

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

Criminal Case No. 21 of 2013

**PUBLIC PROSECUTOR – VS – SEWEN TARI**

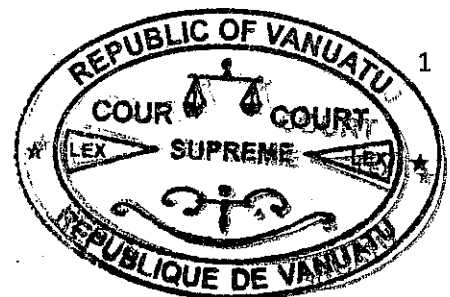
**Coram:** *Mr. Justice Oliver A. Saksak*

**Counsel:** *Mr. Simcha Blessing for the State  
Ms Jane Tari for the Defendant*

**Date:** *13<sup>th</sup> February 2014*

**JUDGMENT**

1. This judgment provides reasons for the verdict of guilt pronounced orally by the Court on the defendant on 11<sup>th</sup> February 2014.
2. The defendant was charged with one count of sexual intercourse without consent under sections 90 and 91 of the Penal Code Act [Cap.135] (the Act).
3. It was alleged by the Prosecutions that on or about 14 September 2012 at Banban area, Santo the defendant had sexual intercourse with the complainant Edith Tina without her consent.
4. The defendant denied the charge and trial hearings were held first on 9<sup>th</sup> October 2013 and secondly on 5<sup>th</sup> November 2013. The trial was adjourned part-heard in order for the defendant's witnesses to be available to give evidence. The defendant had exercised his right to remain silent after the Court had found that the Prosecution had established a prima facie case against him. He however indicated he would call two witnesses in his defence and sought an adjournment because one of his two witnesses had gone to Ambae and the other was engaged in school examinations at the time of trial. The Court therefore adjourned the trial to 10<sup>th</sup> February 2014.



5. On 10<sup>th</sup> February 2014, Ms Tari indicated to the Court that the defendant would no longer call any evidence from defence witnesses and that the defendant had maintained his position to remain silent. Counsel then sought a short adjournment to prepare written summary of evidential facts and submissions. Despite the Prosecution being ready to proceed orally, the Court granted a short adjournment to Tuesday 11<sup>th</sup> February 2014 for the hearing of final addresses from Counsel.

6. During the course of trial the defendant had admitted that he had sexual intercourse with the complainant. He however denied a lack of consent or that the consent was obtained by threat or force.

7. The elements of the offence of sexual intercourse without consent under section 90 of the Act are –

(a) That sexual intercourse took place;

(b) That there was no consent on the part of the victim;

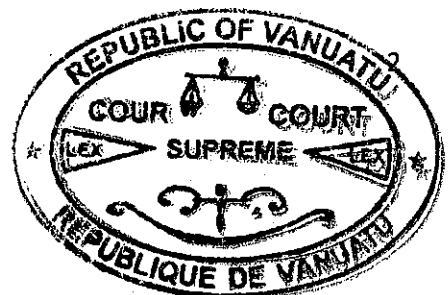
(c) If there was consent, such consent was obtained by force, threats of intimidation of any kind or fear of bodily harm.

8. The Prosecution as always in criminal cases has the general burden of proof. Section 8(1) of the Act requires a high standard of proof: that is proof beyond reasonable doubt.

9. As sexual intercourse was not denied, the Prosecution did not have to prove that element. But the Prosecution had to produce evidence to show (a) there was no consent on the part of the victim and (b) that consent was obtained by force, threats or fear of bodily harm.

10. For that purpose, the Prosecution produced evidence from:-

(a) Edith Tina – Victim



- (b) Esther Mahit
- (c) Tony Tina (Father)
- (d) Germaine Tina (Mother)
- (e) Dr. Wilma Luan – Medical Practitioner.

