

Public Prosecutor

v.

John James Vira Leo

Hearing: 22 – 24 October 2018
Before: Justice G.A. Andrée Wiltens
Counsel: Mr S. Blessing for the Public Prosecutor
Defendant in Person
Decision: 21 December 2018

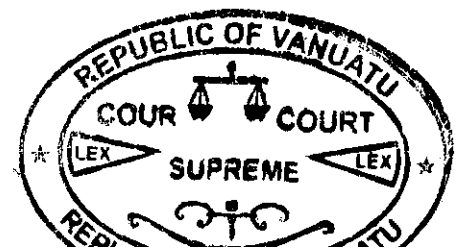
VERDICT

A. Introduction

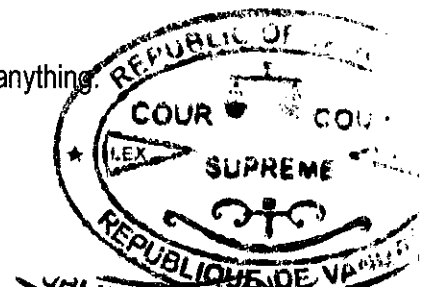
1. A custom ban or taboo was allegedly broken in late 2015 and the manner in which that alleged breach was dealt with has led to 9 individuals being charged with various criminal offences. Eight of those 9 defendants pleaded guilty and have been dealt with by the Court. Only Chief Vira Leo has maintained his innocence, claiming that what he and the others did was in accordance with customary enforcement or *leo ding vuha*; and that he should be found not guilty of any criminal acts.

B. The Charges

2. The Amended Charging Document contains the following 44 allegations of criminal misconduct:



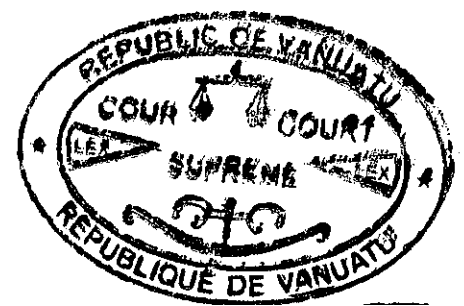
- Intentional Assault, contrary to section 107(b) of the Penal Code, Cap 135 (x1)
 - Threatening to Kill, contrary to section 115 of the Penal Code, Cap 135 (x12)
 - Rioting, contrary to sections 68(3) and 70 of the Penal Code, Cap 135 (x1)
 - Unlawful Entry, contrary to section 143(1) of the Penal Code, Cap 135 (x14)
 - Malicious Damage, contrary to section 133 of the Penal Code, Cap 135 (x6)
 - Arson, contrary to section 134(1) of the Penal Code, Cap 135 (x8); and
 - Theft, contrary to section 122(1) of the Penal Code, Cap 135 (x1).
3. The offence of intentional assault requires the following 3 legal elements to be established: the defendant applied force to another person, he did so intentionally, and the blow(s) resulted in a temporary injury.
 4. The offence of threatening to kill requires the following 2 legal elements to be established: the defendant uttered a threat to kill, and he knew at the time what he was doing.
 5. The offence of rioting requires the following 4 legal elements to be established: the defendant was one of 3 or more persons who assembled, the assembly gathered with the intention of committing a criminal offence, the assembly caused others to reasonably fear a breach of the peace, and the assembly commenced to carry out the purpose for which they assembled.
 6. The offence of unlawful entry requires the following 3 legal elements to be established: the defendant entered a house, the house was used for human habitation, the entry was made with the intent of committing a criminal offence therein.
 7. The offence of malicious damage requires the following 2 legal elements to be established: the defendant unlawfully and wilfully caused damage to or destroyed property, and knowing the property was that of another.
 8. The offence of arson requires the following 2 legal elements to be established: the defendant wilfully and unlawfully set fire to a building or other property, and he knew the building/property belonged to another.
 9. The offence of theft requires the following 5 legal elements to be established: the defendant took and carried away property capable of being stolen, did so intentionally, did so without the consent of the owner, did so fraudulently and without a claim of right, and did so with the intent of permanently depriving the owner of that property.
 10. The prosecution had the onus of proof. Mr Vira Leo did not have to prove anything.



