

**PUBLIC PROSECUTOR**

- v -

**CHIEF SAM KASAURA (DOB 1946)  
CHIEF NANUMAN PETER  
NAONAPEK IAWIKO  
RAKA NAWEI  
TOMLE KATMATUM (NAWEI)  
IESUT NAWEI  
MATHEW NAWEI  
MANASA IERU  
ANDREW IERU  
SAM KASARUA (DOB 1973)**

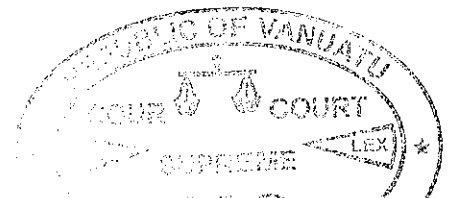
**Coram:** Vincent LunabeK - CJ

**Counsel:** Mr Philip Toaliu for Public Prosecutor  
Mr Henzler Vira and Mr. Harrison Runtres for Chief Sam Kasaura and Chief Natuman Peter.  
Mr Daniel Yawha and Ms Anna Sarrisetts for Noanapek Iawiko, Raka Nawei, Tomle Katmatum (Nawei), Iesut Nawei, Mathew Nawei, Manasa Ieru, Andrew Ieru and Sam Kasaura (Junior).

**Interpreter:** Jack Noka  
**Date of Trial:** 26<sup>th</sup> February 2018 – 1<sup>st</sup> March 2018  
**Date of Verdict:** 19<sup>th</sup> March 2018

**JUDGMENT ON VERDICT**

1. Defendants Noanapek Iawiko, Raka Nawei, Tomle Katmatum (Nawei), Mathew Nawei, Manasa Ieru, Andrew Ieru and Sam Kasaura (Junior) are charged in count 1 with the offence of Intentional Homicide, contrary to s.106 (1) (a) of the Penal Code Act [Cap 135].
2. It is particularised that on 11<sup>th</sup> June 2017, each one of them and together at Kaunameiken Village, Tanna, did unlawfully assaulted Sam Beau at his house with the intention of causing his death.
3. Defendants Chief Sam Kasaura (Senior) and Chief Nanuman Peter are each charged with one count of counselling and procuring Intentional Homicide,



contrary to subsection 106 (1) (a) and section 30 of the Penal Code Act [Cap 135].

4. It is particularised that Chief Sam Kasaura (DOB 1946) between 7<sup>th</sup> June 2017 and 11<sup>th</sup> June 2017 at Kaunameiken Village, Tanna, he did counsel or procure Noanapek lawiko, Raka Nawei, Tomle Katmatum (Nawei), Iesut Nawei, Mathew Nawei, Manasa Ieru, Andrew Ieru and Sam Kasaura (DOB 1973) to unlawfully assault Sam Beau with the intention of causing his death when he called for his death on 8<sup>th</sup> June 2017.
5. It is also particularised that Chief Nanuman Peter on the 11<sup>th</sup> June 2017 at Kaunameiken Village, Tanna, did counsel or procure Noanapek lawiko, Raka Nawei, Tomle Katmatum (Nawei), Iesut Nawei, Mathew Nawei, Manasa Ieru, Andrew Ieru and Sam Kasaura (DOB 1973) to unlawfully assault Sam Beau with the intention of causing his death.
6. Each and all Defendants pleaded not guilty to the offence each is charged with.
7. A trial was required. Section 81 of the Criminal Procedure Code was read and explained to each Defendant.

### **Burden of Proof**

8. This is a criminal trial. The law is that the prosecution must prove the charges. There is no burden on the defence whatsoever. It is the duty of the prosecution to prove each and all essential elements of the offence charged against each and all defendants, beyond reasonable doubt. If at the end of the trial, I am left with a reasonable doubt as to one or any or all of the defendant's guilt, then, anyone or all of them will be entitled to the benefit of that doubt and be acquitted. Some part of the prosecution evidence was based on circumstantial evidence. The prosecution has the legal burden to prove the elements of the charges against each and all the Defendants beyond reasonable doubt. In situation as the present case, the appropriate course to take by the Court is that each item of circumstantial evidence does not have to be independently proved beyond reasonable doubt. A number of facts, each of which alone is not proved beyond reasonable doubt, may, when taken



together by the judge of fact, operated so as to justify an inference beyond reasonable doubt of an assault on the body of another person causing grievous bodily damage or injury, or intended to give grievous bodily damage on the body of another, and that they are reckless about the consequences of the grievous bodily harm on the body of another. Some of the damages resulted in the death of the deceased person. The prosecution is not required to dispute any inference that the ingenuity of counsel might device. I must exclude any reasonable hypothesis based on the evidence which is consistent with innocence but no more.

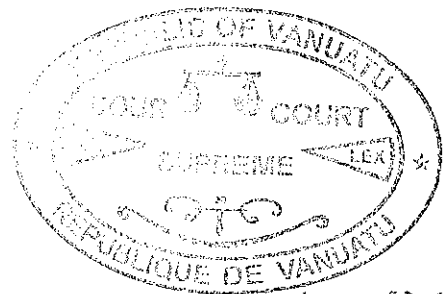
9. Section 8 of the Penal Code Act [Cap 135] indicates proof beyond reasonable doubt but states that “the determination of proof beyond reasonable doubt shall exclude consideration of any possibility which is merely fanciful or frivolous.”
10. Inferences may be drawn from proven facts if they follow logically from them. If they do not, then the showing of any conclusion is speculation and not proof.
11. Eight above named defendants are charged with intentional homicide in count 1, contrary to s.106 (1) (a) of the Penal Code. S.106 (1) (a) says:

*“No person shall by any unlawfully act or omission intentionally causes the death of another person.*

*Penalty: (a) if the homicide is not premeditated, imprisonment is for 20 years.*

12. The other two Defendants (the two Chiefs) are charged with counselling and procuring intentional homicide, contrary to s.106 (1) (a) and s.30 of the Penal Code. Subsection (1) of section 106 (a) is defined above. Section 30 provides:

*“Any person who aids, counsels or procures the commission of a criminal offence shall be guilty as an accomplice and may be charged and convicted as a principle offender.*



## **Elements of offences**

13. Before I can convict any or all defendants in count 1, the prosecution must prove each and all essential elements of the offence of intentional homicide.

They are as follows:

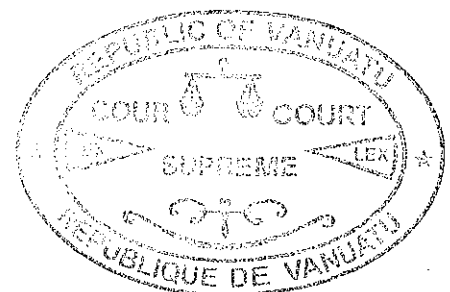
1. That Defendants: Noanapek Iawiko, Raka Nawei, Tomle Katmatum (Nawei), Iesut Nawei, Mathew Nawei, Manasa Ieru, Andrew Ieru and Sam Kasaura (Junior) acted with intent to cause grievous bodily harm or they are reckless as to whether or not death occurred as a result of their action.
  2. That they caused the death of deceased Sam Beau (Senior) on 11<sup>th</sup> June 2017 at Kaunameiken Village, Middle Bush, Tanna.
14. Before I can convict Chief Sam Kasaura (DOB 1946) in count 2 and Chief Nanuman Peter in count 3, the prosecution must prove the followings:

1. That Chief Sam Kasaura (in count 2) and Chief Nanuman Peter (in count 2), aided and/or abetted to cause grievous harm on the body of Sam Beau.
2. That Chief Sam Kasaura and Chief Nanuman Peter aided and/or abetted to cause death of Sam Beau in count 2 and 3 respectively.
3. That the victim, Sam Beau died as a result of the grievous bodily harm on his body.

## **Summary of Evidence**

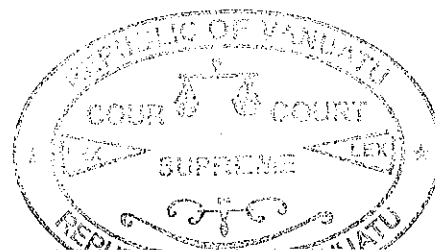
15. The details of the evidence are contained in the Court file. What I now do is to give part of evidence that are important and relevant for decision.

## **Summary of Prosecution Case and evidence**



## Prosecution Case

16. The prosecution alleges that on 8<sup>th</sup> June 2017, at Kaunameiken Village, Middle Bush, Tanna, while drinking kava at Kaunameiken Nakamal, Chief Sam Kasaura (senior) announced to principle defendants that if they see any member of the family of the deceased in the garden they kill them.
17. On 11<sup>th</sup> June 2017, it was a Sunday, Felix Beau and Brian Beau, the two sons of the deceased went to take iron sheets in a nearby village. On their way back, on the road, it was about 6.00am o'clock, they were confronted by Defendant Sam Kasaura (junior). They exchanged words and Defendant Sam Kasaura assaulted both. In retaliation, Felix Beau slapped the Defendant Sam Kasaura with a bel knife causing serious injuries on his hand. Defendant Sam Kasaura called for help as the two young men run away toward the house of their deceased father. The rest of the Defendants arrived and chased the two. Meanwhile, the deceased was in his bush kitchen with his wife and youngest son. They were preparing breakfast. They heard a commotion in their yard.
18. They saw the Defendants shouted and approaching their house. The wife of the deceased run outside the kitchen. About the same time, the elderly mother of Sam Beau (deceased) entered the bush kitchen. The youngest son of the deceased run away from the kitchen. The deceased late Sam Beau went with his elderly mother in the kitchen and closed the door when the Defendants arrived at the bush kitchen. The carried bel knives and stick/woods. Defendant Noanapek lawiko kicked and broke the door of the kitchen. He was followed by Defendant Raka Nawei and Tomle Katmatum. As they entered into the bush kitchen, the deceased youngest son (Joseph) came to see them and pleaded them not to kill his father. Sam Kasaura (junior) took firewood and assaulted the youngest son of the deceased (Joseph). Then Sam Kasaura (Junior) joined the Defendants who entered the kitchen. At the same time, Defendant Manasa Ieru held a stick and stoned the wall of the bush kitchen. Then Defendants Manasa Ieru, Mathew Nawei and Andrew Ieru also entered the bush kitchen. Inside the kitchen, Naonapek lawiko, Raka Nawei, Sam Kasaura (junior) cut deceased Sam Beau with bel knives. While others assaulted the deceased with pieces of sticks or firewood and bricks.



19. In the process of assaulting the deceased, the deceased begged the Defendants to stop by saying: "*enough now*". But the Defendants continued to assault him until he lay down in the kitchen motionless.
20. There were cut on the head of the deceased on his front head, another cut on the deceased's left side which removed half (1/2) ear and a deep cut to the deceased back head. Defendants left the scene for a brief moment. The neighbour of the deceased (Johnny Jimmy) came to help the deceased. When Jimmy tried to help the deceased, the Defendants returned on the scene and said they came to finish off with the deceased Sam Beau. About the same time the assaults happened, Dominique Dick was at his house. He heard women and children were crying, he run towards the house of the deceased.
21. On the way there, he met with Chief Nanuman Peter who came back from the direction of the deceased's house. Dominique Dick asked Chief Nanuman Peter as to what happened. Chief Nanuman Peter responded: "Your two brothers in law broke the hand of Sam Kasaura (Junior). They were looking for the two at the deceased's house but they run away. I told the men to kill Sam Beau senior and they killed him already."

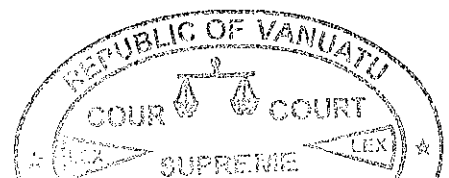
### **Prosecution Evidence**

22. Willie Joseph is the first prosecution witness. He gave evidence to this effect. He is 19 years old. He lives at Kaunameiken Village, Middle Bush, Tanna. On the morning of 11 June 2017, he went to take iron sheet for the church. It was about 6.00am o'clock in the morning. He was with Nauka. He said Sam Kasaura (Jr) assaulted Felix and Brian who took iron sheets to their house. Felix took the knife and assaulted Sam Kasaura with it. He was close to them about 5 meters. Sam Kasaura's hand was broken. Felix and Brian run to their house. He ran following them to Sam Beau's house. He saw Noanapek kicked the door of Sam Beau's kitchen. It was broken. Raka, Mathew, Manasa and Andrew were there. Noanapek entered the kitchen. He said he was about 8 meters away. Raka took an axe in the house of Sam Beau. Noanapek took a knife and Sam Kasaura took firewood. Manasah took a knife and cut the coconut leaves of the kitchen (grass). Defendant Andrew saw him and told the others (defendants) to kill him (witness) too. He ran away. He saw them



entered the kitchen and heard Sam Beau begged them to stop assaulting him: "ol uncle enough blo kilim mi." Defendants did not stop assaulting him. When he ran away he went to Lenpunapen Village. When he got back to Sam Beau's house, he was already taken to the hospital. Inside the kitchen, he saw stones, bricks, pieces of woods and axe.

23. Willie Joseph who was cross-examined. He relates to Sam Beau. He confirmed in the morning he went to take iron sheets for the church on 11 June 2017 but this was different Iron sheet from an old AOG church to a new one. Felix and Brian went to get different iron sheets which were at Ieru's house. He did not reach the old church. He came on the road. He saw Sam Kasaura alone on the road. His Apu Nauka told him Sam Kasaura's wife and daughter went in front of Sam Kasaura Sam Kasaura was well dressed up. He has his bible with him to go to Mormon Church. Then he saw Felix and Brian came on the road. They were carrying iron sheets. He said he was aware of a dispute about these iron sheets which were at Ieru's house. Sam Beau said the iron sheets were his. He denied Sam Kasaura told the two young men (Felix and Brian) the iron sheets were not theirs. He said Sam Kasaura assaulted Felix. He did not see any stick/wood on the road. He saw Sam Kasaura fell on the ground when Felix slapped him with a bush knife. Sam Kasaura tried to assault the two young men but his hand was short. Felix called out to his brother Sam Capen to come and help them.
24. Then he saw Sam Kasaura's wife and daughter running back to the place of the fight. They came with Raka. Felix, Sam and Brian run to Sam Beau's house. He also run and followed them. Sam Kasaura chased Felix with Raka. He also saw Iesut. He was afraid of Raka. He ran to the church and to Sam Beau's house by a different but short cut road. He took 8 minutes and came back to Sam Beau's house. He followed a shortcut road to come to Sam Beau's house. He denied he did not witness anything. He did not see Felix and Sam Capen anymore. He saw Sam Kasaura. Felix ran away. Sam Kasaura arrived and went directly to Sam Beau's kitchen. He denied making up a story. He was on the road to the church which was near Sam Beau's house. It was a short distance He denied after 8 minutes he did not see anything at Sam Beau's house. Sam Beau's kitchen was near the church. He confirmed he saw Sam Kasaura came through Sam Beau's kitchen with Raka



and Iesut. Sam Kasaura did not hold a knife. He saw Sam Kasaura assaulted Joseph Beau with a soft stick. He arrived at Sam Beau's house before Sam Kasaura with others arrived. He was in the bush (Nalalas) near the kitchen. When they entered the kitchen, he was in the bush (Nalalas). He only saw they went inside the kitchen.

25. Joseph Willie was re-examined. He re-confirmed his evidence that he went to take iron sheet from the old church house to a new one. He was not moving out from the old church yet. It was close to the road. He saw the fight on the road. The church was close to the road. There was no talking. Sam Kasaura pushed the iron sheets and assaulted Felix. Felix retaliated by slapping him with the bush knife. Felix called his junior brother Sam Capen to help him. During the fight he saw Sam Kasaura's wife was calling out for help. Raka told Felix to throw the knife. Felix ran away. Iesut came through the road. When Felix ran away, he saw Sam Kasaura, Raka and Iesut chased him. He ran behind the church and went to the house of Sam Beau. He took some 8 minutes at the church as he was watching Iesut taking a knife and sticks and run with them. Sam Kasaura and Raka chased Felix. Iesut followed them. When he was at Sam Beau's house, he saw Noanapek kicked the door of the bush kitchen. He arrived from the back of the kitchen and came around at the front of the kitchen. He said he saw Sam Kasaura assaulted Joseph Beau and at that time, Noanapek did not kick the door yet.
26. Nawia Naus is the second Prosecution witness. She is from Louweau Village. On 11 June 2017 she went to visit Sam Beau (the deceased) she called him daddy. It was 6.00am in the morning. She left her village. She followed the road. She saw the group of these men. She mentioned Noanapek going to the house of Sam Beau. She saw Raka, Tomle and Sam Kasaura (Jr). She saw them entering the bush kitchen of Sam Beau. She saw Sam Beau fell on the floor. She was afraid, she cried and ran away. The first time she saw them was in the yard of Sam Beau. She saw Noanapek entered the kitchen first. Noanapek kicked the door of the kitchen and they all went in. She saw Noanapek, Raka, Tomle, and Sam Kasaura. She was afraid. She cried and she ran away. She was just standing close to the bush kitchen. She described she was in the witness box and she saw them like the cement post of the court house (5-6 meters). She saw Sam Beau fell down. She was afraid, cried and



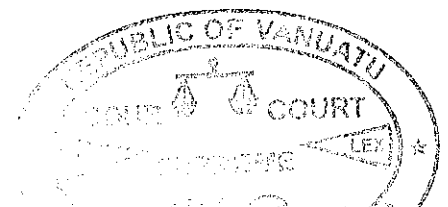


run away. She did not see what happen to him. She saw Noanapek and Raka have each a belt knife. She ran away to the village of her father. She did not come back to Sam Beau's house that day.

27. She was cross-examined. She said the fight on the road was over. It has already been taken place. She saw the group of these men going to Sam Beau's house. She was following them when they went inside the yard of Sam Beau. She did not see any woman. She did not see Sam Kasaura's wife. She did not see Sam Kasaura's daughter. She confirmed she saw Noanapek, Tomle, Raka and Sam Kasaura on a distance from the witness box and the cement post of the Court house. She saw Sam Kasaura was standing at the door. Noanapek got in first, Sam Kasaura was in the middle. She confirmed she recognised those she mentioned their names because she knew them. She mentioned she saw Sam Beau in the kitchen. She did not see Sam Beau outside. She did not see Nauka outside. She did not see Rebecca. She did not see Joseph Beau. She did not see Sam Kasaura assaulted Joseph with a stick. She did not see Joseph Willie in the yard. She did not see Sam Kasaura breaking the thatch leaves of the kitchen. They went inside, she saw Sam Beau fallen on the ground, she run away. She said she saw her daddy Sam Beau was fallen on the ground but she did not see who assaulted him.

28. In re-examination, she confirmed she saw her daddy Sam Beau sat down in the kitchen and he fell down on the ground. She did not see who assaulted him. She was afraid, cried and runaway.

