

**IN THE COURT OF APPEAL OF  
THE REPUBLIC OF VANUATU**  
(Criminal Appellate Jurisdiction)

*Criminal Appeal No. 8 of 2011*

**REGINA MALVARU**  
*Appellant*

**PUBLIC PROSECUTOR**  
*Respondent*

*Criminal Appeal No. 9 of 2011*

**BRIM MOLI**  
*Appellant*

**PUBLIC PROSECUTOR**  
*Respondent*

Coram: Hon. Chief Justice Vincent Lunabek  
Hon. Justice Bruce Robertson  
Hon. Justice John von Doussa  
Hon. Justice Daniel Fatiaki  
Hon. Justice Robert Spear

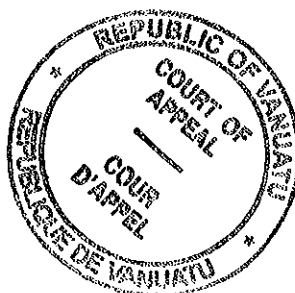
Counsel: Eric Molbaleh for both Appellants  
Parkinson Wirrick for the Respondent

Hearing: 17 & 24 November 2011  
Decision: 25 November 2011

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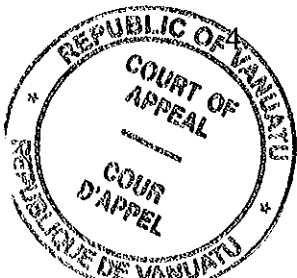
**JUDGMENT OF THE COURT**

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1. Each of these two cases directly involves an appeal against sentence. However, they raise wider issues that made it both convenient and appropriate that the appeals be heard together. Counsel were not opposed to this course.
  
2. Both appeals have been brought out of time. The appellant in each case applies for leave for the appeal to be heard. Mr Wirrick acknowledges that it is entirely appropriate for the appeals to be heard. That concession on the part of the Public Prosecutor is both responsible and appropriate. Leave to appeal out of time is accordingly granted in each case.
  
3. Regina Malvaru is a 19 year old woman from Santo. She was sentenced to 4 years 8 months imprisonment on her conviction for two charges of intentional homicide. She admitted killing babies born to her when she was 15 and 18 years of age. We will return to the facts of the case in due course. Suffice it to say at this stage that Regina Malvaru had been subjected to sexual abuse by her step-father Isaac Jimmy from when she was about 12 years of age through to when she was 17 years of age. This sexual abuse resulted in her becoming pregnant on 3 separate occasions. Her first child was born in July 2006 when she was 14 years of age. That first child is now 5 years old and is being cared for by the appellant's mother. The appellant killed her second and third babies immediately after they were born.

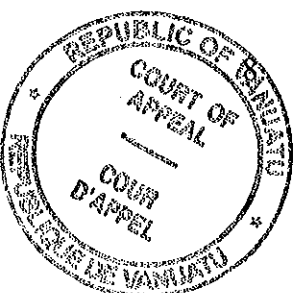
Brim Moli is a 33 year old woman from the island of Malo. She was sentenced to 5 years imprisonment for the intentional homicide of a baby born to her on 19



June 2010. She killed the baby immediately after it was born. Again, the facts of this case will be addressed in greater detail later in this decision.

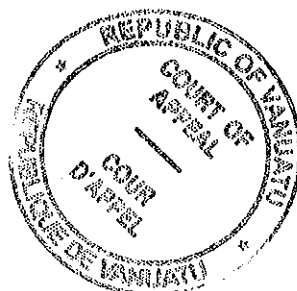
5. Both these cases caused us to be concerned that the psychological state of the respective appellants at the time of the offending had not been sufficiently assessed such that the true culpability of the offender could be determined. We accordingly invited senior members of the Correctional Services, Probation Division to assist us with a more detailed report on each of the appellants. To that end we adjourned the appeal hearing for a week. We now have the benefit of a detailed and most helpful assessment of each of the two appellants.
6. With the benefit of this additional material, we are left in no doubt at all that the sentences involved were manifestly excessive and that the appeals against sentence should be allowed. We will re-sentence the appellants to ensure there are no further delays.
7. We record now our appreciation of the assistance that we have received from counsel for both the appellants and the respondent. In each case, their submissions have been extensive, measured and of great assistance in this difficult area. Additionally, the assistance provided by Correctional Services with the supplementary reports has been of great benefit to us. We are grateful to the probation officers involved in the preparation of the reports for producing such detailed and helpful reports in such a tight time frame.

