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

Criminal Case No. 16/1487

PUBLIC PROSECUTOR

V

~~**PIERRE NOAL**~~
CHARLEY KASUALI
ELTON WORWOR
GLEN KOVOI
MICHAEL SAMUEL
BEN KORO

Ruling: ***Friday, September 2nd, 2016 at 1.30pm***

Before: ***Justice JP Geoghegan***

Appearances: ***Damien Boe for the Public Prosecutor***
Justin Ngwele for Charley Kasuali
Andrew Bal for other defendants

JUDGMENT

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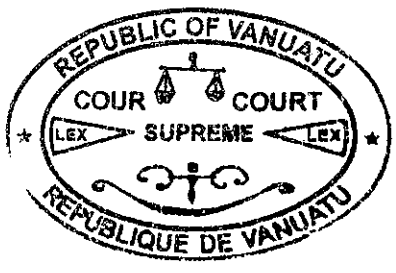
1. This prosecution commenced with six defendants facing a variety of charges arising from an incident on March 13th 2016 which involved a number of the defendants traveling to the office of the complainant at Vanuatu Helicopters, kidnapping her and taking her to a gathering of 50 or more taxi and bus drivers at Star Wharf where she was required to apologize for comments which she had made on Facebook and which the defendants had taken exception to. Pierre Noal, Glen Kovoi and Ben Koro were charged with kidnapping and unlawful assembly and entered guilty pleas at the commencement of this trial. Michael Samuel pleaded guilty to the one charge he faced which was aiding and abetting kidnapping. That left pleas of not guilty in respect of charges of intentional assault and threatening to kill against Mr Koro, charges of



unlawful assembly, threatening to kill and intentional assault against Mr Charlie Kausali and one charge of unlawful assembly against Mr Elton Worwor. It is in respect of these charges that counsel for the defendants make an application to the Court of no case to answer pursuant to s. 164 of the Criminal Procedure Code.

2. The appropriate test on such an application was set out by Bullu J in PP v. Benard [2006] VUSC 26, where he stated :

> 31. At the end of the Prosecutions case, the defendants submitted that there is "*no case*" to answer. They submitted that there is no evidence on which the defendants "*could be convicted*".
> 32. The submission is made pursuant to section 164 of the Criminal Procedure Code. It states:-
>
> "*(1) If, when the case of the Prosecution has been concluded, the judge rules, as a matter of law that there is no evidence on which the accused person could be convicted, he shall thereupon pronounce a verdict of not guilty.*
>
> *(2) In any other case, the Court shall call upon the accused person for his defence and shall comply with the requirements of section 88.*"
>
> 33. The judge in this jurisdiction is both the judge of law and the judge of facts. When a no case submission is made at the end of a Prosecutions case pursuant to section 164 of the Criminal Procedure Code Act [CAP. 136], it is made to the judge as the judge of law. In the present application or submission of no case to answer I remind myself that in determining the application I sit as the judge of law and not the judge of fact.
> 34. I have had to go back carefully over the submissions made by the Defendants and the responses by the Public Prosecutor, and the evidence before the Court to ascertain what is the evidence before the Court on the elements of the charge laid against the Defendants.
> 35. The case of *PP v. Samson Kilman & Others; [1997] VUSC 21; No. 5 of 1997* is of assistance as it lays down a guideline for the court when faced with a no case submission. In that case the learned Chief Justice adopted the pronouncement by Lord Cane CJ in *Reg. v. Gailbraith (CA) (1981) 1 WLR 1039*. The relevant passage reads as follows:-
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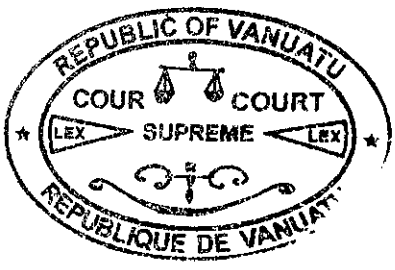
> "*(1) If there is no evidence that the crime alleged has been committed by the defendant there is no difficulty the judge should stop the case.*



(2) The difficulty arises where there is some evidence but it is of tenuous character, for example, because of weakness or vagueness or because it is inconsistent with other evidence.

(a) Where the judge concludes that the Prosecution case taken at its highest is such that a jury properly directed could not properly convict on it, it is his duty on a submission being made to stop the case.

(b) Where however the Prosecution is such that its strength or weakness depends on the view to be taken of a witness's reliability or other matters which are generally speaking within the providence of the jury and where no one possible view of the facts there is evidence on which the jury could properly come to a conclusion that the defendant is guilty then the judge should allow the matter to be tried. (Pe. Lord Land CJ at p. 127)."