11. The relevant parts of the victim's evidence in-chief are as follows:-

"Mi wetem Esther istap kam bak long haos blong slip. Mifala I luk Sewen (defendant) stret long wan stampa blong post laet. Hem I stap nomo. Hemi pulum hand blong mi afta hemi talem nem blong hem. Hemi 8 klok naet. Hemi holem hand blong mi strong mo pulum mi igo long bush. Hemi holem taet mi, mi traem blong singaot be hemi tekemaot clothes blong mi. Mi werem wan trousers wetem wan black shirt. Hemi holem taet mi strong. Hemi pusum mi go foldaon. Hemi slip antap long mi. Mi kick blong traem kamaot be mi no save.....Hemi gat sex wetem mi.....Esther igo bak long ples blong selebresen. Mi go bak long haos. Mi crae mi folem rod igo bak. Sista mo smol brata blong mi istap. Dady I kam mo mi talem aot long hem. Hemi luk blad blong mi mo smol brata hemi crae...."

12. In cross-examination this is the relevant part of the victim's answers:-

Q: "Yu se hemi (defendant) stanap long post laet, taem ia yu save se hemi Sewen?"

A: "Taem hemi pulum hand blong mi afta hemi talem name blong hem."

Q: "Hemi no talem se "Halo, name blong mi Sewen?"

A: "No, hemi pulum hand blong mi afta I talem name blong hem."

Q: "Hemi holem hand blong yu mo pusum yu daon?"

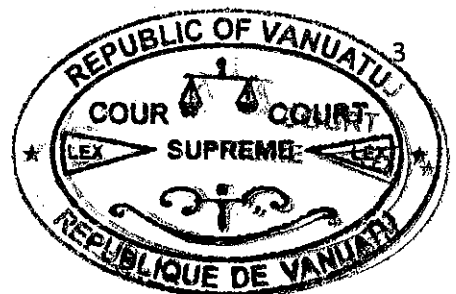
A: "Yes"

Q: "Wanem taem nao hemi talem name blong hem?"

A: "Long taem ia nao hemi holem hand blong mi mo pusum mi, afta mi askem se "yu who ia?"

Q: "Yu no bin singaot long time ia?"

A: "Si, mi singaot, afta Esther I harem afta hemi ron."



Q: "Yu singaot talem wanem?"

A: "Si, mi say "yu lego mi."

Q: "Taem ia nao Esther I ron wei?"

A: "Yes."

Defence Counsel cross-examined the victim in relation to her statement made to the Police dated 21 September 2012. Counsel tendered the statement as exhibit D1.

13. Esther Mahit's relevant evidence-in chief is as follows:-

"Mitufala igo bak blong slip afta mitufala igo luk boy ia mo hemi holem hand blong Edith. Mi no save boy ia. Mi luk hem nomo long taem ia. Hemi 8 klok naet. Hemi holem taet hand blong Edith mo tufala igo long bush. Mi fraet afta mi ron igo talem long dady blong Edith afta hemi go lukaotem hem."

In cross-examination this is her evidence:-

Q: "Hemi pulum nomo be inogat force blong ples ia?"

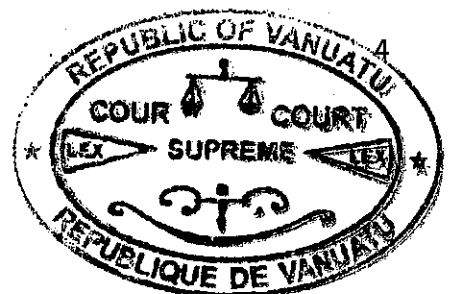
A: "Mi no save nao."

Q: "Yu no luk Edith I kick?"

A: "Mi no save nao, blong mi I finis long ples ia."

