

Judge

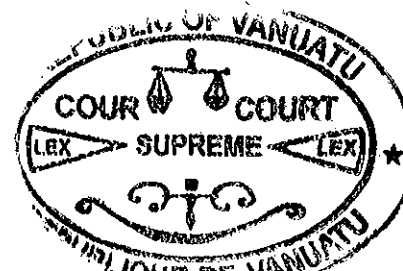
PUBLIC PROSECUTOR
V
RAYMOND CLAY
GEORGE MICHAEL

Coram: Judge Macdonald
Public Prosecutor: Mr S Blessing
Accused: Mr A. Bal
Date of Trial: 9, 10 & 13 September 2010
Verdict: 24 September 2010

VERDICT

Introduction

1. Since 1979 a dispute has raged in the village of Makatea on Emae Island, about whom is the rightful holder of the chiefly title. Mr John William Timakata claims the title of Paramount Chief, which was formerly held by his father who died in 1995. A number support him but there is another group that opposes him. All attempts at resolution have failed. Even a judgment of the Supreme Court delivered on 23 December 2004, ruling in favour of Mr Timakata, has failed to end the dispute. An appeal has been filed against that judgment but has yet to be heard by the Court of Appeal.
2. Events took a sinister turn last year between 23 July and 8 August when seven houses in Makatea Village were burned down. These houses were all owned by supporters of Mr Timakata, and so those responsible for the arsons are almost certainly to be found amongst those who oppose him.
3. The accused, Mr Michael, falls within that group and he faces seven counts of arson, contrary to s 134 of the Penal code. He had been jointly charged with another person, Mr Aisen, but I had found him not guilty at the end of the prosecution case, as there was insufficient evidence to establish his guilt.



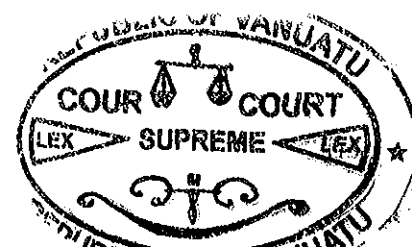
4. On 18 July 2009 at the Market House in Port Vila, and this was five days before the first fire, the prosecution alleges that the accused, Mr Clay, threatened to kill Mr Satiemata, along with Mr Timakata and the whole of his family. There was also a threat that people would travel to Emae Island and burn down their houses, which the prosecution says is precisely what happened.
5. Consequently the accused faces one count of threatening to kill, contrary to s 115 of the Penal Code.

Onus and standard of proof

6. The prosecution has the onus or burden of proving the charges. That obligation remains on the prosecution throughout the trial. The fact that each accused elected to give evidence did not alter that. By giving evidence they did not assume any onus, and nor had they taken it upon themselves to prove their innocence. All they did was to add to the sum total of the evidence for the Court to consider.
7. The standard of proof is proof beyond reasonable doubt. In essence it is a question of being sure. If I am sure that a count has been proved then I am obliged to return a verdict of guilty. If am unsure, then I would be in a state of reasonable doubt and the accused must be acquitted.

Elements of the charges

8. The prosecution does not have to prove every single fact that might be in dispute in this trial, but what it must do in order to obtain a guilty verdict is prove beyond reasonable doubt the elements that make up each charge.
9. On the count of threatening to kill it must prove that:
 - 1) the accused made a threat to kill; and
 - 2) it was directed at the complainant.
10. In this trial we are concerned with an oral threat and one made not only against the recipient of the threat, Mr Satiemata, but against Mr Timakata and others. A threat to kill at least one of the persons just named would suffice. It is also implicit in the charge that the threat, if made, was intended by the accused to have been taken seriously, as a threat that might be carried out. In other words, it was intended to influence the mind of the recipient, and it was not said simply as a joke. At the same time the prosecution does not have to prove that the accused intended to carry out the threat.
11. The issue is whether any threat to kill was made at all. Has the prosecution proved that beyond reasonable doubt?



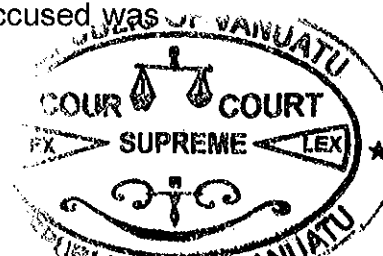
12. On the arson counts the prosecution must prove beyond reasonable doubt that:
 - 1) the accused wilfully and unlawfully set fire to a building; and
 - 2) the building belonged to somebody else.
13. "Wilfully" means deliberately. "Unlawfully" means without authority or lawful excuse. "Building" is not defined in the Penal Code but would obviously include the houses or structures that were burned down in this case.
14. The issue on each arson count is whether the accused set fire to the building. Has the prosecution proved that beyond reasonable doubt?

