

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

**Criminal
Case No. 17/473 SC**

BETWEEN: PUBLIC PROSECUTOR
Appellant

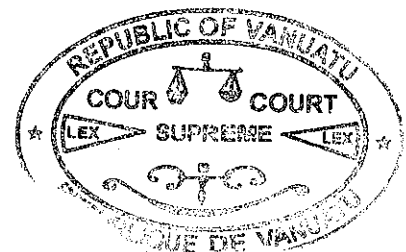
AND: MARGRET TIMOTHY
Accused

Date of Trial : August 31st and September 1st 2017
Submissions : September 6th and 9th and October 2nd 2017
Date of Judgment : November 22nd 2017

Before: Justice Paul Geoghegan
Appearances: Mrs Matariki for the Public Prosecutor
Ms Bakeo (PSO) for the Respondent

JUDGMENT

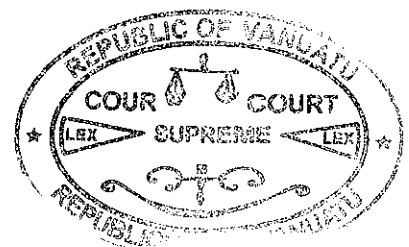
1. Mrs Timothy is charged with three counts of complicity to sexual intercourse without consent contrary to sections 30, 90 and 91 of the Penal Code Act [Cap. 135], one charge of an act of indecency without consent contrary to section 98 of the Penal Code Act [Cap. 135] and one count of threatening to kill contrary to section 115 Penal Code Act [Cap. 135]. These events are alleged to have occurred on February 13th and 14th, 2017.



2. Mrs Timothy was to have been tried together with her husband Timothy Kavila who was charged with five counts of sexual intercourse without consent, one count of an indecent act without consent, one charge of threatening to kill and one count of intentional assault. Mr Kavila pleaded guilty to all of those charges on the morning of the trial. Mrs Kavila maintained her not guilty pleas and the trial proceeded against her.

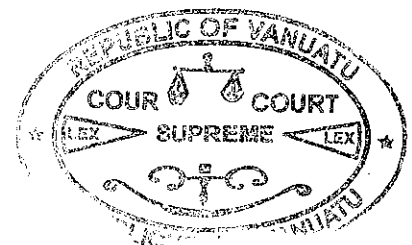
THE ALLEGATIONS

3. It is alleged that the charges which Mrs Timothy faces were committed against another female family member who was 20 years old at the time of the offending.
4. It is alleged that on February 13th 2017, Mrs Timothy and her husband travelled to the complainant's home at Salili. They uplifted the complainant from Salili and took her to their home in Teouma Valley. The reason for this is that the complainant wished to obtain a passport to enable her to travel to Australia and Mrs Timothy and her husband had advised her that they could assist with that.
5. After arriving at Mrs Timothy's home the parties had an evening meal and then went to bed. The complainant was provided with sleeping accommodation in a tent next to Mrs Timothy's home which had been erected by Mrs Timothy and her husband. It is alleged that during the course of that evening the complainant was approached by Mrs Timothy who was accompanied by her husband. Both Mrs Timothy and her husband were naked and Mrs Timothy asked the complainant whether or not the complainant would allow Mrs Timothy and her husband to touch her body. The



complainant made it clear that she did not want that to happen but was then told by Mrs Timothy that she had to allow them to "do what they want" or Mr Kavila would hurt her [the complainant] and would use a knife on her. That threat is the basis for the charge of threatening to kill (count 11).

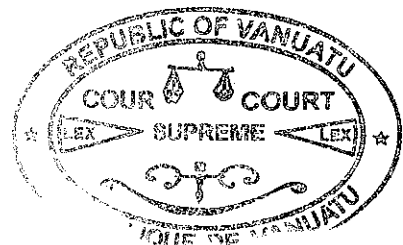
6. It is alleged that, fearful for her safety, the complainant removed her clothes at which point, Mr Kavila sucked on her breasts and her vagina and inserted his fingers into her vagina while Mrs Timothy also sucked on the complainant's breasts and vagina. The complainant was then forced to suck Mr Kavila's penis and Mrs Timothy's vagina. Mr Kavila then had sexual intercourse with the complainant while Mrs Timothy touched the complainant's breasts.
7. Mr Kavila had sexual intercourse with the complainant twice on February 13th in the presence of Mrs Timothy. It is these acts which form the basis of two charges of complicity to sexual intercourse without consent (counts 3 & 4).
8. The alleged acts of Mrs Timothy touching the complainant's breasts and making the complainant suck or lick Mrs Timothy's vagina for the basis for the charge on indecent assault (count 10).
9. Mr Kavila had sexual intercourse with the complainant without her consent, again on February 14th. This act forms the basis for the third charge against Mrs Timothy of complicity to sexual intercourse without consent (count 6).



