IN THE COURT OF APPEAL OF THE REPUBLIC OF VANUATU Criminal Appeal No. 2 of 1997

IN THE MATTER of an Appeal from the Supreme Court of the Republic of Vanuatu by:

SAMSON KILMAN,
JOHN TOKOLE,
RUBEN HANGHANG,
PETER MOSES,
MARSDEN GARAE,
DANSTAN HURI,
PHILIP KALMASEI and
NOEL TAMATA

Appellants

- and -

THE PUBLIC PROSECUTOR

Respondent

Coram: **Justice John von Doussa**
Justice Bruce Robertson
Justice Kalkot Mataskelekela

Counsel: **Mr Stephen Joel, Public Solicitor, for the Appellants**
Mr John Timakata, for the Respondent

REASONS FOR JUDGMENT

THE COURT: The eight appellants each appeal against convictions recorded against them on 13 June 1997 following a trial before Acting Chief Justice Lunabek. The charges arose out of the notorious events of 12 October 1996.

The first seven appellants were convicted of kidnapping contrary to s 105(b) of the *Penal Code Act* [CAP 135] ("the Penal Code"), and of unlawful assembly contrary to s 69 of the Penal Code. Samson Kilman, John Tokole, and Ruben Hanghang were sentenced to 24 months' imprisonment on the convictions for kidnapping, and Peter Moses, Masden Garae, Danstan Huri and Philip Kalmasei were each sentenced to 12 months' imprisonment for their part in the kidnapping. On the unlawful assembly convictions, each was sentenced to 6 months' imprisonment concurrent with the sentence on the kidnapping conviction. The sentences of imprisonment were suspended for periods equal to the period of imprisonment, subject to a good behaviour condition.

The eighth appellant, Noel Tamata, was convicted of complicity to kidnapping contrary to ss 30 and 105(b) of the Penal Code. He was sentenced to 24 months' imprisonment, the sentence also being suspended for 24 months subject to a good behaviour condition.

The appellants did not appeal against their sentences, and there was no cross-appeal on sentence by the Public Prosecutor.

At the conclusion of the hearing of the appeal the Court of Appeal announced its decision, and said that the reasons for the decision would be published at a later date. The Court ordered:

- that the appeals against the convictions for kidnapping by the first seven appellants be dismissed;

- that the appeals against the convictions for unlawful assembly by Samson Kilman, John Tokole and Ruben Hanghang be dismissed;
- that the appeals against the convictions for unlawful assembly by Peter Moses, Marsden Garae, Danstan Huri and Philip Kalmasei be allowed, that the convictions and sentences thereon be set aside, and that acquittals be recorded on the charges against them of unlawful assembly;
- and that the appeal against the conviction for complicity to kidnapping by Noel Tamata be dismissed.

The reasons of the Court for these orders now follow.

The facts:

For many months prior to 12 October 1996 there had been an ongoing dispute between members of the Vanuatu Mobile Force ("the VMF") and the Government over the payment of allowances. Members of the VMF had formed the "standdown group". The standdown group protested against the non-payment of allowances which they alleged were outstanding by withdrawing from training exercises. Requests to the Government did not receive positive responses, but following a change of Government and the appointment of a new Minister, further discussions occurred. The Minister agreed to arrange for the settlement of the outstanding allowances. On 10 October 1996 the appellants and the Government reached an agreement in principle. The agreement was to be signed on 11 October 1996 by representatives of the standdown group and the Prime Minister. However before that occurred the Prime Minister at about 6.00am on 11 October 1996, left the Republic on an overseas mission. The appellants treated his departure as an indication that the proposed agreement had

fallen through. The evidence led at trial indicates that the appellants and others in the VMF decided upon a plan to bring about a solution to the problem of their allowances. The plan was named operation "Thunderbolt".

The nature and purpose of the operation in which the appellants became involved is evident from the events which followed.