The evidence

15. In respect of count 1 the issue is one of credibility between Mr Satiemata and the accused, Mr Clay. In saying that it is not a contest in the sense of deciding which account I prefer or which account sounds more credible. Instead, as stated before, it is a question of the prosecution proving the charge beyond reasonable doubt. To find the accused guilty I must be able to reject his evidence (his denial that he made any threat at all) beyond reasonable doubt.
16. On the arson counts there is direct evidence on count 6, but in all other respects the prosecution relies on circumstantial evidence. It has therefore sought to establish a number of circumstances in relation to each count, from which I am invited to draw an inference beyond reasonable doubt that guilt has been proved.
17. I do not intend to summarise all the evidence. Instead my focus is on the salient evidence on each count.

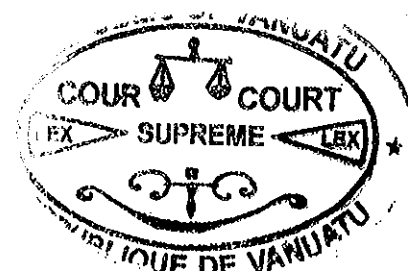
Count 1

18. It is not disputed that Mr Satiemata met the accused, Mr Clay, at the Market House in Port Vila on the morning of 18 July 2009, and that they had a conversation. What is disputed, however, is what was said in the course of that conversation.
19. There was a marked contrast in the attitude and demeanour of each man at the time that they met, which ultimately I found to be significant. Mr Satiemata approached the accused in a friendly manner, and wanted to greet him by shaking hands. The accused acknowledged that and said that Mr Satiemata had extended his hand with the words, "Good morning papa".
20. According to Mr Satiemata the accused refused to shake hands and said words to the effect that he did not know or recognise him. Mr Satiemata said that he was very surprised by this but he saw that the accused was



serious. He asked Mr Satiemata if he had been back to the islands. He then wanted Mr Satiemata to tell his family that they had made him very angry. He repeated that three times. According to Mr Satiemata the accused was trembling, presumably with anger, and the accused went on to say that he Raymond Clay was angry and that he was going to burn down all their houses on the island. He also said that he was going to send his children over to burn down the houses. He further warned Mr Satiemata to leave the markets, saying that his children were returning from Pango, and if they saw them speaking together they would beat him up. He then asked Mr Satiemata whether he wanted to die like chickens. He said that he was going to get rid of the whole Timakata family as chickens. He repeated that he was going to get rid of them all as chickens. He asked, "Do you want to die like chickens?" And finally, before departing, the accused asked, "Did you hear that? I will burn your houses."

21. Mr Satiemata remained at the markets for a short time where he spoke with a friend, Mr Manaroto, and told him of the threats.
22. The accused in his evidence in chief explained in a rather elaborate way that he could not shake hands as he was holding a bunch of l ettuces in each hand. However, that was plainly untrue as he later admitted that even if his hands were free he would not have shaken hands. That is also consistent with his other evidence when he questioned Mr Satiemata as to why he wanted to shake hands in the first place.
23. Although a minor matter on its own these less than frank responses from the accused did not enhance his credibility.
24. There was also a further matter which sounded odd and that was that the accused said in his evidence in chief that he did not shake hands because Mr Satiemata had lied. Yet at that point, even on his own evidence, all that Mr Satiemata had said were the words "Good morning papa". The accused then ventured into explaining that he was angry towards Mr Satiemata because he believed that he had arranged for men from Tanna to travel to Emae Island that very morning. And, that soon became the whole basis for his anger towards Mr Satiemata. However, that had never put to Mr Satiemata in cross examination. I understood Mr Bal to indicate that he was unaware of it, which would explain why it was not put. In any event I propose to place little weight upon it.
25. Of course, even if I accepted what the accused said about the men from Tanna, I fail to see how it helps him. All it does is give him a reason to be angry with Mr Satiemata and in so doing increase the likelihood that he made the threats as alleged. Furthermore, if Mr Satiemata had organised men from Tanna to travel to the island that morning, he is hardly likely to have gone up to the accused and greeted him in the friendly way described.



