

**IN THE SENIOR MAGISTRATE'S COURT OF**  
**THE REPUBLIC OF VANUATU**  
**HELD IN PORT VILA**

CRIMINAL CASE NO.456 OF 1995

**PUBLIC PROSECUTOR -V- PHILIP KATING**

**Coram:** Senior Magistrate LUNABEK Vincent

**State Prosecutor:** Mr RON TEMA

**Defence:** Accused appears in Person.

**REASONS FOR JUDGMENT**

This is a criminal jurisdiction in which the Magistrate is both the judge of Law and the judge of Facts. It is the duty of the Magistrate to apply the Law in full so that the defendant should know exactly what he has been tried on and so that if the Court has misdirected itself on any points of Law, the Defendant would be able to appeal. It is also the duty of the Magistrate to sum up the evidence, that is, to give a resume of the facts, again so that the Defendant should know what evidence has been considered by the Court in consuming to the verdict eventually.

The function of a Magistrate as a Judge of Fact is to consider the evidence with care and to apply the Law as the Court stated it to be, to those facts and eventually to come to the verdict.

This is a criminal case, and in every criminal case, it is for the prosecution who brings the charge to prove it. In that respect, before the prosecution case is opened the Court read to the Accused section 81 of the Criminal Procedure Code Act (CAP 136) which says:

*"In this trial you will be presumed to be innocent unless and until the prosecution has proved your guilt beyond reasonable doubt. It is not your task to prove your innocence. If at the end of the trial, any reasonable doubt exists as to your guilt, you will be deemed to be innocent of the charge and will be acquitted"*

if not then the Defendant will be found guilty.

In this case, the Defendant has exercised his right to give evidence, he did not need to do so. As in any criminal case, there is no evidential burden at all on the Defendant. The fact that he has given evidence does not mean that any burden whatsoever is cast upon him. He could have remained silent in the dock and simply allowed himself to be tried on the evidence called by the prosecution. In any event, he gave evidence. This means that having given evidence, the Court must assess his evidence in the same way as any other evidence given in this case by other witnesses. Because he comes from the dock, his evidence is not less important in this case than anyone else's.

### CHARGE

The Defendant is charged with two (2) Counts.

He was, first, charged with the offence of Drunk and Disorderly against section 148 (b) of the Penal Code Act, and the particulars alleged are that he on the 1st day of June 1995 at Fresh Water Kava Bar he was drunk and behaved disorderly.

The offence of Drunk and Disorderly ... is defined in section 148 (b) of the same Act as:

*" No person shall*

*(a) ...*

*(b) be found drunk and disorderly, or behave in a riotous or disorderly manner, in any public place (including the premises of any Police Station);*

*(c) ...*

On the facts of this particular case it can be put simply in this way: Any person who was found drunk and behave disorderly commits the offence of drunk and Disorderly and that offence is committed in a public place.

In this case the prosecution must prove beyond reasonable doubt that the Defendant was drunk and behave disorderly in a public place.

So, therefore, the Prosecution must prove those elements beyond a reasonable doubt

(1) that the Defendant was drunk; and

(2) that at the time he was behaved disorderly in a public place.

If the Prosecution should fail to prove either element (1) or element (2) the Defendant is entitled to be acquitted on that Count.

The defendant was, then charged with the offence of obstructing Police Officer while on duty, contrary to section 42(2) of the Police Act CAP 105 and the particulars alleged on that Count are that the Defendant, on the same date of 1st June 1995, at the Fresh Water Kava Bar, he was obstructing Police Officer Sergeant Allan Bani while on duty arresting an offender; the Defendant pulled out the arrested offender from the Police custody.

The offence of obstructing Police Officer while on duty is defined in section 42(2) of the Police Act CAP 105 in this way:

- "(1) ...  
(2) *Every person who disobeys a lawful order given to him by any member or who otherwise obstruct a member in the performance of his duty shall be guilty of an offence...* "

In this case, the Prosecution must also prove beyond a reasonable doubt that the Defendant obstruct Police Officer, Sergeant Allan Bani while he was performing his duty.

So thus, the Prosecution must also prove these elements beyond a reasonable doubt (1) that the Defendant had obstructed the Police Officer while on duty and (2) that at the time the Police Officer had performed his duty.

Again, if the Prosecution should fail to prove either element (1) or element (2) then the Defendant is entitled to be acquitted on that Count.

### FACTS

On the 1st June 1995 at 9.00pm o'clock in the evening an incident happened at the Kava Bar (Nakamal) of Fresh Water owned by Sethy Molu.

Sethy Molu went to Vila Central Police Station and reported that a man from Paama Island was drunk and behaved in a disorderly manner in his Nakamal at Fresh Water and sought for Police assistance.

A group of Police Officers headed by Police Sergeant Allan Bani went to the scene.

The Police Sergeant Allan Bani did not turn up to give evidence.

