IN THE COURT OF APPEAL
THE REPUBLIC OF VANUATU
(Criminal Appellate Jurisdiction)

Criminal Appeal Case No. 16/2900 CoA/CRMA

BETWEEN: **FRANK MAHIT KAL**
JOEL AVOCK MASIAL
WILLIE WAKON
TONY JACK
DANIEL KALSAU
Appellants

AND: **PUBLIC PROSECUTOR**
Respondent

Coram: ***Hon. Chief Justice Vincent Lunabek***
Hon. Justice John von Doussa
Hon. Justice Oliver Saksak
Hon. Justice Daniel Fatiaki
Hon. Justice Dudley Aru
Hon. Justice Mary Sey
Hon. Justice Paul Geoghegan

Counsel: *Mr Bryan Livo (PSO) for Willie Wakon, Tony Jack and Daniel Kalsau*
Mr Roger Tevi for Frank Mahit Kal
Mr Less Napuati for Joel Avock Masial
Mr Tristan Karae (PPO) for the Respondent

Date of Hearing: *Tuesday November 15th 2016 at 9 am*
Date of Judgment: *Friday November 18th 2016 at 4 pm*

JUDGMENT

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1. In the early hours of the morning of July 7th 2013, David Ben Ngara was killed on the verandah of his home. He was struck by one or more stones, which caused a

significant head injury causing a compound fracture of his skull and a cerebral hemorrhage which caused his death.

2. The appellants were arrested, interviewed and charged.

3. Each of the appellants were charged with unlawful assembly, intentional homicide of Mr Ngara and, in the case of Willie Wakon, Tony Jack and Daniel Kalsau with soliciting or inciting Frank Kal to kill Mr Ngara. The appellants pleaded not guilty to all charges.

4. After a defended trial Mr Kal and Mr Avock were found guilty of intentional homicide. Mr Wakon, Mr Jack and Mr Kalsau were found not guilty of intentional homicide and not guilty of inciting or soliciting Mr Kal to cause the death of Mr Ngara. All of the appellants were convicted of unlawful assembly.

5. Mr Kal appeals his conviction for intentional homicide but not his conviction for unlawful assembly. Joel Avock appeals his convictions for intentional homicide and unlawful assembly. The remaining appellants appeal their convictions for unlawful assembly.

6. The prosecution case was that at approximately 11 pm on July 6th 2016, Mr Avock and Mr Wakon were at the home of Mr Avock's de facto wife. She lived in the same building as the deceased Mr Ngara. There had been an argument between Mr Avock and his de facto wife and Mr Ngara had told Mr Avock to shut up. It was alleged that

Mr Avock had then made a threat to Mr Ngara that he would come back and *"see him later"*. Mr Avock and Mr Wakon then left the yard.

7. It was alleged that several hours later at approximately 2 am on July 7th, the appellants together with other individuals, went to the yard of Mr Ngara and began throwing stones onto the roof of his home. It was alleged that Joel Avock and Frank Mahit had gone to Mr Ngara's door. Mr Ngara came outside onto the verandah. The three then moved towards the end of the verandah at which time it was alleged that Mr Avock and Mr Mahit threw stones at Mr Ngara at close range, inflicting the fatal head wound.

8. The grounds for the appeals filed may be broadly stated as being ;

   (a) The trial Judge erred in ruling that the appellants' statements to the poice were admissible.

   (b) With reference to Mr Kal and Mr Avock the trial Judge did not correctly identify the elements necessary to support a conviction for intentional homicide.

   (c) There was insufficient evidence to support a conviction for unlawful assembly.

Admissibility of Appellants' Statements

9. It was common to the appeals of all appellants, save for Mr Kal that the trial Judge had erred by admitting the records of interview of the appellants.

10. The complaints by the appellants in respect of their statements were principally two fold. First that they were assaulted by a number of police officers when arrested and while detained in a cell pending their interviews and secondly that the nature of their

interrogation was too oppressive. It is submitted that proof of either one of those matters renders the statements involuntary.

