

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

Criminal Case No.124 of 2011

**PUBLIC PROSECUTOR**  
**-V-**  
**BENJAMIN BROOKMAN**

**Coram:** Justice D. V. Fatiaki  
**Counsels:** Mrs. T. Harrison for the State  
Mr. J. Malcolm for the Defendant  
**Date of Ruling:** 20 July 2012

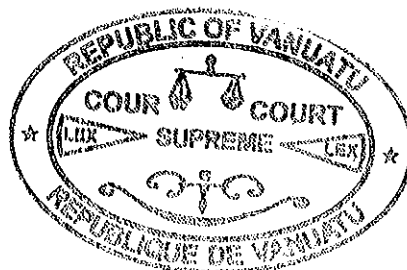
**JUDGMENT**

1. Although there was some confusion on the prosecutor's part, about how many counts there were in the information the only information before the Court is dated **3 October 2011** and charges the defendant **Benjamin Brookman** with a single count of **Threat to Kill** contrary to Section 115 of the **Penal Code** [CAP. 135]. The particulars reads as follows:

*"BEN BROOKMAN samtaem long namba 1 April 2011 long Port Vila, yu bin minim blong telephone long THAMARI HARIHARAN mo JONATHAN NAUPA mo threatenem blong killim tufala i dead."*

I would only note that the nature and details of the "threat" should be included in the particulars of the offence if actual spoken or written words are being relied upon [*see*: **Section 71 and 74 (c)** of the **Criminal Procedure Code** [CAP. 136]].

2. Before the commencement of the trial prosecuting counsel entered a "nolle prosequi" in respect of the first named complainant **THAMARI HARIHARAN** and the defendant was discharged in accordance with **Section 29** of the **Criminal Procedure Code** (CPC). The trial then proceeded on the complaint of Jonathan Naupa only.
3. The statement in **Section 81** of the **CPC** was read aloud to the defendant at the commencement of the trial. That statement reads:



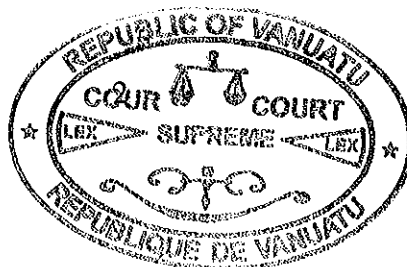
*"In this trial you will be presumed to be innocent unless and until the prosecution has proved your guilt beyond reasonable doubt. It is not your task to prove your innocence. If at the end of the trial, any reasonable doubt exists as to your guilt, you will be deemed to be innocent of the charge and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

4. From that statement the following principles may be deduced as fundamental to a criminal trial:
  - (a) The defendant is presumed to be innocent throughout the trial until proved otherwise;
  - (b) The prosecution bears the burden or onus of proving the defendant's guilt;
  - (c) The standard or quality of proof which the prosecution's evidence must attain is proof beyond reasonable doubt;
  - (d) If, at the end of the trial the Court is not satisfied to the requisite standard or the Court entertains a reasonable doubt, then the defendant will be given the benefit of that doubt and will be acquitted;
  - (e) The defendant does not have to prove his innocence but, in this case, the defendant elected to give sworn evidence and was cross-examined by the prosecutor.

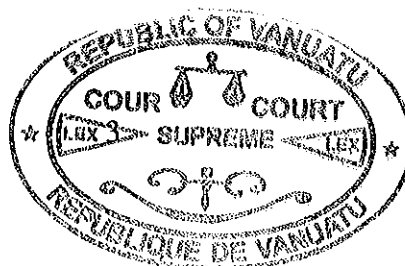
5. **Section 115** of the **Penal Code** provides:

*"No person shall, knowing the contents thereof, directly or indirectly, cause any person to receive any oral or written threats to kill any person."*

6. If I may say so the section is neither reader-friendly or easily understood. I say this advisedly because it is clear to my mind that the criminal law must distinguish between friendly banter; joking; or exaggerated anger and serious credible criminal threats intended to be taken seriously and causing fear and anxiety.
7. The instances in this country where an offence of **Threats to Kill** has been charged successfully may be divided into one of 4 categories:
  - (a) the charge is laid with a more serious charge where the victim is threatened before, during, or after the more serious offence has been committed as commonly occurs in cases of sexual offences;