Between 5.00 and 5.30am on 12 October 1996 Samson Kilman, John Tokole, Ruben Hanghang and one other person, possibly Philip Kalmasei, arrived in a truck at the gate of the State House, Vila. They were not expected by the security guard on the gate, Sangul Banebe. Those who arrived in the truck were dressed in military uniforms, and some of them had blackened faces and carried guns. The security guard was requested to open the gate. He said in evidence that he looked at the guns, felt frightened, and opened the gate. Samson Kilman directed two of the VMF members to stay at the gate whilst he and John Tokole, accompanied by Sangul Banebe, went to the President's house. They knocked at the door. There was no answer. They moved to the back of the house and knocked at a window. The President of the Republic of Vanuatu, His Excellency Jean Marie Leye Lenalcau, was inside with his wife. At that hour of the morning the President's personal security guards had not come on duty.

The President opened the window. Samson Kilman said that he wished to see him very quickly. The President gave evidence that Samson Kilman asked him to come outside, and to accompany them to the VMF barracks. The President said "Wait mi change". He dressed, and went to the front door, with his shoes still in his hands. The President says that when he came

out of the door he observed another VMF member in uniform, with his face painted, holding a gun. That person was John Tokole.

The President asked about his security. Samson Kilman told him that the VMF would look after his security. The President then went with them to the gate, entered the truck, and was driven off with the four VMF members. The truck drove past the entry road to the VMF barracks and continued to the airport. At the airport there were other VMF members in full battle dress, with guns. The evidence established that each of the appellants was at the airport. When the truck arrived, Noel Tamata opened the truck door for the President, and accompanied him into a small room. There the President was informed that he was to go with VMF members by aeroplane to Malekula to bring the Deputy Prime Minister, the Hon. Barak Sope, back to Vila.

Within a few minutes of arrival at the airport, a plane was made ready, and took off for Malekula. The plane contained the President, Noel Tamata and a number of VMF members in battle dress carrying guns. On arrival at the airport in Malekula, a vehicle was commandeered and was used to drive the President, Noel Tamata, and several armed VMF members to Lakatoro where the Deputy Prime Minister was with a delegation. At Lakatoro the VMF members surrounded the house where the Deputy Prime Minister was present. Noel Tamata was directing these officers. He then entered the house with the President, and informed the Deputy Prime Minister that he was to return with them to Vila. The Deputy Prime Minister was reluctant to do so, saying that he would travel back in a separate aircraft. However he was told by Noel Tamata that he was to accompany them. He did so.

On its return to Vila, the plane landed at the far end of the runway where there were other VMF members , dressed in battle dress and armed, who surrounded the plane.

Once the Deputy Prime Minister was back in Vila, negotiations occurred through the day leading eventually to an agreement reached between representatives of the standdown group and the Government.

The decision below:

The learned trial judge, correctly, identified the essential elements of the offence of kidnapping which the prosecution were required to prove beyond reasonable doubt as: (1) the removal of the President from one place to another; (2) by fraudulent means or by compulsion by force; (3) without the consent of the President; and (4) without lawful excuse; see s 150(b) of the Penal Code and *Reg v D* [1984] AC 778 at 800; [1984] 2 All ER 449 at 453. The learned trial judge held that it was proved beyond reasonable doubt on the evidence that the President was removed from the State House against his will, and without his consent by compulsion of force, and without lawful excuse. The prosecution had argued that the President was also induced to leave the State House by a false statement that he was to accompany the VMF members to their barracks whereas he was taken to the airport and thence to Malekula. The trial judge was not satisfied beyond reasonable doubt that the President was so induced. In his Lordship's opinion, the reason that the President left was his apprehension of fear.

