

PUBLIC PROSECUTOR

V

ROGER DAVID

Date of Trial: 17 February 2025, 10 and 31 March 2025

Coram: Hon. Chief Justice Vincent Lunabek

Counsel: BN Tamau for the Public Prosecutor
CD Tovor for the Defendant

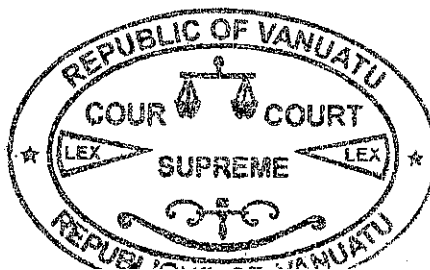
Date of Verdict: 6 June 2025

REASONS FOR VERDICT

I. Introduction

1. The Accused, Roger David, is charged with the following offences:

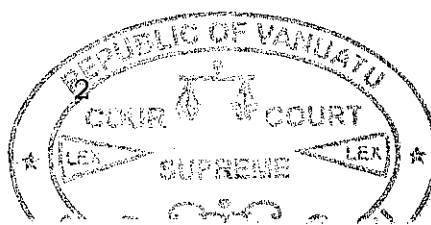
- (i) Act of indecency without consent, contrary to Section 98(a) of the Penal Code Act [CAP. 135] (Count 1);
- (ii) Domestic violence, contrary to Sections 4(1)(e) and 10 of the Family Protection Act No. 28 of 2008 (Count 2);
- (iii) Attempted act of indecency without consent contrary to Sections 28(1) and 98(a) of the Penal Code Act (Count 3);
- (iv) Domestic violence, contrary to Sections 4(1)(e)(g)(c) and 10 of the Family Protection Act (Count 4);
- (v) Domestic violence, contrary to Sections 4(1)(e) and 10 of the Family Protection Act (Count 5);



- (vi) Domestic violence, contrary to Sections 4(1)(a)(g) and 10 of the Family Protection Act (Count 6);
 - (vii) Domestic violence, contrary to Sections 4(1)(a)(g) and 10 of the Family Protection Act (Count 7); and
 - (viii) Attempted intentional assault, contrary to Sections 28 and 107(a) of the Penal Code Act (Count 8).
2. On 23 September 2024, the Accused pleaded not guilty to each and all of the above offences. The matter was listed for 2 days trial on 24 – 25 October 2024. The trial could not eventuate until February – March 2025 (for my medical reason overseas).
 3. On 17 February 2025, the trial started and completed with the submissions on 31 March 2025. Before the trial started, the prosecutor applied for *nolle prosequi* under Section 29 in respect to Counts 7 and 8. The Accused was, then, discharged of the offences of Domestic Violence and Attempted Intentional Assault in Counts 7 and 8 respectfully.
 4. The trial of the Accused proceeded only on Counts 1, 2, 3, 4, 5 and 6 on the offences as contained in the Information dated and filed 7 July 2024. The Accused will be on 5 counts of domestic violence, one count for act of indecency without consent, one count of attempted act of indecency without consent.

II. The Prosecution Case

5. The Accused, Roger David, is related to each and all the complainants in this case. In the alleged acts of indecency and domestic violence towards the complainants, the Accused acted as if he did understand the nature, seriousness and gravity of his actions towards them. The Accused was becoming a threat to his own family members and to the public to access the residential area the Accused and the complainants live for business purposes (part of the residence was used to sale kava to the members of the public).
6. The members of the Accused's family observed that when the Accused was around them in the residence, he acted as if he was not normal or mentally affected. But when he was with strangers he acted normally.
7. Following complainants, Katherine Marie, Naomie Niake and Marie Assomption will testify about acts of indecency and domestic violence, the Accused was alleged to have committed on some of them in the year 2023 at the residence at Anaburu house.



III. The Elements of the offences

8. The prosecution has to prove each and all essential elements of each offence beyond reasonable doubt before the Accused could be convicted on one or all offences.

Acts of Indecency Without Consent

- (i) The Accused committed an act of indecency on the victim(s);
- (ii) The victim(s) did not consent to the act;
- (iii) The Accused knew that the victim(s) did not consent.

