

**BETWEEN: Public Prosecutor**  
*Prosecutor*

**AND: Jacob Toame**  
*Defendant*

**Coram:** *V. Lunabek CJ*

**Counsel:** *Mr Simcha Blessing for the Public Prosecutor*  
*Mrs Mary Grace for Defendant*

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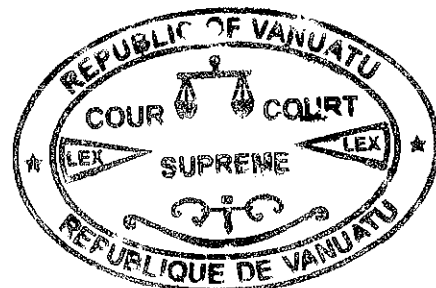
**REASONS FOR JUDGMENT**

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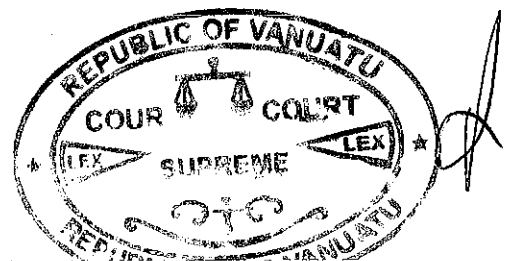
**Introduction**

1. This is the Judgment in this case. Defendant Jacob Toame was charged with two (2) counts of sexual intercourse with a child under care or protection, contrary to section 96 (1) (b) of Penal Code Act [Cap 136] ("the Act"). The Defendant pleaded not guilty to these two (2) counts. A trial is required. A two days trial was conducted on 26 August and 1 September 2016.
2. It is alleged in count 1 that sometimes between the year 2011 and September 2012 at Tautu village on Malekula Island, on many occasions, Defendant Jacob had sexual intercourse with the complainant (NP) by digitally penetrating her vagina with his finger. The complainant was under 18 years of age during these times and she was under the care or protection of the Defendant.
3. It is also alleged that sometimes between October 2012 and December 2012, at Tautu village, Malekula, Defendant Jacob had sexual intercourse with the complainant (NP) on seven (7) different occasions. The intercourse was complete by penile penetration. The complainant was under 18 years old in these times and she was under the care or protection of the Defendant.

**Self direction**



4. This was a criminal trial and the prosecution having brought the charges against Jacob was obliged to prove them and each of their essential elements to a very standard of proof, that of beyond reasonable doubt. That means that I was required to be sure of Jacob's guilt before I could convict him.
5. I record that the formalities of sections 81 and 88 of the Criminal Procedure Code Act, the statements of the presumption of innocence and in relation to the right to give or not give evidence, were complied with. Jacob elected to remain silent. He also elected not to call any other evidence. That is part of his right as I have explained to him. Jacob must not be criticized for that. I bear this in mind and stand by it in this case.
6. The burden of standard of proof is on the prosecution from the start to end. It never shifts.
7. The court must carefully assess the prosecution evidence, or the part of it which it accepts. The court must determine whether or not that evidence leaves the court sure of guilt i.e. satisfied beyond reasonable doubt that each of the essential elements of the charge being considered is proved.
8. In this case, the Defendant was charged with two separate counts of sexual intercourse with a child under care or protection. I was required to consider each of them separately. This is like two trials were being conducted at once. The outcomes on one does not necessary inform the outcome of the other.
9. The court is entitled to consider all of the evidence and decisions about acceptance of evidence, whether total or partial, reliability and credibility may be applied to more than one charge. A conclusion of guilt on one count may be taken into account in assessing the others.
10. As sexual offences are alleged, this was one of the type of cases where a trial judge must be conscious of the danger of convicting a defendant based on the uncorroborated evidence of the complainant, though a Judge may nevertheless

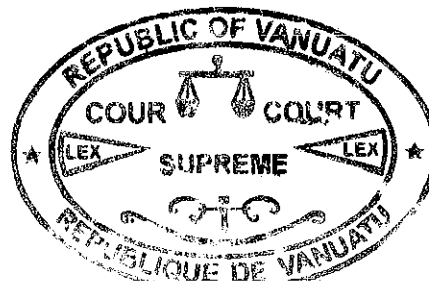


properly do so as long as that danger is borne in mind. Walter -v- PP [2007] VUCA

