

**PUBLIC PROSECUTOR**

**V**

**ANTHONY KIEL**

*Coram:* Chief Justice Vincent Lunabek  
*Counsel:* Mr. Simcha for Public Prosecutor  
Mr. Harrison Rantes for Defendant

*Dates of Hearing:* 22<sup>nd</sup> and 23<sup>rd</sup> July 2019  
*Date of Verdict:* 23<sup>rd</sup> July 2019

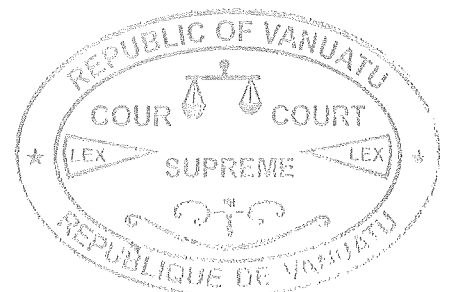
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**VERDICT**

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**Introduction**

1. This is the trial of Defendant Anthony Kiel on the following offences:
  - Unlawful entry of dwelling houses, contrary to section 143 (1) of Penal Code (x3);
  - Threats to kill a person, contrary to section 115 of Penal Code;
  - Intentional assault, contrary to section 107 (b) of the Penal Code; and
  - Intentional assault, contrary to section 107 (c) of the Penal Code.
2. On 22<sup>nd</sup> July 2019, Defendant Anthony Kiel entered a guilty plea on the first count of unlawfully entering a dwelling house of one Talap William and he also entered not guilty pleas in respect to other counts of unlawful entering of dwelling houses, threats to kill a person and intentional assaults as charged against him in the information dated 22 July 2019. The trial proceeded at Isangel, Tanna, on those bases.



### Onus and standard of proof

3. The onus of proof the charges rests on the prosecution and it never shifts. The prosecution has to prove each and all essential elements of each offence on beyond a reasonable doubt. If, at the end of the trial, a reasonable doubt exists as to any of the offences, Defendant Anthony Kiel must be acquitted in respect to any offence or all of them.

### Elements of offences

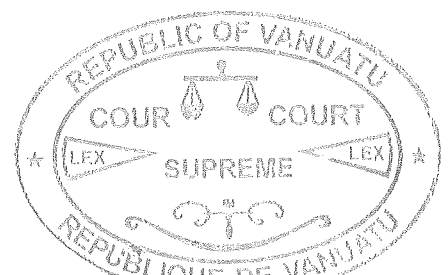
4. There are three different complainants/victims in this case. Talap William is the first victim/complainant. Martha Johnny is the second victim/complainant and Namas Katen Kahy is the third victim/complainant.
5. The prosecution has to prove beyond reasonable doubt each and all essential elements of the following offences charged against the Defendant Anthony Kiel in this case:-

#### **A. Offence of threats to kill a person/contrary to section 115 of the Penal Code:**

1. Defendant Anthony Kiel caused complainant Talap William to receive threats to kill her on 22 December 2018 between 12.00am – 2.00am o'clock.
2. The threats to kill was made directly to Talap William by the Defendant on that date and times.
3. Defendant Anthony Kiel knew the contents of the threats to kill Talap William.

#### **B. Unlawful entry of dwelling houses; contrary to section 143 (1) of the Penal Code:**

1. Defendant unlawful entered houses of three complainants: Talap William, Martha Johnny and Namas Katen Kahy on 22 December 2018 between 12.00am – 2.00am o'clock.
2. Defendant Anthony Kiel entered those houses with intent to commit a crime.



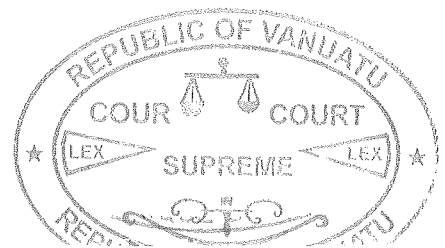
3. These houses are sleeping (dwelling) houses of the three complainants.

