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**IN THE SUPREME COURT**  
**OF THE REPUBLIC OF VANUATU**  
*(Criminal Jurisdiction)*

Criminal Case No.03 of 2004

**PUBLIC PROSECUTOR -v- SAM JACK**

*Coram: Chief Justice Lunabek*

*Mr. Eric Csiba for Prosecution*  
*Mr. Peter Bartels for Defendant*

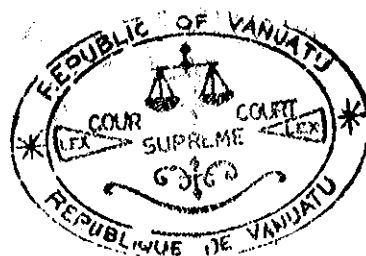
**JUDGMENT**

The Defendant, Sam Jack is charged with the offence of Kidnapping a person contrary to Section 105(b) of the Penal Code Act [CAP. 135] and the offence of rape, contrary to Section 91 of the Penal Code Act [CAP. 135].

The Defendant pleaded guilty to the charge of Kidnapping. He pleaded not guilty to the charge of rape. The trial proceeds with that count of rape, contrary to section 91 of the Penal Code.

The offence of rape is defined under section 90 of the Penal Code in the following manner: -

*"Any person who has sexual intercourse with a woman or a girl without her consent, or with her consent if the consent is obtained by force or by means of threats or intimidation of any kind, or by fear of bodily harm, or by means of false representation as to the nature of the act, or, in the case of a married woman by impersonating her husband, commits the offence of rape. The offence is complete upon penetration."*



*[Handwritten signature]*

The essential elements that the prosecution must prove beyond a reasonable doubt before I can convict the Defendant, are: -

1. The Defendant
2. Has sexual intercourse
3. With the complainant/ prosecutrix
4. Without her consent
5. By penetrating the complainant by his penis.

In the present case, the facts are generally agreed upon by the Prosecution and the defence apart from penetration of the complainant by the Defendant.

The only remaining issue is that the defence denied that he had penetrated the complainant on 25 December 2003.

This begs this question: -

Has the Prosecution proved "penetration" of the complainant by the Defendant beyond the standard of beyond a reasonable doubt?

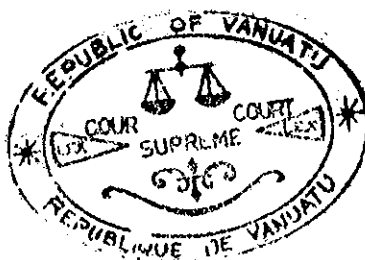
The Prosecution case is that the Defendant had sexual intercourse with the complainant by the Defendant penetrating the complainant with his penis.

The Defence case is that the Prosecution has failed to establish this important element of the offence "beyond a reasonable doubt".

### **The Evidence**

The Prosecution call two (2) witnesses. The First witness is Dr. Warren Brooks. He gave account of his status and qualifications. He is a specialist doctor dealing with pregnant women and delivery of babies and worked specifically with woman in specific area. He is working in Vanuatu as specialist pediathrapy for 18 months at Vila Central Hospital.

He was called on 25 December 2003 to examine the complaint in the early hour of that day.



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He said he produced a medical report concerning the complainant in this case after he examined her. She told him she was raped by a passenger of a bus.

There was evidence of bruising to the complainant's Vagina. The rest of the Vagina was normal.

He was given a paper on which a female private part diagram was drawn by the Prosecutor. He commented on the paper and checked his records of notes taken during his medical examination and conversation with the complainant. He said the bruising was around the opening of the Vagina. He indicated there was a small tear on the part of the Vagina. The rest of the Vagina was alright. The bruising was made about 3 to 4 hours ago.

He said also that the injury to the birth following the delivery of the child was completely healed. There was a trauma there. He expresses his opinion that there is a forceful penetration in the vagina of the complainant but it is for the Court to decide.

