

**PUBLIC PROSECUTOR**

v

**DAVID LUAN**

*Coram:* Chief Justice Vincent Lunabek

*Counsel:* Ms. Marie Taiki for Public Prosecutor  
Mr. Roger Tevi for Defendant

*Date of Hearing:* 19 November 2019

*Date of Decision:* 19 November 2019

---

**JUDGMENT**

---

**Introduction**

1. Mr David Luan is the Defendant in this case. He was charged with two counts of unlawful sexual intercourse, contrary to section 97(2) of the Penal Code Act [CAP 135].

2. Particulars of the offences are as follow:-

Count 1:

David Luan, on or about the month February 2018, at Black Sands area, you had sexual intercourse with a girl (name), by penetrating her vagina with your penis and at that time the girl was 13 or 14 years old.

Count 2:

David Luan, on or about the month of March 2018 in a bush area, you had sexual intercourse with the same girl (name) by penetrating her vagina with your penis and at that time, she was 13 or 14 years old.

3. The Defendant pleaded not guilty to both Counts. A trial was required.

4. The trial begins today 19 November 2019. The prosecution has to prove each and all essential elements of the two offences beyond a reasonable doubt. If there



is a reasonable doubt as to the guilt of the Defendant in any or both he must be acquitted.

**Prosecution Case.**

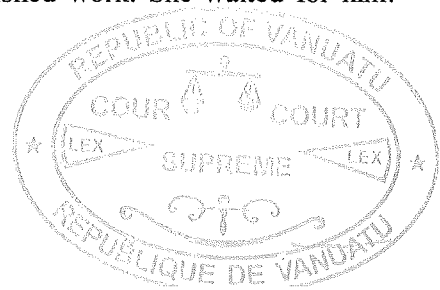
5. The Prosecution indicated that the Prosecution will call two witnesses in respect of both offences. The first Prosecution witness will be the complainant (girl) and the second will be the investigating police officer.
6. Before the Prosecution case started, the statement of presumption of innocence of the accused was read and explained to him. He understood it (Section 81 CPC [Chapter 136]).
7. The prosecution made the opening of the prosecution case to the following effect. This case involved two separate incidents. The First incident occurred in February 2018 and the second incident was in March 2018. The Accused and the complainant were the same in both cases.

**February 2018 incident**

8. Sometime in February 2018, the complainant girl was at her home at Black Sands area the Defendant came to the complainant's house. She was with her little brothers and sisters. Her mother was selling food at 20 vatu Market section. The Defendant came to her and asked to go out with her. The complainant refused. The Defendant insisted. The complainant following the Defendant into an empty house. The Defendant asked the complainant to remove her cloth, she refused. So the Defendant removed the girl's cloths himself and had sexual intercourse with her by penetrating her vagina with his penis. She was 13 or 14 years old and the Defendant told her not to tell anybody of what he did to her.

**March 2018 incident**

9. Sometime in March 2018, the girl complainant finished school at lunch time, she was walking home with her friends and arriving at Esa Corporation at Tebakor where Defendant worked.
10. The Defendant was working at that time and he saw the complainant. He told the complainant to wait for him until he finished work. She waited for him.



When the Defendant finished work, he and the complainant walked back home to Black Sands.

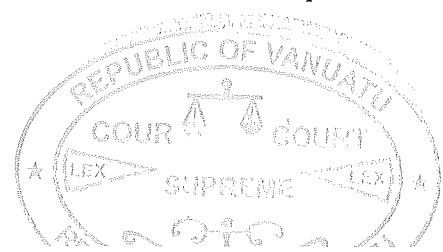
11. They were following the road at the Man place and arrived at a bushy area, the Defendant asked her to go out with her (asking her for sex). She refused. The Defendant insisted. She followed the Defendant in the bush area. The Defendant removed her cloth. He had sexual intercourse with her by penetrating her vagina with his penis.

**Prosecution evidence – Hostile Witness**

12. The prosecution tendered agreed statements including the date of birth (DOB) of the complainant.
13. The prosecution called the girl complainant as the first prosecution witness (PW1).
14. She gave evidence to the following effect. She gave her name. She is 15 years old. She is in class 10 at Tebakor School.
15. She was taken to the first incident of February 2018. She gave the following answer:

*“Mi bin makem 1 statement lo police be statement ia ino true hemi kiaman statement nomo.” (Transalated) [I have made a statement to the police but that statement was not true, it was a false statement].*

16. The Court granted a short adjournment to the Prosecution.
17. After the short adjournment, the prosecution tried to establish the memories of the complainant relating to the making of the statement to the police but the witness persisted the statement was a false story. (Hemi wan kiaman story). The statement was shown to the witness. She said it was a false statement. She was invited to turn to page 1 of the statement. She did so. She was asked whether the signature on the statement was hers. She answered it is her signature on the statement but the statement was false.
18. She was asked to turn to the next page to number 6 line. The passage in the statement was read to her. She was asked whether she remembered that part of