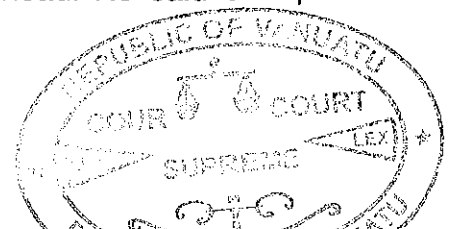
29. Joseph Beau was the third prosecution witness. He is 19 years of age. He is the youngest son of the deceased Sam Beau. He attended the Bahai School for preparation for social action. On 11 June 2017 in the morning, he was with his father and mother in the bush kitchen. They were preparing breakfast (fried cold laplap). When they were in the kitchen, they heard noises like a fight. They were surprised to see these men coming through their yard. He saw Sam Kasaura, Raka, Noanapek, Tomle, Manasa, Andrew, Mathew and Iesut. They were running to their house. He came at the door and outside saw them coming. They asked and wanted Felix and Brian. They did not know where they were. Then he said Tomle, Raka and Iesut said they must kill one today. He saw Raka had a knife, Andrew had a knife, Manasa had a knife. Mathew



had a knife. Iesut had a stick wood. When they said "they were going to kill one today", and then they said, among themselves, they were going to take their father (Sam Beau) and killed him. He said "*olgeta oli talem toktok ia lo olgeta.*" Then Sam Kasaura started to break the coconut thatch leaves of the house. Her mother saw them and went outside and runaway. His father went inside and closed the door. He wanted to run away. Nauka went inside with his father. Nauka went inside at that time they came into the yard. His father went inside the kitchen and closed the door with his grandmother Nauka. Tomle and Sam Kasaura (Jr) broke the coconut thatch leaves of the house. He saw Noanapek was the first to the door of the kitchen. He kicked and broke the door. The door fell inside the kitchen. He wanted to run away when Noanapek kicked the door but he came to them and asked them not to kill his father. Sam Kasaura took a soft wood and assaulted him on his backside (he showed the Court where on his body). Noanapek broke the door and went inside. Raka and Iesut followed Noanapek inside. Sam Kasaura, Tomle, Mathew and Manasa followed them. He heard noises that they were assaulting his father. He ran to other villages to inform them that they killed his father.

30. Joseph Beau was cross-examined. He said on 11 June 2017 in the morning, Felix and Brian went to take the iron sheets but he did not know of that. He did not know that his father wanted them to take the iron sheets.

On 11 June 2017, he was in the kitchen with his father and his mother. He confirmed he heard noises as if there was a fight. He saw the defendants in their yard. Sam Kasaura and Tomle came first followed by the others. Sam Kasaura did not take a knife but he took a wood and assaulted him (witness) with it. Sam Beau was inside the kitchen. It was suggested to him that when his mother runaway outside his father took a knife. He said no. He disagrees. He did not see that his father cut the hand of Sam Kasaura. He confirmed that the defendants went in the kitchen and assaulted his father. He confirmed he came back to hear that they assaulted his father and he runaway. He saw Sam Kasaura broke the coconut thatch leaves of the kitchen. He saw Sam Kasaura broke the house. He did not see Nawia Naus. He did not know whether Naus saw him. When he was running he saw other women far away on the road. He saw a mark on Sam Kasaura's forehead. He said Joseph



Willie was standing on the other side of the kitchen. It was put to him he denied he made up a story on his evidence. It was put to him that the defendants were angry because Felix cut Sam Kasaura. He said he did not know.

31. Nauka Tuan is the next witness. She went to the kitchen to see Sam Beau (her son) and sat with him in the kitchen. Sam Beau fried local laplap in the kitchen and she sat with him. When she was with Sam Beau in the kitchen, Noanapek kicked the door open and went inside with Kasaura. Sam Kasaura cut Sam Beau with the knife and he fell on the ground. Rebecca and Jospheh were with Sam Beau in the kitchen before she got in with him. Sam Beau saw they were coming he closed the door. Noanapek kicked and broke the door. Sam Beau did not go outside. He was sitting in the kitchen. He closed the door of the kitchen. They broke the door and got inside the kitchen. When they came inside the kitchen, Sam Beau was standing and one of them cut him with the knife and he fell down on the ground. One cut him. He fell down and others speared him with wood. Noanapek broke the door. She saw Sam Kasaura cut him and he fell down and others speared him with wood. She saw Tomle, Iesut, Raka, Mathew and Manasa speared the body of Sam Beau with wood. When they assaulted him and he fell down, he did not say anything. After they killed him, they went outside and looked for Felix and Sam to kill them. She was inside the kitchen. She cried and saw them taking knives and wood walked everywhere outside. She did not know why they wanted to kill the two, maybe for the land or something. After the defendants left, others took Sam Beau to hospital.

32. Nauka Tuan was cross-examined. She did not know of her age. She lives at Kaunameiken. Sam Beau is her son. She was asked she said the iron sheets were for them. She was not aware of a community meeting to take place about the iron sheets. There was no more rain. They went to take the iron sheets. They met at the road and they fight. She was at the church she was collecting coconuts when she saw Sam Kasaura blocking the two. Sam was holding his bible to go to church. The distance was about this place to pine tree there (20-30 meters). She saw Sam Kasaura was fighting Felix. She run away and went back to the house and went inside the kitchen with her son (Sam Beau). She said she saw Sam Kasaura assaulted Felix. She runaway to

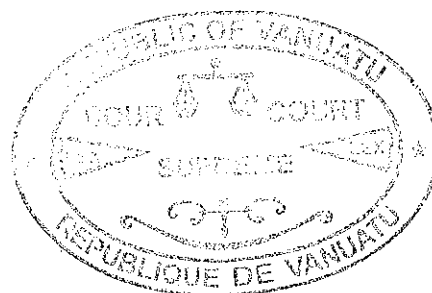


the kitchen. When she went to the kitchen Joseph Beau and Rebecca were no longer in the kitchen. When she went into the kitchen, the defendants also arrived. They broke the door of the kitchen and got inside. When the fight took place on the road, she was afraid and she runaway first she followed a short cut in the garden. Others followed the main road. She said Sam Kasaura cut the head of Sam Beau. She was asked about her statement to the police when she stated that Noanapek cut the head of Sam Beau. She said her evidence that Sam Kasaura cut the head of Sam Beau is her true evidence. She was asked she saw only three men went inside the kitchen. She insisted she did not say just 3 men but she said plenty of them went inside the kitchen. She was asked who cut the ear of Sam Beau. She replied the men she had already mentioned their names. She was asked to mention their names. She said Tomle, Sam Kasaura, Noanapek and others went inside the kitchen. She was asked she said the people she mentioned their names broke the thatch leaves of the kitchen. She said some broke the thatch leaves, others came inside the kitchen. She saw Sam Kasaura cut the head of Sam Beau. He fell on a bed in the kitchen. She saw others spear his head. She was asked, she confirmed what she said was evidence of what she saw of these men when they came inside the kitchen. The men were these she mentioned their names they killed him. He did not talk anymore. She was just sitting with the body of her son inside the kitchen. She saw they were running with wood outside. She insisted her evidence was true.

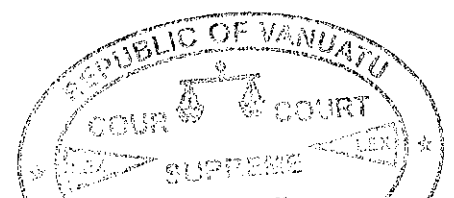
33. She was re-examined. She mentioned Noanapek was the first to come in, Mathew, Andrew, and the three (3) sons of old man Nawei also came inside the kitchen. She specified she is from Nawai family. She mentioned the names of these 3: Raka, Iesut and Mathew. She saw Sam Kasaura cut the head of Sam Beau only once.
34. Rebecca Beau was the next prosecution witness. Rebecca Beau was the wife of Sam Beau. She lives in Lonameltiken Village at Kaunameiken area. On 11 June 2017, she was with her husband and son Joseph Beau in the kitchen that morning. They had fried cold laplap. When they were in the kitchen, they heard noises as if there was a fight. Then they came at the door of the kitchen outside. She saw Noanapek, Sam Kasaura, Raka, Tomle, Mathew, Iesut, Andrew, Manasa and Iawiko Junior. When they came into the yard, they saw



her husband and they said: "*hemia longway umi go killem ded hem*". ("Here is he there let's go and kill him"). Her husband ran in the kitchen and closed the door. She heard a big noise on the door. She said when they run into the yard she did not know that they were coming for a fight. She said before they came, Felix and Sam Beau run passed the kitchen and told them that the Defendants were coming to kill them. She said when they came inside her yard she knew they were going to kill her husband. She was frightened and she ran to the side of the house. When they run to the yard, she saw Noanapek broke the door. She did not see who killed her husband. When they came outside, the Defendants came grouping. Noanapek broke the door. She repeated Tomle, lesut said "here is he let's go and kill him." When they came at the door outside she did not know where Joseph was. When she heard the door was broken, she saw Noanapek went in first. Others followed him inside. She was frightened and runaway to the side of the house. She heard noise of them assaulting her husband inside the kitchen. She did not see any man at the side of the house. After the fight she went back to the kitchen. She saw her husband Sam Beau was laid down and his old mother sat closed to him. She saw they cut his ear. They cut the back of his head. They used the bricks to assault him with. She saw the pieces of bricks inside the kitchen. She saw blood covered his body. She cried. A truck took him to the hospital. When she came back she did not see any of the Defendants. She described the distance she was when she saw the Defendants at a distance of 5-6 meters (witness box to the cement post of the Court house). She said she was just running away after the Defendants entered the kitchen. They came into the yard, some went inside the kitchen, she heard noises of some more coming, she run away to the side of the house. She saw the Defendants went to the door, the door was broken, they went inside the kitchen and she run away. She said when the Defendants came to the yard Sam Beau did not say a word to them. She said her husband saw they were coming to the yard he closed the door of the kitchen. She said she did not see Sam Beau holding a knife to cut them. She saw the kitchen door was broken and it was on the ground inside the kitchen. She saw lots of blood inside the bed in the kitchen. She did not see blood outside the kitchen but she saw blood only inside the kitchen.

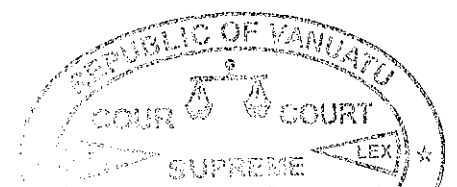


35. Rebecca was cross-examined. She confirmed on 11 June 2017, she was with her late husband Sam Beau and her son Joseph in the kitchen. They fried cold laplap. She was asked and she said she did not know that a meeting will take place and that she did not see any woman coming to her house that morning. She did not know that her husband sent her two sons to take iron sheets that morning. She knew that the iron sheets were for the community. She did not know that her two sons went to take the iron sheets. She confirmed her evidence that when they fried laplap in the kitchen, they heard noises and she saw Felix and Sam running away and told them to run away as they were going to be killed. She saw Felix and Sam running at the distance of 5 meters. Felix and Sam told them to run away as others will kill them. At the time, they heard noises, they stood up and Felix and Sam run passed and told them "*faet faet youfala run away*". She agreed they came outside the door of the kitchen and stood outside. After Felix and Sam run passed them, then the groups of the Defendants came inside the yard. Felix and Sam just went passed them when the Defendants arrived. The Defendants came in and run passed her. They went and broke the door of the kitchen. She was asked that what she said was not true because in her statement to the police she said: "ol boys blo utuffa oli ron I come mo talem se bai oli come kilim yumi. After Sam Beau I ron go lo kitchen. Mi run away. (Our boys run to us and told us that they are going to kill us. Then Sam Beau run into the kitchen and I run away). She answered: "Be tuffa boys ia come ino lo taem nating after groups ia oli come." (But these two boys just came and after the group arrived). Sam Kasaura and others saw that Sam Beau went into the kitchen they decided to kill him. It was put to her she did not tell the truth to the Court. She denied she said that what she told the Court was what she saw. She saw the Defendants came and went to the kitchen. She saw Sam Kasaura took a wood. Others took knives. It was put to her she did not see who went inside the kitchen. She denied. She said she saw Naonapek went and broke the kitchen door. She accepted she did not see that Sam Kasaura took a wood and assaulted Josphe Beau with. It was put to her that Sam Beau took a knife and told Sam Kasaura "You ia now man blo trabol." She said that she did not hear that Sam Beau said anything at that time. She did not see that Sam Beau had a knife at that time. She was asked about Joseph Willie, she said he was on the other side of the kitchen (eastern side- she was on the western side). It was put to her that lots of her evidence



was made up because she was not happy they killed her husband. She said she disagree with that question. She told the Court what she saw happened. They followed the road they came in the yard. They were angry when they came to the yard. They run into the yard. They grouped to come inside the yard. It was put to her she did not know. She said they run as a group to come in and Noanapek broke the door. She confirmed she saw Sam Kasaura, Raka, Tomle and Noanapek. She did not see Sam Kasaura's wife at that time. She did not hear any cries from the road. She was asked she confirmed she heard Sam Kasaura, Raka, Tomle and Noanapek said "*hemia longway yumi go killem hem*" and they run into the yard. It was put to her, it was not possible. She said she saw them running angry and they made that statement when they came inside the yard. She was asked she confirmed they cut her husband's ear, back side of his head. There was an axe, stone inside. There was no knife in the kitchen. She confirmed that she saw blood inside the kitchen; she did not see any blood outside.

36. Rebecca was re-examined. She clarified that she was in the yard when the group of Defendants arrived. She saw Noanapek broke the door. She was frightened they were going to kill her husband she run away. She said when they heard noises they came outside 4-5 meters of the door. Felix and Sam run passed them and they told them "*faet faet*" and not long after the groups of the Defendants came inside the yard. She was asked to clarify her evidence that "*Raka, Tomle, Manasa oli talem se hemia longway yumi go killem hem*". She answered: "*Taem group I come inside mi harem oli talem toktok ia. Be mi no harem who talem stret toktok ia.*" (When the group came inside, I heard they made that statement. But I cannot say who exactly said it).
37. Johnny Jimmy was the next prosecution witness. He lives at Nonpuklepen Village, Middle Bush, Tanna. On 11 June 2017, he was in his house. He heard noises and callings. He run to the place where the noises came from at the house of Sam Beau. His house was 150 meters from Sam Beau's house. On his way he met Joseph Beau. Joseph Beau told him to go to their house they have already killed his father. He saw Joseph's face was that he was scared and frightened. He went to Sam Beau's house and Tomle told him: "*are you looking for fight again?*" He said he told him no. He heard noises and he came. He saw Tomle, Sam Kasaura, Iesut, Iatika, Manasa, Andrew, Raka,



Naonapek, Noel Yokaem, Kasima Junior, lala Yokaem. They were outside on the road. He asked Tomle about the old man they assaulted him and Tomle told him these boys killed him already he was inside. He passed them and went inside the kitchen where they assaulted him. He saw the old man was laid down there. Nauka Tuan was with him inside the kitchen. He lifted him up. He called him. There was no response from him. He saw there were two cuts on the back of his head and side of his head. There was blood on his head. Then he said the Defendants came back when he lifted up the deceased. They came back and wanted to kill him dead. He told them to stop as they had already killed him. He saw Sam Kasaura, Raka, Iesut, Tomle, Naonapek and Ieru. They walked and came in as a group. He saw Sam Kasaura's hand was broken. He saw injuries on his hand. He saw blood on his hand.

38. He was cross-examined. He confirmed his evidence. He was asked he made a statement to the police on 12 June 2017. He did not mention anything about Tomle. He replied, he had forgotten to mention to the police of that part. He was asked about his evidence that the Defendants came back to kill Sam Beau again and he was asked about his statement to the police. He said they were plenty of them coming in and three of them stood in the front. Sam Kasaura was the one who made the statement when he held the body of the deceased and tried to lift him up. He saw pieces of bricks and stones inside the kitchen. He did not see the wife or daughter of Sam Kasaura. He went to get the truck to get the body of Sam Beau to hospital.
39. In re-examination. He said the Defendants walked as a group to assault Sam Beau again. But only three of them came inside.
40. Dominique Dick was the last prosecution witness. He is from Lawaian Village-which is outside Kaunameiken area. Sam Beau is his uncle. He knew him. He knew Nanuman Peter as he called Nanuman his grandfather. Nanuman is the cousin of his grandfather. He knew Chief Sam Kasaura (Senior). He is his grandfather. On 8 June 2017, in the afternoon he was at the nakamal with his brothers in law and his grandfathers. He mentioned uncle Noel, Iesut, Raka, Mathew and all of his brothers in law. They were preparing kava. When kava was ready for drink, his Apu made this statement: "*Sipos yufala I meetim someone lo garden we i brush yufala I killem hem dead.*" (If you meet





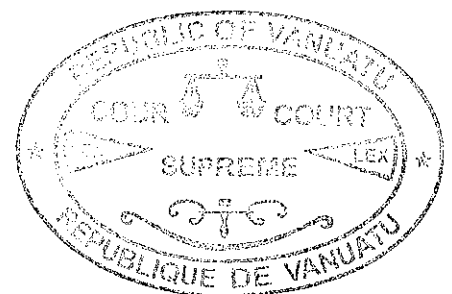
someone brushing the garden, you kill him). He mentioned his Apu's name, Sam Kasaura (Senior). He said when he made that statement they were ready to drink kava and no one else talked. After the kava he came back to Sam Beau's Nakamal and saw Sam Beau was at his nakamal. He told Sam Beau of what he heard at Kaunameiken Nakamal. He told Sam Beau that if he wanted to go to the garden, he must go with one or two of his sons. He explained that when his grandfather made that statement in the nakamal, he was afraid of it. That was the reason he announced it to Sam Beau. He specified that when his grandfather made the statement, he did not know that it was meant specifically for Sam Beau, because his grandfather stated "*sipos oli meetim anyone lo garden killem hem I dead.*" He did not know that there were dispute between Sam Beau and his grandfather (Sam Kasaura) over iron sheets. He was asked to explain the evidence that on 8 June 2017, he came out from the Kaunameiken Nakamal and went straight away to Sam Beau's Nakamal to tell him about the statement. He responded: "*From se Apu I talem se oli meetim anyone we I brush lo garden, mi save se garden hemi garden blo Sam Beau.* (Because when grandfather stated that if they met anyone who brushed in the garden, I know it is the garden of Sam Beau). He said he knew that because at Kaunameiken Nakamal, some of them who were at the nakamal made mention of someone calling out from the garden and said something while they were in the nakamal. Those in the nakamal questioned who brushed in the garden and he knew they were talking about Sam Beau's garden. And his grandfather Kasaura made this statement that if they meet anyone in the garden, they will kill him. On Sunday morning of 11 June 2017, he was at his house. He heard women cried and men were running on the road to Kaunameiken Village. He heard they were calling on the road. He ran to the road. He met Tommy lawiko on the road and run with him to Sam Beau's house, he saw his grandfather Nanuman Peter. His grandfather told him: "*Your two brothers in law assaulted and broke the hand of Sam Kasaura and that he told the boys to kill Sam Beau because his two sons run away.*" They passed him and they went to Sam Beau's house. He saw the door of the kitchen was opened. He went inside and saw Sam Beau was laying down. He saw Sam Beau's elder mother was with him in the kitchen. She was crying. He saw blood in the kitchen where Sam Beau was laying down. He did not see blood outside the kitchen. He did not see Sam Kasaura in the yard.