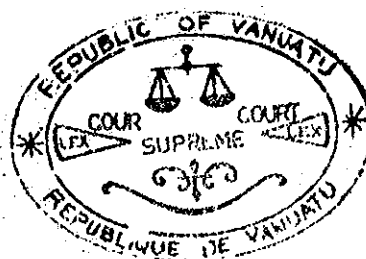
The witness doctor was cross-examined. He said the lady got washed before she went to the hospital. He confirmed the bruising was of recent happening of about 3 to 4 hours.

He said his investigation was based on the history of what the complainant told him. His findings described the history.

He said he never saw that before. He denied that the trauma was caused by an object nor that it was caused by the fact that the Lady had fallen down or it was due by a cane of bicycle. If that is so, the trauma will be different. He said he found no anal penetration. He was then asked about the area of the trauma on the vagina of the lady. This question was put to him:-

Q. Is it on the lips of the vagina or outside of the opening part of the vagina?

He answered:



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Inside - within the area of the lip of vagina.

He was not re-examined.

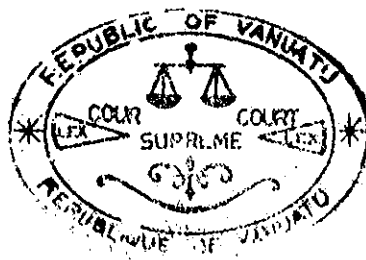
The second witness of the Prosecution was the complainant. She is from Paama Island. She is 18 years of age. A single mother of a child.

She said she come to Court because she reported a rape case to the police on 25 December 2003 about 11 am. She did not know the Defendant until 25 December 2003.

She gave her account of the event in this was: -

On 25 December 2003 the complainant and her sister prepared some lalaps and then they both walked to the road. A red bus stopped. A male passenger came down from the bus. He then grabbed her and forced her entrance into the bus. She wanted to jump out from the window of the bus. The male passenger told her not to. The male passenger was the Defendant. The Defendant told the bus driver to drop them first. They drove to USP, Erakor and then to Club Hippic road. There, he asked the bus driver to stop. He went down and pulled her down the bus. He paid the bus fares for both of them in VT 400 - 500. He pulled her into the bushes. She told him to leave her alone. She ran on the road. He ran after her and pulled her into the bushes. He asked her to go first into the bushes. Her legs were tired. He pushed her into the bushes. Her legs were tagged by the ropes and the stones cut her legs. She asked him to leave her alone. He swore at her by saying "Ah, Fuck". He pushed her against a dry truck of wood. He pushed her again to follow a different road in the bush. He pulled her to a stone/rock. He then came up to her and took off her clothes. He also took off his clothes.

He told her to suck his penis. She refused. He told her that if she refused to such his penis he will kill her and nobody will see. She was frightened and sucked his penis. He told her to such his penis and once it became erected she laid down. She did so. Then he came and laid on top of her. She said he fucked her. Then she said he came out from her again and told her to suck his penis again. She sucked his penis the second time. He told her to bend her



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body once his penis was erected. When his penis erected, she bent down. The Defendant come behind her and was fucking her.

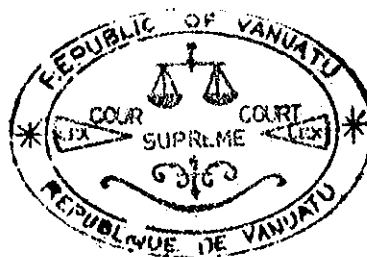
At the time, a man came and spoke to the Defendant in a local language. She knew about the language and she said it is Tanna language. She saw the man assaulted the Defendant so she took her clothes and she ran away into the bush. She put her clothes and ran into the main road.

A car arrived. She stopped the car. She was advised to call for help to the house on the opposite side of the road. She ran towards the house there. People in that house asked her about what was happening. She told them that she was chased by a man. She was hidden inside the house. The door was locked. They called the police. The police arrived and took the Defendant. She reported the matter to the police on same date in the afternoon. She said she went to the hospital and the doctor examined her.