12. I kept this in mind accordingly in the present case.

**Summary of evidence ,submissions and reasons for the verdict.**

11. This case involved allegation of sexual offending where the complainant's evidence is not corroborated by independent evidence. The prosecution case stands or falls on the credibility and reliability of the complainant. This means that unless I could be sure that the complainant girl was telling the essential truth, about the critical matters relating to each of two incidents I could not possibly have found Jacob guilty.
12. The complainant girl gave evidence to the effect that she was adopted by the Defendant, Jacob Toame, when she was 9 years of age. She is now 18 years of age and she lives with a man at Fanafo, Santo.
13. In 2010, 2011 and 2012 she lived with Defendant Jacob Toame and his wife at small Tautu, Malekula. Her natural parents are on Ambrym Island. She identified Defendant Jacob Toame in the Defence dock. She confirmed she lived with her adoptive father (Jacob Toame) in 2010, 2011 and 2012 at small Tautu village.
14. One night while she was sleeping in her room her adoptive father (Jacob Toame) came in her room, touched her private part and inserted his finger inside her vagina. He masturbated his penis until he ejaculated on her. Her mother was sleeping and did not hear anything. It was about 12.00 am o'clock mid-night. He told her not to disclose what he did to her to her mother.
15. He made the same thing to her on many occasions after this. She explained he held her private part, masturbated his penis till ejaculation. She also testified he performed oral sex on her and asked her to do the same thing on him. This occurred "full up time". She estimated 3 times a week.
16. She also testified that between October 2012 and December 2012 Defendant had sexual penile intercourse with her. She described that Defendant removed her clothes. He made her lay down and he inserted his penis into her vagina. He did

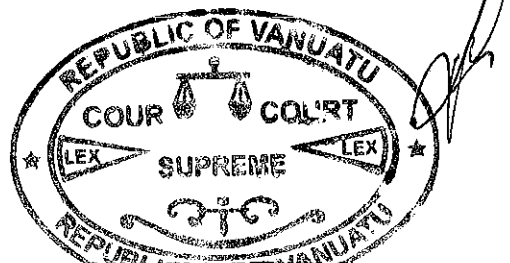


this to her many times after that. She experienced pain in her private part. She said the Defendant had sexual intercourse with her again on Saturday 15 December 2012. That was the last time he had sex with her.

17. Sometimes on 19 December 2012, her daddy Graham Rovea took her to the police station at Lakatoro and her Daddy Graham made a complaint to the police station at Lakatoro of what her adoptive father Jacob did to her. She made a police statement about what the Defendant did to her on 19 December 2012. She made her statement to Police officer Grenly Kenda on the same date at Lakatoro police station.

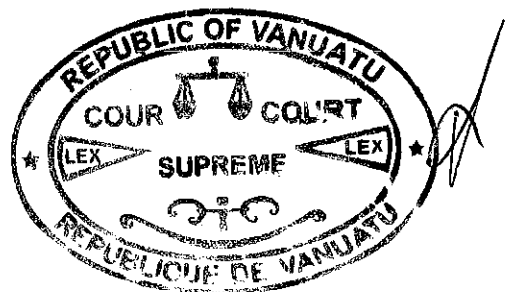
18. In cross-examination, she confirmed she made a police statement against the Defendant in December 2012. She was asked she said she did not sign her statement to the police. She was shown a typed document and asked about the signature on the document. She answered that she made the statement but she did not know who signed it. She was asked and she denied police called her back to sign her statement in 2012. She confirmed she now lives with a man. She confirmed also that she knew that this is the sixth times she was asked about the reason of her not attending the court. She answered that her de facto partner did not allow her to attend the court. She confirmed she sent a report to the prosecution on 30 June 2015 to remove her case (Exhibit D3). She confirmed she attached with the letter the typed version of her statement to the police (her statement). She said she did not sign it. She did not know who signed it. She was asked if the statement was hers she said "si hemi blo mi". She confirmed she did not sign it. She was asked if what she said in court was true or false. She said what she said in court is true. She was asked again as to why she did not come to court. She replied her de facto partner did not allow her to attend the court.