Domestic Violence

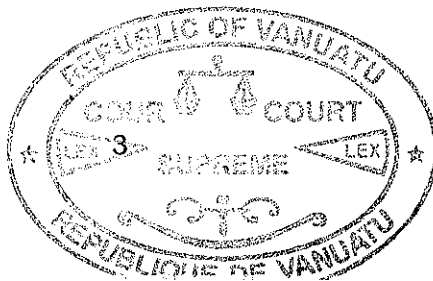
- (i) The victim was a member of the Accused's family;
- (ii) The Accused has the intention to commit the acts of domestic violence towards the victim(s).

IV. The Onus or burden of proof

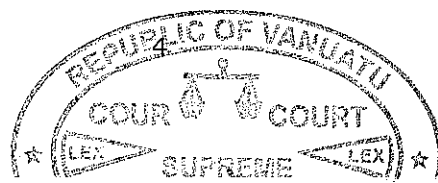
9. The prosecution has the onus or burden to prove each and all essential elements of each offence against the Accused on the standard of beyond reasonable doubt before the Court could convict him on an offence or all of the offences against him. It is not the task of the Accused to prove that he is innocent. If there is a reasonable doubt that exists at the end of the trial, it must be interpreted in favour of the Accused.

V. The Summary of the Prosecution evidence

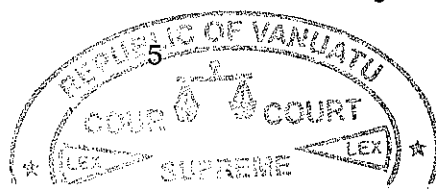
10. The prosecution has called 4 witnesses. Naomie Niake was the first prosecution witness. She gave evidence to this effect. She was the younger sister of the Accused's mother. The Accused called her aunt or small mother.
11. On 6 May 2023, she was having a shower in the bathroom of the house at Anaburu. The Accused came and stood outside the bathroom. The Accused asked her that if there is a space in the bathroom that he could join her in the bathroom to have the shower.



12. Witness Naomie Niake felt offended by the way the Accused acted towards her. She was afraid of the Accused. As his small mother, the Accused was not supposed to act in that manner towards her as it was not correct for him as a member of her family to act offensively towards her.
13. She described the environment when the Accused was with them at the house, she was not feeling safe. She was afraid. She and others in the house slept everywhere in the house as the Accused asked them 100Vatu or cigarettes and if she or others did not give him what he asked, the Accused will assault her or them.
14. When the Accused was remanded in custody, she felt free. She and others could sit down quietly and enjoy the food as a family in the house. They could go out or think properly about something.
15. In cross-examination, she said she knew Roger David before 2023, he was acting rightly towards them. The Accused attended school, he was running on a bicycle, he came in the house to drink water and talk normally with them. In 2023, the actions of the Accused were not normal.
16. Katherine Barry was the second prosecution witness. She gave evidence that she is related to the Accused. She lives at Erakor Half Road. The Accused is her cousin brother as their respective mothers are sisters. The Accused called her sister.
17. She worked as a house girl at the Accused's house at Anaburu area in 2023. On 29 April 2023, the Accused came into the house, called her and told her to have sexual intercourse with her that evening. There was no one there. She was afraid of the Accused. She stopped cleaning up the house.
18. The following week, she washed the plates, she did not see the Accused coming behind her and touched her buttock. She said she did not consent for the Accused to do that to her. She was not happy as the Accused is her cousin brother and this caused her to stop working as a house girl in that house.
19. In cross-examination, she confirmed and maintained her evidence. She added that she grew up with the Accused as she stayed with the Accused's parents when she was younger. At that time, the Accused behaved normally towards her. She explained that the Accused did not act the way he did towards her on 29 April 2023. Before 2023, the Accused was a good brother for her.
20. Henny David was the third prosecution witness. She gave evidence to the following effect. She lives at Anaburu Area, Port Vila with her parents (Theodore David and Dorothy David). There were five (5) children in the family, 5 girls and she was the first born girl of the five girls and the Accused, Roger David, was the only brother among the five girls. The Accused was the last born child of her parents.
21. The Accused is her younger brother. He was a good child and a good brother. He went fishing and took fishes at home. He also attended Montmartre School at Year 12.