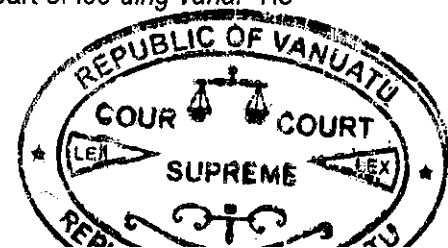
11. The standard of proof required was the criminal standard, namely proof beyond reasonable doubt. To achieve a conviction on any of the charges, the prosecution needed to prove each of the legal elements of the charge to the criminal standard.

C. The Facts

12. In about December 2010, a customary caution or taboo was placed in respect of a certain area of the sea at or near to the boundary of Nageha village in Pentecost. Both Mr Hopkins Binihi and Mr Harry Loloï told me that Mr Vira Leo played a part in imposing the ban, even though Nageha village had its own Chief and Mr Vira Leo had no express authority over the area in question nor the consent of members of the village to impose the ban – there had been no consultation.
13. The taboo was in relation to fishing according to Harry Loloï, and swimming and fishing according to Hopkins Binihi. They were said to have broken the ban on about 10 December 2015 by taking sea urchins, beche de mer. Both denied that in evidence before me – they had been swimming but in area outside the banned area, and while they did take beche de mer, that was from a permitted area.
14. The following day Mr Vira Leo instructed a co-defendant, Mr Viramauri, to speak to the two villagers. Mr Viramauri told them that Mr Vira Leo demanded an explanation from them. The two villagers decided to apologise with a tusked pig, and went to see Mr Vira Leo in person. Mr Vira Leo at first berated both of them, then punched Mr Loloï's face and the back of his neck according to Mr Binihi, or his shoulder blade according to Mr Loloï - before driving them both away by picking up a piece of wood as a weapon and chasing them while brandishing it.
15. Mr Vira Leo followed after them, and threatened them to take their families away from the village by night fall or he would shoot them. Mr Vira Leo then took a hoe and/or a shovel to Mr Loloï's house, causing damage to both the contents and the house, and to other houses, as well as the Nageha village church, before returning home. Mr Binihi and Mr Loloï were unable to stop Mr Vira Leo as he had several of his followers with him – several times they said they wanted to apologise and settle the matter, but Mr Vira Leo was not interested in that. Both told me that Mr Vira Leo damaged the locks to the various houses in order to gain entry, damaged property inside the houses, and then threw personal belongings outside.
16. Mr Vira Leo was not finished, however, and he returned again to continue to damage villagers' houses. He threatened them again saying he would go and get a gun and shoot them.
17. Mr Vira Leo returned a third time and chased after Mr Loloï and Mr Binihi while brandishing a shovel. He said if they were still there the next time he came, he'd shoot them. Mr Binihi and Mr Loloï, considering they had no other choice, collected their families, abandoned their belongings and fled to a nearby village.