11. It was not argued that the records of the statements made by the appellants were inaccurate but rather that the statements were not made on a voluntary basis.

12. There were additional submissions made which we shall also refer to.

13. It is apposite to note at this point that while the police statements, if admitted, could be evidence against the maker of that statement, it could not be evidence against any of the other co-accused.

14. In ruling that the statements were admissible the trial judge stated as follows:

> *"(5) The arresting officers were called and very general questions were put to them in cross examination. The questions put were lacking in the specifics later alleged in evidence from the defendants. The officers were never given the chance to respond to detailed allegations on sustained and violent assaults.*
>
> *(6) There is no suggestion as far as I can ascertain, that there was any violence proffered by Rita Maliliu the investigating officer. What the defendants say about her is that she insisted they signed "statement" (actually records of the interview under caution) even though they didn't want to. Some of the defendant (sic) said that they were in fear of being beaten again.*

(7) *I heard from the defendants and I have to say I found their evidence lacking in conviction. I was left with the distinct impression, especially so far as details of the assaults were concerned, that each defendant feeding off the evidence from the previous witness and the embellishing that evidence. None gave any details of medical treatment received. There was even a suggestion that when they asked for a medical treatment at the Correctional Center they were further assaulted by officers in Correctional Services.*

(8) *The defendants also say they were never actually taken before a Magistrate even though there are warrants signed by a Magistrate. I have no other evidence to suggest that Magistrates were signing warrants without having defendants appearing before Court.*

(9) *I do not accept the evidence of assaults or threats of assault."*

15. With reference to the *"forceful"* behavior of the interviewing officer Rita Maliliu the trial judge was referred to Tor v. PP[1] and with reference to that issue stated:

"11. The Court of Appeal say in the exceptional circumstances of that case, it was not for the police to "cross examine" people. I cannot accept that the Court of Appeal meant that suspects cannot be asked questions the suspects would preferred not to be asked. That would make the job of the police impossible.

[1] [2003] VUCA

12. *The interview was tough but fair. The OIC asked question (sic) about evidence and details she had obtained from other witnesses and asked for explanations.*

13. *Before my brother Judge Fatiaki J in the hearing in August it was put this way. The IOC talked harshly to the defendant.*

14. *She may well have done. She may well have presented details that she had from others quite forcefully but the defendants all had opportunity to refute or deny them. I find it impossible to accept that they did not feel they could refuse to sign the record or otherwise indicate they did not agree with the answers attributed to them".*

16. Mr Napuati, for Mr Avock, made a number of submissions in respect of the statements as follows:-

a) The admissions by the defendants were not reliably corroborated by a tape recording or any other independent device apart from the police officer taking the statements.

17. This submission may be easily disposed of. The appellants were not disputing the statements on the basis that they did not accurately record the statements made by the appellants but rather that the statements were not voluntary. In such circumstances, the fact that the statements have not been tape recorded or otherwise recorded simply has no substance.

b) Mr Avock was not mentally prepared to make the statement he made on July 7th 2013 as he was too weak or tired to make one on his own.

18. Mr Avock was arrested on the morning of July 7th at approximately 9 am and was held in custody until he was interviewed at 5:53 pm. The appellants were held in the same holding cell and there is evidence that they were provided with food at some point during the day although there was an unsubstantiated allegation by one appellant that the police had *"destroyed the food"*, without further detail of that allegation being provided.

19. What is clear is that a number of police officers either involved in the investigation or at the police station at that time the defendants were being held were cross examined as to allegations that they assaulted the appellants. Those allegations were uniformly denied by the officers concerned. Given the general nature of the cross examination undertaken in respect to the allegations of assault, it is not surprising that those allegations were rejected by the trial judge.

20. As far as Mr Avock being *"not mentally prepared"* to make the statement which he made that day, this is a matter which does not appear to have been addressed specifically with the trial judge and there is simply no evidence which would suggest that Mr Avock had been so affected by the delay in his interview that he was not in a fit state either physically or mentally to undertake the interview.

c) The police caution statements have been improperly completed.

