IN THE SUPREME COURT **Criminal Case No. 46 / 2012**
OF THE REPUBLIC OF VANUATU
(Criminal Jurisdiction)

PUBLIC PROSECUTOR

V

STEVE TARI TUGU

Hearing: ***19 June 2012 at Saratamata, Ambae***

Before: ***Justice Robert Spear***

Appearances: ***Parkinson Wirrick for the Public Prosecutor***
Erick Molbaleh for the accused

VERDICT AND REASONS FOR VERDICT
(Ex Tempore)

VERDICT: ***Guilty on Count 1 in respect of both complainants.***

REMAND: ***Remanded in custody to appear at Port Vila for sentence at 9.00 am on Monday 23 July 2012. Pre-sentence report called for.***

1. The accused, Steve Tari Tugu faced trial on an indictment charging him with two counts of sexual offending; as follows:

   a. **Count 1** – Sexual Intercourse without consent against two girls (representative);
   alternatively
   b. **Count 2** – Unlawful sexual intercourse against those same two girls (representative).

2. The indictment, in that form, was presented at the first call of the case yesterday afternoon when pleas were entered. As both count 1 and count 2 alleged offending against three separate girls, count 1 was treated as three separate charges (relating to each of the three girls) and a separate plea of not guilty was received from the accused in respect of count 1. The same approach was taken with count 2 with three separate pleas of not guilty.

3. The trial started this morning. At the commencement of the trial, Mr Wirrick informed me that the youngest of the three girls would not be called to give evidence. Not only was she apparently reluctant to give evidence in Court, Mr Wirrick was also concerned, after speaking her, as to her ability to give a credible account of events given her age. Indeed, his concerns extended to a concern as to whether she would be competent to give any evidence at all. For that reason, Mr Wirrick announced at the commencement of this trial that no evidence would be presented in respect of any allegation relating to the third named complainant.

4. See Trial Ruling 1 in respect of those preliminary matters.

5. That left the case then still with another accused charged with separate offending against one of the other two complainants. He was discharged at the conclusion of the prosecution case – see Trial Ruling 2.

6. The charges faced by the accused Steve Tari Tugu are effectively two representative charges of sexual intercourse without consent with alternatives of two representative charges of unlawful sexual intercourse.

7. I mentioned that these are representative charges as the prosecution case is that the offending in respect of each of the two complainants occurred on more than one occasion. This could indeed have been dealt with here by way of discreet charges relating to each of the separate occasions as they were reasonably well identified by the two complainants in the course of their evidence. That, of course, would have been the more acceptable approach. This trial is being conducted in the provincial centre at Saratamata on the island of Ambae. Mr Wirrick arrived yesterday afternoon and has had a number of cases to deal with as, of course, has Mr Molbaleh for the various defendants. Mr Wirrick has not had the time to meet with the complainants before yesterday. Nor has he had time to amend the indictment. However, I am satisfied that the approach that has been taken, and indeed taken without any opposition by Mr Molbaleh, does not prejudice the accused at all. I have made sure that each allegation has been addressed separately in relation to each complainant. The trial has been conducted as if the accused faced three separate charges of sexual intercourse without consent with the alternative of three separate charges of unlawful sexual intercourse.

8. The essence of the case against the accused is that on three separate occasions relating to the first named complainant (C1) and two separate occasions relating to the second named complainant (C2), the accused either lured or forced these young girls into an isolated area and then proceeded to force them to take his penis into their mouth where he performed oral sex to the point of ejaculation. C1 said that this occurred on two separate occasions. She said that on the third occasion, matters did not progress beyond their respective tongues entering the other's mouth which does not constitute either of the offences charged. However, on the first two occasions relating to C1 and the two occasions relating to C2, the clear evidence from each of the two complainants is that the accused made them take his penis into their mouth and oral sex occurred to the point of ejaculation.

9. The charges each require proof of sexual intercourse. That is defined under s. 89A of the Penal Code CAP 135 which, for present purposes, includes the introduction of any part of the penis of a person into the mouth of another person. That is the physical act that is alleged in this case.

10. What is also required is proof that at the time of the physical act of "sexual intercourse", the complainant did not consent and that the accused did not believe / could not honestly have believed that the complainant was consenting.

