

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

Criminal
Case No. 18/1439 SC/CRML

PUBLIC PROSECUTOR
V
PETER REX TAO

Before: Justice Fatiaki

Appearance: L. Young for the State
D. Yawha for the Defendant

Date of Verdict: 14 June 2019

REASONS FOR VERDICT

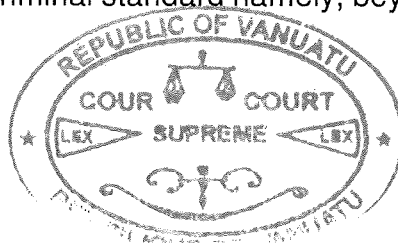
1. This is a defended case of Sexual Intercourse Without Consent in which the defendant is charged that:

"Sometimes between 1st June 2007 mo 30 June 2007 long island blong Tanna you bin kat sexual intercourse wetem woman ia Kawia lotil olsem yu mekem hem ititi long penis blong yu weh long time ia ino tinkting blong hem blong kat sex wetem you".

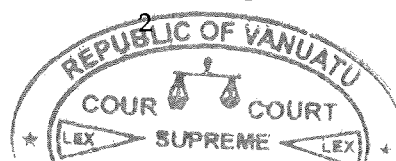
The particular sexual activity charged is defined in the extended definition in Section 89A of the Penal Code as:

"(c) the introduction of any part of the penis of a person into the mouth of another person".

2. The essential elements or ingredients of the charge are:
- (1) That the defendant's penis was introduced into the mouth of the complainant;
 - (2) That the complainant did not consent to having the defendant's penis in her mouth; and
 - (3) The defendant did not believe on reasonable grounds that the complainant consented to have his penis in her mouth.
3. I remind myself that this being a criminal trial, the prosecution alone bears the burden of establishing each of the above elements of the offence against the defendant to the required criminal standard namely, beyond a reasonable doubt.

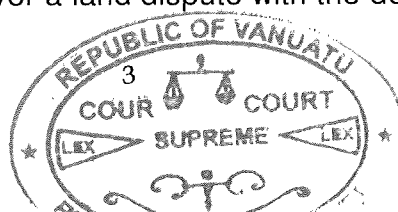


4. In other words, before this Court can convict the defendant it must be satisfied and feel sure on the evidence that he committed the offence as charged. Equally, if after considering all of the evidence called including any for the defence, the Court is not sure the defendant committed the offence or the Court has a reasonable doubt about the defendant's guilt, then it will be the duty of the Court to give the defendant the benefit of that doubt and acquit him.
5. Although the defendant was told that he was not obliged to give evidence and could elect to remain silent, he elected to give sworn evidence and called two (2) witnesses in his defence. The Court is obliged to consider, scrutinise, and assess the defence evidence as it does the prosecution's evidence.
6. At the end of the evidence in the trial both counsels orally addressed the Court for which assistance I am grateful. In this regard it was common ground that the first essential ingredient had been established beyond any doubt and need not trouble the Court. The second and third elements however were hotly contested. Prosecuting counsel whilst acknowledging the need in this case, for the corroboration warning, nevertheless, accepted that there was no corroboration of the complainant's evidence.
7. I turn then to consider the second element or ingredient that the prosecution must establish beyond a reasonable doubt, namely, that the complainant did not consent to the introduction of the defendant's penis into her mouth.
8. The complainant began her evidence by describing how her husband had adopted the defendant as a small child and that she and her husband had raised the defendant after she married her husband. They looked after defendant when he went to school and up until when he grew up and joined the force as a police officer.
9. As for the incident, the complainant's evidence in-chief is that on the night in question while she was sleeping, the defendant came and called out to her to accompany him to search for wild fowl to kill. The defendant was holding a torch and a "*bell knife*" (machete) as they set off with the complainant following behind the defendant.
10. On arriving at a nabanga (banyan) tree the defendant shone the torch up into its branches in search of any roosting wild fowl. Then the defendant shone the torch into her face and asked her to help him ("*Bae yu helpem mi*"). She asked him: "*how can I help you?*" and he repeated himself two more times and insisted that she should help him ("*Yu mas elpem mi tede*"). Then he said: "*let us have sexual intercourse*". She declined saying: "*I can't I'm your mother (*Bai mi no save mekem from mi mummy blong yu*)*".
11. The defendant then took hold of her hand and made her hold his penis for some time before pulling her head down and telling her to suck it and the complainant