21. It was submitted by Mr Napuati that the police caution statements contained the following clause:-

"Suspects to write out the caution in the language of his/her own handwriting and (sic) then signed (sic) it".

It is correct that the first page of the interview record contains those words. Mr Napuati submitted that none of the caution statements of the defendants were hand written by them and that the requirement for anyone completing such a statement is mandatory.

22. What is clear is that Mr Avock signed the statement and acknowledged in his own hand writing that he had been cautioned.

23. There is nothing in the point that the statement had been completed in the hand writing of a police officer particularly when the accuracy of the contents of the statement is not being disputed. Mr Napuati could not point to anything which would have the effect of making such a direction mandatory and there is simply no substance in this point.

d) Mr Napuati referred to the Court of Appeal Decision in Tor v. PP where the Court said:-

"Holding someone for six or seven hours is unacceptable. It creates a real perception that the person is being disadvantaged in what for many people is a very alien situation until the interview".

24. Tor does not have the effect of prescribing maximum holding periods for people in custody awaiting interview. While it may provide general guidelines each case must be determined on its own particular set of facts. In this case Mr Avock was not placed

in isolation or in any other conditions which may have rendered him vulnerable. There is no merit in this particular point.

25. Mr Livo, for Mr Jack, Mr Wakon and Mr Kalsau submitted the following:

a) The trial judge did not identify any *"test of admissibility"* and it is not known what standard or burden of proof was applied in the voir dire.

26. Regarding this submission, the Court accepts that the prosecution was required to prove beyond reasonable doubt that the statements were voluntary[2].

27. While it would have been desirable for the trial judge to refer to the burden and standard of proof we do not consider that his failure to do so invalidates his decision. There is no evidence that the Judge has misdirected himself as to the burden and standard of proof and there is nothing in the decision that would lead us to that conclusion. In all of the circumstances, the police officers involved were subjected to cross examination of a very general nature which could not be said to have raised doubts regarding the matter. The Judge was in the best position to assess the evidence and came to a very clear conclusion that the allegations of the appellants could not be believed.

28. Mr Livo has also referred to the trial Judge's reference to the fact that there was no evidence to support the allegation made by the defendants that they were taken directly to the Correctional Centre without being taken before a Magistrate. In addition there was reference by the trial Judge to there being no medical evidence to

[2] See Wong Kam Ming [1979] AC 247 (Privy Council)

confirm the appellant's injuries. As to the reference to the appellants having allegedly not being taken before a Magistrate Mr Livo submitted that after the trial was conducted counsel for the appellants discovered that it was not unusual for Magistrates in Port Vila to remand unrepresented defendants in custody without the defendant being brought into the Court building. It was submitted that it is common for defendants to be kept waiting in the police vehicle whilst the remand paperwork is signed by the Magistrate. It was submitted that the trial Judge probably concluded that the appellants were lying about this point and therefore he probably concluded that they were also lying about being assaulted. It is suggested that had the Judge been aware of the unusual remand procedure it may have made a difference to his decision on the voir dire.

29. The first point to be made is that Judges make their decisions based on the evidence before them. There was simply no evidence before the Court regarding this matter and it appears that the relevant police officers were not cross examined about these issues. In the circumstances, a Judge will be entitled to take the view that the procedures prescribed under Criminal Procedure Code or other relevant legislation have been complied with in the absence of any evidence to the contrary. While counsel submit that an apparently irregular procedure was discovered after the trial was conducted that does not assist the appellants in respect of this appeal and the matter would need to be the subject of evidence and an application for leave for that evidence to be admitted. In the circumstances, this point cannot assist the appellants.

30. As to the reference by the trial Judge to a lack of medical evidence is it submitted that it was unfair and unrealistic to expect medical evidence in this case. We disagree. It could reasonably be anticipated that injuries such as bloody noses, bruises and swelling particularly to the face may have been noticed or even documented by the receiving officer of the Correctional Centre. There is nothing unfair or unrealistic in expecting the appellants to provide such evidence, if available, in support of their allegations of serious assaults.