The culpability of a mother for killing her child is often treated in a special way in order to recognise the unique features of motherhood. We have dealt with



this previously in cases such as *Mathias v Public Prosecutor* [2002] VUCA 8; *Criminal Case No. 1 of 2002* and *Public Prosecutor v. Jenny Livo* [2010] VUSC 71; *Criminal Case No. 13 of 2010*. The difficulty recognised by those cases is to identify whether the homicide has come about through a careless and selfish disregard for human life or at the time when the mother was acting irrationally for reasons that might be related to the pressures of motherhood in those individual circumstances.

9. *Mathias* is a case where a mother killed her 4 year old disabled child. She was sentenced in the Supreme Court to 8 years' imprisonment. She was 25 years of age at the time with 3 children aged between 2 years and 7 years. Her middle child became severely handicapped as result of illness when he was about 16 months old. It was clear that he presented substantial challenges to his mother.
10. When this disabled child was about 4 years of age, the mother formed a new relationship with a man who had his own family. As that relationship developed, Mathias went between her new partner's home with his family and her home with her family where she had the support of her mother. It was clear that she came to believe, perhaps correctly, that her new relationship was unlikely to develop further if it meant that her disabled child would have to become part of a new blended family. Matters were brought to a head when she became pregnant to her new partner. When 8 months' pregnant, she killed her disabled son by burying him while still alive.

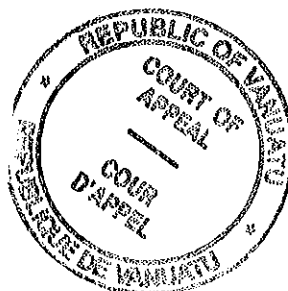


11. We were concerned, in that case, at the adequacy of the material placed before the sentencing Judge; specifically, whether he had sufficient material before him to enable him to make a realistic assessment of her culpability. We said,

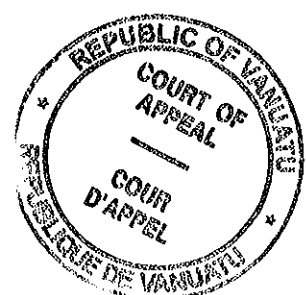
*“the problem which now confronts us is in knowing about the relevant and complete circumstances relating to this strategy. Without that material it is impossible to assess the appropriateness of the sentence or compare it with other cases.”*

*“On the one hand it is possible to view the case as one in which a woman having commenced a new relationship was caught in bind between her parental duty and a new man and her life with his extended family. It has been said that they were taking the view that they did not want to bring into this new relationship a child of another man and particularly one who was disabled. This was coupled with child care problems as her mother was unwilling or unable because of her unemployment to provide full time care. Ms. Mathias therefore decided to deal with her own selfish needs and requirements, taking a heartless and wicked decision to kill her defenceless child.*

*On the other hand the matter may be viewed as a hapless woman in a precarious and vulnerable position shortly before the birth of another child, feeling fragile and unsupported from all sides, emotional stressed and unable to make a rational, sensible decisions and the circumstances, acting in an inexcusable but understandable way because of the impossible pressures which she found around her.”*

