

IN THE SENIOR MAGISTRATE'S COURT OF
THE REPUBLIC OF VANUATU
HELD IN PORT VILA

602
CRIMINAL CASE NO. 456 OF 1995

PUBLIC PROSECUTOR -V- ALFRED TARIMOLILIU MERA

Coram: Senior Magistrate LUNABEK VINCENT

State Prosecutor: Inspector Norman VAVA

Defence: Mrs Heather Leo for the accused.

REASONS FOR JUDGMENT

This is a criminal jurisdiction in which the Magistrate is both the Judge of Law and the Judge of Facts. It is the duty of the Magistrate to apply the law in full so that the Defendant should know exactly what he has been tried on and so that if the Court has misdirected itself on any points of Law, the defendant would be able to appeal. It is also the duty of the Magistrate to sum up the evidence, that is, to give a resume of the facts, again so that the Defendant should know what evidence has been considered by the Court in consuming to the verdict eventually.

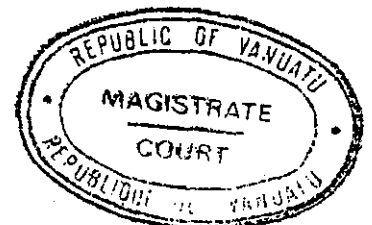
The function of a Magistrate as a Judge of Fact is to consider the evidence with care and to apply the Law as the Court stated it to be, to those facts and eventually to come to the verdict.

This is a criminal case, and in every criminal case, it is for the prosecution who brings the charge to prove it.

Before the Prosecution case is opened the Court read to the Accused section 81 of the Criminal Procedure Code Act (CAP 136) which says:

" In this trial you will be presumed to be innocent unless and until the prosecution has proved your guilt beyond reasonable doubt. It is not your task to prove your innocence. If at the end of the trial, any reasonable doubt exists as to your guilt, you will be deemed to be innocent of the charge and will be acquitted."

If not then the Defendant will be found guilty.



In this case, the Defendant has exercised his right to give evidence, he did not need to do so. As in any criminal case, there is no evidential burden at all on the Defendant. The fact that he has given evidence does not mean that any burden whatsoever is cast upon him. He could have remained silent in the dock and simply allowed himself to be tried on the evidence called by the prosecution. In any event, he gave evidence. This means that having given evidence, the Court must assess his evidence in the same way as any other evidence given in this case by other witnesses. Because he comes from the dock, his evidence is not less important in this case than anyone else's.

CHARGE

The Defendant is originally charged with three (3) Counts of Indecent Assault against section 98 (1) of the penal Code Act CAP 135. Then Counts 2 and 3 were withdrawn on the application of the prosecution so that the Defendant is now facing Count 1 only in this case. The particulars alleged are that the Defendant sometimes in the year 1991 had indecently assaulted Bernadette Aruhuri by pushing his finger into the Prosecutrix's vagina and at that time she was 8 years old. This incident took place at John Atkin Aruhuri, the Prosecutrix's Father's residence at Fresh Water area, Port Vila.

The offence of Indecent Assault is defined in section 98 (1) of the Penal Code Act as:

"No person shall commit any act of indecency with any other person under the age of 13 years..."

On the facts of this particular case it can be put in this way: *Any person who intentionally assaulted the victim and in so doing he intended to commit an indecent assault commits the offence of Indecent Assault.*

In this case, the prosecution must prove beyond a reasonable doubt that the Defendant intentionally assaulted the victim and in doing so he intended to commit an indecent assault. So, therefore, on a charge of indecent assault the prosecution must prove these elements beyond a reasonable doubt:

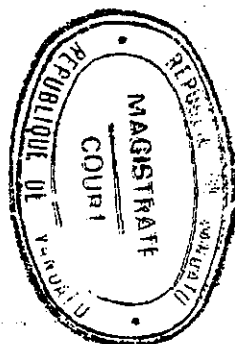
- 1) that the accused intentionally assaulted the victim;
- 2) that the assault, or the assault and the circumstances accompanying it, are capable of being considered by right-minded persons as indecent;
- 3) that the accused intended to commit such an assault as is referred to in (2) above.

If the prosecution should fail to prove either element (1), element (2) or element (3) the defendant is entitled to be acquitted on that Count.