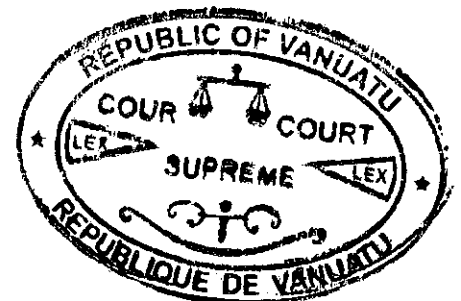


18. At about 7am the next morning, some of the villagers who had fled returned to check on their properties. They observed Mr Vira Leo and others further damaging their houses and saw Mr Vira Leo break into houses with a burning branch which he used to set fire to a total of seven houses. They were burnt to the ground – the loss was said to be VT 5 million.
19. The villagers who fled found it impossible to re-settle, partly at least due to being further threatened by Mr Vira Leo as he considered they had not gone sufficiently far away. Other villages did not want to get involved in their plight. The victims totalled some 32 or 35 people, according to Mr Binihi; some 16 of whom according to Mr Loloï were from Nageha village. Both told me there some elderly persons driven from their homes, and some very young. They were forced to live in isolated bush areas and scavenge to survive – and the inclement weather made matters much worse.
20. Eventually one of the complainants reported the matter to the police. The villagers were then able to go back to their home villages, but it took over a year before their houses were rebuilt.
21. It became apparent, even while cross-examining the prosecution witnesses, that Mr Vira Leo did not dispute much of the prosecution case. He agreed a fishing “gorogoro” (taboo) had been issued, and claimed customary authority, as Chief, to do that. He maintained that the 2 complainants had trespassed into the taboo area and were actually observed to gather beche de mer, in breach of the taboo. He says that was later admitted by the transgressors. He suggested that there was less damage caused than alleged, that only 4 houses were burnt, and that he only threatened to kill on the one occasion.
22. Mr Vira Leo went further in his evidence in-chief. Mr Vira Leo told me that as a result of the transgressions by Mr Loloï and Mr Binihi, he as Chief, imposed “leo ding vuha” (the enforcement of customary laws) in the form of the 3 usual customary remedies; namely, a fine of 5,971 pigs or 242,150 of local currency (pig tusks) or cash VT 4,842,102, which if not paid forthwith as this was a serious breach, would mean that they and their families had to leave the village voluntarily; and as a last resort, if they did not leave voluntarily, then they would be forced to leave by way of a custom eviction. He told me the Paramount Chiefs had set the fine at that level.
23. Mr Vira Leo's position was that the fine was not immediately paid, that despite his efforts of encouragement there was no voluntary departure, and what followed was all a part of a customary eviction; and therefore not justiciable under Vanuatu's written laws. He indicated it was part of his duty as a local Chief to educate the general populace and deter others from similarly breaching taboos.
24. Mr Vira Leo told me that actions carried out during *leo ding vuha* were not considered criminal offences, even if they might be under different circumstances – he did not say who considered that to be the position, but he certainly was of that view himself. He said that the threats to kill, damaging property, arsons and other actions were all carried out as part of *leo ding vuha*. He



would not answer questions whether he adopted the same attitude to the allegations of assault, and chasing the alleged taboo breakers firstly to their village and then to other villages.

25. In cross-examination Mr Viar Leo admitted hitting Mr Harry Loloï, chasing Mr Harry Loloï and Mr Hopkins Binihi away, damaging the houses and contents, and the threats to kill which he claimed were an attempt to teach them to behave as they should. He accepted that he was not alone in these various acts, that there were 9 of them involved; and he agreed that the others involved were his co-accused. Everything alleged, he said, was done as part of *leo ding vuha* and was therefore not criminal. He suggested that he was even able to shoot a 78 year old if it were done as part of *leo ding vuha*.
26. At the course of his evidence, Mr Vira Leo supplied me with a bundle of documents in Bislama. I decided translation of those documents was necessary in order for there to be a fair trial – obviously Mr Vira Leo relied on the contents of the documents as supporting his defence. I was advised that would take something of the order of 3 weeks. As a result I reserved my verdict.
27. Having now received and gone through the translations of those documents, I see some are not material to the issues I need to determine. The symbols and signs of customary law are interesting, as is the article on whether customary law and the Courts overlap. The article would have been relevant to the pre-trial application regarding whether the Supreme Court had jurisdiction to try Mr Vira Leo on the current criminal charges. My earlier decision on that stands – and having read the article I would not change that decision. I placed no weight on this material.
28. Ms Motarilavoã Hilda Lini prepared a “Summary Report and Decisions” in 4 cases of the Vatulanaleo – the last of the decisions mentioned was of relevance to Mr Vira Leo’s trial. The Report sets out the decision of the Vatulanaleo was to impose total fines in order “...to restore peace” of 5,971 pigs, 242,151 Livatu, and VT 4,842,020,000. I noted the difference between that and what Mr Vira Leo told me, especially the cash figure.
29. This material was simply presented to the Court by Mr Vira Leo, without any qualifying evidence as to its relevance, admissibility or accuracy. I decided the material was self-serving and of no assistance in terms of being capable of supporting Mr Vira Leo’s case, as I was simply not in a position to assess the accuracy of the material. I noted further that the documents related solely to what Mr Binihi and Mr Loloï had supposedly done, and did not consider at all what Mr Vira Leo and his supporters (co-accused) had done – the latter was the focus of my involvement. I noted also that the author, Ms Lini, was an ardent Vira Leo supporter, present at most of his Court appearances and responsible for favourable press reporting in the Vanuatu Post about his case. Her impartiality is doubtful. I determined it was not safe for me to rely on work as it was presented to me.