10. It is alleged that on February 15th the complainant attempted to leave the house but was assaulted by Mr Kavila who threatened that he would use a knife on her and throw her into a nearby river if she attempted to leave. Mr Kavila then pulled her into the house and locked her inside. Later that evening Mr Kavila again has sexual intercourse with the complainant without her consent.
11. It is alleged that on February 16th Mr Kavila again had sexual intercourse with the complainant without her consent.
12. The complainant was returned to Salili by Mr Kavila on February 17th 2017.
13. There is no real dispute that all of these events took place, although an analysis of the evidence does not establish everything alleged by the prosecution. It is accepted that the complainant did not consent to any of these acts and it is not contended that Mrs Timothy had reasonable grounds to believe that the complainant consented to the sexual acts. The central issue in this case is whether or not Mrs Timothy can successfully invoke the common law defence of duress or, in the absence of that defence whether Mrs Timothy can avail herself of the defence of necessity set out in Section 23 of the Penal Code.

THE EVIDENCE

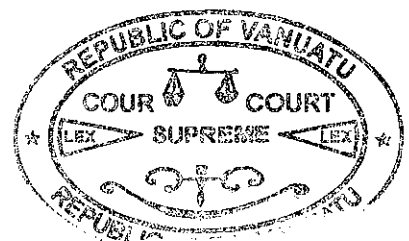
14. There was only one prosecution witness and that was the complainant. She confirmed that Mrs Timothy and her husband came to Salili to assist her to obtain a passport to enable her to travel to Australia. She was told by them to bring her



clothes and to travel with them to Teouma. A tent was constructed for her and they ate an evening meal and then went to bed. She fell asleep and was subsequently woken by Mrs Timothy. Her evidence was that Mrs Timothy told her that she and her husband had agreed for her to come to Teouma on the condition that they *"wanted a baby from her and Mrs Timothy and her husband would raise it"*. The complainant had not expected to return to Teouma with Mrs Timothy and her husband when they had arrived in Salili. It was not until the evening of February 13th that the complainant had heard talk about Mrs Timothy and her husband wanting the complainant to have a baby for them. That clearly came as a surprise to her.

15. Mrs Timothy then left and returned to the tent at which time she was with her husband. Both Mrs Timothy and Mr Kavila were naked. She said that Mrs Timothy then said *"are you removing your clothes so that we can touch your body?"* at which point the complainant then became scared. Mrs Timothy then said *"you have to let us touch you otherwise he [Timothy Kavila] will stab you with a knife"*. The complainant stated that she saw Mr Kavila holding a knife at which point she became extremely fearful. Mr Kavila got on top of her while Mrs Timothy lay on top of Mr Kavila. She stated that Mr Kavila *"entered her and while he did that Mrs Timothy was sucking on her breasts"*. She was told by both parties that she should give birth to their baby. She stated that when Mr Kavila finished having sex with her he forced her to suck his penis.

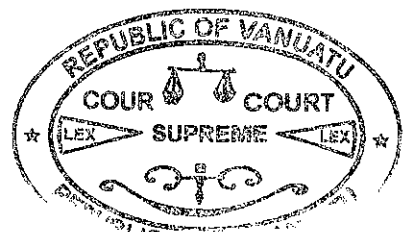
16. The complainant gave evidence that the same thing occurred on the evening of February 14th. She stated that Mrs Timothy said that the complainant should suck



her vagina and that Mrs Timothy would suck on the complainant's. The complainant gave evidence that she was frightened because of the knife that Mr Kavila was carrying. She deposed that Mr Kavila had sexual intercourse with her again and that Mrs Timothy was present while that occurred.

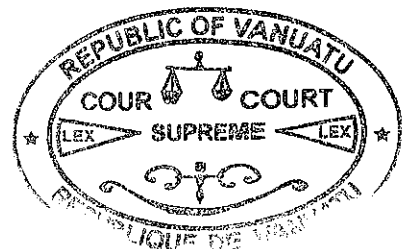
17. She gave evidence that Wednesday February 15th was a repeat of what had occurred on the previous days. Mr Kavila had sex with her while Mrs Timothy sucked on her breasts and the complainant then sucked on Mrs Timothy's breasts. The complainant gave evidence that that night (it is not clear whether this was before or after the sexual offending) she heard crying outside. The complainant gave evidence that she knew why Mrs Timothy was crying and that it was because Mrs Timothy's husband was "concentrating" on the complainant and neglecting her [Mrs Timothy]. When asked how she knew that, the complainant stated that she knew that because she could see when Mr Kavila was having sex with the complainant that Mrs Timothy was annoyed and angry. The complainant went outside and observed Mr Kavila hitting Mrs Timothy. Under cross examination the complainant said that Mr Kavila was hitting Mrs Timothy with his hand and also with the branch of a manioc tree. The complainant described Mr Kavila as hitting Mrs Timothy on the back and with such force that the branch broke. She also acknowledged that Mr Kavila had kicked Mrs Timothy and that what she had seen amounted to a "good beating".