22. She said they noticed the Accused started those behaviours after the year 2000. She described that the Accused started by assaulting their father and their father was admitted to hospital on 2 separate occasions. In 2000, something happened she could not recall.
23. She explained that when the Accused asked for money, you have to give him otherwise he will be cross and reacted violently towards you.
24. The residence where she lives with the Accused and the members of her family is located at Anaburu where the community of Aneityum sold kava. When the women and girls came to purchase kava, the Accused would come behind them and touched their buttocks. They were afraid of the Accused. The Accused did not act in that manner toward her. She said she knows him and if he wanted to act in that manner to her, she would shout at him and the Accused would stop. The Accused did act in that manner toward her other sisters in the house. Lucy is one of her sisters who attended Montmartre School while she was sleeping in the house at Anaburu. But Lucy had run away from the house (because of the Accused's actions).
25. She said they were afraid of the Accused when he was at the house with them. They slept everywhere in the house as if they did not have a proper house. The reason being that they were afraid of the Accused.
26. Henny David was cross-examined. She confirmed that when the Accused was younger, he was her brother. He was alright. They looked after him.
27. She explained that when the Accused was at Montmartre school he had a headache when he was trying to concentrate and study hard. The headache was worsened so her mother took him out of the school. Some years had passed. When the Accused smoked marijuana (cannabis) he will start to behave in the manner described in the case. When the Accused smoked cannabis, his behaviours changed. He started to throw strong talks to everyone. She also said when they were asleep, the Accused will tell them that he will kill them all. They were afraid of him.
28. She confirmed that when the mothers came to purchase kava, the Accused will pass behind them and touched their buttocks, and when these mothers reacted, he will laugh at them.
29. Marie Assomption was the last prosecution witness. Her evidence was to this effect. She is from Aneityum Island and she resides at Anaburu area, Port Vila, Efate. The Accused is her younger brother. In 2023, she lives with her parents and her brother, the Accused, at Anaburu area. She is married and has 3 children. Her children and husband live on the island of Aneityum while she was in Port Vila and lived with her parents as she was admitted to the hospital and got operated.
30. In May 2023, she was living in Anaburu with her parents. On that month, she was cooking in the kitchen. The Accused came into the kitchen and asked her for cigarettes. She went inside her room

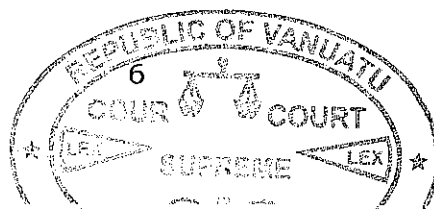


and brought a cigarette for the Accused. The Accused came behind her in her room. The Accused pushed his hand to touch her private part. She pushed away his hand and she came outside.

31. She was not happy as the Accused was her younger brother.
32. On the next day, she was at the house, the Accused came and told her the following: "*You look penis blo mi i stand up, youmitu save go lo room? Mi traem vagina blo you?*"
33. She stood up and run away from him. She was not happy; the Accused is her younger brother.
34. The Accused did these acts in the like manner toward the members of the public (kava customers) who came to purchase kava.
35. On 12 May 2023, she was at home, the Accused came and asked for money. She told him she did not have any money. The Accused told her: "*You come youmitu go inside, mi fuckem you.*" Her big sister, Emmy Kalmet, was there and she heard the Accused said that to her. The Accused also acted in the like manner towards the customers of kava.
36. When the Accused was at the house, they were afraid of him. From time to time, the Accused wanted to assault them (specifically, the girls, women or the Accused's sisters).
37. In cross-examination, Marie Assomption confirmed her evidence. She added that when the Accused was younger, he was normal, he went to school. He consumed leaves (Cannabis) and this caused reactions on him which affected them at the house. Before the Accused was normal. After he consumed cannabis substances, he reacted in the manner described in the case.
38. At the end of the prosecution case, a case was made out under section 164 of the criminal procedure code Act (CAP 136). The statement of rights of the Accused under section 88 of the criminal procedure code was read and explained to him.
39. The Accused exercised is rights to remain silent and to call a witness.

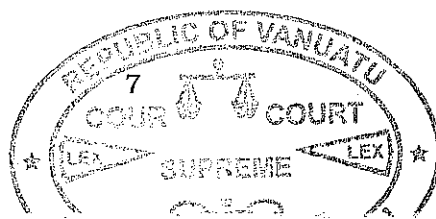
VI. The Defence Case

40. The case of the Defence is that at the time of the offending, the Accused, Roger David, had suffered from schizophrenia which caused him to be incapable of controlling his conduct against the complainants in this case.
41. The Defence will call Doctor Jimmy Obed. He will state the mental state of the Accused at the time of the offending which caused the Accused not to understand the nature and quality of his actions.