11. A consent here means a true consent and not one obtained through fear, threats or submission to what the complainant may consider is the inevitable. It means a consent that is given willingly by a complainant who has a sufficient understanding of the nature and quality of the act.

12. There is some uncertainly in relation to the time of the offending. The charges in each respect place the offending within the period 1 January 2010 to 12 November 2011 which, of course is a significant period of approximately 22 months. However, that in itself is no cause for alarm. The experience of the courts is that young children, when recounting events, have a great deal of difficulties doing so by reference to the particular day, or week or month. They focus upon more upon surrounding events or circumstances as their reference points. For example, what class they were in at school at that time, what they were doing at the time, and where the event occurred. So the significant period of time outlined in the charges is simply to reflect the uncertainly as to exactly when in the calendar years 2010 and 2011 this offending occurred. Although it is more likely to have occurred in 2011. The accused suffers no prejudice in this respect as it is clear that he had the opportunity to commit these offences given the small remote community in which both the complainants and he live.

13. This is a case involving serious criminal charges. The case must be determined solely upon the evidence placed before the Court. There has been some

evidence excluded and, in particular, a statement taken from the accused - see Trial Ruling 3.

14. The prosecution brings the charges and the prosecution must prove them. The accused has to prove nothing at all. Indeed, the prosecution has to prove each essential element of a charge to the high criminal standard of beyond reasonable doubt before the Court can find the accused guilty of that charge. Just because he may be guilty on one charge does not mean that he is necessary guilty of another charge. Each charge must be dealt with separately.

15. Proof beyond reasonable doubt simply means that the Court is left sure of guilt. If the Court is not sure, if the Court is only left with a suspicion as to guilt, if the Court concluded that offence probably occurred or is more likely that not to have occurred then the response of the Court must be to find the accused not guilty. The standard of proof beyond reasonable doubt can only be met if the Court is left sure of guilt on a particular charge.

16. When, as is the case here, representative charges are presented, the Court must be left sure that this offending occurred on at least one occasion.

17. I need to remind myself that it is important the Court treads warily indeed and acts with caution when dealing with the evidence of young children except when it is corroborated in some material respect particularly when a finding of guilt depends critically on the evidence of a child. However, it needs to be said that offending of the type charged here really happens in the public eye. It usually occurs in private as the offender does his best to find a place where his criminal actions will not be detected by passer-bys, family intrusion or such like. It is, however, well accepted that the Court may accept and rely on the evidence of a young witness. It is not a case that the Court cannot convict on the uncorroborated evidence of a young witness.

18. In this case, however, for reasons to which I will soon return, I am satisfied that each of the two complainants gave a credible account of events. Furthermore, they each provided a degree of corroboration for the other given the similarity of their respective and separate account of events. I do not

consider that there was any collusion between them to fabricate a coordinated series of allegations and I am in no doubt that that would have been quite beyond them.

19. C1 gives evidence that, on the first occasion, she was walking home when she met the accused. I should say at this stage that the accused is well known to her. He is related to her and Mr Molbaleh admitted identification in respect of each of the two complainants right from the outset.

20. C1 describe three separate occasions when she said she was accosted by the accused, forced into the bush and made to give him oral sex to the point of ejaculation on the first two occasions. Furthermore, she said that she was threatened by the accused with serious physical harm if she told any one what had happened. C1 is now 9 years of age and she was not shaken from her account in any respect in cross-examination.

21. C2 says that she was in either kindergarten or class 1 at the time of the offending in her respect - when she was around 7 or 8 years of age. She is 8 years of age now. She said that on the first occasion, she was walking to kindergarten which is about 1 kilometre away from her home. She said that she always walked to kindergarten, to and from, by herself and that was confirmed by her mother. After she started school, she used to walk to and from school with her older sister, C1. She said on the first occasion, she was confronted by the accused. She was by herself and no one else was around. He told her that he wanted her to lick his penis and she did. She said that he pushed his penis into her mouth and she noticed and saw "white water" coming out of his penis at some stage. Afterwards he told her not to tell anyone with the threat the he would kill her if she did. She said she was very frighten and went home.

22. Both complainants were questioned as to when they told their mother about this. Both young girls were uncertain as to when they told their mother and eventually it became clear that they were not going to help the Court much in this respect.

