

**IN THE CENTRAL MAGISTRATES COURT)
OF SOLOMON ISLANDS AT HONIARA)
(Criminal Jurisdiction)**



Criminal Case No: 125/2017

REGINA

-V-

WILFRED SURUAU

COURTS RULING ON NO CASE TO ANSWER APPLICATION

Prosecution: Mr. Zoze

Defence: Mr. Lawry

1. The prosecution has had to close its case. This stems out from his complainant for count 2 (Keith NAESOL) failure to attend court. He is the complainant for count 2- for the second charge of demanding money with menace. The trial had to be vacated for continuation to have him as he was overseas during the fixed time of the trial week. By the time the court resumed again for continuation of the trial, the complainant did not come to testify. Prosecution informed the court that he had been conferenced to prepare for trial and is fully aware of the time to testify. However prosecution alone does not understand why he could not make it then.
2. For that reason prosecution closed its case as he had no other evidence to call.

HISTORY OF THE CASE:

3. On the trial date which is the 29th May 2017, we have had to adjourn the trial as prosecution was unable to avail his witnesses to start the trial with. Defence had to ask for copies of the summons to ensure that prosecution has actually gave summons on time as the trial dates have been fixed yet on the trial date no witness is available. The matter was adjourn to the next date being 30th May 2017 as prosecution did not even have copies of summons to show to defence. On the next date (30th May 2017), prosecution informed the court and defence that the summons were not readily available and he could not show them to defence.

4. However prosecution was prepared to commence the trial with his first witness who is one of the complainant Mrs. Naesol. The witness gave evidence and by the end of the day, prosecutor informed the court that he felt unwell so we adjourn the matter to the next date. By next morning which was the 31st May 2017, we had an in chamber session for the matter and the prosecutor informed the court that he still felt unwell and asked to further adjourn to the next day. Court had to remind him to must attend a medical center to be attended to and get medication as we do not want to keep losing time.
5. By next morning on 1st June 2017, we returned to court and prosecution had a new application and asked to be withdrawn from the matter because he had a conflict of interest. The court enquired into the nature of it and prosecution stated that he is a very close friend of the accused's brother (s). The court at that time conveyed its disappointment over the prosecutions manner during that week having had to keep adjourning the trial. The court also viewed the extent of the conflict of interest as too distant to have an effect on the prosecutor. It would have been different if he was close friends with the defendant but which the court would have expected that he withdraws way before even setting the trial date. The prosecutor however insisted to be withdrawn from the matter. The court then saw the need to have the matter stood down as the court sees it fit to make a ruling on his application to be withdrawn on that basis.
6. After lunch hour, court resumed with the prepared ruling for the conflict of interest issue from prosecution. Surprisingly the prosecutor said that there is no need for court to make a ruling as he will proceed with the matter. He then called his second witness Mrs. Jean KINI. She gave her evidence and after completing it, the 3rd prosecution witness was called in namely Mr. Jack SIAU. The witness gave his evidence and after finishing his evidence prosecution asked for an adjournment for his other crown witness who is the complainant of the 1st charge of demand with menace. The complainant was at that time in Fiji and prosecution confirmed to the court that the complainant is aware of the trial and will be returning to Honiara on mid-June 2017. Prosecution stated that 15th June would be appropriate to have him testify.
7. By Thursday 15th June 2017, the court commences again but had to adjourn to the afternoon as there were a few cases for me to deal with along with a trial that morning. At that time prosecution confirmed that his witness is in town and is ready to testify as he has already conferenced him the day before. Defence also stated they were prepared for continuation of trial that morning so no issues with having to move the time to 3pm. Defence in short had no issues.
8. By 3pm of 15th June 2017, court resumed and prosecution came to court and stated that he could not locate his witness any more. He had tried getting through his mobile etc but could not reach him.
9. At this stage the court stood firm on time being a limited resource for the court thus to further delay would not be a negotiable matter anymore. If the complainant had been informed earlier of the trial whilst overseas as well as being summoned, had been conferenced by prosecution to prepare to testify in court and informed of the trial to continue that day and further informed the trial would resume again at 3pm, but then become suddenly unreachable, then the court cannot tolerate such actions and adjourn for the complainant convenience. Honiara is a small town and investigators should easily locate him as he resides

at Tinge Ridge. The court further asked if prosecution has any other witness for his case but prosecution stated that there is none.