VII. The Summary of the Defence evidence

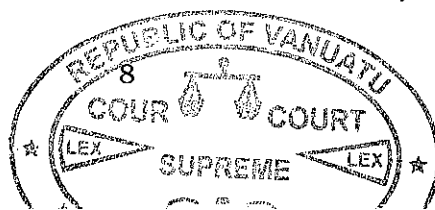
42. Doctor Jimmy Obed was the only defence witness. He gave evidence to this effect. He is a psychiatric doctor at the Vila Central Hospital. He exercised that profession for about 10 years. His role/function is to treat people affected with mental diseases/illnesses.
43. He recognized the Accused, Roger David. The Accused accessed the services of mental health clinic at the Hospital.
44. He identified and recognized a report he wrote about the Accused on 4 December 2024 whether he was fit to attend the trial – Exhibit D1.
45. He also identified and recognized a report he made about the Accused on 11 June 2024 whether the Accused could attend trial on their assessment –Exhibit D2.
46. He further identified and recognized a report he made about the Accused on 11 September 2024. It was a psychiatric report whether the Accused was fit to stand trial – Exhibit 3.
47. The Accused was diagnosed with schizophrenia. The Accused came to the hospital and had accessed to the services at the hospital for more than 6 years.
48. The Doctor explained the actions and decisions of the Accused when he was diagnosed with schizophrenia to the effect that some of his actions or signs were disorganized behaviours. Some of his behaviours will not be normal. Other signs will be that he will talk to himself, that he could not take care of his hygiene, and that he had poor judgments.
49. On a professional assessment, they have their own assessment. The Accused was under the influence of other substances. The only thing they can assess was poor judgment of the offending at the time of offending.
50. The doctor said at the time of offending, the Accused was not in the position to know the nature of the offence. The Accused was psychotic at the time of their assessment when they visited the Accused at the Correctional Centre.
51. He further said that somebody can be diagnosed of schizophrenia after treatment he could be alright, but if he abused the illegal drugs substances like cannabis which is common here, that could cause the disorder to relapse.
52. The Accused was a patient for more than 6 years. At the time of the offending, the Accused did not receive any treatment.



53. He was off treatment for some time. The Accused received treatment only when he was in the Correctional Centre. When the Accused was outside in the community, it was difficult for them to monitor his conditions.
54. Doctor Jimmy was cross-examined. He confirmed the report in Exhibit 1 of 4 December 2023 which was made at the requested of the Defence Counsel. The report asked for the professional opinion for the Accused to stand trial.
55. On the mental state of the Accused at the time of offending or during the time of offending, it is highly likely that the Accused was acutely unwell due to the reasons he sated earlier.
56. He confirmed that the reports in Exhibits 1, 2 and 3 were not made to state the mental status of the Accused but to say whether the Accused is fit to stand the trial. The reports were made as requested by the Correctional Centre. The information came from the Accused and their understanding of the Accused.
57. Doctor Jimmy Obed confirmed his evidence that to his understanding of the context of the Accused, that the Accused did not get medications anymore at the time of offending.

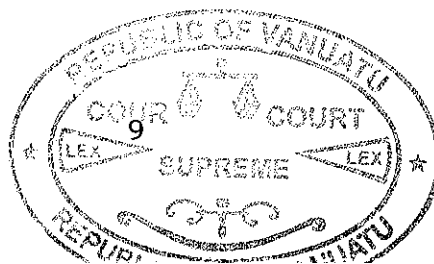
VIII. Discussion: Finding of facts and credibility

58. I saw the witnesses and heard their evidence. I also observed the demeanour of these witnesses in the witness box. I consider the evidence of the witnesses through their oral testimonies, statements, and exhibits. I hear, read and consider arguments, submissions of counsel of which I am greatly assisted. The following assessment of facts and credibility of witnesses are made:-
59. The testimonies of Naomie Niake, Katherine Barry, Henny David and Marie Assumption are honest, credible and can be reliable.
60. On acts of indecency without consent in Count 1, the evidence of Katherine Barry established that the Accused on the 7th of May 2023, at Anaburu area, committed the act of indecency by touching her buttock without her consent. She was doing the dishes when the Accused came behind her and indecently touched her. She was shocked and when turned around, she saw the Accused and he laughed at her. That evidence was not contradicted.
61. On domestic violence in Count 2, the evidence of Naomie Niake established that she is related to the Accused as his aunt or small mother. She lived with the parents of the Accused and the Accused as a member of the family of the Accused. The Accused acted in an indecent or offensive manner towards her when he called out to her inside the bathroom when she was having her shower to the effect that if there was enough space inside the bathroom, he will join her in the bathroom. The



witness did not like the way the Accused behaved toward her as it was not appropriate and she considered the Accused as her son. That evidence was not discredited.

