

PUBLIC PROSECUTOR vs. FRANK MAHIT KAL

JOEL AVOCK MASIAL

WILLIE WAKON

TONY JACK

DANIEL KALSAU

Before: *Justice Chetwynd*

Counsel: *Tristan Garae for the Public Prosecutor*

*Bryan Livo for Frank Mahit Kal, Willie Wakon, Tony
Jack and Daniel Kalsau*

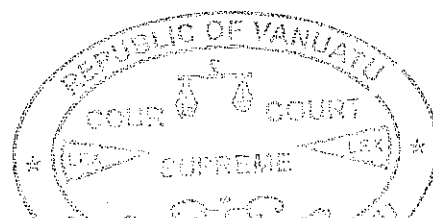
Less Napuati for Joel Avock Masial

VERDICT

1. The 5 Defendants are charged with a number of offences. They all relate to incidents which took place over the night and early morning of 6th and 7th July 2013. The first count against all the Defendants relates to unlawful assembly.
2. Section 68 of the Penal Code [Cap 135] sets out the elements of unlawful assembly:-

When three or more persons assembled 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 persons 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.

It is immaterial that the original assembling was lawful if, being assembled, they conduct themselves with common purpose in such manner as aforesaid.



When an unlawful assembly has begun to execute the purpose for which it assembled by a breach of the peace and to the terror of the public, the assembly is called a riot.

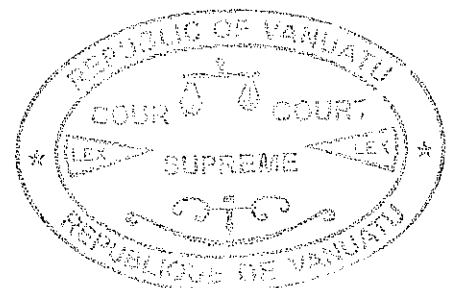
The maximum penalty for unlawful assembly is 3 years.

3. All the Defendants are also charged with the intentional homicide of David Ben Ngara. It is not alleged that the death of the late Mr Ngara was premediated and so the maximum penalty is 20 years imprisonment. There is no need at this stage to deal with the elements of the offence.

4. There is a third count in which Joel Avock, Willie Wakon, Tony Jack and Daniel Kalsau are said to have solicited or incited Frank Mahit Kal to kill Mr Ngara. That count can and will be dealt with shortly towards the end of this judgment.

5. The Defendants were arrested and all interviewed under caution. Joel Avock was arrested and he was interviewed during the evening of 7th July just before six o'clock. Frank Mahit Kal had been interviewed at twenty past four earlier that afternoon. Willie Wakon was interviewed at quarter past five. Tony Jack was interviewed in the morning of the next day at twenty past ten on 8th July 2013. Daniel Kalsau was not interviewed until 27th July 2013 when he was interviewed when he was under caution at half past three in the afternoon. All of the defendants when interviewed made admissions which are relevant to the charges against them.

6. A voir dire was conducted over 7th, 8th and 9th December 2015, the Defendants all said they had been forced to make "confessions" because they had been beaten by the police. They all said the answers they gave were not voluntary. I heard from the police officers who were cross examined. As I mentioned in my decision following the voir dire, the officers were not questioned by the defence on specific allegations later made by the defendants in their evidence. I also noted that there was no medical reports relating to any injuries the Defendants say they sustained. I did not accept the Defendants evidence and did not accept that they had been assaulted.



7. I also found that the answers to the questions put to the Defendants had not been obtained by reason of any threats. I did not accept that the interviews were conducted in an oppressive manner and found that all the answers given were given voluntarily. I allowed the record of interview under caution to be admitted into evidence as exhibits 2, 3, 4, 5 & 6.

8. Following my decision on the voir dire I heard from a number of witnesses. Unfortunately because of time constraints some evidence had to be delayed to May 2015 and the defence case could not be heard until August. It should also be mentioned that the trial which started in December 2015 was a re-trial. That became necessary because at the close of the prosecution case in the first trial defence counsel (neither Mr Napuati nor Mr Livo were involved at that time) said he wanted to cross examine one of his clients. He did not see the apparent conflict in cross examining one of his clients for the benefit of another and so the trial was abandoned and hearings fixed again with new counsel acting for the Defendants. A decision on the need for a re-trial was published on 17th April 2015.

