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

Criminal Case
No.18/3374 SC/CRML

PUBLIC PROSECUTOR
v
BERRY THOMPSON
SEULE SAM

Before: ***Justice D. V. Fatiaki***

Counsel: *Ms M. Tasso for the State*
Mrs. T. Harrison for the Defendants

Date of Ruling: *11 September 2019*

RULING

Introduction

1. On 13 November, 2018 Berry Thompson and Seule Sam were committed by the by the Magistrate's Court for trial in the Supreme Court on a proposed Information containing a single count which jointly charged them and a third person with: Threats to Kill contrary to Section 115 of the Penal Code.

2. On 5 December 2018 an amended Information was filed in the Supreme Court separately and jointly charging the above-named Berry Thompson and Seule Sam on two (2) counts of Threats to Kill. The named complainant/victims are: "*Kirk Kalmarie*" (in **Count 1**) and "*Lukin Kalmarie*" (in **Count 2**) respectively.

3. At their arraignment on 11 December, 2018 both defendants denied the charges and a pre-trial conference was set down for 28 January 2019 later deferred to 01 April, 2019 on which latter date, a trial was fixed for 15/16 April 2019. Given the 5 years that had elapsed between the commission of the alleged offences on 12 September 2013 and the trial dates, counsels were strongly advised on 01 April, 2019, to consider whether it was appropriate to continue with the charges. Some correspondence was exchanged between counsels.

4. By letter dated 11 April, 2019 prosecuting counsel wrote to defence counsel that the trial would continue as there had never been an apology offered by the defendants. Counsel also disclosed that the second-named complainant "*Lukin Kalmarie*" had passed away on 05 April 2019 after the defendants' arraignment

and the prosecution would seek to read his deposition in evidence at the defendant's trial.

The Application

5. On 13 June 2019 a formal application was filed by the prosecution invoking Section 162(3) of the Criminal Procedure Code which relevantly provides:

> ***"If a person who made a statement has died ... his statement may be read as evidence".***

Clearly the Court is given a discretion ("***may***") to permit the reading of a witness' deposition or police statement "*as evidence*" where the witness is deceased.

6. It is undisputed that "*Lukin Kalmarie*" died on 5 April 2019 at his home at Emua Village, North Efate. Furthermore, he is included in the Preliminary Inquiry "*statements*" produced by the prosecution at the defendants' committal and which was considered by the committing Magistrate.

7. Additionally, prosecuting counsel submits that the statement of Lukin Kalmarie "*contains important and relevant details of the incident on the said date*". Counsel also submits it would **not** be unfair to admit the statement as evidence because:

- The statement is that of the named complainant/victim in **Count 2**;
- The statement was made on the day of the incident;
- The statement is supported by other (unnamed) witnesses;
- There is no motive for the maker of the statement to concoct or misrepresent the facts; and
- It is in the interests of justice that the Court should have all relevant and probative information before it in order to find the truth; and
- The court can reduce any prejudice from the absence of cross-examination by taking that factor into account in determining what weight (if any) the statement shall carry.

Finally prosecuting counsel submits that there is a "*real risk*" if the statement of Lukin Kalmarie is not read in evidence, that the prosecution of Count 2 will not proceed. The contents of the statement is also corroborative of Count 1.

8. Defence counsel in opposing the application refers to Article 5(1)(2) of the Constitution dealing with an accused's fundamental right to the "*protection of the law*" and to a "*fair hearing*". Reference was also made to Section 82 of the Criminal Procedure Code which deals with an accused's "*right to cross-examine*" any person called "*as a witness*" [***see also:*** Section 162(8)].

9. Defence counsel also submits that the application should be "*disregarded*" because:

- Once a complainant is deceased his evidence does not exist anymore (whatever that means);

- The defendant's "*right to a fair trial*" including the right to cross-examine witnesses is paramount ... (***see:*** State v Misimango and another [2009] 4 ALL SA 529 (GSJ (27 July 2009) reported in SAFLII];

- The prosecution says there are other witnesses who confirm the threat uttered to the deceased;

- The deceased was a party to an on-going land dispute in the Supreme Court since 2011 involving the defendants' family and therefore his evidence is likely to be biased, exaggerated and even false;

- Although the defendants were only recently charged the events occurred in 2013 and the defendants are prejudiced by the long delay as memories become dimmer and witnesses become unavailable (***see:*** Republic v Teoiaki [1993] KIHC (Kiribati) and Public Prosecutor v Guy Benard and others [2005] VUSC 61);

- Continuing with Count 2 tantamounts to "*malicious prosecution*" and "*a waste of court's time*".