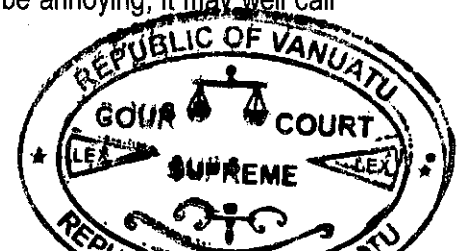


D. Witness Evaluation

30. I looked closely at each of the witnesses who gave evidence before me. I was more concerned with their consistency than the manner in which each testified. I reminded myself that body language and assessments of witness demeanour are but a very small part of an overall analysis as to whether a witness is telling the truth and is an accurate reporter of facts that occurred some time ago.
31. I considered also that different individuals see things differently and remember them differently. Minor discrepancies between accounts were to be expected, and indeed they indicated that the witnesses had not got together to tell a unified tale.
32. Both Mr Hopkins Binihi and Mr Harry Loloi were credible and reliable witnesses in my assessment. I had no reason to doubt their accounts.
33. Mr Vira Leo disputed only small parts of the prosecution case. I accepted that he too was both credible and reliable in the main, although I considered he was prone to minimise his actions and attribute to others the cause for his conduct.
34. Given what Mr Hopkins Binihi and Mr Harry Loloi had told me was substantially supported by Mr Vira Leo through his questioning of the prosecution witnesses and when he gave his evidence, I had no difficulty in finding the facts as earlier set out.
35. There were discrepancies between what the two prosecution witnesses told me, but they were minor and of no real consequence; and, where several discrepancies did exist, there was no need for me to decide which version of those facts I accepted. For example, in respect to the assault charge: Mr Vira Leo admitted he had struck and chased after Mr Harry Loloi holding a piece of wood – it was unnecessary for me to decide whether that involved one or more blows, or where the blow(s) landed.

E. Discussion

36. The defence run was not that these things had not occurred, nor that Mr Vira Leo was not the person responsible for perpetrating them. The defence was that as Mr Vira Leo was merely enforcing customary measures, what he called *leo ding vuha*, he was not subject to the criminal law. In my earlier decision of 28 May 2018, I had already determined that the Supreme Court had jurisdiction to determine the legal charges arising from this matter.
37. Mr Vira Leo was seeking to shield his actions behind the concept of customary laws having precedence over the criminal law. It does not.
38. If it did, this would be a gross example of a disproportionate response to what should really be regarded as a misdemeanour. The breaking of a taboo may well be annoying; it may well call

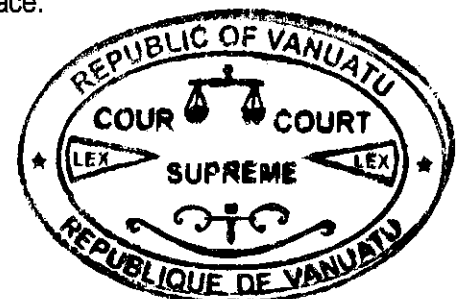


into question the authority of those who imposed the ban. However, no matter how one looks at it, it is not akin to criminal conduct, and it should not be regarded as very serious.