9. Be that as it may, I heard from several witnesses over the 10th and 11th December. Mr Gislain Tabisang was a neighbour of the late Mr Ngara. He is a police officer working with the Maritime Wing. He told of an incident close to 11 O'clock on the night of 6th July 2013. He heard one of the Defendants, Joel Avock, shouting. He knows the Defendant very well. He also heard the deceased shout "shut up". There was then a further exchange where the deceased told Joel Avock he had no respect for people. There were some further words spoken by Joel Avock and then the witness heard the words "Fuck you, I'll be back." Joel Avock was with another of the Defendants, Willie Wakon.

10. Avock does not deny the early incident described by witnesses took place. He does deny saying he would be back. When he gave his version of events in court it was very different. The same can be said of Willie Wakon's evidence of the incident. Neither of them gave credible evidence. Both seemed to be describing a pleasant night out with meals eaten on the veranda and subdued discussion. There was a minor incident of Avock shouting perhaps a bit loudly. This was sometime around 9 pm. The truth is both had been drinking. Avock was arguing with his wife. The incident occurred nearer 11 pm and Avock was threatening and aggressive. He swore at Mr



Ngara and threatened to be back with others. The version of events set out in his answers to questions put to him whilst he was under caution was in accordance with what other witness say. It means, in short, his evidence before this Court cannot be believed.

11. As mentioned, Willie Wakon also confirmed the events early in the evening but again downplayed what actually happened when giving evidence to the Court. He also says it happened earlier in the evening and that there was not much of a disturbance. He does confirm he had to pull Joel Avock out of the yard. His statement under caution however confirms what other witnesses say. This casts grave doubt on his credibility when giving evidence before the court.

12. When we come to the second incident the independent witnesses and the defendants' own answers in the interviews under caution coincide. The incident started in the early hours of the morning with shouting and the sound of stones hitting buildings. This is the evidence of Mr Tabisang and Mr Rapi. The latter was awoken by the noise and looked out of his door. As the stones were still flying he closed his door and watched out of his window. He saw a man in a white shirt moving towards the late Mr Ngara's door. Mr Ngara opened his door and came out onto the veranda. He went towards the man in white and both men approached the corner of the building Mr Ngara fell down. Stones were still being thrown and were hitting the roofs and fronts of houses. Mr Ngara tried to get up but fell down again. His wife came out to help him. Stones were still being thrown and she was hit as well.

13. Mr Tabisang was also awoken by the sound of stones hitting the buildings. He said it sounded like a thunderstorm. He opened his door to look out. He could see Joel Avock and he could see clearly was someone in a white top with a hood going towards Mr Ngara's door. Mr Ngara moved towards the boy in white who then moved away. As Mr Ngara approached the corner of the house he was struck by a stone and fell down. The only person he recognised that night was Joel Avock. He did not know the boy in white.

14. Mr Tabisang's evidence did become a little confusing when cross examined. The idea of Mr Ngara being hit by an axe seems to be first introduced by him. There are several photographs of an axe handle like branch or piece of wood but there is no

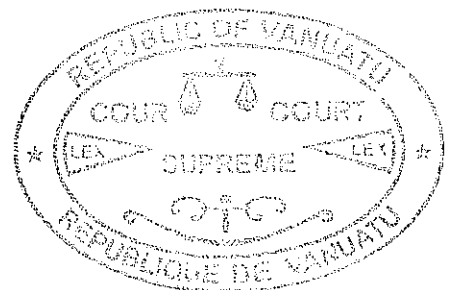


evidence about the significance of the "handle". In any event it is no part of the prosecution case that death was caused by a blow from an axe.

15. I have no doubt that Mr Ngara was struck by stones. It is highly probable that they were thrown by the persons seen in the yard. There is overwhelming evidence that only two of the defendants went into the yard and threw stones, Joel Avock and Frank Mahit Kal. This is the evidence of Mr Tabisang and Mr Rapi and in addition the answers given by the defendants to questions asked under caution. The other defendants were also throwing stones but from outside of the yard or from the just inside the entrance.