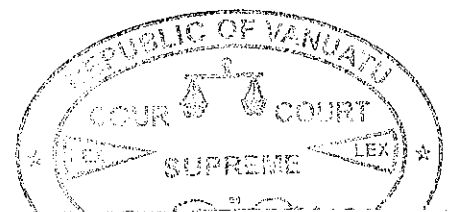
41. He was cross-examined. He was asked about the announcement made in the nakamal. He said he heard that announcement. At the nakamal he said that he saw that family only. They talked and he heard what they said and he saw them. He was asked he confirmed after the announcement he took kava (makas) and went to Sam Beau's nakamal and told him not to go to his garden alone but to go with one or two of his sons. He accepted the announcement was that if they see anyone in the garden, they will kill him. He was asked that when Chief Sam Kasaura made the statement at the nakamal, he did not focus the attention of the people at the nakamal to Sam Beau. He replied that was what he heard at the nakamal. He was asked if the statement could mean anyone who is in the garden. He accepted. He accepted late Sam Beau was killed at his house. He was asked he said he was not aware that Felix cut the hand of Sam Kasaura (Jr). He was asked he said he was not aware of a dispute between Family Beau and Family Chief Kasaura. But he confirmed he heard Chief Sam Kasaura making that announcement at the nakamal. On 11 June 2017 in the morning, he confirmed he run and met Chief Nanuman Peter on the road at Sam Beau's house. He said he asked his grandfather Nanuman Peter as to how he was, Chief Nanuman Peter told him: *"your two uncles cut and broke Sam Kasaura's hand. They chased them to Sam Beau's house and he told the boys to kill Sam Beau."*
42. The Court ruled that a prima facie case was made out against each and all the Defendants. They are each required to put forward their respective defences (s.164 of the Criminal Procedure Code [Cap 136]).
43. Section 88 of the Criminal Procedure Code [Cap 136] was read and explained also to each Defendant. They each understand their rights thereunder.

#### **The Defence Case and witnesses**

44. Counsel for Chief Sam Kasaura and Chief Peter Nanuman informed the Court that Chief Kasaura and Chief Nanuman are not going to give evidence or call any evidence. They exercise their right to remain silent.



45. Mr. Yawha on behalf of the Defendants Naonapek Iawiko, Raka Nawei, Tomle Katmatum (Nawei), Iesut Nawei, Mathew Nawei, Manasa Ieru, Andrew Ieru and Sam Kasaura (Junior) stated the defence of the Defendants as follows:
46. The case for Defendant Sam Kasaura (Jnr) is raising self-defence and in the alternative, he raised a defence of provocation. It is the defence case, that as a consequence of a dispute over iron sheets which was turned into violence on 11 June 2017 on the main road between Sam Kasaura and Felix Beau and Sam Capen, Sam Kasaura's left hand got injured and fractured as a result of a knife used by Felix Beau. Sam Kasaura's left head also had a cut and his right thigh had a cut from Felix Beau. Sam Kasaura chased Felix and Sam Capen. Felix and Sam Capen run to the house of the deceased Sam Beau.
47. Defence said that when Sam Kasaura arrived at Sam Beau's house, Felix and Sam Capen disappeared. Sam Kasaura confronted Sam Beau. It is said that Sam Beau cut the right hand of Sam Kasaura and retreated and went inside his kitchen and closed the door. The evidence of the Defence will show that Sam Kasaura broke the coconut thatch leaves of the bush kitchen and took a timber and stoned inside the kitchen and hit the backside head of Sam Beau and Sam Beau fell on the ground.
48. Defence will show that Sam Kasaura entered the kitchen after Noanapek kicked and broke the door of the kitchen; Kasaura took a brick in the kitchen and stoned the face of the deceased Sam Beau. Defence will say that all the rest of the Defendants came in individually but not as a group as alleged. Other Defendants heard cries of what happened. They saw Sam Kasaura chased Felix and Sam Capen. They run to retaliate against them. Defence will say that the incident between Sam Kasaura and Sam Beau was between them and other Defendants have no involvement to any assault causing the death of Sam Beau.
49. Sam Kasaura is the first defence witness. He lives at Kaunameiken Village. He is married with five children. He attends LTS (Mormon Church). He works in the garden. On 11 June 2017, he and his wife and children prepared to go to the church. It was about 6.00am o'clock. He was at home and a woman named Niko came to inform him to go to a meeting for iron sheets and tank for



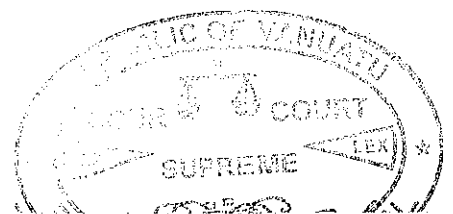
the community. He told Niko that he will be going to church first and the meeting will be in the afternoon.

50. He dressed himself up to go to church with his wife and three of his children. It was 6.30am. He took his bible and placed it in a handbag. His wife Ruth went ahead. He and his three children followed her on the road. On the road he saw stick woods on the side of the road. Then he walked past the sticks. He met Willie Joseph and old woman Nauka Tuan. His wife passed them already.
51. Then he saw Felix and Brian who carried with them iron sheets. He told both of them that he arranged for a meeting about those iron sheets and tank this afternoon. He held tied on the iron sheets trying to stop them. Felix and Brian held on and they fell down. The iron sheets fell on the ground. Felix cut him with his knife. He cut the side behind on his jean trousers. His trousers were broken and he cut him inside (Exhibit D). The other one assaulted him with a stick wood. His children were crying. He fell on his back. Felix tried to cut his head. He protected his head with his hand and Felix cut his hand. His hand was injured and fractured. His wife called out for help. Felix and his brother run away. He was angry and chased them. He wanted to kill them. They followed the main road. He ran after them angrily. He lost track of the two as they followed a different road. He did not see them anymore. He was aware that some men run with him including his wife and the three children. He ran to the house of Sam Beau. He did not see Felix anymore. He saw Sam Beau was holding a bel knife. He said he asked him where Felix and the other run to. Felix cut him.
52. He said Sam Beau told him *"you you stap mekem samting ia."* Beau cut him on the right side of his hand. He moved closer to Beau. Beau cut him with the edge of his knife. He saw Joseph Beau run to him told him not to kill his father. He took a wood and assaulted Joseph with it. The kitchen was old. He wiped out the coconut thatch leaves of the kitchen. He saw Sam Beau holding the door. He took a 2x2 size timber and speared Sam Beau with it. He assaulted Sam Beau on the backside of his head. He tried to push the door it was strong. Noanapek broke the door He went inside. He took bricks and stoned Sam Beau's head on his ear as he was afraid he would cut him. The brick was broken into pieces. He saw Nauka inside the kitchen. She covered her face



with a tissue. She did not want to see what happened. He came outside on the road. He went back inside the kitchen to kill the deceased again. Johnny Jimmy stopped him. He saw Noanapek and Tomle. Tomle told him to go home as he (Kasaura) had already killed Sam Beau. He saw the others he did not know them. Then he went back home. Then he did not know what he did. He lost control. He was taken to the hospital. At the hospital, his mind recovered again.

53. Sam Kasaura was cross-examined. He confirmed he saw Joseph Willie and Nauka Tuan. He confirmed Felix cut him on his right leg and his hand. He denied he assaulted Felix. He was asked why Felix cut him he said Felix was angry that iron sheets fell on the ground. He confirmed his evidence that he chased the two (Felix and Brian) and they followed the main road to the house of Sam Beau. The road turned on a corner; he said he did not see both of them anymore. He was asked and he said if he turned at the corner of the road, the road is bent or straight forward. He said straight forward. But he said he looked on the road he could not see them anymore. They were afraid and run away to the house. He followed the two, he was not too fast. When he arrived at Sam Beau's house, Sam Beau was standing there. He was asked he said he told Sam Beau the reason for coming to the house was because they cut him with a knife. He was angry and shocked. He chased them to kill them. He denied Rebecca Joseph was at the house. He accepted when he saw Sam Beau at his house, he went straight to him. He asked for Felix and Sam as he did not see both of them. He said Sam Beau cut him on his hand. It was put to him he tried to kill Sam Beau first. He denied. It was put to him and he denied that when he tried to assault him, Sam Beau cut him. It was put to him he was so angry when he did not see Felix and Sam he tried to kill their father and Sam Beau cut him. He said no. He said Sam Beau cut him on his hand with the edge of the knife. The skin of his body was not broken. There was no blood. It was put to him that the cut he received from Sam Beau was minor and not serious like the cuts on his body made by Felix. He accepted that. He confirmed Sam Beau run into the kitchen and closed the door. He held the door from inside. He accepted he took out the coconut thatch leaves of the kitchen and saw him inside. He accepted he picked up a timber size (2x2) and threw it at him. He accepted he stood from outside and through the



hole in the thatch leaves, threw timber at him. He accepted he meant to throw the timber at the back of his head. He accepted his target was to hit him on his head. He accepted the consequence of throwing a timber (2x2) on the head of someone is serious. He accepted he understood the seriousness of his action when he threw the timber on Sam Beau that morning. He accepted Noanapek kicked and broke the door. He accepted he saw Sam Beau fell down after he threw the timber on his head. He was asked he said he did not see Felix and Sam inside the kitchen. He accepted he took a brick inside the kitchen and stoned Sam Beau's head with it. He stoned Sam Beau on his left side. He accepted he stoned him Same Beau after he was already laying on the floor. He understood the serious consequence of his action. He accepted he knew the seriousness of his action but he did it. He was asked he said he stoned the deceased head only once. He was asked if he saw any mark on his ear. He said no. He was asked how many Defendants went inside the kitchen; he said he entered the kitchen. He saw Nauka. Noanapek broke the door and stayed at the door outside. He was asked he said he did not send Noanapek to break the door He denied that Noanapek was with him when he assaulted Sam Beau. He was asked whether Sam Beau cut him with Noanapek. He answered he cut him (Kasaura) alone. He was asked that he lost blood and fainted he could not see properly who entered the kitchen. He said yes. He was asked again he said he was the only one in the kitchen. He was asked and he accepted he went back in the kitchen and wanted to assault Sam Beau again for good. He was asked to explain what he meant. He answered because he was too angry. It was put to him that if he assaulted a person twice with a timber and a brick, that person will die. He answered no. It was put to him that he knew that the person will die. He answered no.

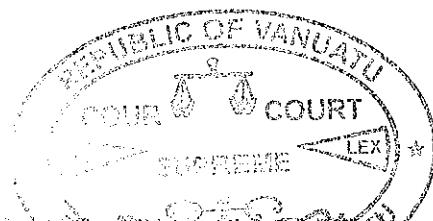
54. In re-examination, he said he assaulted Sam Beau again with a brick because he was afraid he will cut him. Blood running from his injuries caused him to have fainted.

55. Noanapek lawiko is the defence second witness. He lives at Kaunameiken village. He works in the garden. He looked after horses. On 11<sup>th</sup> June 2017, in the morning he went to change his horses. He heard a woman was crying and calling out for help on his left side. The person calling out said that her husband was cut what you all were doing. He recognised the voice of the

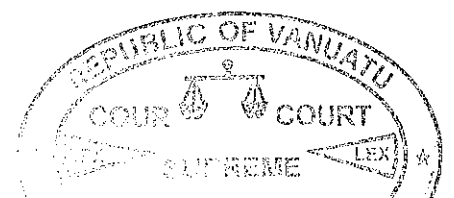


woman who was calling out was Sam Kasaura's wife. The voice was on the road of the house of Sam Beau. He run to the place where iron sheets and tank were. He saw water was running out of the tank. He ran to the road about 40-50 meters. He saw iron sheets left on the road. He heard the voice far end of the road. He followed the road and arrived at the house of Sam Beau. He heard Kasaura's wife was crying and calling for help. Sam Kasaura was calling on Felix and Brian. He thought Felix and Brian might have assaulted Sam Kasaura. He went to Sam Beau's house. He saw Sam Kasaura was breaking the coconut thatch leaves of the kitchen. He walked toward the door. Sam Kasaura cut a wood and used it to remove the thatch leaves of the kitchen. He thought Felix and Brian were inside. He kicked the door. The door opened. He saw Sam Beau and his grand aunty Nauka Tuan. Sam Beau is his uncle. At the same time Sam Kasaura speared Sam Beau with a timber. Sam Beau fell down on the side of a bed in the kitchen. He went back outside. Sam Kasaura went inside again. He saw Sam Kasaura took a brick and stoned the head of Sam Beau with it. He held on Sam Kasaura's hand and took him outside. He saw Nauka covered her face and cried at the side the body of Sam Beau. He told Nauka not to cry. He lifted her and made her sat near the body and told her they are not going to kill her. He came outside. He denied he cut Sam Beau with his knife. He agreed he took a knife with him inside after he came outside; they went and look for Felix and Brian. Noel, Tomle, Mathew, Iesut, Harry, Manasa, Ieru were with him. He saw them when he came outside on the road. He took the knife out from him. He was asked in his evidence in chief whether he had thoughts of killing Sam Beau. He answered: *"Mi look water I ron lo tank. Hemi something blo community"* He saw the injuries sustained by Sam Kasaura.

56. Noanapek was cross-examined. He confirmed on 11 June 2017, in the morning, he changed his horses. Sam Kasaura's wife had called out for help. He ran on the road toward the cries. He ran alone on the road. He saw Sam Kasaura's wife on the road, Tomle, Iesut closed to Sam Beau's house. He was not aware if Tomle and Iesut had knives. He could not see properly. He did not talk to them. He run passed them. When he arrived at Sam Beau's house, he saw Sam Kasaura was breaking the thatch leaves of the kitchen. Sam Kasaura did not say anything he went straight to the door and broke it. When



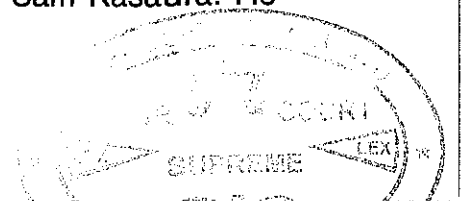
he saw Sam Kasaura broke the thatch leaves, he did not talk to him. When he arrived at Sam Beau's house, others were there already and he went straight to the door. He thought Felix and Sam Capen were inside the kitchen. He was asked and he said if Felix and Sam were in the kitchen he will kill both because of the iron sheets and tank of the community. He was asked of when he walked to the door whether anyone else followed him, he said he did not look behind him. He was asked and he said when he arrived at Sam Beau's house, Sam Kasaura wiped out the coconut thatch leaves of the kitchen, the others did not stop him. Tomle and Iesut did not stop Sam Kasaura. He was asked that when he run toward the door and kicked it, whether he asked Sam Kasaura who was in the kitchen, he answered no. He confirmed that he kicked and broke the door. He accepted when he kicked the door and the door fell on the ground, he accepted he saw Sam Kasaura assaulted Sam Beau with a wood. He was asked to explain and he said he went into the kitchen twice. The first time was when he broke the kitchen door. Sam Kasaura assaulted Sam Beau with a timber. The second time he felt sorry for Nauka he went back inside the kitchen. He saw Sam Kasaura assaulted Sam Beau's head with a brick. It was put to him that in Sam Kasaura's evidence, when he stoned Sam Beau with a timber the door of the kitchen was still closed. It was suggested to him that what he said was not true. He answered he told the Court what he saw and what he made. He accepted that he broke the door and went inside; he saw Sam Kasaura went inside the kitchen. He was asked why he did not stop Sam Kassaura, he said he saw Sam Kasaura was very angry. He said he went behind Sam Kasaura and held him by his hand and told Sam Kasaura not to assault Nauka as he had already killed his uncle Sam Beau. He was asked who else went into the kitchen. He said he saw Tomle was standing at the door. He was asked why he did not stop Sam Kasaura when he lifted the brick and assaulted the head of Sam Beau. He answered at the time Sam Kasaura had already assaulted Sam Beau with the bricks and then he held his hand. It was put to him that Nauka Tuan gave evidence that she saw him assaulted Sam Beau with wood. He said it was not true. He saw Sam Kasaura stoned Sam Beau's head on the side of his ear. He was shown pictures of the injuries on his forehead (face). He said yes. He was shown pictures of big cuts on Sam Beau's ear. He said yes. It was put to him he was with Sam Kasaura in the kitchen at the time. He accepted. It was suggested to



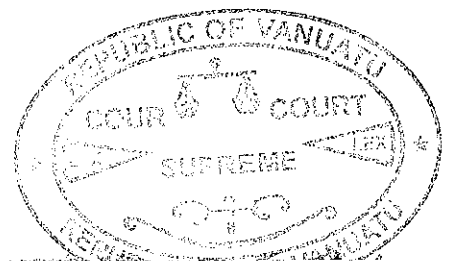


him the pictures showed the points of impact of the injuries on Beau's forehead and ear which suggested Sam Beau was assaulted twice. He accepted. He was shown another picture of injuries on Beau's backside of his head which indicated that Beau was assaulted on three different places on his body. He agreed. He was then asked and he confirmed Sam Kasaura assaulted Sam Beau twice – one on the back side of the head and the other on his ear. He accepted. He was questioned that the photographs showed there were three (3) places of impact on Sam Beau's body showing he was assaulted with injuries and on the evidence of Nauka, she saw him assaulting Sam Beau with a piece of wood also. He said no, it was not true. It was put to him again that he assaulted Sam Beau with wood. He denied. He was asked again that the photos showed three points of impacts of injuries on the body of Sam Beau. He said he thought that Sam Kasaura assaulted Sam Beau's head on two (2) places at the same time. He confirmed he did not know that Felix cut the hand of Sam Kasaura until they were remanded in the jail (correctional centre) in Port Vila. He heard his sister mentioning the name of a man. But he had the name of the man who cut Kasaura's hand.