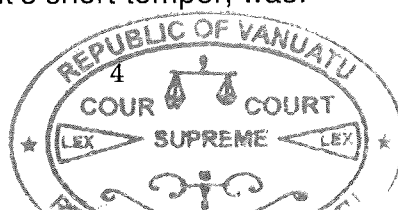


complied. She had the defendant's penis in her mouth and sucked it for some time until the defendant ejaculated on her hand and she wiped it on her skirt. She did not like what had happened but she was afraid of the knife the defendant was holding and they were together alone in the dark. She testified that as she sucked his penis the defendant exclaimed: "awe, awe" as he felt good.

12. After that they returned home. The next day she felt bad ("*feelim nogud*") and ashamed because of the events of the night before. The complainant did not immediately report the matter to the police or to her husband who was away in Vila at the time, as she was ashamed and feared the defendant who had a short temper and was a serving police officer in Santo. She also could not be sure that the police in Tanna would accept and register her complaint if she lodged one against the defendant. She accepted that she eventually lodged her report against the defendant last year in 2018 some 11 years after the actual incident.
13. In cross-examination the complainant was constrained to admit that it was her husband's father **Nakameta** who had adopted the defendant at birth. She accepted that the defendant was already in primary school when she married Tom Itil (Nakameta's son) and they cared for the defendant after her husband said the defendant belonged to them. She agreed the defendant had never hit or assaulted her at any time.
14. Questioned about the incident, the complainant denied that she and the defendant had gone pigeon-shooting that night or that the defendant had gone pigeon-shooting the night before with some girls. She denied the defendant was carrying a slingshot ("*lastic*") or a basket. She denied suggesting to the defendant the place to go torching that night and she repeatedly denied that the defendant had asked her to wake the sleeping girls to accompany them that night or that she had told him to let the girls sleep.
15. She said the defendant forcefully told her to help him and although the defendant did not assault her or threaten to cut her with the knife he was holding, she was afraid of it as there was just the two of them. She didn't report the defendant because she was ashamed at the time. She had no answer when asked why she was not still ashamed 11 years after the incident when she first made her report against the defendant to a retired police officer.
16. She denied that she reported the defendant because of a land dispute and even denied any knowledge of such a dispute or being involved in any meetings with Chief Tom Taia or any attempted settlement of a land dispute with the defendant. She denied being party to the sending or knowing about Chief Tom Taia being sent to stop the defendant from building his house on the disputed land. So adamant was the complainant in her denials of the land dispute that she said Chief Tom Taia who she knew, would be lying if he said there was a meeting with her and her husband over a land dispute with the defendant.



17. She agreed that she lodged her report against the defendant through a retired police officer **Wilfred Nos** who she was constrained to admit under cross-examination after first denying any knowledge of it, that Nos had a problem with the defendant which was straightened out by Chief Jimmy (Noanikam). She remained mute for two (2) minutes when asked why she had not reported at Vila Police Station in 2018 since she was frightened of the defendant who worked in Tanna or earlier in 2008 when she had gone to Vila to finalise her visa to go on the RSE scheme fruit-picking in New Zealand.
18. She continued to deny that her report against the defendant was made up after a row started over disputed land from 2015 to 2018. She frankly admitted however that she converted and claimed the defendant's plantation as her own when the defendant was remanded after he was charged following her report.
19. In re-examination the complainant clarified that she had not called anyone to accompany her and the defendant on the night of the incident because she didn't expect anything bad to happen. She agreed that she sucked the defendant's penis after he held her head and told her to suck it.
20. To the Court's question, the complainant agreed that she had not pushed the defendant's hand away when he held her head and that she was holding the defendant's penis at that time and had herself introduced the defendant's penis into her mouth. She had not tried to avoid or prevent the defendant's penis going into her mouth.
21. The second prosecution witness was **Tom Iotil**, the complainant's husband who testified that he and his dad Nakameta adopted the defendant at his father's suggestion to help him with his kava and they gave the defendant the kastom name "*Nanuman*". He learnt about the incident between the defendant and his wife in 2007 when he returned from Vila but had not reported it at the time because he was ashamed and he thought the defendant's many police friends might "*remove the report*".
22. In cross-examination he agreed that he had lived in Vila for 5 years between 2007 and 2011 after coming to know about the incident between the defendant and his wife but had not thought to report it in Vila Police Station because he hadn't thought about it at the time and the defendant was his son.
23. He too persistently disagreed that the delay in reporting was not shame about the incident as professed, but, because he wanted the defendant removed from the land and needed an excuse to send him to jail.
24. Tom Iotil was constrained however, to admit under cross-examination that one of the reasons included in his police statement for not reporting the incident earlier, besides the defendant's short temper, was:



“... mifala decide blong kam reportem nao from sei mi sendem aot hem be hemi no wantem ...” (We decided to report the defendant now because we had chased him out of the land I had given him but he refused to leave).

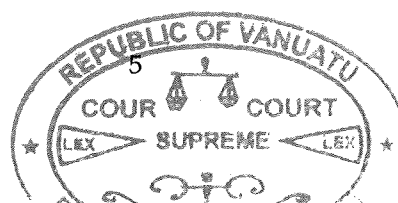
25. Finally he denied attending any meeting(s) with Chief Tom Taia or agreeing to make up a story so as to put the defendant in jail. To the Court's questions he confirmed that the defendant had an unfinished house in the village but he disagreed with the defendant finishing it and living there. So much then for the prosecution's principal oral witnesses.
26. Before the prosecution closed its case counsel was reminded of the dicta of the Court of Appeal in Yercet v Public Prosecutor [2015] VUCA 19 and the defendant's caution statement to the police on 21 May 2018 was marked by consent as **Exhibit P(1)** as part of the prosecution's evidence in the case.
27. In it, the defendant is recorded to have said about the allegation inter alia:

“Issue ia hemi issue blo kraon nao imekem se report ia ikasem police (that issue is about land that ended up in a police report) ... taem apu we ikarem aot mi (Nakameta) ideath hemi bin talem aot long community everi raet mo propertis blo hem ikam long mi (before Nakameta died he told the community that he gave all his rights and property to me).

So naoia mi stap long kraon mo stap work ale Kowia mo lotil istap traem blo pushum aot mi long kraon mo kivim long boy blong Kowia. Oli traem everi way blong mekem mi aot be oli no save mekem so oli mekem false allegation againstem mi (the complainant and her husband tried every way to remove me from the land but failed so they made a false allegation against me).

Follem report we hemi talem se mi bin force hem blo titi long kok blong mi, bae mi jes explain mi wan long court”.

28. In his evidence, the defendant testified that after returning from peace-keeping or monitoring duties in Congo, Africa he went to his village in Tanna for his break. At the village he slept in a concrete house with 3 or 4 young girls while the complainant slept in a separate traditional grass house nearby.
29. One night he went with the four (4) girls in the house to shoot pigeons. The next day while talking about their pigeon-shooting the complainant overheard them and asked if they saw any wild fowl and the complainant offered to show them where the wild fowls roosted at night on the next hunting trip.
30. On the night of the incident after the defendant had bought new batteries for his torch he thought to ask the complainant to show him where the wild fowls roosted as she had earlier offered. He went and called out to the complainant at about 10pm and when the complainant came out he told her to wake the girls. The complainant called one of the girls, Kathleen, who said her leg was sore and when he asked after the other three (3) girls the complainant herself said to leave them to sleep.



31. The defendant said he was carrying a basket of stones, a slingshot and a torch when he and the complainant set out to hunt for wild fowl. He denied he was carrying a knife nor did he see the complainant carrying a knife. Describing the incident he said:

"I asked her where is the wild fowls and she mentioned two (2) places – one (1) place was at the Western side of the village and the other was to the South. We headed to the Western side. We went about three hundred (300) metres.

Q: *Who was holding the torch?*

A: *I was holding the torch and shining it on the road and into the trees.*

Complainant pointed to a mango tree under the Nambanga tree and said one fowl sleeps there. So we headed towards the mango tree.

Under the mango tree I torched up but saw no wild fowl or pigeon. Complainant was standing close to me and I felt her chest (breast) brush up against me from the back. I thought she was afraid or had made a mistake or was afraid of the devil. I moved away from her and through the corner of my eye I saw her smile and her teeth shone in the light.