16. There is a question mark over large wound on Mr Ngara forehead. This has arisen because of the nature of the wound and how it is described by the doctor who saw the deceased in hospital. He seems to have been told the wound was caused by an axe. He confirmed the wound could have been caused by an axe. The doctor agreed that the wound was a penetrating wound caused by a sharp edged object. The defence say this means it could not be the result of being hit by stones. That is a misrepresentation of the doctor's evidence. The doctor gave evidence that death was due to cerebral haemorrhage, loss of blood from a head wound and that the wound was caused by a sharp edged object. There were a number of stones thrown, several of which could be described as sharp edged. For example, one is shown in a photograph marked by label 5. It is a "flat stone". Another can be seen in the photographs next to label 12. Yet another is shown next to label 3.

17. Much of the evidence by the Joel Avock and Frank Mahit Kal given in Court must be rejected. It is very hard to accept what Avock says happened in the early morning. He said in court he was going back to see his wife to ask her for money to go to the club. He is asking the Court to believe that having gotten drunk and after getting into an argument with his wife over child support, he decides to go back several hours later, in the early hours of the morning, and ask for money to go clubbing. He also says he wasn't going to assault or argue with Mr Ngara he was, at 2 o'clock in the morning, going to call and say sorry for his earlier behaviour.

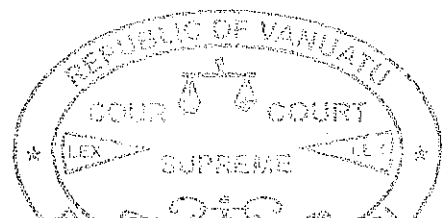


18. Frank Mahit Kal said in court, stones were only thrown after Ngara came out of his house with a knife. He says he had no idea why Joel Avock was going to see the man. Joel Avock never said anything to him about the earlier incident. All he thought was going to happen was that Joel Avock was going to ask his wife for money.

19. The evidence of others such as Mr Rapi and Mr Tabisang as to what went on in the yard is to be preferred. From all the evidence, including that in the answers given by the defendants to questions following cautions, it is clear beyond reasonable doubt that all the defendants went to the yard where Mr David Ngara lived. They went there to teach him a lesson. They were drunk to varying degrees after consuming home brew, Tusker beer and Golden Eagle. Some picked up stones before they got to the yard. Once at the yard there was shouting and there was stone throwing. That behaviour was sufficient to cause anyone nearby, and those in the yard in particular, to fear that a breach of the peace was going to be, and was, committed.

20. It is right to say that it is not possible to say for sure who threw the stone or stones that struck Mr Ngara on the head. There is no direct evidence to say who threw the stone or stones that caused the wound from which he died. However it is clear from the doctor's report and from the photographs of the wound that it was caused by a blow with considerable force. Both Frank Mahit Kal and Joel Avock say they threw stones at Mr Ngara. They were the only ones who were close enough to deliver blows of sufficient force to cause the wounds and in particular the deep penetrating wound which led to Mr Ngara's death. The two of them had gone into the yard with the intention of causing harm to Mr Ngara. Both picked up stones as they went into the yard. The evidence of that comes from the police officer, Sgt Tony Berry, who examined the scene later. He says that some of the stones scattered around the yard had come from a pile of stones just inside the entrance to the yard. When they got to Mr Ngara's door he came out and at a range of no more than 2 metres they threw a number of stones at him. Several of these stones struck Mr Ngara on the head. There is evidence of this from other witnesses as well as what the two defendants admitted in their interviews under caution.

21. In addition there is evidence from two young men who met up with a group of boys including Joel Avock, Tony Jack and Frank Mahit Kal. This was after the second



incident and in the early hours of the morning. They had been at Shakers nightclub and had seen at least two of the defendants there earlier that morning. They were walking home and met the others who were also walking back home. They gave evidence as to what was said as they were all walking to Ohlen. Both agreed they had been drinking that night but they were not full drunk. Elly Avock said that Frank Mahit Kal told them they had stoned someone. He said the man fell down and, "shake shake olsem fowl". Elly Avock remembered Frank Mahit Kal was wearing a white top. Micheal Taylor says as they were walking back to Ohlen Frank Mahit Kal said he'd killed someone. He replied with words to the effect that you're lying. He was then told, "It is true ask Tony". Tony (Jack) confirmed the story.