The Police Officer David Hilton from the General Duties section of Port Vila gave evidence and said that Police received a man from Fresh Water. He sought for Police assistance because a man from Paama Island went into his Kava Bar, threw foods outside the Kava Bar. He said Sethy Molu was the man who reported the incident and was the owner of the Kava Bar at Fresh Water.

He further said that when they attended the scene, he was the first one to get off the vehicle and went to apprehend the man from Paama and he said he hold on his hand; he and the arrested offender were on the point to go into the Police vehicle when on his surprise, the Defendant, Philip Kating hold on the other hand of that man and pulled out from him (Police Officer).

He said he called on the Sergeant and the Sergeant talked and explained to the Defendant that Police come to apprehend the man from Paama who behaved disorderly in the Kava Bar but that they did not come to arrest Philip Kating.

He hold on Johnny's hand and the Defendant came and pulled him off. He said he was afraid of the Defendant.

He heard the Defendant shouting and he come to hold Johnny's hand. He said he was on duty at that time. He said the Defendant was drunk; he said he was shouting at the Police and said "*Friend blong mi, yufala ino save tekem em*".

Sergeant talked to him but the Defendant did not listen and did not respect him. Then they call on for further Police assistance. Soon after, the Police Special Squad arrived at the scene with a different police truck. He said that the Defendant was a professional boxer and he (the Defendant) was in front of his friend Johnny obstructing Police from apprehending Johnny Daniel.

And he stated further that they explained to the Defendant that they did not come for him but they come to arrest Johnny.

He went on to say that when the Special Squad arrived, a police man from Ambrym Island approached the Defendant and the Defendant pushed him off. The Defendant is in front of his friend Johnny Daniel, threatened Police Officers not to arrest him.

Then a Police Officer grabbed one of the Defendant's hands, another Police Officer grabbed on the Defendant's other hand. He was then hand cuffed and was put into Police truck and driven to Police station and locked up in the scelle.

The next witness to give evidence was Police Officer Renold Allan. He said that on the 1st June 1995 in the evening they were requested to arrest who caused trouble in a Kava Bar at Fresh Water. He said Philip Kating, the Defendant, refused that Police arrest that man. The Defendant was drunk. He smell alcoholic liquor and his behaviour too showed that he lost self-control.

He said at that time, he came towards police Officers and shouted at them and pulled the arrested man out from the hands of the Police Sergeant (he meant Police Sergeant Allan Bani).

He pushed away Police Sergeant with his (Defendant) two hands. Then the Police Sergeant called for further Police assistance. The Defendant was arrested, brought to Police Station and then locked up into his scelle.

Daniel Johnny went straight forward to the Police scelle.

Both these witnesses were cross-examined by the Defendant but both witnesses were stuck to their account.

The Third witness for the prosecution to give evidence was Police Officer Constable Etienne Elden from general duty, Police Station, Vila. He said he was the officer who was responsible for releasing the Defendant from the Police custody. He said he got a statement from the Defendant in the Police Rest Room on the 2nd June 1995.

He said he cautioned the Defendant and explained to the Defendant his full right. He further said that the Defendant admitted he was drunk too much alcoholic liquor and he admitted he could not realise what he was doing. He said the Defendant, when making statement, admitted he could not realise what he was doing. He said the Defendant, when making statement, admitted he obstructed Police Officers while performing their duties.

The statement was showed to the Defendant, he identified the signature as his own.

The Defendant elected not to cross examine this witness.

At the end of the prosecution case, there is a Prima Facie case made out against the Defendant.

Section 88 of the Criminal Procedure Code (CAP 136) was read to the Defendant.

*"In making your defence in this trial, you are entitled in addition to calling other persons as witnesses to give evidence yourself on your own behalf, upon oath or affirmation and subject to cross-examination by the prosecution.*

*However you are not obliged to give evidence and may elect instead to remain silent. If you do not choose to give evidence, this will not of itself lead to an inference of guilt against you".*

The Defendant gave evidence in his own defence, he did not need to do so, but he did and his evidence will be tested in the same way as any one else's evidence.

There is a great deal of common ground in his evidence. He agrees he had been to the Kava Bar with his friend Daniel Johnny on that day. He says that he and his friend went to Kava Bar to get some chicken wings and there he met with Alice, his girl friend.

He said she went out, and he too came out from the kava Bar and saw the Police. He said he looked for Daniel and shouted at the Police " *where is Daniel ... Is he causing any trouble?*".

He said he argued with Police. He agreed he knew nothing. He did not see Daniel. Daniel was already in the Police van; He said he did not know where Daniel was; he said he took off his coat and hand watch and gave them to Alice.

He said he did not see Daniel until he saw him in the Police scelle.

He said he did not know why Police took him.

He said he told a Police Officer that if he meets him without uniform he will slap him.

He said he never pushed any Police Officer.

When the Defendant was cross-examined he said he asked about Daniel to the Police Sergeant. He said he came outside the Nakamal looking for Daniel. He said Police told him Daniel was already gone.

