

IN THE SUPREME COURT OF  
THE REPUBLIC OF VANUATU

*(Criminal Jurisdiction)*

Crim Case  
SC/ CRML No. 19/3135

**BETWEEN: Public Prosecutor**

**AND: Stephen Kalo**

**Defendant**

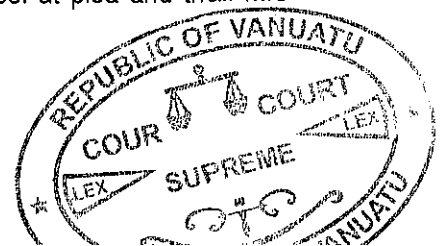
Date of Trial: 10<sup>th</sup> December 2019  
Date of Verdict: 19<sup>th</sup> December 2019  
Court: Justice Oliver A. Saksak  
Counsel: Philip Toaliu for Public Prosecutor  
Marisan P Vire for Defendant

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**VERDICT**

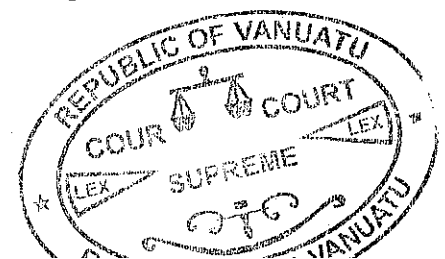
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1. The defendant stood trial on 10<sup>th</sup> December 2019 at the court in Luganville, Santo after pleading not-guilty to a charge of domestic violence laid under sections 4(1) and 10 (1) of the Family Protection Act No. 28 of 2008, and to one charge of unintentional harm laid under section 108 (a) of the Penal Code Act Cap. 135.
2. At the end of the Prosecution case the defendant made a no- case submission. The application was dismissed on 10<sup>th</sup> December 2019. The reasons are contained in the ruling published on the same date
3. Section 88 of the Criminal Procedure Code Act [ Cap 136] was read to the defendant. He chose to maintain his right to silence.
4. The Court gave time for written submissions. Prosecution filed written submissions on 12 December 2019 at 8:30am. The defendant filed lengthy submissions at 11:50am on 12 December 2019. This is unusual because he had Mrs Vire as Counsel at plea and trial. Mrs

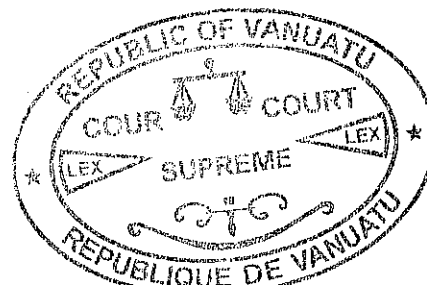


Vire filed a short submission at 8:20am on Friday 13 December 2019. This was 30 minutes before the verdict was to be handed down.

5. I decided that in light of the long submissions filed by the defendant himself and that filed by his Counsel, that Mr Toaliu should be given the opportunity of the final reply. I met with Counsel in Chamber at about 8:45am on 13 December 2019 to inform them of this difficulty and extended time for the defendant to produce to the Court a copy of the Moti case, and for Mr Toaliu to file replies by Tuesday 17 December. I deferred verdict to Thursday 19 December.
6. The defendant, again took the unusual step of filing further closing submissions instead of his legal Counsel on 16 December 2019 at 8:00am. He attached the decision of the Court of Appeal in the Moti Case [1999] VUCA 5.
7. Mr Toaliu filed responses to the defence closing submissions on 17 December 2019 at 2:00pm.
8. For both offences charged, the burden of proof is one of proof beyond reasonable doubt and the burden rests on the prosecution to prove the defendant's guilt in this case.
9. For that purpose the Prosecution called 5 witnesses namely Florida Lessa, Helena Lessa, Dr Michel Raymond, Hannaline Ilo (Magistrate) and Joyce Tari (victim/ complainant). The last witness chose not to give evidence against the defendant after having taken her oath.
10. The summaries of all the evidence in chief of the 4 remaining witnesses are to be found in paragraph 4 (a), (b), (c), and (d) of the Court's Ruling dated 10 December 2019. I need not reinstate them here.
11. The elements of domestic violence offence under section 4 of the Family Protection Act are (a) that the defendant committed an act of assault (b) the assault was done on a member of his family, and (c) the assault was intentional.
12. Under section 108 (a) of the Penal Code Act the elements of the offence are (a) whether the defendant caused harm to David Kalo, (b) harm was unintentional, (c) it was done through recklessness or negligence or failure to observe law, (d) the assault caused damage of a temporary nature.
13. Florida Lessa was with her mother Helena Lessa in the afternoon of 20 October 2019 when Joyce and her baby David Kalo came out of their house. They came over to their house. Joyce and the baby were seen crying. This witness heard them cry out loud on the other side from their own house. She saw belt marks on Joyce's body and asked her what happened. Joyce told her and Helena Lessa that Stephen (defendant) had assaulted her with a belt (strap) and that the belt buckle got David on his right knee causing a scratch and causing the baby to cry out. After speaking to them Joyce took her baby and they left through the gate.