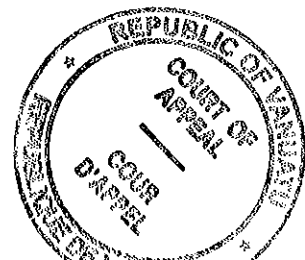


12. In that case, we quashed the sentence and returned the case to the Supreme Court for further inquiry and consideration... “ *Specific findings will have to be made with regard to the environmental circumstances which existed, the medical and health position of the appellant and the deceased at the time of the death and all other circumstances about the death and other relevant surrounding circumstances as can be now discovered.*”
13. Back in the Supreme Court, with the particular benefit of medical evidence, the sentencing judge held, “*I cannot say the prosecution has shown beyond reasonable doubt that this killing was a “heartless and wicked decision”. I therefore must sentence on the basis put forward by the defendant, particularly with the benefit of the opinions of the doctors...*”
14. The eventual sentence was two years’ imprisonment.
15. This case, and other cases that have followed it, emphasized the particular if not unique pressures that can be felt by a mother of a young child. Those pressures can arise from environmental, psychological and even psychiatric factors.
16. ***Mathias, Livo*** and other cases recognised the extreme distinction between a callous and selfish decision by a mother to dispose of an unwanted child and a mother, in a fragile emotional or psychotic state, who acts irrationally and disposes of a child because of the pressures that she perceives that she is under.
17. Of course, those are the extreme ends of the possibilities that can arise and most cases will fall somewhere between those two ends. We do not consider that a sentencing Court can easily face its task without expert evaluation either to dismiss the possibility of some overwhelming psychological or psychiatric

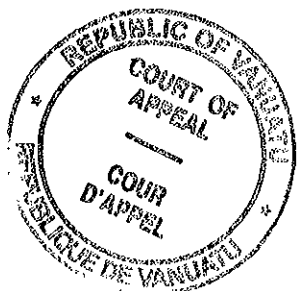


factor or to identify and assess it. That is, of course, what we said in *Mathias* (para. 11 above).

18. In other jurisdictions, the crime of infanticide is treated as a special form of homicide. It is timely to consider how cases of infanticide are approached in other jurisdictions as we consider that there is a need for law reform in this area. Infanticide can be generally considered the crime of mother of killing her child in certain circumstances.
19. In New Zealand, there is a discrete crime of infanticide that carries with it a maximum term of imprisonment of 3 years. A woman can either be charged with infanticide from the outset or, if she is prosecuted for murder or manslaughter then a special verdict of infanticide may be returned if the evidence supports that offence.
20. The New Zealand approach is markedly different to other comparable jurisdictions but only in respect of the age of the child. It relates to cases where a woman causes the death of her child while that child is less than 10 years of age. In Australia, the child must be under 12 months (New South Wales) or under 2 years (Victoria). In the United Kingdom, the child must be under 12 months. Those differences notwithstanding, the mental element of infanticide in those jurisdictions does not differ significantly.
21. In each of those jurisdictions, what must be established is that, at the time of the act or omission which causes the death of the child:



- a. the mother's mind was disturbed by reason of her not having fully recovered from the effect of giving birth to the child or by reason of the effect of lactation consequent upon the birth of the child (New Zealand, New South Wales, UK);
- b. the mother's mind was disturbed because she had not fully recovered from the effect of giving birth or a disorder consequent upon her giving birth (Victoria).
22. In those jurisdictions, where the outcome of a prosecution is effectively a conviction for infanticide, the sentences have generally been for a non-custodial sentence with the emphasis on rehabilitation recognising the offender is not generally to be considered a risk to society.
23. We have raised the issue of infanticide not because we necessarily consider that it is applicable in these two cases but primarily to emphasise that special treatment is required for cases where a mother is found to have killed her child. We suggest that there should be specific statutory recognition of infanticide as a form of homicide requiring special attention. The New Zealand approach establishes infanticide both as a discrete crime as well as an available defence to a charge of intentional homicide. This provides the prosecution with the opportunity to charge the particular offence from the start without requiring the accused to suffer the ordeal of a trial for intentional homicide. It also provides the defence with the opportunity to defend a charge of intentional homicide on the limited basis that it is in fact a case of infanticide. Other jurisdictions leave

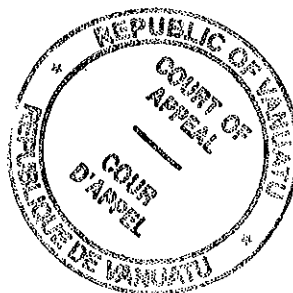




it principally as a defence to intentional homicide. We urge the law reform agencies in Vanuatu to give consideration to reform. We make no comment on what age limit the child should be as expert medical opinion should be sought on that point as a matter of policy consideration.