10. In considering the application and the competing submissions, counsels referred me to the case of Public Prosecutor v Kency Johnny [2018] VUSC 21 where a deceased witness' (**not** the complainant) statement was tendered and read in evidence by consent (**not** the present situation). Also the case of: Public Prosecutor v Johnson Namri [2018] VUSC 77 where the Court said the relevant questions to consider whether to admit a statement under Section 162(3) of the Criminal Procedure Code, are:

> "*(i) The fact that the person making the representation (statement) that it had allegedly occurred at the same time or shortly before the representation was made* ("**contemporaneity**"); and
>
> *(ii) The representative* (sic) *was made in circumstances that make it unlikely that the representation was a fabrication* ("**veracity**")".

11. In similar vein the Privy Council in allowing the appeals and quashing the convictions that were secured with the admission of the depositions of eye-witnesses who had died before the commencement of the trials said, in Richard Scott and another and Winston Barnes and others v R (1989) 1AC 1242 at p.1258 H:

> *" ..... the discretion of a judge to ensure a fair trial includes a power to exclude the admission of a deposition. It is however a power that should be exercised with restraint. The mere fact that the deponent will not be available for cross-examination is obviously an insufficient ground for excluding a deposition for that is a feature common to the admission of all depositions which must have been contemplated and accepted by the legislature when it gave statutory sanction to their admission in evidence."*

and at p. 1259 B:

"It will of course be necessary in every case to warn the jury that they have not had the benefit of hearing the evidence of the deponent tested in cross-examination and to take that into consideration when considering how far they can safely rely on the evidence in the deposition."

later on the same page the Court said at para. G:

"*No doubt in many cases it will be appropriate for a judge to develop this warning* (about the absence of cross-examination) *by pointing out particular features of the evidence in the depositions which conflict with other evidence and which could have been explored in cross-examination; but no rules can usefully be laid down to control the detail to which a judge should descend in the individual case ... the deposition must of course be scrutinized by the judge to ensure it does not contain inadmissible matters such as hearsay or matter that is prejudicial rather than probative ...*".

and then at para. F:

"*it is the quality of the evidence in the deposition that is the crucial factor that should determine the exercise of the discretion*".

and finally at H:

"It is only when the judge decides that such directions cannot ensure a fair trial that the discretion should be exercised to exclude the deposition."

Notably in neither judgment does the Privy Council consider in detail the nature and quality of the accused's right "*to a fair hearing*" and "*to cross-examine*" any prosecution witness called against him.

12. Be that as it may, the prosecution's brief facts in this case confirms:

    (1) the existence of "*... a land dispute between* (the complainants) *of Loukarai village, North Efate (Epule) and the* (the defendants) *of Tongoa Island who also live at North Efate ...*"; and

    (2) the utterance of the threats in that context and during the dispute when the complainants Chief and family members were clearing the boundary of the disputed land and erecting boundary pegs.

13. The prosecution also names "*Kalsarab Kalmarie*" and "*Chief Daniel Maritapok*" as witnesses who "*... witnessed the incident on that particular day*". Presumably, they are additional to the complainants namely, "*Kirk Kalmarie*" and "*Lukin Kalmarie*" against whom the alleged threats were directed.

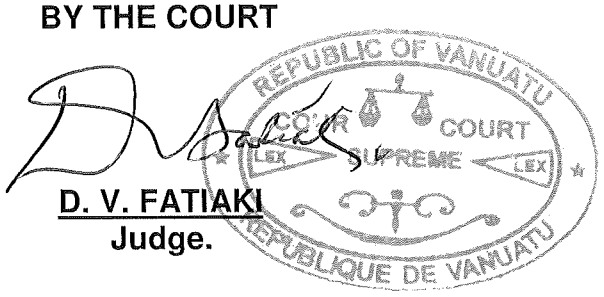
14. After careful consideration of the competing submissions and mindful of the defendants' fundamental rights to "*a fair hearing*"; to "*protection of the law*" which includes the "*right to cross-examine*" any witness who testifies against them as well as the "*presumption of innocence*" (s.81 CPC) and the "*right to remain silent*" (s.88 CPC), and noting the concession that there is an on-going land dispute between the defendants' and the complainant's families since 2011 and there

being no offer by the prosecution to call the police officer who recorded the deceased's statement namely, "*PC Naies Thompson*" of Silaewia Police Post, I have reached the firm conclusion that it would not be appropriate to permit the statement of Lukin Kalmarie to "*be read as evidence*" in the trial of the defendants.

15. The application is accordingly refused.

DATED at Port Vila, this 11th day of September, 2019.

BY THE COURT



D. V. FATIAKI
Judge.