**C. Intentional assault, contrary to section 107 (b) and (c) of the Penal Code.**

1. Defendant assaulted the body of another person(s): Martha Johnny and Namas Katen Kahy on 22 December 2018 between 12.00am and 2.00am o'clock.
2. The Defendant intended to cause damage on the body of another person: Martha Johnny and Namas Katen Kahy.
3. The assault cause damage of temporary nature on the body of Martha Johnny.
4. The assault caused damage of a permanent nature on the body of Namas Katen Kahy.

**Prosecution case**

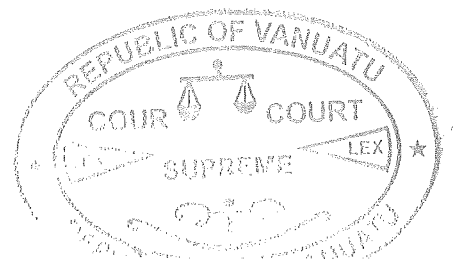
6. The prosecution case is this – It is alleged that Anthony Kiel committed each and all of those offences on 22 December 2018. The offences occurred in the village of Lamtawakel, West Tanna. Defendant Anthony Kiel and the complainants all live in that same village. The offences occurred between 12.00am – 2.00am in the morning of 22 December 2018. The offending occurred with a distance of 100 meters or so with each other. The first offending occurred in the sleeping house of the victim Talap William. Defendant unlawfully entered into the sleeping house of this complainant, made sexual advances to her with threats to kill her. The Defendant proceeded to the house of the second victim Martha Johnny. This victim is a young girl of 12 years of age at the time of offence. The Defendant entered into her room in her sleeping house, sat on top of her, made sexual advances to her. She screamed out. The Defendant run out of the house and came back with a stone and threw it on Martha Johnny and assaulted on her left shoulder. The Defendant, then, proceeded with the offending in the house of the victim Namas Katen Kahy. The Defendant unlawful entered into Namas Katen Kahy's house, grabbed a stone and without any reason threw it at the victim Namas Katen Kahy. Namas Katen Kahy



sustained serious injuries as a result. She had lost two of her teeth on her upper lower jaw.

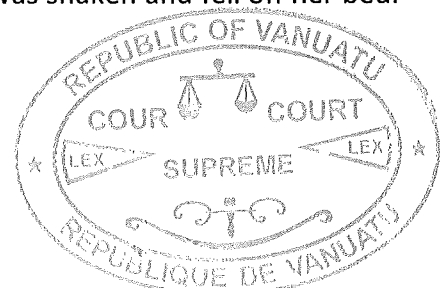
### **Prosecution evidence**

7. The prosecution called five (5) witnesses (PW). Talap William is the first prosecution witness (PW1). PW1's evidence is to this effect. She is 21 years of age. She is not married. She lives at Lenami Village. She knows Defendant Anthony Kiel. She is related to him. Her mother is the sister of Defendant Anthony Kiel's father. In the custom of Tanna, Defendant is her "tawian." She said in the early morning of 22 December 2018 between 12.00am – 2.00am, Defendant Anthony Kiel unlawfully entered her house. He forced her for sex but she refused. He threatened to kill her with a knife. She called out for her tawian when she saw the defendant carried a knife. Defendant Anthony Kiel was wearing a black shirt and covered his body with a towel. Defendant Anthony Kiel was drunk. She asked him for her mobile phone he took from her the previous days. He asked her to follow him to take her mobile phone – she told him to bring back to her the mobile phone the next morning instead. The Defendant went and came back with a knife and said he came to have sex with her she refused. She saw that the Defendant had a knife. She called her tawian and she went and stayed with her. Her house is 40-50 meters from a distance comparing with the distance from the Court house and the road. The house of the second complainant Martha Johnny is at a distance of 50-60 meters. She does not know the distance to the house of Namas Katen Kahy, the third complainant. The door of her house was locked. The Defendant pushed the door open.
  