18. Under cross examination the complainant also gave evidence that when the parties went to Teouma, Mrs Timothy said to the complainant that if Mr Kavila "wanted to do anything we should do it otherwise he would beat her up". When the complainant



was asked to clarify what was meant by the word "her" the complainant that she was referring to Magret Timothy.

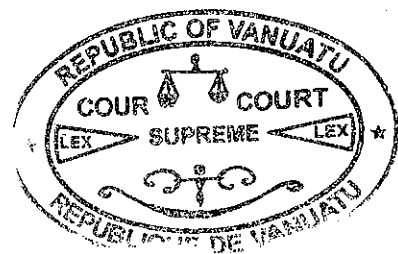
19. The complainant also conceded under cross examination that when Mrs Timothy came to see her in the tent on the first occasion she told her that Mr Kavila had sent her. The complainant also stated that she had asked Mrs Timothy for help on that first evening but had been told that the complainant had to do what she was told otherwise Mr Kavila would hurt "me". The complainant said that Mrs Timothy told her that Mr Kavila beat her up on a regular basis.
20. The complainant's evidence was that on February 16th Mrs Timothy had left the property with the intention to travel to Pango to see her uncles. The complainant wished to run away as well, however was prevented from doing so by Mr Kavila who hit her and locked her inside the house. The complainant provided an affirmative answer to the question "*so Margaret Timothy followed whatever Timothy Kavila said?*".
21. A prima facie case was found to have been made out against the accused and accordingly a statement of the accused's rights was read out to her both in English and Bislama pursuant to section 88 of the Criminal Procedure Code. The accused then elected to give evidence.
22. Mrs Timothy gave evidence that at the time of the offending she lived in Teouma Valley with her husband Mr Kavila, their children aged 9 and 10, an older daughter from Mr Kavila's first marriage and Mr Kavila's older sister who was a widow



together with his older sister's three children. She had been in a relationship with Mr Kavila for ten years. She described her relationship with Mr Kavila in the following way:-

"Ever since I have been with him I am one of those women who has no freedom. Where ever I go he follows. He prevents me from going to church and visiting my family. Even if I am walking on road with him I won't smile to family or friends. If I smile at a young man he tells me that I have slept with that man".

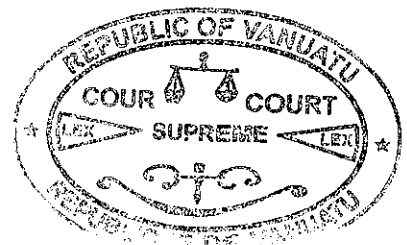
23. She referred to Mr Kavila using her body *"but not as if I were his wife"*. She referred to his wanting to have sex with her on occasions four to five times a day, and the rough and abusive manner in which he would treat her at those times.
24. Mrs Timothy described an environment in which not only she, but also her children, were regularly the subject of brutal assaults. She referred to Mr Kavila using a rope to hang her daughter from a tree at the house and that he would then whip her (the daughter) with a hose or water pipe. She deposed that he had used a knife and chain to discipline the children and that both Mrs Timothy and Mr Kavila's sister were too scared of Mr Kavila to take any steps to prevent it.
25. Mrs Timothy referred to Mr Kavila as having hit her in the eye with a hose pipe and having had to have two false teeth to replace teeth which had been knocked out by Mr Kavila. She referred to Mr Kavila using an iron bar to hit her on the back of the head, to his having broken her wrist by kicking her, standing on her stomach and using a chain to hit her on the back. In short, Mrs Timothy described a lengthy



history of serious and brutal violence perpetrated by Mr Kavila not just against her but other members of the family.

26. In her evidence, Mrs Timothy stated that when they went to Salili the complainant approached Mr Kavila and said she would come back to Teouma with them. She thought nothing further of it since the complainant was her "sister". After arriving in Teouma and after a tent was set up for the complainant Mr Kavila told Mrs Timothy that she would take the children with her and sleep inside and that he would be sleeping in the tent. He requested that she talk to the complainant and ask her if she will sleep with him inside the tent. When Mrs Timothy mentioned that the complainant was her "sister" Mr Kavila threatened that if she did not approach the complainant he would whip her with a chain. She accordingly went to tell the complainant that he wanted to have a baby with her. Subsequently, Mr Kavila told Mrs Timothy to go inside the tent and remove her clothes and to join the complainant inside. Mrs Timothy stated that it was not what she wanted to do but that she was scared so she did what he wanted her to do. She said that she did not wish to remove her clothes in front of her "sister" but that she did so and was then told by Mr Kavila to touch the complainant's body at which point he lay on top of the complainant and got Mrs Timothy to lie on top of him.