Section 68(2) of the Penal Code defines unlawful assembly as:

> *"When three or more persons assemble with intent to commit an offence, or being assembled with intent to carry out some common purpose, conduct themselves in such a manner as to cause nearby persons reasonably to fear that the person so assembled will commit a breach of the peace, or will by such assembly needlessly and without any reasonable occasion provoke other persons to commit a breach of the peace, they are an unlawful assembly."*

The trial judge held that the first seven appellants assembled for a common purpose, namely to take the President from the State House to the airport, then to Malekula to ensure that the Deputy Prime Minister returned with them to Vila. As they were armed they conducted themselves in such a manner as to cause nearby persons reasonably to fear that they would commit a breach of the peace. As to the remaining element of the offence, namely proof that "three or more persons assembled" the learned trial judge said "Prosecution witness Sangul Banabe gave evidence that on 12 October 1996 there were more than three persons in the State House: Samson Kilman, John Tokole, Hanghang Ruben. This element is made out on the standard required".

As to the offence of complicity in kidnapping charged against Noel Tamata, s 30 of the Act provides that "Any person who aids, counsels or procures the commission of a criminal offence shall be guilty as an accomplice...". The learned trial judge held that it was proved beyond reasonable doubt that Noel Tamata had aided, counselled and procured the kidnapping offence committed by the other appellants.

The appeal:

The charge of kidnapping, as originally drafted, alleged that the first seven appellants, as members of the VMF on 12 October 1996 kidnapped the President, by using a gun to force the President to go with them to the airport. Counsel for the appellants complained at trial that

the particulars of the offence charged were inadequate, and at the conclusion of the evidence the particulars were redrawn at the direction of the learned trial judge. The redrafted particulars of the offence of kidnapping read:

> *"Samson Kilman, John Tokole, Hanghang Reuben (sic), Moses Peter, Kalmasei Philip, Dunstan Huri (sic), Masden Garae (sic), yufala i wok olsem ol Vanuatu Mobile Force, Samtaem long namba 12 October 1996 yufala i bin kidnappem President blong Republic blong Vanuatu Jean Marie Leye Lenalcau long State House, oslem yufala ibin fraudulently inducem hem, or compellem hem by force blong mekem hem i folem yufala i go long Bauerfield Airport, Malekula mo kam back long State House, Vila."*

The first ground of appeal against the convictions for kidnapping is that the learned trial judge misapprehended the ingredients of the offence of kidnapping in that he treated it as a continuing offence. Counsel submitted that this misapprehension was evident from the way in which the particulars were redrafted by the judge and from a passage in the judgment. The redrafted particulars alleged that the accused fraudulently induced the President or compelled him by force to follow them "to the Bauerfield Airport, Malekula, and back to Vila" (adopting the translation used in the judgment below). In the course of the judgment his Lordship said:

> *"In this case, the circumstances of the commission of the offence of kidnapping start at the State House, then to the Airport, Malekula and back to the State House (Vila)."*

In *R v Reid* [1973] 1 QB 299; [1972] 2 All ER 1350, the Court of Appeal in England held that the offence of kidnapping was not a continuing offence. The old common law authorities established that the crime of kidnapping was complete upon the victim being "seized and

carried away". We accept the correctness of that decision. In the context of s 105(b) of the Penal Code the offence was complete upon the President being removed from one place to another.

Counsel for the appellants argued that even if in other respects the findings of the trial judge were correct, the offence of kidnapping was complete when Samson Kilman and John Tokole escorted the President from his front door. It was argued that it therefore follows that the other appellants could not be guilty of the offence of kidnapping.

Although the redrafted charge, and the statement from the judgment set out above are capable of being understood as indicating a misapprehension that the offence of kidnapping is a continuing one, we do not consider that is a correct interpretation of his Lordship's reasoning that led to the convictions being recorded against each of the first seven appellants. In our opinion the convictions were entered upon the basis that the seven appellants were acting in concert in pursuit of a common design or joint enterprise, namely as participants in Operation Thunderbolt. It was their common purpose that some of their members (as it transpired Samson Kilman and John Tokole) would approach the President, and that those who went in the truck to the State House would bring him to the airport so that he could be taken by plane to Malekula. The evidence leaves no real doubt that the plan was a carefully executed one, and it was plainly open to the learned trial judge to find on the evidence that the seven appellants were knowing participants in that plan.