PROSECUTION CASE

Bernadette Aruhuri is the first witness for the prosecution. She is the prosecutrix in this case. She gave evidence on oath. she understand the meaning of the oath she took. In her evidence, she said:

"Mi nem blong mi Bernadette Aruhuri; mi blong Ambae village; mi slip long Fresh Wota area; mi kat 12 yia nao mi skul 1st yia long Malapoa College. Bifo mi skul long Central Primary School. Long 1991, afta skul, mi kam back hom, Alfred i kolem mi; mi ko long rum blong hem. Hemi klosem doa. Hemi pulum daon panty blong mi mo pushum finga blong hem insaed long vagina blong mi.



Alfred hemi, cousin brata blong mi mo hemi stap slip wetem mifala long haos. Long taem ia mi kam back from Central Primary School, papa mo mama ino stap; tufala i wok. Alfred hemi mekem olsem ia everytaem mi kam back long skul. Taem mi ko home hemi tekemaot skirt mo panty blong mi nomo afta hemi pushum finga blong hem long vagina blong mi. Long taem ia mi harem i sore. Mi no bin talk abaot wetem papa mo mamy blong mi because mi fraet hemi mekem samting worse long mi.

Alfred hemi mekem smol taem nomo afta hemi ko. Alfred ino wok. Alfred i stap long haos nomo. Ol parents blong mi oli save abaot incident ia through wan letta we brata blong daddy blong mi long Ambae i sendem i kam long daddy blong mi. Mi no save sapos i kat customary settlement o no."

Under cross-examination she said:

"Long today 4 decemba 1995 mi kat 12 yia. Long taem ia mi kat 8 yia. Mi stap long class 3 long Central Primary School. Uniform blong mifala long skul i wan dress. Alfred i stap long haos nomo mo hemi stap clinim inside long haos. Incident ia i tekem ples until Alfred hemi ko back long sem yia.

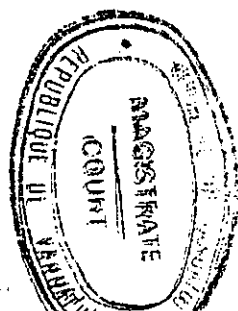
Mi no rimemba hao many manis Alfred i stap wetem mifala. Long 1995 mi ko long yia 7 long Malapoa College. Skul grades blong mi oli gud; mi no ting abaot noting incident we i tekem ples. Alfred hemi wok insaed long haos olsem cooking; hemi wok olsem haos kel. Alfred i swimim mifala taem papa mo mamy blong mifala ino stap..."

The next witness to give evidence was Mrs Paula Aruhuri, mother of the Prosecutrix. She said she was originally from Solomons Islands. She married with John from Ambae, the Prosecutrix's father. She came to Vanuatu in 1984. Bernadette was born in Solomon Islands (Honiara) on the 13th January 1983. She is their first daughter. She said she became aware of the incident on the 27th June 1995 because it was her birthday and ready to go work but she did not have any bus fares. So she checked in for some vatu coins and came accross a letter addressed to John sent from Ambae. She said John never mentioned anything to her. So by curiosity she read the letter but it was written in Ambae language but she said she saw the name of Bernadette inside. She took the letter to one of the lady who works with her at the National Provident Fund so that she could translate it for her. She said the lady refused first ... then accepted to translate the said letter to her.

Then after, she asked Bernadette to tell her what happened. Bernadette told her what had happened. She said Bernadette did not understand words to use but she said "yes Alfred hemi rapem mi". Later on in the evening she called Bernadette outside. Bernadette told her what had happened. She said she was shock her daughter was at that time 8 years old only. She said she was sad because John never mentioned anything to her. She told Bernadette to be strong, she went to report the matter to Police. She did remember Alfred stayed with them at that time until 27 th June 1995 at night until she lodged the complaint to the Police.

Under cross-examination by Defence counsel, she said she remember 27 June 1995 was a Tuesday. John never mentioned anything relating to the letter and that even if John did not know that she went to the Police she said he knew about her feelings. Further she stated Bernadette did not understand which words to use to describe the incident that is why she used the word "rape". She said further the letter contained the name of Alfred, Bernadette and she said she was upset.

She said also she went on Ambae last December 1994. She said the writer of the letter is an Anglican Priest. Alfred lived with them more than 3 years in and out. She said also she is very close to the wife of Anglican Priest. She said she knew about Alfred's life and she saw the name of different young girls and the stories she got from the Anglican Priest's wife. Finally she said they are close relatives.