57. Raka Nawei was the next defence witness. He lives at Kaunameiken Village. On 11 June 2017, he was at home. His place is different from Noanapek. Noanapek lives in the same place with Sam Kasaura. On 11 June 2017, he was at home and he heard calling on the road somewhere 120 meters. He run to the road to see what happened. He saw Sam Kasaura's wife (Ruth) was crying and telling him that hey cut Sam Kasaura. He did not see Sam Kasaura. Ruth was crying and was running on the road. He run following Ruth on the road to the place a fight took place. He saw iron sheets on the road. He did not see any fight. Ruth cried and went to Sam Beau's house. He followed Ruth to Sam Beau's house. At Sam Beau's house, he did not see any man. He did not see Sam Kasaura. He went passed Sam Beau's house looking for Felix. He did not find Felix. Then he came back to Kaunameiken nakamal by following another road. Youths were at the nakamal.
58. Raka was cross-examined. On 11 June 2017 when he heard Ruth's cries he followed her. He did not see Sam Kasaura. He was asked that Sam Kasaura testified that when he run to Sam Beau's house, his wife and daughter were running behind him and if that is true, then he should see Sam Kasaura. He



said he did not see Sam Kasaura. He was asked he said he did not see Sam Kasaura's daughter he only saw her mother (Ruth). It was put to him that his testimony was not true as if he said he followed Ruth he should see Kasaura. He said no. It was suggested to him Joseph Willie said he saw him (Raka) with Sam Kasaura and Iesut. They chased Felix and Sam. He denied. He was asked that Joseph Willie saw him when the fight took place on the road. He denied. He run passed Sam Beau's house as he was chasing Felix. He was asked if he saw Felix and run after him. He said he did not see Felix but Sam Kasaura's wife said Felix run this way. He was asked Sam Kasaura said in his evidence that he was running after Felix and Sam Capen but he did no longer see any of them and so it was not correct that Ruth who ran behind Sam Kasaura would see where Felix went. He answered he did not see Felix; he did not see Sam Kasaura. Ruth mentioned to him that Felix went this way. It was put to him that Ruth did not know where Felix went. He said if Ruth lied to him he will also lie based of what Ruth told him. He was asked why he chased Felix at Sam Beau's house. He answered that Ruth told him that they cut Sam Kasaura. He run and went passed Beau's house. He did not see Sam Kasaura. He was confronted by the evidence of Rebecca Beau that she saw him with Mathew, Manasa, Iesut, Andrew, and Noanapek and she said he also went inside Sam Beau's yard. He admitted he went in the yard after that he went on looking for Felix. He was asked if they went together to Sam Beau's house. He replied he run passed Beau's house. He did not know whether they went inside the house he did not see. It was put to him he lied. He replied he told the Court of what he did not of what others said. It was put to him that Nauka said she saw him also entering the kitchen when they killed Sam Beau. He said it was a lie. It was put to him that Joseph Beau saw him with Sam Kasaura, Tomle, Noanapek and Iesut when they went inside the kitchen. He said he did not go inside the kitchen. It was put to him he lied. He said he had already said what he had to say. He was questioned about the evidence of Johnny Jimmy who testified that after Sam Kasaura killed Sam Beau, they went the second time to assault Sam Beau "for good" and he saw him (witness) with that group. He replied it was not true. It was put to him what he told the Court was not true. He said that was his evidence. It was put to him that on 11 June 2017, he went to Sam Beau's house, he entered Beau's yard,



entered Beau's kitchen, went with others inside the kitchen and killed Sam Beau. He answered he had already given his talks to the Court.

59. In his re-examination, he said at the time he went through Sam Beau' yard and went further to look for Felix.

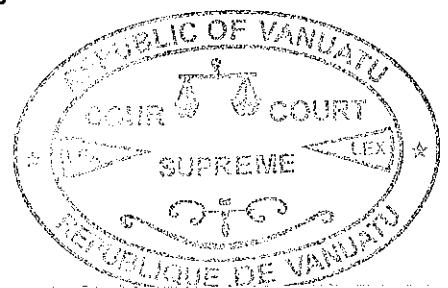
60. Tomle Katmatum (Nawei) was the next defence witness. He lives at Lepasiles at Kaunameiken Area. He works in the garden. He is the Chairman of the Kaunameiken Community. On 11 June 2017, he was at home with his family. He heard the calling out about 200 meters away. He lives near Raka but on upper side of the road. Raka is on downside of the road about 60-70 meters. When he heard the calling, the calling out mentioned the name of Felix and Sam and the calling out said they cut the hand of Sam Kasaura and what were you all doing. He ran following the main road. When he arrived at the place where the calling out came from, he did not see anybody. He saw blood. He saw iron sheets on the road. He ran on the road following them. He recognised the voice of the woman calling out. It was Sam Kasaura's wife. He went and saw Ruth was standing on the road. She told him that Felix and Sam cut the hand of Sam Kasaura. He passed Ruth and asked of their whereabouts. He went into Sam Beau's yard. When he went into the yard he saw Johnny Jimmy coming out in the yard of Sam Beau. He went and met Johnny Jimmy. He asked him whether he was hiding Felix and Sam. He pushed Johnny Jimmy and he fell on the road. He said his wife held his hand and told him not to talk to him, he just arrived. He said on Sunday morning 11 June 2017, he sent his wife to tell Sam Beau that a meeting of the community will take place on that day. When his wife told Sam Beau of the meeting, Sam Beau sent his two sons to take the iron sheets. He said Sam Kasaura assaulted Sam Beau, came outside and wanted to go back and assault Sam Beau again. Sam Kasaura did not go. He saw different people came. He saw Andrew, Iesut, Sam Sasaura and Ruth. He said he went inside the kitchen only to hold the hand of Sam Kasaura. Sam Kasaura's hand was fractured and they came to the road.

61. Tomle Katmatum (Nawei) was cross-examined. He confirmed his evidence he was at home with his family on the morning of 11 June 2017. He saw blood and iron sheets on the road but did not see anybody. He was asked if he

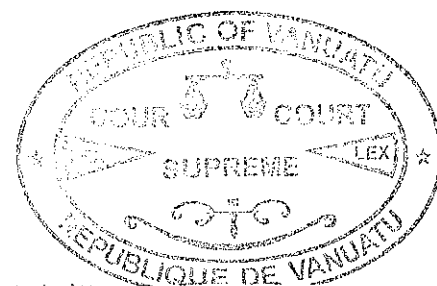


recognised the iron sheets. He said he did not. When he arrived at Sam Beau's house, he saw Ruth only on the road. He did not see Sam Kasaura. He did not see Noanapek. He was asked Noanapek said he run passed him on that day but he did not see him. He answered yes. He saw Johnny Jimmy, he did not see Noanapek. When he talked to Johnny Jimmy they were behind the sleeping house. The place he was with Johnny he could not see the kitchen; there was a house in the middle. He did not see Nawei Naus. He did not see Joseph Beau. He was asked he said he saw Rebecca running into the bush. He recognised Rebecca. He was asked that Nauka saw him inside the kitchen with Sam Kasaura. He said it was not true. He was asked that Rebecca saw him with a group consisted of Noanapek, Sam Kasaura, Manasa, Mathew, Andrew, Raka and Iesut. He said it was not true. He was asked Rebecca saw him with Noanapek and Iesut when he and others said this: "*Hemia long way yumi go killem.*" (*Here he is, let us go and kill him*). He said it was not true. It was put to him he lied. He said he did not agree. It was put to him that on 11 June 2017, he was with Sam Kasaura, Noanapek, Raka, Andrew, Manasa, Mathew, Iesut and they entered the yard of Sam Beau, they went inside the kitchen with the intention of killing Sam Beau. He answered it was not true. He did not enter the kitchen. He was outside.

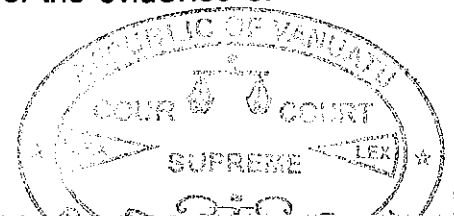
62. Andrew Ieru was the next defence witness. He lives at Kaunameiken Village. His house is 100 meters from Tomle's house. On 11 June 2017, he was at home. In the morning he fed his pigs. He heard noises clearly. Sam Kasaura's wife was calling out saying "*Hey they cut the hand of Sam...*" He ran to the road. He went to Manasa Ieru's house. He went to the main road. He saw Sam Kasaura's hand was cut and fractured. He saw blood. He saw Sam Capen assaulted Sam Kasaura with a stick. Sam Kasaura chased them. He saw Felix and Sam Capen. He saw the iron sheets fallen on the road. He saw the daughter of Sam Kasaura – Josiane. He ran to Lounamilo. He saw Felix and Sam went to Sam Beau's house. He run to Iata Siaka at Lounamilo and told him that Felix cut the hand of his brother in law. He went to Lenaken he saw Tom Nupo and told him of the incident. He saw a man on the road and he told him the condition of Sam Beau was very serious. They went to Kaunameiken Nakamal. He did not go to Sam Beau's yard. He did not see the injuries of Sam Beau.



63. Under cross-examination, he confirmed his evidence that he fed his pigs on the morning of 11 June 2017. He heard Sam Kasaura's wife calling out. He ran to the road. He said the place of the fight on the road was near the old church. He was asked if he went to different villages to get support. He did not answer it instead he said the road to Sam Beau's house went this way he went the opposite. He was asked of his evidence when he said he saw Sam Kasaura but he did not see anybody else. He replied he saw Felix and Sam run first and Sam Kasaura chased them. He saw Ruth was crying and followed Sam Kasaura. He was asked if he saw Raka. He said no. He was asked that Jospeh Beau said in his evidence that he saw him with others getting into the yard of Sam Beau. He said it was not true. He was asked of evidence of Nauka Tuan who said she saw him inside the kitchen; he said it was not true. He was asked of evidence of Rebecca Beau that she saw him with others inside the yard of Sam Beau. He said it was not true. He was asked that if at any time of that day he went into the yard of Sam Beau, he said yes. Jimmy Johnny said he saw him with Sam Kasaura, Tomle, Iesut, Siaka, Iatika, Manasa, Amon, Noel, Kasu Junior, Iala Yokem after Sam Kasaura assaulted Beau. He said it was not true. It was put to him that what he told the Court was not true. He said he did not agree. It was put to him that on 11 June 2017 he went inside Sam Beau's yard with others; he went inside the kitchen of Sam Beau and assaulted Sam Beau until he died. He said he did not agree.
64. Manasa Ieru was the next defence witness. He gave evidence that he lives at Kaunameiken Village. He lives next to Raka. His house is 100 meters from Tomle's house. On 11 June 2017, in the morning, he was at his house preparing food. He heard cries coming out from Sam Beau's house. He ran to Sam Beau's house. He came to Sam Beau's house, he saw Nauka was crying. Nauka was in the kitchen and cried. He saw Sam Kasaura and his wife and daughter Josiane coming out from Sam Beau's house to the road. He went and looked inside the kitchen. He came back and followed Sam Kasaura, his wife and daughter and they walked back home. He went to the nakamal, he saw youths there. He saw Brian, Ula, Bob, Amon, Raka Junior and Gilles.

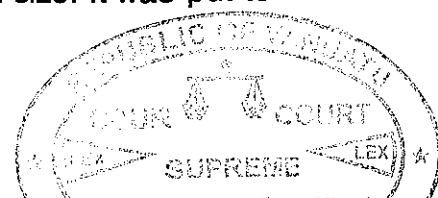


65. He was cross-examined. On 11 June 2017 he confirmed he was at home with his mother. He confirmed running to Sam Beau's house. His house is 500 meters from Sam Beau's house. When he arrived at Sam Beau's house, he saw Sam Kasaura, his wife and his daughter. He confirmed he did not see any other man. He did not see Noanapek in the yard. He was asked that Noanapek told the Court he pulled out Sam Kasaura outside, whether he saw Noanapek in the yard of Sam Beau. He said no. He did not see him. He was asked that Tomle gave evidence that he was in the yard with his wife and they were in the yard with Sam Kasaura whether he saw Tomle. He said no. It was put to him that his version of facts was not true. He said that was his evidence in Court. It was put to him that what he said was not correct because if he was at the yard of Sam Beau, he would see Noanapek, Tomle, and Sam Kasaura. He said at that time, he went to the yard and saw Sam Kasaura only with his wife and daughter and they went back home. He was asked to describe the clothes Sam Kasaura was wearing at that time. He said Sam Kasaura was wearing a yellow shirt which had buttons and red trousers. He was asked if he heard the testimony of Joseph Willie that Sam Kasaura was wearing a white shirt and black trousers. He said Joseph Willie lied that Sam Kasaura wore black trousers. He was reminded that Sam Kasaura's lawyer asked Sam Kasaura whether Felix cut the thigh through his black trousers. He said he did not hear that. It was put to him that his story was not true because in that morning, Sam Kasaura wore a white shirt and black trousers. He said he did not agree. He was asked if Sam Kasaura had injuries on his hand. He said yes. There was blood on his left hand. He was asked whether he followed Sam Kasaura back home. He said yes. He was asked whether Sam Kasaura properly buttoned his shirt. He said yes. He was asked whether he heard the testimony of Johnny Jimmy who said he was at Sam Beau's yard, stopped Sam Kasaura and sent Sam Kasaura out; Sam Kasaura did not wear any shirt at the time. He said he did not hear it. It was put to him what he said was not true. He did not agree. He denied he went inside the yard of Sam Beau. He said he was just on the main road and looked what happened. He said he was standing between the witness box and the other side of the Court house 7-8 meters. He was asked he said he did not see Noanapek, Tomle, Johnny Jimmy, Iesut. He saw Nauka in the kitchen she was crying. It was put to him he was not telling the truth. He disagreed. He was asked of the evidence of



Rebecca that she saw him following Noanapek, Andrew, Raka and Iesut. He said she lied. It was put to him that on 11 June 2017, he was following Noanapek, Sam Kasaura, Tomle, Raka, Andrew, Iesut, Mathew and he went inside the yard of Sam Beau and to Sam Beau's kitchen with the intention to kill him. He said no.

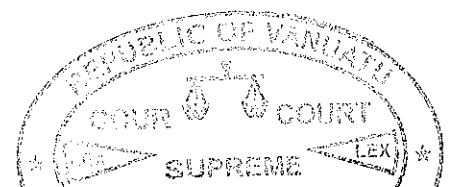
66. Mathew is the next defence witness. He lives at Kaunameikem Village. On 11 June 2017, he was at home. He heard Sam Kasaura's wife crying on the main road, a distance of 100 meters to his house. Kasaura's wife cried and said they cut the hand of Sam Kasaura. He went to the road and saw Sam Kasaura's wife. He saw Josiane, the daughter of Sam Kasaura. He went to Sam Beau's house. He saw Sam Kasaura wipped out the coconut thatch leaves of the kitchen. He went there with a knife. He thought the two sons of Sam Beau, Felix and Sam Capen were in the house. He did not see any other body. He was just standing. He did nothing. He said after Sam Kasaura wipped out the coconut thatch leaves of the kitchen, he took a timber and stoned Sam Beau with it. He was standing close to him on a distance equivalent to the witness box and the post of the Court house (7-8 meters) He saw Noanapek, Tomle, Iesut, Noel, Johnny Jimmy. They were running and came to Sam Beau's yard. They came out one by one. He was asked he said he saw Sam Kasaura assaulted Sam Beau with a timber, Sam Beau fell on the floor then Sam Kasaura assaulted him again with a brick. He also saw Noanapek broke the door and went inside. He said Noanapek talked to Nauka and tried to lift Nauka to sit. They then went to look for Felix and Sam Capen. He was with Noanapek, Noel, Iatika, Morris, Manasa, Harry and Amon. He was angry because Felix cut the hand of Sam Kasaura. They found Sam Capen at Lohanahuru nakamal. They chased him to kill him. Michel threw a stone on Sam Capen. A police officer who happened to arrive there stopped them. They went back to Kaunameiken nakamal.
67. Under cross-examination, he confirmed he met Sam Kasaura on the road. He saw they cut his hand. Sam Kasaura did not say anything to him. He did not see Felix and Sam Capen on the road. Sam Kasaura's wife and his daughter went first, he followed them. He was asked and he said he went inside Sam Beau's yard. He was asked he said he went inside the kitchen. He said no. Sam stoned Sam Beau's head with a brick which is of good size. It was put to



him he was in the kitchen he knew the size of the brick and saw Sam Kasaura took the brick and assault Sam Beau. He was asked he followed Sam Kasaura to Sam Beau's house, he knew the size of the brick, and saw Sam Kasaura took the brick and threw it on the head of Sam Beau, he must have been inside. He answered he was outside. He did not go inside. He was asked he run and followed Sam Kasaura to go to Sam Beau's house. He was asked why he went to Sam Beau's house. He said because he saw they cut and broke Sam Kasaura's and. He was asked and he agreed that he went to Sam Beau;s house to look for Felix and Sam Capen and to kill them. He said in the yard, he saw Noanapek, Tomle, Iesut. Felix and Sam Capen were not there. He was asked you and others went to Sam Beau's house to look for Felix and Sam Capen. They were not there, and then he and others went inside the kitchen to assault Sam Beau with the intent of causing his death. He said no. He was asked and he accepted that after the killing of Sam Beau, they went and looked for Felix and Sam Capen. He confirmed he was with Noanapek, Nole, Iatika, Morris, Manasa, Harry and Amon. He confirmed it was the same Noanapek in Court, the same Manasa. He was asked about the evidence of Manasa that said that from Sam Beau's house, he went to the nakamal. He was asked if Manasa was not with them and Manasa said he was not there, who did not give the true account of what happened. He said he told the truth. He was asked whether he said Manasa did not tell the truth when he gave his evidence. He said no. Manasa said the truth. He was asked if he came to Court this morning and did not tell the truth. He said no. He said what he saw.

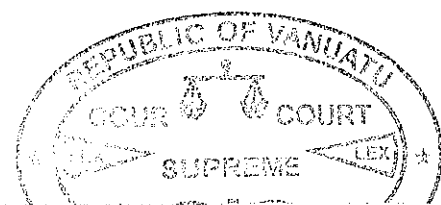
68. Mathew was re-examined. He was asked to clarify his evidence about Manasa and him, he said at the time there were plenty of them, he did not look properly he may make mistake. He thought he made a mistake. He was asked to explain the size of the bricks. He said he was outside he did not see properly at the brick.