The doctrine of common purpose which we consider formed the basis of the reasoning of the trial judge has recently been considered by the High Court of Australia in *McAuliffe v The Queen* (1995) 183 CLR 108; 130 ALR 26. The High Court, in a joint judgment, said at CLR

113-114; ALR 29-30:

The doctrine of common purpose applies where a venture is undertaken by more than one person acting in concert in pursuit of a common criminal design. Such a venture may be described as a joint criminal enterprise. Those terms - common purpose, common design, concert, joint criminal enterprise - are used more or less interchangeably to invoke the doctrine which provides a means, often an additional means, of establishing the complicity of a secondary party in the commission of a crime. The liability which attaches to the traditional classifications of accessory before the fact and principal in the second degree may be enough to establish the guilt of a secondary party: in the case of an accessory before the fact where that party counsels or procures the commission of the crime and in the case of a principal in the second degree where that party, being present at the scene, aids or abets its commission: see Giorgianni v The Queen (1985) 156 CLR 473. *But the complicity of a secondary party may also be established by reason of a common purpose shared with the principal offender or with that offender and others. Such a common purpose arises where a person reaches an understanding or arrangement amounting to an agreement between that person and another or others that they will commit a crime. The understanding or arrangement need not be express and may be inferred from all the circumstances. If one or other of the parties to the understanding or arrangement does, or they do between them, in accordance with the continuing understanding or arrangement, all those things which are necessary to constitute the crime, they are all equally guilty of the crime regardless of the part played by each in its commission: cf* R v Lowery and King *[No 2]* [1972] VR 560 at 560, per Smith J.

Not only that, but each of the parties to the arrangement or understanding is guilty of any other crime falling within the scope of the common purpose which is committed in carrying out that purpose. Initially the test of what fell within the scope of the common purpose was determined objectively so that liability was imposed for other crimes committed as a consequence of the commission of the crime which was the primary object of the criminal venture, whether or not those other crimes were contemplated by the parties to that venture: Mansell and Herbert's Case *(1556) 2 Dyer 128b [73 ER 279];* Ashton's Case *(1698) 12 Mod 256 [88 ER 1304];* R v Radalyski *(1899) 24 VLR 687;* R v Kalinowski *1930) 31 SR (NSW) 377. See generally Smith,* A Modern Treatise on the Law of Criminal Complicity *(1991), pp 209-214. However, in accordance with the emphasis which the law now places upon the actual state of mind of an accused person, the test has become a subjective one and the scope of the common purpose is to be determined by what was contemplated by the parties sharing that purpose: see* R v Johns *[1978] 1 NSWLR 282 at 287-290, per Street CJ."*

It is sufficient to make one of the parties sharing the common purpose guilty of an offence committed by another of the parties sharing the common purpose that the offence must have

been foreseen as a possible incident of the common unlawful enterprise: see *Chan Wing-Siu v The Queen* [1985] AC 168 and *Hui Chi-Ming v The Queen* [1992] 1 AC 34 at 49-51.

Those of the appellants who did not go to the State House may not have known precisely how the President would be persuaded to come to the airport. However they knew that the contingent of members who were to go to the State House were in battle dress and were armed. It was open to the trial judge to hold - indeed the evidence is not really open to any other interpretation - that force would be used if necessary to seize the President to enable the plan to be carried into effect. The plan, unless it were to run the risk of failure, must have assumed that such force as was necessary would be used. The obvious inference from the evidence is that those members who were despatched to the State House had a specific task which formed the essential first step in Operation Thunderbolt.

For the purposes of s 105(b) of the Penal Code, it is not necessary for the prosecution to prove that actual physical force was applied to the victim. It is sufficient that there be a threat of the application of force. We agree with the statement of Downing J in *Public Prosecutor v Walter Kota and Others* (1993) 2 Van. LR 661 at 664 where his Lordship said: "The use of the word 'force' in s 105(b) in my view clearly refers not only to physical force, but coercion and the threats of force".