8. PW1 was cross-examined. On 22 December 2018 between 12.00am - 2.00am, she was asleep. The light in her house was on. The Defendant came into her house and asked her for sex. He was drunk. She was afraid of him. She refused. He did not threatened her when she asked her for sex. It was when he returned that he came with a knife and she called out to her tawian and went and stayed with her. PW1 clarified when re-examined that, the Defendant came into her house, he was drunk. He asked her for sex. She refused. She asked him for her mobile phone. He went outside and came back with a



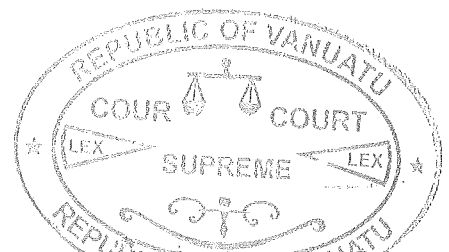
knife and told her that he asked her for sex but she refused. He is going to spear her with the knife.

9. Martha Johnny is the second prosecution witness (PW2). PW2 lives at Lamtawakel village. She is now 13 years of age. She knows Defendant Anthony Kiel. She called him brother. On 22 December 2018 between 12.00 am -2.00am o'clock, she was already sleeping. She shared the room with the child of her sister. She heard someone came into the house. She was in her bed. A man came in and sat on top of her. He slapped her on the jaw to wake her up. She was awoken. She saw the man. The man told her "*Mi nomo ia.*" She recognised the man was Anthony Kiel. She saw the man was fair skinned and she recognised him. The light was on in the house. The Defendant covered himself with a blanket and fastened his head with a black shirt. When the Defendant sat on top of her, she was afraid of him and she called her brother. He went outside and came back and took a stone and threw it at her. The stone hit her left shoulder. She yelled and her sister came to her running. He run away. She did not see him when he came in but she saw him when he run away near the bathroom behind the house.
10. In her cross-examination, she said the man blocked her mouth and nose with his hands. She moved and kicked to breath. She recognised him. He was a fair skinned man and he was not too tall. She recognised him. It was Defendant Anthony Kiel. She recognised his face when he sat on top of her. She also saw and recognised Defendant Anthony Kiel when he threw a stone at her as he was standing near the place where clothes were hanged outside. In the morning, they had a meeting and they suspected the man was Anthony Kiel.
11. Namas Katen Kahy is the third prosecution witness (PW3). PW3 gave evidence to this effect. She does not know her age. She lives at Lamtawakel. She knows Defendant Anthony Kiel. She calls him Apu. Anthony Kiel's village is Lamtawakel. On the night of 22 December 2018 between 12.00am – 2.00am, she was in the village. She lives in a house with her Apu. Her husband has died already. She was sleeping in her house with her Apu. A man came into her house and threw a stone at her. She was shaken and fell off her bed.



She lost two of her teeth. When she fell, she saw Defendant was covering his body with something like blanket. He also broke his skirt. She did not know this. She noticed it when she had returned from the hospital. Her door was closed. She blocked her door with a stone from inside as the interior lock. She did not see Defendant Anthony throwing the stone at her. The stone hit her forehead. She was injured. She was taken to Lenakel hospital. She was admitted and released the next day. There is now a scare on her forehead. When she was assaulted, there was lot of blood. The blood continued to run when they washed her head with the water. She could see the man when he opened the door as the light shined inside. She saw his legs and he is a fair skinned person. In the village, the Defendant is the only fair skinned person. She saw him that night in her house.

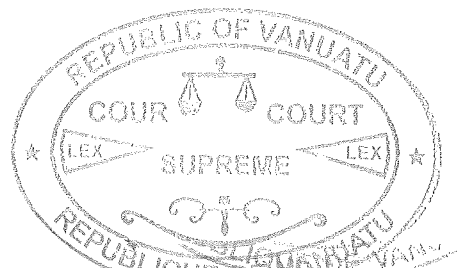
12. In her cross-examination, she said she was sleeping. She did not see the man when he came into her house. It was dark inside her house. She did not know who threw the stone at her. She saw a man when he went outside. She did not say that Defendant Anthony threw the stone at her.
13. Willie Mouiakem is the fourth Prosecution witness (PW4). PW4 is 26 years old. He lives at Lamtakawel village. He is married. Defendant Anthony called him daddy. On 22 December 2018 between 12.00am -2.00am in the morning, he was sleeping in his house in the village. At that night, he heard his mother Namas Katen Kahy crying. He got up and run toward her house. He saw blood spread over about 7 meters. He asked what happened. She told him someone threw stone at her. He went back to sleep. Her mother called him again. He went into the sitting room and saw Defendant Anthony Kiel was there. Anthony covered his body with a blue blanket. Anthony asked him for a cigarette and matches. When he went to get a cigarette in the house, Anthony jumped over the window and run into the nakamal. There was no man at the nakamal that night. The nakamal was at the direction of Anthony's house. The distance was about 500 meters from his house. When he saw and spoke to Defendant Anthony, Anthony carried a stone of "laplap" at that time. On 22 December 2018, he got to bed earlier at 8.00pm. Anthony was not there at 8.00pm. Anthony was there between 12.00am and 2.00am in that early morning. There was no other fair skinned person like Anthony in the village.