36. I adopt this as a guideline judgment in this case. What is the standard of proof on a no case to answer submission. A case on point is that of Auckland city *Council v. Jenkins* where *Speight J said*:-

"A tribunal deciding whether or not there is a case to 'answer' must decide whether a finding of guilt could be made by a reasonable jury or a reasonable judicial officer sitting alone on the evidence thus far presented. He is ruling in fact whether it is 'prima facie' – a well understood phrase."

37. Bearing in mind section 164 of the Criminal Procedure Code Act the test is not proof beyond reasonable doubt but rather as a matter of law whether the accused could be convicted on the evidence presented thus far. I am satisfied that the test is whether a finding of guilt could be made by a reasonable judicial officer sitting alone on the evidence thus far presented. I adopt the test as stated by *Speight J.* in *Auckland City Council v. Jenkins.*

38. The submission of no case to answer requires the Court to refer to the evidence adduced by the Prosecution, more particularly, the evidence relating to the elements of the crime the Defendants have been charged with.

3. The Prosecution case relevant to the outstanding charges is that Mr Kasuali and Mr Worwor were part of an unlawful assembly, that unlawful assembly being a gathering of 50 of more taxi and bus drivers at the Star Wharf. The unlawful assembly involved the complainant Ms Lengkon being forcefully removed from her work place at Vanuatu Helicopters and brought to Star Wharf where she was forced to apologize for comments which she had made on Facebook and which some of the defendants regarded as objectionable. She was taken from

her office by Mr Noal, Mr Kovoi and Mr Koro. As she was in the course of apologizing to the gathered drivers she was struck a forceful blow to the side of her head around her right eye which caused a sub conjunctival hemorrhage, brusing and swelling. There can be no question that the incident would have been an extremely frightening one for her, occurring as it did in difficult circumstances where she was confronted by a large crowd. The prosecution alleges that Mr Koro and Mr Kasuali were guilty of the assault. They also alleged that Mr Koro and Mr Kasuali threatened to kill Ms Lengkon.

4. In submissions presented by Mr Boe, the Public Prosecutor accepted and conceded that there was simply no evidence that Mr Koro or Mr Kasuali threatened to kill Ms Lengkon. While I accept, without reservation, Ms Lengkon's evidence that she was threatened by various people in the large crowd she was forced to confront, she was unable to identify any particular individual. The prosecution concession is entirely appropriate and it accepts that there is no-case to answer. In such circumstances Mr Koro and Mr Kasuali are acquitted on the charges of threatening to kill.

5. Turning to the charge of assault there is absolutely no doubt that Ms Lengkon was assaulted in the way in which I have described. The only issue is the identity of the person responsible. I say "person" rather than "persons" as the evidence which has been heard is such that I can be satisfied that Ms Lengkon was struck by one blow and that accordingly the assault was undertaken by one person as opposed to two or more.

6. The only evidence directly of the assault is that of the complainant herself. Her evidence in this regard was frank and straight forward. She described being brought to Star Wharf and was in the course of a repeated apology when she was struck. She did not see who hit her but it is clear that Mr Worwor was standing beside her on her on her right

side. Ms Lengkon could not identify anyone who was responsible for the assault.

7. Mr Boe acknowledged that the prosecution case really turned on a statement made by Mr Worwor on March 14th 2016, to two police officers in which he identified Mr Kasuali, Mr Koro and a third person Timothy Busai as the persons responsible. Mr Busai is an individual the Public Prosecutor endeavoured to add to the proceedings as a defendant immediately prior to this trial. Given that Mr Busai had not been served with a summons to appear, had not been arraigned and could be charged separately without delaying this trial I declined the Prosecution application to proceed against him as a co-defendant in this trial. The two police officers, officers William Amkorie and John Henry both interviewed Mr Worwor having invited him to attend the police station. That invitation was due to the fact that he was thought to be the President or Vice President of the Public Transport. Assn. He spoke with them on March 14th, the day after the incident. He was asked whether or not he could provide names of the persons who were involved and that he gave three names, Mr Kasuali, Mr Koro and Mr Busai. Mr Worwor then left the station.

8. The matter was complicated by the fact that neither officer in their original statements referred to Messrs Kasuali, Koro or Busai as being involved in the assault of Ms Lengkon as opposed to the incident generally. There was no reference to assault. The reference to assault came in a further statement made by the officers on August 27th, immediately prior to the trial. The evidence of both officers was that they had essentially overlooked the reference to an assault but had certainly written down the names of those three individuals.

