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

Criminal Case No.93 of 2008

PUBLIC PROSECUTOR
-V-
RONNIE MARTIN

Mr. Erick Molbaleh for the State
Mr. Daniel Yawha for the Defence

RULING/VERDICT

At the close of the Prosecution's case defence counsel made a submission that the accused had no case to answer on all 6 counts laid in the Information by the Public Prosecutor.

The high threshold which the submission must meet if it is to be successful is set out in section 164 (1) of the Criminal Procedure Code and reads: "*... as a matter of law that there is no evidence on which the accused person could be convicted ...*" Such a threshold requires the Court to objectively consider the elements of the charge and the evidence (if any) that supports it.

In brief, as to the first four counts with which the accused was charged in the Information, namely, (**count 1**) Act of Indecency with a young person contrary to section 98A of the Penal Code; (**Count 2**) Act of Indecency without consent contrary to section 98 (a) of the Penal Code; (**Count 3**) Incest contrary to section 95 (1) (a) and (2) of the Penal Code; and (**Count 4**) Sexual Intercourse without consent contrary to section 91 of the Penal Code, defence counsel submitted that there was a common thread or lacuna in the prosecution's evidence in failing to establish either some indecent act occurring between the accused and the complainant or actual sexual intercourse. The only significant evidence called by the prosecution to establish this essential element or ingredient was the complainant herself Rayline Ronnie.

The complainant's sworn evidence is to the effect that at no time whatsoever did the accused act indecently towards her or have sexual intercourse with her and, despite being declared '*hostile*' and being closely cross-examined on her prior inconsistent police statement, the complainant remained steadfast and consistent in her sworn denial that the accused had acted indecently towards her or ever had sexual relations with her.

Indeed the complainant was adamant that it was her aunt Betty Nicholson (who was not called as a prosecution witness) who had '*forced*' her to falsely complain that the accused had acted indecently with her and had sexual relations

with her, when, the only grievance that the complainant had against the accused was that he had often whipped her sometimes with a belt and a stick leaving marks and swelling on her arms as shown in the photographs identified by the complainant and tendered as prosecution exhibits P5 and P6.

At the end of defence counsel's "*no-case*" submission, prosecuting counsel conceded that on counts 1, 2, 3 and 4 of the information which concerned the indecency and sexual charges against the accused, there was "*no evidence*" to support the charges. Likewise, counsel conceded that on the 6th count of Threats to kill contrary to section 115 of the Penal Code, there was no evidence of the accused ever uttering such a threat to the complainant.

I consider these concessions are all well made and proper and in accordance with the provisions of section 164 (1) of the Criminal Procedure Code, I enter verdicts of '*not guilty*' on Counts 1, 2, 3, 4 and 6 of the Information. All that now remains for consideration is Count 5.

In this latter regard prosecuting counsel was firm in his submission that there was (in law) evidence sufficient to call upon the accused to make a defence to count 5 which charges the accused with an offence of intentional assault contrary to section 107 (b) of the Penal Code.

In support of this submission prosecuting counsel highlighted the complainant's uncontested sworn evidence that the accused had whipped her on numerous occasions using a belt and raising whelts and swelling on her arms as shown in the prosecution photographs. Although no medical report was produced as to the complainant's injuries it is common ground that no permanent injuries were caused to the complainant which is sufficient for a charge under section 107 (b).

Defence counsel in urging that there was no case to answer on Count 5 also drew attention to the complainant's uncontested sworn testimony to the effect that she would be whipped by the accused whenever she does something wrong or was naughty at home such as going out with boys and returning home late at night without permission. Whenever she was whipped, sometimes with a belt or a stick her arms would swell up and lasted a few days but didn't need medical attention.

Without referring to it directly defence counsel was plainly relying on the common law defence of '*lawful correction*' or '*parental discipline*' as accepted and recognized by the Hon. Chief Justice when he observed in the course of delivering the Court's decision on a presidential reference (involving the Family Protection Bill) in: President of the Republic of Vanuatu v. Speaker of Parliament [2008] VUSC77 (at p.11):-

> "*... There is nothing in the Bill which prohibits the exercise of genuine parental discipline. The term 'assault' is not defined in the Bill nor is it defined in section 107 of the Penal Code [CAP. 135]. In both, the meaning of 'assault' is supplied by the common law. The common law recognizes the exception*

lawful chastisement where a parent delivers reasonable corporal punishment to a child. Such punishment does not amount to an assault at common law and so would not amount to an assault under the Penal Code ..."

I respectfully agree and would highlight for present purposes the critical phrase of the common law defence which is: "*a parent delivers reasonable corporal punishment to a child*".

In considering such a defence the Court must assess, on the facts, whether the punishment is "*reasonable*". In making that assessment the Court must take into consideration the age, build, and mentality of the child and the instrument (if any) that was used in administering the punishment; the frequency of its use, the area of the body to which it was applied and the nature of any injuries caused. The Court may also take into consideration the duties imposed on parents and children by Article 7 (h) and (i) of the Constitution. Parents have a duty to educate their children, and children, a corresponding duty, to respect their parents.