24. Infanticide cases are, however, not the only cases where special consideration needs to be given to the state of mind of a mother who kills her child. Infanticide cases draw on established international jurisprudence that a mother's mind can become disturbed and that she can act irrationally essentially as a result of not having fully recovered from child birth.
25. There are other cases (such as *Mathias*) that militate for a sentencing court to ensure that there is a careful, detailed and specialised assessment of environmental, psychological or psychiatric factors that may have played a part in (what will always be) the extraordinary decision of a mother to kill her child. That assessment may result in a finding that there is nothing to mitigate the culpability of the offender and that it was truly a callous and selfish act designed to dispose of an unwanted child. It might, however, identify factors that need realistically to be taken into account as a matter of basic humanity when assessing the culpability of the offender and what should be the appropriate sentence.
26. With the significant benefit of the supplementary reports from Correctional Services, we turn now to the sentence appeals.

*Regina Malvaru*



27. Regina Malvaru received an effective sentence of 4 years 8 months imprisonment on 2 counts of intentional homicide to which she had pleaded guilty at the first reasonable opportunity. Indeed, she freely admitted to committing both offences when first spoken to by the police. Saksak J considered that the only appropriate sentence was one of imprisonment. The sentencing Judge reached an offending end point (with aggravating factors) of 7 years imprisonment before making a deduction of 1/3rd for mitigating factors. No penalty was, however, imposed on the charge relating to the first child she killed when she was only 15 years of age. The full sentence was imposed on the charge relating to the second child whom she killed when she was 17.

28. Turning first to the aggravating features to the offending above and beyond the actual killing of the two babies just after they were born, the judge identified 5 separate aggravating factors:-

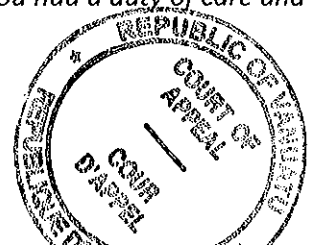
*“(a) You deliberately concealed deliveries and births of your children. You could easily have talked to your church pastor, village chief or elder or your mother about your situations but you did not. **And the only explanation you have provided to the police on interview is that your step-father threatened to “spearem mi wetem knife”. But that is not substantiated by any evidence.***

*b) You knew your actions were unlawful because you stated in all happened according to your stepfather’s plans and instructions. Again, that was not tested and there is no evidence to substantiate the assertions.*

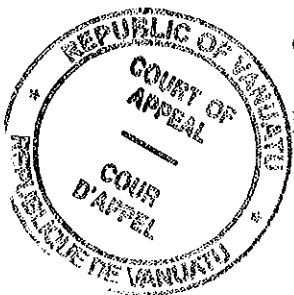
*c) It was a repeated offending. The incident in August 2008 occurred when you were only 15 years old. The second birth in 2010 occurred when you were 17 years old.*

*d) The offending involved the lives of two innocent babies who did not deserve to be treated in such a manner. There was complete lack of any respect for human lives.*

*e) There was a breach of trust as a mother. You had a duty of care and you neglected that duty.” (emphasis added)*