69. Ruth was the second last defence witness. Ruth Sam is the wife of Sam Kasaura. Ruth and Kasaura have five children. Josiane (1999), Kasaura Junior (2001) Fane (2005), Sam (2010) and Ieru (2011). She lives with her family at Kaunameiken Village. On 11 June 2017. They got up in the morning and prepared to go to church. Sam Kasaura, the children and her. When they were ready to go to the church, Niko arrived at their house and told them of a



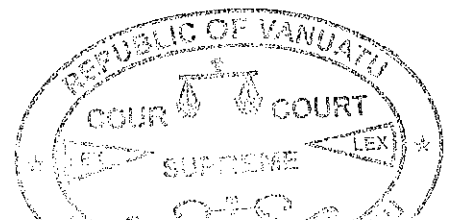


community meeting that Tomle planned to discuss about the tank. The tank that came for the community but Sam Beau said it was his. Niko said the meeting was to happen in the morning but Sam Kasaura said he was going to church first and the meeting would take place in the afternoon at 3.00pm. They went to church. She took old cloths to wash them. Sam Kasaura took his bible and the children took their bible too. Sam Kasaura put his bible in the handbag. Sam Kasaura wore a shirt yellow on its side but almost white and short strong trousers. It was jean trousers. She was in front, the children were in the middle and Sam was behind. They walked on the main road of the truck to go to church. The road was straight she could see them behind. She walked until a heap of sticks on the road. She did not have any thought of these sticks. She saw Nauka and Josphe Willie were standing near them. She passed them and she heard noises of iron sheets on the right side of the road. She saw the two carried the iron sheets in the direction of their house. She saw her husband stopped them and told them to go and put back the iron sheets. After church there would be a meeting. She saw her husband hold on the iron sheets and they fell on the ground. She saw Felix cut her husband with a knife. Felix cut him on many occasions but her husband tried to trick the knife. Felix cut his leg and wanted to cut his head. Her husband blocked his head with his hand and the knife got his hand and part of his face also. At the time she was crying. She called out because there was nobody on the road. So she called out for help. Her children were crying because of their father. Felix and the other run because she called out for help. Sam Kasaura followed them. She followed Sam. She followed Sam with her daughter Josiane. The other children were on the road. They run to Sam Beau's yard. She also ran to the yard. She saw Sam Beau was standing in the yard. She and her husband and daughter Josiane went first. She did not see any man coming behind them. She was crying, she did not look properly whether there was a man behind them. She saw Sam Beau standing closed to the kitchen. Sam Kasaura went and talked to him and asked for Felix and Sam Capen. When her husband was talking to him, she saw Sam Beau lifted the knife to cut Sam Kasaura. She said she heard Sam Beau say "you nao I mekem something ia." (You are the one who make these things). Then Sam Beau went inside and closed the door of the kitchen. She saw her husband tried to kill him. Sam Kasaura broke the coconut thatch leaves of the kitchen in order to create a



hole in the coconut leaves to kill Sam Beau. Sam Beau cut the right hand of her husband but it was not broken. She was watching if Felix and Sam Capen came back. When her husband tried to kill Sam Beau, she thought about her children and went back to the road. She then met Noanapek, and Tomle who moved in the yard. When she went back to get her children, she did not notice lots of people were coming. She said she was afraid, she cried and wanted to take her children back to their house. Josiane saw that her father assaulted Sam Beau, was scared and came on the road. They came and stayed on the road. After Sam Kasaura killed the man, they walked back home. At the house, she saw the hand of her husband was injured and broken. She saw bleeding. His face also had a cut; there were blood. She saw blood on his leg too. When they went back to their house because he lost so many bloods she saw he started to be weak. She saw blood still running. Her husband is still angry and nervous. He lost control of himself and got fainted. He was taken to hospital.

70. Ruth was cross-examined. She was asked to confirm whether Noanapek and Tomle were in the yard of Sam Beau. She said yes. She was asked and she confirmed that when they were at Sam Beau's house, she saw Sam Beau wanted to cut her husband. She said yes. She was asked if she saw the knife of Beau reaching her husband. She replied it reaches Sam Kasaura but did not break the skin of Sam Kasaura. Blood was not running. The skin was not broken. She agreed that the injury was not serious. She saw her husband again on the road when they went home. She saw her husband tried to kill Sam Beau; she was frightened she went on the road. She came out of the yard first time. Manasa Ieru said he saw her and her husband came out at the same time of the yard of Sam Beau. She said she came out first. She was asked she said she did not see Manasa at the time. The evidence of Manasa was that he saw her and Sam Kasaura coming out from the yard the same time. She replied it was a lie. She was out first. She was asked Manasa did not tell the truth to the Court. She thought Manasa lied to Court. She was asked Manasa also said he followed her and her husband to go home. She said she was crying. She did not look properly. She was asked when her husband came to see her on the road what sort of clothes he was wearing. At that time he removed his shirt from his body and walked to the road. She was



asked and she confirmed that when her husband walked on the road, he did not wear any shirt. She said yes. She was asked that Manasa said in his evidence that his version was that when her husband and her walked on the road outside Sam Beau's yard he wore a shirt with buttons. She said at the time her husband removed his shirt and just hold it in his hand. She was asked that the version given by Manasa was not true. She said yes. She was asked if she saw any who was inside the kitchen to assault Sam Beau. She said she saw her husband in the kitchen and she came back on the road. She confirmed that her husband was in the kitchen trying to kill Sam Beau. She saw Tomle and Noanapek went inside the kitchen. She came outside the yard after that. She accepted she did not see others when they went inside the kitchen.

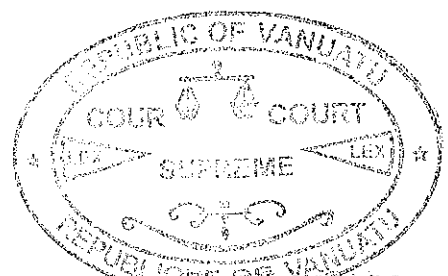
71. Iatika Siaka was the last defence witness. He lives at Lounamilo Village, Middle Bush. It is 1 kilometre distance to Kaunameiken. On 11 June 2017, he was at home with his wife, children and a brother in law, lawilam. At 6.00am o'clock, he saw Andrew Mika came to his house. He was running to come to his village. He told him that they cut the hand of Sam Kasaura. He said he is going to Lenaken to see police officer Jack Nauka to stop the fight. He went to Kaunameiken nakamal with a boy. He saw Andrew came with police office Nokam Charley, David and Tom Nupo. When he arrived at Kaunameiken, the fight was over. They brought Sam Beau to the hospital.
72. Under cross-examination, he confirmed that on 11 June 2017 Andrew came to his house and told him that they cut the hand of Sam Kasaura. He confirmed Andrew came to his house at 6.00 am. Andrew is his brother in law. Andrew then went to get the police. He went to nakamal. When Andrew came he told him that they cut the hand of Sam Kasaura.
73. That is the end of defence case.

### **Discussion on evidence: Fact Findings and Credibility**

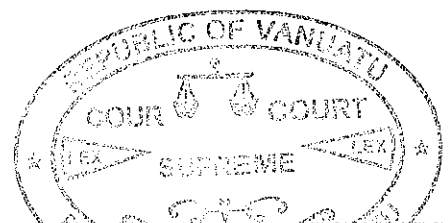
74. I have considered the prosecution's case and their evidence. I have also considered the defence case and their evidence. The following are the facts as found by the Court.-



75. The offence occurred on 11<sup>th</sup> June 2017 at around 6.00am. The deceased was assaulted at his house.
76. Upon arrival at the hospital, the deceased was diagnosed with fresh bleeding and cuts through the left side of the head just above the ear and a scalp of skin cut through where the skull was visible at the back of the head.
77. X-ray also shows that there is a fracture at the left side of the deceased's head just above the ear.
78. Examination revealed that on arrival at Lenakel Hospital, late Sam Beau was already Brain Dead -irreversible brain damage causing the end of independent respiration rightly indicative of death.
79. The injuries sustained by late Sam Beau, as described above, resulted in his death and were caused by the accused persons.
80. Paragraph 75, 76, 77, 78 and 79 are agreed to by the parties in a Memorandum of Agreed Matters signed by the Public Prosecutor and both Defence Counsel on 19<sup>th</sup> February 2018 before the trial.
81. On 11 June 2017, earlier in the morning of that day, before the serious attacks resulting in the death of Sam Beau at Kaunameiken Area, Middle Bush, Tanna, a fight occurred over iron sheets on the main road at Kaunameiken Village.
82. Felix Beau, Brian Beau and Sam Capen, the sons of deceased Sam Beau, were confronted by Defendant Sam Kasaura over the iron sheets. Sam Kasaura sustained injuries on his left hand which was fractured, cuts on his face and right thigh.
83. Sam Kasaura and his wife and children were on their way to church (LTS – Mormon) when the fight occurred on the road. Sam Kasaura wore a yellow handed but white shirt and black jeans trousers.
84. Sam Kasaura's wife, named Ruth Sam, witnessed the assault on her husband and cried, shouted and called for help.



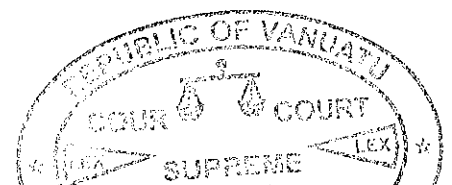
85. At the beginning of the incident on the road, Felix and Brian carried the iron sheets from Ieru's house to the road, and on their way to their house, Sam Kasaura confronted them. Felix called Sam Capen to help them.
86. When Ruth was calling for help, Felix and Sam who assaulted Sam Kasaura run away with Brian taking the direction of their father's house (Sam Beau).
87. Sam Kasaura was injured, angry, chased them and wanted to kill them. They run away following the road to their father's house.
88. In the meantime, Sam Beau, his wife Rebecca and their youngest son Joseph Beau were in their kitchen preparing breakfast. They fried cold laplap.
89. While in the kitchen, Felix and Sam Capen run passed them and told them "faet faet", and asked their parents to run away as others will kill them.
90. That was when Sam Beau, Rebecca and Joseph came out from their bush kitchen and wondered what happened.
91. Raka Nawei arrived in the first incident on the road. I accept Joseph Willie's evidence that Raka told Felix to put down the knife. When Felix and Sam Capen run away, Sam Kasaura and Raka Nawei chased them. Raka did not have a knife at that time.
92. The AOG old church on the side of the road is near Sam Beau's house. I accept the evidence that there was a short cut from the old church to Sam Beau's house (evidence of Joseph Willie, Nauka Tuan).
93. On 11 June 2017, I accept Nauka's evidence that after witnessing the beginning of the confrontation between Sam Kasaura and Felix and Sam Capen on the road, she followed the short cut road to Sam Beau's house. As an old woman, she must have followed a short cut road to arrive at Sam Beau's house at the same time or just before the Defendants arrived at Sam Beau's yard on 11 June 2017. She went into the kitchen before the second incident leading to Sam Beau's death in his kitchen.
94. Iesut Nawei followed Sam Kasaura and Raka with a knife and stick wood to Sam Beau's house.



95. I accepted the evidence that Sam Kasaura, Raka, Noanapek, Tomle, Manasa, Andrew, Mathew and Iesut were running to Sam Beau's house (evidence of Joseph Beau).
96. I also accept the evidence that a statement was made that "*they must kill one today.*" That statement is said to be made by Tomle, Iesut and Raka when they arrived at Sam Beau's house. It is understood that the statement could not be made by all Defendants or three of them at the same time but if one of them or any of the three defendants made the statements, it is to be accepted as their statement. The evidence was that they made the statement among themselves and they moved to take Sam Beau who they saw was in the kitchen and locked him up in the kitchen (evidence of Joseph Beau; Rebecca Beau). That was when Sam Kasaura started to remove the coconut thatch leaves of the kitchen (evidence of Sam Beau, Rebecca).
97. Joseph Beau was not shaking in his evidence; he was firm and forceful in his testimony when he said he saw these men running through their yard on that morning of 11 June 2017: Sam Kasaura, Raka, Noanapek, Tomle, Manasa, Andrew, Mathew and Iesut. Joseph Beau was in the kitchen, when he heard noises and the commotions he came outside the door with his father and mother to see what happened. That was when he saw them and identified them.
98. Nauka came in the kitchen at the time the Defendants arrived in the yard.
99. I reject the Defence evidence that Sam Beau had a knife at that morning and lifted to cut Sam Kasaura and cut him with the edge of the knife. At Sam Beau's yard at the time, Sam Kasaura was not alone. Raka and Iesut followed him and others were there too. It was very unlikely that Sam Beau, an old man, would confront Sam Kasaura alone with a knife in the presence of other angry Defendants armed with knives and sticks.
100. When the Defendants arrived at the yard, Sam Kasaura had seen that Sam Beau had run into the kitchen and closed the door.

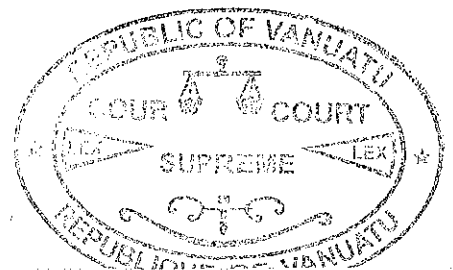


101. Sam Kasaura tried to open the door of the kitchen and, as Kasaura said *"it was too strong."*
102. Rebecca Sam gave evidence to the same effect that when she was with her husband (Sam Beau) and her son (Joseph Beau) in the kitchen, there were noises as if there was a fight. Felix and Sam Capen run passed them and informed them of a situation of *"faet faet"* and they needed to run away and hide because others would kill them. When she came outside, she saw Noanapek, Sam Kasaura, Raka, Tomle, Mathew, Iesut, Andrew, Manasa and lawiko (Jr). Rebecca testified that when they were in the yard, they saw her husband and they said *"hemia longway umi go killem ded hem."* (Here is he, let's go and kill him.) Her husband ran in and closed the door of the kitchen with his old mother inside.
103. That was where Sam Kasaura assisted by Tomle cut and removed the coconut leaves of the bush kitchen.
104. Joseph Beau run away first but came back to the Defendants and asked them not to kill his father. That was where Sam Kasaura took a soft wood and assaulted Joseph Beau with it.
105. There was a hole in the thatch leaves of the kitchen. Sam Kasaura saw that Sam Beau was standing near the door. Sam Kasaura took a timber (2x2) and speared it on Sam Beau. Sam Kasaura assaulted Sam Beau on the back of his head. Sam Beau fell on the floor. That was before Koanapek lawiko kicked and broke the door.
106. Noanapek, then kicked the door and broke it. Noanapek was the first Defendant to enter into the kitchen. Noanapek admitted holding his knife on that date after he changed his horses from the plantations. Noanapek admitted he went into the kitchen twice. The first occasion was when he kicked the door and went inside. Noanapek was first to enter the kitchen. Raka and Iesut followed Noanapek inside the kitchen. Sam Kasaura, Tomle, Mathew and Manasa followed. Joseph Beau heard noises that they were assaulting his father in the kitchen before he ran to other villages to assist his father. There is evidence that Raka had an axe. Mathew had a knife, Manasa had a knife. Iesut had a knife and a stick. Sam Kasaura admitted he assaulted



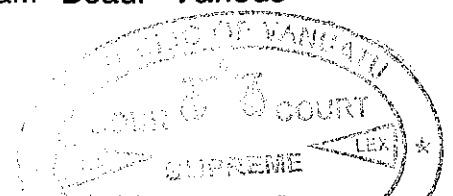
Sam Beau with a brick on his left ear. The size of the brick was big enough to cause serious injuries. The brick was reduced into pieces. I reject Noanapek evidence that at that first occasion, he was just standing at the door and did nothing. Sam Kasaura did not ask Noanapek for help. Sam Kasaura did not ask Tomle, Mathew, Manasa and Iesut for help. There was overwhelming evidence that Noanapek, Raka, Iesut, Sam Kasaura, Tomle, Mathew and Manasa were inside the kitchen with knives, axe and stick (wood). The brick was already in the kitchen. Sam Kasaura admitting spearing the backside of Sam Beau's head causing him to fall on the floor. He admitted assaulting Sam Beau with a brick on his left ear. There was fresh bleeding and scalp of skin cut through where the skull was visible at the back. It is rational to infer that these assaults and injuries on the body of the deceased Sam Beau were caused by any or all of the following Defendants Sam Kasaura, Noanapek, Tomle, Mathew, Manasa, Iesut and Raka. (evidence of Joseph Willie: Sam Kasaura, Raka and Iesut; evidence of Nawia Naus: Noanapek, Raka, Tomle and Sam Kasaura; evidence of Joseph Beau: Sam Kasaura, Raka, Noanapek, Tomle, Manasa, Andrew, Mathew and Iesut; evidence of Rebecca: Noanapek, Sam Kasaura, Raka, Tomle, Mathew, Iesut, Andrew, Manasa, Iawiko Junior; evidence of Nauka: Tomle, Andrew, Manasa, Noanapek, Sam Kasaura, Raka, Iesut and Mathew.

107. Following Defendants came back into the kitchen and wanted to kill Sam Beau to death when Johnny Jimmy lifted him up: Sam Kasaura, Raka, Iesut, Tomle, Noanapek and Ieru. Johnny Jimmy said he stopped Sam Kasaura not to assault Sam Beau again. That was the second occasion when Noanapek went back into the kitchen, saw his Uncle Sam Beau laid on a small bed in the kitchen and covered with blood as a result of serious injuries he sustained. He saw Nauka (his grand aunt) felt sorry for her and assisted her as he testified in his evidence and told Sam Kasaura not to assault her.
108. It is a fact that a dispute arose before 11 June 2017 at Kaunameiken village over iron sheets distributed after Cyclone Pam. Sam Beau and his family claimed that the iron sheets which were at Ieru's house were theirs. Sam Kasaura and his family and other Defendants claimed that the iron sheets belong to Kaunameiken Community.



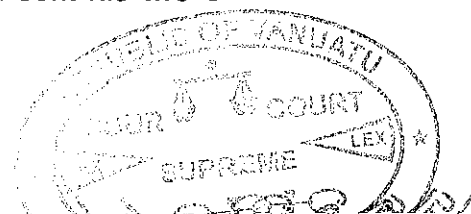


109. On 8 June 2017, while Sam Kasaura (senior), Noel, Iesut, Raka, Mathew, Dominique Dick and others prepared kava at Kaunameiken nakamal, someone shouted from Sam Beau's garden questioned "who brushed in the garden." It was discussed in the nakamal as to who shouted.
110. When the kava is ready Chief Sam Kasaura (senior) made the following statement "*sipos ufala I meetim someone lo garden we I brush ufala I killem hem I dead.*" (If you met someone who brushed in the garden, you kill him." When the statement was made no one else talked. After the kava at Kaunameiken nakamal Dominique brought some "Makas" kava to Sam Beau nakamal. Dominique told Sam Beau of the statement made by Chief Kasaura. Dominique told Sam Beau that if he wanted to go to the garden he must go with one or two of his sons. Dominique was afraid of that statement (evidence of Dominique).
111. On 11 June 2017, Felix and Brian went to get iron sheets. Sam Kasaura (Jr) confronted them on the road on their way to their house leading to Felix Beau causing Sam Kasaura injuries with a knife (Exhibits D1, D2 and D3).
112. On 11 June 2017, Dominique was at his house, he heard women crying and he saw men running on the road to Kaunameiken village. He heard calling on the road. He ran to the road. He met Tommy lawiko and run with him. He saw his grandfather Nanuman Peter. Nanuman Peter told him the following: "Your two brothers in law assaulted and broke the hand of Sam Kasaura (Junior)." Chief Nanuman told this witness (DD) that he told "the boys to kill Sam Beau because his two sons run away." The evidence of Dominique Dick was not challenged and it is accepted as a fact.
113. Sam Kasaura admitted he removed the coconut thatch leaves of Sam Beau's kitchen when he knew Sam Beau was locking him up with his elderly mother (Nauka) inside the kitchen. Sam Kasaura admitted he made a hole in the coconut thatch leaves, saw Sam Beau was behind the door, he saw the back of his head, took a timber (2x2) and speared Sam Beau's back of the head. Sam Beau fell on the floor as a result. Sam Kasaur admitted he assaulted Sam Beau on his left ear side of his head. I reject his evidence that he was the only one who entered the kitchen and assaulted Sam Beau. Various



prosecution evidences are overwhelmingly against what Sam Kasaura said. Further, it is rational to infer that he lost blood after his injuries and got fainted. As he said in his evidence he could not see properly who entered the kitchen.