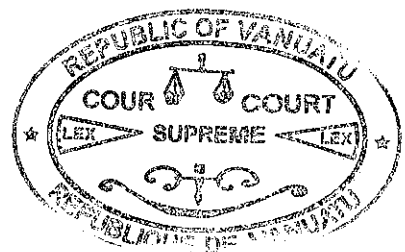
27. Mrs Timothy said that on February 14th Mr Kavila told her that she was again to sleep with he and the complainant that night but that she said she could not, at which point he made threats of harm to her with the chain and a knife. Accordingly, she participated by removing her clothes and touching the complainant while the complainant touched her and watched Mr Kavila engage in intercourse with the



complainant. She referred to feeling afraid and scared because of Mr Kavila's threats. She referred to feeling that there was no way out for her and that accordingly she did what he told her to do.

28. On February 15th Mrs Timothy took the children to the road and came back and worked in the gardens. Mr Kavila's sister was also working in the garden. After gardening had been completed Mrs Timothy had a wash and then prepared food for the afternoon. Mrs Timothy stated that that evening Mr Kavila told her that she was to go and sleep with the children in the "big house" as he wanted to be with the complainant. Mr Kavila used a lock to lock Mrs Timothy and the children inside. At some point in the evening Mrs Timothy wanted to go to the toilet but could not open the door. She called out, at which point Mr Kavila came along and began beating her with the branch of a manioc tree.

29. On February 16th Mrs Timothy decided to go to Pango to see her uncles. She stated that Mr Kavila came with her to the road and tried to prevent her from leaving for Pango but she got a bus regardless. She did not provide any details as to how Mr Kavila tried to prevent her from leaving. She travelled to Pango but Mr Timothy subsequently arrived to take her back to Teouma. He had a long knife that he had hidden in his trousers and Mrs Timothy stated that he struck her in the presence of her family. When an uncle endeavoured to protect her, he assaulted the uncle as well. Several members of the family then assaulted Mr Kavila but despite members of Mrs Timothy's family wanting her to remain in Pango Mrs Timothy returned with Mr Kavila to Teouma Valley after he had told her family that he would not hit her



again. Two of the couples' children were with Mr Kavila at that time and were also distressed by this.

30. Under cross examination, Mrs Timothy conceded that she and Mr Kavila had previously discussed having another child through the complainant. She agreed with the proposition put to her that she had agreed with Mr Kavila that another woman would provide the couple with a child as Mrs Timothy could no longer have children because of injuries which she had suffered at the hands of Mr Kavila. There was then the following sequence of questions and answers:-

"Q) On 13 February you went to see [the complainant] so she would lend you her body?

A) Yes.

Q) And she said she didn't agree?

A) No she did agree.

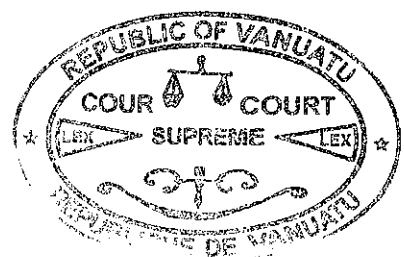
Q) The first time you approached her she didn't agree?

A) No she didn't agree.

Q) That is when you told her that if she didn't agree Timothy will beat her up?

A) Yes."

31. Mrs Timothy acknowledged *"touching the complainant and the complainant touching her"*. Mrs Timothy acknowledged that she did not tell the complainant what might happen to her when she went to Teouma despite the fact that she knew that this behavior was common on the part of Mr Kavila. She accepted that she had not



thought about the complainant's position because of her concern over being assaulted by Mr Kavila. She acknowledged that despite taking the children to school and not being accompanied by Mr Kavila she took no steps to obtain help. In answer to the proposition that she had gone to Pango because she was angry with Mr Kavila because he was focusing on the complainant, Mrs Timothy answered "yes". When it was put to her that she hadn't gone to Pango because Mr Kavila had hit her Mrs Timothy agreed. She acknowledged that both she and Mr Kavila had approached the complainant, in the first instance.

Discussion

32. As this trial is a criminal trial the onus of proving guilt rest solely on the prosecution. That onus does not change in any way at any time.

33. There are three different offences which the accused is charged, each having different elements which must be proved by the prosecution beyond reasonable doubt.