19. In re-examination, she was asked to explain why she wrote the report dated 30 June 2015 to have her case struck out or removed from the court (D3). She answered: "*Mi stap tinktink se bae future blo mi who nao bae i luk luk lo hem.*" She was asked to explain her answers about her statement to the police. In her evidence in chief she said it was her statement, in cross-examination, she said she made a statement to the police but she did not sign it. She was asked to explain whether the content of the typed statement was hers or was for a different person. She answered that the content of the statement was hers. She read and confirmed that the content of the



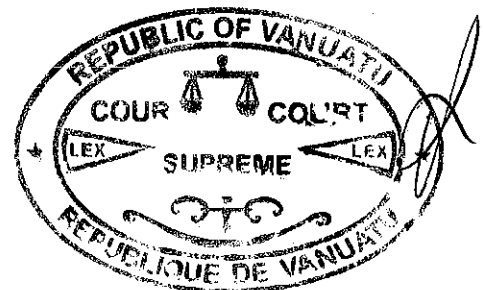
statement was hers. She confirmed that the content of the statement was the statement she lodged at the police at Lakatoro with her Daddy Graham and the statement was written by police officer Grenly Kenda.

20. Grenly Kenda was the other prosecution witness. Corporal Grenly Kenda works 23 years as a Police Officer. In 2011-2012 he was stationed at Lakatoro in the Family Unit Section. He is now stationed in Port Vila, in the crime prevention section. He was involved in the arrest of Defendant Jacob on 25 November 2014 from his village at Tautu and he brought him to Lakatoro police station. At Lakatoro police station, he took him into his office in Family Protection Unit. He informed him of the charge against him. He cautioned him. He asked him if he wanted to talk or keep silence and just talk to the Court.
21. The Defendant wanted to make a statement. He made a statement to the effect that the complaint made by the complainant's father (Gram) against him was true. He said he had sexual intercourse with the complainant. He admitted the offences charged against him.
22. He said after he got advice from the Magistrate, he performed a custom ceremony by giving one (1) pig, 2 mats and 1 yam. He paid 15,000 Vatu. All these items were given to one August Prevaly who is the Defendant's uncle. August Prevaly was related to the complainant. He said he paid a fine of 3000 Vatu to the complainant's mother. He said he paid the travel costs of the complainant's mother from Ambrym to Malekula and back to Ambrym. He said he paid 1,500 to the brother of the complainant. He said the complainant paid a fine of 2000 Vatu to the Defendant's wife. The Defendant signed his statement at his own free will. He said the Defendant made his statement on the same day of his arrest. That statement is now admitted as evidence in his case (Exhibit P1). He said this Defendant has four (4) different cases. He was investigator in the Four (4) cases against the Defendant.
23. Corporal Grenly Kenda was cross-examined. He confirmed on 25 November 2014, he took cautioned statement from the Defendant. He was asked if he took another statement of the Defendant on the same day. He answered he took only one statement. He was asked as to the number of cases against the Defendant. He said



the Defendant has 4 different cases against him. He was asked as to the number of cautioned statements he obtained only one from the Defendant on 25 November 2014 in the case of this complainant (NP). He recalled the complainant case was reported first to the police. He said he did not investigate this case sooner because he heard that Defendant Jacob threatened that he will take his name and the name of the daddy of the complainant and took them and placed them in the Nasara. So he said he was afraid and he did not investigate this case sooner. The other cases against Defendant Jacob were completed. It was put to him that on 25 November 2014, he obtained another statement from Defendant Jacob. He said he has clear recollection of the statement in the case involving this young girl. He was shown and he confirmed the caution statement he made in the case (P1). He was shown another document (statement) dated also 25 November 2014; he said it was his handwriting but the statement is for a different case of Defendant Jacob. It was not for the complaint in this case. It was for the case of Worwor Helliott.

24. He was challenged as to whether this case is not complete. He said this case was completed but when the prosecution made copies of the statements, the prosecution made mistakes by mixing the statements in these files. He was shown a document and he said he did not write down the name of the case but in the case of this complaint he wrote down the name of the victim girl in her statement he obtained in this case. He was further challenged that the Defendant would use the other statements in this case; he replied that the statement of the Defendant in this case is clear because he wrote the name of the victim girl in it. He maintained his answers to this question on the said statement (Exh. D2). He was asked and he said he took the statement of the victim girl in December 2012 and he signed that statement. He confirmed he took the statement in 19 December 2012. He typed it. He was again asked and he said he took a statement from the defendant two years after because he was afraid of his life. He was challenged that the statement said to be obtained from the victim girl is not from her. He answered that this statement is her statement. She told him of what happened and he reduced them down in writing; otherwise, he said he would not know about what happened to the girl in this case. He was asked as to whether he knew the signature on the statement; he said it was for the girl. He was asked and he said he was the only officer in the Family Protection Unit at that



time at Lakatoro Police Station. It was put to him; he confirmed his evidence that there was a complaint made to the police in this case on 19 December 2012.