If, as a matter of fact, in carrying out the plan the VMF members who were assigned to collect the President from the State House actually used force or a threat of force which caused the President to accompany them against his will, all the participants in the plan were

guilty of the offence, as the use of force or the threat of force was within the contemplation of the joint enterprise.

In our opinion the convictions for kidnapping can also be upheld against each of the appellants upon a different basis. If it is accepted that the crime of kidnapping occurred when the President was removed against his will from one place to another, Samson Kilman and John Tokole were guilty of the offence when they removed the President from his front door. Ruben Hanghang was guilty of the offence when he participated in the removal of the President from the gate of the State House to the airport. Peter Moses, Marsden Garae, Danstan Huri and Philip Kalmasei (on the assumption that he was not proved to be at the State House gate) became guilty of the offence when at the airport they participated in the removal of the President from the airport to Malekula. A conviction on this footing would be within the particulars of the offence as charged.

Counsel for the appellants further contended that the convictions for kidnapping, and in turn the conviction against Noel Tamata for complicity to kidnapping, cannot be sustained because the evidence does not establish beyond reasonable doubt that the President did not consent to his movements with the VMF members on 12 October 1996. Counsel argued that the President consented to go along with the VMF members. It was said that this conclusion arose from evidence which counsel submitted established the following matters, namely that:

There was no actual physical force applied to the President at any stage. When the President emerged from the front door of the State House to speak to Samson Kilman there was only one other member there (John Tokole) and only Tokole had a gun. The

gun was not pointed directly at the President. The President did not say that he did not want to go, nor did he question the motives of the VMF members. He did not give any outward appearance of being very frightened. The VMF members who spoke to the President did so in a respectful way. At the State House when the President said that he would change his clothes before coming to the front door, Samson Kilman and John Tokole did not break into the State House and guard the President. When the President asked about his security guards, he was told not to worry as the VMF members would provide his security.

It was argued that all this evidence is consistent with a non-threatening request by the VMF for the President's assistance in trying to sort out their differences with the Government. The trial judge rejected this argument.

The trial judge found that John Tokole was holding his gun so that it was apparent to the President, and that his face was blackened. This was an important finding. The trial judge also referred to several aspects of the President's evidence which is most telling on the question of whether the President went willingly, or whether he went against his will by reason of the threat arising from the circumstances surrounding him. The President in evidence said:

> *"Taem we yu karem masket yu stanap long face blong mi, hemia yu forcem mi ia ... Taem ia mi save, from mi gat 64 years ia, taem yu karem masket yu stap long face blong man, yu pentem yu long ol kala mo yu putum ol uniform blong army, never maen yu no forcem mi mo holem mi sakem mi outside, but wetem masket mi fraet from laef blong mi."*

The President also gave evidence that:

> *"... mi no talem long olgeta se long 5.30am yufala i kam wakemap mi, oli jas kam long tingting blong olgeta nomo ... olgeta nao oli kam from mi wetem masket, masket i askem, but sipos oli bin askem witaot masket, mi wait long sekuriti blong mi. But taem i gat masket behaen, evriting mi mas go."*

In his cross-examination it was put to the President that he did not refuse to go to Malekula with the VMF members, but went willingly. The President said:

> *"No mi no save talem se mi no go from olgeta bihaen oli holem masket istap. So mi gat no way blong go. Mi mas go nomo ... Sipos mi refuse, bae mi stap here today or no?"*

Not surprisingly, the learned trial judge accepted this evidence. He was satisfied beyond any doubt that the President was an unwilling participant. He went against his will. He did so out of the feeling of fear, and the real concern that he held that if he showed resistance actual force would be used.

The resolution of the dispute between VMF members and the Government was not a matter within the area of responsibility of the President. It was not "his problem", and there is no reason on that score why he may have been a willing participant in whatever steps the VMF members proposed to pressure a settlement.