26. I acknowledge that the accused is a pastor and he stressed that he is a truthful man who leads a life based on Christian principles. He is entitled to have that taken into account when it comes to assessing his credibility. Would he, a man of such character, be untruthful or be likely to threaten to kill somebody? On the face of it he is a most unlikely candidate to have issued such threats. However, this needs to be balanced by the fact that he was unquestionably in an unfriendly and aggressive frame of mind that morning. I also sensed from the evidence as a whole that he was very much tied up with this ongoing dispute concerning Mr Timakata's claim to the chiefly title, where undoubtedly there were strong emotions on both sides. And so, the question of whether he issued these threats has to be viewed against those additional circumstances.
27. As for Mr Satiemata he was criticised for not immediately going to the police and complaining about the threats. It is suggested that in failing to do so it indicates, or supports a conclusion, that there were never any threats at all. Likewise his failure to immediately leave the markets, after supposedly being threatened by the accused, supports the same conclusion.
28. In my view while these might be legitimate criticisms my impression was that Mr Satiemata was somewhat shocked at what the accused had said and I am not convinced that he had necessarily worked out in his own mind precisely what they meant. He said that his main concern was to pass on to his family the threats about burning down houses, rather than having any concerns for his personal safety. He also denied being afraid of the accused's children who were coming to collect their father and that would explain why he remained.
29. Interestingly, when Mr Manaroto was told of the threats he suggested to Mr Satiemata that he should go and tell the security guards at the markets. The suggestion was made out of concern for Mr Satiemata's young son but that was not followed either.
30. That supports the fact that Mr Satiemata was not concerned about his own personal safety, which in turn explains why he did not go immediately to the police or to the security guards. I am therefore satisfied that it has no bearing on the issue of whether the threats to kill were made.
31. In the end I found Mr Satiemata to be a credible and reliable witness. He was surprised, perhaps even bemused, at the refusal of the accused to shake hands initially. His reaction to the alleged threats I have already described. And, although he was a supporter of Mr Timakata I had no impression that he had in some malicious way made up these allegations against the accused.
32. In contrast I have the accused in this unfriendly and aggressive frame of mind. Possibly that was due in part to his belief that Mr Satiemata had

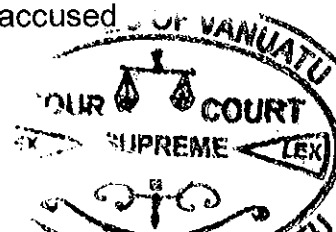


arranged for men from Tanna to travel to the island that morning. Whatever the true position I am in no doubt that he was in a frame of mind where he was capable of issuing the threats as alleged. And, while it might have been out of character for him, given the depth of feeling in this long drawn-out dispute, I am satisfied beyond reasonable doubt that that is precisely what happened. He made the threats as described by Mr Satiemata. They included threats to kill, which the accused intended to be taken seriously. I reject his evidence to the contrary.

33. There is one other matter that supports the prosecution case and that is that in the days that followed houses were burned down on Emae Island, which is entirely in keeping with the threats made by the accused. I am satisfied that was not a coincidence.
34. I find the accused guilty on count 1.

Count 2

35. On 23 July 2009 a house belonging to Mr Jack Thompson in the village of Makatea was burned down.
36. On that morning Mr Pakoa, a resident of Makatea, saw the accused and two other persons peering into the windows of Mr Thompson's house. They did that for two or three minutes. They were talking and laughing. The fact that they were looking into the house went unchallenged, although Mr Pakoa accepted that he did not know what they were doing, and at the time he thought nothing more of it.
37. That evening at about 8.00pm the accused walked past the home of his aunty, Mrs David, and made a remark to her along the lines of "be careful the kitchen might catch fire". At the time Mrs David was lighting a fire to bake bread. She thought it was a flippant remark and said in a joking way.
38. About 50 minutes later Mr Thompson's house burned down. Mr Pakoa ran to the fire but it was too late to do anything. He saw the accused arrive and then start to take photographs of the fire.
39. As mentioned before, the accused is one of those who opposes Mr Timakata and from the evidence I took it that the group opposing Mr Timakata was led by the accused's father and the other accused, Mr Clay.
40. The accused gave evidence and denied any responsibility for the fire. He denied looking into Mr Thompson's house but, as just mentioned, Mr Pakoa was never challenged on that in cross-examination. At the time he became aware of the fire the accused said that he was at home where he had previously consumed kava. He walked to the fire but because of the kava that was not very quickly. Mr Pakoa was at the fire. He did not say anything to him. As he was standing there the accused