22. There can be absolutely no doubt that Frank Mahit Kal and Joel Avock went into the yard that early morning and stoned the deceased David Ben Ngara. They must have been aware that throwing stones at someone as close as they were to him would more than likely cause injuries leading to that someone's death. They intended, at the very least, to cause serious injury to Mr Ngara and it must have been apparent to them that stones thrown from a distance of a couple of metres at someone's head would more than likely cause death. That can be the only result of throwing stones at a person from such close range.

23. The very best the two defendants can say is that they were reckless as to consequences of what they did. Section 6 of the Penal Code [Cap 135] states:

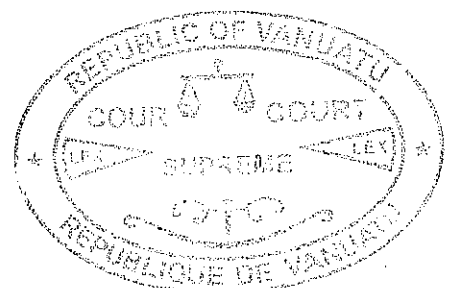
6. Criminal intent, recklessness

(1) No person shall be guilty of a criminal offence unless he intentionally does an act which is prohibited by the criminal law and for which a specific penalty is prescribed. The act may consist of an omission, or a situation which has been created intentionally.

(2) No person shall be guilty of a criminal offence unless it is shown that he intended to do the very act which the law prohibits; recklessness in doing that act shall be equivalent to intention.

(3) A person shall be considered to be reckless if –

(a) knowing that there is a risk that an event may result from his conduct or that a circumstance may exist, he takes that risk; and



(b) it is unreasonable for him to take it having regard to the degree and nature of the risk which he knows to be present.

(4) A person shall not be guilty of a criminal offence if he is merely negligent, unless the crime consists of an omission. A person is negligent if he fails to exercise such care, skill or foresight as a reasonable man in his situation should exercise.

(5) No provision of law constituting a criminal offence shall be construed as dispensing with the necessity to prove the criminal intention of the accused, unless such construction is expressly stated or arises by necessary and distinct implication.

The actions of the two defendants went well beyond mere negligence. They knew or should reasonably have known that stoning David Ben Ngara on the head at close range would result in his death.

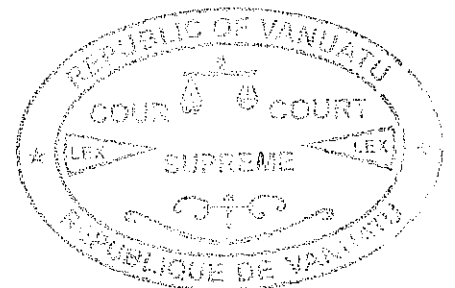
24. The two defendants cannot rely on their intoxication either. No one had forced them to drink. There is no suggestion that someone else administered alcohol to them. Section 21 of the Penal Code deals with intoxication:

21. Voluntary intoxication

(1) Voluntary intoxication shall not constitute a defence to any charge unless the offence charged is one in which criminal intention is an element and the intoxication was of so gross a degree as to deprive the accused of the capacity to form the necessary criminal intention; the onus of proof thereof on the balance of probabilities shall lie on the accused.

(2) For the purpose of this section, intoxication means the impairment of the mental or physical faculties of a person arising from the taking of any foreign substance.

There is no evidence to suggest the defendants were so drunk as to be incapable of forming the necessary intent required by section 106(a) of the Penal Code.



25. Whilst it cannot be said that there is evidence to show who threw the stone or stones at the victim that caused his death, both Joel Avock and Frank Mahit Kal went into the yard with the intention to stone Mr Ngara. Both were involved and in accordance with sections 31 and 33 of the Penal Code, both must share the consequences.

26. I find Frank Mahit Kal and Joel Avock guilty of the intentional homicide of Mr David Ben Ngara.

27. I acquit Willie Wakon, Tony Jack and Daniel Kalsau of intentionally causing death of David Ben Ngara.

28. I find all the Defendants guilty of unlawful assembly.

29. I acquit Joel Avock, Willie Wakon, Tony Jack and Daniel Kalsau of inciting or soliciting Frank Mahit Kal to cause the death of David Ben Ngara.

30. The Defendants are remanded in custody for Sentence on 29th September 2016 at 9:00am. I ask for the Probation Office to prepare pre-sentence reports.

DATED at Port Vila this 22nd day of August, 2016.

BY THE COURT


.....
D. CHETWYND

Judge