Third witness for Prosecution was Senior Sergeant Leily Samuel, head of the Sexual Offences Unit and Investigator, Port Vila. A trial within a trial (Voi Dire) was held as to the voluntary statement made by the Defendant at the Police Station. The Court refuses to accept the admission statement made by the Defendant after the trial on Voi Dire on the very fact that the statement made by the Defendant is not voluntary. the principle was set out by Lord Sumner (in Ibrahim Vs The King [1914]) A. C. 599 P. C.) as follows:

"No statement by an accused is admissible in evidence against him unless it is shown by the Prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority."

Section 88 C. P. C. was read by the Court to the Accused as follows:

"In making your defence in this trial, you are entitled, in addition to calling other persons as witnesses, to give evidence yourself on your own behalf, upon oath or affirmation and subject to cross-examination by the prosecution. However you are not obliged to give evidence and may elect instead to remain silent. If you do not choose to give evidence, this will not of itself lead to an inference of guilt against you."

DEFENCE CASE

Alfred Tarimoliliu gave evidence on his own behalf and said:

"Mi wok long Windsor Hotel. Mi kat 28 yia. Mi skul until Form 2. Reason mi kam long Kot tedei hemi from wan problem we i kam aot long Island mekem se mi kam aot long Kot tedei. Yes mi tingbaot 27 June 1995, long naet Police i kam tekem mi then polis woman ia i talem se mi ko insaed No. 6 then mi ko. Hemi talem se i kat wan kel i ripotem mi. Nem blong hem Aruhuri. Mi stap full naet until next moning ko kasem aftemun. Long moning mi stap mi wan nomo long No. 6 mo then wan polis i tekem mi ko long woman polis ia. First samting mi talem se yu save leko mi, mi tekem wan loya blong mi bifo mi mekem eni statement. Woman Polis i talem long mi yu skul wea? Yu kat wanem degree? Olketa polis we oli stap aoutside oli laf long mi. Then closed to 11. 30 am. Polis i putum mi back long No. 6 until aftemun. Then Polis woman ia i talem long mi se statement blong smol kel we i stap ia hemi true, sipos yu say no, mi shattem yu bakeken long No. 6.

Long 27 June 1995 long naet, polis i kam long haos blong John. Oli talem anything se mifala i arrestem yu; long Polis station nomo woman polis i talem se hemi shattem mi long NO. 6. Problem we i happen long Island hemi bitwin brata blong John mo mi abaot copra. Taem problem ia i kam up, brata blong John i ripotem mi wetem son blong hem mo polis oli shattem mitufala long NO. 6 long Ambae.

So hemi cross from copra i bonem haos blong mi, hemi neva pass long Kot from. Taem mi kam long Vila, mi stap wetem John, brata blong John ia wa emi wan anglican Priest oli bin suspendem hem blong four wiks. Long taem ia nao hemi raketem stori we i stap long leta ia. Mifala family naoia i sheraot i stap.

Bifo leta i kam yet, mi slip wetem John olketa. Taem we problem i kam aot mi no toktok wetem olketa. Long June 1995 oli rilisim mi, long 4 o'clock; mi aot mi ko back long haos blong John. Paula i talem long mi se everi samting



blong mi emi bonem finis. Then mi nomo kat klos mi jes aot. Mi jes save afta why polis oli tekem mi.

Long 1991 mi stap live wetem John long taem ia mi no wok. Mi stap long haos, mi kokum lunch, clinim raon long fence mi luk afta tufala pikinini; afta skul mi mek sure se tufala i swim.

Taem tufala i kam long skul i kat Bernadette wetem smol brata blong hem. Mi swimim tufala, mi swimim tufala tugeta oltaem. Mi neva swimim wan by wan. Long 1991 mi nomo ko long Island. Mi bin stap wok long wan smol boat olsem wokman. Taem mi stap wetem John from we mi bin tekem wan car for repair, mi clin up, katem grass..."

While he was cross-examined, the Defendant said:

"John Atkin hemi brata blong papa blong mi. Long 1991 mi stap wetem olketa. Ino kat man moa wetem mifala..."

Mi stap swimim 2 pikinini inside long bathroom. Every taem tufala i tekem aot klos blong tufala bifo swim. Ino true se mi tatchem private part blong Bernadette. Papa blong mi i mekem wan custom ceremony long ol brata blong hem blong oli kam tugeta from we oli rao or dispute tumas. Hemi no abaot different matta, ino true. Afta custom ceremony family ino coperate mi stap until October 1991 then mi ko wok long ship. Mi fes harem problem ia taem nomo polis oli arrestem mi."