10. Defence further submitted that no further adjournment is tolerated given the loss of time experienced over this matter.
11. Prosecution then informed the court that he has now closed his case.
12. Defence took it from there and informed the court that he wish to file his submissions on no case to answer. He did file his submissions in court and only provided a short summary of it verbally in court. Prosecution after that asked for adjournment to reply to the application and he was given the time to respond by close of business on Monday 19th June 2017.
13. If I may make further comments, the conduct of how this matter was prosecuted is in my view slack and shows to a certain extent of some unpreparedness from the prosecutor for reasons only known to him. I have reiterated what had transpired before the actual trial commenced. There was also no reexamination from prosecution and the way that counts 1 and 2 were chosen were not sequential as well. Prosecution stated that count 1 is the incident on 28th January 2015 and count 2 is the incident on 21st January 2015. Because of this this ruling has been drafted in such manner. It would have been neater and tidier if the counts were sequentially made by prosecution.

DEFENCE APPLICATION AND THE LAW:

14. Defence application came about after the close of prosecution's case. The basis of their application is on section 197 of the Criminal Procedure Code.
15. By doing so, the defence referred me again to the charges that the defendant is currently facing. They are two separate charges of demand with menace contrary to section 295 of the Penal Code.

The particulars of the charges are as follows:

Count 1- demanding money with menaces contravene section 295 of the Penal Code

16. Particulars of the Offence: That Wilfred SURU'AU of Feranagono Village, East Fataleka, Malaita Province, at Tinge Ridge, West Honiara on 28/01/2015 did with menaces demand of a person namely Florence Naesol a thing capable of being stolen to wit SBD \$10,000-00 the property of the said person.

Count 2- demanding money with menaces contravenes section 295 of the Penal Code.

17. Particulars of the Offence: That Wilfred SURU'AU of Feranagono Village, East Fataleka, Malaita Province, at Kukum Police Station, East Honiara on 22/01/2015 did with menaces demand of a person namely Keith Naesol a thing capable of being stolen to wit SBD \$4000-00 the property of the said person.

BASIS OF THE DEFENCE APPLICATION:

Count 1:

18. As for the first count, defence submitted that the defendant has no case to answer as the evidence from prosecution relating to this charge, taking into account the prosecution's evidence already provided to the court cannot sustain or provide any evidence especially regarding the demand with menace element of the offending.
19. It has been agreed that all the elements of the offending's are not disputed except for the question on whether there was menace done in relation to the defendants demanding of money from the complainant. For this count it is alleged that the demand with menace was done against the complainant Mrs. Naesol.
20. As stated the basis of defence application is that after the first alleged incident on 21st January 2015, the defendant came again on that date of 28th January 2015. However he came to Mr. Siau and updated him that the complainant Keith Naesol was seen again with his wife drinking all night. On this basis the defendant would want to settle it once and for all by way of custom and wanted \$10,000 for it. It was further proven through evidence that the money demanded would purposely be for the house he had built for his wife Mrs. Kini. He also said it would be to also end or finalise the matter once and for all. The matter meant here is the relationship between the defendant and his legal wife Mrs. Kini. Mr. Siau conveyed this to the complainant Mrs. Naesol. After some time the money was brought over by the complainants daughter namely Sharon.
21. Defence acknowledged that the evidence from the complainant was that the defendant looked angry. However he further confirmed that though the complainant felt threatened because of the presence of the defendant with a few other men, she had also confirmed that this is usual and normal when such matters of custom are being attended to. Other family members are usually present to witness the mediation and negotiations.
22. Defence submitted that though she may have felt the defendant was angry or somehow frightened the element required is that a threat must happen if she fails to provide the money requested amounting to \$10,000.00. The prosecution's evidence has failed to elicit such evidence and therefore the charge must fail on this basis.

Count 2:

23. For the second count, the basis of the defence application is clear and simple. That the prosecution has designed its charge and put on the date of 22nd January 2015. It is therefore taken and accepted that the alleged actions of the defendant is deemed to have occurred on that date against the complainant Keith NAESOL.
24. With regards to the evidence that is before the court from the prosecution's case, the date is 21st January 2015. The court had alerted the prosecution on this after he commenced calling his witnesses, however the prosecution had not changed or amended the charge until now that it has been closed.
25. Furthermore defence submitted that there is no evidence of any threat or demanding with menace done to the complainant Keith Naesol at the Kukum Police Station as alleged in the charge. This did not even occur on 22nd January 2015. Therefore this charge must also fail.