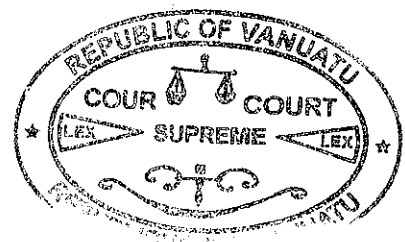
The necessary elements to be proved by the prosecution are the following:

a) Complicity to sexual intercourse without consent:

- (i) the accused;
- (ii) procured, counselled or aided the commission of;
- (iii) sexual intercourse without consent.

b) Sexual intercourse without consent :

- (i) the person aided, counselled or procured by the accused;
- (ii) had sexual intercourse with the complainant;



- (iii) without the consent of the victim;
- (iv) there was no reasonable belief on the part of the accused that the complainant consented to the sexual intercourse which occurred.

c) Act of indecency without consent

- (i) the accused committed an act of indecency;
- (ii) the act of indecency was committed on the complainant;
- (iii) the act of indecency took place without the consent of the complainant;
- (iv) the accused do not reasonably believe the complainant had consented;

d) Threatening to kill

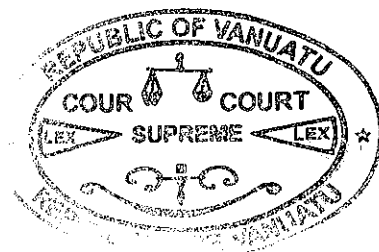
- (i) the accused
- (ii) threatened to kill or inflict grievous bodily harm on the complainant;
- (iii) the threat was deliberately made with an intention that it be taken seriously.

34. I must analyse the evidence in respect of each offence and be satisfied that the elements of each offence are established beyond reasonable doubt before convicting the accused of that offence.

35. Given the nature of the offences this case is unusual in that there is not a significant difference between the complainant and accused's evidence as to what occurred.

36. Mrs Timothy asserts that the common law defence of duress is open to her and that, in the circumstances it provides a complete defence to the charges she faces. Accordingly it is necessary to first determine whether that defence is one which is open to her.

37. In the alternative Mrs Timothy argues that Section 23 of the Penal Code provides her with a defence to these charges.



38. The criminal law in the Republic of Vanuatu has been codified by the Penal Code which provides a comprehensive code in respect to the applicable principles of criminal law and criminal responsibility. Section 1(1) of the Penal Code recognises this by providing that :

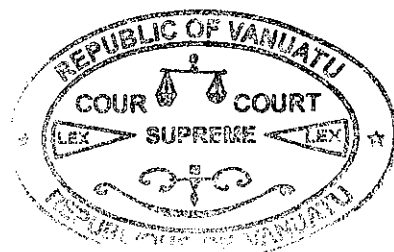
“the criminal law of the Republic shall apply to any act done or omitted within its territory”.

39. In this regard the Penal Code specifically distinguishes between acts which provide a complete defence to a criminal charge and acts which establish diminished responsibility which, while not constituting a defence to a criminal charge may have the effect of reducing the culpability of an accused which may, in turn, have a significant effect upon sentencing.

40. Accordingly, insanity (section 20), acting under superior orders (section 22), self-defence or the necessary defence of another (section 23), and the use of reasonable force in the prevention of the commission of an offence or effecting or assisting in a lawful arrest (section 23 (4)), if established, provide complete defences where no criminal responsibility attaches to the person successfully relying on such a defence.

41. By contrast to these defences the Penal Code recognises conduct which diminishes rather than extinguishes criminal responsibility. Section 24 of the Penal Code provides that:

“Wherever criminal responsibility is diminished by law, the punishment shall be mitigated at the discretion of the Court”.



42. The range of conduct which gives rise to diminished responsibility is set out in sections 26 and 27 of the Penal Code which provide :

"26. Compulsion and coercion

(1) Criminal responsibility shall be diminished in the case of an offence committed by a person acting –

(a) under actual compulsion or threats, not otherwise avoidable, of death or grievous harm;

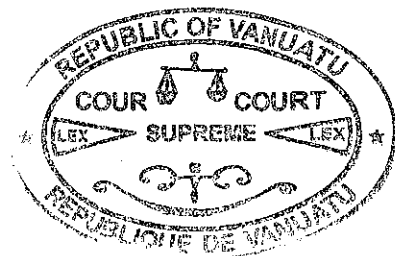
(b) under the coercion of a parent, spouse, employer or other person having actual or moral authority over such person.

(2) Criminal responsibility shall not be diminished under subsection (1) if the person acting has voluntarily exposed himself to the risk of such compulsion, threats or coercion.

27. Provocation

(1) Criminal responsibility shall be diminished in the case of an offence immediately provoked by the unlawful act of another against the offender or, in his presence, his spouse, descendant, ascendant, brother, sister, master or servant, or any minor or incapable person in his charge, provided that the reaction constituting the offence be not disproportionate to the degree of provocation.