25. In re-examination, he explained that when the girl told him of her stories, he reduced them into writing. He confirmed the statement he obtained from the Defendant (P1). He confirmed the signature of the Defendant on the statement. The document (D1) is for the Defendant. The Document (D2) is also for the Defendant. He confirmed the signature of the Defendant.

26. The prosecution submits that on the basis of evidence before the Court there is evidence before the Court that the Defendant had sexual intercourse with the girl between 2011 and September 2012. On a number of occasions "full up times".

27. In respect to the period between October 2012 and December 2012 the evidence is also that the Defendant had sexual intercourse with the girl on different occasions ("full up times) on different dates.

28. Before the Defendant could be convicted, the Court must be satisfied that the prosecution has proved beyond reasonable doubt of the following elements of the offences of sexual intercourse with child under care or protection contrary to s.96 (1) (b) of the Penal Code:-

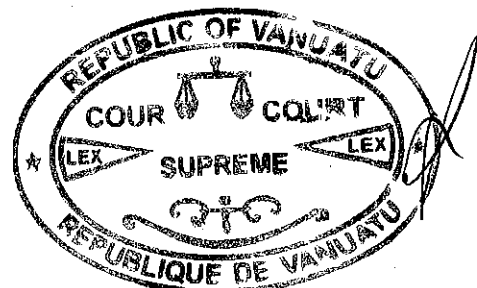
1. That the accused had sexual intercourse with the girl in the relevant times between 2011 and September 2012.
2. On the relevant times the girl lived with the Defendant.
3. The girl at the relevant times was under the age of 18 years.

29. **Section 96 (1) (b) provides:**

***(1) A person must not have or attempt to have sexual intercourse with any child, not being the person's spouse, who is under the age of 18 years and who –***

***(a) being the person's stepchild or foster child, is at the time of the intercourse or attempted intercourse living with the person as a member of the person's family; or***

***(b) Not being the person's stepchild or foster child, and not being a person living with him as the person's spouse is at the time of the intercourse or attempted intercourse living with the person as a member of the person's family and is under the person's care or protection. (Emphasis Added).***



*Penalty: Imprisonment for 10 years.*

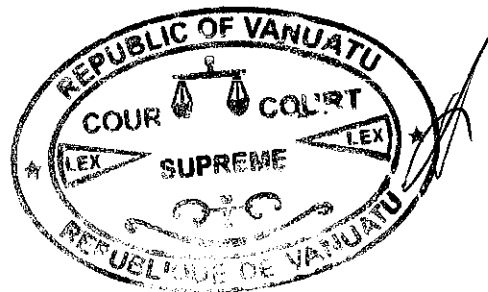
*(2) It is no defence to a charge under this section that the child consented.*

**30. Did the Defendant have sexual intercourse with the complainant girl on different occasions between 2011 and September 2012 and December 2012?**

31. The evidence is from the girl witness that between 2011 and September 2012, the Defendant had sexual intercourse with her on many occasions. The first encounter involved the Defendant entering her room at mid-night, touched her private part and digitally penetrated her vagina with his finger. He masturbated his penis and ejaculated on the girl's body. The Defendant performed the same acts on her plenty of times. The witness girl estimated 3 times a week during the relevant period.

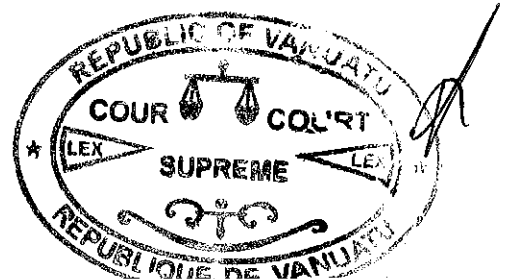
32. In respect to the period October 2012 and December 2012, the evidence from the girl is that the Defendant commenced penile penetration of her vagina. This again happened plenty times on the relevant period. The last time the Defendant had sexual intercourse with her was Saturday 15 December 2012. The girl confirmed her evidence in chief in her cross-examination. She said although she did not sign the typed written statement to the police on 19 December 2012, the content of it was what she reported to police officer Grenly Kenda and it was true.

