Manoah shouted and swore at the defendant Obed Kalwatman. Obed Kalwatman approached him. They started talking. Then a fight broke out. Nolan Albert assaulted the complainant Manoah Kalotiti. He fell on the tar-road unconscious. The defendant Obed Kalwatman assaulted Manoah Kalotiti while laying on the road. Juliette Wora, his wife tried to call on him to stop and followed her. She did it twice. The defendant refused to follow his wife. The security officer, Kiki Noah, attempted to stop them. He was not successful.
31. Nolan Albert tried to stop the defendant from assaulting the complainant Manoah. He was trying to remove Obed Kalwatman's hands on the body of the complainant. He was not successful as Obed Kalwatman took four (4) bottles full of tusker beer and smashed them on the head of the complainant Manoah. Obed Kalwatman also removed the brown trousers of Manoah Kalotiti and touched and pulled on his penis and groins. Manoah Kalotiti received the following injuries:-

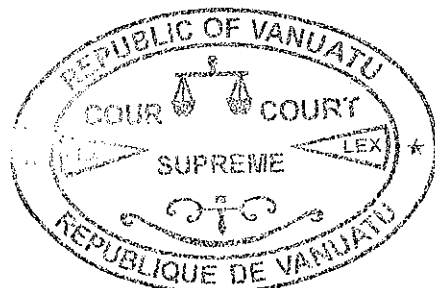


~~Periorbital left eye swelling with complete restriction of eye opening. Laceration~~
"Y" shaped: 4x2 – on frontal part of the head. Painful swollen eyes – eyes completely closed. Head injuries due to assaults received. Manoah was admitted in the hospital for 4 days.

32. Kiki Noah was 3 meters away from the incident. He had a good look of what happened and who did what on the body of the complainant.
33. Meriam Kalwat also was 4-5 meters from the incident. She did not see the assaults but she saw Defendant Obed Kalwatman removing the complainant's trousers and touching and pulling on the penis and groins of the complainant.
34. After this the complainant got up and run to this house. Meriam followed the complainant to his house. The complainant was unstable and fell again. Meriam called on the complainant's family to assist the complainant. They took the complainant to the hospital. Meriam followed Ata and Banga when they took the complainant to the hospital.
35. In this case I am satisfied on the evidence that the defendant Obed Kalwatman assaulted the complainant Manoah Kalotiti while he was laying unconscious on the road on 14 April 2017 between 3.00am and 3.30am o'clock. Obed Kalwatman also assaulted the complainant by breaking 4 bottles of tusker on his head.
36. The next question is whether the Defendant Obed Kalwatman intended to assault Manoah Kalotiti, removed his trousers and touched and pulled his private parts? Defendant Obed Kalwatman said he was too drunk and did not know what he was doing.
37. The defence raised the plea of voluntary intoxication which was so gross a degree as to deprive the accused of the capacity to form the necessary criminal intention. The defendant said he was drunk on Wednesday and Thursday. But on Thursday (13 April 2017) he stopped. His mind was clear on Thursday when he went to the owner of the nakamal to pay his accounts (credit). He did not know he assaulted Manoah. He did not know he took 4 bottles of tusker and broke them on the head of Manoah Kalotiti. He did not know that he removed the trousers of Manoah and touched and pulled on his private parts.



38. ~~The prosecution evidence rebutted the plea of voluntary intoxication. Obed Kalwatman knew that a car was speeding on the road. He said the people in the car were shouting and swearing. He threw a bottle at the rear of the car on the road. He said the car stopped. The owner (driver) of the car was not happy because of the throwing of the bottle on the road. He said he apologized to him and told him to leave. He said the driver left. Manoah Kalotiti shouted and swore at him. He said Manoah was not happy. He said when Manoah came out from the other side of the car, shouting and swearing, he was watching him.~~
39. The detail descriptions and observations of the actions of Manoah and of what happened involved the state of mind of a person who saw, described and acted with mental consciousness and of a person who was sober but did not reflect the status of a person under intoxication which was so gross a degree as to deprive him of the capacity to form the necessary criminal intention.
40. Nolan Albert's evidence was to the effect that they had each one or few bottles of tusker beer but they shared them. The effect of Nolan's evidence is that Obed Kalwatman was sober. I warn myself that Nolan Albert is the co-accused, he pleaded guilty to one count of assault against the complainant, However, I believe he is telling the truth and I accept that evidence.
41. Further, Obed Kalwatman knew and heard that Manoah Kalotiti shouted and swore at him. Obed said he was watching Manoah while he apologized to the driver of the car and told the driver to leave. When Manoah fell down unconscious (after being assaulted by Nolan Albert), Obed assaulted him also and broke 4 bottles of tusker beer on his head.
42. It is rational to infer that he was not happy that Manoah Kalotiti did not accept his apology and the fact Manoah Kalotiti swore at him. I am satisfied on the evidence, Obed Kalwatman was sober at the time of the commission of the offences of intentional assault and removing the trousers, touching and pulling on the private parts of the complainant.
44. In this case there is overwhelming evidence that the defendant Obed Kalwatman assaulted the complainant Manoah Kalotiti on two separate occasions and



removed his trousers and touched and pulled on his private part parts. (Evidence of Kiki Noah, Meriam Kalwat).

45. I accept the evidence of Mark Willie to the effect that the defendant admitted he assaulted the complainant and removed his trousers. I reject the defendant's evidence that he did not touched and pulled on the private parts of the complainant. The prosecution evidence is overwhelmingly to the contrary.
46. I am satisfied that the prosecution has proved each and all essential elements of both offences of intentional assault (counts1&2) and indecency without consent (count 3) against the defendant, Obed Kalwatman, beyond reasonable doubt.
47. **Verdict:-**
- Count 1 – Intentional assault – Guilty
 - Count 2 – Intentional assault – Guilty
 - Count 3 – Indecency without consent - Guilty

DATED at Port Vila, this 23rd day of October, 2017

BY THE COURT



**V. LUNABEK
Chief Justice**