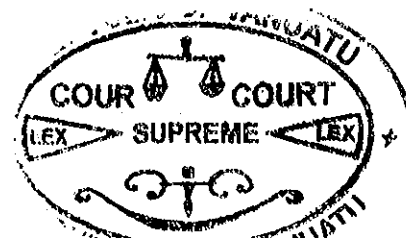


said that he suddenly remembered his camera and he ran back to get it from the house. He returned and, standing at a distance, he took photographs of the fire. After that he went back to his house, he let the kava take effect and he went to sleep.

41. In assessing the witnesses I thought that Mr Pakoa gave a straightforward account with Mr Bal missing the opportunity to question him on the one matter that might have been contentious, namely as to whether the accused and two others were looking into the windows of the house in the morning. Mrs David's evidence was not contentious.
42. As for the accused I did not find him a convincing witness at all. When asked he could not explain why he was taking photographs of the fire, beyond saying that that is what cameras are for. He admitted that he went down to the fire but not very quickly because of the kava he had consumed. Yet when he got to the fire he said he ran back to the house where he was staying to get his camera. Those two statements in terms of his ability to move quickly are at odds. I also mention that he gave an account of having earlier come back from Tongamea Village, but on the times given and the distances involved that sounded most unlikely
43. Viewing the evidence as a whole it establishes that the accused was in the area at the time that the fire must have been lit. The house at which he was staying was close by. That proximity meant that he must have had the opportunity to light the fire, had he been so inclined. Like others opposed to Mr Timakata he had a motive or a reason to light the fire. I am also satisfied that he peered into the house earlier in the day. There could be some innocent explanation for that but quite obviously in light of the house burning down that very same day it could also have sinister overtones. The same applies to his remark to Mrs David. On its own it was a flippant remark of no consequence, but it has to be viewed against all the other circumstances and the fact of the fire only about 50 minutes later. Finally, the accused is at the scene of the fire taking photographs. While the kava could produce an unusual response to such an event the reason for taking photographs is not explained, which again leaves open the possibility that there was some sinister motive.
44. Having regard to all the circumstances, and in particular the matters just discussed, I draw the inference beyond reasonable doubt that the accused, either on his own or with others, lit the fire. I reject his denial.
45. I find him guilty on count 2.

Counts 3, 4 & 5

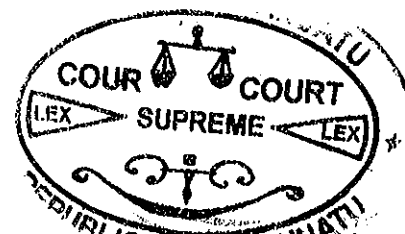
46. The evidence establishes that the accused was on Emae Island at this time, and he is therefore plainly a suspect. I also acknowledge the prosecution theory applying to all counts that the chain of events and the number of fires over such a short time span must have been the work of the accused.



47. However, the accused was not the only person on the island who could have lit the fire. There is also no evidence to link him directly to any of the arsons covered by these three counts.
48. I therefore find him not guilty on counts 3, 4 and 5.

Count 6

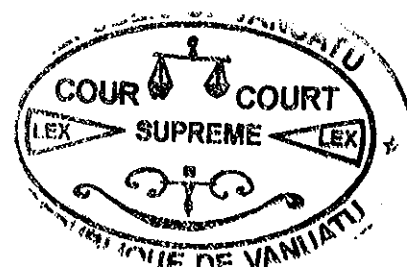
49. On 28 July 2009 the house belonging to Attis Kalo in the village of Makatea was burned down. Like all the fires it was undoubtedly a case of arson.
50. Mr Matariki lives in Makatea and not far from the home belonging to Attis Kalo. At around 9.00pm he saw that the house was on fire and he went to the blaze. As he went towards the house he could see a torch light inside. When he reached the house he saw the accused run out and almost immediately the house burst into flames. The accused ran in the direction of his house. The dogs next door started barking. He ran to his house and then his dog started barking as well. Mr Matariki said that it was not a particularly dark night and he could see clearly in the moonlight. His identification of the accused was also made from relatively close range.
51. In cross examination Mr Matariki conceded that he could not see the person's face because of a hood or something over his head. He also admitted that he had something wrong with his eyesight, although I never did get to the bottom of that. Mr Matariki is 67 years of age and for some reason objected to any further questions being asked about his body. When asked why he did not put out the fire he said it was because he was an old man. Nonetheless he insisted that he could see and he could walk.
52. The accused denied responsibility for the arson. He claims that he was at home. He prepared food in the afternoon and then later kava. That night he drank four shells of kava. By 8.00pm or 9.00pm he was fully under the influence of kava and he had gone to sleep. He denied even knowing about Attis Kalo's house burning down.
53. Once again I did not find the accused a credible witness. While he carried no onus his assertion, on this occasion and others, that he was at home and under the influence of kava, sounded like a convenient excuse.
54. There is, however, a very real issue as to whether I can rely on the identification evidence of Mr Matariki. I also have to remind myself of the need for caution in relying upon such evidence. An honest witness, and Mr Matariki impressed me as coming within that category, might be convincing but still mistaken. And, mistakes can be made about identifying people known to the witness, as is suggested by the defence here.