*I continued to torch and she pressed her breast against me again and now (this time) rubbish thoughts came into my mind ("**tingting blo mi inogud**")*

*I brought the torch between us and I said to her: "I see you want something". She smiled and her eyes said: "yes". I asked her: "would you be alright to suck my cock?". She said: "Sucking your cock is no trouble it's the same as kissing a baby". She reached out and held my penis and continued to hold it ("**long time smol**"). She reached into my sports trousers elastic. She held my penis two to three (2-3) minutes. I didn't say anything to her. I was still holding the torch but it was turned off.*

My cock became erect and I pushed my trousers down to expose it fully and she went down at the same time and pushed my cock into her mouth and began to suck it.

Q: *Did you touch or pull her head down to your penis?*

A: *When she started sucking and I felt "igud" that's when I began to rub her head. She sucked for more than one (1) minute. I ejaculated into her mouth.*

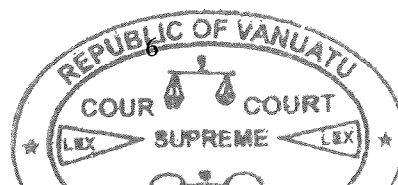
Q: *Did complainant ever try to push your cock away or pull it out of her mouth?*

A: *No*

*When I ejaculated the complainant stopped ("**i brek**") took my cock out and spat out my sperm then complainant stood up and when I torched her, her calico top was gone and she was naked. I held one breast and sucked on it ("**smol taem nomo**") and she laughed. Then we started to return home.*

*As we neared her home the complainant said we had to go the other place on the Southern side. It is about 500 metres, further than the Western place. We went to an old pig fence went through the wire to the other side and complainant started holding me again. She put one hand on my shoulder and the other on my cock again and asked me to "**fuckem hem**".*

*I told her "we agreed to suck but not for intercourse". So she said "alright let me suck you again". She sucked my penis again. She sucked and stopped and said: "I've sucked for too long" ("**mi titi long taem ia olsem yu fuckem mi nomo**"). I told her if you tired*



let's go coz we haven't reached where the fowls are. So she continued to suck until I ejaculated again.

Then we continued on our way and I torched and saw two (2) pigeons resting in the trees together, I gave the torch to the complainant and prepared to shoot. I shot at them and hit one, it fell down. It was a native pigeon "**kapair**". Complainant held the pigeon then we went to where the wild fowls were supposed to be roosting but when I torched there was no fowl. Then we returned to our house. Complainant went to her sleeping house and I returned to my room.

Next morning she called out to me: "police kam kakai banana i hot yet ... mi boilem" (**come and eat banana I just boiled**). I went outside and we ate banana for breakfast with all the girls. Then we yarned until the sun rose up and complainant remembered the pigeon and sent Kathleen to fetch the pigeon from her sleeping house. The pigeon was plucked and cleaned and Kathleen roasted it.

Q: What was complainant's disposition?

A: She appeared happy, glad.

After the incident I remained in the village for another two (2) weeks before leaving for Santo.

Q: Where was Tom lotil?

A: When I went there, he was in Vila and during the time I was in the village he was away in Vila but he returned before I left for Santo.

He returned to Tanna while I was still there we stayed together for one (1) week in the village then I left for Santo. During that week Tom never talked angrily to me. During that week he asked me for some money to help them repair a house. I gave them VT300.000 to Tom to pay for wire, blocks, cement and we helped a builder to build and repair the house.

I returned to Santo and got my family, wife and children, and we came to Tanna on 25/07/2007 and we all lived together with the complainant and Tom lotil in same compound using the same kitchen and living in the same house. Lived there from 2007 until 2015.

Q: At any time did Tom "toktok kros lo you"?

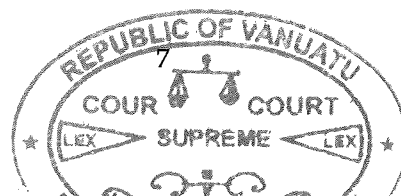
A: No gat

Q: Or did complainant "totkok kros lo yu"?

A: No gat

In 2015 the complainant and Tom went to Vila before cyclone Pam. We stayed in the village. They were about to return from Vila with Peter Nanuman and they called their son "Yasu" form Vila and I overheard their conversation and I told Yasu to tell his parents they should not bring the child to the village."