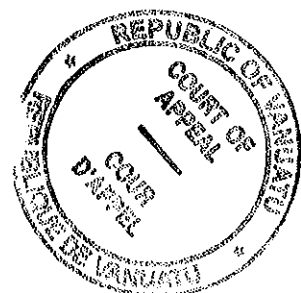


29. There appears to have been insufficient weight given to the explanation from by the appellant that she killed her children because of repeated threats of serious harm made to her by her step-father, that she had lived in fear of him for many years, and that indeed he told her to kill the baby once it was born. He had also given her traditional medicine during her pregnancies to try and induce a miscarriage. Saksak J dismissed this explanation on the basis that it was not substantiated by any evidence although we note that those matters were directly raised by defence counsel in his written submissions and were acknowledged by the prosecutor as having been made by the appellant when she was first interviewed.
30. When matters of possible sentencing significance are raised before a sentencing judge, the first inquiry by the judge must be to ascertain whether the factors raised are accepted by the prosecutor (if raised by the defence) or defence counsel (if raised by the prosecutor). If there is disagreement then the matter has to be determined by a disputed facts hearing - also known as a *Newton* hearing. That is the only means by which disputed facts can be settled in the sentencing context. The object is to reach a settled factual basis for the sentence.
31. Given that the step-father had, indeed, also been charged with intentional homicide of the two babies on the basis of his apparent incitement or encouragement of Regina Malvaru to kill them, it would be surprising if the prosecutor had taken issue with the defence submission that the appellant had

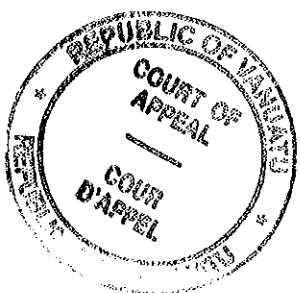


been under those threats and directions from her step-father. In that case, those matters would have been of critical importance to the sentencing consideration.

32. Mr Wirrick informed us that the charge of intentional homicide against the step-father was withdrawn prior to the sentencing of Regina Malvaru. Mr Wirrick was not involved in that particular prosecution as the matter was then being directly handled by the Public Prosecutor herself.
33. It is surprising that the full resources of the State were applied to prosecute this young girl for intentional homicide, and a condign sentence was sought, and obtained, given the distressing circumstances and when without question she was as much a victim as were her two children. The step-father was sentenced to 7 years 6 months imprisonment on 3 representative charges of sexual intercourse with a child under his care of protection and 1 charge of unlawful sexual intercourse. Given that the prosecution case has always been that the step-father started having sexual intercourse with the appellant from when she was 12 years of age and that this continued almost daily, within a regime of fear and intimidation, for up to 5 years, we do not follow why he was not charged with the more serious charge of rape or why the prosecution against him for intentional homicide was not maintained.
34. The appellant's claim that she was directed by her step-father to kill the babies once they were born and that he also threatened on occasions to stab her if she did not comply with his wishes, should have been taken into account unless it was established on the evidence that this was not so.



35. This was a case of a young girl who had effectively been kept as a sexual slave by her stepfather for a period of some 5 years. She did not know how to escape from her situation given that she was dependent upon her step-father who appears also to have had the support of her mother as well.
36. This young and relatively unsophisticated village girl should have been sentenced with full recognition of both the environmental factors that she was subjected to over an extensive period of time and the pressure to kill the children which she found overwhelming. It is of significance that, in respect of her second and third pregnancy which resulted in the two children she killed, she took every step she could to conceal her pregnancy from her mother. She appears to have been concerned at an adverse reaction from her mother if it was revealed that her step-father had continued to sexually abuse her after her first child. Her mother initially blamed this 14 year old girl for becoming pregnant on the first occasion. While the Mother later apologised for her initial reaction, it must have had an effect on Regina Malvaru
37. Regina Malvaru has been in custody now since 17 December 2010 which amounts to 11 months and 9 days. She has accordingly already served an effective sentence of 2 years imprisonment given parole considerations.
38. It may have been open for a wholly rehabilitative sentence to have been imposed on Regina Malvaru given all those environmental factors and pressures that we have mentioned or at least a suspended sentence of imprisonment. However, given the time that Regina Malvaru has already spent in custody, it is clear that she should immediately be released. Furthermore, all available



assistance should be provided to assist her to recover as best she can from the consequences of her step-father's offending against her.