The Court is also required in determining whether the punishment was '*reasonable*', to have regard to present day conditions and commonly accepted standards and punishment methods prevailing in Vanuatu. What is unacceptable in other countries and societies may not necessarily be so in this country. As was said by Dalgety J. in *Uhila v. Kingdom of Tonga [1992] TUSC4 (at p.4)*:

"*I am unable to conclude that 10 strokes inflicted upon a nine year old boy for gross disobedience and willful and persistent misconduct is excessive. It might be abroad, but not in Tonga! As to the mode of chastisement I do no feel able to rule that there is anything objectionable to the use of a manioke stick*".

It must also be remembered that corporal punishment is not *per se* unlawful and that parental punishment of a child is given for the benefit of the child's education and for the purpose of correcting the child in wrong behaviour. Any reason(s) given for the punishment is therefore a relevant consideration including, whether it took place in public view on in the privacy of the family home. Needless to say, corporal punishment by its very nature involves some physical pain and is inherently humiliating.

I am also mindful that the burden of disproving the common law defence of reasonable parental correction rests on the prosecution once there is credible evidence of its existence. In this case it would have been obvious that such a defence was available on the complainant's police statements and undisputed sworn testimony as well as from the accused interview statement.

I turn next to consider the evidence. The complainant admitted to having sexual relations in 2006 and in 2008 with 2 different boys and that she had been counselled by her parents against going out with the neighborhood boys. She

frankly admitted to being whipped by the accused for returning home late after being with her boyfriend without her parents' knowledge or permission. The accused had also whipped her younger siblings on occasions for not doing what they should. She accepted that their whipping was not as hard as hers because they were smaller than she was which suggests some appreciation on the part of the accused of the use of corporal punishment.

The question the Court must ask itself is, given the paucity of the evidence, am I satisfied that the prosecution has discharged its burden of establishing that the punishment inflicted on the complainant in this instance was so excessive, unusual, and misdirected as to be considered "*unreasonable*" by Vanuatu standards? I confess that the prosecution's evidence falls well short of discharging its burden and accordingly, I am constrained to enter a verdict of "*not guilty*" in respect of the sole remaining count namely, intentional assault.

The accused is free to go.

Before I leave this case, I should comment on a few matters that might assist future investigations and prosecutions of similar cases. This case highlights the need where a parent is to be charged with intentionally assaulting a child, for the authorities to carefully consider whether the actions of the parent was of such a nature and gravity as to warrant criminal charges being laid under the Penal Code. The mere fact that a complaint has been lodged against a parent is insufficient, in itself, to justify the laying of criminal charges especially where it appears from the evidence that the assault allegedly occurred as a result of the child being disciplined or punished for wrong behaviour.

Likewise in a charge of incest involving an adopted child, in the absence of an official record of such adoption, there is a need to produce evidence from which the Court might infer that a custom ceremony of adoption had taken place between the accused and adopted child, which extends beyond the mere fact that the adopted child has been part of the accused's family since birth (see: Sitangtang v. Public Prosecutor [1990] VUCA 1. In the recent case of. In re Estate of Molivono [2007] VUCA 22 the Court of Appeal relevantly said of customary adoptions:

> *"The mere assertion that it has occurred is insufficient. There must be clear evidence that what occurred was in accordance with the custom of that place and its traditions and approaches. What may be a recognizable form of adoption on one island or in one village maybe quite unacceptable and not worthy of recognition in another.*
>
> *If in any legal proceeding there is to be an assertion that there has been an adoption according to custom, the Court or tribunal will require clear and unequivocal evidence from those who had leadership positions in that area of custom as to what is required and what in fact occurred and that the appropriate recognition exists."*

It is also a counsel of prudence whenever considering charges for sexual misconduct over an extended period of time to confine the charge to the most

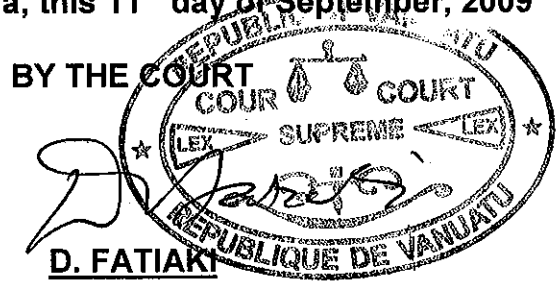
recent and most serious and the particulars of the charge should include as a bare minimum, a specific month and a year in the date of the alleged offence. Furthermore, where the parties are related by blood or belong to the same household and family, consideration should be given to the possibility of laying charges under the provisions of the recently enacted Family Protection Act No. 28 of 2008 which has as its purpose, the preservation and promotion of harmonious family relationships and the prevention of domestic violence in all levels of society in Vanuatu.

This case is also unusual in that, even before the trial had commenced in Court, the victim/complainant wrote to the Public Prosecutor asking that the case against the accused be withdrawn as she no longer wished to proceed with it. Despite the contents of the letter and the victim's clear indication that it was freely written by her without any form of coercion or pressure being put on her, the Prosecutor elected to proceed with the trial with the inevitable consequence that, the victim turned *'hostile'* and was permitted to be cross-examined on her prior inconsistent statements to the police which were exhibited as prosecution exhibits.

Needless to say, although the oral evidence of a hostile witness is generally considered unreliable, nevertheless, her police statements do not constitute evidence which the Court may act upon, in substitution for the witnesses sworn oral testimony in Court.

DATED at Port Vila, this 11th day of September, 2009

BY THE COURT



D. FATIAKI
Judge