

PUBLIC PROSECUTOR

-v-

CLOCLO VERLILI

Coram: V. Lunabek CJ

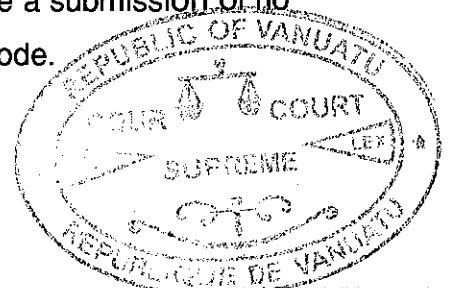
Counsels: Mr Lenry Young for Public Prosecutor
Mr Harrison Rantes for the Defendant

Date of trial: 19-20 October 2017

Date of Delivery: 24th October 2017

RULING ON NO CASE TO ANSWER SUBMISSION

1. Accused Cloclo Verlili is charged with one count of unlawful entry into a dwelling house with intention to commit a criminal offence, contrary to s.143 of Penal Code Act [Cap 135]. The accused pleaded not guilty to the charge. A trial proceeded on that basis on 19 and 20 October 2017.
2. The prosecution called four following witnesses:
 - The complainant Catherine Mahit,
 - The mother of the complainant (Winnie Mahit)
 - Police Constable Catheline Alick; and
 - Steward Garae, the husband of the complainant's sister.
3. The evidence of the Prosecution witnesses are tested and challenged under cross-examination by the defence.
4. At the end of the prosecution case, the Defence counsel made a submission of no case to answer pursuant to s.164 of the Criminal Procedure Code.



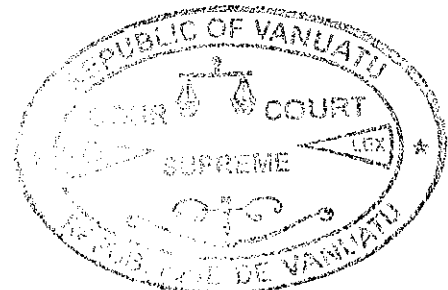
5. The defendant submitted that there is "no case" to answer. He submitted there is no evidence on which the defendant 'could be convicted.'
6. The submission is made pursuant to section 164 of the Criminal Procedure Code. It states:-

"(1) If, when the case of the Prosecution has been concluded, the judge rules, as a matter of law that there is no evidence on which the accused person could be convicted, he shall thereupon pronounce a verdict of not guilty.

"(2) In any other case, the Court shall call upon the accused person for his defence and shall comply with the requirements of section 88."

7. The judge in this jurisdiction is both the judge of law and the judge of facts when a no case submission is made at the end of the prosecution case pursuant to section 164 of the Criminal Procedure Code Act [Cap 136], it is made to the judge as the judge of law. In this submission of no case to answer, I sit as a judge of law and not the judge of fact.
8. I have had to go back carefully over the submissions made by the Defendant and the responses by the Public Prosecutor, and the evidence before the Court to ascertain what is the evidence before the Court on the elements of the charge laid against the Defendant.
9. The case of the *PP –v- Samson Kilman & Ors [1997] VUSC 21; No.5 of 1997* sets out the Guideline Judgment for the Court when faced with a no case submission. There, the Court adopted the pronouncement by Lord Cane CJ in *Reg –v- Gailbraith (CA) (1981) 1 WLR 1039*. The relevant passage reads as follows:-

(1) If there is no evidence that the crime alleged has been committed by the defendant there is no difficulty the judge should stop the case.



(2) *The difficulty arises where there is some evidence but it is of tenuous character, for example, because of weakness or vagueness or because it is inconsistent with other evidence.*

(a) *Where the judge concludes that the Prosecution case taken at its highest is such that a jury properly directed could not properly convict on it, it is his duty on a submission being made to stop the case.*

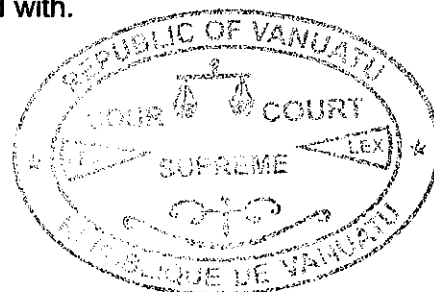
(b) *Where however the Prosecution is such that its strength or weakness depends on the view to be taken of a witness's reliability or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence on which the jury could properly come to a conclusion that the defendant is guilty then the judge should allow the matter to be tried. (Per. Lord Land CJ at p.127)."*

10. The next question is what is the standard of proof of no case to answer submission? *In Public Prosecutor –v- Noal [2016] VUSC 177, Criminal Case No.1487 of 2016 (2 September 2016), Geoghegan J adopted the test as stated by Speight J in Auckland City Council –v- Jenkins when that Court stated :-*

"A tribunal deciding whether or not there is a case to 'answer' must decide whether a finding of guilt could be made by a reasonable jury or a reasonable judicial officer sitting alone on the evidence thus far presented. He is ruling in fact whether it is 'prima facie' – a well understood phrase."