14. He took her mother to the hospital about 5.00am o'clock in the morning. In the morning, they asked Anthony Kiel of what happened in the night and he said that Anthony Kiel admitted his involvements in those actions. They saw blood on Anthony's clothes that morning. Anthony's brother called the police and reported the matter to the police. In his cross-examination he said he saw Anthony that night. Anthony covered his body with a blanket and Anthony had a stone with him. At the nakamal, they asked Anthony strongly whether he was involved in these actions. Anthony admitted his involvements.
  
15. The last prosecution witness is police constable Timothy Arlie (PW5). PW5 is a police officer for 11 years. He is an investigating officer at the general duty at Isangel, Tanna. He is a police constable. He has investigated in this case. He received a complaint from Jean Louis who is the brother of the Defendant. He provides the photographs of the room of victim Namas Katen Kahy (Exh. P3); the photos of the blood spread in the room of Namas Katen (Exh. P4); and also the medical report of the injuries sustained by Namas Katen Kahy. (Exh. P5). The photographs are tendered without objections from the Defence. In his cross-examination, he accepted that there was no identification parade made in respect to the complaints made by the victims Martha Johnny and Namas Katen Kahy as the statements made by other witnesses identified the Defendant. The statement of Talap William identified the Defendant Anthony Kiel was there in the village between 12.00am – 2.00am o'clock of 22 December 2018. Also other witnesses identified Defendant Anthony Kiel went into dwelling houses of these victim and he was seen there that night with a stone. He said the identification parade was not an issue.

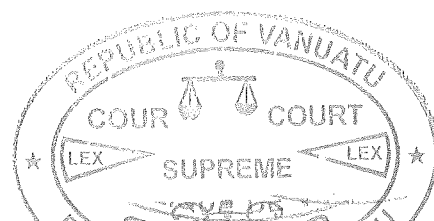
**Defence Position**

16. A prima facie case is made out against the Defendant. He was then required to put forward his defence pursuant to section 164 (1) of the Criminal Procedure Code [CAP 136]. The Defendant Anthony Kiel decided to exercise his right under section 88 of the Criminal Procedure Code [CAP 136] to remain silent.



### Discussion on evidence

17. The position of the Defendant has been noted. That is his right and he has chosen to exercise it in this case. He should not be criticised for doing so.
18. The approach to be adopted by the Court is the approach outlined in **Swanson –v- Public Prosecutor [1998] VUCA 9; Criminal Appeal Case 06 and 11 of 1997 (26 June 1998)**.
19. The Defendant entered a guilty plea that on 22<sup>nd</sup> December 2018 between 12.00am – 2.00am o'clock in that early morning, he unlawfully entered the sleeping house of Talap William when she was sleeping. He pushed the door and went inside. He was not invited in that house at that time (count 1). The Defendant accepted and admitted this offence as alleged in count 1. However, he disputed that he threatened to kill Talap William on that date between 12.00 am-2.00 am.
20. The main challenge advanced by the Defence Counsel is that the evidence of the complainant Martha Johnny in relation to counts 3 and 4 do not support the allegations that Defendant Anthony Kiel has committed the offences of unlawfully entering of the dwelling house of the complainant Martha Johnny and assaulted her with a stone on her left shoulder causing her injury of temporary nature.
21. Again the challenge advanced by the defence Counsel is that the evidence of the complainant Namas Katen Kahy in respect to counts 5 and 6 do not support the allegations that Defendant Anthony Kiel has committed the offences of unlawfully entering of the dwelling house of the complainant Namas Katen Kahy and assaulted her with a stone causing her serious injuries on her forehead of permanent nature.
22. The prosecution submissions are based in part on the direct evidence of witnesses and in part on circumstantial evidence to be drawn on inferences including the same pattern or modus operadi used in the commission of the offences.
23. Inferences may be drawn from proved facts if they follow logically from them. If they do not, then the drawing of any conclusion is speculation but not proof. Inferences need not



