IN THE SUPREME COURT
REPUBLIC OF VANUATU
(Criminal Jurisdiction)

Criminal Case No. 1 of 2015

PUBLIC PROSECUTOR
-v-
CHARLE MARRANGO PAKO

Before Chetwynd J
Mr Karae for Prosecution
Mr Bal for the Defendant

Hearing 12th June 2015

Judgment

1. The defendant has been charged with two counts of having sexual intercourse without consent. The required elements of the offence are that there was sexual intercourse and that it occurred without consent. What constitutes sexual intercourse is set out in detail in section 89A of the Penal Code [Cap 135]. As to consent, the victim in this case was 9 years old at the time and accordingly section 7(2) of the Penal Code is relevant :-

> *"...the victim shall not be taken to have consented to a criminal act if by reason of his age .....he was incapable of.....forming the necessary consent."*

Section 90(b)(vii) of the Penal Code repeats that provision with regard to sexual intercourse by providing that the offence occurs even if actual consent was given when the consent is obtained because of the physical or mental capacity of the person who "gave " consent. Given those provisions there can be no doubt that a nine year old child cannot in any circumstances give consent to sexual intercourse. If any additional authority was needed for that proposition one would only have to look a little further in the Act to see the provisions of section 97 (3). The single issue in this case is did sexual intercourse take place ?

2. The only direct evidence about that comes from the young complainant (Miss F). I must remind myself that I am dealing with someone who is very young and the evidence from someone so young must be looked at carefully. This is not because of any belief that children always lie but because they lack life experience and perhaps do not understand the nature and purpose of criminal proceedings. Even adults who appear in court for the first time are sometimes overawed by the proceedings and so it can be an even more bewildering experience for a child. I spoke to Miss F before she started to give evidence and she clearly understood the difference between truth and lies. Not only did she know the difference between the two, she also knew it was very

wrong not to tell the truth. She was aware of what was going on in the court room and the impression gained during the time she was actually giving her evidence was of intelligence and honesty. She was articulate but although generally confident in her answers occasionally she was unsure of what to say. In particular she was unsure of how to answer a question about other names for her "private parts". I am sure it was not a question of her being dishonest or unreliable, her difficulty was a result of her sexual naivety, she simply did not know any other words.

3. It is for the prosecution to prove, beyond reasonable doubt, the elements of the offence. That is the burden of proof here and in any other criminal case. If the court can say that on the evidence presented it is satisfied beyond any reasonable doubt that sexual intercourse did take place the defendant should be found guilty. As indicated earlier, consent cannot be an issue in this case. Although the question of a section 12 "honest and reasonable mistake" has not been raised by the defendant I must briefly consider the possibility that such may have occurred here. I say briefly because the age of the complainant is such that the defendant could have been under no illusions about how young she was. It would be impossible for anyone to say they thought the defendant was much older than she actually is.

4. Miss F gave her evidence and she was cross examined (it must be said that both prosecution and defence counsel acted in an entirely appropriate manner when dealing with her). For the defendant it was said there were inconsistencies in her evidence. I do not accept that. She spoke of two incidents, one in April and one in May (both in 2014). She was asked to describe what happened in April and she said the defendant had used the second finger of his right hand and had been putting or pulling his hand backwards and forwards across "the front of her private parts" and pulling with the finger. She also described the defendant touching her buttocks. She was asked what happened in May and she said the same thing happened. In cross examination she was asked if the defendant had put his finger inside her private parts and she said that he had. She did not actually say that in her evidence in chief but the description she gave was a description of penetration.

5. She told both counsel she felt bad about what the defendant was doing to her. She had not told anyone at the time what was going on because the defendant had said to her that if she told anyone else something bad would happen. She was scared.

6. The mother's evidence was just that, a mother's evidence. Clearly she was upset and spoke of her being heartbroken at the time she spoke to her daughter about what happened. Her evidence reflected that. Her evidence was conclusive evidence of her being told something by her daughter but it could not and is not conclusive evidence that what she was told by her daughter was what happened.

7. The third witness was a young police officer. She was present when the defendant was interviewed and she confirmed no admissions were made by him.