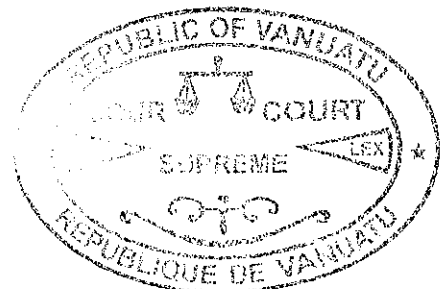
11. I adopt that test in this case. Under section 164 of the Criminal Procedure Code Act the test is not proof beyond reasonable doubt but rather as a matter of law whether the accused person **could** be convicted on the evidence presented thus far. The test is whether a finding of guilt **could** be made by a reasonable judicial officer sitting alone on the evidence thus far presented.

12. The submission of no case to answer requires the Court to refer to the evidence adduced by the prosecution more particularly, the evidence relating to the elements of the crime the Defendant has been charged with.



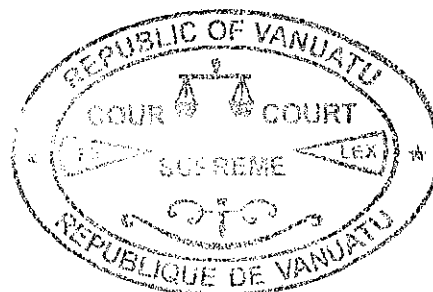
13. The prosecution case alleged that on 29 August 2016, a man entered into the house in which the complainant and her mother slept. Time was about 1.00am o'clock in the morning. The sleeping room is small. There is no door. The complainant slept on her backside. She felt a man touched her face. She thought she was dreaming. She then got up. She realized that a man touched her face. She opened her eyes. It was dark inside the room. The man squeezed her neck. She struggled to get release from him. She was successful. The man punched her face. She shouted. She took her mobile phone. She put her mobile light on. She saw the colour of his trousers, his shirt but she did not see the face of the man. She did not recognize the man. The man went outside. The mother got up. Her brother got up also in the next house. The man left beside the bed stones (carrier stones). The man is thin, short, wore a short black shirt, short trousers of colour blue but the blitz had taken off half the colour. He had black hat also. She thought the man is a well known from the family. She said it cannot be a man who did not know them. The man knew her timing and the place she slept. She said when she described the man it was the defendant because he stayed for a short period with them before the incident. She knew him from birth. He is a mechanic. He is related to the family of her sister's husband. He repaired her daddy's truck at the house. She had the light of her mobile phone 3.50 meters. She thought it was the defendant. When she called out the man did not rush. The man knew his way out of the house but when he heard her brother calling out, he run away through the door. She spent 1 second to observe and describe the man. After the incident, she was with her mother, her brother, her sister, the husband of her sisters, the wife of the brother outside. She described to them the man and she said they told her it was the defendant. She is related to the defendant. That night the man did not say anything to her. After the incident, the defendant did not come back to the house.

14. The complainant (Catherine Mahit) was cross-examined. She confirmed a man came to her room, held her face, squeezed her neck and punched her face on 29 August 2016. It was dark in the room. She opened her eyes. A man was there. When she opened her eyes, he held her neck and punched her face. At that time she did not know who that man was. She was focusing on being released from the

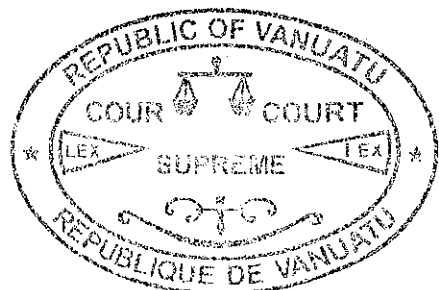


struggle. She did not take the time to see or recognize the man. She never said Cloclo Verlili came to her house causing her to shout. She used the light of her mobile phone to torch the backside of the man. She said she described the man to her family. Her family suspected it was Cloclo but they did not see Cloclo. She saw only the trousers, shirt and black hat and that he was short. On the next morning, news went around that it was Cloclo. She made a statement to the police. Her description was brief. The trousers, the shirt, the hat and he was short. She knew Cloclo. She never saw the face of the man they suspected and thought it was Cloclo. She based her complaint on the suspicion of her family. The police took the defendant alone. She said it was him.