PROSECUTIONS RESPONSE TO DEFENCE:

26. Prosecution responded to the defence application and he cited the same cases already referred to by defence. However he first started off by stating the provision for no case to answer which he stated is section 269 of the Criminal Procedure Code. With respect that is a wrong provision as it is for the High Court procedure for such matter. The right section for a no case to answer at the Magistrates Court is as defence indicated section 197 of the Criminal Procedure Code.
27. Any how the prosecution stood his ground in his response and referred me to his evidence. I have read through his submissions but could not be convinced that there is some evidence to establish all the elements of the two counts for the defendant to answer to.

Count 2:

28. The evidence of Mrs. Naesol is that she attended to Kukum Police Station with the assistance from Mr. Siau. Negotiations took place between Mr. Siau and the defendant. Thereafter she was asked if she could pay \$5000 compensation as her son was seeing the defendant's wife. Mr. Siau himself negotiated to reduce the amount so it came down to \$4000 after the defendant agreed to lessen it.
29. Mrs. Naesol said she would be willing and agreed but said she did not have it with her and can pay it off tomorrow.
30. The payment was then done to Mr. Siau for the defendant on the next date of 22nd January 2015.
31. He further made submissions on the evidence of his other witness Mrs. Kini. He stated that her evidence in short is she was with the complainant Keith Naesol. They were at the Waterlily café at Kukum when the defendant came by. She saw the complainant on the ground with two persons. She did not describe how the defendant got to the ground. After that the defendant pulled the complainant towards Kukum Police Station. She further elaborated on her relationship with the defendant.
32. As for Mr. Siau the prosecution adduced evidence that he accompanied the complainant Mrs. Naesol to Kukum Police Station. When they got there he negotiated with the defendant who preferred to resolve the matter by way of custom. Mr. Siau clarified that in custom what the complainant Keith Naesol had done with Mrs. Kini would attract a compensation of 5 shell money equivalent to about \$5000. That was reduced after further negotiations and \$4000 was finally paid the next day.

Courts view of prosecutions response and defence application:

33. In analyzing the submissions before me, I would respectfully say that the prosecution had chosen to alert me to evidences favorable to his response. He has not laid out other evidences such as Mrs. Naesol having confirmed in her evidence that she was aware an affair that was going on between her son Keith Naesol and Mrs. Kini. Mrs. Naesol had also confirmed that in Malaitan culture what the defendant had demanded was not unwarranted. It was actually a proper approach for the problem between her son and Mrs. Kini.

34. I am mindful that at this stage assessment of witnesses and their evidences is not an issue for me to consider as yet.¹ However my general overview of the evidence that has been adduced in court is as follows:

Count 1:

35. Mrs. Naesol received a call and she had to attend to her home at Tinge Ridge. She consulted with Mr. Saiu as well as her other family members. Later on the defendant came around with a few men. She viewed it as threatening. However she did confirmed that she was aware that her son the complainant Keith Naesol had been seeing the defendant's wife again after the 21st January 2015. She also acknowledged that she had even tried stopping her son but could not control him. She further stated that she knows in custom it is wrong for a man to take or have an affair with another man's wife. She said that on that date, she realized and noted that her son and Mrs. Kini were still hanging out together. She said that she had told her son to stop from hanging out with the married woman but she came to pick him up. She further stated that she knew the basis of the demand for this count then. She also agreed during cross examination that if her son keeps seeing the married woman in custom it would attract continuous asking of compensation. She somehow retracted again and also said that she paid that amount of money \$10,000 as she did not want any further threat. Interestingly she agreed that on neither occasions the defendants never showed any actions of aggressions etc. she could only see him angry.