(2) Without prejudice to the generality of subsection (1), the intentional killing or wounding of another shall be deemed to be not disproportionate to provocation caused by violent blows or injuries.



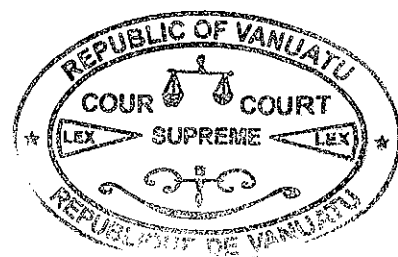
(3) *In order that criminal responsibility be diminished, provocation must be of such degree as to deprive a normal person of his self-control.*"

43. Accordingly criminal responsibility is diminished rather than extinguished in the case of an offence committed by a person acting "under actual compulsion or threats, not otherwise avoidable, of death or grievous harm" or "under the coercion of a spouse".

44. Ms. Bakeo submitted that the Penal Code did not expressly provide that the common law defence of duress had been abolished or replaced by Section 26. She referred to the common law "test" of duress as being very different to this "test" of compulsion and referred to the necessary ingredients of the defence of duress as being that:

- (a) there is a threat of death of grievous harm;
- (b) the circumstances present are such that a person of "ordinary firmness" would have been likely to yield to the threats in the way the accused did;
- (c) the threat was present, imminent and continuing;
- (d) the accused reasonably apprehended that threat would be carried out;
- (e) the accused was thereby induced to commit the crime;
- (f) the crime was not murder or any other "heinous" crime excepted from the doctrine of duress;
- (g) the accused did not by fault on her part expose herself to the duress;
- (h) the accused had no means, with safety to herself, of preventing the execution of the threat.¹

¹ See R v. Hurley & Murray [1967] VR(FC) 526 and DPP v. Lynch [1975] AC 653 and R v. Hasan [2005] UKHL 22.



45. I do not consider that the common law test of duress as submitted by Ms. Bakeo is "very different" to the test for compulsion under Section 26(1)(a). I consider that most, if not all, of the elements necessary to establish the defence of duress would be applicable in an analysis of whether or not the accused was acting under "*actual compulsion or threats, not otherwise avoidable, of death or grievous harm*".
46. It might also be said however that while the test for "*compulsion*" might be very similar if not identical, to the test for duress the concept of "*coercion*" is likely to involve a somewhat less stringent set of criteria. This no doubt impacts upon an assessment of the degree to which criminal responsibility is diminished in any case.
47. If Parliament had intended to make the defence of duress available it would have been very easy to do so. In addition, the deliberate provision for compulsion as amounting to diminished responsibility runs contrary to any argument that the common law defence of duress is one which is available in Vanuatu. The fact that Parliament has codified the criminal law in Vanuatu also defeats any suggestion that duress is available.
48. For these reasons I hold that the common law defence of duress is not available to Mrs Timothy. I should add that even if it had been available the evidence would not have been sufficient to avail Mrs Timothy of such a defence.
49. I turn then to consider the submission that Section 23 of the Penal Code provides Mrs Timothy with a defence to the charges. Section 23 provides :



"23. Self-defence necessity, prevention of offences etc.

(1) No criminal responsibility shall attach to an act dictated by the immediate necessity of defence of the person acting or of another, or of any right of himself or another, against an unlawful action, provided that the means of defence be not disproportionate to the seriousness of the unlawful action threatened.

(2) Without prejudice to the generality thereof, subsection (1) shall apply to the intentional killing of another in defence of an attack causing a reasonable apprehension of death, grievous harm, rape or sodomy.

(3) No criminal responsibility shall attach to an act, not being an act to which subsection (1) applies, done in necessary protection of any right of property, in order to protect the person acting or another, or any property from a grave and imminent danger, provided that the means of protection used be not disproportionate to the severity of the harm threatened.

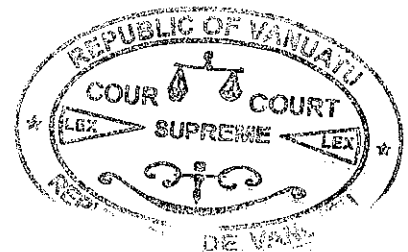
(4) No criminal responsibility shall attach to the use of such force as is reasonable in the circumstances for the purpose of—

(a) preventing the commission of an offence (not being an offence against the person acting); or

(b) effecting or assisting the lawful arrest of any offender or suspected offender or any person unlawfully at large."