15. In re-examination, she said she saw the backside of the man like Cloclo. It was Cloclo because the man she described was of the same size like him. She made two statements to the police. The police took her to make her second statement. They asked her to describe the defendant because he was already kept in custody. She said when she described the man the police told her that the descriptions she made were similar to the defendant. It was Cloclo.
16. Winnie Mahit gave evidence she is the mother of the Complainant. She lives with her and they sleep in the same bedroom of the house at Freshwater 5. She got six children and 3 are girls (Maria, Christina and Catherine). On 29 August 2016, a man came in the room. Her daughter Catherine shouted. She got up. She did not see the man.
17. Police Constable Catheline Alick of Malekula gave evidence. She lives at Malapoa Whitewood. She is the investigating police officer in this case. On 23 September 2016, she cautioned the defendant and obtained a statement from him based on the complaint made by the complainant Catherine Mahit. She said Cloclo understood his rights. Cloclo stated that on 29 August 2016 at 1.00am o'clock in the night, he was sleeping in the house of one of his cousin brothers. He did not go inside the room of Catherine Mahit at Fresh Wota 5. He did not go inside the house of Catherine Mahit at Freshwota 5. He said he is related to Catherine Mahit's family.

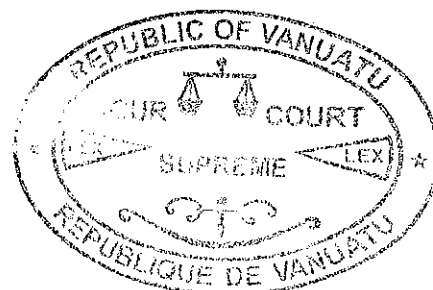


18. In cross-examination, she confirmed she was the investigating officer of this case. There was no mention of Cloclo. The description is similar to the Defendant. Police arrested the defendant on 30 August 2016 based on the descriptions made by Catherine Mahit. Cloclo was kept in Cell #6. Catherine Mahit came down to the police station and described the man she saw. The descriptions were similar to Defendant Cloclo. She said the police did not show Defendant Cloclo to the complainant. The police did not set up an identification parade for the complainant to identify the defendant. The police did not arrange for any photographs of the defendant to the complainant. The police arrested the defendant based on the description of the complainant.
19. She said in re-examination that the police were arresting the complainant on the basis of descriptions made by Catherine Mahit and also Steward Garae.
20. Steward Garae gave evidence that he marries the sister of the complainant. He lives in the same yard with the complainant. He gave details of what he heard on that night of 29 August 2016. His dogs were barking. He heard some noise like the opening of a door. He heard Catherine Mahit shouting. He came outside. Catherine is the sister of her wife. He talked to Catherine Mahit after the incident. Catherine told him a man squeezed her neck and punched her face and run away. He said she described the man as a short man making him thinking of the man who sat in Court (defendant) because he stayed with the family for a short period of time. He meant Cloclo.
21. In cross-examination, he confirmed he heard the noise of the door that was opened. He did not see the man who opened the door. He confirmed he never saw the man. He said Catherine only described that the man was short wearing black shirt and trousers. He confirmed Catherine Mahit had never told him that she saw Cloclo that night. He confirmed it was him who told Catherine that it was Cloclo. He confirmed he suspected Cloclo.
22. The defence submitted that the prosecution failed to prove one of the essential elements of the offence of unlawful entry. The prosecution evidence is based on



speculations and suspicions. The prosecution built up its case on no evidence at all. The defence submitted the prosecution failed to identify the accused as the man who unlawfully entered the dwelling house of the complainant on 29 August 2016 at Fresh Wota 5 at 1.00am o'clock in the morning.