With respect to the arguments of the appellants, it seems to each of the members of the Court of Appeal that it is quite unrealistic to suggest that the President was a willing participant. It is only necessary to reflect on the circumstances in which the President found himself. Early in the morning, when he had just awoken, and before his guards had come on duty, he was

confronted by two soldiers in full battle dress, one of whom carried prominently a gun. That man had his face camouflaged. There were other soldiers at the gate. The security guard at the gate had been frightened to the point that he let these people into the State House compound. The President's wife was frightened. It must have been a terrifying experience for the President who, fortunately, reacted in a calm manner and went with the officers, not knowing what fate lay ahead of him. One can only speculate what may have happened had he been unwise enough to offer resistance.

Counsel for the appellants also argued that the convictions for kidnapping are unsafe as the evidence does not beyond reasonable doubt exclude the possibility that the appellants did not have the requisite intent, or that they were under a mistaken belief of fact. These arguments assert the possibility, on the evidence, that the appellants never intended to move the President against his will, and that the appellants assumed from the events that happened that the President was a willing participant. Again, we consider these arguments are unrealistic in the circumstances that prevailed. The President went from the State House because of the threat of force which he perceived to arise from the presence of armed soldiers dressed for battle. It is unrealistic to suggest that the VMF members involved would not have appreciated that their appearance and conduct would cause a reasonable person occupying the position of the President to feel under threat. The inference from the evidence is inescapable that the VMF members were dressed and armed to present a hostile appearance so that those who encountered them would feel threatened, and not resist them in the execution of their plan.

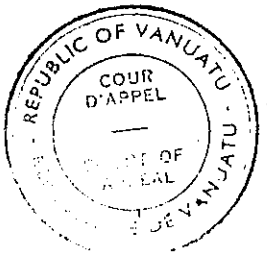
Plainly the removal of the President was without lawful excuse. The contrary has not been argued, nor could it be. The background circumstances relating to the dispute with the

Government over the non-payment of allowances may, as the appellants contended, have caused them to have strong feelings of frustration and a perception that the Government was not intending to honour an arrangement that had been reached for the settlement of the dispute. However those feelings cannot justify the action taken by the appellants and other members of the VMF. Their lawful duty was to keep the peace. Their actions on 12 October 1996 were a most serious and regrettable breach of that duty.

In our opinion the convictions of the first seven appellants for kidnapping were correctly entered. Insofar as it is argued that the convictions are unsafe or unsatisfactory, we reject that submission as the evidence provides overwhelming support for the findings and conclusions of the learned trial judge.

We turn now to the appeal against the convictions for unlawful assembly. It follows from what we have already said that we consider the evidence amply justifies the conclusions of the trial judge that the appellants were acting in pursuit of a common purpose and that when they assembled together they did so for that purpose. Further, the fact that they were dressed and armed as they were was likely to cause fear to other persons nearby. However, the error that we perceive to exist with the conviction of the first seven appellants as a group arises from the particulars of the offence that was charged. The particulars allege that the appellants on about 12 October 1996 at about 5.30am, being armed with a gun assembled together at the State House.

The evidence establishes beyond reasonable doubt that Samson Kilman, John Tokole and Ruben Hanghang assembled together at the gate of the State House at about the time charged,



and that their presence caused actual fear to Sangul Banebe and the President. There was a fourth member of the VMF present but we agree with the submissions of counsel for the appellants that the identification of that fourth person as Philip Kalmasei is open to doubt. The convictions were therefore rightly recorded against Samson Kilman, John Tokole and Ruben Hanghang. However, the evidence does not establish that the other appellants were involved in an assembly at that time and place. The evidence shows that they assembled together at the airport but that is not the assembly charged. The point was apparently raised in the course of the trial, and the trial proceeded on the particulars as charged. The Public Prosecutor did not seek to amend the charge to accord with the evidence. In these circumstances it would not be proper to consider any amendment now, and we are satisfied that the convictions cannot stand.

Whilst the convictions on the kidnapping charge have been lawfully imposed because the participants were acting in pursuit of a common purpose, that doctrine cannot be applied to make persons who were not part of the assembly guilty of the offence of unlawful assembly as principal offenders. The section is clear that the crime is committed by those who actually assemble.