50. It will be immediately apparent from a reading of the section that it is aimed at situations where a person acts in the defence of themselves or another and in the course of that defence commits what would otherwise be a criminal act. An obvious example is where someone who is being attacked by another person then strikes and injures that person in the course of defending themselves. A different example is a person who strikes and injures another person in the course of trying to prevent an attack by that person on a third party.

51. Accordingly, if Mrs Timothy had struck and seriously injured Mr Kavila or even killed him in order to prevent the immediate threat of Mr Kavila raping the



complainant, she would be able to call upon Section 23 as providing a defence. Whether or not she was successful would depend entirely on the circumstances of the case and the proportionality of her actions.

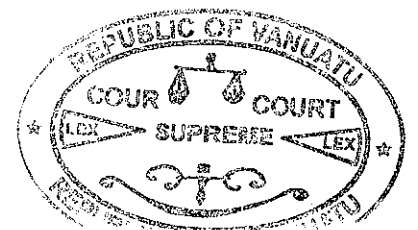
52. That does not however, assist her in the circumstances of this case as Mrs Timothy's argument is that the immediate necessity which existed caused her to commit an offence against the complainant. In those circumstances Mrs Timothy could not be said to be acting in either her defence or the defence of the complainant within the clear meaning of Section 23.

53. For those reasons Section 23 simply has no application to the circumstances of this case and Mrs Timothy has no defence to the charges under Section 23.

54. Accordingly, I need to satisfy myself that the prosecution has, on the basis of the evidence heard by the court established all of the necessary elements of each offence beyond reasonable doubt.

55. There can be no reasonable doubt that on February 13th Mrs Timothy threatened to kill the complainant in the way that is alleged in the information.

56. There can be no doubt as to that because the complainant has given clear evidence regarding the matter and Mrs Timothy in her own frank evidence acknowledged it. There was a clear threat to inflict grievous bodily harm by the use of a knife and the threat was clearly intended to force the complainant to do what Mr Kavila wished. While I accept that Mrs Timothy was coerced into making the threat, that is a matter of mitigation, not a defence. At the time the threat was made it was intended by Mrs



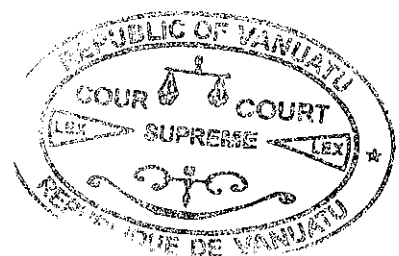
Timothy to be directed at the complainant with the effect referred to. Mrs Timothy is accordingly convicted of a threat to kill (count 11).

57. I am also satisfied beyond reasonable doubt that Mrs Timothy committed an act of indecency on the complainant without consent on February 13th 2017. I am satisfied beyond reasonable doubt that Mrs Timothy indecently assaulted the complainant by touching her breasts. I am not satisfied beyond reasonable doubt that she sucked the complainants vagina or that she had the complainant suck Mrs Timothy's vagina. The reason for that is that the complainant simply never gave evidence of such a thing happening on February 13th as is alleged by the information.

58. In her evidence in chief the complainant described receiving a threat from Mrs Timothy and then said that Mr Kavila *"came on top of me and Magret Timothy likewise"*. She stated that *"Timothy Kavila was hugging me and she [Magret Timothy] was lying on top of him. Timothy Kavila entered me and while he did that Magret Timothy was sucking on my breasts."*

59. The complainant then stated that when Mr Kavila had finished having sex with her he forced the complainant to suck his penis. There was no evidence from the complainant as to the additional alleged indecencies by Mrs Timothy which the prosecution opened its case on.

60. When the complainant was asked about what had happened on February 14th she stated that *"we did the same thing as Monday night. Magret Timothy said I should suck her vagina and she would suck on mine."* There was however, no evidence from



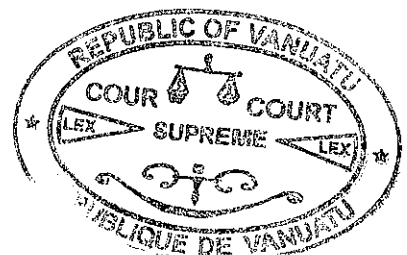
the complainant as to what then actually occurred. This is an unfortunate gap in the evidence but it is incumbent on the prosecution to lead all relevant evidence necessary to found a conviction. While it appears that there were indecencies committed on two occasions rather than one it is clear that the prosecution evidence is deficient in that regard.

61. When cross-examined, it was put to Mrs Timothy that she had "touched" the complainants body. Mrs Timothy acknowledged that she had. While that, taken together with the evidence of the complainant is sufficient for me to be satisfied beyond reasonable doubt that the indecency referred to in paragraph [49] occurred the cross-examination was incapable of proving anything else in respect of an alleged indecent act.