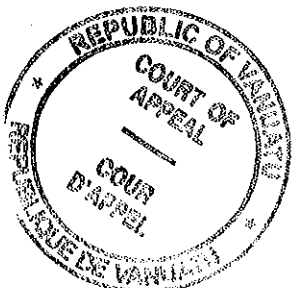
39. Her appeal is allowed. The sentenced of 4 years 8 months imprisonment is quashed. In its place, we impose a sentence of 2 years supervision with these special conditions:-

- a. That she live where directed by her Probation Officer and that she does not move address without written permission from her Probation Officer to do so;
- b. That she attend such education programmes as directed by her Probation Officer;
- c. That she undertake such other counseling to assist in her rehabilitation as directed by her Probation Officer

***Brim/ Primrose Moli***

40. The sentence imposed on Brim Moli on 27 August 2010 was one of 5 years imprisonment. Saksak J acknowledged the facts of the offending to be that Brim Moli took a pair of scissors and went into the bush by her house where she gave birth to the baby. She used the scissors to cut the umbilical cord. She then placed her foot on the baby's throat until it choked to death. The Judge said this:-

*"You do not seem to be sorry at all because of what you did. The only reason you have given for your offending is that your husband's family or relatives did not help and support you. That cannot be a good reason to take your baby's life. You deliberately plan to cause the baby's death. You lost all respect for the life of your child. The baby suffered when you placed your foot on its neck and course it to die. That is heartless and wicked action.*



*The only appropriate sentence for you will be a custodial one. This will serve as a deterrence both to yourself and other women or girl from such outrageous behaviour."*

41. The sentencing judge adopted 4 years as a starting point and then lifted that up by a further 3 years to an offending end point of 7 years to recognise certain aggravating features; specifically:-

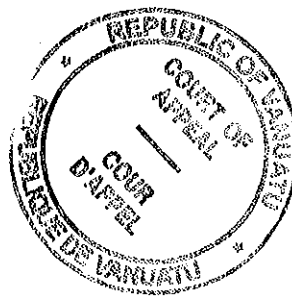
- "a) You planned your actions;*
- b) You delivered the baby herself indicating you did not care whether it lived or died;*
- c) You stood on the baby's neck and deliberately caused it suffering and eventual death; and*
- d) You acted in breach of trust as a mother ..."*

42. Two years was then deducted to recognize Brim Moli's cooperation with the police, her admission at the first available opportunity, that she was a first time offender, and that she was the mother of 4 young children. The early admission and the guilty plea at first reasonable opportunity by itself could have resulted in a full 1/3<sup>rd</sup> deduction without taking account of the environmental factors which led to the decision to deliver and kill the baby.

43. The reality of the pressures that this woman clearly was under at that time does not appear to have been taken into account. The transcript of the police interview with Brim Moli was included in the defence submissions. She is reported to have explained in the course of that interview that, when she told her husband that she was pregnant with (what would be) their fifth child, he swore at her telling her that she was stupid and that 4 children were enough. This is touched upon in the supplementary probation report.



44. We are unable to resist the conclusion that Brim Moli found herself in a somewhat desperate situation when she found herself pregnant in her marriage without any support from her husband on whom she was dependent.
45. While the pressures on Brim Moli may not have necessarily been as overwhelming as those experienced by Regina Malvaru, they would still be significant for this relatively unsophisticated village woman with a family 4 children and dependent on her husband for support.
46. Brim Moli has been in custody since 2 July 2010 and she has accordingly served a total of 1 year 4 months and 24 days. That approaches an effective sentence of 3 years given the opportunity for parole that would have arisen. This is a case where we consider that a rehabilitative sentence was at least arguable. Sentencing should not have proceeded without a great deal more attention being given to the circumstances which led up to the death of this child. Imprisonment should not have been seen by both counsel and the judge as the only available response.
47. Whilst it is a complete tragedy that this baby was killed, this case again raises the need for very careful examination of the environmental, emotional and perhaps psychiatric factors that might have prevailed and brought this mother to the point where she felt she had no option but to kill her child. It is such an extreme step for a mother to take that her culpability at law cannot be assessed without expert appraisal of the prevailing circumstances and her state of mind at the time.