114. Noanapek admitted breaking the door. He kicked and broke the door. He saw the water was running from the tank. He was angry. He wanted to kill both Felix and Sam Capen. They run away. He was with other Defendants at Sam Beau's house. He broke the door and went inside the kitchen. He thought Felix and Sam Capen were inside the kitchen. They were not in. He asked if he had thoughts of killing Sam Beau. He answered "Mi look water I ron lo tank. mi cross. Hemi something blo community mo mi look injuries long Sam Kasaura." He saw Sam Kasaura removing the coconut thatch leaves. He accepted Sam Kasaura did not ask for help. He kicked and broke the door of the kitchen. It is rational to infer that he intended to give serious harm to Sam Beau on 11 June 2017. Nauka saw him assaulting Sam Beau with a stick. She was challenged that in her statement, she said Noanapek assaulted Sam Beau with a knife. When giving her evidence, she said Noanapek assaulted Sam Beau with a stick. There was evidence that Noanapek assaulted Sam Beau on 11 June 2017. I accept that evidence.
115. Raka Nawei is not a credible witness. He was seen on the road at the first incident (fight over the iron sheets). He told Felix to put down his knife. He said he saw Ruth on the road, followed her to Sam Beau's house. He did not see Sam Kasaura. But Sam Kasaura said Ruth and his daughter followed him to Sam Beau's house. Jospheh Beau, Rebecca and Nauka saw Raka in the yard. They saw him entering the kitchen when they assaulted and killed Sam Beau. He had an axe when he entered the kitchen (evidence of Joseph Beau). Johnny Jimmy saw Raka when Sam Kasaura and others went the second time in the kitchen to assault to death Sam Beau. I accept the evidence is overwhelming against Raka. I reject his evidence as not reliable and credible.
116. Tomle Katmatum said he went inside the kitchen just to hold the hand of Sam Kasaura outside. I reject that evidence that he went inside to hold the hand of Sam Kasaura to go outside. It is a fact that he said he sent his wife to inform Sam Beau and Sam Kasaura of the meeting over the iron sheets. That meeting will take place on that day. Instead Sam Beau sent his two sons to



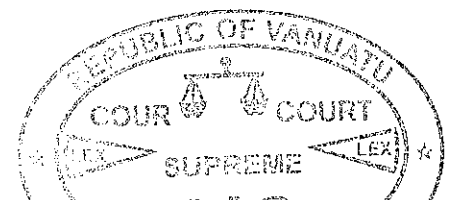
get the iron sheets. He was angry. He pushed Johnny Jimmy and Johnny Jimmy fell on the road. It is rational to infer that he was angry against Sam Beau. Further, he said he did not see Sam Kasaura. He did not see Noanapek. He did not see Joseph Beau. He saw Rebecca running away. Rebecca gave evidence that she ran away to the side of the house when some of the defendants were already there and after she heard that more were arriving at the scene she run to the side of the house. The prosecution's evidence establishes that he entered the kitchen when they assaulted Sam Beau to death (Nawia Naus, Joseph Beau, Joseph Willie, Nauka and Rebecca). I accept the prosecution evidence against him and reject his evidence as not truthful.

117. Andrew Ieru's evidence gave an account of event that he witnessed the first incident on the road on 11 June 2017. He saw Felix and Sam Capen. His evidence in chief is that he did not go to Same Beau's yard. In his cross-examination he was asked whether at any time of that day he went into the yard of Sam Beau. He answered: yes. This is consistent with the evidence of the prosecution that he was at Sam Beau's yard. Joseph Willie saw Andrew was there in the yard of Sam Beau with Raka, Mathew, Manasa, Sam Kasaura and Noanapek. When Noanapek kicked the kitchen's door Andrew was there with the others. Joseph Willie gave evidence that Andrew saw him and told other defendants to kill him. He then ran away to his village at Lenpuanapen and he came back to Sam Beau's yard, Sam Beau was already taken to the hospital. Andrew was one of the Defendants who entered the kitchen of Sam Beau when he was assaulted to death. I reject his evidence and accept the evidence of the prosecution (Joseph, Beau, Nauka, Rebecca and Joseph Willie).
118. Manasa Ieru is not a credible witness. He was at Sam Kasaura's yard. The prosecution evidence established that on 11 June 2017, he had entered into Sam Beau's kitchen with other Defendants when they assaulted Sam Beau to death. Joseph Willie gave evidence that Manasa took a knife and cut the coconut leaves of the kitchen also Joseph Beau's evidence was that after Noanapel broke the door, he went inside the kitchen. Raka and Iesut followed Noanapek inside the kitchen. Sam Kasaura, Tomle, Mathew and Manasa



followed them. He heard noises that they were assaulting his father. I accept the prosecution evidence and reject his evidence as not truthful.

119. Mathew's account of event is that he was standing on the road and did nothing. However, his evidence is also that he saw Sam Kasaura assaulted Sam Beau with a timber. Sam Beau fell on the floor. Sam Kasaura took a brick and assaulted Sam Beau with it. He saw Noanapek broke the door. He saw Noanapek tried to lift Nauka. His evidence contradicted itself. If he was there standing on the road, he could not gave detailed evidence of what happened inside the kitchen. He must have been inside to give such detailed accounts. I reject his evidence that he was just standing on the road and did nothing. The prosecution evidence establishes that on 11 June 2017, he was at Sam Beau'shouse. He had a knife. He had entered the kitchen with others and assaulted Sam Beau to his death (evidence of Josphe Beau, Nauka, and Rebecca). I accept the prosecution evidence against this witness.
120. Ruth Sam's evidence was in great part credible. She gave detailed accounts of events she saw on 11 June 2017, when her husband was assaulted on the road with a knife by Felix and Sam. However, that part of her evidence when she said Sam Beau cut her husband on his right hand is rejected for the reason provided earlier when I assessed the evidence of her husband, Sam Kasaura.
121. latika Siaka's evidence is self-serving purpose. The two incidents took place one after the other at about 6.00-6.30am o'clock in the morning. It was not possible Andrew will be at latika's house at 6.00am when he lives 1 Kilometre away. It is rational that latika made a mistake in terms of the right time. The prosecution evidence establishes that Andrew was at Sam Beau's yard on 11 June 2017 at about 6.00am o'clock in the morning. Josphe Willie saw Andrew at Sam Beau's yard. Josphe Willie testified that Andrew saw him and told other Defendants to kill him causing. Joseph Willie to run away. Josphe Willie saw Andrew and others entered the kitchen on 11 June 2017 and assaulted Sam Beau. Joseph Willie said Sam Beau begged them to stop assaulting him. They did not. I accept the prosecution evidence (evidence of Joseph Willie. Joseph Beau and Nauka). I reject lata Siaka's evidence of the time of 6.00 am o'clock was the time he saw Andrew at his house as Andrew was seen with



other defendants at Sam Beau's house. Andrew did specific act at about the same time (told other defendants to also kill Joseoh Willie at Sam Beau's yard). He was seen by more than one prosecution witnesses in the yard of Sam Beau; he was seen entering the kitchen with other defendants when they entered the kitchen and assaulted Sam Beau to death.

### Considerations.

122. Before I begin considering the legal questions, I would like to take this opportunity to express my thanks and gratitude to all counsel involved for their useful submissions to assist me as the trial judge in this case.
123. The prosecution main submission is that each accused caused death or was a principal party in the causing of death of the deceased on 11 June 2017 as a result of his unlawful act. The prosecution further submits that if the prosecution could not prove that each accused person did cause the death of the deceased, the prosecution would rely on the principle of common purpose to say that the accused persons all went there with the intention to commit the principal offence of intentional homicide. The prosecution refers the Court to the case of **Kilman –v- Public Prosecutor [1997] VUCA 9** where the Court of Appeal dealt with the doctrine of common purpose. The Court of Appeal stated the following:

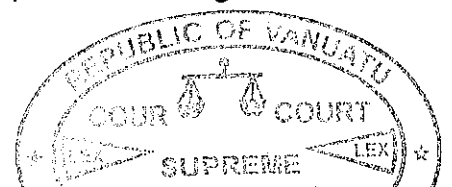
*The doctrine of common purpose applies where a venture is undertaken by more than one person acting in concert in pursuit of a common criminal design. Such a venture may be described as a joint criminal enterprise. Those terms - common purpose, common design, concert, joint criminal enterprise - are used more or less interchangeably to invoke the doctrine which provides a means, often an additional means, of establishing the complicity of a secondary party in the commission of a crime. The liability which attaches to the traditional classifications of accessory before the fact and principal in the second degree may be enough to establish the guilt of a secondary party: in the case of an accessory before the fact where that party counsels or procures the commission of the crime and in the case of a principal in the second degree where that party, being present at the scene, aids or abets its*



*commission: see Giorgianni v The Queen [1985] HCA 29; (1985) 156 CLR 473. But the complicity of a secondary party may also be established by reason of a common purpose shared with the principal offender or with that offender and others. Such a common purpose arises where a person reaches an understanding or arrangement amounting to an agreement between that person and another or others that they will commit a crime. The understanding or arrangement need not be express and may be inferred from all the circumstances. If one or other of the parties to the understanding or arrangement does, or they do between them, in accordance with the continuing understanding or arrangement, all those things which are necessary to constitute the crime, they are all equally guilty of the crime regardless of the part played by each in its commission: cf R v Lowery and King [No 2] [1972] VR 560 at 560, per Smith J.*

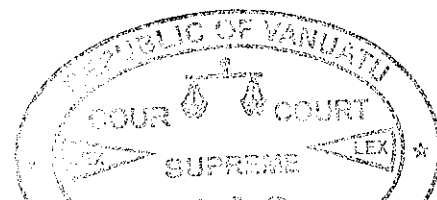
*Not only that, but each of the parties to the arrangement or understanding is guilty of any other crime falling within the scope of the common purpose which is committed in carrying out that purpose. Initially the test of what fell within the scope of the common purpose was determined objectively so that liability was imposed for other crimes committed as a consequence of the commission of the crime which was the primary object of the criminal venture, whether or not those other crimes were contemplated by the parties to that venture: Mansell and Herbert's Case [1794] Eng. 2078; (1556) 2 Dyer 128b [73 ER 279]; Ashton's Case (1698) 12 Mod 256 [88 ER 1304]; R v Radalyski (1899) 24 VLR 687; R v Kalinowski 1930) 31 SR (NSW) 377. See generally Smith, A Modern Treatise on the Law of Criminal Complicity (1991), pp 209-214. However, in accordance with the emphasis which the law now places upon the actual state of mind of an accused person, the test has become a subjective one and the scope of the common purpose is to be determined by what was contemplated by the parties sharing that purpose: see R v Johns [1978] 1 NSWLR 282 at 287-290, per Street CJ."*

*It is sufficient to make one of the parties sharing the common purpose guilty of an offence committed by another of the parties sharing the*



*common purpose that the offence must have been foreseen as a possible incident of the common unlawful enterprise: see Chan Wing-Siu v The Queen [1985] AC 168 and Hui Chi-Ming v The Queen [1992] 1 AC 34 at 49-51.*

124. In the Kilman case, the appellants had a common purpose that two of the VMF members would go to the President's residence, take him and escort him, to Malekula to bring back the then Deputy Prime Minister Barak Sope. They had carefully planned and executed an offence.
125. The prosecution submits that this is similar to the matter at hand. It is said as in the case of Kilman, the planning had started on the 8<sup>th</sup> June 2017 at the Kaunameiken Nalamal. The Defendants were present when Chief Sam Kasaura (Snr) initiated the plan of killing.
126. In evidence, Dominique Dick stated that Chief Kasaura had ordered the Defendants to kill anyone they see at the garden (referring to Sam Beau's garden). The prosecution submits that this was the plan to be executed. The prosecution acknowledges that the plan was to kill in the garden whereas the killing had happened at the confine of the deceased's bush kitchen. However, the prosecution said, that incident that happened on the road between Felix Beau and Sam Kasaura earlier on the 11<sup>th</sup> June 2017, had triggered what was planned on the 8<sup>th</sup> of June 2017. The prosecution said, at that moment, it did not matter anymore whether it was in the garden or at the deceased's house. The plan was done at the Kaunameiken nakamal on the 8<sup>th</sup> June 2017 was to kill anyone at "that garden". "That" specifically refers to the deceased's garden.
127. On the morning of 11<sup>th</sup> June 2017, that plan still stands and the incident between Felix and Sam Kasaura on the road triggered it. It did not matter anymore at that point that the killing was to happen in the garden. All it mattered was that it was the deceased's family and that the killing must happen now because of that earlier accident on the road triggered it.
128. In the case of Kilman, the Court stated that "*the understanding of arrangement need not to be expressed and may be inferred from all the circumstances.*"



This means that the Defendants need not to expressly agree to the killing. The fact that they all gathered inside the deceased's yard and in the deceased's bush kitchen shows an agreement to carry out that offence. Although not all of them may have had a hand in the killing, they had known about the plan since the 8<sup>th</sup> of June 2017 and again gathered together in the deceased yard and kitchen shows their intention to enforce that plan or their willingness and intention to encourage the commission of the crime or their willingness to carry out the offence.

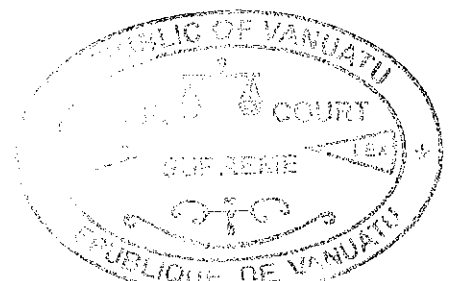
129. The Prosecution also refers to the case of **R –v- Jogge Ruddock (2016) UKS8**, the Defendants had planned to rob the deceased. However, the robbery went wrong and one of the Defendants murdered the deceased while the others stood outside his house and shouted encouragement. This Court held that the mens rea was that there was an intention to encourage the commission of the crime. The actus reus was that the accessory had assisted or encouraged the commission of the principal offence.
130. The Prosecution make reference to two other cases to support their submissions on the facts of the present case before the Court: **Director of Public Prosecutions for the Northern Ireland –v- Maxwell [1978] 1WLR 1350** and **Davies –v- Director of Public Prosecution [1954] AC 378**.
131. The Prosecution finally submits that the Defendants will be convicted as they had a purpose that was initiated by Chief Sam Kasaura on the 8<sup>th</sup> June 2017. It is said the common purpose was amplified through the conducts of the Defendants on the morning of 11<sup>th</sup> June 2017 at the deceased bush kitchen.
132. Mr. Harrison Rantes of the Public Solicitors Office, Counsel for Chief Sam Kasaura (Snr) and Chief Nanuman Peter, submits to the following effect. He identifies two issues:-
1. Whether he or not the Defendant Mr. Sam Kasaura had a common purpose on 8<sup>th</sup> June 2017 with the co-defendants to assault Mr. Beau on 11<sup>th</sup> June 2017.



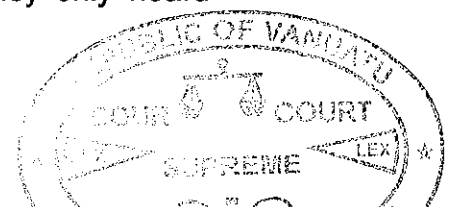


2. Whether or not the Defendant Peter Nanuman had a common purpose with the co-defendants to commit the crime on 11 June 2017.

133. He submits that Defendants Chief Sam Kasaura and Chief Peter Nanuman did not have a common purpose with other co-defendants to commit the crime on 11 June 2017. Mr. Sam Kasaura's case was clear that the instructions were made in relation to a trespass on the garden. This instruction was to kill a person in the garden and not the road. The evidence before the Court is that the issue of 11 June 2017 arose out of a dispute over iron roofing leading to the assault of Mr. Sam Kasaura. In *R -v- Jogge* the Court place emphasis on secondary participation that if the crime requires a particular intent, D2 must intend (it may be conditionally) to assist D1 to act with such intent. The instruction was conditional to kill in the garden.
134. He further submits that the evidence of Mr. Dick about Mr. Peter Nanuman's statement was uncorroborated. There is no independent witness to support the statements said by the Defendant that time. There is no evidence to connect Peter Nanuman was present at the nakamal on 8 June 2017 to have a common purpose with Sam Kasaura and the co-defendants to commit the crime on 11 June 2017. The co-defendants acted at their own will to commit the crime of intentional homicide.
135. The evidence of Mr. Dick is too weak and unreliable to support conviction. The Court must be left with a reasonable doubt about his evidence.
136. Mr. Daniel Yawha of Counsel on behalf on behalf of following Defendants: Noanapek lawiko, Raka Nawei, Tomle Katmatum (Nawei), Mathew Nawei, Manasa Ieru, Andre Ieru and Sam Kasaura (Jnr) submits to the following effect:-
137. He submits that conviction should not be entered against each and all Defendants on the basis of evidence of the prosecution. The credibility of the evidence is not sufficient to affirm beyond reasonable doubt that all the Defendants committed the offence they are charged with.