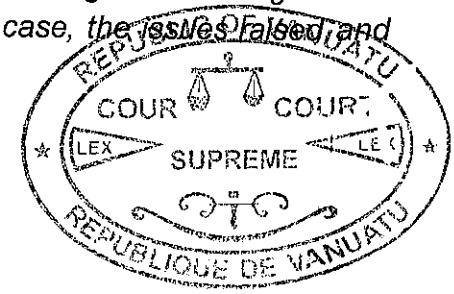
8. There was also medical evidence. It was inconclusive and that was not surprising because the examination under-pinning the report tendered by the prosecution was completed some 5 months or more after the incidents complained of.

9. The lack of other direct evidence raises the question of corroboration. I considered the issue of corroboration in an earlier case, PP v. Manu Kombe criminal case No. 100 of 2014. A judgment was handed down in that case on 19th May 2015. In the absence of specific legislation dealing with corroboration as is found in other jurisdictions, the general principles at common law apply. The 2002 Privy Council case [1] provided guidance on those principles. The general view was that the corroboration warning which had been previously required to be given was a warning about the honesty of the witness. The Privy Council felt:-

> *"Credibility is always a question for the jury whether or not a corroboration warning is given. In an identification case the jury will still have to be directed that they must be satisfied so that they are sure that the prosecution has proved all the ingredients of the offence and that they can only convict if they are so satisfied. In a sexual case the position is no different. But what is under consideration in Chance is whether it is necessary to warn the jury that it is dangerous to convict when no question has been raised as to the honesty, as opposed to reliability, of the complainant's evidence."*

10. In Vanuatu a judge is arbitrator of both law and fact and as there is no jury the credibility of a witness is a matter for the judge. The evidence of any witness will probably have been tested in cross examination. If there has been cross examination a judge can make a reasoned decision about the evidence. If not there is no issue as the evidence has presumably been accepted by all as being accurate. In this case there was cross examination. It has to be acknowledged that the cross examination may not have been as bellicose as is seen in some trials but given Miss F's age it was entirely appropriate and it was testing. As the Privy Council said in Gilbert:-

> *"It is a matter for the judge's discretion what, if any warning, he considers appropriate in respect of such a witness as indeed in respect of any other witness in whatever type of case. Whether he chooses to give a warning and in what terms will depend on the circumstances of the case, the issues raised and the content and quality of the witness's evidence."*



[1] R v. Gilbert (Grenada) [2002] UKPC 17 (21 March 2002)

Having listened to Miss F I repeat what I said earlier, I am satisfied her evidence was a truthful and reliable account of what went on. Nothing in what she said or her manner of saying it gave me any cause to believe her evidence had to be qualified by any convoluted warning based on her age or the fact she was a complainant in a sexual behaviour case.

11. One thing I did note, not as corroborating evidence but of interest, was the content of the medical report. The report itself is not evidence of the truth of what Miss F said but it is thought-provoking to see that what she is reported as telling the Doctor on 4th November 2014, some 5 months after the events, is largely the same as what she told the court during the trial.

12. I have no doubts whatsoever that Miss F was telling the truth about what happened. There was no fabrication or unnecessary elaboration. I am satisfied beyond reasonable doubt that what Miss F told the court was what occurred on at least two occasions in 2014. I am satisfied beyond reasonable doubt that the defendant penetrated the complainant with his finger and that he is therefore guilty of having sexual intercourse with Miss F without her consent. I am satisfied beyond reasonable doubt on the evidence given by Miss F that that occurred on two occasions. He is guilty on both counts on the Information dated 10th February 2015.

13. The defendant will be sentenced on 12th August 2015 (at 2 pm) and I ask the Probation Officer to prepare pre-sentence reports. I will also require written sentencing submissions from the prosecution and defence counsel prior to 12th August. As the defendant has been convicted of two very serious offences he will be remanded in custody until 12th August.

12th June 2015

Chetwynd J

REPUBLIC OF VANUATU
COUR SUPREME COURT
LEX LEX
REPUBLIQUE DE VANUATU