Then he admitted he pushed a Sergeant; He said he knew the Police Officer; that Police officer was trying to catch his hand. He further said that when the Police attempted to grab his hand, he said "*Mi killim aot hand blong hem*".

He accepted he drunk alcohol liquor and said he did not lose control. He said when he saw lots of Policemen outside the Kava Bar he was angry and questioned "*Why yufala i wandem arrestem mifala*" and said that "*Police i kam blong arrestem mi, mi killim aot hand blong hem*".

He said he did not know that Daniel threw foods outside the Nakamal.

As to Count 1, the Prosecution must prove that (1) the Defendant was drunk and that (2) behaved disorderly in a public place. Should they fail to prove either beyond a reasonable doubt, then the Defendant would be entitled to be acquitted on that Count.

As to Count 2, the prosecution must prove that (1) the Defendant obstruct a police officer and that (2) at that time the officer performs his duty and that (3) the apprehension is lawful.

Once again should they fail to prove either beyond a reasonable doubt, then the Defendant would be entitled to be acquitted on that Count.

As for the confession, he says he and Daniel went to the Kava Bar owned by SETHY at Fresh Water. He send Daniel Johnny to get some beer from the bar (within the Nakamal). He said when Police arrived they wanted to arrest Daniel Johnny and the Defendant says: "*No, i oraet mbae mitufala iko long haos but kirap Police i se no mifala nomo i mas karem em. Be kirap nao mi kikim hand blong hem (police officer ia)*".

He said that he took off his jacket and put it on the ground.

He said Police arrested him and his friend because they behaved disorderly.

Again it is not for the Defendant to prove that the confession is false but for the prosecution to prove it is true. If they fail to do so beyond a reasonable doubt then I cannot rely on it at all. If they succeed, then it is evidence capable of amounting to corroboration and if I believe it, it would be corroboration. A true confession is often said to be the best evidence that the prosecution can produce, for it is the Defendant himself who admits his crime;

The Defendant called Alice Ben as his only witness. She said she did not see what the Defendant did.

She said when she was back she saw the defendant was arguing with Police Officers. And that Daniel was arrested and was put in a different Police truck. She said also "*mi no luk you pushum police. Mi stanap longway - mi no luluk good whether oli putum hand cups- ol police oli raonem yu*".

When she was cross-examined she then said she saw Daniel Johnny when he hit the counter, took some foods and ate them freely. He accepted she spent at least 9 or 10 minutes at the opposite side of the Kava Bar. She said when she came, the Defendant was arguing with the Police while Daniel was arrested and put in a Police truck. She said also that when she came out she was not too close to the scene. She was afraid.

She said when she was with the Defendant in the Nakamal, he drunk some beer. Then she said further: "*mi save se tufala i drunk, mi no save how much. taem Philip i kam long Nakamal hemi no drink any beer long Nakamal taem we hemi storian wetem mi*".

This is the entire evidence in this case. I have to judge this case on the evidence that I have heard - I have looked carefully at the entirety of the evidence that I have heard in this case, both oral and written.

On the evidence that I have been heard and seen in this case, I have no doubt in my mind that the Defendant Philip Kating was drunk and disorderly in a Kava Bar or Nakamal which is in my view a place to which the public has access and, thus, a public place within the meaning of the section 148 (b) of the Penal Code Act.

Equally, I have no doubt in my mind that the Defendant, Philip Kating obstructed Police Officers including Police Sergeant Allan Bani while they performed their duty and that the performance of their duties is not excessive.

Therefore my verdicts are as follows:

**Philip Kating is found guilty on both Count 1 and Count 2.**

**SENTENCE:**

Mr Philip Kating, you are a Professional Boxer; you are the first of that kind in this country and many young local boxers admired you and tried to follow your example in this particular field of sport activities. You have to know and to remember that boxing is a violent sport. The exercise of that kind of sport is presumed to be authorised by the laws.

Nonetheless, boxing sport activities are authorised to be exercised inside the Boxing Rings but not outside the Boxing Rings. You have to know and to remember that it is strictly prohibited and become a criminal offence when you use your Boxing skills and powers outside the Boxing Rings and do harm to other person(s).

The Court takes into account in your favour that the offence of "Drunk and Disorderly in a public place" is a minor offence and that the offence of " obstructing Police Officers while they perform their duties" consisted of threats and that the obstruction does not amount to an assault in this particular case.

In this case, the Court considers that the only proper sentence should be fine penalties.

**You are therefore ordered to pay Fines in the sum of Vatu:**

**For COUNT 1:                    5,000 vatu or 5 weeks imprisonment in the alternative.**

**For COUNT 2:                    5, 000 vatu or 5 weeks imprisonment in the alternative.**

**For Prosecution Cost:    3, 000 vatu or 3 weeks imprisonment in the alternative.**

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**13, 000 vatu to be paid  
by the Defendant on the 31st of October 1995.**

**14 days to appeal.**

**DATED at PORT VILA this 26th Day of October 1995.**



**LUNABEK VINCENT**

**Senior Magistrate.**