Courts analysis:

36. In my view of the evidence highlighted above relating to count 1, it would be understandable that a man whose wife had been taken by another in the circumstances the defendant was in, would show some form of disappointment or even anger as stated by Mrs. Naesol. More especially when the love affair is known to the complainant Mrs. Naesol and is a repeated affair despite the fact that the first compensation had already been paid prior to that incident in count 1.
37. And furthermore when the defendant had told or warned the complainant Keith Naesol on the first date of 21st January 2015 that he will not expect to see him with his wife again as stated by Mr. Siau. More so when the first sighting of the complainant Keith Naesol with Mrs. Kini was a few days before that and they are again seen drinking whole night.
38. With the above state of the evidence, I am not satisfied that the element of demand with menace is being established in the prosecution's case. The test from *Somae* is being applied here as it is the leading case authority for such matters. In *Somae's* case, the test for a no case to answer application is:
39. *"...in order to establish a case to answer, there must be some evidence capable of establishing, whether directly or inferentially, every element of the offence charged beyond reasonable doubt."*

¹ *R v Somae* [2005] SBCA 18; [2005] 2 LRC 431 (4 August 2005).

40. I have further researched on this and note the case authority of *Regina v Marau*². In that case the defendants also faced charges similar to the current case. His lordship Justice Palmer as he was then, took note of the customary circumstances of that case. He accepted that there was a breach in custom and the defendant demanded following that. His decision was based on the fact that customary law has always been part of the Solomon Islanders lives and to ask or demand for compensation is not foreign. However since the laws have now been in place to address the criminality of such offences and anything having criminal element in such circumstances, should not be accepted as a customary demand scenario to allow them. If they are coupled with threat or menace, then they will be criminal and satisfy the elements of the charge. He ultimately acquitted the 3 defendants in that case as he could not see any criminality in their demand to the complainant in that case.
41. In applying that test in *Somae* and considering the case authority cited above to the first count elaborated above, I am not satisfied that there is some form of evidence whether directly or inferentially of demanding money with menace. It has been made clear that the count 1 incident stemmed out following the first incident in count 2. The defendant did not show any aggressiveness/aggression but would understandably be in an angry mood and or be emotional after having just learnt again that his wife is again seen with the same man drinking the whole night. That action of being angry in my view is a normal or expected reaction of any reasonable man in the defendant's shoes.
42. I am also not satisfied that the actions of the defendant on both occasions has gone to the extent where it can be defined or fall in the premises of an act of menace and forced or baseless in relation to what he had come to Tinge for the complainant Mrs. Naesol. The complainant had even agreed during cross examination that in custom such actions of her son and the defendant's wife is wrong. She had gone further to add on that she paid the amount to avoid being threatened and for the safety of her son. This is understandable as in custom such love affairs are wrong as she acknowledged and should not be tolerated.
43. Even Mr. Siau had testified confirming that in custom, when a man is repeatedly seen with another man's wife, the woman's husband can order for compensation or even order for the assault on that man for committing such adulterous actions. This again has been highlighted in the case authority of *Regina v Marau*³. His lordship Palmer as he was then, acknowledged that customarily these kinds of demands would be accompanied with threats during those days when the law was not in place. This is why the law has come to try and curb the violent and threat aspect of such matters.
44. The fact that the complainant Keith Naesol was seen again with his wife aroused or resulted in him attending to the complainant Mrs. Naesols residence at Tinge. If Keith Naesol and his wife were not seen together, the defendant would not have arrived there nor at the Kukum Police Station on 21st January 2015.
45. If I may say at this stage, customary law is part of the laws that can be applied in this jurisdiction. However it is subjected to other laws such as the Constitution and legislations etc. In most cases customary reconciliation has been accepted by the courts but only to the extent

² [1993] SBHC 63; HCSI-CRC 48 of 1993 (3 August 1993).

³ [1993] SBHC 63; HCSI-CRC 48 of 1993 (3 August 1993).

of being acceptable for mitigation purposes. Reconciliation is not and cannot be used to buy someone out from an offence committed.