31. Mr Livo made additional submissions about the interview of Daniel Kalsau and submitted that Mr Kalsau gave evidence that he was arrested on July 7th 2013 when he was interviewed by police. He was released without charge and it is submitted that a copy of the first interview was never produced to him or his lawyer. It has never been provided to the Court. It is submitted that the Police have failed to comply with their obligation of open disclosure. It is difficult to follow this point. The Court cannot take account of evidence which is not before it and there is no evidence as to what was contained in the interview.

32. While the police have a clear obligation in respect of disclosure, Mr Livo made no submissions as to how or why the appellant was prejudiced in his defence by the alleged non-disclosure. In the circumstances, any allegation of non-disclosure should have been the subject of a pre-trial application by counsel. As it is however, there is nothing in Mr Livo's submission which impacts upon the admissibility of Mr Kalsau's statement of July 27th 2013 or the decision of the trial Judge in respect of admissibility.

33. Mr Livo also submitted that the statement was defective in the sense that Mr Kalsau failed to write out the caution in his own handwriting and then sign it as required by the instruction at the bottom of page 1 of the interview form which states:-

> *"Suspect to write out the caution in the language of his/her own handwriting and then sign it".*

34. It is clear from the form that a suspect does not have to engage in writing out the caution in his/her own handwriting as the caution is pre-printed on the form above that direction in English, French and Bislama. It is apparent that Mr Kalsau has signed the caution and we find no irregularity.

35. Mr Livo also made reference to a repeat of the caution at the top of page 2 of Mr Kalsau's statement which reads:-

"Mi wantem talem se mi andastandem olgeta raets blong mi we polis I stap talemaot long mi mo mi save se any toktok we bai mi talem, bai polis I raetem daon mo putum I go long kot olsem evidence".

36. Mr Livo submits that the caution translates into English as *"I understand my rights"* but it does not identify what those rights are. He submits there is no recognition that there is a right to silence and in that sense it is only half a caution. We do not agree and are of the view that the phrase does not simply mean "I understand my rights" but suggests a right to silence.

36. That submission ignores the fact that on the previous page of the statement Mr Kalsau has signed an acknowledgement that he has been advised that he is not obliged to say

anything but that whatever he says may be used in evidence and that in full knowledge of his rights he wishes to make a statement.

37. We are satisfied that the caution provided in the statement appropriately advised Mr Kalsau of his rights.

38. Finally Mr Livo submitted that Mr Kalsau was unfairly interrogated. He refers to an interview that went for 2 hours and 54 minutes without any break and to the fact that the interrogating officer put to him at least 9 times that he had formed a plan to follow Mr Avock and Mr Kal to the yard. This issue has already been covered in respect of submissions made by other appellants and will not be repeated. Mr Kalsau's statement was exculpatory and contained no admissions damaging to Mr Kalsau. In any event we do not see any basis for finding the statement to be inadmissible on this ground.

39. For these reasons, we find that the trial judge was correct to rule that the statements were admissible.

Intentional Homicide

40. Section 106 of the Penal Code [Cap. 135] provides that:-

> *"(1) No person shall by any unlawful act or omission intentionally caused the death of another person. Penalty: (a) if the homicide is not premeditated, imprisonment for 20 years, (b) if the homicide is premeditated, imprisonment for life.*

(2) *For the purpose of sub section (1), premeditation consists of a decision made before the Act to make a homicidal attack on a particular person or on any person who may be found or encountered."*

41. In this case both Mr Kal and Mr Avock were charged pursuant to section 106 (1) (a).

42. It is clear from the judgment that the trial Judge reached the conclusion that Mr Kal and Mr Avock had been reckless in the action which they took against the deceased and that pursuant to section 6 of the Penal Code recklessness is equivalent to intention. That much is established from paragraph 23 of the judgment where his Lordship sets out section 6 of the Penal Code after stating:-