14. Tony Tina's relevant evidence is as follows:-

"Mi bin stap long stall wetem waef Germaine Tina. Mifala I salem kava start long 5.00pm kasem taem kava I finis hemia long Banban area. I gat wan ceremony mifala I holem long Banban. Mitufala two nomo istap afta tufala gel ia Edith Tina mo Esther Mahit I kam askem blong tufala igo home. Hem I samples 8 klok naet. Mi trastem gel blong mi from hemi no stap wokbaot olbaot, so mi letem hemi go sleep. Mi stap nomo Esther I ron kambak afta hemi talem se "Papa wan man I pulum hand blong Edith." Esther I talem mo hemi seksek nao mi lego kava mi wokbaot igo luk ples ia we Esther I talem. Hemi talem se klosap long post light we istap. Mi



wokbaot kasem ples ia, mi singaot ino gat wan man. Mi wokbaot kasem haos. Mi wan nomo. Mi kasem haos mi luk Edith istap crae mo wan brata blong hem tu istap crae from hemi luk blad. Mi luk blad istap long klos we hemi sakem istap daon. Afta long hemia mi tekem hem iko luk mama blong hem. Mitufala I mitim hem long rod mo mifala igo luk ples ia we samting I happen long hem. Hemi dragem hem olsem wan anamol. Mama blong hemi askem hem se trabol I happen wea, hemi say; "long ples ia nao." Mifala I luk grass mo leaf oli stap heapap igo isoem se oli pulum samting we istap traem blong brake."

In cross-examination, this the relevant part of his evidence:-

Q: "Yu luk blad long shirt ia?"

A: "Yes, long shirt, long skirt, long trousers blong hem."

Q: "Shirt or trousers?"

A: "Skirt blong hem."

Q: "Yu se oli dragem hem olsem anamol, yu agri yu no stap long taem ia blong talem olsem?"

A: "From mi luk ol grass oli silip istap."

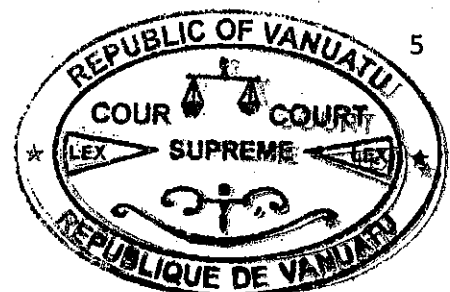
Q: "Yu stap guess nomo ia?"

A: "Yes, tingting blong mi nomo from mi no luk."

15. Germaine Tina gave evidence in chief confirming she was with her husband selling kava at Banban Park. She confirmed the two girls approached them and sought permission to return home and having trusted them granted permission.

That Esther returned to tell them about what happened to Edith and that her husband went looking for her. She confirmed meeting her husband and Edith on the road and they together went to see the place where it all took place. Following is her evidence and description:-

"Mi meetim tufala long rod afta mi askem Edith. Hemi talem long mi afta mi cross tumas mi slapem hem. Mi askem hem blong some ples ia we



*mi tekem mifala trabol i tekem ples long hem. Hemi tekem mifala igo. Mi torch, mi luk ples*  
*is dead .....Blad istap long ples ia. Mifala evriwan I luk.*

In cross-examination her relevance evidence was –

Q: “Hemi crae long taem ia?”

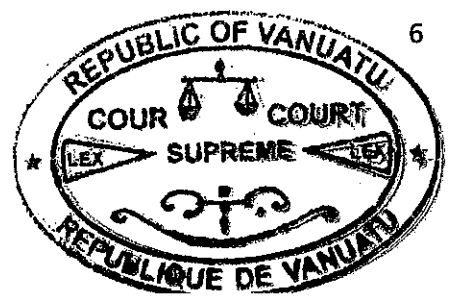
A: “Yes, hemi crae smol nomo, be hemi crae fastaem taem papa  
blong hem I go luk hem. Hemi wokbaot nogud ia long time ia.....”

16. Finally Dr. Wilma Luan gave evidence on 5<sup>th</sup> November 2013 confirming she had  
examined the victim on 21<sup>st</sup> September 2012. Her findings were that (a) her  
hymen was not intact, (b) there was a torn posteria fourchette; and (c) an  
offensive smell. She concluded there was vaginal penetration.

17. From those relevant evidence what are the factors available to the Court from  
which the Court can form a reasonable inference of guilt against the defendant?