9. The making of those statements and the reference to those three individuals being identified by Mr Worwor as responsible for the assault came at the same time as the laying by the Public Prosecutor of an amended information adding charges of threatening to kill and intentional assault to the charges which had been laid some months beforehand. While both officers gave evidence that Mr Worwor had identified the three individuals there was no reference to anything else in relation to the assault or the parts that those three individual were alleged to have played in it. There appears to have been no enquiry of Mr Worwor as to how he knew that those three persons were responsible for the assault, including whether he had witnessed the assault himself and if so, what he witnessed, and if not how he had heard that those three individuals were responsible. In the circumstances, and bearing in mind the seriousness of the incident the failure to make those enquiries is extremely concerning.

10. The statements are challenged in two ways. Firstly, it is submitted that the statement is inadmissible under the common law rule that prevents the evidence in a statement of one accused being used against a co accused.

11. The second, is on the basis of reliability. In short it is submitted that the evidence of the police officers cannot be relied upon and that the reference to the three individuals being involved in the assault of Ms Lengkon was effectively concocted by the police officers to support the assault charge which was laid.

12. As to the first point, it is established law that the confession of one defendant is not evidence against another. A statement by one defendant, not made on oath in the course of trial is not evidence against another. Accordingly, given that Mr Worwor, Mr Koro and Mr Kasuali are co-accused in the same trial (not withstanding that Mr Worwor is not

charge with assault) the statement is, on the face of it, inadmissible. Neither Mr Kasuali or Mr Koro were present when Mr Worwor made the statement and the issue is whether it falls with any of the recognized exceptions to the rule, namely were a co-accused accepts the truth of the statement; things said and done in furtherance of a common design in a case where conspiracy is alleged; and things said and done in furtherance of a common design were the accused are alleged to have engaged in a common enterprise. As was recognised in the New Zealand Court of Appeal in R v Pearce .NZCA [2007]40 at 26:-

> *"The co-accused rule reflects that notwithstanding that a confession is against the interest of the maker of the statement and is thereby likely to be true, in a co-accused situation the maker of the statement may have other motives, such as endeavouring to transfer blame to the other co-accused, that are capable of undermining the reliability of the statement. The rule also reflects that the out of court admission has not been made on oath and that the co-accused will not have had an opportunity to cross examine the maker of the statement".*

In addition to this, of course. such a statement is hearsay evidence.

13. While the statement by Mr Worwor is not a confession by him of any wrong doing on his part, it is a statement which directly implicates three other persons, two of whom are co-defendants in this trial. I am accordingly satisfied that the statement breaches the common law rule which I have referred to and is inadmissible on that basis. It follows that I reject Mr Boe's submission that the statement comes within an exception to the common law rule referring to statements made by a party against his own interest. The statement by Mr Worwor was not a statement against his own interest and was simply a statement which identified three other persons as being responsible for the assault. Accordingly, I find the statement inadmissible as evidence.

14. If I am wrong on that point and assuming that the statement is admissible, I do not consider it to be reliable evidence. The reason for that is that when Mr Worwor first made his statement to the police identifying the three individuals concerned, there was no reference in the police statements to those individuals being responsible for an assault on Ms Lengkon. It is only some five month later and immediately before the trial that those statements are then made by the officers involved which then provided the prosecution with an opportunity to lay charges of assault. In that context the police statements were therefore of considerable importance. I have expressed some incredulity regarding the fact that, given the nature of the incident, the police officers interviewing Mr Worwor would not have taken steps to immediately ascertain further details regarding his allegation of the involvement of the three men in Ms Lengkons assault. I find it highly unlikely that such details would have been omitted from the police officer's statements if the three persons referred to were being named as responsible for the assault, as opposed to be being more generally involved in what happened that day. The timing of the additional statements which then refer to Mr Worwor specifically referring to the assault of Ms Lengkon is questionable and significantly undermines the reliability of those officers statements. I therefore would not have been prepared to have relied on them.

15. There is a third and also very significant matter relating to Mr Worwor's alleged statement. Even if it was accepted as evidence, all that it establishes is that Mr Worwor identified three individuals. It does not provide any context or detail. It does not say how the assault is alleged to have occurred. It does not say that Mr Worwor actually witnessed the assaults. It also stands in very stark contrast to the evidence of Ms Lengkon herself who said that Mr Koro was not close by. In addition the evidence of Ms Lengkon seems to establish, very clearly, that she was

struck by a single blow to her head. That is completely inconsistent with an assertion that three individuals were responsible for the assault.

16. Given all of these circumstances I find that there is no case to answer on the charge of intentional assault and Mr Koro and Mr Kasuali are acquitted on those charges.

17. What I will say however is that Ms Lengkon was assaulted. She was assaulted in the presence of a significant number of persons. The fact that no one has come forward to offer evidence as to who is responsible is an indictment on those who were present and observed this disgraceful incident. I would also make the observation that the police investigation in respect of this matter was very far from adequate.