33. The Defence says the Court should not rely on that statement because the girl did not sign it. The court has before it evidence of context in which the girl made a statement of what the Defendant did to her to the police at Lakatoro on 19 December 2012. At the time of the complaint, police officer Grenly Kenda took her statement in writing. At that time, she said she saw the Defendant came at the Lakatoro police station and stood by the window and looked inside the room while she and her Daddy Graham lodged the complaint to the police at that date against him. The Police officer was then transferred to Port Vila. He typed out the statement of the girl. The girl said she did not sign it. However, she said the content of the statement was her statement made to the police at Lakatoro on 19 December 2012 and it was true. I accept the evidence of the girl as truthful.



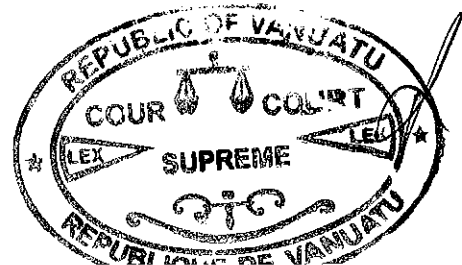


34. The Defendant voluntarily made a statement to the police admitting the allegations contained in the charge. I accept that part of evidence of the Defendant. I do not accept part of the statement that he made reconciliation ceremony to the family (uncle) and the mother of the girl.
35. Element 1 of the offences in Counts 1 and 2 are proved beyond reasonable doubt.
- 36. The next question is: Was the girl lived with the Defendant in the material times?**
37. The evidence is that the girl lived with the Defendant. She gave evidence to that effect. The Defendant was her adoptive father. She confirmed that evidence in cross-examination and confirmed again in re-examination. There was no challenge to that evidence. At the relevant times (2010, 2011 and 2012), it is rational to infer that if the girl lived with the Defendant because she is her adoptive father, the Defendant had the care or protection of the girl at these relevant times. This element is proved beyond reasonable on the two (2) counts.
- 38. The last question is: Whether the girl was under the age of 18 at these times of the offending?**
39. The girl gave evidence that she is now 18 years of age. She was adopted by the Defendant since she was 9 years of age. She gave evidence of the fact that her natural parent were on Ambrym Island. She lived with her adoptive father (Defendant Jacob Toame) since she was 9 years.
40. The evidence was not challenged. It is rational to infer that at the relevant material times of offending she was between 13-14 years of age. This 3 third element is also proved beyond reasonable doubt.
41. The Defence submitted that there was no complaint in this case as the girl wrote a letter to the Public Prosecutor to strike out her case or for the Public Prosecutor to write to the Court to dismiss her case (Exhibit D3). In this case, I sense from the evidence that a complaint was made by one Graham Rovea to the police officer at Lakatoro on behalf of the girl who was a child on 19 December 2012. She was taken to the police station at Lakatoro. A complaint was lodged against the Defendant on



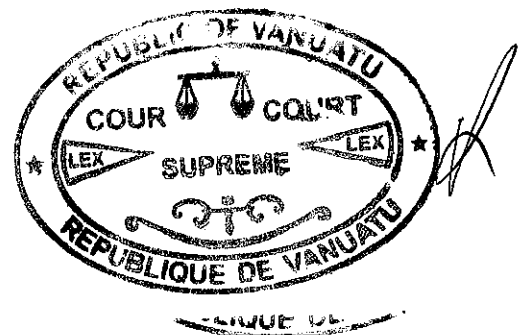
19 December 2012. The girl gave evidence of one of his Daddys (Graham) helping her to make the complaint to the police. She testified while they are making the complaint at Lakatoro police station in December 2012, Defendant Jacob came and stood by the window and looked at them inside the police station. For the purpose of this case, I take it that police officer Grenly Kenda was working in the Family Unit at the police station at Lakatoro at that time.