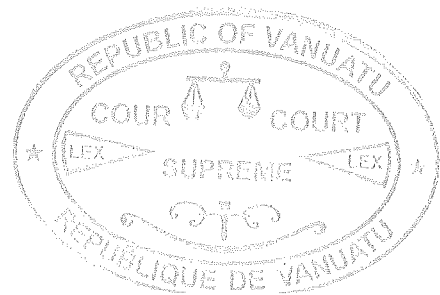


the statement that she gave to the police. She said “*yes be hemi kiaman nomo lo ol toktok ia.*”

**Prosecution’s oral application for leave of the Court to declare PW1 hostile witness**

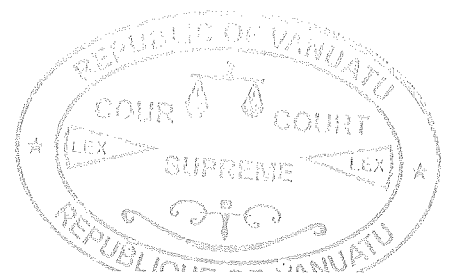
19. The Prosecution then seeks leave of the Court to declare this witness a hostile witness.
20. The Court permitted the prosecution to deal with the prosecution’s own witness as hostile witness by asking the witness leading questions. The purpose of doing so is to demonstrate hostility, providing a basis for application for leave to cross-examine the witness and leave to prove her prior inconsistent statement.
21. She was asked and she answered she made a statement to the police on 3 May 2018.
22. It was put to her that when the police took the statement from her, the police explained to her that what she said in the statement must be true. She answered “*yes I true*”the police explained that to her.
23. She was asked on the day the police took the statement from her whether the statement she gave to the police was a true story. She answered no. “*Hemi wan kiaman story.*”
24. She was asked whether the signature on the statement was hers. She confirmed it was her signature on the statement.
25. She was asked of the statement appearing at the bottom of the 1<sup>st</sup> page of the statement to the following effect”

*“Mi talemaot se toktok blong mi ie true. Mi save se baebae mi go long court sipose toktok blong mi hemi no true or sipose mi think se toktok we mi kivim oli no true,”* and it was put to her whether she understood what it meant. She answered yes.
26. She was taken to the statement in respect to the incident of March 2018. She was referred to that specific passage and it was put to her that at the time she made



the statement to the police, what she told the police of March 2018 incident was true. She answered, it was not a true story. "*Hemi wan kiaman statement.*"

27. She was asked whether she was afraid to tell her story to the Court. She denied and said no.
28. The specific part of her statement relating to March 2018 incident was referred and read to her. It was put to her that when she made the statement to the police, it was a true story. She denied it was a true story. She said it was a false statement.
29. It was put to her whether she was afraid to tell the Court of what she tell the police of the March incident. She denied by saying No.
30. It was put to her when she made the statement to the police of the March incident, it was true. She denied by saying No.
31. It was put to her she signed the statement she made to the police because the statement was true. She denied. She said the statement was not true.
32. She was asked as to the reason why she told the Court that the statement she made to the police on 3 May 2018 was not true and it was false.
33. She answered: "*Mamy ie hearem wan kiaman toktok, after hemi kilim me, after hemi takem mi mi go lo police station blong makem wan statement.*"
34. She was asked to explain what she meant.
35. She answered "*Hemi kilim me, mi fraet after mi makem wan kiaman story nomo.*"
36. She was asked she accepted she never told her mother that the story was not true.
37. She was asked she accepted that at the police station, she never told the police that what she told the police in her statement was not true.
38. It was put to her that her statement to the police on 3 May 2018 was true. She denied.



**Declaration of hostile witness**

39. The Court then, declared that the girl complainant (PW1) is a hostile witness.

**Lunch Adjournment and sequence**

40. The case was adjourned to 2.00pm o'clock with the intention to ask the Defence lawyer to cross-examine the girl complainant if need be and for the prosecution to call the prosecution's last witness.

41. When the Court resumed in the afternoon at 2.30pm, the prosecution informed the Court that given the evidence that transpired from this witness victim this morning the Prosecution will have no further evidence to call.

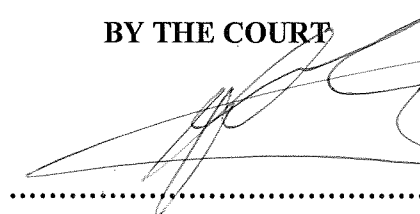
42. The Prosecution will be referring this matter to the police criminal investigation under section 76 of the Penal Code Act for false statement. That is a matter for the prosecution in the public interest of justice in the criminal justice system.

**Verdict**

43. The Court, accordingly, acquitted the Defendant, David Luan, on both Counts 1 and 2 as the Prosecution failed to prove both counts on beyond reasonable doubt against the Defendant.

**DATED at Port Vila this 19<sup>th</sup> day of November, 2019.**

**BY THE COURT**



**Hon. Vincent Lunabek**

**Chief Justice**

