

**CALTO SITANGTANG -v- THE PUBLIC PROSECUTOR**

**JUDGEMENT**

This is an appeal against a decision of Cooke C.J. sitting in the Supreme Court in Luganville on 18 September 1990, wherein the appellant was convicted of incest contrary to section 95 of the Penal Code Cap 135.

The case was presented to the Supreme Court as involving a question of law rather than of fact and is again so presented here. The admitted facts are that the appellant had sexual intercourse with one Leah Sitangtang (herein after referred to as the complainant). The complainant had since shortly after the birth of the appellant been living with the appellant's father as his wife. The appellant's mother was not the complainant but a woman named Margaret who was at the time of the complaint still alive and in contact with the family.

The question for the Court to decide is whether in those circumstance the relationship between the appellant and the complainant falls within the scope of section 95(1) Penal Code Cap 135 which provides:-

95. (1) Incest is sexual intercourse between-

- (a) parent and child (including an adopted child);
- (b) brother and sister, whether of the whole blood or of the half blood, and whether the relationship is traced through lawful wedlock or not; or
- (c) grandparent and grandchild,

where the person charged knows of the relationship between the parties.

"Parent and child (including an adopted child)" is nowhere defined in Vanuatu legislation. The Court must therefore apply general principles of interpretation as set out in the Interpretation Act Cap 132, section 8 of which provides:-

"An Act shall be considered to be remedial and shall receive such fair and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit."

It is contended by the respondent that the relationship between the appellant and the complainant is that of mother and adopted child. Clearly the appellant is not an adopted child within the terms of the Adoption Act 1958, English legislation which applies in Vanuatu as a result of Article 95 of the Constitution but we accept that, by section 95(1) of the Penal Code, adopted child may also include a child adopted in custom.

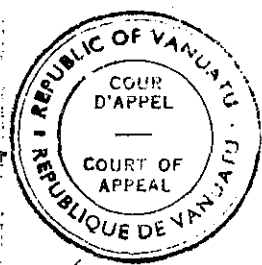
The basis of the crime of incest lies in the blood relationship between the parties and the inclusion of people in an adoptive relationship clearly shows an intention by the legislation to extend the offence to include others who form part of the true family unit. If such a relationship is to be relied upon, it must be proved as part of the case.

No evidence was before the court of any custom ceremony of adoption having taken place. The Court is therefore left with the question of whether an adoption in custom may be inferred from the evidence. The trial judge made no such inference. Whilst it is open to this Court to draw inferences from facts established in the court below, that is not an inference which we would draw on the basis of the limited evidence given and so the relationship between the parties has not been proved.

We were referred to the difficulties encountered in interpretation of Article 5 of the Constitution. We consider that the matter should be the subject of full argument before any useful decision can be made and therefore propose not to deal with it in the course of this appeal.

The appeal is allowed and the conviction quashed.

Dated at Port Vila, this 26 day of October, 1990



*E.P. Goldsbrough*

*G. Ward*

MR JUSTICE E. GOLDSBROUGH  
COURT OF APPEAL JUDGE

MR JUSTICE G. WARD  
COURT OF APPEAL JUDGE