42. The statement attached to Document D3 which was a copy of the unsigned written statement of the girl suggested that the complainant made this statement to support the complaint lodged to the Police at Lakatoro on 19 December 2012 by her Daddy Graham Rovea. It reads: "*Mi makem statement mo report blong mi follem report we papa GRAHAM ROVEA hemi puttum againsem papa Jacob Toame from hemi stap havem sex watem mi*". Although, she did not sign this document, she testified it was her statement. She made that statement to the police station on 19 December 2012. She testified it was true.
43. I make the following comments:- The proceedings are instituted by the making of a complaint or preferment of a charge (section 35 (1) of the Act). A complaint is made under oath and may be made orally and in writing and if made orally, it must be reduced in writing by the judicial officer, and, in either case, shall be signed by the private prosecutor and the judicial officer. But where the proceedings are instituted by a prosecutor or by a public officer authorised under section 33, a formal charge duly signed by any such person may be deemed to be a complaint for the purposes of this code (section 35 (2) of the Act. Pursuant to subsections (3) and (4), the judicial officer upon receiving any such complaint shall, unless such complaint has been made in the form of a formal charge under subsection (2) draw up or cause to be drawn up and shall sign a formal charge. Where the judicial officer is of opinion that a complaint or formal charge made or presented under this section does not disclose any offence, he shall make an order refusing to admit such complaint or formal charge and shall record his reasons for making such order.
44. On the assertions and submissions of the Defence that the complaint has been withdrawn and there was no complaint in this case or that if there was a complaint but it was not signed by the girl, I think these submissions are misconceived. In this case, the evidence adduced by the Defence (D3) illustrates that the complaint was



lodged by one Graham Rovea on behalf of the girl who was a child at the material times. The complaint was made pursuant to the provisions of Family Protection Act.

45. It has to be understood that on the allegations and assertions stated by Mr. Graham and supported by the oral statement of the girl (NP), the First Information Report (FIR) has been registered and investigation is proceeding and when the complaint has put the criminal administration of justice in motion, it is not the wish or the whim of a complainant or alleged victim to carry or not to carry the prosecution, he or she has no power or domain to withdraw the First Information Report only the state is the master of the prosecution and the Public Prosecutor is the authority in charge of the case, hence the present submissions have no adverse effect on continuance of the First Information Report (FIR) and the original report (by Graham) and the supporting statement by the girl are still asserting the allegations alleged in FIR and statement under section 35 Criminal Procedure Code (Cr PC), and no factum of compromise has been placed on Record. This is not such a minor crime or of Civil nature wrong which is extended in crime and evidence of amiable compromise have been provided of an amicable settlement or comprise warranting for an application before the judicial officer to dismiss (section 35 (4) have been placed on records. In the present case, the offences as alleged are serious and grave offences and sexual offences are such type of offences. A complainant or the alleged victim in this case has no locus standi to withdraw the First Information Report. The submissions of the Defence are misconceived and liable to be rejected, hence dismissed.
46. I reject the Defence submissions that the girl has not made a complaint to the police, albeit that she did not sign the type version of her police statement dated 19 December 2012..
47. I accept the prosecution submissions that that statement was not evidence. The evidence was given by the girl in her oral testimonies under oath in court.
48. The statement of Defendant Jacob Toame is accepted partly to the effect that he admitted the allegations of sexual intercourse between him and the girl in the relevant periods.



49. The prosecution proves each and all three (3) elements of the offences of Sexual Intercourse with a child under care or protection, under s.96 (1) (b) against the Defendant Jacob Toame beyond reasonable doubt on both counts charged against him.

50. I found Defendant Jacob Toame guilty on both counts of sexual intercourse with child under care or protection.

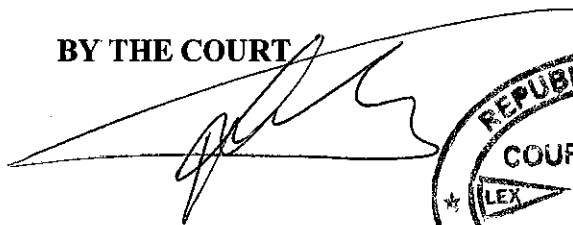
**Conclusion**

**Count 1: Guilty**

**Count 2: Guilty**

**DATED at Lakatoro, this 2<sup>nd</sup> day of September, 2016**

**BY THE COURT**



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**V. LUNABEK**  
**Chief Justice**