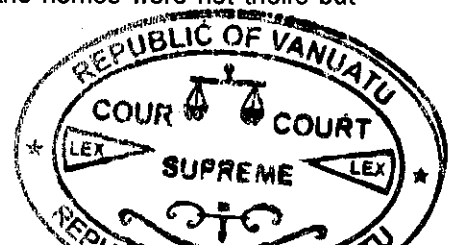
39. Yet, despite this, Mr Vira Leo would have the Court accept that due to the breach of the taboo, which before me was not accepted, that he was entitled on behalf of the community to assault one of the transgressors, to threaten to kill both of them and others, to damage their' and other peoples' property - even to the extent of breaking into homes and burning them to the ground. Those drastic further steps were available to Mr Vira Leo all because the alleged transgressors did not have the means to pay the quite astronomical instant fines imposed, or agree to leave their life-long homes voluntarily.
40. The alleged transgressors told me they begged for Mr Vira Leo to stop – they would apologise, they would give him a tusked pig; they wanted to reconcile.
41. Mr Vira Leo was not interested. He had the taste of revenge in his mouth, and he enjoyed it. He was going to teach the community a lesson – he drove Mr Loloi's and Mr Binihi's wider families from one village to another to get away from his retribution. In the end, they were forced to travel by foot at night, in inclement weather – some very young, some as old as 78 years old, taking what they could with them, to a total of 5 different villages, ever-further away, further in land and uphill, searching for shelter.
42. Mr Vira Leo's response to this conduct is to say that as there was a customary flavour to it, he was entitled to so act – it's not criminal. His reasoning is not legally sound. It is inconsistent with the Constitution. It is inconsistent with basic human rights. It is an affront to right-thinking members of the wider Vanuatu community. I reject Mr Vira Leo's defence completely.
43. At the end of the hearing, I directed that written closing submissions be filed by 4pm on 30 November 2018; and announced that I would deliver my verdict at 10am on 21 December 2018. Regrettably, I have (at the time of preparing these reasons for verdict, namely 19 December 2018) no written final submissions by either Mr Blessing nor Mr Vira Leo; and no request for further time to supply them either. However, this case is already quite dated, and there is a pressing need for finality. I am therefore not prepared to further delay providing my reasons for verdict.

F. Result

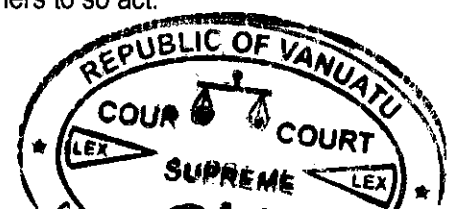
44. All that remains is for me to determine whether the facts as established meet the legal elements of the various charges to the requisite criminal standard.
45. Charge 2 alleges the intentional assault of Harry Loloi. There is uncontested evidence that Mr Vira Leo deliberately punched Mr Loloi and caused swelling to his face.
46. That is sufficient to prove the charge beyond reasonable doubt.



47. Charges 3 and 4 allege threatening to kill. The evidence is that when chasing Mr Loloï and Mr Binihi back to Mr Loloï's home with the intent to cause damage and drive them away, Mr Vira Leo told them they had to leave or he would kill them. This was not an idle threat – Mr Vira Leo knew exactly what he was doing. He intended to convey the need for them to obey his demand that they leave – it was deliberate, and it was intended that they take his threat seriously. Mr Vira Leo accepts that he said this.
48. Accordingly, both charges are proved beyond reasonable doubt.
49. Charge 5 alleges riot. Mr Vira Leo accepts that he was one of 9 persons gathered together at Nageha village with the intention of further damaging and then burning down to the ground a number of houses, which is what they went ahead and did.
50. This charge is proved beyond reasonable doubt.
51. Charges 6, 8, 10, 12, 14 and 16 allege unlawful entry on 10 December 2015 to the homes of Mr Hezekiel Loloï, Mr Luke Loloï (2), Mr Harry Loloï (2) and the Family Loloï Church, all in Nageha village.
52. The evidence is that Mr Vira Leo damaged the locks to a number of buildings with a hoe/shovel and gained access so that he and others could inflict further damage to personal property inside as well to the structures themselves. Mr Hopkins Binihi told me that Mr Vira Leo entered and caused damage in the houses of Mr Harry Loloï, Mr Luke Loloï and the Pastor's house – and also another 2 church houses. Mr Harry Loloï told me that his 2 houses were entered and damaged, his brother Luke's 2 houses were entered and damaged, Pastor Zachary's house was entered and damaged, and 2 other church houses were entered and damaged.
53. Mr Vira Leo accepts that this occurred, but suggested when cross-examining the prosecution witnesses that it was to a lesser number of houses than they alleged. I accept the evidence of the two prosecution witnesses; I reject Mr Vira Leo's attempt to minimise the number of properties involved.
54. The properties were used for human habitation, and the entry was occasioned with the intent of causing damage to property inside, as well as to the structures themselves.
55. Accordingly, Charges 8, 10, 12, 14 and 16 are proved beyond reasonable doubt. Charge 6 is not proved – the evidence in relation to that allegation was insufficient.
56. Charges 7, 9, 11, 13, 15 and 17 all allege malicious damage on 10 December 2015 to those very same buildings as set out in paragraph 51. The evidence is that Mr Vira Leo and others caused damage to personal property and to the structures themselves, and it relates to the same properties as those previously described. They did this without permission or good cause, and they did so deliberately, knowing the property and the homes were not theirs but that they belonged to others.