This is the entire evidence in this case. I have to judge this case on the evidence that I have heard. I have looked carefully at the entirety of the evidence that I have heard in this case, both oral and written.

In this case, the prosecution must prove beyond reasonable doubt:

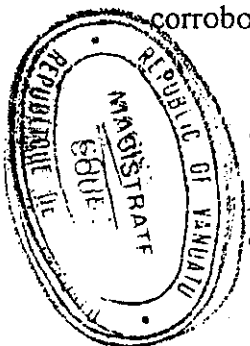
- (1) that the accused intentionally assaulted the victim;
- (2) that the assault, or the assault and the circumstances accompanying it, are capable of being considered by right minded persons as indecent;
- (3) that the accused intended to commit such assault as is referred to in (2) above.

I must say that for the prosecution to prove these 3 elements beyond a reasonable doubt they will rely mainly on Bernadette's evidence. She is 12 years old. She gave evidence on oath in Court. This is one of the circumstances in which corroboration of a child's evidence must be sought where the evidence is sworn. However it must be said that although the evidence need not be corroborated as a matter of Law, the Judge who is the judge of the facts should be warned of the danger of acting on the uncorroborated evidence. The Judge may act on such evidence if, bearing that warning in mind, he (/she) is nonetheless convinced that the witness is telling the truth (see R. V. Campbell (1956) CR App. r. 95.)

The leading case on what constitute corroboration is R. V. Baskerville [1916] 2 K. B. 658, 12 CR. App. R. 81 in which Lord Reading C. J. defines what evidence constituted corroborative evidence for the purpose of the statutory and common Law rules:

"... evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime.

In other words it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has



been committed but also that the defendant committed it. The test applicable to determine the nature and extent of the corroboration is thus the same whether the case falls within the rule of practice at Common Law or within that class of offences for which corroboration is required by statute ... The nature of the corroboration will necessarily vary according to the particular circumstances of the offence charged. It would be in a high degree dangerous to attempt to formulate the kind of evidence which would be regarded as that corroboration except to say that corroborative evidence is evidence which shows or tends to show that the story of [the witness] that the accused committed the crime is true, not merely that the crime has been committed; but that it was committed by the accused."

See also the judgment of the Honourable Chief Justice Charles Vaudin d'IMECOURT in Appeal Case No. 7 of 1992 - Public Prosecutor (Appellant) -V- Michael Mereka (Respondent).

It follows from the requirement that the corroborative evidence must come from a source which is independent of the witness whose evidence is to be corroborated.

The danger sought to be obviated by the Common Law rule in this particular category of witnesses is that the story told by the witness to other competent witness: the risk be of unintentional inaccuracy as in the case of children.

In this case, bearing in mind of that warning in relation to the Prosecutrix's evidence I find that the prosecutrix's evidence is not supported by an independent witness's evidence. The evidence of the mother is not an independent evidence to corroborate the evidence of Bernadette.

More over, as submitted by the Defence counsel, the Prosecutrix's evidence is in general terms and thus, not precise.

"every taem afta skul, after i tekem aot skirt mo panty blong mi afta i pushum finga blong hem long vagina blong mi".

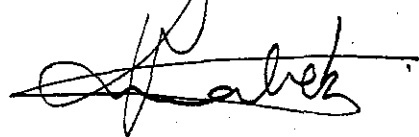
Hemi luk olsem se every taem Prosecutrix i kam stret from skul mo defendant ia emi indecently assaultem hem. I kat wan doubt as to klos. School uniform hemi wan dress as Bernadette i confirmem long Kot".

On the evidence that I have been heard and seen in this case even if as in this case, there is no need to have corroborative evidence, I have doubt in my mind due to the inaccuracy of the evidence given by the prosecutrix as showed by the defence counsel. The prosecution fails to prove his case beyond a reasonable doubt.

In these circumstances, the Court acquitted the accused, Alfred Tarimoliliu Mera and discharged him of the offence of Indecent Assault contrary to section 98 (1) of the Penal Code Act CAP 135.

14 days to appeal.

DATED AT PORT VILA this 7th December 1995.



LUNABEK VINCENT
Senior Magistrate.