138. The Defendants pleaded Not Guilty to the charge of Intentional Homicide. The Defendant Sam Kasaura (Jnr) admitted that he alone committed the act of intentional homicide but he did it by way of self-defence and in the alternative he was being provoked by the deceased which determines his actions towards the deceased.
139. The defence pleaded the defence of self-defence. He relied on the case of **Regina –v- Palmer [1971] AC 814**. The Court in that case stated that the simple question was whether the Defendant was acting in self-defence? If the prosecution satisfies the jury (here the judge of fact) that the Defendant was not, any other issues of justification or excuse remain but not self-defence. An assertion that the use of force was considered subjectively necessary or reasonable would await issues in mitigation.
140. He submits that Sam Kasaura (Jnr) was acting in self-defence in this case. He refers the Court to other cases: **Zecevic –v- DPP (1987) 162 CKR 64 J and Public Prosecutor –v- Manitek [2008] VUSC 97; Criminal Case 49 of 2007**.
141. In the alternative, he submits that Sam Kasaura (Jnr) was being provoked by the deceased when Sam Kasaura chased Felix and Sam Capen and entered up at the yard of the deceased, who attacked Sam Kasaura with a knife.
142. He submits that Sam Kasaura was provoked which caused him to react violently towards the deceased causing his death.
143. In respect to the other Defendants [Nonapek Iawiko, Raka Nawei, Mathew Nawei, Manasa Ieru, and Andrew Ieru], they all denied being at the yard of the deceased when Sam Kasaura killed the deceased. He said they arrived at the scene after Sam Kasaura had already killed Sam Beau. They were each at their homes that morning when they heard screams and cries coming from the road. They then ran down to the road and found out what really happened from Sam Kasaura's wife (Ruth) and their children who have witnessed the fight at the main road.
144. He submits that prosecution fails to prove the case against the Defendants beyond reasonable doubt. The witnesses called by the prosecution are unreliable. Most of them did not witness the fight; they only heard it from

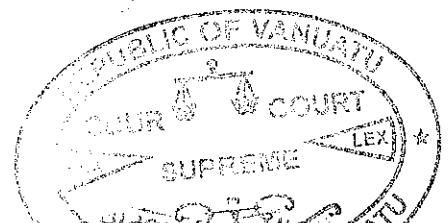


others. Others made up story and guess names of the Defendants who were only part of the crowd that day.

145. Contrary to prosecution arguments and submissions, Mr Yahwa submits there was no understanding or arrangement being expressed by the Defendants to constitute common purpose. Given the circumstances of the case being argued by the Prosecution above, the defence submits that the distance between the Defendants' villages are far apart from each other, the Defendants were not together that day when the incident occurred and the Defendants did not move as a "Mop" to the scene. They were at different places when the incident occurred and they came running in from different places to find out more about the incident from the cry for help coming from Ruth Sam.
146. He submits that there was no "Common Purpose" between Sam Kasaura (DOB 1973) and the other defendants to assault and cause the death of Sam Beau. Again there is lack of evidence for a "Common Purpose" in the prosecution case.
147. The Prosecution alleged that the public announcement at the nakamal on the 8<sup>th</sup> of June 2017 by Chief Sam Kasaura (DOB 1946) in which he publicly announced and said that "sapos yufala I luk any man lo karen, yufala I killem ded em", was part of the common purpose of the defendants.
148. He submits that the meeting of the 8 June 2017 was an isolated issue of its own. The order was for an execution of "anyone" at the garden". Dominique Dick (Prosecution witness) gave evidence that there were people in the nakamal but he did not say that any of the people were the defendants. He said "Mi luk ol tawian ya nomo lo nakamal." He did not specify who those "Tawian" were. Defence submits that the Defendants were not part of the meeting of the 8<sup>th</sup> June 2017.
149. He submits that the issue of the 11<sup>th</sup> June 2017 was an issue that came "out of blue" and "shocking" which arose out of iron sheets and a water tank which belong to Kaunameiken Community. The issue did not arise out of or concerning a garden. The deceased was not assaulted and killed in a garden; he was assaulted and killed at his own kitchen.



150. He submits that no one was aware that there will be a fight on the 11<sup>th</sup> June 2017. Sam Kasaura (DOB 1973) was on his way to church with his family at that time of the incident.
151. There is also evidence that the Defendants live in separate villages and there is evidence that they did not move in as one group (“Mop”) to the house of the deceased. They were at different places at that time and they heard Ruth’s cries and they each ran from where they were towards the direction to find out what was going on.
152. Given the distance of their villages and house, which was given in the evidence by each Defendants, it is impossible for all Defendants to move together in a “Mop” to the scene.
153. If there was a “Common Purpose” to be established in the meeting of 8<sup>th</sup> June 2017, then it must be for the purposes of iron sheets and a water tank and not for a “garden” as it was so.
154. He submits that the defendants were part of a crowd who were curious and ran to the scene to find out what was happening. They were not there for a common purpose.
155. Mr. Yawha refers the Court to the case of **R –v- Jogge Ruddock (2016) UKSC 8**. In that case, the Court held that it was no longer sufficient for the prosecution to prove that the principal’s conduct was probable consequence, in the ordinary course of things, of the criminal enterprise instigated or agreed to by the secondary party. The prosecution had to prove that it was part of their common purpose, should the occasion arise.
156. He submits that the prosecution failed to prove that the alleged incident was part of the defendant’s common purpose. Common purpose is not proven.
157. Mr. Yawha submits that the more appropriate test to apply in this case is that of an “objective test” given that there is no meeting of the minds of the defendants or lack of Mens Rea to establish a common purpose. There was no foreseeability of the occurrence of the incident that happened on the 11<sup>th</sup>

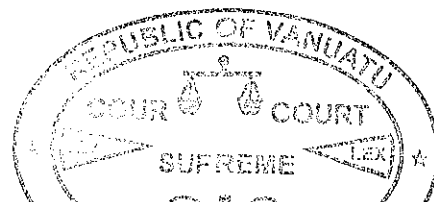


June 2017. An ordinary, reasonable person would have not foreseen that a fight would take place on the 11<sup>th</sup> of June with a common purpose to assault the deceased with the intention of causing his death.

158. He submits the prosecution fails to establish that there was a common purpose between the defendants.

**How the law is applied to the facts in this case?**

159. As a trial judge, I am bound by the Court of Appeal ratio decidendi in the case of **Kilman –v- Public Prosecutor [1997] 1 VUCA** applying the High Court of Australia Judgment in **McAuliffe v the Queen [1995] HCA 37**.
160. It is important to note that since the judgment of the United Kingdom Supreme Court in **R v Jogee and Ruddock [2016] SCUK 8**, the High Court of Australia, in **Miller v the Queen; Smith v the Queen & Presley v the Queen [2016] HCA 30 (24 August 2016)** is asked to review the doctrine of complicity in the criminal law known as "extended common purpose" or "extended joint criminal enterprise" enunciated in **McAuliffe v The Queen [1995] HCA 37** and abandon or confine it. Although of general application, the doctrine is commonly invoked, as here, as a means of establishing the secondary offender's liability for murder.
161. In this context, the doctrine holds that a person is guilty of murder where he or she is a party to an agreement to commit a crime and foresees that death or really serious bodily injury might be occasioned by a co-venturer acting with murderous intention and he or she, with that awareness, continues to participate in the agreed criminal enterprise.
162. The doctrine has been criticised for being inconsistent with the principles of accessorial liability and for being incongruous in light of the mental element of reckless murder. More generally, the criticism is of "over-criminalising": attaching criminal liability to the secondary offender in circumstances in which his or her moral culpability is suggested not to justify that liability. These criticisms were invoked in support of an application to re-open and overrule



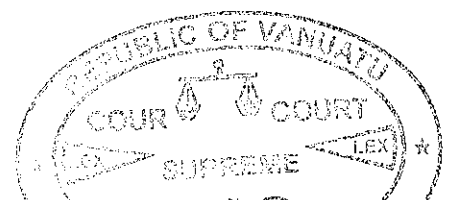
**McAuliffe** in **Clayton v The Queen [2006] HCA 58**. By majority, the High Court of Australia declined to do so. Among the majority's reasons for that refusal was the observation that principles consistent with **McAuliffe** form part of the common law in other countries. These principles are commonly traced to the decision of the Privy Council in **Chan Wing-Siu v The Queen [1984] 3 All ER 877, [1985] AC 168**.

163. Recently, the Supreme Court of the United Kingdom and the Privy Council in **R v Jogee; Ruddock v The Queen ("Jogee") [2016] SCUK 8** held that the common law took a "wrong turn" in *Chan Wing-Siu* and that there is no place for extended joint criminal enterprise liability in the law.
164. **Jogee** makes it appropriate to reconsider **McAuliffe**; however, for the reasons given in the judgment, the High Court of Australia in **Miller, Smith and Presley v the Queen [2016] HCA 30** stated that the principle of extended joint criminal enterprise liability stated in **McAuliffe** should remain part of the common law of Australia.
165. Liability as a secondary party to a joint criminal enterprise "Common purpose", "common design", "concert" and "joint criminal enterprise" are expressions variously used in the Australian jurisdictions to describe one means of establishing the complicity of the secondary party in the commission of a crime. The expression "joint criminal enterprise" is used in South Australia and it is the expression that generally will be used in these reasons.
166. The law, as stated in **McAuliffe**, is that a joint criminal enterprise comes into being when two or more persons agree to commit a crime. The existence of the agreement need not be express and may be an inference from the parties' conduct. If the crime that is the object of the enterprise is committed while the agreement remains on foot, all the parties to the agreement are equally guilty, regardless of the part that each has played in the conduct that constitutes the *actus reus*.
167. Each party is also guilty of any other crime ("the incidental crime") committed by a co-venturer that is within the scope of the agreement ("joint



criminal enterprise" liability). An incidental crime is within the scope of the agreement if the parties contemplate its commission as a possible incident of the execution of their agreement. Moreover, a party to a joint criminal enterprise who foresees, but does not agree to, the commission of the incidental crime in the course of carrying out the agreement and who, with that awareness, continues to participate in the enterprise is liable for the incidental offence ("extended joint criminal enterprise" liability).

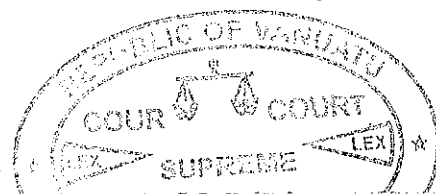
168. The expression used in **Jogee** to describe extended joint criminal enterprise liability is "**parasitic accessory liability**". The expression was coined by Professor JC Smith in an influential article on accessorial liability. Professor JC Smith observed that liability for a crime not intentionally assisted and encouraged by the secondary party, but merely foreseen by him, was not an innovation by the Privy Council in *Chan Wing-Siu*. The rule imposing liability for offences committed in the course of committing the offence which the secondary party assists or encourages is long-standing.
169. The question raised in **McAuliffe**, which was not explicitly raised in **Chan Wing-Siu**, was whether it was necessary for there to be mutual contemplation of the commission of the incidental crime. It was common ground in *McAuliffe* that three youths had agreed to bash a person or persons in a park. All three were convicted of the murder of a man whom they had set upon. The jury was directed that the accused whose case it was considering would be guilty of murder if he shared the common intention, with the accused who did the act causing death, of inflicting grievous bodily harm or if he "*contemplated that the intentional infliction of grievous bodily harm was a possible incident of the common criminal enterprise*". The emphasised part of the direction was the subject of challenge on appeal. The McAuliffe brothers' case on appeal was that joint criminal enterprise liability required the prosecution to prove a shared contemplation that grievous bodily harm might intentionally be inflicted as a possible incident of the agreement to assault.
170. The Court observed that the challenged direction conveyed to the jury that, even if the criminal enterprise embarked upon by the three youths did not



embrace the intentional infliction of grievous bodily harm, there was "a sufficient intent" for murder if the accused contemplated the intentional infliction of grievous bodily harm by one of them as a possible incident in carrying out their agreement and, with that awareness, the accused continued to participate in the enterprise. The accused was as much a party to the incidental crime as when its commission was within the common purpose. Participation in the joint criminal enterprise, with the requisite awareness, was not relevantly distinct from an understanding or arrangement that included foresight of the intentional infliction of grievous bodily harm.

171. The principles applied to the re-opening of decisions of this Court need not be recited. *McAuliffe* was a unanimous decision. It has since been affirmed on a number of occasions<sup>78</sup>. Many prosecutions have been conducted on the law stated in it in the Australian common law jurisdictions. *Jogee* held that the effect of "putting the law right" will not be to invalidate convictions arrived at over many years by faithfully applying the law laid down in *Chan Wing-Siu*, as leave to appeal out of time would only be granted where the applicant can demonstrate substantial injustice. The position in Australian law in this respect cannot be regarded as settled and it cannot be said that to depart from the law as it has been consistently stated and applied would not occasion inconvenience. Of course, were the law stated in *McAuliffe* to have led to injustice, any disruption occasioned by departing from it would not provide a good reason not to do so. However, here, the submissions are in abstract form and do not identify decided cases in which it can be seen that extended joint criminal enterprise liability has occasioned injustices<sup>81</sup>.

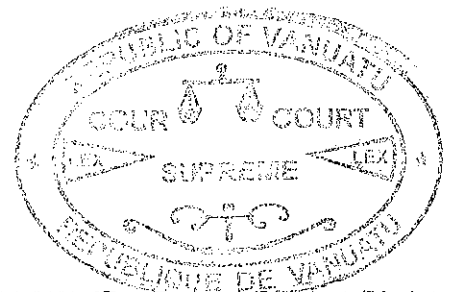
172. In light of the above, it is not appropriate for the High Court of Australia to now decide to abandon extended joint criminal enterprise liability and require, in the case of joint criminal enterprise liability, proof of intention in line with *Jogee*. For the same reasons, it is not appropriate to depart from *McAuliffe* by substituting a requirement of foresight of the probability of the commission of the incidental offence. The difficulty with such a requirement is that it "stakes everything on the probability or improbability of an act, admittedly



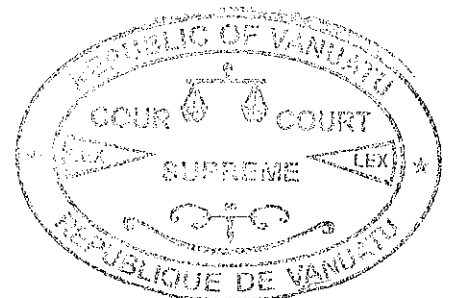


contemplated, occurring". This is not to accept the submission that since "anything is possible", the secondary party may bear liability for a c.

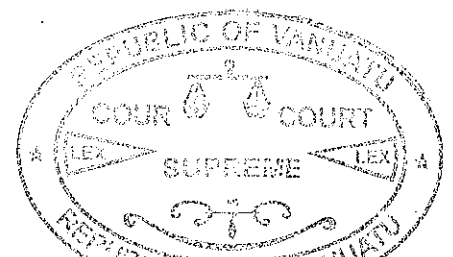
173. Before parting with *Jogee*, it is necessary to say something about the suggestion that the expression "joint enterprise liability" occasions public misunderstanding. The misunderstanding that their Lordships identified was that the expression allows a form of "guilt by association" or "guilt by simple presence without more". Nothing in *McAuliffe* supports either conclusion. It is to be appreciated that in the paradigm case of murder, the secondary party's foresight is not that in executing the agreed criminal enterprise a person may die or suffer grievous bodily harm – it is that in executing the agreed criminal enterprise a party to it may commit murder. And with that knowledge, the secondary party must continue to participate in the agreed criminal enterprise.
174. It is important to point out from the outset that the law to apply in relation to the doctrine of common purpose is the law as applied in **Kilman –v- Public Prosecutor [1997] 1 VUCA**, relying on the High Court of Australia judgment in the case of **McAuliffe v the Queen [1995] HCA 37** as the persuasive authority and it is still the case.
175. I observe that the factual circumstances of the case of **Kilman v Public prosecutor [1997] 1 VUCA** and the English case of **R –v- Jogge Ruddock [2016]SCUK 8** are different. There is no factual similarity between the two cases. Therefore the test to be applied is still the test as applied in **Kilman –v- Public Prosecutor [1997] 1 VUCA**, based on **McAuliffe v the Queen [1995] HCA 37**.
176. On that basis I reject the defence submission that the test to be applied in the case at hand is the test as applied in the English case of **R –v- Jogge and Ruddock [2016] UKSC 8** ("objective test").
177. In the present case, I observe that Chief Sam Kasaura (Snr) and Chief Nanuman Peter exercise their rights to remain silent after I explained to them in the week of trial.



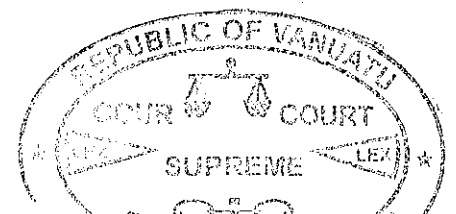
178. I think it is important that the point be emphasised as provided under s.88 of the Criminal Procedure Code [Cap 136]. I am not and I do not criticize both of them for doing that. In this case I do not rely on their silence as a basis for drawing adverse inferences against them. I need to see whether there are adverse inferences on the facts that are available to be drawn from unchallenged evidence that could justify their convictions (**[Swanson v Public Prosecutor [1998]) VUCA 9]**).
179. On the facts of this case, I find that there are adverse inferences to the accused Chief Sam Kasaura, stemming as a matter of common sense from his lack of explanation.
180. I find that on 8<sup>th</sup> June 2017 at Kaunameiken Nakamal, Chief Kasaura made the statement to the Defendants that *"sipos yufala I mitim anyone I brush lo garden ia, yufala I kilim hem."* That garden is the deceased's. Before that statement being made someone shouting from that garden to Chief Sam Kasaura and others while they prepared and drunk kava at the Nakamal. These at the nakamal talked or mentioned about the person shouting or calling out from that garden before Chief Sam Kasaura made the statement to kill in the garden.
181. On evidence, on 8 June 2017 in the afternoon, Domonique Dick was at Kaunameiken Nakamal with grandfathers chief Sam Kasaura and chief Nanuman peter, his uncle Noel, lesut, Raka, Mathew and all his brothers in laws referring to Chief Sam Kasaura's family who were present at the nakamal at that time when cross examined. It is rational to infer that the defendants are the family members of Chief Kasaura. Dominique Dick said on 8 June 2017 at Kaunameiken Nakamal only the family of Chief Sam Kasaura were present. They prepared and drunk kava when the statement was made. It is rational that Chief Sam Kasaura could not make this sort of statement to strangers at the nakamal. No one else at the nakamal talked after the statement was made. It must be very serious and frightening. Dominique said he was afraid of that statement. Dominique must have understood the seriousness and gravity of what such statement meant.



182. On the same 8 June 2017 in the evening, Dominique went straight away to Sam Beau's nakamal and told him of the said statement made by Chief Sam Kasaura and told Sam Beau not to go to his gardens alone but to be accompanied by one or two of his sons because of the seriousness and gravity of such a statement made by the chief in the nakamal.
183. It was a fact that the statement was a call or an order to kill a person. A person shouted or called out in that garden when chief Kasaura and others were in the nakamal drinking kava. It is more probable than not to infer that the person who brushed the garden and shouted in that garden must have been either Sam Beau or any member of his family. It is rational to infer that the order to kill is intended to anyone on its face but on the factual circumstances of this case, it was more likely toward Sam Beau and any member of his family because of the troubling "shouting" or "calling out" from that garden (*"garden ia"*) to those at Kaunameiken Nakamal.
184. Further, before the statements of 8<sup>th</sup> June 2017, being made, there were tensions or disputes between family Kasaura and others and the deceased's family over iron sheets provided after the Cyclone Pam.
185. It was understood that a meeting was to take place on 11<sup>th</sup> June 2017 at Kaunameiken Village over the iron sheets disputed between Chief Kasaura and his family on behalf of the community and Sam Beau and his family.
186. But in the early morning of 11 June 2017, Sam Beau sent his sons (Felix and Brian) to take the iron sheets to their house. Felix and Brian went to take the iron sheets and on their way to their house, Sam Kasaura (Junior) confronted them on the road at about 6.00 am leading to the first fight on the road at Kaunameiken village.
187. Raka, Iesut and Andrew were among others who were at Kaunameiken Nakamal on 8 June 2017 when Chief Sam Kasaura made the call or order to kill a person in the garden.
188. Raka and Iesut were on the road at the first incident and helped Sam Kasaura chasing Felix and his brothers to their father's house.