46. Likewise in my view of the circumstances that are presented before me, the defendant was still the legal husband of Mrs. Kini at the relevant times for the 2 charges he is faced with. It is customary that wives do not have affairs with any other men as confirmed by Mr. Siau. Mr. Siau has been established to a certain extent as an expert on customary law in this aspect (adulterous situation). He has assisted the court in verifying what would occur in such circumstances faced by the defendant and the complainants involved in this matter Mrs. Naesol as well as Keith Naesol. I also consider the analysis made by his lordship then Justice Palmer in the case of *Regina v Marau*⁴ and apply that to the circumstances before me.
47. From all the circumstances that are presented before me, I would therefore agree that the defendant's action was warranted or expected especially when his wife is hanging around and seen alone with Keith Naesol and again at a later date with only a few days apart from the first incident.
48. Further to that, there is no evidence before me to assist me on the ownership of the money that was given by the Complainant Mrs. Naesol for count 1. The particulars of the charge stated that it must be owned by the complainant while the only evidence I have before me is it was brought over to the complainant by her daughter named Sharon.
49. There is also no evidence to direct me or alert me that the amount of money demanded was too much. There was agreement to make payment for the amount demanded on both occasions and the defendant had actually agreed to lessen his demand to \$4000 on 21st January 2015. There was also no complainants made about the amount of \$10000 on 28th January 2015. There was also no weapon or evidence of any weapon involved or used when making the demand and no damages to anything during those 2 occasions resulting in the two charges.
50. Taking into account the case of *Regina v Marau* again, the circumstances of that case is quite similar to this one. In that case the 3 defendants had seen their sister or close relative with a man. On sighting them they approached his supervisor at the camp he was working at and demanded compensation of \$200. This was paid partially on the first day of negotiation and paid fully later.
51. With that case, I would adopt the courts approach to the current one as well given their quite similar circumstances resulting in the charges placed against the defendant. So yes there was a demand but it was not done by way of a threat, force or menace. It arose from the love affair between the complainant Keith Naesol and the defendant's wife and would be an understandable form of resolving or addressing such issue like that in the *Marau* case.

Count 2:

52. For this count, the complainant never came to testify.

⁴ [1993] SBHC 63; HCSI-CRC 48 of 1993 (3 August 1993).

53. The evidence before the court for this count is, the defendant saw the complainant and his wife at Kukum on 21st January 2015. He then took hold of the complainants back shirt at the neck area and took him to Kukum Police Station. Thereafter the complainant's mother who is the other complainant Mrs. Florence NAESOL entered into the scenario with Mr. Jack SIAU as the mediator. The defendant chose to resolve the matter by way of custom and the witness Mrs. Naesol agreed to it. The amount in custom as Mr. SIAU indicated for such offence in custom should have been 5 shell money which is equivalent to about \$5000. Mr. Siau however negotiated for the amount to be reduced and the defendant agreed for \$4000. However Mrs. Naesol did not have that amount that day so asked if it can be paid on the next date. The defendant agreed and that was the end of that matter. The payment was then made on the next date being 22nd January 2015.
54. However there is no evidence of whatsoever form, whether directly or inferentially that is available to assist me to see if there was any demand made to the complainant Keith NAESOL directly or inferentially. The complainant did not come to court when he was told to do so by prosecution for the purpose of this trial and no other evidence could address and assist me to see any connection of any demand done with or coupled with menace and or threat made to him.
55. The evidence from prosecution has not satisfied me to any extent at all as to any evidence made against the complainant Keith Naesol on 22nd January 2015. There is also no evidence to prove to any degree that the money demanded belongs to the complainant Keith Naesol. The evidence that has been adduced has shown to me that the \$4000 belonged to the complainant Mrs. Naesol and made on 21st January 2015 when the charge says 22nd January 2015. Though the prosecution has tried to persuade me in verifying why the date is different on the particular of the charge for count 2, I am still of the view that the demanding of money with menace should and must have been made on the date alleged on the particular of the charge. With that failure I am left with an unsatisfactory and limited evidence to know and see how the accused has a case to answer in that respect.
56. Therefore for the reasons elaborated and deliberated on in this ruling, I will have to rule in favour of the defence application as I find that the defendant has no case to answer to the two charges of demand with menace contrary to section 295 of the Penal Code.

Court Orders:

57. I therefore rule that the defendant has no case to answer in that regard for count 2 for the reasons already explained above. I therefore enter an acquittal for him for that count.
58. I also find that the defendant has no case to answer for count 1 for the reasons already explained above. I also enter an acquittal for him for that count.
59. Anyone aggrieved with my decision can appeal within 14 days from today.



Tearo Beneteti

Principal Magistrate

Dated 22nd June 2017