The witness prosecutrix was cross-examined. She was asked whether before she went to hospital after the incident with the Defendant, she did go home and have a wash. She said no. she was asked whether she was inside the Courtroom when Dr. Brook gave his evidence. She replied no. She was outside.

She was asked and she answered that she would trust the Doctor's record if he told the Court that she went home first and have a swim before she got to Hospital.

She said she went home and had a wash first and then she went to hospital. She washed her whole body. She also washed her private part. She was not angry at the time. She felt her body was dirty so she washed it hardly. She scratched her body very hard. She said she scratched her private part very hard. During the time of the incident she was frightened, scared and emotional too. It was put to her and she replied positively that she was frightened and scared. She did not think properly.



This is the first time that she was frightened. She was asked if she had her monthly period. She said that she saw a small amount of blood in her pants.

She denied that it was the beginning of her monthly period. She recalled she told the police that the Defendant's penis was soft. She confirmed she sucked the Defendant's penis twice but not on 3 occasions. She confirmed that on the 2 occasions when she sucked the Defendant's penis, his penis become stronger (erected).

It was put to her that the defendant's penis did not erect for a short period. She denied that.

She was then asked that the Defendant's penis was not strong (erected) enough to go inside her. She denied that and said the Defendant is lying. She said she is not a married woman but she lives with a man. She understands that if the penis of a man is not erected, he could not have sexual intercourse with a woman.

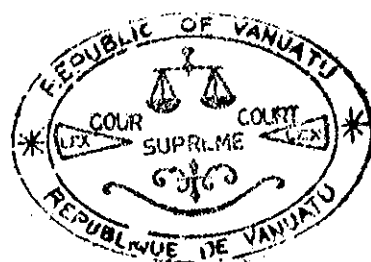
It was then put to her as to whether or not she was in Court when the doctor who examined her gave evidence to the effect that there appeared to be bruising outside her vagina. She denied and reconfirmed she was outside the Court. She said she knew where it was injured on her body.

The diagram of the female genital vagina was shown to her. The evidence of the doctor on which part of her vagina was injured on her private part was put and shown to this witness. She said she accepted it.

She smelt alcohol on the Defendant. But she said he was walking normally.

It was put to her again, because she was so frightened and scared she might think that something might have happened but it did not happen. She denied but says it did happen.

She confirmed the Defendant grabbed her hands. She thought he was going to hurt her because of the way he grabbed her into the bush. She denied that



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the first time she was pushed into the bushes by the Defendant he is going to rape her. She said she only knew this when he asked her to suck his penis.

This witness understood that the Defendant via his counsel, is telling the Court that if a plea of attempted rape is made, the Defendant will plead guilty.

She accepted that if a man does not penetrate a woman there is no rape but attempted rape.

It was then put to her and she denied and refused the suggestion that the injury as shown on the female diagram could be made by someone either with a penis or finger or an object on her vagina.

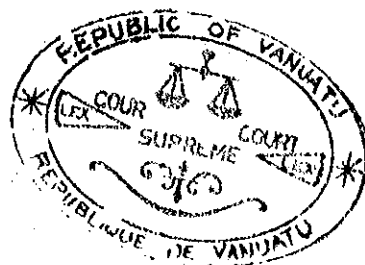
She was asked if she saw the penis of the Defendant inside her vagina. She said she can't remember.

It was again put to her that when someone is scared, upset, or frightened and when the person is thinking that she will be raped then she will feel something in her body and thought it may be a penis. She replied she understood that but she felt it.

It was put to her that she may feel something but not a man's penis. She replied she had a man she knows how a man goes inside a woman. She denied her vagina is invaded by a finger.

The witness confirmed the Defendant asked her to suck his penis and when it was erected, he penetrated her. She confirmed he asked her to suck his penis on 2 occasions. She confirmed he asked her on 2 occasions but not 3 times. She was asked that she told the man that she did not see the penis inside her. She replied by saying "yes but she felt it".