From careful examination there are these –

- (a) The pulling of hand by the defendant and going off into the bush.
- (b) The running off by Esther suddenly to tell the victim’s father.
- (c) The fear upon Esther when she told the victim’s father and the immediate  
steps or respond by the father to go to the scene to look for the victim
- (d) The prior notice by the victim to the defendant that she was not consenting to  
sexual intercourse when she said “*yu lego mi.*”
- (e) Despite hearing this, the defendant did not desist but persistently pulled her  
further into the bushes.
- (f) The grass being crushed indicating some force or struggle took place.
- (g) The blood seen at the scene of the incident.
- (h) The blood seen on the victim’s clothes.
- (i) The distressed mood of the victim when she was first seen by her father at  
home sitting alone with her brother and crying.
- (j) The little brother was also crying due to sight of blood.



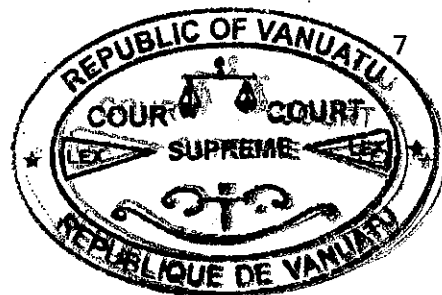
(k) The torn posteria fourchette seen some 7 days later by a doctor.

18. Paragraph 5 of the victim's statement of 21<sup>st</sup> September 2012 is telling and is consistent with her oral evidence. These were taken some 7 days after the incident. The relevant parts read:-

*Samples lo 20.00 hrs (8 O'clock naet) stret behind kraon blong Moses Moli, man ia SEWEN I haed long road I blockem mitufala, I jump wantaem do mi mi seck nao mi i holem taed right hand blo mi, mi seck nao mi singat se "Hei." Taem Esther I luk olsem ia emi fraet mo emi runway ko back long ples blo celebration long Banban Park blong talemoot long dady mo mamy. SEWEN itok long mi mo stoppem mi blo mi no singaot strong, nao emi pulum mi iko inside long bush, mi traem blo talem long hem se "yu lego mi" be emi no lessin long mi mo emi continue pulum mi nomo mo forcem mi trackem mi ko inside long bush. SEWEN I putum narafala hand blong hem kam long left shoulder blo mi mo pusum mi strong mi foldaon long o gras, SEWEN I holem taed mi before emi pusum mi ko down long grass... taem mi foldaon long grass, SEWEN emi silip antap long belly blo mi, emi forcem mi tekemaot short blue nilon trousers blo mi we me werem wetem panty blo mi, Sewen emi openem tufala legs blo mi, I open gud, mi traem blong sarem be emi openem strong....."*

19. Those evidence stand unchallenged and unrebutted by the defendant. And there is no reason to disbelieve her story. She is a 16 year old school girl. His story is not credible and requires no corroboration. By his silence, the defendant has not produced any other evidence consistent with innocence.

20. The victim had clearly indicated her state of mind showing a lack of consent when she said "yu lego mi." When the defendant proceeded beyond that point, he had violated the victim's free will. When therefore sexual intercourse took place thereafter, it was non-consensual on the victim's part.



21. From the evidence which are clear there was force, threat and fear of bodily harm. Any suggestion that there was previous relationship or acquaintance by the victim has no evidential basis and such argument or submissions are untenable and are rejected.

22. For those reasons the Court was satisfied the Prosecution had discharged its legal and evidential burden of proof stipulated by Section 8 of the Act. Further, the Court was satisfied that the Prosecution had proven the defendant's guilt beyond reasonable doubt by proving successfully -

- (a) Sexual intercourse had taken place;
- (b) There was lack of consent; and
- (c) Even if there was consent (which is not the case here), that consent was obtained by force, threat or fear of bodily harm.

23. The Court therefore returned a verdict of guilt and pronounced the defendant Sewen Tari guilty of the charge of Sexual Intercourse Without Consent.

DATED at Luganville this 13<sup>th</sup> day of February 2014.

BY THE COURT

*Oliver A. Saksak*  
OLIVER A. SAKSAK  
Judge