62. On attempted act of indecency without consent in count 3, the evidence of Marie Assumption established that on the 8th of May 2023, the Accused came to her and asked for cigarettes. The witness went into her room to get the cigarette. The Accused accompanied her in the room and pushed his hand towards the witness to touch her vagina but she slapped his hand away from her and she run out of the room. It is accepted that as a fact, the Accused had taken step toward committing the act of indecency. It is inferred and accepted that the Accused would have completed the act if the witness Marie Assumption did not slap the Accused's hand away and run out of the room. That evidence was not contradicted.
63. On domestic violence in Count 4, there is no evidence which established and/or supported the charge alleged in that count. The prosecution failed to prove this charge on the standard of reasonable doubt.
64. On domestic violence in Count 5, the evidence of Marie Assumption established that she is a member of the Accused's family. She is the Accused's aunt or small mother as she is the biological sister of the Accused's mother. This witness testified and her evidence established that the Accused came towards her and told her that he felt like he was having an erection and that he wanted to penetrate her vagina with his penis. The aunt or small mother did not like the way the Accused acted towards her because the Accused is one of her sons. This evidence is not contradicted.
65. On domestic violence in Count 6, there is no evidence establishing the charge alleged against the Accused in that count. The Prosecution failed to prove this charge on beyond reasonable doubt.
66. As to the defence evidence, the Accused exercised his right to remain silent. He must not be criticised of doing so. The Accused called Doctor Jimmy Obed in support of his defence. It is to be reminded that the onus or burden of proof is still remaining on the prosecution until the end of the trial. I must assess the defendant's witness testimonies in the same way I assess the prosecution's witnesses.
67. Dr Jimmy Obed's evidence in chief established that the Accused, Roger David, is diagnosed with schizophrenia and that he is accessing medical treatment at the Mental Care Unit for the last six (6) years. There are four (4) signs of someone with schizophrenia:
- a) Disorganised behaviour;
 - b) Talking to oneself;
 - c) Unable to take care of themselves; and
 - d) Unclear judgment/poor judgment.



68. The evidence shows that at the time of the offending, the Accused was under the influence of other substances that affected his actions – poor judgment. The Accused was unable to understand the nature and quality of his actions at the time of offending.
69. Dr Jimmy Obed explained that someone diagnosed with schizophrenia when on treatment they can be well, however, if that person takes on the substances (such as alcohol drinks or cannabis), it will trigger acute psychosis on that person to cause him to relapse.
70. The defence evidence showed that the Accused despite being a patient at their clinic is not able to take treatment at the time of the offending. It was difficult for the Mental Care Unit to administer treatment to their patients in the community.
71. The medical reports (Exhibits D1, D2 and D3) were tendered as evidence. Dr Jimmy Obed emphasized that the Accused is non-adherent to his medications, which is voluntary, because he is either not present, refuses or is not supported by his family.
72. When cross-examined, Dr Jimmy Obed confirmed he relied on the information that the Accused gave him, and that the sole purpose of the report is to determine whether the Accused is able to stand for trial.
73. Dr Jimmy Obed gave an honest and credible testimony of the Accused's medical conditions/situations for the past 6 years as a patient of the Mental Care Unit diagnosed with schizophrenia; the situation of patient like the Accused when he was not adherent to his medications; and that at the time of offending in April – May 2023, the Accused was out in the community, was not assisted by his family; was under the influence of substances like alcohol or cannabis which affected his actions – poor judgment; as a consequence, the Accused was unable to understand the nature and quality of his actions at the time of offending.