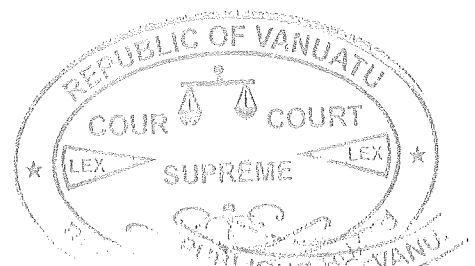


to be irresistible. The prosecution is not required to disprove any inference that the ingenuity of Counsel might devise. The prosecution must exclude any reasonable hypothesis based on the evidence which is consistent with innocence, but no more. To similar effect, is section 8 (1) of the Penal Code Act which mandates proof beyond reasonable doubt but states that *"the determination of proof beyond reasonable doubt shall exclude consideration of any possibility which is merely fanciful or frivolous."*

24. This is in part a circumstantial evidence case, where the Defendant elects not to give evidence, inferences can be shown from the absence of any explanation from him. In this case also, the Defendant made a statement out of Court when he admitted his involvements in the offending on 22 December 2018 in that early morning between 12.00am – 2.00am o'clock when he was confronted at the nakamal. I do not rely on the Defendant's silence as a basis for drawing adverse inferences against him. I do not need to do so if there are other inferences which may exist and justify the convictions. However, since the inferences are available to be shown from unchallenged evidence, this case may provide occasion for the drawing of inferences adverse to the Defendant, stemming from his lack of any explanation. That is the approach I am following when I assess the evidence in this case.

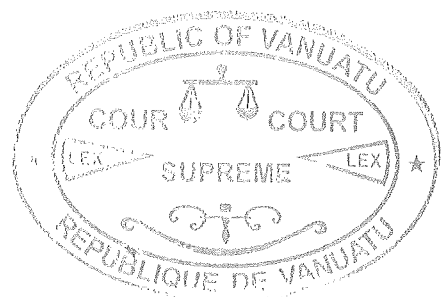
25. The following are evidence accepted as facts by the Court:-

- The complainants Talap William, Martha Johnny and Namas Katen Kahy and Defendant Anthony Kiel – all live at Lamtawakel village – West Tanna. On 28 December 2018, they were all present in their village of Lamtawekel.
- They know each other. They are related one way or the other to Defendant Anthony Kiel.
- Defendant Anthony Kiel was present in the village on 22<sup>nd</sup> December 2018. Defendant Anthony Kiel was entering unlawfully into the sleeping house of the complainant Talap William on the night of 22 December 2018 between 12.00am –



2.00am o'clock in the morning. He admitted this when he entered a guilty plea on that offence in count 1.

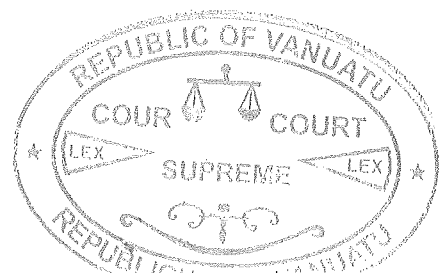
- Witness Talap William saw Defendant Anthony Kiel and spoke to him. Defendant Anthony was drunk when he unlawfully entered the sleeping house of Talap William. I accept the evidence that the Defendant Anthony Kiel entered Talap William's sleeping house. He asked Talap William to have sexual intercourse with her. She refused as he was drunk. She asked Defendant Anthony for her mobile phone. He told her to come with him to take her mobile phone. She told him to bring her mobile phone in the morning, instead.
- Defendant Anthony went outside and came back with a knife. I accept Talap's evidence that Defendant Anthony threatened her with the knife when he told her: *"Mi come from you be you no wantem bai mi spearem you wetem knife."* Talap called out to her tawian and Defendant escaped.
- I accept the evidence of Martha Johnny, a girl of 13 years of age, that on 22 December 2018, she was in a deep sleep at about 12.00am – 2.00am o'clock in the room of the house she shared with the child of her sister. A man unlawfully entered the house. The man sat on top of her and held her mouth and nose. The man slapped the side of her jaw to get her wake. She was awoken. She heard the man said *"Mi nomo ia."* The man covered his body with a blanket and fastened his head with a black shirt. She screamed and the man run outside. She described the man as fair skinned person. She recognised Defendant Anthony Kiel. The same man threw a stone at her and hit her left shoulder. She cried out and the man escaped.
- I also accept the evidence of Namas Katen Kahy that a man entered unlawfully to her sleeping house on 22 December 2018 between 12.00am and 2.00am in the morning.