23. The defence submitted the charge against the Defendant must be dismissed.
24. The Defence relied on the case of *Public Prosecutor –v- Le Blanc [2005] VUSC 98, CRC 033 2005 (10 August 2015)*.
25. The prosecution submitted in response that there is a case to answer. The defendant is required to answer and put forward his defence. The prosecution submitted there is evidence of identification through evidence of the complainant. She got up when a man held her face, squeezed her neck and punched her face. The complainant used the light of her mobile phone to see the backside of the man, the trousers, the shirt and the black hat and that he was short. It was like the Defendant. The defendant was known to the complainant and her family. The complainant gave the description of the man like the man in the Court today. She saw the person in Court and at the police station.
26. The Prosecution relied on the case of *Tunat –v- Public Prosecutor (2014) Criminal Case No. 36 of 2014*.
27. On the careful review of the evidence, a man entered into the sleeping room of the complainant at Freshwota 5 on the night of 29 August 2016 at around 1.00am o'clock in the morning. The complainant slept in the same bedroom with her mother. The mother did not see the man. The mother heard the complainant shouting. She got up. The complainant did not see the face of that man. It was dark in the room when the man touched her face, squeezed her neck and punched her face. She used the light of her mobile phone to see the backside of the man, his trousers, shirt and the hat. The man run away after she shouted. The complainant gave descriptions of the man to his family including Steward Garae. It was Garae who suggested to her that it was Defendant Cloclo. The complainant did not mention the name of Defendant Cloclo when she saw the backside, the



trousers, the shirt, the hat and the fact that he was a short man. She did not recognize the man as the defendant. It was after she discussed the incident and made her descriptions that she thought it was Cloclo.

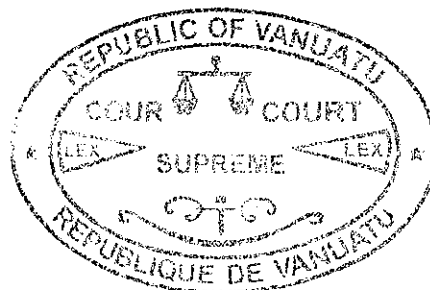
28. In *Tunat v Public Prosecutor* [2014] VUCA 36, the Court of Appeal stated:

« The police officers' identification

1. *Sergeant Alick Walter the officer in charge of the Serious Crime Unit said he had viewed the video footage from the security camera at Mr. Fordham's house and was able to recognize the appellant as the man holding the pistol because of previous dealings with him and recognizing the tattoos on his body and his beard and moustache. Sergeant Ronald Kalorib the officer in charge of CID Sanma Patrol likewise said that he could recognize the appellant as the person on the CCTV. Similar evidence was given by Police Constable Jimmy Remo.*” The Court of Appeal continued:

*“Like the trial judge the CCTV has been viewed in this Court. It is not brilliant but it is to be remembered that this is a case in which we are dealing with recognition by persons known to each other not identification of a total stranger. We see no error in the judge admitting the evidence of these police officers. It would have been quite a different case if this evidence had been proffered by people who did not know Mr. Tunat at all and had seen him only on that one occasion. But this is a simple case of recognition and as the judge noted there is authority including *R v. Ranston* [1991] Crim. L. R. 295 which makes clear that this material is relevant and available as evidence to be assessed and considered.”*

29. The present case is not a case of the complainant recognizing the defendant at the time of the offence. She did not see the face of the man and she did not recognize the man. It was after the offence that the name of the defendant was mentioned to her and that she put a name on the descriptions she made and so she thought it was the defendant because the defendant stayed with them for some time and repaired the truck of Catherine's daddy. He must have known the house and the room. Apart from the fact the man was a short man, the descriptions of the backside, the trousers, the shirt and the black hat were not connected to the defendant on the evidence. Tunat case is a case based on the recognition by persons known to each other at the time of the offence based on evidence thus presented. The prosecuting counsel conceded that the facts of



Tunat case are different from the present case. Tunat case cannot be applied in this case.

30. The police did not set up an identification parade. There was no showing of the defendant, nor photographs of the defendant to the complainant. It was the police officer who told the complainant that the descriptions she made were similar to the defendant. The police dealt with this case as if it was a recognition case. It was not.
31. In this case, I conclude that the prosecution case taken at its highest is such that as a reasonable judicial officer sitting alone on the evidence thus far presented could not properly convict on it, it is my duty on such a submission being made, to stop the case. I now do so.
32. The charge is dismissed.
33. Defendant Cloclo Verlili is acquitted on the charge of unlawful entry, contrary to s.143 of Penal Code Act, accordingly.

DATED AT PORT VILA, this 24th day of October 2017

**Vincent Lunabek
Chief Justice**