> *"The very best the two defendants can say is that they were reckless as to consequences of what they did".*

43. Further at paragraph 23 his Lordship stated:-

> *"The actions of the two defendants went well beyond mere negligence. They knew or should reasonably have known that stoning David Ben Ngara on the head at close range would result in his death".*

44. Further at paragraph 25 he stated:-

> *"Whilst it cannot be said that there is evidence to show who threw the stone or stones at the victim that caused his death, both Joel Avock and Frank Mahit Kal went into the yard with the intention to stone Mr Ngara. Both were involved and in accordance with sections 31 and 33 of the Penal Code both must share the consequences".*

45. For Mr Kal, the only point taken on appeal is that the trial judge failed to properly identify the elements of the offence of intentional homicide. Specifically, it was submitted that section 106 (1) (a) required a finding of an intention to kill a person before a conviction can be entered.

46. Mr Tevi referred to the Court of Appeal decision in Koroka v. Public Prosecutor[3] where the Court of Appeal referred to the 3 essential elements for the offence of intentional homicide as:

a) An intentional act;

b) Which was unlawful;

c) The unlawful act caused the death in question.

47. Mr Tevi submitted that the trial judge had overlooked the element of intention and thus the conviction of the appellant should be set aside. We do not agree with that submission. The trial judge correctly identified the issue of intention when he stated at paragraph 22;

"There can be absolutely no doubt that Frank Mahit Kal and Joel Avock went into the yard that early morning and stoned the deceased David Ben Ngara. They must have been aware that throwing stones at someone as close as they were to him would more than likely cause injuries leading to that someone's death. They intended at the very least, to cause serious injury to Mr Ngara and it must have been apparent to them that stones thrown from a distance of a couple of meters at someone's head would more than likely cause death. That can be the only result at throwing stones at a person from such close range."

48. Mr Tevi's submissions appear to suggest that the appellants could not be convicted on the basis of recklessness. That is not what the law provides and the trial judge was entitled to approach the matter on the basis that he did. Mr Tevi's submission that section 6 (2) of the Penal Code cannot apply to section 106 (1) (a) is simply incorrect.

[3] Koroka v. Public Prosecutor [2007] VUCA 3

49. Mr Napuati submitted that the trial Judge *"erred in law in drawing inferences where there is sufficient evidence to proof (sic) erred that fact"*. We believe that Mr Napuati must have intended to refer to *"insufficient evidence"* rather than *"sufficient evidence"*. Mr Napuati based that submission in part on his assertion that the prosecution case was purely circumstantial we disagree. We disagree. There was clear and direct evidence placing both Mr Kal and Mr Avock in a conflict with Mr Ngara immediately prior to his death. There was evidence referring to the fact that both men threw stones at Mr Ngara at close range. There was evidence that Mr Kal admitted his part in the incident to a third party shortly after leaving the scene of the incident. None of that is circumstantial.

50. Mr Napuati takes issue with the trial judge's statement at paragraph 25:-

> *"Whilst it cannot be said that there is evidence to show who threw the stone or stones at the victim that caused his death, both Joel Avock and Mahit Kal went into the yard with the intention to stone Mr Ngara....."*

51. Mr Napuati submits that there was no evidence adduced by the Prosecution that the two appellants went to the yard armed with stones to stone the deceased. He asserts that rather they went into the yard unarmed and that when the deceased came out with a knife the appellants picked up the stones close by and threw them at the deceased to defend themselves and to scare the deceased off. Nothing in the record of evidence or the verdict indicates that either Mr Kal or Mr Avock relied on a defence of self-defence. There was also evidence that one or both of them had picked up stones

as they approached Mr Ngara's home. Given those circumstances the Judge was entitled to infer that their intention was to cause harm to Mr Ngara.

52. Mr Napuati also refers to the fact that there was a lack of clarity around which stones struck the deceased and accordingly caused his death. That was not required however. Given the evidence in the trial it was completely within the proper purview of the trial Judge to infer that the stones which struck Mr Ngara thereby causing his death were stones thrown by Mr Avock and Mr Kal.