She was re-examined. She confirmed she saw blood on her body when she had a wash. She saw the blood when she came home to have a wash.



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She re-confirmed she was outside the Court when Dr. Brook gave his evidence. She said it is the first time she saw a picture like the female genital diagram shown to her and she understands.

Finally she confirmed she did not see the penis of Jack inside her but she felt it.

The Defendant elected to give evidence on his own behalf after Section 88 of the CPC was read out and explain to him.

The Defendant is Sam Jack from Tanna Island. He lived at Ohlen area. He is 25 - 26 years. He lived in a de facto relationship with a woman. They have 2 children. The first child is 3 years old, the second is 7 months old. He is employed in a construction business.

He gave his account of the events as follows: -

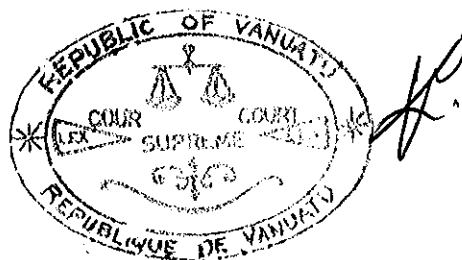
On 24 December 2003, he had been drinking 3 shells of Kava - 1 shell for 100VT and 2 shells for 50VT.

He also shared with his brothers some alcohol drinks. He started drinking on 24 December 2003 at about 9pm o'clock. He said he was very drunk.

On 25 December 2003 at Namburu bus stop, he saw the complainant. He dragged her inside the red bus and told the bus to go to the place where the incident occurred. At Hippic Road, he asked the bus to stop.

He wanted to have sex with the woman. They spent about 30 minutes in the bus. He said at the time he thought he was going to enjoy the Christmas day with the woman. He said he had an idea and stopped the bus to have sex with her.

He said he told the complainant to take all her cloths and he saw some blood in her private part.





He said his penis was soft. He said he asked the complainant to suck his penis so that it can erect. He said he asked her to suck his penis twice. He said his penis become stronger (erected) for a small period of time and become soft again.

He did try to put his penis into the vagina of the complainant. He tried several times to penetrate the complainant's vagina but his penis was soft and did not go inside.

He was asked if the bruising on the body of the complainant (private part) was caused by him. He said he did not know.

He was told that the complainant said he penetrated her. He said he did not feel it. He accepted the situation that he had sex with the complainant but he could not penetrate her.

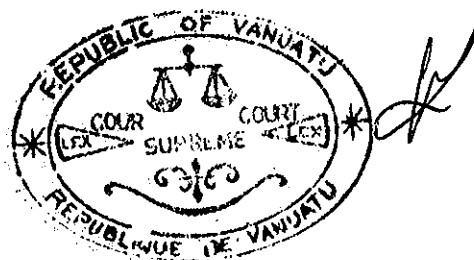
He accepted that he tried to rape the complainant but his penis is too soft. He could not have sexual intercourse with her.

He was cross-examined. He said he remembered about some of the things he did but he could not recall about others.

He accepted he pulled and pushed the woman into the bushes at the area of the incident. He confirmed rope caught the legs of the complainant and she lost her shoes. He accepted he stopped at a rock in the bush. He accepted he took off the complainant's cloths. He took his cloths off himself. He confirmed he asked her to suck his penis twice. He said he tried to penetrate the woman but his penis become soft, then he said the first and second time his penis was so soft that he could not feel it.

He further said that his penis was so soft but if part of his penis went inside the complainant's vagina, he would not feel it.

It was put to him that this is part of the thing that he could not recall. He replied that this is when he could not recall because his penis was so soft.



## Finding and assessment of credibility

I have considered all the evidence in this case. I saw and observed all the witnesses and their demeanor in the witness box.