18. I turn then to the charge of unlawful assembly. Mr Kasuali and Mr Worwor face charges of unlawful assembly. As identified by the prosecution submissions the elements required to be proved are:

    1) The presence of three or more persons.
    2) Conduct in such a manner as to cause nearby persons reasonably to fear that the person's assemble will commit a breach of peace.
    3) An intent to commit an offence or to carry out some common purpose to commit an offence.

19. As is clear, some defendants in this case have already pleaded guilty to unlawful assembly. That unlawful assembly consists .of those persons assembling and resolving to abduct Ms Lengkon from her office and to bring her to a meeting at Star Wharf to apologize for her actions. What must be recognised from the outset is that the evidence establishes that there were 50 or more taxi drivers gathered in the vicinity on the morning of the incident. The evidence satisfies me that this was not unusual and was normal practise when a cruise ship was expected to

arrive in Port Vila. There is no evidence that the gathering had been brought together for the specific purpose of having Ms Lengkon brought before it to explain her Facebook message. In that sense, the assembly was a completely lawful one. There would no doubt have been some drivers present that morning who were completely unaware of the intention of some of the defendants to kidnap Ms Lengkon.

20. The first element of the charge, namely the presence of three or more persons assembled, is easily established. It is the second and third elements which provide some difficulty in this case. While Mr Boe asserts in his submissions that there is evidence as to the intention to carry out an unlawful act, namely the assault of the complainant, I disagree. The evidence relied upon by the prosecution namely the evidence of the complainant together with the medical evidence does not establish that. There was however, another clear purpose, that purpose being the purpose of detaining the complainant at a meeting against her will. That involved the unlawful detention of Ms Lengkon at the meeting, a detention which according to Ms Lengkon's evidence was some ten minutes and which involved her being required to provide an apology.

21. In that regard I consider the situation of Mr Kasuali and Mr Worwor to be quite different.

22. The only evidence of Mr Kasuali's presence at the Star Wharf on March 13th (putting to one side the statement by Mr Worwor which I have already referred to) was the evidence of Mr Garae. The evidence of Ms Lengkon was that she did not recognise Mr Kasuali and she did not know him. The evidence of Mr Garae was that he saw Mr Kasuali after the incident had occurred. There is no evidence of Mr Kasuali being anything other than an individual that who was in the broad vicinity at that time. In my assessment there is no evidence which could support

his conviction on a charge of unlawful assembly and accordingly I find that he has no case to answer and he is acquitted.

23. The position of Mr Worwor is rather different. The evidence to date establishes that Mr Worwor is the President, or Vice President, of the Public Transport Association. The evidence of Ms Lengkon was that when she was brought to Star Wharf to address the crowd she stood by Mr Worwor as she tendered two apologies. She stated that at that time Mr Kovoi was standing at the front of the gathered crowd with his phone showing the comment she had made. She stated that she had apologized to the gathering and that Mr Worwor had asked her to apologize again immediately before she was struck. Among those gathered she recognised Mr Noal, Mr Koro and Mr Kovoi. It was Ms Lengkon's evidence that she was forced to apologize. It was clear from her evidence that at least some parts of the crowd were hostile towards her. While there were lots of people around her Mr Worwor was standing right beside her. In fairness to Mr Worwor, Ms Leingkone also acknowledged that after she was assaulted he was endeavouring to keep people away from her. He also said the words *"boys – enough. Don't touch her"* before organising a driver to take her back to her office.

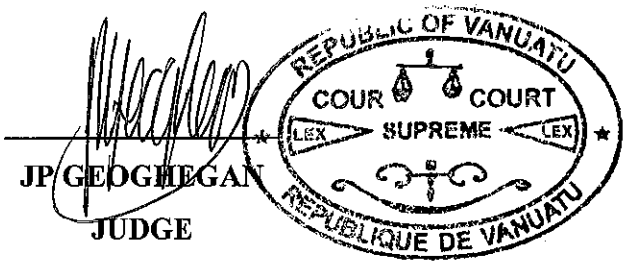
24. She described Mr Worwor as *"chairing the meeting and doing the talking".*

25. In those circumstances I find that there is sufficient evidence to require Mr Worwor to put forward his defence in respect of the charge of unlawful assembly. At that time there were definitely three or more persons present who had the common purpose of detaining Ms Lengkon against her will in order to require her to deliver an apology. While there is no evidence that Mr Worwor spoke with those individuals who had decided to kidnap Ms Lengkon I consider it at least arguable that at the time that he required Ms Lengkon to provide a further apology he

was clearly a party to that unlawful assembly. He is required to put forward his defence accordingly.

Dated at Port Vila this Thursday 1st day of September 2016

BY THE COURT



JP GEOGHEGAN
JUDGE