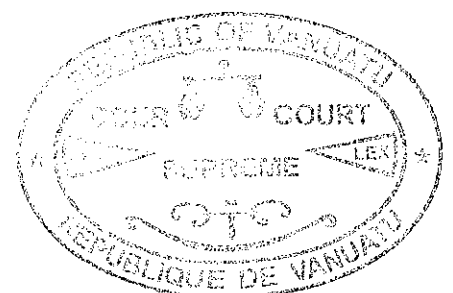


189. Sam Kasaura came through the yard of the deceased with Raka Nawei and Iesut Nawei.
190. When Felix and Sam Capen ran away and the defendants could not find them, then, Raka, Iesut and Tomle decided and agreed that: *"They must kill one today"* and refer to the deceased and his family while grouping together amongst themselves at the yard of the deceased. It is rational to infer that they had in mind the order of their chief to kill dated 8 June 2017, coupled with anger and frustrations that Felix assaulted Sam Kasaura with a knife but they could not find Felix and his brothers. At that time, Raka had a knife, Andrew had a knife, Manasa had a knife, Mathew had a knife, Iesut had wood (stick).
191. As family members of Chief Kasaura, they decided to join Sam Kasaura (Jnr) to retaliate and take revenge of what the sons of the deceased did to Sam Kasaura (Jnr) on the deceased himself. They must have in mind of the chief Sam Kasaura's order to kill of 8 June 2017. That killing has to be executed. That killing was more probable than not that it would be against the deceased and his family. They decided to kill one on that day. They independently and together then joined with Sam Kasaura and decided to take the deceased Sam Beau and killed him (evidence of Joseph Beau, Rebecca Beau).
192. Sam Beau (the deceased) locked himself up in the kitchen. Sam Kasaura tried to open the door. It was too strong. Sam Kasaura started to remove the coconut thatch leaves of the kitchen. He was helped by Andrew Ieru (evidence of Joseph Willie) and Tomle Katmatum (Nawei).
193. It was highly likely that the defendants agreed by their conducts or joined in this criminal enterprise to kill the deceased on 11 June 2017 as a combination of the execution of the order of chief Sam Kasaura to kill dated 8<sup>th</sup> June 2017 and the retaliation in relation to the first incident on the road on 11 June 2017 at 6.00 – 6.30 am.
194. The above understanding or arrangements amongst all defendants (including Sam Kasaura (Jnr)) or between some or other defendants and Sam Kasaura



are inferred from the circumstances of the present case. That understanding or arrangement amounted to an agreement between them to kill the deceased as a retaliation and revenge and also to execute the order of Chief Sam Kasaura of 8<sup>th</sup> June 2017.

195. I accept the prosecution submission that the planning started on 8<sup>th</sup> June 2017. (Evidence of Dominique Dick). It was a plan to be executed. The incident that happened on the road between Felix and Sam Kasaura earlier on the 11<sup>th</sup> June 2017 had triggered what has planned on 8<sup>th</sup> June 2017. I accept the submission that at that moment, it did not matter anymore that whether it was in the garden or at the deceased's home. The plan as done at Kaunameiken Nakamal on the 8<sup>th</sup> June 2017 was to kill someone at that garden. That garden refers specifically to the deceased Sam Beau's garden.
196. I further accept that on 11<sup>th</sup> June 2017, that plan still stands and the incident between Felix and Sam Kasaura triggered it. It did not matter anymore at that point the killing must happen now because that earlier incident on the road triggered it.
197. The multiple prosecution evidences are provided to this effect. The defendants knew that Sam Kasaura was going to kill Sam Beau. They deliberately joined him by removing the coconut thatch leaves of the kitchen, kicking the door and broke it open and entered inside the kitchen. They joined Sam Kasaura to assault Sam Beau to death. The plan of 8<sup>th</sup> June 2017 was executed by the defendants and Sam Kasaura on 11 June 2017 by the killing of Sam Beau, the deceased.
198. Evidence is overwhelmingly against Chief Sam Kasaura that he counselled or solicited and/or procured the killing of a person in his order of 8<sup>th</sup> June 2017 at Kaunameiken Nakamal to the defendants or some of them. Raka Nawei, Iesut Nawei, Andrew Ieru and other defendants who were at the Kaunameiken Nakamal when Chief Kasaura ordered the killing (common purpose) executed the killing with Sam Kasaura (Jnr) or all defendants joined together in this criminal enterprise with Sam Kasaura as a group to execute the plan of killing (common purpose) on 11 June 2017.



199. In the Australian case of **McAuliffe v The Queen [1995]HCA 37; (1995) 183 CLR 108; 130 ALR 26** which was applied in **Kilman V Public Prosecutor [1997] VUCA 9**, the High Court of Australia stated:

*“The liability which attaches to the traditional classifications of accessory before the fact and principal in the second degree may be enough to establish the guilt of a secondary party... But the complicity of a secondary party may also be established by reason of a common purpose shared with the principal offender or with that offender and others. Such a common purpose arises where a person reaches an understanding or arrangement amounting to an agreement between that person and another or others that they will commit a crime. The understanding or arrangement need not be express and may be inferred from all the circumstances. If one or other of the parties to the understanding or arrangement does, or they do between them, in accordance with the continuing understanding or arrangement, all those things which are necessary to constitute the crime, they are all equally guilty of the crime regardless of the part played by each in its commission.*

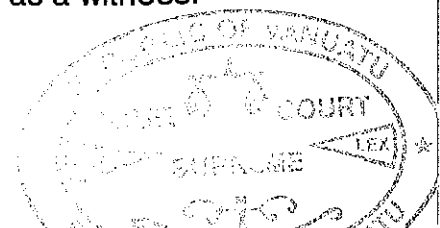
***cf R v Lowery and King [No 2] [1972] VR 560 at 560, per Smith J.***

*Not only that, but each of the parties to the arrangement or understanding is guilty of any other crime falling within the scope of the common purpose which is committed in carrying out that purpose”.*

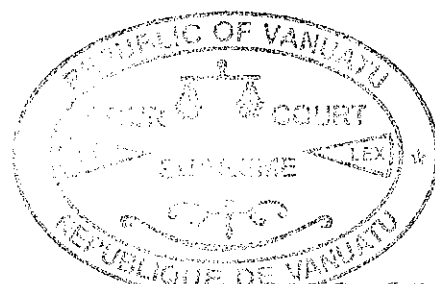
***[Underlined are my emphases]***

200. A verdict of guilty is made in respect to Chief Sam Kasaura.

201. As to Chief Nanuman Peter, I accept his Counsel's submission that I should not rely on the prosecution evidence as a witness (Tommy lawiko) was not called by the prosecution. The only evidence against Chief Nanuman Peter was that of Dominique Dick to the effect that he had a conversation with chief Nanuman Peter and Nanuman Peter voluntarily made the statement that he told the boys to kill the deceased because they could not find the sons of the deceased. He said the statement was made in the presence of one Tommy lawiko. Tommy lawiko has not been called to confirm the versions of facts asserted by Dominique Dick. One would have expected Tommy lawiko to give evidence about it. The prosecution did not call Tommy lawiko as a witness.

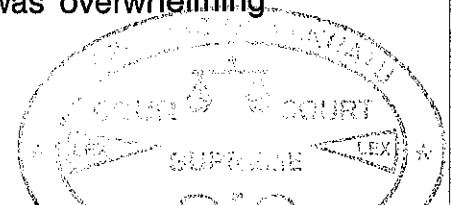


202. There was no other evidence from the prosecution or defence of seeing Nanuman Peter or his whereabouts near or at the scene of the crime on 11 June 2017. In any event there was no any other adverse evidence against Nanuman Peter than witness Dominique Dick asserting that Nanuman Peter voluntarily told him that *“he told the boys to kill Sam Beau because they could not find his sons.”*
203. Here, it is rational to make a **Jones v Dunkel(1959) 101 CLR 298** finding that that the evidence of Tommy lawiko would not have helped the prosecution case.
204. The rule in Jones v Dunkel (1959) 101 CLR 298 concerns the inferences that can be drawn from a party’s unexplained failure to call a witness who might be expected to have been called. The rule was explained in **O,Donnell v Reichard [1975] VR 916 (FC)** by Newton and Norris JJ. After referring to **Jones v Dunkel (1959) 101 CLR 298** they said (at 929):  
*“...the law may be stated to be that where a party without explanation fails to call as a witness a person whom he might reasonably be expected to call, if that person’s evidence would be favourable to him, then, although the jury may not treat as evidence what they may as a matter of speculation think that that person would have said if he had been called as a witness, nevertheless it is open to the jury to infer that that person’s evidence would not have helped that party’s case; if the jury draw that inference, then they may properly take it into account against the party in question for purposes, namely: (a) in deciding whether to accept any particular evidence, which has in fact been given, either for or against that party, and which relates to a matter with respect to which the person not called as a witness could have spoken; and (b) in deciding whether to draw inferences of fact, which are open to them upon evidence which has been given, again in relation to matters with respect to which the person not called as a witness could have spoken”.*
205. In **R v Lao (2000) 5 VR 129; 137 A Crim R 20 (CA)** Buchanan JA put the position concisely. His Honour said (at 139;31 [34]):



*"...When a party appears to be able to prove the true facts and fails to do so, in the absence of explanation, an inference which is open on the facts that is favourable to the other party may be more readily drawn (Jones v Dunkel, at 308 per KittoJ, at 312 per Menzies J and at 320...I per Windeyer J)".*

206. A verdict of not guilty should be made in respect to chief Nanuman Peter.
207. As to Sam Kasaura (Jnr), the facts of this case do not show that a situation of self-defence case was event present. The deceased Sam Beau locked him up inside his kitchen with his mother (Nauka) when the defendants arrived in his yard on 11 June 2017 in the morning. There was no threat of life or risk of serious bodily harm intended or likely to be caused by the deceased toward the defendant Sam Kasaura warranting him to defend himself (self-defence). In this case, I rejected his evidence that the deceased Sam Beau cut him with a knife on his right hand but the skin was not broken and there was no blood.
208. But assuming that that evidence was right and truthful, Sam Kaura himself gave evidence that after the deceased cut him with a knife, the deceased retreated himself inside the kitchen. At that point in time, there was no longer any situation of force or violence on the part of the deceased threatening the life or likely to cause serious bodily harm on the defendant Sam Kasaura warranting him to so defend himself.
209. The fact as found by the court is that the deceased locked him up with his old mother (Nauka Taun) inside the kitchen after the defendants arrived in his yard and decided to take him and killed him instead as his sons run away and they could not find them. His kitchen was broken and he was killed inside the kitchen defenceless. This is not a case of self-defence. It is quite the contrary: a clear case of retaliation and revenge. The factual situation of **Regina v Palmer [1971] AC 814** referred to by Mr Yawha did not exist in this case. The case of **Regina V Palmer [1971] AC 814** cannot assist the case of the defendant Sam Kasaura.
210. I do not find either that provocation is a defence. Provocation is a situation of diminished responsibility as a matter of mitigation. But here, Sam Beau did not provoke Sam Kasaura on the facts as found. Evidence was overwhelming





against Sam Kasaura coupled with his own admissions in the killing of Sam Beau on 11<sup>th</sup> June 2017 in his bush kitchen at Kaunameiken Village.

211. As to other Defendants, Noanapek, Raka, Tomle, Mathew, Manasa and Andrew, there is evidence they were in the yard of Sam Beau on 11<sup>th</sup> June 2017.

212. There was evidence that after Noanapek kicked the door and broke the door, each and all of them went inside the kitchen. Evidence show that they were inside the kitchen at the time of the killing.

213. Injuries sustained by Sam Beau showed that there were more impacts on the body of the deceased than the impacts of serious assaults admittedly caused by Sam Kasaura (Jnr).

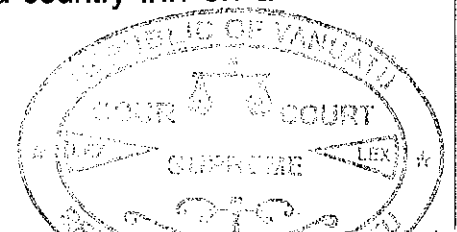
214. It is rational to infer that other Defendants who went inside the kitchen with Sam Kasaura also assaulted the deceased.

215. The following cases are in support of the prosecution submissions:-

216. **In R v Ruddock (2016) UKSC 8**, the defendants had planned to rob the deceased. However, the robbery went wrong and one of the defendants murdered the deceased while the other stood outside his house and shouted encouragement. The court held that the mens rea was that there was an intention to encourage the commission of the crime. The actus reus was that the accessory had assisted or encouraged the commission of the principal offence. It was held also that:

*"Secondary liability does not require the existence of an agreement between the principal and the secondary party to commit an offence. If a person sees an offence being committed, or is aware that it is going to be committed, and deliberately assists its commission, he will be guilty as an accessory."*

217. In the case of **Director of Public Prosecutions for Northern Ireland v Maxell [1978] 1 WLR 1350**, the defendant was a member of a terrorist organization known as Ulster Volunteer Force (UVF). On an occasion, he guided a vehicle of 3 or 4 men on a military mission to a country inn on a



winter evening. He knew they were intended to carry out some form of attack on the inn but did not know the precise form of attack whether it was by shooting, bombing or something else. The attack turned out to be bombing. He was held to be guilty as it was enough that he knew that they were intending to carry out a violent attack on the inn and that he assisted them in doing so.

218. In the present case, the fact that the defendants entered the bush kitchen as shown by multiple prosecution evidences could be interpreted to show their willingness and intention to encourage the commission of the crime. The evidence was that they wanted to kill one of the members of the deceased family that day. Because the sons run away, they decided to kill their father instead. This shows a willingness to carry out the offence. The others being present and entering the yard and also moving together with Sam Kasaura when they decided to take the father and kill him shows their intention to encourage the commission of the offence. By their actions, it shows willingness on their part.
219. The defendants knew that Sam Kasaura was going to kill Sam Beau after Sam Kasaura and others or Sam Kasaura with the support of other defendants decided to take Sam Beau and killed him. All defendants deliberately moved in with Sam Kasaura. They deliberately followed him and assisted him in the commission of the offence by removing the coconut thatch leaves (Tomle Katmatum (Nawei) and Manasa Ieru), kicking the door open (Noanapek lawiko) and entering the kitchen with him (Sam Kasaura and other defendants) with knives, axe and wood (sticks).
220. A question remains though whether I, as a trial judge (jury), I should have warned myself on the evidence of accomplices, in a charge of intentional homicide, like in this case, before relaying on them to secure convictions. I answer that I do not think so.
221. The case of **Davies v Director of Public Prosecutions [1954] AC 378**, supports my answer to the question. The case is about a fight between a group of youths and one of them got stabbed with a knife. One of the



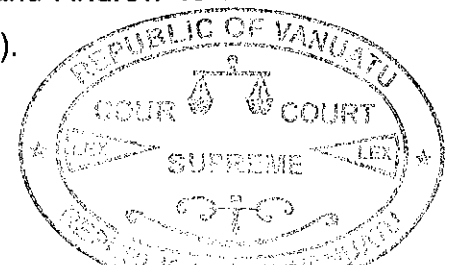
prosecution witnesses was a boy called Lawson and he gave evidence that the appellant had orally admitted to stabbing the boy after the incident. The judge warned the jury that Lawson is a potential party to the offence. He stated that he did not know that there was a knife involved. There was no evidence against Lawson though. The House of Lords rejected the argument that an accomplice warning was required. Lord Simonds LC stated that:

*“ I can see no reason why, if half a dozen boys fight another crowd and one of them produces a knife and stabs one of the opponents to death, all the rest of his group should be treated as accomplices in the use of the knife and the infliction of mortal injury by that means, unless there is evidence that the rest intended or concerted or at least contemplated an attack with a knife by one of their number, as opposed to common assault, and there was no evidence that Lawson, a party to that common assault, knew that any of his companions had a knife, then Lawson was not an accomplice in the crime consisting in its felonious use.”*

222. In the present case, the defendants knew that Sam Kasaura was going to kill the deceased. They aided him regardless. Although he stated that he did not attack the deceased with a knife but rather a piece of wood and a brick, the defendants knew that Sam Kasaura was going to attack the deceased. They did not know however the form of attack. They still assisted him by encouraging him and moving with him into the deceased's yard and kitchen. This is similar to the case of **Director of Public Prosecutions for Northern Ireland v Maxwell [1978] 1 WLR 1350**.

223. On the evidence and circumstances of this case, the defendants will be convicted as they had a common purpose that was initiated by chief Sam Kasaura (Snr) on the 8<sup>th</sup> June 2017. This common purpose was amplified through the conducts of the defendants on the morning of the 11<sup>th</sup> June 2017 at the deceased's bush kitchen.

224. I am satisfied beyond reasonable doubt that the prosecution has proved its case against the Defendants Sam Kasaura (Jnr), Noanapek Iawiko, Raka Nawei, Tomle Katmatum (Nawei), Mathew, Manasa Ieru and Andrew Ieru in Count 1 of the Intentional Homicide, contrary to s.106 (1) (a).



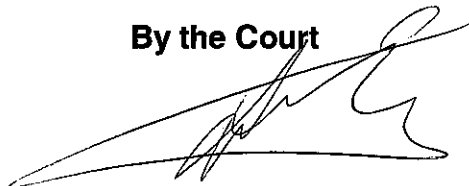
225. I am satisfied that prosecution has proved the case against Defendant chief Sam Kasaura (Snr) beyond reasonable doubt in Count 2 of Aiding and/or counselling and procuring Intentional Homicide, contrary to subsection 106 (1) (a) and section 30 of the Penal Code Act [Cap 135].

226. Verdict:

Noanapek Iawiko – Guilty  
Raka Nawei – Guilty  
Tomle Katmatum (Nawei) – Guilty  
Mathew Nawei – Guilty  
Manasa Ieru – Guilty  
Andrew Ieru – Guilty  
Sam Kasaura (Jnr) – Guilty  
Chief Sam Kasaura (Snr) – Guilty  
Chief Nanuman Peter – Not Guilty

**Dated at Isangel, Tanna this 19<sup>th</sup> day of March 2018.**

**By the Court**



Vincent Lunabek  
Chief Justice