- (b) the charge is laid where there is an immediate actual attempt by the defendant to carry out the threat, such as, swinging a knife or discharging a firearm;
  - (c) the charge is laid where the threat is made whilst the defendant is armed with an offensive or lethal weapon; and
  - (d) the charge is laid where the threat is made directly between strangers or unequal parties in a "face-to-face" situation accompanied with vulgar abuse and delivered in a menacing manner.
8. Context and prior relations between the parties is also important. For instance an "*April-Fools Day*" joke or prank is less likely to be taken seriously between longtime friends than between complete strangers with no prior history of similar behaviour. Even between friends, a threat which immediately results in the lodging of a police complaint also indicates that it has been taken seriously by the recipient.
9. As for whether or not the threat is intended by the utterer, to be taken seriously this can only be inferred from the nature and circumstance of the threat and the reactions of the parties to it. For instance a drunken threat accompanied by laughter and followed by an immediate retraction and apology is less likely to be intended to be taken seriously than one which is unprovoked, repeated and delivered in an aggressive and angry voice accompanied by profanities in a "face-to-face" situation.
10. In the present context we are dealing with a non "*face-to-face*" telephone conversation on "*April Fools Day*" between an employer and an employee who occasionally socialized and were generally on friendly terms. In that detached situation there was no possibility of immediate physical violence and there was time for tempers to cool and for apologies, retraction and reconciliation to take place. Unfortunately that did not occur.
11. Be that as it may, to prove the offence charged against the defendant, the prosecution must call evidence which satisfies the Court beyond a reasonable doubt of the following essential elements or ingredients:
- (a) The defendant caused Jonathan Naupa to receive a communication;
  - (b) The communication was a verbal threat to kill Jonathan Naupa; and



- (c) The defendant intended that the threat should be taken seriously by Jonathan Naupa. [see: **PP v. Jimmy Nouwai** (2006) VUSC 87 and **PP v. Michael Hansel** (2011) VUSC 49]

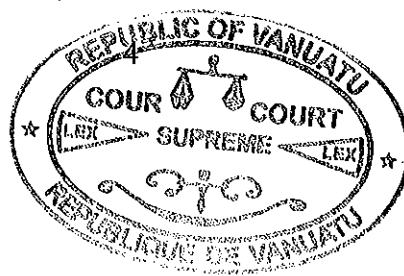
Plainly there is more to the offence than merely establishing that a threat was made.

12. In summary, the prosecution case is that on the afternoon of **1<sup>st</sup> April 2011** the defendant, **Benjamin Brookman**, threatened to kill **Jonathan Naupa** during a telephone conversation he had with him. In particular the defendant is alleged to have said (although not included in the particulars of the charge):

*"I will come to your fucking house and you will not be able to look after your kids because you will be fucking, fucking dead".*

There can be little doubt that these words, if uttered, contain an implied threat to kill the recipient of the words in their plain and ordinary meaning.

13. I turn then to consider the evidence led by the prosecution which was based entirely on the testimony of the complainant, **Jonathan Naupa**, and **Vivian Tore** who was called as a corroborative witness.
14. **Jonathan Naupa** detailed a lengthy history of the defendant's employment with **Tropical Rainforest Aromatics Ltd.** ('TRA') and the close personal and social relationship that had developed between them and their families. Things started to deteriorate from the beginning of 2010 when the defendant expressed an interest in setting up a competing business in essential oils.
15. The defendant also became irregular in his attendance during office hours and in his commitment to **TRA** business, when he became increasingly distracted in building his private home. Suspicions were also aroused about claimed expenses in the company's **Aniwa Island** operations in which the defendant had an unclear part.
16. The hiring of the first-named complainant in **February 2011** to improve the company's protocols and operations only served to aggravate matters and culminated in accusations of the defendant removing highly confidential data including **TRA's** private intellectual property that went missing from the company's computer files. At about this time too, the company was experiencing financial troubles.
17. Matters finally came to a head in **March 2011**, over what **Jonathan Naupa** claims was the intentional bouncing of a company cheque



allegedly issued for petrol expenses but which the defendant improperly treated as being for his unpaid wages.