Counsel for the appellants advanced a further argument against the convictions for unlawful assembly. He argued that where those who have assembled actually execute the common purpose for which they assembled, the proper charge is that of riot. Riot is a much more serious offence, and the appellants should not complain that they were charged with the lesser offence. In our opinion there was not a riot at the gate of the State House, and for this reason the factual basis for the argument in any event fails. As a supplementary aspect of this

argument it was also contended that as the assembly was in reality one of the events leading up to the kidnap, the separate charge of unlawful assembly should not have been brought. We do not agree with that submission. The unlawful assembly charged was at the gate of the State House whereas the kidnapping occurred at a later point in time and was in substance a distinct offence. The fact that the two offences were related happenings in a chain of events was a matter relevant to the imposition of the sentence imposed upon the conviction for unlawful assembly, but was not a reason for not recording the conviction.

For these reasons the convictions for unlawful assembly have been confirmed only against Samson Kilman, John Tokole and Ruben Hanghang, and the appeals in respect of the other appellants convicted of this offence have been set aside and acquittals entered.

The final matter concerns the conviction of Noel Tamata for complicity in the crime of kidnapping. Counsel for the appellants questioned whether the finding that Noel Tamata aided the commission of the crime can be sustained. It was submitted that the notion of "aiding" should be restricted to someone who is present at the time and place of the principal offence. We agree that would usually be the case but it is unnecessary for us to decide whether that is an essential requirement of aiding the commission of an offence. In the present case the conviction is amply supported by the evidence on the basis that Noel Tamata counselled or procured the commission of the offence of kidnapping. The learned trial judge in considering this charge found on the evidence that Noel Tamata was one of the "bosses" of the activities of the appellants, that he was the leader of the group who took the President on the flight to Malekula and back, and that the decisions of the appellants were made together as a group after discussion. These findings were challenged and it was further submitted that

it was not open to the trial judge to infer that Noel Tamata was part of a plan to take the President as a "tool" or a "means" to put pressure on the then Deputy Prime Minister, as the trial judge found.

In our opinion the evidence supports the findings of the trial judge. Whilst Noel Tamata was not at the State House, it defies belief to suggest that he was not fully aware of that part of the plan. It was permissible for the trial judge to have regard to all the evidence of the events of that day when deciding whether Noel Tamata knew what was planned to happen at the State House. Noel Tamata was at the airport awaiting the arrival of the President, and immediately escorted him to a room where the purpose of the proposed flight to Malekula was explained. There was evidence from a number of sources that Noel Tamata was directing the operations at the airport and at Malekula. To describe him as "one of the bosses" fits exactly what the evidence portrays. There is also direct evidence that the appellants had participated in discussion and a group decision. The events themselves, as we have already said, indicate the execution of a carefully prepared plan, the type of plan that would be in keeping with their training as professional soldiers.

We do not accept the contention that the evidence could not support a finding beyond reasonable doubt that Noel Tamata had knowledge that the President would be taken from the State House by force or fraudulent means. The timing of the visit to the President's house, the dress worn by those that went to the State House, and the use of arms taken without permission, fully justified the conclusion that all those involved in the operation, and especially the "bosses", intended to coerce the central figures in the plan, the President and the Deputy Prime Minister, to participate. Moreover, if the mere hostile appearance of

members of the VMF did not in itself achieve that end, the plan, unless it was to be a failure, must have contemplated the use of such threats and force as was necessary. In these circumstances as the threat of force in fact took place, the charge of counselling and procuring was established. Indeed, if Noel Tamata had himself been charged with kidnap as a principal offender, rather than as an accessory, the evidence would have supported a conviction on that charge. In our opinion the grounds of appeal by Noel Tamata were not made out, and accordingly his appeal was dismissed.

The reasons of the Court published at Port Vila on of 1997.

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von Doussa J

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Robertson J

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Mataskelekela J