23. The second occasion involving C2 was when she had been to the village of Ambanga with the accused and her sister, C1. This suggest that the second occasion happen before C2 told her mother because the clear evidence from her mother was that, as soon as she was told, she immediately took steps to contact the Police and to take the girls in to lay their complaints.

24. C2 said that on their way back from Ambanga, the accused told he that he wanted to show her a "bird in a nest" and the two of them went into the bushes. He then said he wanted her to lick his penis and he put his penis into her mouth. Then resulted eventually in ejaculation and she said that it went into her mouth and she swallowed it. She says this was "many days" after the first occasion which again suggests that her complaint to her mother had not been made and that the occasion was quite some time after the first. She said they went back on to the road, met up with C1, and the three of them then walked back to their home.

25. The evidence from the mother was of value as it identified the approximate age of the children at that time and also as to how the complaints emerged. It would appear that there was an occasion involving the youngest sister C3 on the 12 of November 2011 which resulted in first the youngest complainant C3 telling her mother that the accused had done certain things which led quickly to C1, who had heard this exchange, starting to cry and she then told her mother what she said the accused had done with her.

26. All this is hearsay evidence from the mother as to the truth of what she was told and thus inadmissible. It does, however, have some evidentiary value as it explains when the mother first heard of the allegations against the accused and it explains why the mother to another house where C2 was staying and asked whether anything had happened. The mother stated that C2 immediately started to cry and then made similar allegations against the accused.

27. From the mother, this is evidence not of the truth of what of what the young girls told their mother but evidence that helps to identify the date when the complaints were first disclosed to a responsible adult and which saw

complaints made to the police within the next two days. It also assists by providing a credible narrative as to how the complaints from the two young girls emerged. That, in turn, works against any suggestion of collusion between these two young girls, C1 and C2.

28. I accept the evidence of the mother that she did know about these allegations before 12 November 2011. I am satisfied that the young girls are talking about that day when they talk about making their complaints to their mother.

29. I have mentioned that the evidence of both of the two young complainants was not shaken in cross examination. Indeed, it was quite remarkable how clear and detailed their evidence was when considering the description of the events and surrounding events given their young age. C2 told of the first occasion when she was walking home from kindergarten and the second occasion when she was walking back from the other village with the accused who managed to separate her from her sister C1 with the suggestion that the two of them go in to the bush and look at a "bird in a nest".

30. I find each of the two complainants to be credible witnesses and, in particular, I detected no suggestion at all that they had fabricated their accounts or collaborated to provide a joint account of events against the accused. One account easily corroborates the other because of the central similarity involved in the offending. Isolating the young girl from more public areas, confining the sexual offending to oral sex of that form, that progressing through to ejaculation, and then threatening violence if they told on him.

31. However, in this case, even if I had been receiving the evidence of just one of the complainants by herself in relation to the allocation against this accused, I would have accepted that particular complainant's evidence on its own such was the impression that the evidence from such a young and quite unsophisticated girl you.

32. There is even no suggestion that either C1 or C2 told the other what had happened to her although they were not specifically questioned about this.

33. The accused elected not to give evidence and that was his right. He has chosen not to give evidence and that decision cannot be held against him. It simply means that the Court has not heard his account of events. His statement was, of course, ruled inadmissible before he was called upon to make that election.

34. I am in no doubt, much less with a reasonable doubt, that the offending outline by the two young girls happened the way they described it. It was sexual intercourse as defined by the Penal Code. It was without a true consent on their part and it was without the accused believing on reasonable grounds that they were consented. I do not accept that either of these two young girls felt they had any choice but to comply with the forceful demand of the accused on each occasion.

35. For all those reasons, the verdicts in respect of count 1 in relation to C1 is GUILTY and in respect of C2 it is also GUILTY.

36. That can be conveniently noted as a conviction on count 1 on the facts found by me.

37. It is accordingly unnecessary for me to deal with count 2 although, if that had been the only charge before me, the accused would have been found guilty of that as well.

38. Steve Tari Tugu, you are convicted on Count 1 in respect of both complainants. You are remanded in custody to appear in the Supreme Court at Port Vila on Monday 23 July 2012 at 9am for sentence. I call for a pre-sentence report. This offending is sufficiently serious such that you should not hold out any hope that you will receive a sentence other than imprisonment.

BY THE COURT