- The man threw a stone at her and she got injured on her forehead. There were lots of blood. She was taken to hospital. She got treated. She saw the backside of the man when he left. She recognised part of his legs as a fair skinned person.
- I accept Willie Mouiakén evidence that he run to see his mother crying out that night. He saw Defendant Anthony Kiel in a room of the house. Defendant holding a stone. Defendant asked him for a cigarette and matches. When he went to get a cigarette and matches for him, Defendant jumped over the window and run towards the nakamal in the direction of his house which is 500 meters away.
- I also accept the evidence that the next morning, they called on Defendant to say something of the incidents occurring in the night of 22 December 2018 between 12.00am – 2.00am as he was present and he was seen that night at that time. The Defendant admitted that he was involved in these offending. There was also blood seen on his clothes.

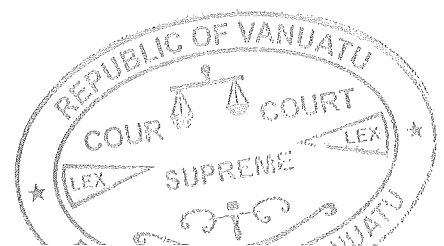
**Consistency of evidence and inferences drawn from same modus operandi**

26. Talap William is a credible and trustworthy witness. I believe her evidence that Defendant Anthony Kiel was drunk; has asked her for sex; she refused; he went outside and came back with a knife and threatened to kill her with the knife because she refused to have sexual intercourse with him. This is consistent with the Defendant's motive to unlawfully enter into Talap's house that night between these times on his own admission when he pleaded guilty to that offence.
27. I am satisfied that Defendant Anthony Kiel threatened to kill Talap William with a knife in the night of 22 December 2018 between 12.00am -2.00am o'clock in the morning as charged against him in count 2.
28. Martha Johnny recognised Defendant Anthony Kiel when he sat on top of her that night of 22 December 2018 in her bed at her house. Her recognition of the man was based on the description she made of the man of being a fair skinned person. There was no any



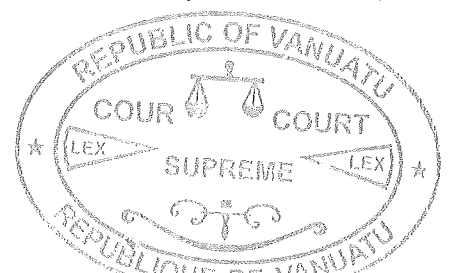
other man or person of that fair skinned complexion in the village on that date and at these times than the Defendant. The Defendant was the only person known by this witness and recognised by her and of that skinned complexion and he was present in the village and he had just unlawfully entered the sleeping house of Talap for sex without success on that date and at these times. He escaped as Talap William was calling for help and went to rescue at her tawian's house. Martha Johnny's house was just 10 meters away from Talap's house. It is rational to infer that the Defendant went then to Martha's house as Martha recognised him in her house when he sat on top of her and slapped the side of her jaw to wake her up and to have sexual intercourse with him. Martha cried out. Defendant went outside. Martha said she saw the same man was standing at the place where they hanged the clothes (calico) and threw a stone at her and hit her at her left shoulder causing her to yield as it was painful. She sustained injury of a temporary nature. Martha is also a creditworthy witness. There is no reason not to believe the stories of this young girl of 13 years old. There was no reason for her to tell lies. I accept her accounts of event.