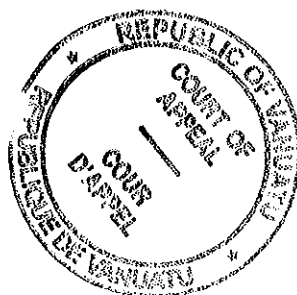




48. We consider that for Brim Moli, attention should be turned to her rehabilitation and re-integration into the community. This will present some challenges. Brim Moli has indicated that she will spend a few months in Port Vila but that she then hopes to return to her husband and children. Our concern is that the lack of support she received from her husband, which at least contributed to her desperate state, might arise again unless there is clear and significant intervention by the authorities to try and limit the possibility of that re-occurring.

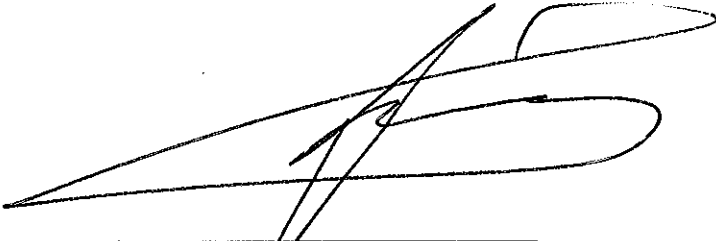
49. For these reasons, we allow this appeal and quash the sentence of 5 years imprisonment. In its place, we impose a sentence of 3 years supervision on these special conditions:-

- a. That she live where directed by her Probation Officer and that she not move address without written permission to do so;
- b. That she attend counseling with the Vanuatu Family Health Service or other such service as directed by her Probation Officer;
- c. That she undertake the *Niufala Rod* Programme as directed by her Probation Officer.

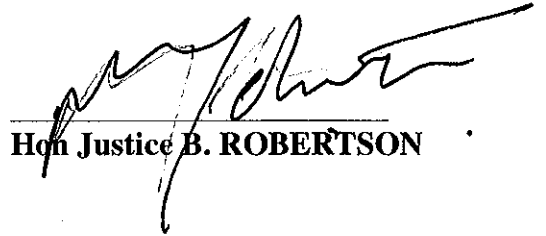


DATED at Port Vila, this 25<sup>th</sup> day of November 2011

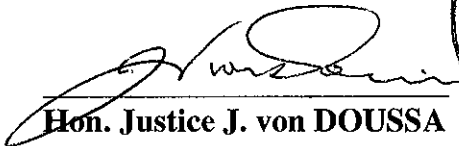
BY THE COURT



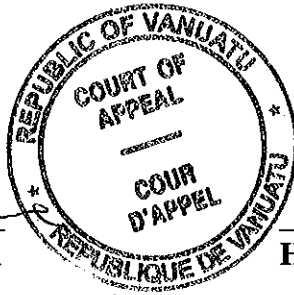
Hon. Chief Justice V. LUNABEK



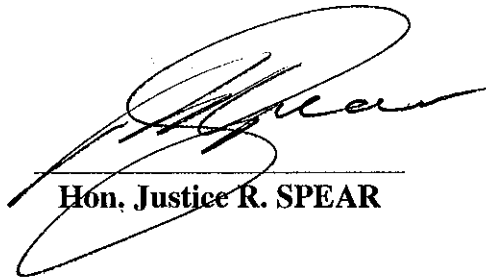
Hon Justice B. ROBERTSON



Hon. Justice J. von DOUSSA



Hon. Justice D. FATIAKI



Hon. Justice R. SPEAR