32. The defendant also testified about attending two meetings with Tom lotil in 2018 concerning land issues. The first, in January about the building of a Muslim mosque and houses on customary land. On that occasion Tom lotil came with a pig and kava to the meeting with the intention of killing the pig to take back the defendant's customary name "**Nanuman**" and return the defendant to his biological parents' village. In short to get rid of the defendant from their custom

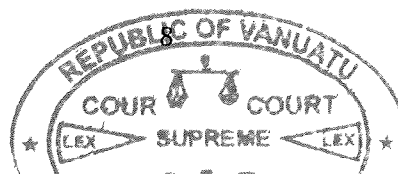


ground that he was building his house on and making his garden. The meeting rejected Tom Iotil's presentation as not being on the agreed agenda.

33. The second meeting in April directly concerned Tom Iotil's demand that the defendant be removed from the family's customary land. At this second meeting the chiefs decided that the defendant and Tom Iotil should reconcile and live peacefully together. Prior to the meeting the complainant and her husband had sent several messages through local chiefs for the defendant to stop building his house and gardens as he had not sought their permission.
34. In cross-examination the defendant consistently maintained his evidence and firmly denied specific aspects of the complainant's evidence that was put to him. He denied forcing the complainant to suck his penis or pushing her head towards it. He was adamant that the allegations were "*trumped-up*" after a land dispute arose between him and the complainant's husband.
35. He agreed he had "*instructed*" the complainant that night meaning he had asked her if it was alright for her to suck his penis and she agreed. Asked about him holding a knife at the time of the incident the defendant said: "*my Lord wild fowl sleep high up and you need a sling shot or bow and arrow to hunt them not a knife*". Asked if he knew the complainant didn't want to suck his penis the defendant answered: "*She wanted to ("**hemi wantem**")*". *She never told me she didn't want to suck my penis I didn't know ("**luk save**") she didn't want to, she did want to suck my penis*". Asked about the complainant's disposition the next morning after the incident the defendant said: "*her face was glad and she cooked for me early morning. She was happy*".
36. In re-examination the defendant clarified that "*since 2007 to 2015 life was normal no row row but when dispute about land started then there was an attempt to have meeting in nakamal and then last year they tried to attack me again*".
37. The defence also called two witnesses **Kathleen Tao** and **Tom Taia**.
38. **Kathleen** confirmed being closely related to all the parties "*as family*". She testified to staying with the defendant and three other girls in the same house and to going pigeon-shooting one night with the three other girls and the defendant in June 2007 when the defendant returned to Tanna after working in Africa. The complainant was also there at the time but did not accompany them.
39. She recalled the defendant going pigeon-shooting on another night with the complainant. To the question: **Q:** "*How do you know that?*"

she answered:

A: "*Apu (the complainant) called me to go and shoot pigeon and I declined because I had a sore foot so the complainant and the defendant went alone together and I slept all night at home*".

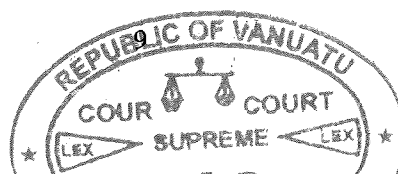


40. She testified that on the morning of the day after the defendant and complainant had gone pigeon-shooting, after breakfast when the sun had fully risen, the complainant sent her to fetch a pigeon from inside the complainant's sleeping house to cook it for them to eat. The complainant plucked and cleaned the pigeon and she roasted it. They remained living with the defendant for another week or so before he left for Santo.
41. On another occasion in June 2018 at the time of the "World Cup" she went to the complainant's house to ask for the balance money owing on some corrugated iron sheets "*kappa*" she had sold to them. While there in the complainant's kitchen, she saw Tom lotil and Chief Tom Taia conversing outside. She testified that after Tom Taia had identified himself the complainant said she was afraid of him because he was "*the person who made us put your uncle (the defendant) in prison. We never thought one day we would put our son (the defendant) in prison. That's the man who came and instigated us to put your uncle in prison*". Kathleen was unshaken in cross-examination.
42. **Tom Taia** confirmed he is the chief of Lapangnuwing village where the defendant and complainant lived. As part of his chiefly duties he deals with and tries to resolve problems within the village. He recalls dealing with problems concerning the complainant's two children: "*Yasu*" and "*Monique*" and a problem between the complainant and the defendant sometime in May 2018 where the allegation was: "*they were liking each other*". He also dealt with the complainant and defendant over a land problem where Tom lotil (the complainant's husband) had sent him to tell the defendant to stop building his house. The defendant disagreed and said he had been adopted by Tom lotil's father to be Tom's younger brother with the customary name "*Nanuman*".
43. He confirms attending a meeting in 2018 about a land problem where Tom lotil had brought a pig to the nakamal to kill it and seek the defendant's return to his biological family. On another occasion may be in April 2018, when he was sent by Tom lotil to tell the defendant to stop building, the defendant refused claiming the land was given to him by his "*pupu*". When he returned and informed Tom lotil of the defendant's refusal to stop building, Tom lotil said:

"We need to find a way to remove Peter (the defendant) and one way is to dig up the problem he had with the complainant in 2007 and we will report it not as a problem of "like/likem tufala" ("an abnormal liking for each other) but we will say it's a rape".

The report would not be made at the Tanna Police Station instead it would be made to "*Nos*".

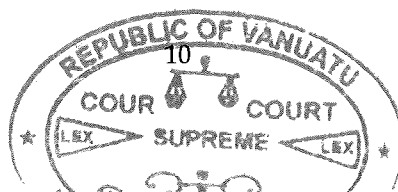
44. He recalls during the "World Cup" going to the complainant and Tom lotil's house to talk about work they planned to do and seeing Kathleen with the complainant inside their house. In cross-examination about his police statement he agreed



that much of his evidence in Court was not recorded in his police statement but he denied lying about the several problems that existed between the complainant and her husband and the defendant. In re-examination when asked what he meant in his police statement about not agreeing with the court case against the defendant, he said:

"I didn't agree because the report made by Tom Iotil was not correct or right in my thinking because the problem was not about the complainant, it was about the land so that's why I don't agree".

45. The difference between the complainant's and the defendant's evidence and their version of the events of the night in question is diametrically opposed in several respects and raises some stark factual issues including:
- (1) Whether the defendant was holding a "bell knife" (machete) during the alleged incident?
 - (2) Whether the defendant had asked the complainant to wake the girls to accompany them that night?
 - (3) Whether the defendant forced the complainant to hold (masturbate) his penis?
 - (4) Whether the defendant directed the complainant's head towards his penis and pushed his penis into the complainant's mouth?
 - (5) Whether the complainant felt bad and was upset and ashamed the following morning after the incident?
 - (6) Whether the complainant knew about any land dispute involving herself and her husband, Tom Iotil and the defendant?
46. During the course of the trial I closely watched and listened to the complainant and the defendant give their evidence both in-chief and under cross-examination and I have no hesitation in saying that I found the complainant a less than truthful witness and I disbelieve her evidence on each of the six (6) factual issues identified above. The complainant struck me as not only selective in her memory of events but much of her evidence was vague, improbable and unbelievable. It lacked crucial details and was uncorroborated. She also tended to exaggerate her denials of contrary evidence.
47. The defendant on the other hand, gave detailed and believable evidence of the events of the night in question and its aftermath. In several important respects the defendant's evidence was also independently corroborated by the evidence of Kathleen and Tom Taia both of whom I found to be credible witnesses who

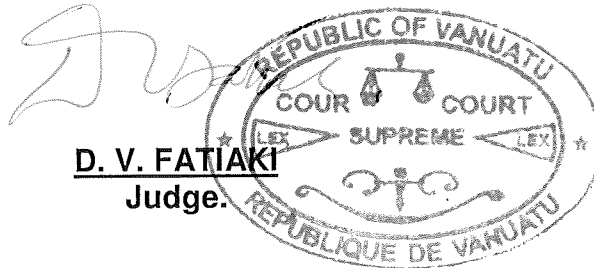


testified to events and conversations that they saw and heard without bias or exaggeration.

48. In the final analysis after considering all of the evidence in the case for the prosecution and the defence, I was not satisfied beyond a reasonable doubt that the prosecution had discharged its burden of establishing the defendant's guilt to the required standard. In particular, I entertained a serious doubt as to whether or not the complainant consented to sucking the defendant penis or that the defendant did not reasonably believe that the complainant was consenting to it.
49. The foregoing are the reasons for the Court's oral acquittal verdict delivered in open court after counsel's closing addresses at Isangel, Tanna on 14 June 2019.

DATED at Isangel, Tanna, this 14th day of June, 2019.

BY THE COURT



D. V. FATIAKI
Judge.