53. We can find nothing wrong with the approach of the trial Judge in his assessment of the facts and of his application of recklessness to the circumstances of this particular case.

Appeal against Convictions for Unlawful Assembly

54. Putting aside the issue of the admissibility of the appellants' statements the only ground for appeal in respect of this matter was that the verdicts were unsafe and unsatisfactory, that is, that the verdicts were not supported by the evidence.

55. At the commencement of his judgment the trial Judge set out section 68 of the Penal Code [Cap. 135] which defines Unlawful Assembly.

56. The only other specific reference to unlawful assembly in the judgment however, is paragraph 19 where the trial Judge stated:-

"The evidence of others such as Mr Rapi and Mr Tabisang as to what went on in the yard is to be preferred. From all the evidence, including that in the answers given by the defendants to questions following cautions, it is clear beyond reasonable doubt that all the defendants went to the yard where Mr David Ngara lived. They went there to teach him a lesson. They were drunk to varying degrees after consuming home brew, Tusker beer and Golden Eagle. Some picked up stones before they got to the yard. Once at the yard there was shouting and there was stone throwing. That behaviour was sufficient to cause anyone nearby, and those in the yard in particular, to fear that a breach of the peace was going to be, and was, committed."

57. That is the basis upon which the trial Judge reached his conclusion that the defendants were guilty of unlawful assembly. It is submitted for the appellants that that conclusion is not justified or supported by the evidence.

58. The essential elements of unlawful assembly are :

(a) The presence of three or more persons ;

(b) Conduct in such a manner as to cause nearby persons reasonably to fear that the persons assembled will commit a breach of the peace ;

(c) Intent to commit an offence or intent to carry out some common purpose.

59. For Mr Kalsau the following submissions are made:-

a) In his oral evidence before the Court he had stated that he did not go anywhere near the scene of the incident on the night in question.

b) That in his statement to the police he had admitted being on the road outside the yard and, later, a few metres inside the yard but only as a spectator. He stated to police that the only reason he went inside the yard was to see what was happening and he told police that he had never formed any plan with the other defendants in respect of taking any action against Mr Ngara.

c) That during the trial no prosecution witness gave any evidence relating to Mr Kalsau and his name was never mentioned by any prosecution witness. Accordingly the only evidence which existed and upon which Mr Kalsau's guilt or innocence could be assessed was his own evidence.

60. In respect of Mr Kalsau, counsel relies upon the Court of Appeal decision in Apia v. Public Prosecutor [2015] VUCA 30 where the Court of Appeal stated:

> *"Where, as here, the defendant elects to give evidence, a Judge may not convict the defendant if his account might reasonably be true. That is simply a reflection of the burden in high standard of proof resting on the prosecution. If the defendant's account might reasonably be true then there is by definition as reasonable doubt about whether the prosecution case has been established. The corollary is that a trial Judge may only convict a defendant who gives evidence if satisfied that the defendant's account is not reasonably capable of belief and must therefore be rejected. Even if that stage is reached a conviction does not necessarily follow: the Judge must then put the defendant's evidence to one side*

and determine whether the prosecution evidence leaves him sure of guilt. A defendant has no obligation to give evidence and it follows that if, when he does, his explanation is rejected by the Judge, that cannot in any way add to the prosecution case. The onus of proof never shifts from the prosecution, regardless of whether a defendant gives evidence."

61. In his evidence at trial, Mr Kalsau resiled from his statements to the police and denied that he had even been present. That no doubt caused the trial Judge to have misgivings about his credibility. But if the trial Judge rejected Mr Kalsau's oral evidence, the only other evidence which existed regarding his involvement was in his police statement which was largely exculpatory and which provided no basis for a finding that there was an intent to commit an offence or carry out some common purpose.