57. Charges 9, 11, 13, 15 and 17 are proved beyond reasonable doubt. Charge 7 is not proved – the evidence in relation to that allegation was insufficient.
58. Charges 18, 19, 20 and 21 allege threats to kill. These charges reflect the evidence that during Mr Vira Leo's second and third return visits to Nageha village on 10 December 2015, he repeated his earlier threats of either Mr Loloï and Mr Binihi and their families leaving or he would shoot them (the second visit); or, he would fetch his gun to return and shoot them (the third visit). The evidence was unchallenged, and Mr Vira Leo accepts this occurred.
59. These were not idle threats – Mr Vira Leo knew what he was doing. They were intended to convey the need to obey his demand they leave – it was deliberate, and it was intended by Mr Vira when he made those utterances that Mr Binihi and Mr Loloï take the threats seriously.
60. Charges 18, 19, 20 and 21 are accordingly proved beyond reasonable doubt.
61. Charges 22, 24, 26, 28, 30, 32, 34 and 36 allege unlawful entry on 11 December 2015 to houses belonging to Mr Hopkins Binihi (2), Mr Mathew Binihi (2), Mr Elise Binihi (2) and Mr Keith Binihi (2) at Averenyasu village, which is adjacent to Nageha village.
62. Mr Harry Loloï gave very general evidence about a total of 7 houses being entered and burnt down. Mr Hopkins Binihi gave more specific evidence of the same nature, but identified that the properties in question were his (2), his parents' (2), his brother's (2, plus a toilet), and an older brother's (1, and a nakamal). He later confirmed that the brother with 2 houses destroyed was Mr Elise Binihi, the brother with 1 house destroyed was Mr Keith Binihi, and the nakamal and partly completed toilet belonged to Mathew Binihi.
63. Mr Vira Leo, in questioning the prosecution witnesses, suggested only 4 houses had been burnt down, implying thereby that only 4 had been unlawfully entered – but the evidence of both prosecution witnesses was to the contrary. I accepted the evidence of Mr Binihi and Mr Loloï, and rejected the minimisation by Mr Vira Leo.
64. I accepted 7 properties were entered unlawfully – I did not accept the partly constructed toilet was a house used for human habitation. The 6 houses and the nakamal were all used for human habitation, and the intent behind the entries was to damage those properties and burn them to the ground.
65. Accordingly Charges 22, 24, 26, 28, 30, 32, and 34 have been proved beyond reasonable doubt. Charge 36 has not been proved.
66. Charges 23, 25, 27, 29, 31, 33, 35 and 37 allege arson to those very same houses as those set out at paragraph 61. The evidence in relation to these charges is the same as that earlier described. There is no doubt Mr Vira Leo was aware the properties were not his. He was seen holding a burning branch when he entered the properties and was seen deliberately lighting the buildings. He does not claim any authority or permission from the owners to so act.



67. Accordingly, Charges 23, 25, 27, 29, 31, 33, and 35 are proved beyond reasonable doubt. Charge 37 has not been proved.

68. Charges 38 to 43 allege threatening to kill on 11 December 2015 at Nageha Village. Neither Mr Harry Loloi nor Mr Hopkins Binihi gave evidence in support of these charges.

69. Accordingly, Charges 38, 39, 40, 41, 42 and 43 are not proved.

70. Charge 44 alleges theft. Neither Mr Harry Loloi nor Mr Hopkins Binihi gave evidence in support of that allegation.

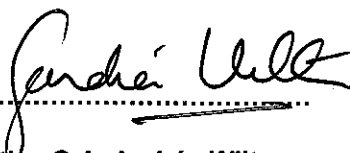
71. Accordingly Charge 44 is not proved.

72. Mr Vira Leo is therefore convicted of the following 39 charges:

- Intentional assault (1);
- Threatening to kill (6);
- Riot (1);
- Unlawful entry (12);
- Malicious damage (12); and
- Arson (7).

Dated at Port Vila this 21st day of December 2018

BY THE COURT


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Justice G.A. Andrée Wiltens