IX. The Law and its application

74. Sections 20 of the Penal Code Act and 92 of the Criminal Procedure Code Act are the relevant provisions.
75. Section 20 states:

- (1) *Every person accused of a criminal offence shall be presumed sane until the contrary is proved; the burden of such proof shall lie upon the accused on the balance of probabilities.*
- (2) *It shall be a defence to a criminal charge that the accused was at the time in question suffering from a defect of reason, due to a disease of the mind which rendered him incapable of appreciating the probable effects of his conduct. Such disease may consist of a mental disorder or deficiency which leads in relation to the criminal act to*



a complete deprivation of the reasoning power of the accused beyond a momentary confusion, absence of self-control or irresistible impulse. Any mental disorder which has manifested itself in violence and is prone to recur is sufficient. The disease need not be permanent or prolonged; a temporary loss of mental awareness shall constitute a sufficient defence.

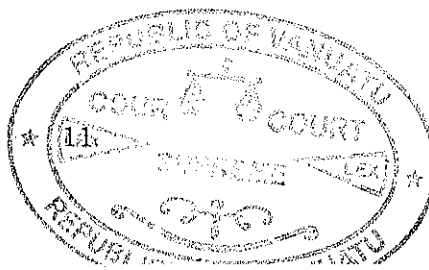
- (3) *If the accused is found insane he shall be entitled to be acquitted. Notwithstanding such acquittal, the court may make an order for his confinement in a manner to be prescribed in its order.*
- (4) *Involuntary intoxication shall for the purposes of the criminal law be deemed to be a mental disease.*

76. Section 92 provides:

DEFENCE OF INSANITY AT TRIAL

92. Where any act or omission is charged against any person as an offence, and it is given in evidence on the trial of such person for that offence that he was insane within the meaning of the Penal Code, then if it appears to the court before which such person is tried that he did the act or made the omission charged but was insane at the time when he did or made the same, the court shall make a special finding to the effect that the accused is not guilty of the offence charged by reason that he was insane when he did the act or made the omission. When such special finding is made the court may order that the accused be kept in custody in such place and in such manner as the court shall direct and the provisions of the Penal Code shall thereafter apply.

- 77. In the present case, the evidence presented by all prosecution witnesses clearly established that the Accused was suffering from a disease of the mind at the time of the alleged offending. They each confirmed that the Accused's behaviour was abnormal, notably in that he no longer recognised them as his family members and failed to display the respect he had consistently shown in the past. This supports the conclusion that the Accused was incapable of appreciating the probable consequences of his conduct.
- 78. The evidence adduced by Dr Jimmy Obed confirmed that the Accused is diagnosed with schizophrenia as the Accused has been accessing medical service for that diagnostic from the Mind Care Clinic in the past 6 years. That, at the time of the offending, due to lack of support in the community, it has caused the Accused to be non-adherent to his medication.
- 79. Based on the evidence, the Court accepts that at the time of the offending in April – May 2023, the Accused, Roger David, who was suffering from schizophrenia, was incapable of appreciating the probable effect of his conduct. The Accused was found insane at the time of offending in April – May 2023.



80. The prosecution has proved beyond reasonable doubt each and all essential elements of the following offences:
- i) Acts of indecency without consent, contrary to s.98(a) of the Penal Code Act (in Count 1);
 - ii) Domestic violence, contrary to ss.4(1)(e) and 10 of the Family Protection Act (in Count 2);
 - iii) Attempted act of indecency without consent, contrary to s.28(1) and 98(a) of the Penal Code Act (in Count 3); and
 - iv) Domestic violence, contrary to ss.4(1)(e) and 10 of the Family Protection Act (in Count 5).
81. The prosecution has failed to prove each and all essential elements of the following two (2) charges:
- i) Domestic violence, contrary to ss.4(1)(a) and (g) and 10 of the Family Protection Act (in Count 4);
 - ii) Domestic violence, contrary to ss.4(1)(e) and 10 of the Family Protection Act (in Count 6).
82. As the Accused, Roger David, was found insane at the time of the offending in Counts 1, 2, 3 and 5, he is acquitted in respect to each of these charges accordingly under Section 20(3) of the Penal Code Act.
83. Notwithstanding such an acquittal, the Court makes an order for the Accused, Roger David, to be confined or placed in such a place and in such manner as the Court shall direct to protect himself and others based on the evidence and also under Section 20(3) of the Penal Code Act [CAP. 135] and Section 92 of the Criminal Procedure Code Act [CAP. 136].
84. The confinement or placement order is adjourned to a date to be confirmed to allow the participation of the prosecution and defence counsel and the Mental Care Unit of the Vila Central Hospital.

DATED at Port Vila, this 6th day of June, 2025.

BY THE COURT

Hon. Chief Justice Vincent Lunabek