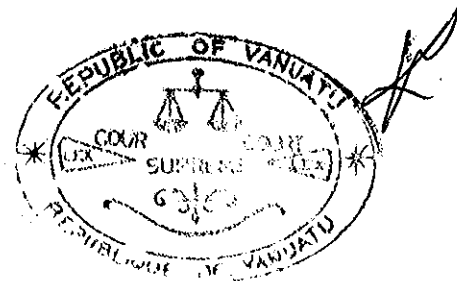
I find Doctor Brook is a credit worthy witness. His evidence is based on the history of the incident. He made his findings few hours after the incident. There were bruising inside within the area of the lips of the vagina. I accept that evidence which is consistent with a forceful penetration of the woman.

The complainant gave her account of what happened to her although she was reluctant to answer directly to some questions under cross-examination. I find the relevant part of her evidence is not disturbed. She said she did not see the penis of the man inside her but she felt it inside her. She lives with a man. She has a child. She knew how and when the penis of a man got inside her. Her evidence is that the penis of the Defendant was erected and the Defendant had sexual intercourse with her when it was erected. I find the evidence of the complainant is credible and understandable for the following reasons:-

The defendant asked the complainant to suck his penis twice. On the first occasion, the defendant told her to suck his penis and when it became stronger (erected), she will lay down. That was what she did and the defendant had sex with her. She said she could not see the penis of the defendant but she could feel it inside her. The circumstances of this case require common sense and practical assessment of facts leading up to this finding.

On the second occasion, the defendant told the complainant again to suck his penis and when it became stronger, she will bend her body down. That was what she did. After she bent down, the defendant came behind her and had sex with her. She could not see the defendant's penis inside her vagina. But she could only feel it. That is her evidence which is accepted as such.

The evidence of the Defendant in some part confirmed the evidence of the complainant. As he said in his evidence he could recall about some part of



what happened but he could not recall about others. He accepted that if part of his penis was inside the vagina of the complainant, he would not feel it because his penis is so soft. This is the admission on the part of the defendant of him penetrating the vagina of the complainant although he could not feel it. There is evidence that his penis erected during the intercourse.

I reject the evidence of the defendant that he did not penetrate the vagina of the complainant.

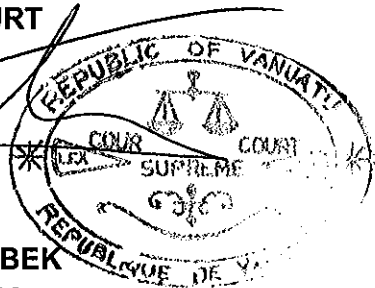
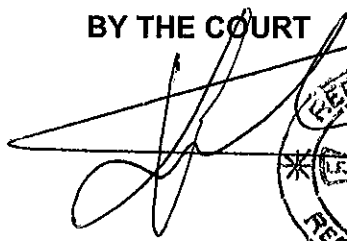
The evidence of the complainant is corroborated by the evidence of the doctor. There was bruising inside within the lips of the vagina of the complainant which is consistent with the forceful penetration of the vagina of the complainant. Although the evidence of the complainant was that she washed her body hardly. I reject the suggestion that the bruises was done by the complainant scratching that part of her body.

I am satisfied that the prosecution has discharged the onus on the point in dispute beyond a reasonable doubt.

I find the defendant Sam Jack guilty of the offence of rape, contrary to Section 91 of the Penal Code Act [CAP.135] and I convict him accordingly.

**Dated AT PORT VILA, this 6<sup>th</sup> day of August 2004**

**BY THE COURT**



The seal of the Republic of Vanuatu Supreme Court is circular. It features a central emblem with a scale of justice and a book. The text 'REPUBLIC OF VANUATU' is written along the top inner edge, and 'REPUBLICQUE DE VANUATU' along the bottom inner edge. In the center, the words 'COUR SUPREME' are written, with 'COUR' on either side of the central emblem.

**Vincent LUNABEK  
Chief Justice**