14. Helena Lessa confirmed Florida's evidence. From 8-10 meters away she heard loud cries from Joyce and her baby David who then left their own house and came over to their house. They were crying. She confirmed she asked Joyce what happened and Joyce told her the defendant had hit her with a belt which also got her baby on the knee, causing injury. Joyce then removed some clothes and she and her baby left their house through the gate.
15. Joyce and baby David arrived at Hannaline's residence at Santo East. She saw Joyce crying. Joyce told Mrs Ilo that the defendant had assaulted her and the baby. She wanted to report the incident to the police. Mrs Ilo facilitated that to happen by taking them down to the Police station.
16. Dr Michel Raymond confirmed seeing Joyce and the baby at 9:00pm on the night of 20 October 2019 explaining the reason for such a late appointment. He confirmed the injuries caused to the right upper forearm and right knee of David Kalo were caused by a blunt trauma, a result of an assault.
17. The victim was Joyce Tari and her baby David Kalo. Her complaint made to the Police at 1643 hours on 20 October 2019 was one of Domestic violence. Joyce is not legally married to the defendant but lives in a defacto relationship. And they have a baby boy David as a result of that relationship.
18. Her complaint was that in the afternoon of 20 October 2019 the defendant had gone to swim in the sea and returned home to rinse in the bathroom. The door was locked. He asked her for the key and Joyce Tari told him to find it himself as she was breast feeding David in the room. This made the defendant angry. He took his belt and assaulted her on her leg and hand while she was breastfeeding David. The buckle hit David's knee causing it to bleed. She was not happy at the way the defendant had treated her and especially baby David who was slightly injured as a result.
19. That complaint made to the police stands despite the victim decided not to give evidence in Court. Joyce Tari falls under the definition of "spouse" under section 5 of the Family Protection Act (FPA).
20. As such, section 34 of the FPA states she is a competent and compellable witness in this proceeding. She could have given evidence without the consent of the defendant (section 34 (a) and (b)), but she chose not to. The Court respected her decision.
21. The evidence of Florida, Helena, Mrs Ilo and Dr Raymond are all consistent with the complaint of Ms Joyce Tari.
22. The revealing of the acts done to her and baby David by the defendant to Florida and her mother Helena, then to Mrs Ilo were recent complaints.



23. Florida and Helena heard Joyce and the baby crying aloud in their house then immediately after that, they left their house and came over to theirs, crying and were seen with minor injuries with bleeding on David's knee. That is direct evidence that an assault had taken place. Had there been no assault, there would have been no crying aloud, no leaving of their house to Florida's house and no crying and bruises seen, and no leaving of the house subsequently.
24. I am satisfied the prosecution has proved its case and all the elements of the two offences charged, beyond reasonable doubt.

### Submissions

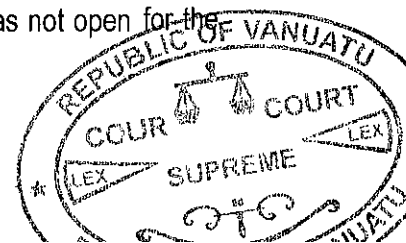
25. It was submitted by the defendant and his counsel that the Court should find the defendant not guilty because-

- a) Section 143-146 of the CPC Act Cap 136 were not complied with. The defendant relied on the case of Moti v PP [1999] VUCA 5.

I have seen Mr Toaliu's submissions in response. I agree with Counsel that Moti's case is distinguished in that he faced triable offences which required compliance with the requirement of section 143 (1) of the Criminal Procedure Code Act. Secondly I agree with Counsel that this Court has unlimited jurisdiction and in the circumstances where as here, there was likelihood of bias if the Senior Magistrate or a Magistrate was to conduct a preliminary injury hearing under section 143, it was absolutely necessary for the matter to be referred directly to the Supreme Court.

Thirdly in any event the Court inquired into the case on 10<sup>th</sup> December 2019 by hearing evidence from Florida, Helena, Dr Raymond and Mrs Ilo. At the end of which Mrs Vire made a no-case submission. The Court was satisfied there was prima facie evidence not only to require the defendant to make a defence but that evidence is such that a reasonable jury could convict the defendant on. In a technical and legal sense a PI has been held. The submissions by the defendant on this point is therefore untenable and rejected.

- b) That Mrs Ilo was biased and in conflict and that she did not make a statement to the police. I find there to be no bias on the part of Mrs Ilo as Senior Magistrate. She stood in a position of being a "mother" to Joyce who rarely visited her except on this occasion which was unusual. She asked for assistance to go see the police and make a complaint and that is what Mrs Ilo did. She took a photograph which Mrs Vire objected to late in the evidence but fortunately which the Court accepted and disallowed. But Mrs Vire did not and never objected to Mrs Ilo giving evidence. I therefore agree with Mr Toaliu that on the clear authority of Pakoa v PP [2019] VUCA 51 it was not open for the



defendant to raise this submission in its closing submissions. That submission is therefore rejected.

- c) That the evidence of Florida and Helena Lessa were hearsay evidence. Again I accept Mr Toaliu's submissions on the basis of the case law referred that their evidence were direct evidence. And Dr Raymond's evidence simply corroborated or confirmed those evidence. The statements of Florida and Helena are so closely associated with the relevant event complained of. And they are admissible evidence.
- d) That the belt alleged to have been used was not produced in evidence. This was irrelevant. The doctor's report confirmed it was done by a blunt trauma. Whatever object caused it is in all likelihood without evidence to the contrary, was a belt as stated in the complaint. But it does not matter what that object was. The reality is that there was an assault and there being no other male person in his house at the time, in all likelihood, only the person causing the assault on Joyce Tari and the unintentional harm on David Kalo (baby) was the defendant himself.

26. The further closing submissions filed personally by the defendant on 16 December 2019, except for the case law of Moti are improper and are rejected.

27. I therefore find the defendant guilty of one charge of domestic violence and of one other charge of unintentional harm. I convict you Mr Kalo accordingly.

**DATED at Port Vila this 19<sup>th</sup> day of December 2019**

**BY THE COURT**

  
**OLIVER.A.SAKSAK**  
Judge