62. Mrs Timothy is convicted of an act of indecency without consent with the act of indecency being as described in paragraph [49] (count 10).

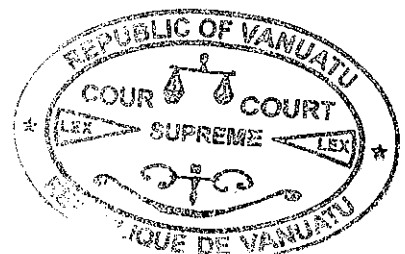
63. Turning to the charges of complicity I am satisfied beyond reasonable doubt that Mrs Timothy is guilty of these offences although it will be clear from the following paragraphs that I am also satisfied that her evidence establishes diminished responsibility, not just in respect of these counts but all of the counts with which she is charged.

64. The clear evidence is that Mrs Timothy went with Mr Kavila to uplift the complainant and take her back to Teouma. Mrs Timothy conceded under cross-



examination that she and Mr Kavila had gone to see the complainant so that "she would lend [them] her body. In making the threat which was made to the complainant Mrs Timothy clearly aided Mr Kavila in forcing the complainant to engage in intercourse with him without the complainants consent. Mrs Timothy also took part in the sexual offending which, in itself aided Mr Kavila in the commission of his offending. There is no dispute that intercourse took place on two occasions on February 13th, Mr Kavila having pleaded guilty to two counts of rape. While again, there is an unfortunate lack of detail in the evidence led by the prosecution regarding the events on February 13th there is sufficient to satisfy me beyond reasonable doubt that Mrs Timothy is guilty of the two counts of complicity to sexual intercourse without consent on February 13th (counts 3 & 4) and she is convicted accordingly.

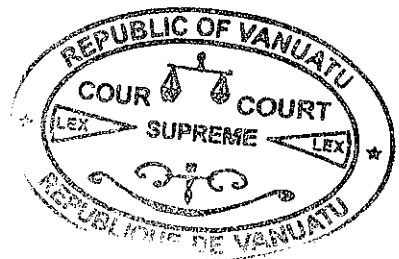
65. I am also satisfied beyond reasonable doubt that Mrs Timothy is guilty of complicity regarding sexual intercourse without consent on February 14th. The clear evidence of the complainant was that Mrs Timothy told her that she should suck Mrs Timothy's vagina and the complainant should suck hers. The evidence of the complainant was that she was still intimidated by the previous threat. Her evidence was that when Mr Kavila had intercourse with her, Mrs Timothy was present. The evidence of Mrs Timothy under cross-examination was that, in fact, Mr Kavila had intercourse with both Mrs Timothy and the complainant. Mrs Timothy acknowledged touching the complainant. In all of the circumstances, and taken together with the events of the previous day, I am satisfied that Mrs Timothy's actions amounted to the aiding of Mr Kavila in the commission of his offences.



66. Accordingly Mrs Timothy is convicted of complicity to sexual intercourse without consent on February 14th (count 6).

67. Having reached those conclusions I am also satisfied that Mrs Timothy acted under the direct coercion of her husband Mr Kavila. Although I do not accept all of her evidence regarding the degree of Mr Kavila's dominance over her (it is clear for example, that she was able to go to the market and also to her family's home in Pango while the complainant was at her home in Teouma) she gave very clear evidence of significant domestic violence suffered at the hands of her husband. That violence has also been inflicted upon the couples children. The violence is of a very serious and troubling nature. While it could be said that it is easy for an accused in the position of Mrs Timothy to give evidence of this nature, her evidence was corroborated by the evidence of the complainant herself as set out in paragraph [17].

68. I have considered whether I could be satisfied that Mrs Timothy was acting under compulsion rather than coercion however I am not satisfied that there is sufficient evidence to establish that there was an otherwise unavoidable threat of grievous harm or death to amount to compulsion. While there is no doubt that Mr Kavila made serious threats of physical harm to Mrs Timothy immediately prior to the offending there is no evidence of any such threats when the complainant was picked up from Salili. In addition, the concessions made by Mrs Timothy under cross-examination as set out in Paragraph [31] run contrary to the suggestion that Mrs Timothy was under compulsion at all relevant times.



69. In reaching these conclusions I also refer to Section 9 of the Penal Code which places the burden of proof on the prosecution to disprove beyond reasonable doubt any plea of compulsion or coercion. The prosecution has failed to discharge that burden although I did not detect a particular desire to do so which, in the circumstances, I regard as entirely appropriate.

70. Mrs Timothy is accordingly convicted on counts 3,4,5,6,10 and 11 of the information dated July 11th 2017.

DATED at Port Vila this 22nd day of November, 2017

BY THE COURT

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JP Geoghegan

Judge