29. I am satisfied Defendant Anthony Kiel has unlawfully entered the sleeping house of the complainant Martha and assaulted her with a stone on her left shoulder causing damage of a temporary nature as charged against him in counts 3 and 4 on the night of 22 December 2018 between 12.00am-2.00am o'clock in the morning.
30. The evidence of Namas Katen Kahy is to the effect that the man who unlawfully entered her house in the night of 22 December 2018 between 12.00am -2.00am and threw a stone at her hitting her on her forehead causing her injury of permanent nature, was a man of fair skinned complexion as she saw the back of the man and saw his legs on his way outside. She does not say Defendant Anthony Kiel was the man who came to her house that night and between those times but she testified consistently with other witnesses that Defendant Anthony Kiel is the only man or person in the village with a fair skinned complexion. However, Mouiaken saw Defendant Anthony Kiel in a room of the house at the yard of the complainant Namas Katen Kahy just after the assault on complainant Namas Katen and that he was still holding a stone (of laplap). The Defendant



asked him for a cigarette and matches but when Mouiaken went to get a cigarette and matches for him he jumped over a window and ran away. Defendant Anthony Kiel was at the house of the complainant Namas Katen Kahy on 22 December 2018 between 12.00am -2.00am in the morning. This was the date and times the offences in counts 5 and 6 occurred. He was still holding a stone (of laplap) at the time he was seen and spoken to after the offending, There was no specific reason for him to be there on that date and in the early hours in the morning. His house was 500 meters away. The legs of the man seen that night by Namas Katen who assaulted her was the legs of a fair skinned complexion man. Defendant Anthony Kiel is the only fair skinned complexion man or person in the village and he was seen in a room in the yard of Namas Katen Kahy still holding a stone on the date and times of the offending. The only rational inference is that he was the one who unlawfully entered the complainant Namas Katen Kahy's house and assaulted her with a stone causing her damage of permanent nature as she sustained injury on her forehead and there is a scare on her forehead and she also lost two of her teeth.

31. There is finally evidence that Defendant Anthony Kiel made a statement out of court when he was asked and pressed whether he had any involvement in these incidents occurring on 22 December 2018 at the nakamal on the next day of these incidents. His statement was to the effect that he was involved in these incidents occurring on 22 December 2018 between 12.00am -2.00am o'clock.
32. I am satisfied Defendant Anthony Kiel unlawfully entered Namas Katen Kahy's house and assaulted her with a stone causing her serious injuries on her forehead and the loss of her two teeth on her upper lower jaw resulting in damage of permanent nature on 22 December 2018 between 12.00am -2.00am o'clock in the morning.
33. I am further satisfied of the same simple modus operandi followed in this case by the Defendant: unlawful entry into the houses occupied by girls or women in the night as the Defendant knew of that as they live in the same village; then, the demand for sex but if the victim refused or shouted or called out for help, the Defendant will have recourse to a weapon such as a knife or stone. That is what happened with the complainants, Talap



William and Martha Johnny. But with the offending involving the complainant Namas Katen Kahy, the motif of offending against her is not clear. The only possible rational explanation was the frustration of not being able to have sex that night after two failed attempts. Again the same primary modus operandi used: unlawful entry and use of weapon such as a stone on the body this old lady.

34. That is the only reasonable inference that Defendant Anthony Kiel committed the offences in counts 2, 3, 4, 5 and 6 in the information. The evidence are overwhelming against the Defendant.
35. The proved facts follow logically from each other. There is no reasonable hypothesis based on the evidence which is consistent with innocence.
36. I am satisfied that the prosecution has proved each and all essential elements of the offences in counts 2, 3, 4, 5 and 6 beyond reasonable doubt.

### Verdict

37. The following verdicts are recorded against the Defendant Anthony Kiel:

Count 2 – Guilty

Count 3 – Guilty

Count 4 – Guilty

Count 5 – Guilty

Count 6 - Guilty

**DATED at Isangel, Tanna this 23<sup>rd</sup> day of July, 2019**

**BY THE COURT**

.....  
**Vincent Lunabek**  
**Chief Justice**