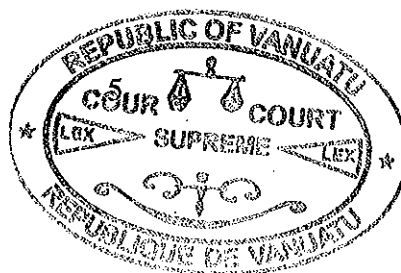
18. The relevant handwritten cheque (**Exhibit D2**) however, is dated "**14 March 2011**" for the sum of "**VT259,500**" and made payable to "**Ben Brookman**" as opposed to the name of a garage or fuel supplier as might be expected if the cheque truly was meant for the purchase of fuel. The amount of the cheque which translates into a large quantity of fuel and which the defendant says "*was the right amount for my pay*", is a further indicator that it was not intended for fuel purchases as the complainant claims.
19. Finally on **1 April 2011** the defendant failed to turn up to work and, his work station desk had been cleared. A check of the defendant's company computer also revealed that a large amount of information was missing during a history of downloading and deleting activities that had been carried out on the computer.
20. At about **3.30 p.m.** that afternoon the first complainant received several abusive calls on his mobile from the defendant. During the third of these calls the mobile was turned onto "*speaker-mode*" and the defendant was over-heard delivering a tirade of abuse to the first named complainant. **Jonathan Naupa** then intervened and received a similar tirade of abuse from the defendant, including, a threat to his life. Shortly thereafter the complainant received several calls on his personal mobile from the defendant of varying duration. Later that evening **Jonathan Naupa** received several (undisclosed) text messages from the defendant's mobile.
21. On **5 April 2011** after consulting with the **TRA Board** members **Jonathan Naupa** sent the defendant an email terminating his employment with **TRA**. The email with minor omissions reads as follows:

*"After consultation with the TRA Board, I am writing to confirm you are terminated from TRA effective immediately. The main reasons are listed below and constitute gross misconduct.*

1. *Removal of TRA IP*
2. *Threats to harm and kill a valued client representative*
3. *Threats to harm the undersigned*

.....

*Given the above situation, we would like the following to happen:*



- a) *Return all data that comprised the 40GB – we will go through this together*
- b) *Refrain from using any of this data that is not personal now or ever*
- c) *Apologize in writing to Mr Kannan and the undersigned*
- d) *Refrain from anymore threats to TRA staff, agents or clients, now or ever*

*We understand you may wish to continue residing and working in Vanuatu. Under employment law here you have an opportunity to answer the allegations leveled against you.*

*The other option is that you follow options a) through d) and accept that:*

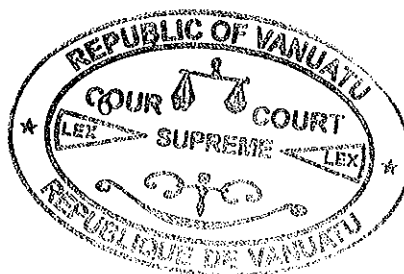
- e) *No severance entitlements will be paid*
- f) *No holiday entitlements will be paid*
- g) *Only two weeks of your current March dues will be paid*
- h) *Any future transgression against any TRA staff member or client of will make our agreement null and void*

*If this is accepted, TRA and those threatened will refrain from pressing criminal and civil charges against you. A mutually satisfactory indemnification can then be drawn up.*

*Please advise so that we may all get on with living our respective lives.*

*Jon Naupa  
CEO – TRA.”*

- 22. Defence counsel pejoratively describes this last *option* as a blatant attempt to blackmail the defendant, **viz** “*you walk away from your lawful entitlements and we won’t press charges against you*” **Jonathan Naupa**, on the other hand, euphemistically describes it as an attempt to “*mediate*” their differences. I am satisfied however that this was an improper attempt to cynically manipulate the criminal law to avoid paying the defendant’s outstanding wages and entitlements justly due under the **Employment Act**.
- 23. By letter dated **8 April 2011** the defendant’s solicitors demanded payment of the whole of the defendant’s outstanding March wages and “*an undertaking not to further defame or blackmail ... threaten ... or otherwise harass (the defendant)*”.



24. Jonathan Naupa responded through his solicitor's email of **11 January 2012** in the following cryptic terms:

*".... My client has indicated he would accept a resolve (sic) of the civil proceedings (which had not yet been filed) on the basis of a monetary payment to him by your client. How much that payment might be is a matter for your client. Further, my client would be minded to approach the public prosecutor and seek his assistance in a resolve (sic) of the criminal proceedings. Hopefully we can find some common ground so as these persons can get on with their lives.  
I await your response."*

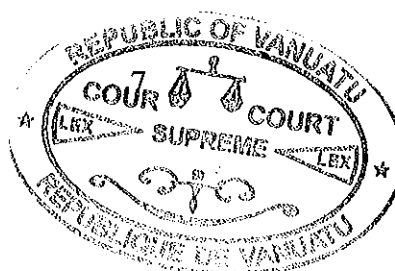
25. On **5 July 2011** the defendant issued a Supreme Court claim for unpaid wages for (March 2011) and other entitlements under the **Employment Act**, including, a severance payment for unjustified dismissal and common law damages for the manner of his dismissal. On **5 December 2011** in the absence of the complainant, default judgment in the total sum of **VT8,238,550** was entered against **TRA**.