55. However, Mr Matariki, despite his reluctance to answer questions about his eyesight, beyond admitting that there was something wrong with it, remained adamant that it was the accused who came out of the house. He was a convincing witness. He had known the accused since he was a small child. He was also related to him, as the accused is his brother in law's son. He said that two dogs from next door started barking as the accused ran out of the house. The accused then ran to his house, or the house at which he was staying, and his dog then started barking as well.
56. Again, as with the other charges that I have found proved, there is evidence of opportunity, given that the accused was living nearby. There is the same motive or reason to light the fire. And, despite the weaknesses in the identification evidence I am satisfied that I can rely upon it. The identification was from close range, and even though he did not see the person's face, it was a person well known to him. Further to that he described the accused running to his home and his dog barking on his arrival.
57. In the end I draw the inference beyond reasonable doubt that it was the accused who committed this arson. I reject his denial.
58. I find the accused guilty on count 6.

Count 7

59. On 2 August 2009 the home of Mr Satiemata in the village of Makatea was burned down.
60. Mr Colin lives in Makatea. On that day he had a visit from the accused who wanted some tobacco. He gave him some. At the time of the transaction Mr Colin noticed that the accused had bare feet. When the accused left he walked off towards his home, which meant going past the house of Mr Satiemata.
61. Soon after Mr Colin noticed that Mr Satiemata's house was on fire and he ran up and put it out. He noticed that there were footprints inside by the window where the fire had started. He obviously regarded the footprints as being recent and, somewhat remarkably, he claimed that he recognised the footprints as belonging to the accused. He then got a torch and followed the footprints. He found that they went towards some grass and were heading in the direction of the house where the accused was staying. Mr Colin further said that he was the only one who lived in that area and he had not seen anybody else go past at that time.
62. The accused denied any responsibility and again claimed that he was at home and under the influence of kava. Once again that sounds like a convenient excuse. He said that was wearing shoes or thongs that day but I do not recall that being put to Mr Colin.



63. In my assessment the fire happened shortly after the accused left Mr Colin's house to walk home. This was not far away. So again the accused is in the vicinity. He has the opportunity to light the fire and the same motive still applies. Mr Colin says that he saw nobody else go past and plainly few people live in that area. That is relevant when looking at the short timeframe involved. I then have to decide what to make of the foot print evidence. Mr Colin does not qualify as an expert and I find it difficult to accept his claim that he can recognise the footprints of every person in the village. There are about 50 villagers. Nonetheless I find that the accused did have bare feet when he called in to see Mr Colin. I further find that Mr Colin saw footprints at the scene. I am also prepared to accept that they were recent, which is what Mr Colin must have believed, and are therefore likely to have been left behind by the arsonist. I further find that they went off in the direction of where the accused was living.

64. On the basis of those circumstances I draw the inference that it was the accused who lit the fire. I am satisfied that the charge is proved beyond reasonable doubt. I reject the denials of the accused and find him guilty on count 7.

Count 8

65. The house belonging to Mr Timakata in the village of Makatea was burned down on 8 August 2009.

66. I am satisfied that the accused was on Emae Island and once again he is a suspect. I again acknowledge the prosecution theory about the fires but the accused is not the only person on the island who might be motivated to burn down Mr Timakata's house. In any event there is no evidence linking him directly to the arson and I am therefore obliged to find him not guilty. That is the verdict on count 8.

Dated at Port Vila, this 24th day of September, 2010

BY THE COURT



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**J. Macdonald
JUDGE**