62. Unfortunately, in the case of Mr Kalsau there was no explanation from the trial Judge as to how he came to the view that Mr Kalsau had been part of an unlawful assembly. There is no specific analysis of Mr Kalsau's evidence, something which is essential given the fact that, despite the differences between Mr Kalsau's oral evidence and his statement to the police, he had consistently denied throwing any stones or being part of any plan. It was incumbent upon the trial Judge to address the essential elements of unlawful assembly and in particular the issue of intent to carry out a common purpose. That has not been done in this case. Accordingly, this Court is unable to detect reasons for the trial Judge coming to the conclusion that Mr Kalsau was guilty of unlawful assembly.

63. Tony Jack provided a police interview and also gave oral evidence at his trial. In his police statement he acknowledged following Joel Avock to the deceased's home but denied knowing what Joel Avock intended to do once there. He stated that he had seen Joel Avock go to the deceased's door, saw the deceased holding a knife and then saw Joel Avock *"stone"* the deceased. He stated that he had walked two to three metres inside the yard and had then stood by the gate of the property. He denied throwing any stones.

64. In the trial Judge's judgment there was no reference to Mr Jack's evidence and certainly no reasons justifying the trial Judge's conclusion that *"[the defendants] went there to teach him a lesson".*

65. As in the case of Mr Kalsau, no reasons were outlined establishing Mr Jack's intention to carry out a common purpose and while Mr Jack's statement to the police contained an admission that he had followed Mr Avock to the property, he had also stated that he had asked Mr Avock whether *"we were going for something good or something bad"* and had been told *"Just come – let's go".*

66. Willie Wakon told the police that earlier in the night he had pulled Joel Avock out of the yard after an argument developed between Joel Avock and his de facto wife. He acknowledged following Joel Avock back to the yard later in the night along with Frank Mahit, Misu Kapi, Tony Jack and some other individuals he did not know. He saw Tony Jack, Joel Avock and Frank Mahit go into the yard, having picked up stones from the road at which point he and others standing there left and walked along the

road to go home. He denied throwing any stones and stated that he was just standing on the road. These denials were repeated in his oral evidence.

67. Unlike Daniel Kalsau and Tony Jack who were not mentioned specifically by the trial Judge in his judgment, his Lordship did refer to the evidence given by Mr Wakon at the trial and stated at paragraph 11 of his judgment:-

> *"As mentioned, Willie Wakon also confirmed the events early in the evening but again downplayed what actually happened when giving evidence to the Court. He also says it happened earlier in the evening and that there was not much of a disturbance. He does confirm he had to pull Joel Avock out of the yard. His statement under caution however confirms what other witnesses say. This casts grave doubt on his credibility when giving evidence before the court."*

68. Unfortunately His Lordship does not set out what evidence he is referring to and it is submitted in any event that that did not advance the prosecution case against him.

69. Like Daniel Kalsau, no prosecution witness gave any evidence about Willie Wakon. None of the other appellants gave evidence against him and there appears to be no evidence to establish that he threw stones, something which he denied.

70. While it is clear that Willie Wakon was present earlier in the evening and also later in the evening there were no reasons given as to why Mr Wakon must thereby be guilty of unlawful assembly.

71. The convictions against Mr Kalsau, Mr Jack and Mr Wakon for unlawful assembly cannot stand and must be quashed.

72. The same cannot be said for Mr Avock. There was clearly an intention on his part to commit an offence, and given the circumstances of the offending involving as it did a number of unknown persons throwing stones at the house of the deceased while Mr Avock and Mr Kal approached him, there was ample basis for the trial Judge to convict Mr Avock.

Conclusion

73. Accordingly :

(a) The appeal by Mr Kal against conviction is dismissed.

(b) The appeal by Mr Avock against convictions for intentional homicide and unlawful assembly is dismissed.

(c) The appeals by Mr Kalsau. Mr Jack and Mr Wakon against their convictions for unlawful assembly are allowed and both their convictions and sentences are quashed.

DATED at Port Vila this 18th day of November, 2016

BY THE COURT

Vincent LUNABEK
Chief Justice