26. In the course of its judgment the Court made the following relevant findings against **TRA**:

- *"Had dishonoured a wages cheque and had taken the money and not paid (the defendant);*
- *Dismissed (the defendant) without giving him an opportunity to be heard;*
- *Blackmailed (the defendant);*
- *Threatened criminal complaints to stifle (the defendant); and*
- *Interfered with (the defendant's) attempts to obtain new employment"*

27. Although no appeal has been lodged against the default judgment **Jonathan Naupa** claims that it is in the process of being set aside or stayed. He was at pains to deny that his criminal complaint was being relied upon as a ground for setting aside the default judgment but was eventually forced, reluctantly, to admit that *"it was only part of it"*.

28. Under cross-examination **Jonathan Naupa** was reluctant to admit that **TRA** was having financial problems in February/March 2011. He was also



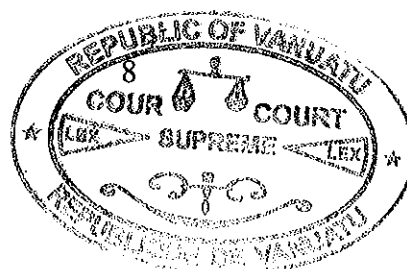
evasive about the payment of the defendant's wages for **March 2011** and even appeared unconcerned. To the question "How much is defendant owed by TRA?" he replied: "Nothing". He reluctantly agreed however that he himself had been paid most of his own salary for the month.

29. I did not find **Jonathan Naupa** an impressive or credible witness. He was often forced to recant his answers in cross examination including about the financial standing and viability of **TRA** and about the payment of the defendant's wages. He also struck me as manipulative and conveniently selective in his evidence.
30. Although he was generally unshaken about the defendant's threat to him, his unexplained lengthy delay in lodging a police complaint about the threat or taking additional security measures for the safety of his family, clearly demonstrates that he had **not** taken it seriously at the time and further, that his police complaint was lodged to provide a "bargaining chip" and a means to avoid payment of the defendant's unpaid wages. This is amply demonstrated by the "strategy" emails exchanged internally between a fellow director of **TRA** and the complainant coupled with the fact that this was not the only, complaint against him of not paying an employee's wages.
31. In this latter regard in **PP v. Jimmy** [2012] VUCA 1 which was a case involving a former employee of the complainant, the Court of Appeal in rejecting the Public Prosecutor's appeal against the suspended sentence of imprisonment imposed by the Supreme Court observed (at para 17):

*"Typically a burglary followed by the arson of the building burgled would result in a sentence of imprisonment. This approach was reflected in the Judge's starting sentence for the overall offending of six years imprisonment. However he was entitled to take into account the highly relevant background facts relating to the respondent's desperate circumstances. This desperation, caused in part by the complainant's failure to pay wages played a part in this offending. This was a man without a criminal record before these events. The Judge was also entitled to take into account the respondent's disability. Such a disability would make it that much more difficult for the respondent to cope with his loss of pay. Further any sentence of imprisonment would inevitably be more difficult for the respondent. Finally he was entitled to credit for the way in which he had managed his life before these events."*

(my underlining)

32. In his defence the defendant elected and testified on oath that in **March 2011** "the finances of TRA was extremely tenuous" and his services were






subcontracted out by TRA. On 14 March 2011 he had taken what he thought was his fortnightly wages cheque for March 2011 which was later dishonoured on presentation.

33. By the end of March 2011 he had formed the view that his employer was trying to force him to resign because it couldn't afford to sack him. He refused to resign as he wanted to protect his employment entitlements and he even suggested his lawyer draw something up, which angered the complainant and in his assessment, "*things changed dramatically*".
34. On 1<sup>st</sup> April 2011 he was at home. He recalls making a series of calls on his mobile but he denies threatening to kill the complainant as he is a "*non-violent person*".
35. In cross-examination he denied getting drunk and threatening to kill the complainant and his family.
36. I did not find the complainant a credible witness on most of his evidence and indeed I find that, even if the words complained about were uttered by the defendant (upon which there is some doubt as to what was actually said), they were **not** taken seriously by the complainant nor did they cause him immediately to fear for his life or for the safety of his family.
37. In light of the foregoing after careful consideration of the evidence in the case I am not satisfied that the prosecution has established all of the ingredients of the offence charged beyond a reasonable doubt and accordingly, the defendant is found "*not guilty*" and is acquitted.

DATED at Port Vila, this 20<sup>th</sup> day of July, 2012.

BY THE COURT

  
D. V. FATIAKI  
Judge.

